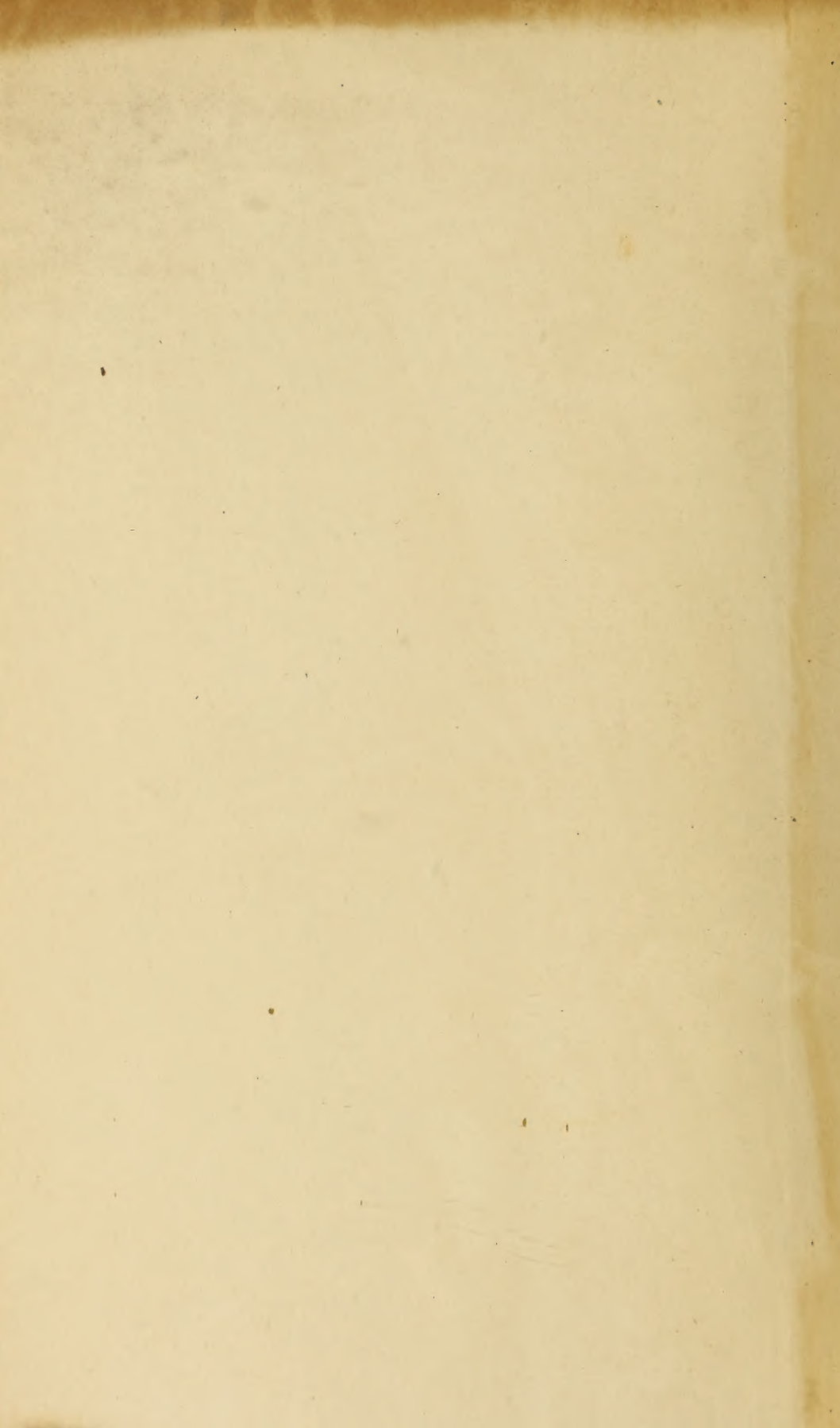





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SUPPLEMENT

TO THE

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ENCYCLOPÆDIA OF LAW

(SECOND EDITION)

EDITED BY

DAVID S. GARLAND AND CHARLES PORTERFIELD

UNDER THE SUPERVISION OF

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HOW TO USE THE SUPPLEMENT.

THE titles of the articles and defined words and phrases are repeated in the order in which they are to be found in the AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW, Second Edition. At the top of each page are given the name of the subject and the pages thereof which are supplemented by reference to and statement of the late cases. Thus :

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AGENCY.

Vol. I.

at the top of a page signifies that pages 956 to 961 of the article "Agency" in the first volume of the Second Edition are supplemented.

In both text and notes the catch lines which appear in the Second Edition are here repeated in connection with new cases, thereby denoting that such new cases support the statement of law made in the text or notes of the Second Edition under the corresponding catch line.

The large heavy-faced figures refer to the pages of the volume of the Second Edition. The smaller figure following the page number in the notes refers to the original note numbered by that same figure on that page. Thus, a note numbered **950. 2.**, with cases cited, indicates that those cases support the proposition to which the cases in note 2 on page 950 were cited.

In some instances the new cases have necessitated the writing of new text, and the fact that such text is new is indicated by inclosing it with brackets. In the notes great freedom has been indulged in stating new illustrations and applications.

The omission of a title that appeared in the Second Edition implies that no new cases on that subject have been found.

HOW TO USE THE GIBBS METHOD

The purpose of this report is to show how the Gibbs method can be used to solve problems in the theory of functions of a complex variable. It is assumed that the reader is familiar with the basic concepts of complex analysis.

1. INTRODUCTION

The Gibbs method is a powerful tool for solving problems in the theory of functions of a complex variable. It is based on the idea of using a series of functions to approximate a given function.

In the first volume of the series, the Gibbs method is applied to the problem of finding the zeros of a function. In the second volume, it is applied to the problem of finding the poles of a function. In the third volume, it is applied to the problem of finding the residues of a function.

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SUPPLEMENT

TO THE

American and English Encyclopædia of Law

(SECOND EDITION.)

MASTERS OF VESSELS.

BY A. W. VARIAN.

199. III. POWERS, DUTIES, AND LIABILITIES — 1. In General. — See notes 2, 5.

200. Limitations upon Master's Authority. — See note 1.

201. 3. As to Crew — *b.* DUTIES AS TO CREW — (3) *Protection from Unlawful Violence.* — See note 8.

204. *c.* POWER TO ENFORCE DISCIPLINE AND TO INFLICT PUNISHMENT — (1) *In General.* — See note 2.

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205. (2) *Character and Measure of Punishment* — (a) *In General.* — See note 5.

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206. Corporal Punishment May Be Administered for Past Offenses. — See note 1.

207. (3) *Liability for Unlawful Punishment* — (a) *Civil Liability.* — See note 6.

208. (b) *Criminal Liability.* — See note 3.

210. 5. As to Vessel — *d.* SALE OF VESSEL — (1) *Rule Stated.* — See note 8.

212. (2) *Necessity Authorizing Sale.* — See note 2.

199. 2. Master as Agent of Ship Owners. — The *Del Norte*, 111 Fed. Rep. 542, *affirmed* (C. C. A.) 119 Fed. Rep. 118; The *Lizzie Burrill*, 115 Fed. Rep. 1015.

5. The Master Has Power to Bring Actions at law or in equity in his own name for the protection of the rights of the owners in the ship, cargo, and freight. *Tuells v. Torras*, 113 Ga. 691.

200. 1. Instructions Limiting Master's Authority. — The *Underwriter*, 119 Fed. Rep. 713.

201. 8. Protection of Crew from Unlawful Violence. — The *Lizzie Burrill*, 115 Fed. Rep. 1015, holding that the vessel is liable in admiralty for unlawful violence of the master and officers toward a seaman.

204. 2. Character of Master's Authority. — *Dorrell v. Schwerman*, 111 Fed. Rep. 209.

5. Acts Punishable by Master. — *Dorrell v. Schwerman*, 111 Fed. Rep. 209.

205. 5. The *City of Mobile*, 116 Fed. Rep. 212, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 205.

7. Corporal Punishment. — The *City of Mobile*, 4 Supp. E. of L.—1

116 Fed. Rep. 212, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 205, and supporting the text paragraph generally; *Dorrell v. Schwerman*, 111 Fed. Rep. 209.

206. 1. Corporal Punishment for Past Offenses. — The *City of Mobile*, 116 Fed. Rep. 212.

207. 6. Civil Liability for Unlawful Punishment. — *Dorrell v. Schwerman*, 111 Fed. Rep. 209.

208. 3. Criminal Liability of Master for Unlawful Punishment. — *Dorrell v. Schwerman*, 111 Fed. Rep. 209.

210. 8. Implied Power to Sell in Cases of Necessity. — The *Yarkand*, 117 Fed. Rep. 336, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 210-212, and supporting the whole text paragraph, *affirmed* (C. C. A.) 120 Fed. Rep. 887, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 210. In this case a sale by the master was upheld.

212. 2. The *Yarkand*, 117 Fed. Rep. 336, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 212, and supporting the whole text paragraph, *affirmed* (C. C. A.) 120 Fed. Rep. 887.

- 212.** But if the Master Can Communicate with the Owners. — See note 3.
- 213.** Immediate Danger Menacing Total Loss. — See note 1.
Necessity Not to Be Determined by Any Event Subsequent to Sale. — See note 2.
(3) *Survey of Vessel.* — See note 4.
- 214.** 6. As to Cargo — *a.* IN GENERAL. — See note 5.
- 215.** *c.* LIABILITY AS COMMON CARRIER — Loading, Transportation, and Delivery. — See note 5.
- 219.** 7. As to Repairs, Supplies, and Advances — *a.* PERSONAL LIABILITY OF MASTER. — See note 6.
- 220.** *b.* AUTHORITY TO PLEDGE OWNER'S CREDIT — (1) *In General* — (a) Rule Stated. — See notes 1, 2.
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- 223.** 8. Power to Execute Commercial Paper. — See note 6.
- 225.** IV. COMPENSATION AND REIMBURSEMENT — 1. Recovery of Wages and Disbursements — *b.* RIGHT TO LIEN — (1) *Lien on Vessel* — (a) In England and Canada — English Statutes. — See note 1.
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- 229.** (4) *Lien of Master of Foreign Vessel* — In England. — See note 1.
- 232.** MATERIAL — MATERIALS. — See note 3.
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- 234.** MATTER. — See note 4.

212. 3. Master Must Communicate with Owners. — The Yarkand, 117 Fed. Rep. 336, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 210-212, affirmed (C. C. A.) 120 Fed. Rep. 887.

213. 1. The Yarkand, 117 Fed. Rep. 336, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 213, affirmed (C. C. A.) 120 Fed. Rep. 887.

2. Necessity Not Determined by Events Subsequent to Sale. — The Yarkand, 117 Fed. Rep. 336, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 213, affirmed (C. C. A.) 120 Fed. Rep. 887.

4. Survey. — The Yarkand, 117 Fed. Rep. 336, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 213, affirmed (C. C. A.) 120 Fed. Rep. 887.

214. 5. Extent of Agency. — It is only to a limited extent that the master of a vessel represents the cargo, and it does not extend to acts or omissions which result to the detriment or injury of the cargo. *Morse v. St. Paul F. & M. Ins. Co.*, 122 Fed. Rep. 748.

215. 5. For Stowage of Cargo. — The Del Norte, 111 Fed. Rep. 542, affirmed (C. C. A.) 119 Fed. Rep. 118.

219. 6. Liability of Master for Necessaries. — *Frechette v. Martin*, 21 Quebec Super. Ct. 417. See also *The Elmville*, (1904) P. 319.

220. 1. If the Vessel Is under Charter and the master is appointed by the charterer and is his agent, he has no power to bind the owner for necessary supplies. *The Barge David Wallace v. Bain*, 8 Can. Exch. 205.

2. Power to Bind Owners Personally for Money Advanced. — *Frechette v. Martin*, 21 Quebec Super. Ct. 417.

222. 1. Medical Expenses of a Stowaway are not expenses for which the master has authority to bind the ship. *The Laura Madsen*, 112 Fed. Rep. 72.

223. 6. No Implied Authority to Execute or Indorse Commercial Paper. — See *The Elmville*, (1904) P. 319.

225. 1. Merchant Shipping Act 1894 — Bonus as "Wages" or "Emoluments." — Where

the master of a ship has earned a bonus, which the owners arranged to pay to him if he remained in the ship and otherwise satisfied them, such bonus is "wages" or "emoluments" within sections 167 and 742 of the Merchant Shipping Act 1894, and the master has a lien for the recovery thereof. *The Elmville* (1904) P. 422.

3. No Lien on Ship for Wages under Maritime Law of United States. — *The Laurel*, 113 Fed. Rep. 373; *Bruce v. Murray*, (C. C. A.) 123 Fed. Rep. 366; *The Ripon City*, (C. C. A.) 102 Fed. Rep. 176.

Rule Not Applicable to Master in Name Only. — *The John McDermott*, 109 Fed. Rep. 90; *McRae v. Bowers Dredging Co.*, 86 Fed. Rep. 344; *Steam Dredge No. 1*, 87 Fed. Rep. 760.

229. 1. English Rule — Law of Forum Governs. — *The Tagus*, (1903) P. 44.

232. 3. Materials. — *Gallman v. Union Hardwood Mfg. Co.*, 65 S. Car. 195, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 232.

Distinguished from Appliances. — *Gallman v. Union Hardwood Mfg. Co.*, 65 S. Car. 195.

Tools and Implements used in construction work are not materials within a bond conditioned to pay for materials used in such work. *Beals v. Fidelity, etc., Co.*, 76 N. Y. App. Div. 526, affirmed 178 N. Y. 581.

Materials Do Not Include Provisions — *Mechanic's Lien Law*. — *Armour v. Western Constr. Co.*, 36 Wash. 529.

233. 1. Material Allegation. — *Ricknor v. Clabber*, 4 Indian Ter. 660.

Material Alteration. — See *Foxworthy v. Colby*, 64 Neb. 216.

Material — Insurance. — *Murphy v. Prudential Ins. Co.*, 205 Pa. St. 444.

234. 4. Matters in Dispute. — *Gutheil v. Goodrich*, 160 Ind. 92; *Gallagher v. Asphalt Co. of America*, 65 N. J. Eq. 258.

Matter or Thing — Revised Statutes. — An inquiry whether any person is engaged in con-

236. MATURITY.—See notes 1, 2.

ducting a fraudulent scheme or device by means of the post-office establishment is a *matter* or "thing" concerning which a senator of the United States is precluded from rendering services for a pecuniary compensation within section 1782, Rev. Stat. U. S. v. Burton, 131 Fed. Rep. 552.

Matters of Probate.—See *Martinovich v. Maricano*, 137 Cal. 354.

236. 1. Maturity.—*Gilbert v. Sprague*, 88 Ill. App. 508.

2. Maturity in Will.—*Cruikshank v. Cruikshank*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 401.

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238. Thus, Where "May" Is Used in Statutes to Confer Power on Public Bodies or Officers.—See note 1.

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239. "May" Contrasted with "Must" or "Shall."—See note 1.

Creation of Right.—See note 2.

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2. Construed as Mandatory.—See note 4.

237. 1. "May" Permissive—*California*.—*Isom v. Rex Crude Oil Co.*, 140 Cal. 680, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 237.

District of Columbia.—U. S. v. Hay, 20 App. Cas. (D. C.) 579, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 237.

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Indiana.—*Wells v. Vermont L. Ins. Co.*, 28 Ind. App. 620.

Massachusetts.—*Hampden Trust Co. v. Leary*, 186 Mass. 577.

Montana.—*Montana Ore Purchasing Co. v. Lindsay*, 25 Mont. 24.

New York.—*Morse v. Press Pub. Co.*, 71 N. Y. App. Div. 359, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 237.

South Dakota.—*State v. Hall*, 14 S. Dak. 161; *Anderson v. Medbery*, 16 S. Dak. 324.

Tennessee.—*Halfacre v. State*, 112 Tenn. 609.

Texas.—*Dallas v. Dallas Consol. Electric St. R. Co.*, 95 Tex. 268.

Vermont.—*State v. Massey*, 72 Vt. 210.

West Virginia.—*Trail v. Trail*, 56 W. Va. 600, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 237.

Wisconsin.—*Hart v. Godkin*, 122 Wis. 646.

238. 1. "May" in Statute Conferring Powers on Public Officers or Bodies.—*Roddy v. Reynolds*, 31 Pa. Co. Ct. 150, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 238.

2. "May," in a statute providing that, where the defendant is a nonresident, and the plaintiff proceeds by attaching his property, the action may be brought in any county in which the defendant has property liable to attachment, is directory and not mandatory. *Clements v. Utley*, 91 Minn. 352.

239. 1. May and Shall Used in Same Statute.—*Carlin v. Freeman*, 19 Colo. App. 337, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 238 (239); *Morse v. Press Pub. Co.*, 71 N. Y. App.

Div. 359, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 238 (239).

Where "May" and "Shall" Were Used in Different Sections of the Same Chapter of Statutes, and the section containing the word "may" was enacted at a later date than the other section, it was held that "may" was used in a permissive and not a mandatory sense. *Eldredge v. Norfolk County*, 185 Mass. 186.

2. Creation of Right.—*Kelley v. Cedar Falls*, 123 Iowa 662, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 239; *Roddy v. Reynolds*, 31 Pa. Co. Ct. 150, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 239; *Furbish v. Kennebec County*, 93 Me. 117; *State v. Alliance*, 65 Neb. 524.

3. Intent.—*Davis v. Moore*, 70 Ark. 240; *Canal Com'r's v. Sanitary Dist.*, 184 Ill. 597; *Banton v. Griswold*, 95 Me. 445; *Montana Ore Purchasing Co. v. Lindsay*, 25 Mont. 24; *Western Travelers Acc. Assoc. v. Taylor*, 62 Neb. 784; *Merchant v. Marshfield*, 35 Oregon 55; *Halfacre v. State*, 112 Tenn. 609; *Clancy v. McElroy*, 30 Wash. 567.

4. May Read Must—Rights of Public or Third Persons Involved—*United States*.—*Kent v. U. S.*, (C. C. A.) 113 Fed. Rep. 237.

California.—*Kemble v. McPhaill*, 128 Cal. 444; *Crocker v. Conrey*, 140 Cal. 213.

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Kansas.—*Phelps v. Lodge*, 60 Kan. 122.

Maine.—*Furbish v. Kennebec County*, 93 Me. 117.

Massachusetts.—*Hampden Trust Co. v. Leary*, 186 Mass. 577.

Missouri.—*Hall v. Wabash R. Co.*, 80 Mo. App. 463; *Lapsley v. Merchants Bank*, 105 Mo. App. 98.

Montana.—*Montana Ore Purchasing Co. v. Lindsay*, 25 Mont. 24.

Texas.—*Dallas v. Dallas Consol. Electric St. R. Co.*, 95 Tex. 268.

Wisconsin.—*Hart v. Godkin*, 122 Wis. 646.

242. See note 1.

Courts. — See note 5.

243. See note 1.

242. 1. "May" Imperative for Sake of Justice or Public Good. — *Pierson v. People*, 204 Ill. 462, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 242.

5. As Applied to Courts — Mandatory. — *State v. Dotson*, 26 Mont. 305; *Brainerd v. De Graef*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 560.

Same — Change of Venue. — *Freud v. Wayne Circuit Judge*, 131 Mich. 606.

A Statute Providing that at Any Time Before Judgment the Court May Permit the Plea of Guilty

to Be Withdrawn, and Another Plea Substituted, is mandatory upon the court. *State v. Hortman*, 122 Iowa 104.

The Word "May," in Code Civ. Pro. N. Y., § 1386, Which Provides that the Court May Award Costs against an executor in certain contingencies, has the effect of the word "shall." *Carter v. Barnum*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 220.

243. 1. Directory. — *Echols v. Brennan*, 99 Va. 150.

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249. 3. Criminal Intent — *a.* INTENT TO MAIM OR DISFIGURE. — See notes 4, 5.

251. MEADOW. — See note 6.

252. MEANDER. — See note 1.

253. MEANS. — See note 1.

254. MECHANIC — MECHANICAL. — See note 2.

247. 4. American Statutes. — See *State v. Kyle*, 177 Mo. 659.

249. 4. See *State v. Holmes*, 4 Penn. (Del.) 196.

Specific Intent Unnecessary. — *Carpenter v. People*, 31 Colo. 284.

5. Wilful and Malicious. — See *Neblett v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 813.

251. 6. Meadow. — *State v. Crook*, 132 N. Car. 1053.

252. 1. Meander Line. — *Hendricks v. Feather River Canal Co.*, 138 Cal. 423; *Kirby v. Potter*, 138 Cal. 686.

253. 1. Means of Support — Civil Damage Act. — *Gorey v. Kelly*, 64 Neb. 605.

254. 2. Mechanical Equivalent. — *Alaska Packers' Assoc. v. Letson*, 119 Fed. Rep. 599.

MECHANICS' LIENS.

BY E. C. ELLSBREE.

269. IV. ORIGIN AND NATURE — 1. Statutory Origin — a. IN GENERAL.
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270. See note 2.

271. c. CONSTITUTIONALITY OF STATUTES. — See note 7.

273. 2. Nature of Lien — b. NO PERSONAL LIABILITY CREATED. —
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c. LIEN NOT DEPENDENT UPON PERSONAL LIABILITY. — See
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**e. LIEN DOES NOT SUPERSEDE OTHER REMEDIES — (i) Rule
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277. VI. GENERAL RULE FOR CONSTRUCTION OF STATUTES. — See notes 2, 3.

**269. 2. Mechanic's Lien Unknown at Common
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poel v. Knight*, 102 Ill. App. 596; *Christian v.
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**271. 7. Mechanics' Lien Statutes Constitu-
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W. Rep. 601; *Stewart v. Gardner-Warren Im-
plement Co.*, (Ky. 1902) 70 S. W. Rep. 1042.

**No Impairment of Right to Jury Trial by En-
forcement in Equity.** — *Hathorne v. Panama
Park Co.*, 44 Fla. 194.

273. 1. McHale v. Maloney, 67 Neb. 532.

2. Lien Not Dependent upon Personal Liability.
— *Holland v. Cunliff*, 96 Mo. App. 67.

4. Lien Merely a Cumulative Remedy. — *Futch
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Pugh Co. v. Wallace*, 198 Ill. 422.

**274. 1. Claimant Not Deprived of Personal
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perior Ct.*, 136 Cal. 427; *M. Pugh Co. v. Wal-
lace*, 198 Ill. 422.

**2. Personal Judgment May Be Obtained Though
Lien Not Established or Not Enforceable.** — *Ter-
williger v. Wheeler*, 81 N. Y. App. Div. 460;
Stenerwald v. Gill, 85 N. Y. App. Div. 605;
Villaume v. Kirchner, (Supm. Ct. App. T.) 85
N. Y. Supp. 377; *Ryan v. Train*, 95 N. Y. App.
Div. 73; *Koeppel v. Macbeth*, 97 N. Y. App.
Div. 299; *Spaulding v. Burke*, 33 Wash. 679;
Security Nat. Bank v. St. Croix Power Co., 117
Wis. 211. Compare *Gallick v. Engelhardt*,
(Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 269.

But one who has never had and could never
have had a valid mechanic's lien is not entitled
to a personal judgment. *Deane Steam Pump
Co. v. Clark*, 87 N. Y. App. Div. 459; *Muller v.
McLaughlin*, (Tex. Civ. App. 1905) 84 S. W.
Rep. 687. See also *Mowbray v. Levy*, 85 N. Y.
App. Div. 68. And see the title MECHANIC'S
LIENS, 13 ENCYC. OF PL. AND PR. 1037, and
the Supplement thereto.

275. 2. See *Wake v. Canadian Pac. Lumber
R. Co.*, 8 British Columbia 358.

3. Remedies May Be Pursued Concurrently. —
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9. See *Clarke v. Heylman*, 80 N. Y. App. Div.
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277. 2. Rule of Strict Construction. — *Emory
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(Colo. App. 1904) 78 Pac. Rep. 1077; *U. S. v.
City Trust, etc., Co.*, 21 App. Cas. (D. C.) 369;
Pere Marquette R. Co. v. Baertz, (Ind. 1905)
74 N. E. Rep. 51; *Davis v. New York*, 75 N.
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App. Div. 509.

278. The Safe Rule. — See note 3.

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279. See note 3.

281. *d. EXTENT OF LAND COVERED BY LIEN — (1) Amount Necessary for Convenient Use.* — See note 3.

283. (3) *Statutes Limiting Area of Land Subject to Lien.* — See note 4.

281. Location of Improvement Must Be Shown. — See note 1.

2. Building or Improvement as Distinct from Land. — See notes 7, 8.

285. See note 1.

286. 4. Buildings or Improvements on Several Lots — *a. SINGLE BUILDING — Block of Buildings.* — See note 2.

b. SEPARATE BUILDINGS — (1) In General. — See notes 3, 4, 5.

287. (2) *Lien Not Given on One Building for Material Which Went into Another.* — See notes 2, 3, 4.

c. WHETHER LOTS MUST BE CONTIGUOUS. — See notes 5, 6.

288. *d. LOTS OF DIFFERENT OWNERS.* — See note 2.

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289. 8. Railroads. — See note 5.

Liberal Construction in Favor of Laborer or Materialman.—*Hercules Powder Co. v. Knoxville, etc., R. Co., 113 Tenn. 382.*

278. 3. The Safe Rule. — *St. Louis, etc., R. Co. v. Love, 74 Ark. 528; Western Iron Works v. Montana Pulp, etc., Co., 30 Mont. 550; Ellwell v. Morrow, 28 Utah 278, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 278.* See also *Salt Lake Hardware Co. v. Chainman Min., etc., Co., 137 Fed. Rép. 632, 128 Fed. Rep. 509; Hill v. Kaufman, 68 Md. 247; Bates Mach. Co. v. Trenton, etc., R. Co., 70 N. J. L. 684; Ryndak v. Seawell, 13 Okla. 737; Field v. Consolidated Mineral Water Co., 25 R. I. 319, 105 Am. St. Rep. 895.* See further the title **STATUTES, 662. 8.**

4. Tools are not a lienable item. *Evans v. Lower, 67 N. J. Eq. 232.*

279. 3. **Lien Attaches to Lands as Well as Buildings.** — *June v. Doke, 35 Tex. Civ. App. 240.*

281. 3. **Surrounding Land Necessary for Convenient Use.** — Under the *Idaho* statute, the trial court is required to ascertain the amount of land necessary for the convenient use of the property to be sold, and it is error not to do so. *Robertson v. Moore, 10 Idaho 115.*

283. 4. **Statutes Limiting Area of Land Covered by Lien.** — *Dusick v. Green, 118 Wis. 240.*

281. 1. **Location of Improvement Must Be Shown.** — See *Dusick v. Green, 118 Wis. 240.*

7. **Right to Lien on Structures as Apart from Land Denied.** — *Leaver v. Kilmer, 71 N. J. L. 291.*

8. **Lien on Building, etc., as Distinct from Land.** — *Zabriske v. Greater America Express Co., 67 Neb. 581, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 284.*

285. 1. **Where Owner of Building, etc., Without Sufficient Interest in Land.** — *Shull v. Best, (Neb. 1903) 93 N. W. Rep. 753.*

Forfeiture by Vendee of Contract of Purchase After Making Improvements. — *Sawyer, etc., Lumber Co. v. Clark, 172 Mo. 588.*

286. 2. **Entire Structure but One Building.** —

Alfred Richards Brick Co. v. Trott, 23 App. Cas. (D. C.) 284.

3. **Work Must Be Pursuant to Single Contract with Owner.** — *Beach v. Stamper, 44 Oregon 4, 102 Am. St. Rep. 597, following Knauff v. Miller, 45 Minn. 61, stated in the original note.*

4. **Single Lien on Distinct Buildings on Separate Lots.** — *Hoooven, etc., Co. v. Featherstone, (C. C. A.) 111 Fed. Rep. 81; Holland v. Cunliff, 96 Mo. App. 67; Flanagan v. O'Connell, 88 Mo. App. 1; Lehmer v. Horton, 67 Neb. 574; Culver v. Lieberman, 69 N. J. L. 341; Powell v. Nolan, 27 Wash. 318.*

5. **In the District of Columbia, by statute, a single lien can cover no more than a single building, except where there are two or more buildings joined together and owned by the same person.** *Alfred Richards Brick Co. v. Trott, 23 App. Cas. (D. C.) 284.*

287. 2. **All of the Debt Cannot Be Charged on a Part of the Lots Only.** — *Gallick v. Englehardt, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 269.*

3. **When Owner Must Show How Materials Were Expended.** — *Lehmer v. Horton, 67 Neb. 574.*

4. **When Claimant Must Show What Went into Each Building.** — *Bradley v. Gaghan, 208 Pa. St. 511.*

5. **Lots Separated by a Public Street or Alley.** — *Bradley Co. v. Gaghan, 208 Pa. St. 511.*

6. **Rule that Contract and Not Location of Premises Governs.** — *Lehmer v. Horton, 67 Neb. 574.*

288. 2. **Joint Contract.** — See *Fairclough v. Smith, 37 Can. L. J. 670.*

7. **Single Lien on Entire Property.** — *Cocciola v. Wood-Dickerson Supply Co., 136 Ala. 532.*

Rule in Connecticut and Indiana. — *Halsted, etc., Co. v. Arick, 76 Conn. 382, following Brabazon v. Allen, 41 Conn. 361, stated in the original note.*

289. 5. **Statutes Held to Extend to Railroads.** — *Ban v. Columbia Southern R. Co., (C. C. A.) 117 Fed. Rep. 21, following Giant Powder Co. v. Oregon Pac. R. Co., 42 Fed. Rep. 470, stated in the original note.*

292. 19. Stationary Engines and Machinery. — See notes 3, 4.

295. 24. Public Property. — See notes 1, 2.

296. See note 5.

Reasons for the Rule. — See note 6.

25. Property of Quasi-public Corporations. — See note 11.

300. VIII. WHAT ESTATE OR INTEREST IS SUBJECT TO LIEN — 4. Homestead (under Exemption Laws). — See note 4.

303. IX. WHAT ESTATES CAN SUPPORT LIEN — 2. Equitable Estate or Interest. — See notes 2, 3.

3. Leasehold Estates. — See note 4.

304. See note 2.

305. X. NATURE OF IMPROVEMENT FOR WHICH LIEN MAY EXIST — 1. In General — Realty Must Be Benefited. — See note 1.

2. Repairs, Alterations, and Additions. — See note 7.

306. 7. Fixtures. — See notes 8, 9.

307. See note 1.

Engines, Boilers, and Machinery. — See note 4.

Effect of Conveying Property to Railroad Company. — Whether the property of a railroad is lienable or not, a subsisting right of lien is not rendered unenforceable by the conveyance of the property to a corporation for railroad purposes. *Bates Mach. Co. v. Trenton, etc., R. Co.*, 70 N. J. L. 684.

292. 3. Machinery. — *Pflueger v. Lewis Foundry, etc., Co.*, (C. C. A.) 134 Fed. Rep. 28; *Campbell v. John W. Taylor Mfg. Co.*, 64 N. J. Eq. 344.

4. Must Have Become Part of Realty. — *Campbell v. John W. Taylor Mfg. Co.*, 64 N. J. Eq. 344.

295. 1. Lien Does Not Extend to Public Buildings or Property. — *Neal-Millard Co. v. Chatham Academy*, 121 Ga. 208, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 295, 296; *Albany v. Lynch*, 119 Ga. 491; *Green Bay Lumber Co. v. Independent School Dist.*, 125 Iowa 227; *A. L. & E. T. Goss Co. v. Greenleaf*, 98 Me. 436, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 295, 296; *Rowley v. Conklin*, 89 Minn. 172, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 295; *Arrison v. Company D*, 12 N. Dak. 554, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 295.

A Free Public Library is not subject to a mechanics' lien. *Young v. Falmouth*, 183 Mass. 80, 97 Am. St. Rep. 418; *A. L. & E. T. Goss Co. v. Greenleaf*, 98 Me. 436.

2. No Lien Against Public School Building. — *Neal-Millard Co. v. Chatham Academy*, 121 Ga. 208, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 296.

296. 5. Municipal Waterworks. — *Emory v. Laurel*, 3 Penn. (Del.) 67.

6. Rule Based upon Public Policy. — See *Neal-Millard Co. v. Chatham Academy*, 121 Ga. 208, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 296, and approving the whole text paragraph.

11. An Armory Building constructed by members of the national guard, organized for the purpose, is the property of a private and not a quasi-public corporation, and is subject to mechanics' liens. *Arrison v. Company D*, 12 N. Dak. 554.

300. 4. Mechanic's Lien May Be Acquired

Against Homestead. — *McAllister v. Des Rochers*, 132 Mich. 381.

303. 2. Lien May Attach to Equitable Estate or Interest. — *Anderson v. Godsall*, 7 British Columbia 404.

3. Interest of Vendee in Possession under Contract of Sale. — *Sawyer-Austin Lumber Co. v. Clark*, 172 Mo. 588; *Hoffstrom v. Stanley*, 14 Manitoba 227.

4. Mechanics' Lien May Attach to Leasehold Estate. — *Zabriskie v. Greater America Exposition Co.*, 67 Neb. 581; *Showalter v. Lowndes*, 56 W. Va. 462, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 303.

304. 2. Lien Although Removal of Buildings Required by Lease. — *Zabriskie v. Greater America Exposition Co.*, 67 Neb. 581.

305. 1. Benefit to Property. — *Showalter v. Lowndes*, 56 W. Va. 462, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 304.

7. *Kolb v. Reformed Episcopal Church*, 18 Pa. Super. Ct. 477; *Hothersall v. Rust*, 18 Pa. Super. Ct. 495; *Chester City Presb. Church v. Conlin*, 19 Pa. Super. Ct. 515.

306. 8. A Fireworks Amphitheatre and Framework, built on exposition grounds, is an appurtenance and subject to a mechanic's lien. *H. F. Cady Lumber Co. v. Greater America Exposition Co.*, (Neb. 1903) 93 N. W. Rep. 961.

9. Articles Must Be Annexed to Building or Land. — *Rinzel v. Stumpf*, 116 Wis. 287.

307. 1. No Lien for Articles Which Have Not Lost Character of Personality. — *Hanson v. News-Pub. Co.*, 97 Me. 99; *Carroll v. Shooting the Chutes Co.*, 85 Mo. App. 563; *Rinzel v. Stumpf*, 116 Wis. 287.

4. Lien for Machinery. — *Pflueger v. Lewis Foundry, etc., Co.*, (C. C. A.) 134 Fed. Rep. 28; *S. Morgan Smith Co. v. Sissiboo Pulp, etc., Co.*, 35 Can. Sup. Ct. 93, *affirming* 36 Nova Scotia 348.

An Oil-well Derrick is a structure subject to a mechanic's lien. *Showalter v. Lowndes*, 56 W. Va. 462.

Repairs to Machinery. — To authorize a mechanic's lien for repairs of machinery, such repairs must be in the nature of fixtures, and not small parts of a machine which are constantly wearing out and have to be replaced. *Ripley*

- 309.** 13. Sidewalks. — See note 4.
- 310.** 16. Laying Pipes — Drain Pipe. — See note 4.
20. Electric-light Wires and Poles. — See note 12.
- 314.** XI. WHO MAY SUBJECT PROPERTY TO LIEN — 3. Improvements Made with Consent of Owner. — See note 4.
Consent Need Not Be Express. — See notes 7, 8.
- 315.** Knowledge of Improvement. — See note 1.
Supervision and Inspection of Improvement. — See note 5.
Qualified Consent. — See note 6.
- 316.** 4. Failure of Owner to Post Notice of Nonresponsibility for Improvement. — See note 3.
- 317.** 5. Joint Tenants and Tenants in Common. — See note 6.
7. Lessees — *a*. IN GENERAL. — See note 9.
- 318.** See notes 1, 2.
- 319.** *b*. IMPROVEMENTS BY LESSEE WITH CONSENT OF LESSOR. — See note 1.
Effect of Lease as Giving Consent. — See note 2.
Consent to Specified Improvements. — See note 5.

v. Cochiti Gold Min. Co., (N. Mex. 1904) 76 Pac. Rep. 285.

309. 4. *Fleming v. Prudential Ins. Co.*, 19 Colo. App. 126; *Bradley v. Gaghan*, 208 Pa. St. 511.

310. 4. A System of Sewers is an improvement to the lots within the sewer district, and is subject to a lien. *Williams, etc., Co. v. Rowell*, 145 Cal. 259.

12. Electric Wires, Conduits, and Switches installed in a house become fixtures, and as such are subject to a mechanic's lien. *Scannevin v. Consolidated Mineral Water Co.*, 25 R. I. 318.

314. 4. Improvements with "Consent" of Owner. — *Winslow Bros. Co. v. McCully Stone Mason Co.*, 169 Mo. 236, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 314; *Lentz v. Eimermann*, 119 Wis. 492.

7. Consent Need Not Be Express. — *Winslow Bros. Co. v. McCully Stone Mason Co.*, 169 Mo. 236, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 314.

8. New Jersey Statute Requiring Written Consent. — *Murphy v. Hussa*, 70 N. J. L. 381.

315. 1. Facts from Which Consent Inferred. — The facts from which the inference of a consent is to be drawn must be such as to indicate at least willingness on the part of the owner to have the improvements made or an acquiescence in the means adopted for that purpose, with knowledge of the object for which they are employed. *Berger Mfg. Co. v. Zabriskie*, (N. Y. City Ct. Tr. T.) 75 N. Y. Supp. 1038.

5. Supervision of Work. — *Gilmour v. Colcord*, 96 N. Y. App. Div. 358.

6. Qualified Consent. — *Berger Mfg. Co. v. Zabriskie*, (N. Y. City Ct. Tr. T.) 75 N. Y. Supp. 1038.

316. 3. Statutory Provisions as to Posting Notice. — *Ah Louis v. Harwood*, 140 Cal. 500.

Time for Posting Notice. — Under the California statute the owner may post a notice within three days after the actual construction has begun. *Birch v. Magic Transit Co.*, 139 Cal. 406.

317. 6. Compare *Tom Sweeney Hardware*

Co. v. Gardner, (S. Dak. 1904) 99 N. W. Rep. 1105.

9. Leasehold Subject to Mechanics' Liens. — *McAnally v. Glidden*, 30 Ind. App. 22.

318. 1. Lien Does Not Bind Reversion. — *Antlers Park Regent Min. Co. v. Cunningham*, 29 Colo. 284; *Reppard, etc., Co. v. Morrison*, 120 Ga. 28; *Crandall v. Sorg*, 198 Ill. 48; *Stevens v. Burnham*, 62 Neb. 672; *Berger Mfg. Co. v. Zabriskie*, (N. Y. City Ct. Tr. T.) 75 N. Y. Supp. 1038; *Reed v. Estes*, 113 Tenn. 200.

2. Acquiescence in Improvements by Lessee. — *Hanson v. News Pub. Co.*, 97 Me. 99; *Eichler v. Warner*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 246; *Sunshine v. Morgan*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 778.

319. 1. Elements of Consent. — Under the New York statute, the owner must either be an affirmative factor in procuring the improvement to be made, or, having possession and control of the premises, assent to the improvement in the expectation that he will reap the benefit of it. *Rice v. Culver*, 172 N. Y. 60; *Beck v. Catholic University*, 172 N. Y. 387; *Sunshine v. Morgan*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 778; *Eichler v. Warner*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 246.

2. Provisions in Lease for Improvements by Lessee. — *Jones v. Menke*, 168 N. Y. 61; *New York Elevator Supply, etc., Co. v. Bremer*, 74 N. Y. App. Div. 400, affirmed 175 N. Y. 520. See also *Crandall v. Sorg*, 198 Ill. 48. Compare *Sunshine v. Morgan*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 778.

It must appear that the materials furnished or the labor performed were actually furnished or performed in the construction of the improvements specified in the lease. *Antlers Park Regent Min. Co. v. Cunningham*, 29 Colo. 284.

5. Consent to Particular Improvement. — *Winslow Bros. Co. v. McCully Stone Mason Co.*, 169 Mo. 236, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 319; *Berger Mfg. Co. v. Zabriskie*, (N. Y. City Ct. Tr. T.) 75 N. Y. Supp. 1038.

Failure to Complete Improvement. — An owner cannot be charged for improvements which are incomplete, and which fail to comply

319. *c.* LESSEE AS AGENT OF LESSOR. — See note 7.

321. 9. Vendees — *a.* IN GENERAL — Power to Bind Interest of Vendor. — See note 2.

Power to Bind Vendee's Own Interest. — See note 5.

322. See note 1.

b. CONTRACT OF SALE REQUIRING IMPROVEMENTS BY VENDEE. — See note 3.

323. *c.* IMPROVEMENTS WITH PRIVACY OR CONSENT OF VENDOR. — See note 5.

325. 12. Married Women — *a.* CONTRACTS BY MARRIED WOMEN FOR IMPROVEMENTS. — See notes 4, 5.

326. *b.* CONTRACT BY HUSBAND FOR IMPROVEMENTS, ETC., ON WIFE'S LAND. — See note 4.

327. Cases in Which Agency of Husband Will Not Be Implied. — See note 4.

328. Express or Implied Agency of Husband. — See notes 4, 5.

330. 17. Executors and Administrators. — See note 7.

332. 20. Contractors — *a.* IN GENERAL. — See note 3.

335. 21. Subcontractors. — See note 1.

336. See note 1.

337. 24. Distinction Between Materialmen and Contractors or Subcontractors. — See notes 1, 2, 4.

339. XII. IN WHOSE FAVOR AND FOR WHAT LIEN MAY EXIST — 4. Non-residents — Foreign Corporations. — See note 6.

340. 5. Persons Who "Do," "Perform," "Bestow," or "Furnish" Labor. — See note 1.

with the terms and specifications under which they were to be done, and upon the performance of which the consent was based. *New York Elevator Supply, etc., Co. v. Bremer*, 74 N. Y. App. Div. 400, *affirmed* 175 N. Y. 520.

319. 7. Provisions in Lease Requiring Improvements. — *Winslow Bros. Co. v. McCully Stone Mason Co.*, 169 Mo. 236, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 319.

321. 2. Power of Vendee to Bind Interest of Vendor. — *Rusche v. Pittman*, 34 Ind. App. 159, *reversing* (Ind. App. 1904) 70 N. E. Rep. 382; *Faber v. Muir*, 27 Tex. Civ. App. 27; *Northwest Bridge Co. v. Tacoma Shipbuilding Co.*, 36 Wash. 333.

5. No Lien on Interest of Vendee. — *Faber v. Muir*, 27 Tex. Civ. App. 27.

322. 1. Lien on Interest of Vendee Upheld. — *Hillhouse v. Pratt*, 74 Conn. 113; *Short v. Stephens*, 92 Mo. App. 151.

3. Lien for Improvements Required by Contract of Sale. — *Hendrie, etc., Mfg. Co. v. Holy Cross Gold Min., etc., Co.*, 17 Colo. App. 341. *Compare* *Bernard v. Adjoran*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 276.

323. 5. Vendor's Knowledge of Improvement Does Not Constitute Consent. — *Rusche v. Pittman*, 34 Ind. App. 159; *Beck v. Catholic University*, 172 N. Y. 387, *reversing* 62 N. Y. App. Div. 599.

325. 4. Common-law Disability to Contract — *Smith v. Gauby*, 43 Fla. 142; *Macfarlane v. Southern Lumber, etc., Co.*, (Fla. 1904) 36 So. Rep. 1029.

5. Effect of Married Women's Property Acts. — *Jefferson v. Hopson*, (Ky. 1905) 84 S. W. Rep. 540; *Finger v. Hunter*, 130 N. Car. 529.

326. 4. Husband No Power to Subject Wife's

Land to Liens. — *Lippmann v. Low*, 69 N. Y. App. Div. 24.

327. 4. Agency of Husband Not Implied from Marital Relation. — *Lippmann v. Low*, 69 N. Y. App. Div. 24.

328. 4. Estoppel of Wife to Deny Agency. — *Hurd v. Wing*, 93 N. Y. App. Div. 62.

5. *Hanchey v. Hurley*, 129 Ala. 306.

330. 7. Powers of Executors or Administrators. — *San Francisco Paving Co. v. Fairfield*, 134 Cal. 220.

332. 3. Contractor as Agent of Owner. — *Smith v. Wilcox*, 44 Oregon 323.

335. 1. No Lien in Favor of Contractor of Subcontractor. — *Dallman v. Clasen*, 116 Wis. 113; *Farmer v. St. Croix Power Co.*, 117 Wis. 76, 98 Am. St. Rep. 914.

336. 1. Statutory Changes in General Rule. — *Barlow Bros. Co. v. Gaffney*, 76 Conn. 107.

337. 1. Person Furnishing Materials under Express Contract Not a Contractor. — See *Salt Lake Hardware Co. v. Chainman Min., etc., Co.*, 128 Fed. Rep. 509.

2. Criterion for Distinction Between Materialman and Contractor. — One who supplies materials which some one else is to put into the building is a materialman. One who supplies material which he incorporates into the building by his own labor is a contractor. *Beckhard v. Rudolph*, (N. J. 1904) 59 Atl. Rep. 253.

4. Person Furnishing Electrical Plant a Materialman. — *Compare* *Salem v. Lane, etc., Co.*, 189 Ill. 593, 82 Am. St. Rep. 481.

339. 6. Foreign Corporation. — *New York Architectural Terra-Cotta Co. v. Williams*, 102 N. Y. App. Div. 1.

340. 1. Persons Who "Do" Labor. — *Compare* *Chapman v. Faith*, 18 Pa. Super. Ct. 578.

340. 8. Labor — *a.* IN GENERAL. — See note 8.

341. *c.* LABOR IN "ERECTION, ALTERATION," ETC. — (1) *In General* — Labor in Preparing Materials. — See note 2.

(2) *Labor Incidentally Connected with Construction Work* — (a) *In General.* — See note 3.

(b) *Hauling Materials.* — See note 5.

342. (d) *Cooking for Laborers.* — See note 3.

d. ARCHITECTS. — See note 4.

e. SUPERINTENDENCE OF CONSTRUCTION. — See note 5.

343. 9. Materials — *b.* PLACE OF SALE OR DELIVERY OF MATERIALS — Materials Sold and Delivered Out of State. — See note 7.

344. *c.* MATERIALS FURNISHED WITHOUT REGARD TO THEIR USE — (1) *In General.* — See note 1.

Proof as to Intended Use of Materials. — See note 2.

345. (2) *Whether Use in Particular Building Must Be Contemplated.* — See note 1.

(3) *Misappropriation to Building Not Contemplated.* — See note 6.

346. *d.* MATERIALS FURNISHED ON PERSONAL CREDIT OF BUYER — Proof with Regard to Credit. — See note 5.

e. WHETHER MATERIALS MUST BE ACTUALLY USED — (1) *In General.* — See note 9.

347. See notes 2, 4.

348. (2) *Proof of Use* — Burden of Proof. — See note 2.

Sufficiency of Proof. — See note 3.

(3) *Necessity for Actual Incorporation of Materials as Part of Structure.* — See note 6.

340. 8. A Laborer in the Course of a General Employment who works upon a structure or excavation is entitled to a lien, although he was not employed directly for such purpose. *Ah Louis v. Harwood*, 140 Cal. 500.

341. 2. *Montmorency Cotton Mills Co. v. Gignac*, 10 Quebec K. B. 158.

3. A Blacksmith Employed for Sharpening and Keeping Tools in Order for the work of mining is entitled in *Ontario* to a lien for wages on a mining location. *Davis v. Crown Point Min. Co.*, 3 Ont. L. Rep. 69.

5. *Fowler v. Pompelly*, (Ky. 1903) 76 S. W. Rep. 173; *Bates Mach. Co. v. Trenton, etc., R. Co.*, 70 N. J. L. 684, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 341.

342. 3. *Cook.* — See *Anderson v. Godsall*, 7 British Columbia 404; *Davis v. Crown Point Min. Co.*, 3 Ont. L. Rep. 69.

4. Lien of Architect Upheld. — *Field v. Consolidated Mineral Water Co.*, 25 R. I. 319, 105 Am. St. Rep. 895.

5. Superintendence — Construction of Buildings. — While a superintendent of construction is entitled to a lien for services performed, in that capacity, he can have no lien for "running around and punching up the people who had contracted to furnish the material." *Pitschke v. Pope*, (Colo. App. 1904) 78 Pac. Rep. 1077.

343. 7. Materials Sold and Delivered Out of State. — *Genest v. Las Vegas Masonic Bldg. Assoc.*, 11 N. Mex. 251.

344. 1. Materials Furnished Without Regard to Use Thereof. — *Tabor-Pierce Lumber Co. v. International Trust Co.*, 19 Colo. App. 108.

2. Proof of Intended Use. — *Hobson v. Townsend*, 126 Iowa 453.

345. 1. *Tabor-Pierce Lumber Co. v. International Trust Co.*, 19 Colo. App. 108.

6. Conversely, where materials are sold on the representation that they are to be used in a particular building, but they are actually used in another building, the owner of the former building is not liable. *Hobson v. Townsend*, 126 Iowa 453.

346. 5. Proof with Regard to Credit. — The fact that the claimant delivered a part of the material on the premises sought to be charged with the lien is of itself no evidence that it was sold on the credit of the building. *Crane Co. v. Neel*, 104 Mo. App. 177.

9. Actual Use Held Necessary. — *Consolidated Engineering Co. v. Crowley*, 105 La. 615; *Ryndak v. Seawell*, 13 Okla. 737; *Murphy v. Fleetford*, 30 Tex. Civ. App. 487; *McConnell v. Hewes*, 50 W. Va. 33.

347. 2. *Stimson Mill Co. v. Los Angeles Traction Co.*, 141 Cal. 30.

4. Actual Use Held Unnecessary. — *Keeley Brewing Co. v. Neuhauer Decorating Co.*, 194 Ill. 580; *Frudden Lumber Co. v. Kinnan*, 117 Iowa 93; *Hobson v. Townsend*, 126 Iowa 453.

348. 2. Proof of Use — Burden of Proof. — *Darlington v. Eldridge*, 88 Mo. App. 525.

3. Sufficiency of Proof. — When the party purchasing materials for a building acknowledges that such materials were wrought into the structure, this is sufficient to make a *prima facie* case in favor of the lien claimant. *Jorammon v. McPhee*, 31 Colo. 26.

6. What Constitutes "Use." — *Stimson Mill Co. v. Los Angeles Traction Co.*, 141 Cal. 30.

350. XIII. CONTRACT UNDER WHICH LIEN ACQUIRED — 2. A Contract Essential to Existence of Lien. — See note 5.

351. See note 1.

The Constitutionality. — See note 5.

352. 3. What Contract Will Support Lien — a. CONTRACT MUST BE VALID. — See note 2.

b. WHETHER IMPLIED CONTRACT SUFFICIENT. — See note 4.

c. WHETHER CONTRACT MUST BE IN WRITING — (1) *In General.*

— See note 5.

353. (4) Statutory Provisions in Regard to Separate Estate of Married Women. — See note 8.

355. e. WHETHER CONTRACT MUST BE RECORDED — (1) Recording as Condition Precedent to Lien — (d) Plans and Specifications as Part of Contract. — See note 7.

356. (2) Recording as Precluding Lien by Subcontractors and Materialmen — (c) What Work or Material Within Purview of Statute. — See note 7.

357. (d) Recording Plans and Specifications as Part of Contract. — See note 1.

g. WHETHER CONTRACT MUST SPECIFY TIME FOR PERFORMANCE AND PAYMENT — (1) *Time of Performance.* — See notes 5, 6, 7, 8.

358. (2) Time of Payment — (a) Illinois Statute. — See notes 1, 2.

350. 5. Contract Essential to Existence of Lien. — Von Platen *v.* Winterbotham, 203 Ill. 198; Wilson *v.* Lubke, 176 Mo. 210, 98 Am. St. Rep. 503; Jose *v.* Hoyt, 106 Mo. App. 594; Waldermeyer *v.* Loebig, 183 Mo. 363; Hengstenberg *v.* Hoyt, 109 Mo. App. 622; Louisiana, etc., Lumber Co. *v.* Myers, 87 Mo. App. 671; Tidball *v.* Holyoke, (Neb. 1904) 97 N. W. Rep. 1019.

351. 1. Contractor Regarded as Agent of Owner. — Smith *v.* Wilcox, 44 Oregon 323, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 350, 351.

5. Statutes Held Constitutional. — Chicago Lumber Co. *v.* Newcomb, 19 Colo. App. 265.

352. 2. No Lien Where Contract Not Valid. — Sherry *v.* Madler, 123 Wis. 621.

4. Implied Contract Insufficient Basis for Lien. — An implied contract is not sufficient in Illinois to support a mechanic's lien unless a time for completion and payment is fixed. Henry *v.* Applegate, 111 Ill. App. 13. See further, *infra*, this title, **357. 4 et seq.**

5. A Verbal Contract Subsequently Reduced to Writing is sufficient to give a lien for materials furnished during the intervening time. Louisiana, etc., Lumber Co. *v.* Myers, 87 Mo. App. 671.

353. 8. See Tarr *v.* Muir, 107 Ky. 283; Johnson *v.* Bush, (Ky. 1901) 65 S. W. Rep. 158.

355. 7. Recording Plans and Specifications as Part of Contract. — Knelly *v.* Horwath, 208 Pa. St. 487.

356. 7. What Work or Materials Within Purview of Statute. — Buckley *v.* Hann, 68 N. J. L. 624.

357. 1. When Recording Plans and Specifications Essential. — English *v.* Warren, 65 N. J. Eq. 30.

5. Time of Performance. — Roulet *v.* Hogan, 203 Ill. 525; Smith *v.* Central Lumber Co., 113 Ill. App. 477.

Whether a Contract Be Written or Verbal,

it must specify a time for completion and a time for payment. Concord Apartment House Co. *v.* Von Platen, 106 Ill. App. 40.

6. King *v.* Lamon, 193 Ill. 537; Webbe *v.* Curran, 198 Ill. 18, reversing 97 Ill. App. 525; Williams *v.* Rittenhouse, etc., Co., 198 Ill. 602; Bolter *v.* Kozlowski, 211 Ill. 79; Superior Lumber Co. *v.* Gottlieb, 102 Ill. App. 392; Pierce *v.* Barnes, 106 Ill. App. 241; Garden City Banking, etc., Co. *v.* Grabe, 108 Ill. App. 453.

The Fact that the Contract Is Performed Within a Year will not prevent the operation of the statute. Garden City Banking, etc., Co. *v.* Grabe, 108 Ill. App. 453.

The Statute Applies Only to the Lien of the Original Contractor, and a subcontractor's lien is not affected by the omission of the contract as to time for completion and payment. Keeley Brewing Co. *v.* Neubauer Decorating Co., 194 Ill. 580. Compare Williams *v.* Rittenhouse, etc., Co., 198 Ill. 602; Von Platen *v.* Winterbotham, 203 Ill. 198.

7. Williams *v.* Rittenhouse, etc., Co., 198 Ill. 602; M. Pugh Co. *v.* Wallace, 198 Ill. 422; Hindert *v.* American Trust, etc., Bank, 198 Ill. 538; Dymond *v.* Bruhns, 200 Ill. 292; Zuttermeister *v.* Central Lumber Co., 104 Ill. App. 120; Richardson *v.* Central Lumber Co., 105 Ill. App. 358; Ludwig *v.* Huverstuhl, 108 Ill. App. 461; Henry *v.* Applegate, 111 Ill. App. 13; Cooke *v.* Haungs, 113 Ill. App. 501; George Green Lumber Co. *v.* Nutriment Co., 113 Ill. App. 635.

8. Decisions under Earlier Statutes — Contracts Partly Express and Partly Implied. — Under the present Illinois mechanic's lien law a lien cannot be established upon implied or partly implied and partly expressed contracts. Williams *v.* Rittenhouse, etc., Co., 198 Ill. 602.

358. 1. Vanderpoel *v.* Knight, 102 Ill. App. 596.

2. Sedgwick *v.* Concord Apartment House Co., 104 Ill. App. 5.

359. *k.* ENTIRE CONTRACTS COMPREHENDING LIENABLE AND NON-LIENABLE ITEMS. — See note 7.

360. *l.* ENTIRETY OF CONTRACT AS AFFECTING PRIORITIES, TIME OF FILING, ETC. — (2) *Intention of Parties.* — See note 1.

361. (5) *Modification of Contract Requiring Additional Material or Labor.* — See note 1.

(8) *Question for Jury.* — See note 5.

362. *4.* Contract Inconsistent with Existence of Lien — *c.* TIME AND MODE OF PAYMENT INCONSISTENT WITH LIEN. — See note 4.

363. *5.* How Far Contract of Principal Contractor Binding on Subcontractor — *c.* STIPULATIONS AGAINST LIENS — (1) *Effect on Subcontractor's Right to Lien.* — See notes 4, 6.

(2) *Time of Making with Reference to Subcontractor's Contract.* — See note 7.

364. (4) *Principle of Construction.* — See notes 3, 5.

(5) *Stipulation Need Not Be in Writing.* — See note 7.

366. *6.* Performance of Contract — *a.* IN GENERAL. — See note 4.

Delay in Performance. — See note 6.

b. AS BETWEEN OWNER AND PRINCIPAL CONTRACTOR — (1) *Substantial Performance Sufficient.* — See note 8.

367. (2) *What Constitutes Substantial Performance* — (a) *In General.* — See note 1.

(b) *Where Defect Is Important and Considerable.* — See note 3.

368. (4) *Waiver by Owner of Contractor's Default* — (b) *What Constitutes Waiver* — *bb.* ACCEPTANCE AND TAKING POSSESSION BY OWNER — *Acceptance as Affecting Time of Performance.* — See note 9.

369. (c) *Waiver by Owner as Affecting Priority of Mortgagee's Claim.* — See note 1.

c. AS BETWEEN OWNER AND SUBCONTRACTOR — (1) *Substantial Performance Required of Subcontractor.* — See note 2.

359. *7.* Entire Contract Comprehending Lienable and Nonlienable Items. — *Rinzel v. Stumpf*, 176 Wis. 287.

360. *1.* *Intention of Parties.* — *Fields v. Daisy Gold Min. Co.*, 25 Utah 76.

361. *1.* *Modification of Contract Requiring Additional Material or Labor.* — *Compare Martin v. Texas Briquette, etc., Co.*, (Tex. Civ. App. 1901) 77 S. W. Rep. 651.

5. *Question for Jury.* — *Western Iron Works v. Montana Pulp, etc., Co.*, 30 Mont. 550.

362. *4.* *Time or Mode of Payment Inconsistent with Lien.* — Where the contract does not stipulate for a credit inconsistent with the enforcement of the lien given by statute, it cannot be construed as a waiver. *Osborne v. Barnes*, 179 Mass. 507.

363. *4.* *Stipulation Against Lien Extends to Subcontractors.* — *Williamson v. Tunis*, 19 Pa. Super. Ct. 207.

6. *Stipulation Held Not to Affect Subcontractors.* — See *Bates Mach. Co. v. Trenton, etc., R. Co.*, 70 N. J. L. 384, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 361 [363].

7. *Subcontractor Only Bound by Stipulations Existing at Time He Contracted.* — *Lee v. Williams*, 22 Pa. Super. Ct. 564, 571, second appeal 26 Pa. Super. Ct. 405, 410.

364. *3.* *Express Covenant or Clear Implied Covenant Necessary.* — In order to prevent the subcontractor from filing a lien there must be an express covenant against liens or a covenant resulting as a necessary implication from the language employed; and the implied covenant

should so clearly appear that the mechanic or materialman can understand it without consulting a lawyer as to its legal effect. If the contract is fairly and reasonably susceptible of any other construction it will not bar a lien. *Bithell v. Diven*, 18 Pa. Super. Ct. 178.

5. See *Ludowici Roofing Tile Co. v. Pennsylvania Blind Inst.*, 116 Fed. Rep. 661.

7. *Stipulation Must Be Express or Necessarily Implied.* — *Bithell v. Diven*, 18 Pa. Super. Ct. 178.

366. *4.* *Performance of Contract Prerequisite to Lien.* — *Tenney v. Anderson Water, etc., Co.*, 69 S. Car. 430, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 366.

6. *Delay in Performance.* — *Tenney v. Anderson Water, etc., Co.*, 69 S. Car. 430, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 366.

8. *Substantial Performance Sufficient.* — *Moore v. Dugan*, 179 Mass. 153; *Sherry v. Madler*, 123 Wis. 621.

367. *1.* *What Constitutes Substantial Performance.* — *Braseth v. State Bank*, 12 N. Dak. 486, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 367; *Windham v. Independent Telephone Co.*, 35 Wash. 166.

3. *Where Defects Are Numerous and Pervade Whole Contract.* — *Braseth v. State Bank*, 12 N. Dak. 486.

368. *9.* *Waiver of Time of Performance.* — *Sedgwick v. Concord Apartment House Co.*, 104 Ill. App. 5.

369. *1.* See *Nolt v. Crow*, 22 Pa. Super. Ct. 113.

2. *Substantial Performance Required of Subcon-*

370. *d. APPROVAL OF ARCHITECT AND ARCHITECT'S CERTIFICATE — (1) Approval as Condition Precedent to Lien.* — See note 6.

371. *(2) Wrongful Refusal of Architect to Give Certificate.* — See note 1.

372. **XIV. FORMAL REQUISITES OF LIEN — 1. In General.** — See note 10.

374. **2. Notice to Owner of Intention to Claim Lien — a. NECESSITY OF NOTICE — (1) In General** — The Object of Requiring Notice. — See note 6.

375. **Who Is Owner.** — See note 1.

376. *(4) By Subcontractors* — In General. — See note 1.
Sworn Statement by Principal Contractor. — See note 3.

377. **Liens for Materials and for Labor.** — See note 2.

378. *b. TIME OF GIVING NOTICE — (1) In General.* — See note 1.

(2) After Completion of Work or Contract. — See note 4.

380. *c. CONTENTS AND SUFFICIENCY OF NOTICE — (1) In General.* — See note 2.

(2) Necessity of Being in Writing. — See note 8.

381. *(5) When Amount Due.* — See note 5.

(6) From Whom Due. — See note 6.

(8) To Whom Addressed. — See note 8.

382. *(11) Signature.* — See note 5.

d. SERVICE OF NOTICE — (1) Upon Whom Made. — See note 8.

383. *(2) By Whom Made.* — See note 2.

(3) Mode of Service. — See notes 4, 7, 9.

tractors. — MacKnight Flintic Stone Co. v. New York, 78 N. Y. App. Div. 641, affirmed 176 N. Y. 586.

370. 6. Architect's Certificate as Condition Precedent to Recovery. — Mindeman v. Douville, 112 Wis. 413.

371. 1. Wrongful Refusal of Certificate. — Windham v. Independent Telephone Co., 35 Wash. 166; Mindeman v. Douville, 112 Wis. 413.

372. 10. Compliance with Statutory Requirements Necessary. — Mertens v. Cassini Mosaic, etc., Co., 53 W. Va. 192.

374. 6. Object of Notice to Owner. — Shryock v. Hensel, 95 Md. 614; P. M. Bruner Granitoid Co. v. Klein, 100 Mo. App. 289; Mertens v. Cassini Mosaic, etc., Co., 53 W. Va. 192.

Notice Not Required When Owner Is Purchaser. — Matthews v. Monts, 61 S. Car. 385.

375. 1. Owner at Time Lien Attaches. — P. M. Bruner Granitoid Co. v. Klein, 100 Mo. App. 289; Getz v. Brubaker, 25 Pa. Super. Ct. 303.

The "owner of the property to be affected by the lien" means the owner of the fee when the fee in the land is to be affected and the owner of a leasehold or less interest when such less interest is to be affected. Poole v. Fellows, 25 R. I. 64.

376. 1. Subcontractors. — Nichols v. Dixon, (Tex. Civ. App. 1905) 85 S. W. Rep. 1051; Craig v. Cromwell, 27 Ont. App. 585.

3. Keeley Brewing Co. v. Neubauer Decorating Co., 194 Ill. 580; Poole v. Fellows, 25 R. I. 64.

377. 2. Labor and Materials Furnished under Entire Contract. — McDowell v. Rockwood, 182 Mass. 150.

378. 1. Notice Must Be Given in Prescribed Time. — Torrance v. Bowton, 96 Ill. App. 475.

4. Effect of Creditor's Agreement to Wait. — Under a statute requiring notice to be given

within a year after payment becomes due, the creditor's agreement to wait a reasonable time does not operate to fix a different date as the time when payment shall become due. Lazzari v. Havens, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 255.

380. 2. Sufficiency of Notice in General. — Craig v. Cromwell, 27 Ont. App. 585.

8. Service of a Written Copy of the notice is sufficient in Wisconsin. Lentz v. Eimermann, 119 Wis. 492.

381. 5. Stating When Amount Due. — Hurtt v. Sanders Bros. Mfg. Co., 99 Ill. App. 665.

6. Statement of Debtor — Sufficiency of Statement. — See Maroni v. Junty, 26 R. I. 109.

8. Address to Owner. — The fact that the notice is addressed to other persons as well as to the owner is immaterial. Hensel v. Johnson, 94 Md. 729.

382. 5. Use of Initials. — A notice of lien is not bad because the Christian name of the person who signed it was not written out in full, but was designated by initials. Pearce v. Albright, (N. Mex. 1904) 76 Pac. Rep. 286.

8. Service on Owner or Agent. — Laev Lumber Co. v. Auer, 123 Wis. 178.

383. 2. Service May Be Made by an Agent or Attorney of the claimant. Fehling v. Goings, 67 N. J. Eq. 375.

A Person Designated by the Claimant's Attorney may make service Cady v. Fair Plain Literary Assoc., 135 Mich. 295.

4. Personal Service Necessary. — Hill v. Kaufman, 98 Md. 247; Hensel v. Johnson, 94 Md. 729.

7. Service in a County Other than That of Residence of the owner has been held to be sufficient, the notice not being process. Dusick v. Green, 118 Wis. 240.

9. Mode of Service Immaterial if Actually Received. — Fehlings v. Goings, 67 N. J. Eq. 375.

384. 5. Filing and Recording Statement of Claim — a. NECESSITY —(1) *In General.* — See note 3.**385. Owner in Failing Circumstances.** — See note 4.**387. (2) As Against Owner or Other Contracting Party.** — See note 2.**389. c. TIME OF FILING OR RECORDING — (1) In General —** Necessity of Compliance with Statute. — See note 3.**390. A Statement Filed Before the Time Named.** — See note 6.**391. (2) Original Contractors and Subcontractors — Who Are Original Contractors.** — See note 4.(3) *Accrual of Indebtedness.* — See note 5.**392. The Phrase "After the Accrual of the Indebtedness."** — See note 1.(6) *Completion of Contract, Work, or Improvement — (a) In General —* The Most Usual Statutory Provisions. — See note 10.**394. See note 1.**

Necessity of Completion. — See note 2.

396. (b) What Constitutes Completion — aa. IN GENERAL — Acceptance, Use, and Occupation as Equivalent to Completion. — See note 3.

Agreement to Consider Building Completed. — See note 4.

Cessation from Labor. — See note 6.

398. cc. DELAY IN COMPLETION OF SMALL MATTERS. — See notes 8, 12.**399. dd. ADDITIONAL WORK OR MATERIAL AS AFFECTING COMPLETION — General Rule.** — See note 1.

Where Defects and Omissions Are Discovered, and Remedied. — See note 7.

384. 3. Filing and Recording Necessary. — *Christian v. Allee*, 104 Ill. App. 177; *Shryock v. Hensel*, 95 Md. 614; *Tidball v. Holyoke*, (Neb. 1904) 97 N. W. Rep. 1019; *Meyers v. Wood*, 95 Tex. 67, 26 Tex. Civ. App. 591; *Elwell v. Morrow*, 28 Utah 278.**385. 4. Owner in Failing Circumstances — Indiana Statute.** — The exemption from giving the required notice in case of the debtor's insolvency does not extend to materialmen, but is confined alone to the claim for wages for mechanics and laborers employed in or about any shop, mill, etc. *Sulzer-Vogt Mach. Co. v. Rushville Water Co.*, 160 Ind. 292, *affirming* (Ind. App. 1902) 62 N. E. Rep. 649; *National Supply Co. v. Stranahan*, 161 Ind. 602.**387. 2. Filing Necessary.** — *Christian v. Allee*, 104 Ill. App. 177.*In Texas.* — *June v. Duke*, 35 Tex. Civ. App. 240.**389. 3. Must Be Filed in Prescribed Time.** — *Foss v. Desjardins*, 98 Me. 539.**390. 6. Premature Filing.** — *Clark v. Anderson*, 88 Minn. 200, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 390.**391. 4. Materialmen and Laborers Not Original Contractors.** — See *Carswell v. Patzowski*, 4 Penn. (Del.) 406.**5. Time Running from Accrual of Indebtedness.** — *R. J. Schwab, etc., Co. v. Frieze*, 107 Mo. App. 553.**392. 1. Meaning of "Accrual of Indebtedness."** — The phrase "after the accrual of the indebtedness" means after the work is finished, and does not refer to the date at which the debt is due. *General Fire Extinguisher Co. v. Schwartz Bros. Commission Co.*, 167 Mo. 171.**10. Completion of Building or Improvement.** — *Quintal v. Benard*, 20 Quebec Super. Ct. 199.**394. 1. Cessation of Labor or Furnishing of Materials.** — *General Fire Extinguisher Co. v. Chaplin*, 183 Mass. 375.The fact that in the progress of the work more than thirty days may have passed without the claimant doing anything on the job does not of itself, and as matter of law, defeat a lien. *D. L. Billings Co. v. Brand*, 187 Mass. 417.**2. Completion of Building.** — *Tabor-Pierce Lumber Co. v. International Trust Co.*, 19 Colo. App. 108.**396. 3. Acceptance and Occupation Not Conclusive Evidence of Completion.** — *Jones v. Kruse*, 138 Cal. 613.**4. General Fire Extinguisher Co. v. Schwartz Bros. Commission Co.**, 165 Mo. 171.**6. Cessation from Labor Equivalent to Completion.** — Labor performed before a building is completed, which is in furtherance of its completion, whatever its character, does not come within the provisions of the statute. *Joralmon v. McPhee*, 31 Colo. 26.**398. 8. Time Runs from Substantial Completion of Work.** — *Genest v. Las Vegas Masonic Bldg. Assoc.*, 11 N. Mex. 251.**12. Last Work in Performance of Contract.** — *General Fire Extinguisher Co. v. Schwartz Bros. Commission Co.*, 165 Mo. 171. See also *Hutchins v. Bautch*, 123 Wis. 394, 107 Am. St. Rep. 907.**399. 1. Additional Work or Material Will Not Revive Expired Claim.** — *Cahoon v. Fortune Min., etc., Co.*, 26 Utah 86; *Sulzer-Vogt Mach. Co. v. Rushville Water Co.*, 160 Ind. 202; *Steuerwald v. Gill*, 85 N. Y. App. Div. 605; *Hobkirk v. Portland Nat. Baseball Club*, 44 Oregon 605.**7. Time Not Extended by Repair of Defects and Omissions.** — *General Fire Extinguisher Co. v. Schwartz Bros. Commission Co.*, 165 Mo. 171.

401. (8) *Entire or Separate Contracts and Running Accounts* — (a) Rule as to Entire Contracts and Running Accounts — General Rule. — See note 5.

402. (b) Rule as to Separate Contracts and Interrupted Accounts. — See note 5.

403. (c) What Constitutes Entire Contract or Running Account — Statement of Rule. — See note 1.

Question of Fact. — See note 3.

405. d. PLACE OF FILING AND RECORDING — (1) *In What Office and County*. — See note 6.

407. g. CONTENTS AND SUFFICIENCY OF LIEN STATEMENT — (1) *General Requisites* — (a) Compliance with Statute — Compliance Necessary. — See note 8.

408. Strict or Liberal Construction. — See notes 1, 2, 3, 7.

410. (e) Completeness in Itself. — See note 6.

Affidavit. — See note 8.

(2) *Amount of Claim* — (a) In General — Amount Must Be Stated. — See note 10.

411. Claiming Excessive Amount. — See notes 3, 6.

412. See note 1.

Statement that Credits and Offsets Have Been Deducted. — See note 4.

(b) Itemizing Account — Statement of Rule. — See note 9.

413. Specifying Debt and Credits. — See note 2.

401. 5. Time Runs from Date of Last Item. — *Hensel v. Johnson*, 94 Md. 729; *General Fire Extinguisher Co. v. Chaplin*, 183 Mass. 375; *Eller v. Cambridge Springs Co.*, 18 Pa. Super. Ct. 44.

402. 5. Different Distinct Contracts. — *E. R. Darlington Lumber Co. v. Harris*, 107 Mo. App. 148; *Miller v. Heath*, 22 Pa. Super. Ct. 313.

Where materials are furnished under distinct contracts the time for filing the lien dates from the furnishing of the different parcels of materials notwithstanding all were to be used for the same purpose. *Hensel v. Johnson*, 94 Md. 729.

403. 1. What Constitutes Entire Contract on Running Account. — *Fields v. Daisy Gold Min. Co.*, 25 Utah 76.

The Following Statement of the Rule Has Been Approved in Numerous Cases. — *Hensel v. Johnson*, 94 Md. 729; *E. R. Darlington Lumber Co. v. Harris*, 107 Mo. App. 148; *Flanagan v. O'Connell*, 88 Mo. App. 1.

3. Question of Fact for Jury. — *Western Iron Works v. Montana Pulp, etc., Co.*, 30 Mont. 550.

405. 6. Filing in Wrong Office or County. — *Terwilliger v. Wheeler*, 81 N. Y. App. Div. 460.

407. 8. Compliance with Statute Necessary. — *New Jersey Steel, etc., Co. v. Robinson*, 85 N. Y. App. Div. 512, *affirmed* 178 N. Y. 632; *Knely v. Horwath*, 208 Pa. St. 487.

408. 1. Statute Liberally Construed. — *Sosman v. Great Southern Fireproof Hotel Co.*, (C. C. A.) 116 Fed. Rep. 800.

2. Substantial Compliance Sufficient. — *Terry v. Prevo*, (Neb. 1901) 95 N. W. Rep. 338; *New Jersey Steel, etc., Co. v. Robinson*, 85 N. Y. App. Div. 512, *affirmed* 178 N. Y. 632; *Ferguson v. Stephenson-Brown Lumber Co.*, 14 Okla. 148.

3. Designating Act under Which Lien Claimed. — Where there is but one lien act it is not necessary to designate the act under which the

notice is filed. *White v. Livingston*, 69 N. Y. App. Div. 361, *affirmed* 174 N. Y. 538. See also *Hawkins v. Boyden*, 25 R. I. 181.

7. Disregard of Plain Requirements. — *Campbell v. Cameron*, (Indian Ter. 1904) 82 S. W. Rep. 762; *Mahley v. German Bank*, 174 N. Y. 499.

410. 6. Statement Must Be Complete in Itself. — *Armstrong v. Chisolm*, 100 N. Y. App. Div. 440.

Notice. — Where the notice of intention to file a lien is attached to the lien statement, it may be looked to for the purpose of supplying omissions in the statement. *O'Shea v. O'Shea*, 91 Mo. App. 221.

8. Affidavit to Claim. — The itemized statement may be supplemented by any more definite facts which appear to explain it, and which constitute a part of the same recorded affidavit. *Great Southern Fireproof Hotel Co. v. Jones*, (C. C. A.) 116 Fed. Rep. 793, *affirmed* 193 U. S. 532.

10. Amount of Claim Must Be Stated. — *Krotz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577.

411. 3. Excessive Amount. — *New Jersey Steel, etc., Co. v. Robinson*, 85 N. Y. App. Div. 512, *affirmed* 178 N. Y. 632.

6. Inclusion of Item for Which No Lien Exists. — *Palmer v. McGinness*, 127 Iowa 118; *Evans v. Lower*, 67 N. J. Eq. 232; *Powell v. Nolan*, 27 Wash. 318.

412. 1. Mistake in Computation of Amount. — *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265.

4. Statement that Credits and Offsets Have Been Deducted Is Unnecessary. — *Alabama State Fair, etc., Assoc. v. Alabama Gas Fixture, etc., Co.*, 131 Ala. 256; *Alabama, etc., Lumber Co. v. Tisdale*, 139 Ala. 250.

9. Itemized Statement Necessary. — *Meyers v. Wood*, 95 Tex. 67, 26 Tex. Civ. App. 591.

413. 2. The Omission of a Trifling Credit is not fatal unless it occurs from a fraudulent

414. Where Work Is Done on Several Buildings, or Different Items of Improvement. — See note 2.

Entire Contract for Lump Sum. — See note 4.

415. Disregarding Improper Items. — See note 5.

(3) *Nature and Amount of Work or Materials* — (a) In General — Necessity of Statement. — See note 7.

Sufficiency of Statement. — See note 9.

416. Figures and Symbols. — See note 6.

(b) Itemizing Statement. — See note 8.

417. Where a Gross Sum Is to Be Paid. — See note 1.

Claim for Extras. — See note 4.

(4) *Description of Property* — (a) Necessity. — See note 5.

418. See note 1.

(b) Sufficiency — Statement of Rule. — See note 3.

419. See note 2.

420. See note 1.

421. Description of Building Alone. — See note 11.

422. Describing Too Much or Too Little. — See note 2.

motive. *Kasper v. St. Louis Terminal R. Co.*, 101 Mo. App. 323.

414. 2. The Penalty for not designating the amount due on each piece of property is the postponement of the general lien to other liens. The lien is not invalidated. *Seattle Lumber Co. v. Sweeney*, 33 Wash. 691.

4. Entire Contract for Agreed Price. — *Great Southern Fireproof Hotel Co. v. Jones*, (C. C. A.) 116 Fed. Rep. 793, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 414, affirmed 193 U. S. 532; *Queal v. Stradley*, 117 Iowa 748; *Mahan v. Brinnell*, 94 Mo. App. 165; *Holland v. Cunniff*, 96 Mo. App. 67; *Baumhoff v. St. Louis, etc., R. Co.*, 171 Mo. 120, 94 Am. St. Rep. 770.

415. 5. *Linck v. Johnson*, 134 Cal. xix, 66 Pac. Rep. 674.

7. Nature and Amount of Labor or Material Must Be Stated. — *Krotz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577; *O'Shea v. O'Shea*, 91 Mo. App. 221; *White v. Livingston*, 69 N. Y. App. Div. 361, affirmed 174 N. Y. 538; *Toop v. Smith*, 87 N. Y. App. Div. 241, affirmed 181 N. Y. 283; *Niswander v. Black*, 50 W. Va. 188.

That the Owner Has Not Been Prejudiced is no excuse for a failure to comply with the requirement. *Frolich v. Beecher*, (Mich. 1905) 102 N. W. Rep. 736.

When Materials Are Furnished for Several Buildings to be erected on the same parcel or premises, it is not necessary that the notice should state what portion thereof is used in the erection of each. *White v. Livingston*, 69 N. Y. App. Div. 361, affirmed 174 N. Y. 538.

9. Statement Held Insufficient. — See *Dwyer Brick Works v. Flanagan*, 87 Mo. App. 340.

A Statement in the Alternative that "the labor performed or to be performed, and the materials furnished or to be furnished," etc., is fatally defective. *Bradley, etc., Co. v. Pacheteau*, 71 N. Y. App. Div. 148, reversed on other grounds 175 N. Y. 492; *Bossert v. Happel*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 560, affirmed 89 N. Y. App. Div. 7; *New Jersey Steel, etc., Co. v. Robinson*, 85 N. Y. App. Div. 512, affirmed 178 N. Y. 632; *Villaume v. Kirch-*

ner, (Supm. Ct. App. T.) 85 N. Y. Supp. 377; *Armstrong v. Chisolm*, 100 N. Y. App. Div. 440; *Siegel v. Ehrshowsky*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 605.

416. 6. Trade Abbreviations or Symbols. — *Great Southern Fireproof Hotel Co. v. Jones*, (C. C. A.) 116 Fed. Rep. 793, affirmed 193 U. S. 532.

8. Itemized Statement Necessary. — *Chapman v. Faith*, 18 Pa. Super. Ct. 578.

417. 1. The Pennsylvania Statute. — *McCune v. Hatch*, 18 Pa. Super. Ct. 469; *Chapman v. Faith*, 18 Pa. Super. Ct. 578.

4. The Fact that Extras Are Not Itemized will not defeat the whole claim. *Sedgwick v. Concord Apartment House Co.*, 104 Ill. App. 5.

5. Description Necessary. — *Bouchard v. Guisti*, 22 R. I. 591; *Merchants', etc., Bank v. Hollis*, (Tex. Civ. App. 1904) 84 S. W. Rep. 269; *Mertens v. Cassini Mosaic, etc., Co.*, 53 W. Va. 192; *Security Nat. Bank v. St. Croix Power Co.*, 117 Wis. 211; *Dusick v. Green*, 118 Wis. 240.

418. 1. Description of Building or Improvement. — See *Western Iron Works v. Montana Pulp, etc., Co.*, 30 Mont. 550.

3. Sufficiency to Identify Property. — *Hooven, etc., Co. v. Featherstone*, (C. C. A.) 111 Fed. Rep. 81; *Hammond v. Darlington*, 109 Mo. App. 333; *Hydraulic Press Brick Co. v. Schlingmann*, 88 Mo. App. 17; *Western Iron Works v. Montana Pulp, etc., Co.*, 30 Mont. 550.

419. 2. Descriptions Held Sufficient. — *Western Iron Works v. Montana Pulp, etc., Co.*, 30 Mont. 550.

Description by Metes and Bounds. — *Hydraulic Press Brick Co. v. Schlingmann*, 88 Mo. App. 17.

420. 1. Descriptions Held Insufficient. — *Dusick v. Green*, 118 Wis. 240; *Miller v. Heath*, 22 Pa. Super. Ct. 313.

421. 11. Building Alone Described. — Under a statute granting a lien upon land and the improvement thereon, an insufficient description of the land will invalidate the whole lien. *Mayes v. Murphy*, 93 Mo. App. 37.

422. 2. Describing Excessive Amount. — *E. R. Darlington Lumber Co. v. Harris*, 107 Mo.

- 422.** (5) *Name of Owner* — (a) *Necessity*. — See note 7.
423. (b) *Sufficiency* — In General. — See notes 5, 6, 7.
424. Who Is Owner to Be Named. — See note 4.
 Owner of Record. — See note 6.
 Owner Unknown. — See notes 7, 8.
425. (6) *Name of Contractor or Debtor* — *Necessity*. — See note 8.
426. A Mistake in the Name. — See note 7.
427. (7) *Name of Claimant*. — See notes 2, 4.
 (8) *Terms of Contract* — *Necessity of Stating Terms and Conditions*. — See note 7.
428. See note 1.
 The Contract Referred To. — See note 3.
 Time of Payment. — See note 12.
429. (9) *Time of Doing Work or Furnishing Material* — *Necessity of Averment*. — See note 4.
 Itemized Account with Dates. — See note 7.
430. Specifying First and Last Dates. — See notes 1, 3.
 Failure of the Account to State the Date. — See note 5.
 Date of Last Item. — See note 6.
431. (11) *Miscellaneous Requirements* — *Maturity of Demand*. — See note 14.
433. Address of Lien Holder. — See note 4.

App. 148; *Western Iron Works v. Montana Pulp, etc., Co.*, 30 Mont. 550.

422. 7. *Name of Owner Must Be Stated*. — *Russell v. Hayner*, (C. C. A.) 130 Fed. Rep. 90.

423. 5. *Reputed Owner Not Real Owner*. — *Shryock v. Hensel*, 95 Md. 614.

6. *Owner "and" Reputed Owner*. — *Seattle Lumber Co. v. Sweeney*, 33 Wash. 691.

7. *Owner "or" Reputed Owner*. — *Hensel v. Johnson*, 94 Md. 729.

424. 4. *Ownership at Time of Filing Statement*. — *Waters v. Johnson*, 134 Mich. 436.

Failure to State When Title Passed Immaterial. — Where a notice states the name of the owner at the time when the claimant was employed, and also the name of the owner when the lien was filed, it is not insufficient because it does not state when title passed from the one to the other. *Ah Louis v. Harwood*, 140 Cal. 500.

6. *Owner of Record Title*. — *Shryock v. Hensel*, 95 Md. 614, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 424.

7. *Owner Unknown*. — When the lien claimants wrongfully proceed against a certain person as the owner, and positively swear in their claim that he is the owner, they will not be permitted to excuse this mistake by pleading ignorance, unless that ignorance is justly chargeable to the owner himself. *Waters v. Johnson*, 134 Mich. 436.

8. See *Russell v. Hayner*, (C. C. A.) 130 Fed. Rep. 90.

425. 8. *Naming Member of Firm as Contractor*. — *H. F. Cady Lumber Co. v. Conkling*, (Neb. 1904) 98 N. W. Rep. 42.

426. 7. *Mistake in Name*. — Stating the debtor to be a corporation instead of a partnership has been held to be a fatal defect. *Sawyer Goodman Co. v. Neagle*, 110 Ill. App. 178.

427. 2. *Name of Claimant Necessary*. — A lien statement is not defective for failing to state in express terms that the materials were furnished by the claimant. *Sickman v. Wollett*, 31 Colo. 58.

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4. *Firm Name*. — See *Kane v. Hutkoff*, 81 N. Y. App. Div. 105.

7. *Terms and Conditions of Contract Must Be Stated*. — *Knely v. Horwath*, 208 Pa. St. 487.

428. 1. *Statement of Terms Unnecessary*. — *Seattle Lumber Co. v. Sweeney*, 33 Wash. 691; *Laev Lumber Co. v. Auer*, 123 Wis. 178.

3. *Subcontract and Not Original Contract Intended*. — See *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265;

12. *Time of Payment Must Be Stated*. — *Hurt v. Sanders Bros. Mfg. Co.*, 99 Ill. App. 665.

Under the *Illinois* statute the time when the last payment became due should be stated. *Richardson v. Central Lumber Co.*, 105 Ill. App. 358.

429. 4. *Time Must Be Stated*. — *Hurt v. Sanders Bros. Mfg. Co.*, 99 Ill. App. 665; *Meyers v. Wood*, 95 Tex. 67, 26 Tex. Civ. App. 591.

7. *Where Materials Were All Purchased at One Time*, but delivered on different dates, an account stating the date of purchase only is sufficient. *Louisiana, etc., Lumber Co. v. Myers*, 87 Mo. App. 671.

430. 1. *Entire Contracts*. — *Kendall v. Fader*, 199 Ill. 294.

3. *Necessity of Stating Dates of First and Last Items*. — *Mahley v. German Bank*, 174 N. Y. 499.

5. *Sufficient to Show that Lien Was Filed in Time*. — *Eggers v. Snook*, 122 Iowa 582.

6. *Sufficient to Show Date of Last Item*. — Compare *Richardson v. Central Lumber Co.*, 105 Ill. App. 358.

431. 14. *Date When Amount Becomes Due*. — *Hurt v. Sanders Bros. Mfg. Co.*, 99 Ill. App. 665.

A notice of lien should state whether the debt is or is not due. *Hurt v. Sanders Bros. Mfg. Co.*, 99 Ill. App. 665.

433. 4. *Lien Holders Living in Unorganized District*. — See *Crerar v. Canadian Pac. R. Co.*, 5 Ont. L. Rep. 383.

- 433.** (12) *Signature* — A Claim by a Firm. — See note 11.
 (13) *Verification* — (a) *Necessity*. — See note 13.
- 434.** (b) *Sufficiency* — Who May Make. — See notes 4, 5.
- 435.** Who May Administer Oath. — See note 8.
- 436.** Affidavit on Information and Belief. — See note 11.
- 437.** Jurat. — See note 8.
- 438.** *i.* AMENDMENT OF STATEMENT. — See notes 1, 2, 3, 5, 6, 8.
- 440.** *l.* INCLUDING SEVERAL CLAIMS IN ONE CERTIFICATE. — See note 14.
- 441.** *m.* APPORTIONMENT OF LIENS. — See notes 8, 9.
- 441.** XV. AMOUNT SECURED BY LIEN — 1. Classes of Liens and General Extent of Each — *b.* LIENS OF SUBCONTRACTORS, MATERIALMEN, AND LABORERS — (1) *Direct or Absolute Liens* — (a) *Decisions Upholding Their Validity*. — See note 5.
- 447.** (2) *Liens by Subrogation* — (a) *In General*. — See note 1.
- 451.** 3. Interest — *a.* IN GENERAL. — See note 4.
- 452.** *b.* FROM WHAT DATE COMPUTED. — See notes 1, 4.
- 453.** 4. Attorney's Fees — *b.* UNDER SPECIAL PROVISIONS IN LIEN LAWS. — See notes 2, 3.
- 454.** 5. Costs — *a.* IN GENERAL. — See note 2.
- 455.** *b.* UNDER VARIOUS SPECIAL LAWS — In New York. — See note 2.
- 433.** 11. Firm Name Sufficient. — Dwyer Brick Works v. Flanagan, 87 Mo. App. 340.
- 13.** Verification Necessary. — Robertson v. Moore, 10 Idaho 115.
- 434.** 4. Attorney, Manager, Agent, or Employee. — Great Southern Fireproof Hotel Co. v. Jones, (C. C. A.) 116 Fed. Rep. 793, affirmed 193 U. S. 532; Jones v. Kruse, 138 Cal. 613; Crerar v. Canadian Pac. R. Co., 5 Ont. L. Rep. 383.
- 5.** Claim by Partnership. — The notice of claim cannot be verified by a copartnership as such. Kane v. Hutkoff, 81 N. Y. App. Div. 105.
- 435.** 8. A Notary Public of Another State. — See Genest v. Las Vegas Masonic Bldg. Assoc., 11 N. Mex. 251.
- 436.** 11. Affidavit on Information and Belief Insufficient. — Merchant, etc., Bank v. Hollis, (Tex. Civ. App. 1904) 84 S. W. Rep. 269.
- 437.** 8. Affixing Official Seal. — See Wheeler v. Hull, 124 Iowa 752.
- 438.** 1. Amendment Not Permitted. — Harris v. Page, 23 R. I. 440; Hawkins v. Boyden, 25 R. I. 181.
- 2.** Amendments Authorized. — Lentz v. Eimmermann, 119 Wis. 492.
- 3.** Amendment of Description. — Atkinson v. Woodmansee, 68 Kan. 71.
- 5.** Amendment as to Date of Furnishing Material or Performing Labor. — See Baltis v. Friend, 90 Mo. App. 408.
- 6.** Amendment as to Name of Owner. — Atkinson v. Woodmansee, 68 Kan. 71; Darlington v. Eldridge, 88 Mo. App. 525.
- 8.** Amendment as to Amount Due. — The lien statement cannot be extended and items added after the filing thereof as required by statute. Harris v. Page, 23 R. I. 440.
- 440.** 14. Several Claims May Be Included in One Statement. — Hooven, etc., Co. v. Featherstone, (C. C. A.) 111 Fed. Rep. 81.
- 441.** 8. Option to File Separate Liens. — See Booth v. Booth, 3 Ont. L. Rep. 294.
- 9.** Different Contracts. — Fairclough v. Smith, 13 Manitoba 509.
- 444.** 5. Decisions Upholding Direct or Absolute Lien. — Browinski v. Pickett, 113 Ky. 420; N. O. Nelson Mfg. Co. v. Mann, (Ky. 1903) 71 S. W. Rep. 851. See also Great Southern Fireproof Hotel Co. v. Jones, (C. C. A.) 116 Fed. Rep. 793, affirmed 193 U. S. 532.
- 447.** 1. Liens by Subrogation. — Rowell v. Harris, 121 Ga. 239; Taylor v. Reed, 68 N. J. L. 178; Butler v. Aquehonga Land Co., 86 N. Y. App. Div. 439; Wood v. Atlantic, etc., R. Co., 131 N. Car. 48; Mertens v. Cassini Mosaic, etc., Co., 53 W. Va. 192. See also Hathorne v. Panama Park Co., 44 Fla. 194; S. Morgan Smith Co. v. Sissiboo Pulp, etc., Co., 35 Can. Sup. Ct. 93, affirming 36 Nova Scotia 348.
- 451.** 4. Lien Secures Interest as Well as Principal. — Sandberg v. Victor Gold, etc., Min. Co., 24 Utah 1.
- 452.** 1. Failure of Pleading to Claim Interest. — See Huetter v. Redhead, 31 Wash. 320.
- 4.** Interest from Date When Lien Perfected. — Hensel v. Johnson, 94 Md. 729.
- 453.** 2. Provisions for Attorney's Fee Held Unconstitutional. — Antlers Park Regent Min. Co. v. Cunningham, 29 Colo. 284; Sickman v. Wollett, 31 Colo. 58; Atkinson v. Woodmansee, 68 Kan. 71.
- 3.** Provisions for Attorney's Fee Upheld. — Thompson v. Wise Boy Min., etc., Co., 9 Idaho 363; Robertson v. Moore, 10 Idaho 115; Genest v. Las Vegas Masonic Bldg. Assoc., 11 N. Mex. 251.
- Attorney's Fees Dependent on Establishment of Lien.** — Linck v. Johnson, 134 Cal. xix, 66 Pac. Rep. 674; Stimson v. Dunham, etc., Co., 146 Cal. 281.
- Proof of the Reasonableness of the Fee** must be adduced in Florida. Gunby v. Drew, 45 Fla. 350.
- 454.** 2. Costs Are Regulated by Statute in mechanic's-lien cases in Illinois. Kalina v. Steinmeyer, 103 Ill. App. 502.
- 455.** 2. When Successful Lien Claimant Entitled to Costs. — Harvey v. Brewer, 82 N. Y. App. Div. 580, affirmed 178 N. Y. 5.

455. 6. Set-offs and Counterclaims — *a.* LIENS OF CONTRACTORS. — See note 6.

458. 7. Measure of Value of Labor and Materials — *b.* SUBCONTRACTORS, MATERIALMEN, AND LABORERS. — See note 2.

459. 9. Application of Payments — *a.* GENERAL RULES — Application by Parties. — See note 5.

460. *b.* CHANGE IN APPLICATION. — See note 3.

10. Limited by Statement of Claim. — See note 4.

461. 12. Restrictions on Payments — *a.* BY OWNER TO CONTRACTOR — (2) *Liens by Subrogation* — (a) Fraud and Collusion. — See note 2.

464. (b) Advance Payments — *cc.* OBLIGATIONS ASSUMED BY OWNER OR FIXED UPON HIM BY LAW — (dd) *Orders by Contractor on Owner Payable Generally.* — See note 1.

cc. STATUTORY CHANGES. — See note 3.

466. (c) Iowa Mechanic's-lien Statute — Under Late Decisions. — See note 1.

467. 13. Abandonment of Contract — *a.* JUSTIFIABLE ABANDONMENT — (1) *In General.* — See note 1.

b. UNJUSTIFIABLE ABANDONMENT — (2) *Exceptions to Rule* — (a) Contract Payable in Instalments. — See note 6.

468. See note 1.

(b) Completion by Surety or Assignee. — See note 2.

(c) Completion at Expense of Claimant. — See notes 3, 4.

470. *c.* SUBSTANTIAL PERFORMANCE — (1) *In General.* — See note 2.

XVI. ASSIGNMENT OF LIEN — 1. Perfected Lien Assignable. — See note 4.

471. 2. Whether Right to Acquire Lien Assignable. — See note 2.

472. 4. Effect of Assignment. — See notes 7, 8.

455. 6. Counterclaims — Owner Against Contractor. — *Woolf v. Schaeffer*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 640, reversed 103 N. Y. App. Div. 567; *Heberlein v. Wendt*, 99 Ill. App. 506; *Tenney v. Anderson Water, etc., Co.*, 69 S. Car. 430.

458. 2. Subcontractors, Materialmen, and Laborers. — See *Sierra Nevada Lumber Co. v. Whitmore*, 24 Utah 130.

459. 5. Application by Subcontractors, Materialmen, or Laborers. — *Smith v. Wilcox*, 44 Oregon 323, rehearing denied 44 Oregon 330.

460. 3. Change in Application. — See *Bopp v. Wittich*, 88 Mo. App. 129.

4. Limited by Statement of Claim. — *Miller v. People's Lumber Co.*, 98 Ill. App. 468.

461. 2. Payment by Owner to Contractor Must Be Made in Good Faith. — *Wolf v. Mendelsohn*, (Supm. Ct. App. T.) 87 N. Y. Supp. 465.

464. 1. Orders by Contractor on Owner Payable Generally. — See *Garden City Co. v. Schnugg*, (N. Y. City Ct. Gen. T.) 39 Misc. (N. Y.) 840.

3. Advance Payments Disallowed by Statute. — *Campbell v. Green, etc., Lumber Co.*, 99 Ill. App. 647; *Taylor v. Reed*, 68 N. J. L. 178; *Kreutz v. Cramer*, 64 N. J. Eq. 648; *Veitch v. Clark*, 67 N. J. Eq. 57.

466. 1. Actual Knowledge — Existing Rule. — Compare *Queal v. Stradley*, 117 Iowa 748; *Frudden Lumber Co. v. Kinnan*, 117 Iowa 93; *Wheelock v. Hull*, 124 Iowa 752.

467. 1. Reasonable Value of Work and Materials — Contractors. — *Person v. Stoll*, 72 N. Y. App. Div. 141, affirmed 174 N. Y. 548.

6. Burden of Proof. — Where a contractor abandons his contract on the ground of a failure of the owner to make an intermediate instalment

payment, he must show full performance of all conditions precedent to his right to such payment. *McGrath v. Horgan*, 72 N. Y. App. Div. 152.

468. 1. Percentage of Instalment to Be Retained by Owner. — *Hawkins v. Burrell*, 69 N. Y. App. Div. 462.

2. Completion by Surety or Assignee. — Compare *St. Peter's Catholic Church v. Vannote*, 66 N. J. Eq. 78.

Assignment of Contract. — *Smith v. Lange*, 81 N. Y. App. Div. 192.

3. Liens by Contractors on Completion by Owner. — *White v. Livingston*, 69 N. Y. App. Div. 361, affirmed 174 N. Y. 538; *McGrath v. Horgan*, 72 N. Y. App. Div. 152.

4. Where Cost of Completion Exceeds Balance Due on Contract. — *Watts v. Metcalf*, (Ky. 1902) 66 S. W. Rep. 824. Compare *Alabama, etc., Lumber Co. v. Tisdale*, 139 Ala. 250.

470. 2. Lien for Contract Price Less Cost of Remedying Defects or Omissions. — *Sherry v. Madler*, 123 Wis. 621.

4. Mechanic's Lien Assignable. — *Davis v. New York*, 75 N. Y. App. Div. 518.

471. 2. Lien May Be Acquired by Assignee of Claim. — *McAllister v. Des Rochers*, 132 Mich. 381.

472. 7. Assignee Has Preference over Subsequent Lienor. — The effect of the assignment is to give to the assignee a preference over a subsequent lienor. *Wood v. Grifenhagen*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 553; *Hall v. New York*, 79 N. Y. App. Div. 102, modified 176 N. Y. 293.

8. The Assignee Takes Subject to All Equities. — *Kent Lumber Co. v. Ward*, 37 Wash. 60.

475. XVII. PRIORITIES — 1. When Lien Attaches — c. COMMENCEMENT OF WORK OR OF FURNISHING MATERIALS. — See note 7.

477. 2. Priority Among Different Mechanic's Liens — a. RULE OF EQUALITY — (1) Rule Stated. — See note 2.

479. e. POSTPONEMENT OF ORIGINAL CONTRACTOR. — See note 1.

3. Priority Between Mechanic's Liens and Other Incumbrances — a. GENERAL RULE STATED. — See note 2.

481. Statutory Requirements Must Be Complied With. — See note 2.

b. LAND AND IMPROVEMENTS CONSIDERED SEPARATELY — (1) Rule Stated. — See note 4.

483. (2) Enforcement of Prior Lien of Mechanic — (a) Separate Sale and Removal of Building or Improvement. — See note 2.

(b) Sale of Entire Property and Pro Rata Distribution of Proceeds. — See note 3.

484. c. PARTICULAR INCUMBRANCES CONSIDERED — (1) Lien for Purchase Money. — See notes 3, 4.

485. Vendee Required by Contract of Sale to Make Improvements. — See note 1.

(2) Lien for Advances for Construction of Building. — See note 4.

486. (7) Assignment of Amount Due Contractor. — See note 6.

487. (9) Conveyances. — See note 3.

490. XVIII. INDEMNITY AGAINST LIENS — 3. Validity of Indemnity Bond or Undertaking — a. CONSIDERATION. — See note 1.

475. 7. Lien Attaching When Labor or Furnishing Materials Begun. — *Fields v. Daisy Gold Min. Co.*, 25 Utah 76.

477. 2. No Priority Between Mechanic's Liens. — *Krotz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577; *Compare Nichols v. Dixon*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1051.

479. 1. Postponement of Original Contractor. — *Keim v. McRoberts*, 18 Pa. Super. Ct. 167.

2. General Rule as to Priority — United States. — *In re Wagner*, 110 Fed. Rep. 931.

Indiana. — Krotz v. A. R. Beck Lumber Co., 34 Ind. App. 577.

Massachusetts. — Taylor v. Springfield Lumber Co., 180 Mass. 3; *Osborne v. Barnes*, 179 Mass. 597.

Minnesota. — Ortonville v. Geer, 93 Minn. 501, 106 Am. St. Rep. 445.

Montana. — Western Iron Works v. Montana Pulp, etc., Co., 30 Mont. 550.

Nebraska. — Cahn v. Romandorf, (Neb. 1903) 93 N. W. Rep. 411; *Boggs v. McEwen*, (Neb. 1903) 96 N. W. Rep. 666.

North Carolina. — Cheesborough v. Asheville Sanatorium, 134 N. Car. 245, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 479.

Pennsylvania. — Nolt v. Crow, 22 Pa. Super. Ct. 113.

Rhode Island. — Blackmar v. Sharp, 23 R. I. 412.

Washington. — Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572.

Subsequent Lien of Which Mortgagee Has Notice. — Where a mortgagee knew at the time of making the loan that materials were being furnished for the erection of a building on the mortgaged premises, he had sufficient notice of the materialman's lien and his mortgage is subordinate thereto. *Bond Lumber Co. v. Masland*, 45 Fla. 188.

481. 2. Noncompliance with Formalities for Acquisition of Mechanic's Lien. — *Harris v. Gardner*, (Ky. 1902) 68 S. W. Rep. 8.

4. Mechanic's Lien Superior as to Buildings but Subordinate as to Land. — *Joralmon v. McPhee*, 31 Colo. 26; *Holland v. Cunliff*, 96 Mo. App. 67; *Hudson v. Barham*, 101 Va. 63, 99 Am. St. Rep. 849.

483. 2. Separate Sale and Removal of Improvement. — *Sawyer, etc., Lumber Co. v. Clark*, 172 Mo. 588.

3. Sale of Entire Property and Distribution of Proceeds. — *Chauncey v. Dyke*, (C. C. A.) 119 Fed. Rep. 1.

484. 3. Vendor's Lien Superior to Mechanic's Lien. — *Watson v. Markham*, 33 Tex. Civ. App. 476.

4. Improvements Made Before Conveyance to Vendee. — *Hillhouse v. Pratt*, 74 Conn. 113.

485. 1. Improvements Required by Contract of Sale. — See *Hillhouse v. Pratt*, 74 Conn. 113.

4. Mortgage to Secure Advances Superior to Lien. — *Joralmon v. McPhee*, 31 Colo. 26; *Reed v. Rochford*, 62 N. J. Eq. 186; *Blackmar v. Sharp*, 23 R. I. 412.

If the Purpose of the Loan Is Not Consummated, the equity of the lender is inferior to that of the holder of a mechanic's lien. — *Chauncey v. Dyke*, (C. C. A.) 119 Fed. Rep. 1; *Young v. Haight*, 69 N. J. L. 453.

486. 6. When Assignee Entitled to Priority. — But see *Armstrong v. Borden's Condensed Milk Co.*, 65 N. Y. App. Div. 503, reversed 174 N. Y. 510; *John P. Kane Co. v. Kinney*, 68 N. Y. App. Div. 163, reversed 174 N. Y. 60.

487. 3. Rights of Lienholder Superior to Those of Subsequent Purchaser. — *Salem v. Lane, etc., Co.*, 180 Ill. 593, 82 Am. St. Rep. 481; *D. L. Billings Co. v. Brand*, 187 Mass. 417; *Hammond v. Darlington*, 109 Mo. App. 333; *Hutchins v. Bauteh*, 123 Wis. 394, 107 Am. St. Rep. 907.

490. 1. Bond Given Pursuant to Antecedent Promise. — *Fullerton Lumber Co. v. Calhoun*, 89 Mo. App. 209.

490. *c.* EFFECT OF FALSE REPRESENTATIONS OF CONTRACTOR TO SUBCONTRACTORS SIGNING BOND. — See note 3.

4. Right of Indemnitors to Acquire Lien — *b.* SURETIES. — See note 7.

491. **5.** What Constitutes Breach — *a.* IN GENERAL. — See note 5.

492. *b.* VOLUNTARY PAYMENTS — Payments Made Before Lien Filed. — See note 2.

6. Measure of Damages — *b.* INTEREST. — See note 6.

c. EXPENSES OF LITIGATION. — See note 7.

493. **7.** Discharge of Sureties — *a.* FAILURE OF OWNER TO COMPLY WITH CONTRACT. — See note 1.

b. CHANGES IN BUILDING PLAN. — See note 3.

8. Sureties Not Liable to Subcontractors and Materialmen. — See note 7.

494. **XIX. WAIVER AND LOSS** — **1.** Lien May Be Waived. — See note 1.

Waiver Must Be Clear. — See note 2.

Effect of Waiver by Contractor on Subcontractor. — See note 4.

495. **3.** Release — *b.* RELEASE OF PORTION OF PROPERTY COVERED BY LIEN. — See note 3.

496. **6.** Taking Other Security — *a.* IN GENERAL — But the Mere Agreement. — See note 8.

b. PRESUMPTION OF WAIVER. — See note 11.

497. *c.* TAKING MORTGAGE — (1) *On Same Property.* — See notes 1, 2.

(2) *On Other Property.* — See note 9.

498. **d.** ACCEPTANCE OF PROMISSORY NOTE — (1) *Note of Owner* — (a) *In General.* — See notes 2, 3.

490. **3.** When Bond Not Invalidated by False Representations of Contractor. — See *Diemer v. Philadelphia German Protestant Home*, 19 Pa. Supér. Ct. 225.

7. Cases Affirming Right of Surety to Acquire Lien. — *Badger Lumber Co. v. Muehlebach*, 109 Mo. App. 646. See also *Evans v. Lower*, 67 N. J. Eq. 232.

491. **5.** When Mere Filing of Lien a Breach. — *Closson v. Billman*, 161 Ind. 610; *Friend v. Ralston*, 35 Wash. 422.

492. **2.** Payments Made Before Lien Filed. — *Chapman v. Eneberg*, 95 Mo. App. 127.

6. Interest. — *Manny v. National Surety Co.*, 103 Mo. App. 716.

7. Costs, Etc. — *Manny v. National Surety Co.*, 103 Mo. App. 716; *Crowley v. U. S. Fidelity, etc., Co.*, 29 Wash. 268.

493. **1.** Failure of Owner to Comply with Provisions of Contract as to Retaining Money. — *St. Peter's Catholic Church v. Vannote*, 66 N. J. Eq. 78. *Contra*, where it appeared that the owner paid out the money complained of on the certificate of the architect, and that he was bound to do so by the terms of the contract itself. *Chapman v. Eneberg*, 95 Mo. App. 127.

Failure to Comply with Provisions of Contract as to Payment. — Where certificates were issued by the architect and payments were made to the contractor without requiring the receipts or waivers provided for in the contract, the sureties on the bond were released. *Queal v. Stradley*, 117 Iowa 748. See also *Tinsley v. Kemery*, 111 Mo. App. 87.

3. *Contra*, when material alterations are made with the owner's knowledge, and not in accordance with the requirements of the contract. *Fullerton Lumber Co. v. Gates*, 89 Mo. App. 201.

Extra Work — Failure to Agree in Writing. — Where a building contract provides that extra work must be agreed upon in writing before it is commenced, failure to comply with this provision discharges the sureties on the contractor's bond. *Chapman v. Eneberg*, 95 Mo. App. 127.

7. Sureties Not Liable to Subcontractors and Materialmen. — *Green Bay Lumber Co. v. Independent School Dist.*, 121 Iowa 663; *Salem Brick, etc., Co. v. Le Sassier*, 106 La. 389. But see *Green Bay Lumber Co. v. Independent School Dist.*, (Iowa 1902) 90 N. W. Rep. 504.

494. **1.** Waiver of Mechanic's Lien in General. — *Keller v. Home L. Ins. Co.*, 95 Mo. App. 627; *Davis v. La Crosse Hospital Assoc.*, 121 Wis. 579.

2. Waiver Must Be Clear. — *Davis v. La Crosse Hospital Assoc.*, 121 Wis. 579.

4. Effect of Waiver by Contractor on Subcontractor. — See *Keeley Brewing Co. v. Neubauer Decorating Co.*, 194 Ill. 580.

495. **3.** Effect of Release of Portion of Property Covered by Lien. — *Powell v. Nolan*, 27 Wash. 318.

496. **8.** Contract for Security Unperformed. — *Baumhoff v. St. Louis, etc., R. Co.*, 171 Mo. 120, 94 Am. St. Rep. 770.

11. Taking Collateral Security Held to Be *Prima Facie* Waiver. — *Kendall v. Fader*, 199 Ill. 294.

497. **1.** Or by Taking Note and Deed of Trust. — *Kendall v. Fader*, 199 Ill. 294.

2. Taking Mortgage Held Not *Prima Facie* Waiver. — *Phoenix Mfg. Co. v. McCormick Harvesting Mach. Co.*, 111 Wis. 570.

9. *Halsted, etc., Co. v. Arick*, 76 Conn. 382.

498. **2.** Acceptance of Note of Owner as Waiver. — *Kendall v. Fader*, 199 Ill. 294; *Bryant v. Grady*, 98 Me. 389; *E. R. Darlington Lumber Co. v. Harris*, 107 Mo. App. 148.

- 500.** (2) *Note of Owner with Third Person as Surety.* — See note 2.
c. ACCEPTANCE OF DRAFT OR ORDER ON OWNER. — See note 7.
f. RESERVATION OF TITLE OR SPECIFIC LIEN. — See note 9.
- 501.** 7. *Giving Order on Owner.* — See note 3.
- 502.** 11. *Promise of Owner to Pay Materialman.* — See note 3.
 12. *Assignment of Claim* — *a.* IN GENERAL — Assignment as Collateral Security. — See note 8.
- 503.** 16. *Effect of Surrender or Forfeiture of Lease upon Lien on Leasehold* — Surrender. — See note 6.
- 505.** 20. *Bankruptcy or Insolvency of Owner.* — See notes 1, 2, 3, 4.
- 506.** 25. *Destruction or Removal of Building or Improvement.* — See note 7.
- 507.** 28. *Erroneous Statement in Notice of Lien* — *b.* CLAIMING MORE THAN IS DUE. — See notes 6, 7.
- 508.** See note 3.
Inclusion of Items for Which Lien Cannot Be Claimed. — See notes 6, 7.
- 509.** See note 2.
c. DEMAND FOR LESS THAN IS DUE. — See note 3.
- 515.** XX. PREVENTION, DISCHARGE, AND SATISFACTION OF LIEN — 2. *Discharge and Satisfaction* — *b.* BY BOND OR UNDERTAKING FOR PAYMENT OF CLAIM — (2) *Who May File Bond.* — See note 5.
- 517.** *c.* BY PAYMENT INTO COURT — (1) *In General.* — See note 6.
- 498.** 3. *Intention in Taking Note.* — *H. F. Cady Lumber Co. v. Greater America Exposition Co.*, (Neb. 1903) 93 N. W. Rep. 961; *Phoenix Mfg. Co. v. McCormick Harvesting Mach. Co.*, 111 Wis. 570.
- 500.** 2. *Taking Note of Owner with Third Person as Surety.* — *Andrews v. Kentucky Citizens' Bldg., etc., Assoc.*, (Ky. 1902) 67 S. W. Rep. 826.
7. *Taking Draft or Order on Owner.* — *Harvey v. Brewer*, 178 N. Y. 5; *Lentz v. Eimmermann*, 119 Wis. 492.
9. *Reservation of Title in Vendor.* — *Hooven, etc., Co. v. Featherstone*, (C. C. A.) 111 Fed. Rep. 81; *Salt Lake Hardware Co. v. Chainman Min., etc., Co.*, 128 Fed. Rep. 509.
- 501.** 3. *Giving Order on Owner.* — *Omaha Oil, etc., Co. v. Greater America Exposition Co.*, (Neb. 1903) 93 N. W. Rep. 963.
- 502.** 3. *Effect of Promise of Owner to Pay Materialman.* — *Spring Brook Lumber Co. v. Watkins*, 26 Pa. Super. Ct. 199.
8. *Lien Not Lost by Assignment of Claim as Collateral Security.* — *Moore v. Dugan*, 179 Mass. 153. See also *Shapiro v. Schultz*, 32 Ind. App. 219.
- 503.** 6. *Effect of Surrender of Leasehold.* — *McAnally v. Glidden*, 30 Ind. App. 22.
- 505.** 1. *Lien Unaffected by Bankruptcy or Insolvency of Owner.* — *Holland v. Cunliff*, 96 Mo. App. 67.
 2. See *Crane Co. v. Pneumatic Signal Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 338, reversed 94 N. Y. App. Div. 53.
3. *Fehling v. Goings*, 67 N. J. Eq. 375.
4. *Holland v. Cunliff*, 96 Mo. App. 67.
- 506.** 7. *Lien Held Not to Be Lost by Destruction of Building.* — *Hooven, etc., Co. v. Featherstone*, (C. C. A.) 111 Fed. Rep. 81; *Armijo v. Mountain Electric Co.*, 11 N. Mex. 235.
- 507.** 6. *Effect of Fraudulent Claim to More than Is Due.* — *Christian v. Allee*, 104 Ill. App. 177; *Bohn Mfg. Co. v. Keenan*, 15 S. Dak. 377.
- Wilful Exaggeration Without Fraud.* — The rule applies where the amount of the claim is intentionally grossly exaggerated, although no elements of actual fraud exist. *New Jersey Steel, etc., Co. v. Robinson*, 85 N. Y. App. Div. 512, affirmed 178 N. Y. 632.
7. *Claiming More than Is Due, Through Mistake.* — *Alabama, etc., Lumber Co. v. Tisdale*, 139 Ala. 250; *McAllister v. Des Rochers*, 132 Mich. 381; *American Mortg. Co. v. Butler*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 253. See also *Continental Bldg., etc., Assoc. v. Hut-ton*, 144 Cal. 609.
- 508.** 3. *No One Harmed by Mistake in Notice.* — *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265; *Beattys v. Searles*, 74 N. Y. App. Div. 214.
6. *Unintentional Inclusion of Items for Which Lien Cannot Be Claimed.* — *Palmer v. McGinness*, 127 Iowa 118; *Evans v. Lower*, 67 N. J. Eq. 232.
7. *Items Must Be Separable.* — *Hooven, etc., Co. v. Featherstone*, (C. C. A.) 111 Fed. Rep. 81; *Wolfley v. Hughes*, (Ariz. 1903) 71 Pac. Rep. 951; *Kendall v. Fader*, 199 Ill. 294; *Ulrich v. Osborn*, 106 Mo. App. 492, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 507, 508.
- 509.** 2. *Where Items Cannot Be Ascertained.* — *Wolfley v. Hughes*, (Ariz. 1903) 71 Pac. Rep. 951; *Kendall v. Fader*, 199 Ill. 294; *Bradley v. Gaghan*, 208 Pa. St. 511; *Rinzel v. Stumpf*, 116 Wis. 287.
3. *Demand for Less Sum than Due.* — See *Sorg v. Pfalzgraf*, 113 Ill. App. 569.
- 515.** 5. *The Massachusetts Statute.* — One holding a conveyance of the equity of redemption, subject to mortgages, may file a bond to release the lien, although the conveyance was made to him with a view to his giving the bond. *Breed v. Gardner*, 187 Mass. 300.
- 517.** 6. *Discharge of Lien by Deposit in Court.* — *White v. Livingston*, 69 N. Y. App. Div. 367, affirmed 174 N. Y. 538.

518. (2) *Necessity of Establishment of Claim.* — See note 3.

520. XXI. TIME FOR ENFORCING LIEN — 2. When Action Barred — a. IN GENERAL. — See note 6.

522. *Notice by Owner to Enforce.* — See note 3.

523. *d. AFTER MONEY DUE.* — See note 2.

526. XXII. SALE UNDER LIEN — 4. Rights and Liabilities of Purchasers. — See note 1.

528. MEDICAL. — See note 4.

518. 3. New York — Both Claim and Lien Must Be Established. — *White v. Livingston*, 69 N. Y. App. Div. 361, *affirmed* 174 N. Y. 538.

520. 6. Statutes of Limitation. — *Foss v. Desjardins*, 98 Me. 539; *Terwilliger v. Wheeler*, 81 N. Y. App. Div. 460.

May Be Brought on Day When Lien Filed. — Under a statute providing that lien suits must be brought within ninety days after the filing of the lien, suit may be brought on the day when the lien is filed. *Phoenix Planing Mill Co. v. Harrison*, (Mo. App. 1904) 84 S. W. Rep. 174.

522. 3. Discretion of Court. — Under the *New York* statute the power to vacate the lien rests in the sound judicial discretion of the court.

William H. Jackson Co. v. Haven, 87 N. Y. App. Div. 236.

523. 2. Extension of Time. — Where final payment is to be made on completion of the work, and the time for completion is extended, the time of actual completion, and not the time originally fixed in the contract, fixes the time of final payment. *Sedgwick v. Concord Apartment House Co.*, 104 Ill. App. 5.

526. 1. For Cases Especially Discussing Sales under Mechanic's Liens. — *June v. Doke*, 35 Tex. Civ. App. 240.

528. 4. Medical Attendance. — What constitutes under a statute requiring such for minors. *People v. Pierson*, 176 N. Y. 201.

MEDICAL JURISPRUDENCE.

BY JOHN SIMPSON.

532. III. MEDICAL EVIDENCE — 1. Medical Experts — There Is No Rule of Law That Requires Jurors to Surrender Their Judgments. — See note 3.

546. X. INSANITY — 1. Definitions and Kinds of Insanity — Insanity May Exist in Various Degrees. — See note 1.

There Is No Dividing Line Between Sanity and Insanity. — See note 2.

**2. Causes of Insanity — b. EXCITING CAUSES ACTING UPON PRE-
DISPOSITION TO INSANITY — (1) In General.** — See note 5.

547. c. HEREDITARY INSANITY — (1) In General. — See note 2.

Corroboration of Other Evidence of Insanity. — See note 5.

**549. d. PARTICULAR DISEASES AND THEIR TENDENCY TO PRODUCE
INSANITY — (6) Epilepsy — Sanity Notwithstanding Epilepsy.** — See note 9.

552. (12) Pneumonia. — See note 2.

**555. f. USE OF ALCOHOL, DRUGS, AND OPIATES — (1) Alcoholism —
Insanity Caused by Habitual Drunkenness.** — See note 4.

**532. 3. Testimony of Medical Experts Not
Conclusive.** — See *Grant v. Stamler*, (N. J. 1905) 59 Atl. Rep. 890.

**546. 1. Distinction Between Partial and Total
Insanity.** — See *State v. Jack*, 4 Penn. (Del.) 470, holding that insanity may be either total or partial.

**2. The Dividing Line Between Sanity and
Insanity.** — In *State v. Speyer*, 182 Mo. 77, it was said that there can be no degrees of mental accountability in criminal cases, and if the defendant is so insane that he has not the mental capacity to deliberate, neither can he premeditate.

5. Excitability and Emotional Temperament are not inconsistent with insanity. *Tidwell v. State*, 84 Miss. 475.

547. 2. Doctrine that Insanity Is Hereditary. — *People v. Quimby*, 134 Mich. 625.

5. Corroboration of Other Evidence of Insanity. — *People v. Quimby*, 134 Mich. 625.

549. 9. Sanity Notwithstanding Epilepsy. — *Lee v. State*, 116 Ga. 563; *People v. Egnor*, 175 N. Y. 419.

552. 2. Pneumonia. — Where a patient executed a will while dying of pneumonia accompanied by delirium, it was held that the proponent must sustain the burden of establishing that the paper was executed in a lucid interval, while the deceased had capacity sufficient to make such a disposition. *In re Coughlin*, (N. J. 1905) 59 Atl. Rep. 879.

555. 4. Insanity Caused by Habitual Drunkenness. — *State v. Kavanaugh*, 4 Penn. (Del.) 131.

556. *Sanity Notwithstanding Excessive Use of Liquor.* — See note 1.

(2) *Drugs and Opiates as Causes of Insanity* — In General. — See note 8.

561. 3. *Manifestations, Symptoms, and Tests of Insanity* — *c.* **WEAKNESS OF MIND.** — See note 4.

562. *h.* **HABITS OF LIFE, CONDUCT, LANGUAGE, ETC.** — (2) *Business Capacity* — (a) *Business Capacity as Evincing Sanity.* — See note 10.

568. *m.* **DELUSIONS, HALLUCINATIONS, MONOMANIA** — (3) *Sanity Notwithstanding Delusion.* — See note 2.

569. (6) *Manifestations of Delusions, Monomania, and Hallucinations* — (d) **Religious Views and Belief in the Supernatural.** — See note 8.

573. **MEDICINE.** — See note 4.

575. **MEMBER.** — See note 1.

577. **MENTAL ANGUISH, AGONY, OR SUFFERING.** — See note 6.

579. **MERCHANT — MERCANTILE — MERCHANDISE.** — See notes 3, 4.

580. **Mercantile.** — See note 3.

Merchandise. — See note 4.

581. **Illustrations.** — See note 1.

585. **MERE.** — See note 5.

556. 1. *Sanity Notwithstanding Excessive Use of Liquor.* — See *Sharp v. State*, 161 Ind. 288.

8. *Instructions.* — Where there is evidence that the defendant was insane from the use of drugs, such as morphine and cocaine, he is entitled to a distinctive charge on the issue. *Burton v. State*, 46 Tex. Crim. 493; *Otto v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 525.

561. 4. *Sanity Notwithstanding Weakness of Mind.* — See *Randall, Appellant*, 99 Me. 396.

562. 10. *Sanity Evincing by Business Capacity.* — See *Lee v. State*, 116 Ga. 563.

568. 2. See *Porter v. State*, 140 Ala. 87.

569. 8. *Religious Views.* — In *Harrison v. State*, 44 Tex. Crim. 164, a bigamy case, it was held that, the evidence being confined to the issue of moral insanity, to show that the defendant was religiously or emotionally insane, the jury were justified in finding him guilty.

A Belief in Swedenborgianism, and enthusiasm manifested in propagating that faith, furnish no evidence of monomania or insanity. *Scott v. Scott*, 212 Ill. 597.

Distinction Between Delusion and Erroneous Conclusion. — In *Hotena v. U. S.*, 186 U. S. 413, a murder case, where the defendant was shown to entertain a belief in witches and to believe that the person he killed was a witch, it was held to be correct to charge in effect that if his belief in witches and his right to kill them was the product of a diseased brain, he was irresponsible, and if the jury had a reasonable doubt on that question it should acquit; but that if his belief was not the product of an insane delusion, but simply an erroneous conclusion of a sane mind, he was responsible.

573. 4. *Practicing Medicine.* — *The Practice of Osteopathy* held to be practice of *medicine*. *Bragg v. State*, 134 Ala. 165. But see *State v. McKnight*, 131 N. Car. 717.

Drug or Medicine — Tobacco. — *Penniston v. Newnan*, 117 Ga. 700.

Medicine — Intoxicating Liquors. — *Pollard v. Allen*, 96 Me. 455.

Medicine Not Sustenance. — Under the *Georgia* statute prohibiting a father from depriving his child of necessary sustenance, evidence that a father refused to permit *medicine* to be administered will not sustain conviction. *Justice v. State*, 116 Ga. 605.

575. 1. *Member of City Council.* — *People v. Bresler*, 70 N. Y. App. Div. 294.

577. 6. *Disappointment and Regret Not Mental Anguish.* — *Hancock v. Western Union Tel. Co.*, 137 N. Car. 497.

579. 3. *Merchant.* — *Cedar Falls v. Gentzer*, 123 Iowa 672.

4. *Cedar Falls v. Gentzer*, 123 Iowa 672.

580. 3. *Mercantile.* — *In re Pacific Coast Warehouse Co.*, 123 Fed. Rep. 749; *In re Philadelphia, etc., Transp. Co.*, 114 Fed. Rep. 403; *In re Surety, etc., Co.*, (C. C. A.) 121 Fed. Rep. 73; *In re White Star Laundry Co.*, 117 Fed. Rep. 571.

4. *Merchandise.* — See *Six Parcels Placer Gold v. U. S.*, (Ariz. 1904) 76 Pac. Rep. 473.

581. 1. *A Farmer Purchasing Sheep to fatten and sell is not a merchant.* *Jewell v. Sumner Tp.*, 113 Iowa 47.

Milliner Not a Merchant within a statute imposing a license tax on latter. *Tuscaloosa v. Holzstein*, 134 Ala. 636.

Manufacturer and Merchant Distinguished. — *Kansas City v. Ferd Heim Brewing Co.*, 98 Mo. App. 590.

A Traveling Optician is not an itinerant merchant subject to a license tax. *Waukon v. Fisk*, 124 Iowa 464.

Restaurant. — *In re Chesapeake Oyster, etc., Co.*, 112 Fed. Rep. 960.

585. 5. "By a Mere License is meant the tacit permission or privilege which a person has of entering upon the premises of another, but without any invitation express or implied." *Klughertz v. Chicago, etc., R. Co.*, 90 Minn. 17.

MERGER.

By J. E. BRADY.

- 588.** II. MERGER OF ESTATES — 1. In General — At Law. — See note 4.
589. Partial Merger. — See note 2.
The Conditions under Which Merger Will Operate. — See note 4.
590. See note 1.
Surrender and Merger Distinguished. — See note 9.
In Equity. — See note 10.
591. See notes 2, 4.
592. 2. Merger of Life Estates — *a.* IN INHERITANCE. — See note 1.
595. 4. Merger of Estates for Years — *a.* IN ESTATE OF FREEHOLD OR INHERITANCE — (3) *Estates Held in Different Rights.* — See note 1.
6. Merger of Charges — Presumption of Intention. — See note 7.
596. Payment of Judgments. — See note 2.
597. III. MERGER OF CONTRACTS — 2. Merger of Simple Contract in Higher Security. — See note 4.
599. IV. MERGER INTO OR OF JUDGMENTS — 1. Of Cause of Action into Judgment. — See notes 1, 2, 5.

588. 4. General Rule as to Merger of Estates. — *Harrison v. Johnston*, 109 Tenn. 260, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 588; *Tolsma v. Adair*, 32 Wash. 383, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 588.

Extinction of Equitable on Union with Legal Estate. — Where equitable and legal estates, equal and coextensive, unite in the same persons, the former merges, although the former is a tenancy in common and the latter a joint tenancy. *In re Selous*, (1901) 1 Ch. 921.

589. 2. Partial Merger — Easement. — Where a part owner of property becomes owner of an easement in the estate there is a merger as to his interest only. *Barringer v. Virginia Trust Co.*, 132 N. Car. 409.

4. Second Estate Immediately Expectant on First. — *Tolsma v. Adair*, 32 Wash. 383.

590. 1. Where a Life Estate in Trust Unites with an Absolute Remainder there is no merger. *Moore's Estate*, 198 Pa. St. 611.

9. *Harrison v. Johnston*, 109 Tenn. 260, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590.

10. Equity Consults Justice and Intention of Parties. — *Ingle v. Jenkins*, (1900) 2 Ch. 368, 69 L. J. Ch. 618, 83 L. T. N. S. 155, 48 W. R. 684; *Capital, etc., Bank v. Rhodes*, (1903) 1 Ch. 631; *Kilmer v. Hannifan*, 113 Iowa 281; *Wettlaufer v. Ames*, 133 Mich. 201, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590; *Tolsma v. Adair*, 32 Wash. 383; *Turner v. Stewart*, 51 W. Va. 504, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590. See also *M. C. Bullock Mfg. Co. v. Sunday Lake Iron Min. Co.*, 132 Mich. 285.

591. 2. No Intention Expressed. — *Wettlaufer v. Ames*, 133 Mich. 201, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 591.

4. Merger Presumed in Accordance with Owner's Interest. — *Ingle v. Jenkins*, (1900) 2 Ch. 368,

83 L. T. N. S. 155, 69 L. J. Ch. 618, 48 W. R. 684; *Wettlaufer v. Ames*, 133 Mich. 201, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 591.

592. 1. Life Estate Merges in Fee. — *Harrison v. Johnston*, 109 Tenn. 260, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 592.

595. 1. No Merger in Equity. — See *Ingle v. Jenkins*, (1900) 2 Ch. 368, 69 L. J. Ch. 618, 83 L. T. N. S. 155, 48 W. R. 684.

7. Charges Paid Off by Life Tenant. — See *In re Lloyd*, (1903) 1 Ir. R. 144.

Where the Owner of Land Becomes Beneficially Entitled to a Charge Thereon, as next of kin to the incumbrancer, the charge will merge, if merger is for the landowner's benefit, even though some person other than the landowner becomes the legal personal representative of the incumbrancer, and even though the charge be secured by an outstanding term vested in trustees for the purpose of raising it. *In re French-Brewster*, (1904) 1 Ch. 713.

596. 2. Where One Purchases Property on Which He Holds a Materialman's Lien there will be no merger in equity so as to render a similar lien held by another prior to the purchaser's, it being "evidently for the benefit of the defendant that no merger be presumed." *M. C. Bullock Mfg. Co. v. Sunday Lake Iron Min. Co.*, 132 Mich. 285.

597. 4. Parties Must Be the Same. — *Agan v. Barry*, 66 N. Y. App. Div. 101, *affirmed* 175 N. Y. 521.

599. 1. Merger of Cause of Action in Judgment. — *Dunn v. Dilks*, 31 Ind. App. 673; *Price v. Atchison First Nat. Bank*, 62 Kan. 735, 84 Am. St. Rep. 419; *Brigel v. Creed*, 65 Ohio St. 40.

2. Matter After Merger Will Not Support Action. — *Price v. Atchison First Nat. Bank*, 62 Kan. 735, 84 Am. St. Rep. 419.

5. Judgment Constitutes Bar to Second Action.

600. 2. Of Judgment into Later Judgment. — See note 5.

602. VI. MERGER IN CRIMINAL LAW — 1. Definition. — See note 3.

604. 2. Where Felony Charged and Misdemeanor Proved — *b.* COMMON-LAW RULE ABROGATED. — See note 4.

606. 3. Misdemeanor Charged and Felony Shown. — See note 2.

607. 4. No Merger if Offenses Are of Same Grade. — See note 1.

MERITS. — See notes 3, 4.

608. See note 1.

610. **MESSUAGE.** — See note 1.

METALLIC. — See note 3.

611. **METALS.** — See note 1.

MIDDLE. — See note 11.

— *Armentrout v. Smith*, 52 W. Va. 96, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 599.

600. 5. Judgment Merges Judgment. — *Dunn v. Dilks*, 31 Ind. App. 673; *Price v. Atchison First Nat. Bank*, 62 Kan. 735, 84 Am. St. Rep. 419; *Springs v. Pharr*, 131 N. Car. 192, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 600; *Turner v. Stewart*, 51 W. Va. 504, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 600.

Where There Are Two Judgments During the Same Term of Court, in the same case, the first judgment merges in the second. *Johnson v. Hesser*, 61 Neb. 631.

602. 3. Distinctions in Trial of Felony and Misdemeanor. — See *Wait v. Com.*, 113 Ky. 821.

604. 4. Conviction for Misdemeanor Allowed on Charge of Felony. — *Graff v. People*, 208 Ill. 322.

606. 2. Conviction for Misdemeanor Though Felony Shown. — *Graff v. People*, 208 Ill. 322, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 605 [606].

Conspiracy. — *Wait v. Com.*, 113 Ky. 821. See also *Graff v. People*, 208 Ill. 322.

In a charge of conspiracy, where the indictment does not sufficiently allege the felony there can be no merger. *People v. Rathbun*, (County Ct.) 44 Misc. (N. Y.) 88.

A misdemeanor merges in felony only where both were committed in the same state. Thus, where a conspiracy was entered into in Illinois

to obtain money by false pretenses from a Kansas corporation, which act constituted a felony under the Kansas statutes, there is no merger. *Regent v. People*, 96 Ill. App. 189.

Distinct Offenses. — Where the defendant was charged with contempt of court in having procured a witness to commit perjury, it was held that the contempt did not merge in the higher offense of subornation of perjury, the two offenses being distinct and independent. *Ricketts v. State*, 111 Tenn. 380.

607. 1. Conspiracy. — *Graff v. People*, 208 Ill. 322.

3. Merits. — *Smoot v. Judd*, 184 Mo. 616, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 607; *Hirshbach v. Ketchum*, 79 N. Y. App. Div. 561.

4. *Smoot v. Judd*, 184 Mo. 616, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 607.

608. 1. *Bolin v. Southern R. Co.*, 65 S. Car. 222.

610. 1. **Messuage** — *House*. — *Board of Education v. State*, 64 Kan. 6.

3. Metallic. — *Hempstead v. Thomas*, (C. C. A.) 122 Fed. Rep. 538. This was a revenue case.

611. 1. **Metal Beads** — **Revenue Law**. — See *Steinhardt v. U. S.*, 113 Fed. Rep. 996.

11. Middle of River — **Question of Law**. — *State v. Burtons*, 106 La. 732.

MILITARY LAW.

By H. O'B. COOPER.

- 618.** III. MILITARY AND MARTIAL LAW DISTINGUISHED. — See notes 3, 5.
Military Government. — See note 6.
- 620.** V. SOURCE AND ELEMENTS OF AMERICAN MILITARY LAW — 4. Army and Navy Regulations — The Army Regulations. — See note 1.
- 623.** VI. MILITARY SERVICE — 3. Enlistment in Army and Navy —
d. WHO MAY BE ENLISTED — (5) *Minors* — (a) Power of Congress to Enlist *Minors*. — See note 5.
Enlistment in Naval Service. — See notes 7, 8, 9.
Enlistment in Marine Corps. — See note 10.
- 621.** (b) Binding Effect of Enlistment — Character of Enlistment as Void or Voidable — Since an Enlistment Is Not Merely a Contract. — See note 3.
Right to Obtain Discharge of Minor Illegally Enlisted. — See note 7.
Whether Minor May Claim to Be Discharged. — See notes 8, 9.
- 625.** Liability of Minor Illegally Enlisted to Be Tried for Desertion. — See notes 1, 2.
Trial for Other Offenses. — See note 5.
- 626.** (8) *Liability of Recruiting Officer*. — See note 5.
e. TERM OF ENLISTMENT. — See notes 7, 8.
- 632.** VII. MILITARY ESTABLISHMENT OF THE UNITED STATES — 1. Composition — *c.* NAVAL FORCES — (2) *Marine Corps*. — See note 3.

618. 3. The Effect of Martial Law is to put into operation the powers and methods vested in the commanding officer by military law. *Com. v. Shortall*, 206 Pa. St. 165, 98 Am. St. Rep. 759.

5. See *Com. v. Shortall*, 206 Pa. St. 165, 98 Am. St. Rep. 759.

6. See *Com. v. Shortall*, 206 Pa. St. 165, 98 Am. St. Rep. 759.

620. 1. Army Regulations. — *In re Brodie*, (C. C. A.) 128 Fed. Rep. 665.

623. 5. Enlistment of Minors. — *Ex p. Houghton*, 129 Fed. Rep. 239.

Minor Over Eighteen — No Consent Required. — *Thomas v. Winne*, (C. C. A.) 122 Fed. Rep. 395.

7. Over Eighteen — Enlistment Binding. — *In re Oliver*, 1 Alaska 1.

8. Enlistment in Naval Service. — *Ex p. Houghton*, 129 Fed. Rep. 239.

9. The Minimum Age Has Been Fixed at Fourteen Years by legislation modifying Rev. Stat. U. S., § 1420. See *Thomas v. Winne*, (C. C. A.) 122 Fed. Rep. 395.

10. Enlistment of Minors in Marine Corps. — See *Com. v. Butler*, 19 Pa. Super. Ct. 626.

624. 3. Contract Not Voidable by Infant. — *U. S. v. Reaves*, (C. C. A.) 126 Fed. Rep. 127; *In re Oliver*, 1 Alaska 1. See also *Ex p. Reaves*, 121 Fed. Rep. 848, *reversed* (C. C. A.) 126 Fed. Rep. 127.

7. Minor Discharged from Service on Application of Parent or Guardian. — *In re Miller*, (C. C. A.) 114 Fed. Rep. 838; *U. S. v. Reaves*, (C. C. A.) 126 Fed. Rep. 127, *reversing* 121 Fed. Rep. 848; *Ex p. Houghton*, 129 Fed. Rep. 239.

8. Provision Requiring Consent for Benefit of Parent or Guardian. — *U. S. v. Reaves*, (C. C. A.) 126 Fed. Rep. 127.

9. Minor Bound by Illegal Contract of Enlistment. — *In re Miller*, (C. C. A.) 114 Fed. Rep. 838; *U. S. v. Reaves*, (C. C. A.) 126 Fed. Rep. 127.

625. 1. Minor Illegally Enlisted Held Punishable as a Deserter. — *In re Lessard*, 134 Fed. Rep. 305.

2. Discharge of Minor Held for Desertion on Application of Parent or Guardian. — *In U. S. v. Reaves*, (C. C. A.) 126 Fed. Rep. 127, *reversing* 121 Fed. Rep. 848, it was held that a parent could not obtain his minor son's discharge on habeas corpus pending charges against him for desertion.

5. Trial for Other Offenses. — See *Ex p. Reaves*, 121 Fed. Rep. 848, *reversed* (C. C. A.) 126 Fed. Rep. 127; *Ex p. Houghton*, 129 Fed. Rep. 239.

626. 5. See *Thomas v. Winne*, (C. C. A.) 122 Fed. Rep. 395, discussing a statutory provision for the dishonorable dismissal of an officer who knowingly enlists an intoxicated person, but holding that the issue of intoxication was not raised by the pleadings in the case at bar.

7. The Term Is Three Years by Act Cong. Aug. 1, 1894, c. 179, § 2, 28 U. S. Stat. at L. 216, 7 Fed. Stat. Annot. 961, superseding Rev. Stat. U. S., § 1119.

8. The Term Is Four Years by Act Cong. March 3, 1899, c. 413, § 16, 30 U. S. Stat. at L. 1008, 5 Fed. Stat. Annot. 270.

632. 3. Marine Corps a Part of Navy. — See *Com. v. Butler*, 19 Pa. Super. Ct. 626.

635. 3. Officers — c. RANK AND GRADE — Relative Rank of Naval Officers. — See note 6.

d. PROMOTION. — See note 7.

637. f. RETIREMENT — (2) Status of Retired Officer. — See note 4.

638. g. DISCHARGE OR DISMISSAL — By the Provisions of This Act. — See note 2.

639. 4. Pay and Allowances — a. IN GENERAL — Army Officers. — See note 6.

640. Naval Officers. — See notes 1, 2, 3, 4, 5.

Officer Holding Two Offices. — See notes 7, 8.

641. b. OFFICERS ABSENT FROM DUTY OR ON WAITING ORDERS. — See note 1.

c. RETIRED OFFICERS. — See note 10.

643. g. EXTRA-DUTY PAY — Officers. — See notes 3, 4.

644. i. ALLOWANCES — (1) In General. — See note 3.

(2) Mileage. — See note 6.

645. Persons Discharged from Service. — See notes 1, 2.

647. VIII. MILITARY COURTS — 1. Courts-Martial — c. COMPOSITION OF COURT — (1) Rank and Character of Members — Officers of the Regular Army. — See note 2.

(2) Number of Members. — See note 10.

648. f. JURISDICTION OF COURT — (1) In General — Jurisdiction Not Conferred by Consent. — See note 7.

635. 6. Relative Rank of Army Officer. — See *U. S. v. Root*, 22 App. Cas. (D. C.) 419.

7. Promotions in the Navy. — See *Peck v. U. S.*, 39 Ct. Cl. 125.

637. 4. Retired Officers Still Officers of United States. — *Murphy v. U. S.*, 38 Ct. Cl. 511, 39 Ct. Cl. 178, supporting the text paragraph generally.

638. 2. A Cadet at West Point is not an officer within the meaning of the statute, and may be dismissed by the President summarily. *Hartigan v. U. S.*, 196 U. S. 169, affirming 38 Ct. Cl. 346.

639. 6. Rodgers v. U. S., 185 U. S. 83.

640. 1. Pay of Naval Officers. — *Rodgers v. U. S.*, 185 U. S. 83; *Ryan v. U. S.*, 38 Ct. Cl. 143.

2. Hannum v. U. S., 36 Ct. Cl. 99.

A Detached Officer from one vessel, assigned to another, is on shore duty while passing from one to the other. *Ryan v. U. S.*, 38 Ct. Cl. 143.

3. Service at Sea Defined. — *Hannum v. U. S.*, 36 Ct. Cl. 99; *Collins v. U. S.*, 37 Ct. Cl. 222; *Taussig v. U. S.*, 38 Ct. Cl. 104; *Ryan v. U. S.*, 38 Ct. Cl. 143.

A Detached Officer Who Is Ordered to Report to the Secretary of the Navy is not entitled to sea pay thereafter. *Bishop v. U. S.*, 38 Ct. Cl. 473.

4. McGowan v. U. S., 36 Ct. Cl. 63; *Taussig v. U. S.*, 38 Ct. Cl. 104.

Temporary Duty on Shore. — See *Engard v. U. S.*, 38 Ct. Cl. 122.

5. McGowan v. U. S., 36 Ct. Cl. 63; *Hannum v. U. S.*, 36 Ct. Cl. 99; *Taussig v. U. S.*, 38 Ct. Cl. 104.

7. Geddes v. U. S., 38 Ct. Cl. 428.

8. See Glenn v. U. S., 37 Ct. Cl. 254.

641. 1. Naval Officers. — *Calhoun v. U. S.*, 38 Ct. Cl. 198.

Absence Due to Sickness — Sea Pay Continues. — *Collins v. U. S.*, 37 Ct. Cl. 222.

10. Pay of Retired Naval Officers. — *Creighton v. U. S.*, 37 Ct. Cl. 327.

A Student at the Naval Academy from 1864 to 1868 is not one who "served during the civil war," within the meaning of Act Cong. March 3, 1899, 30 U. S. Stat. at L. 1006, 5 Fed. Stat. Annot. 287, providing for retirement with three-fourths the rank and pay of the next higher grade. *Jasper v. U. S.*, 38 Ct. Cl. 202.

643. 3. Stocker v. U. S., 39 Ct. Cl. 300.

4. Extra-duty Pay for Officers. — *Stocker v. U. S.*, 39 Ct. Cl. 300.

644. 3. Fuel and Quarters. — *Irwin v. U. S.*, 38 Ct. Cl. 87; *Hunt v. U. S.*, 38 Ct. Cl. 704; *Anderson v. U. S.*, 39 Ct. Cl. 316.

Cost of Sickness — Attendance of Army Surgeon Must Be Unavailable. — *Preston v. U. S.*, 37 Ct. Cl. 39.

6. Mileage — Naval Officers. — *Fitzpatrick v. U. S.*, 37 Ct. Cl. 332; *Thomas v. U. S.*, 38 Ct. Cl. 70.

Inland Travel — Repeated Trips Between Places in Same Vicinity. — See *Willits v. U. S.*, 38 Ct. Cl. 534.

Waiver. — See *Hunt v. U. S.*, 38 Ct. Cl. 135.

645. 1. Residence, for the purpose of adjusting travel pay, is the place where an officer seeks and accepts his appointment, and where he qualifies to discharge the duties of his office. *Sells v. U. S.*, 36 Ct. Cl. 94.

Actual Expenses only are paid to officers traveling to and from island possessions in the Atlantic and Pacific oceans. *Chance v. U. S.*, 38 Ct. Cl. 75.

Resignation of Officer — No Travel Pay. — *U. S. v. Sweet*, 189 U. S. 471; *U. S. v. Barnett*, 189 U. S. 474.

2. Barnett v. U. S., 37 Ct. Cl. 49.

647. 2. McClaghry v. Deming, 186 U. S. 49.

10. Minimum Number — Proper Exercise of Discretion Presumed. — *Bishop v. U. S.*, 38 Ct. Cl. 473.

648. 7. Jurisdiction Not Conferred by Consent. — See *Smith v. U. S.*, 36 Ct. Cl. 304.

- 649.** (3) *As to Persons* — (a) *Persons in Military Service*. — See note 1.
Persons Illegally Enlisted. — See note 4.
- 650.** (4) *As to Offenses* — (b) *Certain Specific Offenses Considered* — *aa. DESERTION* — (bb) *Jurisdiction of Courts-Martial Exclusive*. — See note 7.
- 652.** (ff) *Punishment* — *Forfeiture of Citizenship*. — See note 2.
- 654.** g. *ARREST AND DETENTION OF ACCUSED* — *Duration of Confinement*. — See note 10.
- 655.** j. *FINDINGS AND SENTENCE* — (2) *Requisites to Validity*. — See note 9.
- 656.** (3) *Character of Sentence*. — See note 5.
 k. *REVIEW OF PROCEEDINGS AND SENTENCE* — (1) *By Military Authorities* — (a) *In General*. — See note 10.
- 657.** (b) *Confirmation of Sentence* — *aa. IN GENERAL*. — See notes 3, 4, 6.
 bb. *BY PRESIDENT*. — See note 10.
- 658.** (2) *By Civil Courts*. — See notes 4, 5, 6.
- 659.** l. *LIMITATION OF PROSECUTIONS* — *The One Hundred and Third Article of War*. — See note 1.
The Absence Contemplated by the Article. — See note 3.
- 660.** 2. *Courts of Inquiry*. — See note 4.
- 661.** IX. *CIVIL STATUS AND RELATIONS OF THE MILITARY* — 2. *Exemption from Arrest*. — See note 9.
- 663.** 6. *Liability to Criminal Prosecution*. — See notes 2, 3.
- 665.** 7. *Civil Liability of Persons in Military Service* — c. *LIABILITY FOR EXECUTION OF ORDERS* — (1) *Civil Liability* — *Soldier Not Personally Liable for Execution of Lawful Orders*. — See note 6.
- 666.** (2) *Criminal Liability*. — See note 2.
- 649.** 1. *Retired Officer*. — See *Murphy v. U. S.*, 38 Ct. Cl. 511, new trial denied 39 Ct. Cl. 178.
Provost Marshal. — See *Colman v. U. S.*, 38 Ct. Cl. 315.
- 4.** *Minor Illegally Enlisted*. — *In re Miller*, (C. C. A.) 114 Fed. Rep. 838.
- 650.** 7. *Jurisdiction of Courts-Martial Exclusive*. — *In re Cadwallader*, 127 Fed. Rep. 881; *Ex p. Townsend*, 133 Fed. Rep. 74.
- 652.** 2. *Com. v. Wong Chung*, 186 Mass. 231, 1 A. & E. Ann. Cas. 193, wherein the question arose on an issue as to the competency of a juror.
- 654.** 10. *Trivial Offense — Ten Days Limit*. — In the navy, as in the army, a man may be arrested by the captain of his ship, or the colonel of his regiment, and placed in confinement for trivial offenses, without an assigned reason being given. This confinement must not exceed ten days. *Smith v. U. S.*, 38 Ct. Cl. 257.
- 655.** 9. *Copy of Charges Not Given to Prisoner*. — See *Smith v. U. S.*, 36 Ct. Cl. 304.
- 656.** 5. *Imprisonment in Penitentiary*. — *In re Langan*, 123 Fed. Rep. 132.
- 10.** *Review of Proceedings*. — *In re Brodie*, (C. C. A.) 128 Fed. Rep. 665.
- 657.** 3. *Confirmation*. — *In re Brodie*, (C. C. A.) 128 Fed. Rep. 665.
- 4.** *Confirmation or Disapproval by the Officer Convening the court-martial is unnecessary where the action of the President is required by law*. *Bishop v. U. S.*, 38 Ct. Cl. 473.
- 6.** *Carter v. McClaughry*, 183 U. S. 365.
- 10.** *President Must Act in Person*. — *Bishop v. U. S.*, 38 Ct. Cl. 473.
- 658.** 4. *Courts-Martial Ordinarily Not Subject to Review by Civil Courts*. — *In re Brodie*, (C. C. A.) 128 Fed. Rep. 665; *Ex p. Townsend*, 133 Fed. Rep. 74.
- 5.** *Civil Courts May Inquire into Jurisdiction of Military Courts*. — *Carter v. McClaughry*, 183 U. S. 365; *McClaughry v. Deming*, 186 U. S. 49.
- Offense and Punishment Trivial**. — See *Weirman v. U. S.*, 36 Ct. Cl. 236.
- 6.** *Inquiry Limited to Question of Jurisdiction*. — *Carter v. McClaughry*, 183 U. S. 365; *Ex p. Townsend*, 133 Fed. Rep. 74.
- 659.** 1. *Prosecution Barred After Two Years* — *In re Cadwallader*, 127 Fed. Rep. 881; *Ex p. Townsend*, 133 Fed. Rep. 74.
- 3.** *Ex p. Townsend*, 133 Fed. Rep. 74.
- 660.** 4. *Courts of Inquiry*. — *People v. Hoffman*, 166 N. Y. 462.
- 661.** 9. See *In re Turner*, 119 Fed. Rep. 231.
- 663.** 2. *Criminal Prosecutions*. — *U. S. v. Lewis*, 129 Fed. Rep. 823.
- 3.** *U. S. v. Lewis*, 129 Fed. Rep. 823.
- 665.** 6. *No Liability for Execution of Lawful Orders*. — *In re Turner*, 119 Fed. Rep. 231; *Sheriff v. Turner*, 119 Fed. Rep. 782.
- 666.** 2. *Soldier Not Liable Criminally for Execution of Lawful Order*. — *Com. v. Shortall*, 206 Pa. St. 165, 98 Am. St. Rep. 759.

MILITIA.

669. III. ORGANIZATION AND CONTROL BY FEDERAL AND STATE GOVERNMENTS. — See note 4.

670. V. DISCIPLINE. — See note 2.

673. IX. MILITIA FUNDS, EXPENSES, COMPENSATION, AND STORES. — See note 2.

674. MILL. — See note 3.

675. MILLING. — See note 1.

669. 4. Control of Governor Over Militia. — See *State v. Moore*, (Ark. 1905) 88 S. W. Rep. 881; *Com. v. Shortall*, 206 Pa. St. 165, 98 Am. St. Rep. 759.

670. 2. Dismissal from Army — Governor. — See *State v. Jelks*, 138 Ala. 115.

673. 2. Compensation — Expenses of Militia Called into Active Service Payable Out of State Treasury without special appropriation, where the general appropriation is exhausted. See *Sweeney v. Com.*, (Ky. 1904) 82 S. W. Rep. 639.

Armory Expenses — County. — See *State v. Dickenson*, 44 Fla. 623, holding that Florida Laws 1899, c. 4684, § 27, requiring the board of county commissioners in each county in which there is a company or battery of state troops to provide each company or battery with an armory for its meetings, drills, etc., is unconstitutional and void.

Armory — Expense of Maintaining. — See *Lewis v. New York*, 106 N. Y. App. Div. 454.

See *Witt v. Madigan*, 24 Ohio Cir. Ct. 263, holding that a city is not liable for the payment of janitors of the armory of an independent city military company which is, nevertheless, a part of the state militia.

674. 3. Mill. — *Southwest Missouri Light Co. v. Scheurich*, 174 Mo. 243, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 674.

Machinery. — See *Southwest Missouri Light Co. v. Scheurich*, 174 Mo. 243, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 674.

Used in Sense of Grist Mill. — *Southwest Missouri Light Co. v. Scheurich*, 174 Mo. 243.

675. 1. Milling Synonymous with Manufacturing. — *Denver Power, etc., Co. v. Denver, etc., R. Co.*, 30 Colo. 204.

MINES AND MINING CLAIMS.

BY O. D. ESTEE.

683. I. DEFINITIONS — A Mine. — See note 2.

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685. II. HISTORY OF MINING LAW IN UNITED STATES — 4. Supplemental State Legislation. — See note 2.

5. District Rules Authorized or Recognized by Acts of Congress —

a. STATUTORY PROVISION. — See note 4.

686. c. REQUISITES OF VALID RULES. — See note 7.

683. 2. Land Containing Minerals. — *Bentley v. Botsford*, 8 British Columbia 128.

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Stone Held to Be Mineral. — *Phelps v. Church of Our Lady*, (C. C. A.) 115 Fed. Rep. 882.

Gravel and Sand Are Minerals within the meaning of the word as used in the English Quarries Act, 1894. *Scott v. Midland R. Co.*, (1901) 1 K. B. 317.

Clay Forming the Surface or Subsoil and constituting the "land" compulsorily taken for the purposes of an undertaking is not a mineral within the meaning of the English Railways Clauses Consolidation Act, 1845. *In re Todd*, (1903) 1 K. B. 603.

5. Petroleum Held to Be Mineral. — *Lanyon Zinc Co. v. Freeman*, 68 Kan. 691.

Natural Gas Held to Be Mineral. — *Lanyon Zinc Co. v. Freeman*, 68 Kan. 691.

685. 2. Supplemental State Legislation. — *Treasury Tunnel, etc., Co. v. Boss*, 32 Colo. 27, 105 Am. St. Rep. 60; *Van Buren v. McKinley*, 8 Idaho 93; *Wright v. Lyons*, 45 Oregon 167; *Copper Globe Min. Co. v. Allman*, 23 Utah 410. See also *Butler v. Good Enough Min. Co.*, 1 Alaska 246.

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688. III. LOCATIONS ON PUBLIC LANDS — 1. Public Mineral Lands in General

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689. Possession for Location. — See note 2.

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688. 1. The Land Department. — See Behrends *v.* Goldsteen, 1 Alaska 518, holding that the department of the interior is "the only tribunal vested by Act of Congress" with power to determine the character of public land as mineral or nonmineral.

3. Only Unappropriated and Unoccupied Land Subject to Location. — Porter *v.* Tonopah North Star Tunnel, etc., Co., 133 Fed. Rep. 756; Gurney *v.* Brown, 32 Colo. 472; Traphagen *v.* Kirk, 30 Mont. 562. See also Walton *v.* Wild Goose Min., etc., Co., (C. C. A.) 123 Fed. Rep. 209; Price *v.* McIntosh, 1 Alaska 286; Shattuck *v.* Costello, (Ariz. 1902) 68 Pac. Rep. 529; Sands *v.* Cruikshank, 15 S. Dak. 142.

Location on Land Covered by Excessive Placer Claim. — A placer claim with too extensive boundaries is subject to relocation as to the excess, but the relocation must be made upon some part of the claim that is not actually occupied. Price *v.* McIntosh, 1 Alaska 286.

For the Rule in Canada as to the necessity of lands being unoccupied, see St. Laurent *v.* Mercier, 33 Can. Sup. Ct. 314.

689. 2. Possession for Purpose of Making Location. — Weed *v.* Snook, 144 Cal. 439; Miller *v.* Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63.

690. 4. Land Reserved for Naval Purposes is not subject to the location of a mining claim. Behrends *v.* Goldsteen, 1 Alaska 518.

6. Railroad Grants in Canada. — See Calgary, etc., R. Co. *v.* Rex, (1904) A. C. 765.

691. 2. Location Subject to Easement. — In Bonner *v.* Rio Grande Southern R. Co., 31 Colo. 446, a mining claim located over a railway was held to be subject to the railroad's easement of right of way.

5. Valid Mining Locations Excepted from Townsite Grants. — Larned *v.* Jenkins, (C. C. A.) 113 Fed. Rep. 634; Callahan *v.* James, 141 Cal. 291.

693. 5. "Lode" Defined — Synonymous with "Vein" and "Ledge." — Buffalo Zinc, etc., Co. *v.* Crump, 70 Ark. 525, 91 Am. St. Rep. 87.

695. 4. Excessive Claim Void Only as to Excess. — Gohres *v.* Illinois, etc., Gravel Min. Co., 40 Oregon 516; McPherson *v.* Julius, 17 S. Dak. 98, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 695.

698. 3. Petroleum, etc., Located as Placer Claim. — Miller *v.* Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63; Bay *v.* Oklahoma Southern Gas, etc., Co., 13 Okla. 425.

699. 1. Size of Placer Claims in United States. — Act Cong. July 9, 1870, authorizes the government to sell placer claims containing one hundred and sixty acres. Cranes Gulch Min. Co. *v.* Scherrer, 134 Cal. 350, 86 Am. St. Rep. 279.

Claiming an Excessive Amount of Land Does Not Render the Claim Void if it was made in good faith, and the original locator is entitled to select that part of the excessive claim which he desires to retain. McIntosh *v.* Price, (C. C. A.) 121 Fed. Rep. 716; Pratt *v.* United Alaska Min. Co., 1 Alaska 95.

A Placer Location Made by an Association of persons may include as much as one hundred and sixty acres. Miller *v.* Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63.

4. Necessity for Express Claim. — See Clipper Min. Co. *v.* Eli Min., etc., Co., 29 Colo. 377, 93 Am. St. Rep. 89.

Act Cong. July 9, 1870, authorizes the granting of a placer patent without reservation, and under such a patent a lode claim passes, though it was not expressly claimed. Cranes Gulch Min. Co. *v.* Scherrer, 134 Cal. 350, 86 Am. St. Rep. 279.

700. 1. Statutory Recognition of Water Rights for Mining Purposes. — Tuolumne Consol. Min. Co. *v.* Maier, 134 Cal. 583. See also Cleary *v.* Skiffich, 28 Colo. 362, 89 Am. St. Rep. 207.

3. Millsites — Location Authorized. — Cleary *v.* Skiffich, 28 Colo. 362, 89 Am. St. Rep. 207.

701. V. WHO MAY LOCATE MINERAL LANDS — 1. Rule in United States —
a. CITIZENS AND PERSONS DECLARING INTENTION TO BECOME CITIZENS —
(2) Proof of Citizenship — Presumptions as to Citizenship. — See note 6.

702. (3) Effect of Alienage. — See notes 2, 3.

703. d. AGENTS. — See note 3.

VI. ESSENTIALS OF VALID LOCATION — 1. General Statement. — See note 6.

705. 3. Discovery of Lode or Vein — a. DEFINITION OF DISCOVERY — NECESSITY AND ELEMENTS. — See note 1.

706. See note 1.

b. SOME SPECIAL RULES AND PRINCIPLES RELATING TO DISCOVERY — (2) Effect of Loss of Discovery. — See note 3.

707. (3) Discovery of Mineral Elsewhere in Claim. — See note 1.

708. e. STATE STATUTORY PROVISIONS AS TO DISCOVERY AND DISCOVERY WORK — See note 1.

709. 4. Posting Notice — a. GENERAL STATEMENT — Notice and Record Identical. — See note 2.

701. 6. Presumptions as to Citizenship. —
Buckley v. Fox, 8 Idaho 248.

702. 2. Rule that Alien May Hold until Office Found. —
Shea v. Nilima, (C. C. A.) 133 Fed. Rep. 209; *Tornanses v. Melsing*, (C. C. A.) 109 Fed. Rep. 710; *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563.

3. A Declaration of Intention to Become a Citizen, made subsequently to the location and before adverse rights have arisen, refers back to the time of location and renders such location valid. *Shea v. Nilima*, (C. C. A.) 133 Fed. Rep. 209.

703. 3. Location by Agents. —
McCulloch v. Murphy, 125 Fed. Rep. 147. See also *Russell v. Dufresne*, 1 Alaska 486.

A Location Made under Power of Attorney is valid. *Moore v. Steelsmith*, 1 Alaska 121.

6. Essentials of Valid Location. —
Dwinnell v. Dyer, 145 Cal. 12; *Bay v. Oklahoma Southern Gas, etc., Co.*, 13 Okla. 425.

Two Strips of Land Unconnected with Each Other cannot be embraced in one location. *Dart v. St. Keverne Min. Co.*, 7 British Columbia 56.

705. 1. Discovery — United States. —
Waltton v. Wild Goose Min., etc., Co., (C. C. A.) 123 Fed. Rep. 209; *Uinta Tunnel Min., etc., Co. v. Creede, etc., Min., etc., Co.*, (C. C. A.) 119 Fed. Rep. 164, affirmed 196 U. S. 337.

Alaska. — *Moore v. Steelsmith*, 1 Alaska 121; *Russell v. Dufresne*, 1 Alaska 486.

California. — *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63; *Tuolumne Consol. Min. Co. v. Maier*, 134 Cal. 583.

Colorado. — *Treasury Tunnel, etc., Co. v. Boss*, 32 Colo. 27, 105 Am. St. Rep. 60.

Montana. — *Gemmell v. Swain*, 28 Mont. 331, 98 Am. St. Rep. 570; *State v. District Ct.*, 25 Mont. 504.

Oregon. — *La Grande Invest. Co. v. Shaw*, 44 Oregon 416.

South Dakota. — *Sands v. Cruikshank*, 15 S. Dak. 142. See also *Regan v. Whittaker*, 14 S. Dak. 373.

Utah. — *Copper Globe Min. Co. v. Allman*, 23 Utah 410.

Canada. — *Collom v. Manley*, 32 Can. Sup. Ct. 371.

Oil Lands. — See *Bay v. Oklahoma Southern Gas, etc., Co.*, 13 Okla. 425.

Where Several Claims Are Held in Common, the discovery of petroleum upon one of the claims is sufficient to render valid the location of the other claims. *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63.

Discovery by Stranger in Interest. — It is not necessary that a party locating a claim should be the discoverer of the mineral. He may adopt and take advantage of a discovery made by a stranger in interest and base his claim thereon. *McMillen v. Ferrum Min. Co.*, 32 Colo. 38, 105 Am. St. Rep. 64.

706. 1. What Constitutes a Valid Discovery. —
Columbia Copper Min. Co. v. Duchess Min., etc., Co., (Wyo. 1905) 79 Pac. Rep. 385. See also *Moore v. Steelsmith*, 1 Alaska 121.

A Mere Surface Discovery of Petroleum is rarely, if ever, a sufficient discovery to support a location. *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63; *Bay v. Oklahoma Southern Gas, etc., Co.*, 13 Okla. 425.

3. Loss of Discovery Forfeits Claim. —
Tuolumne Consol. Min. Co. v. Maier, 134 Cal. 583; *Miller v. Hamley*, 31 Colo. 495; *McPherson v. Julius*, 17 S. Dak. 98.

If the Discovery Alleged in the Recording Notice Proves to Be Invalid, a man cannot adopt another discovery of mineral to support his claim, where the rights of third parties have previously intervened. *McMillen v. Ferrum Min. Co.*, 32 Colo. 38, 105 Am. St. Rep. 64.

707. 1. Discovery After Location. —
Creede, etc., Min., etc., Co. v. Uinta Tunnel Min., etc., Co., 106 U. S. 337; *Heman v. Griffith*, 1 Alaska 264; *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63; *Weed v. Snook*, 144 Cal. 439; *La Grande Invest. Co. v. Shaw*, 44 Oregon 416; *Cedar Canyon Consol. Min. Co. v. Yarwood*, 27 Wash. 271, 91 Am. St. Rep. 841. See also *Dwinnell v. Dyer*, 145 Cal. 12.

708. 1. Discovery Shaft. —
McMillen v. Ferrum Min. Co., 32 Colo. 38, 105 Am. St. Rep. 64; *Treasury Tunnel, etc., Co. v. Boss*, 32 Colo. 27, 105 Am. St. Rep. 60; *Wright v. Lyons*, 45 Oregon 167. See also *Field v. Tanner*, 32 Colo. 278.

709. 2. Where a Loss of Discovery Has Occurred in a claim that has been recorded, it is not necessary to place a second notice in another part of the claim at which mineral has

710. *c.* NOTICE REQUIRED BY MINERS' RULES — *Liberally Construed.* — See note 4.

711. *e.* SUMMARY OF GENERAL RULES AS TO NOTICE — *No Notice Required by United States Statute.* — See note 6.

712. *5.* Marking Location on Ground — *a.* REQUIREMENTS OF FEDERAL STATUTE — (1) *In General* — *Canada.* — See note 10.

713. (2) *Statute Mandatory.* — See note 1.

(3) *Compliance Generally Question of Fact.* — See note 2.

714. See note 1.

(4) *Statute Applicable to Placers.* — See note 2.

b. INCLUSION OF APEX OF VEIN — *How the Claim Should Be Marked.* —

See note 4.

c. TIME FOR MARKING. — See note 5.

715. *e.* SPECIAL STATE STATUTORY REQUIREMENTS. — See note 4.

716. *h.* MAINTAINING BOUNDARIES. — See note 3.

6. Recording Notice, Location Certificate, or Claim — *a.* IN GENERAL. — See note 6.

Federal Statute Requires No Record. — See notes 7, 8.

717. Records Authorized. — See note 2.

Place of Record. — See note 4.

been discovered. *Treasury Tunnel, etc., Co. v. Boss*, 32 Colo. 27, 105 Am. St. Rep. 60.

But One Notice Is Required where ore is discovered in two places on a claim. *McMillen v. Ferrum Min. Co.*, 32 Colo. 38, 105 Am. St. Rep. 64.

710. *4.* *Liberally Construed.* — *Walton v. Wild Goose Min., etc., Co.*, (C. C. A.) 123 Fed. Rep. 209.

711. *6.* *No Notice Required by United States Law.* — *Dwinnell v. Dyer*, 145 Cal. 12; *Deeney v. Mineral Creek Milling Co.*, 11 N. Mex. 279.

712. *10.* Where a Location Line Is Not Placed as Near as Possible on the Line of the Ledge or Vein its location is bad. *Bleekir v. Chisholm*, 8 British Columbia 148.

The Fact that a No. 2 Post Is Planted in a Moving Glacier will not invalidate the location, provided the location line is well marked and the claim is otherwise properly marked out so as to be easily identified. *Sandberg v. Ferguson*, 10 British Columbia 123.

The Location Line of a Fractional Mineral Claim must be marked by the blazing of trees or the setting of posts in the same manner as that of a full-sized claim. *Snyder v. Ransom*, 10 British Columbia 182.

713. *1.* *Statute Mandatory.* — *Worthen v. Sidway*, 72 Ark. 215, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 713. See also *Regan v. Whittaker*, 14 S. Dak. 373.

2. *Generally Question of Fact.* — *Walton v. Wild Goose Min., etc., Co.*, (C. C. A.) 123 Fed. Rep. 209.

714. *1.* *Physical Marks Essential.* — *Compare Oregon King Min. Co. v. Brown*, (C. C. A.) 119 Fed. Rep. 48.

Notice in Inaccessible Place. — See *Moore v. Steelsmith*, 1 Alaska 121.

2. *Applies Equally to Placers.* — *Worthen v. Sidway*, 72 Ark. 215, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 714.

4. *How Marked.* — *Walsh v. Erwin*, 115 Fed. Rep. 531; *Walton v. Wild Goose Min., etc., Co.*, (C. C. A.) 123 Fed. Rep. 209; *McIntosh v.*

Price, (C. C. A.) 121 Fed. Rep. 716; *Buffalo Zinc, etc., Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87. See also *Moore v. Steelsmith*, 1 Alaska 121; *Temescal Oil Min., etc., Co. v. Salcido*, 137 Cal. 211.

Posts at Centres of End Lines Held to Be Sufficient. — *Loeser v. Gardiner*, 1 Alaska 641.

5. *Time for Marking.* — *Union Min., etc., Co. v. Leitch*, 24 Wash. 585, 85 Am. St. Rep. 961. See also *Crown Point Gold Min. Co. v. Crismon*, 39 Oregon 364.

Thirty Days. — *Copper Globe Min. Co. v. Allman*, 23 Utah 410.

715. *4.* *State Legislation.* — *Oregon King Min. Co. v. Brown*, (C. C. A.) 119 Fed. Rep. 48; *Walker v. Pennington*, 27 Mont. 369; *Wright v. Lyons*, 45 Oregon 167.

The New Mexico Statute requires that a mining claim must be marked by four posts or four stone monuments, set at each corner of the claim. *Deeney v. Mineral Creek Milling Co.*, 11 N. Mex. 279.

Erection of Stone Mounds Not Sufficient.

Callanan v. George, 8 British Columbia 146.

Failure to Mark on Post Name and Date. — See *Sandberg v. Ferguson*, 10 British Columbia 123.

716. *3.* *Maintaining Boundaries.* — *Moore v. Steelsmith*, 1 Alaska 121; *Treasury Tunnel, etc., Co. v. Boss*, 32 Colo. 27, 105 Am. St. Rep. 60. See also *Walton v. Wild Goose Min., etc., Co.*, (C. C. A.) 123 Fed. Rep. 209.

6. *Technical Accuracy Not Required.* — *Mitchell v. Hutchinson*, 142 Cal. 404.

7. *Federal Statute Requires No Record.* — *Peters v. Tonopah Min. Co.*, 120 Fed. Rep. 587; *Walton v. Wild Goose Min., etc., Co.*, (C. C. A.) 123 Fed. Rep. 209.

8. *Implication that Record Will Be Kept.* — *Zerres v. Vanina*, 134 Fed. Rep. 610.

717. *2.* *Records Authorized.* — See *Van Buren v. McKinley*, 8 Idaho 93.

4. *Place of Record.* — *Van Buren v. McKinley*, 8 Idaho 93; *Copper Globe Min. Co. v. Allman*, 23 Utah 410.

717. Time in Which to Record. — See note 5.

719. *c.* GENERAL RULE AS TO NATURE OF COMPLIANCE REQUIRED — Substantial Compliance. — See notes 1, 2.

d. NECESSITY THAT RECORD REFER TO NATURAL OBJECTS OR PERMANENT MONUMENTS. — See note 5.

721. *e.* LOCAL STATUTORY LOCATION CERTIFICATE OR DECLARATORY STATEMENT — (2) *Verification*. — See note 3.

(3) *Amendment of Location Certificate*. — See note 5.

722. VII. ESTATE SECURED BY LOCATION — 1. In General. — See note 3.

2. Surface Rights — *a.* IN GENERAL. — See note 6.

724. *d.* NATURE, QUALITY, AND EXTENT OF RIGHT — (1) *In General*. — See note 8.

725. See notes 1, 3.

727. 3. Subsurface Rights — *a.* IN GENERAL. — See note 1.

729. *d.* NECESSITY THAT END LINES BE PARALLEL. — See notes 1, 4.

717. 5. Time in Which to Record. — Tonopah, etc., Min. Co. v. Tonopah Min. Co., 125 Fed. Rep. 389; Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co., (C. C. A.) 131 Fed. Rep. 579; Zerres v. Vanina, 134 Fed. Rep. 610; Buffalo Zinc, etc., Co. v. Crump, 70 Ark. 525, 91 Am. St. Rep. 87. See also Columbia Copper Min. Co. v. Duchess Min., etc., Co., (Wyo. 1905) 79 Pac. Rep. 385.

Recording Within Thirty Days Required. — Copper Globe Min. Co. v. Allman, 23 Utah 410.

719. 1. If the Description as Recorded Is So Erroneous as to Mislead Parties Locating Other Claims in the vicinity, the error is not cured by a certificate of work done by the first locator on land not included in such description and covered by the subsequent claims. Coplen v. Callahan, 30 Can. Sup. Ct. 555.

A Description by Monuments Prevails over a description by courses and distances in case of a discrepancy. Price v. McIntosh, 1 Alaska 286.

2. Immaterial Errors Do Not Vitiare. — Zerres v. Vanina, 134 Fed. Rep. 610; Morrison v. Regan, 8 Idaho 291.

5. What Are Natural Objects or Permanent Monuments. — Worthen v. Sidway, 72 Ark. 215, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 719; Carlin v. Freeman, 19 Colo. App. 334. See also Morrison v. Regan, 8 Idaho 291.

721. 3. Verification. — Van Buren v. McKinley, 8 Idaho 93. See also McKay v. McDougall, 25 Mont. 258, 87 Am. St. Rep. 395.

Verification on Information Sufficient. — Mares v. Dillon, 30 Mont. 117.

5. When Amendment Will Relate to Original Date. — See Morrison v. Regan, 8 Idaho 291.

When Amendment Will Operate from Date of Making Only. — Morrison v. Regan, 8 Idaho 291.

722. 3. Right of Possession Secured by Location. — Creede, etc., Min., etc., Co. v. Uinta Tunnel Min., etc., Co., 106 U. S. 337.

6. Cuius Est Solum Ejus Est Usque ad Cælum et ad Inferos. — Parrot Silver, etc., Co. v. Heinze, 25 Mont. 139, 87 Am. St. Rep. 386; Montana Ore Purchasing Co. v. Boston, etc., Consol. Copper, etc., Min. Co., 27 Mont. 536.

724. 8. Valid Location Equivalent to Grant. — Worthen v. Sidway, 72 Ark. 215, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 725 [724].

725. 1. Estate of Inheritance. — Worthen v.

Sidway, 72 Ark. 215, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 725.

3. Characteristics of Estate Acquired by Locator. — Worthen v. Sidway, 72 Ark. 215, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 725.

The word "required" in the catchline of the original note is obviously a misprint for "acquired."

727. 1. Subsurface Rights — *United States*. — Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co., (C. C. A.) 131 Fed. Rep. 579; Pennsylvania Consol. Min. Co. v. Grass Valley Exploration Co., 117 Fed. Rep. 509; St Louis Min., etc., Co. v. Montana Min. Co., (C. C. A.) 113 Fed. Rep. 900, affirmed 194 U. S. 235; Bunker Hill, etc., Min., etc., Co. v. Empire State-Idaho Min., etc., Co., (C. C. A.) 109 Fed. Rep. 538.

Colorado. — Ajax Gold Min. Co. v. Hilkey, 31 Colo. 131, 102 Am. St. Rep. 23; Davis v. Shepherd, 31 Colo. 141.

Montana. — State v. District Ct., 25 Mont. 504; Montana Ore Purchasing Co. v. Boston, etc., Consol. Copper, etc., Min. Co., 27 Mont. 288, modified 27 Mont. 536. See also Parrot Silver, etc., Co. v. Heinze, 25 Mont. 139, 87 Am. St. Rep. 386.

Nevada. — Southern Nevada Gold, etc., Min. Co. v. Holmes, (Nev. 1903) 73 Pac. Rep. 759.

Washington. — Cedar Canyon Consol. Min. Co. v. Yarwood, 27 Wash. 271, 91 Am. St. Rep. 841.

Limitation of Extralateral Rights. — A locator has no right to run a horizontal tunnel through another's location in order the better to reach and work a vein having its apex on his land. His only right outside of his own location is the right to follow the vein on its dip. St. Louis Min., etc., Co. v. Montana Min. Co., 194 U. S. 235.

Where a Portion of the Apex Is on Two Different Locations, and there is a conflict as to the right to follow the vein on the dip, the rights of the senior location prevail over those of the junior one. Jefferson Min. Co. v. Anchoria-Leland Min., etc., Co., 32 Colo. 176.

729. 1. Parallel End Lines Essential. — Central Eureka Min. Co. v. East Cent. Eureka Min. Co., 146 Cal. 147.

It is sufficient if the end lines as originally marked off are parallel, and the fact that the end lines are subsequently found to have en-

729. *e.* LOCATION LENGTHWISE OF VEIN. — See note 5.

f. RIGHTS UNDER DEFECTIVE LOCATIONS — (2) *Locations Across Vein.* — See note 7.

730. See note 1.

(3) *Where Vein Crosses Both End and Side Line.* — See note 2.

(5) *Vein Terminated by "Crossing" Within Location.* — See note 6.

731. *g.* LIMITATIONS OF EXTRALATERAL RIGHTS — (2) *Where Vein Unites with Previously Located Vein.* — See note 1.

(4) *Effect of Lack of Inclination of Vein from Surface Exposure.* — See note 3.

732. *j.* PRESUMPTION AS TO SUBSURFACE OWNERSHIP. — See note 6.

733. See note 1.

VIII. FORFEITURE AND ABANDONMENT — 1. Definitions. — See note 5.

2. Abandonment. — See note 7.

734. Burden of Proof. — See note 1.

3. Failure to Perform Annual Labor — *a.* IN GENERAL. — See note 2.

735. The Purpose. — See note 2.

Burden of Proof. — See note 3.

736. Strict Proof of Forfeiture Required. — See note 1.

croached on a prior location does not destroy a party's extralateral rights, provided these rights do not interfere with the rights of the prior location. *Big Hatchet Consol. Min. Co. v. Colvin*, 19 Colo. App. 405.

729. 4. Parallel End Lines Not Essential under Act of 1866 — *Central Eureka Min. Co. v. East Cent. Eureka Min. Co.*, 146 Cal. 147.

5. Location Should Be Along Course of Vein. — *Davis v. Shepherd*, 31 Colo. 141.

7. Rights under Location Across Vein. — *Empire Mills, etc., Co. v. Tombstone Mill, etc., Co.*, 131 Fed. Rep. 339; *Parrot Silver, etc., Co. v. Heinze*, 25 Mont. 139, 87 Am. St. Rep. 386; *Southern Nevada Gold, etc., Min. Co. v. Holmes*, (Nev. 1903) 73 Pac. Rep. 759.

730. 1. Empire Mill, etc., *Co. v. Tombstone Mill, etc., Co.*, 131 Fed. Rep. 339.

2. Vein Crossing End and Side Line. — *Parrot Silver, etc., Co. v. Heinze*, 25 Mont. 139, 87 Am. St. Rep. 386.

6. Vein Terminated by "Crossing" Within Location. — *Ajax Gold Min. Co. v. Hilkey*, 31 Colo. 131, 102 Am. St. Rep. 23.

731. 1. Intersection of Veins on Dip. — *Montana Ore Purchasing Co. v. Boston, etc., Consol. Copper, etc., Min. Co.*, 27 Mont. 288.

3. Lack of Inclination from Apex. — *Southern Nevada Gold, etc., Min. Co. v. Holmes*, (Nev. 1903) 73 Pac. Rep. 759. See also *Larned v. Jenkins*, (C. C. A.) 113 Fed. Rep. 634.

732. 6. Prima Facie Presumption as to Subsurface Ownership. — *Heinze v. Boston, etc., Consol. Copper, etc., Min. Co.*, 30 Mont. 484; *Maloney v. King*, 25 Mont. 188; *Montana Ore Purchasing Co. v. Boston, etc., Consol. Copper, etc., Co.*, 27 Mont. 536.

733. 1. *Maloney v. King*, 25 Mont. 188, affirmed 30 Mont. 158.

5. Abandonment Dependent upon Intention of Miner. — *Peoria, etc., Milling, etc., Co. v. Turner*, (Colo. App. 1905) 79 Pac. Rep. 915.

7. Abandonment. — *Buffalo Zinc, etc., Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87; *Conn v. Oberto*, 32 Colo. 313; *McKay v. McDougall*, 25 Mont. 258, 87 Am. St. Rep. 305.

The Fact that a Party Patents Only a Part of

His Location does not conclusively show an intention to abandon the remaining part of the location. *Miller v. Hamley*, 31 Colo. 495.

Abandonment Presumed from Nonuser. — In *Alaska* the nonuser of ditches, flumes, and water rights for one year raises the presumption of abandonment. *Noland v. Coon*, 1 Alaska 36.

On the Expiration of a Free Miner's Certificate in *British Columbia*, any mineral claim of which the holder was the sole owner becomes open to location. *Woodbury Mines v. Poyntz*, 10 *British Columbia* 181.

As to the Sufficiency of Notice of Plan on Abandonment under the English Statute directing that the owner of an abandoned mine or seam shall within three months after abandonment send a plan to the secretary of state, see *Stokes v. Hill*, (1901) 1 K. B. 493.

734. 1. Burden of Proof as to Abandonment. — *Noland v. Coon*, 1 Alaska 36; *Loeser v. Gardiner*, 1 Alaska 641; *Buffalo Zinc, etc., Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87.

2. Failure to Perform Annual Labor or Assessment Work. — *Lockhart v. Johnson*, 181 U. S. 516; *Woody v. Bernard*, 69 Ark. 579; *Wright v. Killian*, 132 Cal. 56; *Wagner v. Dorris*, 43 Oregon 392. See also *Yarwood v. Johnson*, 29 Wash. 643.

Rule as to Performance of Labor in *British Columbia*. — See *Victor v. Butler*, 8 *British Columbia* 100.

735. 2. Purpose of Statute. — *McCulloch v. Murphy*, 125 Fed. Rep. 147.

3. Burden of Proof. — *Whalen Consol. Copper Min. Co. v. Whalen*, 127 Fed. Rep. 611; *McCulloch v. Murphy*, 125 Fed. Rep. 147; *Loeser v. Gardiner*, 1 Alaska 641; *Buffalo Zinc, etc., Co. v. Crump*, 70 Ark. 525, 91 Am. St. Rep. 87; *Callahan v. James*, 141 Cal. 291; *Emerson v. McWhirter*, 133 Cal. 510; *Field v. Tanner*, 32 Colo. 278; *Haynes v. Briscoe*, 29 Colo. 137.

736. 1. Strict Proof of Forfeiture Required. — *Walton v. Wild Goose Min., etc., Co.*, (C. C. A.) 123 Fed. Rep. 209; *Thomson v. Allen*, 1 Alaska 636; *Loeser v. Gardiner*, 1 Alaska 641;

736. *b.* TIME OF PERFORMANCE — Beginning of Annual Labor Period. — See note 3.

c. PLACE OF PERFORMANCE — (2) *Claims Held in Common.* — See note 5.

737. *d.* CHARACTER OF WORK REQUIRED. — See note 1.

Burden of Proof. — See note 2.

738. *f.* EXCUSES FOR NONPERFORMANCE — (1) *Where Claim Is Wrongfully Held by Another.* — See note 3.

[(3) *Voluntary Service in War with Spain.* — By Act of Congress in 1898, it was provided that volunteers in the army or navy for the war with Spain might be exempted from performing annual assessment work.^{4a}]

g. RECORDING PROOF OF LABOR. — See notes 5, 6.

h. RESUMPTION OF WORK. — See notes 7, 8.

739. See note 1.

5. Forfeiture to Co-owner by Notice or Advertisement. — See note 4.

740. Proceeding May Operate Against Decedent's Interest. — See note 1.

Mode of Serving Notice. — See note 3.

IX. RELOCATION — 2. Prerequisites to Valid Relocation — *b.* ABANDONMENT OR FORFEITURE. — See note 8.

Buffalo Zinc, etc., Co. *v.* Crump, 70 Ark. 525, 91 Am. St. Rep. 87; Emerson *v.* McWhirter, 133 Cal. 510; Crown Point Gold-Min. Co. *v.* Crismon, 39 Oregon 364.

736. 3. Beginning of Annual Labor Period. — McKay *v.* McDougall, 25 Mont. 258, 87 Am. St. Rep. 395.

5. Work on One of Several Claims Held in Common. — Miller *v.* Chrisman, 140 Cal. 440, 98 Am. St. Rep. 63; Little Dorrit Gold Min. Co. *v.* Arapahoe Gold Min. Co., 30 Colo. 431.

737. 1. Labor Must Tend to Develop Claim. — McCulloch *v.* Murphy, 125 Fed. Rep. 147; Walton *v.* Wild Goose Min., etc., Co., (C. C. A.) 123 Fed. Rep. 209; Little Dorrit Gold Min. Co. *v.* Arapahoe Gold Min. Co., 30 Colo. 431.

Employment of Watchman. — See Hough *v.* Hunt, 138 Cal. 142, 94 Am. St. Rep. 17, holding that money paid to a watchman could not be included in assessment work except in rare cases.

2. Burden of Proof as to Tendency to Develop. — Little Dorrit Gold Min. Co. *v.* Arapahoe Gold Min. Co., 30 Colo. 431.

738. 3. Failure to Work Excusable Where Claim Held by Another. — Field *v.* Tanner, 32 Colo. 278.

4*a.* Volunteers in War with Spain. — Field *v.* Tanner, 32 Colo. 278, holding that there was a sufficient compliance with the statute (30 U. S. Stat. at L. 651) where the certificate of enlistment was filed in the same office in which the location certificate was filed.

5. Recording Proof of Labor. — Whalen Consol. Copper Min. Co. *v.* Whalen, 127 Fed. Rep. 611.

6. McCulloch *v.* Murphy, 125 Fed. Rep. 147.

7. Entry of Third Person Necessary to Complete Forfeiture. — Worthen *v.* Sidway, 72 Ark. 215, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 738; Field *v.* Tanner, 32 Colo. 278.

8. Resumption of Work. — Fee *v.* Durham, (C. C. A.) 121 Fed. Rep. 468; Worthen *v.* Sidway, 72 Ark. 215, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 738; Buffalo Zinc, etc., Co. *v.* Crump, 70 Ark. 525, 91 Am. St. Rep. 87; Temescal Oil Min., etc., Co. *v.* Salcido, 137

Cal. 211; Field *v.* Tanner, 32 Colo. 278; Little Dorrit Gold Min. Co. *v.* Arapahoe Gold Min. Co., 30 Colo. 431; McKay *v.* McDougall, 25 Mont. 258, 87 Am. St. Rep. 395.

739. 1. Work Must Be Prosecuted with Diligence. — Worthen *v.* Sidway, 72 Ark. 215, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 739. See also Fee *v.* Durham, (C. C. A.) 121 Fed. Rep. 468.

4. Forfeiture to Co-owner by Notice or Advertisement. — Elder *v.* Horseshoe Min., etc., Co., 15 S. Dak. 124, affirmed 194 U. S. 248, discussing the question what constitutes sufficient publication.

Strict Construction of Statute Required. — Haynes *v.* Briscoe, 29 Colo. 137.

740. 1. Interest of Deceased Co-owner. — Elder *v.* Horseshoe Min., etc., Co., 194 U. S. 248, affirming 15 S. Dak. 124, 102 Am. St. Rep. 681.

3. Haynes *v.* Briscoe, 29 Colo. 137.

8. Abandonment or Forfeiture Prerequisite. — Fee *v.* Durham, (C. C. A.) 121 Fed. Rep. 468; McCulloch *v.* Murphy, 125 Fed. Rep. 147; Willett *v.* Baker, 133 Fed. Rep. 937; Zerres *v.* Vanina, 134 Fed. Rep. 610; Russell *v.* Dufresne, 1 Alaska 486; Conn *v.* Oberto, 32 Colo. 313; Peoria, etc., Milling, etc., Co. *v.* Turner, (Colo. App. 1905) 79 Pac. Rep. 915; McKay *v.* McDougall, 25 Mont. 258, 87 Am. St. Rep. 395; Reynolds *v.* Pascoe, 24 Utah 219; Cranston *v.* English Canadian Co., 7 British Columbia 266; Grutchfield *v.* Harbottle, 7 British Columbia 344; Rammelmeier *v.* Curtis, 8 British Columbia 383.

The Mere Fact that the Entry of a Mining Location in the Patent Office Has Been Canceled does not make the ground subject to relocation. Rebecca Gold Min. Co. *v.* Bryant, 31 Colo. 119, 102 Am. St. Rep. 17.

The Recording of a Certificate of Work Subsequent to the Abandonment cures defects in a title secured by a relocation made prior to the abandonment of the former location. Gelinis *v.* Clark, 8 British Columbia 42.

Statute Requiring Permission to Relocate. — See Snyder *v.* Ransom, 10 British Columbia 182.

741. 5. By Whom Relocation May Be Made — Relocation by Agent. — See note 8.

750. X. PROCEEDINGS TO OBTAIN PATENT — 2. Proceedings in Land Office — d. PUBLICATION OF NOTICE OF APPLICATION — (1) *Statutory Provision*. — See note 7.

754. f. PROTEST AND ADVERSE CLAIM — (3) *Time to Adverse*. — See note 2.

756. (4) *Requisites, Nature, and Effect of Adverse Claim* — Effect of Failure to Adverse. — See note 5.

757. (5) *Necessity of Adversing* — (b) Townsite Claims. — See note 4.

(a) Tunnel Claims. — See notes 7, 9.

758. 3. Proceedings in Court — a. JURISDICTION. — See note 4.

759. b. COMMENCEMENT AND PROSECUTION OF ACTION — (1) *Time Essential*. — See note 2.

(2) *When Deemed Commenced*. — See note 3.

760. c. FORM OF ACTION — (1) *In General*. — See note 2.

(2) *Ejectment*. — See note 3.

(3) *Action to Quiet Title*. — See note 4.

761. d. WHO MAY SUE — Citizenship. — See note 2.

e. TITLE TO SUPPORT RECOVERY. — See note 3.

762. The Present Rule. — See note 1.

f. JUDGMENT — (2) *Effect as to Parties*. — See note 5.

741. 8. A Relocation by a Tenant in Common operates as a relocation by his cotenants. *Yarwood v. Johnson*, 29 Wash. 643.

750. 7. Notice Held Similar in Effect to Summons. — See *Jefferson Min. Co. v. Anchoria-Leland Min., etc., Co.*, 32 Colo. 176; *Lavagnino v. Uhlig*, 26 Utah 1, 99 Am. St. Rep. 808.

754. 2. Time to Adverse. — *Bunker Hill, etc., Min., etc., Co. v. Empire State-Idaho Min., etc., Co.*, (C. C. A.) 109 Fed. Rep. 538; *Pennsylvania Min. Co. v. Bales*, 18 Colo. App. 108; *Lavagnino v. Uhlig*, 26 Utah 1, 99 Am. St. Rep. 808; *Lily Min. Co. v. Kellogg*, 27 Utah 111.

756. 5. Failure to Adverse Waiver of Right. — *Bunker Hill, etc., Min., etc., Co. v. Empire State-Idaho Min., etc., Co.*, (C. C. A.) 109 Fed. Rep. 538; *Jefferson Min. Co. v. Anchoria-Leland Min., etc., Co.*, 32 Colo. 176; *Lavagnino v. Uhlig*, 26 Utah 1, 99 Am. St. Rep. 808.

The Statute Has No Application to Controversies Between Co-owners as to the Same Location, but refers to conflicting adverse claims to the same ground. *Stevens v. Grand Cent. Min. Co.*, (C. C. A.) 133 Fed. Rep. 28.

757. 4. Townsite Claimant Must Adverse Mining Claimant. — See *Behrends v. Goldstein*, 1 Alaska 518, holding that the owner of an unpatented town lot cannot adverse a mining claim, but has the right of protesting it.

7. *Uinta Tunnel Min., etc., Co. v. Creede, etc., Min., etc., Co.*, (C. C. A.) 119 Fed. Rep. 164, affirmed 196 U. S. 337.

9. *Uinta Tunnel Min., etc., Co. v. Creede, etc., Min., etc., Co.*, (C. C. A.) 119 Fed. Rep. 164, affirmed 196 U. S. 337.

758. 4. *Tonopah Fraction Min. Co. v. Douglass*, 123 Fed. Rep. 936.

Proceedings Should Be Stayed until Termination of Suit. — See *Fox v. Mackay*, 1 Alaska 329, criticising the doctrine inferable from *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, that an applicant for a patent may, pending the decision on an adverse claim, secure a pat-

ent to the part of the tract not in dispute without waiving his claim to the disputed portion.

759. 2. Time of Commencing Action Essential. — *Pennsylvania Min. Co. v. Bales*, 18 Colo. App. 108; *Hopkins v. Butte Copper Co.*, 29 Mont. 390.

Suit Pending Between Parties When Adverse Is Filed. — Where a suit to determine the title to the land is actually pending between the parties at the time when the adverse is filed, it is not necessary to bring a new suit to support the adverse. *Jones v. Pacific Dredging Co.*, 9 Idaho 186.

3. What Is Commencement of Action. — See *Woody v. Hinds*, 30 Mont. 189.

760. 2. Form of Action Controlled by Laws of Jurisdiction. — *Mares v. Dillon*, 30 Mont. 117.

3. *Ejectment*. — *Deeney v. Mineral Creek Milling Co.*, 11 N. Mex. 279; *Clark v. Haney*, 8 British Columbia 130.

4. *Action to Quiet Title*. — *Tonopah Fraction Min. Co. v. Douglass*, 123 Fed. Rep. 936; *Allen v. Myers*, 1 Alaska 114.

761. 2. *Citizenship Involved*. — *Tonopah Fraction Min. Co. v. Douglass*, 123 Fed. Rep. 936.

3. The Burden of Proof is, in *British Columbia*, on the adverse claimant, who must give affirmative evidence of his own title. *Caldwell v. Davys*, 7 British Columbia 156.

If the Plaintiff Wishes to Attack the Defendant's Title He Must Attack It While Proving His Own Title, and not wait until rebutted. *Dunlop v. Haney*, 7 British Columbia 1.

Whether Certificate of Work May Be Impugned. — See *Cleary v. Boscowitz*, 32 Can. Sup. Ct. 417, affirming 8 British Columbia 225.

762. 1. Must Be Good as Against Government. — *Willitt v. Baker*, 133 Fed. Rep. 937; *Wilson v. Freeman*, 29 Mont. 470.

5. *Priority of Location*. — *Bunker Hill, etc., Min., etc., Co. v. Empire State-Idaho Min., etc., Co.*, (C. C. A.) 109 Fed. Rep. 538.

762. 4. Possessory Title. — See note 6.

763. 5. Application for Coal Lands. — See note 1.

764. XI. PATENT — 1. Operation and Effect — *a.* IN GENERAL. — See note 3.

Relation to Time of Location. — See note 5.

765. *b.* CONCLUSIVENESS — (1) *Collateral Attack* — (*a.*) Patent Valid on Its Face. — See notes 1, 4.

766. (2) *Direct Attack* — Presumption of Regularity. — See note 5.

XII. RIGHT OF SOVEREIGN OR STATE TO MINES — 1. In England — *a.* IN GENERAL. — See note 7.

770. XIV. RIGHTS AND LIABILITIES AS TO MINERALS INCIDENT TO DIFFERENT ESTATES — 3. Tenant for Life — *b.* WHAT CONSTITUTES WASTE. — See note 3.

771. 5. When Surface and Mineral Estates Severed — *a.* IN GENERAL. — See note 6.

773. *b.* HOW SEVERANCE ACCOMPLISHED — (1) *By Conveyance*. — See note 1.

774. *d.* RESULTING RIGHTS AND DUTIES OF OWNERS OF MINE AND OF SURFACE — (1) *Right of Mine Owner* — (*a.*) Right to Use Surface. — See note 5.

775. XV. CONVEYANCES — 1. Mines and Mining Claims Transferable. — See note 4.

2. Necessity of Written Conveyance. — See notes 5, 6.

762. 6. Possessory Title. — See *Cleary v. Skiffich*, 28 Colo. 362, 89 Am. St. Rep. 207.

In an action to quiet title to a mine that has been in the actual possession of a party for a number of years, a stranger cannot interpose a defense that a prior claim has not been abandoned where the stranger asserts no rights under the prior claim. *Ramus v. Humphreys*, 133 Cal. xx, 65 Pac. Rep. 875.

763. 1. Application for License to Search for Coal Areas under Canadian Statute. — See *In re Barrington*, 35 Nova Scotia 426.

764. 3. Operation and Effect of Patent Generally. — *Alaska Gold Min. Co. v. Barbridge*, 1 Alaska 311; *Fox v. Mackay*, 1 Alaska 329.

Presumption. — The delivery of a patent raises a conclusive presumption of compliance with all preliminary requirements. *Galbraith v. Shasta Iron Co.*, 143 Cal. 94; *Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co.* (C. C. A.) 131 Fed. Rep. 579.

But it is still possible for a party interested adversely to the owner of the patent to show the time when the preliminary steps were taken. *Creede, etc., Min., etc., Co. v. Uinta Tunnel Min., etc., Co.*, 196 U. S. 337.

5. Relation to Time of Location. — See *Uinta Tunnel Min., etc., Co. v. Creede, etc., Min., etc., Co.* (C. C. A.) 119 Fed. Rep. 164, *affirmed* 196 U. S. 337.

765. 1. Conclusiveness of Patent. — *Peabody Gold Min. Co. v. Gold Hill Min. Co.* (C. C. A.) 111 Fed. Rep. 817; *Quinn v. Baldwin Star Coal Co.*, 19 Colo. App. 497. See also *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499; *Neilson v. Champagne Min., etc., Co.* (C. C. A.) 119 Fed. Rep. 123.

4. Bounds or Limits of Claim. — *Empire State-Idaho Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co.* (C. C. A.) 114 Fed. Rep. 420. See also *Peabody Gold Min. Co. v. Gold Hill Min. Co.* (C. C. A.) 111 Fed. Rep. 817.

766. 5. Presumption of Regularity. — *Pea-*

body Gold Min. Co. v. Gold Hill Min. Co. (C. C. A.) 111 Fed. Rep. 817.

7. The Canadian Government, by regulations made under the Dominion Land Act, may validly reserve a royalty on gold produced by placer mining in the Yukon, though the miner, by his license, has the exclusive right to all the gold mined. *Rex v. Chappelle*, 32 Can. Sup. Ct. 586, *affirmed* (1904) A. C. 127.

770. 3. Right to Work Open Mines. — *In re Chaytor*, (1900) 2 Ch. 804.

771. 6. Mine and Surface Severed. — *Hosack v. Crill*, 204 Pa. St. 97.

773. 1. Severance by Conveyance. — *Barr v. Baird*, Sc. Ct. of Sess. 6 F. 524; *Greville v. Hemingway*, 87 L. T. N. S. 443; *Hosack v. Crill*, 204 Pa. St. 97. See also *McConnell v. Pierce*, 210 Ill. 627.

774. 5. Use of Surface. — *Ingle v. Bottoms*, 160 Ind. 73, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 774.

775. 4. Transferable Character of Mines and Mining Claims. — *In re St. Eugene Min. Co.*, 7 British Columbia 288; *Dumas Gold Mines v. Boulbee*, 10 British Columbia 511. See also *Briggs v. Newswander*, 32 Can. Sup. Ct. 405, construing a contract conveying an interest in certain mining claims.

A Valid Location of a Petroleum Placer Claim can be sold or leased even before the discovery of petroleum. *Weed v. Snook*, 144 Cal. 439.

Conveyance Before Location Perfected. — A party may make a valid conveyance of his location before he has taken all the steps necessary to perfect it. *Miller v. Chrisman*, 140 Cal. 440, 98 Am. St. Rep. 63; *Bay v. Oklahoma Southern Gas, etc., Co.*, 13 Okla. 425.

5. Early Rule as to Verbal Transfer of Mining Claims. — See *Murray Hill Min., etc., Co. v. Havenar*, 24 Utah 73.

6. Contract of Sale Must Be in Writing. — *Snow v. Nelson*, 113 Fed. Rep. 353; *Alexander v. Heath*, 8 British Columbia 95.

777. XVI. MINING LEASES — 4. Right of Lessee to Work Open Mines. — See note 5.

779. 7. Construction — a. IN GENERAL. — See note 1.

b. COVENANTS PECULIAR TO MINING LEASES — (1) Covenant for Diligent Prosecution of Work. — See note 2.

781. Implied Covenant. — See note 2.

Failure to Find Gas or Oil "in Paying Quantities." — See note 3.

784. (5) No Implied Covenant or Warranty that Premises Contain Mineral. — See note 7.

785. 8. Abandonment. — See note 3.

786. 10. Right to Machinery, Fixtures, and Appliances Placed upon Premises by Lessee. — See note 1.

12. Assignment. — See note 4.

787. XVII. TENANTS IN COMMON — 1. General Principles. — See note 1.

788. 3. Partition. — See note 8.

789. Sale to Effect Partition. — See note 4.

XVIII. STATUTORY REGULATION. — See note 6.

790. See notes 1, 3, 6.

Appurtenances. — In *Alaska* it is held that mining ditches and flumes do not pass as appurtenant when a mine is conveyed. They are regarded as real estate, and must be conveyed with the full formalities of a real estate conveyance. *Noland v. Coon*, 1 *Alaska* 36.

777. 5. Lessee Entitled to Work Open Mines. — See *In re Chaytor*, (1900) 2 *Ch.* 804.

779. 1. For the Construction of Certain Provisions Peculiar to Mining Leases. — See *Atty.-Gen. v. Waverley Gold Min. Co.*, 35 *Nova Scotia* 192 (construction of statute requiring applicants for leases to give their addresses to the commissioner of mines); *Haven v. Hughes*, 27 *Ont. App.* 1.

2. Covenants for Diligent Prosecution of Work. — *Clear Creek Leasing, etc., Co. v. Comstock Gold-Silver Min., etc., Co.*, 17 *Colo. App.* 480.

781. 2. Forfeiture from Failure to Perform Implied Covenant. — *Logan Natural Gas, etc., Co. v. Great Southern Gas, etc., Co.*, (C. C. A.) 126 *Fed. Rep.* 623.

3. Failure to Find Gas or Oil in Paying Quantities. — *Chaney v. Ohio, etc., Oil Co.*, 32 *Ind. App.* 193; *Rawlings v. Armel*, 70 *Kan.* 778; *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 *W. Va.* 501, 97 *Am. St. Rep.* 1027.

Construction of Phrase "Paying Quantities." — See *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 *W. Va.* 501, 97 *Am. St. Rep.* 1027.

It is not sufficient that an oil well gives indications that it may produce oil in paying quantities, but it must actually do so. *Murdock-West Co. v. Logan*, 69 *Ohio St.* 514.

784. 7. Express Covenant that Premises Shall Contain Mineral. — See *Kenton Gas, etc., Co. v. Orwick*, 11 *Ohio Cir. Dec.* 786, 21 *Ohio Cir. Ct.* 274.

785. 3. Right of Lessor to Claim Abandonment Indisputable. — *Gadbury v. Ohio, etc., Consol. Natural Gas Co.*, 162 *Ind.* 9; *Calhoun v. Neeley*, 201 *Pa. St.* 97.

786. 1. Right to Machinery, Fixtures, and Appliances. — *Siler v. Globe Window-Glass Co.*, 11 *Ohio Cir. Dec.* 784, 21 *Ohio Cir. Ct.* 284, holding that drive-pipe, casing, and tubing are

trade fixtures and removable; *Couch v. Welsh*, 24 *Utah* 36.

4. Assignment of Mining Leases. — *Caley v. Portland*, 18 *Colo. App.* 390.

Liability of Assignee. — *Chaney v. Ohio, etc., Oil Co.*, 32 *Ind. App.* 193.

Liability of Lessee on Express Covenants After Assignment of Lease. — *Heller v. Dailey*, 28 *Ind. App.* 555.

787. 1. Tenancy in Common. — See *Cedar Canyon Consol. Min. Co. v. Yarwood*, 27 *Wash.* 271, 91 *Am. St. Rep.* 841.

If One of Two Joint Transferees of an Undivided Interest in a Mineral Claim Rejects the Transfer, no title passes to the other. *Cook v. Denholm*, 8 *British Columbia* 39.

788. 8. Right of Partition. — *Ryan v. Egan*, 26 *Utah* 241.

789. 4. Sale to Effect Partition. — *Ryan v. Egan*, 26 *Utah* 241, quoting 20 *AM. AND ENG. ENCYC. OF LAW* (2d ed.) 789, approving the whole text paragraph, and decreeing partition by metes and bounds.

6. Health and Safety Statutes. — *Stokes v. Mitcheson*, (1902) 1 *K. B.* 857; *Anderson v. Mikado Min. Co.*, 3 *Ont. L. Rep.* 581; *McDonald v. Canadian Pac. Exploration Co.*, 8 *British Columbia* 39; *Atty.-Gen. v. Wellington Colliery Co.*, 10 *British Columbia* 397; *In re Coal Mines Regulation Act*, 10 *British Columbia* 408; *St. Louis Consol. Coal Co. v. Illinois*, 185 *U. S.* 203.

Statute Requiring Manholes Along Underground Railway. — See *Booker v. Wellington Colliery Co.*, 9 *British Columbia* 265.

Statute Regulating Use of Explosives in Mines. — See *Jones v. Robson*, (1901) 1 *K. B.* 673.

790. 1 Fencing. — *Knuckey v. Red-nth Rural District Council*, (1904) 1 *K. B.* 382; *Grant v. Acadia Coal Co.*, 32 *Can. Sup. Ct.* 427.

3. Inspection. — *St. Louis Consol. Coal Co. v. Illinois*, 185 *U. S.* 203; *Grant v. Acadia Coal Co.*, 32 *Can. Sup. Ct.* 427.

6. Payment According to Weight at Mine. — *Humble v. Humphreys*, (1902) *A. C.* 207. See also *Sykes v. Barraclough*, (1904) 2 *K. B.* 675, construing a statute permitting miners to station a "check-weigher" at the place of weighing.

790. XIX. LIENS ON MINING PROPERTY — 1. In General. — See note 7.

791. 2. What Interest Is Subject to Lien. — See note 1.

792. XX. MEASURE OF DAMAGES FOR WRONGFUL WORKING OF MINE —
Where Trespass Is Result of Honest Mistake. — See note 1.

793. Where Trespass Is Wilful or Fraudulent. — See note 1.

MINISTERIAL — A Ministerial Act. — See note 3.

A Ministerial Duty. — See note 4.

A Ministerial Office. — See note 5.

798. MINOR. — See note 3.

800. MISCARRIAGE. — See note 1.

801. MISCONDUCT. — See note 1.

802. MISDEMEANOR. — See note 1.

MISFEASANCE. — See note 3.

803. MISFORTUNE. — See note 1.

MISPLEADING. — See note 5.

804. MISREPRESENTATION. — See note 3.

790. 7. Mines Subject to Liens. — See Phillips *v. Salmon River Min., etc., Co.*, 9 Idaho 140.

Foreman or Superintendent Entitled to Lien. — Idaho Min., etc., Co. *v. Davis*, (C. C. A.) 123 Fed. Rep. 396. See also Sutton *v. Consolidated Apex Min. Co.*, 15 S. Dak. 410.

A Party in Whose Charge a Mine Is Placed has a lien on the personal property of the mine for his services. Idaho Comstock Min., etc., Co. *v. Lundstrum*, 9 Idaho 257.

Workman in Refining Mill Entitled to Lien. — Thompson *v. Wise Boy Min., etc., Co.*, 9 Idaho 363.

No Lien for Labor of Expert While Prospecting. — Lindemann *v. Belden Consol. Min., etc., Co.*, 16 Colo. App. 342.

Watchman Not Entitled to Lien. — Williams *v. Hawley*, 144 Cal. 97.

791. 1. Interests of Strangers to Contract Not Affected. — Walter C. Hadley Co. *v. Cummings*, 7 Ariz. 258; Griffin *v. Hurley*, 7 Ariz. 399.

Independent Contractor. — Reese *v. Bald Mountain Consol. Gold Min. Co.*, 133 Cal. 285, holds that a laborer has no lien against a mine owner for services rendered at the mine for an independent contractor where the laborer knew at the time when he performed the services that the contractor had agreed to hold the mine owner harmless from liens.

792. 1. Measure of Damages for Wrongful Working of Mine. — Montrozona Gold Min. Co. *v. Thatcher*, 19 Colo. App. 371; Crawford *v. Forest Oil Co.*, 208 Pa. St. 5.

Trover. — See Ivy Coal, etc., Co. *v. Alabama Coal, etc., Co.*, 135 Ala. 579, 93 Am. St. Rep. 46; Lyon *v. Gormley*, 53 Pa. St. 261.

793. 1. Exemplary or Punitive Damages Allowed. — In *Pennsylvania* the statute imposes treble damages on a party wilfully conducting mining operations on the land of another. Ruttledge *v. Kress*, 17 Pa. Super. Ct. 490.

3. Ministerial Act. — Freund *v. Freund*, 218 Ill. 204, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 793; People *v. Salsbury*, 134 Mich. 548, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed. 793; State *v. Nash*, 66 Ohio St. 612; Marsteller *v. Ward*, 52 W. Va. 84, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 793.

4. Ministerial Duty. — Henkel *v. Millard*, 97 Md. 24; People *v. Jerome*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 256.

5. Ministerial and Administrative Officers Synonymous. — State *v. Loechner*, 65 Neb. 814.

798. 3. Minor Children Does Not Include Grandchildren. — The term "*minor* children" in a statute granting survival of actions to such does not include grandchildren who are *minors*, or those who are of age, or any other descendants, more remote. Walker *v. Vicksburg, etc., R. Co.*, 110 La. 718.

Minor — Emancipation. — See Ray *v. Kelly*, 82 Miss. 597.

800. 1. Miscarriage. — State *v. Magnell*, 3 Penn. (Del.) 307.

801. 1. Parent and Child. — Carson *v. Carson*, (N. J. 1903) 54 Atl. Rep. 149.

Guardian. — See Matter of Nowak, (Surrogate Ct.) 38 Misc. (N. Y.) 713.

802. 1. Crime and Misdemeanor Compared. — Stone *v. Paducah*, (Ky. 1905) 86 S. W. Rep. 531.

3. Brock v. Berry, 132 Ala. 95; Dudley *v. Flemingsburg*, 115 Ky. 5.

Distinction Between Misfeasance, Nonfeasance, and Malfeasance. — Lough *v. Davis*, 30 Wash. 204.

803. 1. Misfortune. — Anthony *v. Karbach*, 64 Neb. 509 (judgment by default).

5. Mispleading. — Chicago, etc., R. Co. *v. Murphy*, 108 Ill. 462.

804. 3. Insurance. — Jenkins *v. Covenant Mut. L. Ins. Co.*, 171 Mo. 375.

MISTAKE.

By E. G. CHILTON.

807. I. DEFINITIONS — Mistake. — See note 1.

A Mistake of Fact. — See note 2.

A Mistake of Law. — See note 3.

808. II. LEGAL EFFECT OF MISTAKE IN GENERAL. — See note 3.

809. III. EFFECT UPON CONTRACTS — 1. Statement of Principle. — See note 1.

Powers of Courts of Equity. — See notes 2, 3, 5.

810. 2. Mistake as to Legal Effect. — See notes 2, 3.

811. 3. Essential Errors — *a. MISTAKES WHICH PREVENT ASSENT OF PARTIES* — (1) *In General.* — See note 3.

(3) *Mistake in Respect to Subject-matter* — Identity. — See note 6.

812. *b. MISTAKES IN RESPECT TO EXTRINSIC CIRCUMSTANCES* — (1) *Mistake as to Extrinsic Facts* — (a) *In General.* — See note 4.

(b) *Requisites for Relief* — *aa. MISTAKE MUST CONCERN MATERIAL FACT.* — See note 5.

813. *bb. MISTAKE MUST BE MUTUAL.* — See notes 1, 3.

cc. MISTAKE MUST CONCERN EXISTING FACT. — See note 4.

814. (a) Mistake as to Quantity of Things Sold. — See note 4.

Sale of Land by Quantity. — See notes 7, 11.

807. 1. Mistake Defined. — See Chicago, etc., R. Co. v. Green, 114 Fed. Rep. 676.

2. Mistake of Fact Defined. — Hoops v. Fitzgerald, 204 Ill. 325; O'Callaghan v. Lancy, 187 Mass. 475, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 807; Marshall v. Homier, 13 Okla. 264.

3. Mistake of Law Defined. — See Atherton v. Roche, 192 Ill. 252.

808. 3. Mistake as Such Has No Legal Effect. — See Curtis v. Albee, 167 N. Y. 360.

809. 1. Effect of Mistake upon Contract. — See Curtis v. Albee, 167 N. Y. 360.

2. If Parties Deliberately Adopt a Certain Contract. — Curtis v. Albee, 167 N. Y. 360.

3. Equity Will Not Add Omitted Provisions. — Curtis v. Albee, 167 N. Y. 360.

5. Smith v. Rust, 112 Ill. App. 84, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 809.

810. 2. Mistake as to Legal Effect No Ground for Rescission. — *In re Morgan*, 125 Iowa 247; Leszynsky v. Ross, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 652.

3. Mistake as to Legal Effect No Ground for Reformation. — Atherton v. Roche, 192 Ill. 252; Morton v. Morris, 27 Tex. Civ. App. 262.

811. 3. Assent Essential to Formation of Contract. — See Bowen v. Wolff, 23 R. I. 56.

6. Mistake as to Lot Purchased — Specific Performance of Contract Refused. — See Van Praagh v. Everidge, (1903) 1 Ch. 434.

812. 4. Mistake as to Extrinsic Facts. — See Farmers' L. & T. Co. v. Suydam, (Neb. 1903) 95 N. W. Rep. 867.

Illustrations. — That parties executed a lease under the mutual erroneous belief that the walls of the leased building were strong enough

to support two additional stories, was held to warrant equitable relief. Hoops v. Fitzgerald, 204 Ill. 325.

5. Mistake Must Concern a Material Fact. — Hoops v. Fitzgerald, 204 Ill. 325; German Sav. Bank v. Geneser, 116 Iowa 119.

813. 1. Mistake Must Be Mutual. — Hoops v. Fitzgerald, 204 Ill. 325; German Sav. Bank v. Geneser, 116 Iowa 119; Stewart v. Dunn, 77 N. Y. App. Div. 631; Travelers' Ins. Co. v. Jones, 32 Tex. Civ. App. 146.

But if one of the parties has, without gross laches, made a mistake which was or should have been known to the opposite party, the court will afford relief. Singer v. Grand Rapids Match Co., 117 Ga. 86.

3. Only Reasonable Diligence Is Required where the facts are open to all parties. Hoops v. Fitzgerald, 204 Ill. 325.

4. Mistake Must Concern an Existing Fact. — Chicago, etc., R. Co. v. Wilcox, (C. C. A.) 116 Fed. Rep. 913. Compare Wilcox v. Chicago, etc., R. Co., 111 Fed. Rep. 435, granting equitable relief where the mistake of fact was caused by the defendant's representations, which in one sense referred to the future and involved a contingency.

814. 4. A Mistake as to the Number of Car Loads of Matches Sold was held to justify a court of equity in granting relief. Singer v. Grand Rapids Match Co., 117 Ga. 86.

7. Mistake in the Sale of Land by Quantity — Slight Discrepancy Will Not Affect. — See Equitable Trust Co. v. Milligan, 31 Ind. App. 20.

11. Giving Compensation for Excess or Deficiency. — Martin v. Peddy, 120 Ga. 1079; Equitable Trust Co. v. Milligan, 31 Ind. App. 20.

815. (e) Mistake as to Value of Things Sold — Value Dependent upon Extrinsic Facts. — See note 2.

(f) When Facts Are Doubtful — *aa.* IN GENERAL. — See note 5.

816. (2) Mistakes of Law — (a) IN GENERAL. — See notes 3, 4, 5, 6, 7.

817. (c) Mistakes of Purchasers — *aa.* VENDOR'S RIGHT TO SELL. — See note 6.
cc. DISCHARGING MORTGAGES. — See note 9.

818. (3) Mistakes of Fact Induced by Mistakes of Law — (b) Private Right of Ownership — *aa.* EXISTENCE OF RIGHT — (*aa.*) *In General.* — See note 6.

819. *bb.* NATURE AND EXTENT OF RIGHT. — See note 6.

A Widow's Election. — See note 9.

820. (e) Existence of Legal Liability. — See note 4.

(4) *Restoring Status Quo.* — See note 8.

821. See note 1.

4. Errors of Expression — *a.* DEFINED AND DISTINGUISHED — Distinguished from Essential Error. — See note 2.

b. ESSENTIAL ELEMENTS — (1) *Definite Preceding Agreement* — (a) *In General.* — See notes 3, 5.

815. 2. Where Value Is Affected by Extrinsic Fact. — *L. D. Garrett Co. v. Halsey*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 438.

5. Settlement Predicated on Uncertain Facts. — See *Heath v. Albrook*, 123 Iowa 559.

816. 3. Ignorance of Law Excuses No One. — *Heath v. Albrook*, 123 Iowa 559; *Scott v. Ford*, 45 Oregon 531, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816. See also *Atlanta Trust, etc., Co. v. Nelms*, 116 Ga. 915; *Bottomff v. Lewis*, 121 Iowa 27; *Biggs v. Bailey*, 49 W. Va. 188.

4. Reason of the Rule. — *Scott v. Ford*, 45 Oregon 531, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816; *Scott v. Slaughter*, 35 Tex. Civ. App. 524.

5. Misrepresentation. — *Scott v. Ford*, 45 Oregon 531, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816; *Olney v. Weaver*, 24 R. I. 409, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816. See also *Wall v. Meilke*, 89 Minn. 232; *Scott v. Slaughter*, 35 Tex. Civ. App. 524.

6. Fraud. — *Scott v. Ford*, 45 Oregon 531, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816; *Olney v. Weaver*, 24 R. I. 409, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816. See also *Wall v. Meilke*, 89 Minn. 232; *Scott v. Slaughter*, 35 Tex. Civ. App. 524.

7. One Party Taking Unfair Advantage of Other's Ignorance. — *Scott v. Ford*, 45 Oregon 531, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816; *Olney v. Weaver*, 24 R. I. 409, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816; *MacKay v. Smith*, 27 Wash. 442, 91 Am. St. Rep. 841; *Biggs v. Bailey*, 49 W. Va. 188. See also *Wall v. Meilke*, 89 Minn. 232.

817. 6. An Action for Money Had and Received is not maintainable by a purchaser of realty from a vendor without title where the moneys were paid with full knowledge of all the facts, but under a clear mistake of law. *Scott v. Slaughter*, 35 Tex. Civ. App. 524.

9. Extinguishing Mortgage by Mistake. — *Perry v. Williams*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 57.

818. 6. Private Right of Ownership. — *Bottomff v. Lewis*, 121 Iowa 27.

819. 6. Conveying Larger Interest than Intended. — Where a renunciation by a widow of

her rights under her husband's will was ineffectual because of failure to file the instrument before her death, and an heir, believing the renunciation to be valid, executed a conveyance of an undivided half of certain realty, instead of one-fourth, which was the extent of the interest intended to be conveyed, the conveyance was canceled by a court of equity. *Castleman v. Castleman*, 184 Mo. 432.

9. Improvements by Widow Believing Herself Entitled to Dower. — A widow may not recover moneys paid for improvements under the misapprehension that she was entitled to dower in an estate *per autre vie*, it appearing that there was no fraud, misrepresentation, or undue influence. *Olney v. Weaver*, 24 R. I. 409.

820. 4. Mistake as to Existence of Legal Liability. — *Connor v. Baxter*, 124 Iowa 219.

8. Substantial Restoration Must Be Made. — *Hoops v. Fitzgerald*, 204 Ill. 325; *Fritz v. Fritz*, (Minn. 1905) 102 N. W. Rep. 705. See also *Niederhauser v. Detroit Citizens' St. R. Co.*, 131 Mich. 550; *Bowen v. Wolff*, 23 R. I. 56.

821. 1. Where by Mistake a Defeasance Clause Was Inserted equity will grant relief by compelling the execution of a perfect deed. *Welch v. Lefler*, (Ky. 1902) 66 S. W. Rep. 619.

2. Errors of Expression — Defined and Distinguished. — *Ferrell v. Ferrell*, 53 W. Va. 520, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 821.

3. Error of Expression — Definite Preceding Agreement Essential. — *Connor v. Baxter*, 124 Iowa 219; *Fritz v. Fritz*, (Minn. 1905) 102 N. W. Rep. 705; *Rowell v. Smith*, 123 Iowa 510. See also *Bowman v. Besley*, 122 Iowa 42; *Lansing v. Commercial Union Assur. Co.*, (Neb. 1903) 93 N. W. Rep. 756; *Jones v. Warren*, 134 N. Car. 394.

5. Actual Contract Must Be Shown. — *Fulton v. Colwell*, 110 Fed. Rep. 54, affirmed (C. C. A.) 112 Fed. Rep. 831; *Johnson v. Sherwood*, 34 Ind. App. 490; *Fritz v. Fritz*, (Minn. 1905) 102 N. W. Rep. 705; *Story v. Gammell*, (Neb. 1903) 94 N. W. Rep. 682. See also *Lansing v. Commercial Union Assur. Co.*, (Neb. 1903) 93 N. W. Rep. 756; *Le Gendre v. Scottish Union, etc., Ins. Co.*, 95 N. Y. App. Div. 562.

Continuance of Intention. — Not only must

821. (b) Agreement Must Be Enforceable. — See note 6.

822. (d) Statute of Frauds and Perjuries. — See note 3.

(2) *Mistake Must Be Mutual* — (a) Statement of Principle. — See note 4.

823. See note 1.

(b) Mistake of Scrivener. — See note 2.

(c) Mistake on One Side and Fraud on the Other. — See notes 3, 4.

824. (3) *Nature of Mistake*. — See notes 1, 3, 4.

the actual intention of the parties be shown, but it must appear that such intention continued concurrently in the minds of both of them down to the time of the execution of the contract sought to be reformed. *Southern Finishing, etc., Co. v. Ozment*, 132 N. Car. 839.

821. 6. *Fritz v. Fritz*, (Minn. 1905) 102 N. W. Rep. 705. See also *Rowell v. Smith*, 123 Wis. 510.

822. 3. Statute of Frauds Not Applicable. — See *Lansing v. Commercial Union Assur. Co.*, (Neb. 1903) 93 N. W. Rep. 756. But see *Rowell v. Smith*, 123 Wis. 510.

4. Mistake Must Be Mutual — *United States*. — *Fulton v. Colwell*, 110 Fed. Rep. 54, affirmed (C. C. A.), 112 Fed. Rep. 831.

California. — *Eureka v. Gates*, 137 Cal. 89.

Illinois. — *Kelly v. Galbraith*, 186 Ill. 593; *Atherton v. Roche*, 192 Ill. 252; *Gray v. Merchants' Ins. Co.*, 113 Ill. App. 537.

Indiana. — *Smelser v. Pugh*, 29 Ind. App. 614; *Johnson v. Sherwood*, 34 Ind. App. 490.

Iowa. — *Nielander v. Chicago, etc., R. Co.*, 114 Iowa 420; *Montgomery v. Mann*, 120 Iowa 609; *Bowman v. Besley*, 122 Iowa 42; *Conner v. Baxter*, 124 Iowa 219.

Kansas. — *German Ins. Co. v. Kirkendall*, 64 Kan. 884, 67 Pac. Rep. 443.

Kentucky. — *Pritchett v. Frisby*, (Ky. 1901) 63 S. W. Rep. 10; *Hill v. Pettit*, (Ky. 1902) 66 S. W. Rep. 188. See also *Bush v. Starks*, (Ky. 1901) 65 S. W. Rep. 589.

Minnesota. — *Fritz v. Fritz*, (Minn. 1905) 102 N. W. Rep. 705.

Mississippi. — *Miles v. Miles*, 84 Miss. 624.

Missouri. — *Benn v. Pritchett*, 163 Mo. 560.

New Jersey. — *Ocean Beach Assoc. v. Trenton Trust, etc., Co.*, (N. J. 1901) 48 Atl. Rep. 559; *Whelen v. Osgoodby*, 62 N. J. Eq. 571.

New York. — *Miller v. Carpenter*, 68 N. Y. App. Div. 346; *Dougherty v. Lion F. Ins. Co.*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 285, affirmed 95 N. Y. App. Div. 618; *Fox v. Coggeshall*, 95 N. Y. App. Div. 410.

North Carolina. — *Jones v. Warren*, 134 N. Car. 394, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 823 [822].

North Dakota. — *Forester v. Van Auken*, 12 N. Dak. 175.

Oklahoma. — *Marshall v. Homier*, 13 Okla. 264.

Oregon. — *King v. Holbrook*, 38 Oregon 452.

Pennsylvania. — *Bierman v. Lebanon Valley College*, 20 Pa. Super. Ct. 133; *Youngstown Electric Light Co. v. Butler County Poor Dist.*, 21 Pa. Super. Ct. 95; *Boyce v. Hamburg-Bremen F. Ins. Co.*, 24 Pa. Super. Ct. 589.

Texas. — *Houston, etc., Cent. R. Co. v. Burns*, (Tex. Civ. App. 1901) 63 S. W. Rep. 1035; *Underwriters' F. Assoc. v. Henry*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1072.

West Virginia. — *Ferrell v. Ferrell*, 53 W. Va. 520.

Definition of Mutual Mistake. — "A mutual mistake is a mistake reciprocal and common to both parties, where each alike labored under the same misconception in respect to the terms of the written instrument." *Coleman v. Illinois L. Ins. Co.*, (Ky. 1904) 82 S. W. Rep. 616.

823. 1. *Jones v. Warren*, 134 N. Car. 394, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 823; *Ferrell v. Ferrell*, 53 W. Va. 520.

2. Mistake of Scrivener — *California*. — *San Jose Ranch Co. v. San Jose Land, etc., Co.*, 132 Cal. 582.

Illinois. — *Kelly v. Galbraith*, 186 Ill. 593.

Indiana. — *Smelser v. Pugh*, 29 Ind. App. 614; *St. Clair v. Marquell*, 161 Ind. 56; *Johnson v. Sherwood*, 34 Ind. App. 490.

Iowa. — *Barry v. Rownd*, 119 Iowa 105; *Montgomery v. Mann*, 120 Iowa 609.

Kentucky. — *Nuttall v. Nutall*, (Ky. 1904) 82 S. W. Rep. 377.

Michigan. — *Newland v. Bellvue First Baptist Church Soc.*, (Mich. 1904) 100 N. W. Rep. 612.

Nebraska. — *Pinkham v. Pinkham*, 60 Neb. 600; *Story v. Gammell*, (Neb. 1903) 94 N. W. Rep. 982.

New York. — *Jamaica Sav. Bank v. Taylor*, 72 N. Y. App. Div. 567. See also *Trotter v. Brevoort*, 60 N. Y. App. Div. 562.

Oklahoma. — *Marshall v. Homier*, 13 Okla. 264.

Pennsylvania. — *Baah v. Houser*, 203 Pa. St. 470.

Texas. — *Zieschang v. Helmke*, (Tex. Civ. App. 1904) 84 S. W. Rep. 436.

West Virginia. — *Ferrell v. Ferrell*, 53 W. Va. 520, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 823; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342.

Essential that Scrivener Acted for Both Parties. — *Benn v. Pritchett*, 163 Mo. 560.

3. Knowledge by Defendant that Instrument Does Not Express the Contract. — *Nuttall v. Nuttall*, (Ky. 1904) 82 S. W. Rep. 377; *Fritz v. Fritz*, (Minn. 1905) 102 N. W. Rep. 705; *Whelen v. Osgoodby*, 62 N. J. Eq. 571; *Curtis v. Albee*, 167 N. Y. 360; *Jamaica Sav. Bank v. Taylor*, 72 N. Y. App. Div. 567; *Duke v. Stuart*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 120, affirmed 100 N. Y. App. Div. 517; *Jones v. Warren*, 134 N. Car. 394, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 823; *Seeman v. Biemann*, 108 Wis. 365.

4. Wilful Misstatement of Contract. — *Jones v. Warren*, 134 N. Car. 394, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 823.

824. 1. Nature of Mistake Immaterial. — See *Jones v. Warren*, 134 N. Car. 394.

825. *d. CORRECTION AT LAW.* — See notes 1, 4.

e. RELIEF IN EQUITY — (1) *In General* — *Mode of Relief.* — See notes 7, 8, 9.

826. (2) *Deeds of Conveyance* — (b) *Misdescription of Land Conveyed.* — See note 7.

827. See notes 1, 3, 4, 5, 6, 7.

828. (c) *Mistake in Quantity of Interest Conveyed.* — See notes 2, 3, 4.

824. 3. *When Instrument Does Not Properly Express Contract* — *California.* — *San Jose Ranch Co. v. San Jose Land, etc., Co.*, 132 Cal. 582; *Kee v. Davis*, 137 Cal. 456.

Illinois. — *Kelly v. Galbraith*, 186 Ill. 593.

Indiana. — *Johnson v. Sherwood*, 34 Ind. App. 490.

Iowa. — *Nieler v. Chicago, etc., R. Co.*, 114 Iowa 420; *Hopwood v. McCausland*, 120 Iowa 218.

Kentucky. — *Nuttall v. Nutall*, (Ky. 1904) 82 S. W. Rep. 377.

Minnesota. — *Wall v. Meilke*, 89 Minn. 232.

Mississippi. — *Miles v. Miles*, 84 Miss. 624.

Nebraska. — *Pinkham v. Pinkham*, 60 Neb. 600; *Story v. Gammell*, (Neb. 1903) 94 N. W. Rep. 982; *Shelby v. Creighton*, 65 Neb. 485, 101 Am. St. Rep. 630.

New Jersey. — *Gough v. Williamson*, 62 N. J. Eq. 526.

New York. — *Le Gendre v. Scottish Union, etc., Ins. Co.*, 95 N. Y. App. Div. 562; *Duke v. Stuart*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 120, affirmed 100 N. Y. App. Div. 517.

North Carolina. — *Jones v. Warren*, 134 N. Car. 39.

Oklahoma. — See *Marshall v. Homier*, 13 Okla. 264.

Pennsylvania. — *Snyder v. Phillips*, 25 Pa. Super. Ct. 648.

Texas. — *Zieschang v. Helmke*, (Tex. Civ. App. 1904) 84 S. W. Rep. 436.

West Virginia. — *Ferrell v. Ferrell*, 53 W. Va. 520; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342.

Erroneous Omission or Inclusion of Terms. — *Chicago, etc., R. Co. v. Green*, 114 Fed. Rep. 676; *Baah v. Houser*, 203 Pa. St. 470; *Bowen v. Wolff*, 23 R. I. 56.

4. Mistake as to Legal Effect of Instrument. — *Brown v. Ward*, 119 Iowa 604; *Wall v. Meilke*, 89 Minn. 232; *Kelley v. Ward*, 94 Tex. 289; *Norris v. W. C. Belcher Land Mortg. Co.*, 98 Tex. 176; *Zieschang v. Helmke*, (Tex. Civ. App. 1904) 84 S. W. Rep. 436.

825. 1. *A Court of Law Cannot Reform a Contract.* — *Compare Medley v. German Alliance Ins. Co.*, 55 W. Va. 342.

4. Courts of Law Bound by Words of Instrument. — *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342.

7. Executory Contract Reformed and Specifically Enforced in Same Suit. — *Kee v. Davis*, 137 Cal. 456; *Nuttall v. Nutall*, (Ky. 1904) 82 S. W. Rep. 377; *Gough v. Williamson*, 62 N. J. Eq. 526.

8. Mortgage Reformed and Foreclosure Decreed in Same Suit. — *Land Mortg. Bank v. Nicholson*, 24 Wash. 258.

9. Mistake May Be Set Up to Rebut Equity. — *South Tule Independent Ditch Co. v. King*, 144

Cal. 450; *Epperson v. Epperson*, 161 Mo. 577; *Kirker v. Kaufmann*, 31 Pittsb. Leg. J. N. S. (Pa.) 205. See also *German Sav. Bank v. Gensser*, 116 Iowa 119; *Bowman v. Besley*, 122 Iowa 42; *Smith v. Rust*, 112 Ill. App. 84, wherein it was held that mistake, to warrant relief by a court of equity, must be established by "strong and convincing evidence," a mere preponderance in favor of the complaining party being insufficient.

826. 7. *Misdescription of Land by Boundaries.* — *St. Clair v. Marquell*, 161 Ind. 56.

827. 1. *Misstatement of Geographical Position of Parcel Conveyed.* — *Wienke v. Deputy*, 31 Ind. App. 621 (deed describing the "middle" instead of the "west" acre).

3. Mistake in Boundaries. — *Manogue v. Bryant*, 15 App. Cas. (D. C.) 245; *Earl v. Van Natta*, 29 Ind. App. 532; *Epperson v. Epperson*, 161 Mo. 577; *Gough v. Williamson*, 62 N. J. Eq. 526; *Slack v. Craft*, (N. J. 1904) 57 Atl. Rep. 1014; *Jamaica Sav. Bank v. Taylor*, 72 N. Y. App. Div. 567; *Southern Finishing, etc., Co. v. Ozment*, 132 N. Car. 839.

4. Tract Sold and Tract Conveyed Not Coincident. — *Miles v. Miles*, 84 Miss. 624; *Slack v. Craft*, (N. J. 1904) 57 Atl. Rep. 1014.

5. Description Not Covering Whole Tract Intended. — *Manogue v. Bryant*, 15 App. Cas. (D. C.) 245; *Miles v. Miles*, 84 Miss. 624; *Epperson v. Epperson*, 161 Mo. 577; *Gough v. Williamson*, 62 N. J. Eq. 526.

6. Description Covering More Land than Sold. — *Earl v. Van Natta*, 29 Ind. App. 532; *Barry v. Rownd*, 119 Iowa 105; *King v. Ballou*, (Ky. 1903) 72 S. W. Rep. 771; *Jamaica Sav. Bank v. Taylor*, 72 N. Y. App. Div. 567; *Southern Finishing, etc., Co. v. Ozment*, 132 N. Car. 839; *Ferrell v. Ferrell*, 53 W. Va. 520.

7. Duty of Court to Supply Defects in Description. — *Manogue v. Bryant*, 15 App. Cas. (D. C.) 245; *Earl v. Van Natta*, 29 Ind. App. 532; *Barry v. Rownd*, 119 Iowa 105; *Miles v. Miles*, 84 Miss. 624; *Epperson v. Epperson*, 161 Mo. 577; *Gough v. Williamson*, 62 N. J. Eq. 526; *Slack v. Craft*, (N. J. 1904) 57 Atl. Rep. 1014; *Jamaica Sav. Bank v. Taylor*, 72 N. Y. App. Div. 567; *Southern Finishing, etc., Co. v. Ozment*, 132 N. Car. 839; *Ferrell v. Ferrell*, 53 W. Va. 520.

828. 2. *Conveyance to "Successors" Instead of "Heirs."* — *Whelen v. Osgoodby*, 62 N. J. Eq. 571.

3. Conveyance of Fee Simple Instead of Estate Pur Autre Vie. — *Newland v. Bellvue First Baptist Church Soc.*, (Mich. 1904) 100 N. W. Rep. 612.

4. Where an Estate Tail Is Conveyed, Instead of a Fee Simple as intended, equity will compel the execution of a perfect deed as well as where a fee simple was conveyed instead of an estate tail. *Weimer v. Himmel*, 200 Ill. 374.

828. (d) *Mistake in Reservations and Exceptions.* — See note 10.

830. (5) *Insurance Policies.* — See notes 13, 15, 16.

831. See note 4.

5. *Errors Committed Through Negligence* — *a.* STATEMENT OF RULE.

— See notes 5, 6.

832. *c.* RELIANCE UPON REPRESENTATIONS OF OTHER PARTY. — See note 1.

d. SIGNING INSTRUMENT WITHOUT READING IT. — See notes 5, 6.

833. If a Party Is Illiterate. — See note 1.

Misreading of Instrument. — See note 2.

836. MODEL. — See note 1.

MODERATE. — See note 2.

[MODERATOR. — See note 2*a.*]

MODIFY. — See note 3.

838. MONEY. — See notes 2, 3, 4.

841. Bank Bills and Banknotes. — See note 2.

842. General Residuary Estate. — See note 3.

828. 10. Underlying Coal. — *Montgomery v. Mann*, 120 Iowa 609; *Baab v. Houser*, 203 Pa. St. 470; *Nutter v. Brown*, 51 W. Va. 598.

830. 13. Insurance Policies May Be Reformed. — *Pictet Spring Water Ice Co. v. Citizens' Ins. Co.*, (Ky. 1903) 71 S. W. Rep. 514; *Medley v. German Alliance Ins. Co.*, 55 W. Va. 342.

15. Misdescription of Subject-matter. — *German Ins. Co. v. Kirkendall*, 64 Kan. 884, 67 Pac. Rep. 443.

16. Interest Insured as Owner Instead of as Mortgagee. — *Hartford F. Ins. Co. v. McCarthy*, 69 Kan. 535.

831. 4. Reformation and Judgment in Same Suit. — *Hartford F. Ins. Co. v. McCarthy*, 69 Kan. 555; *Le Gendre v. Scottish Union, etc., Ins. Co.*, 95 N. Y. App. Div. 562.

5. Negligent Errors. — *Friend v. Osborn*, 8 Ohio Dec. 697.

6. Negligence in Framing Instrument. — *King v. Holbrook*, 38 Oregon 452.

832. 1. Reliance upon Representations of Other Party. — *Bush v. Starks*, (Ky. 1901) 65 S. W. Rep. 589. See also *Wood v. Wack*, 31 Ind. App. 252.

5. Signing Instrument Without Reading — No Defense at Law. — *Chicago, etc., R. Co. v. Green*, 114 Fed. Rep. 676; *Poindexter v. McDowell*, 110 Mo. App. 233.

6. Equity Will Not Release. — *Ferrell v. Ferrell*, 53 W. Va. 520.

If a Party Executes a Contract Prepared by a Scrivener. — See *Smelser v. Pugh*, 29 Ind. App. 614.

833. 1. Illiterate Party — Duty to Have Instrument Read. — *Fritz v. Fritz*, (Minn. 1905) 102 N. W. Rep. 705; *Ferrell v. Ferrell*, 53 W. Va. 520.

2. Misreading Instrument. — See *Nutter v. Brown*, 51 W. Va. 598.

836. 1. Model Distinguished from Map. — See *Montana Ore Purchasing Co. v. Boston, etc., Consol. Copper, etc., Min. Co.*, 27 Mont. 288, and see *supra*, MAP.

2. Moderate Speed — Navigation. — *The Northern Queen*, 117 Fed. Rep. 906.

2*a.* A Moderator is primarily the presiding officer of a town meeting called for the transaction of general business, and his duties as election officer when any such duties devolve upon him are incidental. *Wheeler v. Carter*, 180 Mass. 382.

3. Not in Sense of Increase. — In *Louisiana Western R. Co. v. Crossman*, 111 La. 611, the court said: "The views of the courts vary in these (the common-law) states. The weight of the decisions, however, does not sustain the view that it is the intention in using this word to enlarge or increase an amount allowed, instead of as expressed in the statute here 'to modify.'" Citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 836.

838. 2. Money — Whole Medium of Exchange. — *U. S. v. Beebe*, (C. C. A.) 122 Fed. Rep. 762; *Montgomery County v. Cochran*, (C. C. A.) 121 Fed. Rep. 17.

3. Technical Sense — Coin. — *U. S. v. Beebe*, (C. C. A.) 122 Fed. Rep. 762.

4. Bonds Deposited in Court are not money so as to entitle the clerk to a commission under Rev. Stat. U. S., § 828, allowing commissions to clerks for receiving and paying out money. *Michigan Cent. R. Co. v. Harsha*, (C. C. A.) 134 Fed. Rep. 217.

Certificates of Deposit. — *Montgomery County v. Cochran*, (C. C. A.) 121 Fed. Rep. 17.

Check. — *Griffen v. Train*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 290.

Gaming — Nickel in the Slot Machines. — *State v. Woodman*, 26 Mont. 348.

Property. — *Boyd v. Lemon, etc., Co.*, (C. C. A.) 114 Fed. Rep. 647.

Treasury Notes. — *U. S. v. Smythe*, 120 Fed. Rep. 30.

841. 2. Banknotes Not Money. — *State v. Phillips*, 27 Wash. 364.

842. 3. The Word "Money" is not to be construed in the technical sense where the testator used it as referring to all his personal estate. *Goods of Bramley*, (1902) P. 106.

MONOPOLIES AND CORPORATE TRUSTS.

BY BASIL JONES.

846. I. DEFINITION — 2. Trusts. — See note 3.

847. Form of Combination. — See note 1.

II. AT COMMON LAW AND UNDER OLD ENGLISH STATUTES — At Common

Law. — See note 7.

848. See note 1.

Forestalling and Engrossing. — See note 3.

850. True Test of Legality. — See notes 1, 2, 3.

Injurious Tendency. — See note 7.

851. Partial Control. — See notes 3, 4.

III. PROHIBITIONS IN STATE CONSTITUTIONS. — See note 9.

852. IV. UNDER STATE STATUTES — 1. In General. — See note 1.

2. Constitutionality. — See notes 2, 4, 6.

846. 3. Trust Defined. — See *U. S. v. Northern Securities Co.*, 120 Fed. Rep. 721, *affirmed* 193 U. S. 197; *State v. Continental Tobacco Co.*, 177 Mo. 1; *MacGinnis v. Boston, etc., Consol. Copper, etc., Min. Co.*, 29 Mont. 428.

"A pool or trust is a combination having the intention and power, or tendency, to monopolize business, or to control production, or to interfere with trade, or to fix and regulate prices, and the like." *Chicago, etc., Coal Co. v. People*, 114 Ill. App. 75, *affirmed* 214 Ill. 421.

Statutory Definitions of Trusts. — *Barataria Canning Co. v. Joulain*, 80 Miss. 555; *Yazoo, etc., R. Co. v. Searles*, 85 Miss. 520; *Lewis v. Weatherford, etc., R. Co.*, 36 Tex. Civ. App. 48; *Ft. Worth, etc., R. Co. v. State*, (Tex. 1905) 87 S. W. Rep. 336.

847. 1. Form of Combination Immaterial. — *Yazoo, etc., R. Co. v. Searles*, 85 Miss. 520; *State v. Continental Tobacco Co.*, 177 Mo. 1.

7. Unlawful at Common Law. — *State v. Armour Packing Co.*, 173 Mo. 356, 96 Am. St. Rep. 515; *Walsh v. Master Plumbers' Assoc.*, 97 Mo. App. 280; *Hawarden v. Youghiogheny, etc., Coal, Co.*, 111 Wis. 545.

848. 1. Statutes Against Monopolies Are Declaratory. — *Matter of Davis*, 168 N. Y. 89.

3. Forestalling and Engrossing. — See *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 90 Am. St. Rep. 126.

850. 1. Slaughter *v.* Thacker Coal, etc., Co., 55 W. Va. 642, 104 Am. St. Rep. 1013, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 850. See also *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 90 Am. St. Rep. 126.

2. Injury to Public the Test. — *Slaughter v. Thacker Coal, etc., Co.*, 55 W. Va. 642, 104 Am. St. Rep. 1013, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 850.

3. Tests of Legality. — *Finck v. Schneider Granite Co.*, 187 Mo. 244, 106 Am. St. Rep. 452; *Slaughter v. Thacker Coal, etc., Co.*, 55 W. Va. 642, 104 Am. St. Rep. 1013, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 850; *Rex v. Elliott*, 9 Can. Crim. Cas. (Ont.) 505. See also *Gage v. State*, 24 Ohio Cir. Ct. 724.

A combination of mercantile dealers to compel another dealing in similar goods to sell at prices fixed by it, or, upon his refusal so to do, to prevent those of whom its members are purchasing customers from selling goods to him, is, upon general legal principles, contrary to public policy and void; and the members of such a combination may, collectively or individually, be by injunction restrained from carrying into effect such purpose. *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 90 Am. St. Rep. 126.

7. Power to Control Prices. — *Slaughter v. Thacker Coal, etc. Co.*, 55 W. Va. 642, 104 Am. St. Rep. 1013, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 850, and supporting the whole text paragraph.

851. 3. Partial Control. — See *Slaughter v. Thacker Coal, etc., Co.*, 55 W. Va. 642, 104 Am. St. Rep. 1013.

4. Combination Against Single Rival. — *Gage v. State*, 24 Ohio Cir. Ct. 724.

9. Constitutional Prohibitions. — See *State v. Biggs*, 133 N. Car. 729, 98 Am. St. Rep. 731.

Provision of Washington Constitution Not Self-executing. — *Northwestern Warehouse Co. v. Oregon R., etc., Co.*, 32 Wash. 218.

852. 1. Statutory Enactments. — See *Getz v. Federal Salt Co.*, 147 Cal. 115; *State v. Armour Packing Co.*, 173 Mo. 356, 96 Am. St. Rep. 515.

It Is Competent for the Legislature to enact penal measures to prevent the making and carrying out of anti-competitive trade agreements. *State v. Smiley*, 65 Kan. 240.

2. Freedom of Contract Not Abridged. — *State v. Smiley*, 65 Kan. 240.

The Ohio Statute (93 Ohio Laws 143) prohibiting all contracts or agreements which prevent competition, under all circumstances, without making any distinction between legal and illegal agreements, is unconstitutional. *Gage v. State*, 24 Ohio Cir. Ct. 724.

4. Not a Taking Without Due Process of Law. — *State v. Jack*, 60 Kan. 387; *Matter of Davies*, 168 N. Y. 89.

852. The Exception of Certain Classes of Persons or Products. — See note 7.

Effect of Unconstitutional Provision on Statute. — See note 8.

853. 3. Construction of Statutes — *a.* SUBJECTS AFFECTED. — See note 1.

852. 6. Violate No Constitutional Provision. — *People v. Butler St. Foundry, etc., Co.*, 201 Ill. 236; *State v. Smiley*, 65 Kan. 240; *State v. Jack*, 69 Kan. 387; *Com. v. Bavarian Brewing Co.*, 112 Ky. 925; *State v. Armour Packing Co.*, 173 Mo. 356, 96 Am. St. Rep. 515; *Cleland v. Anderson*, 66 Neb. 252; *Matter of Davies*, 168 N. Y. 89; *State v. Gage*, 72 Ohio St. 210; *State v. Virginia-Carolina Chemical Co.*, 71 S. Car. 544, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 852.

Ohio Statute Unconstitutional. — *Gage v. State*, 24 Ohio Cir. Ct. 724.

Texas Act of 1899 Not Unconstitutional. — *State v. Laredo Ice Co.*, 96 Tex. 461.

7. *Unconstitutional as Class Legislation.* — *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 90 Am. St. Rep. 126; *People v. Butler St. Foundry, etc., Co.*, 201 Ill. 236; *Chicago, etc., Coal Co. v. People*, 114 Ill. App. 75, affirmed 214 Ill. 421; *State v. Shippers Compress, etc., Co.*, 95 Tex. 603.

8. *Statute Not Invalidated by Unconstitutional Provisions.* — *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *People v. Butler St. Foundry, etc., Co.*, 201 Ill. 236; *State v. Shippers Compress, etc., Co.*, 95 Tex. 603. And see the title STATUTES, 570. 2.

853. 1. Subjects Affected. — *Hunt v. Riverside Co-operative Club*, (Mich. 1905) 104 N. W. Rep. 40; *Barataria Canning Co. v. Joulain*, 80 Miss. 555; *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 64; *Walsh v. Master Plumbers' Assoc.*, 97 Mo. App. 280; *Finck v. Schneider Granite Co.*, 187 Mo. 244, 106 Am. St. Rep. 452; *Matter of Davies*, 168 N. Y. 89; *Gage v. State*, 24 Ohio Cir. Ct. 724; *State v. Virginia-Carolina Chemical Co.*, 71 S. Car. 544; *Troy Buggy Works Co. v. Fife*, (Tex. Civ. App. 1903) 74 S. W. Rep. 956; *Simmons v. Terry*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1103. See also *State v. Smiley*, 65 Kan. 240.

Agreement for Exclusive Sale of By-product. — An agreement by a corporation to sell to one person all of a by-product accumulating incidentally in the course of its principal business does not come within the prohibition of the statute even though the corporation is a public-service corporation. *State v. St. Paul Gaslight Co.*, 92 Minn. 467.

Control of Products or Management. — To bring a trust or combination within the prohibition of the *Mississippi* statute, it must place the control to some extent of the business or of the products or earnings thereof in trustees or persons other than the proper officers, agents, or employees of the contracting persons or corporations; or, second, it must have the effect of injuring the public or some particular person or corporation in the state. *Yazoo, etc., R. Co. v. Seales*, 85 Miss. 520.

The Restriction Must Be upon the Free Pursuit of Lawful Business, and a regulation as to the persons who may have privileges which the grantor is not compelled to allow to any one does not constitute a violation of the statute. *Lewis*

v. Weatherford, etc., R. Co., 36 Tex. Civ. App. 48.

The Object of the Law is to prevent interference with business authorized and carried on in accordance with the laws of the state. *Ft. Worth, etc., R. Co. v. State*, (Tex. 1905) 87 S. W. Rep. 336.

Patented Articles. — A combination of dealers in goods covered by patent rights and trademarks which gives the proprietors the exclusive right to specify prices and the right also to require dealers to maintain the prices specified does not constitute a violation of the statute, where it appears that the only effect of the combination is to do away with competition among dealers as to prices, and that it creates no restriction upon them as to quantities which they may sell or the territory within which the transactions may take place. *John D. Park, etc., Co. v. National Wholesale Druggists Assoc.*, 175 N. Y. 1, 96 Am. St. Rep. 578.

An Association of Publishers formed for the purpose of preventing the sale of books by retail dealers at a lower price than that fixed by the association is in violation of the statute where the effect of the agreement is not only to protect the prices at which copyrighted books are to be sold but also to affect the right of the dealer to sell books not copyrighted at any price he may see fit or his right to sell at all. *Straus v. American Publishers' Assoc.*, 177 N. Y. 473.

An Association of Retail Dealers in Lumber, organized, as stated by its constitution, to prevent its members from being subjected to competition of wholesalers, which requires a fixed amount of stock, continuously carried, to entitle a dealer to membership, and levies upon and collects from wholesale dealers a penalty in case they make sales to consumers directly, or to retail dealers not eligible to membership in the association, is unlawful, under the *Nebraska* statute of 1901. *Cleland v. Anderson*, 66 Neb. 252.

An Agreement for the Purchase of Property and Good Will of several firms does not fall within the prohibition of the statute where it does not appear that there was in any sense a combination to control sales and enhance prices. *Booth v. Seibold*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 101.

Combination to Cause Consumer to Pay War Revenue Tax. — A combination of breweries, whereby the price of their product is increased for the purpose of imposing upon the consumer the burden of the revenue tax imposed upon the product, is in violation of the statute, and the illegality of the combination is not affected by the fact that the law does not favor the increased use of intoxicants. *Com. v. Bavarian Brewing Co.*, 112 Ky. 925.

An Agreement to Use the Cars of One Company Exclusively, entered into between a sleeping-car company and a carrier, has been held not to violate the statute. *Ft. Worth, etc., R. Co. v. State*, (Tex. 1905) 87 S. W. Rep. 336. See further the title SLEEPING-CAR COMPANIES, 1125. 4.

- 853.** Interstate Commerce. — See note 7.
b. TESTS OF LEGALITY. — See notes 8, 9, 10.
- 854.** *c.* STATUTES STRICTLY CONSTRUED. — See note 1.
d. STATUTES NOT RETROACTIVE. — See notes 2, 3.
4. Remedies — *a.* INJUNCTION AGAINST FORMATION OF TRUST —
 (1) *By State*. — See note 6.
b. CRIMINAL ACTION — (1) *Against Corporations*. — See note 9.
- 855.** (2) *Against Persons*. — See notes 1, 2.
c. FORFEITURE OF CHARTER OF TRUST. — See notes 5, 6.
d. FORFEITURE OF CHARTER OF CORPORATIONS. — See note 7.
- 856.** *e.* REMEDIES AGAINST FOREIGN CORPORATIONS — Subject to Domestic Laws. — See note 1.
f. ACTION FOR DAMAGES BY PARTY INJURED. — See note 3.

Statute Applicable Only to Acts Within State. — *People v. Butler St. Foundry, etc., Co.*, 201 Ill. 236.

Statute Not Applicable to Bona Fide Purchase of One Corporation by Another. — *State v. Continental Tobacco Co.*, 177 Mo. 1.

An Agreement Between Dealers Not to Sell to Any One Indebted to Members of the Combination is in violation of the statute. *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 64.

It Is for the Court to Determine whether the association or combination in question, without regard to its form or constituent element, is acting in violation of the statute. *MacGinniss v. Boston, etc., Consol. Copper, etc., Min. Co.*, 29 Mont. 428.

853. 7. Validity Sustained. — See *State v. Jack*, 69 Kan. 387.

8. Tests of Legality of Contract. — *Yazoo, etc., R. Co. v. Searles*, 85 Miss. 520; *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 64. See also *Chicago, etc., Coal Co. v. People*, 114 Ill. App. 75, affirmed 214 Ill. 421.

Intent. — Under the *Montana* statute, in order to subject offenders to the penalties therein imposed, there must be shown a specific intent to do the prohibited act, or a necessary tendency of the association or combination to accomplish the prohibited result. *MacGinniss v. Boston, etc., Consol. Copper, etc., Min. Co.*, 29 Mont. 428.

9. *Yazoo, etc., R. Co. v. Searles*, 85 Miss. 520. See also *Fechteler v. Palm*, (C. C. A.) 133 Fed. Rep. 462.

10. See *Chicago, etc., Coal Co. v. People*, 114 Ill. App. 75, affirmed 214 Ill. 421.

Creation of Complete Monopoly Not Essential to Constitute Violation. — *Chicago, etc., Coal Co. v. People*, 214 Ill. 421; *Hunt v. Riverside Co-operative Club*, (Mich. 1905) 104 N. W. Rep. 40; *State v. Armour Packing Co.*, 173 Mo. 356, 96 Am. St. Rep. 515.

Proportion of Participants to Whole Number of Dealers Immaterial. — *Cleland v. Anderson*, 66 Neb. 252.

854. 1. Statutes Strictly Construed. — *State v. Wilson*, (Kan. 1905) 80 Pac. Rep. 639.

2. Statutes Not Retrospective. — *Davis v. Booth*, (C. C. A.) 131 Fed. Rep. 31; *Crump v. Ligon*, (Tex. Civ. App. 1904) 84 S. W. Rep. 250.

3. Apply to Existing Combinations. — *Finck v. Schneider Granite Co.*, 187 Mo. 244, 106 Am. St. Rep. 452; *Matter of Davies*, 168 N. Y. 89.

6. *Dittman v. Distilling Co.*, 64 N. J. Eq. 537.

A Person Injured by the Formation of an Illegal Trust may in *Missouri* obtain an injunction restraining the parties to the agreement from keeping its terms or demanding that they be kept. *Walsh v. Master Plumbers' Assoc.*, 97 Mo. App. 280.

9. Criminal Liability of Corporations. — *Chicago, etc., Coal Co. v. People*, 214 Ill. 421.

855. 1. Criminal Liability of Persons for Conspiracy. — *State v. Dreany*, 65 Kan. 292; *Rex v. Elliott*, 9 Can. Crim. Cas. (Ont.) 505, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 850.

2. Punishment. — *State v. Gage*, 72 Ohio St. 210.

5. Right to Forfeit Charter Dependent upon Intent with Which It Was Procured. — *State v. Shippers Compress, etc., Co.*, 95 Tex. 603.

6. See *Walsh v. Master Plumbers' Assoc.*, 97 Mo. App. 280.

7. Statute Authorizing Forfeiture of Permit to Do Business in State Constitutional. — *State v. Shippers Compress, etc., Co.*, 95 Tex. 603; *National Cotton Oil Co. v. State*, (Tex. Civ. App. 1903) 72 S. W. Rep. 615.

The Provision of the *Kansas Statute of 1897* that every person, company, or corporation violating any of the provisions of the act, within the state, is denied the right and is prohibited from doing any business within the state, contemplates prohibiting only the continuing of business or the engaging in business in the state, in violation of the act. *State v. Jack*, 69 Kan. 387.

Individual Cannot Institute Proceedings. — *MacGinniss v. Boston, etc., Consol. Copper, etc., Min. Co.*, 29 Mont. 428.

856. 1. Under the *Missouri Statute*, the punishment to be imposed rests in the sound discretion of the court. It need not necessarily be a general judgment of ouster. It may be an ouster of the right to do the particular act complained of; or may be a suspensive judgment of ouster accompanied with a fine; or may be a simple fine if it appears that the combination complained of has been terminated. *State v. Armour Packing Co.*, 173 Mo. 356, 96 Am. St. Rep. 515.

3. Right to Recover Damages. — *Cleland v. Anderson*, 66 Neb. 252; *Rourke v. Elk Drug Co.*, 75 N. Y. App. Div. 145.

An Action for the Recovery of Money Paid to the Corporation, under the *Texas statute*, is in the nature of an action for a penalty, and abates with the revocation of the corporation's charter. *Mason v. Adoue*, 30 Tex. Civ. App. 276.

857. 5. Rights and Disabilities of Members of Trusts — a. LEGAL AND EQUITABLE RIGHTS BETWEEN MEMBERS AND COMBINATION — No Action at Law Founded on the Trust Agreement. — See note 2.

No Relief in Equity. — See note 4.

858. 8. Rights of Third Persons — a. CONTRACTS IN FURTHERANCE OF ILLEGAL AGREEMENT NOT ENFORCEABLE. — See note 8.

859. 9. Evidence. — See notes 3, 4.

V. UNDER FEDERAL STATUTE — 1. Power of Congress to Legislate. — See note 7.

860. 2. Provisions of Statute. — See note 2.

3. Construction of Statute — a. FOR PROTECTION OF INTERSTATE AND INTERNATIONAL TRADE. — See note 3.

b. EFFECT ON TRADE MUST BE DIRECT. — See note 4.

857. 2. Contract Made to Further Combination. — *Froelich v. Musicians Mut. Ben. Assoc.*, 93 Mo. App. 383.

4. Not Enforceable in Equity. — *Froelich v. Musicians Mut. Ben. Assoc.*, 93 Mo. App. 383.

858. 8. Contracts in Furtherance of Monopoly. — *Getz v. Federal Salt Co.*, 147 Cal. 115; *Detroit Salt Co. v. National Salt Co.*, 134 Mich. 103; *Troy Buggy Works Co. v. Fife*, (Tex. Civ. App. 1903) 74 S. W. Rep. 956. See also *O'Brien v. Musical Mut. Protective, etc., League*, 64 N. J. Eq. 525; *Slaughter v. Thacker Coal, etc., Co.*, 55 W. Va. 642, 104 Am. St. Rep. 1013.

By Statute in *Missouri* a purchaser from an illegal trust or combination is not liable for the price of the article purchased. *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 64.

Legal Part of Divisible Contract Enforced. — *Monongahela River Consol. Coal, etc., Co. v. Jutte*, 210 Pa. St. 288, 105 Am. St. Rep. 812.

859. 3. Burden of Proving Illegality on Plaintiff. — *Willson v. Morse*, 117 Iowa 581.

Parol Evidence is admissible to prove the contents of a written agreement alleged to have been entered into in furtherance of an illegal trust, when the existence and execution of such agreement is first established, and it is further shown that such agreement is not in the possession or under the control of the prosecution, and the state cannot secure or compel its production. *State v. Dreany*, 65 Kan. 292.

Evidence of Acts and Declarations Admissible. — *Cleland v. Anderson*, 66 Neb. 252.

Statements of Agents Admissible. — *State v. Armour Packing Co.*, 173 Mo. 356, 96 Am. St. Rep. 515.

Sufficiency of Evidence. — *Chicago, etc., Coal Co. v. People*, 214 Ill. 421; *State v. Armour Packing Co.*, 173 Mo. 356, 96 Am. St. Rep. 515; *State v. Shippers Compress, etc., Co.*, 95 Tex. 603.

4. Inquiry into Circumstances Surrounding Incorporation, Etc. — *Detroit Salt Co. v. National Salt Co.*, 134 Mich. 103. See also *Yazoo, etc., R. Co. v. Searles*, 85 Miss. 520.

7. Power to Protect Interstate Trade. — *Chesapeake, etc., Fuel Co. v. U. S.*, (C. C. A.) 115 Fed. Rep. 610; *Northern Securities Co. v. U. S.*, 193 U. S. 197, *affirming* 120 Fed. Rep. 721, *per* Harlan, J., holding further that congressional regulation may take the form of prohibition.

860. 2. Statute Distinguishes Between Con-

tract and Combination. — *Rice v. Standard Oil Co.*, 134 Fed. Rep. 464.

3. Protection of Interstate Trade. — *Northern Securities Co. v. U. S.*, 193 U. S. 197, *affirming* 120 Fed. Rep. 721, *per* Harlan, J., declaring that the statute applies to combinations extinguishing competition between interstate carriers and to combinations among private manufacturers or dealers affecting interstate or international commerce; *Chesapeake, etc., Fuel Co. v. U. S.*, (C. C. A.) 115 Fed. Rep. 610; *Gibbs v. McNeeley*, (C. C. A.) 118 Fed. Rep. 120; *Phillips v. Iola Portland Cement Co.*, (C. C. A.) 125 Fed. Rep. 593; *Atlanta v. Chattanooga Foundry*, (C. C. A.) 127 Fed. Rep. 23; *Robinson v. Suburban Brick Co.*, (C. C. A.) 127 Fed. Rep. 804; *Davis v. Booth*, (C. C. A.) 131 Fed. Rep. 31.

Reasonable Construction to Be Given. — *Whitwell v. Continental Tobacco Co.*, (C. C. A.) 125 Fed. Rep. 454.

Statute Construed to Give Effect to Intention of Legislature. — *Northern Securities Co. v. U. S.*, 193 U. S. 197, *affirming* 120 Fed. Rep. 721, *per* Harlan, J.

That the Combination Is Composed of Manufacturers in One State does not prevent it from being in violation of the statute, where the product is largely used in interstate commerce. *Gibbs v. McNeeley*, (C. C. A.) 118 Fed. Rep. 120.

Statute Not Applicable to Intrastate Manufacture. — *Robinson v. Suburban Brick Co.*, (C. C. A.) 127 Fed. Rep. 804.

4. Effect on Interstate Trade Must Be Direct. — *Northern Securities Co. v. U. S.*, 193 U. S. 197, *affirming* 120 Fed. Rep. 721, *per* Harlan, J., holding illegal a corporation formed to hold the stock of competing corporations; *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618; *Swift v. U. S.*, 196 U. S. 375, *modifying* 122 Fed. Rep. 529 (combination to secure advantage in cost of transportation and to monopolize sales); *Chesapeake, etc., Fuel Co. v. U. S.*, (C. C. A.) 115 Fed. Rep. 610; *Whitwell v. Continental Tobacco Co.*, (C. C. A.) 125 Fed. Rep. 454; *Phillips v. Iola Portland Cement Co.*, (C. C. A.) 125 Fed. Rep. 593; *Davis v. Booth*, (C. C. A.) 131 Fed. Rep. 31; *Ellis v. Inman*, (C. C. A.) 131 Fed. Rep. 182.

Associations Not Forbidden. — An agreement between two carriers containing no provision as to maintaining rates and preventing competition, fixing no prices, and not confining the dealers included to a combination of persons, does not

- 860.** Legitimate Extension of Business. — See note 5.
861. *c* APPLIES TO ALL RESTRAINTS. — See note 1.
 Monopoly Need Not Be Complete. — See note 2.
 Source of Restraint Immaterial. — See note 3.
862. 5. Remedies under Statute — *c*. SUITS IN EQUITY. — See note 2.
d. ACTION BY PERSON INJURED — (1) *In General*. — See note 5.

tend to create a monopoly within the prohibition of the statute. *Ceballos v. Munson Steam Ship Line*, 93 N. Y. App. Div. 593.

So a municipal ordinance requiring the use of asphalt from a foreign state is not a violation of the statute. *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618.

Patents. — The statute does not refer to that restraint which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. *Bement v. National Harrow Co.*, 186 U. S. 70; *U. S. Consolidated Seeded Raisin Co. v. Griffin, etc., Co.*, (C. C. A.) 126 Fed. Rep. 364.

The Proper Test as to the legality of the combination is not what the agreement under which it is formed professes, but what it accomplishes. To constitute a combination a violation of the statute it is not necessary that it shall by its terms refer to interstate commerce, but it is sufficient if its purpose and effect are necessarily to restrain interstate trade. *Gibbs v. McNeeley*, (C. C. A.) 118 Fed. Rep. 120.

But if the combination promotes, or only incidentally or indirectly restricts, competition, while its main purpose and chief effect are to promote business and increase trade, it is not illegal. *Phillips v. Iola Portland Cement Co.*, (C. C. A.) 125 Fed. Rep. 593; *Whitwell v. Continental Tobacco Co.*, (C. C. A.) 125 Fed. Rep. 454.

860. 5. Restraint Ancillary to Lawful Contract. — A contract of sale by a manufacturer to jobbers of some of the seller's product, to be shipped across state lines to the purchasers, whereby the parties agree that the purchasers shall not sell, ship, or allow any of the product thus purchased to be shipped outside of a certain state is not illegal. *Phillips v. Iola Portland Cement Co.*, (C. C. A.) 125 Fed. Rep. 593; *Whitwell v. Continental Tobacco Co.*, (C. C. A.) 125 Fed. Rep. 454.

861. 1. Applicable to All Restraint. — *Northern Securities Co. v. U. S.*, 193 U. S. 197, affirming 120 Fed. Rep. 721, *per* Harlan, J.; *Bement v. National Harrow Co.*, 186 U. S. 70; *Chesapeake, etc., Fuel Co. v. U. S.*, (C. C. A.) 115 Fed. Rep. 610; *Gibbs v. McNeeley*, (C. C. A.) 118 Fed. Rep. 120; *U. S. v. Swift*, 122 Fed. Rep. 529, modified 196 U. S. 375; *Ellis v. Inman*, (C. C. A.) 131 Fed. Rep. 182. Compare *Northern Securities Co. v. U. S.*, 193 U. S. 197, affirming 120 Fed. Rep. 721, *per* Brewer, J., concurring, but holding that the statute should not be construed as including contracts, reasonable or unreasonable, in restraint of interstate trade, but that its application should be limited to such contracts as constitute an unreasonable restraint of interstate trade.

Validity Determined by Effect upon Interstate Commerce, Not by Intention with Which Formed.

— *Chesapeake, etc., Fuel Co. v. U. S.*, (C. C. A.) 115 Fed. Rep. 615; *Ellis v. Inman*, (C. C. A.) 131 Fed. Rep. 182. Compare *Swift v. U. S.*, 196 U. S. 375.

Every Contract, Combination, or Conspiracy, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, is in restraint of interstate commerce, and violates the statute. *Whitwell v. Continental Tobacco Co.*, (C. C. A.) 125 Fed. Rep. 454.

Benefit to Public Resulting from Combination Not to Be Considered in Determining Legality. — *Chesapeake, etc., Fuel Co. v. U. S.*, (C. C. A.) 115 Fed. Rep. 615.

Effect on Prices Immaterial. — *Ellis v. Inman*, (C. C. A.) 131 Fed. Rep. 182.

Extent of Trade in Commodity Affected Immaterial. — *Montague v. Lowry*, 193 U. S. 38.

Where Elements of Scheme Are Lawful. — Although the constituent elements of a scheme may be lawful when considered separately, they may, when bound together by the intent of the parties, constitute as a whole an unlawful combination. *Swift v. U. S.*, 196 U. S. 375.

Lawful Restriction on Sale of Property. — A contract between a corporation furnishing quotations and a telegraph company, restricting the communication to others of the quotations furnished by the corporation to the telegraph company, does not constitute a monopoly or an attempt at monopoly or contract in restraint of trade, either under the statute or at common law, the corporation being under no obligation to communicate the quotations to any one. *Board of Trade v. Christie Grain, etc., Co.*, 198 U. S. 236.

2. Tending to Public Injury through the Test. — *Northern Securities Co. v. U. S.*, 193 U. S. 197, affirming 120 Fed. Rep. 721, *per* Harlan, J.; *Montague v. Lowry*, (C. C. A.) 115 Fed. Rep. 27, affirmed 193 U. S. 38; *Chesapeake, etc., Fuel Co. v. U. S.*, (C. C. A.) 115 Fed. Rep. 610; *Whitwell v. Continental Tobacco Co.*, (C. C. A.) 125 Fed. Rep. 454.

3. Source of Restraint. — *Northern Securities Co. v. U. S.*, 193 U. S. 197, affirming 120 Fed. Rep. 721, *per* Harlan, J. See also *Olsen v. Smith*, 195 U. S. 332; *Whitwell v. Continental Tobacco Co.*, (C. C. A.) 125 Fed. Rep. 454.

862. 2. Dissolution and Injunction. — *Northern Securities Co. v. U. S.*, 193 U. S. 197, affirming 120 Fed. Rep. 721, *per* Harlan, J., holding that the power of the court is not limited to prohibiting formation, but continuance of the illegal combination may be prevented.

5. Recovery of Damages. — *Bement v. National Harrow Co.*, 186 U. S. 70.

Several Members of Combination Individually Liable. — *Atlanta v. Chattanooga Foundry*, (C. C. A.) 127 Fed. Rep. 23.

A Municipal Corporation Engaged in Private Business may maintain an action to recover

- 862.** (3) *Limitation of Action Governed by State Statute.* — See note 8.
6. Effect on Contracts. — See note 9.
Collateral Attack. — See notes 10, 11.
- 864.** VI. GRANTS OF EXCLUSIVE PRIVILEGES — 1. By State — *b. AS TO MATTERS NOT OF COMMON RIGHT* — Illustrations. — See note 7.
c. UNDER POLICE POWER. — See note 8.
- 865.** *d. IN CONSIDERATION OF PUBLIC SERVICES* — See note 2.
e. CONSTRUCTION OF GRANT. — See note 4.
f. GRANT AS A CONTRACT — Protected from Impairment. — See note 5.
- 866.** 2. By Municipal Corporations — *a. VALIDITY OF GRANT* — (1) *Municipality's Authority to Grant.* — See notes 2, 3.
- 867.** (2) *Unauthorized Grant Void.* — See note 1.
b. UNDER POLICE POWER. — See note 4.
c. CONSTRUCTION OF GRANT — (2) *Must Be Expressly Conferred.* — See note 6.
- 868.** See note 1.
d. SUPPLYING WATER AND GAS — (1) *View that Monopoly Is Created.* — See note 5.

under the statute. *Atlanta v. Chattanooga Foundry*, (C. C. A.) 127 Fed. Rep. 23.

Measure of Recovery. — See *Atlanta v. Chattanooga Foundry*, (C. C. A.) 127 Fed. Rep. 23.

Damages Not Recoverable in Collateral Action. — An action authorized by the Act of Congress to recover treble damages must be a direct one, and the damages claimed cannot be set off in actions based upon special contracts for the sale of the commodity that have no direct connection with the alleged combination between the seller and other corporations, firms, or companies. Such damages cannot be said, as a matter of law, to have grown out of the arrangement or combination. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.

Amount of Attorney's Fees Within Discretion of Court. — *Montague v. Lowry*, 193 U. S. 38.

862. 8. Limitation of Action. — *Atlanta v. Chattanooga Foundry*, (C. C. A.) 127 Fed. Rep. 23.

9. Defense to Action on Contract. — One sued upon a contract may set up as a defense a violation of the statute. *Bement v. National Harrow Co.*, 186 U. S. 70.

10. Collateral Attack. — *Kinner v. Lake Shore*, etc., R. Co., 23 Ohio Cir. Ct. 294; *Harrison v. Glucose Sugar Refining Co.*, (C. C. A.) 116 Fed. Rep. 304. See also *Metcalf v. American School Furniture Co.*, 122 Fed. Rep. 115.

Action to Recover for Price of Goods. — Even though an alleged combination is illegal if tested by principles of the common law, it does not follow that the purchaser could, at common law, refuse to pay for goods bought by him under special contracts with the seller. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.

Contract Incidentally Furthering Violation of Statute. — It is no objection to the enforcement of a contract, in the consideration and performance of which nothing illegal inheres, that it may incidentally aid one of the parties in evading or violating the statute. *Ingraham v. Union Salt Co.*, (C. C. A.) 130 Fed. Rep. 676.

11. Violation of Statute by Patentee No Defense to Infringement of Patent. — *General Electric Co. v. Wise*, 119 Fed. Rep. 922.

864. 7. Power of Police Jury to Grant Exclusive Privilege to Turnpike Company. — See *St. Joseph Plank Road Co. v. Kline*, 106 La. 325.

8. Grant of Exclusive Privilege to Keep Sailor's Boarding House Not Proper Exercise of Police Power. — *White v. Holman*, 44 Oregon 180.

865. 2. Public Services. — See *New York*, etc., R. Co. v. *Offield*, 77 Conn. 417.

The Exclusive Privilege of Furnishing School Books. — *Dickinson v. Cunningham*, 140 Ala. 527; *B. T. Johnson Pub. Co. v. Mills*, 79 Miss. 543; *Rand v. Hartranft*, 29 Wash. 591.

4. Power Granted to Corporation to Regulate Business in Its Property does not authorize the creation of a monopoly. *Thousand Island Park Assoc. v. Tucker*, 173 N. Y. 203.

5. Where the Right to Amend, Alter, or Repeal Is Reserved the legislature may revoke a grant. *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212.

866. 2. Power Expressly Conferred. — *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637; *Territory v. DeWolfe*, 13 Okla. 454. See also *Danville v. Noone*, 103 Ill. App. 290.

3. Power Necessarily Implied. — See *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637.

867. 1. Kirkland v. Meramec Highlands Co., 94 Mo. App. 637.

4. Grant of Exclusive Privilege of Disposing of Garbage Valid. — *State v. Robb*, (Me. 1905) 60 Atl. Rep. 874; *Iler v. Ross*, 64 Neb. 710, 97 Am. St. Rep. 676.

The Exclusive Privilege of Removing Ashes, etc., from Private Premises, at the expense of the owners, cannot be granted to an individual by a city. *Iler v. Ross*, 64 Neb. 710, 97 Am. St. Rep. 676.

Ordinance Confining Sale of Intoxicating Liquors to Certain Limits Valid. — *Gorrell v. Newport*, 1 Tenn. Ch. App. 120.

6. Exclusive Grant Not Implied. — *Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150.

868. 1. When Grant Creates Monopoly. — See *Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150.

5. Grant of Exclusive Right to Supply Water

- 869. MONTH.**—See note 4.
870. MONUMENTS.—See note 8.
 [MOONSHINE BUSINESS.—See note 8a.]
871. MORAL CERTAINTY.—See note 4.
872. MORAL OBLIGATION.—See note 3.
MORAL TURPITUDE.—See note 6.
MORE.—See note 8.

and Gas a Monopoly.—See *Kirkwood v. Mera-*
mec Highlands Co., 94 Mo. App. 637.

Contract with Corporation for Furnishing Lights
Not Invalid as Creating Monopoly.—*Denver v.*
Hubbard, 17 Colo. App. 346.

Exclusive Contract for Lighting for Limited
Period Valid When Made under Statutory Au-
thority.—*Davenport Gas, etc., Co. v. Daven-*
port, 124 Iowa 22.

869. 4. Calendar Month in the United States.
 —*Maxwell v. Jacksonville Loan, etc., Co.*, 45
Fla. 425; *Forsman v. Bright*, 8 Idaho 467.

Thirty Days—Criminal Statute.—*McKinney*
v. State, 43 Tex. Crim. 387.

870. 8. Building.—*Ogden's Petition*, 25
R. I. 373.

8a. "The Term Moonshine Business refers to
the unlawful manufacture or sale of spiritu-
ous liquors." *State v. Tuten*, 131 N. Car. 701.

871. 4. Moral Certainty.—*Fidelity Mut. L.*
Assoc. v. Mettler, 185 U. S. 308; *Bailey v.*
State, 133 Ala. 155.

872. 3. Herriott v. Potter, 115 Iowa 648;
Taylor v. Hotchkiss, 81 N. Y. App. Div. 470.

6. Moral Turpitude.—*Baxter v. Mohr*, (N. Y.
City Ct. Gen. T.) 37 Misc. (N. Y.) 833.

8. More than Eight Inches.—See *Cleveland,*
etc., R. Co. v. Wells, 65 Ohio St. 313.

MORE OR LESS.

874. I. REAL PROPERTY—1. Deeds—Metes and Bounds—Monuments.—See
 note 1.

875. Sale in Gross or by Acre.—See note 1.
 When Relief Granted.—See note 3.

878. 4. Illustrations of Material and Immaterial Differences.—See note 1.

880. II. PERSONAL PROPERTY.—See note 1.

881. III. PAROL EVIDENCE.—See note 2.

874. 1. Description by Metes and Bounds and
Monuments Governs.—*Florida Cent., etc., R.*
Co. v. Bell, 43 Fla. 359; *Long v. Ragan*, 94 Md.
 462.

875. 1. Sale in Gross.—*Eaton v. Tod*,
 (Tex. Civ. App. 1902) 68 S. W. Rep. 546.

3. Material Difference—Mistake—Relief
Granted.—*Bigham v. Madison*, 103 Tenn. 358.

878. 1. Material Difference—Missouri.—
 A deficiency of eight or ten feet in a convey-
 ance of land calling for a frontage of twenty-
 six feet. *Krechter v. Grofe*, 166 Mo. 385.

880. 1. Rules Laid Down by United States
Supreme Court.—See *Wolff v. Wells*, (C. C. A.)
 115 Fed. Rep. 32, as supporting the rules and
 classifications laid down in *Brawley v. U. S.*,
 96 U. S. 168, cited in 20 AM. AND ENG. ENCYC.
 OF LAW (2d ed.) 880.

In *Pine River Logging Co. v. U. S.*, 186 U.
 S. 288, the court said: "There is no doubt
 whatever of the general proposition that where
 the words 'about' or 'more or less' are
 used as estimates of an otherwise designated
 quantity, and the object of the parties is the
 sale or purchase of a particular lot, as a pile
 of wood or coal, or the cargo of a particular
 ship, or a certain parcel of land, the words
 'more or less,' used in connection with the
 estimated quantity, are susceptible of a broad
 construction, and the contract would be inter-
 preted as applying to the particular lot or par-
 cel, provided it be sufficiently otherwise identi-
 fied."

881. 2. Parol Evidence—General Rule.—
Krechter v. Grofe, 166 Mo. 385.

MORTALITY TABLES.

883. II. WHEN ADMISSIBLE IN EVIDENCE. — See notes 2, 3.

884. See note 1.

Annuities — Life Interests — Covenants to Support. — See note 5.

886. III. WHAT TABLES ADMISSIBLE. — See notes 1, 2.

IV. PROOF — JUDICIAL NOTICE. — See note 4.

887. See note 1.

V. CONCLUSIVENESS. — See note 2.

883. 2. Personal Injuries — Tables Held Admissible. — *Indianapolis v. Marold*, 25 Ind. App. 428; *Knott v. Peterson*, 125 Iowa 404; *South Omaha v. Sutcliffe*, (Neb. 1904) 101 N. W. Rep. 997; *Hyland v. Southern Bell Telephone, etc., Co.*, 70 S. Car. 324, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 883; *Gulf, etc., R. Co. v. Manghan*, 95 Tex. 413; *Pecos, etc., R. Co. v. Williams*, 34 Tex. Civ. App. 100; *International, etc., R. Co. v. Reeves*, 35 Tex. Civ. App. 162; *Consumers Cotton Oil Co. v. Jonte*, 36 Tex. Civ. App. 18; *Southern Kansas R. Co. v. Sage*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1038; *Texas, etc., R. Co. v. Kelly*, 34 Tex. Civ. App. 21; *Virginia, etc., R. Co. v. Bailey*, 103 Va. 205.

When the Injuries Are Not Permanent the tables are not admissible. *Foster v. Bellaire*, 127 Mich. 13.

Necessity of Evidence as to Value of Plaintiff's Services. — In an action for personal injuries alleged to be permanent, mortality tables are not proper evidence unless there be some evidence as to the value of the plaintiff's services or capacity to earn money. *Atlanta, etc., R. Co. v. Gardner*, 122 Ga. 82.

3. Death by Wrongful Act — Tables Held Admissible. — *Knott v. Peterson*, 125 Iowa 404; *Foster v. Bellaire*, 127 Mich. 13; *Jones v. McMillan*, 129 Mich. 86; *Chicago, etc., R. Co. v. Hambel*, (Neb. 1902) 89 N. W. Rep. 643; *Hyland v. Southern Bell Telephone, etc., Co.*, 70 S. Car. 324, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 883. See also *Decker v. McSorley*, 111 Wis. 91.

The Precise Age Need Not Be Shown to warrant the admission of mortality tables. It is sufficient if the approximate age is shown. *Pearl v. Omaha, etc., R. Co.*, 115 Iowa 535.

884. 1. Extrahazardous Employment. — *Pearl v. Omaha, etc., R. Co.*, 115 Iowa 535; *Internat-*

ional, etc., R. Co. v. Tisdale, 36 Tex. Civ. App. 174.

5. Breach of Covenant by One Party to Support During Life — Tables Held Admissible. — *Banta v. Banta*, 84 N. Y. App. Div. 138. •

886. 1. Carlisle Tables Admissible. — *Western, etc., R. Co. v. Cox*, 115 Ga. 715; *Chicago, etc., R. Co. v. Hambel*, (Neb. 1902) 89 N. W. Rep. 643; *South Omaha v. Sutcliffe*, (Neb. 1904) 101 N. W. Rep. 997; *Horst v. Lewis*, (Neb. 1905) 103 N. W. Rep. 460.

2. Northampton Tables Admissible. — *Banta v. Banta*, 84 N. Y. App. Div. 138.

4. Carlisle Tables — Provable by *Encyclopædia Britannica*. — *Pearl v. Omaha, etc., R. Co.*, 115 Iowa 535.

By Law Book of General Authority and Acceptance. — *Chicago, etc., R. Co. v. Hambel*, (Neb. 1902) 89 N. W. Rep. 643.

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MORTGAGES.

By JOHN SIMPSON.

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900. 5. Mortgage Vests Legal Title in Mortgagee. — *High v. Hoffman*, 129 Ala. 359; *Hayes v. Banks*, 132 Ala. 354; *Arrowood v. McKee*, 119 Ga. 623; *Ware v. Schintz*, 190 Ill. 189; *Collins v. Davis*, 132 N. Car. 106; *Deans v. Gay*, 132 N. Car. 227; *Davison v. Gregory*, 132 N. Car. 389. See also *Worcester v. Boston*, 179 Mass. 41.

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904. 2. Operative Words Not Essential.—*Woodruff v. Adair*, 131 Ala. 530.

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Sufficient Attestation of Mortgage Executed by Mark.—*Chastain v. Porter*, 130 Ala. 410.

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Time of Delivery.—Under the *Texas* statute requiring acknowledgment of a deed not attested, the date of delivery of an unattested mortgage is the date of its acknowledgment. *Guaranty Trust Co. v. Galveston City R. Co.*, (C. C. A.) 107 Fed. Rep. 311.

906. 1. Application of General Rules to Mortgages—Necessity of Acceptance.—*Merriman v. Schmitt*, 211 Ill. 263; *Reagan v. Chicago First Nat. Bank*, 157 Ind. 623; *Wilcox v. Drought*,

906. (8) *Acknowledgment*. — See note 2.

907. (9) *Recording or Registration*. — See note 1.

(Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 351, *affirmed* 71 N. Y. App. Div. 402.

Sufficiency of Acceptance. — *Huber v. Jennings-Heywood Oil Syndicate*, 111 La. 747; *In re Immanuel Presb. Church*, 112 La. 348.

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Impeachment of Acknowledgment. — The acknowledgment cannot be attacked collaterally in ejectment proceedings by the purchaser on foreclosure. *Farmers' Sav., etc., Assoc. v. Greenwood*, 137 Ala. 257.

A mortgage acknowledged before the grantee is not open to collateral attack on that ground. *Fearn v. Beirne*, 129 Ala. 435.

Acknowledgment as Affecting Priority of Lien. — *Ogden Bldg., etc., Assoc. v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330.

Certificate by Mortgagee Insufficient. — *Huntton v. Wood*, 101 Va. 54.

Acknowledgment before a partner of a mortgagee banking firm is insufficient. *Farmers', etc., Bank v. Stockdale*, 121 Iowa 748.

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Mortgage Defectively Acknowledged Not Entitled to Record. — *Blackman v. Henderson*, 116 Iowa 578.

Mortgage Acknowledged Before Stockholders and Officers of Mortgage Corporations Held Invalid. — *Jenkins v. Jonas Schwab Co.*, 138 Ala. 664; *Ogden Bldg., etc., Assoc. v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330; *Sheridan First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925.

Mortgage Acknowledged Before Stockholders and Officers of Mortgage Corporations Held Valid. — *Gilbert v. Garber*, (Neb. 1903) 95 N. W. Rep. 1030; *Read v. Toledo Loan Co.*, 68 Ohio St. 280, 96 Am. St. Rep. 663; *Keene Guaranty Sav. Bank v. Lawrence*, 32 Wash. 572.

The Illinois act authorizing acknowledgment of mortgages before an officer or stockholder of a corporation interested in the mortgage is valid, but not retrospective. *Steger v. Traveling Men's Bldg., etc., Assoc.*, 208 Ill. 236, 100 Am. St. Rep. 225.

907. 1. Necessity of Recording — *United States v. William Firth Co. v. South Carolina L. & T. Co.*, (C. C. A.) 122 Fed. Rep. 569;

Clayton v. Exchange Bank, (C. C. A.) 121 Fed. Rep. 630; *Coonrod v. Kelly*, (C. C. A.) 119 Fed. Rep. 841, *affirming* 113 Fed. Rep. 378. See also *Cumberland Bldg., etc., Assoc. v. Sparks*, (C. C. A.) 111 Fed. Rep. 647.

Alaska. — *Nestor v. Holt*, 1 Alaska 567.

Arkansas. — *Cumberland Bldg., etc., Assoc. v. Sparks*, 106 Fed. Rep. 101 (construing the Arkansas statute), *reversed* (C. C. A.) 111 Fed. Rep. 647.

California. — See *Kent v. Williams*, 146 Cal. 3.

Florida. — *Equitable Bldg., etc., Assoc. v. King*, (Fla. 1904) 37 So. Rep. 181.

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Missouri. — *Feller v. McKillip*, 100 Mo. App. 660; *Finley v. Babb*, 173 Mo. 257.

Montana. — *Cornish v. Woolverton*, 32 Mont. 456, 107 Am. St. Rep. 434; *Shackleton v. Allen Chapel African M. E. Church*, 25 Mont. 421.

Nebraska. — *Sanely v. Crapenhof*, (Neb. 1901) 95 N. W. Rep. 352; *Carter v. Leonard*, 65 Neb. 670.

New Jersey. — *Dahlberg v. Haeberle*, 71 N. J. L. 514; *Lembeck, etc., Eagle Brewing Co. v. Kelly*, 63 N. J. Eq. 401; *Von Schuller v. Commercial Invest. Bldg., etc., Assoc.*, 63 N. J. Eq. 388.

New York. — *Douglas v. Miller*, 102 N. Y. App. Div. 94; *Matthews v. Damainville*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 546, *reversed* 100 N. Y. App. Div. 311; *Hoschke v. Hoschke*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 125; *Wilcox v. Drought*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 351, *affirmed* 71 N. Y. App. Div. 402; *O'Brien v. Fleckenstein*, 180 N. Y. 350, 105 Am. St. Rep. 768.

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North Dakota. — *Merchants' State Bank v. Tufts*, (N. Dak. 1905) 103 N. W. Rep. 760.

Oklahoma. — *Yingling v. Redwine*, 12 Okla. 64.

Pennsylvania. — *Downing v. Glen Rock Oil Co.*, 207 Pa. St. 455.

South Dakota. — *Glenovich v. Zurich*, (S. Dak. 1904) 101 N. W. Rep. 1103.

Texas. — *Garner v. Boyle*, 97 Tex. 460; *Long v. Fields*, 31 Tex. Civ. App. 241.

Vermont. — *Hunt v. Allen*, 73 Vt. 322.

Virginia. — *Huntton v. Wood*, 101 Va. 54.

Washington. — *George v. Butler*, 26 Wash. 456, 90 Am. St. Rep. 756; *Congregational Church Bldg. Soc. v. Scandinavian Free Church*, 24 Wash. 433.

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908. A Failure to Record. — See notes 1, 3.

Necessity of Recording Defeasance. — See note 4.

909. *b.* IN EQUITY. — See notes 1, 2.

2. Form of Defeasance — The Language Used in a Defeasance Is Immaterial.

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912. 3. Parties to Mortgage — *a.* WHO MAY BE MORTGAGOR — (1) *In General.* — See note 1.

908. 1. Rights of Parties to Mortgage Not Affected by Omission to Record. — *Ward v. Ward*, 131 Fed. Rep. 946; *Feller v. McKillip*, 100 Mo. App. 660; *McKenzie v. Beaumont*, (Neb. 1903) 97 N. W. Rep. 225. See also *Cumberland Bldg., etc., Assoc. v. Sparks*, 106 Fed. Rep. 101, reversed (C. C. A.) 111 Fed. Rep. 647.

General Creditors are not affected by the statute. *State Bank v. Backus*, 160 Ind. 682.

3. Persons Having Notice. — *Coonrod v. Kelly*, 113 Fed. Rep. 378, affirmed (C. C. A.) 119 Fed. Rep. 841; *Blackman v. Henderson*, 116 Iowa 575; *Flowers v. Moorman*, (Ky. 1905) 86 S. W. Rep. 545; *Whitney v. Browne*, 180 Mass. 597; *Finley v. Babb*, 173 Mo. 257; *Enyart v. Moran*, 64 Neb. 401; *Kline v. Grannis*, 61 N. J. Eq. 397; *People v. Woodruff*, 75 N. Y. App. Div. 90. See also *English v. Lindley*, 194 Ill. 181. But see *Wood v. Tinsley*, 138 N. Car. 507.

The Burden of Showing Notice is upon the party seeking to establish title by the unrecorded mortgage. *Schoonover v. Foley*, (Iowa 1903) 94 N. W. Rep. 492; *Sidelinger v. Bliss*, 95 Me. 316. But see *Sanely v. Crapenhof*, (Neb. 1901) 95 N. W. Rep. 352.

4. Necessity of Recording Separate Defeasance. — *Payne v. Morey*, 144 Cal. 130; *Holmes v. Newman*, 68 Kan. 418; *Lohrer v. Russell*, 207 Pa. St. 105; *Moran v. Munhall*, 204 Pa. St. 242; *Crotzer v. Bittenbender*, 199 Pa. St. 504. See also *Wolf v. Theresa Village Mut. F. Ins. Co.*, 115 Wis. 402. But see *contra*, *McClure v. Smith*, 115 Ga. 709.

909. 1. Form of Words or Instrument Immaterial. — *Borcherdt v. Favor*, 16 Colo. App. 406; *Horton v. Murden*, 117 Ga. 72; *Johnson v. Prosperity Loan, etc., Assoc.*, 94 Ill. App. 260; *Garvin v. Vincent*, (Ky. 1905) 87 S. W. Rep. 804; *Bray v. Ellison*, (Ky. 1904) 83 S. W. Rep. 96; *Fulwiler v. Roberts*, (Ky. 1904) 80 S. W. Rep. 1148; *In re Immanuel Presb. Church*, 112 La. 348; *Carveth v. Winegar*, 133 Mich. 34; *Feller v. McKillip*, 100 Mo. App. 660; *Cullen v. Casey*, (Neb. 1901) 95 N. W. Rep. 605; *Merchants' State Bank v. Tufts*, (N. Dak. 1905) 103 N. W. Rep. 760; *Feely v. Bryan*, 55 W. Va. 586; *Beebe v. Wisconsin Mortg. Loan Co.*, 117 Wis. 328.

An Attempt to Make a Mortgage, both parties intending to accomplish that result, is a good mortgage in equity. *Harrigan v. Gilchrist*, 121 Wis. 127.

2. An Agreement to Execute a Mortgage may in equity be treated as a mortgage. *Lohmeyer v. Durbin*, 206 Ill. 574. And see the title EQUITABLE MORTGAGES, 125. 8 et seq.

4. Form of Defeasance Immaterial. — A reference to notes in a warranty deed, followed by the clause, "if the above notes are not paid when due, this deed to be null and void," shows that the deed is a mortgage and not a conditional sale. *Land v. May*, 73 Ark. 415.

A Provision for Forfeiture to a defeasance will not deprive it of its character. *Barlow v. Cooper*, 109 Ill. App. 375.

5. Stipulations or Agreements for Reconveyance. — *Johnson v. Prosperity Loan, etc., Assoc.*, 94 Ill. App. 260; *Spicer v. Holbrook*, (Ky. 1902) 66 S. W. Rep. 180; *Ackerman v. Begrisch*, (N. J. 1901) 50 Atl. Rep. 673; *Hoschke v. Hoschke*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 125; *Goetting v. Weber*, 71 N. Y. App. Div. 503; *Wells v. Scanlan*, 124 Wis. 229.

910. 1. A Bond for Reconveyance Is Sufficient as a Defeasance. — *Borcherdt v. Favor*, 16 Colo. App. 406; *Barlow v. Cooper*, 109 Ill. App. 375; *Carveth v. Winegar*, 133 Mich. 34; *McQuin v. Lee*, 10 N. Dak. 160.

2. Agreements for Repurchase. — *Rankin v. Rankin*, 111 Ill. App. 403.

3. Grantee May Be Stranger to Transaction in Equity. — *Borcherdt v. Favor*, 16 Colo. App. 406; *Spicer v. Holbrook*, (Ky. 1902) 66 S. W. Rep. 180.

5. Defeasance May Be by Parol. — *Foster v. Rice*, 126 Iowa 190; *Wall v. Albion College*, 130 Mich. 526; *Gerhardt v. Tucker*, 187 Mo. 46; *Decker v. Decker*, 64 Neb. 239; *Murray v. Sweasy*, 69 N. Y. App. Div. 45; *Farmers, etc., Bank v. Smith*, 61 N. Y. App. Div. 315; *Hursey v. Hursey*, 56 W. Va. 148. See also *Cassem v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160.

Pennsylvania Statute. — *Banés v. Morgan*, 204 Pa. St. 185; *Moran v. Munhall*, 204 Pa. St. 242.

911. 1. Defeasance Need Not Be under Seal. — *Johnson v. Prosperity Loan, etc., Assoc.*, 94 Ill. App. 260.

3. Execution Should Be Simultaneous. — *Turner v. Cochran*, 30 Tex. Civ. App. 549.

Acknowledgment. — Where required by statute the defeasance must be acknowledged. *Crotzer v. Bittenbender*, 199 Pa. St. 504.

912. 1. Mortgagor Must Have Interest in Property Mortgaged. — *Whitlock v. Cohn*, 72 Ark. 83; *Conkey v. Rex*, 112 Ill. 444; *Heaton v. Gaines*, 198 Ill. 479; *Finley v. Babb*, 173 Mo. 257.

A Representation by the Mortgagor that He Is the Sole Owner of the property, although another has an equity in it, will not defeat the mortgage, the equitable owner claiming no interest prejudicial to the mortgagee. *McMullen v. Griggs*, 23 Ohio Cir. Ct. 417.

912. A Mortgage Made by One under Duress. — See note 2.

Where Undue Influence Is Practiced on the Mortgagor. — See note 3.

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914. (7) *Infants*. — See note 3.

b. WHO MAY BE MORTGAGEE — (1) *In General*. — See note 6.

(5) *Infants*. — See note 10.

915. *c.* DESCRIPTION OF PARTIES. — See notes 5, 6.

4. Mortgageable Property and Its Description — *a.* WHAT MAY BE MORTGAGED — (1) *In General*. — See notes 7, 8, 9, 11.

Admission by Mortgagee of Mortgagor's Interest. — The mortgagee will be held, by claiming through the mortgagor under the mortgage, to admit the mortgagor's interest. *Sheats v. Scott*, 133 Ala. 642.

912. 2. What Amounts to Duress and Its Effect in General. — *Mortimer v. McMullen*, 202 Ill. 413; *Lappin v. Crawford*, 186 Mo. 462; *Fry v. Piersol*, 166 Mo. 429; *Polley v. Polley*, 66 N. Y. App. Div. 609; *Dispeau v. Pawtucket First Nat. Bank*, 24 R. I. 508; *Gray v. Freeman*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1105.

Duress of Wife. — *Bogue v. Franks*, 100 Ill. App. 434, *affirmed* 199 Ill. 411.

Proof of Duress. — *Kittel v. Schmieder*, 89 N. Y. App. Div. 618.

Ratification of Mortgage Obtained by Duress. — See *Dispeau v. Pawtucket First Nat. Bank*, 24 R. I. 508.

Right of Cancellation Passes to Purchaser. — The right to have a mortgage canceled on the ground of duress passes to the purchaser of the land. *Gray v. Freeman*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1105.

3. Effect of Undue Influence. — *Sims v. Sims*, 101 Mo. App. 407; *Thorp v. Smith*, 63 N. J. Eq. 70, *affirmed* 65 N. J. Eq. 400.

Mortgagee Must Have Knowledge of the Undue Influence. — *Walker v. Nicrosi*, 135 Ala. 353.

4. Effect of Fraud in General. — *De Roux v. Girard*, (C. C. A.) 112 Fed. Rep. 89; *Harris v. Dumont*, 207 Ill. 583; *Bush v. German-American Bldg. Assoc.*, 33 Ind. App. 583; *Guaranty Sav., etc., Assoc. v. Simko*, (Ind. App. 1904) 71 N. E. Rep. 906; *Ristine v. Clements*, 31 Ind. App. 338; *Farmer's Bank v. Normand*, (Neb. 1902) 92 N. W. Rep. 723; *Roscoe v. Safford*, 61 N. Y. App. Div. 289; *Hill v. Gettys*, 135 N. Car. 373; *Jinks v. Moppin*, (Tex. Civ. App. 1904) 80 S. W. Rep. 390.

Ignorance of Mortgagor Without Misrepresentation by Mortgagee. — *Austen v. Richardson*, 67 N. Y. App. Div. 166.

Mortgagee Must Have Knowledge of Fraud. — *Gray Cloud Land Co. v. Clay*, 89 Minn. 166; *Kuker v. Jarrott*, 61 S. Car. 265.

Effect of Laches in Disaffirming Mortgage. — *Romanoff Min. Co. v. Cameron*, 137 Ala. 214; *Jennette v. Meloche*, 106 Ill. App. 351; *Daly v. Reineldt*, 97 N. Y. App. Div. 147; *Van Beck v. Milbrath*, 118 Wis. 42.

Mortgagee Must Participate in Fraud. — *Mohr v. Griffin*, 137 Ala. 456.

Where land was deeded by the plaintiff to his wife through the fraud of the wife, and she granted a mortgage over it, the mortgage was held to be a valid lien on the land though the deed was void. *Reilly v. Reilly*, 63 N. Y. App. Div. 169.

Proof of the Fraud must be of a convincing character. *Frank v. Schloss*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 140. See also *Simmons v. Reinhardt*, (Ky. 1904) 78 S. W. Rep. 890.

Sufficiency of Evidence. — *Mortimer v. McMullen*, 202 Ill. 413.

Fraud of the Mortgagor. — *McMullen v. Griggs*, 23 Ohio Cir. Ct. 417.

The Fraud Must Be in the Contract, and fraud in withholding an assignment of the mortgage from record will not void the mortgage. *Callcott v. Allen*, 31 Ind. App. 561.

913. 2. Persons of Weak Intellect as Mortgagors. — *Seawel v. Dirst*, 70 Ark. 166; *Farmers' Bank v. Normand*, (Neb. 1902) 92 N. W. Rep. 723; *Hardy v. Berger*, 76 N. Y. App. Div. 393; *Tatum v. Tatum*, 101 Va. 77.

Good Faith of Mortgagee Immaterial. — *Jacks v. Estee*, 139 Cal. 507.

914. 3. Infants as Mortgagors. — In *British Columbia*, a mortgage executed by an infant before the passing of the Infants' Contract Act is not void, but voidable, and if the infant wishes to avoid it he must expressly repudiate it within a reasonable time after coming of age. *Saunders v. Russell*, 9 British Columbia 321.

6. A Person Can Grant a Mortgage in Favor of Himself or a mere nominal party, and the mortgage takes effect where notes pass to his creditor. *Phelan v. Wilson*, 114 La. 813.

10. Infants as Mortgagees. — *Ostrander v. Quin*, 84 Miss. 230, 105 Am. St. Rep. 426.

915. 5. Sufficiency of Description. — *Harlan County v. Whitney*, 65 Neb. 105, 101 Am. St. Rep. 610.

Omission to Name or Describe Mortgagee. — See *Bossingham v. Syck*, 118 Iowa 192.

6. Admissibility of Parol Evidence to Identify Parties. — *Harlan County v. Whitney*, 65 Neb. 105, 101 Am. St. Rep. 610.

7. What May Be Mortgaged — In General. — *Davis v. Willson*, 115 Ky. 639.

8. Mortgage Valid to the Extent of Interest. — *Bryan v. Dupoyster*, (C. C. A.) 130 Fed. Rep. 83; *Crippen v. Comstock*, 17 Colo. App. 89; *Fields v. Fish*, (Ky. 1904) 82 S. W. Rep. 376; *Davis v. Willson*, 115 Ky. 639; *Simmons v. Reinhardt*, (Ky. 1904) 78 S. W. Rep. 890; *Miller v. Warren*, 94 N. Y. App. Div. 192, *affirmed* 182 N. Y. 539; *Schneider v. Reed*, 123 Wis. 488.

9. Rights in Remainder and Reversion. — *Davis v. Willson*, 115 Ky. 639.

11. Leasehold Interest. — *Dunlop v. Mulry*, 85 N. Y. App. Div. 408. See also *Ozark v. Adams*, 73 Ark. 227.

Duration. — A mortgage on a leasehold has no duration beyond the term of the lease. *Miller*

916. See notes 1, 2, 4, 6.

(2) *Future Interests* — At Law. — See note 10.

In Equity. — See note 11.

917. See note 1.

Requisites and Sufficiency of Mortgage Covering Future Interests. — See note 3.

b. DESCRIPTION OF LAND AND ESTATE MORTGAGED — (2) *Manner and Sufficiency of Description*. — See notes 5, 6, 7.

918. See note 2.

General Terms of Description Are Not Sufficient. — See note 5.

Reservations and Exceptions. — See note 7.

919. (3) *Identification of Property Mortgaged*. — See note 4.

v. Warren, 94 N. Y. App. Div. 192, *affirmed* 182 N. Y. 539.

916. 1. Rents and Income. — *McLester v. Rose*, 104 Ill. App. 433; *Ortengren v. Rice*, 104 Ill. App. 428; *Ryan v. Illinois Trust, etc., Bank*, 100 Ill. App. 251, *affirmed* 199 Ill. 76; *Sage v. Mendelson*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 137.

2. Franchises. — *Central Trust Co. v. Warren*, (C. C. A.) 121 Fed. Rep. 323. See also *Old Colony Trust Co. v. Wichita*, 123 Fed. Rep. 762, *modified* (C. C. A.) 132 Fed. Rep. 641.

4. Easements. — *Wood v. Grayson*, 22 App. Cas. (D. C.) 432.

6. Equitable Interests. — *Farmers' L. & T. Co. v. Denver, etc., R. Co.*, (C. C. A.) 126 Fed. Rep. 46; *Gutter v. Dallamore*, 144 Cal. 665; *Wickes v. Hynson*, 95 Md. 511; *Titcomb v. Fonda, etc., R. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 630; *Central Trust Co. v. West India Imp. Co.*, 169 N. Y. 314.

Interest of Ward. — *Shoop v. Stewart*, 66 Kan. 631.

10. Future Interests — Rule at Law. — *New England Nat. Bank v. Northwestern Nat. Bank*, 171 Mo. 307, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 916; *Jacobson v. Smith*, 73 N. Y. App. Div. 412, *appeal dismissed* 172 N. Y. 654; *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487. See also *Murray v. Farmville, etc., R. Co.*, 101 Va. 262.

11. Future Interests — Equitable Rule. — *New England Water Works Co. v. Farmers' L. & T. Co.*, (C. C. A.) 136 Fed. Rep. 521; *Central Trust Co. v. Washington County R. Co.*, 124 Fed. Rep. 813; *Rudd v. Travelers' Ins. Co.*, (Ky. 1903) 73 S. W. Rep. 759; *Pere Marquette R. Co. v. Graham*, 136 Mich. 444; *Monmouth County Electric Co. v. Central R. Co.*, (N. J. 1903) 54 Atl. Rep. 140; *Jacobson v. Smith*, 73 N. Y. App. Div. 412, *appeal dismissed* 172 N. Y. 654; *Cooper v. Rouse*, 130 N. Car. 202, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 916; *Flanagan Bank v. Graham*, 42 Oregon 403; *Masterson v. Burnett*, 27 Tex. Civ. App. 370; *Murray v. Farmville, etc., R. Co.*, 101 Va. 262; *Horner-Gaylord Co. v. Fawcett*, 50 W. Va. 487.

An Estate in Expectancy is mortgageable. *Ward v. Ward*, 131 Fed. Rep. 946.

917. 1. Rights of Third Parties Must Not Be Prejudiced. — *Crippen v. Comstock*, 17 Colo. App. 89.

A mortgage of future-acquired property attaches to the interest obtained by the mortgagor only, and is inferior to junior liens, incumbrances, or equities under which the prop-

erty comes to the mortgagor. *Farmers' L. & T. Co. v. Denver, etc., R. Co.*, (C. C. A.) 126 Fed. Rep. 46.

3. Requisites and Sufficiency of Mortgages Covering After-acquired Property. — *Pardee v. Aldridge*, 189 U. S. 429; *Guaranty Trust Co. v. Atlantic Coast Electric R. Co.*, 132 Fed. Rep. 68; *Mallory v. Maryland Glass Co.*, 131 Fed. Rep. 111; *Murray v. Farmville, etc., R. Co.*, 101 Va. 262.

5. Description by Boundaries. — *Robinson v. Atkins*, 105 La. 790.

6. Name of Property. — *Robinson v. Atkins*, 105 La. 790.

Name and Locality. — *Phelan v. Wilson*, 114 La. 813.

7. Fractional Half-section. — *Huber v. Jennings Heywood Oil Syndicate*, 111 La. 747.

918. 2. Sufficiency of General Description. — *Johnson v. McKay*, 119 Ga. 196, 100 Am. St. Rep. 166, 121 Ga. 763; *Godfrey v. White*, 32 Ind. App. 265; *Fields v. Fish*, (Ky. 1904) 82 S. W. Rep. 376; *Watts v. Parks*, (Ky. 1904) 78 S. W. Rep. 1125; *Huber v. Jennings-Heywood Oil Syndicate*, 111 La. 747; *Scott v. Gordon*, 109 Mo. App. 695; *Edmonston v. Carter*, 180 Mo. 515; *Turner v. Cochran*, 30 Tex. Civ. App. 549; *Crow v. Keliman*, (Tex. Civ. App. 1902) 70 S. W. Rep. 564.

The Want of Reference to State, County, or City in which the land lies is not fatal if the property can be identified. *Horton v. Murden*, 117 Ga. 72.

5. Insufficient Descriptions. — *Simmons v. Hutchinson*, 81 Miss. 351; *Harris v. Woodard*, 130 N. Car. 580.

Erroneous Description. — *Rinehardt v. Reifers*, 158 Ind. 675.

Lack of Description. — A clause in a note giving to a mortgagee bank a lien "upon all the property or securities at any time given into or left in possession of the bank" was held not to create a mortgage on land, because of lack of description of the land. *Fleming v. Georgia R. Bank*, 120 Ga. 1023.

7. Exception and Reservation. — A description by which the part reserved may be identified is sufficient. *Huber v. Jennings-Heywood Oil Syndicate*, 111 La. 747.

A clause in a mortgage providing that "this mortgage is just to include a sufficient amount of said farm to secure said debt" does not render the mortgage invalid, as that would be the legal effect of the instrument if the words were omitted. *Watts v. Parks*, (Ky. 1904) 78 S. W. Rep. 1125.

919. 4. Parol Evidence Admissible to Identify

919. (4) *Interpretation of Description — In General.* — See note 5.

Construction Against Mortgagor. — See note 7.

920. Rejection of Erroneous Description. — See note 1.(5) *Misdescription of Mortgaged Property.* — See notes 2, 5.**921.** 5. Consideration — *a.* IN GENERAL — Valuable Consideration. — See note 1.

Adequacy of Consideration. — See note 3.

Presumption of Consideration. — See note 5.

Truth of Consideration. — See notes 7, 8.

b. ILLEGALITY OF CONSIDERATION. — See note 9.**922.** See note 1.

Partial Illegality of Consideration. — See note 2.

Legal and Illegal Considerations That Are Inseparable. — See note 3.

c. SUFFICIENT CONSIDERATIONS — (2) *Forbearance.* — See notes 6, 7.(4) *Release and Discharge of Prior Mor'gage.* — See note 9.

Property. — *Caston v. McCord*, 130 Ala. 318; *Horton v. Murden*, 117 Ga. 72; *Johnson v. McKay*, 119 Ga. 196, 100 Am. St. Rep. 166, 121 Ga. 763; *Watts v. Parks*, (Ky. 1904) 78 S. W. Rep. 1125; *Robinson v. Atkins*, 105 La. 790; *Welborn v. Dixon*, 70 S. Car. 108; *Ferguson v. Connally*, 33 Tex. Civ. App. 245; *Edmonston v. Carter*, 180 Mo. 515.

Description Too Indefinite. — *Harris v. Woodward*, 130 N. Car. 580.

919. 5. Interpretation of Words of Description. — *Iodence v. Peters*, 64 Neb. 425; *Ackerman v. Begrisch*, (N. J. 1901) 50 Atl. Rep. 673; *Book v. West*, 29 Wash. 70.

7. An Owner who has parted with the title will not be heard to destroy the validity thereof. *Robinson v. Atkins*, 105 La. 790.

920. 1. Rejection of Erroneous Description. — *Risch v. Jensen*, 92 Minn. 107; *Carter v. Leonard*, 65 Neb. 670.

2. As to Priority of Lien After Correction of a Misdescription, see *Herring v. Fitts*, 43 Fla. 54, 99 Am. St. Rep. 108; *Rinehardt v. Reifers*, 158 Ind. 675.

5. Judicial Correction of Mortgage. — *Lester v. Johnston*, 137 Ala. 194; *Herring v. Fitts*, 43 Fla. 54, 99 Am. St. Rep. 108; *Scott v. Gordon*, 109 Mo. App. 695; *Lewis v. Ferris*, (N. J. 1901) 50 Atl. Rep. 630.

After Foreclosure a mortgage cannot be reformed on account of omission in the description, the mortgage being then extinct. *Stewart v. Wilson*, 141 Ala. 405.

Void Mortgage. — The court will not reform in the matter of description a mortgage void because given by a wife to secure her husband's debts. *Day v. Shiver*, 137 Ala. 185.

921. 1. Consideration Need Not Be Valuable. — *Hill v. Gettys*, 135 N. Car. 373.

3. Adequacy Presumed. — *Waterloo First Nat. Bank v. Bennett*, 215 Ill. 398.

Fraud or Duress. — See *Coveney v. Pattullo*, 130 Mich. 275.

5. Consideration Presumed. — *Ambrose v. Drew*, 139 Cal. 665.

7. Presumption of Truth of Consideration. — *Corbett v. Clute*, 137 N. Car. 546.

8. Application of Principle to Mortgages. — *Lunn v. Guthrie*, 115 Iowa 501; *Dean v. Radford*, (Mich. 1904) 101 N. W. Rep. 598; *Harlan County v. Whitney*, 65 Neb. 105, 101 Am. St.

Rep. 610; *Boren v. Boren*, (Tex. Civ. App. 1902) 68 S. W. Rep. 184; *Street v. Robertson*, 28 Tex. Civ. App. 222; *Masterson v. Burnett*, 27 Tex. Civ. App. 370.

Exception. — Proof of a separate oral agreement that a mortgage, providing that it should be security for four notes, would be released upon payment of two notes was held not to be admissible, as being inconsistent with the terms of the written instrument. *Langdon First Nat. Bank v. Prior*, 10 N. Dak. 146.

Operative Effect Cannot Be Defeated. — Though a party may show the failure of consideration in part, by parol, he cannot thus defeat the operative effect of the mortgage as a conveyance. *Wishart v. Gerhart*, 105 Mo. App. 112.

9. Where Consideration Is Wholly Bad. — *Ristine v. Clements*, 31 Ind. App. 338.

922. 1. Effect of Mortgagee's Ignorance of Illegality. — *McKinnon v. Waterbury*, 136 Fed. Rep. 489; *Birdsall v. Wheeler*, 62 N. Y. App. Div. 625, *affirmed* 173 N. Y. 590.

Use to Which Money Put Immaterial. — Knowledge by the mortgagor that the borrower intends to use the money for an illegal purpose is no defense to a foreclosure suit where there was no participation by the mortgagee in the illegal act or furtherance of the unlawful design. *Hines v. Union Sav. Bank, etc., Co.*, 120 Ga. 711, *distinguishing* *Jones v. Dannenberg Co.*, 112 Ga. 426.

2. Mortgage Good as to Legal and Void as to Illegal Consideration. — *Pierson v. Green*, 69 S. Car. 559.

3. Inseparable Legal and Illegal Considerations. — *Reagan v. Chicago First Nat. Bank*, 157 Ind. 623.

6. Forbearance of Legal Remedy. — *Birdsall v. Wheeler*, 62 N. Y. App. Div. 625, *affirmed* 173 N. Y. 590; *Dispeau v. Pawtucket First Nat. Bank*, 24 R. I. 508.

Forbearance to Foreclose is a sufficient consideration for an assumption of the personal indebtedness by a grantee in a conveyance subject to the mortgage, but containing no assumption of the debt. *Citizens' Permanent Sav., etc., Assoc. v. Rampe*, 68 N. Y. App. Div. 556.

7. Extension of Time of Payment. — *O'Brien v. Fleckenstein*, 180 N. Y. 350, 105 Am. St. Rep. 768, *affirming* 86 N. Y. App. Div. 140.

9. Release and Discharge of Mortgage Good Con-

923. (5) *Consideration of Original Obligations Secured by Mortgage* — Where the Consideration of an Original Obligation of the Mortgagor. — See note 1.

Consideration of Original Obligation of Another. — See note 3.

(6) *Antecedent Indebtedness*. — See notes 4, 5.

(7) *Future Advances and Obligations*. — See note 6.

924. Consideration of Future Advance Need Not Be Patent. — See note 2.

925. See note 1.

The Fact that the Mortgage Does Not Express. — See note 3.

Future Maintenance and Support. — See note 4.

6. Indebtedness Secured — *b. SUFFICIENCY OF DESCRIPTION* — (1)

In General — Literal Accuracy. — See note 8.

Usual Practice as to Stating Amount of Debt. — See note 9.

Sufficiency of Reference to Subject-matter Secured. — See note 10.

926. See note 1.

(2) *General Descriptions* — (a) *In General*. — See notes 3, 6.

927. (c) *Effect of Recording Laws*. — See note 4.

(3) *Mortgages for Future Advances*. — See note 5.

928. See note 1.

sideration. — *Kyle v. Hamilton*, 136 Cal. xix, 68 Pac. Rep. 484.

923. 1. *Sufficiency of Original Obligation Supports Mortgage*. — *Sargent v. Cooley*, 12 N. Dak. 1.

3. *Consideration of Original Obligation Sufficient*. — *Dodsworth v. Sullivan*, (Minn. 1905) 103 N. W. Rep. 719.

4. *Pre-existing Debt a Sufficient Consideration*. — *Reed v. Rochford*, 62 N. J. Eq. 186; *Sargent v. Cooley*, 12 N. Dak. 1.

A Moral Obligation to Pay a Pre-existing Debt is a sufficient consideration. *Cadiz Fourth Nat. Bank v. Craig*, (Neb. 1901) 96 N. W. Rep. 185.

Payment of a Mortgagor's Indebtedness is sufficient consideration, although the money never passes through his hands. *Ball v. Marske*, 202 Ill. 31.

5. *Mortgagee Not Purchaser for Value*. — *Collins v. Moore*, 115 Ga. 327; *Empire State Trust Co. v. Fisher*, 67 N. J. Eq. 602; *O'Brien v. Fleckenstein*, 86 N. Y. App. Div. 140, affirmed 180 N. Y. 350, 105 Am. St. Rep. 768; *Wilcox v. Drought*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 351, affirmed 71 N. Y. App. Div. 402.

6. *Future Advances and Liabilities*. — *Helena First Nat. Bank v. Waddell*, (Ark. 1905) 85 S. W. Rep. 417; *Hamilton v. Rhodes*, 72 Ark. 625; *Banta v. Wise*, 135 Cal. 277; *Holliday v. Snow*, 129 Mich. 494; *Harlan County v. Whitney*, 65 Neb. 105, 101 Am. St. Rep. 610; *Reed v. Rochford*, 62 N. J. Eq. 186; *Merchants' State Bank v. Tufts*, (N. Dak. 1905) 103 N. W. Rep. 760; *Neland v. Dealy*, 11 N. Dak. 529; *Blackmar v. Sharp*, 23 R. I. 412. See also *Baker v. Bailey*, 204 Pa. St. 524.

924. 2. *Mortgage Need Not Show that It Is to Cover Future Advances*. — *Reed v. Rochford*, 62 N. J. Eq. 186; *Huntington v. Kneeland*, 102 N. Y. App. Div. 284; *Blackmar v. Sharp*, 23 R. I. 412.

925. 1. *Blackmar v. Sharp*, 23 R. I. 412.

3. *Statutory Modifications of Rule that Consideration May Be Future Advance*. — *Baltimore High Grade Brick Co. v. Amos*, 95 Md. 571; *Staniels v. Whitcher*, 72 N. H. 451.

4. *Support of Mortgagee*. — *Davis v. Poland*, 99 Me. 345.

8. *Minuteness of Description Not Necessary*. — *Moore v. Russell*, 133 Cal. 297, 85 Am. St. Rep. 166; *Thompson v. Cobb*, 95 Tex. 140.

9. *Usual Practice as to Stating Amount of Debt*. — *Equitable Bldg., etc., Assoc. v. King*, (Fla. 1904) 37 So. Rep. 181.

10. *Suitable Reference to Subject-matter*. — *Beach v. Osborne*, 74 Conn. 405; *Gardner v. Cohn*, 191 Ill. 553.

926. 1. *Description According to Tenor and Effect*. — *Gardner v. Cohn*, 191 Ill. 553.

A Reference to a Note Without Specifying Its Contents. — *Bangs v. Fallon*, 179 Mass. 77.

Inconsistent Recitals. — Where the note is identified by description, number, and paraph, a recital in the mortgage that the money was borrowed from one person and in the note that it was borrowed from another is immaterial. *Huber v. Jennings-Heywood Oil Syndicate*, 111 La. 747.

3. *General Description Ordinarily Sufficient*. — *Ferris v. Johnson*, 136 Mich. 227.

6. *Slight Mistakes in the description of a note will not invalidate the mortgage, if the note is sufficiently identified*. *Moore v. Russell*, 133 Cal. 297, 85 Am. St. Rep. 166.

Rejection of Erroneous Particulars. — The description of a note is sufficient if it can be identified by rejecting the recital of erroneous particulars. *Thompson v. Cobb*, 95 Tex. 140.

Proof. — Where the description applies equally to two series of notes held by different parties, the holder of one series, seeking to foreclose, must prove that the notes held by him are those described in and secured by the mortgage. *Santee v. Day*, 111 Ill. App. 495.

927. 4. *Reasonable Certainty Sufficient*. — *Beach v. Osborne*, 74 Conn. 405.

5. *General Rule as to Statement of Maximum Amount of Future Advances*. — *McClure v. Smith*, 115 Ga. 709; *Merchants' State Bank v. Tufts*, (N. Dak. 1905) 103 N. W. Rep. 760.

928. 1. *Maximum Amount Should Be Stated*. — See *Reed v. Rochford*, 62 N. J. Eq. 186.

928. (4) *Interpretation of Clauses Describing Indebtedness* — In General. — See note 3.

(5) *Identification of Indebtedness* — (b) *Admissibility of Parol Evidence* — Where an Existing Debt or Obligation. — See note 10.

929. See note 1.

Where a Sum Certain Is Mentioned. — See note 2.

Where Future Advances Are Secured. — See note 3.

7. Covenants and Stipulations — *b. COVENANTS OF WARRANTY.* — See note 6.

930. *c. FURTHER ASSURANCE.* — See note 1.

e. PROVISION FOR FORECLOSURE — (2) *Default in Payment of Interest.* — See note 7.

g. TIME OF PERFORMANCE. — See note 9.

931. See note 2.

h. PAYMENT OF TAXES. — See notes 3, 4.

j. STIPULATION CLOGGING EQUITY OF REDEMPTION. — See note 9.

k. STIPULATION FOR RECONVEYANCE. — See note 11.

932. *a. STIPULATION FOR MATURITY OF ENTIRE DEBT* — (1) *In General.* — See notes 1, 3, 4, 5, 6.

928. 3. Consideration of Whole Instrument. — Northern Cent. R. Co. v. Hering, 93 Md. 164.

10. Identification of Existing Debt by Parol. — Equitable Bldg., etc., Assoc. v. King, (Fla. 1904) 37 So. Rep. 181; Northern Cent. R. Co. v. Hering, 93 Md. 164; Harlan County v. Whitney, 65 Neb. 105, 101 Am. St. Rep. 610; Pape v. Ludeman, (N. J. 1904) 59 Atl. Rep. 9; Thompson v. Cobb, 95 Tex. 140.

929. 1. Impropriety of Parol Proof of Debt Not Contemplated. — Bowery Bank v. Hart, 77 N. Y. App. Div. 121. *Contra*, Huntington v. Kneeland, 102 N. Y. App. Div. 284, 105 N. Y. App. Div. 629.

2. Parol Proof of Intention to Secure Future Advances. — Kirby v. Raynes, 138 Ala. 194, 100 Am. St. Rep. 39; Reed v. Rochford, 62 N. J. Eq. 186; Huntington v. Kneeland, 102 N. Y. App. Div. 284; Lippincott v. Lawrie, 119 Wis. 573.

3. Parol Proof of Amount of Future Advances. — Huntington v. Kneeland, 102 N. Y. App. Div. 284; Merchants' State Bank v. Tufts, (N. Dak. 1905) 103 N. W. Rep. 760.

6. Materiality of Covenants of Warranty. — Rinehardt v. Reifers, 158 Ind. 675.

930. 1. Remedy of Defect. — Trust Co. v. Universal Talking Mach. Co., 90 N. Y. App. Div. 207.

7. Nonpayment of Interest. — Perry v. Fisher, 30 Ind. App. 261.

9. Fixture of Time for Performance Unnecessary. — Pickett v. Wadlow, 94 Md. 564.

931. 2. Omission Supplied by Law. — Tuggle v. Berkeley, 101 Va. 83.

3. Payment of Taxes by Mortgagor. — Consterdine v. Moore, 65 Neb. 291, 101 Am. St. Rep. 620.

The Amount of Indebtedness Is Not Rendered Uncertain by an agreement to pay taxes. Garnett v. Meyers, 65 Neb. 280; Consterdine v. Moore, 65 Neb. 291, 101 Am. St. Rep. 620.

Tax Assessment Against Mortgagee, Based on Mortgage. — See Green v. Grant, 134 Mich. 462.

4. Payment of Taxes by Mortgagee. — Barnwell v. Marion, 60 S. Car. 314.

9. Stipulation Clogging Equity of Redemption.

— Rice v. Noakes, (1900) 2 Ch. 445, 69 L. J. Ch. 635, 82 L. T. N. S. 784, *affirmed* (1902) A. C. 24.

11. Stipulation for Reconveyance. — See Welborn v. Dixon, 70 S. Car. 108.

932. 1. Stipulation for Maturity of Entire Debt — Taxes. — Keene Five Cent Sav. Bank v. Reid, (C. C. A.) 123 Fed. Rep. 221; Plummer v. Park, 62 Neb. 665.

3. Insurance. — Keene Five Cent Sav. Bank v. Reid, (C. C. A.) 123 Fed. Rep. 221; Uedelhofen v. Mason, 201 Ill. 465.

4. Instalment of Principal. — Houston v. Curran, 101 Ill. App. 203, *affirmed* 201 Ill. 442; Hutchings v. Reinhalter, 23 R. I. 518.

Where There Is No Stipulation for Maturity a provision that the principal is to be paid in annual instalments until the note is paid in full does not make the mortgage enforceable until the maturity of the entire note. Hinton v. Jones, 136 N. Car. 53.

5. Instalment of Interest. — Keene Five Cent Sav. Bank v. Reid, (C. C. A.) 123 Fed. Rep. 221; American Freehold Land Mortg. Co. v. Pollard, 132 Ala. 155; Moore v. Russell, 133 Cal. 297, 85 Am. St. Rep. 166; Houston v. Curran, 101 Ill. App. 203, *affirmed* 201 Ill. 442; Illinois Nat. Bank v. School Trustees, 211 Ill. 500; Houston v. Fatka, 30 Ind. App. 693; Dalton v. Eaves, 92 Mo. App. 72; Colton v. Salomon, 67 N. J. L. 73; Long Island L. & T. Co. v. Long Island City, etc., R. Co., 85 N. Y. App. Div. 36, *affirmed* 178 N. Y. 588; White v. Krutz, 37 Wash. 34; Sheridan First Nat. Bank v. Citizens' State Bank, 11 Wyo. 32, 100 Am. St. Rep. 925.

6. Stipulation for Maturity at Option of Mortgagee. — Meyer v. Weber, 133 Cal. 681; Holdroff v. Remlee, 105 Ill. App. 671; Houston v. Curran, 101 Ill. App. 203, *affirmed* 201 Ill. 442; Consterdine v. Moore, 65 Neb. 291, 101 Am. St. Rep. 620; Boigeol v. Eigabroadt, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 606; Clark v. El-mendorf, (Tex. Civ. App. 1904) 78 S. W. Rep. 538; Lincoln v. Corbett, 31 Tex. Civ. App. 352.

Option Available on Breach of Warranty of Title. — King v. King, 215 Ill. 100.

- 932.** Such a Stipulation Is Regarded Not in the Nature of a Penalty. — See note 7.
Such a Clause Is Permissive and Not Compulsory. — See note 9.
- 933.** Necessity of Strict Compliance with Stipulation. — See note 3.
- 934.** *g.* RECEIVERSHIP. — See note 1.
r. ATTORNEY'S FEES. — See note 3.
- 935.** 9. Illegality, Usury, and Fraud upon Creditors — *c.* FRAUD UPON CREDITORS. — See note 2.

Effect of Stipulation on Note Secured. — A stipulation in a mortgage for the maturity of the entire debt does not affect the negotiability of the note which it secures. *Consterdine v. Moore*, 65 Neb. 291, 101 Am. St. Rep. 620.

932. 7. Stipulation Not a Penalty or Forfeiture. — *White v. Gracey*, 45 Fla. 657; *Houston v. Curran*, 101 Ill. App. 203, *affirmed* 201 Ill. 442.

9. Permissive Nature of Clause. — *Huston v. Fatka*, 30 Ind. App. 693; *Warner v. Williams*, 93 Md. 517. See also *Schieck v. Donohue*, 92 N. Y. App. Div. 330.

Filing of Bill to Foreclose Sufficient Election. — *Holdroff v. Remlee*, 105 Ill. App. 671; *Curran v. Houston*, 201 Ill. 442; *Boigeol v. Eigabroadt*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 606.

Clause Not Self-operative Though Option Not Mentioned in Mortgage. — *Keene Five Cent Sav. Bank v. Reid*, (C. C. A.) 123 Fed. Rep. 221.

Rule in Wisconsin. — The mortgagor's right to notice of the mortgagee's election is held in *Wisconsin* to be merely a rule of equity, and not a requirement construed into the contract. *Julien v. Model Bldg., etc., Assoc.*, 116 Wis. 79.

933. 3. Necessity of Strict Compliance with Clause Accelerating Maturity. — *Lincoln v. Corbett*, 31 Tex. Civ. App. 352. See also *Plummer v. Park*, 62 Neb. 665.

Option in Mortgagee. — *White v. Krutz*, 37 Wash. 34.

934. 1. Validity of Stipulation for Receivership. — *Bagley v. Illinois Trust, etc., Bank*, 199 Ill. 76; *Pringle v. James*, 109 Ill. App. 100.

Solvency of Mortgagor Immaterial under Stipulation. — *Pringle v. James*, 109 Ill. App. 100.

Court Not Bound by Provision. — *Thomas v. Davis*, 90 N. Y. App. Div. 1.

Where the Rents and Profits Are Pledged for the payment of the debt a receiver will be appointed on default pending foreclosure. *Ortengren v. Rice*, 104 Ill. App. 428; *West v. Adams*, 106 Ill. App. 114; *McLester v. Rose*, 104 Ill. App. 433; *Lechner v. Green*, 104 Ill. App. 442.

3. Validity of Stipulation for Attorneys' Fees. — *American Freehold Land Mortg. Co. v. Pollard*, 132 Ala. 155; *Chastain v. Porter*, 130 Ala. 410; *Thrasher v. Moran*, 146 Cal. 683; *Damon v. Quinn*, 143 Cal. 75; *Borchardt v. Favor*, 16 Colo. App. 406; *Ottensoser v. Scott*, (Fla. 1904) 37 So. Rep. 161; *Healy v. Protection Mut. F. Ins. Co.*, 107 Ill. App. 632, *reversed* 213 Ill. 99; *Union Trust Co. v. Shilling*, 30 Ind. App. 543; *Hayward v. Hayward*, 114 La. 476; *Bowery Bank v. Hart*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 412, *reversed* 77 N. Y. App. Div. 121; *Columbian Bldg., etc., Assoc. v. Rice*, 68 S. Car. 236; *Sheridan First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925.

An Allowance of Fees Is Erroneous. — See *Hall v. Read*, 28 Tex. Civ. App. 18.

Reasonableness of Fee. — *Peacock, etc., Co. v. Thaggard*, 128 Fed. Rep. 1005, *affirmed* (C. C. A.) 129 Fed. Rep. 1005; *White v. Gracey*, 45 Fla. 657.

Liability for Fee. — *National Bldg., etc., Assoc. v. Cheatham*, 137 Ala. 395.

Not Lien on Land. — An attorney's fee provided in the mortgage is not a lien on the land unless the mortgage specially provides that it shall be secured thereby. *Loewenthal v. Coonan*, (Cal. 1902) 67 Pac. Rep. 1033.

Evidence of What Is a Reasonable Fee is admissible. *Healy v. Protection Mut. F. Ins. Co.*, 213 Ill. 99.

Parol Evidence is admissible to show that by a stipulation for "expenses" in an action pending on the evidence of indebtedness the parties meant to include attorney's fees. *Bowery Bank v. Hart*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 412, *reversed* 77 N. Y. App. Div. 121.

Where a New Deed in Security of the Debt Has Been Substituted for a Mortgage containing an attorney-fee clause, the deed containing no such clause, and being based on an erroneous idea that it will obviate a foreclosure, there can be no allowance of an attorney fee in a foreclosure suit based on the old mortgage. *Kyle v. Hamilton*, 136 Cal. xix, 68 Pac. Rep. 484.

A Statute Prohibiting a Stipulation for Attorney's Fees in the evidence of indebtedness does not apply to a mortgage securing a bond, the latter being the evidence of indebtedness. *Barry v. Snowden*, 106 Fed. Rep. 571.

935. 2. Intention to Defraud Creditors — *United States*. — *Clayton v. Exchange Bank*, (C. C. A.) 121 Fed. Rep. 630; *In re Kellogg*, 113 Fed. Rep. 120, *affirmed* (C. C. A.) 121 Fed. Rep. 333.

Colorado. — *Chittenden v. Charles H. Sieg Mfg. Co.*, 16 Colo. App. 549.

Illinois. — *Beatty v. Somerville*, 102 Ill. App. 487.

Indiana. — *Reagan v. Chicago First Nat. Bank*, 157 Ind. 623.

Indian Territory. — *Glover v. Fitzpatrick*, 4 Indian Ter. 224.

Iowa. — *Schoonover v. Foley*, (Iowa 1903) 94 N. W. Rep. 492.

Kentucky. — *Bramblet v. Commonwealth Land, etc., Co.*, (Ky. 1904) 83 S. W. Rep. 599.

Maryland. — *Baltimore High Grade Brick Co. v. Amos*, 95 Md. 597.

Nebraska. — *Marcus v. Leake*, (Neb. 1903) 94 N. W. Rep. 100.

New Jersey. — *Empire State Trust Co. v. Fisher*, 57 N. J. Eq. 602; *Levy v. Levy*, (N. J. 1904) 57 Atl. Rep. 1011; *Asbury Park Bldg., etc., Assoc. v. Shepherd*, (N. J. 1901) 50 Atl. Rep. 65.

North Dakota. — *Forester v. Van Auken*, 12 N. Dak. 175.

Oregon. — *U. S. Mortgage, etc., Co. v. Marquam*, 41 Oregon 391.

935. V. TRANSACTIONS EITHER MORTGAGES OR SALES — 1. Where and in What Proceedings Deed Prima Facie a Sale Regarded as Mortgage — Jurisdiction in Equity. — See note 3.

936. 2. By Whom Question Raised. — See note 2.

937. 3. Determination of Question — b. CHARACTER OF TRANSACTION DETERMINED BY INTENTION OF PARTIES — In General. — See notes 2, 3, 4.

The Courts Do Not Presume to Change the Contract. — See note 5.

In Doubtful Cases. — See note 6.

938. See notes 1, 2.

Character of Transaction Must Be Fixed at Its Inception. — See note 4.

Pennsylvania. — Monessen Nat. Bank v. Lichtenstein, 207 Pa. St. 187.

Texas. — Watts v. Dubois, (Tex. Civ. App. 1902) 66 S. W. Rep. 698; Schultze v. Schultze, (Tex. Civ. App. 1901) 66 S. W. Rep. 56, affirmed 95 Tex. 352.

Virginia. — Tatum v. Tatum, 101 Va. 77.

Washington. — Chantler v. Hubbell, 34 Wash. 211.

935. 3. Jurisdiction in Equity — Alabama. — Richter v. Noll, 128 Ala. 198; Hammett v. White, 128 Ala. 380.

Arizona. — See Rees v. Rhodes, 3 Ariz. 235.

Illinois. — Rook v. Rook, 111 Ill. App. 398.

Louisiana. — Franklin v. Sewall, 110 La. 292.

Massachusetts. — Clark v. Seagraves, 186 Mass. 430.

Michigan. — Bigelow v. Thompson, 133 Mich. 334; Weise v. Anderson, 134 Mich. 502; Wall v. Albion College, 130 Mich. 526; Malone v. Danforth, (Mich. 1904) 100 N. W. Rep. 445; Cottrell v. Moran, (Mich. 1904) 101 N. W. Rep. 561.

Missouri. — Gee v. Van Natta-Lynds Drug Co., 105 Mo. App. 27.

New York. — Levy v. Hamilton, 68 N. Y. App. Div. 277; New York County Nat. Bank v. American Surety Co., 69 N. Y. App. Div. 153, affirmed 174 N. Y. 544.

Washington. — Conner v. Clapp, 37 Wash. 299.

936. 2. Who May Raise Question — Grantor. — Franklin v. Sewall, 110 La. 292; Herrick v. Teachout, 74 Vt. 196.

Administrators of Decedent Grantor. — Clark v. Seagraves, 186 Mass. 430.

The Real Owner of the Fee, though not the grantor, may raise the question. *Dickson v. Stewart*, (Neb. 1904) 98 N. W. Rep. 1085.

937. 2. Intention of Parties Controlling — Arizona. — Rees v. Rhodes, 3 Ariz. 235.

Georgia. — McElmurray v. Blodgett, 120 Ga. 9; Felton v. Grier, 109 Ga. 320.

Illinois. — Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283; Johnson v. Prosperity Loan, etc., Assoc., 94 Ill. App. 260.

Iowa. — Bigler v. Jack, 114 Iowa 667.

Michigan. — Malone v. Danforth, (Mich. 1904) 100 N. W. Rep. 445; Sowles v. Wilcox, 127 Mich. 166.

Nebraska. — Sanders v. Ayres, 63 Neb. 271.

New York. — Lucsenhop v. Einsfeld, 93 N. Y. App. Div. 68.

Oklahoma. — Yingling v. Redwine, 12 Okla. 64.

South Carolina. — McGill v. Thorne, 70 S. Car. 65; Miller v. Price, 66 S. Car. 85.

Utah. — Smyth v. Reed, 28 Utah 262.

Vermont. — Herrick v. Teachout, 74 Vt. 196.

West Virginia. — Liskey v. Snyder, 56 W. Va. 610; Hursey v. Hursey, 56 W. Va. 148.

3. Necessity of Mutual Understanding. — Rose v. Gandy, 137 Ala. 329; Bacon v. National German-American Bank, 191 Ill. 205; Crane v. Chandler, 190 Ill. 584; Yost v. Hays City First Nat. Bank, 66 Kan. 605; Forester v. Van Auken, 12 N. Dak. 175.

4. Understanding of Grantor Only Not Sufficient. — Forester v. Van Auken, 12 N. Dak. 175; Dabney v. Smith, 38 Wash. 40.

5. Courts Do Not Presume to Change Contract. — Stafford v. Stafford, 29 Tex. Civ. App. 73, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 937.

6. Conditional Sales Not Favored. — Rose v. Gandy, 137 Ala. 329; Rankin v. Rankin, 111 Ill. App. 403; Fulwiler v. Roberts, (Ky. 1904) 80 S. W. Rep. 1148; Carveth v. Winegar, 133 Mich. 34; Wilson v. McWilliams, 16 S. Dak. 96; Herrick v. Teachout, 74 Vt. 196; Tuggle v. Berkeley, 101 Va. 83; Hursey v. Hursey, 56 W. Va. 148; Thacker v. Morris, 52 W. Va. 220, 94 Am. St. Rep. 928. See also Bigler v. Jack, 114 Iowa 667.

938. 1. Impropriety of Forced Construction. — Herrick v. Teachout, 74 Vt. 196.

Mortgage More Benign in Operation. — Fulwiler v. Roberts, (Ky. 1904) 80 S. W. Rep. 1148.

2. Inclination to Sustain Absolute Sale. — Rose v. Gandy, 137 Ala. 329.

Submission to Jury — Theory of Case. — Where the issue made by the pleadings and evidence is that of deed absolute or mortgage it is error to submit to the jury the theory that it may have been a conditional sale. *Bradford v. Malone*, 33 Tex. Civ. App. 349.

4. Original Character of Instrument Is Decisive. — Rees v. Rhodes, 3 Ariz. 235; Johnson v. Prosperity Loan, etc., Assoc., 94 Ill. App. 260; Yost v. Hays City First Nat. Bank, 66 Kan. 605; Hoschke v. Hoschke, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 125; Holladay v. Willis, 101 Va. 274; Hursey v. Hursey, 56 W. Va. 148.

Changes Affecting the Parties in Their Relations to the Contract will not be allowed to control its construction. *Herrick v. Teachout*, 74 Vt. 196.

Once a Mortgage Always a Mortgage. — Greenwood Bldg., etc., Assoc. v. Stanton, 28 Ind. App. 548; Faulkner v. Cody, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 64; Keller v. Kirby, 34 Tex. Civ. App. 404; Long v. Fields, 31 Tex. Civ. App. 241.

Conversion of Mortgage into Absolute Conveyance. — In *Illinois*, where a deed absolute on its face is originally intended as a security

938. How Intention of Parties May Be Ascertained. — See note 5.

939. See notes 1, 2, 3.

940. See note 1.

The Principal Test. — See note 2.

These Several Considerations Have More or Less Weight. — See note 3.

941. Where No Extrinsic Facts or Circumstances Have Been Shown. — See note 2.

for the payment of a debt, that intention may be abandoned by the parties, and a subsequent parol arrangement that the deed is to be treated as an absolute conveyance will be binding on them. *Cramer v. Wilson*, 202 Ill. 83.

938. 5. Not Limited to Written Contract. — *Hammett v. White*, 128 Ala. 380; *Rees v. Rhodes*, 3 Ariz. 235; *Bigler v. Jack*, 114 Iowa 667; *Sanders v. Ayres*, 63 Neb. 271; *Platt v. McClong*, (N. J. 1901) 49 Atl. Rep. 1125; *Farmers', etc., Bank v. Smith*, 61 N. Y. App. Div. 315; *Wells v. Geyer*, 12 N. Dak. 316; *Stafford v. Stafford*, 29 Tex. Civ. App. 73; *Long v. Fields*, 31 Tex. Civ. App. 241; *Herrick v. Teachout*, 74 Vt. 196.

939. 1. Consideration of Surrounding Circumstances — *Alabama*. — *Rose v. Gandy*, 137 Ala. 329.

Kansas. — *Martin v. Allen*, 67 Kan. 758.

Michigan. — *Carveth v. Winegar*, 133 Mich. 34.

Nebraska. — *Sanders v. Ayres*, 63 Neb. 271; *David City First Nat. Bank v. Sargeant*, 65 Neb. 594.

New Jersey. — *Platt v. McClong*, (N. J. 1901) 49 Atl. Rep. 1125.

North Dakota. — *Forester v. Van Auker*, 12 N. Dak. 175; *Wells v. Geyer*, 12 N. Dak. 316; *McGuin v. Lee*, 10 N. Dak. 160.

South Carolina. — *McGill v. Thorne*, 70 S. Car. 65.

Texas. — *Lehman v. Chatham Machinery Co.*, 28 Tex. Civ. App. 228.

Vermont. — *Herrick v. Teachout*, 74 Vt. 196.

West Virginia. — *Liskey v. Snyder*, 56 W. Va. 610; *Hursey v. Hursey*, 56 W. Va. 148.

Wisconsin. — *Beebe v. Wisconsin Mortg. Loan Co.*, 117 Wis. 328.

Conversations Between the Parties prior to the delivery of the deed may be considered. *Grier v. Casares*, (Tex. Civ. App. 1903) 76 S. W. Rep. 451.

2. Relationship of Parties in General. — *Rose v. Gandy*, 137 Ala. 329; *Rees v. Rhodes*, 3 Ariz. 235; *Dillon v. Dillon*, (Ky. 1902) 69 S. W. Rep. 1099; *Dean v. Radford*, (Mich. 1904) 101 N. W. Rep. 598; *Sanders v. Ayres*, 63 Neb. 271; *Farmers', etc., Bank v. Smith*, 61 N. Y. App. Div. 315; *McGill v. Thorne*, 70 S. Car. 65; *Liskey v. Snyder*, 56 W. Va. 610; *Beebe v. Wisconsin Mortg. Loan Co.*, 117 Wis. 328.

3. Relative Value to Be Considered. — *Rose v. Gandy*, 137 Ala. 329; *Carveth v. Winegar*, 133 Mich. 34; *Dean v. Radford*, (Mich. 1904) 101 N. W. Rep. 598; *Evans v. Thompson*, 89 Minn. 202; *Wells v. Geyer*, 12 N. Dak. 316; *Forester v. Van Auker*, 12 N. Dak. 175; *Wilson v. McWilliams*, 16 S. Dak. 96; *Tuggle v. Berkeley*, 101 Va. 83; *Dabney v. Smith*, 38 Wash. 40.

940. 1. Conduct and Declarations in General. — *Adams v. Hopkins*, 144 Cal. 19; *Sanders v. Ayres*, 63 Neb. 271; *Liskey v. Snyder*, 56 W.

Va. 610; *Beebe v. Wisconsin Mortg. Loan Co.*, 117 Wis. 328.

Subsequent Conversations. — *Hoskins v. Hoskins*, (Ky. 1905) 87 S. W. Rep. 320.

Subsequent Conduct of Parties. — *Rose v. Gandy*, 137 Ala. 329; *Wright v. Wright*, (Iowa 1904) 98 N. W. Rep. 137; *Dabney v. Smith*, 38 Wash. 40; *Hursey v. Hursey*, 56 W. Va. 148. But see *Franklin v. Sewall*, 110 La. 292.

Declarations of the Attorney of the grantee are admissible. *Murray v. Sweasy*, 69 N. Y. App. Div. 45.

2. Principal Test — *Alabama*. — *Rose v. Gandy*, 137 Ala. 329.

Arizona. — *Rees v. Rhodes*, 3 Ariz. 235.

California. — *Holmes v. Warren*, 145 Cal. 457.

Georgia. — *Felton v. Grier*, 109 Ga. 320; *McElmurray v. Blodgett*, 120 Ga. 9.

Illinois. — *Rankin v. Rankin*, 111 Ill. App. 403.

Indiana. — *Greenwood Bldg., etc., Assoc. v. Stanton*, 28 Ind. App. 548.

Kansas. — *Fabrique v. Cherokee, etc., Coal, etc., Co.*, 69 Kan. 733; *Yost v. Hays City First Nat. Bank*, 66 Kan. 605; *Martin v. Allen*, 67 Kan. 758.

Kentucky. — *Oberdorfer v. White*, (Ky. 1904) 78 S. W. Rep. 436.

Maryland. — *Pickett v. Wadlow*, 94 Md. 564; *Northern Cent. R. Co. v. Hering*, 93 Md. 164.

Montana. — *Morrison v. Jones*, 31 Mont. 154.

Nebraska. — *Fahay v. State Bank*, (Neb. 1901) 95 N. W. Rep. 505; *Tannyhill v. Peppel*, (Neb. 1903) 96 N. W. Rep. 1005; *Samuelson v. Mickey*, (Neb. 1905) 103 N. W. Rep. 671.

New York. — *Faulkner v. Cody*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 64; *Braun v. Vollmer*, 89 N. Y. App. Div. 43.

South Carolina. — *McGill v. Thorne*, 70 S. Car. 65.

South Dakota. — *Wilson v. McWilliams*, 16 S. Dak. 96.

Texas. — *Lehman v. Chatham Machinery Co.*, 28 Tex. Civ. App. 228.

West Virginia. — *Liskey v. Snyder*, 56 W. Va. 610; *Way v. Mayhugh*, 57 W. Va. 175.

3. Considerations Affected by Circumstances. — *Hursey v. Hursey*, 56 W. Va. 148.

941. 2. Documents Relating to Same Transaction Construed Together. — *Adams v. Hopkins*, 144 Cal. 19; *Cassem v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160; *Johnson v. Prosperity Loan, etc., Assoc.*, 94 Ill. App. 260; *Morrison v. Jones*, 31 Mont. 154; *Ackerman v. Begrish*, (N. J. 1901) 50 Atl. 673; *Hoschke v. Hoschke*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 125; *Wilson v. McWilliams*, 16 S. Dak. 96; *Turner v. Cochran*, 30 Tex. Civ. App. 549; *Holladay v. Willis*, 101 Va. 274; *Beebe v. Wisconsin Mortg. Loan Co.*, 117 Wis. 328.

941. *c.* WHERE TRANSACTION REGARDED AS ABSOLUTE OR CONDITIONAL SALE — When the Intention to Secure an Indebtedness Does Not Appear. — See note 4.

942. Where a Deed Absolute on Its Face Is Fraudulent. — See note 1.

Absence of Mutual Rights. — See notes 2, 3

The Voluntary Surrender or Cancellation of a Defeasance. — See note 4.

943. *d.* WHERE TRANSACTION PRIMA FACIE A SALE REGARDED AS MORTGAGE. — See note 1.

941. 4. Intention to Secure Indebtedness Not Apparent — *California*. — *Holmes v. Warren*, 145 Cal. 457.

Georgia. — *Felton v. Grier*, 109 Ga. 320; *McElmurray v. Blodgett*, 120 Ga. 9.

Illinois. — *Carroll v. Tomlinson*, 192 Ill. 398, 85 Am. St. Rep. 344; *Gannon v. Moles*, 111 Ill. App. 19, *affirmed* 209 Ill. 180; *Steele v. Steele*, 112 Ill. App. 409.

Iowa. — *Wright v. Wright*, (Iowa 1904) 98 N. W. Rep. 137; *Butterfield v. Kirtley*, 114 Iowa 520.

Kansas. — *Fabrique v. Cherokee, etc., Coal, etc., Co.*, 69 Kan. 733; *Martin v. Allen*, 67 Kan. 758; *Yost v. Hays City First Nat. Bank*, 66 Kan. 605.

Montana. — *Morrison v. Jones*, 31 Mont. 154.

New York. — *Reich v. Dyer*, 180 N. Y. 107.

North Dakota. — *Forester v. Van Auker*, 12 N. Dak. 175; *Little v. Braun*, 11 N. Dak. 410; *McGuin v. Lee*, 10 N. Dak. 160.

South Carolina. — *Miller v. Price*, 66 S. Car. 85.

Texas. — *Pumilia v. De George*, (Tex. Civ. App. 1903) 74 S. W. Rep. 813; *Harrington v. Claflin*, 28 Tex. Civ. App. 100.

Utah. — *Smyth v. Reed*, 28 Utah 262.

Virginia. — *Holladay v. Willis*, 101 Va. 274.

Washington. — *Reed v. Parker*, 33 Wash. 107.

West Virginia. — *Way v. Mayhugh*, 57 W. Va. 175.

942. 1. Fraudulent Conveyance. — *Burch v. Nicholas*, (Ky. 1904) 80 S. W. Rep. 1132.

2. Necessity of Mutual Rights. — *Northern Cent. R. Co. v. Hering*, 93 Md. 164; *Reed v. Parker*, 33 Wash. 107, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 942.

Want of Mutuality Is No Defense where the party not bound has performed all the conditions of the contract. *Dickson v. Stewart*, (Neb. 1904) 98 N. W. Rep. 1085.

3. No Mortgage Where Right of Repurchase Is Optional. — *Crane v. Chandler*, 190 Ill. 584; *Wright v. Wright*, (Iowa 1904) 98 N. W. Rep. 137; *Fabrique v. Cherokee, etc., Coal, etc., Co.*, 69 Kan. 733; *Yost v. Hays City First Nat. Bank*, 66 Kan. 605; *Morrison v. Jones*, 31 Mont. 154; *Smyth v. Reed*, 28 Utah 262; *Holladay v. Willis*, 101 Va. 274; *Reed v. Parker*, 33 Wash. 107, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 942; *Liskey v. Snyder*, 56 W. Va. 610.

4. Voluntary Surrender of Defeasance. — *Bigler v. Jack*, 114 Iowa 667.

943. 1. Conveyances Held Mortgages in Equity — *Alabama*. — *Hammitt v. White*, 128 Ala. 380.

Arkansas. — *Land v. May*, 73 Ark. 415; *Bogenshultz v. O'Toole*, 70 Ark. 253.

Florida. — *Equitable Bldg., etc., Assoc. v. King*, (Fla. 1904) 37 So. Rep. 181.

Illinois. — *Johnson v. Prosperity Loan, etc., Assoc.*, 94 Ill. App. 260; *Cassen v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160; *Gannon v. Moles*, 209 Ill. 180; *Ætna Ins. Co. v. Jacobson*, 105 Ill. App. 283; *Schmitt v. Merriman*, 101 Ill. App. 443, *affirmed* 211 Ill. 263; *Howat v. Howat*, 101 Ill. App. 158; *McCorkle v. Richards*, 112 Ill. App. 495.

Iowa. — *Thompson v. People's Bldg., etc., Co.*, 114 Iowa 481.

Kentucky. — *Dillon v. Dillon*, (Ky. 1902) 69 S. W. Rep. 1099; *Oberdorfer v. White*, (Ky. 1904) 78 S. W. Rep. 436; *Fulwiler v. Roberts*, (Ky. 1904) 80 S. W. Rep. 1148; *Hoskins v. Hoskins*, (Ky. 1905) 87 S. W. Rep. 320; *Garvin v. Vincent*, (Ky. 1905) 87 S. W. Rep. 804; *Guenther v. Wisdom*, (Ky. 1905) 84 S. W. Rep. 771.

Maryland. — *Pickett v. Wadlow*, 94 Md. 564.

Massachusetts. — *Providence, etc., Steamboat Co. v. Fall River*, 187 Mass. 45.

Michigan. — *Dean v. Radford*, (Mich. 1904) 101 N. W. Rep. 598; *Malone v. Danforth*, (Mich. 1904) 100 N. W. Rep. 445; *Bigelow v. Thompson*, 133 Mich. 334; *Wall v. Albion College*, 130 Mich. 526; *Sowles v. Wilcox*, 127 Mich. 166.

Minnesota. — *Evans v. Thompson*, 89 Minn. 202.

Nebraska. — *Falkner v. Powell*, (Neb. 1904) 100 N. W. Rep. 937; *Fahay v. State Bank*, (Neb. 1901) 95 N. W. Rep. 505.

New Jersey. — *Ackerman v. Begrish*, (N. J. 1901) 50 Atl. Rep. 673; *Adoue v. Spencer*, 62 N. J. Eq. 782, 90 Am. St. Rep. 484.

New York. — *Braun v. Vollmer*, 89 N. Y. App. Div. 43.

North Carolina. — *Fuller v. Jenkins*, 130 N. Car. 554.

North Dakota. — *Wells v. Geyer*, 12 N. Dak. 316.

South Carolina. — *Welborn v. Dixon*, 70 S. Car. 108.

South Dakota. — *Bradley v. Helgeson*, 14 S. Dak. 593.

Texas. — *Masterson v. Burnett*, 27 Tex. Civ. App. 370; *Keller v. Kirby*, 34 Tex. Civ. App. 404.

Utah. — *Azzalia v. St. Claire*, 23 Utah 401.

Vermont. — *Herrick v. Teachout*, 74 Vt. 196.

Virginia. — *Tuggle v. Berkeley*, 101 Va. 83.

Wisconsin. — *Schneider v. Reed*, 123 Wis. 488; *Beebe v. Wisconsin Mortg. Loan Co.*, 117 Wis. 328; *Wolf v. Theresa Village Mut. F. Ins. Co.*, 115 Wis. 402.

Though the Debt Secured Is That of a Third Person, the grantor or his representative may show that an absolute deed is a mortgage. *Clark v. Seagraves*, 186 Mass. 430.

944. *e.* INDICIA OF MORTGAGE. — See note 2.

945. See notes 1, 2, 3, 4, 5, 6, 7.

946. See notes 2, 3, 4, 5, 6, 7.

944. 2. Pre-existence and Continuance of Debt — *Alabama*. — *Rose v. Gandy*, 137 Ala. 329.

Arkansas. — *Land v. May*, 73 Ark. 415.

Georgia. — *McElmurray v. Blodgett*, 120 Ga. 9; *Felton v. Grier*, 109 Ga. 320.

Illinois. — *Gannon v. Moles*, 209 Ill. 180.

Indiana. — *Greenwood Bldg., etc., Assoc. v. Stanton*, 28 Ind. App. 548.

Maryland. — *Pickett v. Wadlow*, 94 Md. 564.

Michigan. — *Malone v. Danforth*, (Mich. 1904) 100 N. W. Rep. 445.

Nebraska. — *Tannyhill v. Pepperl*, (Neb. 1903) 96 N. W. Rep. 1005; *Fahay v. State Bank*, (Neb. 1901) 95 N. W. Rep. 505; *David City First Nat. Bank v. Sargeant*, 65 Neb. 594; *Sanders v. Ayres*, 63 Neb. 271.

New Jersey. — *English v. Rainear*, (N. J. 1903) 55 Atl. Rep. 41; *Adoue v. Spencer*, 62 N. J. Eq. 782, 90 Am. St. Rep. 484.

New York. — *Faulkner v. Cody*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 64.

Oklahoma. — *Yingling v. Redwine*, 12 Okla. 64.

South Carolina. — *McGill v. Thorne*, 70 S. Car. 65.

South Dakota. — *Bradley v. Helgersen*, 14 S. Dak. 593.

Utah. — *Smyth v. Reed*, 28 Utah 262.

Virginia. — *Tuggle v. Berkeley*, 101 Va. 83. *West Virginia*. — *Liskey v. Snyder*, 56 W. Va. 610; *Thacker v. Morris*, 52 W. Va. 220, 94 Am. St. Rep. 928.

945. 1. Application for Loan of Money. — *Rose v. Gandy*, 137 Ala. 329; *Garvins v. Vincent*, (Ky. 1905) 87 S. W. Rep. 804; *Evans v. Thompson*, 89 Minn. 202; *Fahay v. State Bank*, (Neb. 1901) 95 N. W. Rep. 505; *Wilson v. McWilliams*, 16 S. Dak. 96. See also *Liskey v. Snyder*, 56 W. Va. 610.

2. Negotiation for Loan Pending When Deed Was Made. — See *Way v. Mayhugh*, 57 W. Va. 175.

3. Necessitous Circumstances of Grantor. — *Wells v. Geyer*, 12 N. Dak. 316.

4. Retention of Possession by Grantor. — *Hammett v. White*, 128 Ala. 380; *Fleming v. Georgia R. Bank*, 120 Ga. 1023; *Sanders v. Ayres*, 63 Neb. 271; *Falkner v. Powell*, (Neb. 1904) 100 N. W. Rep. 937; *Faulkner v. Cody*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 64; *Yingling v. Redwine*, 12 Okla. 64; *Lehman v. Chatham Machinery Co.*, 28 Tex. Civ. App. 228; *Tuggle v. Berkeley*, 101 Va. 83; *Hursey v. Hursey*, 56 W. Va. 148.

Possession by the Grantee is not conclusive evidence of an absolute sale. *Carveth v. Winegar*, 133 Mich. 34; *Schwartz v. Lieber*, (Miss. 1902) 32 So. Rep. 954.

Surrender of Possession Indicative that Deed Is Absolute Conveyance. — *Reich v. Dyer*, 180 N. Y. 107; *Franklin v. Sewall*, 110 La. 292.

Retention of Possession Not Conclusive. — *Philips v. Mo.*, 91 Minn. 311.

5. Grantor Not Required to Pay Rent. — *Rose v. Gandy*, 137 Ala. 329; *De Carrion v. De Aguayo*, 133 Cal. xix, 65 Pac. Rep. 619; *Mat-*

chett v. Knisely, 27 Ind. App. 664; *David City First Nat. Bank v. Sargeant*, 65 Neb. 594; *Sanders v. Ayres*, 63 Neb. 271; *McGill v. Thorne*, 70 S. Car. 65; *Hursey v. Hursey*, 56 W. Va. 148. See also *Liskey v. Snyder*, 56 W. Va. 610, where the possession of the grantor without payment of rent was held to be consistent with an absolute sale.

6. Lease Not Conclusive Evidence of Sale. — *Wilson v. McWilliams*, 16 S. Dak. 96.

Where the Rent Is Equivalent to the Interest.

— *Murray v. Sweasy*, 69 N. Y. App. Div. 45; *Yingling v. Redwine*, 12 Okla. 64; *McCrillis v. Cole*, 25 R. I. 156, 105 Am. St. Rep. 875.

Rent Equivalent to Interest Not Conclusive. — *Bigler v. Jack*, 114 Iowa 667.

Where "Rent Notes" Were Given as payments on the loan it was held that the maker could not be considered a tenant. *Hammett v. White*, 128 Ala. 380.

7. Failure of Grantee to Exercise Control over Property. — *Farmers', etc., Bank v. Smith*, 61 N. Y. App. Div. 315; *McGill v. Thorne*, 70 S. Car. 65.

946. 2. Payment of Taxes by Grantor. — *Matchett v. Knisely*, 27 Ind. App. 664; *Hursey v. Hursey*, 56 W. Va. 148.

3. Improvements by Grantor. — *De Carrion v. De Aguayo*, 133 Cal. xix, 65 Pac. Rep. 619; *Matchett v. Knisely*, 27 Ind. App. 664; *Sanders v. Ayres*, 63 Neb. 271; *Farmers, etc., Bank v. Smith*, 61 N. Y. App. Div. 315. But see *Franklin v. Sewall*, 110 La. 292.

Improvements Made by an Innocent Purchaser will not prevent the court from declaring an *ex facie* absolute deed to be a mortgage, because the improvements can be allowed for on accounting. *Carveth v. Winegar*, 133 Mich. 34.

4. Gross Inadequacy Strong Evidence of Mortgage. — *Rose v. Gandy*, 137 Ala. 329; *Fulwiler v. Roberts*, (Ky. 1904) 80 S. W. Rep. 1148; *Evans v. Thompson*, 89 Minn. 202; *Tuggle v. Berkeley*, 101 Va. 83; *Way v. Mayhugh*, 57 W. Va. 175; *Thacker v. Morris*, 52 W. Va. 220, 94 Am. St. Rep. 928. See also *Forester v. Van Auken*, 12 N. Dak. 175.

Where Accompanying Circumstances Warrant an Inference to the Contrary. — *McGuin v. Lee*, 10 N. Dak. 160.

Inadequacy Not Conclusive. — *Emery v. Lowe*, 140 Cal. 379.

A Price Which Is Less than Half the Value of the Property has been held in *Louisiana* not to be necessarily insignificant. *Franklin v. Sewall*, 110 La. 292.

5. Weight Given to Mere Inadequacy. — *Burch v. Nicholas*, (Ky. 1904) 80 S. W. Rep. 1132.

Where the Market Value of the Property Does Not Substantially Exceed. — See *Bigler v. Jack*, 114 Iowa 667; *Reed v. Parker*, 33 Wash. 107.

Inadequacy Coupled with Other Circumstances. — *Carveth v. Winegar*, 133 Mich. 34.

Inadequacy Not Shown. — *Forester v. Van Auken*, 12 N. Dak. 175.

Mere Inadequacy of Price Alone is not sufficient. *Bonnette v. Wise*, 111 La. 855.

947. See notes 1, 4.

948. See notes 1, 2, 3, 4, 5.

949. The Fact that There Is No Collateral Undertaking as Evidence of the Indebtedness. — See note 1.

f. ADMISSIBILITY OF PAROL EVIDENCE — (1) *Parol Proof that Absolute or Conditional Deed Is a Mortgage* — At Law. — See note 2.

950. In Equity and under Codes. — See note 2.

946. 6. Accounting Subsequent to Deed. — Guenther v. Wisdom, (Ky. 1905) 84 S. W. Rep. 771.

7. No Surrender of Evidence of Debt. — Tannyhill v. Pepperl, (Neb. 1903) 96 N. W. Rep. 1005; Murray v. Sweasy, 69 N. Y. App. Div. 45; McGill v. Thorne, 70 S. Car. 65.

947. 1. Payment of Interest. — Rees v. Rhodes, 3 Ariz. 235; De Carrion v. De Aguayo, 133 Cal. xix, 65 Pac. Rep. 619; Faulkner v. Cody, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 64; Wells v. Geyer, 12 N. Dak. 316.

Agreement to Pay Interest. — Wells v. Geyer, 12 N. Dak. 316.

4. Simultaneous Defeasance. — Malone v. Roy, 134 Cal. 344; Rankin v. Rankin, 111 Ill. App. 403; Barlow v. Cooper, 109 Ill. App. 375; Cassem v. Heustis, 201 Ill. 208, 94 Am. St. Rep. 160; Thompson v. People's Bldg., etc., Co., 114 Iowa 481; Spicer v. Holbrook, (Ky. 1902) 66 S. W. Rep. 180; Ackerman v. Begrish, (N. J. 1901) 50 Atl. Rep. 673; Hoschke v. Hoschke, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 125; Thacker v. Morris, 52 W. Va. 220, 94 Am. St. 928.

948. 1. Absolute Conveyances and Agreements for Reconveyance Not Necessarily Mortgages — Georgia. — McElmurray v. Blodgett, 120 Ga. 9; Felton v. Grier, 109 Ga. 320; Pitts v. Maier, 115 Ga. 281.

Iowa. — Bigler v. Jack, 114 Iowa 667.

Kansas. — Fabrique v. Cherokee, etc., Coal, etc., Co., 69 Kan. 733.

Michigan. — Geer v. Traders' Bank, 132 Mich. 215. See also Sowles v. Wilcox, 127 Mich. 166.

New York. — Luesenhop v. Einsfeld, 93 N. Y. App. Div. 68.

North Carolina. — Frazier v. Frazier, 129 N. Car. 30.

North Dakota. — McGuin v. Lee, 10 N. Dak. 160.

Ohio. — Bates v. Sherwood, 24 Ohio Cir. Ct. 146.

Texas. — Pumilia v. De George, (Tex. Civ. App. 1903) 74 S. W. Rep. 813.

Virginia. — Holladay v. Willis, 101 Va. 274.

Washington. — Reed v. Parker, 33 Wash. 107.

West Virginia. — Liskey v. Snyder, 56 W. Va. 610.

2. Absence of Indicia Significant of Sale. — Bigler v. Jack, 114 Iowa 667; Conner v. Clapp, 37 Wash. 299; Way v. Mayhugh, 57 W. Va. 175.

3. No Disparity Evidence of Sale. — Stockton v. Dillon, 66 N. J. Eq. 100.

4. Where There Is No Indebtedness from Grantor. — Tappen v. Eshelman, 164 Ind. 338; Martin v. Allen, 67 Kan. 758; Yost v. Hays City First Nat. Bank, 66 Kan. 605; Morrison v. Jones, 31 Mont. 154; Stockton v. Dillon, 66 N. J. Eq. 100; Harrington v. Claflin, 28 Tex. Civ. App. 100; Holladay v. Willis, 101 Va. 274.

5. Effect of Surrender of Evidence of Indebtedness. — Gannon v. Moles, 209 Ill. 180; Forester v. Van Auken, 12 N. Dak. 175; Creswell v. Smith, 61 S. Car. 575; Pumilia v. De George, (Tex. Civ. App. 1903) 74 S. W. Rep. 813; Dabney v. Smith, 38 Wash. 40.

949. 1. Absence of Collateral Agreement. — Gannon v. Moles, 111 Ill. App. 19, affirmed 209 Ill. 180.

Absence of Express Promise to Pay. — Creswell v. Smith, 61 S. Car. 575.

Absence of Express Promise to Repay — Not Conclusive. — Rose v. Gandy, 137 Ala. 329.

2. Admissibility of Evidence at Law — Authorities Refusing Admission. — See Stafford v. Stafford, 29 Tex. Civ. App. 73; Billingsley v. Stutler, 52 W. Va. 92, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 949; Boardman v. Handley, 4 N. W. Ter. 266.

Illinois Rule. — In Illinois parol evidence has been held to be admissible in all actions at law where the title is not directly in issue. Northern Assur. Co. v. Chicago Mut. Bldg., etc., Assoc., 98 Ill. App. 152, affirmed 198 Ill. 474.

950. 2. In Equity and under Codes — Alabama. — Richter v. Noll, 128 Ala. 198.

Arizona. — Rees v. Rhodes, 3 Ariz. 235.

California. — Harp v. Harp, 136 Cal. 421. See also Rawlins v. Ferguson, 133 Cal. 470.

Illinois. — Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283; Northern Assur. Co. v. Chicago Mut. Bldg., etc., Assoc., 198 Ill. 474, affirming 98 Ill. App. 152; Merriman v. Schmitt, 211 Ill. 263, affirming 101 Ill. App. 443; Heaton v. Gaines, 198 Ill. 479; Crane v. Chandler, 190 Ill. 584.

Indiana. — Greenwood Bldg., etc., Assoc. v. Stanton, 28 Ind. App. 548; Matchett v. Knisely, 27 Ind. App. 664.

Iowa. — Foster v. Rice, 126 Iowa 190; Bigler v. Jack, 114 Iowa 667.

Kansas. — Martin v. Allen, 67 Kan. 758.

Kentucky. — Oberdorfer v. White, (Ky. 1904) 78 S. W. Rep. 436.

Louisiana. — Franklin v. Sewall, 110 La. 292.

Maryland. — Pickett v. Wadlow, 94 Md. 564.

Massachusetts. — Providence, etc., Steamboat Co. v. Fall River, 187 Mass. 45.

Mississippi. — Schwartz v. Lieber, 79 Mich. 257.

Nebraska. — Falkner v. Powell, (Neb. 1904) 100 N. W. Rep. 937; Dickson v. Stewart, (Neb. 1904) 98 N. W. Rep. 1085; Fahay v. State Bank, (Neb. 1901) 95 N. W. Rep. 505; Tannyhill v. Pepperl, (Neb. 1903) 96 N. W. Rep. 1005.

New Jersey. — Ackerman v. Begrish, (N. J. 1901) 50 Atl. Rep. 673.

New York. — Farmers, etc., Bank v. Smith, 61 N. Y. App. Div. 315; Matter of Holmes, 79 N. Y. App. Div. 264, affirmed 176 N. Y. 603; Braun v. Vollmer, 89 N. Y. App. Div. 43;

951. (2) *Parol Proof that Mortgage Is a Sale.* — See note 1.

952. (5) *Grounds on Which Evidence Is Admissible.* — See notes 4, 6.

953. See note 1.

(6) *Statute of Frauds No Bar to Admission.* — See note 2.

(7) *Nonapplication of Rule as to Varying Writing by Parol.* — See note 3.

954. g. BURDEN OF PROOF. — See note 1.

h. SUFFICIENCY OF EVIDENCE — In General. — See note 2.

The Presumption of Law. — See notes 3, 4.

Hoschke v. Hoschke, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 125.

North Dakota. — *Wells v. Geyer*, 12 N. Dak. 316; *Forester v. Van Auken*, 12 N. Dak. 175.

Oklahoma. — *Yingling v. Redwine*, 12 Okla. 64.

South Carolina. — *Welborn v. Dixon*, 70 S. Car. 108.

Texas. — *Long v. Fields*, 31 Tex. Civ. App. 241; *Lehman v. Chatham Machinery Co.*, 28 Tex. Civ. App. 228; *Masterson v. Burnett*, 27 Tex. Civ. App. 370.

Virginia. — *Tuggle v. Berkeley*, 101 Va. 83; *Holladay v. Willis*, 101 Va. 274.

Washington. — *Borrow v. Borrow*, 34 Wash. 684; *Ross v. Howard*, 31 Wash. 393.

West Virginia. — *Billingsley v. Stutler*, 52 W. Va. 92, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 950; *Hursey v. Hursey*, 56 W. Va. 148; *Liskey v. Snyder*, 56 W. Va. 610.

Wisconsin. — *Beebe v. Wisconsin Mortg. Loan Co.*, 117 Wis. 328; *Hurlbert v. T. D. Kellogg Lumber, etc., Co.*, 115 Wis. 225.

951. 1. Mortgage Cannot Be Proved Sale by Parol Evidence. — *Borcherdt v. Favor*, 16 Colo. App. 406; *Greenwood Bldg., etc., Assoc. v. Stanton*, 28 Ind. App. 548; *Keller v. Kirby*, 34 Tex. Civ. App. 404.

952. 4. Fraud, Accident, or Mistake Always Grounds. — *Clark v. Seagraves*, 186 Mass. 430. The taking and insisting upon an absolute conveyance which was only intended to secure a debt is a fraud. See *Clark v. Seagraves*, 186 Mass. 430.

6. Necessity of Showing Fraud. — *Franklin v. Sewall*, 110 La. 292; *Frazier v. Frazier*, 129 N. Car. 30. See also *Miller v. Price*, 66 S. Car. 85.

The *Mississippi* statute providing that parol proof is admissible only when fraud in procurement of the mortgage is in issue does not apply when the grantee continues in possession. *Culp v. Wooten*, 79 Miss. 503; *Schwartz v. Lieber*, 79 Miss. 257.

953. 1. Admissibility on General Grounds. — *Matchett v. Knisely*, 27 Ind. App. 664; *Bigler v. Jack*, 114 Iowa 667. See also *Fuller v. Jenkins*, 130 N. Car. 554. But see *Marley v. National Bldg., etc., Assoc.*, 28 Ind. App. 369.

2. No Violation of Statute of Frauds. — *Hursey v. Hursey*, 56 W. Va. 148. See also *Gerhardt v. Tucker*, 187 Mo. 46; *Lucia v. Adams*, 36 Tex. Civ. App. 454.

3. Admission of Parol Testimony No Breach of Rule as to Varying Writing. — *Pickett v. Wadlow*, 94 Md. 564; *Hursey v. Hursey*, 56 W. Va. 148.

954. 1. Burden of Proof — California. — *Holmes v. Warren*, 145 Cal. 457; *Bryant v. Broadwell*, 140 Cal. 490.

Illinois. — *Gannon v. Moles*, 209 Ill. 180; *Heaton v. Gaines*, 198 Ill. 479.

Iowa. — *Wright v. Wright*, (Iowa 1904) 98 N. W. Rep. 137; *Bigler v. Jack*, 114 Iowa 667.

Minnesota. — *Philips v. Mo*, 91 Minn. 311.

New York. — *Braun v. Vollmer*, 89 N. Y. App. Div. 43; *Matter of Holmes*, 79 N. Y. App. Div. 264, affirmed 176 N. Y. 603; *Murray v. Sweasy*, 69 N. Y. App. Div. 45.

North Dakota. — *Northwestern F. & M. Ins. Co. v. Lough*, 113 N. Dak. 601; *McGuin v. Lee*, 10 N. Dak. 160.

South Carolina. — *Miller v. Price*, 66 S. Car. 85.

Virginia. — *Holladay v. Willis*, 101 Va. 274. *Washington.* — *Dabney v. Smith*, 38 Wash. 40.

West Virginia. — *Liskey v. Snyder*, 56 W. Va. 610.

Burden of Going Forward with Evidence. — In *McGill v. Thorne*, 70 S. Car. 65, it was held that after *prima facie* proof has been given that the alleged deed was intended as a mortgage it is then incumbent on the mortgagee to remove the inference that may be drawn from such *prima facie* showing.

2. No Fixed or Definite Standard. — The degree of proof is different where the issue is whether the transaction was intended as a mortgage or a conditional sale, from a case where the issue is whether it was intended as a mortgage or an unconditional sale, a higher degree of proof being required in the latter case. *Rose v. Gandy*, 137 Ala. 329.

Each Case Must Be Decided on Its Own Merits. — *Bigler v. Jack*, 114 Iowa 667; *Gerhardt v. Tucker*, 187 Mo. 46; *Murray v. Sweasy*, 69 N. Y. App. Div. 45; *McGill v. Thorne*, 70 S. Car. 65. See also *Tappen v. Eshelman*, 164 Ind. 338.

3. Presumption as to Instrument Purporting to Be Sale. — *Heaton v. Gaines*, 198 Ill. 479; *Butterfield v. Kirtley*, 114 Iowa 520; *Bass v. Bell*, 64 S. Car. 177.

4. Necessity of Clear, Satisfactory, and Convincing Evidence — Alabama. — *Rose v. Gandy*, 137 Ala. 329.

California. — *Holmes v. Warren*, 145 Cal. 457; *Emery v. Lowe*, 140 Cal. 379; *Harp v. Harp*, 136 Cal. 421.

Illinois. — *Rankin v. Rankin*, 111 Ill. App. 403; *Carpenter v. Plagge*, 93 Ill. App. 445, affirmed in part 192 Ill. 82; *Gannon v. Moles*, 209 Ill. 180; *Heaton v. Gaines*, 198 Ill. 479.

Iowa. — *Wright v. Wright*, (Iowa 1904) 98 N. W. Rep. 137.

Kentucky. — See *Oberdorfer v. White*, (Ky. 1904) 78 S. W. Rep. 436.

Michigan. — *Sowles v. Wilcox*, 127 Mich. 166. See also *Bigelow v. Thompson*, 133 Mich. 334.

955. See notes 1, 2, 3.

956. See note 2.

No Evidence Is Sufficient Which Is Generally Loose. — See notes 3, 6, 7, 8.

957. See note 2.

VI. INTERPRETATION AND CONSTRUCTION OF MORTGAGES — 1. In General — Mortgage Construed with Separate Writing. — See note 11.

Separate Writings Referred to by Mortgage. — See note 14.

958. Force and Effect of Mortgage Questions of Law. — See note 1.

What Laws Govern Construction. — See note 3.

Federal Interpretation of Mortgage. — See note 4.

959. VII. LIEN OF MORTGAGE — 1. Duration of Lien — a. IN GENERAL — When Once It Has Attached. — See note 5.

Minnesota. — A. J. Dwyer Pine Land Co. v. Whiteman, 92 Minn. 55.

Missouri. — Gerhardt v. Tucker, 187 Mo. 46. *Nebraska.* — Tannyhill v. Pepperl, (Neb. 1903) 96 N. W. Rep. 1005.

New York. — Murray v. Sweasy, 69 N. Y. App. Div. 45; Farmers, etc., Bank v. Smith, 61 N. Y. App. Div. 315; Matter of Holmes, 79 N. Y. App. Div. 264, affirmed 176 N. Y. 603.

North Dakota. — Wells v. Geyer, 12 N. Dak. 316; Little v. Braun, 11 N. Dak. 410; McGuin v. Lee, 10 N. Dak. 160.

South Carolina. — McGill v. Thorne, 70 S. Car. 65; Creswell v. Smith, 61 S. Car. 575.

South Dakota. — Wilson v. McWilliams, 16 S. Dak. 96.

Texas. — Rogers v. Tompkins, (Tex. Civ. App. 1905) 87 S. W. Rep. 379.

Utah. — Smyth v. Reed, 28 Utah 262.

Virginia. — Holladay v. Willis, 101 Va. 274.

Washington. — Dabney v. Smith, 38 Wash. 40.

West Virginia. — Way v. Mayhugh, 57 W. Va. 175.

Preponderance of Evidence. — Bigelow v. Thompson, 133 Mich. 334. See also Murray v. Sweasy, 69 N. Y. App. Div. 45; Gray v. Moore, (Tex. Civ. App. 1904) 84 S. W. Rep. 293; Harrington v. Claflin, 28 Tex. Civ. App. 100.

Must Be Certain and Direct. — Franklin v. Sewall, 110 La. 292.

955. 1. Strong. — Frazier v. Frazier, 129 N. Car. 30.

2. Precise and Indubitable. — Crotzer v. Bitenbender, 199 Pa. St. 504.

3. Explicit and Unequivocal. — Gerhardt v. Tucker, 187 Mo. 46; Smyth v. Reed, 28 Utah 262. See also Holladay v. Willis, 101 Va. 274.

956. 2. Proof Must Leave No Room for Doubt. — A. J. Dwyer Pine Land Co. v. Whiteman, 92 Minn. 55; Gerhardt v. Tucker, 187 Mo. 46; Farmers, etc., Bank v. Smith, 61 N. Y. App. Div. 315; Little v. Braun, 11 N. Dak. 410; Beebe v. Wisconsin Mortg. Loan Co., 117 Wis. 328.

3. Loose and Uncertain Evidence Not Sufficient. — Bass v. Bell, 64 S. Car. 177.

6. Loose and Random Statements Not Sufficient. — Butterfield v. Kirtley, 114 Iowa 520; Franklin v. Sewall, 110 La. 292; Conner v. Clapp, 37 Wash. 290.

7. Unsupported and Contradicted Evidence of Grantor. — Schwartz v. Lieber, (Miss. 1902) 32 So. Rep. 954.

Testimony of the Grantee that the deed was intended as a mortgage, uncontradicted by the

grantor, is sufficient to warrant a judgment that the deed is a mortgage. Banta v. Wise, 135 Cal. 277.

8. Parol Admissions Alone that a Deed Was Intended as a Mortgage Are Not Sufficient. — Frazier v. Frazier, 129 N. Car. 30.

Written Admission Sufficient. — Schwartz v. Lieber, 79 Miss. 257.

Parol Admissions by the Grantor of the Title of the Grantee were held in Tuggle v. Berkeley, 101 Va. 83, not to bind the grantor, the court being otherwise of opinion that the deed was intended to be a mortgage.

957. 2. McGuin v. Lee, 10 N. Dak. 160.

11. Mortgage Construed with Separate Writing. — Adams v. Hopkins, 144 Cal. 19, (Cal. 1902) 69 Pac. Rep. 228; Johnson v. Prosperity Loan, etc., Assoc., 94 Ill. App. 260; Turner v. Cochran, 30 Tex. Civ. App. 549.

14. Mortgage and Note Secured by It. — Matthews v. Ormerd, 134 Cal. 84; Meyer v. Weber, 133 Cal. 681; Bangs v. Fallon, 179 Mass. 77; Cornish v. Woolverton, 32 Mont. 456, 107 Am. St. Rep. 434; Allen v. Dunn, (Neb. 1904) 99 N. W. Rep. 680; Garnett v. Meyers, 65 Neb. 280; Consterdine v. Moore, 65 Neb. 291, 101 Am. St. Rep. 620.

Mortgage and Bond Secured. — Ross v. Glenwood Cemetery Assoc., 81 N. Y. App. Div. 357.

Mortgage and Note Separate Contracts Except for Purpose of Interpretation. — See Thorp v. Mindeman, 123 Wis. 149, 107 Am. St. Rep.

958. 1. Force and Effect of Mortgage Questions of Law. — Bradford v. Malone, 33 Tex. Civ. App. 349.

3. Lex Loci Rei Sitæ Controls. — Ft. Wayne Trust Co. v. Sihler, 34 Ind. App. 140; Brainlet v. Commonwealth Land, etc., Co., (Ky. 1904) 83 S. W. Rep. 599; *In re Immanuel Presb. Church*, 112 La. 348; Schmaltz v. York Mfg. Co., 204 Pa. St. 1, 93 Am. St. Rep. 782; Iowa L. & T. Co. v. Schnose, (S. Dak. 1905) 103 N. W. Rep. 22; Watts v. Dubois, (Tex. Civ. App. 1902) 66 S. W. Rep. 698.

4. Federal Interpretation of Mortgage. — *In re Kellogg*, 113 Fed. Rep. 120, affirmed (C. C. A.) 121 Fed. Rep. 333; Cumberland Bldg., etc., Assoc. v. Sparks, 106 Fed. Rep. 101, reversed (C. C. A.) 111 Fed. Rep. 647.

Where the Questions Are Not Dependent on Local Statutes modifying the common law the federal court will not hold itself bound by a construction placed upon the contract by the state courts. Keene Five Cent Sav. Bank v. Reid, (C. C. A.) 123 Fed. Rep. 221.

959. 5. Continuance of Lien Until Debt Ex-

959. *b.* CHANGE IN FORM OF INDEBTEDNESS. — See note 6.

c. EFFECT OF SUBSEQUENT TRANSACTIONS ON LIEN — (1) *In General.* — See note 7.

960. 2. For What Lien Attaches — *a.* IN GENERAL. — See note 4.

961. *b.* FUTURE ADVANCES OR LIABILITIES — (1) *As Between Mortgagor and Mortgagee* — (a) *In General.* — See note 1.

963. (d) Effect of Statutes. — See note 3.

964. *c.* DEBTS NOT DESCRIBED IN MORTGAGE — (1) *As Between Mortgagor and Mortgagee or Their Successors* — (b) *Extension of Lien by Contract* — *aa.* IN GENERAL. — See note 7.

965. *cc.* BY PAROL CONTRACT. — See note 3.

969. (2) *As Between Mortgagee and Subsequent Creditors and Incumbrancers.* — See note 2.

970. See note 2.

3. To What Lien Attaches — *a.* IN GENERAL. — See note 4.

972. Appurtenances. — See note 2.

b. AFTER-ACQUIRED PROPERTY. — See note 3.

tinguished. — *McLaughlin v. Taylor*, 115 Ga. 671; *Williams Bros. Co. v. Hanmer*, 132 Mich. 635.

When a Note Secured by the Mortgage Is Declared to Be Void, the lien of the mortgage ceases to be effective. *Ft. Wayne Trust Co. v. Sihler*, 34 Ind. App. 140.

959. 6. Principle of Rule. — *Sheridan First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 959. See also *Russell v. Bosworth*, 106 Ill. App. 314; *Alden v. White*, 32 Ind. App. 671; *Freeburg v. Eksell*, 123 Iowa 464.

7. How Affected by Subsequent Conveyances — *In General.* — *Blair v. St. Louis, etc., R. Co.*, 92 Mo. App. 538.

960. 4. Description of Indebtedness. — Where a mortgage contained a provision that the bonds secured thereby should not be valid until the certificate indorsed thereon should have been signed by the trustee, it was held that it covered only the principal of the bonds with such interest coupons as remained attached when the bonds were certified and delivered to the purchasers. *Holland Trust Co. v. Thomson-Houston Electric Co.*, 170 N. Y. 68.

961. 1. Mortgages for Future Advances or Liabilities. — *Peacock, etc., Co. v. Thaggard*, 128 Fed. Rep. 1005, affirmed (C. C. A.) 129 Fed. Rep. 1005; *Ueland v. Dealy*, 11 N. Dak. 529; *Merchants' State Bank v. Tufts*, (N. Dak. 1905) 103 N. W. Rep. 760.

963. 3. The New Hampshire Statute does not render invalid a mortgage given in execution of an agreement to lend a certain sum at such times and in such amounts as the borrower might indicate within a certain time, the mortgage taking effect at the time of each advancement. *Staniefs v. Whitcher*, 72 N. H. 451.

964. 7. Extension of Mortgage Security to Subsequent Debts. — *Huntington v. Kneeland*, 102 N. Y. App. Div. 284.

965. 3. Subsequent Parol Contract Held Inoperative. — *Fleming v. Georgia R. Bank*, 120 Ga. 1023.

969. 2. Mortgage Not Enforceable for Subsequent Liabilities as Against Junior Incumbrancer. — *Crooks v. Jenkins*, 124 Iowa 317, 104 Am. St. Rep. 326.

970. 2. First Mortgagee Not Bound to Know of Subsequent Acts of Mortgagor. — Legal rights and equities being equal, the first in time is first in right. *Schimberg v. Waite*, 93 Ill. App. 130.

Where the First Mortgagee Is Bound to Make Future Advances the mortgage is valid as against a junior mortgagee for advances made either before or after notice to the mortgagee of the junior mortgagor's lien. *Blackmar v. Sharp*, 23 R. I. 412.

4. To What Lien Attaches — *In General.* — *William Firth Co. v. South Carolina L. & T. Co.*, (C. C. A.) 122 Fed. Rep. 569; *Citizens' Nat. Bank v. Strauss*, 29 Tex. Civ. App. 407.

Annexations to Mortgaged Premises. — *In re Goldville Mfg. Co.*, 118 Fed. Rep. 892, affirmed (C. C. A.) 122 Fed. Rep. 569; *Morley v. Quimby*, 132 Mich. 140; *McMillan v. Leaman*, 101 N. Y. App. Div. 436; *Condit v. Goodwin*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 312, affirmed 107 N. Y. App. Div. 616; *Schmaltz v. York Mfg. Co.*, 204 Pa. St. 1, 93 Am. St. Rep. 782.

The Lien on Fixtures May Be Waived by express agreement. *Ayers v. Makely*, 131 N. Car. 60.

Cotenants. — A mortgage by the owner of an undivided half of a piece of land creates no lien upon the other undivided half unless the owner thereof joins in the mortgage. *Joliffe v. Maxwell*, (Neb. 1902) 91 N. W. Rep. 563. See generally the title JOINT TENANTS AND TENANTS IN COMMON, 672. 8 *et seq.*

Nursery Trees are a part of the realty as between mortgagor and mortgagee. *Dubois v. Bowles*, 30 Colo. 44.

972. 2. Land Indispensably Necessary to Mortgaged Land. — *Putnam v. Putnam*, 77 N. Y. App. Div. 554. See also *Book v. West*, 29 Wash. 70.

Easement Covered by Mortgage of Land. — *Wood v. Grayson*, 22 App. Cas. (D. C.) 432.

3. After-acquired Property. — *New England Water Works Co. v. Farmers' L. & T. Co.*, (C. C. A.) 136 Fed. Rep. 521; *Guaranty Trust Co. v. Atlantic Coast Electric R. Co.*, 132 Fed. Rep. 68; *Central Trust Co. v. Washington County R. Co.*, 124 Fed. Rep. 813; *Pere Marquette R. Co. v. Graham*, 136 Mich. 444; *St. Joseph, etc.,*

972. *c.* AFTER-ACQUIRED TITLE — Where a Mortgage Contains Full Covenants of Title. — See note 4.

974. VIII. ESTATE OR INTEREST HELD BY MORTGAGOR AND MORTGAGEE — 2. Estate or Interest of Mortgagee — *a.* PERSONAL CHARACTER OF ESTATE. — See note 2.

975. *e.* FIDUCIARY NATURE OF ESTATE. — See notes 2, 5.

g. WHETHER AN ESTATE IN COTENANCY. — See note 7.

976. IX. RIGHTS AND LIABILITIES OF MORTGAGOR — 1. In General — Mortgagor Regarded as Owner. — See note 2.

Mortgagor May Not Impair Mortgagee's Rights. — See note 5.

977. 2. Right to Possession. — See note 2.

978. 3. Right to Deal with Mortgaged Property — *a.* POWER TO SELL. — See note 3.

c. POWER TO LEASE. — See note 7.

979. See note 1.

4. Right to Rents and Profits — *a.* IN GENERAL. — See note 4.

980. *b.* RIGHT TO RENTS AND PROFITS TRANSFERABLE. — See note 2.

c. LIMITATIONS UPON RIGHT. — See notes 3, 4.

981. 8. Right to and Necessity of Reconveyance — *b.* WHERE MORTGAGE PASSES TITLE — Effect of Payment at Time Fixed. — See note 8.

982. See note 4.

984. X. PERSONAL LIABILITY FOR INDEBTEDNESS — 1. In General. — See note 7.

985. See note 6.

Express Obligation Not Merged in Mortgage. — See note 7.

Moreover, the Pendency of Foreclosure Proceedings. — See note 9.

R. Co. v. Smith, 170 Mo. 327; *Monmouth County Electric Co. v. Central R. Co.*, (N. J. 1903) 54 Atl. Rep. 140; *Central Trust Co. v. West India Imp. Co.*, 169 N. Y. 314; *Flanagan Bank v. Graham*, 42 Oregon 403.

972. 4. After-acquired Title — Where There Is Covenant for Title. — *Blair v. St. Louis*, etc., R. Co., 92 Mo. App. 538; *Logue v. Atkeson*, 35 Tex. Civ. App. 303; *People's Sav. Bank v. Lewis*, 37 Wash. 344.

974. 2. Mortgage Personal Property. — *Johnston v. Johnston*, 173 Mo. 91, 96 Am. St. Rep. 486.

975. 2. A Mortgagee Who Has Entered for Foreclosure holds as trustee for the owner. *Fletcher v. Bass River Sav. Bank*, 182 Mass. 5, 94 Am. St. Rep. 632.

5. Mortgagee Cannot Profit by His Own Laches. — *Davis v. Evans*, 174 Mo. 307.

7. Survivorship. — See *Johnston v. Johnston*, 173 Mo. 91, 96 Am. St. Rep. 486.

976. 2. Mortgagor Regarded as Owner. — *Ware v. Schintz*, 190 Ill. 189.

5. May Not Impair Mortgagee's Rights. — *Davis v. Evans*, 174 Mo. 307.

977. 2. Statutory Right to Retain Possession. — *Ortengren v. Rice*, 104 Ill. App. 428; *Kelso v. Norton*, 65 Kan. 778, 93 Am. St. Rep. 308; *Cullen v. Casey*, (Neb. 1901) 95 N. W. Rep. 605; *Becker v. McCrear*, (Supm. Ct. Spec. T.) 48 Misc. (N. Y.) 341; *McClary v. Rick*, 11 N. Dak. 38; *State v. Mellette*, 16 S. Dak. 297; *Galloway v. Kerr*, (Tex. Civ. App. 1901) 63 S. W. Rep. 180.

978. 3. Power to Sell or Mortgage. — *Williams v. Foy Mfg. Co.*, 111 Ga. 856; *Snow v. Bass*, 174 Mo. 149; *Titcomb v. Fonda*, etc., Co., (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 630.

7. Power to Lease. — *Titcomb v. Fonda*, etc., Co., (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 630.

979. 1. Statute Authorizing Lease Binding Mortgagee. — *Brown v. Peto*, (1900) 2 Q. B. 653.

4. Rights to Rents While in Possession. — *Ortengren v. Rice*, 104 Ill. App. 428.

980. 2. Only Land Pledged, Not Rents and Profits. — *West v. Adams*, 106 Ill. App. 114; *McLester v. Rose*, 104 Ill. App. 433.

3. Right to Collect Rents Subject to Condition. — *Pringle v. James*, 109 Ill. App. 100; *West v. Adams*, 106 Ill. App. 114; *McLester v. Rose*, 104 Ill. App. 433; *Berrera v. Frost*, 33 Tex. Civ. App. 580.

4. Rents and Profits Covered by Mortgage Not Collectible by Mortgagor. — *West v. Adams*, 106 Ill. App. 114; *Ortengren v. Rice*, 104 Ill. App. 428; *McLester v. Rose*, 104 Ill. App. 433; *Bagley v. Illinois Trust*, etc., Bank, 199 Ill. 76.

981. 8. Where Mortgage Passes Title — Payment at Time Specified. — See *Knowles v. Knowles*, 25 R. I. 464.

982. 4. Necessity of Reconveyance After Default. — See *Knowles v. Knowles*, 25 R. I. 464.

984. 7. In General — Necessity of Covenant or Express Promise to Pay. — *Farmers' L. & T. Co. v. Penn Plate Glass Co.*, 186 U. S. 434.

985. 6. Nonapplication of Statute Where Indebtedness Exists Independent of Mortgage. — *Colton v. Salomon*, 67 N. J. L. 73.

7. Express Obligation of Mortgagor Not Merged in Mortgage. — *Crosby v. Washburn*, 66 N. J. L. 494.

9. Pending Foreclosure No Defense to Suit for Indebtedness. — *Crosby v. Washburn*, 66 N. J. L. 494.

986. 2. Liability for Deficiency After Foreclosure Sale. — See note 1.

987. 3. Liability of Purchaser Assuming Mortgage — *b.* GRANTEE IS LIABLE ONLY UPON HIS ASSUMPTION. — See note 1.

c. EXPRESS ASSUMPTION — (1) *Effect of Taking Subject to Mortgage.* — See note 3.

988. (2) *Effect of Taking Subject to Payment of Mortgage.* — See note 1.

989. See note 1.

The Word "Assumes" in the Deed. — See note 2.

(3) *Rule in Pennsylvania.* — See notes 3, 4.

990. (4) *Assumption by Deed Poll.* — See note 1.

(5) *Assumption by Extraneous Agreement.* — See note 2.

991. (6) *Mortgage as Part Consideration for Land.* — See note 1.

d. IMPLIED ASSUMPTION. — See notes 2, 3.

986. 1. Liability to Action for Deficiency. — *Farmers', etc., Bank v. Copsey*, 134 Cal. 287; *Sacramento Bank v. Copsey*, 133 Cal. 663, 85 Am. St. Rep. 242.

987. 1. Grantee Is Liable Only upon His Assumption. — *Crebbin v. Shinn*, 10 Colo. App. 302; *Ray v. Lobdell*, 213 Ill. 389, *affirming* 110 Ill. App. 230; *Siegel v. Borland*, 191 Ill. 107; *Schmitt v. Merriman*, 101 Ill. App. 443, *affirmed* 211 Ill. 263; *Elser v. Williams*, 104 Ill. App. 238; *Grover v. Bishop*, (Mich. 1904) 101 N. W. Rep. 627; *Heffernan v. Weir*, 99 Mo. App. 301; *Mueller v. Renkes*, 31 Mont. 100; *Ayres v. Makely*, 131 N. Car. 60.

3. Effect of Taking Subject to Mortgage. — *Hadley v. Clark*, 8 Idaho 497; *Schmitt v. Merriman*, 101 Ill. App. 443, *affirmed* 211 Ill. 263; *Monarch Coal, etc., Co. v. Hand*, 99 Ill. App. 322, *affirmed* 197 Ill. 288; *Elser v. Williams*, 104 Ill. App. 238; *Moore v. Olive*, 114 Iowa 650; *McNaughton v. Burke*, 63 Neb. 704; *Frerking v. Thomas*, 64 Neb. 193; *Gottschalk v. Jungmann*, 78 N. Y. App. Div. 171; *New York L. Ins. Co. v. Casey*, 81 N. Y. App. Div. 92, *reversed* 178 N. Y. 381. See also *Foster v. Bowles*, 138 Cal. 346.

988. 1. "Subject to Payment of." — *Johns v. Wilson*, 180 U. S. 440; *Farmers', etc., Bank v. Copsey*, 134 Cal. 287; *Colchester Sav. Bank v. Brown*, 75 Conn. 69; *Lang v. Dietz*, 191 Ill. 161; *Schmitt v. Merriman*, 101 Ill. App. 443, *affirmed* 211 Ill. 263; *Smith v. Davis*, 90 Mo. App. 533; *Steele v. Johnson*, 96 Mo. App. 147; *Rudolf v. Burton*, 85 N. Y. App. Div. 312; *Stites v. Erhart*, 113 Wis. 479.

Acceptance of Deed. — *Swisher v. Palmer*, 106 Ill. App. 432; *Merriman v. Schmitt*, 211 Ill. 263.

Deed Taken in Name of Third Party. — Where a deed taken in the name of a third party for the convenience of another contained an assumption of a mortgage, of which the grantee had no knowledge, the deed being delivered to the real owner and placed on record, it was held that the assumption clause was not binding on the grantee. *Gill v. Robertson*, 18 Colo. App. 313. And in *Wisconsin* it has been held that the real purchaser of property conveyed to a third party cannot be held to have assumed payment of the debt. *Arnold v. Randall*, 121 Wis. 462. But in *Iowa* it is held that the real grantee may be held personally liable under an assumption of indebtedness though his name is not inserted in the deed. *Santee v. Keefe*, 127 Iowa 128.

A Married Woman may assume the payment of the incumbrance on property which she purchases. *Vizard v. Moody*, 119 Ga. 918.

"All Other Liens." — An assumption, in an executory contract for the sale of land, of all unpaid mortgages shown of record "and all other liens" was held not to cover an unrecorded mortgage, though the grantee had knowledge thereof. *Whicker v. Hushaw*, 159 Ind. 1.

989. 1. The Lex Fori Determines the Form of the Remedy. — *Johns v. Wilson*, 180 U. S. 440.

2. "Assumes" Equal to "Assumes to Pay." — *Johns v. Wilson*, 180 U. S. 440; *Swope v. Jordan*, 107 Tenn. 166.

3. "Under and Subject" in Pennsylvania. — *Farmers' L. & T. Co. v. Penn Plate Glass Co.*, 186 U. S. 434; *Fisler v. Reach*, 202 Pa. St. 74; *Hazleton Nat. Bank v. Kintz*, 24 Pa. Super. Ct. 456.

4. No Right of Action until After Payment. — *Fisler v. Reach*, 202 Pa. St. 74.

990. 1. Assumption by Deed Poll. — *Whicker v. Hushaw*, 159 Ind. 1; *Pearson v. Bailey*, 180 Mass. 229; *Higgins v. Evans*, 188 Mo. 627.

2. Assumption by Extraneous Agreement. — *Wyatt v. Dufrene*, 106 Ill. App. 214; *Whicker v. Hushaw*, 159 Ind. 1; *Bossingham v. Syck*, 118 Iowa 192; *Higgins v. Evans*, 188 Mo. 627, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 990; *Colton v. Salomon*, 67 N. J. L. 73; *Citizens' Permanent Sav., etc., Assoc. v. Rampe*, 68 N. Y. App. Div. 556; *Howard v. Robbins*, 67 N. Y. App. Div. 245, *affirmed* 170 N. Y. 498; *Hazleton Nat. Bank v. Kintz*, 24 Pa. Super. Ct. 456.

991. 1. Mortgage as Part Consideration for Land. — *Hadley v. Clark*, 8 Idaho 497; *Brosseau v. Lowy*, 209 Ill. 405, *affirming* 110 Ill. App. 16; *Lang v. Dietz*, 191 Ill. 161; *Schmitt v. Merriman*, 101 Ill. App. 443, *affirmed* 211 Ill. 263; *Wyatt v. Dufrene*, 106 Ill. App. 214; *Lobdell v. Ray*, 110 Ill. App. 230, *affirmed* 213 Ill. 389; *Farmers', etc., Bank v. German Ins. Bank*, (Ky. 1902) 66 S. W. Rep. 280; *Lincoln University v. Polk*, (Neb. 1901) 95 N. W. Rep. 611.

2. Mortgage as Part Consideration. — *Brosseau v. Lowy*, 209 Ill. 405, *affirming* 110 Ill. App. 16; *Ray v. Lobdell*, 213 Ill. 389, *affirming* 110 Ill. App. 230; *Bossingham v. Syck*, 118 Iowa 192.

Parol Evidence Is Admissible to show assumption. *Brosseau v. Lowy*, 209 Ill. 405. But in the absence of a written assumption, the evidence must be clear. *Assets Realization Co. v. Heiden*, 215 Ill. 9.

992. See note 2.

e. LIABILITY OF GRANTEE TO MORTGAGOR. — See note 5.

f. LIABILITY OF GRANTEE TO MORTGAGEE — (1) *In General.* —

See note 6.

993. (2) *Doctrine of Equitable Subrogation* — (a) *In General.* — See note 2.

994. (b) *Liability of Grantee Depends upon That of His Grantor.* — See note 1.

995. (3) *Doctrine of Beneficial Interest* — (a) *In General.* — See note 1.

997. (4) *Doctrine of Suretyship as Applied to Parties* — (a) *In General.* —

See note 4.

998. (b) *Duty of Mortgagee to Respect New Relation.* — See note 1.

999. (6) *Release of Grantee from Assumed Liability* — (a) *General Rule.* —

See note 2.

1000. *h.* SAME PRINCIPLES APPLY TO SUCCESSIVE GRANTEES. — See notes 1, 2, 3, 5.

The Acceptance of a Warranty Deed for a Nominal Sum, excepting certain mortgages, shows that the vendees assumed the payment of the mortgages. *Pike v. Wathen*, (Ky. 1903) 76 S. W. Rep. 322.

991. 3. No Assumption Without an Express Agreement. — *Crebbin v. Shinn*, 19 Colo. App. 302. See also *Heffernan v. Weir*, 99 Mo. App. 301.

992. 2. Assumption Not Within Statute of Frauds. — *Higgins v. Evans*, 188 Mo. 627, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 992.

5. *Wyatt v. Dufrene*, 106 Ill. App. 214.

6. Where the Deeds to Successive Grantees Were Without Consideration, and the grantor remained in possession as the real owner, it was held that the mortgagee could not recover a deficiency from the grantees, unless he had acted on the faith of their assumption, or made himself a party to the agreement. *Giesy v. Truman*, 17 App. Cas. (D. C.) 449. See also *Merriman v. Schmitt*, 211 Ill. 263.

993. 2. The Doctrine of Equitable Subrogation. — *Johns v. Wilson*, 180 U. S. 440; *Farmers', etc., Bank v. Copsey*, 134 Cal. 287; *Regan v. Williams*, 185 Mo. 620, 105 Am. St. Rep. 600; *Thurmond v. Thurmond*, (Tex. Civ. App. 1905) 87 S. W. Rep. 878.

994. 1. Liability of Grantee Depends upon That of His Grantor. — *Higgins v. Evans*, 188 Mo. 627, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 994.

A Statute Passed in New Jersey. — The statute does not apply where the mortgage is on property outside of the state. *Colton v. Salomon*, 67 N. J. L. 73.

In Indiana the amount of the grantee's liability is as shown by the record and not the amount stipulated in the mortgage. *Osborn v. Hocker*, 160 Ind. 1.

995. 1. The Doctrine of Beneficial Interest. — *Johns v. Wilson*, 180 U. S. 440; *Wyatt v. Dufrene*, 106 Ill. App. 214; *Steele v. Johnson*, 96 Mo. App. 147; *Higgins v. Evans*, 188 Mo. 627; *Smith v. Davis*, 90 Mo. App. 533; *Howard v. Robbins*, 67 N. Y. App. Div. 245, affirmed 170 N. Y. 498; *Germania L. Ins. Co. v. Casey*, 98 N. Y. App. Div. 88; *Iowa L. & T. Co. v. Schnose*, (S. Dak. 1905) 103 N. W. Rep. 22. See also *Regan v. Williams*, 88 Mo. App. 577, affirmed 185 Mo. 620, 105 Am. St. Rep. 600.

997. 4. Doctrine of Suretyship as Applied to Parties. — *Johns v. Wilson*, 180 U. S. 440;

Schultz v. Sroelowitz, 191 Ill. 249; *Smith v. Davis*, 90 Mo. App. 533; *Regan v. Williams*, 88 Mo. App. 577, affirmed 185 Mo. 620, 105 Am. St. Rep. 600; *Higgins v. Evans*, 188 Mo. 627; *Howard v. Robbins*, 67 N. Y. App. Div. 245, affirmed 170 N. Y. 498; *Germania L. Ins. Co. v. Casey*, 98 N. Y. App. Div. 88; *Thurmond v. Thurmond*, (Tex. Civ. App. 1905) 87 S. W. Rep. 878. See also *Mulvane v. Sedgley*, 63 Kan. 105.

In Iowa the doctrine appears to be that the assumption does not render the mortgagor a mere surety without some new agreement between him and the mortgagee. *Iowa L. & T. Co. v. Haller*, 119 Iowa 645.

In *Keller v. Lee*, 66 N. Y. App. Div. 184, appeal withdrawn 172 N. Y. 606, it was held that by the assumption of the debt the liability of the grantee is as surety of the grantor only, and if the grantor pays the debt and discharges the mortgage of record, without first requiring the grantee to resort to the land, he cannot enforce the debt against the grantee.

Whether Relation Assented to by Mortgagee Question of Fact. — *Mulvane v. Sedgley*, 63 Kan. 105.

998. 1. Mortgagee Bound to Respect Mortgagor's Rights as Surety. — *Lowy v. Boenert*, 110 Ill. App. 16, affirmed 209 Ill. 405; *Pearson v. Bailey*, 180 Mass. 229; *Higgins v. Evans*, 188 Mo. 627; *Smith v. Davis*, 90 Mo. App. 533; *Laird v. Wittkowski*, 67 N. Y. App. Div. 476; *New York L. Ins. Co. v. Casey*, 81 N. Y. App. Div. 92, reversed 178 N. Y. 381. See also *Egbert v. McGuire*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 245.

Where There Is No Assumption of the Mortgage Debt the mortgagor is still protected as a surety to the extent of the value of the land, and to that extent he is entitled to the same measure of protection that obtains in the case of a suretyship, where a grantee has assumed the payment of the mortgage. *Gottschalk v. Jungmann*, 78 N. Y. App. Div. 171.

999. 2. The Mortgagee May, by Covenant, Release the Grantee from personal liability, and the covenant will be valid and enforceable for the benefit of the grantor. *Pearson v. Bailey*, 180 Mass. 229.

1000. 1. Same Principles Apply to Successive Grantees. — *Bossingham v. Syck*, 118 Iowa 192; *Higgins v. Evans*, 188 Mo. 627, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1000;

1001. *j.* DEFENSES TO ACTION — (1) *In General.* — See note 2.

(2) *Invalidity of Mortgage.* — See note 3.

(3) *Usury.* — See note 7.

1002. See notes 1, 2.

(4) *Fraud.* — See note 5.

1003. (6) *Want or Failure of Consideration.* — See note 1.

k. GRANTEE MAY NOT KEEP MORTGAGE ALIVE. — See notes

4, 5.

1004. XI. RIGHTS AND LIABILITIES OF MORTGAGEE — 1. In General —

a. DISTINCTION BETWEEN MORTGAGEE IN AND OUT OF POSSESSION —

(2) *What Constitutes Mortgagee in Possession — In General.* — See note 1.

A Grantee in an Absolute Deed. — See note 3.

1006. 2. Possession of Mortgaged Property — a. IN GENERAL. — See notes 3, 4, 5.

1007. b. RECOVERY OF POSSESSION. — See notes 1, 2.

1008. c. RETENTION AND ABANDONMENT OF POSSESSION — (1) Retention of Possession. — See note 1.

1009. 3. Rents and Profits — a. RIGHT TO RENTS AND PROFITS. — See note 2.

Thomas v. Fourth St. M. E. Church, 24 Pa. Co. Ct. 642.

1000. 2. Last Grantee Alone Liable. — Thomas v. Fourth St. M. E. Church, 24 Pa. Co. Ct. 642.

3. Last Grantee Alone Not Liable. — Williams v. Van Geison, 76 N. Y. App. Div. 592.

5. Successive Grantees as Sureties. — See Bossingham v. Syck, 118 Iowa 192.

1001. 2. Defenses — In General. — Hadley v. Clark, 8 Idaho 497.

3. Invalidity of Mortgage. — Hadley v. Clark, 8 Idaho 497; Lang v. Dietz, 191 Ill. 161; Kellogg v. Dennis, (County Ct.) 38 Misc. (N. Y.) 82; Swope v. Jordan, 107 Tenn. 166.

7. Grantee May Not Plead Usury in Mortgage. — In re Kellogg, 113 Fed. Rep. 120, affirmed (C. C. A.) 121 Fed. Rep. 333.

1002. 1. Lewis v. Farmers' Loan, etc., Assoc., 183 Mo. 351.

The Trustee in Bankruptcy of a Mortgagor may set up the defense on the ground of fraud. In re Kellogg, 113 Fed. Rep. 120, affirmed (C. C. A.) 121 Fed. Rep. 333.

2. Lewis v. Farmers' Loan, etc., Assoc., 183 Mo. 351; National Mut. Bldg., etc., Assoc. v. Retzman, (Neb. 1903) 96 N. W. Rep. 204.

5. Fraud. — Hutchinson v. Gorman, 71 Ark. 305. See also In re Kellogg, 113 Fed. Rep. 120, affirmed (C. C. A.) 121 Fed. Rep. 333.

1003. 1. Want or Failure of Consideration. — Lang v. Dietz, 191 Ill. 161.

4. Grantee May Not Keep Mortgage Alive. — Armstrong v. Purcell, 74 N. Y. App. Div. 623.

5. Armstrong v. Purcell, 74 N. Y. App. Div. 623; Howard v. Robbins, 170 N. Y. 498.

1004. 1. What Constitutes Mortgagee in Possession — In General. — Stouffer v. Harlan, 68 Kan. 135, 104 Am. St. Rep. 396.

3. Grantee in Absolute Deed Mortgagee in Possession. — Cullen v. Casey, (Neb. 1901) 95 N. W. Rep. 605.

1006. 3. In General — Mortgagee's Right to Possession. — Kransz v. Uedelhofen, 193 Ill. 477; Davis v. Poland, 99 Me. 345.

4. Stipulation for Mortgagor's Possession. — Kransz v. Uedelhofen, 193 Ill. 477.

5. Implied Right of Mortgagor. — Kransz v. Uedelhofen, 193 Ill. 477.

The Mortgagor Impliedly Has a Right to Possession. — Davis v. Poland, 99 Me. 345.

1007. 1. Statutes Providing Otherwise. — Ortengren v. Rice, 104 Ill. App. 428; Kelso v. Norton, 65 Kan. 778, 93 Am. St. Rep. 308; Felino v. K. S. Newcomb Lumber Co., 64 Neb. 335, 97 Am. St. Rep. 646; Becker v. McCrea, (Supm. Ct. Spec. T.) 48 Misc. (N. Y.) 341; McClory v. Ricks, 11 N. Dak. 38; Yingling v. Redwine, 12 Okla. 64; State v. Mellette, 16 S. Dak. 297; Galloway v. Kerr, (Tex. Civ. App. 1901) 63 S. W. Rep. 180. See also Moore v. Boagni, 111 La. 490.

2. After Condition Broken. — In Illinois the rule that the mortgagee can bring ejectment against the mortgagor only after condition broken is supported by the authority of several cases. Kransz v. Uedelhofen, 193 Ill. 477.

1008. 1. Retention of Possession by Mortgagee until Satisfaction of Mortgage. — Stouffer v. Harlan, 68 Kan. 135, 104 Am. St. Rep. 396; Equitable Mortg. Co. v. Gray, 68 Kan. 100; Kelso v. Norton, 65 Kan. 778, 93 Am. St. Rep. 308; Catlin v. Rea, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 535; Barson v. Mulligan, 66 N. Y. App. Div. 486; Becker v. McCrea, (Supm. Ct. Spec. T.) 48 Misc. (N. Y.) 341; Investment Securities Co. v. Adams, 37 Wash. 211. See also Morford v. Wells, 68 Kan. 122. But see McClory v. Ricks, 11 N. Dak. 38, disapproving the doctrine.

Assignee of Mortgage in Possession. — See Catlin v. Rea, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 535.

1009. 2. As Against an Assignee for Benefit of Creditors the mortgagee has a right to the rents accruing after the assignee has taken possession. Hutchinson v. Straub, 64 Ohio St. 413, 83 Am. St. Rep. 764.

The Mortgagee Is Not Entitled to a Commission for taking charge of the estate and collecting the rents. Moss v. Odell, 141 Cal. 335; Barnard v. Paterson, (Mich. 1904) 100 N. W. Rep. 893.

- 1009.** *b. APPLICATION OF RENTS TO PURPOSE OF MORTGAGE.* — See notes 3, 4.
- 1010.** *c. ACCOUNTING* — (1) *In General.* — See note 5.
When Chargeable as Mortgagee in Possession. — See note 9.
- 1011.** (2) *With What Chargeable.* — See notes 1, 2.
- 1012.** (3) *Manner of Accounting* — Frequency of Rests. — See note 2.
Rests Are Always Proper. — See note 4.
Compound Interest Not Permitted. — See note 7.
- 4. Power to Mortgage or Assign.** — See note 9.
Power to Convey Title. — See note 11.
- 1013.** **7. Purchase of Outstanding Title.** — See note 5.
8. Acquisition of Mortgagor's Interest. — See note 6.
Effect of Acquiring Mortgagor's Interest. — See note 7.
- 1014.** **Requisites of Valid Purchase.** — See note 1.
9. Rights Respecting Title Deeds — In the United States. — See note 2.
In England. — See note 4.

1009. 3. Application of Rents by Receiver. — See Ray v. Henderson, 210 Ill. 305.

4. Application of Profits to Other Debts. — Mitchell v. Saylor, 1 Ont. L. Rep. 458.

1010. 5. Accounting by Mortgagee in Possession. — American Freehold Land Mortgage Co. v. Pollard, 132 Ala. 155; Richter v. Noll, 128 Ala. 198; Cowdery v. London, etc., Bank, 139 Cal. 298, 96 Am. St. Rep. 115; Weise v. Anderson, 134 Mich. 502; Hatch v. Falconer, 67 Neb. 249; Moffett v. Trent, 66 N. J. Eq. 143; Howard v. Clark, 72 Vt. 429.

9. Possession Must Be under Mortgage. — Ireland v. U. S. Mortgage, etc., Co., 72 N. Y. App. Div. 95, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1010, affirmed 175 N. Y. 491, and supporting the whole text paragraph.

A Grantee of a Widow's Dower Rights, in possession, holding also a mortgage on the premises, is not required in *New Jersey* to account before the dower is assigned, the Dower Act providing that the widow may hold without liability for rent before assignment of dower. Moffett v. Trent, 66 N. J. Eq. 143.

1011. 1. With What Chargeable. — Maurer v. Grimm, 84 N. Y. App. Div. 575. And see the title EQUITY OF REDEMPTION, 234. 4 *et seq.*

Mortgagee Only Required to Account for Actual Receipts. — Chapman v. Cooney, 25 R. I. 657.

Chargeable with Net Profits Only. — Briggs v. Neal, (C. C. A.) 120 Fed. Rep. 224.

Where the Mortgagor Agrees to a Reduction of Rental the mortgagee is not chargeable with the difference between the original and the reduced rental. Burgson v. Jacobson, 124 Wis. 295.

The Hostile Attitude of the Mortgagor, preventing the letting of the premises, will release the mortgagee from liability for rent while they are unlet. La Forest v. Wm. L. Blake Co., (Mc. 1905) 60 Atl. Rep. 899.

2. Wilful Default or Neglect. — American Freehold Land Mortg. Co. v. Pollard, 132 Ala. 155.

Burden of Proving Fraud. — National Mut. Bldg. Assoc. v. Houston, 81 Miss. 386.

1012. 2. Propriety of Annual Rests. — McQueen v. Whetstone, 127 Ala. 417; Chapman v. Cooney, 25 R. I. 657.

4. Rests Proper Where Rents and Profits Exceed Interest. — McQueen v. Whetstone, 127 Ala. 417.

7. Compound Interest Not Allowed. — Chapman v. Cooney, 25 R. I. 657.

9. Power to Mortgage. — Bogenschultz v. O'Toole, 70 Ark. 253.

11. Mortgagee May Pass Title to Mortgaged Property. — High v. Hoffman, 129 Ala. 359.

The Mortgagee May Sell His "Right, Title, and Interest" in the land, though he makes no assignment of the mortgage, and the vendee will thereby acquire such title as the mortgagee had. Deans v. Gay, 132 N. Car. 227.

1013. 5. May Acquire Adverse Title. — In *Washington* the mortgagee cannot purchase an outstanding tax title and hold it for the purpose of destroying the title of his mortgagor; his action in doing so must be considered a payment, discharge, or redemption of the tax title, and he may recover the amount disbursed therefor, with interest, under his mortgage. Shepard v. Vincent, 38 Wash. 493.

6. Sale Must Be Subsequent to Mortgage. — De Lancey v. Finnegan, 86 Minn. 255.

7. Effect of Acquisition of Redemption by Mortgagee. — Luesenhop v. Eisenfeld, 93 N. Y. App. Div. 68.

1014. 1. Sale Must Be Untainted by Fraud. — See Liskey v. Snyder, 56 W. Va. 610.

Consideration Must Be Adequate. — Noble v. Graham, 140 Ala. 413; De Lancey v. Finnegan, 86 Minn. 255; McGill v. Thorne, 70 S. Car. 65; Liskey v. Snyder, 56 W. Va. 610.

Adequacy of Consideration. — In *Glover v. Fitzpatrick*, 4 Indian Ter. 224, the indebtedness existing between the parties was held to be a valid consideration.

Transaction Closely Scrutinized. — Cassem v. Heustis, 201 Ill. 208, 94 Am. St. Rep. 160; De Lancey v. Finnegan, 86 Minn. 255; Faulkner v. Cody, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 64; Odell v. Montross, 68 N. Y. 499; Liskey v. Snyder, 56 W. Va. 610.

2. An Abstract of Title delivered to the mortgagee's agent is part of the security for the loan, depriving the mortgagor of the right to possession so long as the mortgage is unpaid. Equitable Trust Co. v. Burley, 110 Ill. App. 538.

4. Duty with Respect to Preservation of Deeds. — In *Gilligan v. National Bank*, (1901) 2 Ir. 513, it was held that there is no implied covenant on the part of a mortgagee to take reasonable

1015. 10. Extension of Time of Performance — Right to Extend Time. — See note 4.

Parol Extension of Time. — See note 5.

1016. An Extension Does Not Waive. — See note 1.

11. Rights Respecting Injuries to Mortgaged Property — *a.* ACTION FOR DAMAGES. — See note 2.

Form of Action. — See note 5.

1017. *b.* INJUNCTION AGAINST THREATENED INJURY. — See note 3.

Whether the Insolvency of the Mortgagor. — See note 4.

12. Liability for Waste, and Duty to Repair — Duty to Repair. — See note 6.

Credit for Necessary Repairs. — See note 8.

1018. 15. Enforcement of Claim — *a.* IN GENERAL. — See notes 4, 5.

1019. Foreclosure. — See notes 3, 5, 8, 9.

care of the title deeds during the continuance of the security.

1015. 4. Right of Mortgagee to Extend Time of Performance. — *Crebben v. Shinn*, 19 Colo. App. 302; *Kransz v. Uedelhofen*, 193 Ill. 477; *Kraft v. Holzmamm*, 206 Ill. 548; *Missouri Real Estate Syndicate v. Sims*, 179 Mo. 679; *Dunnaway v. O'Reilly*, 102 Mo. App. 718; *Higgins v. Evans*, 188 Mo. 627; *Hicks v. Beedle*, 98 Mo. App. 223; *Priest v. Gumprecht*, 81 N. Y. App. Div. 631, *affirmed* 178 N. Y. 595; *Germania L. Ins. Co. v. Casey*, 98 N. Y. App. Div. 88; *Briggs v. Weeks*, 98 N. Y. App. Div. 487; *Heard v. Thrasher*, (Tex. Civ. App. 1902) 71 S. W. Rep. 803; *Sheridan First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925.

Necessity of Consideration. — *Welbon v. Webster*, 89 Minn. 177; *Regan v. Williams*, 88 Mo. App. 577, *affirmed* 185 Mo. 620, 105 Am. St. Rep. 600.

Sufficient Considerations — *Agreement to Pay Interest During Period of Extension.* — *Steele v. Johnson*, 96 Mo. App. 147.

Agreement of Another to Purchase Stock in the Mortgage Corporation. — *Hauser v. Capital City Brewing Co.*, (N. J. 1904) 57 Atl. Rep. 722.

The Reduction by a First Mortgagee of the Amount Due on his mortgage is a sufficient consideration for an extension of time by the second mortgagee. *Bradley v. Glenmary Co.*, 64 N. J. Eq. 77.

Proof of Extension. — *Nations v. Pulse*, 175 Mo. 86; *New York L. Ins. Co. v. Casey*, 178 N. Y. 381; *Denison University v. Manning*, 65 Ohio St. 138.

Necessity of Recording. — In *Weideman v. Zielinska*, 102 N. Y. App. Div. 163, it was held that the agreement should be recorded, and if not recorded is not binding against the holder of a subsequent recorded assignment who had no notice thereof.

5. **Validity of Parol Extension.** — *Hauser v. Capital City Brewing Co.*, (N. J. 1904) 57 Atl. Rep. 722; *New York L. Ins. Co. v. Casey*, 81 N. Y. App. Div. 92, *reversed* 178 N. Y. 381. See also *Bradley v. Glenmary Co.*, 64 N. J. Eq. 77.

Extension of Time of Payment of the Note secured by the mortgage is sufficient. *Kraft v. Holzmamm*, 206 Ill. 548.

1016. 1. Extension May Waive Right to

Mature Debt. — *Clark v. Elmendorf*, (Tex. Civ. App. 1904) 78 S. W. Rep. 538.

2. **Right to Sue for Damages When Security Is Impaired.** — *Holbrook v. Greene*, 98 Me. 171; *Watkins v. Kaolin Mfg. Co.*, 131 N. Car. 536.

5. *Holbrook v. Greene*, 98 Me. 171.

1017. 3. **Enjoining Threatened Injuries.** — *Farmers L. & T. Co. v. Sioux Falls*, 131 Fed. Rep. 890; *Old Colony Trust Co. v. Wichita*, 123 Fed. Rep. 762, *modified* (C. C. A.) 132 Fed. Rep. 641; *Wilkinson v. Dunkley-Williams Co.*, (Mich. 1905) 103 N. W. Rep. 170, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1017; *Collins v. Rea*, 127 Mich. 273; *Beaver Lumber Co. v. Eccles*, 43 Oregon 400; *Schmaltz v. York Mfg. Co.*, 204 Pa. St. 1, 93 Am. St. Rep. 782.

4. **Insolvency Essential to Relief.** — *Beaver Lumber Co. v. Eccles*, 43 Oregon 400.

6. **Must Make Ordinary Repairs.** — *Barnard v. Paterson*, (Mich. 1904) 100 N. W. Rep. 893.

Where the premises were in bad repair when the mortgagee took possession, and the mortgagee failed to make ordinary repairs, but the premises were not permanently injured, he was held not to be liable for permissive waste, it appearing that the mortgagor had been credited with the sum which would have been spent in repairs. *Chapman v. Cooney*, 25 R. I. 657.

8. **Allowances for Necessary Repairs.** — *American Freehold Land Mortg. Co. v. Pollard*, 132 Ala. 155; *Fletcher v. Bass River Sav. Bank*, 182 Mass. 5, 94 Am. St. Rep. 632; *Faulkner v. Cody*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 64.

Only Necessary Repairs Allowed For. — *Whetstone v. McQueen*, 137 Ala. 301; *Barnard v. Paterson*, (Mich. 1904) 100 N. W. Rep. 893; *Eggensperger v. Lanpher*, 92 Minn. 503.

1018. 4. **Breach of Condition for Support and Maintenance.** — *Davis v. Poland*, 99 Me. 345.

5. **Available Remedies of Mortgagee.** — *Cassem v. Heustis*, 201 Ill. 208, 94 Am. St. Rep. 160; *Brown v. Schintz*, 109 Ill. App. 598; *Bradfield v. Hale*, 67 Ohio St. 316.

1019. 3. **Right of Foreclosure — In General.** — *Brown v. Schintz*, 109 Ill. App. 598; *Gerhardt v. Tucker*, 187 Mo. 46; *Teegarden v. Burton*, 62 Neb. 639; *Bradfield v. Hale*, 67 Ohio St. 316; *Griffin v. Stone River Nat. Bank*, (Tex. Civ. App. 1904) 80 S. W. Rep. 254; *George v. Butler*, 26 Wash. 456, 90 Am. St. Rep. 756.

Receivership to Protect Property. — A court of

1020. Recovery of Personal Indebtedness. — See note 1.

Remedies Are Concurrent. — See notes 4, 7.

b. UNDER STATUTES. — See note 9.

1021. Where the Mortgagor Is Personally Liable. — See note 1.

1022. *f.* OBTAINING SATISFACTION OF JUDGMENT — Application of Mortgaged Property to Debt. — See note 3.

16. Rights and Liabilities of Junior Mortgagees — *a.* IN GENERAL. — See note 4.

Right to Extinguish Senior Incumbrance. — See note 6.

1023. *d.* HOW AFFECTED BY FORECLOSURE OF PRIOR MORTGAGE. — See note 2.

e. LIABILITY TO STRICT FORECLOSURE. — See notes 3, 4.

1024. XIII. ASSIGNMENT OF MORTGAGE — 1. Assignability — *a.* GENERAL RULE. — See note 3.

1025. *d.* ASSIGNMENT FOR COLLECTION. — See note 2.

1026. 2. Who May Assign — *d.* JOINT MORTGAGEES. — See note 3.

f. EXECUTORS OR ADMINISTRATORS — See note 6.

1027. 3. To Whom Mortgage May Be Assigned — *a.* MORTGAGOR — Assignment in Trust. — See note 4.

1028. 4. Methods of Assignment — *a.* AT LAW — (2) *Sufficiency of Deeds* — (a) Quitclaim Deed. — See note 4.

equity may decree foreclosure and appoint a receiver although, by the terms of the mortgage, the mortgagee is not entitled to possession until six months after default, where it is necessary for the protection of the property. *State Trust Co. v. Kansas City, etc., R. Co.*, 120 Fed. Rep. 398. See generally the title RECEIVERS, **1026.** 3 *et seq.*

Right of Foreclosure for Amount of Part of Notes Due and Unpaid. — See *Land v. May*, 73 Ark. 415.

1019. 5. A Junior Mortgagee May Foreclose His Mortgage. — *Garza v. Howell*, (Tex. Civ. App. 1905) 85 S. W. Rep. 461. See also *Boatmen's Bank v. Fritzlen*, (C. C. A.) 135 Fed. Rep. 650.

8. Culpable Negligence May Divest Right of Foreclosure. — *Gunnison v. Chicago, etc., R. Co.*, 117 Fed. Rep. 629, *affirmed* (C. C. A.) 130 Fed. Rep. 259; *Wills v. Field*, 62 N. J. Eq. 271; *Eddy v. Campbell*, 23 R. I. 192. As to what constitutes culpable delay see *London, etc., Bank v. Horton*, (C. C. A.) 126 Fed. Rep. 593.

9. Mortgagor's Death as Affecting Foreclosure. — See *Whitmire v. May*, 96 Tex. 317.

1020. 1. Right to Recover Indebtedness at Law. — *Brown v. Schintz*, 109 Ill. App. 598; *Brophy v. Downey*, 26 Mont. 252; *George v. Butler*, 26 Wash. 456, 60 Am. St. Rep. 756.

4. Remedies Are Concurrent. — *Clark v. Harvard*, 122 Ga. 273; *Ray v. Pitman*, 119 Ga. 678; *Brown v. Schintz*, 109 Ill. App. 598.

7. Action on Indebtedness No Defense to Ejectment. — *Clark v. Harvard*, 122 Ga. 273.

9. Remedy as to Property Confined to Foreclosure. — *Mann v. Burkland*, (Neb. 1903) 94 N. W. Rep. 116.

1021. 1. Statutory Provisions Qualifying Right to Proceed with Action to Recover Indebtedness. — *Meyer v. Weber*, 133 Cal. 681; *Waugh v. Newell*, 62 Neb. 438; *Crary v. Buck*, (Neb. 1901) 95 N. W. Rep. 839; *Burrows v. Vanderbergh*, (Neb. 1903) 95 N. W. Rep. 57. See also *Carnahan v. Brewster*, (Neb. 1902) 96 N. W. Rep. 590; *Staunchfield v. Jeutter*, (Neb. 1903) 96 N. W. Rep. 642.

1022. 3. Application of Mortgaged Property to Indebtedness. — *Compare Eglach v. Labadie*, 21 Quebec Super. Ct. 481.

4. Junior Mortgagees Acquire Mortgagor's Rights. — *Boatmen's Bank v. Fritzlen*, (C. C. A.) 135 Fed. Rep. 650.

6. Right to Pay Off Prior Vendor's Lien. — *Bowen v. Gilbert*, 122 Iowa 448.

Effect of Removing Prior Incumbrances. — *Illinois Nat. Bank v. School Trustees*, 211 Ill. 500; *Hatch v. Falconer*, 67 Neb. 249.

A junior mortgagee cannot, by buying a tax title, extinguish the lien of the first mortgage. *Davis v. Evans*, 174 Mo. 307.

The Right May Be Waived or abandoned. *Shattuck v. Belknap Sav. Bank*, 63 Kan. 443.

1023. 2. Foreclosure of Prior Mortgage as Affecting Junior Mortgagee. — *Brophy v. Downey*, 26 Mont. 252; *Jones v. Dutch*, (Neb. 1902) 92 N. W. Rep. 735; *Nichols v. Tingstad*, 10 N. Dak. 172.

3. Junior Mortgagee Liable to Strict Foreclosure. — *South Omaha Sav. Bank v. Levy*, (Neb. 1901) 95 N. W. Rep. 603.

4. Strict Foreclosure Not Permissible. — *Carpenier v. Plagge*, 192 Ill. 82.

1024. 3. Mortgage Assignable in Equity. — *Romberg v. McCormick*, 194 Ill. 205; *Schultz v. Sroelowitz*, 191 Ill. 249.

Mortgage Not Assignable to Vest Legal Interest. — *Hass v. Lobstein*, 108 Ill. App. 217.

1025. 2. Assignment for Collection. — See *Snyder v. Snyder*, 131 Mich. 658.

1026. 3. Joint Mortgagees. — See *Collyer v. Cook*, 28 Ind. App. 272.

6. Executor or Administrator May Assign Mortgage. — *McCausland v. Baltimore Humane Impartial Soc., etc.*, 95 Md. 741.

1027. 4. The Trustee in Bankruptcy of the Mortgagor is entitled, on tender of the amount due, to an assignment of the mortgage, either to himself or to a person designated by him. *In re Bacon*, 132 Fed. Rep. 157. See generally the title INSOLVENCY AND BANKRUPTCY, **730.** 9.

1028. 4. *McMillan v. Craft*, 135 Ala. 148.

1028. *b. IN EQUITY — (1) Rules Applicable to Choses in Action Govern.* — See note 7.

(3) *Separate Instrument Not Necessary.* — See note 13.

1029. (4) *Written Assignment Not Necessary.* — See notes 1, 2.

c. WHAT MAY OPERATE AS AN ASSIGNMENT — (1) Conveyance of Property by Mortgagee — (a) In Possession. — See notes 4, 7.

(b) *Not in Possession.* — See note 9.

1030. (4) *Delivery of Mortgage.* — See note 5.

(5) *Effect of Assignment of Secured Indebtedness.* — See note 7.

1032. See note 1.

1033. See note 1.

(6) *Effect of Assignment of Mortgage Without Secured Indebtedness.* — See notes 4, 5, 6.

1034. See note 1.

(7) *Effect of Payment of Mortgage Debt.* — See note 3.

1035. *d. FORMAL REQUISITES OF WRITTEN ASSIGNMENTS — (1) Names of Parties to Assignment and Mortgage — (b) Assignee.* — See note 3.

(4) *Acknowledgment.* — See note 8.

(5) *Delivery — (a) Of Assignment.* — See note 9.

1028. 7. *Mortgage Debt a Chose in Action.* — *Frerking v. Thomas*, 64 Neb. 193; *Goddard v. Clarke*, (Neb. 1901) 96 N. W. Rep. 350; *Brynjolfson v. Osthus*, 12 N. Dak. 42.

13. *Separate Deed Effective.* — *Perry v. Fisher*, 30 Ind. App. 261.

1029. 1. *Parol Assignment of Debt, Etc.* — *McMillan v. Craft*, 135 Ala. 148; *Schultz v. Sroelowitz*, 191 Ill. 249.

2. *Written Assignment Not Necessary.* — *McMillan v. Craft*, 135 Ala. 148; *Brynjolfson v. Osthus*, 12 N. Dak. 42. See also *Wilcox v. Gregory*, 135 Cal. 217.

4. *Conveyance by Mortgagee in Possession.* — *Hooper v. Birchfield*, 138 Ala. 423. See also *Howat v. Howat*, 101 Ill. App. 158.

7. *Hooper v. Birchfield*, 138 Ala. 423.

9. See *Wilcox v. Gregory*, 135 Cal. 217.

1030. 5. *Delivery.* — *McMillan v. Craft*, 135 Ala. 148.

The Delivery of the Bond and Mortgage is sufficient, provided there is an intention to transfer. *John H. Mahnken Co. v. Pelletreau*, 93 N. Y. App. Div. 420.

7. *Assignment of Debt Carries Mortgage — United States.* — *O'Rourke v. Wahl*, (C. C. A.) 109 Fed. Rep. 276; *McDaniel v. Stroud*, (C. C. A.) 106 Fed. Rep. 486.

Alabama. — *Buckheit v. Decatur Land Co.*, 140 Ala. 216.

Illinois. — *Kittler v. Studabaker*, 113 Ill. App. 342, 352; *Mann v. Merchants' L. & T. Co.*, 100 Ill. App. 224; *Romberg v. McCormick*, 194 Ill. 295; *Schultz v. Sroelowitz*, 191 Ill. 249.

Indiana. — *Alden v. White*, 32 Ind. App. 671; *Perry v. Fisher*, 30 Ind. App. 261.

Maryland. — *McCauseland v. Baltimore Humane Impartial Soc., etc.*, 95 Md. 741.

Minnesota. — *Bloomer v. Burke*, (Minn. 1904) 101 N. W. Rep. 974; *Mankato First Nat. Bank v. Pope*, 85 Minn. 433.

Montana. — *Cornish v. Woolverton*, 32 Mont. 456, 107 Am. St. Rep. 434.

Nebraska. — *Frerking v. Thomas*, 64 Neb. 193; *Northern Counties Invest. Trust v. Edgar*, 65 Neb. 301; *Garnett v. Myers*, 65 Neb. 280;

Snell v. Margritz, 64 Neb. 6; *Consterdine v. Moore*, 65 Neb. 291, 101 Am. St. Rep. 620.

North Dakota. — *Brynjolfson v. Osthus*, 12 N. Dak. 42.

South Dakota. — *Grether v. Smith*, 17 S. Dak. 279.

Tennessee. — *Union, etc., Bank v. Smith*, 107 Tenn. 476.

Washington. — *Fischer v. Woodruff*, 25 Wash. 67, 87 Am. St. Rep. 742.

Wisconsin. — *Boyle v. Lybrand*, 113 Wis. 79.

1032. 1. *Transfer of Interest Coupon.* — *Curtiss v. McCune*, (Neb. 1903) 94 N. W. Rep. 984.

1033. 1. *Assignee Ignorant of Existence of Mortgage.* — *Mankato First Nat. Bank v. Pope*, 85 Minn. 433.

4. *Mortgage Not Assignable Without Debt.* — *Cornish v. Woolverton*, 32 Mont. 456, 107 Am. St. Rep. 434.

5. *Assignment of Mortgage Without Debt a Nullity.* — *Cornish v. Woolverton*, 32 Mont. 456, 107 Am. St. Rep. 434; *Ex p. Powell*, 68 S. Car. 324.

6. *Assignment of Mortgage Does Not Carry Indebtedness.* — *Contra, Klingensfield v. Houghton*, (Neb. 1901) 96 N. W. Rep. 76.

1034. 1. *Intention to Pass Indebtedness.* — *Lazarus v. Rosenberg*, 70 N. Y. App. Div. 105, *distinguishing Merritt v. Bartholick*, 36 N. Y. 44.

3. *Effect of Payment.* — *Davison v. Gregory*, 132 N. Car. 389.

1035. 3. *An Assignee Must Be Named.* — Where the assignee's name was not inserted in the assignment until after delivery, it was held that the defect was cured by its subsequent insertion with the express consent of the assignor. *Fidelity Ins., etc., Co. v. Nelson*, 30 Wash. 340.

8. *Acknowledgment Not Necessary.* — *Breed v. National Bank*, 57 N. Y. App. Div. 468, *affirmed* 171 N. Y. 648. See also *Burt v. Moore*, 62 Kan. 536.

9. *Proof of Delivery.* — See *Aldrich v. Ward*, 68 N. Y. App. Div. 647.

1036. *f.* NOTICE TO MORTGAGOR. — See note 6.

5. Consideration — *a.* NECESSITY FOR. — See notes 8, 11.

1037. *b.* SUFFICIENCY — EVIDENCE. — See note 1.

c. CONSIDERATION FOR MORTGAGE. — See notes 3, 4.

6. Effect of Assignment — *a.* IN GENERAL. — See note 7.

Passing Legal Title. — See notes 8, 9.

1040. **7.** Priorities — *d.* AS BETWEEN ASSIGNEE AND PURCHASERS OR OTHER INCUMBRANCERS. — See note 4.

8. Rights of Assignee — *a.* IN GENERAL. — See notes 6, 7, 8, 9.

1041. *b.* RULE AS TO EQUITIES — (1) *In Favor of Mortgagor* — (a) Rule Stated. — See notes 1, 2.

1036. **6.** Notice to Mortgagor Not Necessary. — *Fitzgerald v. Beckwith*, 182 Mass. 177. See also *Bateman v. Hunt*, (1904) 2 K. B. 530.

To Be Fully Protected the assignee should give actual notice or have his assignment filed for record. *Williams v. Pelley*, 96 Ill. App. 346; *Hahn v. Geiger*, 96 Ill. App. 104.

8. Consideration No Concern of Mortgagor. — *Woronieki v. Pariskiego*, 74 Conn. 224.

11. Snyder *v.* Snyder, 131 Mich. 658.

1037. **1.** Sufficiency — Evidence. — *Ambrose v. Drew*, 139 Cal. 665; *Bloomer v. Burke*, (Minn. 1904) 101 N. W. Rep. 974; *Loan, etc., Sav. Bank v. Stoddard*, (Neb. 1902) 89 N. W. Rep. 301; *Breed v. National Bank*, 57 N. Y. App. Div. 468, *affirmed* 171 N. Y. 648.

3. Lack of Consideration Available Against Assignee. — See *Hetzel v. Easterly*, 96 N. Y. App. Div. 517.

4. Bona Fide Assignee Protected. — *Heintz v. Klebba*, (Neb. 1904) 98 N. W. Rep. 431.

An assignee of a mortgage executed without consideration, the assignment being for less than the face value of the mortgage, the proceeds being received by the mortgagor, can enforce it only for the actual consideration of the assignment. *Verity v. Sternberger*, 62 N. Y. App. Div. 112, *affirmed* 172 N. Y. 633.

7. Mortgagee's Interest Vested in Assignee. — *State v. Mellette*, 16 S. Dak. 297.

8. Legal Title Passes. — *Hooper v. Birchfield*, 138 Ala. 423; *Carter v. Smith*, (Ala. 1905) 38 So. Rep. 184, holding further that the erasure of the name of the assignee and the delivery of the mortgage back to the assignor will not have the effect of revesting the title in the latter.

If the Assignment Is by Parol the legal title to the debt and the premises remains in the assignor. *Buckheit v. Decatur Land Co.*, 140 Ala. 216.

9. Legal Estate Not Transferred. — *Clark v. Havard*, 122 Ga. 273; *Collins v. Davis*, 132 N. Car. 106.

1040. **4.** Date of Execution of Mortgage Governs. — *Finley v. Babb*, 173 Mo. 257, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1040 and supporting the whole text paragraph.

Priority of Record. — See *Coonrod v. Kelly*, (C. C. A.) 119 Fed. Rep. 841.

6. Rules Applicable to Other Nonnegotiable Instruments Govern. — *Finley v. Babb*, 173 Mo. 257, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1040.

7. Assignee Succeeds to Rights of Mortgagee. — *Coonrod v. Kelly*, (C. C. A.) 119 Fed. Rep. 841; *Raymond v. Whitehouse*, 119 Iowa 132; *Maslin v. Marshall*, 94 Md. 480; *Mankato First*

Nat. Bank v. Pope, 85 Minn. 433; *Paulsen v. Koon*, 85 Minn. 240; *Finley v. Babb*, 173 Mo. 257, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1040; *Cornish v. Woolverton*, 32 Mont. 456, 107 Am. St. Rep. 434; *Darr v. Spencer*, 63 Neb. 80; *Allison v. Manzke*, 118 Wis. 11.

8. Rights of Mortgagee Not Based upon Mortgage. — *Finley v. Babb*, 173 Mo. 257, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1040.

9. Assignee Has No Other or Greater Rights than Mortgagee Had. — *Anglo-California Bank v. Eudey*, (C. C. A.) 123 Fed. Rep. 39, *modified* (C. C. A.) 125 Fed. Rep. 1000; *Hass v. Lobstein*, 108 Ill. App. 217; *Howat v. Howat*, 101 Ill. App. 158; *Morris v. Joyce*, 63 N. J. Eq. 549; *Paulsen v. Koon*, 85 Minn. 240; *Finley v. Babb*, 173 Mo. 257, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1040; *Hetzel v. Easterly*, 96 N. Y. App. Div. 517; *State v. Mellette*, 16 S. Dak. 297; *Merager v. Madson*, (S. Dak. 1905) 103 N. W. Rep. 650; *Allison v. Manzke*, 118 Wis. 11.

1041. **1.** Equities Between Original Parties. — *Alabama*. — *Marshall v. Shift*, 130 Ala. 545. *California*. — *Payne v. Morey*, 144 Cal. 130; *Adams v. Hopkins*, 144 Cal. 19; *Meyer v. Weber*, 133 Cal. 681; *San José Ranch Co. v. San José Land, etc., Co.*, 132 Cal. 582.

Illinois. — *Bebber v. Moreland*, 100 Ill. App. 198; *Kittler v. Studabaker*, 113 Ill. App. 342, 352; *Williams v. Pelley*, 96 Ill. App. 346; *Hahn v. Geiger*, 96 Ill. App. 104; *Elser v. Williams*, 104 Ill. App. 238; *Schultz v. Sroelowitz*, 191 Ill. 249; *Brosseau v. Lowy*, 209 Ill. 405; *Romberg v. McCormick*, 194 Ill. 205; *Bouton v. Cameron*, 205 Ill. 50, *affirming* 99 Ill. App. 600.

Minnesota. — *Paulsen v. Koon*, 85 Minn. 240.

Montana. — *Cornish v. Woolverton*, 32 Mont. 456, 107 Am. St. Rep. 434.

Nebraska. — *Garnett v. Myers*, 65 Neb. 287; *Darr v. Spencer*, 63 Neb. 80.

New York. — *Central Trust Co. v. West India Imp. Co.*, 169 N. Y. 314; *Mertens v. Wakefield*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 501; *Scheurer v. Brown*, 67 N. Y. App. Div. 567; *Howard v. Robbins*, 170 N. Y. 498.

Pennsylvania. — *Boyer v. Webber*, 22 Pa. Super. Ct. 35.

Vermont. — *Howard v. Clark*, 72 Vt. 429.

Wisconsin. — *Boyle v. Lybrand*, 113 Wis. 79.

2. Duty of Assignee to Inquire of Mortgagee. — *Hass v. Lobstein*, 108 Ill. App. 217; *Mann v. Merchants' L. & T. Co.*, 100 Ill. App. 224; *Brosseau v. Lowy*, 209 Ill. 405; *Schultz v. Sroelowitz*, 191 Ill. 249; *Gibson v. Thomas*, 180 N. Y. 483.

- 1042.** (2) *In Favor of Third Persons.* — See note 4.
In New York. — See note 7.
- 1043.** (3) *Mortgage Securing Negotiable Note* — (a) *Assignment Before Maturity.* — See notes 1, 2.
* (b) *Assignment After Maturity.* — See note 4.
(4) *Equities of Which Assignee Had Notice.* — See note 5.
- 1044.** (5) *Equities Arising After Assignment.* — See note 1.
d. *RIGHT TO FORECLOSE.* — See note 3.
- 1045.** f. *RIGHTS NOT AFFECTED BY SUBSEQUENT TRANSACTIONS OF MORTGAGEE.* — See note 2.
i. *EFFECT OF RELEASE OR DISCHARGE BY MORTGAGEE.* — See note 6.
- 1046.** See note 1.
- 1047.** 9. *Rights and Liabilities of Assignor* — f. *PERSONAL LIABILITY TO ASSIGNEE.* — See note 2.
10. *Protection of Mortgagor in Payments to Mortgagee* — Where a Mortgage Secures a Non-negotiable Note or Bond. — See notes 5, 6.
- 1048.** XV. *PRIORITY OF MORTGAGES* — 5. *Priority as Between Notes Secured by Single Mortgage* — a. *NOTES DUE ORIGINALLY TO MORTGAGEE* — (1) *In Hands of Different Assignees* — (a) *In General.* — See note 6.
- 1050.** (2) *Where Mortgagee Retains Part of the Notes.* — See note 5.
Effect of Express Agreement Between Mortgagee and Assignee. — See note 6.
(3) *Where Notes Have Same Date of Maturity.* — See notes 7, 8.
- 1042.** 4. *Latent or Secret Equities of Third Persons.* — *McDaniel v. Stroud*, (C. C. A.) 106 Fed. Rep. 486; *Mann v. Merchants' L. & T. Co.*, 100 Ill. App. 224; *Kittler v. Studabaker*, 113 Ill. App. 342, 352; *Schultz v. Sroelowitz*, 191 Ill. 249; *Boyer v. Webber*, 22 Pa. Super. Ct. 35.
Assignee Must Be Bona Fide Assignee for Value. — *Tate v. Security Trust Co.*, 63 N. J. Eq. 559.
7. *New York Rule.* — *Scheurer v. Brown*, 67 N. Y. App. Div. 567; *Mertens v. Wakefield*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 501; *Central Trust Co. v. West India Imp. Co.*, 169 N. Y. 314.
Rule Extends Only to Equities Attending Original Transaction. — *Weideman v. Zielinska*, 102 N. Y. App. Div. 163.
- 1043.** 1. *Assignee Takes Free from Equities.* — *O'Rourke v. Wahl*, (C. C. A.) 109 Fed. Rep. 276; *Cowing v. Cloud*, 16 Colo. App. 326; *Boyle v. Lybrand*, 113 Wis. 79; *Thorpe v. Nindeman*, 123 Wis. 149, 107 Am. St. Rep. 897.
2. *Contrary Doctrine.* — *Kittler v. Studabaker*, 113 Ill. App. 342, 352; *Welbon v. Webster*, 89 Minn. 177. See also *Mann v. Merchants' L. & T. Co.*, 100 Ill. App. 224.
- A Provision in the Mortgage May Render the Note Nonnegotiable, and the assignee will take subject to the equities in the hands of the mortgagee. *Allen v. Dunn*, (Neb. 1904) 99 N. W. Rep. 680; *Garnett v. Myers*, 65 Neb. 287.
4. *Subject to Equities Between Parties.* — *Marshall v. Shift*, 130 Ala. 545.
5. *Assignee Takes Subject to Equities of Which He Had Notice.* — *Allen v. Gates*, 73 Vt. 222.
- 1044.** 1. *Equities or Defenses Arising After Assignment.* — *Cornish v. Woolverton*, 32 Mont. 456, 107 Am. St. Rep. 434.
3. *Right to Foreclose.* — *Woodruff v. Adair*, 131 Ala. 530; *Farmers', etc., Bank v. Copsey*, 134 Cal. 287; *Montgomery v. King*, 123 Ga. 14; *Barlow v. Cooper*, 109 Ill. App. 375; *Santee v.*
- Keefe*, 127 Iowa 128; *Darr v. Spencer*, 63 Neb. 89; *Enyart v. Moran*, 64 Neb. 401; *Heintz v. Klebba*, (Neb. 1904) 98 N. W. Rep. 431; *Ruberg v. Brown*, 71 S. Car. 287; *Barber v. Stroub*, 111 Mo. App. 57.
- Mortgage Assigned as Security.* — *Provident Life, etc., Co. v. Parrott*, (N. J. 1901) 49 Atl. Rep. 1131.
- 1045.** 2. *Rights Not Affected by Subsequent Transactions of Mortgagee.* — *Cornish v. Woolverton*, 32 Mont. 456, 107 Am. St. Rep. 434.
6. *Mortgagee Cannot Rightfully Release Mortgage After Assignment.* — *Heintz v. Klebba*, (Neb. 1904) 98 N. W. Rep. 431.
- 1046.** 1. *Protection of Bona Fide Purchasers Where Assignment Not Recorded.* — *Montgomery v. Waite*, (Neb. 1901) 95 N. W. Rep. 343.
- 1047.** 2. *Where the Assignee, Without the Assignor's Consent, Releases Half the Lands from the mortgage, the assignor is released from a covenant that the mortgagor will pay the mortgage.* *Farmers' Loan, etc., Co. v. Patchett*, 6 Ont. L. Rep. 255.
5. *Mortgagor Protected.* — *Pennypacker v. Latimer*, 10 Idaho 618; *Cornish v. Woolverton*, 32 Mont. 456, 107 Am. St. Rep. 434.
6. *Payments After Notice.* — *Cornish v. Woolverton*, 32 Mont. 456, 107 Am. St. Rep. 434.
- 1048.** 6. *Priority Determined by Dates of Maturity of Notes.* — *Alden v. White*, 32 Ind. App. 671.
- 1050.** 5. *Rule Giving Assignee Preference over Mortgagee.* — *Alden v. White*, 32 Ind. App. 671.
6. *The Mortgagee May Stipulate that the notes which he retains shall have a preferred lien.* *Romberg v. McCormick*, 194 Ill. 205.
7. *Alden v. White*, 32 Ind. App. 671.
8. *Effect of Provisions in Mortgage.* — Where the mortgage provides that default in the payment of the first of a series of notes shall mature all the notes, and contains no authority to

1050. *b.* NOTES DUE ORIGINALLY TO DIFFERENT PARTIES. — See note 9.

1055. XVII. EXTINGUISHMENT OF MORTGAGE — 1. In General. — See notes 4, 5.

Dependent upon Interest and Intent of Parties. — See note 7.

1056. Circumstances Showing Intention. — See notes 2, 3.

2. Methods of Extinguishment — *a.* BY PAYMENT — (1) *In General.*

— See note 5.

1057. See notes 1, 3.

1058. (2) *Partial Payment.* — See note 1.

(3) *Payment After Maturity.* — See note 2.

the mortgagee to apply the proceeds of a sale of the property to the payment of certain of the notes to the exclusion of the others, the proceeds of the sale will be credited *pro rata* on all the notes. *Bostick v. Jacobs*, 133 Ala. 344, 91 Am. St. Rep. 36.

1050. 9. Mortgage Given Originally to Secure Notes to Different Parties. — *Guthrie v. Treat*, 66 Neb. 415.

1055. 4. Mortgage Extinguished by Payment or Release. — *Ballard v. Nye*, (Cal. 1902) 69 Pac. Rep. 481; *Davis v. Thomas*, 66 Neb. 26; *Collins v. Davis*, 132 N. Car. 106; *Merchants' State Bank v. Tufts*, (N. Dak. 1905) 103 N. W. Rep. 760.

Surrender of the Premises will not satisfy the mortgage. *Borchardt v. Favor*, 16 Colo. App. 406.

5. *Compare* *Swancey v. Parrish*, 62 S. Car. 240.

7. Extinguishment Depends upon Intention. — *McMillan v. Craft*, 135 Ala. 148; *Bradshaw v. Gunter*, 135 Ala. 240; *White v. Stevenson*, 144 Cal. 104; *Russell v. Bosworth*, 106 Ill. App. 314; *Santee v. Keefe*, 127 Iowa 128; *Bloomer v. Burke*, (Minn. 1904) 101 N. W. Rep. 974; *Davis v. Thomas*, 66 Neb. 26.

1056. 2. Taking Assignment to Third Person for Payer's Benefit. — See *Everett v. Gately*, 183 Mass. 503.

3. Where the Mortgagor Pays the Amount Due on a note and mortgage before maturity and the mortgage is assigned to a third party for his benefit without consideration, the mortgagee conveys nothing by the assignment as the mortgagor is in of his former estate, without any assignment or discharge. *Flye v. Berry*, 181 Mass. 442.

5. Extinguishment by Payment — *Alaska.* — *Jorgensen v. Young*, 1 Alaska 335.

California. — *Hooker v. Burr*, 137 Cal. 663, 99 Am. St. Rep. 17.

Colorado. — *Murto v. Lemon*, 19 Colo. App. 314.

Florida. — *Garrison v. Parsons*, 45 Fla. 335. *Illinois.* — *Lowy v. Boenert*, 110 Ill. App. 16, affirmed 209 Ill. 405; *Harris v. Dumont*, 207 Ill. 583.

Kentucky. — *Fitch v. Duckwall*, (Ky. 1904) 78 S. W. Rep. 185; *Gardner v. Continental Ins. Co.*, (Ky. 1903) 75 S. W. Rep. 283; *Hall v. Metcalfe*, 114 Ky. 886; *Fidelity Trust, etc., Co. v. Carr*, (Ky. 1902) 67 S. W. Rep. 258.

Louisiana. — *Hibernia Nat. Bank v. Gragard*, 109 La. 677.

Minnesota. — *Wenzel v. Weigand*, 92 Minn. 152.

Nebraska. — *Campbell v. Miller*, (Neb. 1905) 103 N. W. Rep. 434; *Falkner v. Powell*, (Neb. 1904) 100 N. W. Rep. 937; *Decker v. Decker*, 64 Neb. 239; *Davis v. Thomas*, 66 Neb. 26.

New Jersey. — *Bouker v. Galligan*, (N. J. 1904) 57 Atl. Rep. 1010.

New York. — *Douglas v. Miller*, 102 N. Y. App. Div. 94; *Mertens v. Wakefield*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 501.

North Dakota. — *Prescott v. Brooks*, (N. Dak. 1902) 94 N. W. Rep. 88.

Pennsylvania. — *Dinner v. Van Dyke*, 25 Pa. Super. Ct. 433; *Steigerwald v. Philadelphia Brewing Co.*, 21 Pa. Super. Ct. 540.

South Dakota. — *State v. Mellette*, 16 S. Dak. 297.

Washington. — *Dabney v. Smith*, 38 Wash. 40.

The Burden of Proof of Payment is on the mortgagor. *Archibald v. Banks*, 203 Ill. 380; *Tisdale v. Mallett*, 73 Ark. 431.

Costs of a Foreclosure Suit Begun must be paid down to the date of payment of the mortgage. *Hall v. Metcalfe*, 114 Ky. 886.

Waiver of Proof of Payment. — *Ninde v. Union Trust Co.*, 135 Mich. 573.

Presumption of Payment — Prescription. — *Kuhn v. Bercher*, 114 La. 602.

Statement as to Ownership of Insurance Money. — Intimation to the mortgagee that the insurance money on property destroyed by fire belongs to him is not payment under the *California* statute, which requires the actual delivery of money to constitute payment. *Ballard v. Nye*, (Wash. 1902) 69 Pac. Rep. 481.

Evidence — Receipt Not Conclusive. — *Rarden v. Cunningham*, 136 Ala. 263.

Declarations of Deceased Mortgagor Inadmissible. — *Conkling v. Weatherwax*, 181 N. Y. 258.

Application of Payment. — *Kelso v. Russell*, 33 Wash. 474; *Burnett v. Sledge*, 129 N. Car. 114; *St. Thomas First Nat. Bank v. Flath*, 10 N. Dak. 275; *Roberts v. Wessinger*, 69 S. Car. 283.

1057. 1. By Gift. — See *Collins v. Maude*, 144 Cal. 289; *Trombly v. Klersy*, (Mich. 1905) 102 N. W. Rep. 638.

3. Satisfaction by Arrangement Between the Parties. — *Peirson v. Peirson*, (Mich. 1904) 100 N. W. Rep. 457.

1058. 1. Effect of Partial Payment. — *Salomon v. Stoddard*, 107 Ill. App. 227. See also *In re Thuresson*, 3 Ont. L. Rep. 271.

2. Extinguishment by Payment After Maturity. — *Wood v. Grayson*, 22 App. Cas. (D. C.) 432.

1058. (4) *Extension of Time of Payment* — (a) *When Mortgagor Is Principal Debtor.* — See notes 3, 4.

(b) *When Mortgagor Is Surety.* — See note 8.

1059. (5) *To Whom Payment Made* — (a) *In General.* — See notes 1, 2.

When There Are Several Mortgagees. — See note 3.

(b) *To Agent or Attorney.* — See note 4.

(d) *After Assignment* — *bb.* *To Mortgagee.* — See note 7.

Nonnegotiable Note Secured by Mortgage. — See note 8.

1060. See note 1.

Where the Note Secured by the Mortgage Is Negotiable. — See notes 2, 4.

(6) *Effect Dependent upon Person Paying* — (a) *By Person Obligated to Pay.* — See notes 5, 6.

1061. *Revivor of Mortgage.* — See note 3.

1058. 3. *Agreement Between Mortgagor and Mortgagee.* — *Higman v. Humes*, 127 Ala. 404.

By Extension of Time of Payment of Note. — *Kraft v. Holzmänn*, 206 Ill. 548; *Kransz v. Uedelhofen*, 193 Ill. 477; *Hulme v. Neosho Valley Invest. Co.*, 63 Kan. 886, 66 Pac. Rep. 239.

4. *Heard v. Thrasher*, (Tex. Civ. App. 1902) 71 S. W. Rep. 803.

8. *Extension by Purchaser of Mortgaged Land.* — *Lowy v. Boenert*, 110 Ill. App. 16, *affirmed* 209 Ill. 405; *Wyatt v. Dufrene*, 106 Ill. App. 214; *Franklin Sav. Bank v. Cochrane*, 182 Mass. 586; *Steele v. Johnson*, 96 Mo. App. 147; *Higgins v. Evans*, 188 Mo. 627; *Germania L. Ins. Co. v. Casey*, 98 N. Y. App. Div. 88; *New York L. Ins. Co. v. Casey*, 178 N. Y. 381; *Iowa L. & T. Co. v. Schnose*, (S. Dak. 1905) 103 N. W. Rep. 22. See also *Egbert v. McGuire*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 245.

Mortgagor Consenting Not Released. — *Warner v. Williams*, 93 Md. 517.

Where the Mortgagor Remains the Principal Debtor he is not discharged. *Iowa L. & T. Co. v. Haller*, 119 Iowa 645.

Where the Premises Are Sold Merely Subject to the Mortgage, the mortgage being surety to the value thereof, the result is the same. *New York L. Ins. Co. v. Casey*, 81 N. Y. App. Div. 92, *reversed* 178 N. Y. 381.

Subsequent Grantees. — A valid extension of time given by the mortgagee to a grantee who has assumed payment of the debt will not release subsequent grantees who assume its payment. *Higgins v. Evans*, 188 Mo. 627.

Extension Must Be for Consideration. — *Regan v. Williams*, 185 Mo. 620, 105 Am. St. Rep. 600; *Regan v. Williams*, 88 Mo. App. 577; *New York L. Ins. Co. v. Casey*, 178 N. Y. 381.

1059. 1. *To Whom Payment May Be Made.* — *Casner v. Johnson*, 66 Kan. 404; *Walter v. Logan*, 63 Kan. 193; *Fitzgerald v. Beckwith*, 182 Mass. 177; *Cornish v. Woolverton*, 32 Mont. 456, 107 Am. St. Rep. 434.

2. *Apparent Authority to Receive Payment.* — *Pennypacker v. Latimer*, 10 Idaho 618; *Fitzgerald v. Beckwith*, 182 Mass. 177; *Barnes v. Long Island Real Estate Exch., etc., Co.*, 88 N. Y. App. Div. 83.

3. *Where Mortgagees Have Advanced Money on a Joint Account*, payment to one of them during the others' lifetime, though a good discharge of the debt at law, only discharges the security to the extent of the payee's beneficial interest, if any, even though the payee ulti-

mately becomes the survivor in the joint account. *Powell v. Brodhurst*, (1901) 2 Ch. 160.

4. *Right of Agent or Attorney to Receive Payment.* — *Pennypacker v. Latimer*, 10 Idaho 618; *Ninde v. Union Trust Co.*, 135 Mich. 573; *Cornish v. Woolverton*, 32 Mont. 456, 107 Am. St. Rep. 434; *Thompson v. Buehler*, (Neb. 1901) 95 N. W. Rep. 854; *Cheshire Provident Inst. v. Gibson*, (Neb. 1902) 89 N. W. Rep. 243. See also *Walter v. Logan*, 63 Kan. 193.

7. *Payment to Mortgagee Before Notice of Assignment.* — *Carey v. Kuten*, 98 Ill. App. 197; *Barnes v. Long Island Real Estate Exch., etc., Co.*, 88 N. Y. App. Div. 83.

8. *Nonnegotiable Note.* — *Pennypacker v. Latimer*, 10 Idaho 618; *Cornish v. Woolverton*, 32 Mont. 456, 107 Am. St. Rep. 434; *Garnett v. Meyers*, 65 Neb. 287.

1060. 1. *Payment to Mortgagee After Notice of Assignment.* — *Walter v. Logan*, 63 Kan. 193; *Cornish v. Woolverton*, 32 Mont. 456, 107 Am. St. Rep. 434.

Recording Assignment. — *Detwilder v. Heckenlaible*, 63 Kan. 627; *Cornish v. Woolverton*, 32 Mont. 456, 107 Am. St. Rep. 434. *Compare* *Rodgers v. Parker*, 136 Cal. 313.

2. *Negotiable Note.* — *Schultz v. Sroelowitz*, 191 Ill. 249; *Garnett v. Meyers*, 65 Neb. 280; *Northern Counties Invest. Trust v. Edgar*, 65 Neb. 301; *Consterdine v. Moore*, 65 Neb. 291, 101 Am. St. Rep. 620; *Snell v. Margritz*, 64 Neb. 6.

4. See *contra*, *Snell v. Margritz*, 64 Neb. 6, where payment by the mortgagor to the original mortgagee was held to be no defense to a suit for foreclosure.

5. *Extinguished When Payer Obligated to Pay.* — *Carroll v. Haigh*, 97 Ill. App. 576, *reversed* 197 Ill. 193; *Hetzel v. Easterly*, 96 N. Y. App. Div. 517; *Mertens v. Wakefield*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 501.

Payment by the Obligor Inures to the Benefit of Purchasers of the property and releases the lien. *Fidelity Trust, etc., Co. v. Carr*, (Ky. 1902) 67 S. W. Rep. 258.

6. *Payment by Person Assuming Mortgage Debt.* — *Brosseau v. Lowy*, 209 Ill. 405; *Forthman v. Deters*, 206 Ill. 159, 99 Am. St. Rep. 145. See also *Pearson v. Bailey*, 180 Mass. 229.

1061. 3. *Mortgagor Cannot Revive After Actual Payment.* — *Brosseau v. Lowy*, 209 Ill. 405; *Hibernia Nat. Bank v. Gragard*, 100 La. 677; *Flye v. Berry*, 181 Mass. 442; *Conlon v. Minor*, 94 N. Y. App. Div. 458; *Mertens v.*

- 1061.** (b) By Stranger. — See notes 5, 6.
 (d) By Partner or Tenant in Common. — See note 8.
 (e) By Person Having Right to Redeem. — See note 9.
- 1062.** (f) By Life Tenant. — See note 1.
 b. BY TENDER — (1) *In General*. — See notes 3, 4, 5.
 (2) *Effect of Making Tender* — (a) *On the Law Day*. — See note 6.
- 1063.** (b) After Default. — See notes 1, 3, 4, 5.
 c. BY TAKING NEW NOTE OR MORTGAGE. — See note 6.
 d. BY REDUCTION OF DEBT TO JUDGMENT. — See note 7.
- 1064.** See note 1.
 g. BY MERGER — (1) *In General*. — See note 5.
- Wakefield, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 501.
- 1061.** 5. See *Matchett v. Knisely*, 27 Ind. App. 664.
- Payment by Stranger After Death of Mortgagor.** — A stranger who, without authority, pays the balance of a mortgage debt after decease of the mortgagor cannot recover the sum paid from the mortgagor's estate. *Falls v. Jones*, 107 Mo. App. 357.
6. *Schneider v. Sellers*, (Tex. Civ. App. 1904) 81 S. W. Rep. 126.
8. **Payment by Partner or Tenant in Common.** — *Look v. Horn*, 97 Me. 283.
9. **Payment by Redemptioner.** — See *Bowen v. Gilbert*, 122 Iowa 448.
- The Purchaser of an Equity of Redemption** cannot, on tendering the amount of the mortgage debt, compel the mortgagee to assign to him the mortgage, all he is entitled to being a discharge or cancellation of the mortgage. *Lumsden v. Manson*, 96 Me. 357.
- 1062.** 1. **Effect of Payment by Life Tenant.** — *Downing v. Hartshorn*, (Neb. 1903) 95 N. W. Rep. 801; *Warner v. York*, 25 Ohio Cir. Ct. 310.
3. **Solicitor's Fees and Costs Included.** — *Healy v. Protective Mut. F. Ins. Co.*, 213 Ill. 99. See also *Middleton v. Scott*, 4 Ont. L. Rep. 459.
- Payment into Court.** — *Chappell v. Clark*, 92 Md. 98.
- Must Include Interest and Taxes Paid by Mortgagee.** — *McNeil v. Sun, etc., Bldg., etc., Assoc.*, 75 N. Y. App. Div. 290.
- Mortgagee May Waive Tender.** — *Buonocore v. De Feo*, 76 Conn. 705.
4. **Must Be Unconditional.** — *Lumsden v. Manson*, 96 Me. 357.
5. *Kennedy v. Roundtree*, 63 S. Car. 395.
6. **Discharged by Tender on Law Day.** — *Snow v. Bass*, 174 Mo. 149.
- Tender Before Maturity Effectual When So Stipulated in Mortgage.** — *Snow v. Bass*, 174 Mo. 149.
- 1063.** 1. **View that Mortgage Not Discharged.** — See *Svenson v. Rohrer*, 206 Pa. St. 407.
3. **View that Mortgage Is Discharged.** — *Knollenberg v. Nixon*, 171 Mo. 445, 94 Am. St. Rep. 790; *Schieck v. Donohue*, 77 N. Y. App. Div. 321.
4. *Leet v. Armbruster*, 143 Cal. 663.
5. **Unnecessary to Keep Tender Good.** — *Leet v. Armbruster*, 143 Cal. 663; *Schieck v. Donohue*, 77 N. Y. App. Div. 321.
- Tender Must Be Kept Good to Entitle Mortgagor to Affirmative Relief.** — *Knollenberg v. Nixon*, 171 Mo. 445, 94 Am. St. Rep. 790; *McNeil v. Sun, etc., Bldg., etc., Assoc.*, 75 N. Y. App. Div. 290; *Schieck v. Donohue*, 77 N. Y. App. Div. 321.
6. *Sheridan First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1063.
7. **Mortgage Not Extinguished by Judgment.** — *Alden v. White*, 32 Ind. App. 671.
- Satisfaction of Judgment Extinguishes Mortgage.** — *Finnegan v. Janeway*, 85 Minn. 384.
- 1064.** 1. *Downing v. Hartshorn*, (Neb. 1903) 95 N. W. Rep. 801; *Powell v. Patrick*, 64 S. Car. 190.
5. **Effect of Union of Estates of Mortgagor and Mortgagee** — *United States*. — *McDaniel v. Stroud*, (C. C. A.) 106 Fed. Rep. 486.
- California*. — *Anglo-Californian Bank v. Field*, 146 Cal. 644.
- Connecticut*. — *Skinner v. Hale*, 76 Conn. 223.
- Georgia*. — *Woodside v. Lippold*, 113 Ga. 877, 84 Am. St. Rep. 267; *Coleman, etc., Co. v. Rice*, 115 Ga. 510.
- Illinois*. — *Forthman v. Deters*, 206 Ill. 159, 99 Am. St. Rep. 145; *Security Title, etc., Co. v. Schlender*, 190 Ill. 609; *Hester v. Frary*, 99 Ill. App. 51.
- Indiana*. — *Artz v. Yeager*, 30 Ind. App. 677.
- Iowa*. — *Moore v. Olive*, 114 Iowa 650; *Kilmer v. Hannifan*, 113 Iowa 281.
- Kansas*. — *Gilman v. Stock Exch. Bank*, 64 Kan. 87; *Shattuck v. Belknap Sav. Bank*, 63 Kan. 443.
- Massachusetts*. — *Pearson v. Bailey*, 180 Mass. 229.
- Michigan*. — *Wettlaufer v. Ames*, 133 Mich. 201, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 950.
- Minnesota*. — *Bloomer v. Burke*, (Minn. 1904) 101 N. W. Rep. 974; *Welborn v. Webster*, 89 Minn. 77.
- Nebraska*. — *Lincoln v. Lincoln St. R. Co.*, (Neb. 1903) 97 N. W. Rep. 255; *Ames v. Miller*, 65 Neb. 204.
- New York*. — *Coon v. Smith*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 112; *Zarkowski v. Schroeder*, 71 N. Y. App. Div. 526.
- North Carolina*. — *Davison v. Gregory*, 132 N. Car. 380.
- Ohio*. — *Warner v. York*, 25 Ohio Cir. Ct. 310.
- Pennsylvania*. — *Fenton v. Fenton*, 208 Pa. St. 358; *Saint v. Cornwall*, 207 Pa. St. 270; *Continental Title, etc., Co. v. Devlin*, 209 Pa. St. 380.
- South Carolina*. — *Ex p. Powell*, 68 S. Car. 324. See also *Singleton v. Singleton*, 60 S. Car. 216.
- Vermont*. — *Gleason v. Carpenter*, 74 Vt. 399.

- 1066.** See note 1.
 (2) *Circumstances Showing Intention*. — See notes 2, 3, 4, 6.
- 1067.** See note 1.
 (3) *Circumstances Creating Estoppel to Deny Merger*. — See note 2.
 (4) *Effect of Intervening Incumbrance*. — See note 3.
- 1068.** (5) *Union of Titles in Same Person* — (a) *In General*. — See notes 4, 5.
 (b) *Union of Titles in Husband and Wife*. — See note 6.
- 1069.** (7) *Partial Merger*. — See note 3.
h. BY RELEASE OR RECONVEYANCE — (1) *In General*. — See notes 5, 6.
 (2) *Form of Release*. — See notes 7, 8, 12.
- 1070.** (3) *Consideration for Release*. — See note 1.
 (4) *Partial Release*. — See note 2.
- 1071.** 3. *By Whom Discharged* — *a. IN GENERAL*. — See notes 2, 3.
b. WHERE THERE ARE SEVERAL MORTGAGEES, PERSONAL REPRESENTATIVES, OR TRUSTEES. — See note 4.

Washington. — *Woodhurst v. Cramer*, 29 Wash. 40; *Chase Nat. Bank v. Security Sav. Bank*, 28 Wash. 150.

1066. 1. Innocent Intention. — *Forthman v. Deters*, 206 Ill. 159, 99 Am. St. Rep. 145; *Downing v. Hartshorn*, (Neb. 1903) 95 N. W. Rep. 801.

2. Intention in Instrument. — *Fenton v. Fenton*, 208 Pa. St. 358; *Fitch v. Applegate*, 24 Wash. 25.

3. Woodside v. Lippold, 113 Ga. 877, 84 Am. St. Rep. 267; *Coon v. Smith*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 112.

4. Time for Indicating Intention. — *Aldrich v. Ward*, 68 N. Y. App. Div. 647.

6. Conveyance Subject to Mortgage. — *Saint v. Cornwall*, 207 Pa. St. 270.

1067. 1. Assignment of Mortgage by Person Holding Both Estates. — *Bloomer v. Burke*, (Minn. 1904) 101 N. W. Rep. 974.

2. Covenant by Warranty Deed Omitting Mention of Mortgage. — *Pearson v. Bailey*, 180 Mass. 229. See also *Brosseau v. Lowy*, 209 Ill. 405.

3. Intervening Incumbrance Preventing Merger. — *Anglo-Californian Bank v. Field*, 146 Cal. 644; *Hester v. Frary*, 99 Ill. App. 51; *Shattuck v. Belknap Sav. Bank*, 63 Kan. 443; *Chase Nat. Bank v. Security Sav. Bank*, 28 Wash. 150.

In South Carolina. — *In Glenn v. Rudd*, 68 S. Car. 102, 102 Am. St. Rep. 659, it was held that the contract that there should be no merger may be by parol and not necessarily in writing, and inserted in the conveyance.

1068. 4. Necessity of Union of Titles. — *Swift v. Kortrecht*, (C. C. A.) 112 Fed. Rep. 709; *Warner v. York*, 25 Ohio Cir. Ct. 310; *Juckett v. Fargo Mercantile Co.*, (S. Dak. 1905) 102 N. W. Rep. 604.

5. No Extinguishment by Conveyance to Mortgagee After His Assignment. — *Farmers', etc., Bank v. German Ins. Bank*, (Ky. 1902) 66 S. W. Rep. 280.

6. No Extinguishment Because Titles United in Husband and Wife. — *Skinner v. Hale*, 76 Conn. 223, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1068.

1069. 3. Partial Merger. — *Ex p. Powell*,

68 S. Car. 324, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069.

5. Release of Mortgage. — *Poole v. Kelsey*, 95 Ill. App. 233; *Gadsden v. Johnson*, 65 Neb. 447.

The Consent of the Mortgagor to the release is unnecessary. *Mueller v. Renkes*, 31 Mont. 100.

6. Reconveyance. — Where the mortgage is in the form of an absolute deed the proper form of release is by reconveyance. *Grogan v. Valley Trading Co.*, 30 Mont. 229.

7. An Agreement to Release and to accept a new mortgage on other land is not binding until a mortgage on the other land has been tendered. *Trombley v. Cannon*, 134 Mich. 417.

8. Quitclaim Deed. — *Bradshaw v. Gunter*, 135 Ala. 240; *Nickell v. Tracy*, 100 N. Y. App. Div. 80.

12. Parol Agreement. — *Hunt v. Allen*, 73 Vt. 322.

1070. 1. Necessity for Consideration. — *White v. Stevenson*, 144 Cal. 104; *Linn v. Ziegler*, 68 Kan. 528; *Watts v. Parks*, (Ky. 1904) 78 S. W. Rep. 1125; *Maas v. Tacquard*, 33 Tex. Civ. App. 40.

Consideration Unnecessary. — See *Mueller v. Renkes*, 31 Mont. 100.

Partial Payment. — Payment of the mortgage in full is not essential to extinguish the lien. *Gadsden v. Johnson*, 65 Neb. 447.

A Good Consideration Will Be Presumed in the absence of evidence to the contrary. *Adams v. Hopkins*, 144 Cal. 19.

2. Release of Part of Premises. — *In re Thureson*, 3 Ont. L. Rep. 271.

1071. 2. An Unauthorized Release by a Trustee in a trust deed does not give a prior lien to a subsequent incumbrancer. *Barbour v. Scottish-American Mortg. Co.*, 102 Ill. 121; *Chicago, etc., R. Land Co. v. Peck*, 112 Ill. 498.

3. When Others Beneficially Interested. — *Busby v. Compton*, 112 Mo. App. 569.

4. By One Mortgagee — Contra. — The entry of discharge by one of two sureties to whom a mortgage has been given to indemnify them against liability as such sureties will not protect subsequent mortgagees so far as the security of the other surety is concerned. *Howe v.*

- 1072.** *c.* AFTER ASSIGNMENT.—See notes 1, 2.
4. Effect of Fraud, Undue Influence, Accident, or Mistake—*a.* IN GENERAL.—See note 7.
b. IGNORANCE OF INTERVENING INCUMBRANCE.—See note 8.
1073. *c.* RULE AS TO SUBSEQUENT PURCHASERS AND INCUMBRANCERS.—See notes 1, 2, 3.
d. MISTAKE OF LAW.—See note 6.
1074. **5.** Methods of Canceling—*b.* BY ENTRY OF DISCHARGE UPON RECORD—(1) *In General*.—See notes 3, 4.
(2) *Statutory Penalty for Failure to Discharge of Record*.—See note 5.
1076. MOTION.—See note 3.
1078. MOTIVE—Criminal Law.—See note 1.
1079. MRS.—See note 2.
1080. MULTIFARIOUSNESS.—See note 2.

White, 162 Ind. 74, (Ind. App. 1903) 67 N. E. Rep. 203.

1072. **1.** Brass *v.* Green, 113 Ill. App. 61, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1072; Cheshire Provident Inst. *v.* Gibson, (Neb. 1902) 89 N. W. Rep. 243.

2. Montgomery *v.* Waite, (Neb. 1901) 95 N. W. Rep. 343; Columbia Nat. Bank *v.* Marshall, (Neb. 1902) 90 N. W. Rep. 218; Heintz *v.* Klebba, (Neb. 1904) 98 N. W. Rep. 431; Perry *v.* Baker, 61 Neb. 841; Cheshire Provident Inst. *v.* Gibson, (Neb. 1902) 89 N. W. Rep. 243.

7. Release on Account of Fraud or Mistake.—San Francisco Mut. Loan Assoc. *v.* Bowden, 137 Cal. 236; White *v.* Stevenson, 144 Cal. 104; Cowing *v.* Cloud, 16 Colo. App. 326; Linn *v.* Ziegler, 68 Kan. 528; Gadsden *v.* Johnson, 65 Neb. 447; Farrell *v.* Bouck, 60 Neb. 771; Frerking *v.* Thomas, 64 Neb. 193; Higgins *v.* Jamesburg Mut. Bldg., etc., Assoc., 67 N. J. Eq. 525; Swedesboro Loan, etc., Assoc. *v.* Gans, 65 N. J. Eq. 132; Perry *v.* Fries, 90 N. Y. App. Div. 484; Saint *v.* Cornwall, 207 Pa. St. 270. See also Bowen *v.* Gilbert, 122 Iowa 448; Scott *v.* Lewis, 40 Oregon 37.

8. Ignorance of Intervening Lien.—White *v.* Stevenson, 144 Cal. 104; Laconia Sav. Bank *v.* Vittum, 71 N. H. 465, 93 Am. St. Rep. 561.

No Relief When Party Releasing Knows of Incumbrance.—Woodside *v.* Lippold, 113 Ga. 877, 84 Am. St. Rep. 267.

1073. **1.** Bona Fide Purchasers.—Lennartz *v.* Quilty, 191 Ill. 174, 85 Am. St. Rep. 260.

Assignee of Junior Mortgagee.—Perry *v.* Fries, 90 N. Y. App. Div. 484; Coonrod *v.* Kelly, 113 Fed. Rep. 378.

2. Effect of Discharge by Mistake or Fraud of Third Person.—Farrell *v.* Bouck, 60 Neb. 771, on rehearing 61 Neb. 874. See also Higgins *v.* Jamesburg Mut. Bldg., etc., Assoc., 67 N. J. Eq. 525.

3. Purchaser with Notice.—See Lennartz *v.* Quilty, 191 Ill. 174, 85 Am. St. Rep. 260.

6. No Relief in Case of Mistake of Law.—Steele *v.* Walter, 204 Pa. St. 257.

1074. **3.** Discharge on Record.—Delta County Land, etc., Co. *v.* Talcott, 17 Colo. App. 316; Havighorst *v.* Bowen, 214 Ill. 90; Stork

v. American Surety Co., 109 La. 713; Busby *v.* Compton, 112 Mo. App. 569; Mueller *v.* Renkes, 31 Mont. 100; Montgomery *v.* Waite, (Neb. 1901) 95 N. W. Rep. 343; Gibson *v.* Thomas, 180 N. Y. 483; Mayo *v.* Stanton, 137 N. Car. 670; Mader *v.* Plano Mfg. Co., 17 S. Dak. 553.

4. White *v.* Stevenson, 144 Cal. 104. See also Leech *v.* Karthaus, 141 Ala. 509.

5. Statutory Penalty.—Partridge *v.* Wilson, 141 Ala. 164; Henderson *v.* Wilson, 139 Ala. 327; Jowers *v.* Brown, 137 Ala. 581; Osborn *v.* Hocker, 160 Ind. 1; British, etc., Mortg. Co. *v.* Burke, 80 Miss. 643; Snow *v.* Bass, 174 Mo. 149; Henry *v.* Orear, 104 Mo. App. 570; Mader *v.* Plano Mfg. Co., 17 S. Dak. 553.

Form and Sufficiency of Request.—Partridge *v.* Wilson, 141 Ala. 164; Henderson *v.* Wilson, 139 Ala. 327; British, etc., Mortg. Co. *v.* Burke, 80 Miss. 643.

A Request by One of Two Joint Mortgagors is insufficient, without proof of the knowledge and assent of the other mortgagor. Jowers *v.* Brown, 137 Ala. 581.

Liability of Assignee.—Henry *v.* Orear, 104 Mo. App. 570.

Good Faith a Defense.—Snow *v.* Bass, 174 Mo. 149.

Tender as Satisfaction.—Snow *v.* Bass, 174 Mo. 149.

Statute Strictly Construed.—Osborn *v.* Hocker, 160 Ind. 1; Snow *v.* Bass, 174 Mo. 149.

Alabama—A Cestui Qui Trust is not liable for the penalty in Alabama, as he is not included in the penal clause of the statute. Southwest-ern Bldg., etc., Assoc. *v.* Acker, 138 Ala. 523.

Statutory Penalty for Failure to Execute Release.—See Buonocore *v.* De Feo, 76 Conn. 705.

1076. **3.** Motion.—Citizens St. R. Co. *v.* Reed, 28 Ind. App. 629; Reid *v.* Fillmore, 12 Wyo. 72.

1078. **1.** Motive and Intent Distinguished.—People *v.* Molineux, 168 N. Y. 264.

1079. **2.** Mrs.—Married Woman.—State *v.* Alexander, 113 La. 749, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1079.

1080. **2.** Multifariousness.—Allred *v.* Tate, 113 Ga. 441; New York Cent., etc., R. Co. *v.* Reeves, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 496, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1080.

1080. MUNICIPAL — MUNICIPALITY. — See notes 5, 6.

A Municipality. — See note 7.

1080. 5. *United R., etc., Co. v. Mevers*, 112 La. 898, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1080.**6. Municipal.** — *Sessions v. State*, 115 Ga. 18; *State v. Levee Com'rs*, 109 La. 403.Distinction Between Municipal and Municipality. — *State v. Levee Com'rs*, 109 La. 403.**7. Municipality.** — *Lexington v. Thompson*, 113 Ky. 540.School District. — *State v. Wilson*, 65 Kan. 237.

MUNICIPAL AID.

BY B. B. CLARK.

1086. II. POWER OF LEGISLATURE TO AUTHORIZE MUNICIPAL AID — 2. What Constitutes a Public Purpose or Enterprise — i. TURNPIKES, PLANK-ROADS, AND CANALS. — See note 1.**1090. 3. Express Constitutional Restrictions on Power of Legislature — a. IN GENERAL.** — See note 1.

b. "LOAN OF CREDIT." — See note 4.

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1091. Payments Based on Consideration. — See note 2.**1093. f. RETROACTIVE EFFECT OF CONSTITUTIONAL PROVISIONS.** — See note 1.**1094. III. GRANT AND REPEAL OF POWER — 1. How Power May Be Granted — a. IN GENERAL.** — See notes 5, 6.**1095. b. CURATIVE ACTS.** — See note 2.**1097. IV. CONSTRUCTION OF LEGISLATIVE GRANTS OF POWER — 1. Implied Power.** — See note 3.**1086. 1. Turnpikes, Plankroads, and Canals.** — *Perkins County v. Graff*, 114 Fed. Rep. 441, 52 C. C. A. 243 (irrigation canal); *Kearney v. Woodruff*, (C. C. A.) 115 Fed. Rep. 90 (canal for water power).**1090. 1. Constitutional Restrictions.** — *Whitney v. Kentucky Midland R. Co.*, 110 Ky. 955; *Woolfolk v. Paducah* (Ky. 1904) 80 S. W. Rep. 186; *Adams v. Jackson Electric R., etc., Co.*, 78 Miss. 887.**Constitutional Provision as to Enactment of Statute.** — See *Graves v. Moore County*, 135 N. Car. 49.**4. "Loan of Credit."** — A city, by giving its premium notes for the payment of assessments to meet losses incurred by a mutual insurance company in which city property is insured, does not loan its credit to the company, in violation of the provision of the *New Jersey Constitution* prohibiting cities from loaning their credit to any corporation. *French v. Millville*, 66 N. J. L. 392, affirmed 67 N. J. L. 349.Nor does a restriction on a loan of credit prohibit a subscription by a municipality to the stock of a railway company. *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697.**6. A Statute Granting Pensions to Teachers Retired Before Its Enactment** has been held to be unconstitutional. *Mahon v. Board of Education*, 171 N. Y. 263, affirming 68 N. Y. App. Div. 154.**Street Improvements.** — A contract by a municipality for the improvement of a street, the expenses of which are assessed against theproperty benefited, is not invalid as a grant of aid for the reason that the municipality undertakes the collection of the special assessment and its disbursement. *Kronsbein v. Rochester*, 76 N. Y. App. Div. 494.**1091. 2. Abolishing Grade Crossing.** — *State v. St. Louis*, 169 Mo. 31.**The Reimbursement of an Officer for Expenses Incurred by Him** in the removal of a public nuisance is not unauthorized on the ground that it is a donation of public money to such officer. *State v. St. Louis*, 174 Mo. 125.**1093. 1. A Constitutional Provision with Regard to the Manner of Enacting Statutes** authorizing municipal aid to railway companies does not have a retroactive effect so as to repeal statutes theretofore enacted. *Henderson County v. Travelers' Ins. Co.*, (C. C. A.) 128 Fed. Rep. 817.**1094. 5. Grant of Power by Legislature.** — *Jennings Banking, etc., Co. v. Jefferson*, 30 Tex. Civ. App. 534.**6. Shortell v. Green County, (Ky. 1900) 59 S. W. Rep. 522; *Sparks v. Bohannon*, (Ky. 1901) 61 S. W. Rep. 260.****1095. 2. Carpenter v. Greene County, 130 Ala. 613; *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697.****1097. 3. Power Not Implied.** — *Scott v. Laporte*, 162 Ind. 34, rehearing denied 162 Ind. 51.**Private Waterworks for Village.** — *Grant v. Sherrill*, (Neb. 1904) 98 N. W. Rep. 681.**Payment of a Debt Barred by the Statute of Limitations** is *ultra vires*. *Trowbridge v. Schmidt*, 82 Miss. 475.

1099. 4. Express Restrictions upon Power of Newly Organized Counties. — See note 1.

5. Construction of Particular Statutes — *a.* IN GENERAL. — See note 2.

b. CONSTRUCTION OF STATUTES WITH REGARD TO PARTICULAR MUNICIPALITIES — Villages, Towns, Cities, and Counties. — See note 3.

Municipal Corporations Incorporated After Enabling Act. — See note 5.

c. CONSTRUCTION OF STATUTES WITH REGARD TO OBJECT OF AID — (1) *In General.* — See note 8.

1100. Aid "in the Completion of" Railroad. — See note 3.

Foreign Corporations. — See note 5.

Railroad Companies in Which Municipality Has an Interest. — See note 6.

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1101. (3) *De Facto Railway Corporations.* — See note 5.

(4) "*Roads.*" — See note 8.

1102. (5) "*Internal Improvements.*" — See note 1.

d. CONSTRUCTION OF STATUTES WITH REGARD TO CHARACTER OF AID AUTHORIZED. — See note 11.

General Power to Aid. — See note 12.

1103. *e.* RESTRICTIONS ON AMOUNT OF AID — Express Restrictions. — See notes 5, 6.

1099. 1. Restrictions on Issuance of Bonds by New Counties. — The *Kansas* statute prohibits merely the actual issuance of bonds within a year after organization of a county, and does not prohibit the filing of a petition for an election to determine whether railroad-aid bonds shall be issued. *Corning v. Meade County*, (C. C. A.) 102 Fed. Rep. 57.

But the bonds are invalid where the election authorizing their issuance was held within a year after the organization of the township. *Sage v. Fargo Tp.*, (C. C. A.) 107 Fed. Rep. 383.

2. Particular Statutes. — *Alden v. Easton*, (C. C. A.) 113 Fed. Rep. 60 (Special Laws Minn. 1868, c. 47); *Demaree v. Bridges*, 30 Ind. App. 131; *Clifton v. Hobgood*, 106 La. 535 (Acts La. 1880, No. 84; 1886, No. 35; 1894, No. 153).

3. *Graves v. Moore County*, 135 N. Car. 49.

5. *Schmitz v. Zeh*, 91 Minn. 290.

8. Consolidated Companies. — In *Henderson County v. Travelers' Ins. Co.*, (C. C. A.) 128 Fed. Rep. 817, a county authorized to subscribe to the stock of a railroad company whose railroad was projected through the county was held to be authorized to subscribe to the stock of another railway company with which the former was consolidated.

Protection of Bona Fide Holders of Bonds. — *Bona fide* holders of bonds issued in payment of municipal subscriptions to the stock of a railway company may be entitled to protection in the enforcement of the bonds by recitals therein though the railway company was not a corporation to whose stock the municipality could lawfully subscribe. *Municipal Trust Co. v. Johnson City*, (C. C. A.) 116 Fed. Rep. 458.

1100. 3. *Graves v. Moore County*, 135 N. Car. 49. See, however, *Stanly County v. Coler*, 190 U. S. 437, affirming 113 Fed. Rep. 705, 51 C. C. A. 379, which reversed on rehearing 96 Fed. Rep. 284, 37 C. C. A. 484.

5. Domestic and Foreign Corporations Consolidated. — *Municipal Trust Co. v. Johnson City*, (C. C. A.) 116 Fed. Rep. 458.

6. Contra. — *Stanley County v. Coler*, 190 U. S. 437, affirming 113 Fed. Rep. 705, 51 C. C. A. 379, which reversed on rehearing 96 Fed. Rep. 284, 37 C. C. A. 484.

9. *Wilkes County v. Coler*, 113 Fed. Rep. 725, 51 C. C. A. 399, affirmed 190 U. S. 437.

1101. 5. *De Facto Railway Companies.* — *James v. Arkansas Southern R. Co.*, 110 La. 145.

8. "*Roads.*" — *Washington County v. Williams*, 111 Fed. Rep. 801, 49 C. C. A. 621 ("*any road*"); *Washington County v. David*, (Neb. 1902) 89 N. W. Rep. 737.

1102. 1. Irrigation Canals are works of "internal improvement" so as to authorize bonds in aid thereof. *Keith County v. Citizens' Sav., etc., Assoc.*, (C. C. A.) 116 Fed. Rep. 13.

But a State Normal School has been held not to be within the *Nebraska* statute authorizing the issuance of bonds "in aid of works of internal improvements, improving streets in cities of the second class, and villages, highways," etc. *State v. Weston*, (Neb. 1903) 96 N. W. Rep. 668, distinguishing *Traver v. Merrick County*, 14 Neb. 327; *Cummings v. Hyatt*, 54 Neb. 35.

11. Bonds to Purchase Land for Depot Purposes have been held to be authorized under a statute authorizing a municipality to issue bonds in aid of the construction of a railroad. *Jefferson v. Jennings Banking, etc., Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 876, 30 Tex. Civ. App. 534.

12. *Colburn v. McDonald*, (Neb. 1904) 100 N. W. Rep. 961, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1102.

1103. 5. Aid by Both County and Town. — The *Louisiana* statute limiting to a tax of five mills on the dollar the amount to which any parish, municipality, etc., shall be authorized to vote aid in favor of any railroad company, does not prohibit a town from voting aid to such extent because the county in which the town is situated has already voted an aid tax of such amount. *Vicksburg, etc., R. Co. v. Goodenough*, 108 La. Ann. 442.

- 1103.** Bonds in Excess of Authorized Amount. — See note 7.
- 1104.** V. EXERCISE OF POWER BY MUNICIPALITY. — See note 1.
- 1105.** By What Officers Power to Be Exercised. — See note 1.
- 1107.** VII. ASSENT OF ELECTORS OR TAXPAYERS — 2. Petition by Taxpayers. — See note 5.
- 1108.** 3. Election to Determine Assent of Electors or Taxpayers — *a.* IN GENERAL. — See note 1.
- 1109.** Where Manner of Conducting Election Not Prescribed. — See note 1.
- b.* PETITION OR APPLICATION FOR ELECTION. — See note 5.
- 1110.** *c.* CALL OR ORDER FOR ELECTION — By Whom Election to Be Called. — See note 2.
- d.* PROPOSITION SUBMITTED TO VOTE. — See note 5.
- 1111.** Proposition Must Be Single. — See note 1.
- e.* AT WHAT ELECTIONS QUESTION TO BE SUBMITTED. — See note 7.
- 1112.** *h.* FORM OF BALLOTS. — See note 1.
- j.* VOTE REQUIRED TO CARRY PROPOSITION. — See note 5.
- k.* DETERMINING RESULT OF ELECTION. — See note 6.
- 1113.** *l.* CONTESTING ELECTION. — See note 4.
- m.* EFFECT OF BRIBERY AND CORRUPT PRACTICES. — See note 7.
- 1114.** *n.* EXTENT OF AUTHORITY CONFERRED BY ELECTION. — See note 3.
- 1115.** VIII. WHEN RIGHT OF COMPANY BECOMES EFFECTIVE — Effect of Assent of Taxpayers or Electors. — See note 1.

Evidence as to Amount of Taxable Property. — Where the amount of aid which may be granted to a railway is limited to a certain proportion of the taxable property of the municipality, the assessment roll of the municipality for the year prior to the issuance of the bonds is not conclusive as to the amount of such taxable property. *Municipal Trust Co. v. Johnson City*, (C. C. A.) 116 Fed. Rep. 458.

1103. 6. *Whitney v. Kentucky Midland R. Co.*, 110 Ky. 955.

7. **Bonds.** — Compare *Schmitz v. Zeh*, 91 Minn. 290.

1104. 1. **Compliance with Statute in Exercise of Power.** — *Oswego County Sav. Bank v. Genoa*, 172 N. Y. 635, affirming 66 N. Y. App. Div. 330.

1105. 1. *Edwards v. Bates County*, 117 Fed. Rep. 526.

Delegation of Ministerial Duties. — *Green County v. Shortell*, 116 Ky. 108.

1107. 5. **New York Act.** — *Clarke v. Northampton*, (C. C. A.) 120 Fed. Rep. 661.

1108. 1. **Election Essential to Exercise of Power by Municipality.** — *Sage v. Fargo Tp.*, (C. C. A.) 107 Fed. Rep. 383; *Edwards v. Bates County*, 117 Fed. Rep. 526; *Wetzel v. Paducah*, 117 Fed. Rep. 647.

1109. 1. *Bras v. McConnell*, 114 Iowa 401.

5. **Petition by Electors or Taxpayers.** — *Edwards v. Bates County*, 117 Fed. Rep. 526; *James v. Arkansas Southern R. Co.*, 110 La. 145.

Petition in New County under Kansas Statute. — See *supra*, this title, 1099. 1.

Misnomer of Company to Be Aided. — See *James v. Arkansas Southern R. Co.*, 110 La. 145.

1110. 2. *Shortell v. Green County*, (Ky. 1900) 59 S. W. Rep. 522.

5. *Edwards v. Bates County*, 117 Fed. Rep. 526.

1111. 1. **Proposition Should Be Submitted**

Singly. — See *Leavenworth v. Wilson*, 69 Kan. 74, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1111.

7. **Election in New County under Kansas Statute.** — See *supra*, this title, 1099. 1.

1112. 1. **Form of Ballots.** — *Bras v. McConnell*, 114 Iowa 401.

5. See *Carpenter v. Greene County*, 130 Ala. 613.

6. **Determining Result of Election.** — *Edwards v. Bates County*, 117 Fed. Rep. 526.

1113. 4. **Contests.** — *Guillory v. Avoyelles R. Co.*, 104 La. 11.

Limitation as to Time for Contesting Election. — *James v. Arkansas Southern R. Co.*, 110 La. 145.

7. **What Constitutes Improper Influence of Voters.** — A public offer to employ citizens of the municipality in the construction of the work of internal improvements for which aid is to be granted is not a corrupt practice which will invalidate bonds issued in pursuance of such election. *Perkins County v. Graff*, (C. C. A.) 114 Fed. Rep. 441.

1114. 3. **Authority Conferred by Election.** — *James v. Arkansas Southern R. Co.*, 110 La. 145.

Observance of Conditions Imposed. — *Edwards v. Bates County*, 117 Fed. Rep. 526.

Consolidation of Corporations. — An election authorizing a subscription to the stock of a particular railway company does not authorize a subscription to the stock of another company with which the former is consolidated. *Edwards v. Bates County*, 117 Fed. Rep. 526.

Immaterial Departure from the terms of the proposition for donation of bonds will not render the bonds invalid. *Keith County v. Citizens' Sav., etc., Assoc.*, (C. C. A.) 116 Fed. Rep. 13.

1115. 1. **Effect of Favorable Election.** — Red

1115. Actual Subscription on Books of Company Unnecessary. — See note 4.

1116. IX. TRANSFER AND ASSIGNMENT OF GRANTS OF AID — When Donations Are Granted. — See note 3.

X. RELEASE OF MUNICIPALITY FROM LIABILITY ON SUBSCRIPTIONS — Negligent and Improvident Construction of Railroad. — See note 10.

1117. Consolidation of Corporations. — See note 1.

XII. RIGHTS OF TAXPAYERS TO STOCK. — See note 12.

1119. XIII. CONDITIONAL GRANTS OF AID — 1. Power of Municipality to Impose Conditions. — See note 1.

2. Performance of Conditions — *a.* IN GENERAL. — See note 5.

1120. See notes 1, 3.

b. TIME OF PERFORMANCE. — See notes 5, 6.

c. CONSTRUCTION OF PARTICULAR CONDITIONS — (1) *Right to Aid Made Dependent on Work in Construction of Railway.* — See note 7.

River Furnace Co. *v.* Tennessee Cent. R. Co., 113 Tenn. 697.

1115. 4. Subscription on Books of Company Not Required. — Compare Red River Furnace Co. *v.* Tennessee Cent. R. Co., 113 Tenn. 697, distinguishing Nelson *v.* Haywood County, 87 Tenn. 781.

1116. 3. Donations Transferable. — See Keith County *v.* Citizens' Sav., etc., Assoc., (C. C. A.) 116 Fed. Rep. 13.

10. Noncompletion of a Canal has been held not to invalidate bonds in aid thereof. Perkins County *v.* Graff, (C. C. A.) 114 Fed. Rep. 441.

1117. 1. Edwards *v.* Bates County, 117 Fed. Rep. 526.

12. Louisville, etc., R. Co. *v.* Hart County, 116 Ky. 186.

1119. 1. Edwards *v.* Bates County, 117 Fed. Rep. 526; Demaree *v.* Bridges, 30 Ind. App. 131; Bras *v.* McConnell, 114 Iowa 401; Atkins *v.* Shreveport, etc., R. Co., 106 La. 568.

5. Conditions Must Be Performed. — Demaree *v.* Bridges, 30 Ind. App. 131; Atkins *v.* Shreveport, etc., R. Co., 106 La. 568.

1120. 1. Edwards *v.* Bates County, 117 Fed. Rep. 526; Green County *v.* Shortell, 116 Ky. 108.

3. Construction of Terms of Conditions. — Marion County *v.* Louisville, etc., R. Co., (Ky. 1904) 78 S. W. Rep. 437; Atkins *v.* Shreveport, etc., R. Co., 106 La. 568; Bradley-Ramsay Lumber Co. *v.* Perkins, 109 La. 317.

Substantial Performance Held to Be Sufficient. — Guillory *v.* Avoyelles R. Co., 104 La. 11.

5. Time of Performance. — Red River Furnace Co. *v.* Tennessee Cent. R. Co., 113 Tenn. 697.

6. Waiver of Right to Object to Delay in Construction of Railway. — James *v.* Arkansas Southern R. Co., 110 La. 145.

7. Construction "Through" County. — Where bonds in aid of a railway were conditioned upon the construction of a railroad "through" the county, the construction of the road for only a distance of four and one-half miles into the county was held not to be a sufficient compliance with the condition. Green County *v.* Shortell, 116 Ky. 108.

MUNICIPAL CORPORATIONS.

BY J. E. BRADY.

1130. II. DEFINITION AND DISTINCTIONS — 1. In General. — See note 1.
2. As Distinguished from Quasi-Municipal Corporations. — See notes

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1131. III. GENERAL NATURE OF MUNICIPAL CORPORATIONS. — See notes
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1130. 1. Various Definitions — United States.

— *Columbus v. Union Pac. R. Co.*, (C. C. A.)
 137 Fed. Rep. 869.

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Colorado. — *Wolff v. Denver*, (Colo. App.
 1904) 77 Pac. Rep. 364.

Delaware. — *State v. Churchman*, 3 Penn.
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Georgia. — *Langley v. Augusta*, 118 Ga. 590,
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Iowa. — *State v. Barker*, 116 Iowa 96, 93 Am.
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Kansas. — *In re Van Tuyl*, (Kan. 1905) 81
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Louisiana. — *Allen, etc., Mfg. Co. v. Shreve-*
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Maine. — *In re Opinion of Justices*, (Me.
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Missouri. — *State v. Butler*, 178 Mo. 272.

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Nebraska. — *Goddard v. Lincoln*, (Neb. 1903)
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Ohio. — *Board of Education v. Volk*, 72 Ohio
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 12 Ohio Dec. 756.

Pennsylvania. — *Com. v. Moir*, 199 Pa. St.
 534, 85 Am. St. Rep. 801; *Webster v. Hope-*
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3. Whitehead v. Board of Education, (Mich.
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4. See Conner v. Nevada, 188 Mo. 148, 107
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5. Townships. — See *Conner v. Nevada*, 188
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1131. 4. State v. Barker, 116 Iowa 96, 93
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5. Twofold Character — United States. — *U. S.*
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Colorado. — *Denver v. Hubbard*, 17 Colo.
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Connecticut. — *Hourigan v. Norwich*, 77
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Georgia. — *Dalton v. Wilson*, 118 Ga. 100, 98
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7. U. S. v. Sault Ste. Marie, 137 Fed. Rep.
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 115 Ky. 382; *In re Opinion of Justices*, (Me.
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8. U. S. v. Sault Ste. Marie, 137 Fed. Rep.
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1133. The Members of a Municipal Corporation. — See notes 4, 5.

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1135. **5. Delegation of Creative Power.** — See note 1.

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1132. 1. U. S. v. Sault Ste. Marie, 137 Fed. Rep. 258; Denver v. Porter, (C. C. A.) 126 Fed. Rep. 288; Denver v. Hubbard, 17 Colo. App. 346; Chicago v. Selz, 104 Ill. App. 376, *affirmed* 202 Ill. 545; Tahlequah v. Guinn, (Indian Ter. 1904) 82 S. W. Rep. 886; Hubbell v. South Hutchinson, 64 Kan. 645; Swarz v. Ramala, 63 Kan. 633; Henderson v. Young, (Ky. 1904) 83 S. W. Rep. 583; Lexington v. Thompson, 113 Ky. 540; Barry v. Port Jervis, 64 N. Y. App. Div. 268; Wagner v. Portland, 40 Oregon 392; Penn Iron Co. v. Lancaster, 25 Pa. Super. Ct. 478; Ogden City v. Bear Lake, etc., Waterworks, etc., Co., 28 Utah 25.

3. Savannah, etc., R. Co. v. Jordan, 113 Ga. 687; Americus v. Perry, 114 Ga. 871; Common Council v. Schmid, 128 Mich. 379, 92 Am. St. Rep. 468; Morrow v. Kansas City, 186 Mo. 675; Redell v. Moores, 63 Neb. 219.

7. Required Number of Inhabitants. — State v. Lammers, 113 Wis. 398, *affirmed* on rehearing 113 Wis. 411.

Required Number of Inhabitants and Maximum Area. — People v. Marquiss, 192 Ill. 377.

What Territory and Population Shall Be Sufficient to constitute a city are, under the Georgia constitution, questions for legislative determination. Mattox v. State, 115 Ga. 212.

1133. 4. Allen, etc., Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 104 Am. St. Rep. 525; Finnie v. Montreal, 32 Can. Sup. Ct. 345, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1133.

5. Allen, etc., Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 104 Am. St. Rep. 525.

7. See Sessions v. State, 115 Ga. 18.

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1134. 1. For Cases Construing Various General Municipal Incorporation Acts — Alabama. — West End v. State, 138 Ala. 295.

California. — Vernon S. San Bernardino County, 142 Cal. 513; Borchard v. Ventura County, 144 Cal. 10; Ex p. Jackson, 143 Cal. 564; Ex p. Helm, 143 Cal. 553.

Georgia. — Walker v. McNelly, 121 Ga. 114.

Illinois. — Baltimore, etc., R. Co. v. People, 200 Ill. 541; People v. Pike, 197 Ill. 449; School Trustees v. School Inspectors, 214 Ill. 30.

Indiana. — Stembel v. Bell, 161 Ind. 323.

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Mississippi. — Yazoo City v. Lightcap, 82 Miss. 148.

Missouri. — Morrow v. Kansas City, 186 Mo. 675.

New Jersey. — Smith v. Hightstown, 71 N. J. L. 536.

New York. — People v. Daley, 89 N. Y. App. Div. 156.

Ohio. — Zumstein v. Mullen, 67 Ohio St. 382; Hall v. Siegrist, 13 Ohio Dec. 46.

South Carolina. — Milster v. Spartanburg, 68 S. Car. 26.

Texas. — Grace v. Bonham, 26 Tex. Civ. App. 161.

Wisconsin. — Appleton Waterworks Co. v. Appleton, 116 Wis. 363; State v. Lammers, 113 Wis. 411.

3. Existing Charters Not Interfered with. — See also School Trustees v. School Inspectors, 214 Ill. 30.

4. School Trustees v. School Inspectors, 115 Ill. App. 479, *affirmed* 214 Ill. 30; Smith v. Hightstown, 71 N. J. L. 536.

Provisions of the Previous Charter, Not Saved by the General Law, are annulled by incorporation under a general act. Harris v. Water Valley, 78 Miss. 659.

Rights as to Taxes and Other Debts Due are not affected by the adoption of the general law by a city existing under a special charter. Milster v. Spartanburg, 68 S. Car. 26.

5. School Trustees v. School Inspectors, 115 Ill. App. 479, *affirmed* 214 Ill. 30; People v. Hummel, 215 Ill. 71; Baltimore, etc., R. Co. v. People, 200 Ill. 541; Harris v. Water Valley, 78 Miss. 659.

1135. 1. Disconnecting Territory. — A statute authorizing the District Court to disconnect a portion of any incorporated city upon certain conditions is not a delegation of legislative power. Young v. Salt Lake City, 24 Utah 321.

Incorporation Proceedings are not invalidated by the fact that the judge, with the parties, went to the place to be incorporated and there took the testimony. Herndon Borough, 19 Pa. Super. Ct. 127.

2. Prescription. — Readsboro v. Woodford, 76 Vt. 376.

3. Readsboro v. Woodford, 76 Vt. 376. But a town does not become a city because the general assembly refers to it as a city in various legislative acts. Savannah, etc., R. Co. v. Jordan, 113 Ga. 687.

1136. 8. How Corporate Existence Shown. — See note 2.

V. MUNICIPAL CHARTERS — 1. In General — No Particular Form of Words. — See note 4.

2. Municipal Charter Not a Contract. — See note 5.

1137.* 3. Acceptance of Charter — *b.* CONSENT OF INCORPORATORS. — See note 7.

1138. See note 1.

4. Conflict Between Charter and General Laws — *a.* CONFLICT BETWEEN CHARTER AND STATUTE. — See notes 3, 5.

1139. *b.* CONFLICT BETWEEN CHARTER AND STATE CONSTITUTION. — See note 1.

5. Amendment and Repeal. — See notes 2, 3, 6.

VI. POWERS AND DUTIES OF MUNICIPAL CORPORATIONS — 1. In General. — See note 7.

2. Two Classes of Powers and Rights. — See note 8.

3. Delegated Governmental or Legislative Powers. — See note 9.

1135. 4. Corporations De Facto. — *McMickle v. Hardin*, 25 Tex. Civ. App. 222.

5. Corporate Existence Not Subject to Collateral Attack. — *Topeka v. Dwyer*, 70 Kan. 244; *People v. Smith*, 131 Mich. 70; *State v. Birch*, 186 Mo. 205; *Agner v. Com.*, 103 Va. 811. See also *Susanville v. Long*, 144 Cal. 362.

1136. 2. Answer Admitting Corporate Existence. — See *Peterson v. Cokato*, 84 Minn. 205.

Parol Evidence is admissible to establish the incorporation of a municipality where the original records cannot be produced. *People v. Pike*, 197 Ill. 449.

4. See *State v. Kohnke*, 109 La. 838.

5. Charter Not a Contract. — *Colwell v. Waterbury*, 74 Conn. 568; *State v. Barker*, 116 Iowa 96, 93 Am. St. Rep. 222.

1137. 7. Submission to Vote. — *Santa Rosa v. Bower*, 142 Cal. 299.

A Constitutional Provision for the submission of a charter to the voters of a municipality "at the next election thereafter" is not violated by a statute providing for the ratification of the charter at a general or special election. *State v. Kiewel*, 86 Minn. 136.

1138. 1. Time of Taking Effect. — Where the inhabitants of a municipality vote to accept a general charter, the charter becomes effective only upon the count of the vote and its declaration. *Govin v. Chicago*, 132 Fed. Rep. 848.

3. Law v. San Francisco County, 144 Cal. 384. See also *State v. Kersten*, 118 Wis. 287.

5. *Bybee v. Smith*, (Ky. 1901) 61 S. W. Rep. 15. See also *Ex p. Loving*, 178 Mo. 194.

1139. 1. *Windsor v. Cleveland*, etc., R. Co., 105 Ill. App. 46.

Special Charters are not affected by the subsequent adoption of a constitution containing a provision against the granting of special charters. *Ulbrecht v. Keokuk*, 124 Iowa 1.

Charter Cannot Contravene Prior Constitution. — A provision in the state constitution as to the manner of making assessments cannot be evaded by a charter provision conflicting therewith. *Saltonstall v. Board of Review*, 132 Mich. 196.

2. Repeal of Old Charter by New. — *Wichmann v. Placerville*, 147 Cal. 162; *Wright v. Overstreet*, 122 Ga. 633.

Right to Taxes Due. — The repeal of one charter by the grant of a new charter has no effect

upon the city's right to taxes due under the old charter. *Bennison v. Galveston*, 34 Tex. Civ. App. 382.

3. Effect of Amendment. — An amendment to a city charter repeals a provision in the charter with which it conflicts. *Chamberlain v. Saginaw*, 135 Mich. 61.

6. *Lubliner v. Alpers*, 145 Cal. 291; *Yazoo City v. Lightcap*, 82 Miss. 148.

7. *Inge v. Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1139; *Schroeder v. Scranton Gas, etc., Co.*, 20 Pa. Super. Ct. 255.

8. *Veraguth v. Denver*, 19 Colo. App. 473; *Denver v. Hubbard*, 17 Colo. App. 346; *Dalton v. Wilson*, 118 Ga. 100, 98 Am. St. Rep. 101; *Tablequah v. Guinn*, (Indian Ter. 1904) 82 S. W. Rep. 886; *Georgetown v. Com.*, 115 Ky. 382; *Ogden City v. Bear Lake, etc., Waterworks, etc., Co.*, 28 Utah 25. And see *supra*, this title, **1130. 2 et seq.**, **1131. 4 et seq.**

9. Delegated Governmental Powers — *United States*. — *Cargill v. Duffy*, 123 Fed. Rep. 721, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1139.

Arkansas. — *Pate v. Jonesboro*, (Ark. 1905) 87 S. W. Rep. 437; *Little Rock v. North Little Rock*, 72 Ark. 195.

Colorado. — *Wolff v. Denver*, (Colo. App. 1904) 77 Pac. Rep. 364.

Kentucky. — *Henderson v. Young*, (Ky. 1904) 83 S. W. Rep. 583.

Louisiana. — *Ruston v. Perkins*, 114 La. 851. *Mississippi*. — *Yazoo City v. Lightcap*, 82 Miss. 148.

Missouri. — *Sluder v. St. Louis Transit Co.*, 189 Mo. 107.

New York. — *Rhinehart v. Redfield*, 93 N. Y. App. Div. 410, affirmed 179 N. Y. 569.

Pennsylvania. — *Smith v. Selinsgrove*, 199 Pa. St. 615.

Virginia. — *Danville v. Hatcher*, 101 Va. 523. *Wisconsin*. — *State v. Nohl*, 113 Wis. 15.

The Power of Appointment to Office may be delegated by the legislature to the city council. *Atty.-Gen. v. Bolger*, 128 Mich. 355.

Power to Pass an Ordinance Ousting a Court of Its Jurisdiction cannot be delegated by the legislature to a municipal corporation. *Vesta Mills v. Charleston*, 60 S. Car. 1.

1140. 4. Express and Implied Powers. — See notes 1, 3.

5. Powers by Usage, Custom, or Prescription. — See note 6.

6. Construction of Powers. — See note 7.

1141. See note 1.

7. Whether Powers or Duties Mandatory, Permissive, or Discretionary.

— See notes 4, 5.

1140. 1. General Rule as to Municipal Power

— *United States*. — *Danville Water Co. v. Danville*, 180 U. S. 619; *Freeport Water Co. v. Freeport*, 180 U. S. 587; *Milk v. Chicago*, 127 Fed. Rep. 731; *Riverside, etc., R. Co. v. Riverside*, 118 Fed. Rep. 736; *Fort Scott v. W. G. Eads Brokerage Co., (C. C. A.)* 117 Fed. Rep. 51.

Alabama. — *Blumenthal v. Headland*, 132 Ala. 249, 90 Am. St. Rep. 904.

California. — *Wichmann v. Placerville*, 147 Cal. 162.

Colorado. — *Sauer v. Gillett*, (Colo. App. 1904) 78 Pac. Rep. 1068.

Florida. — *Porter v. Vinzant*, (Fla. 1905) 38 So. Rep. 607.

Georgia. — *Walker v. McNelly*, 121 Ga. 114.

Illinois. — *Coquard v. Oquawka*, 192 Ill. 355; *People v. Blocki*, 203 Ill. 363.

Indiana. — *Elkhart v. Lipschitz*, (Ind. 1905) 74 N. E. Rep. 528; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201; *Scott v. Laporte*, 162 Ind. 34; *Gaslight, etc., Co. v. New Albany*, 156 Ind. 406; *Walker v. Towle*, 156 Ind. 639.

Kansas. — *In re Van Tuyl*, (Kan. 1905) 81 Pac. Rep. 181.

Kentucky. — *Stone v. Paducah*, (Ky. 1905) 86 S. W. Rep. 531.

Louisiana. — *Louisiana State Board v. Standard Oil Co.*, 107 La. 713.

Maine. — *Mayo v. Dover, etc., Village Fire Co.*, 96 Me. 539.

Maryland. — *Cambridge v. Cambridge Water Co.*, 99 Md. 501.

Missouri. — *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637; *State v. Butler*, 178 Mo. 272; *Carpenter v. Reliance Realty Co.*, 103 Mo. App. 480; *Vaughn v. Greencastle*, 104 Mo. App. 206; *St. Louis v. J. E. Kaime, etc., Real Estate Co.*, 180 Mo. 309; *State v. Missouri, etc., R. Co.*, 164 Mo. 208.

New Jersey. — *Potts v. Cape May*, 66 N. J. L. 544.

New York. — *People v. Coler*, 173 N. Y. 103; *Ryan v. New York*, 177 N. Y. 271.

North Carolina. — *State v. Ray*, 131 N. Car. 814, 92 Am. St. Rep. 795.

Ohio. — *Crawford v. Madigan*, 13 Ohio Dec. 404; *Columbus v. Federal Gas, etc., Co.*, 14 Ohio Dec. 261; *Horstman v. Cincinnati St. R. Co.*, 12 Ohio Dec. 756; *Lower River Road Co. v. Cincinnati*, 13 Ohio Dec. 214; *Wellsville v. O'Connor*, 24 Ohio Cir. Ct. 689.

Pennsylvania. — *Carpenter v. Yeadon*, 208 Pa. St. 396; *Com. v. Gingrich*, 21 Pa. Super. Ct. 286.

South Dakota. — *Wilson v. Mitchell*, 17 S. Dak. 515, 106 Am. St. Rep. 784.

Tennessee. — *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712.

West Virginia. — *State v. Godfrey*, 54 W. Va. 54; *Cain v. Elkins*, 57 W. Va. 9.

Wisconsin. — *State v. Sheboygan*, 111 Wis. 23; *Manske v. Milwaukee*, 123 Wis. 172; *Allen v. Clausen*, 114 Wis. 244; *Ogden v. Madison*, 111 Wis. 413.

No Inherent Powers. — See *Rhinehardt v. Redfield*, 93 N. Y. App. Div. 410, *affirmed* 179 N. Y. 569.

No Inherent Power to Operate Street Railway. — *Raynolds v. Cleveland*, 24 Ohio Cir. Ct. 215.

Only Such Powers as Are Delegated by Law. — *Nerlien v. Brooten*, (Minn. 1905) 102 N. W. Rep. 867.

3. See *Lexington v. Thompson*, 113 Ky. 540.

6. Nuisance. — A municipality cannot gain a prescriptive right to maintain a public nuisance. *Birmingham v. Land*, 137 Ala. 538.

7. Grant of Powers Construed Strictly — *United States*. — *Riverside, etc., R. Co. v. Riverside*, 118 Fed. Rep. 736; *Ft. Scott v. W. G. Eads Brokerage Co., (C. C. A.)* 117 Fed. Rep. 51.

Georgia. — *Walker v. McNelly*, 121 Ga. 114.

Illinois. — *Coquard v. Oquawka*, 192 Ill. 355.

Indiana. — *Scott v. Laporte*, 162 Ind. 34, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1140; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201; *Elkhart v. Lipschitz*, (Ind. 1905) 74 N. E. Rep. 528; *Lake County Water, etc., Co. v. Walsh*, 160 Ind. 32, 98 Am. St. Rep. 264. See also *Scott v. Laporte*, 162 Ind. 34.

Maryland. — *Cambridge v. Cambridge Water Co.*, 99 Md. 501.

Missouri. — *State v. Butler*, 178 Mo. 272; *Carthage v. Carthage Light Co.*, 97 Mo. App. 20; *St. Louis v. J. E. Kaime, etc., Real Estate Co.*, 180 Mo. 309.

New Jersey. — *Meday v. Rutherford*, 65 N. J. L. 645.

North Carolina. — *State v. Ray*, 131 N. Car. 814, 92 Am. St. Rep. 795.

Ohio. — *Wellsville v. O'Connor*, 24 Ohio Cir. Ct. 689; *Crawford v. Madigan*, 13 Ohio Dec. 404.

West Virginia. — *State v. Godfrey*, 54 W. Va. 54, *quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1140; *Cain v. Elkins*, 57 W. Va. 9.

Wisconsin. — *State v. Sheboygan*, 111 Wis. 23; *Ogden v. Madison*, 111 Wis. 413; *Allen v. Clausen*, 114 Wis. 244.

General Powers granted to a city in its charter are limited by specific provisions with which they are followed. *Blankenship v. Sherman*, 33 Tex. Civ. App. 507.

In the Construction of Private Powers of a city the same rules apply as are applicable in the case of a private corporation. *Henderson v. Young*, (Ky. 1904) 83 S. W. Rep. 583.

1141. 1. Custom and Usage May Be Considered. — *Scott v. Laporte*, 162 Ind. 56, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1141.

4. *Staples v. Bridgeport*, 75 Conn. 500.

Permissive Power. — *Weaver v. San Francisco*, 146 Cal. 728.

1142. 8. Exercise of Powers — a. IN GENERAL. — See note 1.

9. Presumed Knowledge of Powers. — See notes 6, 7.

10. Divestiture of Governmental Functions. — See note 8.

1143. 11. Miscellaneous Powers — a. TO HAVE NAME AND SEAL. —

See note 1.

b. POWER TO CONTRACT — (1) In General. — See note 7.

1141. 5. *Daytona v. Edson*, (Fla. 1903) 34 So. Rep. 954; *Smith v. Selingsgrove*, 199 Pa. St. 615.

Directory. — "When duties are imposed upon public officers which affect the rights and duties of others, and the time of performance is stated in such language as does not deprive the officer of the power to perform after the time prescribed, such statute, in relation to the time for the discharge of such duties, must be regarded as directory." *Landes v. State*, 160 Ind. 479.

1142. 1. Manner of Exercise of Powers — United States. — *Holst v. Savannah Electric Co.*, 131 Fed. Rep. 931, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1142, reversed (C. C. A.) 132 Fed. Rep. 901; *Ft. Scott v. W. G. Eads Brokerage Co.*, (C. C. A.) 117 Fed. Rep. 51; *Chester v. Hagan*, 116 Fed. Rep. 223; *Morris-town v. East Tennessee Telephone Co.*, (C. C. A.) 115 Fed. Rep. 304; *Allen v. Davenport*, (C. C. A.) 132 Fed. Rep. 209.

Colorado. — *Sauer v. Gillett*, (Colo. App. 1904) 78 Pac. Rep. 1068.

Indiana. — *Scott v. Laporte*, 162 Ind. 34, rehearing denied 162 Ind. 51, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1142; *Bluffton v. Miller*, 33 Ind. App. 521.

Kansas. — *In re Van Tuyl*, (Kan. 1905) 81 Pac. Rep. 181.

Kentucky. — *Henderson v. Young*, (Ky. 1904) 83 S. W. Rep. 583; *Covington v. Brinckman*, (Ky. 1904) 79 S. W. Rep. 234.

Missouri. — *Tarkio v. Clark*, 186 Mo. 285; *Carthage v. Carthage Light Co.*, 97 Mo. App. 20; *Unionville v. Martin*, 95 Mo. App. 28.

New Jersey. — *Jersey City Supply Co. v. Jersey City*, 71 N. J. L. 631.

New York. — *People v. Geneva*, 98 N. Y. App. Div. 383; *Walden v. Relyea*, 89 N. Y. App. Div. 241.

North Carolina. — *Robinson v. Goldsboro*, 135 N. Car. 382; *Wadsworth v. Concord*, 133 N. Car. 587.

Oregon. — *Oregon Transfer Co. v. Portland*, (Oregon 1905) 81 Pac. Rep. 575.

Pennsylvania. — *Pittsburg v. Biggert*, 23 Pa. Super. Ct. 540; *Com. v. Hitchens*, 12 Pa. Dist. 752.

Texas. — *Peck v. Hempstead*, 27 Tex. Civ. App. 80.

Vermont. — *Blanchard v. Barre*, 77 Vt. 420.

Wisconsin. — *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931; *Borgman v. Antigo*, 120 Wis. 296.

A Power Conferred by Ordinance must be exercised in the manner prescribed in the ordinance. *Martin v. Oskaloosa*, 126 Iowa 680.

6. Presumption of Knowledge of Powers — United States. — *Wright v. East Riverside Irrigation Dist.*, (C. C. A.) 138 Fed. Rep. 313; *Fairfield v. Rural Independent School Dist.*, 111

Fed. Rep. 453, reversed (C. C. A.) 116 Fed. Rep. 838.

Colorado. — *Sauer v. Gillett*, (Colo. App. 1904) 78 Pac. Rep. 1068.

Illinois. — *Hope v. Alton*, 214 Ill. 102.

Indiana. — *McKee v. Greensburg*, 160 Ind. 378.

Iowa. — *Citizens' Bank v. Spencer*, 126 Iowa 101; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234.

Maryland. — *Mealey v. Hagerstown*, 92 Md. 741.

Minnesota. — See *Schmitz v. Zeh*, 91 Minn. 290.

Missouri. — *Thornburg v. School Dist. No. 3*, 175 Mo. 12.

Ohio. — *Columbus v. Federal Gas Co.*, 14 Ohio Dec. 261; *Horstman v. Cincinnati St. R. Co.*, 12 Ohio Dec. 756.

Pennsylvania. — See *O'Malley v. Olyphant*, 198 Pa. St. 525.

Texas. — *Tyler v. Tyler Bldg., etc., Assoc.*, (Tex. 1905) 86 S. W. Rep. 750.

Wisconsin. — *Schneider v. Menasha*, 118 Wis. 298, 99 Am. St. Rep. 996.

7. *Driscoll v. New Haven*, 75 Conn. 92; *Hope v. Alton*, 214 Ill. 102; *Bennett v. Mt. Vernon*, 124 Iowa 537; *Citizens' Bank v. Spencer*, 126 Iowa 101; *Green County v. Shortell*, 116 Ky. 108; *Wormstead v. Lynn*, 184 Mass. 425; *Schmitz v. Zeh*, 91 Minn. 290; *Jewell Belting Co. v. Bertha*, 91 Minn. 9; *Horstman v. Cincinnati St. R. Co.*, 12 Ohio Dec. 756; *Mitchell v. Kearns*, 16 Pa. Super. Ct. 357. And see the titles **AGENCY**, 988. 2; **PUBLIC OFFICERS**, 385. 2.

8. May Not Divest Itself of Governmental Functions. — *Ft. Smith v. Hunt*, 72 Ark. 556, 105 Am. St. Rep. 51; *Thompson v. Alameda*, 144 Cal. 281; *Carbondale v. Wade*, 106 Ill. App. 654; *Chicago v. Chicago Union Traction Co.*, 199 Ill. 259; *Miller v. Kalamazoo*, (Mich. 1905) 103 N. W. Rep. 845; *Sluder v. St. Louis Transit Co.*, 189 Mo. 107; *Union Sav. Bank, etc., Co. v. Norwood*, 12 Ohio Dec. 198; *Edison Electric Illuminating Co. v. Tamaqua*, 13 Pa. Dist. 86; *Shenandoah v. Schuylkill Traction Co.*, 27 Pa. Co. Ct. 465; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647. See also *Kemp v. Stradley*, 134 Mich. 676; *Alexander v. Cincinnati, etc., R. Co.*, 14 Ohio Dec. 102.

Forfeiture of Governmental Powers by Nonuser. — It has been held that governmental functions granted to a municipality by legislature may be forfeited by a failure of the municipality to exercise them for a period of many years. *Cincinnati, etc., R. Co. v. Baughman*, 116 Ky. 479 (seventeen years).

1143. 1. Seal. — *Defiance v. Schmidt*, (C. C. A.) 123 Fed. Rep. 1.

Power to Take Census. — See *McFarlain v. Jennings*, 106 La. 541.

7. Contracts. — A contract of a municipal cor-

- 1143.** (2) *Power to Borrow Money or Incur Debt.* — See notes 8, 10.
1144. *Commercial Paper.* — See note 3.
 (3) *Subscription to Stock in Private Corporation.* — See notes 4, 5.
1145. *POWER TO SUE AND BE SUED.* — See note 4.
f. CELEBRATIONS AND ENTERTAINMENTS. — See note 11.
1146. *g. GIFTS, DONATIONS, BOUNTIES.* — See note 1.
h. GRANT OF FRANCHISES, MONOPOLIES, EXCLUSIVE PRIVILEGES. — See note 6.
i. ARBITRATION — COMPROMISE. — See note 8.
1147. See note 1.
j. POLICE POWER. — See notes 2, 3.
l. HOSPITALS, PEST HOUSES, ALMSHOUSES, ETC. — See note 5.

poration which can be performed only by exercising the power of taxation is invalid where the power of taxation for that purpose does not exist. *Manning v. Devils Lake*, 13 N. Dak. 47.

The Power to Make Improvements gives to a city so empowered implied authority to make general contracts therefor. *Jones v. Holzapfel*, 11 Okla. 405.

1143. 8. *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201; *Grant v. Sherrill*, (Neb. 1904) 98 N. W. Rep. 681. See also *Thomson v. Elton*, 109 Wis. 589.

10. Approval of Voters. — Where a statute requires an issue of bonds to be sanctioned by the voters at an election, bonds issued without such approval are void. *Robinson v. Goldsboro*, 135 N. Car. 382.

1144. 3. *Coquard v. Oquawka*, 192 Ill. 355; *Grant v. Sherrill*, (Neb. 1904) 98 N. W. Rep. 681; *Hubbell v. Custer City*, 15 S. Dak. 55.

4. Subscriptions to Stock of Private Corporations. — *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1144. See also *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697.

5. Municipal Trust Co. v. Johnson City. (C. C. A.) 116 Fed. Rep. 458; *Edwards v. Bates County*, 117 Fed. Rep. 526; *Wetzell v. Paducah*, 117 Fed. Rep. 647; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201; *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697.

1145. 4. *Power to Sue and Be Sued.* — *Ayres v. Thurston County*, 63 Neb. 96. See also *Dexter v. Gay*, 115 Ga. 765; *Augusta Southern R. Co. v. Tennesse*, 119 Ga. 804; *State v. Barker*, 116 Iowa 96, 93 Am. St. Rep. 222.

11. Expenditures for Celebrations and the Like. — *Com. v. Gingrich*, 21 Pa. Super. Ct. 286.

1146. 1. *The Reimbursement of a Policeman* by a city for a liability incurred while in the performance of his duty and acting within the scope of his authority is not contrary to the constitution of *Missouri* as being a donation of public funds to an individual. *State v. St. Louis*, 174 Mo. 125.

6. Three Years' Contract Valid. — *Tanner v. Auburn*, 37 Wash. 38.

Ten Years' Contract Not Unreasonable. — *Denver v. Hubbard*, 17 Colo. App. 346 (contract for lighting); *Reid v. Trowbridge*, 78 Miss. 542.

Thirty-one Years Not Unreasonable. — *Reed v. Anoka*, 85 Minn. 294.

Twenty-five Years Unreasonable. — *Hall v. Cedar Rapids*, 115 Iowa 199.

Express Authority to Contract for Twenty-five Years. — *Davenport Gas, etc., Co. v. Davenport*, 124 Iowa 22.

Limitation by Statute. — See *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234. And see *infra*, this title, **1159**. 3.

Water Rates. — A municipal corporation may contract not to interfere with water rates when invested with such authority. *Danville Water Co. v. Danville*, 180 U. S. 619; *Freeport Water Co. v. Freeport*, 180 U. S. 587.

Under Statutory Authority to contract for the construction and operation of waterworks, etc., and to grant to the person or company contracted with the exclusive privilege for the time agreed on of furnishing water, etc., and of using the streets for such purpose, it has been held that a city might contract for a water supply for a period of sixty years. *Tahlequah v. Guinn*, (Indian Ter. 1904) 82 S. W. Rep. 886.

8. Compromise Taxes. — *Ostrum v. San Antonio*, 30 Tex. Civ. App. 462.

A Compromise or Remission of Taxes by a city council is void. *Shuck v. Lebanon*, (Ky. 1902) 68 S. W. Rep. 843.

1147. 1. **Cannot Compromise Claim Based on Void Contract.** — *Ft. Scott v. W. G. Eads Brokerage Co.*, (C. C. A.) 117 Fed. Rep. 51.

2. Police Power. — See *Louisville v. Wehmhoff*, 116 Ky. 812.

A municipality can exercise only such police powers as are granted in its charter. *Judy v. Lashley*, 50 W. Va. 628.

Alienation of Police Power. — In *Arkansas* it has been held that the exercise of the police power, being a governmental function, cannot be alienated by the legislature nor by a municipality. *Ft. Smith v. Hunt*, 72 Ark. 556, 105 Am. St. Rep. 51.

3. *Danville v. Hatcher*, 101 Va. 523.

5. Express Power. — *Lexington v. Batson*, (Ky. 1904) 81 S. W. Rep. 264; *Twynan v. Board of Councilmen*, (Ky. 1904) 78 S. W. Rep. 447.

Power to Establish Pest Houses Withheld. — Where the power to establish pest houses, etc., is expressly granted to certain classes of cities it is impliedly withheld from a class of cities to which it is not so expressly granted. *Arnold v. Stanford*, 113 Ky. 852.

1147. *m.* ILLUMINATION — SUPPLYING LIGHT TO INHABITANTS. — See notes 6, 7, 8.

1148. *g.* EMINENT DOMAIN. — See note 4.

VII. TERRITORIAL LIMITS AND SUBDIVISIONS — 1. In General. — See note 6.

1150. *5.* Nature of Territory Included. — See notes 1, 2, 4.

6. Two Cities in Same Territory. — See note 6.

7. Change of Boundaries — *a.* IN GENERAL. — See note 7.

1151. *b.* CHANGE BY CORPORATE AUTHORITIES. — See note 4.

1152. *d.* EFFECT OF CHANGE OF BOUNDARIES ON PROPERTY, DEBTS, ORDINANCES, ETC. — See notes 3, 4, 5.

8. Extension of Limits — Annexation of Territory — *a.* IN GENERAL. — See note 6.

1153. See notes 1, 2.

1147. *6.* Lighting Streets, Etc. — *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201; *Lake County Water, etc., Co. v. Walsh*, 160 Ind. 32, 98 Am. St. Rep. 264; *Lake Charles Ice, etc., Co. v. Lake Charles*, 106 La. 65; *Fawcett v. Mt. Airy*, 134 N. Car. 125, 101 Am. St. Rep. 825. See also *Belding Land, etc., Co. v. Belding*, 128 Mich. 79.

Price of Gas. — A city has no inherent power to regulate the prices to be charged by gas companies. *Mills v. Chicago*, 127 Fed. Rep. 731.

7. *Blanchard v. Benton*, 109 Ill. App. 569; *Davenport Gas, etc., Co. v. Davenport*, 124 Iowa 22; *Fawcett v. Mt. Airy*, 134 N. Car. 125, 101 Am. St. Rep. 825. See also *Jack v. Grangeville*, 9 Idaho 291.

Authority to Erect Not Authority to Purchase. — *Austin v. McCall*, 95 Tex. 565.

8. **Express Authority** — *United States*. — *Anoka Water Works, etc., Co. v. Anoka*, 109 Fed. Rep. 580.

Colorado. — *Denver v. Hubbard*, 17 Colo. App. 346.

Georgia. — *McMaster v. Waynesboro*, 122 Ga. 231.

Illinois. — *Baltimore, etc., R. Co. v. People*, 200 Ill. 541; *Blanchard v. Benton*, 109 Ill. App. 569.

Indiana. — *Gosport v. Pritchard*, 156 Ind. 400.

Kentucky. — *Henderson v. Young*, (Ky. 1904) 83 S. W. Rep. 583.

Maryland. — *Mealey v. Hagerstown*, 92 Md. 741.

Michigan. — *Belding Land, etc., Co. v. Belding*, 128 Mich. 79; *Howell Electric Light, etc., Co. v. Howell*, 132 Mich. 117.

Minnesota. — *Reed v. Anoka*, 85 Minn. 294.

Mississippi. — *Reid v. Trowbridge*, 78 Miss. 542.

Missouri. — *State v. Allen*, 183 Mo. 283; *State v. Missouri, etc., R. Co.*, 164 Mo. 208.

New Jersey. — *Mason v. Cranbury Tp.*, '68 N. J. L. 149; *Smith v. Avon-by-the-Sea*, 68 N. J. L. 243.

North Carolina. — *Wadsworth v. Concord*, 133 N. Car. 587.

Virginia. — *Winchester v. Carroll*, 99 Va. 727.

Washington. — *State v. Superior Ct.*, 35 Wash. 303.

1148. *4.* *St. Louis, etc., R. Co. v. Fayette* — 4 Supp. E. of L. — 7

ville, (Ark. 1905) 87 S. W. Rep. 1174; *State v. Superior Ct.*, 35 Wash. 303; *Tarkio v. Clark*, 186 Mo. 285; *Helena v. Rogan*, 26 Mont. 452.

6. **Territorial Limits.** — *Richard v. Cypremort Drainage Dist.*, 107 La. 657.

1150. *1.* Nature of Territory Included. — *State v. Lammers*, 113 Wis. 411.

2. *State v. Merchant*, (Tex. Civ. App. 1905) 85 S. W. Rep. 483.

4. *Toney v. Macon*, 119 Ga. 83; *State v. Holloway*, 90 Minn. 271; *State v. Merchant*, (Tex. Civ. App. 1905) 85 S. W. Rep. 483; *State v. Lammers*, 113 Wis. 411.

6. **A Poor District and a City** may exist at the same time in the same territory. *Melvin v. Summerville*, 210 Pa. St. 41.

7. **Power to Alter Boundaries.** — *Pepin Tp. v. Sage*, (C. C. A.) 129 Fed. Rep. 657; *McCully v. Tracy*, 66 N. J. L. 489; *Henderson v. New York*, 65 N. Y. App. Div. 180; *Hollister v. Rochester*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 559, *affirmed* 96 N. Y. App. Div. 501.

1151. *4.* Matter of Mathews, 59 N. Y. App. Div. 159.

1152. *3.* Effect on Property, Debts, Etc. — *Lake Charles Ice, etc., Co. v. Lake Charles*, 106 La. 65; *McCully v. Tracy*, 66 N. J. L. 489.

4. *Hollister v. Rochester*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 559, *affirmed* 96 N. Y. App. Div. 501.

5. *Indiana R. Co. v. Hoffman*, 161 Ind. 593, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1152.

6. **Annexation of Territory.** — *Hollister v. Rochester*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 559, *affirmed* 96 N. Y. App. Div. 501, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1152, *affirmed* 180 N. Y. 518.

Authorizing Statute Not Open to Collateral Attack. — *McCain v. Des Moines*, (Iowa 1905) 103 N. W. Rep. 979.

1153. *1.* *Hollister v. Rochester*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 559, *affirmed* 96 N. Y. App. Div. 501, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1152 [1153].

Debts Ex Delicto as well as those arising from contracts have been held to be included under an act annexing a village to a city and providing that the city should be liable for the debts of the annexed territory. *Tyler v. Lansingburgh*, 76 N. Y. App. Div. 165.

2. *Little Rock v. North Little Rock*, 72 Ark. 195.

1153. *b.* RULE UNDER GENERAL MUNICIPAL INCORPORATION ACTS — (1) *In General.* — See note 4.

1154. (3) *Adjacent or Contiguous Territory.* — See note 2.

(4) *Compliance with Statute Requirements.* — See note 4.

For Various Decisions Involving Particular Statutes. — See note 5.

1155. 9. Reduction of Boundaries — Excision of Territory. — See note 5.

10. Local Subdivisions — Wards, Precincts, Districts, Etc. — See notes 7, 8.

1156. VIII. MUNICIPAL CONTRACTS — 1. Generally. — See note 2.

5. Incidents of Municipal Contracts — *a.* IN GENERAL. — See note 8.

1157. See notes 1, 2, 3.

b. ASSIGNABILITY. — See note 5.

6. Express and Implied Contracts — *a.* IN GENERAL. — See notes 6, 7.

b. WHEN CONTRACT IMPLIED AND WHEN NOT — (1) *In General.* — See notes 8, 9.

1153. 4. General Municipal Incorporation Acts. — *Hunter v. Senn*, 61 S. Car. 44.

1154. 2. Adjacent or Contiguous Territory. *Little Rock v. North Little Rock*, 72 Ark. 195.

4. Collateral Attack. — The validity of the proceedings to annex territory to a city may not be collaterally attacked. *Topeka v. Dwyer*, 70 Kan. 244.

Where City Officials Are Vested with a Discretion in the extension of municipal boundaries their action will not be interfered with except in case of abuse. *State v. Birch*, 186 Mo. 205.

5. *Little Rock v. North Little Rock*, 72 Ark. 195; *Toney v. Macon*, 119 Ga. 83; *McCoy v. Cloverdale*, 31 Ind. App. 331; *Topeka v. Dwyer*, 70 Kan. 244; *Fredonia v. Rice*, 115 Ky. 443; *Jackson v. Whiting*, 84 Miss. 163; *State v. Birch*, 186 Mo. 205; *Hunter v. Senn*, 61 S. Car. 44.

1155. 5. Reduction of Boundaries. — *Anaconda Min. Co. v. Anaconda*, 33 Colo. 70; *Fletcher v. Smith*, 33 Colo. 473; *Roodhouse v. Briggs*, 105 Ill. App. 116; *Weiland v. Ashton*, 17 S. Dak. 621. See also *People v. Binns*, 192 Ill. 68.

Detaching Territory at Suit of Owner. — *Osmund v. Smathers*, 62 Neb. 509.

Statute Prohibiting Disconnection of Plotted Territory. — *Fruita v. Williams*, 33 Colo. 157.

Reduction on Petition of Voters and Owners of Territory to Be Excluded. — *Coughran v. Huron*, 17 S. Dak. 271.

The Repeal of the Statute Authorizing the Disconnection of Territory from a municipality, before the completion of proceedings thereunder, defeats the right to disconnect. *Phoenix Nursery Co. v. Seibert*, 101 Ill. App. 147.

7. Local Subdivisions. — *State v. Sawyer*, 139 Ala. 138; *Landers v. Walls*, 160 Ind. 216; *Meier v. St. Louis*, 180 Mo. 391; *Allison v. Corker*, 67 N. J. L. 596; *Zumstein v. Mullen*, 67 Ohio St. 382.

8. *State v. Sawyer*, 139 Ala. 138; *Allison v. Corker*, 67 N. J. L. 596.

Creating Sewer District. — *Shannon v. Omaha*, (Neb. 1905) 103 N. W. Rep. 53.

Statutory Method Must Be Pursued. — *McCulley v. Elizabeth*, 66 N. J. L. 555.

1156. 2. Power to Contract. — *Columbus v. Cleveland*, etc., R. Co., 25 Ohio Cir. Ct. 663. And see *supra*, this title, **1143**, 7.

8. Liability for Interest. — See *Toledo Consol. Electric Co. v. Toledo*, 13 Ohio Dec. 137.

Money Paid under Mistake of Law by a municipal corporation cannot be recovered. The same rule applies as in the case of individuals. *Morgan Park v. Knopf*, 199 Ill. 444.

1157. 1. *Mann v. Rochester*, 29 Ind. App. 12.

2. See *Shinn v. Cunningham*, 120 Iowa 383.

3. See *Palatka Waterworks v. Palatka*, 127 Fed. Rep. 161; *Penn Iron Co. v. Lancaster*, 25 Pa. Super. Ct. 478.

5. *Gordon v. Jefferson City*, 111 Mo. App. 23, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1156 [1157]. See also *Chapin v. Pike*, 184 Mass. 184.

6. Implied Contracts. — *Wellston v. Morgan*, 65 Ohio St. 219 (under statute).

7. *Austin v. Bartholomew*, (C. C. A.) 107 Fed. Rep. 349; *Howell Electric Light, etc., Co. v. Howell*, 132 Mich. 117, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1157; *Ephrata Water Co. v. Ephrata*, 16 Pa. Super. Ct. 484 (implied contract binding where no particular mode prescribed); *Dallas v. Martyn*, (Tex. Civ. App. 1902) 68 S. W. Rep. 710.

In the Absence of Statute a municipality may become bound on an implied contract in the same manner as an individual. *Wellston v. Morgan*, 65 Ohio St. 219.

8. Liability to Employe for Overtime. — *O'Boyle v. Detroit*, 131 Mich. 15.

Services of Engineer. — *Newport News v. Potter*, (C. C. A.) 122 Fed. Rep. 321.

Where No Formalities Prescribed. — *Ephrata Water Co. v. Ephrata*, 16 Pa. Super. Ct. 484.

Benefit Received under Authorized Contract Not Properly Entered Into. — *Dallas v. Martyn*, (Tex. Civ. App. 1902) 68 S. W. Rep. 710.

Instruction Given in Schools of Town to Children of Another Town. — *Hardwick v. Wolcott*, (Vt. 1905) 61 Atl. Rep. 471.

9. Unauthorized Act of City Officer. — *Wilson v. Mitchell*, 17 S. Dak. 515, 106 Am. St. Rep. 784.

Illegal Contract. — *Bluthenthal v. Headland*, 132 Ala. 249, 90 Am. St. Rep. 904.

Services of Physician. — *Nash v. Knoxville*, 108 Tenn. 68.

Services by a Municipal Officer for which the ordinances provide no compensation will not

- 1157.** (2) *Where Charter Prescribes Formalities.* — See note 10.
1158. See note 1.
 (3) *Contract Not Implied Where Express Contract Unauthorized.*
 — See note 2.
 (4) *Money Received Through Illegality or Mistake.* — See notes 3, 4.
1159. 8. *Contracts Abridging or Restricting Municipal Powers.* — See note 1.
The Duration of Municipal Contracts. — See notes 3, 4.
 9. *Contracts with Reference to Public Duties.* — See note 6.
 10. *Contracts with Attorneys* — *a.* IN GENERAL. — See note 7.
1160. See note 2.
Requisites of Contract. — See note 4.
b. DEFENSE OF MUNICIPAL OFFICERS. — See note 6.
 11. *Contracts of Guaranty and Suretyship.* — See note 7.
1161. 12. *Formal Requisites* — *a.* WHERE NO MODE PRESCRIBED — (1) *In General.* — See note 1.
 (2) *Name and Seal* — At Common Law, It Has Been Said, a Seal Was Necessary. — See note 6.

raise an implied assumpsit. *Durango v. Hampson*, 29 Colo. 77.

1157. 10. *Charter Formalities.* — *Jersey City Supply Co. v. Jersey City*, 71 N. J. L. 631; *Bosard v. Grand Forks*, 13 N. Dak. 587; *Wells-ton v. Morgan*, 65 Ohio St. 219; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931.

1158. 1. *Howell Electric Light, etc., Co. v. Howell*, 132 Mich. 117, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1158.

2. *Where Express Contract Unauthorized.* — *Moss v. Sugar Ridge Tp.*, (Ind. App. 1903) 67 N. E. Rep. 460; *Jersey City Supply Co. v. Jersey City*, 71 N. J. L. 631.

3. *Illegality or Mistake.* — See *Bluthenthal v. Headland*, 132 Ala. 249, 90 Am. St. Rep. 904.

4. *Bluthenthal v. Headland*, 132 Ala. 249, 90 Am. St. Rep. 904.

1159. 1. *Contracts Abridging Municipal Powers.* — *Birmingham v. Land*, 137 Ala. 538; *Chicago v. Chicago Union Traction Co.*, 199 Ill. 259; *Carbondale v. Wade*, 106 Ill. App. 654; *Snouffer v. Cedar Rapids, etc., R. Co.*, 118 Iowa 287; *Union Sav. Bank, etc., Co. v. Norwood*, 12 Ohio Dec. 198; *Edison Electric Illuminating Co. v. Tamaqua*, 13 Pa. Dist. 86; *Shenandoah v. Schuylkill Traction Co.*, 27 Pa. Co. Ct. 465; *Braddock v. Allegheny County Telephone Co.*, 25 Pa. Super. Ct. 544; *Erie City v. Erie Electric Motor Co.*, 24 Pa. Super. Ct. 77.

3. *Exceeding Statutory Limit* — *Valid for Time Prescribed.* — *Harter v. San Jose*, 141 Cal. 659.

Invalid Even for Time Prescribed. — *Gas Light, etc., Co. v. New Albany*, 156 Ind. 406; *Defiance v. Defiance Council*, 23 Ohio Cir. Ct. 96; *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637.

4. *Le Feber v. West Allis*, 119 Wis. 608, 100 Am. St. Rep. 917. And see *supra*, this title, **1146.** 6.

Contract May Extend beyond Terms of Officers Making. — *Tanner v. Auburn*, 37 Wash. 38. But see *Wadsworth v. Concord*, 122 N. Car. 587.

A Contract for an Indefinite Period of Time with a water company is invalid even for the

time for which the existence of the water company is limited by law. *Westminster Water Co. v. Westminster*, 98 Md. 551.

6. *Contract Surrendering Performance of Official Duty.* — *Shelby v. Miller*, 114 Wis. 660.

7. *Employment of Counsel.* — *Boise City v. Randall*, 8 Idaho 119; *Hope v. Alton*, 214 Ill. 102; *Moorhead v. Murphy*, (Minn. 1905) 102 N. W. Rep. 219; *Treeman v. Perry*, 11 Okla. 66.

As to the Right to Collect Fees from the Municipality, under particular agreements for compensation, see *Atchison v. Owensboro*, 114 Ky. 706 (no fee for securing dissolution of injunction under agreement for percentage of "sums recovered and collected"); *Kemp v. Monett*, 95 Mo. App. 452 (no fee recoverable from municipality under ordinance allowing fees as costs collectible from convicted parties).

1160. 2. See *Moorhead v. Murphy*, (Minn. 1905) 102 N. W. Rep. 219.

4. *Necessity for Yea and Nay Vote of Council.* — See *Bosard v. Grand Forks*, 13 N. Dak. 587.

Ultra Vires. — Where a law department with a corporation counsel at its head is created by an ordinance providing that the city shall not be liable to any other attorney for services, a contract with an attorney other than the corporation council is *ultra vires* and not binding on the city. *Hope v. Alton*, 214 Ill. 102.

6. *Expense of Defending Officials.* — *Moorhead v. Murphy*, (Minn. 1905) 102 N. W. Rep. 219, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1160. But see *Miller v. Hastings*, 25 Pa. Super. Ct. 569.

7. *Contracts of Guaranty and Suretyship.* — An agreement by a city to pay for materials furnished to a contractor, out of money due to the contractor after performance of his contract, is not in contravention of the *Georgia Constitution*. *Albany v. Cameron, etc., Co.*, 121 Ga. 794.

1161. 1. *Where No Mode of Contracting Prescribed.* — *Gosport v. Pritchard*, 156 Ind. 400; *Wilt v. Redkey*, 29 Ind. App. 199. See also *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29; *Ephrata Water Co. v. Ephrata*, 16 Pa. Super. Ct. 484.

6. *Wilt v. Redkey*, 29 Ind. App. 199.

1162. *b. WHERE MODE PRESCRIBED — (1) In General.* — See notes 5, 6.

1163. See note 1.

(2) *Rule in Executory Contracts.* — See note 4.

(3) *Rule in Executed Contracts — (a) Doctrine that City Bound — aa. IN GENERAL.* — See note 5.

bb. LIABILITY ON QUANTUM MERUIT OR VALEBAT. — See note 6.

1164. (b) *Doctrine that City Not Liable.* — See notes 1, 3.

(4) *When Writing Required.* — See note 4.

1165. 13. *Provisions for Letting on Bids — a. IN GENERAL.* — See notes 1, 2, 3, 4.

Need Not Let to Lowest Bidder Unless Required by Charter or Statute. — See notes 5, 6.

1162. 5. *Charter Formalities.* — Marion Water Co. v. Marion, 121 Iowa 306; Knauss v. Columbus, 13 Ohio Dec. 200; Press Pub. Co. v. Pittsburgh, 207 Pa. St. 623; Ephrata Water Co. v. Ephrata, 16 Pa. Super. Ct. 484; Watterson v. Nashville, 106 Tenn. 410.

Money Paid to a City for Bonds Irregularly Issued may be recovered back. Chelsea Sav. Bank v. Ironwood, (C. C. A.) 130 Fed. Rep. 410.

An Appointment to the Position of Health Officer by the mayor and board of a town does not constitute a contract by the town to pay the appointee for services rendered in preventing the spread of smallpox. Pass Christian v. Washington, 81 Miss. 470.

6. View that Noncompliance Is Fatal. — Ft. Scott v. W. G. Eads Brokerage Co., (C. C. A.) 117 Fed. Rep. 51; Jersey City Supply Co. v. Jersey City, 71 N. J. L. 631; Platt v. Englewood, 68 N. J. L. 231; Wadsworth v. Concord, 133 N. Car. 587; Robinson v. Goldsboro, 135 N. Car. 382; Press Pub. Co. v. Pittsburgh, 207 Pa. St. 623; Carpenter v. Yeadon, 208 Pa. St. 396; Watterson v. Nashville, 106 Tenn. 410; Chippewa Bridge Co. v. Durand, 122 Wis. 85, 106 Am. St. Rep. 931.

Counter Signature of Designated Official. — Johnson v. Philadelphia, 113 Fed. Rep. 40.

1163. 1. See Chippewa Bridge Co. v. Durand, 122 Wis. 85, 106 Am. St. Rep. 931.

4. Executory Contracts. — Marion Water Co. v. Marion, 121 Iowa 306.

5. Executed Contracts — City Held Liable. — Westbrook v. Middlecoff, 99 Ill. App. 327; Robinson v. Park Ridge, 100 Ill. App. 409, reversed 198 Ill. 571, 92 Am. St. Rep. 276; Drainage Com'rs v. Lewis, 101 Ill. App. 150; Moss v. Sugar Ridge Tp., (Ind. App. 1903) 67 N. E. Rep. 460; Marion Water Co. v. Marion, 121 Iowa 306; Swenson v. Bird Island, 93 Minn. 336; Ephrata Water Co. v. Ephrata, 16 Pa. Super. Ct. 481, 18 Lanc. L. Rev. 160. See also Lines v. Otego, (Supm. Ct. Tr. T.) 91 N. Y. Supp. 785.

6. Moss v. Sugar Ridge Tp., (Ind. App. 1903) 67 N. E. Rep. 460. See also Chippewa Bridge Co. v. Durand, 122 Wis. 85, 106 Am. St. Rep. 931.

Partly Executed Contract. — Wentink v. Chosen Freeholders, 66 N. J. L. 65.

1164. 1. *Executed Contracts — City Held Not Liable.* — Citizens' Bank v. Spencer, 126 Iowa 101; Jersey City Supply Co. v. Jersey City, 71 N. J. L. 631; Lewis v. New York, 106 N. Y. App. Div. 454; Wellston v. Morgan, 65 Ohio

St. 219; Chippewa Bridge Co. v. Durand, 122 Wis. 85, 106 Am. St. Rep. 931.

3. Ultra Vires Contracts. — U. S. v. Sault Ste. Marie, 137 Fed. Rep. 258; Driscoll v. New Haven, 75 Conn. 92; Hope v. Alton, 214 Ill. 102; South Covington Dist. v. Kenton Water Co., (Ky. 1904) 78 S. W. Rep. 420; Horstman v. Cincinnati St. R. Co., 12 Ohio Dec. 756; O'Malley v. Olyphant, 198 Pa. St. 525.

4. Where Writing Necessary. — Times Pub. Co. v. Weatherby, 139 Cal. 618; Mann v. Rochester, 29 Ind. App. 12; California v. Bunceton Telephone Co., 112 Mo. App. 722; Smart v. Philadelphia, 205 Pa. St. 329; O'Rourke v. Philadelphia, 211 Pa. St. 79, affirming 13 Pa. Dist. 379. See also Watterson v. Nashville, 106 Tenn. 410.

Directions for Additional Work. — Oral directions by the city engineers for additional work upon a contract which has been put into writing are insufficient to bind the city. McManus v. Philadelphia, 201 Pa. St. 632.

1165. 1. *Inviting Bids or Proposals.* — Pennsylvania Co. v. Cole, 132 Fed. Rep. 668; Inge v. Public Works, 135 Ala. 187, 93 Am. St. Rep. 20; Ellis v. Witmer, 134 Cal. 249; Trapp v. Newport, 115 Ky. 840; Barber Asphalt Paving Co. v. Garr, 115 Ky. 334; State v. King, 109 La. 799; Diamond v. Mankato, 89 Minn. 48, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1165; Fairbanks v. North Bend, (Neb. 1903) 94 N. W. Rep. 537; Faist v. Hoboken, (N. J. 1905) 60 Atl. Rep. 1120; Bradley v. Van Wyck, 65 N. Y. App. Div. 293; Sisson v. Buffalo, (Supm. Ct. Eq. T.) 41 Misc. (N. Y.) 236; Times Printing Co. v. Seattle, 25 Wash. 149.

2. Chicago v. Hanreddy, 211 Ill. 24, affirming 102 Ill. App. 1; Packard v. Hayes, 94 Md. 233; Warren v. Boston, 181 Mass. 6; Le Tourneau v. Hugo, 90 Minn. 420; Broderick v. St. Paul, 90 Minn. 443; Reid v. Trowbridge, 78 Miss. 542; Marshall v. Nashville, 109 Tenn. 495; Chippewa Bridge Co. v. Durand, 122 Wis. 85, 106 Am. St. Rep. 931.

3. Allen v. Davenport, (C. C. A.) 132 Fed. Rep. 209; Reid v. Trowbridge, 78 Miss. 542; Tanner v. Auburn, 37 Wash. 38.

Public Improvements. — Chicago v. Hanreddy, 102 Ill. App. 1, affirmed 211 Ill. 24.

4. Diamond v. Mankato, 89 Minn. 48, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1165; Fairbanks v. North Bend, (Neb. 1903) 94 N. W. Rep. 537.

5. Coward v. Bayonne, 67 N. J. L. 470.

6. Coward v. Bayonne, 67 N. J. L. 470.

1165. Contract Invalid if Not Let as Prescribed. — See note 7.

1166. Competition Among Bidders. — See note 1.

b. TO WHAT CONTRACTS APPLICABLE — (1) *In General.* — See note 3.

(2) *Patented Articles -- Monopolies.* — See notes 4, 5.

1167. See note 1.

c. ADVERTISEMENT FOR BIDS — (1) *In General.* — See notes 2, 3, 4.

(2) *Readvertisement.* — See note 5.

d. SUBMISSION OF BIDS — (1) *In General.* — See note 8.

Contents of Advertisement. — In the absence of requirement that municipal contracts be let to the lowest bidder, an advertisement is not illegal for the reason that it does not specify the style of a bridge which the city contemplates having built. *Kundinger v. Saginaw*, 132 Mich. 395.

1165. 7. Provisions as to Letting Mandatory. — *Ft. Scott v. W. G. Eads Brokerage Co.*, (C. C. A.) 117 Fed. Rep. 51; *Inge v. Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20; *Chicago v. Hanreddy*, 102 Ill. App. 1, *affirmed* 211 Ill. 24; *State v. King*, 109 La. 799; *Leflore County v. Cannon*, 81 Miss. 334; *Diamond v. Mankato*, 89 Minn. 48, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1165; *Le Tourneau v. Hugo*, 90 Minn. 420; *Faist v. Hoboken*, (N. J. L. 1905) 60 Atl. Rep. 1120; *People v. Buffalo*, (Supm. Ct. Spec. T.) 84 N. Y. Supp. 434. See also *Puget Sound Pub. Co. v. Times Printing Co.*, 33 Wash. 551.

Where the Advertisement Is Invalid a binding contract cannot be predicated thereon. *Pennsylvania Co. v. Cole*, 132 Fed. Rep. 668.

1166. 1. Irregular Where Each Bidder Prepares Separate Plans. — *Diamond v. Mankato*, 89 Minn. 48, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1165-1169.

Object of Statutes — Fair Competition Among Bidders. — *Marshall, etc., Co. v. Nashville*, 109 Tenn. 495, *per Wilkes, J., dissenting, quoting* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1166 and note; *Warren v. Boston*, 181 Mass. 6. See also *Barber Asphalt Paving Co. v. Willcox*, 90 N. Y. App. Div. 245.

3. Where There Could Be But One Bidder advertisement is not required. — *Capdevielle v. New Orleans, etc., R. Co.*, 110 La. 904.

Unfinished Work. — The statute requiring a letting to the lowest bidder applies to a contract for the completion of work left unfinished by the original contractor. *Chicago v. Hanreddy*, 211 Ill. 24.

Contracts with Attorneys for legal services are not within charter provisions requiring contracts to be let to the lowest responsible bidder. *Moorhead v. Murphy*, (Minn. 1905) 102 N. W. Rep. 219.

Construction of Provision. — Where the charter of a city required all "work" in excess of fifty dollars to be let to the lowest bidder the provision was held to apply to the construction of buildings and bridges. *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931.

4. Patented Articles. — *Monaghan v. Indianapolis*, (Ind. App. 1905) 75 N. E. Rep. 33; *Fineran v. Central Bitulithic Paving Co.*, 116

Ky. 495. See also *Kay v. Monroe*, 93 N. Y. App. Div. 484; *Rose v. Low*, 85 N. Y. App. Div. 461; *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480.

5. *Swift v. St. Louis*, 180 Mo. 80.

1167. 1. An Article Manufactured by Only One Person may be contracted for where the privilege of purchasing the article is left to the lowest bidder. *Knowles v. New York*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 195, *affirmed* 74 N. Y. App. Div. 632.

2. Publication. — *Inge v. Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20; *State v. King*, 109 La. 799; *Packard v. Hayes*, 94 Md. 233; *Diamond v. Mankato*, 89 Minn. 48, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1165-1169; *Fairbanks v. North Bend*, (Neb. 1903) 94 N. W. Rep. 537.

3. Contract Void Unless Advertised. — *Sanitary Dist. v. McMahon, etc., Co.*, 110 Ill. App. 510. **Sufficiency of Publication.** — See *Bradley v. Van Wyck*, 65 N. Y. App. Div. 293, holding a publication valid notwithstanding the paper failed to appear on two Sundays and a holiday during the period.

4. *State v. King*, 109 La. 799. See also *Owens v. Marion*, 127 Iowa 469; *Packard v. Hayes*, 94 Md. 233; *Taylor v. Wapakoneta*, 26 Ohio Cir. Ct. 285.

Specifications. — In advertising for bids for bridge materials a city may require steel of a certain quality and specify that the bidder should be possessed of a plant which had been in operation for the period of a year. *Meyers v. Pennsylvania Steel Co.*, 77 N. Y. App. Div. 307.

5. Where the Lowest Bid Fails to Comply with the Conditions Required the contract may be let to the next lowest bidder without readvertisement and at a sum less than that named by such bidder in his bid. *Sanitary Dist. v. McMahon, etc., Co.*, 110 Ill. App. 510.

Where the Lowest Bidder Retracts His Bid the contract may be let to the next lowest bidder. *Corry v. Corry Chair Co.*, 18 Pa. Super. Ct. 271.

8. Submission of Bids. — *Columbus v. Board of Public Service*, 14 Ohio Dec. 715; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931.

A Requirement that Work Should Bear a Union Label has been held to be void. *Marshall v. Nashville*, 109 Tenn. 495.

The Award Must Be upon the Bid Submitted, to be valid, and a contract cannot be let to a bidder on a proposal made subsequent to his original bid. *Ryan v. Ashbridge*, 10 Pa. Dist. 153.

1168. See note 1.

(2) *Bond or Security for Performance.* — See note 3.

e. *WITHDRAWING BIDS.* — See note 7.

f. *OPENING BIDS.* — See note 9.

1169. g. *ACCEPTANCE OR REJECTION OF BIDS* — (1) *Rejection of All Bids.* — See notes 1, 2.

(2) *Contract Awarded Must Correspond with Advertisement.* — See notes 4, 5.

(3) *Rule as to Discretion* — (a) *In General.* — See note 7.

1170. See note 1.

(b) *Circumstances to Be Considered.* — See note 2.

(c) *Quality and Value of Work* — *Skill of Bidder.* — See note 3.

h. *ILLEGAL ACCEPTANCE OR REJECTION.* — See notes 5, 6.

i. *EFFECT OF ACCEPTANCE — WHEN CONTRACT ARISES.* — See note 7.

1171. j. *FRAUD AND COLLUSION.* — See note 3.

14. *Construction of Municipal Contracts.* — See note 5.

1168. 1. *Faist v. Hoboken*, (N. J. 1905) 60 Atl. Rep. 1120.

3. *Bond for Performance.* — *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931.

Recovery Back of Deposit. — Where the contract awarded is void the party to whom it is awarded may recover back a deposit which he made on submitting the bid. *Fairbanks v. North Bend*, (Neb. 1903) 94 N. W. Rep. 537.

7. *A Bid Modified After the Date Set for Submission*, with the consent of the city, is invalid, and a contract awarded upon it is void. *Fairbanks v. North Bend*, (Neb. 1903) 94 N. W. Rep. 537.

9. *Bids Need Not Be Opened Immediately* upon expiration of the time during which they were to be received. *McCord v. Lauterbach*, 91 N. Y. App. Div. 315.

Bid Not to Be Altered After Being Opened. — *Chicago v. Mohr*, 216 Ill. 320, *affirming* 114 Ill. App. 283.

1169. 1. *Rejection of All Bids.* — *Trapp v. Newport*, 115 Ky. 840; *Warren v. Boston*, 181 Mass. 6; *Faist v. Hoboken*, (N. J. 1905) 60 Atl. Rep. 1120.

Fraud is not established by the fact that a contract was not awarded to the lowest bidder, where, by statute, the board could reject any bid. *Peckham v. Watsonville*, 138 Cal. 242.

2. *Stanley-Taylor Co. v. San Francisco*, 135 Cal. 486.

Rejection of Any or All Bids. — *Trowbridge v. Hudson*, 24 Ohio Cir. Ct. 76.

But Where the Lowest Bid Conforms to All Requirements a city cannot reject it in favor of one higher under a provision for the rejection of "any or all bids." *Faist v. Hoboken*, (N. J. 1905) 60 Atl. Rep. 1120.

4. *May Not Award Contract Different from That Advertised.* — *Inge v. Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20; *Diamond v. Mankato*, 89 Minn. 48, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1165-1169; *Le Tournau v. Hugo*, 90 Minn. 420.

5. *Inge v. Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20.

7. *Discretion as to Lowest or Best Bid.* — *Inge v. Public Works*, 135 Ala. 187, 93 Am. St.

Rep. 20; *Trapp v. Newport*, 115 Ky. 840; *Bradley v. Van Wyck*, 65 N. Y. App. Div. 293; *State v. Hermann*, 63 Ohio St. 440; *Columbus v. Board of Public Service*, 14 Ohio Dec. 715; *Philadelphia v. Pemberton*, 25 Pa. Super. Ct. 323; *Philadelphia v. Pemberton*, 208 Pa. St. 214. See also *Packard v. Hayes*, 94 Md. 233; *Ryan v. Paterson*, 66 N. J. L. 533; *Puget Sound Pub. Co. v. Times Printing Co.*, 33 Wash. 551. But see *Mohr v. Chicago*, 114 Ill. App. 283.

Authorities Must Not Act Arbitrarily. — *Faist v. Hoboken*, (N. J. 1905) 60 Atl. Rep. 1120.

Ordinance Directing to Whom Contract Shall Be Let. — A contract by a board of health for printing will not be allowed to stand where it appears that in awarding the contract the discretion of the board was governed by an invalid ordinance. *Goddard v. Lowell*, 179 Mass. 496.

1170. 1. *Inge v. Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20; *Trapp v. Newport*, 115 Ky. 840; *State v. Hermann*, 63 Ohio St. 440.

Discretion Not to Be Arbitrarily Exercised. — *Puget Sound Pub. Co. v. Times Printing Co.*, 33 Wash. 551.

2. *Other Matters than the Mere Pecuniary Responsibility* of the bidder may be considered by municipal officers in awarding a contract. *Philadelphia v. Pemberton*, 208 Pa. St. 214.

3. *Time for Performance May Be Considered.* — *Chicago v. Mohr*, 216 Ill. 320.

5. *Illegal Rejection.* — *Faist v. Hoboken*, (N. J. 1905) 60 Atl. Rep. 1120.

6. *Delay in Acceptance.* — One who does not show that he had been prejudiced thereby cannot object to the letting of a contract because the bid was made five years previous to its acceptance. *Philadelphia v. Hood*, 211 Pa. St. 180.

7. *No Contract until Acceptance.* — See *Hattersly v. Waterville*, 26 Ohio Cir. Ct. 226.

1171. 3. *Contract Set Aside for Collusion.* — See *Seltzer v. Metropolitan Electric Co.*, 199 Pa. St. 100.

5. *Liberal Construction in Favor of Municipality.* — *Indiana R. Co. v. Hoffman*, 161 Ind. 593.

- 1171.** 15. *Presumption of Legality.* — See note 6.
16. *Limitation of Indebtedness* — *c.* EFFECT OF SUBSEQUENT STATUTE ON PRIOR LIMITATION. — See note 11.
- 1172.** *d.* WHERE CONTRACT VALID WHEN MADE. — See note 1.
- e.* MAY NOT CONTRACT BEYOND LIMIT PRESCRIBED — (1) *In General.* — See notes 3, 4, 6.
- 1173.** See note 1.
- (3) *Debts Partly Within Limit.* — See notes 4, 5.
- f.* LIABILITIES EX DELICTO. — See notes 7, 8.
- h.* LIMITATION TO ANNUAL REVENUE — (1) *In General.* — See note 10.
- 1174.** (2) *Anticipation of Revenues.* — See note 3.
- i.* REQUIREMENT FOR PREVIOUS APPROPRIATION. — See note 5.
- j.* PROHIBITION OF INDEBTEDNESS UNLESS PROVISION MADE FOR PAYMENT. — See notes 7, 8.
- 1175.** *k.* LIMITATION TO PRESCRIBED PER CENTUM OF VALUE OF TAXABLE PROPERTY — (1) *In General.* — See note 1.

1171. 6. *Riverside, etc., R. Co. v. Riverside*, 118 Fed. Rep. 744; *Newport News v. Potter*, (C. C. A.) 122 Fed. Rep. 321; *Reed v. Anoka*, 85 Minn. 294.

11. *Hixon v. Gould*, 181 Mass. 567.

1172. 1. *Prior Contracts.* — *Warren v. Newport*, (Ky. 1901) 64 S. W. Rep. 852.

3. *May Not Exceed Limit Prescribed* — *United States*. — *Columbus v. Woonsocket Sav. Inst.*, (C. C. A.) 114 Fed. Rep. 162.

Illinois. — *Baltimore, etc., R. Co. v. People*, 200 Ill. 541; *Joliet v. Alexander*, 194 Ill. 457.

Indiana. — *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201.

Iowa. — *Ft. Dodge Electric Light, etc., Co. v. Ft. Dodge*, 115 Iowa 568; *Hall v. Cedar Rapids*, 115 Iowa 199; *Citizens' Bank v. Spencer*, 126 Iowa 101.

Maine. — *Adams v. Waterville*, 95 Me. 242.

Missouri. — *Thornburg v. School Dist. No. 3*, 175 Mo. 12.

Oregon. — *Brockway v. Roseburg*, (Oregon 1905) 79 Pac. Rep. 335, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1172.

South Carolina. — *Duncan v. Charleston*, 60 S. Car. 532.

Wisconsin. — *Herman v. Oconto*, 110 Wis. 660; *Balch v. Beach*, 119 Wis. 77.

The Legislature Cannot Authorize the incurring of a debt which will bring the total indebtedness of a city beyond the constitutional limit. *In re Opinion of Justices*, (Me. 1905) 60 Atl. Rep. 85.

4. *Joliet v. Alexander*, 194 Ill. 457; *Brockway v. Roseburg*, (Oregon 1905) 79 Pac. Rep. 335, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1172.

6. *The Nature of the Power Exercised, Whether Legislative or Proprietary*, does not affect the rule. *Joliet v. Alexander*, 194 Ill. 457.

Ratification. — A municipality cannot validate a debt in excess of the constitutional limit by subsequently ratifying it. *Balch v. Beach*, 119 Wis. 77.

1173. 1. *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201.

4. *Debts Partly Within Limit.* — *Columbus v. Woonsocket Sav. Inst.*, (C. C. A.) 114 Fed.

Rep. 162; *Baltimore, etc., R. Co. v. People*, 200 Ill. 541; *Herman v. Oconto*, 110 Wis. 660. See also *Ft. Dodge Electric Light, etc., Co. v. Ft. Dodge*, 115 Iowa 568.

5. *Thornburg v. School Dist. No. 3*, 175 Mo. 12.

7. *Liabilities Ex Delicto.* — *Ft. Dodge Electric Light, etc., Co. v. Ft. Dodge*, 115 Iowa 568; *Conner v. Nevada*, 188 Mo. 148, 107 Am. St. Rep. 267, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1173.

8. See *Ft. Dodge Electric Light, etc., Co. v. Ft. Dodge*, 115 Iowa 568.

10. *Indebtedness Limited to Annual Income.* — *Law v. San Francisco County*, 144 Cal. 384; *O'Bryan v. Owensboro*, 113 Ky. 680; *Carpenter v. Central Covington*, (Ky. 1904) 81 S. W. Rep. 919; *Adams v. Ashland*, (Ky. 1904) 80 S. W. Rep. 1105; *Thornburg v. School Dist. No. 3*, 175 Mo. 12; *Conner v. Nevada*, 188 Mo. 148, 107 Am. St. Rep. 267.

1174. 3. *Anticipating Revenues.* — *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201, supporting the whole text paragraph.

5. *To Contract for City Lighting* for a period of ten years it is not necessary to make a prior appropriation for the entire period. *Denver v. Hubbard*, 17 Colo. App. 346.

Previous Appropriation. — *Webb Granite, etc., Co. v. Worcester*, 187 Mass. 385; *Hurley v. Trenton*, 66 N. J. L. 538.

7. *Columbus v. Woonsocket Sav. Inst.*, (C. C. A.) 114 Fed. Rep. 162; *Blanks v. Monroe*, 110 La. 944; *Tyler v. Jester*, 97 Tex. 344.

8. *Peck v. Hempstead*, 27 Tex. Civ. App. 80; *Austin v. McCall*, 95 Tex. 565; *Dallas Fourth Nat. Bank v. Dallas*, (Tex. Civ. App. 1903) 73 S. W. Rep. 841; *Tyler v. Jester*, (Tex. Civ. App. 1903) 74 S. W. Rep. 359.

Salaries of Officers do not constitute debts within the constitutional requirement that provision for payment must be made at the time of incurring the indebtedness. *Oak Cliff v. Etheridge*, (Tex. Civ. App. 1903) 76 S. W. Rep. 602.

1175. 1. *Limitation to Percentage of Taxable Values* — *United States*. — *Ottumwa v. City Water Supply Co.*, (C. C. A.) 119 Fed. Rep. 315; *Pierre v. Dunscomb*, (C. C. A.) 106 Fed.

1175. (2) *Valuation of Property — How Determined.* — See note 3.

1176. 1. *WHAT CONSTITUTES INDEBTEDNESS.* — (1) *In General.* — See note 1.

(2) *Where Provision Made for Payment.* — See note 2.

(5) *Funding Existing Debts.* — See note 5.

(6) *Liability Limited to Special Fund.* — See notes 6, 7.

(7) *Debts for Current Expenses Payable Out of Current Revenues.*

— See note 8.

1177. (8) *Debts Due in Futuro.* — See notes 2, 3.

Rep. 611; *Farmers' L. & T. Co. v. Sioux Falls*, 131 Fed. Rep. 890.

Georgia. — *Epping v. Columbus*, 117 Ga. 263. *Illinois.* — *Chicago v. Fishburn*, 189 Ill. 367; *Joliet v. Alexander*, 194 Ill. 457; *Baltimore, etc., R. Co. v. People*, 200 Ill. 541; *Stone v. Chicago*, 207 Ill. 492.

Indiana. — *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201; *Heinl v. Terre Haute*, 161 Ind. 44.

Iowa. — *Ft. Dodge Electric Light, etc., Co. v. Ft. Dodge*, 115 Iowa 568; *Swanson v. Ottumwa*, 118 Iowa 161.

Minnesota. — *Purcell v. East Grand Forks*, 91 Minn. 486.

Missouri. — *Thornburg v. School Dist. No. 3*, 175 Mo. 12.

Pennsylvania. — *Keller v. Scranton*, 202 Pa. St. 586, 200 Pa. St. 130, 86 Am. St. Rep. 708; *O'Malley v. Olyphant*, 198 Pa. St. 525; *Gable v. Altoona*, 200 Pa. St. 15.

South Carolina. — *Duncan v. Charleston*, 60 S. Car. 332.

Virginia. — *Robertson v. Staunton*, (Va. 1905) 51 S. E. Rep. 178.

Washington. — *Smith v. Seattle*, 25 Wash. 300.

Wisconsin. — *Herman v. Oconto*, 110 Wis. 660.

Construction of Provision. — In *Wells v. Sioux Falls*, 16 S. Dak. 547, a constitutional amendment allowing cities to incur indebtedness to the extent of ten per cent. of the assessed value of their taxable property in addition to the amount originally prescribed, when authorized by a majority vote of the electors, was construed to permit the further indebtedness of ten per cent., regardless of the obligations then existing.

1175. 3. Valuation Based on Assessed and Not Actual Value. — *City Water Supply Co. v. Ottumwa*, 120 Fed. Rep. 309.

1176. 1. Equity of Redemption. — *Browne v. Boston*, 179 Mass. 321.

Judgments. — *Stone v. Chicago*, 207 Ill. 492.

Contract to Assume Damages to Abutting Property. — *Keller v. Scranton*, 200 Pa. St. 130, 86 Am. St. Rep. 708.

Notes Given by the School City in Indiana do not constitute an indebtedness on the part of the civil city. *Heinl v. Terre Haute*, 161 Ind. 44.

A Contract to Give a Purchase-money Mortgage is not evidence of an obligation to be considered in ascertaining the indebtedness of a municipal corporation. *Swanson v. Ottumwa*, 118 Iowa 161.

2. Appropriation to Be Made in Future. — See *Bailey v. Sioux Falls*, (S. Dak. 1905) 103 N. W. Rep. 16.

Cost of Street Improvement Assessed upon Abutting Owners. — See *Adams v. Ashland*, (Ky. 1904) 80 S. W. Rep. 1105.

Special Assessments. — A city already indebted to the constitutional limit may contract for work to be paid for with money raised by special assessments. *Ft. Dodge Electric Light, etc., Co. v. Ft. Dodge*, 115 Iowa 568.

Where the Provision for Payment Was Invalid it was held that the city was liable notwithstanding the constitutional provision limiting the indebtedness, the city having had no intention of increasing the debt. *Gable v. Altoona*, 200 Pa. St. 15.

5. Funding Existing Debts. — *Lake County v. Keene Five-Cents Sav. Bank*, (C. C. A.) 108 Fed. Rep. 505; *Pierre v. Dunscomb*, (C. C. A.) 106 Fed. Rep. 611; *Fairfield v. Rural Independent School Dist.*, (C. C. A.) 116 Fed. Rep. 839; *Hirt v. Erie*, 200 Pa. St. 223; *Hyde v. Ewert*, 16 S. Dak. 133; *Tyler v. Jester*, 97 Tex. 344.

6. Special Fund. — *Blanchard v. Benton*, 109 Ill. App. 569; *Brix v. Clatsop County*, (Oregon 1905) 80 Pac. Rep. 650.

7. Obligation Payable Out of Special Fund. — Where an obligation on the part of the city to pay money has been created, the fact that payment is to be made out of a particular fund does not change its character. It is a debt nevertheless, and, if in excess of the constitutional limit, is invalid. *Joliet v. Alexander*, 194 Ill. 457.

8. Debts for Current Expenses. — *Gladwin v. Ames*, 30 Wash. 608; *Hull v. Ames*, 26 Wash. 272, 90 Am. St. Rep. 743. See also *Helena Water Works Co. v. Helena*, 31 Mont. 243.

An Issue of Bonds to Be Paid from the Proceeds of the Waterworks of a city does not create a municipal debt within the constitutional prohibition. *Brockenbrough v. Water Com'rs*, 134 N. Car. 1.

1177. 2. Debts Payable in Future. — *Epping v. Columbus*, 117 Ga. 263; *Baltimore, etc., R. Co. v. People*, 200 Ill. 541; *Swanson v. Ottumwa*, 118 Iowa 161; *Brix v. Clatsop County*, (Oregon 1905) 80 Pac. Rep. 650.

3. Anoka Water Works, etc., Co. v. Anoka, 109 Fed. Rep. 580.

Interest to Fall Due. — *Kelly v. Cole*, 63 Kan. 385.

Contract for Annual Services. — *Herman v. Oconto*, 110 Wis. 660.

Extending the Time of Payment of the debts of a city, already owing, does not constitute the creation of a debt within the clause of the *Texas* constitution requiring a provision for the payment of an indebtedness to be made at the time of its contracting. *Tyler v. Jester*, (Tex. Civ. App. 1903) 74 S. W. Rep. 359.

1177. *m.* COMPUTATION OF INDEBTEDNESS — (1) *Cash on Hand.* — See notes 6, 7.

- 1178.** (2) *Uncollected Taxes.* — See notes 1, 2.
 (4) *Aggregating Payments.* — See note 4.
 (5) *Miscellaneous Matters.* — See note 6.

17. *Contracts with Officials* — *a.* IN GENERAL. — See notes 7, 8.

1179. *b.* WHAT CONSTITUTES "INTEREST" IN CONTRACT. — See note 1.

1180. 18. *Ultra Vires Contracts.* — See notes 2, 3.

19. *Ratification* — *a.* IN GENERAL. — See note 4.

1177. 6. *Cash on Hand Which Had Been Borrowed* for a specific purpose should not be counted as an asset. *Herman v. Oconto*, 110 Wis. 660.

7. *Compare* *Jordan v. Andrus*, 27 Mont. 22.

1178. 1. *Taxes Uncollected.* — See *Balch v. Beach*, 119 Wis. 77.

2. *Taxes in the Process of Collection* are not to be deducted in ascertaining the amount of indebtedness until the tax roll has been placed with the collecting officer with authority to collect. *Balch v. Beach*, 119 Wis. 77.

4. *Aggregating Payments.* — *Mercantile Trust, etc., Co. v. Columbus Waterworks Co.*, 130 Fed. Rep. 180; *Columbia Ave. Sav. Fund, etc., Co. v. Dawson*, 130 Fed. Rep. 152; *Fidelity Trust, etc., Co. v. Fowler Water Co.*, 113 Fed. Rep. 560; *Denver v. Hubbard*, 17 Colo. App. 346; *Cain v. Wyoming*, 104 Ill. App. 538; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201; *Blanks v. Monroe*, 110 La. 944. See also *Swanson v. Ottumwa*, 118 Iowa 161. But see *Brockway v. Roseburg*, (Oregon 1905) 79 Pac. Rep. 335.

6. *Interest on money borrowed by a city* does not constitute a debt until earned and due. *Herman v. Oconto*, 110 Wis. 660.

Unearned Interest on money due by a city does not constitute a part of its indebtedness. *Epping v. Columbus*, 117 Ga. 263.

The Debt of a School District, the boundaries of which coincide with those of a city, should not be computed in ascertaining the total indebtedness of the city. *Hyde v. Ewert*, 16 S. Dak. 133.

A State Debt is not to be included in ascertaining the indebtedness of a municipality. *Lancaster School Dist. v. Robinson-Humphrey Co.*, 64 S. Car. 545.

Debts Authorized by a Constitutional Amendment passed when the city was indebted beyond the constitutional limit are not to be included in computing the city's indebtedness. *Stone v. Chicago*, 207 Ill. 492.

For a Discussion of Various Items which should or should not be computed in ascertaining the amount of indebtedness, see *Stone v. Chicago*, 207 Ill. 492.

7. See *Wilson v. Montrose*, 12 Pa. Dist. 754.

8. *Contracts with City Officials.* — *Hardy v. Gainesville*, 121 Ga. 327; *Nuckols v. Lyle*, 8 Idaho 580; *O'Neil v. Flannagan*, 98 Me. 426; *State v. Meier*, 96 Mo. App. 160; *Harrison v. Elizabeth*, 70 N. J. L. 591; *Northport v. Northport Townsite Co.*, 27 Wash. 543.

The Right of Action of a Member of the Council against the city for personal injuries is not affected by a provision against contracting with city officials. *Danville v. Robinson*, 99 Va. 448.

1179. 1. *Pecuniary Interest.* — *Stone v. Bevans*, 88 Minn. 127, 97 Am. St. Rep. 506; *Northport v. Northport Townsite Co.*, 27 Wash. 543.

Contracts with Corporations in Which Municipal Officers Are Stockholders have been held in several jurisdictions in the *United States* to be invalid. *Hardy v. Gainesville*, 121 Ga. 327; *Brown v. Street Lighting Dist. No. 1*, 71 N. J. L. 79; *Duncan v. Charleston*, 60 S. Car. 532. But the contrary has been held in *England*. *London Electric Lighting Co. v. London*, 82 L. T. N. S. 530.

State Officer. — A contract between a city and a corporation is valid though the president of the latter is an election commissioner of the city, such office being filled by appointment of the government. *State v. Meier*, 96 Mo. App. 160.

Contract with Wife of Member of School Board. — See *Nuckols v. Lyle*, 8 Idaho 589.

1180. 2. *Ultra Vires Contracts* — *United States.* — *U. S. v. Sault Ste. Marie*, 137 Fed. Rep. 258; *Allen v. Davenport*, (C. C. A.) 132 Fed. Rep. 209.

Alabama. — *Bluthenthal v. Headland*, 132 Ala. 249, 90 Am. St. Rep. 904.

Connecticut. — *Driscoll v. New Haven*, 75 Conn. 92.

Illinois. — *Hope v. Alton*, 214 Ill. 102.

Kansas. — See *Chicago Lumber, etc., Co. v. Sugar-Loaf Tp.*, 64 Kan. 163.

Kentucky. — *South Covington Dist. v. Kenton Water Co.*, (Ky. 1904) 78 S. W. Rep. 420.

Maine. — *O'Neil v. Flannagan*, 98 Me. 426.

Maryland. — *Westminster Water Co. v. Westminster*, 98 Md. 551.

Ohio. — *Horstman v. Cincinnati St. R. Co.*, 12 Ohio Dec. 756; *Lower River Road Co. v. Cincinnati*, 13 Ohio Dec. 214.

Pennsylvania. — *O'Malley v. Olyphant*, 198 Pa. St. 525.

Wisconsin. — *Compare* *Monroe Water Works Co. v. Monroe*, 110 Wis. 11; *Thomson v. Elton*, 109 Wis. 589.

For a Full Discussion see the title *ULTRA VIRES*, 49, 5 *et seq.*

3. *Valley Falls Co. v. Taft*, (R. I. 1905) 61 Atl. Rep. 41; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931.

The Payment of a Claim Barred by the Statute of Limitations is *ultra vires*. *Trowbridge v. Schmidt*, 82 Miss. 475.

4. *General Rule as to Ratification.* — *Marion Water Co. v. Marion*, 121 Iowa 306; *Chicago Lumber, etc., Co. v. Sugar Loaf Tp.*, 64 Kan. 163; *Pierce v. Greenfield*, 96 Me. 350; *Swenson v. Bird Island*, 93 Minn. 336; *Unionville v. Martin*, 95 Mo. App. 28; *Hett v. Portsmouth*,

1181. See note 1.

b. WHAT CONSTITUTES RATIFICATION. — See note 4.

c. CONTRACTS BEYOND CORPORATE POWERS. — See note 5.

1182. *d.* MODE OF RATIFICATION. — See note 1.

e. EFFECT OF RATIFICATION. — See note 4.

20. Estoppel — *a.* ESTOPPEL OF CORPORATION — (1) *In General.*

— See notes 5, 6, 7.

1183. See note 1.

(2) *Unauthorized Acts of Officers and Agents.* — See note 3.

(N. H. 1905) 61 Atl. Rep. 596; *Lines v. Otego*, (Supm. Ct. Tr. T.) 91 N. Y. Supp. 785; *Sandy Lake v. Sandy Lake, etc.*, Gas Co., 16 Pa. Super. Ct. 234; *Tarentum v. Moorhead*, 26 Pa. Super. Ct. 273; *Dallas v. Martyn*, (Tex. Civ. App. 1902) 68 S. W. Rep. 710; *Uncas Nat. Bank v. Superior*, 115 Wis. 340.

1181. 1. See *Com. v. Hitchens*, 12 Pa. Dist. 752.

4. *Tarentum v. Moorhead*, 26 Pa. Super. Ct. 273. Compare *Kroffe v. Springfield*, 86 Mo. App. 530, holding that ratification can be by ordinance only.

Attorney's Services. — The direction by the council that the city attorney assist the plaintiff in bringing a suit in behalf of the city does not ratify a previous unauthorized contract with the plaintiff for such services. *Root v. Topeka*, 63 Kan. 129.

5. Ultra Vires Contracts — Contracts Void Ab Initio. — *Sage v. Fargo Tp.*, (C. C. A.) 107 Fed. Rep. 383; *Wichmann v. Placerville*, 147 Cal. 162; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234; *Pierce v. Greenfield*, 96 Me. 350; *Packard v. Hayes*, 94 Md. 233; *Unionville v. Martin*, 95 Mo. App. 28; *Balch v. Beach*, 119 Wis. 77; *Uncas Nat. Bank v. Superior*, 115 Wis. 340. See also *Swenson v. Bird Island*, 93 Minn. 336; *Horstman v. Cincinnati St. R. Co.*, 12 Ohio Dec. 756.

1182. 1. Method of Ratification. — *Unionville v. Martin*, 95 Mo. App. 28; *Caxton County v. School Dist. No. 5*, 120 Wis. 374; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931. But see *Sandy Lake v. Sandy Lake, etc.*, Gas Co., 16 Pa. Super. Ct. 234.

Re-enactment of Irregular Ordinance. — *Marion Water Co. v. Marion*, 121 Iowa 306.

4. Effect of Ratification. — *Pierce v. Greenfield*, 96 Me. 350.

5. Estoppel. — *Schmitz v. Zeh*, 91 Minn. 290; *Stealey v. Kansas City*, 179 Mo. 400; *Unionville v. Martin*, 95 Mo. App. 28; *Horstman v. Cincinnati St. R. Co.*, 12 Ohio Dec. 756, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1182; *Mt. Vernon v. State*, 71 Ohio St. 428, 104 Am. St. Rep. 783. See also *Peck v. Hempstead*, 27 Tex. Civ. App. 80.

6. *Chicago Lumber, etc., Co. v. Sugar Loaf Tp.*, 64 Kan. 163; *Schmitz v. Zeh*, 91 Minn. 290; *Horstman v. Cincinnati St. R. Co.*, 12 Ohio Dec. 756, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1182.

7. Total Want of Power — California. — *Wichmann v. Placerville*, 147 Cal. 162.

Illinois. — *Lowery v. Pekin*, 210 Ill. 575; *Hope v. Alton*, 214 Ill. 102.

Iowa. — *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234.

Kansas. — See *Chicago Lumber, etc., Co. v. Sugar Loaf Tp.*, 64 Kan. 163.

Maryland. — *Mealey v. Hagerstown*, 92 Md. 741.

Minnesota. — *Schmitz v. Zeh*, 91 Minn. 290.

Mississippi. — *Trowbridge v. Schmidt*, 82 Miss. 475.

Missouri. — *Stealey v. Kansas City*, 179 Mo. 400; *Thornburg v. School Dist. No. 3*, 175 Mo. 12; *Unionville v. Martin*, 95 Mo. App. 28.

Nebraska. — See *Fairbanks v. North Bend*, (Neb. 1903) 94 N. W. Rep. 537.

New Jersey. — *Meday v. Rutherford*, 65 N. J. L. 645.

North Carolina. — *Debnam v. Chitty*, 131 N. Car. 657.

Ohio. — *Horstman v. Cincinnati St. R. Co.*, 12 Ohio Dec. 756, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1182; *Defiance v. Defiance*, 23 Ohio Cir. Ct. 96; *Lower River Road Co. v. Cincinnati*, 13 Ohio Dec. 214; *Mt. Vernon v. State*, 71 Ohio St. 428, 104 Am. St. Rep. 783.

Texas. — *Peck v. Hempstead*, 27 Tex. Civ. App. 80.

Wisconsin. — *Uncas Nat. Bank v. Superior*, 115 Wis. 340.

Canada. — *St. Louis v. Citizens' Light, etc., Co.*, 13 Quebec K. B. 39, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1182.

The Payment of Interest on Bonds will not estop a municipality to show that the bonds were issued without authority and were therefore void. *Green County v. Shortell*, 116 Ky. 108.

1183. 1. Informal Exercise of Power Granted. — *Henderson County v. Travelers' Ins. Co.*, (C. C. A.) 128 Fed. Rep. 817; *King v. Superior*, (C. C. A.) 117 Fed. Rep. 113; *Kearny County v. Vandriess*, (C. C. A.) 115 Fed. Rep. 866; *Keith County v. Citizens' Sav., etc., Assoc.*, (C. C. A.) 116 Fed. Rep. 13; *Fairfield v. Rural Independent School Dist.*, (C. C. A.) 116 Fed. Rep. 839; *Westbrook v. Middlecoff*, 99 Ill. App. 327; *Drainage Com'rs v. Lewis*, 101 Ill. App. 150; *Marion Water Co. v. Marion*, 121 Iowa 306; *Chicago Lumber, etc., Co. v. Sugar Loaf Tp.*, 64 Kan. 163; *Tyler v. Tyler Bldg., etc., Assoc.*, (Tex. 1905) 86 S. W. Rep. 750; *Ogden City v. Bear Lake, etc., Waterworks, etc., Co.*, 28 Utah 25; *St. Louis v. Citizens' Light, etc., Co.*, 13 Quebec K. B. 39, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1183.

Where the Claimant Had Knowledge that the city was acting illegally in the exercise of power no estoppel arises. *Ft. Scott v. W. G. Eads Brokerage Co.*, (C. C. A.) 117 Fed. Rep. 51.

3. Unauthorized Acts of Officers and Agents. —

1183. *b.* ESTOPPEL OF PERSONS DEALING WITH CORPORATION. — See note 5.

21. Presumption of Knowledge of Limitations on Municipal Powers.

— See note 7.

1184. See note 1.

IX. MUNICIPAL PROPERTY — 2. Acquisition — a. IN GENERAL. —

See note 5.

1185. *b.* MANNER OF ACQUISITION. — See note 5.

1186. See note 1.

c. POWER TO TAKE AS TRUSTEE. — See note 4.

1187. *d.* CONVEYANCE ON CONDITION OR LIMITATION. — See note 1.

e. PROPERTY BEYOND CORPORATE LIMITS. — See notes 3, 4, 5.

3. Ownership and Control. — See note 8.

1188. **4. Disposition — a. IN GENERAL.** — See note 2.

b. PROPERTY HELD IN TRUST FOR THE PUBLIC. — See note 4.

Hope v. Alton, 214 Ill. 102; *Citizens' Bank v. Spencer*, 126 Iowa 101; *Wormstead v. Lynn*, 184 Mass. 425; *Indiana Road-Mach. Co. v. Sulphur Springs*, (Tex. Civ. App. 1901) 63 S. W. Rep. 908.

1183. 5. Estoppel of Party Dealing with Municipality.—*Unionville v. Martin*, 95 Mo. App. 28; *Madison v. American Sanitary Engineering Co.*, 118 Wis. 480.

7. Presumption—*United States*. — *Fairfield v. Rural Independent School Dist.*, 111 Fed. Rep. 453, reversed (C. C. A.) 116 Fed. Rep. 838.

Colorado. — *Sauer v. Gillett*, (Colo. App. 1904) 78 Pac. Rep. 1068.

Illinois. — *Hope v. Alton*, 214 Ill. 102.

Indiana. — *McKee v. Greensburg*, 160 Ind. 378; *Mann v. Rochester*, 29 Ind. App. 12.

Iowa. — *Citizens' Bank v. Spencer*, 126 Iowa 101.

Maryland. — *Mealey v. Hagerstown*, 92 Md. 741.

Minnesota. — *Jewell Belting Co. v. Bertha*, 91 Minn. 9, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1183. See also *Schmitz v. Zeh*, 91 Minn. 290.

Missouri. — *Thornburg v. School Dist. No. 3*, 175 Mo. 12.

North Carolina. — *Debnam v. Chitty*, 131 N. Car. 657.

North Dakota. — *Roberts v. Fargo*, 10 N. Dak. 230.

Ohio. — *Lower River Road Co. v. Cincinnati*, 13 Ohio Dec. 214; *Horstman v. Cincinnati St. R. Co.*, 12 Ohio Dec. 756.

Pennsylvania. — *O'Malley v. Olyphant*, 198 Pa. St. 525.

Texas. — *Peck v. Hempstead*, 27 Tex. Civ. App. 80; *Tyler v. Tyler Bldg., etc., Assoc.*, (Tex. 1905) 86 S. W. Rep. 750.

Wisconsin. — *Uncas Nat. Bank v. Superior*, 115 Wis. 340.

1184. 1. Citizens' Bank v. Spencer, 126 Iowa 101. See also *Hope v. Alton*, 214 Ill. 102.

Contract with President and Recorder of Village. — *Jewell Belting Co. v. Bertha*, 91 Minn. 9.

Contract for Longer Period than Allowed by Statute. — *Defiance v. Defiance Council*, 23 Ohio Cir. Ct. 96.

5. Property for Municipal Purposes. — *Santa Barbara v. Davis*, 142 Cal. 669; *State v. Barker*, 116 Iowa 96, 93 Am. St. Rep. 222; *Monroe v. Johnson*, 106 La. 350; *Gilbert v. Berlin*, 70 N.

H. 396; *Parker v. Concord*, 71 N. H. 468; *Rolling v. Lorain*, 13 Ohio Dec. 87; *Richmond v. Gallego Mills Co.*, 102 Va. 165; *Schneider v. Menasha*, 118 Wis. 298, 99 Am. St. Rep. 996.

Parks. — *Holburn v. Pfannmiller*, 114 Ky. 831; *Law v. San Francisco County*, 144 Cal. 384; *Vaughn v. Greencastle*, 104 Mo. App. 206.

Land for Wharf Purposes. — *Hafner v. St. Louis*, 161 Mo. 34.

Authority by Statute to Purchase Property for Library Purposes. — *Douglas v. Porter*, 14 Ohio Dec. 239.

1185. 5. Acquisition by Adverse Possession. — *Murphy v. Com.*, 187 Mass. 361.

1186. 1. No Power to Lease Turnpike. — *Lower River Road Co. v. Cincinnati*, 13 Ohio Dec. 214.

4. State v. Toledo, 23 Ohio Cir. Ct. 327.

1187. 1. Condition or Limitation as to Use. — See *Seattle Land, etc., Co. v. Seattle*, 37 Wash. 274.

3. Realty Beyond Corporate Limits. — See *Hafner v. St. Louis*, 161 Mo. 34. But see *Schneider v. Menasha*, 118 Wis. 298, 99 Am. St. Rep. 996.

4. State v. Superior Ct., 35 Wash. 303; *Hofner v. St. Louis*, 161 Mo. 34; *Butler v. Montclair*, 67 N. J. L. 426.

5. A City Having Authority to Build Drains has implied power to extend them beyond the corporate limits. *Minnesota, etc., Land, etc., Co. v. Billings*, (C. C. A.) 111 Fed. Rep. 972; *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133; *Richmond v. Gallego Mills Co.*, 102 Va. 165.

8. Right to Insure. — *French v. Millville*, 66 N. J. L. 392.

Power to Lease. — *Hirsch v. Brunswick*, 114 Ga. 776; *Morgan City v. Dalton*, 112 La. 9; *Murphy v. Com.*, 187 Mass. 361.

1188. 2. Power to Dispose of Property. — *Lake County Water, etc., Co. v. Walsh*, 160 Ind. 32, 98 Am. St. Rep. 264; *De Motte v. Valparaiso*, 161 Ind. 319.

Warranty. — A city may convey by warranty deed under charter authority to hold and convey real property. *Abbott v. Galveston*, 97 Tex. 474.

4. No Power to Alienate Property Held in Trust for Public. — *Murray v. Allegheny*, (C. C. A.) 136 Fed. Rep. 57; *District of Columbia v. Crowley*, 23 App. Cas. (D. C.) 232; *Lake County*

1189. *c.* DIVERSION TO PRIVATE USES. — See note 1.

d. MANNER OF DISPOSITION. — See note 2.

5. Liability to Execution, Garnishment, Etc. — *a.* IN GENERAL. —

See note 7.

1190. Property of a Public or Governmental Nature. — See note 1.

But the Private Property. — See note 2.

Doctrine that Municipal Property Not Liable. — See note 3.

1191. X. MUNICIPAL TORTS — 2. Doctrine that Liability Dependent Entirely on Statute. — See note 4.

3. Doctrine that Municipal Corporation Liable as Individual. — See note 5.

4. Distinction Between Public and Private Functions. — See note 6.

1192. 6. Proper Exercise of Lawful Power. — See note 2.

1193. See note 1.

7. Public or Governmental Functions or Duties — *a.* GENERALLY.

— See note 3.

Water, etc., *Co. v. Walsh*, 160 Ind. 32, 98 Am. St. Rep. 264.

The Legislature May Authorize the sale of public property. *Driscoll v. New Haven*, 75 Conn. 92.

1189. 1. Diversion to Private Uses. — *Murray v. Allegheny*, (C. C. A.) 136 Fed. Rep. 57; *Augusta v. Reynolds*, 122 Ga. 754, 106 Am. St. Rep. 147; *John Anisfield Co. v. Grossman*, 98 Ill. App. 180; *Heineck v. Grosse*, 99 Ill. App. 441; *Nerlein v. Brooten*, (Minn. 1905) 102 N. W. Rep. 867; *Rhinehart v. Redfield*, 93 N. Y. App. Div. 410, affirmed 179 N. Y. 569. Compare *Bryant v. Logan*, 56 W. Va. 141, holding that a city may lease a public park for the purpose of racing horses, reserving access at times to the public for riding and driving on the track.

Diversion to Other Public Use. — In *Seattle Land, etc., Co. v. Seattle*, 37 Wash. 274, it was held that property acquired by eminent domain for park purposes and paid for out of the general city fund may be put to an entirely different use suggested by the requirements of the city.

2. Covenants. — The power to transfer property by tax deed will not support an implication of authority to give covenants of title and quiet enjoyment, since such covenants are not essential to the validity of the conveyance. *Meday v. Rutherford*, 65 N. J. L. 645.

7. Exemption from Execution, Etc. — *Clarksdale Compress Co. v. Caldwell Co.*, 80 Miss. 343; *Brockenbrough v. Water Com'rs*, 134 N. Car. 1; *Board of Directors v. Bodkin*, 108 Tenn. 700.

Money Payable to Contractors by a city is not subject to garnishment. *Pringle v. Guild*, 118 Fed. Rep. 655.

1190. 1. Public Property Not Subject to Sale for Debts. — *Kerr v. New Orleans*, (C. C. A.) 126 Fed. Rep. 920; *Equitable Loan, etc., Co. v. Edwardsville*, (Ala. 1905) 38 So. Rep. 1016, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1190; *Monroe v. Johnson*, 106 La. 350; *Board of Directors v. Bodkin*, 108 Tenn. 700.

2. Private Property of Municipality. — *Kerr v. New Orleans*, (C. C. A.) 126 Fed. Rep. 920; *Equitable Loan, etc., Co. v. Edwardsville*, (Ala. 1905) 38 So. Rep. 1016, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1190.

3. Municipal Property in General Held Not

Liable to Execution, Etc. — See *Dolton v. Dolton*, 196 Ill. 154.

1191. 4. Liability Held Purely Statutory. — *Matheny v. Aiken*, 68 S. Car. 163; *Bryant v. Orangeburg*, 70 S. Car. 137. See also *Reeder v. Omaha*, (Neb. 1905) 103 N. W. Rep. 673.

5. Liability at Common Law. — See *O'Donnell v. White*, 23 R. I. 318.

6. Distinction Between Public and Private Functions — *United States*. — *Denver v. Porter*, (C. C. A.) 126 Fed. Rep. 288.

Arkansas. — *Collier v. Ft. Smith*, 73 Ark. 447, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1191.

Colorado. — *Veraguth v. Denver*, 19 Colo. App. 473.

Connecticut. — *Hourigan v. Norwich*, 77 Conn. 358.

Kansas. — *Swarz v. Ramala*, 63 Kan. 633.

Kentucky. — *Georgetown v. Com.*, 115 Ky. 382; *Clark v. Nicholasville*, (Ky. 1905) 87 S. W. Rep. 300.

New Hampshire. — *Rhobidas v. Concord*, 70 N. H. 90, 85 Am. St. Rep. 604.

New York. — *Barry v. Port Jervis*, 64 N. Y. App. Div. 268.

Ohio. — *Green v. Muskingum County*, 23 Ohio Cir. Ct. 43; *Rose v. Toledo*, 24 Ohio Cir. Ct. 540.

Oregon. — *Wagner v. Portland*, 40 Oregon 392.

Vermont. — *Stockwell v. Rutland*, 75 Vt. 76.

Washington. — *Lynch v. North Yakima*, 37 Wash. 657.

West Virginia. — *Shaw v. Charleston*, 57 W. Va. 433.

Wisconsin. — *Lowe v. Conroy*, 120 Wis. 151, 102 Am. St. Rep. 983.

1192. 2. Proper Exercise of Power — No Liability for Resulting Damage. — *Uppington v. New York*, 165 N. Y. 222.

1193. 1. Negligence in Exercise of Powers. — See *Uppington v. New York*, 165 N. Y. 222.

3. Injuries Resulting from Exercise of Governmental Functions — *United States*. — *U. S. v. Sault Ste. Marie*, 137 Fed. Rep. 258. See also *Denver v. Porter*, (C. C. A.) 126 Fed. Rep. 288.

Arkansas. — *Collier v. Ft. Smith*, 73 Ark. 447. See also *Gray v. Batesville*, (Ark. 1905) 86 S. W. Rep. 295.

Colorado. — *Veraguth v. Denver*, 19 Colo. App. 473.

1194. See notes 1, 3, 4, 5.

1195. *b.* ENFORCEMENT OF LAWS—CONDITION OF JAILS, PRISONS, ETC.—See notes 4, 5, 6.

c. ENFORCING VOID ORDINANCES.—See note 8.

1196: *d.* PUBLIC DUTY—PRIVATE INJURY.—See note 1.

f. DUTIES VOLUNTARILY UNDERTAKEN.—See note 4.

8. Private, Local, or Corporate Functions and Duties—*a.* IN GENERAL.—See note 7.

Connecticut.—Hourigan *v.* Norwich, 77 Conn. 358; Colwell *v.* Waterbury, 74 Conn. 568.

Georgia.—Augusta *v.* Little, 115 Ga. 124.

Indiana.—Vincennes *v.* Spees, (Ind. App. 1904) 72 N. E. Rep. 531; Aschoff *v.* Evansville, 34 Ind. App. 25; Williams *v.* Indianapolis, 26 Ind. App. 628.

Iowa.—McFadden *v.* Jewell, 119 Iowa 321, 97 Am. St. Rep. 321.

Kansas.—Swarz *v.* Ramala, 63 Kan. 633.

Kentucky.—Having *v.* Covington, (Ky. 1904) 78 S. W. Rep. 431, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1193; Lexington *v.* Batson, (Ky. 1904) 81 S. W. Rep. 264; Twyman *v.* Board of Councilmen, (Ky. 1904) 78 S. W. Rep. 447; Georgetown *v.* Com., 115 Ky. 382; Clark *v.* Nicholasville, (Ky. 1905) 87 S. W. Rep. 300.

Louisiana.—Blume *v.* New Orleans, 104 La. 345.

Massachusetts.—Butman *v.* Newton, 179 Mass. 1, 88 Am. St. Rep. 349; Kelley *v.* Boston, 186 Mass. 165; Rome *v.* Worcester, (Mass. 1905) 74 N. E. Rep. 370.

Missouri.—Ely *v.* St. Louis, 181 Mo. 723. See also Conner *v.* Nevada, 188 Mo. 148, 107 Am. St. Rep. 267.

New Hampshire.—See Rhobidas *v.* Concord, 70 N. H. 90, 85 Am. St. Rep. 604.

New York.—Munn *v.* Hudson, 61 N. Y. App. Div. 343; Uppington *v.* New York, 165 N. Y. 222. See also Dunstan *v.* New York, 91 N. Y. App. Div. 355.

North Carolina.—Levin *v.* Burlington, 129 N. Car. 184.

Ohio.—Rose *v.* Toledo, 24 Ohio Cir. Ct. 540; Green *v.* Muskingum County, 23 Ohio Cir. Ct. 43.

Oregon.—See Wagner *v.* Portland, 40 Oregon 392.

Pennsylvania.—Miller *v.* Hastings, 25 Pa. Super. Ct. 569.

Rhode Island.—Blair *v.* Granger, 24 R. I. 17.

Texas.—Butterworth *v.* Henrietta, 25 Tex. Civ. App. 467.

Vermont.—Stockwell *v.* Rutland, 75 Vt. 76.

Washington.—Lynch *v.* North Yakima, 37 Wash. 657; Simpson *v.* Whatcom, 33 Wash. 392, 99 Am. St. Rep. 951.

West Virginia.—Shaw *v.* Charleston, 57 W. Va. 433.

Wisconsin.—Lowe *v.* Conroy, 120 Wis. 151, 102 Am. St. Rep. 983.

1194. 1. Uppington *v.* New York, 165 N. Y. 222; Green *v.* Muskingum County, 23 Ohio Cir. Ct. 43; Lynch *v.* North Yakima, 37 Wash. 657. See also Dunstan *v.* New York, 91 N. Y. App. Div. 355.

Lynch *v.* North Yakima, 37 Wash. 657.

4. Exercise of Police Power.—St. Louis, etc., R. Co. *v.* Fayetteville, (Ark. 1905) 87 S. W. Rep. 1174. See also Williams *v.* Greenville, 130 N. Car. 93, 89 Am. St. Rep. 860.

5. Sanitary Regulations—Preventing Spread of Disease.—Lynch *v.* North Yakima, 37 Wash. 657.

Removal of Ashes and Garbage.—Compare Denver *v.* Porter, (C. C. A.) 126 Fed. Rep. 288.

Negligence of Physicians in City Hospital.—Williams *v.* Indianapolis, 26 Ind. App. 628.

1195. 4. Robertson *v.* Marion, 97 Ill. App. 332; Levin *v.* Burlington, 129 N. Car. 184.

5. Unhealthy Condition of Jail.—Levin *v.* Burlington, 129 N. Car. 184; Rose *v.* Toledo, 24 Ohio Cir. Ct. 540; Shaw *v.* Charleston, 57 W. Va. 433.

Unhealthy Condition of Pest House.—Lexington *v.* Batson, (Ky. 1904) 81 S. W. Rep. 264; Having *v.* Covington, (Ky. 1904) 78 S. W. Rep. 431; Twyman *v.* Board of Councilmen, (Ky. 1904) 78 S. W. Rep. 447.

City Hall.—Kelley *v.* Boston, 186 Mass. 165.

Negligence.—See Green *v.* Muskingum County, 23 Ohio Cir. Ct. 43.

6. Negligence of Officials.—Shaw *v.* Charleston, 57 W. Va. 433.

8. Enforcing Void Ordinances.—Simpson *v.* Whatcom, 33 Wash. 392, 99 Am. St. Rep. 951.

1196. 1. See Keeley *v.* Portland, (Me. 1905) 61 Atl. Rep. 180.

4. Voluntary Assumption of Duties.—Roberts *v.* Dover, 72 N. H. 147; Lockwood *v.* Dover, (N. H. 1905) 61 Atl. Rep. 32. See also Rhobidas *v.* Concord, 70 N. H. 90, 85 Am. St. Rep. 604.

7. Powers Given for Private or Local Purposes—United States.—Denver *v.* Porter, (C. C. A.) 126 Fed. Rep. 288.

Arkansas.—Collier *v.* Ft. Smith, 73 Ark. 447.

Colorado.—Veraguth *v.* Denver, 19 Colo. App. 473.

Connecticut.—Hourigan *v.* Norwich, 77 Conn. 358.

Idaho.—See Carson *v.* Genesee, 9 Idaho 244.

Illinois.—Chicago *v.* Selz, 104 Ill. App. 376, affirmed 202 Ill. 545; Chicago *v.* Murdock, 212 Ill. 9.

Indiana.—Aschoff *v.* Evansville, 34 Ind. App. 25.

Kansas.—Swarz *v.* Ramala, 63 Kan. 633.

Kentucky.—Twyman *v.* Board of Councilmen, (Ky. 1904) 78 S. W. Rep. 447; Having *v.* Covington, (Ky. 1904) 78 S. W. Rep. 431; Owensboro *v.* Knox, 116 Ky. 451. See also Georgetown *v.* Com., 115 Ky. 382.

Missouri.—See Conner *v.* Nevada, 188 Mo. 148, 107 Am. St. Rep. 267.

New Hampshire.—Lockwood *v.* Dover, (N. H. 1905) 61 Atl. Rep. 32. See also Rhobidas *v.*

1197. *b.* SUPPLYING WATER OR LIGHT. — See notes 2, 3, 4.

c. QUESTION OF PECUNIARY PROFIT. — See note 5.

1198. *9.* Legislative and Discretionary Functions — *a.* IN GENERAL. — See notes 1, 2.

b. FAILURE TO PASS OR ENFORCE ORDINANCES. — See notes 3, 5.

10. Ministerial Duties and Functions. — See note 6.

Concord, 70 N. H. 90, 85 Am. St. Rep. 604; Roberts *v.* Dover, 72 N. H. 147.

New York. — Barry *v.* Port Jervis, 64 N. Y. App. Div. 268; Dunstan *v.* New York, 96 N. Y. App. Div. 355.

Oregon. — Wagner *v.* Portland, 40 Oregon 392.

Vermont. — See Stockwell *v.* Rutland, 75 Vt. 76.

Corporate Duty Imposed by Law—City Not Liable. — Blair *v.* Granger, 24 R. I. 17.

1197. 2. Water or Light Supplied to Inhabitants. — Chicago *v.* Selz, 202 Ill. 545, affirming 104 Ill. App. 376; Aschoff *v.* Evansville, 34 Ind. App. 25; St. Germain *v.* Fall River, 177 Mass. 550; Dunston *v.* New York, 91 N. Y. App. Div. 355.

Collapse of Culvert. — Richmond *v.* Gallego Mills Co., 102 Va. 165.

Building and Maintaining Sewers. — See Lockwood *v.* Dover, (N. H. 1905) 61 Atl. Rep. 32; Sundheimer *v.* New York, 77 N. Y. App. Div. 53, reversed 176 N. Y. 495.

Lighting Streets. — See Vincennes *v.* Spees, (Ind. App. 1904) 72 N. E. Rep. 531.

3. Water for Fire Department Only. — U. S. *v.* Sault Ste. Marie, 137 Fed. Rep. 258; Aschoff *v.* Evansville, 34 Ind. App. 25; Allen, etc., Mfg. Co. *v.* Shreveport Waterworks Co., 113 La. 1091, 104 Am. St. Rep. 525, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1197. See also Dunstan *v.* New York, 91 N. Y. App. Div. 355.

A City Is Liable to One of Its Servants employed in the waterworks department, maintained for fire purposes and for the benefit of its inhabitants, for an injury received through the negligence of municipal officers or agents. Rhobidas *v.* Concord, 70 N. H. 90, 85 Am. St. Rep. 604.

Failure to Supply Sufficient Water. — A city which maintains waterworks for the supply of its inhabitants and for fire department purposes is not liable for a failure to supply the water necessary to save burning property. Butterworth *v.* Henrietta, 25 Tex. Civ. App. 467.

Water for Public Purposes Principally. — Where a city maintains waterworks partly for profit, it is liable for negligence in the management thereof, although the system is principally put to public uses. Chicago *v.* Selz, 104 Ill. App. 376, affirmed 202 Ill. 545.

4. Injuries in Management of Waterworks. — But see Rhobidas *v.* Concord, 70 N. H. 90, 85 Am. St. Rep. 604.

Injuries in Construction of Sewers. — Graves *v.* Olean, 64 N. Y. App. Div. 598.

5. Enterprises Undertaken for Pecuniary Profit. — Chicago *v.* Selz, 104 Ill. App. 376, affirmed 202 Ill. 545; Aschoff *v.* Evansville, 34 Ind. App. 25. See also Dunstan *v.* New York, 91 N. Y. App. Div. 355; Blair *v.* Granger, 24 R. I. 17. But see Kelley *v.* Boston, 186 Mass. 165.

1198. 1. Legislative and Judicial Functions

— *District of Columbia.* — District of Columbia *v.* Cropley, 23 App. Cas. (D. C.) 232.

Georgia. — Augusta *v.* Little, 115 Ga. 124; Dalton *v.* Wilson, 118 Ga. 100, 98 Am. St. Rep. 101.

Indiana. — Aschoff *v.* Evansville, 34 Ind. App. 25.

Kansas. — Bowden *v.* Kansas City, 69 Kan. 587.

Kentucky. — Louisville *v.* Norris, 111 Ky. 903, 98 Am. St. Rep. 437.

Maine. — Keeley *v.* Portland, (Me. 1905) 61 Atl. Rep. 180.

Massachusetts. — Hewett *v.* Canton, 182 Mass. 220.

Michigan. — Miller *v.* Kalamazoo, (Mich. 1905) 103 N. W. Rep. 845.

New Jersey. — Harrington *v.* Woodbridge Tp., 70 N. J. L. 28.

New York. — See Munn *v.* Hudson, 61 N. Y. App. Div. 343; Graves *v.* Olean, 64 N. Y. App. Div. 598.

North Carolina. — See Williams *v.* Greenville, 130 N. Car. 93, 89 Am. St. Rep. 860.

Pennsylvania. — Smith *v.* Selingsgrove, 199 Pa. St. 615.

Tennessee. — See Knoxville *v.* Klasing, 111 Tenn. 134.

Washington. — Lynch *v.* North Yakima, 37 Wash. 657; Simpson *v.* Whatcom, 33 Wash. 392, 99 Am. St. Rep. 951.

2. Continuing Injury. — Ahrens *v.* Rochester, 97 N. Y. App. Div. 480; O'Donnell *v.* Syracuse, 102 N. Y. App. Div. 80. See also Miles *v.* Brooklyn, 98 N. Y. App. Div. 195.

3. Failure to Pass or Enforce Ordinances. — Veraguth *v.* Denver, 19 Colo. App. 473; Arnold *v.* Stanford, 113 Ky. 852; Georgetown *v.* Com., 115 Ky. 382; Rogers *v.* Binghamton, 101 N. Y. App. Div. 352, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1198; Landau *v.* New York, 180 N. Y. 48, 105 Am. St. Rep. 709; McGuinness *v.* Allison Realty Co., (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 8; Bryant *v.* Orangeburg, 70 S. Car. 137.

Repeal of Ordinance. — Landau *v.* New York, 90 N. Y. App. Div. 50.

5. Indictment for Failure to Enact Ordinances. — See Dalton *v.* Wilson, 118 Ga. 100, 98 Am. St. Rep. 101.

6. Liability in Respect to Ministerial Duties. — Denver *v.* Porter, (C. C. A.) 126 Fed. Rep. 288; Dalton *v.* Wilson, 118 Ga. 100, 98 Am. St. Rep. 101; Murphy *v.* Indianapolis, 158 Ind. 238; Aschoff *v.* Evansville, 34 Ind. App. 25; Bowden *v.* Kansas City, 69 Kan. 587; Ely *v.* St. Louis, 181 Mo. 723; Snook *v.* Anaconda, 26 Mont. 128; Gordon *v.* Omaha, (Neb. 1904) 99 N. W. Rep. 242; Munn *v.* Hudson, 61 N. Y. App. Div. 343; Wagner *v.* Portland, 40 Oregon 392. See also Carson *v.* Genesee, 9 Idaho 244; Keeley *v.* Portland, (Me. 1905) 61 Atl. Rep. 180,

1199. 11. Plan of Public Work — Mode of Execution. — See notes 1, 2.

12. Torts of Officers, Agents, Employees, and Servants — *a.* IN GENERAL. — See note 5.

1200. *b.* ACTS DONE WITHIN SCOPE OF AUTHORITY. — See notes 1, 2.

c. ACTS DONE IN COURSE OF EMPLOYMENT. — See note 3.

1201. *d.* UNLAWFUL AND UNAUTHORIZED ACTS. — See notes 1, 4.

e. ACTS DONE COLORE OFFICII. — See notes 5, 6.

f. ULTRA VIRES ACTS. — See note 7.

1202. See note 3.

g. LIABILITY BY RATIFICATION. — See note 5.

The Theory. — See note 8.

1199. 1. Plan of Public Work. — District of Columbia *v.* Cropley, 23 App. Cas. (D. C.) 232; Augusta *v.* Little, 115 Ga. 124; Kemp *v.* Des Moines, 125 Iowa 640; Keeley *v.* Portland, (Me. 1905) 61 Atl. Rep. 180; Hewett *v.* Canton, 182 Mass. 220; Cooper *v.* Scranton City, 21 Pa. Super. Ct. 17. See also Roberts *v.* Dover, 72 N. H. 147; Graves *v.* Olean, 64 N. Y. App. Div. 598. But see Louisville *v.* Norris, 111 Ky. 903, 98 Am. St. Rep. 437, holding that if the plan adopted is bad, the city cannot escape liability by showing that the work was skilfully carried out; McDonald *v.* Duluth, 93 Minn. 206, holding a city liable for damages resulting from a defect in the plan adopted in the construction of a bridge, where the defect consisted of failure to construct and maintain a railing.

2. Bowden *v.* Kansas City, 69 Kan. 587; Ely *v.* St. Louis, 181 Mo. 723; Harrington *v.* Woodbridge Tp., 70 N. J. L. 28, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1199.

5. Responsibility Only for Acts of Officers, etc., Acting as Such — Illinois. — Chicago *v.* Murdock, 212 Ill. 9; Campbell *v.* Clinton, 94 Ill. App. 43.

Iowa. — McFadden *v.* Jewell, 119 Iowa 321, 97 Am. St. Rep. 321.

Kansas. — Fowler *v.* Kansas City, 64 Kan. 566.

Maine. — Bowden *v.* Rockland, 96 Me. 129.

New York. — McGuinness *v.* Allison Realty Co., (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 8.

Oregon. — Wagner *v.* Portland, 40 Oregon 392.

Washington. — Lynch *v.* North Yakima, 37 Wash. 657; Simpson *v.* Whatcom, 33 Wash. 392, 99 Am. St. Rep. 951; Normile *v.* Ballard, 33 Wash. 369. See also Copeland *v.* Seattle, 33 Wash. 415.

Contractors. — Foster *v.* Chicago, 197 Ill. 264; Lenderink *v.* Rockford, 135 Mich. 531; Uppington *v.* New York, 165 N. Y. 222. See also Thompson *v.* West Bay City, (Mich. 1904) 100 N. W. Rep. 280.

When work intrinsically dangerous, contracted for under the corporate power of a city, is done by an independent contractor, the city is liable for his negligence. Chicago *v.* Murdock, 212 Ill. 9.

Where the Relation of Master and Servant Is Shown to Exist a municipality is liable for the negligence of its servants while operating a vessel belonging to it. The Major Reybold, 111 Fed. Rep. 414.

1200. 1. Acts Within Scope of Authority. — Rhobidas *v.* Concord, 70 N. H. 90, 85 Am. St.

Rep. 604; Hathaway *v.* Osborne, 25 R. I. 249. See also Hunt *v.* Boston, 183 Mass. 303; Simpson *v.* Whatcom, 33 Wash. 392, 99 Am. St. Rep. 951.

Ministerial Duty of Officer — City Not Liable. — Gordon *v.* Omaha, (Neb. 1904) 99 N. W. Rep. 242.

Liability for Negligence of Officers in Care of Public Streets. — Kleopfert *v.* Minneapolis, 90 Minn. 158.

2. Acts Outside Scope of Authority. — Tyler *v.* Revere, 183 Mass. 98.

3. City Responsible for Negligence of Engineer Acting in Course of Duty. — Normile *v.* Ballard, 33 Wash. 369.

A Municipal Corporation Is Not Liable for the negligence of its agents in furnishing defective apparatus to one engaged in painting public buildings. Whitehead *v.* Board of Education, (Mich. 1904) 102 N. W. Rep. 1028.

1201. 1. Unlawful and Unauthorized Acts. — Langley *v.* Augusta, 118 Ga. 590, 98 Am. St. Rep. 133, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1201; Gardner *v.* St. Joseph, (Mo. 1902) 71 S. W. Rep. 63; Barger *v.* Hickory, 130 N. Car. 550; Briggs *v.* Allen, 24 R. I. 80; Simpson *v.* Whatcom, 33 Wash. 392, 99 Am. St. Rep. 951.

4. Acts Necessarily Done in Performance of Duty. — Langley *v.* Augusta, 118 Ga. 590, 98 Am. St. Rep. 133, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1201.

5. Unauthorized Acts Done Colore Officii. — O'Donnell *v.* White, 24 R. I. 483.

6. Authorized Acts Done Colore Officii. — Langley *v.* Augusta, 118 Ga. 590, 98 Am. St. Rep. 133, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1201. See also O'Donnell *v.* White, 24 R. I. 483.

7. Ultra Vires Acts. — Langley *v.* Augusta, 118 Ga. 590, 98 Am. St. Rep. 133, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1201; Roughton *v.* Atlanta, 113 Ga. 948; Arnold *v.* Stanford, 113 Ky. 852; Atwood *v.* Biddeford, 99 Me. 78; Briggs *v.* Allen, 24 R. I. 80.

1202. 3. A Municipality Which Has Assumed the Management of Work which, under the statute, should have been superintended by certain designated officers, is liable for the negligence of persons in its employ in the work. Butman *v.* Newton, 179 Mass. 1, 88 Am. St. Rep. 349.

5. Ultra Vires Acts Not Susceptible of Ratification. — Wilson *v.* Mitchell, 17 S. Dak. 515, 106 Am. St. Rep. 784.

8. See Wilson *v.* Mitchell, 7 S. Dak. 515, 106 Am. St. Rep. 784.

1203. 13. Acts of State or Public Officers or Agents — *a.* IN GENERAL. — See notes 1, 3.

b. OFFICERS APPOINTED BY CITY AUTHORITIES OR ELECTED THEREIN. — See note 6.

1204. *d.* POLICE. — See notes 3, 4.

1205. *e.* FIREMEN, FIRE DEPARTMENTS, ETC. — See notes 3, 6.

14. Liability of Municipal Corporations as Owners of Property. — See note 7.

1206. See notes 1, 3.

15. Liability for Mere Nonfeasance. — See notes 5, 8.

16. Liability for Damage Done by Mobs — *a.* IN GENERAL. — See note 9.

1207. See notes 1, 2, 4.

1208. *c.* SIZE AND CHARACTER OF MOB. — See note 5.

d. PROPERTY DESTROYED. — See note 6.

1203. 1. Officers Acting under Authority of State. — *Collier v. Ft. Smith*, 73 Ark. 447; *McFadden v. Jewell*, 119 Iowa 321, 97 Am. St. Rep. 321; *Georgetown v. Com.*, 115 Ky. 382; *Bowden v. Rockland*, 96 Me. 129; *Keeley v. Portland*, (Me. 1905) 61 Atl. Rep. 180; *Murray v. Omaha*, 66 Neb. 279, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1203; *Rose v. Toledo*, 24 Ohio Cir. Ct. 540; *Miller v. Hastings*, 25 Pa. Super. Ct. 569; *Lynch v. North Yakima*, 37 Wash. 657; *Simpson v. Whatcom*, 33 Wash. 392, 99 Am. St. Rep. 951; *Lowe v. Conroy*, 120 Wis. 151, 102 Am. St. Rep. 983. See also *Wagner v. Portland*, 40 Oregon 392.

3. Officer Not Subject to Municipal Control. — *Murray v. Omaha*, 66 Neb. 279, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1203.

6. Officers Appointed by Municipality. — *McFadden v. Jewell*, 119 Iowa 321, 97 Am. St. Rep. 321; *Swarz v. Ramala*, 63 Kan. 633; *Blair v. Granger*, 24 R. I. 17; *Rose v. Toledo*, 24 Ohio Cir. Ct. 540; *Simpson v. Whatcom*, 33 Wash. 392, 99 Am. St. Rep. 951; *Manske v. Milwaukee*, 123 Wis. 172.

1204. 3. Police Officers. — *Robertson v. Marion*, 97 Ill. App. 332; *Rose v. Toledo*, 24 Ohio Cir. Ct. 540; *Simpson v. Whatcom*, 33 Wash. 392, 99 Am. St. Rep. 951.

4. *Simpson v. Whatcom*, 33 Wash. 392, 99 Am. St. Rep. 951. See also *Robertson v. Marion*, 97 Ill. App. 332.

1205. 3. Firemen. — *Blankenship v. Sherman*, 33 Tex. Civ. App. 507; *Lynch v. North Yakima*, 37 Wash. 657; *Manske v. Milwaukee*, 123 Wis. 172, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1205. See also *Chicago v. Selz*, 202 Ill. 545.

6. Repairing Fire Alarm. — See *Wagner v. Portland*, 40 Oregon 392.

7. Liability of Municipality as Property Owner. — *Bowden v. Kansas City*, 69 Kan. 587; *Westcott v. Boston*, 186 Mass. 540; *Winnemore v. Philadelphia*, 18 Pa. Super. Ct. 625; *Powers v. Philadelphia*, 18 Pa. Super. Ct. 621. See also *Keeley v. Portland*, (Me. 1905) 61 Atl. Rep. 180.

1206. 1. *Powers v. Philadelphia*, 18 Pa. Super. Ct. 621.

3. Compare *Fox v. Philadelphia*, 208 Pa. St. 127.

Throwing Snow from Roof. — The act of a city employee in throwing snow from the roof of the city hall has been held not to render the

city liable for damages resulting therefrom notwithstanding the fact that departments collecting revenue for the city were housed in the building free of rent. *Kelley v. Boston*, 186 Mass. 165.

5. No Liability for Mere Nonfeasance. — *Chicago v. Rustin*, 99 Ill. App. 47; *Rogers v. Binghamton*, 101 N. Y. App. Div. 352; *Bryant v. Orangeburg*, 70 S. Car. 137.

No Liability for Failure to Light Streets. — *Daytona v. Edson*, (Fla. 1903) 34 So. Rep. 954.

8. *Daytona v. Edson*, (Fla. 1903) 34 So. Rep. 954; *Smith v. Selinsgrove*, 199 Pa. St. 615.

9. Damage by Mobs — Liability at Common Law. — *Iola v. Birnbaum*, (Kan. 1905) 81 Pac. Rep. 198, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1206.

1207. 1. Statutory Liability for Damage by Mobs. — *Chicago v. Pennsylvania Co.*, (C. C. A.) 119 Fed. Rep. 497; *Madisonville v. Bishop*, 113 Ky. 106; *Marshall v. Buffalo*, 63 N. Y. App. Div. 603, affirmed 176 N. Y. 545.

Evidence. — A claim against a city for damage done by a mob must be established with reasonable certainty as to the amount of loss. *Fink v. New Orleans*, 110 La. 84.

2. Statutory Liability Independent of Negligence. — *Iola v. Birnbaum*, (Kan. 1905) 81 Pac. Rep. 198.

Under the Illinois statute a city is liable for damage done by a mob though it used every possible means to save the property. *Chicago v. Pennsylvania Co.*, (C. C. A.) 119 Fed. Rep. 497.

4. Constitutionality of Statutes. — *Iola v. Birnbaum*, (Kan. 1905) 81 Pac. Rep. 198.

1208. 5. Character of Mob. — A statute making a city liable for injuries done by a "riotous or tumultuous assemblage" applies though the mob in question was engaged in the celebration of Christmas and was acting without wrongful intent. *Madisonville v. Bishop*, 113 Ky. 106.

The Absence of Noise or Rioting by the mob is no defense on the part of the city. *Marshall v. Buffalo*, 63 N. Y. App. Div. 603, affirmed 176 N. Y. 545.

6. Property in Transitu. — Freight cars stored by a railroad company in its yards while awaiting use are not in transit, and a recovery may be had for their destruction by a mob. *Chicago v. Pennsylvania Co.*, (C. C. A.) 119 Fed. Rep. 497.

1209. 17. Negligence. — See notes 1, 2.

18. Nuisances. — See notes 3, 4, 6, 7, 8.

XI. GOVERNING BODIES — 1. In General. — See note 9.

1210. 3. Organization and Constitution — Governing Body in Two Branches. — See note 4.*

4. Mode of Action — *a.* IN GENERAL. — See notes 6, 8.

Must Act in Manner Prescribed. — See notes 9, 10.

"Injury to Life or Limb" is construed to apply to all bodily injuries, and is not limited to those resulting in death or loss of limb. *Iola v. Birnbaum*, (Kan. 1905) 81 Pac. Rep. 198.

1209. 1. *Moreton v. St. Anthony*, 9 Idaho 532; *Knouff v. Logansport*, 26 Ind. App. 202, 84 Am. St. Rep. 292; *Anderson v. Pierce*, 68 Kan. 57; *Kansas City v. Gilbert*, 65 Kan. 469; *Campbell v. Stanberry*, 105 Mo. App. 56. See also *Honickson v. Philadelphia*, 28 Pa. Co. Ct. 506.

2. *Chicago v. Rustin*, 99 Ill. App. 47; *Kluska v. Chicago*, 97 Ill. App. 666; *Carey v. Kansas City*, 187 Mo. 715; *Rhine v. Philadelphia*, 24 Pa. Super. Ct. 564; *Honickson v. Philadelphia*, 28 Pa. Co. Ct. 506. See also *Foley v. New York*, 95 N. Y. App. Div. 374.

3. Nuisances — *Alabama*. — *Birmingham v. Land*, 137 Ala. 538.

Georgia. — *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133; *Holmes v. Atlanta*, 113 Ga. 961.

Iowa. — *Vogt v. Grinnell*, 123 Iowa 332; *Sudeth v. Boone*, 121 Iowa 258; *Pettit v. Grand Junction*, 119 Iowa 352.

Kentucky. — *Georgetown v. Com.*, 115 Ky. 382, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1209; *Glasgow v. Gillenwaters*, 113 Ky. 140. See also *Louisville v. Norris*, 111 Ky. 903, 98 Am. St. Rep. 437.

Missouri. — *Smith v. Sedalia*, 182 Mo. 1. *New York*. — *Landau v. New York*, 180 N. Y. 48, 105 Am. St. Rep. 709; *Munn v. Hudson*, 61 N. Y. App. Div. 343; *Hentz v. Mt. Vernon*, 78 N. Y. App. Div. 515.

South Carolina. — *Matheny v. Aiken*, 68 S. Car. 163.

Tennessee. — *Kolb v. Knoxville*, 111 Tenn. 311; *Knoxville v. Klasing*, 111 Tenn. 134.

Texas. — *Stephenville v. Bower*, (Tex. Civ. App. 1902) 68 S. W. Rep. 833.

Virginia. — *Richmond v. Smith*, 101 Va. 161.

Wisconsin. — *Winchell v. Waukesha*, 110 Wis. 101, 84 Am. St. Rep. 902.

Remedy of Injunction. — *Waycross v. Houk*, 113 Ga. 963; *Sammons v. Gloversville*, 175 N. Y. 346; *Coleman v. New York*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 664, reversed 70 N. Y. App. Div. 218.

Injunction Against Creation of Nuisance. — *Rolling v. Lorain*, 13 Ohio Dec. 87.

City May Not Authorize Nuisance. — *Alexander v. Cincinnati*, etc., R. Co., 14 Ohio Dec. 102.

Ultra Vires Act. — Where the act creating the nuisance is *ultra vires* the city cannot be held liable. *Atwood v. Biddeford*, 99 Me. 78.

4. *Georgetown v. Com.*, 115 Ky. 382, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1209; *Kolb v. Knoxville*, 111 Tenn. 311. See also *Smith v. Davis*, 22 App. Cas. (D. C.) 208.

6. *Dalton v. Wilson*, 118 Ga. 100, 98 Am. St. Rep. 101; *Georgetown v. Com.*, 115 Ky. 382,

quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1209; *Board of Councilmen v. Com.*, (Ky. 1903) 75 S. W. Rep. 217; *Rogers v. Binghamton*, 101 N. Y. App. Div. 352; *Miller v. Newport News*, 101 Va. 432. But see *Smith v. Davis*, 22 App. Cas. (D. C.) 298; *Richmond v. Smith*, 101 Va. 161.

7. *Georgetown v. Com.*, 115 Ky. 382, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1209. See also *Dalton v. Wilson*, 118 Ga. 100, 98 Am. St. Rep. 101.

8. *Georgetown v. Com.*, 115 Ky. 382, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1209.

9. *Bybee v. Smith*, (Ky. 1901) 61 S. W. Rep. 15; *Atty.-Gen. v. Trehy*, 178 Mass. 186; *Pollasky v. Schmid*, 128 Mich. 699, 92 Am. St. Rep. 560; *Jewell Belting Co. v. Bertha*, 91 Minn. 9; *Zumstein v. Mullen*, 67 Ohio St. 382.

The "Common Council or Other Governing Body," as the term is used in the *New Jersey* statutes, means, with reference to *Jersey City*, the board of aldermen. *Fitzgerald v. Jersey City*, 69 N. J. L. 152.

Acts of Council — Presumption of Good Faith. — *Buffalo v. Hill*, 79 N. Y. App. Div. 402.

1210. 4. *Hilgert v. Barber Asphalt Paving Co.*, 107 Mo. App. 385.

6. *Pennsylvania Co. v. Cole*, 132 Fed. Rep. 668; *Root v. Topeka*, 63 Kan. 129; *Bybee v. Smith*, (Ky. 1901) 61 S. W. Rep. 15; *Rolling v. Lorain*, 13 Ohio Dec. 87; *Fitzgerald v. Pawtucket St. R. Co.*, 24 R. I. 201; *Benwood v. Wheeling R. Co.*, 53 W. Va. 465; *Kleimenhagen v. Dixon*, 122 Wis. 526. See also *Moore v. Perry*, 119 Iowa 423.

8. *Root v. Topeka*, 63 Kan. 129; *Rolling v. Lorain*, 13 Ohio Dec. 87; *Com. v. Hitchens*, 12 Pa. Dist. 752.

Must Act in Conjunction with Mayor. — *Golden v. Toluca*, 108 Ill. App. 467.

9. **Must Act in Manner Prescribed.** — *Holst v. Savannah Electric Co.*, 131 Fed. Rep. 931, reversed (C. C. A.) 132 Fed. Rep. 901; *Citizens' Bank v. Spencer*, 126 Iowa 101; *Root v. Topeka*, 63 Kan. 129; *Essen v. Cape May*, (N. J. 1905) 60 Atl. Rep. 1131; *Platt v. Englewood*, 68 N. J. L. 231; *People v. Geneva*, 98 N. Y. App. Div. 383.

10. **Ordinance or By-law Required** — *United States*. — *Holst v. Savannah Electric Co.*, 131 Fed. Rep. 931, reversed (C. C. A.) 132 Fed. Rep. 901; *Morristown v. East Tennessee Telephone Co.*, (C. C. A.) 115 Fed. Rep. 304.

Colorado. — *Sauer v. Gillett*, (Colo. App. 1904) 78 Pac. Rep. 1068.

Indiana. — *Meyer v. Boonville*, 162 Ind. 165.

Iowa. — *Martin v. Oskaloosa*, 126 Iowa 680; *Citizens' Bank v. Spencer*, 126 Iowa 101; *Markham v. Anamosa*, 122 Iowa 689.

Kansas. — *Root v. Topeka*, 63 Kan. 120.

Missouri. — *Unionville v. Martin*, 95 Mo.

1211. See note 1.

b. MEETINGS — (1) *In General*. — See note 3.

(2) *General and Special Meetings*. — See note 5.

(3) *Notice of Meetings*. — See note 7.

1212. See notes 1, 2, 3.

(4) *Adjourned Meetings*. — See note 5.

(5) *Presumption of Regularity*. — See notes 6, 7.

c. QUORUM — (1) *In General*. — See notes 8, 9, 10. See also the title *QUORUM*.

1213. (2) *Majority of Quorum*. — See notes 2, 3.

App. 28; *Tarkio v. Clark*, 186 Mo. 285. See also *State v. Allen*, 178 Mo. 555.

New Jersey. — *Platt v. Englewood*, 68 N. J. L. 231; *Essen v. Cape May*, (N. J. 1905) 60 Atl. Rep. 1131.

New York. — *People v. Geneva*, 98 N. Y. App. Div. 383.

Ohio. — See also *Erie R. Co. v. Youngstown*, 26 Ohio Cir. Ct. 679.

Pennsylvania. — *Philipsburg v. Way*, 12 Pa. Dist. 173. See also *Central Valley R. Co. v. Pittston*, 13 Pa. Dist. 675.

Texas. — *Mills v. San Antonio*, (Tex. Civ. App. 1901) 65 S. W. Rep. 1121; *Tyler v. Tyler*, Bldg., etc., Assoc., (Tex. 1905) 86 S. W. Rep. 750.

1211. 1. Action by Resolution, Order, or Motion. — *Holst v. Savannah Electric Co.*, 131 Fed. Rep. 931, *reversed* (C. C. A.) 132 Fed. Rep. 901; *Earl v. Bowen*, 146 Cal. 754; *London Mills v. Fairview-London Telephone Circuit*, 105 Ill. App. 146, *affirming* 208 Ill. 289; *Shelby v. Burlington*, 125 Iowa 343; *State v. Allen*, 178 Mo. 555; *Central Valley R. Co. v. Pittston*, 13 Pa. Dist. 675; *Ogden City v. Bear Lake*, etc., *Waterworks, etc., Co.*, 28 Utah 25. See also *Martin v. Oskaloosa*, 126 Iowa 680; *Langan v. Bitzer*, (Ky. 1904) 82 S. W. Rep. 280; *Fox v. Clark*, (N. J. 1904) 59 Atl. Rep. 224; *Ehrhardt v. Seattle*, 33 Wash. 664.

In Respect to Legislative Matters a municipality in *Iowa* can act by ordinance only. *Martin v. Oskaloosa*, (Iowa 1904) 99 N. W. Rep. 557.

3. Under Statute. — Meetings cannot be held in a manner other than that provided by statute. *Kleimenhagen v. Dixon*, 122 Wis. 526.

5. Special Meetings. — *Sommercamp v. Kelly*, 8 Idaho 712; *Mills v. San Antonio*, (Tex. Civ. App. 1901) 65 S. W. Rep. 1121.

7. Adjourned Meeting — Notice Not Necessary. — *Com. v. Fleming*, 23 Pa. Super. Ct. 404.

1212. 1. Notice Not Legally Practicable. — In *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647, it was held that where notice to an alderman is not legally practicable an ordinance passed at a special meeting of which he was not notified is not for that reason invalid; and the question of practicability is one of mixed law and fact.

2. Notice Must Specify Purposes of Meeting. — *Mills v. San Antonio*, (Tex. Civ. App. 1901) 65 S. W. Rep. 1121.

Example of Sufficient Notice. — See *Richardson v. Omaha*, (Neb. 1905) 104 N. W. Rep. 172.

3. Moore v. Perry, 119 Iowa 423. See also *Schofield v. Tampico*, 98 Ill. App. 324; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647.

Absence of One Member, Though Not Notified,

Immaterial. — *State v. Bowers*, 26 Ohio Cir. Ct. 326.

Absence of Call. — Any business not involving the creation of an indebtedness may be transacted at a meeting from which one of the councilmen was absent although a call was not made in writing as required by statute. *Sommercamp v. Kelly*, 8 Idaho 712.

5. Adjourned Meeting. — *Com. v. Fleming*, 23 Pa. Super. Ct. 404.

Less than a Quorum of a city council cannot, it has been held, adjourn a meeting to a subsequent date. *Pennsylvania Co. v. Cole*, 132 Fed. Rep. 668.

Extrinsic Evidence is inadmissible to show that a meeting was adjourned to a day different from that appearing in the record. *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931.

Notice of an Adjourned Meeting is unnecessary where all of the trustees were present at a previous regular meeting at which the adjournment was taken and at which the matter passed upon at the adjourned meeting was under consideration. *Tonawanda v. Price*, 171 N. Y. 415.

Adjournment by Mayor. — The mayor has no authority to adjourn a meeting without the consent of a majority of the council where it does not appear that it was impossible to preserve order. *Atty.-Gen. v. Remick*, (N. H. 1904) 58 Atl. Rep. 871.

6. Presumption of Regularity. — *Fletcher v. Hickman*, (C. C. A.) 136 Fed. Rep. 568.

7. Moore v. Perry, 119 Iowa 423. See also *Fletcher v. Hickman*, (C. C. A.) 136 Fed. Rep. 568.

8. Quorum. — Where a majority of the members of the council is made a quorum by statute the presiding officer, who is not a member, and one-half of the councilmen are not a quorum. *Bybee v. Smith*, (Ky. 1901) 61 S. W. Rep. 15.

Less than a Quorum of a city council cannot take any valid municipal action. *Benwood v. Wheeling R. Co.*, 53 W. Va. 465.

9. Matter of Brearton, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 247.

10. Majority. — *People v. Wright*, 30 Colo. 439, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1212; *McChesney v. Chicago*, 201 Ill. 344; *Murdoch v. Strange*, 99 Md. 89.

1213. 2. Thurston v. Huston, 123 Iowa 157; *Murdoch v. Strange*, 99 Md. 89; *Atty.-Gen. v. Remick*, 71 N. H. 480; *Matter of Brearton*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 247; *Schweers v. Muhlenberg*, 19 Pa. Super. Ct. 388; *Com. v. Fleming*, 23 Pa. Super. Ct. 404.

3. Atty.-Gen. v. Remick, 71 N. H. 480; *Mat-*

1213. *d.* RULES OF PROCEDURE — (1) *In General.* — See notes 4, 5.
(2) *Suspension of Rules.* — See note 6.

1214. *e.* AYES AND NAYS — (1) *In General.* — See note 2.
(2) *Extrinsic Evidence of.* — See note 3.

* *f.* QUALIFICATIONS OF MEMBERS — (1) *In General.* — See notes 4, 5.

(2) *Interest.* — See note 7.

1215. *g.* CHIEF OFFICER — NECESSITY FOR PRESENCE OF. — See notes 3, 4, 6, 8.

h. PUBLICATION OF PROCEEDINGS. — See note 9.

1216. 5. Reconsideration, Rescission of Former Action, Etc. — *a.* IN GENERAL. — See notes 1, 2.

XII. COMMITTEES, OFFICERS, AND AGENTS — 1. In General. — See note 5.

1217. 2. Must Act Within Scope of Powers. — See note 2.

ter of Brearton, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 247; *Com. v. Fleming*, 23 Pa. Super. Ct. 404.

A Blank Ballot is to be counted in determining whether a majority of the votes cast are in favor of a certain motion. *Murdoch v. Strange*, 99 Md. 89.

1213. 4. Power to Make Rules of Procedure. — *Carbondale v. Wade*, 106 Ill. App. 654, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1213. See also *Chicago Telephone Co. v. Northwestern Telephone Co.*, 199 Ill. 324.

5. See *Landes v. State*, 160 Ind. 479.

6. Suspension of Rules. — *Thompson v. Alameda*, 144 Cal. 281; *Corry v. Corry Chair Co.*, 18 Pa. Super. Ct. 271. But see *Carbondale v. Wade*, 106 Ill. App. 654.

Waiver of Rules. — *Sedalia v. Scott*, 104 Mo. App. 595.

1214. 2. *Schofield v. Tampico*, 98 Ill. App. 324; *Markham v. Anamosa*, 122 Iowa 689; *Marion Water Co. v. Marion*, 121 Iowa 306; *Hicks v. Long Branch Commission*, 69 N. J. L. 303, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1214; *Pickton v. Fargo*, 10 N. Dak. 469.

Unanimous Vote. — See *Goodyear Rubber Co. v. Eureka*, 135 Cal. 613.

3. Extrinsic Evidence Incompetent. — *Hicks v. Long Branch Commission*, 69 N. J. L. 303; *Pickton v. Fargo*, 10 N. Dak. 469.

4. Qualifications of Members. — *Evanston v. Carroll*, 92 Ill. App. 495; *Sheridan v. St. Louis*, 183 Mo. 25.

Election of Alderman. — *Garms v. People*, 108 Ill. App. 631.

5. Quo Warranto. — See *Evanston v. Carroll*, 92 Ill. App. 495.

Filling Vacancies. — The house of delegates of St. Louis, Mo., has no power to fill a vacancy made by the ouster of a delegate declared by it to be ineligible, by declaring one receiving the next highest number of votes elected. *Sheridan v. St. Louis*, 183 Mo. 25.

7. For Instances of Interest Held Not Disqualifying. — *Hicks v. Long Branch Commission*, 69 N. J. L. 300; *Erie City v. Grant*, 24 Pa. Super. Ct. 109; *Shitzker v. Altoona*, 27 Pa. Co. Ct. 10.

1215. 3. *Frost v. Board of Review*, 113 Iowa 547; *Com. v. Williams*, (Ky. 1905) 86 S. W. Rep. 553; *Bybee v. Smith*, (Ky. 1901)

61 S. W. Rep. 15; *Bousquet v. State*, 78 Miss. 478; *People v. Bresler*, 171 N. Y. 302; *McCourt v. Beam*, 42 Oregon 41.

Mayor Must Preside When Present. — *Golden v. Toluca*, 108 Ill. App. 467.

4. Tie Vote. — *Com. v. Williams*, (Ky. 1905) 86 S. W. Rep. 553; *Bybee v. Smith*, (Ky. 1901) 61 S. W. Rep. 15; *Hecht v. Coale*, 93 Md. 692; *Atty.-Gen. v. Remick*, 71 N. H. 480; *Armstrong v. Whitehead*, 67 N. J. L. 406; *People v. Bresler*, 171 N. Y. 302, *affirming* 70 N. Y. App. Div. 294; *McCourt v. Beam*, 42 Oregon 41; *State v. Mott*, 111 Wis. 19.

Making and Deciding Tie. — The mayor cannot vote, thereby making a tie, and then cast a second vote to decide the tie. *Bousquet v. State*, 78 Miss. 478; *Ott v. State*, 78 Miss. 487.

Mayor Pro Tem. — One elected to act temporarily as mayor is entitled to vote on any question whether there is a tie or not. *Harris v. People*, 18 Colo. App. 160.

Mayor as Member. — Under the Iowa statute making the mayor a member of the city council the mayor, though only voting in case of a tie, is to be counted in determining whether there has been a three-fourths vote upon a given question. *Griffin v. Messenger*, 114 Iowa 99.

6. Chief Officer Not Member of Board. — *Bousquet v. State*, 78 Miss. 478.

8. Chesapeake, etc., R. Co. v. Maysville, (Ky. 1902) 69 S. W. Rep. 728. See also *Frost v. Board of Review*, 113 Iowa 547.

9. *Reed v. Louisville*, (Ky. 1901) 61 S. W. Rep. 11.

1216. 1. Power to Reconsider and Rescind. — *Greenwood v. State*, 159 Ind. 267, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1215, 1216.

Reformation of Contract. — *McManus v. Philadelphia*, 211 Pa. St. 394.

2. *In re Fitzgerald*, (County Ct.) 82 N. Y. Supp. 811 (appointment to office).

5. May Appoint Committees and Agents. — *Atty.-Gen. v. Trehy*, 178 Mass. 186; *Dancer v. Mannington*, 50 W. Va. 322.

1217. 2. What Acts Bind the Corporation — *Connecticut.* — *Driscoll v. New Haven*, 75 Conn. 92.

Illinois. — *Carbondale v. Wade*, 106 Ill. App. 654, *citing* 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1217; *Chicago v. Hannon*, 115 Ill. App. 183.

1217. 3. Delegation of Powers — a. GOVERNMENTAL AND DISCRETIONARY FUNCTIONS. — See note 3.

1218. b. MINISTERIAL OR ADMINISTRATIVE FUNCTIONS. — See note 1.

4. How Committee Must Act. — See note 2.

XIII. LEGISLATIVE CONTROL OF MUNICIPAL CORPORATIONS — 1. In General. — See note 3.

1219. Legislation Delegated to Municipality May Be Resumed. — See note 1.

Requirement as to Title of Statutes. — See note 2.

2. Purely Local Matters. — See notes 3, 4, 5.

1220. See notes 1, 2.

Iowa. — *Marion Water Co. v. Marion*, 121 Iowa 306; *Burge v. Rockwell City*, 120 Iowa 495.

Kentucky. — *Louisville v. Louisville R. Co.*, 111 Ky. 1, 98 Am. St. Rep. 387.

Minnesota. — *Jewell Belting Co. v. Bertha*, 91 Minn. 9.

New Jersey. — *Jersey City Supply Co. v. Jersey City*, 71 N. J. L. 631.

Ohio. — *Horstman v. Cincinnati St. R. Co.*, 12 Ohio Dec. 756.

South Dakota. — *Wilson v. Mitchell*, 17 S. Dak. 515, 106 Am. St. Rep. 784.

Tennessee. — *Nash v. Knoxville*, 108 Tenn. 68.

Texas. — *Galveston v. Hutches*, (Tex. Civ. App. 1903) 76 S. W. Rep. 214; *Indiana Road-Mach. Co. v. Sulphur Springs*, (Tex. Civ. App. 1901) 63 S. W. Rep. 908; *Tyler v. Adams*, (Tex. Civ. App. 1901) 62 S. W. Rep. 119.

1217. 3. Governmental and Discretionary Functions Cannot Be Delegated. — *Illinois.* — *Johnson v. People*, 202 Ill. 306; *Chicago v. Chicago Union Traction Co.*, 199 Ill. 259; *People v. Birch*, 201 Ill. 81; *De Witt County v. Clinton*, 194 Ill. 521; *Carbondale v. Wade*, 106 Ill. App. 654.

Iowa. — *Burge v. Rockwell City*, 120 Iowa 495.

Kentucky. — *Lowery v. Lexington*, 116 Ky. 157.

Minnesota. — *Jewell Belting Co. v. Bertha*, 91 Minn. 9.

Missouri. — *State v. St. Louis*, 161 Mo. 371; *Ayers v. Schmohl*, 86 Mo. App. 349.

Vermont. — *Blanchard v. Barre*, 77 Vt. 420.

Virginia. — *Roanoke v. Bolling*, 101 Va. 182.

West Virginia. — *Dancer v. Mannington*, 50 W. Va. 322.

Wisconsin. — *Shelby v. Miller*, 114 Wis. 660.

An Ordinance Empowering the Mayor to Compel the Muzzling of Dogs when danger from hydrophobia threatens does not constitute a delegation of legislative power. *Walker v. Towle*, 156 Ind. 639.

Legislative or Discretionary Powers Cannot Be Contracted Away. — *Macon Consol. St. R. Co. v. Macon*, 112 Ga. 782.

1218. 1. Ministerial Functions May Be Delegated. — *Walker v. Towle*, 156 Ind. 639; *Burge v. Rockwell City*, 120 Iowa 495, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1219 [1218]; *Green County v. Shortell*, 116 Ky. 108; *Rich v. Woods*, (Ky. 1904) 82 S. W. Rep. 578; *Jewell Belting Co. v. Bertha*, 91 Minn. 9; *Dancer v. Mannington*, 50 W. Va. 322. See also *Goodyear Rubber Co. v. Eureka*, 135 Cal. 613.

2. Committee Must Act in Body. — *Kavanaugh v. Wausau*, 120 Wis. 611.

3. Power of Legislation — United States. — *Pepin Tp. v. Sage*, (C. C. A.) 129 Fed. Rep. 657. *Arkansas.* — *Little Rock v. North Little Rock*, 72 Ark. 195.

Illinois. — *People v. Binns*, 192 Ill. 68; *Chicago v. Cook County*, 106 Ill. App. 47.

Iowa. — *State v. Barker*, 16 Iowa 96, 93 Am. St. Rep. 222.

Kansas. — *Little River Tp. v. Reno County*, 65 Kan. 9.

Kentucky. — *Lexington v. Thompson*, 113 Ky. 540.

Nebraska. — *Redell v. Moores*, 63 Neb. 219.

New York. — *Ryan v. New York*, 177 N. Y. 271; *Henderson v. New York*, 65 N. Y. App. Div. 180.

North Carolina. — *Brockenbrough v. Water Com'rs*, 134 N. Car. 1.

Pennsylvania. — *Com. v. Moir*, 199 Pa. St. 534, 85 Am. St. Rep. 801.

Wisconsin. — See *Oshkosh Waterworks Co. v. Oshkosh*, 109 Wis. 208, 95 Am. St. Rep. 870.

1219. 1. Legislature May Not Permanently Divest Itself of Its Powers. — *New England Telephone, etc., Co. v. Boston Terminal Co.*, 182 Mass. 397.

Repeal of Municipal Powers. — Authority to contract for lighting streets for a period not exceeding five years is not repealed by a subsequent statute authorizing a contract for lighting with a "private company," as the two grants are not inconsistent. *State v. Avon-by-the-Sea*, 68 N. J. L. 243.

2. Title of Statutes. — *Wenk v. New York*, 82 N. Y. App. Div. 584. See also *Boorum v. Connelly*, 66 N. J. L. 197, 88 Am. St. Rep. 469.

3. State Cannot Control Purely Local Concerns. — *State v. Fox*, 158 Ind. 126; *State v. Barker*, 116 Iowa 96, 93 Am. St. Rep. 222; *Lexington v. Thompson*, 113 Ky. 540; *People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605; *Ex p. Lewis*, 45 Tex. Crim. 1. See also *Paye v. Grosse Pointe Tp.*, 134 Mich. 524.

4. Local Self-Government Guaranteed by Spirit of Constitution. — *Ex p. Lewis*, 45 Tex. Crim. 1.

5. Powers Reserved under Constitution. — *Lexington v. Thompson*, 113 Ky. 540.

1220. 1. Prohibition on Special Legislation. — See *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 183, holding that a statute creating a sewerage district did not violate the constitutional provision prohibiting special legislation regulating the internal affairs of towns and counties.

2. Legislation May Regulate Local Affairs. — *Adams v. Kuykendall*, 83 Miss. 571.

- 1220.** 3. Matters of Public Concern. — See note 3.
 4. Control over Municipal Property — *a.* IN GENERAL. — See notes 4, 5, 6.
1222. 5. Municipal Revenues. — See notes 1, 2.
 6. Municipal Contracts — Vested Rights — *a.* IN GENERAL. — See note 3.
a. PAYMENT OF DEBTS. — See note 8.
1223. See note 3.
 7. Municipal Officers. — See notes 5, 6.
1224. See notes 1, 5.
 8. Consolidation, Merger, and Division — *a.* GENERALLY. — See note 7.
1225. *b.* CONSOLIDATION AND MERGER — (1) *Effect on Contracts and Debts* — In General. — See notes 3, 4.

1220. 3. Highways. — See also State *v.* Fox, 158 Ind. 126.

Public Parks. — In the management of public parks cities are subject to the control of legislature. *Hartford v. Maslen*, 76 Conn. 599.

The Legislature May Compel the Maintenance of a Bridge by a city in compliance with the federal and state law. *In re Opinion of Justices*, (Me. 1905) 60 Atl. Rep. 85.

4. City's Property Protected by Constitutional Guarantees. — State *v.* Barker, 116 Iowa 96, 93 Am. St. Rep. 222.

5. Property Held in Right of Private Ownership. — State *v.* Barker, 116 Iowa 96, 93 Am. St. Rep. 222; *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 183, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1220, and supporting the whole text paragraph.

6. The Streets of a City. — *Columbus v. Union Pac. R. Co.*, (C. C. A.) 137 Fed. Rep. 869.

Legislature May Control Property Held for Public Purposes. — *Harter v. San Jose*, 141 Cal. 659. See also *Rhinehart v. Kedfield*, 93 N. Y. App. Div. 410, affirmed 179 N. Y. 569.

1222. 1. State Control of Municipal Revenues. — *Little River Tp. v. Reno County*, 65 Kan. 9.

Illustration. — Where a village was created so as to include a part of a road which a township had been authorized to improve, an act requiring the payment to the village of the money raised for the purpose of improvement was held to be within the powers of legislature. *Paye v. Grosse Pointe Tp.*, 134 Mich. 524.

Payment of Money to Volunteer Fire Company. — See *People v. Grout*, 79 N. Y. App. Div. 61.

2. Power to Apply to Private Purpose. — See *Perry County v. Lindemann*, (Ind. 1905) 73 N. E. Rep. 912.

3. Power over Municipal Contracts. — *Ft. Madison v. Ft. Madison Water Co.*, (C. C. A.) 134 Fed. Rep. 214; *Padgett v. Post*, (C. C. A.) 106 Fed. Rep. 600. See also *New York L. Ins. Co. v. Cuyahoga County*, (C. C. A.) 106 Fed. Rep. 123; *Little River Tp. v. Reno County*, 65 Kan. 9; *People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605; *Oshkosh Waterworks Co. v. Oshkosh*, 109 Wis. 208, 95 Am. St. Rep. 870.

The legislature has no greater control over the valid contracts of a municipality than over those of an individual. *Shinn v. Cunningham*, 120 Iowa 383.

8. Payment of Just Claims Imposed. — *New York L. Ins. Co. v. Cuyahoga County*, (C. C. A.)

106 Fed. Rep. 123; *Merchants' Nat. Bank v. East Grand Forks*, (Minn. 1905) 102 N. W. Rep. 703; *O'Neill v. Hoboken*, (N. J. 1905) 60 Atl. Rep. 50; *Matter of Borup*, 182 N. Y. 222; *Chapman v. New York*, 168 N. Y. 80, 85 Am. St. Rep. 661; *Syracuse v. Hubbard*, 64 N. Y. App. Div. 587, appeal dismissed 168 N. Y. 668.

1223. 3. Cannot Compel Payment Where No Obligation to Pay. — *Chapman v. New York*, 168 N. Y. 80, 85 Am. St. Rep. 661.

5. Legislature May Create Municipal Offices. — *Syracuse v. Hubbard*, 64 N. Y. App. Div. 587, appeal dismissed 168 N. Y. 668; *Com. v. Moir*, 199 Pa. St. 534, 85 Am. St. Rep. 801.

Appointment of Town Officers. — In the incorporating of a town the legislature may appoint a mayor and aldermen to act until their successors are elected. *Lambert v. Norman*, 119 Ga. 351.

6. Principle of Local Self-Government Protected. — *Ex p. Lewis*, 45 Tex. Crim. 1. See also *Common Council v. Schmid*, 128 Mich. 379.

Constitutional Provision Against Legislative Appointment. — *Matter of Haase*, 88 N. Y. App. Div. 242.

The Legislature Cannot Authorize the Governor of a state to appoint purely municipal officers. *Ex p. Levine*, 46 Tex. Crim. 364.

1224. 1. Boards of Police. — *Americus v. Perry*, 114 Ga. 871; *Redell v. Moores*, 63 Neb. 219; *State v. Broatch*, (Neb. 1903) 94 N. W. Rep. 1016; *State v. Nolan*, (Neb. 1904) 98 N. W. Rep. 657; *Wiggin v. Manchester*, 72 N. H. 576; *Gooch v. Exeter*, 70 N. H. 413, 85 Am. St. Rep. 637; *People v. Coler*, 173 N. Y. 103. See also *Lexington v. Thompson*, 113 Ky. 540; *Brokenbrough v. Water Com'rs*, 134 N. Car. 1. But see *State v. Fox*, 158 Ind. 126; *O'Connor v. Fond du Lac*, 109 Wis. 253.

Civil Service Commissioners. — *Hope v. New Orleans*, 106 La. 345.

5. Fire Commissioners. — *Compare State v. Fox*, 158 Ind. 126; *Redell v. Moores*, 63 Neb. 219.

The Legislature Cannot Fix the Rate of Wages of city firemen. *Lexington v. Thompson*, 113 Ky. 540.

7. Legislature May Consolidate or Divide Municipalities. — *Little Rock v. North Little Rock*, 72 Ark. 195.

1225. 3. Liability of New Corporation for Debts. — *Pepin Tp. v. Sage*, (C. C. A.) 129 Fed. Rep. 657; *Tyler v. Lansingburgh*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 604, affirmed

1225. (4) *Ordinances*. — See note 8.

c. SEPARATION AND DIVISION — (1) *Effect on Debts and Liabilities*. — See note 10.

1226. The Legislature May Make an Equitable Apportionment of the Debts. — See note 2.

9. Validating Municipal Acts. — See note 7.

1227. 10. Special Legislation — *a.* IN GENERAL. — See note 4. See generally the title STATUTES, 682, *i et seq.*

1228. *b.* ACTS GENERAL IN FORM AND CHARACTER. — See note 3.

c. CLASSIFICATION AND CLASS LEGISLATION — (1) *In General*. — See note 5.

1229. See notes 1, 2, 3.

76 N. Y. App. Div. 165. See also Taylor *v.* Pine Grove Tp., 132 Fed. Rep. 565.

Conditional Contract. — Where a town contracted with an attorney to bring proceedings to test the validity of an act annexing it to a city in event the act became a law, it was held that the attorney could not recover for his services against the city notwithstanding a provision in the act against impairing the obligation of contract, as there was no liability at the time when the act took effect. Henderson *v.* New York, 65 N. Y. App. Div. 180.

1225. 4. Tyler *v.* Lansingburgh, 76 N. Y. App. Div. 165. See also Board of Education *v.* State, 64 Kan. 6 (annexation of school district).

A Contract to Be Performed After the Merger, made by the district about to be annexed, is not binding. Schwan *v.* New York, 65 N. Y. App. Div. 420, reversed 173 N. Y. 32.

A General Statutory Provision that a town annexing an incorporated town shall be liable for the debts of the annexed town does not apply where the annexed territory is unincorporated. Carpenter *v.* Central Covington, (Ky. 1904) 81 S. W. Rep. 919.

8. People *v.* Harrison, 191 Ill. 257; Harrison *v.* People, 97 Ill. App. 421, reversed 195 Ill. 466.

Statutes. — See New York *v.* H. W. Johns-Manville Co., 89 N. Y. App. Div. 440.

10. Liability of Corporation as Undivided. — McCully *v.* Tracy, 66 N. J. L. 489.

1226. 2. Apportionment of Debts — Jurisdiction of Equity to Adjust. — Mulhall *v.* Mifflin Tp., 210 Pa. St. 527.

7. Validation by Legislation. — Givens *v.* Hillsborough County, (Fla. 1903) 35 So. Rep. 88; Leavenworth *v.* Leavenworth City, etc., Water Co., 69 Kan. 82; Mayo *v.* Dover, etc., Village Fire Co., 96 Me. 539; Red River Furnace Co. *v.* Tennessee Cent. R. Co., 113 Tenn. 607.

Validation of Proceedings for Incorporation. — Stembel *v.* Bell, 161 Ind. 323.

1227. 4. Provisions Against Special Legislation — *United States*. — Pepin Tp. *v.* Sage, (C. C. A.) 129 Fed. Rep. 657.

Alabama. — Little *v.* State, 137 Ala. 659.

Arizona. — Sanford *v.* Tucson, (Ariz. 1903) 71 Pac. Rep. 903.

Illinois. — People *v.* Binns, 192 Ill. 68; L'Hote *v.* Milford, 212 Ill. 418; Bessette *v.* People, 193 Ill. 334.

Indiana. — State *v.* Fox, 158 Ind. 126.

Kansas. — Leavenworth *v.* Leavenworth City, etc., Water Co., 69 Kan. 82.

Kentucky. — Woolley *v.* Louisville, 114 Ky. 556.

Missouri. — Elting *v.* Hickman, 172 Mo. 237.

New Jersey. — Halsey *v.* Nowrey, 71 N. J. L. 481; Van Cleve *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 183; Gilhooly *v.* Elizabeth, 66 N. J. L. 484.

Ohio. — Horstman *v.* Cincinnati St. R. Co., 12 Ohio Dec. 756.

Pennsylvania. — Com. *v.* Moir, 199 Pa. St. 534, 85 Am. St. Rep. 801.

Virginia. — Arcy *v.* Lindsey, 103 Va. 250.

Wisconsin. — State *v.* Policemen's Pension Fund, 121 Wis. 44.

Illustrations of Special Legislation — Act Authorizing Construction of Viaduct. — Willen *v.* Cincinnati, 12 Ohio Dec. 54.

Special Act Regarding Term of Office of Tax Collectors. — Uffert *v.* Vogt, 65 N. J. L. 621.

An Act Applying to All Cities in a state is not special legislation. Boorum *v.* Connelly, 66 N. J. L. 197, 88 Am. St. Rep. 469.

1228. 3. Acts General in Form, Limited in Application. — Givens *v.* Hillsborough County, (Fla. 1903) 35 So. Rep. 88; L'Hote *v.* Milford, 212 Ill. 418; Woolley *v.* Louisville, 114 Ky. 556; Hager *v.* Gast, (Ky. 1905) 84 S. W. Rep. 556; Le Tourneau *v.* Hugo, 90 Minn. 420; Ramsey *v.* Columbus, 12 Ohio Dec. 725.

5. Dividing Cities into General Classes. — Little Rock *v.* North Little Rock, 72 Ark. 195; L'Hote *v.* Milford, 212 Ill. 418; State *v.* Rogers, 93 Minn. 55; Le Tourneau *v.* Hugo, 90 Minn. 420; McArdle *v.* Jersey City, 66 N. J. L. 590, 88 Am. St. Rep. 496; Boorum *v.* Connelly, 66 N. J. L. 197, 88 Am. St. Rep. 469; Ramsey *v.* Columbus, 12 Ohio Dec. 725; Com. *v.* Moir, 199 Pa. St. 534, 85 Am. St. Rep. 801; Beltz *v.* Pittsburg, 26 Pa. Super. Ct. 66; State *v.* Policemen's Pension Fund, 121 Wis. 44. See also Butler *v.* Montclair, 67 N. J. L. 426.

1229. 1. Classification Must Be Reasonable. — Pepin Tp. *v.* Sage, (C. C. A.) 129 Fed. Rep. 657; Givens *v.* Hillsborough County, (Fla. 1903) 35 So. Rep. 88; L'Hote *v.* Milford, 212 Ill. 418; Bessette *v.* People, 193 Ill. 334; State *v.* Rogers, 93 Minn. 55; Le Tourneau *v.* Hugo, 90 Minn. 420; Halsey *v.* Nowrey, 71 N. J. L. 481; Willen *v.* Cincinnati, 12 Ohio Dec. 54; Horstman *v.* Cincinnati St. R. Co., 12 Ohio Dec. 756; State *v.* Policemen's Pension Fund, 121 Wis. 44. See also Boorum *v.* Connelly, 66 N. J. L. 197, 88 Am. St. Rep. 469.

2. Gooch *v.* Exeter, 70 N. H. 413, 85 Am. St. Rep. 622.

3. L'Hote *v.* Milford, 212 Ill. 418; Bessette *v.* People, 193 Ill. 334. See also Pepin Tp. *v.* Sage, (C. C. A.) 129 Fed. Rep. 657.

1229. (3) *Classification According to Population.* — See notes 5, 6.

XIV. JUDICIAL CONTROL — 1. Legislative or Discretionary Functions.

— See note 8.

1230. *Error or Mistake of Judgment.* — See note 1.

2. Administrative or Ministerial Functions. — See note 2.

3. Illegal or Ultra Vires Acts. — See note 4.

1229. 5. Classification Founded on Population.

— *Besette v. People*, 193 Ill. 334; *Le Tourneau v. Hugo*, 90 Minn. 420; *State v. Rogers*, 93 Minn. 55; *State v. Speed*, 183 Mo. 186; *McArdle v. Jersey City*, 66 N. J. L. 590, 88 Am. St. Rep. 496; *Beltz v. Pittsburgh*, 26 Pa. Super. Ct. 66; *Com. v. Moir*, 199 Pa. St. 534, 85 Am. St. Rep. 801; *State v. Policemen's Pension Fund*, 121 Wis. 44.

6. Difference in Population Must Be Reasonable. — *L'Hote v. Milford*, 212 Ill. 418. See also *State v. Speed*, 183 Mo. 186.

8. General Rule as to Judicial Interference — *United States.* — *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29; *Rico v. Snider*, 134 Fed. Rep. 953; *Glucose Refining Co. v. Chicago*, 138 Fed. Rep. 209.

Alabama. — *Inge v. Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20.

Arkansas. — *Ex p. Foote*, 70 Ark. 12, 91 Am. St. Rep. 63; *Belding v. Rector*, 71 Ark. 463.

California. — *Stanley-Taylor Co. v. San Francisco*, 135 Cal. 486.

Georgia. — *McMaster v. Waynesboro*, 122 Ga. 231.

Illinois. — *Summerfield v. Chicago*, 197 Ill. 270, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1229.

Iowa. — *Kemp v. Des Moines*, 125 Iowa 640.

Kansas. — *Ward v. Piper*, 69 Kan. 773; *McGrew v. Kansas City*, 69 Kan. 606.

Kentucky. — *Chesapeake, etc., R. Co. v. Maysville*, (Ky. 1902) 69 S. W. Rep. 728; *Dulser v. Barber Asphalt Paving Co.*, (Ky. 1903) 74 S. W. Rep. 744.

Louisiana. — *Capdevielle v. New Orleans, etc., R. Co.*, 110 La. 904, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1229; *Brennan v. Sewerage, etc., Board*, 108 La. 569, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1229; *Johnson v. New Orleans*, 105 La. 149.

Maryland. — *Frostburg v. Wineland*, 98 Md. 239; *Mason v. Cumberland*, 92 Md. 451.

Michigan. — *Kundinger v. Saginaw*, 132 Mich. 395.

Minnesota. — *Reed v. Anoka*, 85 Minn. 294.

Missouri. — *Heman v. Schulte*, 166 Mo. 409; *State v. Birch*, 186 Mo. 205.

New Hampshire. — *Parker v. Concord*, 71 N. H. 468, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1229; *Sherburne v. Portsmouth*, 72 N. H. 539.

New Jersey. — *Carling v. Jersey City*, 71 N. J. L. 154; *Suburban Land, etc., Co. v. Vailsburg*, 67 N. J. L. 461; *Coward v. Bayonne*, 67 N. J. L. 470.

New York. — *United Traction Co. v. Water-vliet*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 392; *Harriman v. Yonkers*, 82 N. Y. App. Div. 408, affirmed 181 N. Y. 24; *People v. Woodbury*, 88 N. Y. App. Div. 443.

North Carolina. — *Fawcett v. Mt. Airy*, 134 N. Car. 125, 101 Am. St. Rep. 825.

Ohio. — *Columbus v. Board of Public Service*, 14 Ohio Dec. 715; *Cleveland, etc., R. Co. v. Urbana, etc., R. Co.*, 26 Ohio Cir. Ct. 180.

Pennsylvania. — *Pittsburg v. W. H. Keech Co.*, 21 Pa. Super. Ct. 548; *Carpenter v. Yeadon*, 208 Pa. St. 396.

Virginia. — *Danville v. Hatcher*, 101 Va. 523.

Washington. — *Hester v. Thomson*, 35 Wash. 119; *Kakeldy v. Columbia, etc., R. Co.*, 37 Wash. 675.

West Virginia. — *Pence v. Bryant*, 54 W. Va. 263.

Wisconsin. — *Lange v. La Crosse, etc., R. Co.*, 118 Wis. 558; *Le Feber v. West Allis*, 119 Wis. 608, 100 Am. St. Rep. 917; *Tilly v. Mitchell, etc., Co.*, 121 Wis. 1, 105 Am. St. Rep. 1007.

Court Will Not Amend Ordinance. — *Chicago Union Traction Co. v. Chicago*, 208 Ill. 187.

A Power Granted by the Legislature cannot be enjoined by a court of equity. *Raycraft v. Harrison*, 108 Ill. App. 313.

1230. 1. *Glide v. Superior Ct.*, 147 Cal. 21; *Brennan v. Sewerage, etc., Board*, 108 La. 569, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1230; *Capdevielle v. New Orleans, etc., R. Co.*, 110 La. 904; *Parker v. Concord*, 71 N. H. 468, citing 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1229. See also *Lincoln School Tp. v. Union Trust Co.*, (Ind. App. 1905) 73 N. E. Rep. 623.

2. Ministerial Duties. — *Huey v. Waldrop*, 141 Ala. 318; *Bourgeois v. Fairchild*, 81 Miss. 708; *Sherburne v. Portsmouth*, 72 N. H. 539; *Edward C. Jones Co. v. Guttenberg*, 66 N. J. L. 659.

4. Illegal or Ultra Vires Acts — United States. — *Leverich v. Mobile*, 110 Fed. Rep. 170; *Murray v. Allegheny*, (C. C. A.) 136 Fed. Rep. 57.

Louisiana. — *Pleasants v. Shreveport*, 110 La. 1046.

Maine. — *Blood v. Beal*, (Me. 1905) 60 Atl. Rep. 427.

Maryland. — *Frostburg v. Wineland*, 98 Md. 239.

Minnesota. — *Gile v. Stegner*, 92 Minn. 429.

New Hampshire. — See *Sherburne v. Portsmouth*, 72 N. H. 539.

New Jersey. — *Fuller v. Bellevue Tp.*, 67 N. J. Eq. 468.

New York. — *Bird v. Grout*, 106 N. Y. App. Div. 159.

Ohio. — *Pullen v. Smith*, 26 Ohio Cir. Ct. 549; *McGuire v. East Cleveland*, 25 Ohio Cir. Ct. 497; *Henry v. Cincinnati*, 25 Ohio Cir. Ct. 178.

Oklahoma. — *Board of Education v. Territory*, 12 Okla. 286.

South Dakota. — *Lee v. Mellette*, 15 S. Dak. 86.

Virginia. — See *Roanoke v. Bolling*, 101 Va. 182.

Washington. — *Swope v. Seattle*, 35 Wash. 69.

1231. 4. Unauthorized Contracts. — See notes 1, 2, 3.

XV. INDICTMENT OF MUNICIPAL CORPORATIONS. — See notes 4, 5.

XVI. PRESENTATION OF CLAIMS, NOTICE OF INJURY AND INTENT TO SUE — 1. In General. — See note 7.

2. Presentation of Claims — *a.* IN GENERAL. — See note 8.

1232. See note 1.

b. WHAT CLAIMS OR DEMANDS MUST BE PRESENTED. — See notes 2, 3, 4.

c. SUFFICIENCY OF PRESENTATION — FORMALITIES. — See note 5.

1233. See note 1.

West Virginia. — *Cain v. Elkins*, 57 W. Va. 9.

Who May Maintain Suit. — A person cannot restrain a city from committing a wrongful act whereby he has been injured unless his damages differ in kind from those suffered by the general public. *Amusement Syndicate Co. v. Topeka*, 68 Kan. 801. See also *Blanton v. Merry*, 116 Ga. 288.

Injunction Against Creation of Nuisance. — *Rolling v. Lorain*, 13 Ohio Dec. 87.

1231. 1. Contracts. — *Bluffton v. Miller*, 33 Ind. App. 521; *Purcell v. East Grand Forks*, 91 Minn. 486. See also *Le Feber v. West Allis*, 119 Wis. 608, 100 Am. St. Rep. 917.

2. *Chicago v. Mohr*, 216 Ill. 320; *Westbrook v. Middlecoff*, 99 Ill. App. 327; *Mohr v. Chicago*, 114 Ill. App. 283; *Meyer v. Boonville*, 162 Ind. 165; *State v. King*, 109 La. 799; *Packard v. Hayes*, 94 Md. 233; *Diamond v. Mankato*, 89 Minn. 48; *Austin v. McCall*, 95 Tex. Civ. App. 565. Compare *Barto v. San Francisco*, 135 Cal. 494.

Illegal Issue of Bonds. — *Appleton Water Works Co. v. Appleton*, 116 Wis. 363.

3. *City Water Supply Co. v. Ottumwa*, 120 Fed. Rep. 309; *Inge v. Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20; *Chicago v. Mohr*, 216 Ill. 320.

Any Taxpayer of a Municipal Corporation. — *Purcell v. East Grand Forks*, 91 Minn. 486.

4. **Liability to Indictment.** — *Georgetown v. Com.*, 115 Ky. 382, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1231.

5. *Com. v. New Bethlehem*, 15 Pa. Super. Ct. 158. See also *Dalton v. Wilson*, 118 Ga. 100, 98 Am. St. Rep. 101. But see *Georgetown v. Com.*, 115 Ky. 382.

7. **Presentation of Claims — Notice of Suit, Etc.** — *Philomath v. Ingle*, 41 Oregon 289, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1231; *Com. v. New Bethlehem*, 15 Pa. Super. Ct. 158.

8. **Provisions for Presentation of Claims.** — *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133; *Columbus v. McDaniel*, 117 Ga. 823; *Saunders v. Fitzgerald*, 113 Ga. 619; *Lamson v. Marshall*, 133 Mich. 250; *Wilton v. Flint*, 128 Mich. 156; *Tattan v. Detroit*, 128 Mich. 650; *Dawes v. Great Falls*, 31 Mont. 9; *Sammons v. Gloversville*, 175 N. Y. 346; *Phipps v. North Pelham*, 61 N. Y. App. Div. 442; *McCarthy v. Syracuse*, 96 N. Y. App. Div. 566; *Ehrhardt v. Seattle*, 33 Wash. 664; *Bell v. Spokane*, 30 Wash. 508; *Durham v. Spokane*, 27 Wash. 615; *Davis v. Seattle*, 17 Wash. 223. See also *Mauch v. Hartford*, 112 Wis. 40.

1232. 1. Statutes Requiring Presentation

Mandatory — *Alabama.* — *Barrett v. Mobile*, 129 Ala. 179, 87 Am. St. Rep. 54.

California. — *Bigelow v. Los Angeles*, 141 Cal. 503.

Michigan. — *Pollard v. Cadillac*, 133 Mich. 503; *Hunter v. Ithaca*, 135 Mich. 281; *Woodworth v. Kalamazoo*, 135 Mich. 233; *Spier v. Kalamazoo*, (Mich. 1904) 101 N. W. Rep. 846.

Minnesota. — *State v. District Ct.*, 90 Minn. 457.

New York. — *Jewell v. Ithaca*, 72 N. Y. App. Div. 220, affirming (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 499; *Biggs v. Geneva*, 100 N. Y. App. Div. 25; *Seliger v. New York*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1003; *Smith v. New York*, 88 N. Y. App. Div. 606.

North Carolina. — *Board of Education v. Greenville*, 132 N. Car. 4.

Oregon. — *Philomath v. Ingle*, 41 Oregon 289.

Wisconsin. — *Morrison v. Eau Claire*, 115 Wis. 538, 95 Am. St. Rep. 955.

Such a Provision Is Not a Condition Precedent to the Right of Action, but is in the nature of a statute of limitation. *Van Auken v. Adrian*, 135 Mich. 534; *Davis v. Appleton*, 109 Wis. 580; *O'Connor v. Fond du Lac*, 109 Wis. 253.

Statute Not Retrospective. — *Thoeni v. Dubuque*, 115 Iowa 482; *Sehl v. Syracuse*, 81 N. Y. App. Div. 543.

Filing Claim Excused. — *Ehrhardt v. Seattle*, 33 Wash. 664; *Born v. Spokane*, 27 Wash. 719.

2. *Kelly v. Faribault*, (Minn. 1905) 104 N. W. Rep. 231; *Ahrens v. Rochester*, 97 N. Y. App. Div. 480.

Claims Arising from Defective Streets. — *McIntee v. Middletown*, 80 N. Y. App. Div. 434.

Equity Suits. — A requirement of presentation does not apply to suits in equity. *Sammons v. Gloversville*, 175 N. Y. 346.

3. **Whether Applicable to Claims Ex Delicto.** — *Barrett v. Mobile*, 129 Ala. 179, 87 Am. St. Rep. 54. See also *Van Auken v. Adrian*, 135 Mich. 534.

4. *Dawes v. Great Falls*, 31 Mont. 9. See also *Hathaway v. Osborne*, 25 R. I. 249.

5. **Formalities.** — *Hunter v. Ithaca*, 135 Mich. 281.

A Substantial Compliance is sufficient. *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133.

Reasonableness of Requirement. — Sixty days is not an unreasonable limitation within which a claim must be presented in order that suit may be brought against a city. *Jewell v. Ithaca*, 72 N. Y. App. Div. 220, affirming (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 400.

1233. 1. Bland v. Mobile, (Ala. 1904) 37 So. Rep. 843; *Langley v. Augusta*, 118 Ga. 590,

1233. d. TO WHOM PRESENTATION MADE. — See note 2.*e. AMOUNT OF CLAIM.* — See notes 5, 6, 7.*g. DISALLOWANCE OF CLAIMS.* — See note 10.**1234. 3. Notice of Injury** — *a. IN GENERAL.* — See notes 1, 2, 3.*b. WHEN NOTICE EXCUSED.* — See note 4.**4. Notice of Intent to Sue.** — See note 5.

98 Am. St. Rep. 133; *Hunter v. Ithaca*, 135 Mich. 281; *Nestle v. Flint*, (Mich. 1905) 104 N. W. Rep. 406; *McIntee v. Middletown*, 80 N. Y. App. Div. 434; *Smith v. New York*, 88 N. Y. App. Div. 606; *Seliger v. New York*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1003; *McCarthy v. Syracuse*, 96 N. Y. App. Div. 566; *Biggs v. Geneva*, 100 N. Y. App. Div. 25; *O'Donnell v. Syracuse*, 102 N. Y. App. Div. 88; *Bell v. Spokane*, 30 Wash. 508; *Davis v. Seattle*, 37 Wash. 223.

1233. 2. To Whom Presentation to Be Made. — *Smith v. New York*, 88 N. Y. App. Div. 606.

A Requirement that Notice Be Given to the Common Council is complied with by presentation to the acting president and the clerk of the common council. *O'Donnell v. Syracuse*, 102 N. Y. App. Div. 80. Or, it has been held, by service on the president of the council alone. *McIntee v. Middletown*, 80 N. Y. App. Div. 434. Or by presentation to the city clerk. *Durham v. Spokane*, 27 Wash. 615.

A Presentation of a Claim by One Who Has Assigned It is valid, the assignee having knowledge of the presentation and bringing of suit. *Lamson v. Marshall*, 133 Mich. 250.

5. Amount of Claim. — *Sweeney v. New York*, 69 N. Y. App. Div. 80, *reversed* 173 N. Y. 414.

Stating the Amount of Several Claims in One Sum does not affect the validity of the notice. *Hunter v. Ithaca*, 135 Mich. 281.

6. Spier v. Kalamazoo, (Mich. 1904) 101 N. W. Rep. 846.

7. Mackay v. Salt Lake City, 29 Utah 247, quoting 20 AM. AND ENG. ENCYC. OF LAW (2d ed. 1233, and supporting the whole text paragraph).

10. Disallowance of Claim. — *State v. District Ct.*, 90 Minn. 457; *Jewell v. Ithaca*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 499, *affirmed* 72 N. Y. App. Div. 220. See also *Barrett v. Mobile*, 129 Ala. 179, 87 Am. St. Rep. 54.

1234. 1. Notice of Injury — *Colorado.* — *Denver v. Bradbury*, 19 Colo. App. 441; *Stoors v. Denver*, 19 Colo. App. 159.

Iowa. — *Rusch v. Dubuque*, 116 Iowa 402. *Massachusetts.* — *McLean v. Boston*, 180 Mass. 69.

Michigan. — *Wilkins v. Flint*, 128 Mich. 262; *Brown v. Owosso*, 126 Mich. 91; *Wilton v. Detroit*, (Mich. 1904) 100 N. W. Rep. 1020; *Chamberlain v. Saginaw*, 135 Mich. 61.

Minnesota. — *Olcott v. St. Paul*, 91 Minn. 207.

Missouri. — *Reno v. St. Joseph*, 169 Mo. 642; *Lyons v. St. Joseph*, 112 Mo. App. 681.

Nebraska. — *Schmidt v. Freemont*, (Neb. 1903) 97 N. W. Rep. 830; *Lincoln v. Miller*, (Neb. 1901) 96 N. W. Rep. 484.

New York. — *Rauber v. Wellsville*, 83 N. Y. App. Div. 581; *Walden v. Jamestown*, 178 N. Y. 213. See also *Bedell v. New York*, 99 N. Y. App. Div. 128.

Texas. — *Parsons v. Ft. Worth*, 26 Tex. Civ. App. 273.

Reasonably Strict Construction to Be Given. — *Tattan v. Detroit*, 128 Mich. 650.

Statute One of Limitation Merely. — *Belken v. Iowa Falls*, 122 Iowa 430.

2. Time of Giving Notice. — *Tattan v. Detroit*, 128 Mich. 650; *Brown v. Owosso*, 126 Mich. 91; *Wilton v. Detroit*, (Mich. 1904) 100 N. W. Rep. 1020; *McEvoy v. Sault Ste. Marie*, 136 Mich. 172; *Chamberlain v. Saginaw*, 135 Mich. 61; *Schmidt v. Freemont*, (Neb. 1903) 97 N. W. Rep. 830; *De Vore v. Auburn*, 64 N. Y. App. Div. 84; *Walden v. Jamestown*, 178 N. Y. 213; *Parsons v. Ft. Worth*, 26 Tex. Civ. App. 273.

3. Description of Nature of Injury. — *Schnee v. Dubuque*, 122 Iowa 459; *Chamberlain v. Saginaw*, 135 Mich. 61; *Wilton v. Flint*, 128 Mich. 156; *Tattan v. Detroit*, 128 Mich. 650; *Olcott v. St. Paul*, 91 Minn. 207; *Gibson v. Midland Bridge Co.*, 112 Mo. App. 594; *Lincoln v. Miller*, (Neb. 1901) 96 N. W. Rep. 484; *Rauber v. Wellsville*, 83 N. Y. App. Div. 581; *Parsons v. Ft. Worth*, 26 Tex. Civ. App. 273. See also *Bauer v. Dubuque*, 122 Iowa 500; *McCarthy v. Syracuse*, 96 N. Y. App. Div. 566.

Sufficiency of Notice Question for Jury. — *Ljunberg v. North Mankato*, 87 Minn. 484.

As to the Sufficiency of Notice in General, see *Denver v. Bradbury*, 19 Colo. App. 441; *Wood v. Stafford Springs*, 74 Conn. 437; *Burnette v. St. Joseph*, 112 Mo. App. 668; *Lyons v. St. Joseph*, 112 Mo. App. 681; *Shaw v. New York*, 83 N. Y. App. Div. 212.

Description of Place of Injury. — See *Rusch v. Dubuque*, 116 Iowa 402; *Hoffman v. North Milwaukee*, 118 Wis. 278; *Ruscher v. Stanley*, 120 Wis. 380.

Description of Cause of Injury. — See *Stoors v. Denver*, 19 Colo. App. 159.

Service of Notice. — In *Minnesota* a notice of an injury received on a street of a city need be served only on the city council. Service of notice on the board having charge and control of the street is unnecessary. *Kleopfert v. Minneapolis*, 90 Minn. 158.

Remedying Defective Notice. — An insufficient notice has no invalidating effect upon a subsequent proper notice, and the latter is good if served within the required time. *McLean v. Boston*, 180 Mass. 69.

4. Notice Excused. — *Walden v. Jamestown*, 178 N. Y. 213. See also *Barry v. Port Jervis*, 64 N. Y. App. Div. 268. But see *Schmidt v. Freemont*, (Neb. 1903) 97 N. W. Rep. 830.

Waiver. — There is no waiver of the defects in a notice where the claimant, after serving the defective notice, took no further action until the bringing of suit. *Chamberlain v. Saginaw*, 135 Mich. 61.

5. Notice of Intent to Sue. — *De Vore v. Auburn*, 64 N. Y. App. Div. 84, holding that

1235. See note 1.

5. Waiver of Requirements. — See note 5.

1236. XVII. DISSOLUTION — 4. Judicial Decree of Dissolution — *c.* COLLATERAL ATTACK. — See note 6.

1237. 5. Disincorporation by Vote of Inhabitants. — See note 2.

6. Effect of Dissolution — *a.* EFFECT ON DEBTS AND LIABILITIES — Where a Municipal Corporation Is Reorganized or Reincorporated. — See note 5.

1238. See notes 1, 2.

verbal notice is insufficient. See also *Bedell v. New York*, 99 N. Y. App. Div. 128.

Notice of Claim — Proper Service. — *Peterson v. Cokato*, 84 Minn. 205.

A Statute Requiring Service of Notice Within Forty-eight Hours of the accrual of the action is void. *Barry v. Port Jervis*, 64 N. Y. App. Div. 268.

1235. 1. Form of Notice. — Where a notice contains a "reasonably definite statement" of the matter required by statute to be stated the council cannot wait until the time for filing a notice has expired and then regard the notice as insufficient. *Brown v. Owosso*, 126 Mich. 91.

Notice Sufficient Though Containing No Explicit Statement of Intent to Sue. — *Halpin v. New York*, 82 N. Y. App. Div. 311; *Shaw v. New York*, 83 N. Y. App. Div. 212.

5. *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133; *Hunter v. Durand*, (Mich. 1904) 100 N. W. Rep. 191. See also *Spier v. Kalamazoo*, (Mich. 1904) 101 N. W. Rep. 846; *Wilton v. Detroit*, (Mich. 1904) 100 N. W. Rep. 1020.

1236. 6. Collateral Attack. — *Topeka v. Dwyer*, 70 Kan. 244; *People v. Smith*, 131 Mich. 70; *State v. Birch*, 186 Mo. 205; *Readsboro v. Woodford*, 76 Vt. 376; *Agner v. Com.*, 103 Va. 811. See also *Susanville v. Long*, 144 Cal. 362.

1237. 2. Ex p. Cross, 44 Tex. Crim. 376, wherein the statute providing for disincorporation by vote was held not to apply to a municipality organized under a special charter.

5. Reincorporation, Etc. — *Tyler v. Lansingburgh*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 604, affirmed 76 N. Y. App. Div. 165. See also *Wichmann v. Placerville*, 147 Cal. 162.

The Liability of a Township for Bonds Issued is not affected by the creation of a new county including the township, thereby transferring the township from the county of which it formed a part at the time when the debt was created. *Planters', etc., Bank v. Huiett*, 132 Fed. Rep. 627; *Taylor v. Pine Grove Tp.*, 132 Fed. Rep. 565; *Susong v. Cokesbury Tp.*, 132 Fed. Rep. 567.

Apportionment of Liability. — When a municipal corporation is dissolved and added in sections to other municipalities the latter are liable for the debts of the former in proportion to the property received. *Pepin Tp. v. Sage*, (C. C. A.) 129 Fed. Rep. 657.

1238. 1. Effect of Different Boundaries, Powers, or Name. — *Taylor v. Pine Grove Tp.*, 132 Fed. Rep. 565. See also *Wichmann v. Placerville*, 147 Cal. 162; *Susong v. Cokesbury Tp.*, 132 Fed. Rep. 567.

2. Merger or Consolidation. — *Taylor v. Pine Grove Tp.*, 132 Fed. Rep. 565.

MUNICIPAL COURTS.

BY H. N. ELDRIDGE.

2. I. DEFINITION AND CHARACTERISTICS — Whether Inferior or Superior Courts. — See note 2.

3. II. CREATION AND ESTABLISHMENT — 1. Authority to Establish — In the United States. — See note 1.

III. LIMITS OF JURISDICTION — 1. In Civil Cases — *a.* RESIDENCE OF PARTIES — (1) *Residence of Defendant* — (a) Natural Persons. — See note 6.

4. b. EQUITY JURISDICTION. — See notes 4, 5.

5. d. LIMITATION AS TO AMOUNT. — See note 1.

[*e.* MISCELLANEOUS INSTANCES. — See note 1*a.*]

2. In Criminal Cases — *a.* VIOLATION OF BY-LAWS AND ORDINANCES. — See note 2.

b. JURISDICTION IN OTHER CRIMINAL CASES — (1) *In General.* — See note 4.

6. IV. REVIEW OF JUDGMENTS. — See note 6.

2. 2. Municipal Courts Are Inferior Courts. — *Marcus v. Aufses*, (N. Y. City Ct. Spec. T.) 94 N. Y. Supp. 397.

3. 1. Authority of Legislature to Establish. — *Leavitt v. Katzoff*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 26; *Gelb v. Cuffs*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 165.

6. Jurisdiction Extended to Nonresidents of Municipality. — *McGillicuddy v. Edwards*, 96 Me. 347.

4. 4. No Equity Jurisdiction. — *Ehrlich v. Shuptrine*, 117 Ga. 882; *Pound v. Williams*, 119 Ga. 904; *Regan v. Standard Scale Co.*, 123 Ga. 14; *Midler v. Lese*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 637; *Krous v. Smolen*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 463; *Bellettieri v. Lawlor*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 161.

Declaring Bill of Sale Fraudulent in Action for Conversion. — In *Milella v. Simpson*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 690, which was an action for conversion, it was held that the court did not, by declaring that a bill of sale, under which the plaintiff claimed to own the property in dispute, was fraudulent, thereby assume to exercise the powers of a court of equity as prohibited by the Municipal Court Act of New York.

5. As the Granting of an Order of Interpleader Would Transform an Action into an Equitable One, a court which has no equity jurisdiction is without authority to grant such an order. *Marcus v. Aufses*, (N. Y. City Ct. Spec. T.) 94 N. Y. Supp. 397; *Krugman v. Hanover F. Ins. Co.*, (N. Y. City Ct. Spec. T.) 94 N. Y. Supp. 399.

5. 1. Limitation as to Amount. — *Pierson v. Hughes*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1059; *Cohen v. Lewsen*, (Supm. Ct. App. T.)

92 N. Y. Supp. 59; *Smith v. Dunn*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 475; *Frenchi v. New York City R. Co.*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 612; *Hamburger v. Hellman*, 103 N. Y. App. Div. 263.

1*a.* An Action for Assault will not lie under the Municipal Court Act regulating the municipal courts of the city of New York. *Rein v. Brooklyn Heights R. Co.*, (Supm. Ct. App. T.) 94 N. Y. Supp. 636; *Busch v. Interborough Rapid Transit Co.*, (Supm. Ct. App. T.) 93 N. Y. Supp. 372.

The Issuing of a Writ of Habeas Corpus was held to be within the authority of the judge of the City Court of Montgomery, Alabama. *Barriere v. State*, (Ala. 1905) 39 So. Rep. 55.

2. As to Jurisdiction of State Offenses. — In *Ex p. Hinson*, 46 Tex. Crim. 587, it was held that the City Court of Corsicana, which under its charter provisions was only a municipal court, with jurisdiction of municipal offenses, had no jurisdiction of a state offense.

4. Jurisdiction for Prosecution of Crimes Other than Violation of Ordinances. — *State v. Bass*, 97 Me. 484.

6. 6. Appeal to Supreme Court. — *Toher v. Schaefer*, (Supm. Ct. App. T.) 92 N. Y. Supp. 795; *Metal Stamping Co. v. Samuel*, (Supm. Ct. App. T.) 94 N. Y. Supp. 11.

Appeal to Circuit Court. — *State v. Wills*, (Fla. 1905) 38 So. Rep. 289.

Errors of Law or Fact may be reviewed on appeal from the municipal courts of the city of New York to the Supreme Court. *Couch v. New York City R. Co.*, (Supm. Ct. App. T.) 94 N. Y. Supp. 393.

MUNICIPAL RECORDS.

BY H. N. ELDRIDGE.

- 8. I. RECORDS AS EVIDENCE — 1. In General.** — See note 1.
10. II. AMENDMENT OF RECORDS — 2. By Order of Council. — See note 7.
11. III. INSPECTION OF RECORDS — 1. Right to Inspection. — See note 4.
2. Remedies — a. MANDAMUS — Permission to Inspect Records Compelled by Mandamus. — See note 5.
- 8. 1. Corporate Acts Proved by Municipal Records.** — Selma St., etc., R. Co. v. Owen, 132 Ala. 420.
10. 7. Amendment by Order of Council. — White v. Clarksville, (Ark. 1905) 87 S. W. Rep. 630.
11. 4. Right to Inspect Records. — State v. Williams, 110 Tenn. 549.
5. Mandamus to Compel Inspection of Record. — State v. Williams, 110 Tenn. 549.

MUNICIPAL SECURITIES.

BY BRISCOE B. CLARK.

- 16. II. WARRANTS OR ORDERS — 2. General Power to Issue Warrants — circulation as Money — Selling Warrants.** — See notes 5, 6.
17. Implied Power to Issue Warrants. — See note 5.
18. The Issuance of Warrants in Anticipation of Taxes. — See note 2.
3. Issuance of Warrant and Formal Requisites — a. BY WHOM TO BE DRAWN AND SIGNED. — See note 3.
b. ALLOWANCE OF CLAIM AND ORDER FOR WARRANT. — See note 7.
19. c. DELIVERY OF WARRANT. — See note 1.
d. SEAL. — See note 2.
g. FORM — Contents. — See note 7.
Designation of Claim for Which Warrant Is Issued. — See note 9.
Designation of Fund for Payment. — See note 12.
- 16. 5. Warrants for Sale in Market.** — Kellogg v. School Dist. No. 10, 13 Okla. 285.
6. Warrants at Discount. — Kearny County v. Irvine, (C. C. A.) 126 Fed. Rep. 689; Stewart v. Indian Territory Bank, 68 Kan. 755.
17. 5. Warrants to Pay Authorized Indebtedness. — Little Rock v. U. S., 103 Fed. Rep. 418, 43 C. C. A. 261.
18. 2. Coles County v. Goehring, 209 Ill. 142; Bacon v. Dawes County, 66 Neb. 191; Coler v. Sterling, 15 S. Dak. 415.
A Warrant Drawn in Violation of the Statute may still be competent evidence of the indebtedness. Board of Education v. Foley, 90 Ill. App. 494.
3. By Whom Warrants to Be Drawn. — Valley Bank v. Brodie, (Ariz. 1904) 76 Pac. Rep. 617; Johnson v. School Corp., 117 Iowa 319; Loomis v. Brown County, 15 S. Dak. 606.
Warrants Drawn by De Facto Officers are valid. State v. Hart, 106 Tenn. 260.
Warrant May Issue in Name of Assignee of Claim. — Hadley v. Dague, 130 Cal. 207.
Successor in Office May Issue. — American Bridge Co. v. Wheeler, 35 Wash. 40.
Personal Liability of Officers Drawing Warrant. — Germania Bank v. Trapnell, 118 Ga. 578; Bailey v. Tompkins, 127 Mich. 74.
7. Allowance of Claims. — State v. Craig, 11 Ohio Cir. Dec. 557, 21 Ohio Cir. Ct. 180.
19. 1. American Bridge Co. v. Wheeler, 35 Wash. 40.
2. Seal. — Condon v. Eureka Springs, 135 Fed. Rep. 566.
7. Surplusage. — Hadley v. Dague, 130 Cal. 207.
Warrant Held Invalid for Failure to Follow Statutory Form. — Coler v. Sterling, 15 S. Dak. 415.
9. Statement as to When Claim Accrued. — Bingham County v. Ogden First Nat. Bank, 122 Fed. Rep. 16, 58 C. C. A. 332.
12. The Purpose of the Requirement in Nebraska that county warrants shall express on their face the amount levied and appropriated to the fund against which they are drawn, and

- 20.** *i.* ENJOINING ILLEGAL ISSUANCE OF WARRANTS. — See note 4.
 4. Presumption with Regard to Validity of Warrants. — See note 5.
 5. Validating Invalid Warrants. — See note 6.
- 21.** 7. Warrants Receivable in Payment of Taxes and Debts Due to Municipality. — See notes 2, 3.
 8. Payment of Warrants — *a.* TO WHOM PAYMENT TO BE MADE. — See note 7.
b. RECOVERY OF MONEY PAID ON ILLEGAL WARRANT. — See note 10.
d. ENJOINING PAYMENT OF ILLEGAL WARRANTS. — See note 15.
- 22.** *f.* FUND FROM WHICH WARRANT PAYABLE — Claim on Particular Fund — Warrant on General Fund. — See note 7.
 General Claim — Warrant on Special Fund. — See notes 8, 9.
 Where a Warrant Is Drawn Against a Particular Fund for a Claim Payable Solely Out of Such Fund. — See note 10.
- 23.** Misappropriation of Fund. — See note 2.
 Failure to Provide Fund. — See note 3.
g. ORDER IN WHICH WARRANTS PAYABLE — Statutory Provisions. — See note 7.
- 24.** 9. Funding Warrants. — See note 10.
 10. Calling In Warrants for Examination, Cancellation, and Reissue — In Arkansas. — See note 14.
- 25.** 11. Interest on Warrants — General Liability for Interest. — See notes 2, 3.

the amount expended for such fund, is to guard against the overdrawing of warrants against the fund. *National L. Ins. Co. v. Dawes County*, 67 Neb. 40.

20. 4. *Kellogg v. School Dist. No. 10*, 13 Okla. 285.

5. Presumption as to Validity of Warrant. — *Lake County v. Keene Five-Cents Sav. Bank*, 108 Fed. Rep. 505, 47 C. C. A. 464; *Coffin v. Kearney County*, 114 Fed. Rep. 518, modified (C. C. A.) 126 Fed. Rep. 689 (exceeding limitation on indebtedness); *Lake County v. Linn*, 29 Colo. 446; *Mitchelltree School Tp. v. Hall*, (Ind. App. 1903) 68 N. E. Rep. 919; *Farmers', etc., State Bank v. School Tp.*, 118 Iowa 540; *Dakota County v. Bartlett*, 67 Neb. 62; *Greer County v. Gregory*, (Okla. 1905) 81 Pac. Rep. 422, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 20; *Rochford v. School Dist. No. 11*, 17 S. Dak. 542.

Quantum of Proof — Acquiescence. — Where warrants issued by a municipality have been acquiesced in for a long time, the municipality, in order to prevent recovery thereon, must show by convincing proof that they were invalid. *Kearney County v. Irvine*, (C. C. A.) 126 Fed. Rep. 689.

6. Ratification by the Municipality cannot give validity to warrants void on their face. *Bingham County v. Ogden First Nat. Bank*, 122 Fed. Rep. 16, 58 C. C. A. 332.

21. 2. Where the Enforcement of a Warrant Is Barred by the statute of limitations its receipt in payment of taxes is also barred. *Coler v. Sterling*, 15 S. Dak. 415, disapproving dicta in *Pelton v. Crawford County*, 10 Wis. 69.

3. *Ex p. Willis*, (Ark. 1905) 86 S. W. Rep. 300.

7. Compare *State v. Auditor*, 5 Ohio D. c. 545, 7 Ohio N. P. 666

10. *Etsell v. Knight*, 117 Wis. 540 (action by taxpayer).

15. Enjoining Payment of Illegal Warrants. — *Farmers' Sav. Bank v. Independent School Dist.*, 122 Iowa 99; *Stephens v. Wyoming School Dist.*, 10 Pa. Dist. 135.

22. 7. The Surplus Revenue of a County remaining after all current expenses are paid for the year for which such revenue was levied and collected is applicable to the payment of outstanding valid unpaid county warrants of previous years. *State v. Johnson*, 162 Mo. 621.

8. *Blanchard v. Chaffee County*, 15 Colo. App. 410 (recovery on original indebtedness allowed where warrant drawn on special fund is invalid); *Dakota County v. Bartlett*, 67 Neb. 62.

9. *Stewart v. Custer County*, 14 S. Dak. 135.

10. *Bacon v. Dawes County*, 66 Neb. 191; *Turner v. Guthrie*, 13 Okla. 26; *Loomis v. Brown County*, 15 S. Dak. 606; *Stephenson v. Union Seating Co.*, 26 Tex. Civ. App. 16; *Potter v. Whatcom*, 25 Wash. 207.

23. 2. *New Orleans v. Warner*, 180 U. S. 199; *Pine Tree Lumber Co. v. Fargo*, 12 N. Dak. 377, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 23; *Red River Valley Nat. Bank v. Fargo*, (N. Dak. 1905) 103 N. W. Rep. 390.

Limitation of Actions. — See *Northwestern Lumber Co. v. Aberdeen*, 35 Wash. 636.

3. Compare *Turner v. Guthrie*, 13 Okla. 26.

7. *State v. Johnson*, 162 Mo. 621; *Stewart v. Custer County*, 14 S. Dak. 155.

24. 10. Right of Assignee of Warrants. — See *Valley Bank v. Brodie*, (Ariz. 1904) 76 Pac. Rep. 617.

14. *Condon v. Eureka Springs*, 135 Fed. Rep. 566.

Warrants Not Barred unless Statute Complied With. — *Nevada County v. Williams*, 72 Ark. 394 (quashing order of County Court declaring warrants barred).

25. 2. Interest on Warrants. — *Valley Bank v. Brodie*, (Ariz. 1904) 76 Pac. Rep. 617.

3. *National Bank v. Duval County*, 45 Fla.

- 25.** Statutory Provisions. — See note 6.
- 26.** 12. Transfer of Warrants — *a.* NEGOTIABILITY OF WARRANTS. — See note 8.
- 27.** *b.* TRANSFER OR ASSIGNMENT — General Rule. — See notes 1, 2. Minority Rule. — See note 3.
- 28.** Liabilities Between Transferer and Transferee. — See notes 6, 8.
- 13.** Actions on Warrants — *a.* IN GENERAL. — See note 10.
- 29.** See note 1. Want of Funds for Payment. — See note 5. Presentation for Payment. — See note 6.
- 30.** *b.* DEFENSES — (1) *In General.* — See note 2. (3) *Limitation of Actions.* — See note 6. Where the Corporate Seal Is Affixed. — See note 8. Where the Warrant Is Payable on Demand. — See notes 9, 10, 11.
- 31.** If the Warrant Is Payable from a Particular Fund. — See notes 1, 2.
- III. BILLS AND NOTES.** — See note 6.

496, explaining *Jefferson County v. Hawkins*, 22 Fla. 223; *Mueller v. Cavour*, 107 Wis. 599 (town warrant).

25. 6. Statutory Provisions for Interest. — *McIntosh v. Salt Lake County*, 23 Utah 504.

26. 8. Warrants Not Negotiable. — *Germania Bank v. Trapnell*, 118 Ga. 578, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 26; *Delfosse v. Metropolitan Nat. Bank*, 98 Ill. App. 123; *Morrison v. Austin State Bank*, 213 Ill. 472, 104 Am. St. Rep. 225, reversing 113 Ill. App. 651; *Garfield Tp. v. Crocker*, 63 Kan. 272; *Arkansas City First Nat. Bank v. Gates*, 66 Kan. 505, 97 Am. St. Rep. 383; *Bailey v. Tompkins*, 127 Mich. 74; *National L. Ins. Co. v. Dawes*, 67 Neb. 40; *Casey v. Pilkington*, 83 N. Y. App. Div. 91; *Kellogg v. School Dist. No. 10*, 13 Okla. 285; *Livingston v. School Board*, 15 Pa. Super. Ct. 358; *Com. v. Sholtis*, 24 Pa. Super. Ct. 487; *Hubbell v. Custer City*, 15 S. Dak. 55; *Loomis v. Brown County*, 15 S. Dak. 606. See, however, *Staten Island Bank v. New York*, 174 N. Y. 519, affirming 68 N. Y. App. Div. 231 (warrant issued on claims allowed).

Estoppel Against Owner. — The owner of a warrant may, by indorsing it and thereby giving indicia of title to the indorsee, be estopped from claiming title to the warrant as against one to whom the indorsee transfers it. *Delfosse v. Metropolitan Nat. Bank*, 98 Ill. App. 123.

27. 1. Actions on Warrants by Transferee. — *Germania Bank v. Trapnell*, 118 Ga. 578, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 27.

2. *Kearny County v. Irvine*, (C. C. A.) 126 Fed. Rep. 689.

3. *Com. v. Sholtis*, 24 Pa. Super. Ct. 487.

28. 6. *Stewart v. Indian Territory Bank*, 68 Kan. 755.

8. *Stephens v. Wyoming School Dist.*, 10 Pa. Dist. 135.

10. Action to Recover Judgment. — Compare *Gunnison County v. Sims*, 31 Colo. 483.

Where the Fund for Payment Has Been Misapplied. an action to recover a money judgment on a county warrant may be maintained. *Ayres v. Thurston County*, 63 Neb. 96.

Where Valid Warrants Are Surrendered for Invalid Bonds, a court of equity has jurisdiction to

enforce the warrants surrendered. *Kearny County v. Irvine*, (C. C. A.) 126 Fed. Rep. 689.

Recovery on the Original Indebtedness is not barred by the acceptance of a warrant which proves to be illegal. *Blanchard v. Chaffee County*, 15 Colo. App. 410; *Johnson v. School Corp.*, 117 Iowa 319.

29. 1. See *Com. v. Sholtis*, 24 Pa. Super. Ct. 487.

5. Compare *Bacon v. Dawes County*, 66 Neb. 191; *Stewart v. Custer County*, 14 S. Dak. 155; *Brannon v. White Lake Tp.*, 17 S. Dak. 83.

6. Presentation for Examination and Adjustment by the county board is not required in *Nebraska* in the case of county warrants before an action may be maintained thereon. *Ayres v. Thurston County*, 63 Neb. 96.

30. 2. *Farmers' Sav. Bank v. Independent School Dist.*, 122 Iowa 99.

6. Limitation of Actions. — *Condon v. Eureka Springs*, 135 Fed. Rep. 566; *Coler v. Sterling*, 15 S. Dak. 415.

8. *Condon v. Eureka Springs*, 135 Fed. Rep. 566.

9. A Call for Outstanding Warrants by the county treasurer is not necessary to start the running of the statute, as such provision is merely for the benefit of the county to relieve it from liability for interest. *Bodman v. Johnson County*, 115 Iowa 296.

10. *Bodman v. Johnson County*, 115 Iowa 296.

11. *Brannon v. White Lake Tp.*, 17 S. Dak. 83. See also *Hubbell v. South Hutchinson*, 64 Kan. 645.

31. 1. See *Hubbell v. South Hutchinson*, 64 Kan. 645.

2. Compare *Rodman v. Johnson County*, 115 Iowa 296, distinguishing *Wetmore v. Monona County*, 73 Iowa 88, cited in the original note.

6. Municipal Bills and Notes. — *Tyler v. Jester*, (Tex. Civ. App. 1903) 74 S. W. Rep. 359; *Corporation, etc., v. Bessette*, 9 Quebec Q. B. 423.

Notes Executed in Lieu of Other Notes do not create an indebtedness within the meaning of the statutory provision requiring the levy of a tax to pay indebtedness created. *Tyler v. Jester*, 97 Tex. 344.

Instrument Construed to Be Note and Not Bond. — See *Tyler v. Jester*, 97 Tex. 344.

31. Negotiability. — See note 9.

32. IV. BONDS — 1. Power to Issue Bonds — *a.* GENERAL POWER TO ISSUE BONDS — (1) *Rule Stated.* — See notes 2, 3, 5.

33. See note 1.

General Construction of Statutes for Issuance of Bonds. — See notes 5, 6.

(2) *Bonds for Money Borrowed.* — See note 7.

34. (5) *Funding and Renewal Bonds* — (a) *Implied Power to Issue.* — See notes 9, 10.

35. See note 3.

(b) *Statutory Authority* — *aa.* IN GENERAL. — See notes 7, 10.

36. *cc.* CONSTITUTIONALITY OF STATUTE. — See note 3.

dd. RIGHT OF CREDITORS TO DEMAND FUNDING BONDS. — See notes 4, 6.

ee. WHAT INDEBTEDNESS MAY BE REFUNDED. — See note 7.

37. (e) *Constitutional and Statutory Restrictions on Indebtedness.* — See notes 2, 3.

A Distinction. — See note 4.

38. (e) *Rights of Bona Fide Holders.* — See note 3.

(g) *Recovery on Original Indebtedness.* — See note 7.

31. 9. Negotiability. — Coquard *v.* Oquawka, 192 Ill. 355, *affirming* 91 Ill. App. 648.

32. 2. Constitutional Provision as to Enactment of Statute. — See Debnam *v.* Chitty, 131 N. Car. 657.

Special Legislation. — See State *v.* Brock, 66 S. Car. 357.

3. Implied Power to Issue Nonnegotiable Bonds. — Coquard *v.* Oquawka, 91 Ill. App. 648, *affirmed* 192 Ill. 355.

Presumption as to Validity of Bond. — See Connelville Second Nat. Bank *v.* School Dist., 23 Pa. Co. Ct. 636.

5. Bonds to Enforce Lawful Indebtedness. — Witter *v.* Polk County, 112 Iowa 380; Bennett *v.* Nebagamon, 122 Wis. 295.

"Certificates of Indebtedness." — A statute authorizing a municipality to create an indebtedness and to issue therefor "certificates of indebtedness" authorizes the issuance of bonds therefor. Christie *v.* Duluth, 82 Minn. 202.

33. 1. Bonds for Unauthorized Indebtedness. — Bennett *v.* Nebagamon, 122 Wis. 295.

5. Hanson *v.* Grand' Mère, 33 Can. Sup. Ct. 58, *quoting* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 33.

Village Authorized by Statute Authorizing Every "City or Town." — Brown *v.* Grangeville, 8 Idaho 784.

6. Washington County *v.* Williams, (C. C. A.) 111 Fed. Rep. 801; Hanson *v.* Grand' Mère, 33 Can. Sup. Ct. 58, *quoting* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 33.

7. Bonds for Authorized Loans to Municipality. — Fernald *v.* Gilman, 123 Fed. Rep. 797.

34. 9. Funding or Renewal Bonds — Implied Powers. — Hyde *v.* Ewert, 16 S. Dak. 133; Ewert *v.* Mallery, 16 S. Dak. 151.

10. U. S. Trust Co. *v.* Mineral Ridge, 104 Fed. Rep. 851, 44 C. C. A. 218; Tyler *v.* Tyler Bldg., etc., Assoc., (Tex. Civ. App. 1904) 82 S. W. Rep. 1066.

Presumption as to Validity of Funding Bonds. — See Lake County *v.* Keene Five-Cents Sav. Bank, 108 Fed. Rep. 505, 47 C. C. A. 464.

35. 3. Macon *v.* Jones, 122 Ga. 455. See also Coquard *v.* Oquawka, 91 Ill. App. 648, *affirmed* 192 Ill. 355.

7. Waite *v.* Santa Cruz, 184 U. S. 302;

Sparks *v.* Bohannon, (Ky. 1901) 61 S. W. Rep. 260; Carpenter *v.* Central Covington, (Ky. 1904) 81 S. W. Rep. 919; Lancaster City School Dist. *v.* Lamprecht Bros. Co., 198 Pa. St. 504; Carbon County *v.* Rollins, 9 Wyo. 281.

10. Pierre *v.* Dunscomb, 106 Fed. Rep. 611, 45 C. C. A. 499; Stone *v.* Chicago, 207 Ill. 492.

36. 3. Enactment of Statute. — See Henderson County *v.* Travelers' Ins. Co., 128 Fed. Rep. 817, 63 C. C. A. 467, holding that a constitutional provision requiring bills authorizing municipal indebtedness to be read three times did not apply to bills authorizing refunding bonds.

4. Board of Liquidation *v.* U. S., 108 Fed. Rep. 689, 47 C. C. A. 587.

6. Jones *v.* Madison County, 135 N. Car. 218.

7. Board of Liquidation *v.* U. S., 108 Fed. Rep. 689, 47 C. C. A. 587; Stone *v.* Chicago, 207 Ill. 492; Smith *v.* Vicksburg, (Miss. 1905) 38 So. Rep. 301; Diefenderfer *v.* State, 13 Wyo. 387.

The Term "Bonded Indebtedness Actually Existing" includes matured interest coupons of outstanding bonds, but not unmatured coupons. Kelly *v.* Cole, 63 Kan. 385.

37. 2. Reynolds *v.* Lyon County, 121 Iowa 733. See also Montpelier Sav. Bank, etc., Co. *v.* School Dist. No. 5, 115 Wis. 622.

3. Reynolds *v.* Lyon County, 121 Iowa 733.

4. Pierre *v.* Dunscomb, 106 Fed. Rep. 611, 45 C. C. A. 499; Lake County *v.* Keene Five-Cents Sav. Bank, 108 Fed. Rep. 505, 47 C. C. A. 464; Independent School Dist. *v.* Rew, (C. C. A.) 111 Fed. Rep. 1; Fairfield *v.* Rural Independent School Dist., (C. C. A.) 116 Fed. Rep. 838; Hirt *v.* Erie, 200 Pa. St. 223; Hyde *v.* Ewert, 16 S. Dak. 133; Ewert *v.* Mallery, 16 S. Dak. 151; Cass County *v.* Wilbarger County, 25 Tex. Civ. App. 52.

38. 3. Bona Fide Holders. — Waite *v.* Santa Cruz, 184 U. S. 302.

7. Subrogation to Rights of Holders of Warrants Funded Upheld. — Coffin *v.* Kearney County, 114 Fed. Rep. 518, *modified* (C. C. A.) 126 Fed. Rep. 689.

Recovery on Warrants Surrendered for invalid bonds may be had by *bona fide* holders. Kearny County *v.* Irvine, (C. C. A.) 126 Fed. Rep. 689.

39. c. SPECIAL PURPOSES FOR WHICH BONDS MAY BE AUTHORIZED — (2) *Public Works and Improvements* — The Statutes. — See note 8.

40. See notes 1, 2, 3, 5.

41. (3) *Light and Water Bonds*. — See note 7.

42. See note 1.

c. LIMITATION ON INDEBTEDNESS — (1) *In General* — Statutory and Constitutional Restrictions. — See note 6.

43. Decrease in Property Valuation. — See note 5.

44. (3) *Recovery for Money Had and Received* — Implied Promise. — See note 5.

(4) *Presumption with Regard to Excess of Indebtedness*. — See note 6.

45. d. CURATIVE ACTS. — See notes 1, 3.

2. Conditions Precedent to Issuance of Bonds — *a. IN GENERAL.* — See note 4.

46. See note 2.

b. FAILURE TO PROVIDE SINKING FUND OR TAX FOR PAYMENT OF BONDS. — See notes 3, 4, 9.

Limitation of Actions. — See *Coffin v. Kearney County*, 114 Fed. Rep. 518, *modified* (C. C. A.) 126 Fed. Rep. 689; *Coquard v. Oquawka*, 192 Ill. 355.

Limitation of Actions on Surrendered Warrants. — See *Kearney County v. Irvine*, (C. C. A.) 126 Fed. Rep. 689.

39. 8. Purchase of Fire Apparatus. — *Bennett v. Nebagamon*, 122 Wis. 295.

40. 1. Public Buildings. — *Law v. San Francisco*, 144 Cal. 384; *Witter v. Polk County*, 112 Iowa 380; *People v. Seaman*, 59 N. Y. App. Div. 76; *Kyes v. St. Croix County*, 108 Wis. 136.

School Building. — *Allen v. Adams*, 66 S. Car. 244.

2. Improvement of Streets and Roads. — *Burlington Sav. Bank v. Clinton*, 106 Fed. Rep. 269; *Mill Valley v. House*, 142 Cal. 698; *Deitrich v. Parke County*, 28 Ind. App. 83; *Favallora v. Police Jury*, 112 La. 384; *Grosse Pointe Tp. v. Finn*, 134 Mich. 529; *Canandaigua v. Hayes*, 90 N. Y. App. Div. 336.

3. Bridges. — *Schmidt v. Defiance*, 117 Fed. Rep. 702.

5. Sewerage and Drainage Systems. — *Law v. San Francisco*, 144 Cal. 384.

41. 7. Water Bonds. — *Weldin v. Wilmington*, 3 Penn. (Del.) 472; *State v. Topeka*, 68 Kan. 177; *Evans v. McFarland*, 186 Mo. 703; *New York, etc., Cement Co. v. Davis*, 173 N. Y. 235, *affirming* 62 N. Y. App. Div. 577; *People v. White Plains*, 93 N. Y. App. Div. 599; *Territory v. Whitehall*, 13 Okla. 534; *Wells v. Sioux City*, 16 S. Dak. 547; *Smith v. Seattle*, 25 Wash. 300; *Appleton Waterworks Co. v. Appleton*, 116 Wis. 363.

42. 1. Light Bonds. — *Middleton v. St. Augustine*, 42 Fla. 287, 89 Am. St. Rep. 227; *Blanchard v. Benton*, 109 Ill. App. 569; *Evans v. McFarland*, 186 Mo. 703; *State v. Allen*, 178 Mo. 555; *Davis v. Fremont*, 135 N. Car. 538.

6. Limitation on Indebtedness. — *Purcell v. East Grand Forks*, 91 Minn. 486.

"Last Preceding Assessment." — See *Chicago, etc., R. Co. v. Wilber*, 63 Neb. 624.

43. 5. Ewert v. Mallory, 16 S. Dak. 151.

44. 5. Thornburgh v. School Dist. No. 3, 175 Mo. 12.

Subrogation. — Where a municipality issues bonds in excess of the constitutional limitation on indebtedness, such bonds may be enforced to the extent to which the proceeds are used in paying off the valid indebtedness of the municipality. *Everett v. Independent School Dist.*, 109 Fed. Rep. 697.

6. Compare *Thornburgh v. School Dist. No. 3*, 175 Mo. 12.

45. 1. Curative Acts. — *New York L. Ins. Co. v. Cuyahoga County*, (C. C. A.) 106 Fed. Rep. 123; *Carpenter v. Greene County*, 130 Ala. 613; *Birmingham Mineral R. Co. v. Tuscaloosa County*, 137 Ala. 260; *Middleton v. St. Augustine*, 42 Fla. 287, 89 Am. St. Rep. 227; *Potter v. Lainhart*, 44 Fla. 647; *Givens v. Hillsborough County*, (Fla. 1903) 35 So. Rep. 88; *Witter v. Polk County*, 112 Iowa 380. *Compare* *Berkley v. Board of Education*, (Ky. 1900) 58 S. W. Rep. 506.

The Existence of a Judgment Holding Bonds to Be Invalid because of some irregularity does not defeat the right of the legislature by subsequent curative act to authorize their issuance. *Givens v. Hillsborough County*, (Fla. 1903) 35 So. Rep. 88.

3. Shearer v. Bay County, 128 Mich. 552.

4. Statutory Method to Be Followed. — *U. S. Trust Co. v. Mineral Ridge*, 104 Fed. Rep. 851, 44 C. C. A. 218; *Clapp v. Marice City*, 111 Fed. Rep. 103, 49 C. C. A. 251; *McHugh v. San Francisco*, 132 Cal. 381; *Canandaigua v. Hayes*, 90 N. Y. App. Div. 336.

Sufficiency of Resolution as to Issuance of Bonds. — See *Potter v. Lainhart*, 44 Fla. 647; *Hillsborough County v. Henderson*, 45 Fla. 356; *New York, etc., Cement Co. v. Davis*, 173 N. Y. 235.

Notice of Proposed Issuance of bonds as required by statute must be given. *Clarksdale v. Broadus*, 77 Miss. 667.

Sufficiency of Notice of Proposal. — See *Kemp v. Hazelhurst*, 80 Miss. 443.

46. 2. Tyler v. Tyler Building, etc., Assoc., 98 Tex. 69.

3. Tax to Pay Bonds. — See *Potter v. Lainhart*, 44 Fla. 647.

As to What Constitutes a Sufficient Compliance with the requirement of the Idaho Constitution,

47. c. ASSENT OF TAXPAYERS, OR VOTERS — (1) In General. — See notes 1, 2, 3.

(2) *Form and Character of Proposition Submitted.* — See note 5.

Two Propositions. — See note 6.

(3) *Order, Call, or Proclamation for Election.* — See note 7.

48. By Whom to Be Called. — See note 1.

(4) *Petition for Election.* — See note 2.

(5) *Time of Holding Election.* — See notes 5, 6.

(6) *Notice of Election.* — See note 7.

see *Boise City v. Union Bank, etc., Co.*, 7 Idaho 342.

Validity Pro Tanto Upheld. — *Columbus v. Woonsocket Sav. Inst.*, 114 Fed. Rep. 162, 52 C. C. A. 118.

46. 4. *Sauer v. Gillett*, (Colo. App. 1904) 78 Pac. Rep. 1068; *Woodall v. Adel*, 122 Ga. 301; *Wilkins v. Waynesboro*, 116 Ga. 359; *Canandaigua v. Hayes*, 90 N. Y. App. Div. 336; *Peck v. Hempstead*, 27 Tex. Civ. App. 80; *Montpelier Sav. Bank, etc., Co. v. School Dist.* No. 5, 115 Wis. 622.

As to the sufficiency of the provision for a tax see *Epping v. Columbus*, 117 Ga. 263; *Austin v. Valle*, (Tex. Civ. App. 1902) 71 S. W. Rep. 414 (increase in tax valuations).

A Mere Resolution that a sufficient tax shall be levied to pay the interest upon the bonds and the principal when due, without specifying the amount of the tax, is not a sufficient compliance with a statute requiring the levy of an annual tax sufficient to pay the principal of the bonds when due. *Kyes v. St. Croix County*, 108 Wis. 136.

9. *King v. Superior*, 117 Fed. Rep. 113, 54 C. C. A. 499.

47. 1. Petition. — *Clarke v. Northampton*, 120 Fed. Rep. 661, 57 C. C. A. 123; *Hamilton v. Detroit*, 85 Minn. 83.

Defects in Petition Invalidating Bonds. — *Clarke v. Northampton*, 105 Fed. Rep. 312.

2. Election. — *Farmers' L. & T. Co. v. Sioux Falls*, 131 Fed. Rep. 890; *Fritz v. San Francisco*, 132 Cal. 373; *Potter v. Lainhart*, 44 Fla. 647; *Smith v. Dublin*, 113 Ga. 833; *Shearer v. Bay County*, 128 Mich. 552; *Le Tourneau v. Duluth*, 85 Minn. 219; *Broadfoot v. Fayetteville*, 128 N. Car. 529; *Robinson v. Goldsboro*, 135 N. Car. 382; *Cincinnati v. Ferguson*, 11 Ohio Dec. 101, 8 Ohio N. P. 361; *Montpelier Sav. Bank, etc., Co. v. School-Dist.* No. 5, 115 Wis. 622; *Appleton Waterworks Co. v. Appleton*, 116 Wis. 363.

3. Necessity for Consent of Taxpayers or Voters. — *Middleton v. St. Augustine*, 42 Fla. 287, 89 Am. St. Rep. 227; *Grosse Pointe Tp. v. Finn*, 134 Mich. 529; *Davis v. Fremont*, 135 N. Car. 538; *Hyde v. Ewert*, 16 S. Dak. 133.

5. Form of Submission. — *Brockport v. Green*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 231; *Parkinson v. Seattle School Dist.* No. 1, 28 Wash. 335.

Amount of Bonds to Be Stated. — In submitting a proposition to issue bonds, a proposition is sufficiently definite if it fixes the maximum amount to be issued, and vests the village with authority to issue a smaller amount. *Chicago, etc., R. Co. v. Wilber*, 63 Neb. 624.

A Proposition to Raise Money upon the Village

is sufficient to authorize issuance of bonds. *New York, etc., Cement Co. v. Keator*, 62 N. Y. App. Div. 577, affirmed 173 N. Y. 235.

6. *Farmers' L. & T. Co. v. Sioux Falls*, 131 Fed. Rep. 890; *Denver v. Hayes*, 28 Colo. 111; *Leavenworth v. Wilson*, 69 Kan. 74, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 47, and holding that a ballot submitting a proposition to issue bonds "to purchase, procure, provide, or contract for the construction of waterworks" was dual and illegal; *State v. Allen*, 186 Mo. 673, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 47; *Hempstead v. Seymour*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 92. See, however, *Potter v. Lainhart*, 44 Fla. 647, wherein a proposition for bonds to a certain amount for the erection of a courthouse and jail and also to a certain amount for building roads was held to be valid; *Kemp v. Hazlehurst*, 80 Miss. 443, holding that a proposition as to the issuance of bonds for the erection of an electric-light plant and waterworks was not double.

What Constitutes Double Proposition. — See *Louisville v. Park Com'rs*, 112 Ky. 409; *Hamilton v. Detroit*, 83 Minn. 119; *State v. Allen*, 178 Mo. 555.

Two Separate Propositions may be voted upon at the same time. *Woolfolk v. Paducah*, (Ky. 1904) 80 S. W. Rep. 186; *Maybin v. Biloxi*, 77 Miss. 673.

7. Call for Election. — *State v. Topeka*, 68 Kan. 177.

Resolution Instead of Ordinance Held to Be Sufficient. — *State v. Allen*, 178 Mo. 555.

48. 1. *Shortell v. Green County*, (Ky. 1900) 59 S. W. Rep. 522.

2. To Whom Petition to Be Made. — See *State v. Topeka*, 68 Kan. 177.

5. *Law v. San Francisco*, 144 Cal. 384.

6. Elections in Newly Organized Counties. — See the title MUNICIPAL AID, 1099. 1.

7. Form and Sufficiency of Notice. — *Wilkins v. Waynesboro*, 116 Ga. 359; *Sommercamp v. Kelly*, 8 Idaho 712; *Hamilton v. Detroit*, 83 Minn. 119; *Hauswirth v. Mueller*, 25 Mont. 156; *Fletcher v. Collingswood*, (N. J. 1904) 59 Atl. Rep. 90; *Asheville v. Webb*, 134 N. Car. 72; *Parkinson v. Seattle School Dist.* No. 1, 28 Wash. 335.

Length of Notice. — *Davis v. Dougherty County*, 116 Ga. 491; *State v. Allen*, 178 Mo. 868; *State v. Weston*, 67 Neb. 385; *Hesseltine v. Wilbur*, 29 Wash. 407 (publication for more than required time immaterial).

Issuance of Bonds Invalidated for Want of Notice. — *Clarksdale v. Broadus*, 77 Miss. 667.

Substantial Compliance. — *Wimberly v. Twiggs County*, 116 Ga. 50.

48. (7) *Requisite Vote to Carry Proposition*. — See note 8.
 49. (8) *Qualification of Voters*. — See note 1.
 (9) *Form of Ballots*. — See notes 2, 3, 4.
 (10) *Conduct of Election*. — See notes 5, 6.
 (11) *Returns and Canvass*. — See note 7.
 (12) *Contesting Election*. — See note 8.
 50. 3. *Execution of Bonds — a. SIGNING*. — See note 5.
 51. See note 1.
De Facto Officers. — See note 10.
b. SEALING. — See note 13.
 52. See note 3.
c. DELIVERY. — See notes 5, 7.
f. REGISTRATION. — See note 11.
 53. 4. *Form of Bonds — a. IN GENERAL*. — See notes 9, 10.
 54. *b. MEDIUM OF PAYMENT*. — See note 3.
c. FORM OF NEGOTIABILITY. — See note 8.
 55. *d. PLACE OF PAYMENT*. — See note 3.
e. TIME OF PAYMENT. — See note 8.

Insufficient Specification of Purpose of Bond Issue. — *Smith v. Dublin*, 113 Ga. 833.

48. 8. See *Fritz v. San Francisco*, 132 Cal. 373; *Law v. San Francisco*, 144 Cal. 384; *Potter v. Lainhart*, 44 Fla. 647; *Floyd County v. State*, 112 Ga. 794; *McKnight v. Senoia*, 115 Ga. 915; *Wilkins v. Waynesboro*, 116 Ga. 359; *Worthington v. Board of Education*, (Ky. 1903) 71 S. W. Rep. 879; *Shearer v. Bay County*, 128 Mich. 552; *Ewert v. Mallery*, 16 S. Dak. 151.

49. 1. See *Hamilton v. Detroit*, 85 Minn. 83.

Husband Residing in Wife's Homestead Not Freeholder. — *Hamilton v. Detroit*, 85 Minn. 83.

Power of Legislature to Fix Qualification of Voters. — *Spitzer v. Fulton*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 257, *affirmed* 61 N. Y. App. Div. 612.

Registration of Voters. — *Epping v. Columbus*, 117 Ga. 263.

2. *Whaley v. Com.*, 110 Ky. 154; *Stone v. Gregory*, 110 Ky. 492; *Kemp v. Hazlehurst*, 80 Miss. 443.

3. *Brown v. Grangeville*, 8 Idaho 784.

4. *Stone v. Chicago*, 207 Ill. 492; *Fletcher v. Collingswood*, (N. J. 1904) 59 Atl. Rep. 90.

5. *Thornburgh v. School Dist. No. 3*, 175 Mo. 12.

Voting Places. — *State v. Allen*, 178 Mo. 555.

Time for Closing Polls. — *Hammond v. San Leandro*, 135 Cal. 450.

6. *Potter v. Lainhart*, 44 Fla. 647; *O'Bryan v. Owensboro*, 113 Ky. 680.

The Use of a Separate Ballot Box is authorized in *New Jersey* where the election is held at the time of a general election. *Fletcher v. Collingswood*, (N. J. 1904) 59 Atl. Rep. 90.

7. **Irregularities in Transmitting Returns.** — *State v. Topeka*, 68 Kan. 177.

Publication of Result of Election. — *Wilbur v. Wyatt*, 63 Neb. 261.

8. *Epping v. Columbus*, 117 Ga. 263; *Louisville v. Park Com'rs*, 112 Ky. 409.

The Burden of Proving that Illegal Votes Were Counted is on the party attacking the election. *Territory v. Whitehall*, 13 Okla. 534.

50. 5. **Signing the Bonds.** — *Kearny County v. Vandriss*, (C. C. A.) 115 Fed. Rep. 866.

Estoppel to Deny Execution. — *Mobile County v. Sands*, 127 Ala. 493.

51. 1. *Potter v. Lainhart*, 44 Fla. 647.

10. **De Facto Officers.** — *Waite v. Santa Cruz*, 184 U. S. 302.

13. **Sealing.** — *Schmidt v. Defiance*, 117 Fed. Rep. 702.

52. 3. **Equitable Relief Where the Wrong Seal Is Used** will be granted to a *bona fide* holder. *Defiance v. Schmidt*, (C. C. A.) 123 Fed. Rep. 1.

5. **Proof of Delivery.** — See *Thompson v. Mecosta*, 127 Mich. 522.

Delivery in Escrow. — See *Schmid v. Frankfort*, 131 Mich. 197.

7. See *McCurdy v. School Dist. No. 1*, 127 Mich. 210.

11. **Registration.** — *Martin County v. Gillespie County*, 30 Tex. Civ. App. 307.

53. 9. **Legislature May Prescribe Form.** — *U. S. Trust Co. v. Mineral Ridge*, 104 Fed. Rep. 851, 44 C. C. A. 218.

Sufficiency of Designation of Obligor. — See *Thompson v. Mecosta*, 127 Mich. 522.

Substitution of Printed Bonds for Typewritten Bonds. — *Oswego City Sav. Bank v. Board of Education*, 174 N. Y. 515, *affirming* 70 N. Y. App. Div. 538.

Power of Municipality to Prescribe Form in Absence of Statute. — *Potter v. Lainhart*, 44 Fla. 647.

10. *Cass County v. Wilbarger County*, 25 Tex. Civ. App. 52.

54. 3. **Gold Bonds — General Rule.** — *Hillsborough County v. Henderson*, 45 Fla. 356.

8. **Negotiability.** — *Jennings Banking, etc., Co. v. Jefferson*, 30 Tex. Civ. App. 534, (Tex. Civ. App. 1904) 79 S. W. Rep. 876. See, however, *Coquard v. Oquawka*, 192 Ill. 355, *affirming* 91 Ill. App. 648.

55. 3. **Restraining Issuance of Bonds Violating Statutory Requirement as to Place of Payment.** — *Middleton v. St. Augustine*, 42 Fla. 287, 89 Am. St. Rep. 227.

8. **Time of Payment.** — *Sauer v. Gillett*, (Colo. App. 1904) 78 Pac. Rep. 1069; *Kemp v. Hazlehurst*, 80 Miss. 443.

Bonds Running for Longer Period than Author-

- 56.** If the Statute Fixes No Time. — See note 1.
 And Where the Maximum Period Is Fixed. — See note 2.
 The Computation of the Time. — See note 7.
- 57.** *f.* INTEREST. — See note 1.
g. DENOMINATION OF BONDS. — See note 8.
h. RECITALS AS TO PURPOSE FOR WHICH BONDS ARE ISSUED. — See note 10.
- 58.** *i.* REFERENCE TO STATUTORY AUTHORITY. — See note 4.
j. DATE. — See note 6.
- 5.** Sale or Negotiation of Bonds — *a.* IN GENERAL. — See note 7.
 Where the Bonds Are Issued for the Purpose of Borrowing Money. — See note 9.
 Paying Indebtedness. — See note 10.
- 59.** If the Authority Is Merely to Issue Bonds in Payment of a Certain Indebtedness. — See note 1.
- b.* PRICE — The Terms "Par Value" or "at Par." — See note 7.
- 60.** *d.* LIABILITY ON BID. — See notes 1, 5.
 After the Municipality Has Entered into a Valid Contract. — See note 6.
- 6.** Bonds of De Facto Municipal Corporations. — See note 7.

ized Invalid. — *Shearer v. Bay County*, 128 Mich. 552.

Bonds Running for Less than Required Period Invalid. — Compare *Kearny County v. Vandriess*, (C. C. A.) 115 Fed. Rep. 866.

An Option to Redeem before the statutory time for redemption has been held not to invalidate bonds, though such provision was void. *Pontotoc v. Fulton*, 79 Miss. 511; *Howell v. Western R. Co.*, 94 U. S. 463.

56. 1. Effect of Provision for Sinking Fund. — The fact that a statute providing for the issuance of bonds requires the levy of a tax to provide a yearly five per cent. sinking fund does not impliedly restrict the time for which the bonds shall be issued to twenty years. *Keith County v. Citizens' Sav., etc., Assoc.*, (C. C. A.) 116 Fed. Rep. 13.

2. *Wilkins v. Waynesboro*, 116 Ga. 359; *Radford v. Heth*, 100 Va. 16, 3 Va. Sup. Ct. 581. See also *Kearny County v. Vandriess*, (C. C. A.) 115 Fed. Rep. 866.

7. *Syracuse Tp. v. Rollins*, (C. C. A.) 104 Fed. Rep. 958, holding bonds to be valid regardless of their date where their actual issuance was within the statutory period before their maturity. See also *infra*, this title, **58. 6.**

57. 1. Interest. — *Keith County v. Citizens' Sav., etc., Assoc.*, (C. C. A.) 116 Fed. Rep. 13.

8. Denomination of Bonds. — *Law v. San Francisco*, 144 Cal. 384.

10. Recitals as to Purpose of Bonds. — *Clapp v. Marice City*, 111 Fed. Rep. 103, 49 C. C. A. 251; *Tyler v. Tyler Bldg., etc., Assoc.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 1066.

Bonds Designated as the "Ogallala Precinct Canal Bonds" sufficiently state for what purpose they were issued. *Keith County v. Citizens' Sav., etc., Assoc.*, (C. C. A.) 116 Fed. Rep. 13.

58. 4. Recital of Wrong Statute. — See *Beatrice v. Edminson*, (C. C. A.) 117 Fed. Rep. 427; *Wilkes County v. Coler*, (C. C. A.) 113 Fed. Rep. 725, *affirmed* 190 U. S. 107; *Keith County v. Citizens' Sav., etc., Assoc.*, (C. C. A.) 116 Fed. Rep. 13; *Schmidt v. Defiance*, 117 Fed. Rep. 702; *Fernald v. Gilman*, 123 Fed. Rep. 797.

The Recital of an Unconstitutional Statute as authority for issuing bonds will not invalidate them in the hands of an innocent holder, if power for the issue can be found elsewhere. *Defiance v. Schmidt*, (C. C. A.) 123 Fed. Rep. 1.

6. The Date of Issue Is to Be Determined from the time at which the municipality actually parted with the custody and control of the bonds. *Chicago, etc., R. Co. v. Dundy County*, (Neb. 1902) 91 N. W. Rep. 554. See also *supra*, this title, **56. 7.**

7. Sale of Bonds. — *Roberts v. Taft*, 109 Fed. Rep. 825, 48 C. C. A. 681; *Roberts v. Taft*, 116 Fed. Rep. 228; *State v. Allison*, 11 Ohio Dec. 62, 8 Ohio N. P. 170; *State v. Young*, 66 S. Car. 115.

Notice of Sale. — See *Givens v. Hillsborough County*, (Fla. 1903) 35 So. Rep. 88; *Cincinnati v. Fenner*, 11 Ohio Dec. 281, 8 Ohio N. P. 342; *Parkinson v. Seattle School Dist. No. 1*, 28 Wash. 335.

Issuance in Instalments Allowed. — *Wells v. Sioux Falls*, 16 S. Dak. 547.

9. Power to Rescind Award to Highest Bidder. — *State v. Allison*, 11 Ohio Dec. 62, 8 Ohio N. P. 170.

10. Ewert v. Mallery, 16 S. Dak. 151.

59. 1. *Edwards v. Bates County*, 117 Fed. Rep. 526. See further the title MUNICIPAL AID, **1106. 4, 5.**

7. Meaning of Term "Par." — *Duval County v. Knight*, 42 Fla. 366.

60. 1. Construction of Bid. — See *Duval County v. Knight*, 42 Fla. 366.

Bid Is to Be Paid in Money. — *Potter v. Laihart*, 44 Fla. 647.

Bidder Liable for Breach of Contract to Purchase. — *Carbon Co. v. Rollins*, 9 Wyo. 281.

5. Interest on Deposit Not Recoverable. — *Denver v. Hayes*, 28 Colo. 111.

6. Mandamus Will Lie to Compel Issuance of bonds in pursuance of a contract. *Edwards C. Jones Co. v. Guttenberg*, 66 N. J. L. 659.

7. Corporations De Facto. — *Clapp v. Otoe County*, 104 Fed. Rep. 473, 45 C. C. A. 579; *Bradford v. Westbrook*, (Tex. Civ. App. 1905) 88 S. W. Rep. 382.

60. 7. Rights and Liabilities Arising Out of Illegal Issue of Bonds — a. ENJOINING ILLEGAL ISSUANCE OF BONDS. — See note 8.

61. b. ENJOINING PAYMENT OF BONDS. — See note 3.

c. INJUNCTION AGAINST COLLECTION OF TAX. — See note 5.

e. RECOVERY AGAINST MUNICIPALITY ON IMPLIED CONTRACT. — See notes 11, 12.

62. 8. Transfer of Bonds, and Rights of Bona Fide Holders — a. TRANSFER OF BONDS. — See note 3.

b. PROTECTION AFFORDED TO BONA FIDE HOLDERS — (1) *In General* — And in New York. — See note 5.

But in Practically All the Other Jurisdictions in the United States. — See note 7.

63. (2) Who Are Bona Fide Holders — (a) In General. — See note 1.

Subrogation to Rights of Antecedent Holders. — See note 2.

64. Presumptions. — See notes 1, 2.

60. 8. Enjoining Illegal Issuance of Bonds. — *Hamilton v. Detroit*, 85 Minn. 83; *Purcell v. East Grand Forks*, 91 Minn. 486; *Clarksdale v. Broadus*, 77 Miss. 667. See also *Middleton v. St. Augustine*, 42 Fla. 287, 89 Am. St. Rep. 227.

61. 3. Enjoining Payment of Illegal Bonds. — *Kyes v. St. Croix County*, 108 Wis. 136.

Effect of Laches. — See *Schmitz v. Zeh*, 91 Minn. 290.

5. Enjoining Collection of Special Tax. — *Waples v. Dubuque*, 116 Iowa 167; *Graves v. Moore County*, 135 N. Car. 49.

11. Implied Contract. — *Geer v. School Dist. No. 11*, 111 Fed. Rep. 682, 49 C. C. A. 539; *Fernald v. Gilman*, 123 Fed. Rep. 797; *Chelsea Sav. Bank v. Ironwood*, (C. C. A.) 130 Fed. Rep. 410; *Lancaster City School Dist. v. Lamprecht Bros. Co.*, 198 Pa. St. 504. *Compare Thornburgh v. School Dist. No. 3*, 175 Mo. 12.

Recovery by Assignee. — *Chelsea Sav. Bank v. Ironwood*, (C. C. A.) 130 Fed. Rep. 410.

Limitation of Actions. — *Geer v. School Dist. No. 11*, (C. C. A.) 111 Fed. Rep. 682; *Coquard v. Oquawka*, 91 Ill. App. 648, *affirmed* 192 Ill. 355.

12. Newburgh Sav. Bank v. Woodbury, 173 N. Y. 55.

Payment into Treasury. — The fact alone that the proceeds of void bonds were paid into the treasury of the municipality does not impose any liability upon it. *Peck v. Hempstead*, 27 Tex. Civ. App. 80.

62. 3. Action Maintainable by Transferee. — *Salmon v. Rural Independent School Dist.*, 125 Fed. Rep. 235; *Carpenter v. Greene County*, 130 Ala. 613; *Jennings Banking, etc., Co. v. Jefferson*, 30 Tex. Civ. App. 534.

5. New York Rule. — See *Citizens' Sav. Bank v. Greenburgh*, 173 N. Y. 215, *reversing* 60 ... Y. App. Div. 225, reviewing prior cases, and holding that the bonds in question were "invested with a character of negotiability which, in the hands of bona fide holders, rendered them unassailable upon any ground that did not relate to the authority for their issue;" *Manhattan Sav. Inst. v. New York Nat. Exch. Bank*, 170 N. Y. 58, 88 Am. St. Rep. 640, *affirming* 53 N. Y. App. Div. 635, and holding that the purchaser of stolen bonds payable to bearer was entitled to protection; *Brockport v. Green*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 231.

7. Bona Fide Purchasers of Municipal Bonds Protected. — *Hughes County v. Livingston*, 104 Fed. Rep. 306, 43 C. C. A. 541; *Independent School Dist. v. Rew*, (C. C. A.) 111 Fed. Rep. 1; *Gamble v. Rural Independent School Dist.*, 132 Fed. Rep. 514; *Fletcher v. Hickman*, (C. C. A.) 136 Fed. Rep. 568; *Jefferson v. Jennings Banking, etc., Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 876. See, however, *Coquard v. Oquawka*, 192 Ill. 355, *affirming* 91 Ill. App. 648.

If There Are No Recitals in the Bonds Which Will Operate as an Estoppel. — *Green County v. Shortell*, 116 Ky. 108.

Must Be Negotiable in Form. — *National Bank v. Petterson*, 200 Ill. 215, *affirming* 102 Ill. App. 501.

Bonds Payable from a Special Tax Only have been held not to be negotiable paper because of the uncertainty as to whether the fund would be adequate for payment. *Washington County v. Williams*, (C. C. A.) 111 Fed. Rep. 801.

Rule in Federal Courts. — The question whether protection shall be afforded to bona fide holders of municipal securities is a question of general jurisprudence, and the federal courts are not upon this question required to follow the decision of the state courts. *Clapp v. Otoe County*, (C. C. A.) 104 Fed. Rep. 473; *Stanley County v. Coler*, (C. C. A.) 113 Fed. Rep. 705, *affirmed* 190 U. S. 437.

63. 1. Edwards v. Bates County, 117 Fed. Rep. 526.

Taking a Guaranty from the Seller of municipal bonds will not prevent the purchaser from being a bona fide holder. *Schmid v. Frankfort*, 134 Mich. 610.

2. Subrogation to Rights of Antecedent Holders. — *Hughes County v. Livingston*, 104 Fed. Rep. 306, 43 C. C. A. 541; *Jefferson v. Jennings Banking, etc., Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 876. See, however, *Gamble v. Rural Independent School Dist.*, 132 Fed. Rep. 514.

The Burden of Showing that the precedent holder was a bona fide holder seems to be upon the party claiming subrogation to his rights. *Montpelier Sav. Bank, etc., Co. v. School Dist. No. 5*, 115 Wis. 622.

64. 1. Presumptions in Favor of Holder. — *Compare Salmon v. Rural Independent School Dist.*, 125 Fed. Rep. 235 (bond issued in excess of constitutional limitation on indebtedness);

- 64.** (b) *Value.* — See note 4.
Purchasers on Credit. — See note 5.
Payment of Antecedent Debt. — See note 7.
Purchase Below Par. — See note 8.
- 65.** (c) *Purchaser After Maturity.* — See note 1.
 (d) *Notice.* — See notes 4, 5, 6.
Municipal Records. — See note 7.
- 66.** (3) *Bonds Issued Without Authority.* — See note 5.
- 67.** (4) *Bonds in Excess of Authorized Indebtedness* — *Recitals in Bonds.* — See note 1.
- 68.** So, Also, Where Such a Limitation Is Imposed by the Constitution. — See note 3.
 (5) *Irregularities in Exercise of Power to Issue Bonds* — (a) *In General.* — See note 4.

Thompson v. Mecosta, 127 Mich. 522; *Montpelier Sav. Bank, etc., Co. v. School Dist. No. 5*, 115 Wis. 622.

Question for Jury as to Status of Bona Fide Purchaser. — *Schmid v. Frankfort*, 131 Mich. 197.

64. 2. Bonds Issued Without Consideration. — *Salmon v. Rural Independent School Dist.*, 125 Fed. Rep. 235; *Gamble v. Rural Independent School Dist.*, 132 Fed. Rep. 514.

4. A Holder Acquiring Title as a Distributee of a decedent's estate is not a bona fide holder. *Salmon v. Rural Independent School Dist.*, 125 Fed. Rep. 235.

5. Payment by Check when the check is paid may constitute the purchaser a *bona fide* holder. *Hughes County v. Livingston*, 104 Fed. Rep. 306, 43 C. C. A. 541.

7. Consideration Payment of Antecedent Debt. — *Thompson v. Mecosta*, 127 Mich. 522; *Gamble v. Rural Independent School Dist.*, 132 Fed. Rep. 514.

8. Purchase Below Par. — *Compare Gamble v. Rural Independent School Dist.*, 332 Fed. Rep. 514.

65. 1. Purchase After Maturity. — *Edwards v. Bates County*, 117 Fed. Rep. 526; *Salmon v. Rural Independent School Dist.*, 125 Fed. Rep. 235.

4. Notice. — *Burlington Sav. Bank v. Clinton*, 111 Fed. Rep. 439.

A Purchaser of Bonds from the President of the Municipality by which they were issued may be a *bona fide* purchaser. *Perris Irrigation Dist. v. Thompson*, (C. C. A.) 116 Fed. Rep. 832.

The Burden of Proof as to Want of Notice has been held to be upon the person claiming to be a *bona fide* holder. *Thompson v. Mecosta*, 127 Mich. 522.

5. Recitals as Constructive Notice. — *Sage v. Fargo Tp.*, 107 Fed. Rep. 383, 46 C. C. A. 361; *Burlington Sav. Bank v. Clinton*, 111 Fed. Rep. 439; *Fairfield v. Rural Independent School Dist.*, 111 Fed. Rep. 453, *reversed* (C. C. A.) 116 Fed. Rep. 838; *Sauer v. Gillett*, (Colo. App. 1904) 78 Pac. Rep. 1068; *Green County v. Shortell*, 116 Ky. 108; *Thornburgh v. School Dist. No. 3*, 175 Mo. 12; *Wilbur v. Wyatt*, 63 Neb. 261; *Chicago, etc., R. Co. v. Dundys County*, (Neb. 1902) 91 N. W. Rep. 554; *Grant v. Sherrill*, (Neb. 1904) 98 N. W. Rep. 681; *Peck v. Hempstead*, 27 Tex. Civ. App. 80; *Montpelier Sav. Bank, etc., Co. v. School Dist. No. 5*, 115 Wis. 622. *Com-*

pare Fairfield v. Rural Independent School Dist., (C. C. A.) 116 Fed. Rep. 838 (not charged with notice of terms of ordinance referred to as authorizing bonds).

6. Provisions of Statutes under Which Bonds Are Issued. — *U. S. Trust Co. v. Mineral Ridge*, 104 Fed. Rep. 851, 44 C. C. A. 218; *Fairfield v. Rural Independent School Dist.*, 111 Fed. Rep. 453; *Sauer v. Gillett*, (Colo. App. 1904) 78 Pac. Rep. 1068; *Oswego County Sav. Bank v. Genoa*, 172 N. Y. 635, *affirming* 66 N. Y. App. Div. 330; *Miller v. Hixson*, 64 Ohio St. 39.

7. Municipal Records. — *U. S. Trust Co. v. Mineral Ridge*, 104 Fed. Rep. 851, 44 C. C. A. 218. See, however, *Fairfield v. Rural Independent School Dist.*, 111 Fed. Rep. 453, *reversed* (C. C. A.) 116 Fed. Rep. 838.

66. 5. Want of Authority to Issue Bonds. — *Thornburgh v. School Dist. No. 3*, 175 Mo. 12; *Oswego County Sav. Bank v. Genoa*, 172 N. Y. 635, *affirming* 66 N. Y. App. Div. 330; *Debnam v. Chitty*, 131 N. Car. 657; *Graves v. Moore County*, 135 N. Car. 49; *Cass County v. Wilbarger County*, 25 Tex. Civ. App. 52; *Peck v. Hempstead*, 27 Tex. Civ. App. 80; *Uncas Nat. Bank v. Superior*, 115 Wis. 340; *Hanson v. Grand' Mère*, 33 Can. Sup. Ct. 56.

67. 1. Bonds Exceeding Authorized Indebtedness. — *Municipal Trust Co. v. Johnson City*, (C. C. A.) 116 Fed. Rep. 458; *Beatrice v. Edminson*, 117 Fed. Rep. 427, 54 C. C. A. 601; *Salmon v. Rural Independent School Dist.*, 125 Fed. Rep. 235; *Gamble v. Rural Independent School Dist.*, 132 Fed. Rep. 514; *State v. Wichita County*, 62 Kan. 494.

68. 3. Constitutional Limitation. — *Fairfield v. Rural Independent School Dist.*, 111 Fed. Rep. 453, *reversed* (C. C. A.) 116 Fed. Rep. 838; *Peck v. Hempstead*, 27 Tex. Civ. App. 80.

4. Recitals. — *Hughes County v. Livingston*, 104 Fed. Rep. 306, 43 C. C. A. 541; *Clapp v. Otoe County*, 104 Fed. Rep. 473, 45 C. C. A. 579; *Syracuse Tp. v. Rollins*, 104 Fed. Rep. 958, 44 C. C. A. 277; *Pierre v. Dunscomb*, 106 Fed. Rep. 611, 45 C. C. A. 499; *Board of Education v. McLean*, 106 Fed. Rep. 817, 45 C. C. A. 658; *Independent School Dist. v. Rew*, (C. C. A.) 111 Fed. Rep. 1; *Clapp v. Marice City*, 111 Fed. Rep. 103, 49 C. C. A. 251; *Stanley County v. Coler*, 113 Fed. Rep. 705, 51 C. C. A. 379, *affirmed* 190 U. S. 437; *Wilkes County v. Coler*, 113 Fed. Rep. 725, 51 C. C. A. 399, *affirmed* 190 U. S. 107; *Kearney v. Woodruff*, (C. C. A.) 115 Fed. Rep. 90; *Kearney County v. Vandriss*,

70. Unauthorized Recitals. — See note 1.

Recitals Inconsistent on Their Face. — See note 2.

(b) Irregularities in Election. — See note 3.

71. See notes 1, 2.**72. (a) Irregularities in Sale or Disposition of Bonds.** — See note 2.(6) *Protection Afforded by Prior Judicial Decisions* — Federal Courts. — See notes 3, 4.(8) *Official Character and Authority of Officers Issuing Bonds.* — See note 7.**73.** See note 1.(10) *Misapplication of Proceeds of Bonds.* — See note 8.**74. (11) Recital as to Purpose of Issue.** — See notes 1, 2.(12) *Breach of Collateral Agreements by Payee* — Conditional Grants of Aid to Railway Companies. — See note 4.

(C. C. A.) 115 Fed. Rep. 866; Keith County v. Citizens' Sav., etc., Assoc., (C. C. A.) 116 Fed. Rep. 13; Municipal Trust Co. v. Johnson City, (C. C. A.) 116 Fed. Rep. 458; Perris Irrigation Dist. v. Thompson, (C. C. A.) 116 Fed. Rep. 832; Fairfield v. Rural Independent School Dist., (C. C. A.) 116 Fed. Rep. 838; Wetzell v. Paducah, 117 Fed. Rep. 647; Schmidt v. Defiance, 117 Fed. Rep. 702; Stanly County v. Coler, 190 U. S. 437; Defiance v. Schmidt, (C. C. A.) 123 Fed. Rep. 1; Henderson County v. Travelers' Ins. Co., 128 Fed. Rep. 817, 63 C. C. A. 467; Gamble v. Rural Independent School Dist., 132 Fed. Rep. 514; Rees v. Olmsted, (C. C. A.) 135 Fed. Rep. 296; State v. Wichita County, 62 Kan. 494; South Hutchinson v. Barnum, 63 Kan. 872; Tyler v. Tyler Bldg., etc., Assoc., (Tex. 1905) 86 S. W. Rep. 750. See, however, Thornburgh v. School Dist. No. 3, 175 Mo. 12.

The Fact that the Purchaser Did Not Rely Solely on the Recitals in the bonds in making his purchase does not deprive him of the right to claim protection by reason of such recitals. Schmid v. Frankfort, 134 Mich. 619.

Recital as to Compliance with Constitutional Provision. — King v. Superior, 117 Fed. Rep. 113, 54 C. C. A. 499.

A Bond Referring to a Special Statute as authority for its issuance and reciting that "all the acts and things required to be done" have been done as required by law, refers to acts and things required by that statute, and cannot be construed to be an express statement that a constitutional requirement has been complied with. Montpelier Sav. Bank, etc., Co. v. School Dist. No. 5, 115 Wis. 622.

The Rule Applies to Actions on Coupons which were attached to the bonds containing recitals. Independent School Dist. v. Rew, (C. C. A.) 111 Fed. Rep. 1.

Purchasers of Renewal Bonds containing no recitals are not protected by recitals in the bonds superseded thereby. Salmon v. Rural Independent School Dist., 125 Fed. Rep. 235.

70. 1. Officer's Authority. — Peck v. Hempstead, 27 Tex. Civ. App. 80.

2. Sauer v. Gillett, (Colo. App. 1904) 78 Pac. Rep. 1068.

3. Irregularities in Election. — Hughes County v. Livingston, 104 Fed. Rep. 306, 43 C. C. A. 541; Clapp v. Otoe County, 104 Fed. Rep. 473, 45 C. C. A. 579.

Irregularities in Proposition Submitted to Vote. — Clapp v. Otoe County, (C. C. A.) 104 Fed. Rep. 473; Kearney v. Woodruff, (C. C. A.) 115 Fed. Rep. 90; Beatrice v. Edminson, 117 Fed. Rep. 427, 54 C. C. A. 601.

71. 1. Canvass of Election. — Hughes County v. Livingston, 104 Fed. Rep. 306, 43 C. C. A. 541; Syracuse Tp. v. Rollins, 104 Fed. Rep. 958, 44 C. C. A. 277.

2. No Election Held. — Defiance v. Schmidt, (C. C. A.) 123 Fed. Rep. 1.

72. 2. Irregularities in Sale of Bonds. — Hughes County v. Livingston, 104 Fed. Rep. 306, 43 C. C. A. 541; Pierre v. Dunscomb, 106 Fed. Rep. 611, 45 C. C. A. 499.

3. Clapp v. Otoe County, (C. C. A.) 104 Fed. Rep. 473.

4. Rule of Federal Courts. — Henderson County v. Travelers' Ins. Co., (C. C. A.) 128 Fed. Rep. 817.

7. Authority of Officials. — State v. Gibson, 11 Ohio Dec. 90, 8 Ohio N. P. 367.

73. 1. De Facto Officers. — Clapp v. Otoe County, 104 Fed. Rep. 473, 45 C. C. A. 579.

8. Misapplication of Proceeds. — Hughes County v. Livingston, 104 Fed. Rep. 306, 43 C. C. A. 541; Clapp v. Otoe County, 104 Fed. Rep. 473, 45 C. C. A. 579; Independent School Dist. v. Rew, (C. C. A.) 111 Fed. Rep. 1.

74. 1. Purpose of Issue. — Hughes County v. Livingston, 104 Fed. Rep. 306, 43 C. C. A. 541; Clapp v. Otoe County, 104 Fed. Rep. 473, 45 C. C. A. 579; Board of Education v. McLean, (C. C. A.) 106 Fed. Rep. 817; Kearney v. Woodruff, (C. C. A.) 115 Fed. Rep. 90; Defiance v. Schmidt, (C. C. A.) 123 Fed. Rep. 1; Gamble v. Rural Independent School Dist., 132 Fed. Rep. 514; Thompson v. Mecosta, 127 Mich. 522; Schmid v. Frankfort, 131 Mich. 197, 134 Mich. 619.

2. Waite v. Santa Cruz, 184 U. S. 302, reversing (C. C. A.) 98 Fed. Rep. 387; Pierre v. Dunscomb, 106 Fed. Rep. 611, 45 C. C. A. 499; Hardy Tp. v. Brattleboro Sav. Bank, 106 Fed. Rep. 986, 46 C. C. A. 66, affirming 98 Fed. Rep. 524; Independent School Dist. v. Rew, (C. C. A.) 111 Fed. Rep. 1; Fairfield v. Rural Independent School Dist., (C. C. A.) 116 Fed. Rep. 838; State v. Wichita County, 62 Kan. 494; Tyler v. Tyler Bldg., etc., Assoc., (Tex. 1905) 86 S. W. Rep. 750.

4. Carpenter v. Greene County, 130 Ala. 613. See also the title MUNICIPAL AID, **1120**, 1, 2.

- 76.** (20) *Estoppel by Acquiescence*. — See notes 3, 4.
- 78.** 9. **Payment of Bonds** — *d.* PLACE OF PAYMENT. — See note 2.
e. TIME OF PAYMENT. — See notes 3, 5.
g. INTEREST ON DEFAULT IN PAYMENT. — See notes 9, 10.
- 79.** The Rate of Interest. — See note 1.
h. BONDS PAYABLE FROM SPECIAL TAX OR FUND — Implied Authority to Tax. — See note 5.
Special Tax. — See notes 6, 7.
- 80.** If the Municipal Officers Neglect to Raise the Total Amount of the Special Tax. — See note 3.
i. REMEDIES TO COMPEL PAYMENT — A Summary Remedy. — See note 9.
Action to Recover Judgment. — See note 10.
- 81.** A Court of Equity. — See note 3.
j. SINKING FUND. — See notes 4, 5.

76. 3. **Acquiescence**. — *Wetzell v. Paducah*, 117 Fed. Rep. 647; *Schmitz v. Zeh*, 91 Minn. 290.

4. **Ultra Vires**. — *Sage v. Fargo Tp.*, 107 Fed. Rep. 383, 46 C. C. A. 361; *Washington County v. Williams*, (C. C. A.) 111 Fed. Rep. 801; *Clarke v. Northampton*, (C. C. A.) 120 Fed. Rep. 661; *Green County v. Shortell*, 116 Ky. 108; *Washington County v. David*, (Neb. 1902) 89 N. W. Rep. 737; *Oswego County Sav. Bank v. Genoa*, 172 N. Y. 635, *affirming* 66 N. Y. App. Div. 330; *Debnam v. Chitty*, 131 N. Car. 657; *Uncas Nat. Bank v. Superior*, 115 Wis. 340.

Effect on Construction of Statute Authorizing Issue. — Acquiescence by a municipality in the payment of interest upon bonds issued by it will lead to a liberal construction of the statute authorizing the issuing of the bonds in favor of the holders. *Washington County v. Williams*, (C. C. A.) 111 Fed. Rep. 801; *Washington County v. David*, (Neb. 1902) 89 N. W. Rep. 737.

Where There Was a Want of Jurisdictional Prerequisites to the issuance of bonds there was held to be no estoppel by acquiescence for twenty years. *Clarke v. Northampton*, 105 Fed. Rep. 312.

78. 2. *Williamson County v. Farson*, 101 Ill. App. 328, *affirmed* 199 Ill. 71. See also *supra*, this title, **55**, 3 *et seq.*

3. A Public Corporation can acquire no vested contract rights as to the time of maturity of payment of bonds held by it against another corporation. *Little River Tp. v. Reno County*, 65 Kan. 9.

5. *Little River Tp. v. Reno County*, 65 Kan. 9. See also *supra*, this title, **55**, 8 *et seq.*

9. **Interest After Maturity**. — *Hughes County v. Livingston*, 104 Fed. Rep. 306, 43 C. C. A. 541; *Ellis v. Witmer*, 134 Cal. 249; *Williamson County v. Farson*, 101 Ill. App. 328, *affirmed* 199 Ill. 71.

10. **Coupons**. — *Lake County v. Linn*, 29 Colo. 446.

79. 1. **Rate of Interest**. — *Edward C. Jones Co. v. Guttenberg*, 66 N. J. L. 659.

5. **Implied Power to Tax to Pay Bonds**. — *Cleveland v. U. S.*, (C. C. A.) 111 Fed. Rep. 341; *U. S. v. Saunders*, 124 Fed. Rep. 124, 59 C. C. A. 394.

6. **Special Tax Authorized**. — *Burlington Sav. Bank v. Clinton*, 111 Fed. Rep. 439; *Vickrey v. Sioux City*, 115 Fed. Rep. 437; *Franklin*

County v. Gardiner Sav. Inst., 119 Fed. Rep. 36, 55 C. C. A. 614; *U. S. v. Saunders*, 124 Fed. Rep. 124, 59 C. C. A. 394; *Birmingham Trust, etc., Co. v. Jefferson County*, 137 Ala. 375. See also *Gable v. Altoona*, 200 Pa. St. 15 (special assessment invalid).

7. **Limitation to Special Tax**. — *Shapter v. San Francisco*, 110 Fed. Rep. 615; *Choate v. Buffalo*, 167 N. Y. 597, *affirming* 39 N. Y. App. Div. 379; *Vickrey v. Sioux City*, 115 Fed. Rep. 437; *Jewell v. Superior*, (C. C. A.) 135 Fed. Rep. 19; *Miller v. Hixson*, 64 Ohio St. 39; *Uncas Nat. Bank v. Superior*, 115 Wis. 340.

Municipality Liable for Neglect to Impose Special Assessment. — See *Dime Deposit, etc., Bank v. Scranton*, 208 Pa. St. 383.

80. 3. *Burlington Sav. Bank v. Clinton*, 111 Fed. Rep. 439; *Mather v. San Francisco*, 115 Fed. Rep. 37, 52 C. C. A. 631. *Compare Shapter v. San Francisco*, 110 Fed. Rep. 615. The bondholder is not entitled, however, for failure of the municipality to levy a special tax from which the bonds are to be paid, to enforce the bonds against the municipality as a general indebtedness. *Washington County v. Williams*, (C. C. A.) 111 Fed. Rep. 801.

9. **Stipulation in Bond as to Remedy**. — When a statute provides an extraordinary remedy to the holder of bonds containing an express stipulation that he "shall be entitled" to that remedy he is not entitled to it in the absence of such stipulation. *Hubbert v. Campbellsville Lumber Co.*, 191 U. S. 70.

10. **Action to Recover Judgment**. — *Perris Irrigation Dist. v. Thompson*, (C. C. A.) 116 Fed. Rep. 832. See, however, *Gunnison County v. Sims*, 31 Colo. 483.

Presentation to Commissioner's Court Before Suit Not Required. — *Martin County v. Gillespie County*, 30 Tex. Civ. App. 307.

81. 3. **Relief in Equity**. — *Washington County v. Williams*, (C. C. A.) 111 Fed. Rep. 801. See, however, *Everett v. Independent School Dist.*, 109 Fed. Rep. 607 (subrogation); *Burlington Sav. Bank v. Clinton*, 111 Fed. Rep. 439; *Chelsea Sav. Bank v. Ironwood*, (C. C. A.) 130 Fed. Rep. 410.

4. **Sinking Fund**. — *People v. Hummel*, 215 Ill. 71; *O'Bryan v. Owensboro*, 113 Ky. 680; *Woolley v. Louisville*, 114 Ky. 556; *Austin v. Cahill*, (Tex. 1905) 88 S. W. Rep. 542.

5. *Vickrey v. Sioux City*, 104 Fed. Rep. 164.

- 81.** An Injunction. — See note 10.
82. Investment of Sinking Fund. — See note 6.
10. Overissue of Bonds — Sealing. — See notes 8, 9.

81. 10. Vickrey v. Sioux City, 104 Fed. Rep. 164; Farson v. Sioux City, 106 Fed. Rep. 278.

82. 6. Investment in Municipal Bonds. — See Ft. Scott v. W. G. Eads Brokerage Co., (C. C. A.) 117 Fed. Rep. 51 (*Kansas* statute).

8. Thornburgh v. School Dist. No. 3, 175 Mo. 12. See, however, Schmitz v. Zeh, 91 Minn. 290.

For Cases Where the Excess Was Scaled from a Series of Bonds issued in excess of the constitutional limitation on indebtedness, see Everett v. Independent School Dist., 109 Fed. Rep. 697; Columbus v. Woonsocket Sav. Inst., 114 Fed. Rep. 162, 52 C. C. A. 118.

9. McDermott v. Sinking Fund Com'rs, 69 N. J. L. 575.

MURDER AND MANSLAUGHTER.

BY H. N. ELDRIDGE.

- 91.** **I. DEFINITIONS** — **1. Homicide in General.** — See notes 1, 2.
2. Criminal Homicide — Classification of Criminal Homicide. — See note 5.
92. **II. CAPACITY TO COMMIT CRIMINAL HOMICIDE** — **2. Convicts.** — See note 1.
3. Corporations. — See note 3.
93. **III. ELEMENTS OF CRIMINAL HOMICIDE** — **1. The Killing** — *a. THE LIFE DESTROYED* — (2) *Quantity of Vitality and Duration of Life Immaterial* — (c) *Killing Person Incurably Diseased.* — See note 3.
b. CAUSE OF DEATH — (2) *Death Within Year and Day.* — See note 7.
94. (3) *Predisposing Conditions.* — See note 1.
(4) *Supervening Causes* — (a) *Disconnected from Defendant's Act* — *aa. IN GENERAL.* — See note 2.
dd. SUPERVENING CRIMINAL AGENCY. — See note 5.
(b) *Dependent upon Defendant's Act* — *aa. IN GENERAL.* — See note 8.
95. *bb. CAUSES PREVENTING RECOVERY.* — See notes 7, 8.
96. (c) *When Defendant's Act Merely Creates a Condition* — *aa. PROVOKING FATAL ACT BY ANOTHER.* — See note 5.
bb. PROVOKING FATAL ACT BY DECEASED — (*bb*) *Death in Attempt to Escape Violence.* — See note 13.

91. **1. Homicide in General** — Definition. — See State v. Brinte, 4 Penn. (Del.) 551.

Statutory Definition. — In *New York* the Penal Code defines homicide as the killing of one human being by the act, procurement, or omission of another. See *People v. Young*, 96 N. Y. App. Div. 33.

2. Crime Not Necessarily Imported by Word "Homicide." — *Hammond v. People*, 199 Ill. 173.

5. Two Grades of Criminal Homicide. — State v. Brinte, 4 Penn. (Del.) 551.

92. **1. Murder of Member of Posse by Escaped Convict.** — See *People v. Wood*, 145 Cal. 659.

3. Canada Statute — *Indictment Will Not Lie.* — *Union Colliery Co. v. Reg.*, 31 Can. Sup. Ct. 81, affirming 7 British Columbia 247.

93. **3. Killing Person Incurably Diseased.** — *Hopkins v. Com.*, (Ky. 1904) 80 S. W. Rep. 156; *Gardner v. State*, 44 Tex. Crim. 572.

7. Death Within Year and Day — State v. Keerl, 29 Mont. 508, 101 Am. St. Rep. 579. See also *Early v. Com.*, (Ky. 1902) 70 S. W. Rep. 1061.

94. **1. Predisposing Conditions.** — *Cunningham v. People*, 195 Ill. 550; *Hopkins v. Com.*,

(Ky. 1904) 80 S. W. Rep. 156; *Gardner v. State*, 44 Tex. Crim. 572; *Garner v. State*, 45 Tex. Crim. 308.

2. Independent Supervening Causes of Death. — State v. Keerl, 29 Mont. 508, 101 Am. St. Rep. 579. See also *Armstrong v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 215.

5. Supervening Criminal Agency. — *Walker v. State*, 116 Ga. 537.

8. Dependent Supervening Causes. — In State v. Wilson, 114 La. 398, it was held not to be essential that the act of the defendant should have been the sole cause of the death; it is sufficient if it hastened the termination of life, or contributed mediately or immediately to the death, in a degree sufficient to be a clearly contributing cause.

95. **7. Want of Medical or Surgical Attention.** — *Downing v. State*, 114 Ga. 30. See also *Bishop v. State*, 73 Ark. 568.

8. Improper or Negligent Treatment of Wound. — *Thomas v. State*, 130 Ala. 80.

96. **5. Johnson v. State**, 43 Tex. Crim. 283.
13. Death Caused by Falling into a Canal while

- 98. c. MODE OF KILLING** — (4) *Operating upon Mind of Deceased* — (a) *Death from Nervous Irritation or Shock* — Old Rule and Application. — See note 1.
- 99. (c) Advising Commission of Suicide.** — See note 2.
Suicide by Mutual Agreement. — See note 3.
- 100. 2. The Person Killed** — *a. IN GENERAL.* — See note 12.
- 102. 3. Intent** — *a. IN GENERAL.* — See note 7.
b. NATURE OF INTENT — (1) *Voluntary Homicide* — (a) *In General.* — See note 10.
- 105. c. AGAINST WHOM DIRECTED** — (3) *Killing One Person in Attempt to Kill Another.* — See notes 2, 3, 4, 6.
- 106. IV. CRIMINAL RESPONSIBILITY OF PARTICIPANTS** — **2. Instigating Others to Commit Homicide** — *a. LIABILITY AT COMMON LAW* — (1) *In General.* — See note 2.
- 107. b. LIABILITY UNDER STATUTES.** — See note 10.
- 109. c. ESSENTIAL ELEMENTS OF CRIMINAL LIABILITY** — (2) *Active Encouragement to Crimc.* — See note 4.
 (4) *Absence at Time of Homicide.* — See note 9.
- 110. d. WHAT DEGREES OF HOMICIDE ADMIT ACCESSORIES BEFORE THE FACT** — (1) *Murder.* — See note 1.
 (2) *Manslaughter* — General Rules. — See note 3.
- 3. Aiding and Abetting in Homicide** — *a. GENERAL RULE.* — See note 6.
- 114. c. ESSENTIAL ELEMENTS OF CRIMINAL LIABILITY** — (1) *Criminal Intent* — (b) *Intent of Each Participant the Measure of His Guilt.* — See note 1.
Homicide as Result of Assault and Battery. — See note 3.

attempting to escape from a violent assault made by the accused has been held to render the accused guilty of criminal homicide. *Norman v. U. S.*, 20 App. Cas. (D. C.) 494.

98. 1. See *Ray v. State*, 108 Tenn. 282.

99. 2. *Burnett v. People*, 204 Ill. 208, 98 Am. St. Rep. 206. See also *Nordgren v. People*, 211 Ill. 425. *Contra in Texas*, *Grace v. State*, 44 Tex. Crim. 193.

3. Suicide by Mutual Agreement. — *Rex v. Abbott*, 67 J. P. 151. See also *Burnett v. People*, 204 Ill. 208, 98 Am. St. Rep. 206.

100. 12. Only Human Beings Are Subjects of Homicide. — *People v. Lee Look*, 137 Cal. 590; *Sutherland v. State*, 121 Ga. 591; *Bowers v. State*, 122 Wis. 163.

102. 7. Criminal Intent Necessary. — *State v. Hoot*, 120 Iowa 238, 98 Am. St. Rep. 352; *People v. Muste*, (Mich. 1904) 100 N. W. Rep. 455.

10. "Every Man Is Presumed to Intend All the Probable Consequences of his wilful act." *State v. Hoot*, 120 Iowa 238, 98 Am. St. Rep. 352.

105. 2. Killing One Person in Attempt to Kill Another — Result Follows Intention. — *Gater v. State*, 141 Ala. 10; *Ringer v. State*, (Ark. 1905) 85 S. W. Rep. 410; *State v. Brown*, 4 Penn. (Del.) 120; *State v. Williams*, 122 Iowa 115; *White v. State*, 44 Tex. Crim. 346.

3. Murder. — *Wheatley v. Com.*, (Ky. 1904) 81 S. W. Rep. 687; *State v. Betsa*, 71 N. J. L. 322.

4. Manslaughter. — *Trabue v. Com.*, (Ky. 1902) 66 S. W. Rep. 718; *Hjeronymus v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 708; *Thomas v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1154; *Nelson v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 143.

Involuntary Manslaughter. — *Scott v. State*, (Ark. 1905) 86 S. W. Rep. 1004.

6. Mistaken Identity. — See *Webb v. State*, 135 Ala. 36; *Ringer v. State*, (Ark. 1905) 85 S. W. Rep. 410.

106. 2. Accessory Before the Fact. — See *Johnson v. State*, 85 Miss. 572.

107. 10. Accessories Before the Fact Principals by Statute. — *Ferguson v. State*, 141 Ala. 20; *State v. Gray*, 116 Iowa 231.

109. 4. See *Young v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 1035.

9. Absence Essential to Guilt as Accessory. — *Wheeler v. Com.*, (Ky. 1905) 87 S. W. Rep. 1106.

110. 1. Accessories Before the Fact to Murder. — *Hewitt v. State*, 43 Fla. 194 (murder in the second degree); *Mathis v. State*, 45 Fla. 46 (murder in the third degree).

3. Limitation of Rule. — *State v. Gray*, 116 Iowa 231. See also *Mathis v. State*, 45 Fla. 46.

6. All Present Aiding and Abetting Are Principals. — *Greene v. State*, (Ark. 1902) 70 S. W. Rep. 1038; *Humphrey v. State*, (Ark. 1905) 86 S. W. Rep. 431; *Vasser v. State*, (Ark. 1905) 87 S. W. Rep. 635; *State v. Dunn*, 116 Iowa 219; *State v. Cobby*, (Iowa 1905) 103 N. W. Rep. 99; *State v. Melvin*, 166 Mo. 565; *People v. Flanigan*, 174 N. Y. 356; *People v. Patrick*, 182 N. Y. 131; *State v. Gaylord*, 70 S. Car. 415; *Renner v. State*, 43 Tex. Crim. 347; *Ramon v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 987; *Grimsinger v. State*, 44 Tex. Crim. 1; *Johnson v. State*, 45 Tex. Crim. 453.

114. 1. Intent Is the Criterion for Determining Guilt of Each Participant. — *State v. Phillips*, 118 Iowa 660; *Bibby v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 193; *Renner v. State*, 43 Tex. Crim. 347.

3. Death Caused by Use of Deadly Weapon. — *Cecil v. State*, 44 Tex. Crim. 450.

115. (2) *Presence and Participation* — (a) *Preconcert Lacking, Both Presence and Participation Essential* — *aa. GENERAL PRINCIPLES* — See note 5.

116. *Killing by Relative or Friend of Participant in a Fight.* — See note 1.

bb. PRESENCE WITH KNOWLEDGE OR APPROVAL OF CRIME. — See notes 2, 3.

cc. FAILURE TO INTERFERE. — See note 4.

117. (b) *Preconcert Shown, Actual or Constructive Presence Sufficient* — *aa. WHERE DESIGN IS TO KILL.* — See note 2.

Acting Parts in Criminal Design. — See note 3.

bb. WHERE DESIGN IS TO DO OTHER UNLAWFUL ACT. — See note 4.

118. (c) *Participation Shown, Preconcert Not Essential.* — See note 2.

119. (d) *Nature of Participation* — *cc. ACTS MUST CONTRIBUTE TO THE DEATH* — (bb) *Sufficiency of Contribution.* — See notes 6, 7.

120. *e. DEGREES OF HOMICIDE NOT ADMITTING AIDERS AND ABETTORS* — (1) *Involuntary Manslaughter.* — See note 5.

121. 4. *Combining in Unlawful Acts Resulting in Homicide* — *a. GENERAL PRINCIPLE.* — See note 1.

122. *Homicide During Robbery.* — See note 3.

123. *c. CIRCUMSTANCE OF DURESS.* — See note 6.

124. *d. ESSENTIAL ELEMENTS OF CRIMINAL LIABILITY* — *General Principles.* — See note 1.

126. 6. *Abandonment of Criminal Purpose* — *b. ESSENTIALS OF PROOF* — (2) *Communication Essential.* — See note 6.

127. 7. *Effect of Statutes.* — See note 1.

115. 5. *Necessity for Active Participation* — *Mere Presence Insufficient.* — *Renner v. State*, 43 Tex. Crim. 347.

116. 1. *Killing by Son of Participant in Fight.* — *Sullivan v. State*, 85 Miss. 149.

2. *Knowledge that Homicide Is About to Be Committed.* — *Harper v. State*, 83 Miss. 402; *Ramon v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 987; *Walker v. State*, 118 Ga. 10. See also *Franklin v. State*, 45 Tex. Crim. 470.

3. *Consent to or Approval of the Homicide.* — *Harper v. State*, 83 Miss. 402.

4. *Failure to Interfere Not Sufficient.* — *Harper v. State*, 83 Miss. 402.

117. 2. *Common Design to Kill* — *Actual or Constructive Presence Sufficient.* — *Martin v. State*, 44 Tex. Crim. 279.

Encouragement by Words is not essential. Mere presence may be sufficient. *State v. Dunn*, 116 Iowa 219.

3. *Taking Different Parts in Plot.* — *Grimsinger v. State*, 44 Tex. Crim. 1.

4. *Homicide Occurring as Result of Unlawful Act* — *Presence Not Essential.* — *Ferguson v. State*, 134 Ala. 63, 92 Am. St. Rep. 17.

118. 2. *Prior Agreement Not Necessary.* — *Anderson v. State*, 43 Tex. Crim. 275; *Renner v. State*, 43 Tex. Crim. 347.

119. 6. *Any Contribution to the Death Sufficient.* — *Ferguson v. State*, 134 Ala. 63, 92 Am. St. Rep. 17.

7. *Aiding and Abetting Need Not Relate to Act of Killing.* — *People v. Moran*, 144 Cal. 48; *Mow v. People*, 31 Colo. 351; *Myers v. State*, 43 Fla. 500; *Bruner v. U. S.*, 4 Indian Ter. 580; *State v. Gray*, 116 Iowa 231; *Havens v. Com.*, (Ky. 1904) 82 S. W. Rep. 369; *Jahnke v. State*, (Neb. 1903) 94 N. W. Rep. 158; *State v. White*, 138 N. Car. 704; *U. S. v. Densmore*, (N. Mex. 1904) 75 Pac. Rep. 31; *State v. Nargashian*, 26 R. I. 299, 106 Am. St. Rep. 715;

State v. White, 67 S. Car. 320; *McMahon v. State*, 46 Tex. Crim. 540.

120. 5. *No Aiders and Abettors in Involuntary Manslaughter.* — See *State v. Gray*, 116 Iowa 231.

121. 1. *Homicide Occurring in Accomplishment of Unlawful Act* — *Alabama.* — *Ferguson v. State*, 134 Ala. 63, 92 Am. St. Rep. 17; *Martin v. State*, 136 Ala. 32.

California. — *People v. Lawrence*, 143 Cal. 148.

Georgia. — *Davis v. State*, 114 Ga. 104.

Mississippi. — *Sullivan v. State*, 85 Miss. 149.

New York. — *People v. Flanigan*, 174 N. Y.

356.
Texas. — *Bibby v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 193; *Renner v. State*, 43 Tex. Crim. 347; *Kipper v. State*, 45 Tex. Crim. 377; *Cortez v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 812.

Utah. — *State v. King*, 24 Utah 482, 91 Am. St. Rep. 808.

Wisconsin. — *Hayes v. State*, 112 Wis. 304.

Canada. — *Rex v. Rice*, 4 Ont. L. Rep. 223.

122. 3. *Homicide During Robbery.* — *Dean v. State*, 85 Miss. 40; *State v. Young*, 67 N. J. L. 223.

123. 6. *Duress* — *Fear of Personal Injury No Defense.* — *Brewer v. State*, 72 Ark. 145.

124. 1. *Killing Must Be Consequential to Unlawful Purpose.* — *Martin v. State*, 136 Ala. 32; *Myers v. State*, 43 Fla. 500; *Bibby v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 193; *Renner v. State*, 43 Tex. Crim. 347; *Kipper v. State*, 45 Tex. Crim. 377; *Scott v. State*, 46 Tex. Crim. 536; *Bowen v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 520.

126. 6. *Intent to Abandon Plot Must Be Communicated.* — *Wilson v. U. S.*, (Indian Ter. 1904) 82 S. W. Rep. 624.

127. 1. *Both Accessories Before the Fact and Aiders and Abettors as Principals by Statute.* —

128. V. JURISDICTION — 1. As to Place of Jurisdiction — *c. ACT CAUSING DEATH, AND DEATHS IN DIFFERENT COUNTIES* — (1) *In England*. — See note 8.

129. (2) *In United States*. — See note 3.

131. VI. MURDER — 1. Definition. — See note 3.

132. Statutory Definitions. — See notes 2, 3.

2. Intent to Kill — *a. GENERAL RULE*. — See notes 4, 5.

b. IMPLIED INTENT TO KILL. — See note 6.

133. *c. INTENT TO KILL AS EVIDENCE OF MALICE*. — See note 1.

3. Malice — *a. DEFINITION AND GENERAL PRINCIPLES*. — See notes 4, 5.

135. Aforethought. — See note 2.

b. DISTINGUISHING CHARACTERISTIC OF MURDER. — See note 3.

Ferguson v. State, 134 Ala. 63, 92 Am. St. Rep. 17; *People v. Morine*, 138 Cal. 626; *State v. Brinte*, 4 Penn. (Del.) 551; *Burnett v. People*, 204 Ill. 208, 98 Am. St. Rep. 206; *State v. Washington*, 107 La. 298; *Harper v. State*, 83 Miss. 402; *State v. Dotson*, 26 Mont. 305.

128. 8. Common-law Doctrine. — See *American Strawboard Co. v. State*, 70 Ohio St. 140, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 128, affirming 13 Ohio Dec. 373, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 128.

129. 3. Mississippi Statute. — *Coleman v. State*, 83 Miss. 290.

In County Where Fatal Stroke Given. — *Albright v. Territory*, 11 Okla. 497.

131. 3. Murder Defined. — *U. S. v. Lewis*, 111 Fed. Rep. 630; *People v. Ung Ting Bow*, 142 Cal. 341; *State v. Di Guglielmo*, 4 Penn. (Del.) 336; *State v. Scott*, 4 Penn. (Del.) 538; *State v. Brinte*, 4 Penn. (Del.) 551; *Hill v. U. S.*, 22 App. Cas. (D. C.) 395; *State v. Williams*, 122 Iowa 115; *Hocker v. Com.*, (Ky. 1902) 70 S. W. Rep. 291; *State v. Cole*, 132 N. Car. 1069. See also *Carle v. People*, 200 Ill. 494, 93 Am. St. Rep. 208; *State v. McDaniel*, 68 S. Car. 304, 102 Am. St. Rep. 661.

In South Carolina murder is still a common-law and not a statutory offense. *State v. Bowers*, 65 S. Car. 207, 95 Am. St. Rep. 795.

132. 2. Murder Defined by Statute. — See *Smith v. Territory*, 11 Okla. 656.

3. Changes Effected by Statute. — In *Florida* it is said that the offense of murder as it existed at the common law no longer exists and that in lieu thereof there is the statutory crime of premeditated killing. *Olds v. State*, 44 Fla. 452.

4. Actual Intent to Kill Not Always Necessary. — *Bailey v. State*, 133 Ala. 155; *Norman v. U. S.*, 20 App. Cas. (D. C.) 494; *Chelsey v. State*, 121 Ga. 340; *State v. Halliday*, 112 La. 846; *State v. Capps*, 134 N. Car. 622.

5. Intent to Kill Sometimes Necessary. — *Danforth v. State*, 44 Tex. Crim. 105.

6. When Intent Will Not Be Implied. — Where it is sought to attach criminal responsibilities to the commission of an act, in itself indifferent, the intent necessary to give character to the act as a crime can never be implied. *State v. Hoot*, 120 Iowa 238, 98 Am. St. Rep. 352.

133. 1. Intent to Kill as Evidence of Malice. — *State v. Bonofiglio*, 67 N. J. L. 239, 91 Am. St. Rep. 423. See also *State v. Linhoff*, 121 Iowa 632.

"Purpose to Kill," merely, is not the equivalent of the malice aforethought necessary to constitute murder, since every one who takes life in self-defense has the "purpose to kill." *Lofton v. State*, 79 Miss. 723.

4. Malice Defined — Meaning in Common Speech. — *State v. Speyer*, 182 Mo. 77. See also *Sampson v. Com.*, (Ky. 1904) 82 S. W. Rep. 384.

5. Malice in Its Legal Sense. — *U. S. v. Lewis*, 111 Fed. Rep. 630; *People v. Balkwell*, 143 Cal. 259; *State v. Marx*, (Conn. 1905) 60 Atl. Rep. 690; *State v. Brinte*, 4 Penn. (Del.) 551; *Hathaway v. Com.*, (Ky. 1904) 82 S. W. Rep. 400; *State v. Spivey*, 132 N. Car. 989; *State v. McDaniel*, 68 S. Car. 304, 102 Am. St. Rep. 661; *State v. Foster*, 66 S. Car. 469; *Kipper v. State*, 45 Tex. Crim. 377; *Connell v. State*, 46 Tex. Crim. 259.

Statutory Definition. — See *Territory v. Guillen*, 11 N. Mex. 194.

Anger. — In *State v. Hunter*, 118 Iowa 686, an objection to the use of the word "anger" in an instruction to the effect that by malice is meant not only anger, hate, and revenge, but any other unlawful and unjustifiable motive, was held to be without foundation.

135. 2. See *U. S. v. Lewis*, 111 Fed. Rep. 630; *Etheridge v. State*, 141 Ala. 29; *State v. Marsh*, 171 Mo. 523; *Hathaway v. Com.*, (Ky. 1904) 82 S. W. Rep. 400.

3. Essential Ingredient of Murder — United States. — *U. S. v. Lewis*, 111 Fed. Rep. 630.

Alabama. — *Smith v. State*, 130 Ala. 95; *Hunt v. State*, 135 Ala. 1.

Arkansas. — *Noble v. State*, (Ark. 1905) 87 S. W. Rep. 120.

Connecticut. — *State v. Yanz*, 74 Conn. 177, 92 Am. St. Rep. 205; *State v. Marx*, (Conn. 1905) 60 Atl. Rep. 690.

Delaware. — *State v. DiGuglielmo*, 4 Penn. (Del.) 336; *State v. Scott*, 4 Penn. (Del.) 538; *State v. Brinte*, 4 Penn. (Del.) 551; *State v. Harmon*, 4 Penn. (Del.) 580.

Florida. — *Olds v. State*, 44 Fla. 452.

Georgia. — *Owens v. State*, 120 Ga. 296.

Iowa. — *State v. Busse*, 127 Iowa 318.

Kansas. — *State v. Clark*, 69 Kan. 576.

Mississippi. — See *Harper v. State*, 83 Miss. 402.

New Mexico. — *U. S. v. Densmore*, (N. Mex. 1904) 75 Pac. Rep. 31.

New Hampshire. — *State v. Greenleaf*, 71 N. H. 612.

South Carolina. — *State v. Bowers*, 65 S. Car.

136. *c.* EXPRESS MALICE AND IMPLIED MALICE — (1) *In General.* — See note 6.

(2) *Express Malice.* — See note 7.

137. See note 1.

(3) *Implied Malice* — (a) *Definition.* — See notes 2, 3.

(b) *Malice as a Presumption of Law* — *Rule in United States.* — See note 9.

138. *Circumstances of Homicide Disclosed by Evidence.* — See note 3.

139. (c) *Malice as an Inference of Fact.* — See note 3.

140. *d.* FACTS SUPPORTING INFERENCE OF MALICE — (1) *Fact of Killing* — (a) *In General.* — See note 3.

141. (b) *Killing Officers and Others in Discharge of Public Duty* — *aa. OFFICERS.* — See note 2.

De Facto Officers. — See note 5.

142. *bb. PRIVATE CITIZENS ASSISTING OFFICER.* — See note 7.

143. *cc. PRIVATE CITIZENS ACTING INDEPENDENTLY IN INTEREST OF JUSTICE.* — See note 4.

144. *dd. LIMITATIONS OF RULE* — (bb) *Legal Authority to Act* — *ccc. Arrest Without Warrant* — See note 4.

(dd) *Defendant's Knowledge of Authority* — *aaa. In General.* — See note 7.

207, 95 Am. St. Rep. 795; *State v. Adams*, 68 S. Car. 421. See also *State v. Thrailkill*, 71 S. Car. 136.

Texas. — See *Young v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 822.

West Virginia. — *State v. Hertzog*, 55 W. Va. 74.

136. 6. *Malice Never Provable by Direct Evidence.* — See *Roberson v. State*, 45 Fla. 94.

7. *Express Malice Defined.* — U. S. *v. Lewis*, 111 Fed. Rep. 630; *State v. Brown*, 4 Penn. (Del.) 120; *State v. DiGuglielmo*, 4 Penn. (Del.) 336; *State v. Brinte*, 4 Penn. (Del.) 551; *Henderson v. State*, 120 Ga. 504.

A *Malignant Disposition* indicates express malice. *Rogers v. State*, 44 Tex. Crim. 350.

137. 1. *Evidence of Express Malice.* — U. S. *v. Lewis*, 111 Fed. Rep. 630; *Henderson v. State*, 120 Ga. 504; *Kipper v. State*, 45 Tex. Crim. 377.

2. *Implied Malice Defined.* — *State v. DiGuglielmo*, 4 Penn. (Del.) 336. See also *Smith v. State*, 45 Tex. Crim. 552.

Malice Is Implied by Law from Every Deliberate Cruel Act committed by one person against another, no matter how sudden that act may be, for the law considers that he who does a cruel act voluntarily does it maliciously. *State v. Brinte*, 4 Penn. (Del.) 551.

3. *Actual Malice Presumed to Exist.* — *Connell v. State*, 46 Tex. Crim. 259.

9. *English Rule Followed in United States.* — *State v. DiGuglielmo*, 4 Penn. (Del.) 336; *State v. Brinte*, 4 Penn. (Del.) 551; *State v. Capps*, 134 N. Car. 622; *Litton v. Com.*, 101 Va. 833. See also *State v. Clark*, 134 N. Car. 698; *State v. Utley*, 132 N. Car. 1022; *State v. Cole*, 132 N. Car. 1060.

138. 3. *Attending Circumstances in Evidence.* — *State v. Hertzog*, 55 W. Va. 74.

139. 3. *Malice Always a Question of Fact for Jury.* — U. S. *v. Lewis*, 111 Fed. Rep. 630; *State v. Greenleaf*, 71 N. H. 613, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 139. See also *Howard v. Com.*, (Ky. 1903) 71 S. W. Rep. 446.

140. 3. *Malice Inferred from Fact of Homicide* — *Delaware.* — *State v. Brown*, 4 Penn. (Del.) 120; *State v. DiGuglielmo*, 4 Penn. (Del.) 336; *State v. Brinte*, 4 Penn. (Del.) 551; *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036; *State v. Harmon*, 4 Penn. (Del.) 580.

Georgia. — *Owens v. State*, 120 Ga. 296; *Chelsey v. State*, 121 Ga. 340; *Anderson v. State*, 122 Ga. 175.

Missouri. — *State v. McMullin*, 170 Mo. 608. *Nebraska.* — *Robinson v. State*, (Neb. 1904) 98 N. W. Rep. 694.

New Mexico. — *Territory v. Gutierrez*, (N. Mex. 1905) 79 Pac. Rep. 716.

New York. — *People v. Filippelli*, 173 N. Y. 509.

South Carolina. — *State v. McDaniel*, 68 S. Car. 304, 102 Am. St. Rep. 661.

Texas. — *Thomas v. State*, 45 Tex. Crim. 111; *Smith v. State*, 45 Tex. Crim. 552; *Friday v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 815; *Martin v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 390.

Virginia. — *Litton v. Com.*, 101 Va. 833.

West Virginia. — *State v. Hertzog*, 55 W. Va. 74.

141. 2. *Malice Implied from Killing Officer in Discharge of Duty.* — *Rex v. Sheriff*, 20 Cox C. Cas. 334; *Brooks v. State*, 114 Ga. 6; *McDuffie v. State*, 121 Ga. 580; *State v. Shaw*, 73 Vt. 149. See also *Hendrickson v. Com.*, (Ky. 1904) 81 S. W. Rep. 266.

5. *Killing De Facto Officers.* — *McDuffie v. State*, 121 Ga. 580.

142. 7. *Malice Implied from Killing Persons Assisting Officer.* — *State v. Craft*, 164 Mo. 631.

143. 4. *Malice Implied from Killing Citizen Acting in Interest of Justice.* — *Com. v. Grether*, 204 Pa. St. 203.

144. 4. *Killing Officer Arresting Without Warrant Held Murder.* — *Brooks v. State*, 114 Ga. 6; *Montgomery v. State*, 43 Tex. Crim. 304; *State v. Shaw*, 73 Vt. 149.

7. *If the Capacity and Purpose of the Officer Are Known to the person about to be arrested*, it is not necessary for the officer to make known such purpose, or in what capacity he is acting. *Montgomery v. State*, 43 Tex. Crim. 304.

145. (c) Killing in Perpetration of, or Attempt to Perpetrate, Felony — *aa.* RULE STATED.
— See note 7.

148. *cc.* ATTEMPTING TO KILL THIRD PERSON. — See note 1.

149. (2) *Means or Mode of Killing* — (a) *Circumstances of Cruelty or Atrocity.*
— See note 1.

(b) *Use of Deadly Weapons* — *aa.* RULE STATED. — See note 3.

150. See note 1.

Deliberate Use of Weapon. — See note 2.

151. *Inference to Be Drawn by Jury.* — See note 5.

Presumption Not Conclusive. — See note 6.

Rebutting Presumption. — See note 7.

bb. WHAT CONSTITUTES DEADLY WEAPON — (*aa.*) *Definition and General Principles.*

— See note 8.

152. *Manner of Use as Determining Deadly Character.* — See note 1.

Fact of Death Not Conclusive of Deadly Character. — See note 2.

(*bb.*) *Instances of Deadly Weapons* — **A Pistol.** — See note 3.

Instruments Used for Striking. — See notes 5, 10.

Instruments Used to Cut or Stab. — See note 12.

145. 7. *Killing in Perpetration of, or Attempt to Perpetrate, Felony.* — *Cunningham v. People*, 195 Ill. 550; *Rhea v. State*, 63 Neb. 461; *State v. Greenleaf*, 71 N. H. 613, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 145; *People v. Flanigan*, 174 N. Y. 356.

148. 1. *Mistake as to Identity of Person Killed.* — *State v. Dennis*, 119 Iowa 688.

149. 1. *Malice Implied from Circumstances of Atrocity* — *Rule Stated.* — *Hocker v. Com.*, (Ky. 1902) 70 S. W. Rep. 291; *Danforth v. State*, 44 Tex. Crim. 105. See also *Rogers v. State*, 44 Tex. Crim. 350.

3. *Malice Implied from Use of Deadly Weapons* — *Alabama.* — *Wilson v. State*, 140 Ala. 43; *Gater v. State*, 141 Ala. 10.

Arkansas. — *Vance v. State*, 70 Ark. 272.

Indiana. — *Coolman v. State*, 163 Ind. 503.

Iowa. — *State v. Phillips*, 118 Iowa 660.

Kansas. — *State v. Dull*, 67 Kan. 793.

Kentucky. — *Ashcraft v. Com.*, (Ky. 1902) 68 S. W. Rep. 847.

Missouri. — *State v. Speyer*, 182 Mo. 77.

North Carolina. — *State v. Caldwell*, 129 N. Car. 682; *State v. Bishop*, 131 N. Car. 733; *State v. Utley*, 132 N. Car. 1022; *State v. Barrett*, 132 N. Car. 1005; *State v. Cole*, 132 N. Car. 1069; *State v. Capps*, 134 N. Car. 627; *State v. Lipscomb*, 134 N. Car. 689.

Oregon. — *State v. Gibson*, 43 Oregon 184.

Pennsylvania. — *Com. v. Gibson*, 211 Pa. St. 546.

South Carolina. — *State v. Foster*, 66 S. Car. 469.

Texas. — *Thomas v. State*, 45 Tex. Crim. 111; *Connell v. State*, 46 Tex. Crim. 259. See also *Brownlee v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 1153.

West Virginia. — *State v. Hertzog*, 55 W. Va. 74; *State v. Kellison*, 56 W. Va. 690.

Wisconsin. — *Cupps v. State*, 120 Wis. 504, 102 Am. St. Rep. 996.

150. 1. *No Presumption Where Circumstances of Killing Appear.* — *Darden v. State*, 73 Ark. 315 *State v. Gibson*, 43 Oregon 184.

2. *Deliberate Use of Weapon.* — *Raines v. State*, 81 Miss. 489.

151. 5. *Inference of Malice from Use of Deadly*

Weapon to Be Drawn by Jury. — *Darden v. State*, 73 Ark. 315; *Frame v. State*, 73 Ark. 501; *Keady v. People*, 32 Colo. 57; *Territory v. Gutierrez*, (N. Mex. 1905) 79 Pac. Rep. 716; *State v. Gibson*, 43 Oregon 184; *State v. Hertzog*, 55 W. Va. 74. See also *State v. Foster*, 66 S. Car. 469.

6. *Presumption Not Conclusive.* — *Darden v. State*, 73 Ark. 315; *Henry v. People*, 198 Ill. 162; *Hammond v. People*, 199 Ill. 173; *Coolman v. State*, 163 Ind. 503; *State v. Capps*, 134 N. Car. 622; *State v. Gibson*, 43 Oregon 184; *State v. Foster*, 66 S. Car. 469.

7. *Evidence to Satisfaction of Jury Not Required to Rebut Presumption.* — *Ragsdale v. State*, 134 Ala. 24; *Territory v. Gutierrez*, (N. Mex. 1905) 79 Pac. Rep. 716, holding that it is error to instruct the jury that the killing of a human being with a dangerous weapon is murder in the second degree, unless the jury believes that the killing was without malice in fact; *State v. Gibson*, 43 Oregon 184.

In North Carolina. — See *State v. Clark*, 134 N. Car. 608.

8. *Deadly Weapon Defined.* — *People v. Lopez*, 135 Cal. 23.

152. 1. *Manner of Use as Determining Deadly Character.* — *State v. Roan*, 122 Iowa 136; *State v. Williamson*, 65 S. Car. 242; *Connell v. State*, 46 Tex. Crim. 259; *Craig v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 208. See also *Clemmons v. State*, (Fla. 1904) 37 So. Rep. 647; *Posey v. State*, 46 Tex. Crim. 190.

2. *Mere Fact that Weapon Caused Death Not Proof of Deadly Character.* — *State v. Roan*, 122 Iowa 136; *Danforth v. State*, 44 Tex. Crim. 105; *Craig v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 208.

3. *Pistol Held a Deadly Weapon.* — *Territory v. Watson*, (N. Mex. 1904) 78 Pac. Rep. 504.

5. *Clubs, Sticks, etc., Held Deadly Weapons.* — *Moran v. State*, 120 Ga. 846.

Billiard Cues Held Deadly Weapons. — *State v. Smith*, 164 Mo. 567.

10. *Stone Held a Deadly Weapon.* — *State v. Vinso*, 171 Mo. 576.

12. *Knives, etc., Held Deadly Weapons.* — *Con-*

153. *cc.* DETERMINATION OF DEADLY CHARACTER — (*bb*) *Question for Jury.* — See note 1.

(*c*) *Use of Poison.* — See note 3.

(3) *Gross Recklessness and Misconduct.* — See note 5.

154. *But Any Unlawful Act.* — See notes 3, 8.

155. *Abortion.* — See note 1.

(4) *Neglect of Duty.* — See note 6.

156. 4. Degrees of Murder — *b.* DEGREES CREATED BY STATUTE — (*t*) *In General.* — See notes 7, 8.

Effect of Creating Degrees. — See note 9.

157. (2) *Murder in First Degree* — (*a*) *Statutory Provisions.* — See note 1.

(*b*) *Elements of Murder in First Degree* — *aa.* PREMEDITATION AND DELIBERATION — (*aa*) *Rule Stated.* — See note 4.

nell v. State, 46 Tex. Crim. 259; *Baker v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 1215.

A Pocket Knife may be a deadly weapon. *State v. Roan*, 122 Iowa 136; *Craiger v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 208.

153. 1. *Deadly Character of Weapon for Determination of Jury.* — *People v. Lopez*, 135 Cal. 23; *Moran v. State*, 120 Ga. 846; *State v. Smith*, 164 Mo. 567; *State v. Anderson*, 30 Wash. 14. See also *Com. v. Yarnell*, (Ky. 1902) 68 S. W. Rep. 136; *Fulcher v. State*, 82 Miss. 630; *Mikel v. State*, 43 Tex. Crim. 615.

3. *Malice Implied from Use of Poison.* — *Chelsey v. State*, 121 Ga. 340 (putting poison into a sack of flour with expectation that the flour would be cooked into bread and eaten).

5. *Murder by Reckless Discharge of Firearms.* — *Bailey v. State*, 133 Ala. 155 *State v. Capps*, 134 N. Car. 629, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 153; *State v. Young*, 50 W. Va. 96. See also *Ringer v. State*, (Ark. 1905) 85 S. W. Rep. 410; *Clark v. State*, 117 Ga. 254; *Strickland v. State*, 81 Miss. 134; *Wood v. State*, 81 Miss. 408.

154. 3. *Reckless Driving.* — See *State v. Stentz*, 33 Wash. 444.

8. *Cruel and Excessive Punishment of Children.* — *Johnson v. State*, 133 Ala. 38. See also *State v. Shaw*, 64 S. Car. 566, 92 Am. St. Rep. 817, where it was held that the circumstances surrounding the homicide were such as to warrant the jury in drawing the inference that the purpose and intention of the accused was to take the life of the deceased.

155. 1. *Homicide in Procuring Abortion Declared Murder by Statute.* — *Johnson v. People*, 33 Colo. 224.

6. *Wilful Neglect of and Cruelty to Child by Parent or Other Custodian.* — See *Patton v. State*, 117 Ga. 230.

156. 7. *No Degrees of Murder in Some States.* — *Hocker v. Com.*, (Ky. 1902) 70 S. W. Rep. 291.

8. *No Degrees of Murder under Federal Statutes.* — *U. S. v. Lewis*, 111 Fed. Rep. 630.

9. *Common-law Qualities of Murder Not Affected by Division into Degrees.* — *Watkins v. State*, 133 Ala. 88; *Cook v. State*, (Fla. 1903) 35 So. Rep. 665; *State v. Phillips*, 118 Iowa 665, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 156; *State v. Hliboka*, 31 Mont. 455; *State v. Greenleaf*, 71 N. H. 606; *State v. Cole*, 132 N. Car. 1069; *State v. Bishop*, 131 N. Car. 733; *State v. Campbell*, 24 Utah 103. See also *State*

v. Foster, 130 N. Car. 666, 89 Am. St. Rep. 876.

157. 1. *In New Hampshire* all murder committed by poison, starving, torture, or other deliberate and premeditated killing is murder in the first degree. *State v. Greenleaf*, 71 N. H. 612.

4. *Deliberation and Premeditation as Essential Element* — *Alabama.* — *Johnson v. State*, 133 Ala. 38; *Adams v. State*, 133 Ala. 166; *Hunt v. State*, 135 Ala. 1; *Webb v. State*, 135 Ala. 36; *Etheridge v. State*, 141 Ala. 29; *Thayer v. State*, 138 Ala. 39.

Arkansas. — See *Brewer v. State*, 72 Ark. 145; *Powell v. State*, (Ark. 1905) 85 S. W. Rep. 781; *Thomas v. State*, (Ark. 1905) 86 S. W. Rep. 404.

California. — See *People v. Ung Ting Bow*, 142 Cal. 341.

Connecticut. — *State v. Marx*, (Conn. 1905) 60 Atl. Rep. 690.

Delaware. — *State v. Di Guglielmo*, 4 Penn. (Del.) 336; *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036; *State v. Harmon*, 4 Penn. (Del.) 580, 60 Atl. Rep. 867; *State v. Brown*, 4 Penn. (Del.) 120.

Florida. — *Bassett v. State*, 44 Fla. 12; *Olds v. State*, 44 Fla. 452; *Cook v. State*, (Fla. 1903) 35 So. Rep. 665; *Griffin v. State*, (Fla. 1904) 37 So. Rep. 209; *Ewert v. State*, (Fla. 1904) 37 So. Rep. 334. See also *Williams v. State*, 45 Fla. 128.

Georgia. — *Chelsey v. State*, 121 Ga. 340.

Iowa. — *State v. Dunn*, 116 Iowa 219; *State v. McPherson*, 114 Iowa 492; *State v. Gray*, 116 Iowa 231; *State v. Dennis*, 119 Iowa 688; *State v. Linhoff*, 121 Iowa 632; *State v. Williams*, 122 Iowa 115; *State v. Busse*, 127 Iowa 318; *State v. Fuller*, 125 Iowa 212; *State v. Phillips*, 118 Iowa 660.

Kansas. — *State v. Moore*, 67 Kan. 620.

Missouri. — *State v. McMullin*, 170 Mo. 608; *State v. Marsh*, 171 Mo. 523; *State v. Vinso*, 171 Mo. 576; *State v. McKenzie*, 177 Mo. 699; *State v. Robertson*, 178 Mo. 496; *State v. Brown*, 188 Mo. 451. See also *State v. Garth*, 164 Mo. 553; *State v. Craft*, 164 Mo. 631; *State v. Gregory*, 178 Mo. 48.

Montana. — *State v. Martin*, 29 Mont. 273; *State v. Shafer*, 26 Mont. 11.

Nebraska. — *Hans v. State*, (Neb. 1904) 100 N. W. Rep. 419.

New Jersey. — *State v. Gruff*, 68 N. J. L. 287; *State v. Bectsa*, 71 N. J. L. 322; *State v.*

158. See note 1.

Killing by Poison or Lying in Wait. — See notes 3, 4.

159. (bb) Definitions. — See note 4.

(cc) Time for Deliberation. — See note 8.

161. Act Must Result from Deliberation. — See note 4.

(dd) Question of Fact for Jury. — See note 6.

(ee) Evidence of Premeditation and Deliberation. — See notes 7, 8, 9.

Jaggers, 71 N. J. L. 281; State v. Jones, 71 N. J. L. 543.

New York. — People v. Schmidt, 168 N. Y. 568; People v. Hall, 169 N. Y. 184; People v. Sullivan, 173 N. Y. 122, 93 Am. St. Rep. 582; People v. Filippelli, 173 N. Y. 509; People v. Flanigan, 174 N. Y. 356; People v. Bonier, 179 N. Y. 315; People v. Raffo, 180 N. Y. 434; People v. Totterman, 181 N. Y. 385.

North Carolina. — State v. Foster, 130 N. Car. 666, 89 Am. St. Rep. 876; State v. Conly, 130 N. Car. 683; State v. Bishop, 131 N. Car. 733; State v. Boggan, 133 N. Car. 761; State v. Lipscomb, 134 N. Car. 689.

Ohio. — State v. Schiller, 70 Ohio St. 1.

Oklahoma. — Mahaffey v. Territory, 11 Okla. 213; Barker v. Territory, (Okla. 1904) 78 Pac. Rep. 81.

Pennsylvania. — Com. v. West, 204 Pa. St. 68; Com. v. Dudash, 204 Pa. St. 124.

Tennessee. — See Ray v. State, 108 Tenn. 282.

Texas. — White v. State, 44 Tex. Crim. 346; Kipper v. State, 45 Tex. Crim. 377; Sparks v. State, (Tex. Crim. 1903) 77 S. W. Rep. 811.

Utah. — State v. Haworth, 24 Utah 398.

Virginia. — Bowles v. Com., 103 Va. 816.

Washington. — State v. Underwood, 35 Wash. 558.

West Virginia. — State v. Young, 50 W. Va. 96, 88 Am. St. Rep. 846; State v. Beatty, 51 W. Va. 232; State v. Davis, 52 W. Va. 224; State v. Hertzog, 55 W. Va. 74.

Wyoming. — Gustavson v. State, 10 Wyo. 300; Downing v. State, 11 Wyo. 86.

158. 1. Killing in Combat. — Osburn v. State, 164 Ind. 262.**3. Homicide Perpetrated by Means of Poison.** — State v. Burns, 124 Iowa 207; State v. Bishop, 131 N. Car. 733; State v. Daniels, 134 N. Car. 671.**4. Lying in Wait.** — Williams v. State, 130 Ala. 107; State v. Privitt, 175 Mo. 207; State v. Henderson, 186 Mo. 473; State v. Rose, 129 N. Car. 575; State v. Bishop, 131 N. Car. 733; State v. Daniels, 134 N. Car. 671; State v. Hertzog, 55 W. Va. 74. See also State v. Dixon, 131 N. Car. 808.**"Lying in Wait" Defined.** — "Lying in wait" means hiding in ambush or concealment. It does not necessarily refer to the attitude of the body, but rather to its location, and the purpose of taking the person attacked unawares. It is the mental poise of the wild beast in quest of prey, and necessarily implies malice, premeditation, deliberation, and the wilful intent. State v. Tyler, 122 Iowa 125. See also LIE — LYING, 1. 5.**159. 4. Definition of Wilful, Deliberate, and Premeditated.** — State v. Jackson, 167 Mo. 291; State v. Taylor, 171 Mo. 465; State v. Conly, 130 N. Car. 683; State v. Snivey, 132 N. Car. 989; State v. Exum, 138 N. Car. 599.**"Premeditated Design,"** as used in the Florida statute, means an intent to kill. Olds v. State, 44 Fla. 452.**"Deliberation" and "Premeditation" Synonymous.** — Cook v. State, (Fla. 1903) 35 So. Rep. 665.**8. No Particular Length of Time Required for Deliberation** — Alabama. — Ragsdale v. State, 134 Ala. 24; Stewart v. State, 137 Ala. 33; Sherrill v. State, 138 Ala. 3; Etheridge v. State, 141 Ala. 29.

California. — People v. Suesser, 142 Cal. 364.

Delaware. — State v. Brinte, 4 Penn. (Del.) 551; State v. Emory, (Del. 1904) 58 Atl. Rep. 1036; State v. Harmon, 4 Penn. (Del.) 580.

Florida. — Olds v. State, 44 Fla. 452.

Idaho. — State v. Shuff, 9 Idaho 115.

Iowa. — State v. McPherson, 114 Iowa 492; State v. Fuller, 125 Iowa 212.

Missouri. — State v. Vinso, 171 Mo. 576.

Nebraska. — Rhea v. State, 63 Neb. 461; Robinson v. State, (Neb. 1904) 98 N. W. Rep. 694.

New Jersey. — State v. Zdanowicz, 69 N. J. L. 619.

North Carolina. — State v. Foster, 130 N. Car. 666, 89 Am. St. Rep. 876; State v. Cole, 132 N. Car. 1069; State v. Hunt, 134 N. Car. 684; State v. Spivey, 132 N. Car. 989; State v. Teachey, 138 N. Car. 587.

Pennsylvania. — Com. v. West, 204 Pa. St. 168.

Wisconsin. — Cupps v. State, 120 Wis. 504, 102 Am. St. Rep. 996.

Rule in New York. — In People v. Koenig, 180 N. Y. 155, it was held that the design to kill must precede the killing by some appreciable space of time, and though the time need not be long, it must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill, and when the time is sufficient for this it matters not how brief it is; and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case. See also People v. Boggiano, 179 N. Y. 267.**161. 4. Killing Must Be Done Deliberately and Not in Heat of Blood.** — State v. Cole, 132 N. Car. 1069; Bowles v. Com., 103 Va. 816.**Murder Committed on the Impulse of the Moment** is not murder committed deliberately. State v. Greenleaf, 71 N. H. 613.**6. Question for Jury.** — State v. Phillips, 118 Iowa 660; People v. Bonier, 179 N. Y. 315; People v. Koenig, 180 N. Y. 155; State v. Daniels, 134 N. Car. 671; State v. Young, 50 W. Va. 96, 88 Am. St. Rep. 846.**7. Deliberation Not Ordinarily Provable by Direct Evidence — Inference from Circumstances.** — State v. Brinte, 4 Penn. (Del.) 551; State v. Brown, 4 Penn. (Del.) 120; State v. Green-

162. See notes 1, 2, 3, 8.

163. No Presumption from Fact of Killing. — See note 3.

164. *cc.* KILLING IN PERPETRATION OF, OR ATTEMPT TO PERPETRATE, DESIGNATED FELONIES. — See notes 3, 5, 6, 9.

165. See note 2.

dd. INTENT TO KILL — (*aa*) *Wilful, Deliberate, and Premeditated Murder* — *aaa.* In General. — See note 5.

166. Intent to Kill Third Person. — See notes 1, 2.

bbb. Murder by Means of Poison. — See note 8.

167. (*bb*) *Homicide Committed in Perpetration of Another Felony.* — See note 1.

(*cc*) *Proof of Intent to Kill.* — See notes 4, 5, 7, 8.

leaf, 71 N. H. 615, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 161; *State v. Hunt*, 134 N. Car. 684.

Flight of the Accused does not tend to prove deliberation and premeditation. *State v. Foster*, 130 N. Car. 666, 89 Am. St. Rep. 876.

Evidence Held Not Sufficient to Show Premeditation and Deliberation. — See *People v. Raffo*, 180 N. Y. 434.

161. 8. Ill Will of Accused Towards Deceased. — *State v. Hunt*, 134 N. Car. 684.

9. Previous Threats as Evidence of Premeditation. — *Porter v. State*, 135 Ala. 51; *People v. Koenig*, 180 N. Y. 155; *Com. v. Kilpatrick*, 204 Pa. St. 218.

162. 1. Previous Difficulties Between the Parties. — *State v. Brown*, 4 Penn. (Del.) 120; *State v. Hunt*, 134 N. Car. 684.

2. Preparing to Kill — Seeking Deceased. — *State v. Brown*, 4 Penn. (Del.) 120; *State v. Di Guglielmo*, 4 Penn. (Del.) 336.

Procuring Deadly Weapon. — *Com. v. Kilpatrick*, 204 Pa. St. 218.

3. Subsequent Declaration of Intent to Kill. — *State v. Hunt*, 134 N. Car. 684.

8. Killing by Strangulation. — *People v. Koenig*, 180 N. Y. 155.

163. 3. Premeditation and Deliberation Not Presumed from Fact of Killing. — *State v. Linhoff*, 121 Iowa 632; *State v. Phillips*, 118 Iowa 670, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 163; *State v. Bonofiglio*, 67 N. J. L. 239, 91 Am. St. Rep. 423; *State v. Cole*, 132 N. Car. 1069; *State v. Bishop*, 131 N. Car. 733. See also *State v. Zdanowicz*, 69 N. J. L. 619; *People v. Schmidt*, 168 N. Y. 568. But see *State v. Tucker*, 52 W. Va. 420; *Cupps v. State*, 120 Wis. 504, 102 Am. St. Rep. 996.

164. 3. Murder in Perpetration, etc., of Arson. — *State v. Betsa*, 71 N. J. L. 322.

Murder in Perpetration, etc., of Robbery — *California*. — *People v. Wardrip*, 141 Cal. 229. *Colorado*. — *Andrews v. People*, (Colo. 1905) 79 Pac. Rep. 1031.

Indiana. — *Jackson v. State*, 161 Ind. 36.

New Jersey. — *State v. Young*, 67 N. J. L. 223; *State v. Lyons*, 70 N. J. L. 635.

New York. — *People v. Truck*, 170 N. Y. 203.

Ohio. — *Lindsey v. State*, 69 Ohio St. 215, 24 Ohio Cir. Ct. 1.

Texas. — *Williams v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1042; *Johnson v. State*, 44 Tex. Crim. 332.

Utah. — *State v. King*, 24 Utah 482, 91 Am. St. Rep. 808.

Murder in Perpetration, etc., of Arson, Rape, or Burglary. — *State v. Greenleaf*, 71 N. H. 612.

5. Homicide in Perpetration of, or Attempt to Perpetrate, Mayhem. — See also *People v. Milton*, 145 Cal. 169.

6. Homicide in Perpetration of, or Attempt to Perpetrate, Sodomy. — *State v. Betsa*, 71 N. J. L. 322.

9. Homicide in Perpetration of, or Attempt to Perpetrate, Any Felony. — *People v. Sullivan*, 173 N. Y. 122, 93 Am. St. Rep. 582; *People v. Flanigan*, 174 N. Y. 356.

165. 2. In Delaware it is murder in the first degree when the killing is done in perpetrating or attempting to perpetrate any crime punishable with death. *State v. Brown*, 4 Penn. (Del.) 120; *State v. Brinte*, 4 Penn. (Del.) 551; *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036.

5. Necessity of Specific Intent to Kill. — *Olds v. State*, 44 Fla. 452; *State v. May*, 172 Mo. 630; *State v. Beatty*, 51 W. Va. 232; *State v. Hertzog*, 55 W. Va. 74.

Wounds Inflicted by the Defendant with the Specific Intent to Kill are wilfully inflicted. *State v. Phillips*, 118 Iowa 660.

166. 1. Homicide in Attempt to Kill Third Person Held Murder in First Degree. — *People v. Suesser*, 142 Cal. 354, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 165 [166]; *State v. Cole*, 132 N. Car. 1069.

2. Homicide in Attempt to Kill Third Person Held Not Murder in First Degree. — *Sparks v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 811.

8. Intent to Kill by Poison Held Not Necessary. — *State v. Burns*, 124 Iowa 207. See also *State v. Robinson*, 126 Iowa 60.

167. 1. Attempt to Perpetrate Other Crimes — Intent to Kill Not Necessary. — *Andrews v. People*, (Colo. 1905) 79 Pac. Rep. 1031; *Bassett v. State*, 44 Fla. 12; *State v. Greenleaf*, 71 N. H. 613, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 167; *State v. Betsa*, 71 N. J. L. 322; *People v. Flanigan*, 174 N. Y. 356; *State v. Daniels*, 134 N. Car. 671; *State v. King*, 24 Utah 482, 91 Am. St. Rep. 808.

Immaterial that Killing Was Accidental. — *People v. Milton*, 145 Cal. 169.

4. Intent to Kill Inferred from Facts and Circumstances. — *Lowe v. State*, 118 Wis. 641.

5. Inference from Nature of Weapon and Mode of Use. — *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036; *State v. Gibson*, 43 Oregon 184.

7. Character of Wound as Evidence of Intent to Kill. — *State v. Greenleaf*, 71 N. H. 606; *Lowe v. State*, 118 Wis. 641.

8. Acts, Conduct, etc., of Accused. — *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036.

Evidence of Prior Attempts made by the ac-

167. *cc. MALICE.* — See note 11.

168. (3) *Murder in Second Degree* — (a) *What Constitutes in General.* — See notes 1, 3, 4, 5.

(b) *Deliberation and Premeditation.* — See note 6.

169. See notes 1, 2, 3.

Premeditation — Malice Aforethought. — See note 4.

cused to kill the deceased is admissible for the purpose of showing an intent to kill. *Jahnke v. State*, (Neb. 1903) 94 N. W. Rep. 158.

167. 11. Malice an Element of Murder in First Degree. — *State v. Brown*, 4 Penn. (Del.) 120; *State v. Di Guglielmo*, 4 Penn. (Del.) 336; *State v. Brinte*, 4 Penn. (Del.) 551; *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036; *State v. Harmon*, 4 Penn. (Del.) 580; *Stau: v. Linhoff*, 121 Iowa 632; *State v. Williams*, 122 Iowa 115; *State v. Busse*, 127 Iowa 318; *State v. Brown*, 168 Mo. 449; *State v. Marsh*, 171 Mo. 523; *State v. Lewis*, 181 Mo. 235; *State v. Bishop*, 131 N. Car. 733. See also *State v. Privitt*, 175 Mo. 207; *State v. Garth*, 164 Mo. 553.

Express Malice must be proved in order to sustain a conviction of murder in the first degree. *Rogers v. State*, 44 Tex. Crim. 350.

168. 1. What Constitutes Murder in Second Degree Generally. — *State v. Shafer*, 26 Mont. 11; *State v. Betsa*, 71 N. J. L. 322; *State v. Hertzog*, 55 W. Va. 74. See also *State v. Caldwell*, 129 N. Car. 682.

3. *State v. May*, 172 Mo. 630.

4. *Statutory Provisions.* — *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036; *State v. Greenleaf*, 71 N. H. 612; *Territory v. Gutierrez*, (N. Mex. 1905) 79 Pac. Rep. 716; *People v. Sullivan*, 173 N. Y. 122, 93 Am. St. Rep. 582.

5. *Implied Malice as Test of Second Degree.* — *State v. Yanz*, 74 Conn. 177, 92 Am. St. Rep. 205.

6. *First and Second Degrees of Murder Distinguished — Absence of Deliberation — Alabama.* — *Johnson v. State*, 133 Ala. 38; *Adams v. State*, 133 Ala. 166; *Etheridge v. State*, 141 Ala. 29.

California. — *People v. Mendenhall*, 135 Cal. 344.

Connecticut. — See *State v. Marx*, (Conn. 1905) 60 Atl. Rep. 690.

Delaware. — *State v. Brown*, 4 Penn. (Del.) 120; *State v. Brinte*, 4 Penn. (Del.) 551; *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036; *State v. Harmon*, 4 Penn. (Del.) 580.

Florida. — *Bassett v. State*, 44 Fla. 12. See also *Pyke v. State*, (Fla. 1904) 36 So. Rep. 577.

Iowa. — *State v. Sale*, 119 Iowa 1; *State v. Williams*, 122 Iowa 115; *State v. Busse*, 127 Iowa 318.

Kansas. — *State v. Moore*, 67 Kan. 620.

Missouri. — *State v. McMullin*, 170 Mo. 608; *State v. Marsh*, 171 Mo. 523; *State v. Robertson*, 178 Mo. 406.

Montana. — *State v. Shafer*, 26 Mont. 11.

Nebraska. — *Hans v. State*, (Neb. 1904) 100 N. W. Rep. 419.

New York. — *People v. Burt*, 51 N. Y. App. Div. 106, affirmed 170 N. Y. 561.

North Carolina. — *State v. Foster*, 130 N. Car. 666, 89 Am. St. Rep. 876; *State v. Lipscomb*, 134 N. Car. 689.

Texas. — *White v. State*, 44 Tex. Crim. 346; *Ray v. State*, 46 Tex. Crim. 511.

Washington. — *State v. Underwood*, 35 Wash. 558.

West Virginia. — *State v. Hager*, 50 W. Va. 370.

Wyoming. — *Downing v. State*, 11 Wyo. 86.

169. 1. Intoxication as Reducing Degree of Murder — Arkansas. — *Jarvis v. State*, 70 Ark. 613, 67 S. W. Rep. 76.

Florida. — *Cook v. State*, (Fla. 1903) 35 So. Rep. 665; *Thomas v. State*, (Fla. 1904) 36 So. Rep. 161.

Iowa. — *State v. Williams*, 122 Iowa 115; *State v. Roan*, 122 Iowa 135. See also *State v. Cather*, 121 Iowa 106.

Kentucky. — *Seaborn v. Com.*, (Ky. 1904) 80 S. W. Rep. 223.

Minnesota. — *State v. Rogers*, '93 Minn. 55.

Missouri. — See also *State v. Brown*, 181 Mo. 192.

Pennsylvania. — *Com. v. Dudash*, 204 Pa. St. 124. See also *Com. v. West*, 204 Pa. St. 68.

Texas. — *Pollard v. State*, 45 Tex. Crim. 121.

West Virginia. — *State v. Davis*, 52 W. Va. 224; *State v. Hertzog*, 55 W. Va. 74.

Wyoming. — *Gustavenson v. State*, 10 Wyo. 300.

On the Question of Malice evidence is admissible that the defendant was intoxicated. *Henderson v. Com.*, (Ky. 1903) 72 S. W. Rep. 781.

2. *Passion Without Adequate Provocation — California.* — *People v. Mendenhall*, 135 Cal. 344.

Delaware. — *State v. Brinte*, 4 Penn. (Del.) 551.

Missouri. — *State v. May*, 172 Mo. 630; *State v. Robertson*, 178 Mo. 406; *State v. Gregory*, 178 Mo. 48; *State v. Williams*, 186 Mo. 128. See also *State v. Niehaus*, 188 Mo. 304.

Texas. — *White v. State*, 44 Tex. Crim. 346; *Foster v. State*, 45 Tex. Crim. 98; *Connell v. State*, 46 Tex. Crim. 259; *Manning v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1149. See also *Pollard v. State*, 45 Tex. Crim. 121; *Thomas v. State*, 45 Tex. Crim. 111.

Wisconsin. — See *Eckert v. State*, 114 Wis. 160.

Wyoming. — *Downing v. State*, 11 Wyo. 86.

3. *Insanity Not Available to Reduce Degree.* — *Jarvis v. State*, 70 Ark. 613, 67 S. W. Rep. 76; *State v. Speyer*, 182 Mo. 77.

4. *Necessity of Premeditation.* — *Adams v. State*, 133 Ala. 166; *Etheridge v. State*, 141 Ala. 29; *People v. Mendenhall*, 135 Cal. 344; *State v. Harmon*, 4 Penn. (Del.) 580; *Osburn v. State*, 164 Ind. 262; *State v. Williams*, 122 Iowa 115; *State v. Phillips*, 118 Iowa 660; *State v. Parker*, 172 Mo. 191; *State v. Robertson*, 178 Mo. 406; *Thomas v. State*, 45 Tex. Crim. 111; *Smith v. State*, 45 Tex. Crim. 552; *State v. Underwood*, 35 Wash. 558. See also *State v. Schaeffer*, 172 Mo. 335.

169. (c) Intent to Kill. — See notes 6, 8.

170. See notes 1, 2.

(d) Presumption from Fact of Killing. — See note 4.

(4) *Murder in Third Degree.* — See note 5.

c. DETERMINATION OF DEGREE — (1) *In General.* — See note 6.

171. See notes 1, 2.

(2) *Effect of Plea of Guilty.* — See note 4.

(3) *Doubt as to Degree.* — See note 5.

VII. MANSLAUGHTER — 1. Definition. — See note 6.

169. 6. Intent to Kill Not Necessary Element of Murder in Second Degree. — *State v. Beatty*, 51 W. Va. 232. *Contra*, *State v. Kinder*, 184 Mo. 276, wherein the court said: "There can be no dispute upon the legal proposition that, to constitute murder of the second degree, there must be an intent to kill." *Compare* *State v. John*, 172 Mo. 220, 95 Am. St. Rep. 513; *State v. May*, 172 Mo. 630.

8. Intent to Cause Great Bodily Harm Short of Death. — See *Beaver v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 1020.

170. 1. Killing in Perpetration of Another Felony as Murder in Second Degree. — *State v. Brinte*, 4 Penn. (Del.) 551.

2. Unlawful Acts Dangerous to Human Life. — *State v. Rodman*, 173 Mo. 681.

4. Only Second Degree Presumed from Fact of Killing — *Delaware.* — *State v. Brinte*, 4 Penn. (Del.) 551.

Iowa. — *State v. Phillips*, 118 Iowa 679, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 176.

Missouri. — *State v. McMullin*, 170 Mo. 608.

North Carolina. — *State v. Bishop*, 131 N. Car. 733; *State v. Utley*, 132 N. Car. 1022; *State v. Capps*, 134 N. Car. 622; *State v. Teachey*, 138 N. Car. 587. See also *State v. Williams*, 129 N. Car. 581; *State v. Munn*, 134 N. Car. 680; *State v. White*, 138 N. Car. 704.

Texas. — *Martin v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 390. See also *Smith v. State*, 45 Tex. Crim. 552.

Virginia. — *Litton v. Com.*, 101 Va. 833.

Washington. — *State v. Melvern*, 32 Wash. 7.

West Virginia. — *State v. Hertzog*, 55 W. Va. 74.

Contra. — *Cupps v. State*, 120 Wis. 504, 102 Am. St. Rep. 996.

5. Murder in Third Degree. — *Clemmons v. State*, 43 Fla. 200; *Bassett v. State*, 44 Fla. 12; *Mathis v. State*, 45 Fla. 46; *Carr v. State*, 45 Fla. 11; *Cook v. State*, (Fla. 1903) 35 So. Rep. 665; *Weightnovel v. State*, (Fla. 1903) 35 So. Rep. 856; *Thomas v. State*, (Fla. 1904) 36 So. Rep. 161; *Ryan v. State*, 115 Wis. 488.

6. Degree Must Be Determined by Jury — *Alabama.* — *Watkins v. State*, 133 Ala. 88; *Collins v. State*, 138 Ala. 57. See also *Sherrill v. State*, 138 Ala. 3; *Thomas v. State*, 139 Ala. 80.

Delaware. — *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036.

Florida. — *Reyes v. State*, (Fla. 1905) 38 So. Rep. 257.

Illinois. — See *Henry v. People*, 198 Ill. 162.

Kansas. — *State v. McNarney*, 70 Kan. 679.

Maine. — *State v. Oakes*, 95 Me. 369.

Missouri. — *State v. Williams*, 186 Mo. 128.

Montana. — *State v. Shadwell*, 26 Mont. 52;

State v. Hliboka, 31 Mont. 455.

New York. — *People v. Gaimari*, 176 N. Y. 84. See also *People v. Sullivan*, 173 N. Y. 122, 93 Am. St. Rep. 582.

North Carolina. — *State v. Williams*, 129 N. Car. 581.

Pennsylvania. — *Com. v. Sutton*, 205 Pa. St. 605; *Com. v. Kovovic*, 209 Pa. St. 465.

Tennessee. — *Waddle v. State*, 112 Tenn. 556.

Texas. — *Murray v. State*, 46 Tex. Crim. 400; *Lyles v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 763.

Utah. — *State v. Campbell*, 24 Utah 103.

Washington. — *State v. Crawford*, 31 Wash. 260.

West Virginia. — *State v. Tucker*, 52 W. Va. 420; *State v. Hertzog*, 55 W. Va. 74. See also *State v. Clark*, 51 W. Va. 457.

Degree Not to Be Fixed Arbitrarily. — *State v. Cole*, 132 N. Car. 1069.

Degree of Murder Fixed by Grand Jury. — In *Massachusetts*, under the statute of 1899, the grand jury is expressly authorized to indict for murder in the second degree, finding the defendant not guilty of the first degree. *Com. v. Ibrahim*, 184 Mass. 255.

171. 1. Murder by Poison, etc. — Jury May Find Either Degree. — *State v. Daniels*, 134 N. Car. 671; *Lindsay v. State*, 24 Ohio Cir. Ct. 1.

2. State v. Young, 67 N. J. L. 223.

4. Degree to Be Found by Jury on Plea of Guilty. — *Lancaster v. State*, 71 Ark. 100; *Warren v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 275; *Murray v. State*, 46 Tex. Crim. 400.

5. Doubt as to Degree. — *Coolman v. State*, 163 Ind. 503; *Mullins v. Com.*, (Ky. 1902) 67 S. W. Rep. 824; *Arnold v. Com.*, (Ky. 1903) 72 S. W. Rep. 753; *Hibler v. Com.*, (Ky. 1903) 74 S. W. Rep. 1079; *Demaree v. Com.*, (Ky. 1904) 82 S. W. Rep. 231; *People v. Sullivan*, 173 N. Y. 122, 93 Am. St. Rep. 582; *Wells v. Territory*, 14 Okla. 436; *Ryan v. State*, 115 Wis. 488.

The Doubt Must Be a Reasonable One in order to warrant the jury in finding the accused guilty of murder in the lower degree. *State v. May*, 172 Mo. 630.

6. Manslaughter Defined. — *State v. Brown*, 4 Penn. (Del.) 120; *State v. Brinte*, 4 Penn. (Del.) 551.

Statutory Definition. — *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036; *Bassett v. State*, 44 Fla. 12; *Potter v. State*, 162 Ind. 213; *Barker v. Territory*, (Okla. 1904) 78 Pac. Rep. 81; *Gustavenson v. State*, 10 Wyo. 300.

Statutory Manslaughter in Third and Fourth Degrees Defined. — *Bliss v. State*, 117 Wis. 596.

Homicide Necessary. — There can be no manslaughter where there is no homicide. *State v. Hartley*, 185 Mo. 669, 105 Am. St. Rep. 608.

- 172.** 2. Voluntary Manslaughter — *a.* DEFINITION. — See note 1.
b. DISTINGUISHED FROM MURDER. — See notes 2, 3, 4.
173. *c.* KILLING IN SUDDEN PASSION — (1) *In General.* — See note 2.
 (3) *Violence of Emotion.* — See note 5.
174. Qualifications of Rule. — See note 3.
 (4) *Necessity of Provocation.* — See note 6.

Unlawful Killing. — Killing a human being without malice, to constitute manslaughter, must be unlawful. *State v. Adams*, 68 S. Car. 421.

Common-law Offense in South Carolina. — In South Carolina manslaughter is still a common-law and not a statutory offense. *State v. Bowers*, 65 S. Car. 207, 95 Am. St. Rep. 795.

Manslaughter Either Voluntary or Involuntary. — Under the *Kentucky* statutes there no longer remains any such offense as manslaughter, what is left of the common-law offense known by that name being involuntary manslaughter. *Spriggs v. Com.*, 113 Ky. 724. See also *Mullins v. Com.*, (Ky. 1902) 67 S. W. Rep. 824.

172. 1. Voluntary Manslaughter Defined. — *United States.* — U. S. *v. Lewis*, 111 Fed. Rep. 630.

Florida. — See *Olds v. State*, 44 Fla. 452.

Kentucky. — *Montgomery v. Com.*, (Ky. 1904) 81 S. W. Rep. 264, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 172; *Wheatley v. Com.*, (Ky. 1904) 81 S. W. Rep. 687.

Mississippi. — *Green v. State*, (Miss. 1905) 37 So. Rep. 646.

New Hampshire. — *State v. Greenleaf*, 71 N. H. 612, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 172.

North Carolina. — *State v. White*, 138 N. Car. 704.

South Carolina. — *State v. Foster*, 66 S. Car. 469.

Texas. — *Clifton v. State*, (Tex. Crim. 1904) 84 S. W. Rep. 237. See also *Hatchell v. State*, (Tex. Crim. 1904) 84 S. W. Rep. 234.

West Virginia. — See *State v. Beatty*, 51 W. Va. 232.

Voluntary manslaughter is the intentional taking of life without malice, without premeditation, without deliberation. *State v. Prater*, 52 W. Va. 138.

Statutory Definition. — See *Potter v. State*, 162 Ind. 213.

Killing Must Arise from Sudden Heat of Passion. — *State v. Brinte*, 4 Penn. (Del.) 551; *Warner v. Com.*, (Ky. 1905) 84 S. W. Rep. 743.

Intent to Take Life Must Exist. — *Connell v. State*, 46 Tex. Crim. 259.

2. Distinction Between Murder and Manslaughter. — *United States.* — U. S. *v. Lewis*, 111 Fed. Rep. 630; *Roberts v. U. S.*, (C. C. A.) 126 Fed. Rep. 897.

Alabama. — *Johnson v. State*, 133 Ala. 38; *Williams v. State*, 140 Ala. 10.

Arkansas. — See *Nash v. State*, 73 Ark. 399. *Connecticut.* — *State v. Marx*, (Conn. 1905) 60 Atl. Rep. 690.

Delaware. — *State v. Brown*, 4 Penn. (Del.) 120; *State v. Brinte*, 4 Penn. (Del.) 551; *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036; *State v. Harmon*, 4 Penn. (Del.) 580.

Florida. — *Olds v. State*, 44 Fla. 452.

Georgia. — *Prior v. State*, 118 Ga. 756; *May v. State*, 120 Ga. 135.

Kansas. — *State v. Clark*, 69 Kan. 576.

Kentucky. — *Wheatley v. Com.*, (Ky. 1904) 81 S. W. Rep. 687; *Hellard v. Com.*, (Ky. 1905) 84 S. W. Rep. 329. See also *Howard v. Com.*, (Ky. 1903) 71 S. W. Rep. 446; *Taber v. Com.*, (Ky. 1904) 82 S. W. Rep. 443; *Wheeler v. Com.*, (Ky. 1905) 87 S. W. Rep. 1106.

Mississippi. — *Moore v. State*, (Miss. 1905) 38 So. Rep. 504.

Missouri. — *State v. Weakley*, 178 Mo. 413; *State v. Hartley*, 185 Mo. 669, 105 Am. St. Rep. 608, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 173 [172].

Nebraska. — See *Ford v. State*, (Neb. 1904) 98 N. W. Rep. 807.

New Hampshire. — *State v. Greenleaf*, 71 N. H. 612.

South Carolina. — *State v. Bowers*, 65 S. Car. 207, 95 Am. St. Rep. 795; *State v. Foster*, 66 S. Car. 469; *State v. Adams*, 68 S. Car. 421.

Texas. — *Chambers v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 752.

Wyoming. — *Gustavenson v. State*, 10 Wyo. 300.

3. Intent Not the Criterion. — *Connecticut.* — *State v. Yanz*, 74 Conn. 177, 92 Am. St. Rep. 205.

Illinois. — *Hammond v. People*, 199 Ill. 173. *Kentucky.* — *Wheeler v. Com.*, (Ky. 1905) 87 S. W. Rep. 1106.

Missouri. — *State v. Weakley*, 178 Mo. 413; *State v. Hartley*, 185 Mo. 669, 105 Am. St. Rep. 608, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 173 [172].

New Hampshire. — *State v. Greenleaf*, 71 N. H. 612.

New Jersey. — *State v. Barker*, 68 N. J. L. 19.

Texas. — *Danforth v. State*, 44 Tex. Crim. 105. See also *Estep v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 966.

West Virginia. — *State v. Beatty*, 51 W. Va. 232.

4. Grade of Offense Not Determined by Character of Weapon Used. — *State v. Hartley*, 185 Mo. 669, 105 Am. St. Rep. 608, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 173 [172]. Compare *Perrin v. State*, 45 Tex. Crim. 560, under a statute providing that where a party with a weapon not calculated to kill, in a sudden transport of passion does kill, he is not guilty of manslaughter unless the intent to kill evidently appears.

173. 2. *State v. Foster*, 66 S. Car. 469.

5. Rule as to Effect of Provocation. — *Ryan v. State*, 115 Wis. 488.

174. 3. Dethronement of Reason Unnecessary. — Compare *Olds v. State*, 44 Fla. 452, wherein the court said: "It would not be putting it too strong to say that the heat of passion, in order to preclude premeditation, must be such as to cloud the senses or obscure the reason."

6. Necessity of Adequate Provocation. — *Alabama.* — *Wilson v. State*, 140 Ala. 43.

175. (5) *Killing Must Proceed from Passion under Provocation* — (a) In General. — See note 1.

(b) *Killing from Previous Malice* — *aa.* IN GENERAL. — See note 3.

bb. WHEN KILLING WILL BE ATTRIBUTED TO OLD GRUDGE. — See note 4.

176. (c) *Killing in Brutal or Ferocious Manner*. — See note 1.

(d) *Killing in Revenge* — *Cooling Time* — *aa.* RULE STATED. — See notes 2, 3.

bb. SUFFICIENCY OF COOLING TIME — (*aa.*) In General. — See note 4.

177. (*bb.*) *Question of Law or Fact*. — See notes 5, 6.

(6) *Adequacy of Provocation* — (a) In General. — See note 7.

178. See note 2.

Individual Temperament or Particular Mental Condition. — See note 3.

179. *Question of Law or Fact*. — See notes 2, 4.

Arkansas. — *Vance v. State*, 70 Ark. 272.

California. — *People v. Mendenhall*, 135 Cal.

344.

Florida. — *Olds v. State*, 44 Fla. 452.

Georgia. — See *Cohen v. State*, 118 Ga. 31.

Iowa. — *State v. Hunter*, 118 Iowa 686.

Kansas. — See *State v. Clark*, 69 Kan. 576.

Kentucky. — *Martin v. Com.*, (Ky. 1904) 78

S. W. Rep. 1104. See also *Cox v. Com.*, (Ky.

1902) 69 S. W. Rep. 799; *Shepherd v. Com.*,

(Ky. 1904) 82 S. W. Rep. 378.

Missouri. — *State v. May*, 172 Mo. 630; *State*

v. Diller, 170 Mo. 1; *State v. Weakley*, 178

Mo. 413. See also *State v. Hall*, 168 Mo. 475.

Pennsylvania. — See *Com. v. Gibson*, 211 Pa.

St. 546.

Texas. — *Scott v. State*, 43 Tex. Crim. 591;

Black v. State, (Tex. Crim. 1902) 68 S. W.

Rep. 683; *Hatchell v. State*, (Tex. Crim. 1904)

84 S. W. Rep. 234. See also *Nelson v. State*,

(Tex. Crim. 1904) 81 S. W. Rep. 713.

West Virginia. — See *State v. Beatty*, 51 W.

Va. 232.

Provocation Must Arise at Time of Killing. —

Cole v. State, (Tex. Crim. 1905) 88 S. W. Rep.

341.

Where Two Provocations Exist the killing will

be imputed to the later of the two. *Venters*

v. State, (Tex. Crim. 1904) 83 S. W. Rep. 832.

175. 1. Necessity of Passion. — *U. S. v. Lewis*,

111 Fed. Rep. 630; *Johnson v. State*, 133 Ala.

38; *Vance v. State*, 70 Ark. 272; *State v. Har-*

mon, 4 Penn. (Del.) 580; *Martin v. Com.*, (Ky.

1904) 78 S. W. Rep. 1104; *State v. Weakley*,

178 Mo. 413; *State v. Beatty*, 51 W. Va. 232.

See also *Cox v. Com.*, (Ky. 1902) 69 S. W. Rep.

799; *Warner v. Com.*, (Ky. 1905) 84 S. W.

Rep. 742; *State v. Niehaus*, 188 Mo. 304; *Nel-*

son v. State, (Tex. Crim. 1904) 81 S. W. Rep.

713.

3. Seeking Fight in Order to Kill. — See *Tardy*

v. State, 46 Tex. Crim. 214.

4. Question for Jury Whether Old Grudge or

Provocation Caused Killing. — See *State v. Ut-*

ley, 132 N. Car. 1022; *State v. Clark*, 51 W.

Va. 457, discussing the question of presumption.

176. 1. Killing in Brutal and Ferocious Man-

ner. — *State v. Hunt*, 134 N. Car. 684.

2. Killing After Time for Passion to Cool. —

Lide v. State, 133 Ala. 43; *Perry v. State*, 117

Ga. 719; *McCarty v. Com.*, 114 Ky. 620; *State*

v. Powell, 109 La. 727; *State v. Beatty*, 51 W.

Va. 232.

3. Actual Cooling of Passion Not Necessary. —

U. S. v. Lewis, 111 Fed. Rep. 630.

4. Sufficiency of Cooling Time in General. —

Young v. State, (Tex. Crim. 1902) 69 S. W.

Rep. 153; *Hayman v. State*, (Tex. Crim. 1904)

83 S. W. Rep. 204. See also *Jarvis v.*

State, 138 Ala. 17; *State v. Hunt*, 134 N. Car.

684.

177. 5. Question of Law. — *Lide v. State*,

133 Ala. 43.

6. Question of Fact. — *Ewert v. State*, (Fla.

1904) 37 So. Rep. 334; *State v. Cooper*, 112

La. 281, 104 Am. St. Rep. 447; *Hayman v.*

State, (Tex. Crim. 1904) 83 S. W. Rep. 204;

State v. Beatty, 51 W. Va. 232.

7. Adequacy of Provocation in General — *Ari-*

zona. — *Hicklin v. Territory*, (Ariz. 1905) 80

Pac. Rep. 340.

Arkansas. — *Vance v. State*, 70 Ark. 272.

Kentucky. — *Cook v. Com.*, (Ky. 1903) 72 S.

W. Rep. 283; *Martin v. Com.*, (Ky. 1904) 78

S. W. Rep. 1104; *Metcalfe v. Com.*, (Ky. 1905)

86 S. W. Rep. 534.

Missouri. — See *State v. McKenzie*, 177 Mo.

699.

Texas. — *McAnear v. State*, 43 Tex. Crim.

518; *Young v. State*, (Tex. Crim. 1902) 69 S.

W. Rep. 153; *Swain v. State*, (Tex. Crim.

1905) 86 S. W. Rep. 335; *White v. State*, 44

Tex. Crim. 346; *Thomas v. State*, 45 Tex. Crim.

111; *Brown v. State*, 45 Tex. Crim. 139; *Vann*

v. State, 45 Tex. Crim. 434; *Chism v. State*,

(Tex. Crim. 1904) 78 S. W. Rep. 949; *Riley*

v. State, (Tex. Crim. 1904) 81 S. W. Rep. 711;

Connell v. State, 46 Tex. Crim. 259; *Freeman*

v. State, 46 Tex. Crim. 318; *Thomas v. State*,

(Tex. Crim. 1905) 85 S. W. Rep. 1154; *Yancy*

v. State, (Tex. Crim. 1905) 87 S. W. Rep. 693.

See also *Beckham v. State*, (Tex. Crim. 1902)

69 S. W. Rep. 534.

Wisconsin. — *Ryan v. State*, 115 Wis. 500,

quoting 21 AM. AND ENG. ENCYC. OF LAW (2d

ed.) 177.

Not Every Indignity which is calculated to

throw the average man in sudden heat and pas-

sion is a sufficient legal provocation. *State v.*

Gilliam, 66 S. Car. 410.

178. 2. "Reasonable" Provocation. — See

State v. McKenzie, 177 Mo. 690.

3. Test of Adequacy — Effect on Persons of Aver-

age Mind and Disposition. — *Ryan v. State*, 115

Wis. 500, quoting 21 AM. AND ENG. ENCYC. OF

LAW (2d ed.) 178.

179. 2. Question of Fact. — *Johnson v. State*,

133 Ala. 38; *Allison v. State*, (Ark. 1904) 86

S. W. Rep. 409; *State v. Senegal*, 107 La. 452.

See also *Scott v. State*, 43 Tex. Crim. 591.

179. (b) Words and Gestures — *aa.* WORDS AND GESTURES AFFECTING ACCUSED. — See note 5.

180. Provocation by Words, etc., as Affecting Degrees of Murder. — See note 4.

181. *bb.* INSULTING WORDS AND CONDUCT TO FEMALE RELATIVES — (*aa.*) *General Doctrine.* — See note 1.

(*bb.*) *Statutory Rule in Texas.* — See notes 2, 3, 5.

Who Are Relations. — See note 7.

What Constitutes Insult to Female Relation. — See note 8.

Killing by Woman. — See note 9.

Belief of Accused as to Insult. — See note 10.

182. Restriction as to Time of Killing. — See notes 1, 2, 3, 4.

(c) Acts Affecting Person — *aa.* ASSAULTS AND BATTERIES — (*aa.*) *In General.* — See note 6.

An Actual Battery. — See note 8.

183. (*bb.*) *Blows or Wounds Involving Pain or Injury.* — See note 3.

(*cc.*) *Slight Blows.* — See note 5.

184. *bb.* MUTUAL COMBAT — (*aa.*) *In General.* — See notes 3, 4.

179. 4. *Hancock v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 696.

5. Mere Words, etc., Not Adequate Provocation. — *U. S. v. Lewis*, 111 Fed. Rep. 630; *Wilson v. State*, 140 Ala. 43; *Jarvis v. State*, 138 Ala. 17; *People v. Mendenhall*, 135 Cal. 344; *Lynch v. People*, 33 Colo. 128; *Robinson v. State*, 118 Ga. 198; *State v. Gartrell*, 171 Mo. 489; *State v. May*, 172 Mo. 630; *State v. Atchley*, 186 Mo. 174; *State v. Spivey*, 132 N. Car. 989; *State v. Gilliam*, 66 S. Car. 419; *Hatchell v. State*, (Tex. Crim. 1904) 84 S. W. Rep. 234. See also *State v. Valentina*, 71 N. J. L. 553.

180. 4. Provocation by Words, etc., as Determining Degree of Murder. — *State v. McMullin*, 170 Mo. 608; *State v. Gartrell*, 171 Mo. 489; *State v. Brown*, 181 Mo. 192; *State v. Williams*, 186 Mo. 128.

181. 1. Insult, etc., to Female Relatives Not Adequate Provocation. — *Perryman v. State*, 114 Ga. 545; *State v. Powell*, 109 La. 727; *State v. Atchley*, 186 Mo. 174.

2. Texas Statute. — See *Brown v. State*, 45 Tex. Crim. 139; *Johnson v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 824.

Insults Relating to a Deceased Female Relative are within the terms of the statute. *Willis v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 790.

3. Killing Must Be Direct Result of Provocation. — *McComas v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 1212; *Venters v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 832. See also *Jones v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 5.

5. Female Affected Need Not Regard Conduct as Insulting. — *McAnear v. State*, 43 Tex. Crim. 518.

7. Actual Relationship Not Required. — *Elmore v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 520.

A Married Sister is a female relative within the meaning of statute though the insults were offered by her husband. *Willis v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 790.

8. What Are Insults to Female Relations. — See *Driver v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 528; *Hayman v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 204.

9. Killing by Woman — Insult to Herself. — See *Doss v. State*, 43 Tex. Crim. 551.

10. Belief of Accused as to Supposed Insult. —

Hudson v. State, 43 Tex. Crim. 420; *McAnear v. State*, 43 Tex. Crim. 518; *Melton v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 822.

182. 1. Killing Immediately on Happening of Insulting Conduct. — See *Townsell v. State*, (Tex. Crim. 1903) 78 S. W. Rep. 938.

2. Killing at First Meeting. — *McAnear v. State*, 43 Tex. Crim. 518; *Ray v. State*, 46 Tex. Crim. 511; *Melton v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 822; *Venters v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 832. See also *McComas v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 533; *Ricks v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 1036.

Meeting May Be Either Casual or Intended. — *Allen v. State*, 44 Tex. Crim. 205.

3. Lapse of Time Before Meeting Not Material. — *Hudson v. State*, 43 Tex. Crim. 420.

4. Killing Must Be Result of Passion. — *Melton v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 822.

6. Intent to Inflict Bodily Injury. — See *Gardner v. State*, 44 Tex. Crim. 572.

8. Actual Battery as Adequate Provocation. — *Bearden v. State*, 44 Tex. Crim. 578. See also *State v. Weakley*, 178 Mo. 413.

183. 3. Blows or Wounds Involving Pain or Injury. — *Garner v. State*, 45 Tex. Crim. 308; *Dodson v. State*, 45 Tex. Crim. 571; *Connell v. State*, 46 Tex. Crim. 259; *Hjeronymus v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 708. See also *Hancock v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 696.

5. Violence Disproportionate to Provocation. — *Hatchell v. State*, (Tex. Crim. 1904) 84 S. W. Rep. 234; *Gustavenson v. State*, 10 Wyo. 300.

184. 3. Killing in Mutual Combat. — *Smith v. State*, 118 Ga. 61; *Goodman v. State*, 122 Ga. 111; *Trabue v. Com.*, (Ky. 1902) 66 S. W. Rep. 718; *Reynolds v. Com.*, (Ky. 1904) 82 S. W. Rep. 978; *Hellard v. Com.*, (Ky. 1905) 84 S. W. Rep. 329; *State v. May*, 172 Mo. 630; *Moore v. State*, 44 Tex. Crim. 45; *Christian v. State*, 46 Tex. Crim. 47. See also *Osborn v. State*, 164 Ind. 262; *State v. Hough*, 138 N. Car. 663; *State v. Vance*, 29 Wash. 435.

4. Killing After Combat and Before Subsidence of Passion. — *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036.

- 185.** (bb) *Intent to Kill or Do Great Bodily Harm.* — See note 1.
 (cc) *Taking Unfair Advantage of Antagonist.* — See note 3.
 (dd) *Combat Provoked by Accused.* — See note 4.
- 186.** *ee. ILLEGAL ARREST* — Statement of the Principle. — See note 5.
- 187.** *Killing in Passion upon Provocation.* — See notes 2, 3.
 (d) *Acts Affecting Pride and Reputation of Accused* — *aa. ADULTERY OF WIFE* — Detection in Act. — See notes 9, 10.
- 188.** *Killing in Revenge.* — See notes 2, 3.
 (e) *Acts Affecting Property* — *Simple Trespass upon Land.* — See note 6.
- 189.** *3. Involuntary Manslaughter* — *a. DEFINITION.* — See note 9.
- 190.** *c. UNLAWFUL ACTS CAUSING DEATH* — (i) *Misdemeanors* — (b) *Assaults and Batteries.* — See notes 4, 7.
- 191.** (2) *Reckless or Dangerous Acts* — (a) *In General.* — See note 4.
 (b) *Improper Use of Firearms* — *aa. RECKLESS DISCHARGE* — *In Public Place.* — See note 5.
- 192.** *bb. ACCIDENTAL DISCHARGE DURING IMPROPER USE.* — See note 2.
- 185.** *1. Intent to Kill or Do Great Bodily Harm.* — *People v. Glover*, 141 Cal. 233; *Pugh v. State*, 114 Ga. 16; *Kyle v. People*, 215 Ill. 250; *State v. Sale*, 119 Iowa 1; *Schrader v. State*, 84 Miss. 593; *State v. Sharp*, 183 Mo. 715; *People v. Filippelli*, 173 N. Y. 509; *State v. White*, 138 N. Car. 704; *State v. Cobb*, 65 S. Car. 324, 95 Am. St. Rep. 801; *Johnson v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 824. See also *Cooper v. State*, 80 Miss. 175.
- 3. Mere Possession of Weapon Not Evidence of Felonious Intent.** — *State v. Taylor*, 57 W. Va. 228, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 185.
- 4. Combat Provoked by Accused.** — *Noble v. State*, (Ark. 1905) 87 S. W. Rep. 120; *People v. Filippelli*, 173 N. Y. 509. See also *State v. Clayton*, 113 La. 782.
- 186.** **5.** See *Williford v. State*, 121 Ga. 173.
- 187.** **2.** See *Roberson v. State*, 45 Fla. 94; *Cortez v. State*, 44 Tex. Crim. 169.
- 3. Killing Must Result from Sudden Passion.** — See *Earles v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 2.
- 9. Killing Adulterous Wife Detected in Act.** — *Angling v. State*, 137 Ala. 17; *Rowland v. State*, 83 Miss. 487, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187.
- That the Woman Is Killed by Mistake** while an attempt is being made to kill the paramour is immaterial. *Giles v. State*, 43 Tex. Crim. 561.
- 10. Killing Wife's Paramour Detected in Act.** — *Angling v. State*, 137 Ala. 17; *Rowland v. State*, 83 Miss. 487, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 187; *Orange v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 385. See further *infra*, this title, **209. 7.**
- A Mistaken Belief** that adultery has been going on makes the killing manslaughter if the killing is done in the first transport of passion and the belief is reasonable. *State v. Yanz*, 74 Conn. 177, 92 Am. St. Rep. 205.
- 188.** **2. Killing Wife's Paramour in Revenge.** — *State v. Powell*, 109 La. 727; *State v. Privitt*, 175 Mo. 207. See also *Williams v. State*, 130 Ala. 107.
- Under the Penal Code of Texas.** — *Orange v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 385.
- 3. Killing upon Suspicion of Improper Conduct.** — See *State v. Botha*, 27 Utah 289.
- 6. Simple Trespass upon Land.** — *Com. v. Bullock*, (Ky. 1902) 67 S. W. Rep. 992; *State v. Clark*, 51 W. Va. 457.
- 189.** **9. Involuntary Manslaughter Defined.** — *Ringer v. State*, (Ark. 1905) 85 S. W. Rep. 410; *Montgomery v. Com.*, (Ky. 1904) 81 S. W. Rep. 264; *State v. Twinage*, 138 N. Car. 566; *Johnson v. State*, 66 Ohio St. 59; *State v. Gilliam*, 66 S. Car. 419. See also *Selby v. Com.*, (Ky. 1904) 80 S. W. Rep. 221.
- Statutory Definition.** — *Ackers v. State*, 73 Ark. 262; *Eaton v. State*, 162 Ind. 554.
- Lack of Due Caution and Circumspection Required.** — *Overby v. State*, 115 Ga. 240.
- Negligent Homicide of the Second Degree** — *Texas Statute.* — See *Flynn v. State*, 43 Tex. Crim. 407.
- 190.** **4. Death from Blows with Fists.** — *People v. Sharkey*, 87 N. Y. App. Div. 532, affirmed 178 N. Y. 584.
- Death from Kicks and Blows with Fists.** — *Thomas v. Com.*, (Ky. 1905) 86 S. W. Rep. 694.
- 7. Striking with Stick.** — *Perrymore v. State*, 73 Ark. 278.
- 191.** **4. Reckless and Dangerous Acts.** — *Potter v. State*, 162 Ind. 217, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 191.
- 5. Reckless Discharge of Gun in Public Place.** — *Henderson v. Com.*, (Ky. 1903) 72 S. W. Rep. 781; *Morton v. State*, (Tex. Crim. 1902) 71 S. W. Rep. 281.
- Voluntary Manslaughter.** — In *Kentucky* the reckless discharge of a pistol in a public place, resulting in the killing of a person, constitutes voluntary manslaughter. *Montgomery v. Com.*, (Ky. 1904) 81 S. W. Rep. 264.
- Discharge of Gun on Owner's Premises.** — One who unintentionally shoots and kills another by discharging firearms on his own premises is not thereby guilty of manslaughter. *Martin v. State*, 70 Ohio St. 219.
- The Accidental Discharge of a Revolver** illegally carried by the defendant, killing a person with whom the defendant was scuffling, has been held not to constitute involuntary manslaughter. *Potter v. State*, 162 Ind. 213.
- 192.** **2. Accidental Discharge During Improper Use.** — *Tanks v. State*, 71 Ark. 450; *State v. Turnage*, 138 N. Car. 566; *Williams v. State*, 45 Tex. Crim. 218; *Friday v. State*, (Tex. Crim.

192. Pointing Gun at Another. — See notes 3, 4.

Snapping Gun Supposed to Be Harmless. — See note 6.

Brandishing Gun. — See note 7.

194. *d.* IMPROPER PERFORMANCE OF LAWFUL ACTS — (1) *Wilful Misbehavior* — (a) *Immoderate Punishment*. — See note 3.

(2) *Culpable Negligence* — (a) *General Principles*. — See note 6.

195. (b) *Negligence in Respect to Dangerous Agencies* — *bb.* OPERATION OF RAILROADS. — See note 6.

197. *dd.* DRIVING VEHICLES. — See note 2.

198. *e.* WILFUL OR NEGLIGENT OMISSION OF DUTY — (2) *Negligence in Care of Dependent Person* — (a) *Statement of Rule*. — See note 2.

(b) *Requisites of Criminal Liability* — *aa.* DUTY TO SUPPLY NECESSARIES. — See note 6.

bb. ABILITY TO PERFORM DUTY. — See note II.

199. (c) *Effect of Religious Disbelief in Efficacy of Drugs* — *Under English Statute*. — See note I.

At Common Law. — See note 5.

200. 4. Degrees of Manslaughter — *b.* VOLUNTARY AND INVOLUNTARY MANSLAUGHTER. — See notes 1, 3.

c. INVOLUNTARY HOMICIDE IN PERPETRATION OF CRIME NOT FELONIOUS — See note 8.

201. *f.* UNINTENTIONAL KILLING IN HEAT OF PASSION. — See notes 1, 3.

g. RESIDUARY CLAUSE. — See note 6.

VIII. JUSTIFIABLE AND EXCUSABLE HOMICIDE — 1. Definitions and Distinctions — *a.* JUSTIFIABLE HOMICIDE DEFINED. — See note 9.

202. *b.* EXCUSABLE HOMICIDE DEFINED. — See note 1.

d. MODERN RULE. — See note 4.

1904) 79 S. W. Rep. 815. See also *Stewart v. State*, 137 Ala. 33; *Casteel v. State*, 73 Ark. 152; *Messer v. Com.*, (Ky. 1903) 76 S. W. Rep. 331; *State v. Gilliam*, 66 S. Car. 419.

Accidental Discharge During Struggle for Possession of Loaded Gun. — *State v. Hall*, 132 N. Car. 1094.

192. 3. Pointing Gun at Another — *Statutory Misdemeanor*. — *Barnes v. State*, 134 Ala. 36; *State v. Turnage*, 138 N. Car. 566.

4. Independently of Statute. — See *State v. Turnage*, 138 N. Car. 566.

6. Snapping Gun Supposed to Be Harmless. — *Ford v. State*, (Neb. 1904) 98 N. W. Rep. 807.

7. Brandishing Gun. — See *Ford v. State*, (Neb. 1904) 98 N. W. Rep. 807.

194. 3. Excessive Punishment of Child by Parent. — *Ackers v. State*, 73 Ark. 262.

6. Negligence Predicated upon Duty. — See *State v. Young*, (N. J. 1903) 56 Atl. Rep. 471.

195. 6. When Directors of Street Railroad Guilty of Involuntary Manslaughter. — See *State v. Young*, (N. J. 1903) 56 Atl. Rep. 471.

197. 2. *Thompson v. State*, 131 Ala. 18.

198. 2. *Negligence in Care of Dependent Persons*. — See *State v. Goode*, 132 N. Car. 982.

6. Master and Servant. — *Reg. v. Brown*, 1 N. W. Ter. 475.

11. Ability to Perform Duty Essential. — *Rex v. Jones*, 19 Cox C. C. 678.

199. 1. The Omission to Call In a Physician to treat a sick child under the defendant's care, from which omission the child died, has been held in *Canada* to render the defendant guilty

of an indictable offense under *Crim. Code Can.*, §§ 209, 210, as a failure to provide "necessaries." *Rex v. Lewis*, 6 Ont. L. Rep. 132.

5. *Under Common Law*. — See *State v. Chenoweth*, 163 Ind. 94; *State v. Sandford*, 99 Me. 441.

200. 1. *Alabama Statute Interpreted*. — *Thayer v. State*, 138 Ala. 39; *Thomas v. State*, 139 Ala. 80.

3. *Where Horse-racing Along a Public Road Is Unlawful*, a homicide caused by such unlawful act may amount to manslaughter in the second degree, regardless of whether the running was furious, reckless, and grossly negligent. *Thompson v. State*, 131 Ala. 18.

8. *State v. McAnarney*, 70 Kan. 679.

201. 1. *Unintentional Killing in Heat of Passion with Dangerous Weapon*. — See *State v. Clark*, 69 Kan. 576.

3. *Involuntary Killing in Heat of Passion in Manner Not Cruel*. — *State v. McKenzie*, 177 Mo. 699. See also *State v. Knoll*, 69 Kan. 767; *State v. Brown*, 188 Mo. 451.

6. *Residuary Clause*. — See *State v. Weakley*, 178 Mo. 413.

9. *Definition of Justifiable Homicide*. — See *Bassett v. State*, 44 Fla. 12.

202. 1. *Definition of Excusable Homicide*. — See *Bassett v. State*, 44 Fla. 12.

4. *No Practical Distinctions at Present Day*. — *State v. McDaniel*, 68 S. Car. 304, 102 Am. St. Rep. 661.

Terms "Justifiable" and "Excusable" Often Used as Synonyms. — *State v. Gray*, (Oregon 1905) 79 Pac. Rep. 55.

- 202.** Statutory Classification. — See note 5.
- 204.** 2. Matters of Justification and Excuse — *a.* PERFORMANCE OF LEGAL DUTIES OR PROMOTION OF JUSTICE — (3) *Arrest* — (b) *Overcoming Resistance* — *aa.* IN CASE OF FELONY. — See note 3.
- bb.* IN CASE OF OFFENSE LESS THAN FELONY. — See note 6.
- 205.** See notes 1, 3.
- cc.* WHERE ARREST IS ILLEGAL. — See note 9.
- 207.** (d) Preventing Interference by Third Persons. — See note 2.
- (5) *Prevention of Felony* — *aa.* IN GENERAL. — See note 7.
- 208.** Suppressing Riot. — See note 1.
- 209.** *c.* SEDUCTION OF FEMALE RELATIVES. — See note 1.
- By Statute. — See note 7.
- 213.** IX. EVIDENCE — 2. Admissibility — *b.* DYING DECLARATIONS. — See note 1.
- 214.** *c.* CIRCUMSTANTIAL EVIDENCE. — See note 1.

202. 5. Statutory Justifiable Homicide. — State *v.* Crea, 10 Idaho 88.

The Georgia Statute. — See Williams *v.* State, 120 Ga. 870.

204. 3. Homicide Justifiable in Overcoming Resistance to Arrest. — Petrie *v.* Cartwright, 114 Ky. 103, 102 Am. St. Rep. 274, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 204. And see the title ARREST, 848, 3.

6. Arrest for Offense Less than Felony — Self-defense the Ground of Justification. — State *v.* Smith, 127 Iowa 528; Com. *v.* Rhoades, 23 Pa. Super. Ct. 517, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 204; Com. *v.* Crowley, 26 Pa. Super. Ct. 124; Bartay *v.* State, (Tex. Crim. 1902) 67 S. W. Rep. 416. And see the title ARREST, 849, 4, 906. I *et seq.*

205. 1. Rule to the Contrary. — State *v.* Coleman, 186 Mo. 151.

3. Officer Justifiable in Killing in Self-defense. — State *v.* Hickey, 70 N. J. L. 623.

9. Homicide Not Justifiable in Making Illegal Arrest. — See Coleman *v.* State, 121 Ga. 594.

207. 2. A Person Who Aids a Prisoner to Escape from the custody of an officer is in Iowa by statute guilty of a felony, and an officer, to prevent such a felony from being committed, has the right to kill, where that is the only reasonably apparent method of accomplishing the result. State *v.* Smith, 127 Iowa 528.

7. Homicide to Prevent Felony Justifiable. — Osborne *v.* State, 140 Ala. 84; Bassett *v.* State, 44 Fla. 12. See also Scott *v.* State, 46 Tex. Crim. 85.

208. 1. In Case of a Riot. — See Bassett *v.* State, 44 Fla. 12.

209. 1. Debauching of Daughter. — A father may, if necessary, to protect his minor daughter from seduction or debauchery, where a criminal act is in progress or about to take place, slay the wrongdoer; but he may not deliberately kill in revenge for a past injury. Gossett *v.* State, 123 Ga. 431.

7. Killing by Reason of Adultery Justifiable by Statute. — Dewberry *v.* State, (Tex. Crim. 1903) 74 S. W. Rep. 308. See also Powell *v.* State, (Tex. Crim. 1902) 70 S. W. Rep. 218.

213. 1. Dying Declaration as Evidence — England. — Rex *v.* Smith, 65 J. P. 426; Rex *v.* Abbott, 67 J. P. 151.

Arkansas. — Scott *v.* State, (Ark. 1905) 86 S. W. Rep. 1004; Young *v.* State, 70 Ark. 156.

California. — People *v.* Thomson, 145 Cal. 717.

Colorado. — Zipperian *v.* People, 33 Colo. 134.

Florida. — Bassett *v.* State, 44 Fla. 12.

Illinois. — Brom *v.* People, 216 Ill. 148.

Iowa. — State *v.* Kuhn, 117 Iowa 216.

Kentucky. — Bright *v.* Com., (Ky. 1905) 86 S. W. Rep. 527.

Mississippi. — Flowers *v.* State, 85 Miss. 591;

Ashley *v.* State, (Miss. 1905) 37 So. Rep. 960.

Missouri. — State *v.* Brown, 188 Mo. 451;

State *v.* Craig, 190 Mo. 332.

North Carolina. — State *v.* Teachey, 138 N. Car. 587.

Pennsylvania. — Com. *v.* Spahr, 211 Pa. St. 542.

Texas. — Bennett *v.* State, (Tex. Crim. 1903)

75 S. W. Rep. 314; Lyles *v.* State, (Tex. Crim.

1905) 86 S. W. Rep. 763; Long *v.* State, (Tex.

Crim. 1905) 88 S. W. Rep. 203; Roberts *v.*

State, (Tex. Crim. 1905) 88 S. W. Rep. 221.

214. 1. Competency and Sufficiency of Circumstantial Evidence — Alabama. — Goodlett *v.*

State, 136 Ala. 39; Sanders *v.* State, 134

Ala. 74; Bowen *v.* State, 140 Ala. 65.

California. — People *v.* Donnolly, 143 Cal. 394.

Connecticut. — State *v.* Gallivan, 75 Conn.

326, 96 Am. St. Rep. 203.

Delaware. — State *v.* Brinte, 4 Penn. (Del.)

551.

Georgia. — Cook *v.* State, 114 Ga. 523; Wil-

liams *v.* State, 123 Ga. 138.

Iowa. — State *v.* Dennis, 119 Iowa 688.

Kansas. — State *v.* Moore, 67 Kan. 620.

Kentucky. — Williams *v.* Com., (Ky. 1904)

78 S. W. Rep. 134.

Maine. — State *v.* Lambert, 97 Me. 51.

Missouri. — State *v.* Brown, 168 Mo. 449;

State *v.* Crabtree, 170 Mo. 642; State *v.* Dunn,

179 Mo. 95; State *v.* Brown, 188 Mo. 451; State

v. Heusack, 189 Mo. 295.

Montana. — State *v.* Dotson, 26 Mont. 305.

New Hampshire. — State *v.* Greenleaf, 71 N.

H. 606.

New Mexico. — Territory *v.* Guillen, 11 N.

Mex. 194.

New York. — People *v.* Totterman, 181 N. Y.

385; People *v.* Patrick, 182 N. Y. 131.

North Carolina. — State *v.* Wilcox, 132 N.

Car. 1120.

Pennsylvania. — Com. *v.* Danz, 211 Pa. St.

507; Com. *v.* Kovovic, 209 Pa. St. 465.

214. *d. EVIDENCE AS TO MOTIVE — (1) In General.* — See note 2.

215. See note 1.

Knowledge by Accused Necessary. — See note 2.

(2) *Pecuniary Gain.* — See note 3.

Life Insurance Policy of Deceased Payable to Defendant. — See note 4.

216. (3) *Removal of Burden or Obstacle.* — See notes 3, 4.

South Dakota. — State *v. Coleman*, 17 S. Dak. 594.

Texas. — McKinney *v. State*, (Tex. Crim. 1903) 71 S. W. Rep. 753; Trijo *v. State*, 45 Tex. Crim. 127; Weaver *v. State*, 46 Tex. Crim. 607; Beaver *v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 1020.

West Virginia. — State *v. Sheppard*, 49 W. Va. 582.

Wisconsin. — Lowe *v. State*, 118 Wis. 641.

Conduct of Suspected Person After the Crime is a legitimate subject for consideration as bearing upon the probability of his guilt. Paulson *v. State*, 118 Wis. 89.

214. 2. Not Necessary to Establish Motive — United States. — Hotema *v. U. S.*, 186 U. S. 413.

Arkansas. — Stokes *v. State*, 71 Ark. 112.

Colorado. — Keady *v. People*, 32 Colo. 57.

Connecticut. — State *v. Rathbun*, 74 Conn. 524.

Indiana. — Wheeler *v. State*, 158 Ind. 687.

Kansas. — See State *v. Dull*, 67 Kan. 793.

Missouri. — State *v. Brown*, 168 Mo. 449; State *v. Crabtree*, 170 Mo. 642; State *v. Gregory*, 178 Mo. 48.

Nebraska. — Robinson *v. State*, (Neb. 1904) 98 N. W. Rep. 694; Lillie *v. State*, (Neb. 1904) 100 N. W. Rep. 316.

New Jersey. — State *v. Jagers*, 71 N. J. L. 281.

New York. — People *v. Schmidt*, 168 N. Y. 568.

North Carolina. — State *v. Wilcox*, 132 N. Car. 1120; State *v. Adams*, 136 N. Car. 620.

Pennsylvania. — Com. *v. Danz*, 211 Pa. St. 507.

Texas. — Reeves *v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 803.

Wisconsin. — Cupps *v. State*, 120 Wis. 517, 102 Am. St. Rep. 996.

But the Jury Must Not Be Told that It Can Imagine a Motive Without Proof. — People *v. Enwright*, 134 Cal. 527.

Effect of Failure to Prove Notice — Instructions. — See People *v. Glaze*, 139 Cal. 154; Lanckton *v. U. S.*, 18 App. Cas. (D. C.) 348; State *v. Brown*, 181 Mo. 192.

215. 1. Evidence as to Motive Admissible — Alabama. — Sanders *v. State*, 134 Ala. 74; Bowen *v. State*, 140 Ala. 65. See also Kennedy *v. State*, 140 Ala. 1.

Florida. — Smith *v. State*, (Fla. 1904) 37 So. Rep. 573.

Georgia. — See Robinson *v. State*, 118 Ga. 198.

Kentucky. — Bess *v. Com.*, 116 Ky. 927; Helton *v. Com.*, (Ky. 1905) 84 S. W. Rep. 574.

Nebraska. — McCormick *v. State*, 66 Neb. 337.

Missouri. — State *v. Bailey*, 190 Mo. 257; State *v. Heussack*, 189 Mo. 295.

Nebraska. — Lillie *v. State*, (Neb. 1904) 100 N. W. Rep. 316.

New York. — People *v. Gallagher*, 75 N. Y. App. Div. 39, affirmed 174 N. Y. 505.

North Carolina. — State *v. Wilcox*, 132 N. Car. 1120.

Texas. — Fletcher *v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 173; Moore *v. State*, 44 Tex. Crim. 526. See also Hudson *v. State*, 43 Tex. Crim. 420.

Utah. — State *v. Campbell*, 25 Utah 342.

Knowledge of Deceased as to Matters Which Defendant Desired Kept Concealed. — Smith *v. State*, 44 Tex. Crim. 53.

Remoteness of Evidence as to Motive goes to its weight and not to its admissibility. Weaver *v. State*, 46 Tex. Crim. 607; Weaver *v. State*, 43 Tex. Crim. 340.

Proof of the Commission of Another Crime by the Accused may be given to show motive. See Robinson *v. State*, 114 Ga. 56 (rape); Tompkins *v. Com.*, (Ky. 1903) 77 S. W. Rep. 712, and see the title PROOF OF OTHER CRIMES, **253. 2 et seq.**

Adultery of the defendant may be shown as bearing on the question of the motive in the prosecution for the murder of the defendant's husband or wife. People *v. Montgomery*, 176 N. Y. 219.

Evidence of Acts, Conduct, and Words of the Party Accused are admissible to show motive. Johnson *v. State*, 85 Miss. 572.

That the Accused Did Not Indorse the Religious Views of the Deceased is admissible on the question of motive. Long *v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 203.

Evidence that Revenue Officers Had Seized a Still Belonging to the Accused is admissible for the purpose of showing motive. State *v. Rose*, 129 N. Car. 575.

Absence of Apparent Motive may always be shown and is a circumstance for the jury to consider. Robinson *v. State*, (Neb. 1904) 98 N. W. Rep. 694.

2. Accused Must Know Facts. — State *v. Felker*, 27 Mont. 451; State *v. Adams*, 136 N. Car. 620, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 215.

3. Possession by Deceased of Money or Property. — Paulson *v. State*, 118 Wis. 89. See also State *v. Henry*, 51 W. Va. 283.

Evidence that Husband Wanted Wife's Money. — State *v. Sheppard*, 49 W. Va. 582.

4. Desire to Obtain Insurance on Life of Deceased. — Nordgren *v. People*, 211 Ill. 425; State *v. Coleman*, 17 S. Dak. 594. See also Jahnke *v. State*, (Neb. 1905) 104 N. W. Rep. 154, holding it to be error to exclude evidence that the insurance policy was known to the defendant to be of little, if any, value. Jahnke *v. State*, (Neb. 1905) 104 N. W. Rep. 154.

216. 3. Obstacle to Marriage. — State *v. Burton*, 63 Kan. 602.

4. Deceased an Obstacle to Improper Relations. — Stokes *v. State*, 71 Ark. 112; Weaver *v.*

216. (5) *Jealousy*. — See note 6.

(6) *Suppression of Evidence*. — See note 7.

217. *e. RELATIONS AND FEELINGS EXISTING BETWEEN ACCUSED AND DECEASED*. — See note 1.

218. See notes 1, 2.

219. See notes 1, 2, 3.

Relations and Feelings Between Accused or Deceased and Third Person Inadmissible.

— See note 4.

f. THREATS — (1) *By Accused* — (a) *Purpose of Admission*. — See note 5.

220. See note 1.

(b) *Against Whom Directed*. — See note 3.

State, 43 Tex. Crim. 340; Gallegos *v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1150. See also Caddell *v. State*, 136 Ala. 9.

Illicit Relations with Sister of Deceased. — Morrison *v. Com.*, (Ky. 1903) 74 S. W. Rep. 277.

216. 6. Evidence Tending to Show Jealousy. — Jones *v. State*, 117 Ga. 324; Rowsey *v. Com.*, 116 Ky. 617; Mathley *v. Com.*, (Ky. 1905) 86 S. W. Rep. 988; Brittain *v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 278. See also State *v. Williams*, 129 N. Car. 581.

7. Suppression of Evidence as Motive. — See Walker *v. State*, 44 Tex. Crim. 569.

That the Deceased Had Caused the Filing of an Information Against the Defendant for Burglary is admissible evidence to show motive. Zipperian *v. People*, 33 Colo. 134.

217. 1. Evidence of State of Relations and Feelings — *Alabama*. — Pitts *v. State*, 140 Ala. 70.

Florida. — Sylvester *v. State*, (Fla. 1903) 35 So. Rep. 142.

Indiana. — Wheeler *v. State*, 158 Ind. 687.

Iowa. — State *v. Hossack*, 116 Iowa 194.

Kentucky. — Com. *v. Booker*, (Ky. 1903) 76 S. W. Rep. 838.

Louisiana. — State *v. Coleman*, 111 La. 303; State *v. Nix*, 111 La. 812.

Mississippi. — See Raines *v. State*, 81 Miss. 489; Petty *v. State*, 83 Miss. 260.

Missouri. — State *v. Dunn*, 179 Mo. 95.

North Carolina. — State *v. Foster*, 130 N. Car. 666, 89 Am. St. Rep. 876.

Texas. — Rush *v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 927; Friday *v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 815.

Virginia. — O'Boyle *v. Com.*, 100 Va. 785.

218. 1. Quarrel's and Ill-treatment. — State *v. Hossack*, 116 Iowa 194; State *v. Shafer*, 26 Mont. 11.

Evidence of Defendant's Friendly Disposition Toward the Deceased is inadmissible on the question of justification, excuse, or mitigation where it appears that the killing was with a deadly weapon. State *v. Capps*, 134 N. Car. 622.

2. Previous Quarrels Generally Inadmissible for the Accused. — See Hudson *v. Com.*, (Ky. 1902) 69 S. W. Rep. 1079; State *v. Ronk*, 91 Minn. 419.

219. 1. Exceptions. — State *v. Exum*, 138 N. Car. 599. See also State *v. Ronk*, 91 Minn. 419.

2. State *v. Nelson*, 166 Mo. 191, 89 Am. St. Rep. 681.

3. Details Inadmissible. — Gordon *v. State*, 140 Ala. 29; Pitts *v. State*, 140 Ala. 70; Thomp-

son *v. State*, 84 Miss. 758; Hughes *v. State*, (Miss. 1905) 38 So. Rep. 33; State *v. Adams*, 68 S. Car. 421. See also Poole *v. State*, 45 Tex. Crim. 348.

4. Only Difficulties Between Accused and Deceased Admissible. — State *v. Sumner*, 130 N. Car. 718; Poole *v. State*, 45 Tex. Crim. 348; Wallace *v. State*, 46 Tex. Crim. 341.

5. Threats Admissible — *Alabama*. — Richardson *v. State*, 133 Ala. 78; Webb *v. State*, 135 Ala. 36; Pitts *v. State*, 140 Ala. 70; Tipton *v. State*, 140 Ala. 39.

California. — People *v. Fitzgerald*, 138 Cal. 39.

Illinois. — Henry *v. People*, 198 Ill. 162.

Kentucky. — Rowsey *v. Com.*, 116 Ky. 617. See also Hillard *v. Com.*, (Ky. 1905) 84 S. W. Rep. 329.

Louisiana. — State *v. Nix*, 111 La. 812.

Mississippi. — Raines *v. State*, 81 Miss. 489 (threats made recently before the killing). See also Mackmasters *v. State*, 81 Miss. 374.

Missouri. — State *v. Dunn*, 179 Mo. 95.

New York. — People *v. Gaimari*, 176 N. Y. 84.

North Carolina. — State *v. Vaughn*, 129 N. Car. 502; State *v. Rose*, 129 N. Car. 575; State *v. Foster*, 130 N. Car. 666, 89 Am. St. Rep. 876; State *v. Exum*, 138 N. Car. 599.

Texas. — Brown *v. State*, 43 Tex. Crim. 293; Mikel *v. State*, 43 Tex. Crim. 615; Rambo *v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 163; Hudson *v. State*, 44 Tex. Crim. 251; Marchan *v. State*, 45 Tex. Crim. 212; Poole *v. State*, 45 Tex. Crim. 348; Rush *v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 927; Friday *v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 815; Hernandez *v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 1210.

Washington. — State *v. Gates*, 28 Wash. 689; State *v. Vance*, 29 Wash. 435.

Words Held Not to Constitute Threats. — Owens *v. State*, 80 Miss. 499.

220. 1. To Connect Accused with Killing. — See Webb *v. State*, 135 Ala. 36.

3. Threats Including Deceased Admissible. — Barnes *v. Com.*, (Ky. 1902) 70 S. W. Rep. 827; Taylor *v. State*, 44 Tex. Crim. 547; Holloway *v. State*, 45 Tex. Crim. 303. See also Pitts *v. State*, 40 Ala. 70.

The Deceased Must Be Connected with the Threat, otherwise evidence of it is inadmissible. Melton *v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 822. Compare Earles *v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 2, holding that the threat "must be directed toward the deceased, or embrace him in a class, or the threat must be of such a malignant character as to embrace all persons within its scope."

221. See note 1.

(c) *Weight*. — See note 4.

222. (2) *By Deceased*. — See note 2.

224. (3) *By Third Persons*. — See notes 2, 3.

g. MEANS, PREPARATION, AND OPPORTUNITY. — See note 6.

225. *h.* CHARACTER. — See notes 1, 2.

226. *i.* EVIDENCE AS TO DECEASED GOING ARMED. — See notes 2, 3.

227. *l.* ARTICLES IN EVIDENCE — (1) *In General*. — See notes 9, 10, 11.

(2) *Clothing*. — See notes 12, 13.

221. 1. Threat to Kill "Some One." — *Hutsell v. Com.*, (Ky. 1903) 75 S. W. Rep. 225; *State v. Gates*, 28 Wash. 689; *State v. Vance*, 29 Wash. 435.

4. *Weight Is Question for Jury*. — *State v. Crawford*, 31 Wash. 260.

Remoteness of Threats Question for Court in Exercise of Discretion. — *Compare Abbott v. Com.*, (Ky. 1902) 68 S. W. Rep. 124, holding that the remoteness of threats affects only their weight with the jury, and not their competency; *State v. Coleman*, 186 Mo. 151. See also *Johns v. State*, (Fla. 1903) 35 So. Rep. 71, holding that the jury may consider the remoteness of threats in determining the weight to be given to them.

222. 2. When Threats Made by Deceased Admissible — *Alabama*. — *Wilson v. State*, 140 Ala. 43; *Ragsdale v. State*, 134 Ala. 24. See also *Gilmore v. State*, 141 Ala. 51.

Arkansas. — *Lee v. State*, 72 Ark. 436.

Florida. — *Lane v. State*, 44 Fla. 105.

Indian Territory. — *Williams v. U. S.*, 4 Indian Ter. 269.

Kansas. — *State v. Burton*, 63 Kan. 602.

Kentucky. — *Hudson v. Com.*, (Ky. 1902) 69 S. W. Rep. 1079; *Morrison v. Com.*, (Ky. 1903) 74 S. W. Rep. 277; *Hellard v. Com.*, (Ky. 1905) 84 S. W. Rep. 329; *Wheeler v. Com.*, (Ky. 1905) 87 S. W. Rep. 1106.

Louisiana. — *State v. Perieux*, 107 La. 601.

Missouri. — *State v. Nelson*, 166 Mo. 191, 89 Am. St. Rep. 681; *State v. Smith*, 164 Mo. 567; *State v. Bartlett*, 170 Mo. 658; *State v. Privitt*, 175 Mo. 207.

Montana. — *State v. Shadwell*, 26 Mont. 52; *State v. Whitworth*, 26 Mont. 107.

New York. — *People v. Taylor*, 177 N. Y.

Texas. — *Wallace v. State*, 44 Tex. Crim. 300; *Cline v. State*, (Tex. Crim. 1902) 71 S. W. Rep. 23; *Crockett v. State*, 45 Tex. Crim. 276; *Chism v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 949; *Askew v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 706; *Armstrong v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 215.

Proper Foundation Must Be Laid for Admission. — *State v. Tasyb*, 110 La. 121; *State v. Thomas*, 111 La. 804.

There Must Be Proof of Hostile Demonstration before evidence of threats can be admitted. *State v. Harrison*, 111 La. 304.

224. 2. Threats by Third Persons Inadmissible. — *Keith v. State*, 157 Ind. 376; *Wallace v. State*, 46 Tex. Crim. 341; *Horn v. State*, 12 Wyo. 80. But see *State v. Gaylord*, 70 S. Car. 415.

3. Threats by Third Person for Whom Deceased Mistaken Admissible. — See *Baker v. State*, 45 Tex. Crim. 392.

6. Admissibility of Evidence Showing Means and Opportunity. — *Sanders v. State*, 131 Ala. 1; *State v. Aspara*, 113 La. 940 (evidence of possession of weapon of calibre of that used); *State v. Wilcox*, 132 N. Car. 1120. See also *Anderson v. State*, 122 Ga. 161.

225. 1. Character of Accused. — See *State v. Brown* 4 Penn. (Del.) 120; *Lane v. State*, 44 Fla. 105; *Williams v. U. S.*, 4 Indian Ter. 269; *Black v. Com.*, (Ky. 1903) 72 S. W. Rep. 772; *Shepherd v. Com.*, (Ky. 1905) 85 S. W. Rep. 191; *Maston v. State*, 83 Miss. 647; *State v. Lockett*, 168 Mo. 480; *State v. Kennedy*, 177 Mo. 98; *State v. Castle*, 133 N. Car. 769; *Rogers v. State*, 44 Tex. Crim. 350; *Hollaway v. State*, 45 Tex. Crim. 303; *Cupps v. State*, 120 Wis. 504, 102 Am. St. Rep. 996.

2. Character of Deceased — Evidence of Dangerous Character. — *Kennedy v. State*, 140 Ala. 1; *Thomas v. State*, (Fla. 1904) 36 So. Rep. 161; *Osburn v. State*, 164 Ind. 262; *State v. Cather*, 121 Iowa 106; *Com. v. Booker*, (Ky. 1903) 76 S. W. Rep. 838; *Hellard v. Com.*, (Ky. 1905) 84 S. W. Rep. 329; *U. S. v. Densmore*, (N. Mex. 1904) 75 Pac. Rep. 31; *State v. Sumner*, 130 N. Car. 718; *Gibson v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 174; *Bearden v. State*, 44 Tex. Crim. 578; *Connell v. State*, 45 Tex. Crim. 142; *Pettis v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 312; *Bowles v. Com.*, 103 Va. 816; and see the title CHARACTER (IN EVIDENCE), **872. i et seq.**

226. 2. Evidence as to Deceased Going Armed Admissible. — *State v. Crawford*, 31 Wash. 260. See also *Long v. State*, 72 Ark. 427.

Inferences to Be Drawn by Jury. — *State v. Yourex*, 30 Wash. 611.

3. See *Carle v. People*, 200 Ill. 494, 93 Am. St. Rep. 208.

227. 9. Blood-stained Articles. — *State v. Henry*, 51 W. Va. 283.

10. Bullets. — *State v. Aspara*, 113 La. 940.

Empty Cartridge Shells. — *State v. Laudano*, 74 Conn. 638.

Identifying Cartridges. — *State v. Gray*, 116 Iowa 231.

11. Weapon Used. — *Boynton v. State*, 115 Ga. 587; *Roberts v. State*, 123 Ga. 146; *Osburn v. State*, 164 Ind. 262; *State v. Aspara*, 113 La. 940; *State v. Gartrell*, 171 Mo. 489; *Yancey v. State*, 45 Tex. Crim. 366; *Long v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 203; *State v. Tucker*, 52 W. Va. 420.

Unidentified Weapon Inadmissible. — *State v. Tyler*, 122 Iowa 125.

12. Clothing of Deceased. — *Stevens v. State*, 133 Ala. 28; *Henry v. People*, 198 Ill. 162; *Thornton v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1105; *Johnson v. State*, 44 Tex. Crim.

228. *m.* LETTERS. — See note 2.

n. MAPS AND DIAGRAMS. — See note 6.

o. POSSESSION OF PROPERTY OF DECEASED — **Money.** — See note 10.

p. RELATIVE STRENGTH OF ACCUSED AND DECEASED. — See note 11.

229. See note 1.

q. EVIDENCE INCRIMINATING ANOTHER. — See notes 3, 4, 5.

3. Presumptions and Burden of Proof. — See note 7.

4. Weight and Sufficiency of Evidence. — See notes 8, 10.

332. See also *State v. Gartrell*, 171 Mo. 489; *Venters v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 832; *Crenshaw v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1147.

Clothing Must Illustrate and Make Pertinent Some Phase of the Evidence relied upon by the state for a conviction. It is not proper to use the clothing for the mere purpose of inflaming the minds of the jury. *Christian v. State*, 46 Tex. Crim. 47. To similar effect see *Melton v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 822; *Cole v. State*, 45 Tex. Crim. 225.

For the Purpose of Showing the Location of Wounds on the Body of the Deceased his clothing is admissible. *Seaborn v. Com.*, (Ky. 1904) 80 S. W. Rep. 223.

227. 13. Clothing of Accused. — *State v. Aspara*, 113 La. 940; *State v. Henry*, 51 W. Va. 283.

228. 2. To Show Motive. — *Stokes v. State*, 71 Ark. 112; *McAneer v. State*, 43 Tex. Crim. 518.

6. *State v. Shaw*, 73 Vt. 149.

10. Possession of Money by Accused. — *Paulson v. State*, 118 Wis. 89.

11. Evidence as to Strength of Deceased. — See *Mann v. State*, 134 Ala. 1.

Admissibility on Question of Malice. — When the only question to be determined is whether the accused is guilty of murder or voluntary manslaughter, evidence that the deceased was "a small, delicate man," is not irrelevant, since such evidence would elucidate the question whether the killing was done with malice. *Wells v. State*, 115 Ga. 577.

Evidence Must Be Confined to Relative Strength at Time of Homicide. — *State v. Crea*, 10 Idaho 88.

A Certificate of Discharge from the Army has been held to be inadmissible in rebuttal to show the height of the deceased. *Com. v. Crowley*, 26 Pa. Super. Ct. 124.

229. 1. Evidence as to Weakness of Deceased. — See *Bearden v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 808.

3. Admissible to Show Guilty Agency of Another. — *Goodlett v. State*, 136 Ala. 39; *Lawrence v. State*, 45 Fla. 42; *Jackson v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 497. See also *State v. Laudano*, 74 Conn. 638; *Castillo v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 517.

4. Evidence Must Be Connected with Killing. — *Tatum v. State*, 131 Ala. 32; *Harrison v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 699.

5. Bare Motive Inadmissible. — *Walker v. State*, 139 Ala. 56.

7. Burden of Proof Rests on Prosecution — *Alabama*. — *Adams v. State*, 133 Ala. 166; *Hunt v. State*, 135 Ala. 1. See also *Jarvis v. State*, 138 Ala. 17.

California. — *People v. Matthai*, 135 Cal. 442.

Connecticut. — *State v. Gallivan*, 75 Conn. 326, 96 Am. St. Rep. 203.

Delaware. — *State v. Brinte*, 4 Penn. (Del.)

551; *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036.

District of Columbia. — *Hill v. U. S.*, 22 App. Cas. (D. C.) 395.

Florida. — *Smith v. State*, (Fla. 1904) 37 So. Rep. 573.

Georgia. — *Morgan v. State*, 120 Ga. 294; *Young v. State*, 121 Ga. 334.

Iowa. — *State v. McKnight*, 119 Iowa 79; *State v. Linhoff*, 121 Iowa 632.

Mississippi. — *Blalack v. State*, 79 Miss. 517.

Missouri. — *State v. Hendricks*, 172 Mo. 654.

New Mexico. — *Territory v. Gutierrez*, (N. Mex. 1905) 79 Pac. Rep. 716.

New York. — *People v. Cantor*, 71 N. Y. App. Div. 185.

Ohio. — *Knapp v. State*, 25 Ohio Cir. Ct., 571.

Oklahoma. — *Mahaffey v. Territory*, 11 Okla. 213.

Texas. — *Francis v. State*, 44 Tex. Crim. 246; *Spivey v. State*, 45 Tex. Crim. 496; *Perrin v. State*, 45 Tex. Crim. 560; *Scott v. State*, 46 Tex. Crim. 85; *Scott v. State*, 46 Tex. Crim.

536; *Adams v. State*, (Tex. Crim. 1904) 84 S. W. Rep. 231; *Ray v. State*, (Tex. Crim. 1905)

85 S. W. Rep. 1151.

Vermont. — *State v. Bean*, 77 Vt. 384.

Washington. — *State v. Clark*, 34 Wash. 485, 101 Am. St. Rep. 1006.

Burden Where Plea of Accidental Killing Is Set Up — The defense of accidental killing is a denial of criminal intent and throws upon the state the burden of proving such intent beyond a reasonable doubt, and the accused is not required to sustain such defense by a preponderance of the evidence. *State v. McDaniel*, 68 S. Car. 304, 102 Am. St. Rep. 661.

8. Jury to Determine Weight and Sufficiency — *Alabama*. — *Hainsworth v. State*, 136 Ala.

13; *Eatman v. State*, 139 Ala. 67.

Arkansas. — *Bishop v. State*, 73 Ark. 568.

California. — *People v. Gonzales*, 143 Cal. 605; *People v. Moran*, 144 Cal. 18.

Delaware. — *State v. Brinte*, 4 Penn. (Del.) 551.

Florida. — *Thomas v. State*, (Fla. 1904) 36 So. Rep. 161.

Illinois. — *Henry v. People*, 198 Ill. 162; *Hammond v. People*, 199 Ill. 173.

Indiana. — *Keith v. State*, 157 Ind. 376; *Osburn v. State*, 164 Ind. 262.

Iowa. — *State v. Dunn*, 116 Iowa 219.

Kansas. — *State v. Clark*, 69 Kan. 576.

Kentucky.—*Trabue v. Com.*, (Ky. 1902) 66 S. W. Rep. 718; *Howard v. Com.*, (Ky. 1903) 71 S. W. Rep. 446; *Underwood v. Com.*, (Ky. 1905) 84 S. W. Rep. 310; *Hellard v. Com.*, (Ky. 1905) 84 S. W. Rep. 329.

Maine.—*State v. Lambert*, 97 Me. 51.

Massachusetts.—*Com. v. Best*, 180 Mass. 492.

Michigan.—*People v. Hossler*, 135 Mich. 384.

Mississippi.—*Woods v. State*, 81 Miss. 164; *Cook v. State*, 85 Miss. 738.

Missouri.—*State v. Kinder*, 184 Mo. 276; *State v. Williams*, 186 Mo. 128; *State v. Rollins*, 186 Mo. 501.

Montana.—*State v. Dotson*, 26 Mont. 305.

New Jersey.—*State v. Young*, (N. J. 1903) 56 Atl. Rep. 471.

North Carolina.—*State v. Vaughn*, 129 N. Car. 502; *State v. Wilcox*, 132 N. Car. 1120; *State v. Capps*, 134 N. Car. 622; *State v. Turnage*, 138 N. Car. 566.

Oklahoma.—*Mahaffey v. Territory*, 11 Okla. 213; *Smith v. Territory*, 11 Okla. 656.

South Dakota.—*State v. Coleman*, 17 S. Dak. 594.

Virginia.—*Bowles v. Com.*, 103 Va. 816.

Washington.—*State v. Underwood*, 35 Wash. 558.

229. 10. For Cases Discussing the Sufficiency of Evidence to Sustain a Conviction of Murder, see the following:

Alabama.—*Hainsworth v. State*, 136 Ala. 13.

Arizona.—*Territory v. Shankland*, 3 Ariz. 403; *Ubillos v. Territory*, (Ariz. 1905) 80 Pac. Rep. 363; *Edwards v. Territory*, (Ariz. 1904) 76 Pac. Rep. 458; *Elias v. Territory*, (Ariz. 1904) 76 Pac. Rep. 605.

Arkansas.—*Crenshaw v. State*, 70 Ark. 613, 66 S. W. Rep. 196; *Vance v. State*, 70 Ark. 272; *Levy v. State*, 70 Ark. 610; *Ruffin v. State*, (Ark. 1902) 70 S. W. Rep. 1038; *Tanks v. State*, 71 Ark. 459; *Taylor v. State*, 72 Ark. 613; *Hamby v. State*, 72 Ark. 623; *Frame v. State*, 73 Ark. 501; *Daniels v. State*, (Ark. 1905) 88 S. W. Rep. 844.

California.—*People v. Amaya*, 134 Cal. 531; *People v. Wheelock*, 136 Cal. xix, 68 Pac. Rep. 579; *People v. Cebulla*, 137 Cal. 314; *People v. Adams*, 137 Cal. 580; *People v. Dobbins*, 138 Cal. 694; *People v. Suesser*, 142 Cal. 354; *People v. Buckley*, 143 Cal. 375.

Colorado.—*Mow v. People*, 31 Colo. 351.

Florida.—*Brown v. State*, 44 Fla. 28; *Bassett v. State*, 44 Fla. 12; *Mitchell v. State*, 45 Fla. 76; *Lawrence v. State*, 45 Fla. 42; *Mathis v. State*, 45 Fla. 46; *Starke v. State*, (Fla. 1905) 37 So. Rep. 850; *Schley v. State*, (Fla. 1904) 37 So. Rep. 518.

Georgia.—*Hoxie v. State*, 114 Ga. 19; *Perryan v. State*, 114 Ga. 545; *Wells v. State*, 115 Ga. 577; *Boynton v. State*, 115 Ga. 587; *Miller v. State*, 118 Ga. 12; *Middlebrooks v. State*, 118 Ga. 772; *Grant v. State*, 118 Ga. 804; *Harris v. State*, 110 Ga. 114; *Anderson v. State*, 119 Ga. 441; *Walker v. State*, 120 Ga. 491; *Roberts v. State*, 123 Ga. 146; *Chelsey v. State*, 121 Ga. 340; *Williford v. State*, 121 Ga. 173.

Idaho.—*State v. Levy*, 9 Idaho 483.

Illinois.—*Knight v. People*, 192 Ill. 170; *Henry v. People*, 198 Ill. 162; *Carle v. People*

200 Ill. 494, 93 Am. St. Rep. 208; *Waller v. People*, 209 Ill. 284; *Mackin v. People*, 214 Ill. 232.

Indiana.—*Keith v. State*, 157 Ind. 376; *Wheeler v. State*, 158 Ind. 687; *Freese v. State*, 159 Ind. 597; *Dunn v. State*, (Ind. 1903) 67 N. E. Rep. 940; *Hoover v. State*, 161 Ind. 348; *Spaulding v. State*, 162 Ind. 297.

Iowa.—*State v. Kuhn*, 117 Iowa 216; *State v. Sale*, 119 Iowa 1; *State v. Dennis*, 119 Iowa 688; *State v. Tyler*, 122 Iowa 125; *State v. Roan*, 122 Iowa 136; *State v. Lucas*, 122 Iowa 141; *State v. Walker*, 124 Iowa 414.

Kentucky.—*Aiken v. Com.*, (Ky. 1902) 68 S. W. Rep. 849; *Brown v. Com.*, (Ky. 1902) 69 S. W. Rep. 1098; *Howard v. Com.*, (Ky. 1902) 70 S. W. Rep. 295; *Cook v. Com.*, 114 Ky. 586; *Wilkerson v. Com.*, (Ky. 1903) 76 S. W. Rep. 359; *Turner v. Com.*, (Ky. 1904) 80 S. W. Rep. 197; *Sampson v. Com.*, (Ky. 1904) 82 S. W. Rep. 384; *Hathaway v. Com.*, (Ky. 1904) 82 S. W. Rep. 400; *Allen v. Com.*, (Ky. 1904) 82 S. W. Rep. 589; *Green v. Com.*, (Ky. 1904) 83 S. W. Rep. 638; *Hellard v. Com.*, (Ky. 1905) 84 S. W. Rep. 329; *Warner v. Com.*, (Ky. 1905) 84 S. W. Rep. 742.

Maine.—*State v. Lambert*, 97 Me. 51.

Massachusetts.—*Com. v. Best*, 180 Mass. 492.

Minnesota.—*State v. Gallehugh*, 89 Minn. 212; *State v. Nelson*, 91 Minn. 143.

Mississippi.—*Rogers v. State*, 82 Miss. 479; *Flowers v. State*, 85 Miss. 591; *Dill v. State*, (Miss. 1905) 38 So. Rep. 37.

Missouri.—*State v. Flutcher*, 166 Mo. 582; *State v. Brown*, 168 Mo. 449; *State v. Hall*, 168 Mo. 475; *State v. Ashcraft*, 170 Mo. 409; *State v. Gurley*, 170 Mo. 429; *State v. Crabtree*, 170 Mo. 642; *State v. Vinso*, 171 Mo. 576; *State v. Gleason*, 172 Mo. 259; *State v. Wilson*, 172 Mo. 420; *State v. May*, 172 Mo. 630; *State v. Rodman*, 173 Mo. 681; *State v. Steffen*, 174 Mo. 628; *State v. Robertson*, 178 Mo. 496; *State v. Gregory*, 178 Mo. 48; *State v. Dunn*, 179 Mo. 95; *State v. Nesenhenner*, 164 Mo. 461; *State v. Garth*, 164 Mo. 553; *State v. Atchley*, 186 Mo. 174; *State v. White*, 189 Mo. 339; *State v. Cummings*, 189 Mo. 626.

Nebraska.—*Rhea v. State*, 63 Neb. 461; *Russell v. State*, 66 Neb. 497; *Jahnke v. State*, (Neb. 1903) 94 N. W. Rep. 158; *Lillie v. State*, (Neb. 1904) 100 N. W. Rep. 316; *Barker v. State*, (Neb. 1905) 103 N. W. Rep. 71.

New York.—*People v. Filippelli*, 173 N. Y. 509; *People v. Hall*, 169 N. Y. 184; *People v. Smith*, 172 N. Y. 210, 180 N. Y. 125; *People v. Van Wormer*, 175 N. Y. 188; *People v. Egnor*, 175 N. Y. 419; *People v. Conklin*, 175 N. Y. 333; *People v. Gaimari*, 176 N. Y. 84; *People v. Tobin*, 176 N. Y. 278; *People v. Ennis*, 176 N. Y. 289; *People v. White*, 176 N. Y. 331; *People v. Rodawald*, 177 N. Y. 408; *People v. Mooney*, 178 N. Y. 91; *People v. Koeping*, 178 N. Y. 247; *People v. Burness*, 178 N. Y. 429; *People v. Lagrosso*, 179 N. Y. 125, *affirming* 90 N. Y. App. Div. 219; *People v. Rimieri*, 180 N. Y. 163; *People v. Ebelt*, 180 N. Y. 470; *People v. Silverman*, 181 N. Y. 235; *People v. Totterman*, 181 N. Y. 385; *People v. Breen*, 181 N. Y. 493; *People v. Jackson*, 182 N. Y. 66; *People v. Patrick*, 182 N. Y. 131; *People v. Fucarino*, 104 N. Y. App. Div. 437.

231. 5. Proof of Corpus Delicti — *a.* DEFINITION. — See note 1.

232. b. NECESSITY FOR PROOF. — See note 1.

c. HOW PROVED. — See notes 3, 4.

North Carolina. — *State v. Vaughn*, 129 N. Car. 502; *State v. Conly*, 130 N. Car. 683; *State v. Bishop*, 131 N. Car. 733; *State v. Cole*, 132 N. Car. 1069; *State v. Wilcox*, 132 N. Car. 1120; *State v. Boggan*, 133 N. Car. 761; *State v. Adams*, 136 N. Car. 620; *State v. Teachey*, 138 N. Car. 587.

Oklahoma. — *New v. Territory*, 12 Okla. 172; *Howland v. Territory*, 13 Okla. 575.

Pennsylvania. — *Com. v. West*, 204 Pa. St. 68; *Com. v. Dudash*, 204 Pa. St. 124; *Com. v. Kovovic*, 209 Pa. St. 465; *Com. v. Dardaia*, 210 Pa. St. 61; *Com. v. Dillen*, 210 Pa. St. 579; *Com. v. Gibson*, 211 Pa. St. 546; *Com. v. Danz*, 211 Pa. St. 507.

Rhode Island. — *State v. Quigley*, 26 R. I. 263; *State v. Nargashian*, 26 R. I. 299, 106 Am. St. Rep. 715.

Tennessee. — *Wilson v. State*, 109 Tenn. 167; *Bundren v. State*, 109 Tenn. 225.

Texas. — *Black v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 906; *Bass v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 919; *Doss v. State*, 43 Tex. Crim. 551; *Johnson v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 412; *Morgan v. State*, 43 Tex. Crim. 543; *Mikel v. State*, 43 Tex. Crim. 615; *Nobles v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 989; *Rambo v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 163; *Smith v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 545; *White v. State*, 44 Tex. Crim. 346; *Hernandez v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 840; *Burrows v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 848; *Teel v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 11; *Newsome v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 296; *Lewis v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 788; *Clark v. State*, 45 Tex. Crim. 456; *Fugett v. State*, 45 Tex. Crim. 313; *Sparks v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 811; *Brown v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 507; *Clarkston v. State*, (Tex. Crim. 1904) 79 S. W. Rep. 304; *Hjeronymus v. State*, 46 Tex. Crim. 157; *Weaver v. State*, 46 Tex. Crim. 607; *Black v. State*, 46 Tex. Crim. 590; *Monroe v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 726; *Hernandez v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 1210; *Baker v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 1215; *Eddy v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 513; *Young v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 1035; *Schwartz v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 105; *Hancock v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 696; *Reeves v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 803; *Young v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 822; *Johnson v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 824; *Scott v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1060; *Vann v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1064; *Lentz v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1068; *Charba v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 829; *Johnson v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 223.

Washington. — *State v. Melvern*, 32 Wash. 7; *State v. Clark*, 34 Wash. 485, 101 Am. St. Rep. 1006.

Wisconsin. — *Lonergan v. State*, 111 Wis. 453.

Wyoming. — *Horn v. State*, 12 Wyo. 80.

For Cases Discussing the Sufficiency of Evidence to Sustain a Conviction of Manslaughter, see the following:

Arkansas. — *White v. State*, (Ark. 1905) 86 S. W. Rep. 296; *Scott v. State*, (Ark. 1905) 86 S. W. Rep. 1004.

Georgia. — *Davis v. State*, 114 Ga. 104; *Arnold v. State*, 114 Ga. 527; *Hatcher v. State*, 116 Ga. 617; *Goodman v. State*, 122 Ga. 111; *Berry v. State*, 122 Ga. 429.

Kansas. — *State v. Ryno*, 68 Kan. 348.

Kentucky. — *Bohannon v. Com.*, (Ky. 1903) 72 S. W. Rep. 322; *Dean v. Com.*, (Ky. 1904) 78 S. W. Rep. 1112; *Brock v. Com.*, (Ky. 1904) 82 S. W. Rep. 638; *Morris v. Com.*, (Ky. 1905) 84 S. W. Rep. 560; *Moseley v. Com.*, (Ky. 1905) 84 S. W. Rep. 748, 1181.

Mississippi. — *Mackmasters v. State*, 83 Miss. 1; *Buchanan v. State*, 84 Miss. 332.

Missouri. — *State v. Mahaney*, 164 Mo. 532; *State v. Rollins*, 186 Mo. 501.

Montana. — *State v. Felker*, 27 Mont. 451.

North Carolina. — *State v. Goode*, 132 N. Car. 982.

Pennsylvania. — *Com. v. Johnson*, 211 Pa. St. 640.

Texas. — *Aldredge v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 843; *Willis v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 543; *Allen v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 218; *Scott v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 47; *Lundy v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 352; *Bell v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 1160.

Washington. — *State v. Gates*, 28 Wash. 689.

Wisconsin. — *Kenney v. State*, 124 Wis. 486; *Schmidt v. State*, 124 Wis. 516.

231. 1. Corpus Delicti Defined. — *Vaughn v. State*, 130 Ala. 18; *People v. Moran*, 144 Cal. 48; *Brown v. State*, 44 Fla. 28; *State v. Henderson*, 186 Mo. 473; *People v. Patrick*, 182 N. Y. 131; *Knapp v. State*, 25 Ohio Cir. Ct. 571. See also *People v. Wood*, 145 Cal. 659; *State v. Crabtree*, 170 Mo. 642; *State v. White*, 189 Mo. 339.

Proof of the Manner and Means in and by which the crime was consummated does not relate to the *corpus delicti*. *State v. Knapp*, 70 Ohio St. 380.

232. 1. Prosecution Must Establish. — *Vaughn v. State*, 130 Ala. 18; *Scott v. State*, 141 Ala. 1; *Dunn v. State*, (Ind. 1903) 67 N. E. Rep. 940; *State v. Henderson*, 186 Mo. 473; *People v. Patrick*, 182 N. Y. 131.

Sufficiency of Evidence as to Corpus Delicti. — See *Wilson v. State*, 140 Ala. 43.

3. Common-law Rule. — *State v. Henderson*, 186 Mo. 473; *State v. Williams*, (Oregon 1905) 80 Pac. Rep. 655.

4. Circumstantial Evidence Sufficient. — *Gibson v. Territory*, (Ariz. 1902) 68 Pac. Rep. 540; *People v. Wood*, 145 Cal. 659; *State v. Brinte*, 4 Penn. (Del.) 551; *State v. Henderson*, 186 Mo. 473; *State v. Gates*, 28 Wash. 680.

The Body of the Deceased Need Not Furnish the Evidence of the fact that death was caused by

- 233.** See note 1.
Statutory Changes. — See note 6.
- 234.** 6. Proof of Identity. — See note 1.
Comparison of Footprints. — See note 3.
7. Proof of Venue. — See notes 6, 7.
- 235.** 8. Proof of Time of Death. — See note 1.
- 237.** XI. PUNISHMENT — 1. Murder — *b.* MURDER IN FIRST DEGREE —
(2) Imprisonment — (a) As Alternative of Death. — See notes 1, 2.
- 238.** 2. Manslaughter. — See note 6.
XII. MURDER AS AFFECTING DEVOLUTION OF PROPERTY. — See note 7.
- 239.** See note 2.
Murder of Husband by Wife — Right to Dower. — See note 3.
- 240.** MUST. — See notes 4, 5.
MUTILATE — MUTILATION. — See note 8.
- 241.** MUTUAL — MUTUALITY. — See note 2.

criminal means. The admissions, statements, and acts of the accused, or any other competent proof will be admissible. *Dunn v. State*, (Ind. 1903) 67 N. E. Rep. 942.

233. 1. Only Portions of Body Found. — *State v. Henderson*, 186 Mo. 473; *State v. Williams*, (Oregon 1905) 80 Pac. Rep. 655; *Paulson v. State*, 118 Wis. 89.

6. New York Statute. — *People v. Patrick*, 182 N. Y. 131. See also the title *CORPUS DELICTI*, 864. 1 *et seq.*

234. 1. Identity of Deceased. — *Johnson v. State*, 45 Tex. Crim. 453; *Paulson v. State*, 118 Wis. 89.

3. Evidence as to Footprints. — *Parker v. State*, 46 Tex. Crim. 461. See also *State v. Daniels*, 134 N. Car. 641.

Appearance of Tracks. — In *Smith v. State*, 137 Ala. 22, it was held to be permissible for a witness to testify that a track which led from the defendant's barn along a field looked, where it left the barn, like the track of a person running, and in the field looked like that of a person walking, these statements not being of opinion merely, but being descriptive of facts.

Evidence as to Handprints. — See *State v. Miller*, 71 N. J. L. 527.

6. Sufficiency of Evidence as to Venue. — *Vaughn v. State*, 130 Ala. 18; *Waller v. People*, 209 Ill. 284; *Warner v. Com.*, (Ky. 1905) 84 S. W. Rep. 742.

7. Contra. *Keith v. State*, 157 Ind. 376, wherein the court said: "The venue, like other material averments of the indictment, must be proved beyond a reasonable doubt."

235. 1. Date of Death of Deceased. — *State v. Brinte*, 4 Penn. (Del.) 551; *Sutherland v. State*, 121 Ga. 591.

237. 1. Alternative of Life Imprisonment — Discretion of Jury. — *Watkins v. State*, 133 Ala. 88; *People v. Wardrip*, 141 Cal. 229; *Jackson v. State*, 161 Ind. 36; *Owens v. State*, 82 Miss.

18; *Rhea v. State*, 63 Neb. 461; *State v. Beatty*, 51 W. Va. 232.

Recommendation to Mercy. — In *Ohio* it is provided by statute that murder in the first degree is punishable by death unless the jury trying the accused shall recommend mercy, in which case the punishment shall be imprisonment for life. *State v. Schiller*, 70 Ohio St. 1.

Guidance of Jury's Discretion by Court. — See *People v. Ross*, 134 Cal. 256; *Cohen v. State*, 116 Ga. 573.

2. Alternative of Death or Imprisonment for Life Determined by Court. — *State v. Smith*, 127 Iowa 528.

238. 6. Fine and Imprisonment or Both. — *Spriggs v. Com.*, 113 Ky. 724.

7. Husband Feloniously Killing Wife Cannot Take Her Choses in Action. — *Box v. Lanier*, 112 Tenn. 393.

239. 2. Constitutional Provision Against Forfeitures. — Compare *Box v. Lanier*, 112 Tenn. 393.

3. Dower Not Barred by Murder of Husband. — The *Iowa* statute prohibiting one who has feloniously taken or caused to be taken the life of another from taking any portion of his estate by inheritance, devise, or legacy does not deprive a widow who has taken the life of her husband of her distributive share of his estate, as such share goes to her as a matter of contract and of right, and not by inheritance. *Matter of Kuhn*, 125 Iowa 449.

240. 4. Must. — *Stewart v. Price*, 64 Kan. 191; *People v. Thomas*, (Supm. Ct. Crim. T.) 32 Misc. (N. Y.) 170.

5. Not Always Imperative. — *Matter of O'Hara*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 255.

8. Mutilation of Railroad Tickets. — See *Young v. Central of Georgia R. Co.*, 120 Ga. 25.

241. 2. Mutual. — See *Robison v. Wolf*, 27 Ind. App. 683.

Mutuality of Contract. — See *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210.

MUTUAL ACCOUNTS.

BY H. N. ELDRIDGE.

242. I. GENERAL RULE AS TO APPLICATION OF STATUTE OF LIMITATIONS. — See note 2.

244. Termination of Account. — See note 2.

II. WHAT CONSTITUTE — 1. In General. — See note 3.

245. 2. Items Must Be on Both Sides. — See note 2.

246. 3. Payments Alone Not Sufficient. — See notes 1, 2.

4. Intent — Different Character of Items. — See note 3.

247. III. MANNER OF KEEPING. — See note 2.

242. 2. General Rule. — *Beach v. Bennett*, 16 Colo. App. 459; *Wagener v. Steele*, 117 Ga. 145; *Lancieri v. Kansas City Improved St. Sprinkling Co.*, 95 Mo. App. 319; *Leahy v. Campbell*, 70 N. Y. App. Div. 127; *Hudson v. Hudson*, 21 Pa. Super. Ct. 92.

244. 2. Statute Runs on Stated Account from Date. — *Hudson v. Hudson*, 21 Pa. Super. Ct. 92.

3. What Constitute. — *Wagener v. Steele*, 117 Ga. 145; *Hudson v. Hudson*, 21 Pa. Super. Ct. 92.

245. 2. Items Must Be on Both Sides. — *Hudson v. Hudson*, 21 Pa. Super. Ct. 92.

246. 1. Payments. — *Meehan v. Figliuolo*, (Supm. Ct. App. T.) 88 N. Y. Supp. 920; *Hudson v. Hudson*, 21 Pa. Super. Ct. 92.

2. Loans. — *Hudson v. Hudson*, 21 Pa. Super. Ct. 92.

3. Intent. — *Wagener v. Steele*, 117 Ga. 145; *Hudson v. Hudson*, 21 Pa. Super. Ct. 92.

247. 2. Account Kept by Only One Party. — *Hudson v. Hudson*, 21 Pa. Super. Ct. 92.

MUTUAL INSURANCE.

BY P. B. MCKENZIE.

253. I. DEFINITION. — See note 2.

254. A Mutual Company Is Somewhat of the Nature of a Partnership. — See note 2.

III. MUTUAL COMPANIES DISTINGUISHED FROM STOCK COMPANIES. —

See note 6.

255. V. ORGANIZATION — Incorporation Not Essential. — See note 5.

Conditions Precedent to Organization and Transaction of Business. — See note 8.

256. Members Estopped to Question Regularity of Organization. — See note 2.

VII. POWERS AND DUTIES — 1. Powers in General. — See note 5.

257. 2. Power to Contract — b. CONTRACTS OF INSURANCE — (1) In General. — See note 4.

253. 2. Mutual Insurance Company. — *Enterprise F. Ins. Co.'s Receiver v. Enterprise F. Ins. Co.*, 79 S. W. Rep. 1180, 25 Ky. L. Rep. 1630; *Dwinnell v. Minneapolis F. & M. Mut. Ins. Co.*, 87 Minn. 59, 67.

254. 2. Dwinnell v. Minneapolis F. & M. Mut. Ins. Co., 87 Minn. 59, 67.

6. Kansas State Mut. Hail Assoc. v. Prather, (Kan. 1905) 79 Pac. Rep. 1080; *Dwinnell v. Minneapolis F. & M. Mut. Ins. Co.*, 87 Minn. 59, 67.

255. 5. Aetna L. Ins. Co. v. Coulter, 115 Ky. 801, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 255.

8. See Stevens v. Reeves, 138 Cal. 678; *Montgomery v. Whitbeck*, 12 N. Dak. 391.

Strict Compliance with Conditions Required. — *Dwinnell v. Minneapolis F. & M. Mut. Ins. Co.*, 87 Minn. 59, 67.

256. 2. Estoppel to Question Regularity of Organization. — *Montgomery v. Whitbeck*, 12 N. Dak. 391; *Gilman v. Druse*, 111 Wis. 400.

Extension of Territory. — There is no estoppel to question the ineffectual attempt of a mutual insurance company to extend its territory of operation. *Patrons of Industry F. Ins. Co. v. Plum*, 84 N. Y. App. Div. 96.

5. Powers of Mutual Insurance Companies. — *Dwinnell v. Minneapolis F. & M. Mut. Ins. Co.*, 87 Minn. 59, 67.

257. 4. Authority to Enter into Contracts of Insurance. — *Morgan v. Hog Raisers' Mut. Ins. Co.*, 62 Neb. 446.

No Power to Enter into Contracts of Insurance until Act of Incorporation Approved. — *Montgomery v. Whitbeck*, 12 N. Dak. 391, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 257.

258. Premium Note Void if Contract Is Unauthorized or Prohibited. — See note 2.

(2) Implied Power to Issue Policies on Cash Premium Plan. — See note 4.

(3) Power to Divide Business and Risks into Distinct Departments.

— See note 5.

(4) Power to Make Assessments — (a) In General. — See note 6.

(b) In Whom Authority Is Vested. — See note 7.

259. (c) When Authority May Be Exercised. — See note 1.

260. See note 2.

(d) Upon Whom Assessment Must Be Made. — See note 5.

(f) Method of Making Assessment — aa. IN GENERAL. — See note 8.

261. bb. NOTICE OF ASSESSMENT. — See notes 3, 5.

262. cc. WHAT ASSESSMENT OR NOTICE THEREOF MUST CONTAIN. — See note 1.

(g) Amount of Assessment. — See notes 3, 4, 5.

263. Whole Assessment Not Necessarily Invalid Because Part Is Illegal. — See note 3.

(h) Effect of Delay to Make Assessment. — See note 4.

Attachment of Application to Policy. — A statute requiring insurance companies to attach the application as a part of the policy applies to mutual insurance companies. *Corson v. Iowa Mut. F. Ins. Assoc.*, 115 Iowa 485.

Parol Contract. — A mutual insurance company may be bound by a parol contract of insurance. *Alliance Co-operative Ins. Co. v. Corbett*, 69 Kan. 564. But see *Brink v. Merchants'*, etc., *United Mut. Ins. Assoc.*, 17 S. Dak. 235.

A Mutual Company May Reinsure Property insured by a similar company where there is no statutory prohibition. *Cass County v. Mercantile Town Mut. Ins. Co.*, 188 Mo. 1.

Insuring Municipal Property. — A mutual insurance company has authority to insure municipal property, and a municipal corporation may become a member thereof. *French v. Millville*, 67 N. J. L. 349.

Right to Limit Liability. — A mutual company having for its purpose the insurance of its members against losses by hail has authority to limit its liability to certain seasons or portions of the year. *Kansas State Mut. Hail Assoc. v. Prather*, (Kan. 1905) 79 Pac. Rep. 1080.

258. 2. *Montgomery v. Whitbeck*, 12 N. Dak. 391, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 258.

4. *Graham v. Mercantile Town Mut. Ins. Co.*, 110 Mo. App. 95.

5. **Where Authority to Divide Risks into Distinct Classes Is Given**, such classification is invalid as to risks theretofore incurred. *Benjamin v. Mutual Reserve Fund L. Assoc.*, 146 Cal. 34.

6. **Changing Rate of Assessment.** — Where a company was authorized to alter the rate of assessment as occasion demanded, it was held to be valid for it to change from an assessment based on the age at the time of becoming a member to one based on the attained age. *Gaut v. Mutual Reserve Fund L. Assoc.*, 121 Fed. Rep. 403.

7. **Authority to Make Assessments.** — *American Guaranty Fund Mut. Ins. Co. v. Mattson*, 100 Mo. App. 316.

Where Authority to Make Assessments Is Vested in the Secretary, the fact that he counseled with

some of the directors will not invalidate it. *Phelps County Farmers' Mut. Ins. Co. v. Johnston*, 66 Neb. 590.

259. 1. **Assessments Authorized "as Often as" Directors "Deem Necessary."** — *American Guaranty Fund Mut. Ins. Co. v. Mattson*, 100 Mo. App. 316.

260. 2. **Notice of an Intention to Levy an Assessment** cannot be demanded by the insured unless such notice is expressly provided for by the contract. *Dwinnell v. Felt*, 90 Minn. 9.

5. **Upon Whom Assessment to Be Made.** — *Benjamin v. Mutual Reserve Fund L. Assoc.*, 146 Cal. 34; *Mutual F. Ins. Co. v. Jean*, 96 Md. 252, 94 Am. St. Rep. 570.

8. **As to the Proper Method of Making Assessments.** — *Mutual F. Ins. Co. v. Jean*, 96 Md. 252, 94 Am. St. Rep. 570.

261. 3. **Computation of Time.** — In *Ferrenbach v. Mutual Reserve Fund L. Assoc.*, (C. C. A.) 121 Fed. Rep. 945, under a by-law requiring thirty days' notice to be given by mail, it was held that the time was to be computed from the date on which the notice was, or should have been, received.

5. **Publication in Newspaper or Newspapers.** — *Milwaukee Trust Co. v. Farmers' Mut. F. Ins. Co.*, 115 Wis. 371.

262. 1. **What Must Be Stated in Assessment and Notice.** — *American Guaranty Fund Mut. Ins. Co. v. Mattson*, 100 Mo. App. 316; *Shuman v. Juniata Farmers' Mut. F. Ins. Co.*, 206 Pa. St. 417; *Milwaukee Trust Co. v. Farmers' Mut. F. Ins. Co.*, 115 Wis. 371. See also *Phelps County Farmers' Mut. Ins. Co. v. Johnston*, 66 Neb. 590.

3. **Rule as to Amount of Assessment.** — *Gilman v. Druse*, 111 Wis. 400.

4. *McDonald v. Anchor Mut. Ins. Co.*, 116 Iowa 371; *Gilman v. Druse*, 111 Wis. 400.

5. *Gilman v. Druse*, 111 Wis. 400.

263. 3. **Effect of Partial Illegality.** — See *Gilman v. Druse*, 111 Wis. 400, holding that "if an assessment be levied, any substantial part of which is for purposes for which an assessment is not authorized, the entire assessment will be invalidated."

4. See *Mutual F. Ins. Co. v. Jean*, 96 Md. 252, 94 Am. St. Rep. 570.

263. *d.* POWER TO PROCURE SURETIES OR TO ESTABLISH GUARANTY FUND — (1) *Implied Power.* — See note 16.

264. 4. Duty to Make Assessments and to Pay Losses. — See note 5.

265. VIII. MEMBERSHIP — 1. Who Are Members. — See notes 1, 3.

266. See notes 1, 2.

Agent in Receiving Application Acts as Agent of Company. — See note 4.

2. Termination of Membership — *a.* IN GENERAL. — See notes 6, 8.

267. *b.* BY SURRENDER AND CANCELLATION OF POLICY. — See note 1.

e. SUCCESSION OF HEIRS OR PERSONAL REPRESENTATIVES. —

See note 7.

268. 3. Rights and Liabilities of Members — *a.* IN GENERAL. — See notes 2, 3, 4, 5.

269. See notes 1, 2, 3.

b. RIGHT TO ATTEND MEETINGS AND VOTE FOR DIRECTORS. —

See note 7.

263. 16. Implied Power to Procure Sureties or to Establish Guaranty Fund. — *Contra*, Dwinell *v.* Minneapolis F. & M. Mut. Ins. Co., 87 Minn. 59, 67, collating and discussing the authorities.

264. 5. Duty to Make Assessments and Properly Apply Proceeds. — *Morgan v. Hog Raisers' Mut. Ins. Co.*, 62 Neb. 446.

265. 1. All Insured Are Members. — National Mut. Church Ins. Co. *v.* M. E. Church, 105 Ill. App. 143; *Younghoe v. Grain Shippers' Mut. F. Ins. Assoc.*, 126 Iowa 374; *Kansas State Mut. Hail Assoc. v. Prather*, (Kan. 1905) 79 Pac. Rep. 1080; *Blue Grass Ins. Co. v. Cobb*, 72 S. W. Rep., 1099, 24 Ky. L. Rep. 2132; *Fidelity Mut. F. Ins. Co. v. Lowe*, (Neb. 1903) 93 N. W. Rep. 749; *Patrons of Industry F. Ins. Co. v. Harwood*, 64 N. Y. App. Div. 248; *Montgomery v. Whitbeck*, 12 N. Dak. 391; *Richards v. Hale*, 24 Ohio Cir. Ct. 468; *Gilman v. Druse*, 111 Wis. 400.

Only Those Becoming Members of a mutual insurance company can obtain policies therein. Merchants, etc., *Mut. Ins. Co. v. Baker*, (Neb. 1903) 94 N. W. Rep. 627. See also *Planters' Mut. Ins. Co. v. Loyd*, 71 Ark. 292.

3. Only Persons Insured Are Members. — *Cook v. Kentucky Growers' Ins. Co.*, 72 S. W. Rep. 764, 24 Ky. L. Rep. 1956.

266. 1. Assignee of Policy. — *Breeyear v. Rockingham Farmers' Mut. F. Ins. Co.*, 71 N. H. 445; *Davis v. Farmers Mut. F. Ins. Assoc.*, 134 N. Car. 60; *McQuillan v. Mutual Reserve Fund L. Assoc.*, 112 Wis. 665, 88 Am. St. Rep. 986, rehearing denied 112 Wis. 676.

2. *Davis v. Farmers' Mut. F. Ins. Co.*, 134 N. Car. 60.

4. Agency in Receiving Application for Insurance. — *Younghoe v. Grain Shippers' Mut. F. Ins. Assoc.*, 126 Iowa 374; *Ross-Langford v. Mercantile Town Mut. Ins. Co.*, 97 Mo. App. 79; *Ormsby v. Laclede Farmers' Mut. F., etc., Ins. Co.*, 98 Mo. App. 371, 105 Mo. App. 143; *Bushnell v. Farmers Mut. Ins. Co.*, 110 Mo. App. 223; *Fidelity Mut. F. Ins. Co. v. Lowe*, (Neb. 1903) 93 N. W. Rep. 749; *Foster v. Pioneer Mut. Ins. Assoc.*, 37 Wash. 288.

6. When Membership Ceases. — *Kansas State Mut. Hail Assoc. v. Prather*, (Kan. 1905) 79 Pac. Rep. 1080.

8. *Manitoba Farmers' Mut. Hail Ins. Co. v. Fisher*, 14 Manitoba 157.

267. 1. Surrender and Cancellation of Policy. — *Patrons of Industry F. Ins. Co. v. Harwood*, 64 N. Y. App. Div. 248.

All Assessments Must Be Paid before the insured can insist on the cancellation of his policy. *Backenstoe v. O'Neil*, 18 Pa. Super. Ct. 55.

Where Surrender of the Policy Was a Condition Precedent to the right to withdraw it was held that the fact that the policy was lost did not relieve him from the necessity of performing the condition. *Manitoba Farmers' Mut. Hail Ins. Co. v. Fisher*, 14 Manitoba 157.

7. See *Cook v. Kentucky Growers' Ins. Co.*, 72 S. W. Rep. 764, 24 Ky. L. Rep. 1956.

268. 2. Charter Part of Contract of Insurance. — *Farmers Mut. Hail Ins. Assoc. v. Slattery*, 115 Iowa 410; *Graham v. Mercantile Town Mut. Ins. Co.*, 110 Mo. App. 95; *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 808; *Montgomery v. Whitbeck*, 12 N. Dak. 391.

3. By-laws Part of Contract of Insurance. — *Farmers Mut. Hail Ins. Assoc. v. Slattery*, 115 Iowa 410; *Graham v. Mercantile Town Mut. Ins. Co.*, 110 Mo. App. 95; *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 808; *Montgomery v. Whitbeck*, 12 N. Dak. 391.

4. Members Presumed to Contract with Knowledge of Provisions of Charter and By-laws. — *Dwinell v. Minneapolis F. & M. Mut. Ins. Co.*, 87 Minn. 59, 67; *Montgomery v. Whitbeck*, 12 N. Dak. 391; *Wilson v. Union Mut. F. Ins. Co.*, 77 Vt. 28.

5. How Rights and Liabilities of Members Are Defined and Controlled. — *Farmers Mut. Hail Ins. Assoc. v. Slattery*, 115 Iowa 410; *Merchants', etc., Mut. Ins. Co. v. Baker*, (Neb. 1903) 94 N. W. Rep. 627.

A Policy issued by a mutual insurance company is not affected by the by-laws of the company unless they are made a part thereof. *Goodson v. National Masonic Acc. Assoc.*, 91 Mo. App. 339.

269. 1. By-laws Subsequently Adopted. — *Farmers Mut. Hail Ins. Assoc. v. Slattery*, 115 Iowa 410; *Farmer's Mut. Ins. Co. v. Kinney*, 64 Neb. 808.

2. Mere Silence will not imply assent to an amended by-law. *Farmers' Mut. Hail Ins. Assoc. v. Slattery*, 115 Iowa 410.

3. *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 808.

7. *Kansas State Mut. Hail Assoc. v. Prather*, (Kan. 1905) 79 Pac. Rep. 1080.

- 269.** *c.* EXCLUSIVE RIGHT TO BECOME DIRECTORS. — See note 8.
d. RIGHT IN ASSETS AND SURPLUS. — See note 10.
- 270.** *e.* RIGHT TO RETURN OF UNEARNED PREMIUMS. — See note 3.
f. RIGHT UPON HAPPENING OF LOSS INSURED AGAINST — (1) *In General.* — See note 4.
- 271.** (2) *Liability of Company for Failure or Refusal to Make Assessment.* — See note 2.
 (3) *Effect of By-law Subsequent to Date of Policy.* — See note 3.
 (4) *Personal Liability of Directors* — (a) *In General.* — See note 4.
 (c) *For Misapplication of Funds Derived from Assessments to Pay Losses.* — See notes 7, 8, 9.
- 272.** *g.* LIABILITIES OF MEMBERS AS INSURERS — (2) *Liability upon Premium and Deposit Notes* — (b) *Where Conditional Liability Is Created* — *aa. In General.* — See note 2.
- 273.** *bb. NECESSITY FOR ASSESSMENT AND NOTICE THEREOF* — *Burden of Proving Legal Assessment.* — See note 3.
Notice. — See note 6.
- 274.** *dd. TO WHAT OBLIGATIONS LIABILITY EXTENDS* — (*aa*) *In General.* — See note 7.
- 275.** (*dd*) *Liability to Repay Money Borrowed to Pay Losses.* — See note 4.
 (*ff*) *Liability Confined to Obligations Accruing During Membership* — *aaa. Rule Stated.* — See note 9.
- 276.** See note 1.

Basis of Voting on Amendment to By-laws. — See *Walker v. Johnson*, 17 App. Cas. (D. C.) 144.

The Validity of a Policy is not affected by failure to notify the insured of an annual meeting. *Dwinnell v. Felt*, 90 Minn. 9.

269. 8. *Backenstoe v. O'Neil*, 18 Pa. Super. Ct. 55.

10. **The Assignee** of a policy as collateral security for a debt is not entitled as against the member and assignor to increment or earnings accruing and payable from time to time, the face value of the policy not being diminished thereby. *Sommer v. New England Mut. L. Ins. Co.*, 21 Pa. Super. Ct. 501.

270. 3. *Senor v. Western Millers' Mut. F. Ins. Co.*, 181 Mo. 104.

4. **As to the Right of Recovery upon Policies in Mutual Companies.** — *Byrnes v. American Mut. F. Ins. Co.*, 114 Iowa 738; *Delle v. State Mut. Hail Ins. Co.*, 119 Iowa 173; *Wood v. Farmers' L. Assoc.*, 121 Iowa 44; *Sherman v. Harbin*, 124 Iowa 643, 125 Iowa 174; *McQuillan v. Mutual Reserve Fund L. Assoc.*, 112 Wis. 665, 88 Am. St. Rep. 986, rehearing denied 112 Wis. 676.

271. 2. **Failure or Refusal to Make Assessment.** — *Mandamus* may be issued to compel an assessment. *Perry v. Farmers' Mut. L. Ins. Co.*, 132 N. Car. 283.

Recovery of the Sum Named in the Policy was allowed where two or three sources were indicated for the payment of claims and there was no provision that an assessment must necessarily be made for each loss, and where, moreover, it was stipulated that the insured should receive the full amount of one assessment, not to exceed the sum named in the policy, and there was no assessment, and no showing as to what an assessment would realize. *Wood v. Farmers' L. Assoc.*, 121 Iowa 44.

3. See *Knights Templars', etc., L. Indemnity Co. v. Jarman*, 187 U. S. 197.

4. *Compare Dwinnell v. Minneapolis F. & M. Mut. Ins. Co.*, 90 Minn. 383.

7. *Sherman v. Harbin*, 124 Iowa 643, 125 Iowa 174; *Boyd v. Mutual F. Assoc.*, 116 Wis. 155, 96 Am. St. Rep. 948.

8. *Boyd v. Mutual F. Assoc.*, 116 Wis. 155, 96 Am. St. Rep. 948. But see *Manhattan F. Ins. Co. v. Fox*, 74 N. Y. App. Div. 271, affirmed 177 N. Y. 576.

9. See *Sherman v. Harbin*, 124 Iowa 643, 125 Iowa 174.

272. 2. *Schofield v. Hayes*, 17 Pa. Super. Ct. 110.

273. 3. **Burden of Proving that Assessment Was Legally Made.** — The company must prove the defendants' membership and liability to assessment. *Manitoba Farmers' Mut. Hail Ins. Co. v. Fisher*, 14 Manitoba 157.

6. **Necessity for Personal Notice.** — Where public notice was required, and in addition personal notice was voluntarily given to some members, the fact that personal notice was not given to one sued for assessment was held to be defense. *Gonder v. Lancaster County Mut. F. Ins. Co.*, 17 Pa. Super. Ct. 119.

274. 7. **Liability Confined Exclusively to Losses.** — See *Quintance v. Farmers' Mut. Aid Assoc.*, 77 S. W. Rep. 1121, 25 Ky. L. Rep. 1379; *Gilman v. Druse*, 111 Wis. 400.

275. 4. **Liability to Repay Borrowed Money.** — *Enterprise F. Ins. Co.'s Receiver v. Enterprise F. Ins. Co.*, 79 S. W. Rep. 1180, 25 Ky. L. Rep. 1630; *Mutual F. Ins. Co. v. Jean*, 96 Md. 252, 94 Am. St. Rep. 570; *American Guaranty Fund Mut. Ins. Co. v. Mattson*, 100 Mo. App. 316.

9. **Losses and Expenses Accruing During Membership.** — *Mutual F. Ins. Co. v. Jean*, 96 Md. 252, 94 Am. St. Rep. 570; *Morgan v. Hog Raisers Mut. Ins. Co.*, 62 Neb. 446; *Stockley v. Schwerdfeger*, 19 Pa. Super. Ct. 289.

276. 1. See *Gilman v. Druse*, 111 Wis. 400.

- 276.** ccc. Liability under Assessments Made After Expiration of Membership. — See note 4.
- 277.** ddd. Effect of Surrender and Cancellation of Policy — Obligations Thereafter Accruing. — See note 2.
- 279.** ggg. Effect of Reorganization of Company. — See note 1.
- hhh. Exact Mathematical Precision in Assessment Not Essential to Liability. — See note 2.
- 280.** ee. LIABILITY PROPORTIONATE TO AMOUNT OF NOTE — (bb) *Effect of Insolvency of Some Members.* — See note 7.
- 281.** (cc) *Where Risks Are Divided into Classes.* — See note 1.
- hh. ESTOPPEL TO DENY LIABILITY. — See notes 5, 6, 7.
- 282.** ii. STATUTE OF LIMITATIONS. — See notes 3, 6.
- (c) *Where Absolute Liability Is Created — Advance Notes for Security of Dealers* — See note 7.
- 284.** (a) Lien to Secure Payment of Note or Assessments Thereon — aa. ON PROPERTY INSURED. — See note 8.
- 285.** Conveyance of Insured Property to Bona Fide Purchaser. — See note 6.
- (3) *Nonliability of Cash Premium Members to Assessment.* — See note 8.
- 286.** IX. CONDITIONS RELATING TO NONPAYMENT OF PREMIUMS OR ASSESSMENTS — 1. Entire Premium Note to Fall Due. — See note 1.
2. Forfeiture or Suspension of Policy — a. IN GENERAL — (1) *Forfeiture.* — See notes 5, 6.

276. 4. *Stockley v. Schwerdfeger*, 19 Pa. Super. Ct. 289; *South Carolina Mut. Ins. Co. v. Price*, 67 S. Car. 207.

277. 2. *Surrender and Cancellation of Policy Absolves from Liability for Subsequent Losses.* — *Patrons of Industry F. Ins. Co. v. Harwood*, 64 N. Y. App. Div. 248.

279. 1. *South Carolina Mut. Ins. Co. v. Price*, 67 S. Car. 207.

2. *Substantial Accuracy of Assessment Sufficient.* — See *Mutual F. Ins. Co. v. Jean*, 96 Md. 252, 94 Am. St. Rep. 570.

280. 7. *Extent of Liability Where Some Members Are Insolvent.* — *Gilman v. Druse*, 111 Wis. 400.

281. 1. *Compare Benjamin v. Mutual Reserve Fund L. Assoc.*, 146 Cal. 34.

5. *Gilman v. Druse*, 111 Wis. 400.

6. *Dwinnell v. Felt*, 90 Minn. 9; *Richards v. Hale*, 24 Ohio Cir. Ct. 468.

7. *Compare Montgomery v. Whitbeck*, 12 N. Dak. 391.

Failure of a Member to Sign the Constitution of the company cannot be set up by him as a defense. *Richards v. Louis Lipp Co.*, 69 Ohio St. 359, 100 Am. St. Rep. 679.

The Fact that the Application Is Not Attached to the Policy, as required by statute in *Pennsylvania*, will not enable a member of a mutual company, after waiver of such attachment by acceptance of the policy and enjoyment of its benefits, to avoid paying his share of the losses. *Moore v. Bestline*, 23 Pa. Super. Ct. 6.

Other Invalid Defenses. — It is no defense to say that the insurer accepted from the defendant chattel security, in lieu of personal security as required by the by-laws, or that the insurer employed solicitors in violation of the statutes under which it was incorporated. *Randall v. Phelps County Mut. Hail Ins. Assoc.*, (Neb. 1902) 89 N. W. Rep. 398.

282. 3. *Statute of Limitations.* — *Mills v. Whitmore*, 12 Ohio Cir. Dec. 338, 22 Ohio Cir. Ct. 467.

6. *For the Construction of the Wisconsin Statute* of 1898 (Stat. Wis. 1898, § 4219) and its application to suits to enforce the liability of stockholders in insolvent mutual insurance companies, see *Boyd v. Mutual F. Assoc.*, 116 Wis. 155, 96 Am. St. Rep. 948.

7. *Advance Notes for Better Security of Dealers.* — Where advance notes were given prior to the organization of the company, and its organization was not perfected nor the policies issued within the time prescribed by law, and the makers of the notes demanded their return, but were deceived by the promoters into believing that the notes were lost, it was held that the receiver of the company could not maintain suit to recover on the notes. *Raegen v. Brockway*, 171 N. Y. 629, affirming 58 N. Y. App. Div. 166.

284. 8. *Lien on Property Insured.* — *Enterprise F. Ins. Co.'s Receiver v. Enterprise F. Ins. Co.*, 79 S. W. Rep. 1180, 25 Ky. L. Rep. 1630.

285. 6. *Mutual F. Ins. Co. v. Jean*, 96 Md. 252, 94 Am. St. Rep. 570.

8. *Dwinnell v. Kramer*, 87 Minn. 392; *Swing v. Humbird*, (Minn. 1904) 101 N. W. Rep. 938.

286. 1. *Premium Note Recoverable upon Default in Payment of Assessment.* — *American Guaranty Fund Mut. Ins. Co. v. Mattson*, 100 Mo. App. 316.

5. *Columbus Mut. L. Assoc. v. Hanrahan*, 98 Ill. App. 22.

6. *Forfeiture Condition Valid.* — *Manhattan L. Ins. Co. v. Wright*, (C. C. A.) 126 Fed. Rep. 82; *Brown v. Mutual Reserve Fund L. Assoc.*, 137 Cal. 278; *Madison v. Northwestern Mut. L. Ins. Co.*, 141 Cal. 475; *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 808; *Merchants, etc., Mut. Ins. Co. v. Baker*, (Neb. 1903) 94 N. W. Rep. 627; *Perry v. Farmers' Mut. L. Ins. Co.*, 132 N. Car. 283; *Shuman v. Juniata Farmers' Mut. F. Ins. Co.*, 206 Pa. St. 417. See also *Lone v. Mutual L. Ins. Co.*, 33 Wash. 577.

Statutory Nonforfeiture Provisions. — *In Mutual Reserve L. Ins. Co. v. Roth*, (C. C. A.)

- 287.** Sometimes Affirmative Action by the Company After Default. — See notes 6, 7.
 Interpretation of Peculiar Provisions of Forfeiture Clauses. — See note 11.
- 288.** (2) *Suspension.* — See note 3.
 Default in Payment After Loss. — See note 5.
b. LIABILITY OF INSURED AFTER FORFEITURE. — See note 6.
- 289.** *e.* EXCUSES FOR NONPAYMENT — (1) *Illegality of Assessment.* — See notes 2, 4, 5.
 (2) *Absence of Legal Notice.* — See note 8.
- 290.** (3) *Demand of More than Is Due.* — See note 8.
- 291.** *f.* WAIVER OF FORFEITURE OR SUSPENSION — (1) *In General.* — See note 8.
- 292.** See notes 2, 3, 4, 7.
- 293.** (2) *Extension of Time for Payment.* — See note 4.
 Retention, After Maturity, of Note Taken for Premium. — See note 5.

122 Fed. Rep. 853, it was held that mutual insurance companies were not within the operation of Rev. Stat. Mo. 1879, § 5983, which prohibits the forfeiture of life policies for nonpayment of premiums after two full annual payments are made and provides for extension of the policies thereafter.

287. 6. *Columbus Mut. L. Assoc. v. Hanrahan*, 98 Ill. App. 22; *Tucker v. Dairy Mut. Ins. Co.*, 116 Iowa 37.

7. See *Columbus Mut. L. Assoc. v. Hanrahan*, 98 Ill. App. 22.

11. *Peculiar Provisions of Forfeiture Clauses Interpreted.* — *Tucker v. Dairy Mut. Ins. Co.*, 116 Iowa 37.

288. 3. *Suspension for Nonpayment of Premium or Assessment.* — *Jefferson Mut. Ins. Co. v. Murray*, (Ark. 1905) 86 S. W. Rep. 813; *Hill v. Farmers' Mut. F. Ins. Co.*, 129 Mich. 141, 8 Detroit Leg. N. 897; *Graham v. Mercantile Town Mut. Ins. Co.*, 110 Mo. App. 95; *Johnston v. Phelps County Farmers' Mut. Ins. Co.*, 63 Neb. 21; *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 808.

5. *Johnston v. Phelps County Farmers' Mut. Ins. Co.*, 63 Neb. 21.

6. *Liability of Insured After Forfeiture.* — *Hill v. Farmers' Mut. F. Ins. Co.*, 129 Mich. 141, 8 Detroit Leg. N. 897.

289. 2. *Failure to Pay Illegal Assessment.* — *Benjamin v. Mutual Reserve Fund L. Assoc.*, 146 Cal. 34.

Where the Insured Has an Extra Assessment in the Hands of the Company it cannot forfeit his policy for nonpayment of an assessment. *Younghoe v. Grain Shippers' Mut. F. Ins. Assoc.*, 126 Iowa 374.

4. *Mutual F. Ins. Co. v. Jean*, 96 Md. 252, 94 Am. St. Rep. 570.

5. *Benjamin v. Mutual Reserve Fund L. Assoc.*, 146 Cal. 34.

8. *Absence of Legal Notice as Excuse.* — *McDonald v. Anchor Mut. Ins. Co.*, 116 Iowa 371; *Newton v. Southwestern Mut. L. Assoc.*, 116 Iowa 311; *Thuot v. La Compagnie d'Assurance*, etc., 10 Quebec K. B. 104.

290. 8. *Demand in Excess of What Is Due.* — *Gaut v. Mutual Reserve Fund L. Assoc.*, 121 Fed. Rep. 403; *Benjamin v. Mutual Reserve Fund L. Assoc.*, 146 Cal. 34; *McDonald v. Anchor Mut. Ins. Co.*, 116 Iowa 371.

291. 8. *Forfeiture or Suspension May Be Waived.* — *Knarston v. Manhattan L. Ins. Co.*,

140 Cal. 57; *Johnston v. Phelps County Farmers' Mut. Ins. Co.*, 63 Neb. 21; *Perry v. Farmers' Mut. L. Ins. Co.*, 132 N. Car. 283.

292. 2. *Implied Waiver.* — *Farmers' Ins. Assoc. v. Reavis*, 163 Ind. 321, rehearing denied 163 Ind. 327; *Duby v. Farmers' Mut. F. Ins. Co.*, 133 Mich. 661; *Johnston v. Phelps County Farmers' Mut. Ins. Co.*, 63 Neb. 21; *Fidelity Mut. F. Ins. Co. v. Murphy*, (Neb. 1903) 95 N. W. Rep. 702; *McQuillan v. Mutual Reserve Fund L. Assoc.*, 112 Wis. 665, 88 Am. St. Rep. 986, rehearing denied 112 Wis. 676.

3. *Slight Circumstances Will Establish a Waiver.* — *McDonald v. Anchor Mut. Ins. Co.*, 116 Iowa 371; *Hoover v. Mercantile Town Mut. Ins. Co.*, 93 Mo. App. 111; *Bowman v. Mutual F. Ins. Co.*, 203 Pa. St. 150; *Farmers' Benev. F. Ins. Assoc. v. Kinsey*, 101 Va. 236; *McQuillan v. Mutual Reserve Fund L. Assoc.*, 112 Wis. 665, 88 Am. St. Rep. 986, rehearing denied 112 Wis. 676. See also *Denver Tp. Mut. F. Ins. Co. v. Resor*, 95 Ill. App. 197.

Waiver Not Implied from Mere Silence. — *Hill v. Farmers' Mut. F. Ins. Co.*, 129 Mich. 141, 8 Detroit Leg. N. 897.

4. *Agreement, Declaration, or Conduct.* — *Insurance Co. v. Eggleston*, 96 U. S. 572; *Jelly v. Muscatine City, etc., Mut. Aid Soc.*, 120 Iowa 691, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 292; *Perry v. Farmers' Mut. L. Ins. Co.*, 132 N. Car. 283; *Bowman v. Mutual F. Ins. Co.*, 203 Pa. St. 150; *Farmers' Benev. F. Ins. Assoc. v. Kinsey*, 101 Va. 236; *McQuillan v. Mutual Reserve Fund L. Assoc.*, 112 Wis. 665, 88 Am. St. Rep. 986, rehearing denied 112 Wis. 676.

7. *Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57; *Perry v. Farmers' Mut. L. Ins. Co.*, 132 N. Car. 283; *Farmers' Benev. F. Ins. Assoc. v. Kinsey*, 101 Va. 236.

293. 4. *Agreement to Extend Time for Payment.* — *Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57.

Authority of Agent. — An agent authorized to issue policies has no authority to extend the time for payment of the premium. *Graham v. Mercantile Town Mut. Ins. Co.*, 110 Mo. App. 95.

5. *Compare Fidelity Mut. L. Ins. Co. v. Price*, 77 S. W. Rep. 384, 25 Ky. L. Rep. 1148, wherein it was held that a stipulation in the note that the policy should be void on default in payment was binding on the insured.

293. (4) *Receiving Payment After Default.* — See note 8.

294. See note 1.

(5) *Levying Assessment After Forfeiture for Nonpayment of Previous Assessment.* — See note 2.

(6) *Custom of Receiving Premiums or Assessments After They Are Due* — (a) *From Members Generally.* — See note 5.

295. X. INSOLVENCY AND DISSOLUTION — 1. **What Constitutes Insolvency.** — See note 5.

3. **Powers and Duties of Receiver** — *b. POWER TO MAKE ASSESSMENTS.* — See note 9.

296. See note 2.

4. **Power to Make Assessments After Voluntary Assignment.** — See note 7.

5. **Distribution of Assets** — *a. EFFECT OF ADJUDICATION OF INSOLVENCY AND APPOINTMENT OF RECEIVER.* — See note 10.

298. h. PERSONAL LIABILITY OF DIRECTORS FOR MISAPPLICATION OF FUNDS. — See note 3.

299. 7. Liability of Members — *c. EFFECT OF ORDER OF COURT AUTHORIZING ASSESSMENT* — (1) *As to Defenses by Members under Their Contracts.* — See note 1.

(2) *As to Necessity for Making Assessment and Amount Thereof.* — See note 3.

300. f. OBLIGATIONS FOR WHICH MEMBERS ARE LIABLE ON THEIR PREMIUM NOTES. — See note 5.

293. 8. Receiving Payment of Premium or Assessment After Default. — *Pennsylvania Lumberman's Mut. F. Ins. Co. v. Meyer*, (C. C. A.) 126 Fed. Rep. 352; *Barrett v. Des Moines Mut. Hail, etc., Ins. Assoc.*, 120 Iowa 184; *Farmers' Benev. F. Ins. Assoc. v. Kinsey*, 101 Va. 236. See also *Jefferson Mut. Ins. Co. v. Murray*, (Ark. 1905) 86 S. W. Rep. 813; *McQuillan v. Mutual Reserve Fund L. Assoc.*, 112 Wis. 665, 88 Am. St. Rep. 986, *rehearing denied* 112 Wis. 676.

Reception of Overdue Assessments and Recognition of Loss. — *Perry v. Farmers' Mut. L. Ins. Co.*, 132 N. Car. 283.

Acceptance of Overdue Assessment After a Partial Loss During Suspension of Policy. — *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 808; *Phelps County Farmers' Mut. Ins. Co. v. Johnston*, 66 Neb. 590.

Acceptance of Overdue Assessment After a Total Loss During Suspension of Policy. — See *Johnston v. Phelps County Farmers' Mut. Ins. Co.*, 63 Neb. 21, 66 Neb. 590, where, under different facts, the rule of *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 808, was applied.

If the Loss Was Unknown to the Insurer at the time of acceptance of an overdue assessment, and the assessment is promptly returned and all liability is denied on ascertainment of the facts, there is no waiver. *Hill v. Farmers' Mut. F. Ins. Co.*, 129 Mich. 141, 8 Detroit Leg. N. 897.

294. 1. McQuillan v. Mutual Reserve Fund L. Assoc., 112 Wis. 665, 88 Am. St. Rep. 986, *rehearing denied* 112 Wis. 676.

2. Assessment After Forfeiture for Nonpayment. — *Barrett v. Des Moines Mut. Hail, etc., Ins. Assoc.*, 120 Iowa 184.

A Levy and Unconditional Acceptance of an Assessment. — *Farmers' Benev. F. Ins. Assoc. v. Kinsey*, 101 Va. 236.

5. Custom of Receiving Overdue Premiums from Members. — *Wagaman v. Security Mut. L. Ins. Co.*, 110 Mo. App. 616; *Farmers' Benev. F. Ins. Assoc. v. Kinsey*, 101 Va. 236. See also *Doherty v. Miller's, etc., Ins. Co.*, 4 Ont. L. Rep. 303, *affirmed* 6 Ont. L. Rep. 78.

295. 5. Enterprise F. Ins. Co.'s Receiver v. Enterprise F. Ins. Co., 79 S. W. Rep. 1180, 25 Ky. L. Rep. 1630.

9. Receiver's Power to Make Assessments. — See *French v. Millville Mfg. Co.*, 70 N. J. L. 699.

296. 2. Mere Irregularities in making the assessment will not avail one sued to recover them. *Richards v. Hale*, 24 Ohio Cir. Ct 468.

7. A Voluntary Assignee Has No Authority to Sue for the Recovery of Assets diverted by the officers. *Beale v. Connecticut F. Ins. Co.*, 120 Fed. Rep. 790, 57 C. C. A. 158.

10. Adjudication of Insolvency Relieves Company from Liability for Subsequent Losses. — *Boyd v. Mutual F. Assoc.*, 116 Wis. 155, 96 Am. St. Rep. 948.

298. 3. See Sherman v. Harbin, 124 Iowa 643, 125 Iowa 174; *Boyd v. Mutual F. Assoc.*, 116 Wis. 155, 96 Am. St. Rep. 948.

299. 1. Effect of Order Authorizing Assessment. — *Swing v. Humbird*, (Minn. 1904) 101 N. W. Rep. 938.

3. Order Authorizing Assessment Conclusive as to Necessity Therefor and Amount Thereof. — *Stockley v. Schwerdfeger*, 19 Pa. St. Super. Ct. 289; *Moore v. Reifsnyder*, 22 Pa. Super. Ct. 326; *Dwinnell v. Felt*, 90 Minn. 9; *Swing v. Humbird*, (Minn. 1904) 101 N. W. Rep. 938.

300. 5. Expenses of Making and Collecting Assessments. — *Gilman v. Druse*, 111 Wis. 400.

300. *g.* DISCRETION OF COURT OR RECEIVER AS TO RATE OF ASSESSMENT. — See note 8.

301. *k.* SET-OFF OF CLAIMS AGAINST COMPANY. — See note 8.

302. See note 1.

MUTUAL MISTAKE. — See note 3.

MUTUUM. — See note 4.

MY. — See note 5.

300. 8. *Stockley v. Schwerdfeger*, 19 Pa. Super. Ct. 289.

301. 8. *Amount of Loss Cannot Be Set Off.* — See *Patrons Mut. F. Ins. Co. v. Coble*, 20 Pa. Super. Ct. 533.

302. 1. *Snader v. Bomberger*, 21 Pa. Super. Ct. 629.

3. *Mutual Mistake.* — *German Sav. Bank v. Geneser*, 116 Iowa 119; *Hill v. Pettit*, (Ky. 1902) 66 S. W. Rep. 188; *San Antonio Nat. Bank v. McLane*, 96 Tex. 48.

4. Mutuum. — *Adams v. Colonial, etc., Mortg. Co.*, 82 Miss. 263.

5. My — Wills. — *In re Cozens*, (1903) 1 Ch. 138.

Same — Legacies. — See *Scoville v. Mason*, 76 Conn. 459.

My Estate. — See *Lediger v. Canfield*, 78 N. Y. App. Div. 596.

My Legal Heirs. — See *Miller v. Metcalf*, 77 Conn. 176.

My Moneys, Etc. — See *Scoville v. Mason*, 76 Conn. 459.

NAME.

BY F. G. BAMMAN.

306. I. DEFINITION — Misspelling. — See note 1.

II. NAME HAS TWO MEMBERS. — See note 2.

307. IV. MIDDLE NAME OR INITIAL UNIMPORTANT. — See notes 1, 2.

308. See note 1.

V. INITIALS. — See notes 2, 3.

309. VI. PRESUMPTION THAT LETTER CONSTITUTES NAME. — See note 3.

VII. ABBREVIATIONS, CORRUPTIONS, DERIVATIONS, AND PREFIXES. —

See note 4.

310. VIII. JUNIOR AND SENIOR. — See notes 4, 5.

306. 1. *Misspelling Unimportant.* — *Taylor v. State*, 72 Ark. 613; *Collin v. Farmer's Alliance Mut. F. Ins. Co.*, 18 Colo. App. 170; *Green v. Meyers*, 98 Mo. App. 438; *Albright v. Lehigh Coal, etc., Co.*, 203 Pa. St. 65; *State v. Johnson*, 36 Wash. 294. See also *Altschul v. Casey*, 45 Oregon 182.

2. Two Members. — *Slingluff v. Gainer*, 49 W. Va. 7.

307. 1. *Middle Name or Initial Unimportant.* — *Cox v. Durham*, (C. C. A.) 128 Fed. Rep. 870; *Veal v. State*, 116 Ga. 589; *Slingluff v. Gainer*, 49 W. Va. 7. See also *Lucas v. Current River Land, etc., Co.*, 186 Mo. 448.

2. Middle Name or Initial Important. — See *Lancy v. Snow*, 180 Mass. 411.

308. 1. *Cleveland, etc., R. Co. v. Peirce*, 34 Ind. App. 188.

2. Initials. — *Cox v. Durham*, (C. C. A.) 128 Fed. Rep. 870; *Hall v. State*, 130 Ala. 45; *Old Wayne Mut. L. Assoc. v. McDonough*, 164 Ind. 321; *State v. Appleton*, 70 Kan. 217; *State v. Kyle*, 166 Mo. 287; *Gottlieb v. Alton Grain Co.*, 87 N. Y. App. Div. 380; *Pearce v. Albright*, (N. Mex. 1904) 76 Pac. Rep. 286; *Geiger v. State*, 25 Ohio Cir. Ct. 742; *Swanner v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 186.

Record — Notice. — *Green v. Meyers*, 98 Mo. App. 438.

Transposed Initials. — Where the initials of the Christian name of a nonresident defendant in attachment proceedings were transposed in all notices, process, etc., down to the order of confirmation of the sale, the defect was held to be fatal. *Buchanan v. Edmisten*, (Neb. 1901) 95 N. W. Rep. 620.

3. Initials Insufficient. — See *Slingluff v. Gainer*, 49 W. Va. 7, discussing the effect of service of process on the wrong person because of identity of initials and holding that in judicial process or other legal documents full names rather than mere initials should be used.

Order of Publication. — See *Riffle v. Ozark Land, etc., Co.*, 93 Mo. App. 41; *Burge v. Burge*, 94 Mo. App. 15.

309. 3. *Consonant Presumed to Be Name.* — *Gottlieb v. Alton Grain Co.*, 87 N. Y. App. Div. 380.

4. Minnie and Mena or Wilhelmina. — In divorce proceedings where service was by publication the designation "Minnie" was held not to be the same as "Mena" or "Wilhelmina." *Grober v. Clements*, 71 Ark. 565, 100 Am. St. Rep. 91.

310. 4. *Junior and Senior Unimportant.* — *Davids v. People*, 192 Ill. 176; *State v. Cafiero*, 112 La. 453; *Hunt v. Searcy*, 167 Mo. 158.

312. XI. MARRIED WOMEN. — See note 1.

XIII. SEX. — See note 4.

313. XV. DOCTRINE OF IDEM SONANS — 1. Statement of Rule. — See note 2.

317. See note 1.

Final S. — See note 2.

2. How Question Determined. — See notes 3, 4.

318. 3. Names Beginning with Different Letters. — See note 1.

310. 5. Presumption. — See *Hunt v. Searcy*, 167 Mo. 158.

312. 1. Use of Husband's Name with Prefix "Mrs." to Designate Wife Allowable. — See *Stokes v. State*, 46 Tex. Crim. 357.

4. No Presumption of Sex from Name. — See *Supernant v. People*, 100 Ill. App. 121.

313. 2. General Rule—Idem Sonans. — *Taylor v. State*, 72 Ark. 613, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 313; *Metz v. McAvoy Brewing Co.*, 98 Ill. App. 584 *Selby v. State*, 161 Ind. 667; *Thornily v. Prentice*, 121 Iowa 89, 100 Am. St. Rep. 317, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 313; *State v. Perkins*, 70 N. H. 330; *Cogdell v. Western Union Tel. Co.*, 135 N. Car. 438, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 313; *State v. Johnson*, 36 Wash. 294. See also *Alexis v. U. S.*, 63 C. C. A. 502, 129 Fed. Rep. 60.

Idem sonans is said to exist if the attentive ear finds difficulty in distinguishing the names when pronounced or if common and long-continued usage has by corruption or abbreviation made them identical in pronunciation. *State v. Johnson*, 70 Kan. 861; *Burge v. Burge*, 94 Mo. App. 15; *Arnall v. Newcomb*, 29 Tex. Civ. App. 521.

In the Use of Foreign Names. — See *Metz v. McAvoy Brewing Co.*, 98 Ill. App. 584.

A Presumption of Identity arises from the fact that names are *idem sonans*. *Galveston, etc., R. Co. v. Sanchez*, (Tex. Civ. App. 1901) 65 S. W. Rep. 893.

A—Names Held Idem Sonans. — *Arnall and Arnold, Arnall v. Newcomb*, 29 Tex. Civ. App. 521.

B—Names Held Idem Sonans. — *Battels and Battles, Leath v. State*, 132 Ala. 26; *Bert and Burt, State v. Johnson*, 70 Kan. 861.

B—Names Held Not Idem Sonans. — *Boppes and Boppels, Leath v. State*, 132 Ala. 26.

C—Names Held Idem Sonans. — *Celia and Selia, Galveston, etc., R. Co. v. Sanchez*, (Tex. Civ. App. 1901) 65 S. W. Rep. 893.

C—Names Held Not Idem Sonans. — *Chapelear and Chapeleas, Leath v. State*, 132 Ala. 26.

D—Names Held Idem Sonans. — *Doorley and Dooley, New York, etc., Land Co. v. Dooley*, 33 Tex. Civ. App. 636.

E—Names Held Not Idem Sonans. — *Emma and Emily, Burge v. Burge*, 94 Mo. App. 15.

F—Names Held Idem Sonans. — *Forsbee and Foshee, Taylor v. State*, 72 Ark. 613.

F—Names Held Not Idem Sonans. — *Ferdinand and Fernando, Cleveland, etc., R. Co. v. Peirce*, 34 Ind. App. 188.

G—Names Held Idem Sonans. — *Gorden and Gordon, White v. State*, 136 Ala. 58; *Gottlieb and Gottlieb, Gottlieb v. Alton Grain Co.*, 87 N. Y. App. Div. 380; *Gittings and Giddans, Woody v. State*, 113 Ga. 927; *Guadalupe and Guadalupe, Reys v. State*, 45 Tex. Crim. 463,

rehearing denied 45 Tex. Crim. 465; *Guadalupe and Guadalupe, Cabellero v. State*, 46 Tex. Crim. 457.

I—Names Held Not Idem Sonans. — *Israel and Isaac, Greenberg v. Augerman*, (Supm. Ct. App. T.) 84 N. Y. Supp. 244.

K—Names Held Idem Sonans. — *Krower and Krowder, Alexis v. U. S.*, 63 C. C. A. 502, 129 Fed. Rep. 60.

L—Names Held Idem Sonans. — *Larsen and Larson, Gustavenson v. State*, 10 Wyo. 300.

M—Names Held Idem Sonans. — *Metz and Meetz, Metz v. McAvoy Brewing Co.*, 98 Ill. App. 584; *Mikel and Mikil, Mikel v. State*, 43 Tex. Crim. 615.

M—Names Held Not Idem Sonans. — *Minnie and Mena or Wilhelmina, Grober v. Clements*, 71 Ark. 565, 100 Am. St. Rep. 91.

R—Names Held Idem Sonans. — *Reed and Read, Goethal v. Reed*, 35 Tex. Civ. App. 461.

S—Names Held Idem Sonans. — *Seibert and Sibert, Green v. Meyers*, 98 Mo. App. 438; *Selia and Celia, Galveston, etc., R. Co. v. Sanchez*, (Tex. Civ. App. 1901) 65 S. W. Rep. 893; *Shutter and Shuter, State v. Johnson*, 36 Wash. 294; *Stirr and Stier, New Albany v. Steir*, 34 Ind. App. 615.

T—Names Held Idem Sonans. — *Tidmarsh and Tidmarch, People v. Tidmarsh*, 113 Ill. App. 153.

V—Names Held Idem Sonans. — *Veike and Vieke, Selby v. State*, 161 Ind. 667.

W—Names Held Idem Sonans. — *Welch and Welsh, Donohoe-Kelly Banking Co. v. Southern Pac. Co.*, 138 Cal. 183, 94 Am. St. Rep. 28; *Witt and Wid, Veal v. State*, 116 Ga. 589.

317. 1. Not Question of Spelling. — See *Cleveland, etc., R. Co. v. Peirce*, 34 Ind. App. 188.

2. Final S. — *Noble v. State*, 139 Ala. 90, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 313, 317; *Davids v. People*, 192 Ill. 176.

3. Question for Court. — *Veal v. State*, 116 Ga. 589.

The names "Celia" and "Selia" are *idem sonans* in the English language, and the court cannot judicially know that they are not so in the Spanish language. *Galveston, etc., R. Co. v. Sanchez*, (Tex. Civ. App. 1901) 65 S. W. Rep. 893.

4. Question for Jury. — *State v. Perkins*, 70 N. H. 330; *Cogdell v. Western Union Tel. Co.*, 135 N. Car. 431.

318. 1. Indices Kept on Vowel System. — "The fact that the indices are kept on the vowel system, * * * and that names beginning with the letters 'Si' are found several pages further on than those beginning with 'Se' can make no difference, for * * * the name he seeks may be found spelled either way." *Green v. Meyers*, 98 Mo. App. 438.

NATIONAL BANKS.

BY E. G. CHILTON.

- 325. I. ORGANIZATION, CONTROL, AND REGULATION — 1. Organization —**
a. IN GENERAL — National Bank Acts. — See note 2.
326. b. FORMATION OF NATIONAL BANKS. — See note 3.
c. ORGANIZATION CERTIFICATE. — See note 4.
328. 2. Power to Control and Regulate — Rule and Exception Stated. — See
 note 1.
329. 4. Transformation of State Banks into National Banks — The National
 Bank Act Was Intended. — See note 13.
330. Shareholders. — See note 6.
6. Bank Examiners. — See note 12.
331. II. CAPITAL STOCK AND SHAREHOLDERS — 1. Amount, Issue, and Pay-
 ment of Capital Stock. — See note 4.
332. 3. Reduction of Capital. — See note 8.
333. 5. Sale and Transfer of Stock — a. CONTROL AND REGULATION —
 By Bank. — See note 8.
335. 6. Lien on Stock — A National Bank Cannot Acquire a Lien. — See note 5.
336. 9. Liability of Stockholders for Debts — a. STATUTORY PROVISIONS.
 — See note 8.
337. b. WHO LIABLE — (2) Apparent Owner. — See note 4.
338. (3) Necessity of Transfer on Books of Bank — Neglect to Have Transfer
 Made. — See note 3.

325. 2. National Bank Acts. — See Bailey *v.* Farmers' Nat. Bank, 97 Ill. App. 66; Weinhard *v.* Commercial Nat. Bank, 41 Oregon 359.

326. 3. Formation. — See Easton *v.* Iowa, 188 U. S. 220; Weinhard *v.* Commercial Nat. Bank, 41 Oregon 359.

4. Organization Certificate. — Weinhard *v.* Commercial Nat. Bank, 41 Oregon 359.

328. 1. State Laws Applicable Only Where They Do Not Impair Efficiency of National Banks. — Cogswell *v.* Norwich Second Nat. Bank, 76 Conn. 252; Matter of Hayt, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 356.

National Banking Act Supreme So Far as It Attempts to Regulate Banks. — Boyd *v.* Schneider, 124 Fed. Rep. 239.

Sole Power of Congress to Regulate and Control Operations. — In Easton *v.* Iowa, 188 U. S. 220, the United States Supreme Court, in denying the power of the state to enact a law prohibiting national banks from receiving deposits, ruled squarely that Congress, having power to create a system of national banks, is the judge of the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control their operations.

329. 13. See Aldrich *v.* Bingham, 131 Fed. Rep. 363.

330. 6. Shareholders. — See Aldrich *v.* Bingham, 131 Fed. Rep. 363.

12. Powers of Bank Examiner. — A bank examiner has power to make a thorough examination into all the affairs of a national bank, and in so doing to examine any of the officers or agents, and to make a full and detailed re-

port of the condition to the comptroller. See Easton *v.* Iowa, 188 U. S. 220.

331. 4. Payment of Capital. — Weinhard *v.* Commercial Nat. Bank, 41 Oregon 359.

332. 8. The Approval of the Comptroller is essential to a valid reduction of capital. Cogswell *v.* Norwich Second Nat. Bank, 76 Conn. 252.

333. 8. Bank Cannot Control. — A shareholder, though indebted to the bank, may, without the consent of the directors, make a valid transfer of his shares of stock. Buffalo Third Nat. Bank *v.* Buffalo German Ins. Co., 193 U. S. 581.

335. 5. National Bank Cannot Acquire Lien on Its Own Stock. — Smith *v.* Marietta First Nat. Bank, 115 Ga. 608.

336. 8. McClaine *v.* Rankin, 197 U. S. 154.

Nature of Shareholder's Obligation. — The obligation of a shareholder for debts is one created by the statute and implied from the express contract of the shareholder to take and pay for his shares. McDonald *v.* Thompson, 184 U. S. 71.

Shareholder's Liability Contingent. — Waldron *v.* Alling, 73 N. Y. App. Div. 86. See also Aldrich *v.* Bingham, 131 Fed. Rep. 363.

Liability Arises Only in Event of Liquidation. — Weinhard *v.* Commercial Nat. Bank, 41 Oregon 359.

337. 4. Apparent Owner Liable. — Rankin *v.* Fidelity Ins., etc., Co., 189 U. S. 242; Schofield *v.* Twining, 127 Fed. Rep. 486.

338. 3. Where Power of Attorney Is Given. — McDonald *v.* Dewey, (C. C. A.) 134 Fed.

338. Effect of Neglect by Bank Officers. — See note 7.

(4) *Pledges* — Liable Where Registered Owners. — See note 10.

339. (5) *Effect of Notice of Title on Books of Bank* — Not Liable Where Registered as "Pledgees," Etc. — See notes 4, 9.

(6) *Transfers to Avoid Responsibility or to Irresponsible Persons* — It Has Been Broadly Stated. — See note 11.

Knowledge of Insolvency and Colorable Transfer. — See note 12.

340. Financial Condition of Transferee and Knowledge of Insolvency — When Material. — See note 4.

341. (10) *Minors* — Cannot Become Stockholders. — See notes 6, 8.

343. c. EXTENT OF LIABILITY — (1) *For What Debts Liable* — In General. — See note 3.

(2) *Limit of Liability*. — See note 8.

The Liability Is Several. — See note 9.

344. e. ENFORCEMENT OF LIABILITY — (1) *Determination of Comptroller* — The Comptroller of the Currency Has Power. — See note 1.

The Questions as to the Necessity of an Assessment. — See notes 2, 3.

(2) *Assessments* — Second Assessment. — See note 4.

(3) *Action to Enforce Liability* — (a) *Conditions Precedent* — The Determination of the Comptroller. — See note 5.

Rep. 528. See also *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242.

338. 7. *McDonald v. Dewey*, (C. C. A.) 134 Fed. Rep. 528.

10. *Liability of Pledgee*. — See *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242, holding that to charge a pledgee of national bank stock with personal liability it must appear that he is the owner in fact or 'has held himself out to be such owner.

339. 4. Registered as "Pledgee." — *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242.

9. *Good Faith Required*. — *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242.

11. *Transfer to Avoid Liability or to Irresponsible Person*. — That the transferee is not able financially to meet the liabilities imposed upon a stockholder is not material, but it is essential that he shall be legally liable to assume such obligations and not at liberty to repudiate them. *Aldrich v. Bingham*, 131 Fed. Rep. 363.

12. See *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242; *McDonald v. Dewey*, (C. C. A.) 134 Fed. Rep. 528.

340. 4. *Insolvent Transferee*. — *Earle v. Carson*, 188 U. S. 42, holding that the insolvency of the bank at the time of the sale is immaterial "unless the fact of insolvency was known to the seller, and the sale was made to avoid impending liability — that is, in contemplation of insolvency."

341. 6. *Minors Cannot Become Stockholders*. — *Aldrich v. Bingham*, 131 Fed. Rep. 363.

8. *A Father Transferring Stock to His Minor Children* cannot by such action escape personal liability as a shareholder. *Aldrich v. Bingham*, 131 Fed. Rep. 363.

343. 3. *Liability Extends Only to Enforceable Debts*. — See *McClaine v. Rankin*, 197 U. S. 154.

8. *Limit of Liability*. — *Rankin v. Barton*, 69 Kan. 629; *Beckham v. Hague*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 606, affirmed 80 N. Y. App. Div. 626; *Merchants' Nat. Bank v. Wehrmann*, 69 Ohio St. 160; *Weinhard v. Commercial Nat. Bank*, 41 Oregon 359.

9. See *Studebaker v. Perry*, 184 U. S. 258.

Liability Several, and Not Joint. — *Merchants' Nat. Bank v. Wehrmann*, 69 Ohio St. 160.

344. 1. *Comptroller Has Power to Determine Necessity for Assessment*. — *Boyd v. Schneider*, 124 Fed. Rep. 239; *Rankin v. Barton*, 69 Kan. 629. See also *Studebaker v. Perry*, 184 U. S. 258.

The Only Obligation of the Stockholders, when notice is given by the comptroller, is either to assess themselves for the purpose of making up the deficiency or to go out of business. *Weinhard v. Commercial Nat. Bank*, 41 Oregon 359.

2. *Comptroller's Determination Is Conclusive as to Necessity*. — *McClaine v. Rankin*, 197 U. S. 154; *Boyd v. Schneider*, 124 Fed. Rep. 239; *Rankin v. Barton*, 69 Kan. 629; *Waldron v. Alling*, 73 N. Y. App. Div. 86. See also *Studebaker v. Perry*, 184 U. S. 258.

3. *But Not as to Liability*. — *McClaine v. Rankin*, 197 U. S. 154.

4. *Comptroller May Make Successive Assessments*. — *McClaine v. Rankin*, 197 U. S. 154; *Studebaker v. Perry*, 184 U. S. 258. See also *Beckham v. Hague*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 606, affirmed 80 N. Y. App. Div. 626.

5. See *McDonald v. Thompson*, 184 U. S. 71; *Studebaker v. Perry*, 184 U. S. 258; *Fish v. Olin*, 76 Vt. 120.

A Court of Equity, Instead of the Comptroller, may determine the necessity of instituting proceedings where such court has appointed a receiver for the bank in voluntary liquidation. *King v. Pomeroy*, (C. C. A.) 121 Fed. Rep. 287.

The Assignee of a Receiver May Enforce the individual liability of stockholders. *Waldron v. Alling*, 73 N. Y. App. Div. 86.

Revocation of Authority of Receiver. — Where the comptroller specially authorized a receiver to bring an action to enforce the personal liability of a stockholder, authority subsequently given to compromise the demand or to sell it does not operate to revoke the authority to sue.

- 345.** (b) Jurisdiction. — See note 2.
 (c) Form of Remedy — At Law or in Equity. — See notes 3, 4.
 A Creditor's Bill. — See notes 8, 9.
 (d) Who Liable to Suit. — See note 11.
- 346.** (e) Limitations — What Statute Governs. — See note 2.
 Accrual of Cause of Action. — See notes 3, 4.
 Running of Statute. — See note 7.
 (f) Defenses. — See note 11.
- 348.** 10. Voluntary Assessment in Case of Impairment of Capital — *a.* STATUTORY PROVISIONS. — See note 7.
b. HOW MADE. — See note 8.
c. HOW ENFORCED. — See note 10.
- 349.** 11. Dividends — *b.* RIGHT TO DIVIDENDS. — See note 2.
c. WHO ENTITLED TO DIVIDENDS. — See note 3.
- 350.** III. OFFICERS AND AGENTS — 1. Election, Appointment, and Tenure —
b. DIRECTORS — (2) *Election.* — See note 4.
c. MINISTERIAL OFFICERS — (1) *Appointment.* — See notes 8, 9.
- 351.** 3. Authority and Powers — *a.* IN GENERAL — (1) *Definition.* — See note 1.
 (3) *Express or Implied Authority.* — See note 7.

McClaine *v.* Rankin, (C. C. A.) 119 Fed. Rep. 110.

345. 2. Creditor's Bill. — Williamson *v.* American Bank, (C. C. A.) 115 Fed. Rep. 793, affirming 109 Fed. Rep. 36. See also George *v.* Wallace, (C. C. A.) 135 Fed. Rep. 286.

3. Suit May Be in Equity or at Law. — Studebaker *v.* Perry, 184 U. S. 258.

4. Action at Law Where Full Assessment Levied. — Studebaker *v.* Perry, 184 U. S. 258. See also Fish *v.* Olin, 76 Vt. 120.

8. Creditor's Bill in Cases of Voluntary Liquidation. — George *v.* Wallace, (C. C. A.) 135 Fed. Rep. 286; Williamson *v.* American Bank, (C. C. A.) 115 Fed. Rep. 793.

9. Creditor's Bill Only Remedy in Voluntary Liquidation. — Compare King *v.* Pomeroy, (C. C. A.) 121 Fed. Rep. 287.

11. Executors or Administrators May Be Sued. — Waldron *v.* Alling, 73 N. Y. App. Div. 86.

346. 2. State Statute Governs. — McDonald *v.* Thompson, 184 U. S. 71; McClaine *v.* Rankin, 197 U. S. 154; Beckham *v.* Hague, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 606, affirmed 80 N. Y. App. Div. 626. See also King *v.* Pomeroy, (C. C. A.) 121 Fed. Rep. 287.

3. Cause of Action Accrues When Assessment Becomes Payable. — McDonald *v.* Thompson, 184 U. S. 71; McClaine *v.* Rankin, 197 U. S. 154; Beckham *v.* Hague, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 606, affirmed 80 N. Y. App. Div. 626.

Accrual of Liability Where Affairs in Liquidation in Equity. — In an action by a receiver to enforce the liability of a shareholder of an insolvent national bank whose affairs are in the course of liquidation in a court of equity, the liability of the shareholders does not accrue until the court decides that it is necessary to collect some part of it, determines the amount, and fixes the time of payment. King *v.* Pomeroy, (C. C. A.) 121 Fed. Rep. 287.

4. Rankin *v.* Barton, 69 Kan. 629.

7. Compare King *v.* Pomeroy, (C. C. A.) 121 Fed. Rep. 287.

11. Facts Constituting No Defense to Second Assessment. — In an action by the receiver to collect a second assessment, the mere fact that the first assessment, if collected during a given year, would, together with the bank's assets, if then realized upon, have been sufficient to wipe out all the debts, constitutes no defense, it not appearing that the receiver could have realized upon the assets and collected the first assessment during the year specified. Beckham *v.* Hague, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 606, affirmed 80 N. Y. App. Div. 626.

348. 7. Weinhard *v.* Commercial Nat. Bank, 41 Oregon 359, affirmed 192 U. S. 243.

8. Assessment Must Be Made by Stockholders. — Commercial Nat. Bank *v.* Weinhard, 192 U. S. 243.

10. See Commercial Nat. Bank *v.* Weinhard, 192 U. S. 243.

349. 2. A Dividend When Declared Is Held in Trust by the bank for the benefit of the stockholder. Redhead *v.* Iowa Nat. Bank, 127 Iowa 572.

3. Dividend Declared Belongs to Assignor. — A dividend when declared constitutes an indebtedness of the bank and does not pass with the assignment of the shares of stock. Redhead *v.* Iowa Nat. Bank, 127 Iowa 572.

350. 4. Election of Directors. — Weinhard *v.* Commercial Nat. Bank, 41 Oregon 359.

8. Appointment of Ministerial Officers. — Weinhard *v.* Commercial Nat. Bank, 41 Oregon 359.

9. Weinhard *v.* Commercial Nat. Bank, 41 Oregon 359.

351. 1. Extent of Authority. — The authority of the directors and of the officers and committees of a national bank extends only to legitimate transactions intended for the benefit of the bank. U. S. *v.* Breese, 131 Fed. Rep. 915.

Officers Cannot Delegate Their Powers. — Merchants' Nat. Bank *v.* Wehrmann, 69 Ohio St. 160.

7. Jones *v.* Lincoln First Nat. Bank, (Neb. 1902) 90 N. W. Rep. 912, holding that the rule

- 351.** (4) *Customary Powers*. — See note 8.
 (5) *Habitual Exercise of Special Powers*. — See note 9.
- 352.** *b. TO BORROW MONEY* — *Special Authority* — *When Necessary*. — See note 4.
- 353.** *Loan to Officers*. — See note 1.
d. PARTICULAR OFFICERS — (1) *Directors*. — See note 3.
 (2) *President*. — See note 5.
- 354.** (3) *Vice-President*. — See note 8.
 (4) *Cashier*. — See notes 10, 11, 13, 14, 15.
- 355.** See notes 2, 4.
4. Personal Liability — *a. IN GENERAL* — (1) *What Officers Liable*. — See note 5.
 (3) *Degree of Dereliction*. — See note 8.

is especially applicable when the acts in question are wrongful and fraudulent.

351. 8. Customary Powers of Officers. — See *Goshorn v. People's Nat. Bank*, 32 Ind. App. 428, 102 Am. St. Rep. 248; *Campbell v. Manufacturers Nat. Bank*, 67 N. J. L. 301, 91 Am. St. Rep. 438.

9. Habitual Exercise of Special Powers. — *Iowa Nat. Bank v. Sherman*, 17 S. Dak. 396.

Drawing Personal Drafts. — See, on second appeal, *Gale v. Chase Nat. Bank*, (C. C. A.) 108 Fed. Rep. 987, reversed 188 U. S. 557, on the ground that the court's ruling as to the cashier's implied authority from the course of previous business to draw a draft in his official capacity in his individual favor was not relevant, though it was conceded to be correct.

352. 4. Later Holdings. — As holding that officers have implied authority to borrow money, see *Hanover Nat. Bank v. Burlingame First Nat. Bank*, (C. C. A.) 109 Fed. Rep. 421.

353. 1. Loan to Officers Valid if Made in Good Faith. — *U. S. v. Breeze*, 131 Fed. Rep. 915 (overdrafts by president); *St. Johns Nat. Bank v. Steel*, 135 Mich. 165 (director may not act for both bank and himself).

3. Status of Directors. — See *Commercial Nat. Bank v. Cuero First Nat. Bank*, 97 Tex. 536, 104 Am. St. Rep. 879.

Degree of Care. — Directors of national banks are held to the same degree of care that men of ordinary prudence exercise in regard to their own affairs. *Hanna v. Lyon*, 179 N. Y. 107.

5. Status of President. — *National Bank v. Byrnes*, 84 N. Y. App. Div. 100, affirmed 178 N. Y. 561; *Commercial Nat. Bank v. Cuero First Nat. Bank*, 97 Tex. 536, 104 Am. St. Rep. 879.

354. 8. Right to Offer Paper for Discount. — A vice-president of a national bank acting as agent for his father may offer paper to the bank for discount, so long as he does not attempt to play the double role of agent for his father and officer of the bank. *St. Johns Nat. Bank v. Steel*, 135 Mich. 165.

10. Cashier Defined. — *Duncan First Nat. Bank v. Anderson*, (Indian Ter. 1904) 82 S. W. Rep. 693.

11. Cashier Acts as General Agent. — *Duncan First Nat. Bank v. Anderson*, (Indian Ter. 1904) 82 S. W. Rep. 693; *Goshorn v. People's Nat. Bank*, 32 Ind. App. 428, 102 Am. St. Rep. 248.

Agreement to Pay Commissions to Broker. — The cashier of a national bank is its collecting officer, and has the power to bind the bank by a promise to pay commissions to a broker for effecting the sale of realty held by the bank as security for a debt. *Flatonia First Nat. Bank v. Ratliff*, 33 Tex. Civ. App. 279.

When Bank Not Bound by Acts of Cashier. — A bank is not bound by the acts of its cashier outside the usual scope of his authority, in a matter to which the bank is not a party, and of which it is not chargeable with notice. *Jones v. Lincoln First Nat. Bank*, (Neb. 1902) 90 N. W. Rep. 912.

The Test of a given transaction with a cashier is whether it is with the bank and its business, or with the cashier personally and in his business. *Campbell v. Manufacturers Nat. Bank*, 67 N. J. L. 301, 91 Am. St. Rep. 438.

The Same Rules of Agency apply to cashiers as to other persons occupying fiduciary relations. *Campbell v. Manufacturers' Nat. Bank*, 67 N. J. L. 301, 91 Am. St. Rep. 438.

13. May Borrow Money. — See *Duncan First Nat. Bank v. Anderson*, (Indian Ter. 1904) 82 S. W. Rep. 693.

14. Receive Demands for Collection. — See *Duncan First Nat. Bank v. Anderson*, (Indian Ter. 1904) 82 S. W. Rep. 693.

15. May Receive Deposits. — *Hindman v. Louisville First Nat. Bank*, (C. C. A.) 112 Fed. Rep. 931.

Receipt of Money for Deposit by the Cashier Outside the Bank will not render the bank liable unless the money has been subsequently actually transferred into the corporate possession. *Demarest v. Holdeman*, 34 Ind. App. 685.

355. 2. Indorsement Supported by Consideration. — An indorsement that enables the bank to obtain payment of moneys due to it from the maker is supported by a sufficient consideration. *Duncan First Nat. Bank v. Anderson*, (Indian Ter. 1904) 82 S. W. Rep. 693.

4. Cannot Certify His Own Checks or Draw Drafts to His Own Order. — *Rankin v. Bush*, 93 N. Y. App. Div. 181.

But proof of direct authority or ratification of similar transactions may render the bank liable. *Campbell v. Manufacturers Nat. Bank*, 67 N. J. L. 301, 91 Am. St. Rep. 438.

5. Particular Officers Liable. — *Hanna v. Lyon*, 179 N. Y. 107.

8. Degree of Dereliction Immaterial. — See *Hanna v. Lyon*, 179 N. Y. 107.

- 355.** (4) *Effect of Good Faith and Diligence.* — See note 9.
- 357.** *c. EXCESSIVE LOANS.* — See note 1.
- f. MISAPPROPRIATION OF FUNDS — Liability to Bank.* — See note 5.
- g. LIABILITY OF DIRECTORS FOR NEGLIGENCE AND MISMANAGEMENT — (1) Duty of Supervision — Directors Must Exercise Ordinary Care and Prudence.* — See note 10.
- 358.** *Details of Business.* — See note 1.
- (2) *Effect of Want of Knowledge.* — See note 3.
- 359.** *5. Suits to Enforce Personal Liability — a. CONDITIONS PRECEDENT TO SUIT.* — See note 2.
- b. WHO MAY SUE — Bank.* — See note 3.
- Stockholders or Creditors.* — See notes 5, 7.
- 361.** *6. Offenses by Officers and Agents and Aiders and Abettors — a. CONFLICT OF LAWS — Offenses Not Covered by Federal Laws.* — See note 7.
- b. NATURE AND ELEMENTS OF OFFENSES IN GENERAL — (1) Statutory Provisions.* — See notes 13, 14.
- 362.** (3) *Intent — Essential Ingredient.* — See note 4.
- 363.** *d. ABSTRACTING FUNDS.* — See note 5.
- To Constitute the Offense.* — See note 6.
- No Previous Lawful Possession.* — See note 7.
- e. MISAPPLICATION OF FUNDS — (1) Intent to Injure or Defraud — Essential Element of Offense.* — See note 8.
- 364.** *Other Motives.* — See note 1.
- (2) *Possession and Control of Funds — "Misapply" Distinguished from "Embezzle" and "Abstract."* — See note 6.

355. *9. Good Faith and Diligence.* — National Bank v. Fridenberg, 206 Pa. St. 243.

357. *1. Directors Participating in Excessive Loan Are Liable.* — Zinn v. Baxter, 65 Ohio St. 341. See also Hanna v. People's Nat. Bank, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 517, reversed on another ground 76 N. Y. App. Div. 224.

5. *Officers Liable for Misappropriation of Funds.* — Zinn v. Baxter, 65 Ohio St. 341.

10. *Degree of Care.* — Hanna v. Lyon, 179 N. Y. 107.

Pure Errors of Judgment will not render the directors personally liable though the result is depreciation in the value of the shares of stock. Warren v. Robinson, 25 Utah 205.

358. *1. Details of Business.* — Hanna v. People's Nat. Bank, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 517, affirmed 179 N. Y. 107.

3. *Want of Knowledge.* — Hanna v. People's Nat. Bank, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 517, affirmed 179 N. Y. 107.

359. *2. Forfeiture of Charter Not Condition Precedent to Suit Against Directors for Violation of Act.* — Boyd v. Schneider, 124 Fed. Rep. 239.

3. *Rights of Action Enforceable by Bank.* — Hanna v. Lyon, 179 N. Y. 107.

5. *When the Bank Refuses to Sue, upon request, an action may be maintained by a stockholder on behalf of himself and all other stockholders, the bank to be made a party, and the proceeds of the action to inure to the benefit of all the stockholders.* Zinn v. Baxter, 65 Ohio St. 341.

Creditors Who Have No Interest in the moneys recovery of which is sought, apart from their individual claims, cannot maintain a suit against the directors for moneys lost through negligence or mismanagement of the bank's affairs. Boyd v. Schneider, 124 Fed. Rep. 239.

Depositors, it has been held, may sue the directors for negligence in permitting improper loans, irrespective of the receiver's refusal to sue, since there is always an implied contract between depositors and the bank that the deposits shall be lawfully used. Boyd v. Schneider, (C. C. A.) 131 Fed. Rep. 223.

7. *After Loss of Stock.* — *Contra*, Hanna v. Lyon, 179 N. Y. 107, modifying Hanna v. People's Nat. Bank, 76 N. Y. App. Div. 224, which reversed (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 518, stated in the original note.

361. *7. Receiving Deposits with Knowledge that Bank Is Insolvent.* — *Compare* Easton v. Iowa, 188 U. S. 220.

13. *Embezzlement.* — U. S. v. Breese, 131 Fed. Rep. 915.

14. *Abstraction and Misapplication.* — U. S. v. Breese, 131 Fed. Rep. 915.

362. *4. Intent.* — McKnight v. U. S., (C. C. A.) 111 Fed. Rep. 735; U. S. v. Breese, 131 Fed. Rep. 915.

363. *5. "Abstract" Defined.* — U. S. v. Breese, 131 Fed. Rep. 915.

6. *Elements of Offense of Abstracting Funds.* — U. S. v. Breese, 131 Fed. Rep. 915.

7. *Previous Lawful Possession Not Necessary.* — U. S. v. Breese, 131 Fed. Rep. 915.

8. *Intent Essential Element of Offense.* — McKnight v. U. S., (C. C. A.) 115 Fed. Rep. 972; U. S. v. German, 115 Fed. Rep. 987.

Malice or Ill Will. — See U. S. v. Breese, 131 Fed. Rep. 915.

364. *1. Wrongful Intent Presumed from Wrongful Act.* — U. S. v. German, 115 Fed. Rep. 987.

6. *"Wilful Misapplication, as described in the statute, means a misapplication, wilfully and unlawfully made by one of the officers enumer-*

- 365.** (4) *Overdrafts* — *Overdraft by Officer.* — See note 1.
Proof of Intent. — See note 2.
 (5) *Loans and Discounts* — *Bad Loans Made for Private Gain.* — See note 4.
- 366.** (8) *Knowledge or Consent of Directors.* — See note 1.
f. FALSE ENTRIES IN BOOKS AND REPORTS — (1) *Statutory Provisions.* — See note 5.
- 367.** (3) *Reports and Statements* — *Report to Comptroller.* — See note 1.
- 368.** (5) *What Entries in Books Are False* — *In General.* — See note 5.
- 372.** IV. *POWERS, FUNCTIONS, AND DEALINGS* — 2. *Banking Powers in General* — *a. GRANT OF POWERS* — *Limitation of Powers.* — See note 6.
b. INCIDENTAL POWERS — (1) *Definition.* — See note 9.
- 374.** 3. *Acting as Agent or Broker* — *a. DEALING IN GOVERNMENT BONDS.* — See note 3.
b. DEALING IN OTHER BONDS AND STOCKS. — See note 4.
- 375.** 4. *Borrowing Money* — *a. IMPLIED POWER.* — See note 7.
b. EXTENT OF POWER. — See note 8.
- 376.** 7. *Circulating Notes.* — See notes 6, 7, 8.
 8. *Collections* — *Rights and Liabilities.* — See note 11.

ated therein, of the moneys, funds, or credits of the bank, and made with intent to injure the bank, or some other company or person; and it has been held that there must be a conversion of the funds misapplied, to the use and benefit of the wrongdoer, or to the use of some one other than the bank. It is not necessary that the officer so charged should have been previously in the possession or custody of the money, funds, or credits of the bank by virtue of any trust, duty, or employment." U. S. v. Breese, 131 Fed. Rep. 915.

365. 1. *Overdraft by President.* — The president of a national bank making an overdraft in bad faith and for personal gain is guilty of a misapplication. U. S. v. Breese, 131 Fed. Rep. 915.

2. *Evidence of Other Offenses* may be admitted to show intent. U. S. v. Breese, 131 Fed. Rep. 915.

4. *Bad Loans Made for Private Gain Criminal.* — McKnight v. U. S., (C. C. A.) 115 Fed. Rep. 972.

366. 1. *The Burden Is on the Defendant* to prove knowledge or consent of the directors unless the transaction is of such a nature as to raise a presumption that the directors had knowledge. McKnight v. U. S., (C. C. A.) 115 Fed. Rep. 972.

5. U. S. v. German, 115 Fed. Rep. 987.

Conspiracy. — A violation of Rev. Stat. U. S., § 5209, constitutes an "offense against the United States," and subjects an offender acting in concert with another to indictment for conspiracy under Rev. Stat. U. S., § 5449. Scott v. U. S., (C. C. A.) 130 Fed. Rep. 429.

367. 1. *Contracts Not Affected.* — The contracts on which resources and liabilities are based do not become either void or unenforceable on account of false reports as to such resources and liabilities. Hanover Nat. Bank v. Burlingame First Nat. Bank, (C. C. A.) 109 Fed. Rep. 422.

368. 5. *Fraudulent Transaction.* — See U. S. v. Young, 128 Fed. Rep. 111.

372. 6. *Restricted to Powers Granted or Nec-*

essarily Implied. — Bailey v. Farmers Nat. Bank, 97 Ill. App. 66; Merchants' Nat. Bank v. Wehrmann, 69 Ohio St. 160; Commercial Nat. Bank v. Cuero First Nat. Bank, 97 Tex. 536, 104 Am. St. Rep. 879. See also Easton v. Iowa, 188 U. S. 220.

9. *"Incidental Powers" Defined.* — Commercial Nat. Bank v. Cuero First Nat. Bank, 97 Tex. 536, 104 Am. St. Rep. 879.

The Transmission of Funds is an important and essential function of national banks. Goshorn v. People's Nat. Bank, 32 Ind. App. 428, 102 Am. St. Rep. 248.

374. 3. *May Deal in Government Bonds.* — See Newport Nat. Bank v. Board of Education, 114 Ky. 87.

4. *The Purchase of Municipal Bonds* as an investment of its surplus funds has been held in Kentucky to be within the powers of a national bank. Newport Nat. Bank v. Board of Education, 114 Ky. 87.

375. 7. *May Borrow Money in Regular Course of Business.* — Hanover Nat. Bank v. Burlingame First Nat. Bank, (C. C. A.) 109 Fed. Rep. 421.

8. *Extent of Power to Borrow Money.* — See Hanover Nat. Bank v. Burlingame First Nat. Bank, (C. C. A.) 109 Fed. Rep. 421.

376. 6. *Circulating Notes.* — See Moscow First Nat. Bank v. American Nat. Bank, 173 Mo. 153; Commercial Nat. Bank v. Cuero First Nat. Bank, 97 Tex. 536, 104 Am. St. Rep. 879.

7. *Commercial Nat. Bank v. Cuero First Nat. Bank,* 97 Tex. 536, 104 Am. St. Rep. 879.

8. See Easton v. Iowa, 188 U. S. 220.

11. *Rights and Liabilities as Collecting Agents.* — Bay Biscayne Bank v. National Bank, 126 Fed. Rep. 436; Manhattan L. Ins. Co. v. Denver First Nat. Bank, (Colo. App. 1905) 80 Pac. Rep. 467; Lord v. Hingham Nat. Bank, 186 Mass. 161; Ft. Dearborn Nat. Bank v. Security Bank, 87 Minn. 81; Continental Nat. Bank v. West Point First Nat. Bank, 84 Miss. 103; Nash v. Red Bank Second Nat. Bank, 67 N. J. L. 265; Peoples Nat. Bank v. Brogden, 98 Tex. 360.

376. 9. Contracts of Guaranty or Suretyship — *a.* LOAN OF CREDIT IN GENERAL. — See note 12.

377. See note 4.

378. *d.* EFFECT OF ULTRA VIRES ACT. — See note 1.

12. Dealing in Coin — The Statute Expressly Provides. — See note 9.

13. Dealing in Stocks — *b.* STOCKS OF OTHER CORPORATIONS —

(1) *Purchase as Investment.* — See note 12.

379. (2) *Taking Stocks as Security or by Way of Compromise.* — See note 1.

(3) *Liability as Stockholder.* — See notes 2, 3.

14. Deposits — *a.* GENERAL DEPOSITS — (1) *Statutory Provision.*

See note 7.

381. 15. Limit of Indebtedness — *b.* STATUTORY PROVISION. — See note 1.

d. EFFECT OF ULTRA VIRES ACT. — See note 3.

16. Loans and Discounts — *a.* POWER TO MAKE LOANS AND DISCOUNTS — (1) *In General* — Statutory Provision. — See note 4.

382. (3) *Loan to Directors.* — See note 3.

b. LIMIT OF AMOUNT OF LOANS AND DISCOUNTS — (1) *Statutory Provisions.* — See note 5.

(5) *Effect of Ultra Vires Act.* — See note 9.

383. *c.* SECURITY FOR LOANS — (1) *Personal Security* — (a) *Definition.* — See note 1.

376. 12. Cannot Make Accommodation Guaranty of Debt. — *Moscow First Nat. Bank v. American Nat. Bank*, 173 Mo. 153.

377. 4. Surety in Replevin Suit. — A national bank has no power to act as surety in a replevin suit. *Bailey v. Farmers Nat. Bank*, 97 Ill. App. 66.

378. 1. Estoppel. — The fact that the other party has performed the contract does not estop a national bank to plead *ultra vires* as to a contract of guaranty. *Moscow First Nat. Bank v. American Nat. Bank*, 173 Mo. 153.

9. May Deal in Coin. — *Commercial Nat. Bank v. Cuero First Nat. Bank*, 97 Tex. 536, 104 Am. St. Rep. 879. See also *Moscow First Nat. Bank v. American Nat. Bank*, 173 Mo. 153.

12. Purchase of Stock in Other Corporations as Investment Void. — *Shaw v. National German-American Bank*, (C. C. A.) 132 Fed. Rep. 658; *Merchants' Nat. Bank v. Wehrmann*, 69 Ohio St. 160. See also *Brunswick Terminal Co. v. National Bank*, 112 Fed. Rep. 812, affirmed 192 U. S. 386.

But a National Bank Must Pay Losses Sustained in the purchase and sale by its cashier of stocks on margins, where the cashier, having authority to buy and sell stocks, opened an account in the bank's name with brokers, and, buying and selling for both cash and on margins, made large profits on the cash transactions. *National Bank v. Fridenberg*, 206 Pa. St. 243.

379. 1. Stock May Be Taken by Way of Security or in Compromise of Debt. — *Merchants' Nat. Bank v. Wehrmann*, 69 Ohio St. 160.

Question Can Be Raised by Government Only. — The question of a bank's right to take stock of another corporation as security for an indebtedness can be raised by the government only. *Union Nat. Bank v. Touzalin Imp. Co.*, (Neb. 1901) 95 N. W. Rep. 489. And see *supra*, this title, **373**, 13.

2. *Merchants' Nat. Bank v. Wehrmann*, 69 Ohio St. 160.

3. Bank Not Liable as Stockholder When Purchase Not Authorized. — *Shaw v. National German-American Bank*, (C. C. A.) 132 Fed. Rep. 658; *Brunswick Terminal Co. v. National Bank*, 112 Fed. Rep. 812, affirmed 192 U. S. 386.

7. May Receive Deposits. — See *Easton v. Iowa*, 188 U. S. 220; *Moscow First Nat. Bank v. American Nat. Bank*, 173 Mo. 153; *Commercial Nat. Bank v. Cuero First Nat. Bank*, 97 Tex. 536, 104 Am. St. Rep. 879.

381. 1. Statutory Provision Limiting Indebtedness. — See *Hanover Nat. Bank v. Burlingame First Nat. Bank*, 109 Fed. Rep. 422.

3. *Brown v. Schleier*, 112 Fed. Rep. 577, affirmed (C. C. A.) 118 Fed. Rep. 981. See also *Hanover Nat. Bank v. Burlingame First Nat. Bank*, (C. C. A.) 109 Fed. Rep. 422.

4. Loans and Discounts. — See *Moscow First Nat. Bank v. American Nat. Bank*, 173 Mo. 153; *Commercial Nat. Bank v. Cuero First Nat. Bank*, 97 Tex. 536, 104 Am. St. Rep. 879.

382. 3. May Loan to Directors. — See U. S. v. Breese, 131 Fed. Rep. 915; *St. Johns Nat. Bank v. Steel*, 135 Mich. 165.

5. Provisions Limiting Amount of Loans and Discounts. — See *Hanover Nat. Bank v. Burlingame First Nat. Bank*, (C. C. A.) 109 Fed. Rep. 422.

9. Ultra Vires Act No Defense to Suit for Money Loaned. — See *Hanover Nat. Bank v. Burlingame First Nat. Bank*, (C. C. A.) 109 Fed. Rep. 422.

The Validity of Notes Is Not Affected by the fact that the cashier of the bank has been convicted for discounting notes for the same maker in excess of the statutory limit, and that the receiver of the bank has recovered the amount of the penalty in the cashier's bond. *In re Edison*, 119 Fed. Rep. 487.

383. 1. Personal Security. — See *Moscow First Nat. Bank v. American Nat. Bank*, 173 Mo. 153; *Commercial Nat. Bank v. Cuero First Nat. Bank*, 97 Tex. 536, 104 Am. St. Rep. 879.

383. (2) *Bank's Own Shares as Security* — (a) *Statutory Provisions.* — See note 7.

(c) *Effect of Ultra Vires Act.* — See note 9.

384. (3) *Loans on Real Estate* — (a) *Statutory Prohibition.* — See note 2.

(e) *Effect of Ultra Vires Act.* — See note 7.

385. 17. *Other Business Enterprises* — a. *PROHIBITION AGAINST ENGAGING IN OTHER BUSINESS.* — See note 1.

b. *EFFECT OF ULTRA VIRES ACTS.* — See note 4.

386. 18. *Real Estate and Mortgages* — a. *RIGHT TO PURCHASE AND HOLD REAL ESTATE* — (2) *Real Estate Necessary for Banking Business.* — See note 1.

(3) *Real Estate Necessary to Secure Debt.* — See note 2.

387. d. *MORTGAGES* — *Right to Take or Purchase.* — See note 1.

V. *INTEREST AND USURY* — 1. *What Law Governs* — *Federal Laws Exclusive.* — See note 4.

388. 2. *Rate of Interest Allowed* — b. *RATE ALLOWED BY STATE LAWS.* — See note 1.

c. *WHERE NO RATE IS FIXED BY STATE LAWS.* — See note 6.

391. 3. *Payment or Reservation of Usury* — f. *REMITTING INTEREST.* — See note 2.

4. *Effect of Usury on Transaction* — a. *VALIDITY OF CONTRACT.* — See note 5.

b. *FORFEITURE OF INTEREST* — (1) *Interest-bearing Power of Debt Destroyed by Usury.* — See note 7.

392. See note 1.

383. 7. *Loan on Bank's Own Shares Prohibited.* — *Brown v. Ohio Nat. Bank*, 18 App. Cas. (D. C.) 598. See also *Hanover Nat. Bank v. Burlingame First Nat. Bank*, (C. C. A.) 109 Fed. Rep. 422.

9. *Effect of Ultra Vires Act.* — *Brown v. Ohio Nat. Bank*, 18 App. Cas. (D. C.) 598.

384. 2. *Loan on Real Estate Prohibited.* — *Sutton First Nat. Bank v. Grosshans*, 61 Neb. 575. See also *Hanover Nat. Bank v. Burlingame First Nat. Bank*, (C. C. A.) 109 Fed. Rep. 421.

A *National Bank May Be Substituted to the Rights of a Surety* who has taken a mortgage on realty. *Magoffin v. Boyle Nat. Bank*, (Ky. 1902) 69 S. W. Rep. 702.

7. *Securities Taken in Violation of Law Are Enforceable.* — *Sutton First Nat. Bank v. Grosshans*, 61 Neb. 575. See also *Hanover Nat. Bank v. Burlingame First Nat. Bank*, (C. C. A.) 109 Fed. Rep. 421.

385. 1. *Boyd v. Schneider*, 124 Fed. Rep. 239.

4. *Effect of Ultra Vires Acts.* — *Merchants' Nat. Bank v. Wehrmann*, 69 Ohio St. 160.

386. 1. *Term of Lease of Realty for Banking Purposes.* — A national bank may lease real estate for use in its banking business, and it is no objection that the lease is for a term exceeding the bank's corporate life, the leasehold interest being salable as an asset during the life of the corporation or on its dissolution, *Brown v. Schleier*, (C. C. A.) 118 Fed. Rep. 981, affirming 112 Fed. Rep. 577, affirmed 194 U. S. 18; *Weeks v. International Trust Co.*, (C. C. A.) 125 Fed. Rep. 370.

2. *Speculations in Real Estate Prohibited.* See *Buchanan v. Saunders County Nat. Bank*, (Neb. 1903) 94 N. W. Rep. 631.

387. 1. *Mortgage May Be Taken to Secure Antecedent Debts.* — See *Merchants' Nat. Bank v. Wehrmann*, 69 Ohio St. 160.

An *Owner of Mortgaged Property Cannot Enjoin the Foreclosure* of a mortgage on the ground that the defendant, a national bank, has taken an assignment of the decree in foreclosure as a speculation. *Buchanan v. Saunders County Nat. Bank*, (Neb. 1903) 94 N. W. Rep. 631.

4. *Federal Laws Fixing Rates and Penalties Supersede State Laws.* — *Haseltine v. Central Nat. Bank*, 183 U. S. 132.

388. 1. *By Compounding Interest* oftener than the law permits a bank may charge a higher rate than allowed by state law and thereby violate the federal law fixing the minimum rate to be charged. *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369.

6. *Haseltine v. Central Nat. Bank*, 183 U. S. 132.

391. 2. *When Offer to Remit Too Late.* — Where an action on a note is met by a plea of usury it is too late for the bank to elect to remit the excessive interest. *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369.

So on a second trial after a successful plea of usury and reversal on another ground it is too late to offer to remit. *Richmond Second Nat. Bank v. Fitzpatrick*, (Ky. 1905) 84 S. W. Rep. 1150.

5. *Validity of Contract Not Affected by Usury.* — See *Rapid City First Nat. Bank v. McCarthy*, (S. Dak. 1904) 100 N. W. Rep. 14.

7. *The Statute Provides.* — *Talbot v. Sioux City First Nat. Bank*, 185 U. S. 172, affirming 106 Iowa 361; *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255.

392. 1. *All Interest Forfeited Where Usury Paid or Reserved.* — *Richmond Second Nat.*

392. (3) *Defense of Usury* — (a) *Jurisdiction*. — See note 4.

393. (b) *Who May Make in General*. — See note 1.

(d) *Limitation*. — See note 4.

c. *RENEWAL NOTES*. — See note 5.

5. Remedies Where Unlawful Interest Taken — a. *STATUTORY REMEDY EXCLUSIVE*. — See note 6.

394. b. *SET-OFF OF INTEREST OR USURY PAID*. — See note 1.

c. *RECOVERY OF DOUBLE INTEREST PAID* — (1) *Statutory Provision*. — See note 2.

(2) *Set-off of Penalty in Suit for Debt*. — See note 3.

395. (4) *Who May Sue* — (a) *Statutory Provision*. — See note 6.

(b) *Persons Making Payment*. — See note 9.

(c) *Legal Representatives*. — See note 12.

396. (5) *Jurisdiction*. — See note 3.

(6) *Limitation of Action*. — See notes 4, 5.

397. (8) *Extent of Recovery*. — See notes 2, 3.

VI. ACTIONS BY AND AGAINST NATIONAL BANKS — 1. *Right to Sue and Be Sued* — The First National Bank Act Empowered. — See note 5.

2. *Remedies* — a. *ATTACHMENT* — (1) *Statutory Provision*. — See note 6.

Bank v. Fitzpatrick, (Ky. 1905) 84 S. W. Rep. 1150; *Rapid City First Nat. Bank v. McCarthy*, (S. Dak. 1904) 100 N. W. Rep. 14. See also *Talbot v. Sioux City First Nat. Bank*, 185 U. S. 172, *affirming* 106 Iowa 361.

The statute provides for the forfeiture, not of the amount by which the usurious has exceeded the lawful rate, but of the entire interest. *Lake Benton First Nat. Bank v. Watt*, 184 U. S. 151.

392. 4. *Defense of Usury Available in Any Court*. — See *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369.

393. 1. *Defense Available to Any Party*. — *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369.

4. *Statute of Limitations Not Applicable to Defense of Usury*. — Compare *Rapid City First Nat. Bank v. McCarthy*, (S. Dak. 1904) 100 N. W. Rep. 14.

5. *Renewal Notes Tainted with Usury in Prior Transaction*. — *Rapid City First Nat. Bank v. McCarthy*, (S. Dak. 1904) 100 N. W. Rep. 14; *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255.

6. *Statutory Remedy Exclusive*. — *Haseltine v. Central Nat. Bank*, 183 U. S. 132; *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255.

394. 1. *Interest and Usury Paid Cannot Be Set Off in Action on Debt*. — *Haseltine v. Central Nat. Bank*, 183 U. S. 132; *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255. But see *Rapid City First Nat. Bank v. McCarthy*, (S. Dak. 1904) 100 N. W. Rep. 14.

2. *Statutory Remedy Where Usury Actually Paid*. — *Talbot v. Sioux City First Nat. Bank*, 185 U. S. 172, *affirming* 106 Iowa 361; *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255.

A Change in the Personnel of the Bank's Working Force, between the making of the contract and the last usurious payments, is immaterial in an action to recover the statutory penalty. *U. S. National Bank v. Forstedt*, 64 Neb. 855.

3. *Actual Payment Necessary*. — *Talbot v. Sioux City First Nat. Bank*, 185 U. S. 172, *affirming* 106 Iowa 361.

395. 6. *Statutory Provision*. — *Lake Ben-*

ton First Nat. Bank v. Watt, 184 U. S. 151; *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255.

Payment of a Note by a Third Person in consideration of the conveyance of property by the maker of the note is to be treated as payment made by the maker. *Lasater v. Jacksboro First Nat. Bank*, 96 Tex. 345.

9. *A Continuing Partner* may sue under an assignment to him of his partner's cause of action to recover the penalty for exacting usurious interest from the partnership. *Lasater v. Jacksboro First Nat. Bank*, 96 Tex. 345.

12. *Where a Trustee in Bankruptcy Fails to Sue* on a cause of action for taking usury from the bankrupt, the bankrupt himself, after his discharge, should be allowed to recover. *Lasater v. Jacksboro First Nat. Bank*, 96 Tex. 345.

396. 3. *State Courts Have Jurisdiction of Action for Penalty*. — *McCreary v. Morristown First Nat. Bank*, 109 Tenn. 134, *quoting* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 396; *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255.

4. *Statutory Provision Limiting Time to Sue*. — *Talbot v. Sioux City First Nat. Bank*, 106 Iowa 361; *Rapid City First Nat. Bank v. McCarthy*, (S. Dak. 1904) 100 N. W. Rep. 14; *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255.

5. *Limitation Runs from Actual Payment of Interest*. — *Lasater v. Jacksboro First Nat. Bank*, (Tex. Civ. App. 1902) 72 S. W. Rep. 1054.

397. 2. *Double All Interest Paid May Be Recovered*. — *Lake Benton First Nat. Bank v. Watt*, 184 U. S. 151; *Talbot v. Sioux City First Nat. Bank*, 185 U. S. 172, *affirming* 106 Iowa 361; *U. S. National Bank v. Forstedt*, 64 Neb. 855; *McCreary v. Morristown First Nat. Bank*, 109 Tenn. 134; *Charleston Nat. Bank v. Bradford*, 51 W. Va. 255.

3. *Amount Does Not Bear Interest*. — *McCreary v. Morristown First Nat. Bank*, 109 Tenn. 134.

5. *Right to Sue and Be Sued*. — *Boyd v. Schneider*, (C. C. A.) 131 Fed. Rep. 223.

6. *Attachment*. — *Willard Mfg. Co. v. Merchants' Nat. Bank*, 130 N. Car. 609.

- 398.** (2) *In State Courts.* — See note 1.
 (3) *In Federal Courts.* — See note 2.
- 399.** *b.* INJUNCTION. — See note 5.
- 400.** 3. JURISDICTION — *a.* FEDERAL COURTS — Jurisdiction Changed by Statute. — See note 3.
 Diversity of Citizenship or Federal Question. — See note 6.
 Actions to Wind up Bank. — See note 8.
- 401.** Location of Bank. — See note 2.
b. STATE COURTS — State Courts Have Concurrent Jurisdiction. — See note 6.
- 402.** Subsequent Statutes. — See note 2.
 VII. VOLUNTARY LIQUIDATION — 1. Right to Liquidate. — See note 4.
 2. Proceedings for Liquidation. — See note 6.
- 403.** 3. Effect of Liquidation Proceedings — *a.* DISSOLUTION OF CORPORATION. — See note 2.
 4. Liquidating Agents — Duty to Collect Assets. — See note 6.
- 404.** VIII. EXPIRATION, EXTENSION, OR FORFEITURE OF FRANCHISE AND DISSOLUTION — 2. Expiration of Franchise. — See note 5.
 4. Dissolution and Its Effect. — See note 9.
- 406.** IX. INSOLVENCY AND RECEIVERS — 2. Receivers — *a.* APPOINTMENT — (1) *Power of Courts* — In General. — See note 5.
 But Where the Bank Is Clearly Insolvent. — See note 7.

A Suit in Equity, in Attachment, under the *Mississippi* Code, by the buyer of corn against a national bank which purchased and subsequently collected a draft with bill of lading attached, does not come within the prohibition of Rev. Stat. U. S., § 5242. *Searles v. Smith Grain Co.*, 80 Miss. 688.

The Appointment of a Permanent Receiver, as part of a final judgment, is not a violation of the statute. *Cogswell v. Norwich Second Nat. Bank*, 76 Conn. 252.

398. 1. Attachment Cannot Be Issued in Any Case Before Final Judgment. — *Van Reed v. People's Nat. Bank*, 67 N. Y. App. Div. 75, *affirmed* 173 N. Y. 314; *Willard Mfg. Co. v. Merchants' Nat. Bank*, 130 N. Car. 609.

2. No Exception in Favor of Federal Courts. — See *Willard Mfg. Co. v. Merchants' Nat. Bank*, 130 N. Car. 609.

399. 5. But Not Out of State Court. — *Meyer v. Cœur d'Alene First Nat. Bank*, 10 Idaho 175.

400. 3. National Banks Placed in the Same Category with Other Banks. — *George v. Wallace*, (C. C. A.) 135 Fed. Rep. 286. See also *Cogswell v. Norwich Second Nat. Bank*, 76 Conn. 252.

6. National Banks on Same Footing as Other Parties. — *Cogswell v. Norwich Second Nat. Bank*, 76 Conn. 252; *Tuttle v. Iron Nat. Bank*, 170 N. Y. 9.

8. Actions to Wind up Bank. — *International Trust Co. v. Weeks*, 116 Fed. Rep. 898, (C. C. A.) 125 Fed. Rep. 370; *George v. Wallace*, (C. C. A.) 135 Fed. Rep. 286. See also *Cogswell v. Norwich Second Nat. Bank*, 76 Conn. 252.

401. 2. Location of Bank for Jurisdictional Purposes. — *George v. Wallace*, (C. C. A.) 135 Fed. Rep. 286.

6. State Courts Have Concurrent Jurisdiction with Federal Courts. — *Matter of Hayt*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 356.

402. 2. Purpose of Statute. — Act Cong. July 12, 1882, was intended to prescribe the forum

for litigation by and against national banks. *Van Reed v. People's Nat. Bank*, 67 N. Y. App. Div. 75, *affirmed* 173 N. Y. 304.

4. Provisions for Liquidation. — *Muir v. Citizens' Nat. Bank*, (Wash. 1905) 80 Pac. Rep. 1007. See also *George v. Wallace*, (C. C. A.) 135 Fed. Rep. 286.

6. Statute Providing for Liquidating Proceedings. — See *Muir v. Citizens' Nat. Bank*, (Wash. 1905) 80 Pac. Rep. 1007.

403. 2. Corporation Not Dissolved but May Sue and Be Sued. — *George v. Wallace*, (C. C. A.) 135 Fed. Rep. 286.

A Suit to Compel a Transfer of Stock on the books and the issuance of new certificates to the transferee is not maintainable during the pendency of liquidation proceedings, the bank's existence being continued merely for winding-up purposes, and not for the purposes of a going concern. *Muir v. Citizens' Nat. Bank*, (Wash. 1905) 80 Pac. Rep. 1007.

6. The Assets Constitute a Trust Fund, in the hands of the liquidating agent, for the primary benefit of the creditors. *George v. Wallace*, (C. C. A.) 135 Fed. Rep. 286.

404. 5. *Cogswell v. Norwich Second Nat. Bank*, 76 Conn. 252; *Tuttle v. Iron Nat. Bank*, 170 N. Y. 9.

9. The Federal Law Is Supreme in the distribution of the assets of a dissolved national bank. *Chicago First Nat. Bank v. Selden*, (C. C. A.) 120 Fed. Rep. 212.

406. 5. Courts May Appoint Receiver. — The jurisdiction and power remain in the federal courts to appoint receivers of national banks in voluntary liquidation. *King v. Pomeroy*, (C. C. A.) 121 Fed. Rep. 287.

A state court may appoint a receiver of a national bank whose charter has expired, in a suit brought by a person claiming to be both stockholder and *cestui que trust* with respect to a specific fund. *Cogswell v. Norwich Second Nat. Bank*, 76 Conn. 252.

7. Receiver Will Be Appointed in Case of Gross

- 406.** (2) *Power of Comptroller* — Statutory Provision. — See notes 8, 9.
- 407.** See note 1.
- (3) *Conclusiveness of Comptroller's Action.* — See note 3.
- (4) *Effect of Appointment.* — See note 4.
- d. REMOVAL.** — See note 5.
- c. POWERS** — (1) *Status of Receiver* — The Receiver Stands in Place of the Bank. — See note 7.
- 408.** (2) *Control of Court.* — See notes 1, 2, 3.
- (3) *Authority to Contract.* — See notes 5, 7, 8.
- (4) *Sale of Property* — Necessity of Order of Court. — See note 9.
- 409.** (5) *Compromise of Debts or Suits.* — See note 1.
- d. SUITS BY AND AGAINST RECEIVERS** — (1) *Right to Sue or Defend.* — See notes 5, 7.
- (3) *Jurisdiction* — (a) Federal Courts — Receiver Is Officer of United States. — See note 11.
- 412. 3. Claims and Distribution** — **b. DETERMINATION AND ENFORCEMENT OF CLAIMS** — How Claims Established. — See note 2.

Mismanagement. — Cogswell v. Norwich Second Nat. Bank, 76 Conn. 252. See also King v. Pomeroy, (C. C. A.) 121 Fed. Rep. 287.

406. 8. Appointment of Receiver by Comptroller. — See Studebaker v. Perry, 184 U. S. 258; King v. Pomeroy, (C. C. A.) 121 Fed. Rep. 287.

9. See King v. Pomeroy, (C. C. A.) 121 Fed. Rep. 287.

407. 1. See King v. Pomeroy, (C. C. A.) 121 Fed. Rep. 287; Rankin v. Barton, 69 Kan. 629.

Power Judicial in Nature. — Boyd v. Schneider, 124 Fed. Rep. 239.

3. Comptroller's Action Conclusive on All Parties. — Boyd v. Schneider, 124 Fed. Rep. 239.

4. Appointment of Receiver Does Not Dissolve Corporation or Prevent Suits. — Camp v. Ocala First Nat. Bank, 44 Fla. 497; Tecumseh Nat. Bank v. Chamberlain Banking House, 63 Neb. 163.

5. Removal of Receiver. — Boyd v. Schneider, 124 Fed. Rep. 239. See also Studebaker v. Perry, 184 U. S. 258.

7. A Receiver Has Legal Title to the property covered by his appointment. Fish v. Olin, 76 Vt. 120.

Receivers of Courts of Equity, appointed in the judicial administration of the affairs of insolvent banks, are, in the absence of restrictive statutes, empowered to enforce the rights of creditors as well as the rights of the debtor. King v. Pomeroy, (C. C. A.) 121 Fed. Rep. 287.

408. 1. Receiver Merely Instrument of Comptroller. — Boyd v. Schneider, 124 Fed. Rep. 239. See also Studebaker v. Perry, 184 U. S. 258.

2. The Receiver Is Practically the Agent of the Comptroller, who acts for the government. Watts v. Dubois, (Tex. Civ. App. 1902) 66 S. W. Rep. 698.

3. See Boyd v. Schneider, 124 Fed. Rep. 239.

5. Powers Limited by Statute. — Watts v. Dubois, (Tex. Civ. App. 1902) 66 S. W. Rep. 698.

7. A Receiver May Assign a Claim Against a

Stockholder personally liable for the debts of the bank. Waldron v. Alling, 73 N. Y. App. Div. 86.

8. Cannot Rescind Bank's Contract. — Brown v. Schleier, 112 Fed. Rep. 577, affirmed (C. C. A.) 118 Fed. Rep. 981, 194 U. S. 18, holding that the receiver cannot rescind a contract on the ground that it was *ultra vires*, since his rights to such relief are not superior to those of the bank.

9. The Receiver, as Instrument of the Comptroller, has authority to sell the bank's real estate. Boyd v. Schneider, 124 Fed. Rep. 239.

409. 1. Receiver May Compromise Debts. — The receiver, as the instrument of the comptroller, has authority to collect and compromise debts. Boyd v. Schneider, 124 Fed. Rep. 239.

5. Receiver May Sue to Recover Assets. — McCartney v. Earle, (C. C. A.) 115 Fed. Rep. 462. See also Campbell v. Manufacturers' Nat. Bank, 67 N. J. L. 301, 91 Am. St. Rep. 438; Fish v. Olin, 76 Vt. 120.

The Receiver Is the Proper Party to institute all suits. Boyd v. Schneider, 124 Fed. Rep. 239, (C. C. A.) 131 Fed. Rep. 223.

A Receiver Is Not Exempted from the Operation of State Laws relative to fraudulent mortgages, although he may be suing as the agent of the comptroller. Watts v. Dubois, (Tex. Civ. App. 1902) 66 S. W. Rep. 698.

7. Receiver May Defend Suits Against Banks. — U. S. v. Young, 128 Fed. Rep. 111.

11. Jurisdiction of Federal Circuit Courts. — McCartney v. Earle, (C. C. A.) 115 Fed. Rep. 462.

Citizenship of Receiver Not Material. — Weeks v. International Trust Co., (C. C. A.) 125 Fed. Rep. 370.

412. 2. Notice to Be Given to Creditors. — The comptroller, through his receiver, is required to give notice to creditors to present their claims. Boyd v. Schneider, 124 Fed. Rep. 239.

NATURAL GAS.

- 417.** I. NATURE AND CHARACTER. — See note 2.
 II. PROPERTY IN NATURAL GAS. — See note 3.
- 418.** IV. NATURAL-GAS COMPANIES. — See note 4.
- 419.** Eminent Domain. — See note 1.
- 420.** NATURALLY. — See note 4.
 NATURAL WATERCOURSE. — See note 6.
 NATURE — NATURAL. — See note 7.
- 423.** [NAVAL STORES. — See note 2a.]
- 417.** 2. That Natural Gas Is a Mineral is well settled. *Lanyon Zinc Co. v. Freeman*, 68 Kan. 691.
3. Property. — *Lanyon Zinc Co. v. Freeman*, 68 Kan. 691.
- 418.** 4. The Wasting of Natural Gas by allowing it to escape from wells is made a misdemeanor by the legislature of *Indiana*. See *Bailey v. State*, 163 Ind. 165.
- 419.** 1. Eminent Domain. — *State v. Consumers Gas Trust Co.*, 157 Ind. 345; *La Harpe v. Elm Tp. Gas, etc., Co.*, 69 Kan. 97; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662.
- 420.** 4. Naturally. — See *Davis v. Rich*, 180 Mass. 235.
6. Natural Watercourse. — *Singleton v. Atchison, etc., R. Co.*, 67 Kan. 284; *Porter v. Armstrong*, 129 N. Car. 101.
7. Natural Children. — *Vance's Succession*, 110 La. 760.
- Natural and Proximate Cause or Consequences. — See *Flynn v. Consolidated Traction Co.*, 67 N. J. L. 546; *Carter v. Cape Fear Lumber Co.*, 129 N. Car. 203.
- Natural State of Shells — Customs Duties. — *Schoenemann v. U. S.*, 115 Fed. Rep. 842.
- The Term "Natural Flow" as used in a statute regulating the use of pumps in natural gas wells means the entire volume of gas that will issue from the mouth of a well when retarded only by the atmospheric pressure. *Richmond Natural Gas Co. v. Enterprise Natural Gas Co.*, 31 Ind. App. 222.
- 423.** 2a. The Term "Naval Stores" includes rosin, turpentine, products of crude turpentine, tar, and rosin oil. *Interstate Commerce Commission v. Louisville, etc., R. Co.*, 118 Fed. Rep. 617.

NAVIGABLE WATERS.

BY E. G. CHILTON.

- 425.** I. TESTS OF NAVIGABILITY — 1. Ebb and Flow of Tide. — See note 1.
- 426.** See note 1.
2. Actual Navigability — a. IN GENERAL. — See note 2.
- 428.** In Canada. — See note 3.
- b. WHAT CONSTITUTES — (1) *In General*. — See note 4.
- 425.** 1. English Rule. — See *State v. Baum*, 128 N. Car. 600.
- 426.** 1. May Be Nonnavigable Though Tidal. — Compare *Brookhaven v. Smith*, 98 N. Y. App. Div. 212.
2. Usual Rule in United States. — *State v. Longfellow*, 169 Mo. 109; *Brewster v. J. & J. Rogers Co.*, 169 N. Y. 79; *State v. Twiford*, 136 N. Car. 603; *Webster v. Harris*, 111 Tenn. 668; *Dawson v. McMillan*, 34 Wash. 274, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 426; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905; *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662. See also *U. S. v. Wishkah Boom Co.*, (C. C. A.) 136 Fed. Rep. 42; *Lathrop v. Racine*, 119 Wis. 461.
- Matter of Fact or of Law. — Fresh-water rivers are navigable as a matter of fact, while salt-water rivers and tidewaters generally are navigable as a matter of law. *Brookhaven v. Smith*, 98 N. Y. App. Div. 212.
- 428.** 3. Canada Rule. — *Hull v. Scott*, 24 Quebec Super. Ct. 59, 13 Quebec K. B. 164; *Atty.-Gen. v. Hull*, 34 Can. Sup. Ct. 603.
- In the Province of Quebec the question of navigability or floatability of rivers is governed by the principles of the ancient law of France. *Le Procureur Gen. v. Fraser*, 25 Quebec Super. Ct. 104.
4. Capability of Use for Transportation. — *Brewster v. J. & J. Rogers Co.*, 169 N. Y. 79; *Webster v. Harris*, 111 Tenn. 668; *Monroe Mill*

- 428.** Floatable Streams. — See notes 5, 6.
 (2) *Natural Navigability Necessary.* — See note 7.
- 429.** (3) *Continuous Navigability Not Necessary.* — See note 1.
 (4) *Continuing Capacity Not Necessary.* — See notes 3, 4.
 c. *PROOF OF NAVIGABILITY.* — See note 5.
- 430. II. OWNERSHIP AND CONTROL — 1. Ownership — b. TIDAL LANDS AND WATERS — (1) In England. — See note 3.
 (2) *In United States — (a) In Organized States.* — See note 4.**
- 431.** (b) *In Other Territory.* — See notes 1, 2.
 c. *NONTIDAL WATERS — In the United States.* — See note 4.
- 432. 2. Control — b. IN UNITED STATES — (1) By Congress. — See notes 4, 5.**
- Co. v. Menzel, 35 Wash. 487, 102 Am. St. Rep. 905; Matthews v. Belfast Mfg. Co., 35 Wash. 662.
- Capacity for Use, and Not Actual Use, Determines.** — State v. Twiford, 136 N. Car. 603. Compare State v. Baum, 128 N. Car. 600.
- Termini Necessary.** — To make a stream a public highway it must not only be capable of flotation, but it must have a terminus at which the public can enter it and a terminus at which they may leave it. Manigault v. Ward, 123 Fed. Rep. 707.
- 428. 5. Floatable Streams Navigable.** — U. S. v. Wishkah Boom Co., (C. C. A.) 136 Fed. Rep. 42; Watkins v. Dorris, 24 Wash. 636; Monroe Mill Co. v. Menzel, 35 Wash. 487, 102 Am. St. Rep. 905; Matthews v. Belfast Mfg. Co., 35 Wash. 662. See also Dawson v. McMillan, 34 Wash. 274; Creech v. Humptulips Boom, etc., Imp. Co., 37 Wash. 172.
- Must Be Floatable for Rafts of Lumber.** — Brewster v. J. & J. Rogers Co., 169 N. Y. 79.
- 6 Compare Manigault v. Ward, 123 Fed. Rep. 707.**
- 7. Artificial Navigability Insufficient.** — Webster v. Harris, 111 Tenn. 668. See also Brewster v. J. & J. Rogers Co., 169 N. Y. 79; State v. Baum, 128 N. Car. 600. Compare Beidler v. Sanitary Dist., 211 Ill. 628; Lathrop v. Racine, 119 Wis. 461.
- 429. 1. Continuous Navigability Not Necessary.** — See Le Procureur v. Fraser, 25 Quebec Super. Ct. 104.
- 3. Perennial Navigability Not Necessary.** — Miller v. Enterprise Canal, etc., Co., 142 Cal. 208, 100 Am. St. Rep. 115; Dawson v. McMillan, 34 Wash. 274; Monroe Mill Co. v. Menzel, 35 Wash. 487, 102 Am. St. Rep. 905; Matthews v. Belfast Mfg. Co., 35 Wash. 662.
- 4. Webster v. Harris, 111 Tenn. 668; Dawson v. McMillan, 34 Wash. 274.** See also Matthews v. Belfast Mfg. Co., 35 Wash. 662.
- 5. Question of Fact.** — State v. Baum, 128 N. Car. 600; State v. Twiford, 136 N. Car. 603; Webster v. Harris, 111 Tenn. 668.
- Evidence.** — The connection of a stream of water, or its want of connection, with other navigable streams is a strong circumstance in determining the navigability. Webster v. Harris, 111 Tenn. 668.
- 430. 3. Ownership of Tidal Waters — Rule in England.** — See San Francisco Sav. Union v. R. G. R. Petroleum, etc., Co., 144 Cal. 134; Cobb v. Lincoln Park, 202 Ill. 427, 95 Am. St. Rep. 258; Brookhaven v. Smith, 98 N. Y. App. Div. 212; Taylor v. Com., 102 Va. 759, 102 Am. St. Rep. 865.
- 4. Rule in United States — United States.** — Mobile Transp. Co. v. Mobile, 187 U. S. 479; U. S. v. Mission Rock Co., 189 U. S. 391; Leverich v. Mobile, 110 Fed. Rep. 170; Stockley v. Cissna, (C. C. A.) 119 Fed. Rep. 812.
Alabama. — Mobile Transp. Co. v. Mobile, 128 Ala. 335, 86 Am. St. Rep. 143.
California. — San Francisco Sav. Union v. R. G. R. Petroleum, etc., Co., 144 Cal. 134.
Illinois. — Bliss v. Ward, 198 Ill. 104; Cobb v. Lincoln Park, 202 Ill. 427, 95 Am. St. Rep. 258; Chicago Transit Co. v. Campbell, 110 Ill. App. 366.
Maryland. — Dundalk, etc., R. Co. v. Smith, 97 Md. 177.
New Jersey. — Atlantic City v. New Auditorium Pier Co., 63 N. J. Eq. 644; Simpson v. Moorhead, 65 N. J. Eq. 623; Shamburg v. Board of Riparian Com'rs, (N. J. 1905) 60 Atl. Rep. 43; Woodcliff Land Imp. Co. v. New Jersey Shore Line R. Co., (N. J. 1905) 60 Atl. Rep. 44.
New York. — White v. Nassau Trust Co., 168 N. Y. 149; Southold v. Parks, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 456, affirmed 97 N. Y. App. Div. 636.
North Carolina. — Shepard's Point Land v. Atlantic Hotel, 132 N. Car. 517.
Oregon. — Muckle v. Good, 45 Oregon 230.
Rhode Island. — New York, etc., R. Co. v. Horgan, 25 R. I. 408; Rhode Island Motor Co. v. Providence, (R. I. 1903) 55 Atl. Rep. 696.
Virginia. — Taylor v. Com., 102 Va. 759, 102 Am. St. Rep. 865.
Washington. — West Seattle v. West Seattle Land, etc., Co., 38 Wash. 359.
West Virginia. — See State v. Faudre, 54 W. Va. 122, 102 Am. St. Rep. 927.
Wisconsin. — Rossmiller v. State, 114 Wis. 169, 91 Am. St. Rep. 910.
- Whatever the Bed of the River Contains Belongs to the State,** and the state alone has the right to develop those hidden sources of wealth, if such there be, for the common benefit of all its citizens. Taylor v. Com., 102 Va. 759, 102 Am. St. Rep. 865.
- 431. 1. Territorial Tidal Waters.** — U. S. v. Mission Rock Co., 189 U. S. 391.
- 2. Leverich v. Mobile, 110 Fed. Rep. 170.**
- 4. Ownership of Nontidal Waters, Etc. — United States Rule.** — See Mobile Transp. Co. v. Mobile, 23 U. S. Supm. Ct. Rep. 170; State v. Longfellow, 169 Mo. 109; Slingerland v. International Contracting Co., 169 N. Y. 60.
- 432. 4. Power of Congress over Navigable Waters.** — Montgomery v. Portland, 190 U. S. 89; Bedford v. U. S., 36 Ct. Cl. 474, affirmed 192 U. S. 217; Mission Rock Co. v. U. S., (C.

- 433.** Obstructions. — See note 4.
 (2) *By States* — (a) *In General* — Except So Far as Congress May See Fit to Interfere. — See note 6.
- 434.** Upon the Admission of a State into the Union. — See note 1.
In New York. — See note 5.
Concurrent Control. — See note 6.
- 435.** (b) *Improvements* — *aa. In General.* — See notes 1, 2.
bb. Right of Riparian Owner to Damages. — See note 3.
- 436.** **III. GRANTS OF SHORES OR LANDS UNDER WATER** — 1. *In General.* — See note 1.
 2. *Limitation of Right to Grant* — *a. In England.* — See note 2.
b. In United States. — See notes 3, 4, 5.

C. A.) 109 Fed. Rep. 763, *affirmed* 189 U. S. 391; *McCaulley v. Philadelphia*, (C. C. A.) 119 Fed. Rep. 580; *Stockley v. Cissna*, (C. C. A.) 119 Fed. Rep. 812; *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143; *Frost v. Washington County R. Co.*, 96 Me. 76; *Crookston Waterworks, etc., Co. v. Sprague*, 91 Minn. 461; *Kansas City, etc., R. Co. v. Wiygul*, 82 Miss. 223. See also *Carrigan Transp. Co. v. Sanitary Dist.*, 125 Fed. Rep. 611.

432. 5. *Navigable Waters of United States Defined.* — *State v. Baum*, 128 N. Car. 600; *Webster v. Harris*, 111 Tenn. 668. See also *Manigault v. Ward*, 123 Fed. Rep. 707; *Bendich v. Sobel*, 107 La. 242.

433. 4. *Power to Remove Obstructions.* — *U. S. v. Wishkah Boom Co.*, (C. C. A.) 136 Fed. Rep. 42.

The Duty of Providing for the Safe Navigation of Rivers belongs to the sphere of the governmental duties of imperfect obligation. The federal government or the state government may voluntarily assume it, or the latter may impose it upon one of its municipalities to the extent that such waters are within the municipal limits. *Faust v. Cleveland*, (C. C. A.) 121 Fed. Rep. 810.

Right to Obstruct Navigation. — See *infra*, this title, 443. 1, 2.

6. *Power of States over Navigable Waters.* — *Cummings v. Chicago*, 188 U. S. 410; *Montgomery v. Portland*, 190 U. S. 89; *McCaulley v. Philadelphia*, (C. C. A.) 119 Fed. Rep. 580; *Chapin v. Maine Cent. R. Co.*, 97 Me. 151; *Crookston Waterworks, etc., Co. v. Sprague*, 91 Minn. 461; *Kansas City, etc., R. Co. v. Wiygul*, 82 Miss. 223; *Taylor v. Com.*, 102 Va. 759, 102 Am. St. Rep. 865; *Dawson v. McMillan*, 34 Wash. 274. See also *Corrigan Transp. Co. v. Sanitary Dist.*, 125 Fed. Rep. 611.

434. 1. *Right of States Admitted into Union.* — *U. S. v. Mission Rock Co.*, 189 U. S. 391; *Mobile v. Sullivan Timber Co.*, (C. C. A.) 129 Fed. Rep. 298; *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143; *West Seattle v. West Seattle Land, etc., Co.*, 38 Wash. 359; *Rossmiller v. State*, 114 Wis. 169, 91 Am. St. Rep. 910.

5. *Control by Certain New York Towns.* — See *Southold v. Parks*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 456, *affirmed* 97 N. Y. App. Div. 636.

Control by Municipality. — See *Matter of New York*, 168 N. Y. 134.

Control by Rhode Island Towns. — The Colo-

nial General Assembly of Rhode Island, acting by the express authority of the crown, granted to each town in the colony the title to and sovereignty over tide lands. *New York, etc., R. Co. v. Horgan*, 25 R. I. 408.

6. *State v. Faudre*, 54 W. Va. 122, 102 Am. St. Rep. 927.

Meaning of "Concurrent Jurisdiction." — The term "concurrent jurisdiction" refers to that authority commonly exercised concurrently upon water divided by the boundary line between two countries. *Roberts v. Fullerton*, 117 Wis. 222.

435. 1. *Improvements in Navigable Waters.* — *White v. Nassau Trust Co.*, 168 N. Y. 149; *Slingerland v. International Contracting Co.*, 169 N. Y. 60; *Carvalho v. Brooklyn, etc., Turnpike Co.*, (Supm. Ct. App. Div.) 76 N. Y. Supp. 859; *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N. Car. 517; *Rhode Island Motor Co. v. Providence*, (R. I. 1903) 55 Atl. Rep. 696. See also *U. S. v. Lynah*, 188 U. S. 445; *Berrien Springs Water-Power Co. v. Berrien Circuit Judge*, 133 Mich. 48.

2. *Harbor Commissioners.* — *Slingerland v. International Contracting Co.*, 169 N. Y. 60; *Dawson v. Broome*, 24 R. I. 359; *Rhode Island Motor Co. v. Providence*, (R. I. 1903) 55 Atl. Rep. 696.

3. *No Damages for Injuries Caused by Improvements.* — *Salliotte v. King Bridge Co.*, (C. C. A.) 122 Fed. Rep. 378.

Where the Taking Was Not for Navigation Purposes, the riparian owner is entitled to compensation. *Matter of New York*, 168 N. Y. 134.

436. 1. *Grant or Prescription.* — *Cobb v. Lincoln Park*, 202 Ill. 427, 95 Am. St. Rep. 258. See also *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N. Car. 517.

Express Grant Necessary in Quebec. — *Le Procureur v. Fraser*, 25 Quebec Super. Ct. 104.

2. *Rights of Grantee — In England.* — See *Cobb v. Lincoln Park*, 202 Ill. 427, 95 Am. St. Rep. 258; *Dawson v. McMillan*, 34 Wash. 274.

3. See *Stockley v. Cissna*, (C. C. A.) 119 Fed. Rep. 812; *Mobile v. Sullivan Timber Co.*, (C. C. A.) 129 Fed. Rep. 298; *Topping v. Cohn*, (Neb. 1904) 99 N. W. Rep. 372.

Right to Convey Absolute Title. — It has recently been held that as the state is the absolute owner of all lands upon the navigable streams lying between high-water and low-water marks, the title of one to whom it conveys its rights is as absolute as the words of the grant import. *Woodcliff Land Imp. Co. v.*

437. See note 1.

IV. RIGHTS OF RIPARIAN OWNERS — 1. In General. — See note 2.

438. 2. Right of Access. — See notes 1, 2, 3, 4.

New Jersey Shore Line R. Co., (N. J. 1905) 60 Atl. Rep. 44.

436. 4. Extent of Right to Grant in United States. — *Stockley v. Cissna*, (C. C. A.) 119 Fed. Rep. 812; *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143; *Cobb v. Lincoln Park*, 202 Ill. 427, 95 Am. St. Rep. 258; *Dundalk, etc., R. Co. v. Smith*, 97 Md. 177; *Shamberg v. Board of Riparian Com'rs*, (N. J. 1905) 60 Atl. Rep. 43. See also *U. S. v. Mission Rock Co.*, 189 U. S. 391; *Mobile v. Sullivan Timber Co.*, (C. C. A.) 129 Fed. Rep. 298; *White v. Nassau Trust Co.*, 168 N. Y. 149; *Southold v. Parks*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 456, affirmed 97 N. Y. App. Div. 636.

Right to Grant Exclusive Fishery. — See *Slingerland v. International Contracting Co.*, 169 N. Y. 60.

Exceeding Limit of Power to Grant. — The state cannot grant the lands under the navigable waters of an entire harbor or bay, or of a sea or lake. *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N. Car. 517.

5. Grant to Municipality. — *Mobile Transp. Co. v. Mobile*, 187 U. S. 479; *Sullivan Timber Co. v. Mobile*, 110 Fed. Rep. 186; *Mobile v. Sullivan Timber Co.*, (C. C. A.) 129 Fed. Rep. 298; *Mobile Transp. Co. v. Mobile*, 128 Ala. 335, 86 Am. St. Rep. 143.

437. 1. Grants to Upland Owners. — *Grey v. Morris, etc.*, *Dredging Co.*, 64 N. J. Eq. 555. See also *Topping v. Cohn*, (Neb. 1904) 99 N. W. Rep. 372.

New York Statute Regulating Grants to Upland Owners. — See *Brookhaven v. Smith*, 98 N. Y. App. Div. 212.

Boundaries of Riparian Grant. — In *New Jersey* the right to a riparian grant, like the right to wharf out, must be exercised by keeping within side lines, at right angles with the high-water line, if that is straight, and, if the high-water line is curved or irregular, then within the side lines which divide the foreshore proportionately among the riparian owners. *Bradley v. McPherson*, (N. J. 1904) 58 Atl. Rep. 105.

2. Riparian Rights Determined by Local Law — United States. — *Whitaker v. McBride*, 197 U. S. 510; *Leverich v. Mobile*, 110 Fed. Rep. 170; *Sullivan Timber Co. v. Mobile*, 110 Fed. Rep. 186; *Widdicombe v. Rosemiller*, 118 Fed. Rep. 295; *Salliotte v. King Bridge Co.*, (C. C. A.) 122 Fed. Rep. 378.

Alabama. — See *Turner v. Mobile*, 135 Ala. 73.

Alaska. — See *Sutter v. Heckman*, 1 Alaska 188.

Connecticut. — *Fisk v. Ley*, 76 Conn. 295; *Richards v. New York, etc.*, R. Co., 77 Conn. 501.

Illinois. — *Cobb v. Lincoln Park*, 202 Ill. 427, 95 Am. St. Rep. 258; *Beidler v. Sanitary Dist.*, 211 Ill. 628.

Kansas. — *Black v. Diver*, 68 Kan. 204.

Minnesota. — *Crookston Waterworks, etc.*, *Co. v. Sprague*, 91 Minn. 461.

Missouri. — *State v. Longfellow*, 169 Mo. 109.

Nebraska. — See *Topping v. Cohn*, (Neb. 1904) 99 N. W. Rep. 372.

New Jersey. — *Atlantic City v. New Auditorium Pier Co.*, 63 N. J. Eq. 644; *Simpson v. Moorhead*, 65 N. J. Eq. 623.

New York. — *Matter of New York*, 168 N. Y. 134; *Slingerland v. International Contracting Co.*, 169 N. Y. 60; *Brewster v. J. & J. Rogers Co.*, 169 N. Y. 79; *Brookhaven v. Smith*, 98 N. Y. App. Div. 212; *Matter of New York*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 157.

North Carolina. — *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N. Car. 517.

Oregon. — *Hunter v. Grande Ronde Lumber Co.*, 39 Oregon 448; *Montgomery v. Shaver*, 40 Oregon 244.

Rhode Island. — *Rhode Island Motor Co. v. Providence*, (R. I. 1903) 55 Atl. Rep. 696.

South Carolina. — *Jones v. Seaboard Air Line R. Co.*, 67 S. Car. 194.

Tennessee. — *Webster v. Harris*, 111 Tenn. 668.

Texas. — *Rodriguez v. Hernandez*, 35 Tex. Civ. App. 78.

Virginia. — *Taylor v. Com.*, 102 Va. 759, 102 Am. St. Rep. 865.

Washington. — *Watkins v. Dorris*, 24 Wash. 636; *Johnson v. Brown*, 33 Wash. 588.

Wisconsin. — *McCarthy v. Murphy*, 119 Wis. 159, 100 Am. St. Rep. 876; *Lathrop v. Racine*, 119 Wis. 461; *Thomas v. Ashland, etc.*, *Logging R. Co.*, 122 Wis. 519. See also *Franzini v. Layland*, 120 Wis. 72.

Mere Easements in River. — The riparian owner is not the owner in fee simple of the soil, but has mere easements in the river. *Taylor v. Com.*, 102 Va. 759, 102 Am. St. Rep. 865.

Title Ends with Low-water Mark. — In some jurisdictions a riparian owner is held to own to the low-water mark of a fresh-water navigable river. *State v. Longfellow*, 169 Mo. 109; *Taylor v. Com.*, 102 Va. 759, 102 Am. St. Rep. 865. And see the title **BOUNDARIES**, 825. 1, 826. 1.

How Rights of Riparian Owner and State Must Be Exercised. — The right of the riparian owner and the commonwealth must be exercised, if possible, so that the one shall not unnecessarily disturb or impair the enjoyment of the other. *Taylor v. Com.*, 102 Va. 759, 102 Am. St. Rep. 865.

Right to Injunction. — The rights of a riparian owner will be protected by injunction. *Webster v. Harris*, 111 Tenn. 668.

438. 1. Right of Access and Wharfage — United States. — *Leverich v. Mobile*, 110 Fed. Rep. 170; *Sullivan Timber Co. v. Mobile*, 110 Fed. Rep. 186.

Alabama. — See *Turner v. Mobile*, 135 Ala. 73.

Alaska. — *Sutter v. Heckman*, 1 Alaska 81, 188; *Martin v. Heckman*, 1 Alaska 165; *Lewis v. Johnson*, 1 Alaska 529; *Juneau Ferry Co. v. Alaska Steamship Co.*, 1 Alaska 533.

California. — *San Francisco Sav. Union v. R. G. R. Petroleum, etc., Co.*, 144 Cal. 134.

Connecticut. — *Richards v. New York, etc.*,

439. V. RIGHTS OF PUBLIC — 1. In General. — See note 2.

2. Navigation — *a. WATERS IN WHICH RIGHT OBTAINS* — (1) *In England* — (a) **Tidal Waters.** — See note 7.

(b) **Nontidal Waters.** — See note 8.

440. (2) In United States. — See notes 1, 3, 4.

441. b. NATURE AND EXTENT OF RIGHT — (1) *In General.* — See notes 1, 2, 3, 4, 5.

R. Co., 77 Conn. 501. See also *Fisk v. Ley*, 76 Conn. 295.

Illinois. — *Bliss v. Ward*, 198 Ill. 104; *Cobb v. Lincoln Park*, 202 Ill. 427, 95 Am. St. Rep. 258.

Missouri. — *State v. Longfellow*, 169 Mo. 109.

New York. — See *Brookhaven v. Smith*, 98 N. Y. App. Div. 212.

North Carolina. — *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N. Car. 517; *Reyburn v. Sawyer*, 135 N. Car. 328, 102 Am. St. Rep. 555.

Oregon. — *Montgomery v. Shaver*, 40 Oregon 244.

Rhode Island. — *Rhode Island Motor Co. v. Providence*, (R. I. 1903) 55 Atl. Rep. 696.

South Carolina. — *Jones v. Seaboard Air Line R. Co.*, 67 S. Car. 194, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 438.

Tennessee. — *Webster v. Harris*, 111 Tenn. 668.

Virginia. — *Taylor v. Com.*, 102 Va. 759, 102 Am. St. Rep. 865.

Wisconsin. — *McCarthy v. Murphy*, 119 Wis. 159, 100 Am. St. Rep. 876; *Lathrop v. Racine*, 119 Wis. 461.

Injunction Will Lie to protect a littoral owner's right of access. *Leverich v. Mobile*, 110 Fed. Rep. 170; *Sutter v. Heckman*, 1 Alaska 188; *Martin v. Heckman*, 1 Alaska 165; *Rhode Island Motor Co. v. Providence*, (R. I. 1903) 55 Atl. Rep. 696. See also *Lowndale v. Gray's Harbor Boom Co.*, 117 Fed. Rep. 983, in which case, however, deprivation of ingress to and egress from premises not occupied and used by the owner was held not to constitute an irreparable injury authorizing an injunction. *Lowndale v. Gray's Harbor Boom Co.*, 117 Fed. Rep. 983.

Right to Accretions. — See *Bliss v. Ward*, 198 Ill. 104; *Black v. Diver*, 68 Kan. 204; *Taylor v. Com.*, 102 Va. 759, 102 Am. St. Rep. 865. And see the title ACCRETIONS, 469. 3 *et seq.*

Right to Abatement of Nuisance Below High-water Mark. — See *San Francisco Sav. Union v. R. G. R. Petroleum, etc., Co.*, 144 Cal. 134.

438. 2. Right to Compensation. — *Mobile v. Sullivan Timber Co.*, (C. C. A.) 129 Fed. Rep. 298; *Sutter v. Heckman*, 1 Alaska 188; *Martin v. Heckman*, 1 Alaska 165; *Cobb v. Lincoln Park*, 202 Ill. 427, 95 Am. St. Rep. 258; *Woodcliff Land Imp. Co. v. New Jersey Shore Line R. Co.*, (N. J. 1905) 60 Atl. Rep. 44; *Taylor v. Com.*, 102 Va. 759, 102 Am. St. Rep. 865. See also *Sullivan Timber Co. v. Mobile*, 110 Fed. Rep. 186; *Richards v. New York, etc., R. Co.*, 77 Conn. 501.

Railroad Companies impairing the right of free access for their corporate purposes must compensate the owner. *Jones v. Seaboard Air Line R. Co.*, 67 S. Car. 194.

3. Mobile v. Sullivan Timber Co., (C. C. A.) 129 Fed. Rep. 298; *Jones v. Seaboard Air Line R. Co.*, 67 S. Car. 194.

4. In New Jersey the riparian owner may, by reclamation, acquire the title of the state to lands lying under tide water in front of his ownership. *Simpson v. Moorhead*, 65 N. J. Eq. 623; *Shamberg v. Board of Riparian Com'rs*, (N. J. 1905) 60 Atl. Rep. 43.

439. 2. Right to Float Logs. — *Brewster v. J. & J. Rogers Co.*, 169 N. Y. 79; *Dawson v. McMillan*, 34 Wash. 274; *Ingram v. Wishkah Boom Co.*, 35 Wash. 191; *Lowndale v. Gray's Harbor Boom Co.*, 36 Wash. 198; *Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 90 Am. St. Rep. 819; *Roy v. Fraser*, 36 N. Bruns. 113. See also *White v. Codd*, (Wash. 1905) 80 Pac. Rep. 836.

Rafts. — *The Mary*, 123 Fed. Rep. 609, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 439.

7. Rights of Public in Tidal Waters. — See *Harrison v. Hughes*, (C. C. A.) 125 Fed. Rep. 860; *State v. Baum*, 128 N. Car. 600.

8. Rights of Public in Nontidal Waters. — See *State v. Baum*, 128 N. Car. 600.

440. 1. Public Highways — *United States.* — *Mission Rock Co. v. U. S.*, (C. C. A.) 109 Fed. Rep. 763, affirmed 189 U. S. 391; *Leverich v. Mobile*, 110 Fed. Rep. 170; *Manigault v. Ward*, 123 Fed. Rep. 707; *Harrison v. Hughes*, (C. C. A.) 125 Fed. Rep. 860. See also *Corrigan Transp. Co. v. Sanitary Dist.*, 125 Fed. Rep. 611; *New Haven Towing Co. v. New Haven*, 126 Fed. Rep. 882.

California. — See *Miller v. Enterprise Canal, etc., Co.*, 142 Cal. 208, 100 Am. St. Rep. 115.

Missouri. — *State v. Longfellow*, 169 Mo. 109.

North Carolina. — *State v. Baum*, 128 N. Car. 600; *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N. Car. 517; *State v. Twiford*, 136 N. Car. 603.

Rhode Island. — *Rhode Island Motor Co. v. Providence*, (R. I. 1903) 55 Atl. Rep. 696.

South Carolina. — *State v. Charleston Light, etc., Co.*, 68 S. Car. 540.

Washington. — *Watkins v. Dorris*, 24 Wash. 636; *Dawson v. McMillan*, 34 Wash. 274; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905.

3. Legislative Act Unnecessary. — *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905.

4. Statutes Declaring Streams Navigable. — *Crookston Waterworks Power, etc., Co. v. Sprague*, 91 Minn. 461; *Denton v. State*, 72 N. Y. App. Div. 248.

441. 1. Frost v. Washington County R. Co., 96 Me. 76; *Rossmiller v. State*, 114 Wis. 169, 91 Am. St. Rep. 910.

Nature of Right. — The right of navigation means the right to pass over waters freely and without obstruction. *Brookhaven v. Smith*, 98 N. Y. App. Div. 212.

2. Navigation the Superior Right. — *Clement v. Metropolitan West Side El. R. Co.*, (C. C. A.)

- 441.** (3) *Right to Exclusive Occupation of Part.* — See note 7.
 (4) *Right to Use Banks and Shores* — (a) *In General.* — See note 8.
442. *c. MANNER OF EXERCISING RIGHT.* — See note 3.
443. *d. HOW RIGHT LOST.* — See note 2.

VI. OBSTRUCTIONS — 2. Objects Constituting Obstructions. — See notes 8, 10.

Wrecks. — See note 12.

444. **3. Public and Private Rights as to Obstructions** — *a. IN GENERAL.* — See notes 3, 4, 5, 6, 7.

445. *b. SLIGHT OR TEMPORARY OBSTRUCTIONS.* — See note 1.

NEAR — NEAREST — NEARLY. — See note 7.

448. NEAT CATTLE. — See note 1.

123 Fed. Rep. 271; *State v. Faudre*, 54 W. Va. 122, 102 Am. St. Rep. 927. See also *Juneau Ferry Co. v. Alaska Steamship Co.*, 1 Alaska 533; *State v. Faudre*, 54 W. Va. 133; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905.

441. 3. Superior to Right of Fishery. — *Bliss v. Ward*, 198 Ill. 104; *Slingerland v. International Contracting Co.*, 169 N. Y. 60; *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N. Car. 517; *Rhode Island Motor Co. v. Providence*, (R. I. 1903) 55 Atl. Rep. 696; *Rossmiller v. State*, 114 Wis. 169, 91 Am. St. Rep. 910.

4. Superior to Ferry Franchise. — *State v. Faudre*, 54 W. Va. 133, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 441.

5. No Private Right of Navigation. — *Frost v. Washington County R. Co.*, 96 Me. 76.

7. Right to Anchor. — *State v. Twiford*, 136 N. Car. 603.

8. Right to Use Banks When Floating Logs. — *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905.

The use of the water when it is above the line of mean high tide is not a use of the banks. *Lowndale v. Gray's Harbor Boom Co.*, 36 Wash. 198.

442. 3. Exercise Must Be Reasonable. — *The Mary*, 123 Fed. Rep. 609; *Ingram v. Wishkah Boom Co.*, 35 Wash. 191; *White v. Codd*, (Wash. 1905) 80 Pac. Rep. 836; *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662; *Roy v. Fraser*, 36 N. Bruns. 113.

An Injunction will lie for an abuse of the right of navigation. *Matthews v. Belfast Mfg. Co.*, 35 Wash. 662.

443. 2. Congress May Obstruct or even close the navigation of a tidewater stream. *Frost v. Washington County R. Co.*, 96 Me. 76.

8. Weirs. — *Dunton v. Parker*, 97 Me. 461.

10. Dams. — *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905.

Stones. — *Maxon v. Chicago, etc., R. Co.*, 123 Fed. Rep. 555.

12. Liability of Owner of Wreck. — *The Mary S. Lewis*, 126 Fed. Rep. 848. See also *The Mary*, 123 Fed. Rep. 609.

444. 3. E. A. Chatfield Co. v. New Haven, 110 Fed. Rep. 788; *State v. Dundee Water Power, etc., Co.*, 71 N. J. L. 419; *State v. Baum*, 128 N. Car. 600; *Reyburn v. Sawyer*, 135 N. Car. 328, 102 Am. St. Rep. 555; *Dawson v. McMillan*, 34 Wash. 274. See also *State v. Charleston Light, etc., Co.*, 68 S. Car. 540.

A Public Improvement Sanctioned by the Federal Government does not constitute a nuisance. *Corrigan Transp. Co. v. Sanitary Dist.*, 125 Fed. Rep. 611.

4. Abatement of Nuisance. — *Dawson v. McMillan*, 34 Wash. 274, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 444.

Some Special or Particular Injury, different in kind as well as in degree from that sustained by the general public, is requisite to enable a private party to maintain a suit to abate a nuisance as an impediment to navigation. *Thomas v. Wade*, (Fla. 1904) 37 So. Rep. 743.

5. Indictable Nuisance. — *State v. Dundee Water Power, etc., Co.*, 71 N. J. L. 419; *State v. Baum*, 128 N. Car. 600; *Reyburn v. Sawyer*, 135 N. Car. 328, 102 Am. St. Rep. 555; *State v. Twiford*, 136 N. Car. 603. See also *E. A. Chatfield Co. v. New Haven*, 110 Fed. Rep. 788; *State v. Charleston Light, etc., Co.*, 68 S. Car. 540.

6. Action for Damages. — *Maxon v. Chicago, etc., R. Co.*, 122 Fed. Rep. 555; *Harrison v. Hughes*, (C. C. A.) 125 Fed. Rep. 860; *The Mary S. Lewis*, 126 Fed. Rep. 848; *Armistead v. Shreveport, etc., R. Co.*, 108 La. 171; *Reyburn v. Sawyer*, 135 N. Car. 328, 102 Am. St. Rep. 555. See also *Faust v. Cleveland*, (C. C. A.) 121 Fed. Rep. 810; *Clement v. Metropolitan West Side El. R. Co.*, (C. C. A.) 123 Fed. Rep. 271.

7. Injunction. — *E. A. Chatfield Co. v. New Haven*, 110 Fed. Rep. 788; *Reyburn v. Sawyer*, 135 N. Car. 328, 102 Am. St. Rep. 555; *Rhode Island Motor Co. v. Providence*, (R. I. 1903) 55 Atl. Rep. 696; *Dawson v. McMillan*, 34 Wash. 274; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905.

Mandamus will not lie to compel the removal of an obstruction where there is no special or peculiar injury to the petitioner other than that common to the general public. *State v. Charleston Light, etc., Co.*, 68 S. Car. 540.

445. 1. Temporary Obstructions Not a Nuisance. — *The Mary*, 123 Fed. Rep. 609. See also *State v. Charleston Light, etc., Co.*, 68 S. Car. 540.

7. As Near as May Be. — See *Lantz v. Morse*, 28 Nova Scotia 535.

Nearest Male Heirs. — *Jones v. Jones*, 201 Pa. St. 548.

448. 1. Neat Cattle — Larceny. — *Wilburn v. Territory*, 10 N. Mex. 402.

449. NECESSARY — NECESSITY — NECESSARILY. — See note 1.

450. Exemption Laws — Distinguished from Indispensable. — See note 1.

451. Necessarily. — See note 2.

452. NECESSARY IMPLICATION. — See note 1.

NECESSARY PARTIES. — See note 2.

NEED — NEEDFUL — NEEDLESSLY. — See note 4.

453. NEGATIVE PREGNANT. — See note 3.

NEGLECT. — See note 5.

449. 1. Distinguished from Indispensable. — *Wice v. Chicago, etc.*, R. Co., 193 Ill. 351; *Coles County v. Goehring*, 209 Ill. 142; *Spiegler v. Chicago*, 216 Ill. 114; *Getchell, etc., Lumber, etc., Co. v. Des Moines Union R. Co.*, 115 Iowa 734; *Vice v. Eden*, 113 Ky. 255; *Cory v. Cook*, 24 R. I. 421; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586.

Ways. — *Vice v. Eden*, 113 Ky. 255.

450. 1. Exemptions. — *Chicago, etc., R. Co. v. Douglas County*, 122 Wis. 273.

451. 2. Necessarily Absent from Court. — See *State v. Smith*, 107 La. 129.

452. 1. Necessary Implication. — *Gilbert v. Craddock*, 67 Kan. 346; *Galloway v. Durham*, 118 Ky. 544; *Whitfield v. Garriss*, 134 N. Car. 24.

2. The Duc d'Aumale, (1903) P. 18; *Castle v. Madison*, 113 Wis. 346.

4. The Term "Needful Buildings" in article 1, section 8, of the Federal Constitution is considered to include all buildings required for public use. *Newcomb v. Rockport*, 183 Mass. 74.

453. 3. Negative Pregnant. — *Jackson v. Green*, 13 Okla. 314; *State v. Box*, 34 Tex. Civ. App. 435.

5. Neglect in the Sense of Omission. — *Northern Pac. R. Co. v. Adams*, 192 U. S. 440.

Neglect in the Sense of Wilful Neglect. — See *People v. Herlihy*, (Ct. Gen. Sess.) 35 Misc. (N. Y.) 711.

NEGLIGENCE.

By B. B. BLYDENBURGH.

457. II. DEFINITIONS — 1. Negligence. — See note 2.

458. 2. Actionable Negligence. — See note 1.

457. 2. Justice Swayne's Definition. — See *Turrentine v. Wellington*, 136 N. Car. 308, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 458.

Definition in Heaven v. Pender. — Quoted in *Wencker v. Missouri*, etc., R. Co., 169 Mo. 592.

A Frequently Cited Definition of Negligence. — In *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, the definition of Baron Alderson in *Blyth v. Birmingham Waterworks Co.*, 25 L. J. Exch. 212, 11 Exch. 781 (quoted in the original note), was quoted with the proviso in Pollock on Torts 455, viz., "provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care." For other cases discussing this definition, see *Lauritsen v. American Bridge Co.*, 87 Minn. 518; *Drum v. Miller*, 135 N. Car. 204, 102 Am. St. Rep. 528; *Houston*, etc., R. Co. v. *Everett*, (Tex. Civ. App. 1905) 86 S. W. Rep. 17.

"The Opposite of Care and Prudence." — Putney v. Keith, 98 Ill. App. 285.

For Various Definitions of Negligence — *United States*. — *Denver v. Porter*, (C. C. A.) 126 Fed. Rep. 288; *National Biscuit Co. v. Nolan*, (C. C. A.) 138 Fed. Rep. 6.

Arizona. — *Gila Valley*, etc., R. Co. v. *Lyon*, (Ariz. 1905) 80 Pac. Rep. 337.

Connecticut. — *Nesbit v. Crosby*, 74 Conn. 554.

Delaware. — *Queen Anne's R. Co. v. Reed*, (Del. 1905) 59 Atl. Rep. 860; *Goldstein v. People's R. Co.*, (Del. 1905) 60 Atl. Rep. 975; *Neal v. Wilmington*, etc., Electric R. Co., 3 Penn. (Del.) 467; *Adams v. Wilmington*, etc., Electric R. Co., 3 Penn. (Del.) 512; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Tully v. Philadelphia*, etc., R. Co., 3 Penn. (Del.) 455; *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527.

Florida. — *Morris v. Florida Cent.*, etc., R. Co., 43 Fla. 10.

Illinois. — *Illinois Cent. R. Co. v. Behrens*, 101 Ill. App. 33.

Indiana. — *Van Camp Hardware*, etc., Co. v. *O'Brien*, 28 Ind. App. 152; *Wabash R. Co. v. De Hart*, 32 Ind. App. 62.

Kentucky. — *Kentucky*, etc., Bridge, etc., Co. v. *Shrader*, (Ky. 1904) 80 S. W. Rep. 1094; *Covington Saw Mill*, etc., Co. v. *Drexilius*, (Ky. 1905) 87 S. W. Rep. 266; *Cincinnati*, etc., R. Co. v. *Vaught*, (Ky. 1904) 78 S. W. Rep. 859; *Franklin v. Tracy*, (Ky. 1904) 77 S. W. Rep. 1113; *Floyd v. Paducah R.*, etc., Co., (Ky. 1903) 73 S. W. Rep. 1122; *Louisville*, etc., R. Co. v. *Logsdon*, 114 Ky. 746.

Maine. — *Merrill v. Bassett*, 97 Me. 501.

Maryland. — *West Virginia Cent.*, etc., R. Co. v. *State*, 96 Md. 652.

Minnesota. — *Ready v. Peavy Elevator Co.*, 89 Minn. 154.

Missouri. — *Reyburn v. Missouri Pac. R. Co.*, 187 Mo. 565; *Holden v. Missouri R. Co.*, 108 Mo. App. 665; *Meng v. St. Louis*, etc., R. Co., 108 Mo. App. 553; *Montgomery v. Missouri Pac. R. Co.*, 181 Mo. 477; *Kean v. Schoening*, 103 Mo. App. 77; *Peterson v. Westman*, 103 Mo. App. 672; *Groom v. Kavanagh*, 97 Mo. App. 362.

Nebraska. — *L. W. Pomerene Co. v. White*, (Neb. 1903) 97 N. W. Rep. 232; *Chicago*, etc., R. Co. v. *Lagerkrans*, 65 Neb. 566.

New Hampshire. — *Carney v. Concord St. R. Co.*, 72 N. H. 364.

New York. — *Adsit v. Catskill Electric R. Co.*, 88 N. Y. App. Div. 167; *Uppington v. New York*, 165 N. Y. 222.

North Carolina. — *Jones v. American Warehouse Co.*, 137 N. Car. 337, 138 N. Car. 546.

Oregon. — *Shobert v. May*, 40 Oregon 68, 91 Am. St. Rep. 453.

Pennsylvania. — *Anderson v. Hays Mfg. Co.*, 207 Pa. St. 106; *White v. Roydhouse*, 211 Pa. St. 13; *Drinkwater v. Quaker City Cooperage Co.*, 208 Pa. St. 649.

Rhode Island. — *Vizacchero v. Rhode Island Co.*, 26 R. I. 392.

South Carolina. — *Oliver v. Columbia*, etc., R. Co., 65 S. Car. 1; *Kirby v. Southern R. Co.*, 63 S. Car. 494; *Bodie v. Charleston*, etc., R. Co., 61 S. Car. 468; *Davis v. Southern R. Co.*, 68 S. Car. 446.

Texas. — *Houston*, etc., R. Co. v. *Brown*, (Tex. Civ. App. 1905) 85 S. W. Rep. 44; *Rapid Transit R. Co. v. Miller*, (Tex. Civ. App. 1905) 85 S. W. Rep. 439; *Southern Kansas R. Co. v. Sage*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1038; *Missouri*, etc., R. Co. v. *O'Connor*, (Tex. Civ. App. 1904) 78 S. W. Rep. 374.

Virginia. — *Danville R.*, etc., Co. v. *Hodnett*, 101 Va. 361.

West Virginia. — *Williams v. Belmont Coal*, etc., Co., 55 W. Va. 84.

Wisconsin. — *Boyce v. Wilbur Lumber Co.*, 119 Wis. 642; *Zimmer v. Fox River Valley Electric R. Co.*, 118 Wis. 614; *Warden v. Miller*, 112 Wis. 67.

458. 1. "Actionable" Negligence. — "In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury, a failure to discharge that duty, and injury resulting from the failure." *Means v. Southern California R. Co.*, 144 Cal. 473.

459. 5. Criminal Negligence. — See note 4.**III. DEGREES OF NEGLIGENCE — 1. In General.** — See notes 5, 6, 7, 8, 9.**460. 2. Where Exemplary Damages Claimed.** — See note 2.**4. Rule under Statutes.** — See note 4.**IV. DEGREES OF CARE AND PRUDENCE.** — See note 5.

459. 4. Rule under Statutes. — As to wilful neglect of a child see *Reg. v. Senior*, (1895) 1 Q. B. 283, 47 W. R. 367.

5. Origin of Degree Theory. — See *Atchison v. Wills*, 21 App. Cas. (D. C.) 548.

6. Classification into Degrees. — *Illinois Cent. R. Co. v. Leiner*, 202 Ill. 624, 95 Am. St. Rep. 266.

"Gross Negligence" as More than Mere Omission of Duty. — *Tully v. Philadelphia, etc., R. Co.*, 3 Penn. (Del.) 455; *Chicago Terminal Transfer R. Co. v. Kotoski*, 199 Ill. 383; *Louisville, etc., R. Co. v. Walden*, (Ky. 1903) 74 S. W. Rep. 694; *Chesapeake, etc., R. Co. v. Dodge*, (Ky. 1902) 66 S. W. Rep. 606; *Chesapeake, etc., R. Co. v. Board*, (Ky. 1903) 77 S. W. Rep. 189; *Labarge v. Pere Marquette R. Co.*, 134 Mich. 139; *Rhymes v. Jackson Electric R., etc., Co.*, 85 Miss. 140; *Yazoo, etc., R. Co. v. Block*, 86 Miss. 427; *Kirby v. Southern R. Co.*, 63 S. Car. 494; *Wilson v. Chippewa Valley Electric R. Co.*, 120 Wis. 636; *Rideout v. Winnebago Traction Co.*, 123 Wis. 297.

Slight Negligence. — See *Chicago, etc., R. Co. v. Randolph*, 199 Ill. 126; *Putney v. Keith*, 98 Ill. App. 285.

7. No Degrees of Negligence. — *Kelly v. Malott*, (C. C. A.) 135 Fed. Rep. 74; *Denver, etc., R. Co. v. Peterson*, 30 Colo. 77, 97 Am. St. Rep. 76; *Atchison v. Wills*, 21 App. Cas. (D. C.) 548; *Hutcheis v. Cedar Rapids, etc., R. Co.*, (Iowa 1905) 103 N. W. Rep. 779; *Magrane v. St. Louis, etc., R. Co.*, 183 Mo. 119; *German-American Ins. Co. v. Standard Gas Light Co.*, 67 N. Y. App. Div. 539, *affirmed* 174 N. Y. 508.

8. Kelly v. Malott. (C. C. A.) 135 Fed. Rep. 74; *Caven v. Bodwell Granite Co.*, 99 Me. 278.

Negligence with Epithet. — *Purple v. Union Pac. R. Co.*, 51 C. C. A. 564, 114 Fed. Rep. 123; *Atchison v. Wills*, 21 App. Cas. (D. C.) 548.

"Gross Negligence" Is a Relative Term. — See *Belt R. Co. v. Banicki*, 102 Ill. App. 642.

The Words "Wilful," "Reckless," and "Malicious" have no place in an action founded on "mere actionable negligence." *Turtenwald v. Wisconsin Lakes Ice, etc., Co.*, 121 Wis. 65.

The Words "Reckless" and "Careless" mean nothing more than simple negligence. *Great-house v. Croan*, 4 Indian Ter. 668.

9. Purple v. Union Pac. R. Co., 51 C. C. A. 564, 114 Fed. Rep. 123.

460. 2. Distinction with Reference to Exemplary Damages. — *Louisville, etc., R. Co. v. Price*, (Ky. 1903) 76 S. W. Rep. 836; *South Covington, etc., St. R. Co. v. McHugh*, (Ky. 1903) 77 S. W. Rep. 202; *Gosa v. Southern R. Co.*, 67 S. Car. 347; *Memphis St. R. Co. v. Shaw*, 110 Tenn. 467. And see the title EXEMPLARY DAMAGES, **26. 7 et seq.**

4. Rule under Statutes. — *Hayes v. Pitts-Kimball Co.*, 183 Mass. 262; *Lutolf v. United Electric Light Co.*, 184 Mass. 53; *Brennan v. Standard Oil Co.*, 187 Mass. 376; *Witherington v. Lynn, etc., R. Co.*, 182 Mass. 596; *Sullivan v.*

Boston Electric Light Co., 181 Mass. 294; *Davis v. Atlanta, etc., Air Line R. Co.*, 63 S. Car. 370; *Kirby v. Southern R. Co.*, 63 S. Car. 494.

Violation of Statutory Duty. — See *Fulton v. Wilmington Star Min. Co.*, (C. C. A.) 133 Fed. Rep. 193; *Spring Valley Coal Co. v. Rowatt*, 196 Ill. 156; *O'Fallon Coal, etc., Co. v. Laquet*, 198 Ill. 125; *Western Anthracite Coal, etc., Co. v. Beaver*, 192 Ill. 333; *Elgin, etc., R. Co. v. Duffy*, 191 Ill. 489; *Southern R. Co. v. Drake*, 107 Ill. App. 12; *Chicago, etc., R. Co. v. Stone*, 109 Ill. App. 517.

5. Degrees of Care and Prudence — England. — *Harris v. Perry*, (1903) 2 K. B. 219.

United States. — *Chicago, etc., R. Co. v. Benton*, (C. C. A.) 132 Fed. Rep. 460.

Colorado. — *Denver Consol. Electric Co. v. Lawrence*, 31 Colo. 301.

Delaware. — *Tully v. Philadelphia, etc., R. Co.*, 3 Penn. (Del.) 455, 50 Atl. Rep. 95.

Florida. — *Morris v. Florida Cent., etc., R. Co.*, 43 Fla. 10.

Illinois. — *North Chicago St. R. Co. v. Polkey*, 203 Ill. 225.

Indiana. — *Wabash R. Co. v. De Hart*, 32 Ind. App. 62.

Kentucky. — *South Covington, etc., St. R. Co. v. Constans*, (Ky. 1903) 74 S. W. Rep. 705; *Lexington R. Co. v. Fain*, (Ky. 1903) 71 S. W. Rep. 628; *H. B. Phillips Co. v. Pruitt*, (Ky. 1904) 82 S. W. Rep. 628.

Louisiana. — *Hebert v. Lake Charles Ice, etc., Co.*, 111 La. 522, 100 Am. St. Rep. 505.

Maine. — *Caven v. Bodwell Granite Co.*, 99 Me. 278.

Minnesota. — *Gilbert v. Duluth Gen. Electric Co.*, 93 Minn. 99, 106 Am. St. Rep. 430.

Missouri. — *Geismann v. Missouri-Edison Electric Co.*, 173 Mo. 654; *McKinstry v. St. Louis Transit Co.*, 108 Mo. App. 12; *Maggioli v. St. Louis Transit Co.*, 108 Mo. App. 416; *McDaniels v. Royle Min. Co.*, 110 Mo. App. 706.

New Jersey. — *Hoboken Land, etc., Co. v. United Electric Co.*, 71 N. J. L. 430.

New York. — *Adams v. Union R. Co.*, 80 N. Y. App. Div. 136.

Ohio. — *Burton Telephone Co. v. Gordon*, 25 Ohio Cir. Ct. 641.

Oregon. — *Chaperson v. Portland Electric Co.*, 41 Oregon 39.

Pennsylvania. — *Alexander v. Nanticoke Light Co.*, 209 Pa. St. 571.

South Carolina. — *Stembridge v. Southern R. Co.*, 65 S. Car. 410.

Tennessee. — *Memphis St. R. Co. v. Kartright*, 110 Tenn. 277, 100 Am. St. Rep. 807.

Texas. — *San Antonio Traction Co. v. Court*, 31 Tex. Civ. App. 146; *St. Louis Southwestern R. Co. v. Harrison*, 32 Tex. Civ. App. 368; *Chicago, etc., R. Co. v. Buie*, 31 Tex. Civ. App. 654.

West Virginia. — *Peters v. Johnson*, 50 W. Va. 644, 88 Am. St. Rep. 900.

"Ordinary Care Has No Grades known to the

460. V. NATURE OF DUTY — HOW CREATED — 1. Duty Implied by Law. — See note 6.

2. Duty Created by Statute or Ordinance. — See note 7.

461. 3. Relation in Which Duty Implied Created by Contract — a IN GENERAL. — See note 1.

b. PRIVACY — (1) In General. — See note 6.

law." Kentucky, etc., *Bridge Co. v. Montgomery*, (Ky. 1902) 67 S. W. Rep. 1008.

460. 6. Duty Implied by Law. — Chicago, etc., *R. Co. v. Martin*, 31 Ind. App. 308; *Bretsch v. Plate*, 82 N. Y. App. Div. 399; *Freel v. Wanamaker*, 208 Pa. St. 279; *Jones v. Charleston*, etc., R. Co., 65 S. Car. 410; *Richmond Traction Co. v. Clarke*, 101 Va. 382.

Imposed by Law. — Most of the recent cases use the expression that the duty is "imposed" by law or that it is a duty the law imposes. *Clarke v. Army*, etc., Co-operative Soc., (1903) 1 K. B. 155; *Rooney v. Woolworth*, 74 Conn. 720; *Ortolano v. Morgan's Louisiana*, etc., R., etc., Co., 109 La. 902; *Lucas v. St. Louis*, etc., R. Co., 174 Mo. 270; *Perrigo v. St. Louis*, 185 Mo. 274; *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.*, 71 N. H. 522; *Jones v. American Warehouse Co.*, 137 N. Car. 337; *Chattanooga Electric R. Co. v. Moore*, 113 Tenn. 531; *Cruseturner v. International*, etc., R. Co., (Tex. Civ. App. 1905) 86 S. W. Rep. 778; *St. Louis Southwestern R. Co. v. Jacobson*, 28 Tex. Civ. App. 150.

7. Duty Created by Statute or Ordinance — United States. — *Fulton v. Wilmington Star Min. Co.*, (C. C. A.) 133 Fed. Rep. 193; *Louisville*, etc., R. Co. v. *Summers*, (C. C. A.) 125 Fed. Rep. 719.

Alabama. — *Mobile*, etc., R. Co. v. *Bromberg*, 141 Ala. 258.

Arkansas. — *St. Louis Southwestern R. Co. v. Bowen*, 73 Ark. 594.

Georgia. — *Heidt v. Southern Telephone*, etc., Co., 122 Ga. 474.

Illinois. — *Commonwealth Electric Co. v. Rose*, 214 Ill. 545, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 460; *American Car*, etc., Co. v. *Armentraut*, 214 Ill. 509; *Chicago*, etc., R. Co. v. *Wise*, 206 Ill. 453; *Himrod Coal Co. v. Stevens*, 203 Ill. 115; *Donk Bros. Coal*, etc., Co. v. *Stroff*, 200 Ill. 483.

Indiana. — *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149; *Malott v. Hawkins*, 159 Ind. 127; *D. H. Davis Coal Co. v. Polland*, 158 Ind. 607, 92 Am. St. Rep. 319; *Diamond Block Coal Co. v. Cuthbertson*, (Ind. 1905) 73 N. E. Rep. 818; *Smith v. Michigan Cent. R. Co.*, (Ind. App. 1905) 73 N. E. Rep. 928; *M. S. Huey Co. v. Johnston*, 164 Ind. 489; *Toledo*, etc., R. Co. v. *Bond*, (Ind. App. 1904) 72 N. E. Rep. 647; *Espenlaub v. Ellis*, 34 Ind. App. 163; *Pittsburgh*, etc., R. Co. v. *Collins*, 163 Ind. 560.

Iowa. — *Kuehl v. Chicago*, etc., R. Co., 126 Iowa 638; *Selensky v. Chicago G. W. R. Co.*, 120 Iowa 113.

Kentucky. — *Henderson v. O'Halaran*, 114 Ky. 186, 102 Am. St. Rep. 279; *Parish v. Louisville*, etc., R. Co., (Ky. 1904) 78 S. W. Rep. 186.

Massachusetts. — *McDonald v. New York Cent.*, etc., R. Co., 186 Mass. 474; *Daniels v. New York*, etc., R. Co., 183 Mass. 393.

Michigan. — *Sipes v. Michigan Starch Co.*, (Mich. 1904) 100 N. W. Rep. 447; *Plant v. Heraty*, 131 Mich. 619; *Johnson v. Detroit*, etc., R. Co., 135 Mich. 353.

Missouri. — *Hirst v. Ringen Real Estate Co.*, 169 Mo. 194; *McHugh v. St. Louis Transit Co.*, 190 Mo. 85; *MacDonald v. St. Louis Transit Co.*, 108 Mo. App. 374.

New Hampshire. — *Tucker v. Boston*, etc., R. Co., (N. H. 1905) 59 Atl. Rep. 943.

New Jersey. — *Fielders v. North Jersey St. R. Co.*, 68 N. J. L. 343, 96 Am. St. Rep. 552, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 460.

New York. — *Greeley v. State*, 94 N. Y. App. Div. 605; *Madden v. Hughes*, 104 N. Y. App. Div. 101.

South Carolina. — *Hutto v. South Bound R. Co.*, 61 S. Car. 495; *Jones v. Charleston*, etc., R. Co., 61 S. Car. 556.

Tennessee. — *Russell v. Dayton Coal*, etc., Co., 109 Tenn. 43.

Texas. — *St. Louis Southwestern R. Co. v. Kilman*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1050; *Galveston*, etc., R. Co. v. *Tirres*, 33 Tex. Civ. App. 362; *Missouri*, etc., R. Co. v. *Goss*, 31 Tex. Civ. App. 300; *San Antonio Traction Co. v. Bryant*, 30 Tex. Civ. App. 437.

Washington. — *Atherton v. Tacoma R.*, etc., Co., 30 Wash. 395; *Czarecki v. Seattle*, etc., R., etc., Co., 30 Wash. 288.

Wisconsin. — *Schroeder v. Wisconsin Cent. R. Co.*, 117 Wis. 33.

Canada. — *Tabb v. Grand Trunk R. Co.*, 8 Ont. L. Rep. 203.

And see *infra*, this title, **478. 5 et seq.**

Actual Performance of an Act, and not only ordinary care, may be required by the statute. *International*, etc., R. Co. v. *Haddox*, 36 Tex. Civ. App. 385.

461. 1. Duty Created by Contract. — *Clarke v. Army*, etc., Co-operative Soc., (1903) 1 K. B. 155; *Pritty v. Child*, 71 L. J. K. B. 512; *Fallis v. Gartshore*, etc., Co., 4 Ont. L. Rep. 176; *Marande v. Texas*, etc., R. Co., 184 U. S. 192; *Texas*, etc., R. Co. v. *Coutourie*, (C. C. A.) 135 Fed. Rep. 465; *Barber v. Lockwood*, 134 Fed. Rep. 985; *Citizens' Gas*, etc., Min. Co. v. *Whipple*, 32 Ind. App. 203; *Indiana Nitroglycerine*, etc., Co. v. *Lippincott Glass Co.*, (Ind. App. 1904) 72 N. E. Rep. 183; *German-American Ins. Co. v. Standard Gas Light Co.*, 67 N. Y. App. Div. 539, affirmed 174 N. Y. 508; *Duval v. Atlantic Coast Line R. Co.*, 134 N. Car. 331, 101 Am. St. Rep. 830; *Alexander v. Nanticoke Light Co.*, 209 Pa. St. 571; *St. Louis Southwestern R. Co. v. Highnote*, (Tex. Civ. App. 1904) 84 S. W. Rep. 365; *Benedict v. Union Agricultural Soc.*, 74 Vt. 91.

6. Privacy of Contract. — *Standard Oil Co. v. Wakefield*, 102 Va. 824.

Where One Party Contracts with Another to Bring a Third Person. — See *Standard Light*, etc.,

462. See note 1.

(2) *Sense in Which Privity Necessary.* — See note 2.

463. 4. Ordinary or Reasonable Care and Prudence — GENERAL RULE.
— See notes 1, 2.

Co. v. Muncey, 33 Tex. Civ. App. 416. See also *infra*, this title, **471.** 2.

Doctrine that Privity Necessary. — See Earl v. Lubbock, (1905) 1 K. B. 253; Huset v. J. I. Case Threshing Mach. Co., 57 C. C. A. 237, 120 Fed. Rep. 865, reviewing the authorities.

462. 1. Riggs v. Standard Oil Co., 130 Fed. Rep. 199; Skinn v. Reutter, 135 Mich. 57, 106 Am. St. Rep. 384; Kahner v. Otis Elevator Co., 96 N. Y. App. Div. 169; Standard Oil Co. v. Wakefield, 102 Va. 824, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 462; Weiser v. Holzman, 33 Wash. 87, 99 Am. St. Rep. 932.

Contract to Furnish Cars — Servants of Oblige
— Hoye v. Great Northern R. Co., 120 Fed. Rep. 712. As adverting to the conflict of authority see Union Stock Yards Co. v. Chicago, etc., R. Co., 196 U. S. 217.

Negligence of the obligee in failing to inspect has been held to be no defense. Teal v. American Min. Co., 84 Minn. 320. But see Missouri, etc., R. Co. v. Merrill, 65 Kan. 436, 93 Am. St. Rep. 287, *overruling* 61 Kan. 671.

2. Marquardt v. Ball Engine Co., (C. C. A.) 122 Fed. Rep. 374; Standard Oil Co. v. Murray, (C. C. A.) 119 Fed. Rep. 572; O'Neill v. James, (Mich. 1904) 101 N. W. Rep. 828; Peck v. New York Cent., etc., R. Co., 165 N. Y. 347; Kuelling v. Roderick Lean Mfg. Co., 88 N. Y. App. Div. 309; Slattery v. Colgate, 25 R. I. 220; McCaffrey v. Mossberg, etc., Mfg. Co., 23 R. I. 381, 91 Am. St. Rep. 637.

"Inherently Dangerous" Rule. — Huset v. J. I. Case Threshing Mach. Co., 57 C. C. A. 237, 120 Fed. Rep. 865; Stowell v. Standard Oil Co., (Mich. 1905) 102 N. W. Rep. 227; Skinn v. Reutter, 135 Mich. 57, 106 Am. St. Rep. 384; Standard Oil Co. v. Wakefield, 102 Va. 824. As to what is "inherently dangerous" see Kuelling v. Roderick Lean Mfg. Co., 88 N. Y. App. Div. 309.

463. 1. Ordinary or Reasonable Care and Prudence — *England.* — Clarke v. Army, etc., Co-operative Soc., (1903) 1 K. B. 155; Wright v. Lefever, 51 W. R. 149.

Canada. — Cox v. Nova Scotia Telephone Co., 35 Nova Scotia 148.

United States. — Choctaw, etc., R. Co. v. McDade, 191 U. S. 64; Choctaw, etc., R. Co. v. Holloway, 191 U. S. 334; The Shenandoah, 134 Fed. Rep. 304; Roessler, etc., Chemical Co. v. Peterson, (C. C. A.) 134 Fed. Rep. 789; Chicago, etc., R. Co. v. Benton, (C. C. A.) 132 Fed. Rep. 460; Illinois Cent. R. Co. v. Coughlin, (C. C. A.) 132 Fed. Rep. 801; Gilbert v. Burlington, etc., R. Co., (C. C. A.) 128 Fed. Rep. 529; Pennsylvania R. Co. v. Paul, (C. C. A.) 126 Fed. Rep. 157; Denver v. Porter, (C. C. A.) 126 Fed. Rep. 288; Northern Pac. R. Co. v. Tynan, (C. C. A.) 119 Fed. Rep. 288; Cudahy Packing Co. v. Anthes, 54 C. C. A. 504, 117 Fed. Rep. 118.

Alabama. — Sloss Iron, etc., Co. v. Tilson, 141 Ala. 152.

Arkansas. — St. Louis Southwestern R. Co. v.

Underwood, (Ark. 1905) 86 S. W. Rep. 804; St. Louis, etc., R. Co. v. Hill, (Ark. 1905) 86 S. W. Rep. 303.

California. — Shea v. Pacific Power Co., 145 Cal. 680; Davis v. Diamond Carriage, etc., Co., 146 Cal. 59; Helling v. Schindler, 145 Cal. 303; Harrington v. Los Angeles R. Co., 140 Cal. 514, 98 Am. St. Rep. 85; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340; Muller v. Hale, 138 Cal. 163; Seller v. Market St. R. Co., 139 Cal. 268. *Colorado.* — Denver Consol. Electric Co. v. Lawrence, 31 Colo. 301; Zimmerman v. Denver Consol. Tramway Co., 18 Colo. App. 480.

Connecticut. — Currelli v. Jackson, 77 Conn. 115; Downs v. Seeley, 76 Conn. 317; Nelson v. Branford Lighting, etc., Co., 75 Conn. 548.

Delaware. — McAllister v. People's R. Co., 4 Penn. (Del.) 272; Karczewski v. Wilmington City R. Co., 4 Penn. (Del.) 24.

Georgia. — Columbus v. Anglin, 120 Ga. 785; Atlanta R., etc., Co. v. Monk, 118 Ga. 449; Warren County v. Evans, 118 Ga. 200; Ashworth v. Southern R. Co., 116 Ga. 635; Atlantic, etc., R. Co. v. Reynolds, 117 Ga. 47.

Illinois. — McAllister v. Jung, 112 Ill. App. 138, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 463; Chicago, etc., R. Co. v. Reilly, 212 Ill. 506; Spring Valley Coal Co. v. Buzis, 213 Ill. 341; Aledo v. Honeyman, 208 Ill. 415; Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145; North Chicago St. R. Co. v. Rodert, 203 Ill. 413; North Chicago St. R. Co. v. Irwin, 202 Ill. 345; Elgin v. Nofs, 200 Ill. 252.

Indiana. — Indianapolis Abattoir Co. v. Temperly, 159 Ind. 651, 85 Am. St. Rep. 330; Indianapolis St. R. Co. v. O'Donnell, (Ind. App. 1905) 73 N. E. Rep. 163; Indianapolis v. Cauley, 164 Ind. 304; Indianapolis, etc., Rapid Transit Co. v. Andis, 33 Ind. App. 625; Indiana Nitroglycerin, etc., Co. v. Lippincott Glass Co., (Ind. App. 1904) 72 N. E. Rep. 183; Lake Erie, etc., R. Co. v. McFall, (Ind. 1904) 72 N. E. Rep. 552; Terre Haute Electric Co. v. Kiely, (Ind. App. 1904) 72 N. E. Rep. 658; Indianapolis St. R. Co. v. Taylor, 164 Ind. 155; Indianapolis St. R. Co. v. Schmidt, (Ind. App. 1904) 71 N. E. Rep. 663, 72 N. E. Rep. 478; St. Joseph Ice Co. v. Berthel, 33 Ind. App. 491; Michigan City v. Phillips, 163 Ind. 449; Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138; Chicago, etc., R. Co. v. Stephenson, 33 Ind. App. 95; Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687; Wabash R. Co. v. De Hart, 32 Ind. App. 62.

Iowa. — Scott v. Iowa Telephone Co., 126 Iowa 524; Schlensig v. Monona County, 126 Iowa 625; Elenz v. Conrad, 123 Iowa 522; Fishburn v. Burlington, etc., R. Co., (Iowa 1904) 98 N. W. Rep. 380; Quinn v. Dubuque St. R. Co., (Iowa 1903) 94 N. W. Rep. 476; Carver v. Minneapolis, etc., R. Co., 120 Iowa 346; Aga v. Harbach, (Iowa 1903) 93 N. W. Rep. 601; Padelford v. Eagle Grove, 117 Iowa 616.

Kentucky. — Kentucky Stove Co. v. Bryan, (Ky. 1905) 84 S. W. Rep. 537; Cincinnati, etc.,

R. Co. v. Burgess, (Ky. 1905) 84 S. W. Rep. 760; Ahrens, etc., Mfg. Co. v. Rellihan, (Ky. 1904) 82 S. W. Rep. 993; West Kentucky Telephone Co. v. Pharis, (Ky. 1904) 78 S. W. Rep. 917; Bromley v. Bodkin, (Ky. 1903) 77 S. W. Rep. 696; Wilmarth v. Illinois Cent. R. Co., (Ky. 1903) 76 S. W. Rep. 193; Louisville, etc., R. Co. v. Price, (Ky. 1903) 76 S. W. Rep. 836; Midway v. Lloyd, (Ky. 1903) 74 S. W. Rep. 195; Louisville v. Bailey, (Ky. 1903) 74 S. W. Rep. 688.

Louisiana. — Williams v. Illinois Cent. R. Co., 114 La. 13.

Maine. — Butler v. Rockland, etc., R. Co., 99 Me. 149, 105 Am. St. Rep. 267; Neal v. Rendall, 98 Me. 69; Thornton v. Maine State Agricultural Soc., 97 Me. 108, 94 Am. St. Rep. 488; Coombs v. Mason, 97 Me. 270.

Maryland. — Baltimore, etc., R. Co. v. Stumpf, 97 Md. 78; Consolidated Gas Co. v. Getty, 96 Md. 683, 94 Am. St. Rep. 603; Conowingo Bridge Co. v. Hedrick, 95 Md. 669; Western Maryland R. Co. v. State, 95 Md. 637.

Massachusetts. — Baker v. Fall River, 187 Mass. 53; Hyde v. Boston, 186 Mass. 115; Gile v. J. W. Bishop Co., 184 Mass. 413; Miller v. North Adams, 182 Mass. 569; Morris v. Whipple, 183 Mass. 27.

Michigan. — Culver v. South Haven, etc., R. Co., (Mich. 1904) 101 N. W. Rep. 663; Philip v. Heraty, 135 Mich. 446; Newman v. Ann Arbor, 134 Mich. 29; Labarge v. Pere Marquette R. Co., 134 Mich. 139.

Minnesota. — Cameron v. Duluth-Superior Traction Co., 94 Minn. 104; Hjelm v. Western Granite Contracting Co., 94 Minn. 169; Hebert v. Interstate Iron Co., 94 Minn. 257; Clarke v. Philadelphia, etc., Coal, etc., Co., 92 Minn. 418; Kennedy v. St. Cloud, 90 Minn. 523; Peterson v. Minneapolis St. R. Co., 90 Minn. 52; Nye v. Dibley, 88 Minn. 465; Gray v. St. Paul City R. Co., 87 Minn. 280.

Mississippi. — Carver v. Jackson, 82 Miss. 583.

Missouri. — Deitring v. St. Louis Transit Co., 109 Mo. App. 524; Freymark v. St. Louis Transit Co., 111 Mo. App. 208; Deckerd v. Wabash R. Co., 111 Mo. App. 117; Holden v. Missouri R. Co., 108 Mo. App. 665; Small v. Kansas City, 185 Mo. 291; Brock v. St. Louis Transit Co., 107 Mo. App. 109; McGauley v. St. Louis Transit Co., 179 Mo. 583; Udden v. O'Reilly, 180 Mo. 650; Ford v. Kansas City, 181 Mo. 137; Lee v. Jones, 181 Mo. 291; Montgomery v. Missouri Pac. R. Co., 181 Mo. 477; Quinlan v. Kansas City, 104 Mo. App. 616; Hesselbach v. St. Louis, 179 Mo. 505; Meeker v. Metropolitan St. R. Co., 178 Mo. 173; Jett v. Central Electric R. Co., 178 Mo. 664; Jones v. Kansas City, etc., R. Co., 178 Mo. 528, 101 Am. St. Rep. 434.

Montana. — Meisner v. Dillon, 29 Mont. 116; Metz v. Butte, 27 Mont. 506; Cummings v. Helena, etc., Smelting, etc., Co., 26 Mont. 434.

Nebraska. — Lincoln v. Miller, (Neb. 1901) 96 N. W. Rep. 484; Riley v. Missouri Pac. R. Co., (Neb. 1903) 95 N. W. Rep. 20; Ittner Brick Co. v. Killian, 67 Neb. 580; New Omaha Thomson-Houston Electric Light Co. v. Rombold, (Neb. 1903) 93 N. W. Rep. 066.

New Hampshire. — Hilton v. Fitchburg R. Co., (N. H. 1904) 59 Atl. Rep. 625; Laronde v. Boston, etc., R. Co., (N. H. 1905) 60 Atl.

Rep. 684; Shaw v. Manchester St. R. Co., (N. H. 1904) 58 Atl. Rep. 1073.

New Jersey. — Carroll v. Tidewater Oil Co., 67 N. J. L. 679; Sutphen v. Hedden, 67 N. J. L. 324; Cameron v. Jersey City, etc., R. Co., 70 N. J. L. 633; Zolpher v. Camden, etc., R. Co., 69 N. J. L. 417; Adams v. Camden, etc., R. Co., 69 N. J. L. 424; Campbell v. T. A. Gillespie Co., 69 N. J. L. 279; Dotson v. Erie R. Co., 68 N. J. L. 679; Bliss v. F. & M. Schaeffer Brewing Co., 67 N. J. L. 29.

New York. — Fejdowski v. Delaware, etc., Canal Co., 168 N. Y. 500; Welsh v. Cornell, 168 N. Y. 508; McGuire v. Bell Telephone Co., 167 N. Y. 208; Eaton v. New York Cent., etc., R. Co., 163 N. Y. 391, 79 Am. St. Rep. 600; Dougherty v. Milliken, 163 N. Y. 527, 79 Am. St. Rep. 608; Murphy v. Wait, 102 N. Y. App. Div. 121; Kremer v. New York Edison Co., 102 N. Y. App. Div. 433; Moran v. Carlson, 95 N. Y. App. Div. 116; Heck v. New York Cent., etc., R. Co., 94 N. Y. App. Div. 562; Smith v. Donnelly, 93 N. Y. App. Div. 569; Powles v. Halstead, 93 N. Y. App. Div. 549; Bradner v. Warwick, 91 N. Y. App. Div. 408; Fisher v. New York Dock Co., 91 N. Y. App. Div. 526, affirmed 181 N. Y. 579; Murphy v. New York, 89 N. Y. App. Div. 93; Wesener v. Smith, 89 N. Y. App. Div. 211; Perras v. United Traction Co., 88 N. Y. App. Div. 260; Reed v. Metropolitan St. R. Co., 87 N. Y. App. Div. 427, 180 N. Y. 315; Kennealy v. Westchester Electric R. Co., 86 N. Y. App. Div. 293, affirmed 181 N. Y. 582; Burke v. Brooklyn Wharf, etc., Co., 86 N. Y. App. Div. 296; Lane v. Brooklyn Heights R. Co., 85 N. Y. App. Div. 85, appeal dismissed 176 N. Y. 557; Fitzgerald v. New York Cent., etc., R. Co., 84 N. Y. App. Div. 59, affirmed 179 N. Y. 559; Geary v. Metropolitan St. R. Co., 84 N. Y. App. Div. 514, affirmed 177 N. Y. 535; Lahne v. Seach, 83 N. Y. App. Div. 636; White v. Manhattan R. Co., 82 N. Y. App. Div. 259; Wagner v. Brooklyn Heights R. Co., 69 N. Y. App. Div. 349, affirmed 174 N. Y. 520.

North Carolina. — Turrentine v. Wellington, 136 N. Car. 308; Harris v. Atlantic Coast Line R. Co., 132 N. Car. 160.

North Dakota. — Balding v. Andrews, 12 N. Dak. 267.

Ohio. — Fremont v. Dunlap, 69 Ohio St. 286; Erie R. Co. v. McCormick, 69 Ohio St. 45; Toledo, etc., R. Co. v. Gilbert, 24 Ohio Cir. Ct. 181; Scanlon v. Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 256.

Oklahoma. — Ruemmeli-Braun Co. v. Cahill, 14 Okla. 422; Guthrie v. Finch, 13 Okla. 496; Neeley v. Southwestern Cotton Seed Oil Co., 13 Okla. 356.

Oregon. — Duntley v. Inman, 42 Oregon 334.

Pennsylvania. — Osterheldt v. Peoples, 208 Pa. St. 310; Kitchen v. Riter-Conley Mfg. Co., 207 Pa. St. 558; Seifred v. Pennsylvania R. Co., 206 Pa. St. 399; Guilmarin v. Philadelphia, 201 Pa. St. 518; Farr v. Philadelphia, etc., R. Co., 24 Pa. Super. Ct. 332.

Rhode Island. — Laforrest v. O'Driscoll, 26 R. I. 547.

South Carolina. — Matthews v. Seaboard Air Line R. Co., 67 S. Car. 499; Holcombe v. Southern R. Co., 66 S. Car. 6; Boggero v. Southern R. Co., 64 S. Car. 104.

464. See notes 1, 2.

South Dakota. — *McCarrier v. Hollister*, 15 S. Dak. 366; *Patterson v. Jos. Schlitz Brewing Co.*, 16 S. Dak. 33.

Texas. — *Missouri, etc., R. Co. v. Wood*, 95 Tex. 223, 93 Am. St. Rep. 834; *El Paso Electric R. Co. v. Kendall*, (Tex. Civ. App. 1905) 85 S. W. Rep. 61; *Galveston, etc., R. Co. v. Manns*, (Tex. Civ. App. 1904) 84 S. W. Rep. 254; *St. Louis Southwestern R. Co. v. Highnote*, (Tex. Civ. App. 1904) 84 S. W. Rep. 365; *Missouri, etc., R. Co. v. Keefe*, (Tex. Civ. App. 1905) 84 S. W. Rep. 679; *Houston, etc., R. Co. v. Laforge*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1072; *Missouri, etc., R. Co. v. Matherly*, 35 Tex. Civ. App. 604; *St. Louis Southwestern R. Co. v. Kennemore*, (Tex. Civ. App. 1904) 81 S. W. Rep. 802; *International, etc., R. Co. v. McVey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 991; *St. Louis Southwestern R. Co. v. Crabb*, (Tex. Civ. App. 1904) 80 S. W. Rep. 408; *Hirsch v. Ashe*, 35 Tex. Civ. App. 495; *Southern Kansas R. Co. v. Sage*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1038; *Galveston, etc., R. Co. v. Leavy*, 35 Tex. Civ. App. 107; *International, etc., R. Co. v. Reeves*, 35 Tex. Civ. App. 162; *Standard Light, etc., Co. v. Muncey*, 33 Tex. Civ. App. 416; *Dallas v. Moore*, 32 Tex. Civ. App. 230; *Fuller v. Denison, etc., R. Co.*, 32 Tex. Civ. App. 399; *Missouri, etc., R. Co. v. Hawk*, 30 Tex. Civ. App. 142.

Utah. — *Wood v. Rio Grande Western R. Co.*, 28 Utah 351; *Copley v. Union Pac. R. Co.*, 26 Utah 361.

Vermont. — *Morrisette v. Canadian Pac. R. Co.*, 74 Vt. 232.

Virginia. — *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708; *Norfolk, etc., R. Co. v. Cheatwood*, 103 Va. 356; *Standard Oil Co. v. Wakefield*, 102 Va. 824; *Richmond Pass., etc., Co. v. Gordon*, 102 Va. 498; *Richmond Traction Co. v. Clarke*, 101 Va. 382; *Richmond Traction Co. v. Wilkinson*, 101 Va. 394; *Wright v. Southern R. Co.*, 101 Va. 36; *Atlantic, etc., R. Co. v. West*, 101 Va. 13.

Washington. — *Young v. O'Brien*, 36 Wash. 570; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25.

West Virginia. — *Fulton v. Crosby, etc., Co.*, 57 W. Va. 91.

Wisconsin. — *Hughes v. Chicago, etc., R. Co.*, 122 Wis. 258; *Boyce v. Wilbur Lumber Co.*, 110 Wis. 642; *Hanlon v. Milwaukee Electric R., etc., Co.*, 118 Wis. 210; *Wells v. Remington*, 118 Wis. 573.

Wyoming. — *Union Pac. R. Co. v. Gilland*, 4 Wyo. 395.

Due Care. — The expression "due care" is often used instead of "ordinary" or "reasonable" care. *Kirk v. Sturdy*, 187 Mass. 87; *Delaplain v. Kansas City*, 100 Mo. App. 107; *Hoboken Land, etc., Co. v. United Electric Co.*, 71 N. J. L. 430; *Barrett v. Lake Ontario Beach Imp. Co.*, 174 N. Y. 310; *Bodie v. Charleston, etc., R. Co.*, 66 S. Car. 302; *Davis v. Southern R. Co.*, 68 S. Car. 446; *Selby v. Vancouver Water Works Co.*, 32 Wash. 522. But there is authority to the effect that "due care" is not the equivalent of "ordinary care." *San Antonio v. Talerico*, (Tex. Civ. App. 1903) 78 S. W. Rep. 28.

463. 2. No Liability Where Reasonable Care Employed — *Illinois*. — *South Side El. R. Co. v. Nesvig*, 214 Ill. 463.

Indiana. — *Bostock-Ferari Amusement Co. v. Brocksmith*, 34 Ind. App. 566, 107 Am. St. Rep. 213.

Kentucky. — *Louisville, etc., R. Co. v. Hower-ton*, 115 Ky. 89; *Kentucky, etc., Bridge Co. v. Montgomery*, (Ky. 1902) 67 S. W. Rep. 1008.

Louisiana. — *Douglas v. Faust*, 112 La. 1050.

Maine. — *Merrill v. Bassett*, 97 Me. 501.

Nebraska. — *Chicago, etc., R. Co. v. Roberts*, (Neb. 1902) 91 N. W. Rep. 707; *Bock v. Grooms*, (Neb. 1902) 92 N. W. Rep. 603; *Vansyoc v. Freewater Cemetery Assoc.*, 63 Neb. 143.

New Hampshire. — *Hughes v. Boston, etc., R. Co.*, 71 N. H. 279, 93 Am. St. Rep. 518.

New York. — *Luria v. Cusick*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 126.

Pennsylvania. — *White v. Roydhouse*, 211 Pa. St. 13.

Rhode Island. — *Edwards v. Brayton*, 25 R. I. 597.

Tennessee. — *Nashville, etc., R. Co. v. Wither-spoon*, 112 Tenn. 128.

Texas. — *Talley v. Beaver*, 33 Tex. Civ. App. 675.

Utah. — *Fares v. Rio Grande Western R. Co.*, 28 Utah 132.

Washington. — *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67.

West Virginia. — *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 88 Am. St. Rep. 884; *Veith v. Hope Salt, etc., Co.*, 51 W. Va. 96.

Canada. — *Guinea v. Campbell*, 22 Quebec Super. Ct. 257.

464. 1. Negligent Doing of Lawful Act — *England*. — *Eastern, etc., Tel. Co. v. Cape Town Tramways Cos.*, (1902) A. C. 381, 71 L. J. P. C. 122.

United States. — *Cary v. Morrison*, (C. C. A.) 129 Fed. Rep. 177.

Connecticut. — *Hill v. Fair Haven, etc., R. Co.*, 75 Conn. 177.

Georgia. — *Chalkley v. Central of Georgia R. Co.*, 120 Ga. 683.

Indiana. — *Nichols v. Baltimore, etc., R. Co.*, 33 Ind. App. 229.

Iowa. — *Wolf v. Des Moines Elevator Co.*, 126 Iowa 659.

Maryland. — *West Virginia Cent., etc., R. Co. v. State*, 96 Md. 652.

Michigan. — *Scott v. Longwell*, (Mich. 1905) 102 N. W. Rep. 230.

Nebraska. — *Vansyoc v. Freewater Cemetery Assoc.*, 63 Neb. 143.

Nevada. — *Powell v. Nevada, etc., R. Co.*, (Nev. 1904) 78 Pac. Rep. 978.

New York. — *Wilson v. American Bridge Co.*, 74 N. Y. App. Div. 506; *Van Doren v. Holbrook, etc., Contracting Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 348.*

North Carolina. — *Drum v. Miller*, 135 N. Car. 204, 102 Am. St. Rep. 528.

Tennessee. — *Knoxville Traction Co. v. Mullins*, 111 Tenn. 329.

Texas. — *Ft. Worth, etc., R. Co. v. Partin*, 33 Tex. Civ. App. 173; *Ft. Worth, etc., R. Co. v. Beauchamp*, 95 Tex. 496, 93 Am. St. Rep. 864.

464. Absolute r ve. tion of Injuries. — See notes 3, 4.**b. ORDINARY CARE — REASONABLE CARE — TERMS CONTRASTED.**

See notes 5, 6.

West Virginia. — *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 102 Am. St. Rep. 941.

Wisconsin. — *Heer v. Warren-Scharf Asphalt Paving Co.*, 118 Wis. 57.

464. 2. Inherently Dangerous Acts. — *Fitz-Simmons, etc., Co. v. Braun*, 199 Ill. 390; *Louisville, etc., R. Co. v. Logsdon*, 114 Ky. 746; *Laugabough v. Anderson*, 12 Ohio Cir. Dec. 341, 22 Ohio Cir. Ct. 178.

3. Absolute Prevention — England. — *Bell v. Caledonian R. Co.*, Sc. Ct. of Sess., 4 F. 431.

United States. — *Choctaw, etc., R. Co. v. Tennessee*, 191 U. S. 326; *Southern Pac. R. Co. v. Schuyler*, (C. C. A.) 135 Fed. Rep. 1015; *The Oregon*, (C. C. A.) 133 Fed. Rep. 609; *Illinois Cent. R. Co. v. Coughlin*, (C. C. A.) 132 Fed. Rep. 801; *Wright v. Stanley*, (C. C. A.) 119 Fed. Rep. 330; *Walker v. Wilmington Steamboat Co.*, 117 Fed. Rep. 784.

Alabama. — *Southern Bell Telephone, etc., Co. v. McTyler*, 137 Ala. 601, 97 Am. St. Rep. 62.

Connecticut. — *Rosenstein v. Fair Haven, etc., R. Co.*, (Conn. 1905) 60 Atl. Rep. 1061; *Nelson v. Branford Lighting, etc., Co.*, 75 Conn. 548.

Delaware. — *McAllister v. People's R. Co.*, 4 Penn. (Del.) 272; *Colbourn v. Wilmington*, 4 Penn. (Del.) 443; *Betts v. Wilmington City R. Co.*, 3 Penn. (Del.) 448.

District of Columbia. — *Kight v. Metropolitan R. Co.*, 21 App. Cas. (D. C.) 494.

Georgia. — *Babcock Bros. Lumber Co. v. Johnson*, 120 Ga. 1030; *Warren County v. Evans*, 118 Ga. 200; *Atlantic, etc., R. Co. v. Reynolds*, 117 Ga. 47; *Robert Portner Brewing Co. v. Cooper*, 116 Ga. 171.

Illinois. — *McAllister v. Jung*, 112 Ill. App. 138, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 464; *Elgin v. Nofs*, 200 Ill. 252; *Chicago, etc., R. Co. v. Murphy*, 198 Ill. 462; *People's Gas Light, etc., Co. v. Porter*, 102 Ill. App. 461.

Indiana. — *Standard Pottery Co. v. Moudy*, (Ind. App. 1905) 73 N. E. Rep. 188; *Vincennes v. Spees*, (Ind. App. 1904) 72 N. E. Rep. 531; *Indianapolis St. R. Co. v. Schomberg*, 164 Ind. 111; *Citizens St. R. Co. v. Jolly*, 161 Ind. 8; *Wabash R. Co. v. De Hart*, 32 Ind. App. 62.

Iowa. — *Larkin v. Chicago, etc., R. Co.*, 118 Iowa 652.

Kentucky. — *Midway v. Lloyd*, (Ky. 1903) 74 S. W. Rep. 195; *Bell v. Henderson*, (Ky. 1903) 74 S. W. Rep. 206.

Maine. — *York v. Cleaves*, 97 Me. 413.

Maryland. — *South Baltimore Car Works v. Schaefer*, 96 Md. 88, 94 Am. St. Rep. 560.

Michigan. — *McIntyre v. Pfaudler Vacuum Fermentation Co.*, 133 Mich. 552; *Newman v. Ann Arbor*, 134 Mich. 29; *Gilson v. Cadillac*, 134 Mich. 189.

Mississippi. — *Carver v. Jackson*, 82 Miss. 583.

Missouri. — *Coffey v. Carthage*, 186 Mo. 573; *Smith v. Fordyce*, 190 Mo. 1; *Deckerd v. Wabash R. Co.*, 111 Mo. App. 117; *Maggioli v. St. Louis Transit Co.*, 108 Mo. App. 416; *Mc-*

Kinsty v. St. Louis Transit Co., 108 Mo. App. 12; *Vancleve v. St. Louis, etc., R. Co.*, 107 Mo. App. 96; *Jones v. Kansas City, etc., R. Co.*, 178 Mo. 528, 101 Am. St. Rep. 434; *Reed v. Mexico*, 101 Mo. App. 155; *Curtis v. McNair*, 173 Mo. 270; *Becker v. Lincoln Real Estate, etc., Co.*, 174 Mo. 246.

Montana. — *Meisner v. Dillon*, 29 Mont. 116.

Nebraska. — *Lincoln Traction Co. v. Webb*, (Neb. 1905) 102 N. W. Rep. 258; *Nothdurft v. Lincoln*, 66 Neb. 434.

New Jersey. — *Hollingshead v. Camden, etc., R. Co.*, (N. J. 1905) 60 Atl. Rep. 514.

New York. — *King v. Ft. Ann*, 180 N. Y. 496; *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380; *O'Shaughnessey v. Middleport*, 93 N. Y. App. Div. 93; *Beecroft v. New York Athletic Club*, 80 N. Y. App. Div. 524; *Colabel v. Metropolitan St. R. Co.*, 74 N. Y. App. Div. 505, affirmed 173 N. Y. 627; *Baird v. New York Cent., etc., R. Co.*, 64 N. Y. App. Div. 14, affirmed 172 N. Y. 637; *McFeeters v. New York*, 102 N. Y. App. Div. 32.

Ohio. — *Leipsic v. Gerdeman*, 68 Ohio St. 1.

Oklahoma. — *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356.

Oregon. — *Duntley v. Inman*, 42 Oregon 334.

Pennsylvania. — *Alexander v. Nanticoke Light Co.*, 209 Pa. St. 571; *Hartman v. Citizens Natural Gas Co.*, 210 Pa. St. 19; *Anderson v. Hays Mfg. Co.*, 207 Pa. St. 106.

Tennessee. — *Memphis St. R. Co. v. Shaw*, 110 Tenn. 467; *Memphis St. R. Co. v. Kart-right*, 110 Tenn. 277, 100 Am. St. Rep. 807.

Texas. — *El Paso Electric R. Co. v. Harry*, (Tex. Civ. App. 1904) 83 S. W. Rep. 735; *Texas, etc., R. Co. v. Storey*, (Tex. Civ. App. 1904) 83 S. W. Rep. 852; *St. Louis Southwestern R. Co. v. Byers*, (Tex. Civ. App. 1902) 70 S. W. Rep. 558.

Utah. — *Roth v. Eccles*, 28 Utah 456; *Downey v. Gemini Min. Co.*, 24 Utah 431, 91 Am. St. Rep. 798.

Washington. — *Edwards v. Burke*, 36 Wash. 107; *Benson v. Spokane*, (Wash. 1905) 80 Pac. Rep. 1106; *Goe v. Northern Pac. R. Co.*, 30 Wash. 654; *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67.

West Virginia. — *Compare Thomas v. Wheeling Electrical Co.*, 54 W. Va. 395.

Verbal Assurance of Safety. — See *Bachant v. Boston, etc., R. Co.*, 187 Mass. 392, 105 Am. St. Rep. 408.

4. Where Safer Manner of Performance. — *Smith v. Donnelly*, 93 N. Y. App. Div. 569.

The Test. — *Southern Pac. R. Co. v. Hetzer*, (C. C. A.) 135 Fed. Rep. 272; *Stephenson v. Corder*, (Kan. 1905) 80 Pac. Rep. 938; *Johnson v. Prince Line*, 104 N. Y. App. Div. 157.

5. Ordinary Care — Reasonable Care. — *Louisville, etc., R. Co. v. Pointer*, 113 Ky. 952; *Caven v. Bodwell Granite Co.*, 99 Me. 278; *Freel v. Wanamaker*, 208 Pa. St. 279; *Richmond, etc., Electric R. Co. v. Rubin*, 102 Va. 809.

"Ordinary Care," "Due Care," and "Reasonable Care" are synonymous terms. *Lewis v. Norfolk, etc., R. Co.*, 132 N. Car. 382.

464. 6. Care of Ordinarily Careful and Prudent Person—*United States*.—*Choctaw, etc., R. Co. v. Tennessee*, 191 U. S. 326; *Southern Electric R. Co. v. Hageman*, (C. C. A.) 121 Fed. Rep. 262.

Alabama.—*Southern Bell Telephone, etc., Co. v. McTyer*, 137 Ala. 601, 97 Am. St. Rep. 62; *Alabama G. S. R. Co. v. Clark*, 136 Ala. 450.

Arkansas.—*Ford v. Bodcaw Lumber Co.*, 73 Ark. 49; *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572.

Colorado.—*Colorado Springs v. May*, (Colo. App. 1904) 77 Pac. Rep. 1093; *Tanner v. Harper*, 32 Colo. 156.

Connecticut.—*Monroe v. Hartford St. R. Co.*, 76 Conn. 201; *Hayden v. Fair Haven, etc., R. Co.*, 76 Conn. 355; *Nesbit v. Crosby*, 74 Conn. 554.

Delaware.—*Neal v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 467; *Snyder v. Peoples R. Co.*, 4 Penn. (Del.) 145; *Cox v. Wilmington City R. Co.*, 4 Penn. (Del.) 162; *Adams v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 512; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Tully v. Philadelphia, etc., R. Co.*, 3 Penn. (Del.) 455; *Goldstein v. People's R. Co.*, (Del. 1905) 60 Atl. Rep. 975.

District of Columbia.—*Metropolitan R. Co. v. Blick*, 22 App. Cas. (D. C.) 194.

Florida.—*Consumers Electric Light, etc., Co. v. Pryor*, 44 Fla. 354; *Florida Cent., etc., R. Co. v. Mooney*, 45 Fla. 286.

Illinois.—*Chicago Junction R. Co. v. McGrath*, 203 Ill. 511; *Armour v. Golkowska*, 202 Ill. 144; *Chicago City R. Co. v. Fennimore*, 199 Ill. 9; *Putney v. Keith*, 98 Ill. App. 285.

Indiana.—*Clear Creek Stone Co. v. Carmichael*, (Ind. App. 1905) 73 N. E. Rep. 935; *Indianapolis St. R. Co. v. Seerley*, (Ind. App. 1904) 72 N. E. Rep. 169; *Bostock-Ferari Amusement Co. v. Brocksmith*, 34 Ind. App. 566, 107 Am. St. Rep. 213; *Cleveland, etc., R. Co. v. Stewart*, 161 Ind. 242.

Iowa.—*Christy v. Des Moines City R. Co.*, 126 Iowa 428.

Kansas.—*Stephenson v. Corder*, (Kan. 1905) 80 Pac. Rep. 938.

Kentucky.—*Cincinnati, etc., R. Co. v. Vaught*, (Ky. 1904) 78 S. W. Rep. 859; *Louisville, etc., Packet Co. v. Mulligan*, (Ky. 1903) 77 S. W. Rep. 704; *Chesapeake, etc., R. Co. v. Riddle*, (Ky. 1903) 72 S. W. Rep. 22.

Maine.—*Maxfield v. Maine Cent. R. Co.*, (Me. 1905) 60 Atl. Rep. 710; *Merrill v. Bassett*, 97 Me. 501; *Ward v. Maine Cent. R. Co.*, 96 Me. 136; *York v. Cleaves*, 97 Me. 413; *Caven v. Bodwell Granite Co.*, 99 Me. 278.

Michigan.—*Burgess v. Stowe*, 134 Mich. 204; *Merryman v. Hall*, 131 Mich. 406.

Minnesota.—*Gilbert v. Duluth Gen. Electric Co.*, 93 Minn. 99, 106 Am. St. Rep. 430; *Lauritsen v. American Bridge Co.*, 87 Minn. 518.

Missouri.—*Carey v. Kansas City*, 187 Mo. 715; *Livingston v. Wabash R. Co.*, 170 Mo. 452; *Woods v. Wabash R. Co.*, 188 Mo. 229; *Ashby v. Elsberry, etc., Gravel Road Co.*, 111 Mo. App. 70; *Furber v. Kansas City Bolt, etc., Co.*, 185 Mo. 301; *Lackland v. Lexington Coal Min. Co.*, 110 Mo. App. 634; *Miller v. George B. Peck Dry Goods Co.*, 104 Mo. App. 609; *Kean v. Schoening*, 103 Mo. App. 77; *Peterson*

v. Westman, 103 Mo. App. 672; *Holden v. Missouri R. Co.*, 177 Mo. 456; *Kolb v. St. Louis Transit Co.*, 102 Mo. App. 143; *Aldrich v. St. Louis Transit Co.*, 101 Mo. App. 77; *Curtis v. McNair*, 173 Mo. 270; *Koenig v. Union Depot R. Co.*, 173 Mo. 698; *Groom v. Kavanagh*, 97 Mo. App. 362; *Gebhardt v. St. Louis Transit Co.*, 97 Mo. App. 373.

Nebraska.—*Chicago, etc., R. Co. v. Lilley*, (Neb. 1903) 93 N. W. Rep. 1012; *Chicago, etc., R. Co. v. Lagerkrans*, 65 Neb. 566; *Bock v. Grooms*, (Neb. 1902) 92 N. W. Rep. 603.

New Hampshire.—*True v. Meredith Creamery*, 72 N. H. 154; *Waldron v. Boston, etc., R. Co.*, 71 N. H. 362; *Minot v. Boston, etc., R. Co.*, (N. H. 1905) 61 Atl. Rep. 509.

New York.—*Simone v. Kirk*, 173 N. Y. 7; *Burke v. Ireland*, 166 N. Y. 305; *Buckley v. Westchester Lighting Co.*, 93 N. Y. App. Div. 436; *Klimpl v. Metropolitan St. R. Co.*, 92 N. Y. App. Div. 291; *Colabel v. Metropolitan St. R. Co.*, 74 N. Y. App. Div. 505, *affirmed* 173 N. Y. 627; *Adsit v. Catskill Electric R. Co.*, 88 N. Y. App. Div. 167.

North Carolina.—*Jones v. American Warehouse Co.*, 137 N. Car. 337; *Drum v. Miller*, 135 N. Car. 204, 102 Am. St. Rep. 528; *Ramsbottom v. Atlantic Coast Line R. Co.*, 138 N. Car. 38.

North Dakota.—*Meehan v. Great Northern R. Co.*, 13 N. Dak. 432.

Ohio.—*Burton Telephone Co. v. Gordon*, 25 Ohio Cir. Ct. 641.

Oregon.—*Shobert v. May*, 40 Oregon 68, 91 Am. St. Rep. 453.

Pennsylvania.—*Pollack v. Pennsylvania R. Co.*, 210 Pa. St. 631, 105 Am. St. Rep. 843; *Brown v. Schellenberg*, 19 Pa. Super. Ct. 286.

Rhode Island.—*Carr v. American Locomotive Co.*, 26 R. I. 180.

South Carolina.—*Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1; *Smoak v. Savannah, etc., R. Co.*, 65 S. Car. 299; *Bodie v. Charleston, etc., R. Co.*, 61 S. Car. 468; *Willis v. Cherokee Falls Mfg. Co.*, (S. Car. 1905) 51 S. E. Rep. 538.

Texas.—*Boyles v. Texas, etc., R. Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 936; *Ft. Worth, etc., R. Co. v. Dial*, (Tex. Civ. App. 1905) 85 S. W. Rep. 22; *Rapid Transit R. Co. v. Miller*, (Tex. Civ. App. 1905) 85 S. W. Rep. 439; *Texas, etc., R. Co. v. McDonald*, (Tex. Civ. App. 1905) 85 S. W. Rep. 493; *St. Louis Southwestern R. Co. v. Hall*, 98 Tex. 480; *Southern Kansas R. Co. v. Sage*, 98 Tex. 438; *San Antonio, etc., R. Co. v. Hahl*, (Tex. Civ. App. 1904) 83 S. W. Rep. 27; *Missouri, etc., R. Co. v. Wood*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1187; *Missouri, etc., R. Co. v. O'Connor*, (Tex. Civ. App. 1904) 78 S. W. Rep. 374; *Missouri, etc., R. Co. v. Hammer*, 34 Tex. Civ. App. 354; *Ft. Worth, etc., R. Co. v. Partin*, 33 Tex. Civ. App. 173; *Missouri, etc., R. Co. v. Owens*, (Tex. Civ. App. 1903) 75 S. W. Rep. 579; *McGrew v. St. Louis, etc., R. Co.*, 32 Tex. Civ. App. 265; *Texas, etc., R. Co. v. Ball*, (Tex. Civ. App. 1903) 73 S. W. Rep. 420; *St. Louis Southwestern R. Co. v. Brown*, 30 Tex. Civ. App. 57; *Missouri, etc., R. Co. v. Keaveney*, (Tex. Civ. App. 1904) 80 S. W. Rep. 387.

Utah.—*Downey v. Gemini Min. Co.*, 24 Utah 431, 91 Am. St. Rep. 798.

465. See note *a*.**c. ORDINARY OR REASONABLE CARE AS DEPENDENT ON PARTICULAR FACTS. — See note i.**

Vermont. — *McGovern v. Smith*, 73 Vt. 52; *Dufur v. Boston, etc.*, R. Co., 75 Vt. 165.

Virginia. — *Persinger v. Allegheny Ore, etc.*, Co., 102 Va. 350; *Collins v. George*, 102 Va. 509; *Danville R., etc., Co. v. Hodnett*, 101 Va. 361.

Washington. — *Lynch v. Kineth*, 36 Wash. 368, 104 Am. St. Rep. 958; *Benson v. Spokane*, (Wash. 1905) 80 Pac. Rep. 1106; *Atherton v. Tacoma R., etc., Co.*, 30 Wash. 395.

Wisconsin. — *Pumorlo v. Merrill*, 125 Wis. 102; *Williams v. North Wisconsin Lumber Co.*, 124 Wis. 328; *Busse v. Rogers*, 120 Wis. 443; *Hupfer v. National Distilling Co.*, 119 Wis. 417; *Zimmer v. Fox River Valley Electric R. Co.*, 118 Wis. 614; *Rylander v. Laursen*, 124 Wis. 2.

Wyoming. — *Howell v. Big Horn Basin Colonization Co.*, (Wyo. 1905) 81 Pac. Rep. 785.

Such Care as the Great Majority of Men Would Use. — See *Boyce v. Wilbur Lumber Co.*, 119 Wis. 642.

Degree of Care Ordinarily Exercised in Business. — Compare *Montgomery v. Missouri Pac. R. Co.*, 181 Mo. 477.

"The Ideal Prudent Man." — *Marks v. Harriet Cotton Mills*, 138 N. Car. 401.

Varying Conceptions of Moral Duty cannot be permitted to alter the standard. *Southern Pac. R. Co. v. Hetzer*, (C. C. A.) 135 Fed. Rep. 272, holding that too heavy a burden was laid on the defendant by a charge that it was his duty to exercise that degree of care "that an ordinarily prudent business man would use under similar circumstances if the danger to be apprehended from a want of care was his personal danger." See to the same effect *Southern Pac. R. Co. v. Gloyd*, (C. C. A.) 138 Fed. Rep. 388.

465. a. Reasonable Care in the Light of Circumstances is all that is required, whatever may be the relations of the parties or the likelihood of danger. *Wheeler v. South Orange, etc., Traction Co.*, 70 N. J. L. 725, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 495 [465].

1. As Dependent on the Particular Facts of the Case — *England.* — *Harris v. Perry*, (1903) 2 K. B. 219.

Canada. — *Royal Electric Co. v. H  v  *, 32 Can. Sup. Ct. 462.

United States. — *Southern Pac. R. Co. v. Hetzer*, (C. C. A.) 135 Fed. Rep. 272; *Kelly v. Malott*, (C. C. A.) 135 Fed. Rep. 74.

Arkansas. — *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572.

California. — *Wikberg v. Olson Co.*, 138 Cal. 479; *Mock v. Los Angeles Traction Co.*, 139 Cal. 616.

Colorado. — *Tanner v. Harper*, 32 Colo. 156.

Connecticut. — *Rohloff v. Fair Haven, etc.*, R. Co., 76 Conn. 689; *Hayden v. Fair Haven, etc.*, R. Co., 76 Conn. 355; *Nesbit v. Crosby*, 74 Conn. 554.

Delaware. — *Tully v. Philadelphia, etc.*, R. Co., 3 Penn. (Del.) 455; *Adams v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 512; *Neal v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 467; *Snyder v. People's R. Co.*, 4 Penn.

(Del.) 145; *Cox v. Wilmington City R. Co.*, 4 Penn. (Del.) 162; *Wilman v. People's R. Co.*, 4 Penn. (Del.) 260; *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527; *Foulk v. Wilmington City R. Co.*, (Del. 1905) 60 Atl. Rep. 973; *Goldstein v. People's R. Co.*, (Del. 1905) 60 Atl. Rep. 975.

District of Columbia. — *Atchison v. Wills*, 21 App. Cas. (D. C.) 548.

Florida. — *Consumers' Electric Light, etc., Co. v. Pryor*, 44 Fla. 354.

Georgia. — *Bullard v. Southern R. Co.*, 116 Ga. 644.

Illinois. — *Chicago City R. Co. v. Bennett*, 214 Ill. 26; *Chicago City R. Co. v. Fennimore*, 199 Ill. 9; *Chicago City R. Co. v. Tuohy*, 196 Ill. 410; *Chicago City R. Co. v. Biederman*, 102 Ill. App. 617.

Indiana. — *Cleveland, etc., R. Co. v. Haas*, (Ind. App. 1905) 74 N. E. Rep. 1003.

Iowa. — *German Ins. Co. v. Chicago, etc.*, R. Co., (Iowa 1905) 104 N. W. Rep. 361; *Oliver v. Iowa Cent. R. Co.*, 122 Iowa 217; *Sankey v. Chicago, etc., R. Co.*, 118 Iowa 39; *Lanza v. Le Grand Quarry Co.*, 124 Iowa 659; *Fitch v. Mason City, etc., Traction Co.*, 124 Iowa 665.

Kentucky. — *Illinois Cent. R. Co. v. Hays*, (Ky. 1905) 84 S. W. Rep. 338; *Greene v. Louisville R. Co.*, (Ky. 1905) 84 S. W. Rep. 1154; *Illinois Cent. R. Co. v. Watson*, (Ky. 1904) 78 S. W. Rep. 175; *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 249; *Louisville R. Co. v. French*, (Ky. 1903) 71 S. W. Rep. 486.

Louisiana. — *Mitchell v. Illinois Cent. R. Co.*, 110 La. 630, 98 Am. St. Rep. 472; *Schwartz v. New Orleans, etc., R. Co.*, 110 La. 534; *Eichorn v. New Orleans, etc., R., etc., Co.*, 112 La. 236, 104 Am. St. Rep. 437.

Maine. — *Caven v. Bodwell Granite Co.*, 99 Me. 278; *Maxfield v. Maine Cent. R. Co.*, (Me. 1905) 60 Atl. Rep. 710; *Butler v. Rockland, etc., R. Co.*, 99 Me. 149, 105 Am. St. Rep. 267.

Maryland. — *West Virginia Cent., etc., R. Co. v. State*, 96 Md. 652.

Massachusetts. — *Kirk v. Sturdy*, 187 Mass. 87.

Michigan. — *Westphal v. St. Joseph, etc., St. R. Co.*, 134 Mich. 239; *Burgess v. Stowe*, 134 Mich. 204; *Geller v. Briscoe Mfg. Co.*, 136 Mich. 330.

Minnesota. — *Klugherz v. Chicago, etc., R. Co.*, 90 Minn. 7, 101 Am. St. Rep. 384; *Gilbert v. Duluth General Electric Co.*, 93 Minn. 99, 106 Am. St. Rep. 430.

Missouri. — *Heinzle v. Metropolitan St. R. Co.*, 182 Mo. 528; *Oates v. Metropolitan St. R. Co.*, 168 Mo. 535; *Franklin v. Missouri, etc., R. Co.*, 97 Mo. App. 473; *Klockenbrink v. St. Louis, etc., R. Co.*, 172 Mo. 678; *Koenig v. Union Depot R. Co.*, 173 Mo. 608; *Holden v. Missouri R. Co.*, 177 Mo. 456; *Kolb v. St. Louis Traction Co.*, 102 Mo. App. 143; *O'Keefe v. St. Louis, etc., R. Co.*, 108 Mo. App. 177; *Young v. Missouri Pac. R. Co.*, (Mo. App. 1904) 84 S. W. Rep. 175; *Meng v. St. Louis, etc., R. Co.*, 108 Mo. App. 553; *Harper v. St. Louis Merchants Bridge Terminal Co.*, 187 Mo. 575.

466. See notes 1, 2.**VI. NECESSITY FOR DUTY — 1. General Rule. —** See note 3.

Nebraska. — *Chicago, etc., R. Co. v. Lilley*, (Neb. 1903) 93 N. W. Rep. 1012.

New Jersey. — *Wheeler v. South Orange, etc., Traction Co.*, 70 N. J. L. 725, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 465; *Conrad v. Elizabeth, etc., R. Co.*, 70 N. J. L. 676.

New York. — *Snowden v. Somerset*, 171 N. Y. 99; *Wieland v. Delaware, etc., Canal Co.*, 167 N. Y. 19, 82 Am. St. Rep. 707; *Solomon v. Buffalo R. Co.*, 96 N. Y. App. Div. 487; *Klinger v. United Traction Co.*, 92 N. Y. App. Div. 100, modified 181 N. Y. 521; *Adsit v. Catskill Electric R. Co.*, 88 N. Y. App. Div. 167; *Conway v. Brooklyn Heights R. Co.*, 82 N. Y. App. Div. 516; *Pelletreau v. Metropolitan St. R. Co.*, 74 N. Y. App. Div. 192, affirmed 174 N. Y. 503; *Sternfels v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 494, affirmed 174 N. Y. 512; *Shilagi v. Degnon-McLean Contracting Co.*, 71 N. Y. App. Div. 152, affirmed 173 N. Y. 625; *Ludwig v. Metropolitan St. R. Co.*, 71 N. Y. App. Div. 210, 174 N. Y. 546; *Flanagan v. New York Cent., etc., R. Co.*, 70 N. Y. App. Div. 505, affirmed 173 N. Y. 631; *Knight v. Lanier*, 69 N. Y. App. Div. 454.

North Carolina. — *Drum v. Miller*, 135 N. Car. 204, 102 Am. St. Rep. 528; *Edwards v. Atlantic Coast Line R. Co.*, 132 N. Car. 99.

Oregon. — *Schleiger v. Northern Terminal Co.*, 43 Oregon 4.

Pennsylvania. — *Anderson v. Hays Mfg. Co.*, 207 Pa. St. 106; *Rachmel v. Clark*, 205 Pa. St. 314; *Rauch v. Smedley*, 208 Pa. St. 175; *Hartman v. Citizens Natural Gas Co.*, 210 Pa. St. 19.

South Carolina. — *Carroll v. Charleston, etc., R. Co.*, 65 S. Car. 378; *Bodie v. Charleston, etc., R. Co.*, 61 S. Car. 468.

Tennessee. — *Louisville, etc., R. Co. v. Sawyer*, (Tenn. 1905) 86 S. W. Rep. 386.

Texas. — *St. Louis Southwestern R. Co. v. Kilman*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1050; *Galveston, etc., R. Co. v. Perry*, (Tex. Civ. App. 1905) 85 S. W. Rep. 62; *Olivares v. San Antonio, etc., R. Co.*, (Tex. Civ. App. 1904) 84 S. W. Rep. 248; *Central Texas, etc., R. Co. v. Gibson*, 35 Tex. Civ. App. 66; *Galveston City R. Co. v. Hanna*, 34 Tex. Civ. App. 608; *Missouri, etc., R. Co. v. Hammer*, 34 Tex. Civ. App. 354; *Dallas Electric Co. v. Mitchell*, 33 Tex. Civ. App. 424; *McGrew v. St. Louis, etc., R. Co.*, 32 Tex. Civ. App. 265; *Missouri, etc., R. Co. v. Buchanan*, 31 Tex. Civ. App. 209; *Missouri, etc., R. Co. v. Wood*, 95 Tex. 223, 93 Am. St. Rep. 834.

Vermont. — *McGovern v. Smith*, 73 Vt. 52.

Virginia. — *Persinger v. Allegheny Ore., etc., Co.*, 102 Va. 350; *Danville R., etc., Co. v. Hodnett*, 101 Va. 361; *Norfolk, etc., R. Co. v. Fritts*, 103 Va. 687, 106 Am. St. Rep. 911; *Richmond, etc., Electric R. Co. v. Rubin*, 102 Va. 809; *Collins v. George*, 102 Va. 500.

Washington. — *Lynch v. Kineth*, 36 Wash. 368, 104 Am. St. Rep. 958; *Halverson v. Seattle Electric Co.*, 35 Wash. 600; *Atherton v. Tacoma R., etc., Co.*, 30 Wash. 305.

Wisconsin. — *Forrestal v. Milwaukee Electric R., etc., Co.*, 119 Wis. 495; *Zimmer v.*

Fox River Valley Electric R. Co., 118 Wis. 614; *Walker v. Ontario*, 118 Wis. 564; *Warden v. Miller*, 112 Wis. 67.

"Negligence" Has Only One Correct Definition, and it must necessarily be the same in every action founded on negligence." *Boyles v. Texas, etc., R. Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 936.

No Hard or Fast Rule. — *Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1.

Doctrine that Great Care Required of One Having Life of Another in Charge. — *Spring Valley Coal Co. v. Buzis*, 115 Ill. App. 196, affirmed 213 Ill. 341.

Age as Affecting Degree of Care Required. — *Chicago City R. Co. v. O'Donnell*, 114 Ill. App. 359.

466. 1. Degree of Care Varies with Danger — *Georgia.* — *Chattanooga Southern R. Co. v. Wheeler*, 123 Ga. 41; *Chenall v. Palmer Brick Co.*, 117 Ga. 106.

Iowa. — *Eakins v. Chicago, etc., R. Co.*, 126 Iowa 324.

Kansas. — *Keldkamp v. Kansas City*, 68 Kan. 479.

Missouri. — *Magrane v. St. Louis, etc., R. Co.*, 183 Mo. 119.

New Hampshire. — *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.*, 71 N. H. 522; *Hughes v. Boston, etc., R. Co.*, 71 N. H. 279, 93 Am. St. Rep. 518.

New York. — *Solomon v. Buffalo R. Co.*, 96 N. Y. App. Div. 487; *Clarke v. Welsh*, 93 N. Y. App. Div. 393; *Buckley v. Westchester Lighting Co.*, 93 N. Y. App. Div. 436.

Oregon. — *Chapelon v. Portland Electric Co.*, 41 Oregon 39.

Rhode Island. — *Paolino v. McKendall*, 24 R. I. 432, 96 Am. St. Rep. 736.

South Carolina. — *Cooper v. Charleston, etc., R. Co.*, 65 S. Car. 214.

Washington. — *Curtis v. Tenino Stone Quarries*, 37 Wash. 355.

Extraordinary Care. — *Sutton v. Wood*, (Ky. 1905) 85 S. W. Rep. 201; *Coffeyville Min., etc., Co. v. Carter*, 65 Kan. 565.

Something More than Mere Reasonable Care, it has been held, is required in certain cases, as in the management of electricity. *Winkelman v. Kansas City Electric Light Co.*, 110 Mo. App. 184.

"Commensurate." — The care must be commensurate with the danger.

United States. — *Delaware, etc., R. Co. v. Devore*, (C. C. A.) 122 Fed. Rep. 791.

Delaware. — *Queen Anne's R. Co. v. Reed*, (Del. 1905) 59 Atl. Rep. 860; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564.

District of Columbia. — *Metropolitan R. Co. v. Blick*, 22 App. Cas. (D. C.) 194.

Florida. — *Morris v. Florida Cent., etc., R. Co.*, 43 Fla. 10.

Illinois. — *Commonwealth Electric Co. v. Melville*, 210 Ill. 70; *Economy Light, etc., Co. v. Hiller*, 203 Ill. 518; *Baudler v. People's Gas Light, etc., Co.*, 108 Ill. App. 187.

Indiana. — *Cleveland, etc., R. Co. v. Miles*, 162 Ind. 646; *Indianapolis St. R. Co. v. Schmidt*,

163 Ind. 360; *Citizens Gas, etc., Co. v. Whipple*, 32 Ind. App. 203.

Iowa.—*Barto v. Iowa Telephone Co.*, 126 Iowa 241, 106 Am. St. Rep. 347.

Kentucky.—*Chesapeake, etc., R. Co. v. Riddle*, (Ky. 1903) 72 S. W. Rep. 22.

Minnesota.—*Lauritsen v. American Bridge Co.*, 87 Minn. 518.

Missouri.—*McDaniels v. Royle Min. Co.*, 110 Mo. App. 706; *Degel v. St. Louis Transit Co.*, 101 Mo. App. 56; *Curtis v. McNair*, 173 Mo. 270; *Gebhardt v. St. Louis Transit Co.*, 97 Mo. App. 373.

Nebraska.—*Bianki v. Greater American Exposition Co.*, (Neb. 1902) 92 N. W. Rep. 615; *Chicago, etc., R. Co. v. Roberts*, (Neb. 1902) 91 N. W. Rep. 707.

New York.—*Wolpers v. New York, etc., Electric Light, etc., Co.*, 91 N. Y. App. Div. 424; *O'Sullivan v. Knox*, 81 N. Y. App. Div. 438, *affirmed* 178 N. Y. 565; *German-American Ins. Co. v. Standard Gas Light Co.*, 69 N. Y. App. Div. 539, *affirmed* 174 N. Y. 508.

Oregon.—*Shobert v. May*, 40 Oregon 68, 91 Am. St. Rep. 453.

Tennessee.—*Mansfield v. Northcut*, 112 Tenn. 536.

Virginia.—*Norfolk R., etc., Co. v. Spratley*, 103 Va. 379.

Washington.—*Anderson v. Seattle-Tacoma Interurban R. Co.*, 36 Wash. 387, 104 Am. St. Rep. 962.

Commensurate with Duty.—*Atchison, etc., R. Co. v. Parry*, 67 Kan. 515; *Marden v. Portsmouth, etc., St. R. Co.*, (Me. 1905) 60 Atl. Rep. 530.

"Proportionate" to Danger.—Many of the cases use the expression that the care must be "proportionate" or "in proportion to" the danger. *Kelly v. Malott*, (C. C. A.) 135 Fed. Rep. 74; *Adams v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 512; *Giordano v. Brandywine Granite Co.*, 3 Penn. (Del.) 423; *Colbourn v. Wilmington*, 4 Penn. (Del.) 443; *Consumers Electric Light, etc., Co. v. Pryor*, 44 Fla. 354; *Indianapolis St. R. Co. v. Seerley*, (Ind. App. 1904) 72 N. E. Rep. 169; *Toledo, etc., R. Co. v. Parks*, 163 Ind. 592; *Indianapolis St. R. Co. v. Schomberg*, (Ind. App. 1904) 71 N. E. Rep. 237; *German Ins. Co. v. Chicago, etc., R. Co.*, (Iowa 1905) 104 N. W. Rep. 361; *Ford v. Crigler*, (Ky. 1903) 74 S. W. Rep. 661; *Scott v. Longwell*, (Mich. 1905) 102 N. W. Rep. 230; *Aldrich v. St. Louis Transit Co.*, 101 Mo. App. 77; *Welle v. Celluloid Co.*, 175 N. Y. 401; *Dowd v. New York, etc., R. Co.*, 170 N. Y. 459; *Norfolk, etc., R. Co. v. Fritts*, 103 Va. 687, 106 Am. St. Rep. 911.

466. 2. Reasonable Care in an Emergency.—*Lewis v. Long Island R. Co.*, 162 N. Y. 52; *New York, etc., R. Co. v. Kistler*, 66 Ohio St. 326.

Different Degrees of Precaution May Be Necessary in the exercise of the same degree of care. *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630.

Legal Standard Reasonable Care.—The dangerous character of dynamite "requires a proportionate degree of care, but the legal standard is reasonable care." *Erickson v. Monson Consol. Slate Co.*, (Me. 1905) 60 Atl. Rep. 708.

3. General Rule as to Necessity for Duty—*England*.—*Clarke v. Army, etc., Co-operative Soc.*,

(1903) 1 K. B. 155; *Parker v. Plomesgate Rural Council*, 9 Com. Cas. (Eng.) 107.

Canada.—*Davidson v. Stuart*, 34 Can. Sup. Ct. 215.

United States.—*Huset v. J. I. Case Threshing Mach. Co.*, 57 C. C. A. 237, 120 Fed. Rep. 865; *Gilbert v. Burlington, etc., R. Co.*, (C. C. A.) 128 Fed. Rep. 529; *Standard Oil Co. v. Murray*, (C. C. A.) 119 Fed. Rep. 572.

Alabama.—*Southern Bell Telephone, etc., Co. v. McTyler*, 137 Ala. 601, 97 Am. St. Rep. 62.

California.—*Means v. Southern California R. Co.*, 144 Cal. 473.

Connecticut.—*Hillyer v. Winsted*, 77 Conn. 304.

Delaware.—*Giordano v. Brandywine Granite Co.*, 3 Penn. (Del.) 423.

Georgia.—*Atlanta, etc., R. Co. v. West*, 121 Ga. 641, 104 Am. St. Rep. 179; *Knowles v. Central of Georgia R. Co.*, 118 Ga. 795.

Illinois.—*Cleveland, etc., R. Co. v. Cline*, 111 Ill. App. 416; *Moster v. Terminal R. Assoc.*, 106 Ill. App. 494; *Western Wheel Works v. Stachnick*, 102 Ill. App. 420; *Putney v. Keith*, 98 Ill. App. 285.

Indiana.—*Pittsburgh, etc., R. Co. v. Lightheiser*, 163 Ind. 247, 264; *Cincinnati, etc., Co. v. Brown*, 32 Ind. App. 58; *Cincinnati, etc., R. Co. v. Worthington*, 30 Ind. App. 663; *Chicago, etc., R. Co. v. Martin*, 31 Ind. App. 308.

Iowa.—*Wagner v. Chicago, etc., R. Co.*, 124 Iowa 462, 122 Iowa 360.

Kansas.—*Union Pac. R. Co. v. Cappier*, 66 Kan. 649; *Atchison, etc., R. Co. v. Walkenshaw*, (Kan. 1905) 81 Pac. Rep. 463.

Kentucky.—*Reusch v. Licking Rolling Mill Co.*, (Ky. 1904) 80 S. W. Rep. 1168; *Dugan v. Chesapeake, etc., R. Co.*, (Ky. 1903) 72 S. W. Rep. 291.

Maryland.—*West Virginia Cent., etc., R. Co. v. State*, 96 Md. 652; *United Electric Light, etc., Co. v. State*, 100 Md. 634.

Massachusetts.—*Bachant v. Boston, etc., R. Co.*, 187 Mass. 392, 105 Am. St. Rep. 408.

Minnesota.—*Wickenburg v. Minneapolis, etc., R. Co.*, 94 Minn. 276.

Missouri.—*Sykes v. St. Louis, etc., R. Co.*, 178 Mo. 693.

Montana.—*Driscoll v. Clark*, 32 Mont. 172.

Nebraska.—*New Omaha Thomson-Houston Electric Light Co. v. Anderson*, (Neb. 1905) 102 N. W. Rep. 89; *Heist v. Jacoby*, (Neb. 1904) 98 N. W. Rep. 1058.

New Jersey.—*Furey v. New York Cent., etc., R. Co.*, 67 N. J. L. 270; *Land v. Fitzgerald*, 68 N. J. L. 28.

New York.—*Desure v. New York Cent., etc., R. Co.*, 94 N. Y. App. Div. 251; *Krebs v. Heitmann*, 104 N. Y. App. Div. 173; *Ross v. Metropolitan St. R. Co.*, 104 N. Y. App. Div. 378; *Fink v. Slade*, 66 N. Y. App. Div. 105.

North Carolina.—*Ramsbottom v. Atlantic Coast Line R. Co.*, 138 N. Car. 38; *Harris v. Balfour Quarry Co.*, 131 N. Car. 553.

Ohio.—*Baltimore, etc., R. Co. v. Cox*, 66 Ohio St. 276, 90 Am. St. Rep. 583; *Cleveland, etc., R. Co. v. Stein*, 24 Ohio Cir. Ct. 643.

Rhode Island.—*Laforest v. O'Driscoll*, 26 R. I. 547; *Howard v. Union R. Co.*, 25 R. I. 652; *White v. New York, etc., R. Co.*, 25 R. I. 19.

South Carolina.—*Carroll v. Charleston, etc.*,

467. 2. Duty as Dependent on Ownership or Jurisdiction — a. IN GENERAL. — See notes 2, 3, 4.

b. EXTENT OF DUTY IMPLIED FROM OWNERSHIP. — See note 5.

c. HOW DUTY DISCHARGED — CONTRACTS WITH THIRD PARTIES. — See note 6.

d. NATURE OF DEFENDANT'S TITLE. — See note 7.

468. See notes 2, 4.

469. VII. PERSON TO WHOM DUTY DUE — 1. In General. — See note 2.

R. Co., 65 S. Car. 378; *Jones v. Charleston*, etc., *R. Co.*, 61 S. Car. 556.

South Dakota. — *Strait v. Eureka*, 17 S. Dak. 326.

Tennessee. — *Chattanooga Electric R. Co. v. Moore*, 113 Tenn. 531.

Texas. — *Boyles v. Texas*, etc., *R. Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 936; *Cruseturner v. International*, etc., *R. Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 778; *Texas Cent. R. Co. v. Harbison*, 98 Tex. 490; *Freeman v. San Antonio Brewing Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1165; *G. A. Duerler Mfg. Co. v. Dullnig*, (Tex. Civ. App. 1904) 83 S. W. Rep. 889; *Lovett v. Gulf*, etc., *R. Co.*, 97 Tex. 436; *Bishop v. Gulf*, etc., *R. Co.*, (Tex. Civ. App. 1903) 75 S. W. Rep. 1086; *De la Pena v. International*, etc., *R. Co.*, 32 Tex. Civ. App. 241; *Brown v. Missouri*, etc., *R. Co.*, (Tex. Civ. App. 1902) 69 S. W. Rep. 178.

Virginia. — *Hortenstein v. Virginia-Carolina R. Co.*, 102 Va. 914; *Carson Lime Co. v. Rutherford*, 102 Va. 244.

Washington. — *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67.

West Virginia. — *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 102 Am. St. Rep. 941; *Williams v. Belmont Coal*, etc., *Co.*, 55 W. Va. 84; *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 88 Am. St. Rep. 884.

Where There Is No Legal Duty. — *The Napolitan Prince*, 134 Fed. Rep. 159; *Bridgeport Water Co. v. Goodwin*, 132 Ala. 533; *Rowe v. Taylorville Electric Co.*, 213 Ill. 318.

Illustrations. — *Gibson v. Torbert*, 115 Iowa 163, 91 Am. St. Rep. 147; *Griswold v. Boston*, etc., *R. Co.*, 183 Mass. 434; *Lucas v. St. Louis*, etc., *R. Co.*, 174 Mo. 270; *Thaney v. A. Friederick*, etc., *Co.*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 134.

But However a Duty May Arise. — *Durfield v. New York*, 101 N. Y. App. Div. 581.

467. 2. Possession of Another for Purposes of Repair. — *Keyes v. Second Baptist Church*, 99 Me. 308.

3. Illustrations — Use of Part of Telephone Pole by Telegraph Company. — *Quill v. Empire State Telephone*, etc., *Co.*, 159 N. Y. 1.

4. See *New Castle v. Kurtz*, 210 Pa. St. 183. But see, in case of notice, *Dunstan v. New York*, 91 N. Y. App. Div. 355; *Duerr v. Consolidated Gas Co.*, 86 N. Y. App. Div. 14.

5. Extent of Duty. — *Carver v. Minneapolis*, etc., *R. Co.*, 120 Iowa 346; *Thornton v. Maine State Agricultural Soc.*, 97 Me. 108, 94 Am. St. Rep. 488; *Ray v. Jones*, etc., *Co.*, 92 Minn. 101.

6. Contract with Third Party No Excuse — United States. — *Texas State Fair v. Brittain*, (C. C. A.) 118 Fed. Rep. 713.

District of Columbia. — *Washington Market Co. v. Clagett*, 19 App. Cas. (D. C.) 12.

Kansas. — *Holitz v. Kansas City*, 68 Kan. 157.

Kentucky. — *Board of Councilmen v. Allen*, (Ky. 1904) 82 S. W. Rep. 292; *Nahm v. Register Newspaper Co.*, (Ky. 1905) 87 S. W. Rep. 296; *Covington v. Johnson*, (Ky. 1902) 69 S. W. Rep. 703.

Louisiana. — *Leveret v. Shreveport Belt R. Co.*, 110 La. 399.

Maryland. — *Baltimore v. Beck*, 96 Md. 183.

Michigan. — *Robinson v. Chicago*, etc., *R. Co.*, 135 Mich. 254.

New Jersey. — *Hoboken Land*, etc., *Co. v. United Electric Co.*, 71 N. J. L. 430.

New York. — *Bolster v. Ithaca St. R. Co.*, 79 N. Y. App. Div. 239, *affirmed* 178 N. Y. 554; *Starer v. Stern*, 100 N. Y. App. Div. 393. *Compare Coolidge v. New York*, 99 N. Y. App. Div. 175.

North Dakota. — *Pewonka v. Stewart*, 13 N. Dak. 117.

Washington. — *Eskildsen v. Seattle*, 29 Wash. 583; *Drake v. Seattle*, 30 Wash. 81, 94 Am. St. Rep. 844.

Injuries from Falling Walls. — *Lauer v. Palms*, 129 Mich. 671.

Obstruction in Street. — See *Deming v. Terminal R. Co.*, 169 N. Y. 1, 88 Am. St. Rep. 521.

Contract Limiting Liability. — See *Texas*, etc., *R. Co. v. Watson*, 190 U. S. 287.

7. Dominion or Control Generally Raises Duty. — *Devine v. National Wall Paper Co.*, 95 N. Y. App. Div. 194, *affirmed* 182 N. Y. 565; *Bolster v. Ithaca St. R. Co.*, 79 N. Y. 239, *affirmed* 178 N. Y. 554; *Pewonka v. Stewart*, 13 N. Dak. 117; *Macdonald v. O'Reilly*, 45 Oregon 589. *Compare Sias v. Rochester R. Co.*, 169 N. Y. 118.

A Trustee Holding the Legal Title to the franchises and property of a street railway is liable as master for the tort of a motorman. *O'Toole v. Faulkner*, 29 Wash. 544.

General and Independent Contractors. — See *Wolf v. American Tract Soc.*, 164 N. Y. 30, and the title **INDEPENDENT CONTRACTORS**.

468. 2. Skinn v. Reutter, 135 Mich. 57, 106 Am. St. Rep. 384; *Standard Oil Co. v. Wakefield*, 102 Va. 824. *Compare Patnoud v. New York*, etc., *R. Co.*, 180 Mass. 119.

4. See *Patnoud v. New York*, etc., *R. Co.*, 180 Mass. 119; *Gordon v. Ashley*, 77 N. Y. App. Div. 525; *Crowe v. Nanticoke Light Co.*, 209 Pa. St. 580.

469. 2. Person to Whom Duty Due — England. — *Clarke v. Army*, etc., *Co-operative Soc.*, (1903) 1 K. B. 155; *Earl v. Lubbock*, 91 L. T. N. S. 73.

Alabama. — *Southern Bell Telephone*, etc.,

470. Where a Duty Towards Particular Persons or Classes. — See notes 1, 2.**2. General Duty Not to Injure Others.** — See notes 3, 4.

Co. v. McTyer, 137 Ala. 601, 97 Am. St. Rep. 62.

California. — *Means v. Southern California R. Co.*, 144 Cal. 473.

Delaware. — *Giordano v. Brandywine Granite Co.*, 3 Penn. (Del.) 423.

Georgia. — *Chattanooga Southern R. Co. v. Wheeler*, 123 Ga. 41; *Knowles v. Central of Georgia R. Co.*, 118 Ga. 795.

Illinois. — *Western Wheel Works v. Stachnick*, 102 Ill. App. 420.

Indiana. — *St. Joseph Ice Co. v. Bertch*, 33 Ind. App. 491; *Cincinnati, etc., Co. v. Brown*, 32 Ind. App. 58; *Cincinnati, etc., R. Co. v. Worthington*, 30 Ind. App. 663, 96 Am. St. Rep. 355.

Iowa. — *Earl v. Cedar Rapids*, 126 Iowa 361, 106 Am. St. Rep. 361; *Eakins v. Chicago, etc., R. Co.*, 126 Iowa 324.

Maryland. — *United Electric Light Co. v. State*, 100 Md. 634; *West Virginia Cent., etc., R. Co. v. State*, 96 Md. 652.

Massachusetts. — *Perkins v. Rice*, 187 Mass. 28.

Minnesota. — *Wickenburg v. Minneapolis, etc., R. Co.*, 94 Minn. 276; *Sullivan v. Minneapolis, etc., R. Co.*, 90 Minn. 390, 101 Am. St. Rep. 414.

Missouri. — *Fry v. St. Louis Transit Co.*, 111 Mo. App. 324.

Montana. — *Driscoll v. Clark*, 32 Mont. 172.

Nebraska. — *New Omaha Thomson Houston Electric Light Co. v. Anderson*, (Neb. 1905) 102 N. W. Rep. 89; *Fremont, etc., R. Co. v. Hagblad*, (Neb. 1904) 101 N. W. Rep. 1033.

New Hampshire. — *Hughes v. Boston, etc., R. Co.*, 71 N. H. 279, 93 Am. St. Rep. 518; *Spauld v. Tomlinson*, (N. H. 1904) 59 Atl. Rep. 376.

New Jersey. — *Fielders v. North Jersey St. R. Co.*, 68 N. J. L. 343, 96 Am. St. Rep. 552; *Furey v. New York Cent., etc., R. Co.*, 67 N. J. L. 270.

New York. — *Krebs v. Heitmann*, 104 N. Y. App. Div. 173; *Knight v. Lanier*, 69 N. Y. App. Div. 454; *Crawford v. New York*, 68 N. Y. App. Div. 107, affirmed 174 N. Y. 518; *Johnson v. Yellow Pine Co.*, 67 N. Y. App. Div. 528; *Fink v. Slade*, 66 N. Y. App. Div. 105; *Thaney v. A. Friederick, etc., Co.*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 134.

North Carolina. — *Ramsbottom v. Atlantic Coast Line R. Co.*, 138 N. Car. 38; *Quantz v. Southern R. Co.*, 137 N. Car. 136.

Ohio. — *Baltimore, etc., R. Co. v. Cox*, 66 Ohio St. 276, 90 Am. St. Rep. 583; *Lake Shore, etc., R. Co. v. Liidtke*, 69 Ohio St. 384; *Cleveland, etc., R. Co. v. Stein*, 24 Ohio Cir. Ct. 643.

Rhode Island. — *White v. New York, etc., R. Co.*, 25 R. I. 19; *Paolino v. McKendall*, 24 R. I. 432, 96 Am. St. Rep. 736.

Tennessee. — *White v. Nashville, etc., R. Co.*, 108 Tenn. 739.

Texas. — *St. Louis Southwestern R. Co. v. Pope*, 98 Tex. 535; *Freeman v. San Antonio Brewing Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1165; *Texas Cent. R. Co. v. Harbison*, 98 Tex. 490; *McCowen v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 46.

Virginia. — *Carson Lime Co. v. Rutherford*, 102 Va. 244.

West Virginia. — *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 102 Am. St. Rep. 941; *Peters v. Johnson*, 50 W. Va. 644, 88 Am. St. Rep. 909; *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 88 Am. St. Rep. 884.

470. 1. Duty to Particular Persons or Classes. — *Chicago, etc., R. Co. v. Wise*, 206 Ill. 453; *Sluder v. St. Louis Transit Co.*, 189 Mo. 107; *Fielders v. North Jersey St. R. Co.*, 68 N. J. L. 343, 96 Am. St. Rep. 552; *Wesner v. Green*, (N. J. 1903) 56 Atl. Rep. 237; *Peters v. Johnson*, 50 W. Va. 644, 88 Am. St. Rep. 909.

2. *New York, etc., R. Co. v. Martin*, (Ind. App. 1904) 72 N. E. Rep. 654; *Wickenburg v. Minneapolis, etc., R. Co.*, 94 Minn. 276; *Fielders v. North Jersey St. R. Co.*, 68 N. J. L. 343, 96 Am. St. Rep. 552; *Lake Shore, etc., R. Co. v. Harris*, 23 Ohio Cir. Ct. 400. And see *infra*, this title, **482. 6.**

3. General Duty Not to Injure Others — *England*. — *O'Gorman v. O'Gorman*, (1903) 2 Ir. R. 573.

United States. — *Huset v. J. I. Case Threshing Mach. Co.*, 57 C. C. A. 237, 120 Fed. Rep. 865.

Arkansas. — *St. Louis Southwestern R. Co. v. Underwood*, (Ark. 1905) 86 S. W. Rep. 804.

Colorado. — *Adams Express Co. v. Aldridge*, (Colo. App. 1904) 77 Pac. Rep. 6.

Illinois. — *North Chicago St. R. Co. v. Irwin*, 202 Ill. 345.

Indiana. — *Cleveland, etc., R. Co. v. Miles*, 162 Ind. 646; *Cincinnati, etc., Co. v. Brown*, 32 Ind. App. 58.

Iowa. — *Kleihauer v. Shedd*, (Iowa 1905) 102 N. W. Rep. 497.

Kansas. — *Combs v. Thompson*, 68 Kan. 277; *Metropolitan St. R. Co. v. Arnold*, 67 Kan. 260.

Louisiana. — *Eichorn v. New Orleans, etc., R., etc., Co.*, 112 La. 236, 104 Am. St. Rep. 437; *Hebert v. Lake Charles Ice, etc., Co.*, 111 La. 522, 100 Am. St. Rep. 505; *Ortolano v. Morgan's Louisiana, etc., R., etc., Co.*, 109 La. 902.

Maine. — *York v. Cleaves*, 97 Me. 413.

Maryland. — *West Virginia Cent., etc., R. Co. v. State*, 96 Md. 652.

Michigan. — *Skinn v. Reutter*, 135 Mich. 57, 106 Am. St. Rep. 384; *Breeze v. MacKinnon Mfg. Co.*, (Mich. 1905) 103 N. W. Rep. 908.

Minnesota. — *Wickenburg v. Minneapolis, etc., R. Co.*, 94 Minn. 276; *Peterson v. Minneapolis St. R. Co.*, 90 Minn. 52.

Missouri. — *Reyburn v. Missouri Pac. R. Co.*, 187 Mo. 565; *Leu v. St. Louis Transit Co.*, 110 Mo. App. 458; *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524; *Burkhardt v. Schott*, 101 Mo. App. 465; *Meyers v. St. Louis Transit Co.*, 99 Mo. App. 363.

New Hampshire. — *Minot v. Boston, etc., R. Co.*, (N. H. 1905) 61 Atl. Rep. 509; *Batchelder v. Boston, etc., R. Co.*, 72 N. H. 528.

New Jersey. — *O'Brien v. Traynor*, 69 N. J. L. 239.

New York. — *O'Leary v. Erie R. Co.*, 160 N. Y. 280; *Fajdowski v. Delaware, etc., Canal Co.*, 168 N. Y. 500; *Wilson v. American Bridge*

471. 3. Rule of Duty to Person Injured and General Duty to All Persons Considered and Contrasted. — See note 1a.

4. Persons on Premises by Invitation — a. IN GENERAL. — See note 2.

Co., 74 N. Y. App. Div. 596; *Healy v. Vorn-dran*, 65 N. Y. App. Div. 353.

North Dakota. — *Pewonka v. Stewart*, 13 N. Dak. 117.

Pennsylvania. — *Kitchen v. Riter-Conley Mfg. Co.*, 207 Pa. St. 558.

Texas. — *Denison, etc., R. Co. v. Carter*, (Tex. Civ. App. 1902) 70 S. W. Rep. 322; *Dallas Electric Co. v. Mitchell*, 33 Tex. Civ. App. 424; *Gulf, etc., R. Co. v. Yarbrough*, (Tex. Civ. App. 1903) 73 S. W. Rep. 844.

Virginia. — *Standard Oil Co. v. Wakefield*, 102 Va. 824; *Richmond Pass, etc., Co. v. Gordon*, 102 Va. 498.

Washington. — *Carlson v. White Star Steamship Co.*, (Wash. 1905) 81 Pac. Rep. 838.

West Virginia. — *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 102 Am. St. Rep. 941.

Wisconsin. — *Heer v. Warren-Scharf Asphalt Paving Co.*, 118 Wis. 57.

470. 4. Maxim. — *Edgington v. Burlington, etc., R. Co.*, 116 Iowa 410; *Schwartz v. New Orleans, etc., R. Co.*, 110 La. 534.

Rule Applicable to Corporations. — See *Standard Light, etc., Co. v. Muncey*, 33 Tex. Civ. App. 416; *Erickson v. Monson Consol. Slate Co.*, (Me. 1905) 60 Atl. Rep. 708.

Limits to Maxim. — See *Driscoll v. Clark*, 32 Mont. 172.

Leading Case of Heaven v. Pender Explained. — See *Earl v. Lubbock*, 91 L. T. N. S. 73.

Discovered Peril. — As to the duty to avert injury to one discovered to be in peril, see generally the title CONTRIBUTORY NEGLIGENCE, **385. 1; 387. 1; 391. 2 et seq.**; and specific titles such as RAILROADS; STREET RAILROADS. See also the following illustrative cases: *Consumers' Electric Light, etc., Co. v. Pryor*, 44 Fla. 354; *Christy v. Elliott*, 216 Ill. 31; *Chicago Terminal Transfer R. Co. v. Kotoski*, 199 Ill. 383; *Murphy v. Wait*, 102 N. Y. App. Div. 121; *Knight v. Lanier*, 69 N. Y. App. Div. 454; *Thies v. Thomas*, (Supm. Ct. Tr. T.) 77 N. Y. Supp. 276; *Brown v. Schellenberg*, 19 Pa. Super. Ct. 286.

Negligence in Failing to Discover the Perilous Position of Another is not the equivalent of discovered peril. *Hawkins v. Missouri, etc., R. Co.*, 36 Tex. Civ. App. 633. See *infra*, this title, **488. 4.**

471. 1a. "Where the Use of Premises Is Not Contemplated, as in the case of trespassers, the proprietor is not as a rule negligent in failing to maintain the premises in a safe condition, for the simple reason that injury to others is not reasonably to be anticipated." *McAllister v. Jung*, 112 Ill. App. 138, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 471.

2. Persons on Premises by Invitation — General Rule — *England.* — *Wright v. Lefever*, 51 W. R. 149; *Fraser v. Caledonian R. Co.*, (Sc. Ct. of Sess.) 5 F. 41; *Ville de St. Nazaire*, 52 W. R. 68.

Canada. — *Fallis v. Gartshore, etc., Co.*, 4 Ont. L. Rep. 176.

United States. — *Foster v. Portland Gold Min. Co.*, 52 C. C. A. 393, 114 Fed. Rep. 613.

Alabama. — *Sloss Iron, etc., Co. v. Tilson*, 141 Ala. 152, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 471.

California. — *Sheyer v. Lowell*, 134 Cal. 357. *District of Columbia.* — *Washington Market Co. v. Clagett*, 19 App. Cas. (D. C.) 12.

Florida. — *Morris v. Florida Cent., etc., R. Co.*, 43 Fla. 10.

Georgia. — *Horton v. Harvey*, 119 Ga. 219.

Illinois. — *Illinois Cent. R. Co. v. Hopkins*, 200 Ill. 122; *Chicago, etc., R. Co. v. Burridge*, 107 Ill. App. 23, 211 Ill. 9.

Indiana. — *Wabash R. Co. v. Erb*, (Ind. App. 1905) 73 N. E. Rep. 939.

Iowa. — *Wilsey v. Jewett*, 122 Iowa 315; *Healy v. Patterson*, 123 Iowa 73; *Carver v. Minneapolis, etc., R. Co.*, 120 Iowa 346. *Compare Martinek v. Swift*, 122 Iowa 611.

Kentucky. — *Ford v. Crigler*, (Ky. 1903) 74 S. W. Rep. 661.

Louisiana. — *Lawson v. Shreveport Waterworks Co.*, 111 La. 73.

Maryland. — *State v. Western Maryland R. Co.*, 98 Md. 125.

Massachusetts. — *Pratt v. New York, etc., R. Co.*, 187 Mass. 5; *Wright v. Perry*, 188 Mass. 268.

Michigan. — *Brown v. Stevens*, 136 Mich. 311; *McIntyre v. Pfaudler Vacuum Fermentation Co.*, 113 Mich. 552.

Minnesota. — *Klugherz v. Chicago, etc., R. Co.*, 90 Minn. 17, 101 Am. St. Rep. 384.

Missouri. — *Miller v. George B. Peck Dry Goods Co.*, 104 Mo. App. 609; *Kean v. Schoening*, 103 Mo. App. 77.

New Hampshire. — *True v. Meredith Creamery*, 72 N. H. 154.

New Jersey. — *Smith v. Jackson*, 70 N. J. L. 183; *Land v. Fitzgerald*, 68 N. J. L. 28; *Spicer v. Boice*, 66 N. J. L. 434.

New York. — *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630; *Graham v. Joseph H. Bauland Co.*, 97 N. Y. App. Div. 141; *Withers v. Brooklyn Real Estate Exch.*, 106 N. Y. App. Div. 255; *Dutton v. Greenwood Cemetery Co.*, 80 N. Y. App. Div. 352; *Bolster v. Ithaca St. R. Co.*, 79 N. Y. App. Div. 239, affirmed 178 N. Y. 554; *Grifhahn v. Kreizer*, 62 N. Y. App. Div. 413, affirmed 171 N. Y. 661; *Dougherty v. New York Cent., etc., R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 746; *McDonough v. James Reilly Repair, etc., Co.*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 334. *Compare Boyd v. U. S. Mortgage, etc., Co.*, 94 N. Y. App. Div. 413.

Oregon. — *Shobert v. May*, 40 Oregon 68, 91 Am. St. Rep. 453.

Pennsylvania. — *Reid v. Linck*, 206 Pa. St. 109; *Rachmel v. Clark*, 205 Pa. St. 314; *Polenske v. Lit*, 18 Pa. Super. Ct. 474.

Rhode Island. — *Paolino v. McKendall*, 24 R. I. 432, 96 Am. St. Rep. 736.

South Carolina. — *League v. Stradley*, 68 S. Car. 515; *Matthews v. Seaboard Air Line R. Co.*, 67 S. Car. 499; *Smoak v. Savannah, etc., R. Co.*, 65 S. Car. 299.

472. See notes 1, 2.

Question for Jury. — See note 3.

b. PUBLIC RESORTS AND PLACES OF AMUSEMENT. — See note 4.

5. Trespassers — *a. IN GENERAL.* — See note 5.

473. See notes 1, 2.

West Virginia. — *Sesler v. Rolfe Coal, etc.*, Co., 51 W. Va. 318.

Wisconsin. — *Hupfer v. National Distilling Co.*, 119 Wis. 417; *Barowski v. Schultz*, 112 Wis. 415.

Compared with Duty to Employee. — It has been said that the duty due to a person invited upon premises is no greater than that due to an employee. Read *v. Warwick Mills*, 25 R. I. 476.

Servants. — Where, by the nature of the invitation, the servants of the person invited are included, the duty extends to them. *Moore v. Stetson*, 96 Me. 197; *O'Leary v. Erie R. Co.*, 169 N. Y. 289.

Injury to Barge Lying at Defendant's Wharf by Invitation. — See *Butler v. M'Alpine*, (1904) 2 Ir. R. 445.

472. 1. Limits of Invitation. — See *Rooney v. Woolworth*, 74 Conn. 720; *Stewart v. Washington, etc., Electric R. Co.*, 22 App. Cas. (D. C.) 496; *Etheredge v. Central of Georgia R. Co.*, 122 Ga. 853; *Cowen v. Kirby*, 180 Mass. 504; *Hathaway v. New York, etc., R. Co.*, 182 Mass. 286; *Archer v. Union Pac. R. Co.*, 110 Mo. App. 349; *Ryerson v. Bathgate*, 67 N. J. L. 337; *Dotson v. Erie R. Co.*, 68 N. J. L. 679; *Furey v. New York Cent., etc., R. Co.*, 67 N. J. L. 270; *Albert v. New York*, 75 N. Y. App. Div. 553; *Greis v. Hazard Mfg. Co.*, 209 Pa. St. 276; *Texas Cent. R. Co. v. Harbison*, 98 Tex. 490.

2. Pardington v. Abraham, 93 N. Y. App. Div. 359.

3. Question for Jury. — *Wright v. Lefever*, 51 W. R. 149; *Sloss Iron, etc., Co. v. Tilson*, 141 Ala. 152, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 472; *Southern R. Co. v. Drake*, 107 Ill. App. 12; *Wilsey v. Jewett*, 122 Iowa 315; *Kentucky Distilleries, etc., Co. v. Leonard*, (Ky. 1904) 79 S. W. Rep. 281; *Foley v. Young Men's Christian Assoc.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 406; *Reid v. Linck*, 206 Pa. St. 109; *League v. Stradley*, 68 S. Car. 515.

When Question for Court. — See *Fredenburg v. Baer*, 89 Minn. 241; *Ryerson v. Bathgate*, 67 N. J. L. 337; *Furey v. New York Cent., etc., R. Co.*, 67 N. J. L. 270; *Curtis v. Tenino Stone Quarries*, 37 Wash. 355.

Where the Plaintiff Was Clearly a Mere Licensee, it is error to leave the question of invitation to the jury. *McCann v. Thilemann*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 145, affirmed 74 N. Y. App. Div. 630.

4. Public Resorts. — *Texas State Fair v. Brittain*, (C. C. A.) 118 Fed. Rep. 713; *Barrett v. Lake Ontario Beach Imp. Co.*, 174 N. Y. 310; *Beecroft v. New York Athletic Club*, 80 N. Y. App. Div. 524. And see the titles dealing with specific places of resort, such as AGRICULTURAL SOCIETIES, **25**, 2, 3; INNS AND INNKEEPERS, **547**, 3, 4; STATIONS (RAILROAD), **506**, 9 et seq.; THEATRES AND AMUSEMENTS, **125**, 5 et seq.

Not Insurers. — *Beecroft v. New York Athletic Club*, 80 N. Y. App. Div. 524.

5. No Duty to Trespassers. — *Chattanooga Southern R. Co. v. Wheeler*, 123 Ga. 41; *Louisville, etc., R. Co. v. Logsdon*, (Ky. 1904) 81 S. W. Rep. 657; *Flanagan v. Sanders*, (Mich. 1904) 101 N. W. Rep. 581; *Ryan v. Towar*, 128 Mich. 463, 92 Am. St. Rep. 481; *Fredenburg v. Baer*, 89 Minn. 241; *Powers v. Owego Bridge Co.*, 97 N. Y. App. Div. 477; *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 88 Am. St. Rep. 884.

But One May Not Set a Gun Trap for a trespasser. *Grant v. Hass*, 31 Tex. Civ. App. 688. See further as to spring guns the titles MURDER AND MANSLAUGHTER, **153**, 2; NUISANCES, **701**, 4 et seq.

473. 1. Liability to Trespassers Only for Wanton Injury — *United States*. — *Purple v. Union Pac. R. Co.*, 51 C. C. A. 564, 114 Fed. Rep. 123.

Alabama. — *Nashville, etc., R. Co. v. Harris*, (Ala. 1904) 37 So. Rep. 794.

Delaware. — *Tully v. Philadelphia, etc., R. Co.*, 3 Penn. (Del.) 455.

Georgia. — *Ashworth v. Southern R. Co.*, 116 Ga. 635.

Illinois. — *Illinois Cent. R. Co. v. Leiner*, 202 Ill. 624, 95 Am. St. Rep. 266; *Chicago Terminal Transfer R. Co. v. Kotoski*, 199 Ill. 383; *Cleveland, etc., R. Co. v. Cline*, 111 Ill. App. 416.

Kentucky. — *Manning v. Illinois Cent. R. Co.*, (Ky. 1905) 84 S. W. Rep. 565; *Hulsey v. Louisville, etc., R. Co.*, (Ky. 1905) 87 S. W. Rep. 302.

Massachusetts. — *Bjornquist v. Boston, etc., R. Co.*, 185 Mass. 130, 102 Am. St. Rep. 332; *Albert v. Boston El. R. Co.*, 185 Mass. 210.

Missouri. — *Koegel v. Missouri Pac. R. Co.*, 181 Mo. 379.

New York. — *Johnson v. New York Cent., etc., R. Co.*, 173 N. Y. 79; *Magar v. Hammond*, 95 N. Y. App. Div. 249; *Le Duc v. New York Cent., etc., R. Co.*, 92 N. Y. App. Div. 107; *Hill v. Baltimore, etc., R. Co.*, 75 N. Y. App. Div. 325; *Riordan v. New York Cent., etc., R. Co.*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 399.

North Carolina. — *Lewis v. Norfolk, etc., R. Co.*, 132 N. Car. 382.

South Carolina. — *Jones v. Charleston, etc., R. Co.*, 61 S. Car. 556; *Elkins v. South Carolina, etc., R. Co.*, 64 S. Car. 553.

Tennessee. — *White v. Nashville, etc., R. Co.*, 108 Tenn. 739.

Texas. — *Ratteree v. Galveston, etc., R. Co.*, 36 Tex. Civ. App. 197; *St. Louis Southwestern R. Co. v. Mayfield*, 35 Tex. Civ. App. 82; *Houston, etc., R. Co. v. Bowen*, 36 Tex. Civ. App. 165.

Utah. — *Morgan v. Oregon Short Line R. Co.*, 27 Utah 92.

Washington. — *Dotta v. Northern Pac. R. Co.*, 36 Wash. 506; *Hamlin v. Columbia, etc., R. Co.*, 37 Wash. 448.

No Duty until Discovered — *Georgia.* — *Nashville, etc., R. Co. v. Priest*, 117 Ga. 767.

Illinois. — *Cleveland, etc., R. Co. v. Largent*,

473. *b.* WHERE PRESENCE OF TRESPASSER KNOWN. — See note 3.

474. *c.* DUTY TO CHILDREN. — See notes 1, 2, 3, 4.

475. Application of Rule that No Duty Is Owed to Trespassers. — See notes 1, 2.

108 Ill. App. 650; Chicago, etc., R. Co. v. Urbaniac, 106 Ill. App. 325.

Kentucky. — Early v. Louisville, etc., R. Co., 115 Ky. 13; Davis v. Chesapeake, etc., R. Co., 116 Ky. 144; Illinois Cent. R. Co. v. Broughton, (Ky. 1904) 78 S. W. Rep. 876; Monehan v. South Covington, etc., St. R. Co., (Ky. 1904) 78 S. W. Rep. 1106; Wilmurth v. Illinois Cent. R. Co., (Ky. 1903) 76 S. W. Rep. 193; Kendall v. Louisville, etc., R. Co., (Ky. 1903) 76 S. W. Rep. 376.

Maryland. — West Virginia Cent., etc., R. Co. v. State, 96 Md. 652.

Minnesota. — See Wickenburg v. Minneapolis, etc., R. Co., 94 Minn. 276.

New York. — Clarke v. New York Cent., etc., R. Co., 104 N. Y. App. Div. 167.

Ohio. — Cleveland, etc., R. Co. v. Gahan, 24 Ohio Cir. Ct. 277; Cleveland, etc., R. Co. v. Stein, 24 Ohio Cir. Ct. 643.

Virginia. — Richmond Pass, etc., Co. v. Racks, 101 Va. 487; Humphrey v. Valley R. Co., 100 Va. 749; Richmond Traction Co. v. Wilkinson, 101 Va. 394.

473. 2. Duty to Trespassers Dependent on Likelihood of Their Presence. — Ashworth v. Southern R. Co., 116 Ga. 635; Fearons v. Kansas City El. R. Co., 180 Mo. 208. And see McClanahan v. Vicksburg, etc., R. Co., 111 La. 781, per Provosty, J., dissenting, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 472.

Leaving Exposed a Dangerous Excavation Near a Public Street. — Devlin v. Jeffray, Sc. Ct. of Sess. 5 F. 130.

3. Presence Known. — Kendrick v. Seaboard Air-Line R. Co., 121 Ga. 775; Bentley v. Lovetock, 102 Ill. App. 166; Gregory v. Wabash R. Co., 126 Iowa 230; Farrell v. Chicago, etc., R. Co., 123 Iowa 690; Cincinnati, etc., R. Co. v. Marrs, (Ky. 1905) 85 S. W. Rep. 188; Rawitzer v. St. Paul City R. Co., 93 Minn. 84.

474. 1. Rule in Case of Children — *England.* — Innes v. Fife Coal Co., Sc. Ct. of Sess., 3 F. 335.

Alabama. — Alabama G. S. R. Co. v. Crocker, 131 Ala. 584.

Georgia. — See Ashworth v. Southern R. Co., 116 Ga. 635.

Illinois. — See Donk Bros. Coal, etc., Co. v. Leavitt, 109 Ill. App. 385.

Indiana. — Cincinnati, etc., R. Co. v. Brown, 32 Ind. App. 58; Chicago, etc., R. Co. v. Fox, (Ind. App. 1904) 70 N. E. Rep. 81.

Iowa. — See Edgington v. Burlington, etc., R. Co., 116 Iowa 410, stating the Iowa doctrine at length.

Kansas. — Consolidated Electric-light, etc., Co. v. Healy, 65 Kan. 798.

Kentucky. — See Ball v. Middlesboro Town, etc., Co., (Ky. 1902) 68 S. W. Rep. 6.

Minnesota. — Berg v. Minneapolis, etc., R. Co., (Minn. 1905) 104 N. W. Rep. 293; Mattson v. Minnesota, etc., R. Co., (Minn. 1905) 104 N. W. Rep. 443.

Pennsylvania. — See Rachmel v. Clark, 205 Pa. St. 314; Duffy v. Sable Iron Works, 210

Pa. St. 326; Pollack v. Pennsylvania R. Co., 210 Pa. St. 631, 105 Am. St. Rep. 843.

Texas. — Houston, etc., R. Co. v. Ollis, (Tex. Civ. App. 1904) 83 S. W. Rep. 850; Denison, etc., R. Co. v. Harlan, (Tex. Civ. App. 1905) 87 S. W. Rep. 732; San Antonio, etc., R. Co. v. Skidmore, 27 Tex. Civ. App. 329.

Doctrine that Affirmative Care Not Required. — See North Texas Constr. Co. v. Bostick, 98 Tex. 239.

That the Place Was Alluring or Inviting to Children must be shown in order to render the defendant liable. Rome v. Cheney, 114 Ga. 194; American Advertising, etc., Co. v. Flannigan, 100 Ill. App. 452.

Such Use as Is Customary throughout the country has been held not to show an invitation. Williamson v. Gulf, etc., R. Co., (Tex. Civ. App. 1905) 88 S. W. Rep. 279.

The Test is what a man of ordinary care and prudence would do under the circumstances. Chicago, etc., R. Co. v. Kravenbuhl, 65 Neb. 889.

Unfenced Machinery on Waste Ground Used as Playground. — See Cummings v. Darngavil Coal Co., Sc. Ct. of Sess., 5 F. 513.

2. Knowledge of Fact of Trespass. — Donk Bros. Coal, etc., Co. v. Leavitt, 109 Ill. App. 385; Chicago, etc., R. Co. v. Kravenbuhl, 65 Neb. 889; Ludtke v. Lake Shore, etc., R. Co., 24 Ohio Cir. Ct. 120; Houston, etc., R. Co. v. Ollis, (Tex. Civ. App. 1904) 83 S. W. Rep. 850; St. Louis Southwestern R. Co. v. Abernathy, 28 Tex. Civ. App. 613; Richmond Traction Co. v. Wilkinson, 101 Va. 394.

Effect of Warning to Children. — See Ott v. Johnson, (Tex. Civ. App. 1905) 86 S. W. Rep. 649; J. I. Case Threshing Mach. Co. v. Burns, (Tex. Civ. App. 1905) 86 S. W. Rep. 65.

Knowledge of Presence Analogous to Discovered Peril. — North Texas Constr. Co. v. Bostick, 98 Tex. 239.

3. Presence of Children Not Reasonably Anticipated. — Brinkley Car Co. v. Cooper, 70 Ark. 331; Goldstein v. People's R. Co., (Del. 1905) 60 Atl. Rep. 975; Southern R. Co. v. Eubanks, 117 Ga. 217; McAllister v. Jung, 112 Ill. App. 138; Jordan v. Grand Rapids, etc., R. Co., 162 Ind. 464, 102 Am. St. Rep. 217; Horn v. Chicago, etc., R. Co., 124 Iowa 281; Wagner v. Chicago, etc., R. Co., 122 Iowa 360.

4. Where Injuries Not Contemplated. — Brinkley Car Co. v. Cooper, 70 Ark. 331; Ball v. Middlesboro Town, etc., Co., (Ky. 1902) 68 S. W. Rep. 6; Ann Arbor R. Co. v. King, 68 Ohio St. 210; Guilmarin v. Philadelphia, 201 Pa. St. 518.

"All Possible Dangers." — Carey v. Kansas City, 187 Mo. 715.

An Unprotected Pool of Water. — Compare Kansas City v. Siese, (Kan. 1905) 80 Pac. Rep. 626.

Distinction Between Natural and Artificial Conditions. — See McCabe v. American Woolen Co., 124 Fed. Rep. 283, wherein a canal was considered as equivalent to a stream or natural condition; Driscoll v. Clark, 22 Mont. 172.

475. 1. Application of Rule of No Duty to Trespassers. — Louisville, etc., R. Co. v. Logs-

475. 6. Licensees. — See note 3.

476. See note 2.

7. Public Duty — Private Injury. — See notes 3, 4.

VIII. VIOLATION OF DUTY — CHARACTER OF ACT CONSTITUTING —

1. Omission or Commission. — See note 5.

don, (Ky. 1904) 81 S. W. Rep. 657; *Peninsular Trust Co. v. Grand Rapids*, 131 Mich. 571; *Katzinski v. Grand Trunk R. Co.*, (Mich. 1905) 104 N. W. Rep. 409; *Hughes v. Boston*, etc., R. Co., 71 N. H. 279, 93 Am. St. Rep. 518; *Powers v. Owego Bridge Co.*, 97 N. Y. App. Div. 477; *Albert v. New York*, 75 N. Y. App. Div. 553; *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 88 Am. St. Rep. 884.

Turntable Cases — Not to Be Extended. — *Northwestern El. R. Co. v. O'Malley*, 107 Ill. App. 599; *Etheredge v. Central of Georgia R. Co.*, 122 Ga. 853; *Wilson v. Atchison*, etc., R. Co., 66 Kan. 183; *Denison*, etc., R. Co. v. *Carter*, 98 Tex. 196; *Simonton v. Citizens Electric Light*, etc., Co., 28 Tex. Civ. App. 374; *Clark v. Northern Pac. R. Co.*, 29 Wash. 139; *Curtis v. Tenino Stone Quarries*, 37 Wash. 355; *Harris v. Cowles*, 38 Wash. 331, 107 Am. St. Rep. 747. And see the title **TURNTABLES**.

The doctrine of the turntable cases is repudiated in some jurisdictions. *Coleman v. Robert Graves Co.*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 85; *Paolino v. McKendall*, 24 R. I. 432, 96 Am. St. Rep. 736.

475. 2. Gross Negligence — Wanton Injuries. — *Nashville*, etc., R. Co. v. *Priest*, 117 Ga. 767; *Goodman v. Louisville*, etc., R. Co., 116 Ky. 900; *Ryan v. Towar*, 128 Mich. 463, 92 Am. St. Rep. 481; *Paolino v. McKendall*, 24 R. I. 432, 96 Am. St. Rep. 736.

3. England. — See *Harris v. Perry*, (1903) 2 K. B. 219; *Giles v. London County Council*, 68 J. P. 10 (adults playing game on obviously dangerous ground).

Canada. — *Collier v. Michigan Cent. R. Co.*, 27 Ont. App. 630.

United States. — See *Currier v. Dartmouth College*, (C. C. A.) 117 Fed. Rep. 44; *Foster v. Portland Gold Min. Co.*, 52 C. C. A. 393, 114 Fed. Rep. 613.

California. — *Grundel v. Union Iron Works*, 141 Cal. 564.

Connecticut. — *Rooney v. Woolworth*, 74 Conn. 720.

Illinois. — See *Illinois Cent. R. Co. v. Parkhurst*, 106 Ill. App. 467.

Indiana. — *St. Joseph Ice Co. v. Bertch*, 33 Ind. App. 491; *Cincinnati*, etc., Co. v. *Brown*, 32 Ind. App. 58.

Kentucky. — See *Kentucky Distilleries*, etc., Co. v. *Leonard*, (Ky. 1904) 79 S. W. Rep. 281.

Louisiana. — *Ederle v. Vicksburg*, etc., R. Co., 112 La. 728.

Massachusetts. — *McCoy v. Walsh*, 186 Mass. 369; *Griswold v. Boston*, etc., R. Co., 183 Mass. 434.

Minnesota. — See *Sullivan v. Minneapolis*, etc., R. Co., 90 Minn. 390, 101 Am. St. Rep. 414; *Klugherz v. Chicago*, etc., R. Co., 90 Minn. 17, 101 Am. St. Rep. 384.

New Jersey. — *Furey v. New York Cent.*, etc., R. Co., 67 N. J. L. 270.

New York. — *Downes v. Elmira Bridge Co.*

179 N. Y. 136; *Forbrick v. General Electric Co.*, (Supreme Ct. Tr. T.) 45 Misc. (N. Y.) 452.

Ohio. — *Buchtel College v. Martin*, 25 Ohio Cir. Ct. 494.

Pennsylvania. — *Greis v. Hazard Mfg. Co.*, 209 Pa. St. 276.

Texas. — *Lovett v. Gulf*, etc., R. Co., 97 Tex. 436.

Washington. — *McConkey v. Oregon R.*, etc., Co., 35 Wash. 55.

West Virginia. — *Williams v. Belmont Coal*, etc., Co., 55 W. Va. 84.

See further the title **LICENSE (REAL PROPERTY)**, **1136**, 7 *et seq.*

Firemen. — *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, (Neb. 1905) 102 N. W. Rep. 89.

Distinction Between Invitation and License. — *Paolino v. McKendall*, 24 R. I. 432, 96 Am. St. Rep. 736.

Duty Less than Due Towards Guest. — See *Slough v. W. G. Ragley Lumber Co.*, (Tex. Civ. App. 1903) 76 S. W. Rep. 779.

Question Dependent on Circumstances of Particular Case. — *Lauritsen v. American Bridge Co.*, 87 Minn. 518.

Mail Clerk — Same Care as to Passenger. — *Cavin v. Southern Pac. R. Co.*, (C. C. A.) 136 Fed. Rep. 592.

Quarantine Officer — Great Care Necessary. — *Ward v. Dampskibsselskabet Kjoebenhaven*, 136 Fed. Rep. 502.

476. 2. Presence of Licensees Contemplated. — *Louisville*, etc., R. Co. v. *Smith*, (Ky. 1905) 84 S. W. Rep. 755; *Murrell v. Missouri Pac. R. Co.*, 105 Mo. App. 88; *International*, etc., R. Co. v. *Davis*, (Tex. Civ. App. 1905) 84 S. W. Rep. 669; *Ollis v. Houston*, etc., R. Co., 31 Tex. Civ. App. 601.

Private Crossings. — See *Ortolano v. Morgan's Louisiana*, etc., R. Co., 109 La. 902; *Meneo v. Central R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 448; *Gulf*, etc., R. Co. v. *Johnson*, (Tex. Civ. App. 1905) 86 S. W. Rep. 34; *Texas*, etc., R. Co. v. *Ball*, (Tex. Civ. App. 1903) 73 S. W. Rep. 420; *Over v. Missouri*, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 535.

3. Public Duty. — See *Union Pac. R. Co. v. Cappier*, 66 Kan. 649; *Fielders v. North Jersey St. R. Co.*, 68 N. J. L. 343, 96 Am. St. Rep. 552; *Missouri*, etc., R. Co. v. *Wood*, 95 Tex. 223, 93 Am. St. Rep. 834.

4. *Willis v. Maysville*, etc., R. Co., (Ky. 1905) 85 S. W. Rep. 716; *Buechner v. New Orleans*, 112 La. 599, 104 Am. St. Rep. 455; *Yazoo*, etc., R. Co. v. *Watson*, 82 Miss. 80; *Carson v. Mackin*, 23 Pa. Super. Ct. 50; *Memphis St. R. Co. v. Kartright*, 110 Tenn. 277, 100 Am. St. Rep. 807.

Failure to Prevent Escape of Smallpox Patient. — See *Missouri*, etc., R. Co. v. *Wood*, 95 Tex. 223, 93 Am. St. Rep. 834.

5. Nature of Act Constituting Breach of Duty — United States. — *The Oregon*, (C. C. A.) 133

477. 2. Inadvertence. — See notes 1, 2, 3.

Fed. Rep. 609; Texas, etc., R. Co. v. Carlin, (C. C. A.) 111 Fed. Rep. 777, *affirmed* 189 U. S. 354.

California. — Cooper v. Los Angeles Terminal R. Co., 137 Cal. 229; Sampson v. Hughes, 147 Cal. 62.

Colorado. — Thunborg v. Pueblo, 18 Colo. App. 80.

Georgia. — Central of Georgia R. Co. v. Owen, 121 Ga. 220; Alabama Midland R. Co. v. Guilford, 114 Ga. 627.

Illinois. — Hansell-Elcock Foundry Co. v. Clark, 214 Ill. 399; Siegel v. Trcka, 115 Ill. App. 56; Feldman v. Sellig, 110 Ill. App. 130.

Indiana. — Indianapolis v. Cauley, 164 Ind. 304; Wabash R. Co. v. De Hart, 32 Ind. App. 62.

Iowa. — German Ins. Co. v. Chicago, etc., R. Co., (Iowa 1905) 104 N. W. Rep. 361; Collingwood v. Illinois, etc., Fuel Co., 125 Iowa 537; Beringer v. Dubuque St. R. Co., 118 Iowa 135.

Kansas. — Kansas City v. Gilbert, 65 Kan. 469.

Kentucky. — Chesapeake, etc., R. Co. v. Wilder, (Ky. 1903) 72 S. W. Rep. 353; Louisville R. Co. v. French, (Ky. 1903) 71 S. W. Rep. 486.

Louisiana. — Pharr v. Morgan's Louisiana, etc., R., etc., Co., (La. 1905) 38 So. Rep. 943.

Maine. — Marden v. Portsmouth, etc., R. Co., (Me. 1905) 60 Atl. Rep. 530; Barnes v. Rumford, 96 Me. 315.

Massachusetts. — Spinney v. Boston El. R. Co., 188 Mass. 30; Daniels v. New York, etc., R. Co., 183 Mass. 393.

Michigan. — La Fernier v. Soo River Lighter, etc., Co., 129 Mich. 596.

Minnesota. — Swartz v. Great Northern R. Co., 93 Minn. 339; Curran v. Olson, 88 Minn. 307, 97 Am. St. Rep. 517.

Mississippi. — Advance Gin, etc., Co. v. Thomas, 81 Miss. 486.

Missouri. — Smith v. Fordyce, 190 Mo. 1; Klockenbrink v. St. Louis, etc., R. Co., 172 Mo. 678; Livingston v. Wabash R. Co., 170 Mo. 452; Holden v. Missouri R. Co., 108 Mo. App. 665; Borden v. Falk Co., 97 Mo. App. 566.

Nebraska. — Bock v. Grooms, (Neb. 1902) 92 N. W. Rep. 603; Bianki v. Greater American Exposition Co., (Neb. 1902) 92 N. W. Rep. 615; South Omaha v. Meyers, (Neb. 1902) 92 N. W. Rep. 743.

New Jersey. — Carroll v. Tidewater Oil Co., 67 N. J. L. 679; Newbury v. Luke, 68 N. J. L. 189.

New York. — Barrett v. Lake Ontario Beach Imp. Co., 174 N. Y. 310; Cox v. Mason, 89 N. Y. App. Div. 219; Adsit v. Catskill Electric R. Co., 88 N. Y. App. Div. 167; Sutter v. New York Cent., etc., R. Co., 79 N. Y. App. Div. 362; German-American Ins. Co. v. Standard Gas Light Co., 67 N. Y. App. Div. 539, *affirmed* 174 N. Y. 508.

North Carolina. — Davis v. Summerfield, 131 N. Car. 352, 92 Am. St. Rep. 781; Fleming v. Southern R. Co., 131 N. Car. 476.

North Dakota. — Meehan v. Great Northern R. Co., 13 N. Dak. 432; Nokken v. Avery Mfg. Co., 11 N. Dak. 399.

Ohio. — Chamber of Commerce Bldg. Co. v. Klussman, 25 Ohio Cir. Ct. 728.

South Carolina. — Oliver v. Columbia, etc., R. Co., 65 S. Car. 1.

Texas. — St. Louis Southwestern R. Co. v. Duck, (Tex. Civ. App. 1903) 72 S. W. Rep. 445; Galveston, etc., R. Co. v. Collins, 31 Tex. Civ. App. 70; Thweatt v. Houston, etc., R. Co., 31 Tex. Civ. App. 227; Bell v. Texas, etc., R. Co., (Tex. Civ. App. 1902) 70 S. W. Rep. 573; Shoemaker v. Texas, etc., R. Co., 29 Tex. Civ. App. 578; Ft. Worth, etc., R. Co. v. Beauchamp, 95 Tex. 496, 93 Am. St. Rep. 864; Missouri, etc., R. Co. v. Wood, 95 Tex. 223, 93 Am. St. Rep. 834.

Vermont. — Benedict v. Union Agricultural Soc., 74 Vt. 91; La Flam v. Missisquoi Pulp Co., 74 Vt. 125.

Virginia. — Wright v. Southern R. Co., 101 Va. 36.

Washington. — Roberts v. Port Blakely Mill Co., 30 Wash. 25; Drake v. Seattle, 30 Wash. 81, 94 Am. St. Rep. 844.

Wyoming. — See Union Pac. R. Co. v. Gil-land, 4 Wyo. 395.

Canada. — Delage v. Delisle, 10 Quebec K. B. 481.

Distinction Between Acts of Commission and of Omission. — See Hargroves v. Hartopp, (1905) 1 K. B. 472; Doyle v. Hawkins, 34 Ind. App. 514; Klugherz v. Chicago, etc., R. Co., 90 Minn. 17, 101 Am. St. Rep. 384.

Trespassers and Licensees. — The distinction is important in cases where the law imposes no duty of active vigilance, as, for example, towards trespassers and licensees. Knight v. Lanier, 69 N. Y. App. Div. 454; Wilson v. American Bridge Co., 74 N. Y. App. Div. 596. Thus it has been said that for injuries arising from "passive" negligence a mere licensee has no right of action. Means v. Southern California R. Co., 144 Cal. 473.

477. 1. Inadvertence. — Morrison v. Lee, 13 N. Dak. 591; Griffin v. Southern R. Co., 65 S. Car. 122; Stembridge v. Southern R. Co., 65 S. Car. 440; Rideout v. Winnebago Traction Co., 123 Wis. 297; Wilson v. Chippewa Valley Electric R. Co., 120 Wis. 636.

Intent. — The words "negligence" and "intentional" are contradictory. Gibeline v. Smith, 106 Mo. App. 545.

Mistakes — Errors of Judgment or Opinion. — A failure to exercise perfect judgment is not necessarily negligence. Lewis v. Long Island R. Co., 162 N. Y. 52; New York, etc., R. Co. v. Kistler, 66 Ohio St. 326. But neither is the mere exercise of one's best judgment necessarily ordinary care. Louisville, etc., R. Co. v. Vandersdell, (Ky. 1904) 77 S. W. Rep. 1103; Carney v. Concord St. R. Co., 72 N. H. 364. The standard is what an ordinarily prudent man would do under the same circumstances. Western, etc., R. Co. v. Vaughan, 113 Ga. 354; Woods v. Wabash R. Co., 188 Mo. 229.

2. Atchison v. Wills, 21 App. Cas. (D. C.) 548.

3. See Proctor v. Southern R. Co., 61 S. Car. 170.

Distinction Between Negligence and Wilfulness. — See Hewson v. Interurban St. R. Co., 95 N. Y. App. Div. 112.

477. 3. Wilfulness — Wantonness. — See notes 4, 5, 6, 7.

478. Wanton Negligence. — See note 1.

4. Fraud. — See note 4.

IX. VIOLATION OF STATUTE OR ORDINANCE — 1. In General. — See note 5.

2. Negligence Per Se. — See notes 6, 7.

477. 4. Kelly v. Malott, (C. C. A.) 135 Fed. Rep. 74.

Recklessness. — "An allegation that an act is wanton, reckless, and grossly negligent is not equivalent to an allegation of a wilful or an intentional act." *Denver, etc., R. Co. v. Buf-fehr*, 30 Colo. 27.

In *South Carolina* recklessness is more than mere negligence and is practically equivalent to wilfulness. *Pickett v. Southern R. Co.*, 69 S. Car. 445.

"Negligence may be so gross as to amount to recklessness; but, when it does, it ceases to be mere negligence, and assumes very much the nature of wilfulness." *Proctor v. Southern R. Co.*, 61 S. Car. 170. See also *Stembridge v. Southern R. Co.*, 65 S. Car. 440; *Griffen v. Southern R. Co.*, 65 S. Car. 122.

5. In Alabama. — *Alabama G. S. R. Co. v. Hamilton*, 135 Ala. 343.

Reckless Disregard of Consequences may be equivalent to wilfulness or wantonness, *Central of Georgia R. Co. v. Partridge*, 136 Ala. 587; or to intentional wrong, *Birmingham Southern R. Co. v. Powell*, 136 Ala. 232.

An Actual Intent to Injure Is Not Necessary to constitute wilful or wanton negligence. *Birmingham R., etc., Co. v. Baker*, 132 Ala. 507; *Illinois Cent. R. Co. v. Leiner*, 202 Ill. 624, 95 Am. St. Rep. 266.

6. Thomasson v. Southern R. Co., (S. Car. 1905) 51 S. E. Rep. 443.

Wilful Injury in the Legal Sense has been held to grow out of a failure to anticipate the plaintiff's presence and provide against his injury, where it should have been done. *Ashworth v. Southern R. Co.*, 116 Ga. 635.

7. See Bjornquist v. Boston, etc., R. Co., 185 Mass. 130, 102 Am. St. Rep. 332; *Alger v. Duluth-Superior Traction Co.*, 93 Minn. 314 (discussing the effect of wilful negligence on the defense of contributory negligence, as to which see the title CONTRIBUTORY NEGLIGENCE, **443. 3 et seq.**); *Southern R. Co. v. Drake*, 107 Ill. App. 12.

Thorough Disregard of Persons or Rights of Others. — *Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1.

478. 1. Lincoln Traction Co. v. Heller, (Neb. 1904) 100 N. W. Rep. 197.

Conscious Failure to Observe Due Care. — *McKeown v. South Carolina, etc., R. Co.*, 68 S. Car. 483.

Breach of Duty to Exercise Ordinary Care Not Sufficient. — *Turtenwald v. Wisconsin Lakes Ice, etc., Co.*, 121 Wis. 65; *Wilson v. Chippewa Valley Electric R. Co.*, 120 Wis. 636.

Wantonness Equivalent to Wilful Intent to Injure. — *Cleveland, etc., R. Co. v. Cline*, 111 Ill. App. 416.

4. Two Innocent Parties Rule — Negligence — Fraud. — *Nash v. De Freville*, (1900) 2 Q. B. 72, 69 L. J. Q. B. 484.

5. Duty May Be Created by Statute or Ordinance. — *Denison, etc., R. Co. v. Carter*, 98 Tex. 196, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 478, 479.

6. View that Violation of Statute Is Negligence per Se — Alabama. — *Southern R. Co. v. Shelton*, 136 Ala. 191; *Peters v. Southern R. Co.*, 135 Ala. 533.

California. — See *Harrington v. Los Angeles R. Co.*, 140 Cal. 514, 98 Am. St. Rep. 85.

Illinois. — *Wabash R. Co. v. Kamradt*, 109 Ill. App. 203.

Indiana. — *Nickey v. Steuder*, 164 Ind. 189, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 478; *Baltimore, etc., R. Co. v. Reynolds*, 33 Ind. App. 219; *Pittsburgh, etc., R. Co. v. Lightheiser*, 163 Ind. 247, 264; *Pennsylvania R. Co. v. Fertig*, 34 Ind. App. 459.

Iowa. — *Burk v. Creamery Package Mfg. Co.*, 126 Iowa 730, 106 Am. St. Rep. 377; *Healy v. Johnson*, 127 Iowa 221; *Ives v. Welden*, 114 Iowa 476, 89 Am. St. Rep. 379.

Kentucky. — See *Parish v. Louisville, etc., R. Co.*, (Ky. 1904) 78 S. W. Rep. 186.

Mississippi. — *Hemingway v. Illinois Cent. R. Co.*, 52 C. C. A. 477, 114 Fed. Rep. 843; *Louisville, etc., R. Co. v. Crominarity*, 86 Miss. 464.

Missouri. — *Livingston v. Wabash R. Co.*, 170 Mo. 452; *Sluder v. St. Louis Transit Co.*, 189 Mo. 107; *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524; *McDaniels v. Royle Min. Co.*, 110 Mo. App. 706; *Holden v. Missouri R. Co.*, 108 Mo. App. 665; *Story v. St. Louis Transit Co.*, 108 Mo. App. 424; *Reed v. St. Louis, etc., R. Co.*, 107 Mo. App. 238; *Murrell v. Missouri Pac. R. Co.*, 105 Mo. App. 88; *Marsh v. Kansas City Southern R. Co.*, 104 Mo. App. 577; *Kolb v. St. Louis Transit Co.*, 102 Mo. App. 143; *Moore v. St. Louis Transit Co.*, 95 Mo. App. 728; *Meyers v. St. Louis Transit Co.*, 99 Mo. App. 363.

New Jersey. — See *Fielders v. North Jersey St. R. Co.*, 68 N. J. L. 343, 96 Am. St. Rep. 552, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 478 as to the varying rules in different jurisdictions, but not passing on the question.

North Carolina. — See *Fleming v. Southern R. Co.*, 131 N. Car. 476.

Ohio. — See *Ludtke v. Lake Shore, etc., R. Co.*, 24 Ohio Cir. Ct. 120.

South Carolina. — *Gosa v. Southern R. Co.*, 67 S. Car. 347; *Mercer v. Southern R. Co.*, 66 S. Car. 246; *Davis v. Atlanta, etc., Air Line R. Co.*, 63 S. Car. 370; *Boggero v. Southern R. Co.*, 64 S. Car. 104.

Tennessee. — *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712; *Louisville, etc., R. Co. v. Martin*, 113 Tenn. 266.

Texas. — *McKerley v. Red River, etc., R. Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 499; *Taylor v. Houston Electric Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1019; *Hawkins v. Missouri, etc., R. Co.*, 36 Tex. Civ. App. 633; *Mis-*

478. 3. Prima Facie Negligence.— See note 8.

479. 4. Evidence of Negligence to Be Considered by Jury— *a.* IN GENERAL.— See notes 1, 2.

b. WHEN NEGLIGENCE NOT SHOWN.— See note 3.

480. 5. Natural and Proximate Cause.— See note 1.

souri, etc., *R. Co. v. Matherly*, 35 Tex. Civ. App. 604; *Shippers Compress, etc., Co. v. Davidson*, 35 Tex. Civ. App. 558; *St. Louis Southern R. Co. v. Matthews*, 34 Tex. Civ. App. 302; *Galveston, etc., R. Co. v. Levy*, 35 Tex. Civ. App. 107; *Missouri, etc., R. Co. v. Owens*, (Tex. Civ. App. 1903) 75 S. W. Rep. 579; *Browne v. Bachman*, 31 Tex. Civ. App. 430; *Gulf, etc., R. Co. v. Holt*, 30 Tex. Civ. App. 330.

Utah.— *Holland v. Oregon Short Line R. Co.*, 26 Utah 209.

Vermont.— *Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288.

Washington.— *Green v. Western American Co.*, 30 Wash. 87.

Wisconsin.— See *Daly v. Milwaukee Electric R., etc., Co.*, 119 Wis. 398, 100 Am. St. Rep. 893.

Negligence by Express Terms of Statute.— *Chicago, etc., R. Co. v. Mochell*, 193 Ill. 208, 86 Am. St. Rep. 318; *Kelley v. Anderson*, 15 S. Dak. 107; *Missouri, etc., R. Co. v. Taff*, 31 Tex. Civ. App. 657.

Presumed to Be Negligence.— See *Chicago, etc., R. Co. v. Pollock*, 195 Ill. 156.

Where a Statute Imposes a Specific Duty upon a master, his violation of it is negligence *per se*, but a failure to comply with the requirements of a general statute as to appliances may or may not be negligence. *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149.

478. 7. See Mitchell v. Union Terminal R. Co., 122 Iowa 237.

8. View that Such Violation Is Prima Facie Negligence.— *True, etc., Co. v. Woda*, 201 Ill. 315; *Commonwealth Electric Co. v. R  se*, 214 Ill. 545; *U. S. Brewing Co. v. Stoltenberg*, 113 Ill. App. 435; *Mobile, etc., R. Co. v. Dugan*, 103 Ill. App. 371; *Perry v. Tozer*, 90 Minn. 431, 101 Am. St. Rep. 416; *Mattes v. Great Northern R. Co.*, (Minn. 1905) 104 N. E. Rep. 234.

479. 1. View that Evidence for the Jury— *Arkansas.*— See *Neal v. St. Louis, etc., R. Co.*, 71 Ark. 445.

Colorado.— *Colorado Midland R. Co. v. Robbins*, 30 Colo. 449.

Illinois.— *Illinois Cent. R. Co. v. Jernigan*, 198 Ill. 297.

Maine.— *Neal v. Rendall*, 98 Me. 69.

Massachusetts.— *Brusseau v. New York, etc., R. Co.*, 187 Mass. 84.

Michigan.— *Philip v. Heraty*, 135 Mich. 446.

Minnesota.— *Oddie v. Mendenhall*, 84 Minn. 58.

Missouri.— See *McLain v. St. Louis, etc., R. Co.*, 100 Mo. App. 374; *Perrigo v. St. Louis*, 185 Mo. 274.

Nebraska.— See *Riley v. Missouri Pac. R. Co.*, (Neb. 1903) 95 N. W. Rep. 20; *Omaha St. R. Co. v. Larson*, (Neb. 1903) 97 N. W. Rep. 824; *Chicago, etc., R. Co. v. Clinebell*, (Neb. 1904) 99 N. W. Rep. 830.

New Hampshire.— See *Tucker v. Boston, etc., R. Co.*, (N. H. 1905) 59 Atl. Rep. 943.

New York.— *Lewis v. Long Island R. Co.*, 162 N. Y. 52; *Marino v. Lehmaier*, 173 N. Y. 530; *Pelin v. New York Cent., etc., R. Co.*, 102 N. Y. App. Div. 71; *McAuliffe v. New York Cent., etc., R. Co.*, 88 N. Y. App. Div. 356, *affirmed* 181 N. Y. 537; *Schlotterer v. Brooklyn, etc., Ferry Co.*, 75 N. Y. App. Div. 330; *Koch v. Fox*, 71 N. Y. App. Div. 288; *Ziegler v. Brennan*, 75 N. Y. App. Div. 584.

North Carolina.— *Henderson v. Durham Traction Co.*, 132 N. Car. 779.

Ohio.— *Lake Shore, etc., R. Co. v. Johnston*, 25 Ohio Cir. Ct. 41.

Pennsylvania.— See *Ubelmann v. American Ice Co.*, 209 Pa. St. 398.

South Carolina.— *Burns v. Southern R. Co.*, 61 S. Car. 404; *Jones v. Charleston, etc., R. Co.*, 65 S. Car. 410.

South Dakota.— See *Borneman v. Chicago, etc., R. Co.*, (S. Dak. 1905) 104 N. W. Rep. 208, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 478, 479, as to the various views, but holding that as the doctrine most favorable to the appellant was adopted by the trial court, a determination as to which doctrine should prevail in South Dakota was unnecessary.

Texas.— See *St. Louis Southwestern R. Co. v. Bolton*, 36 Tex. Civ. App. 87; *Rio Grande, etc., R. Co. v. Martinez*, (Tex. Civ. App. 1905) 87 S. W. Rep. 853.

Washington.— See *Atherton v. Tacoma R., etc., Co.*, 30 Wash. 395.

2. When Evidence Inadmissible.— *Ubelmann v. American Ice Co.*, 209 Pa. St. 398.

Permissive Ordinance Cannot Excuse Negligence.— *Thies v. Thomas*, (Supm. Ct. Tr. T.) 77 N. Y. Supp. 276; *Drake v. Auburn City R. Co.*, 173 N. Y. 466.

3. The Rule of the Road.— *Neal v. Rendall*, 98 Me. 69.

Where Compliance Impracticable.— *La Porte Carriage Co. v. Sullender*, (Ind. App. 1904) 71 N. E. Rep. 922. *Compare* *Lee v. Sterling Silk Mfg. Co.*, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 182.

In Kentucky.— *Southern R. Co. v. Wood*, (Ky. 1899) 52 S. W. Rep. 796.

480. 1. Violation Must Be Proximate Cause— *Alabama.*— *Nashville, etc., R. Co. v. Harris*, (Ala. 1904) 37 So. Rep. 704.

Arkansas.— *Neal v. St. Louis, etc., R. Co.*, 71 Ark. 445; *St. Louis, etc., R. Co. v. Boback*, 71 Ark. 427.

Colorado.— *Colorado Midland R. Co. v. Robbins*, 30 Colo. 449.

Connecticut.— See *Monroe v. Hartford St. R. Co.*, 76 Conn. 201.

Illinois.— *Chicago, etc., R. Co. v. Crose*, 214 Ill. 602, 105 Am. St. Rep. 135; *Chicago, etc., R. Co. v. Corson*, 108 Ill. 68; *Southern R. Co. v. Drake*, 107 Ill. App. 12; *Middendorf v. Schulze*, 105 Ill. App. 221; *Chicago, etc., R. Co. v. Appell*, 103 Ill. App. 185.

Indiana.— See *Smith v. Michigan Cent. R. Co.*, (Ind. App. 1905) 73 N. E. Rep. 928.

481. See notes 1, 2.

6. Conflict of Cases — Attempted Reconciliation — True Rule. — See notes 3, 4, 5, 7.

482. 7. Consequences Against Which Statute Intended to Provide — a. IN GENERAL. — See notes 1, 2.

Iowa. — *Defrieze v. Illinois Cent. R. Co.*, (Iowa 1903) 94 N. W. Rep. 505.

Louisiana. — *Romano v. Seidel Furniture Mfg. Co.*, 114 La. 432.

Massachusetts. — *Glasse v. Worcester Consol. St. R. Co.*, 185 Mass. 315.

Michigan. — *Hinchman v. Pere Marquette R. Co.*, 136 Mich. 341.

Minnesota. — *Kemp v. Northern Pac. R. Co.*, 89 Minn. 139; *Mattes v. Great Northern R. Co.*, (Minn. 1905) 104 N. E. Rep. 234.

Mississippi. — *Louisville, etc., R. Co. v. Crominarity*, 86 Miss. 464.

Missouri. — *Fry v. St. Louis Transit Co.*, 111 Mo. App. 324; *Murrell v. Missouri Pac. R. Co.*, 105 Mo. App. 88; *McLain v. St. Louis, etc., R. Co.*, 100 Mo. App. 374.

New Jersey. — See *Fielders v. North Jersey St. R. Co.*, 68 N. J. L. 343, 96 Am. St. Rep. 552.

New York. — *Kunnen v. White*, 102 N. Y. App. Div. 36; *Acton v. Reed*, 104 N. Y. App. Div. 507. Compare *Marino v. Lehmaier*, 173 N. Y. 530.

North Carolina. — *Butts v. Atlantic, etc., R. Co.*, 133 N. Car. 82; *Henderson v. Durham Traction Co.*, 132 N. Car. 779.

Ohio. — *Lake Shore, etc., R. Co. v. Liidtkke*, 69 Ohio St. 384; *Lake Shore, etc., R. Co. v. Harris*, 23 Ohio Cir. Ct. 400.

Pennsylvania. — See *Davis v. Pennsylvania Coal Co.*, 209 Pa. St. 153.

Texas. — *Missouri, etc., R. Co. v. Jackson*, (Tex. Civ. App. 1905) 88 S. W. Rep. 406; *International, etc., R. Co. v. Hall*, 35 Tex. Civ. App. 545, 98 Tex. 100; *Galveston, etc., R. Co. v. Levy*, 35 Tex. Civ. App. 107; *Gulf, etc., R. Co. v. Holt*, 30 Tex. Civ. App. 330.

Virginia. — See *Seaboard, etc., R. Co. v. Hickey*, 102 Va. 394.

Wisconsin. — *O'Brien v. Wisconsin Cent. R. Co.*, 119 Wis. 7.

481. 1. *Monroe v. Hartford St. R. Co.*, 76 Conn. 201; *Davis v. Mercer Lumber Co.*, 164 Ind. 413; *Fehrman v. Pine River*, 118 Wis. 150.

2. Causal Connection Necessary Though Violation Negligence per Se — *Alabama.* — *Peters v. Southern R. Co.*, 135 Ala. 533.

Indiana. — *Nickey v. Steuder*, 164 Ind. 189, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 480-482; *Baltimore, etc., R. Co. v. Reynolds*, 33 Ind. App. 219.

Iowa. — *Burk v. Creamery Package Mfg. Co.*, 126 Iowa 730, 106 Am. St. Rep. 377.

Missouri. — *Livingston v. Wabash R. Co.*, 170 Mo. 452; *Harper v. St. Louis Merchants Bridge Terminal Co.*, 187 Mo. 575; *Story v. St. Louis Transit Co.*, 108 Mo. App. 424; *Moore v. St. Louis Transit Co.*, 95 Mo. App. 728.

North Carolina. — Compare *Fleming v. Southern R. Co.*, 131 N. Car. 476.

Ohio. — See *Ludtke v. Lake Shore, etc., R. Co.*, 24 Ohio Cir. Ct. 120.

South Carolina. — *Gosa v. Southern R. Co.*, 67 S. Car. 347.

Tennessee. — *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712.

Texas. — *Taylor v. Houston Electric Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1019; *Dallas Consol. Electric St. R. Co. v. Ison*, (Tex. Civ. App. 1904) 83 S. W. Rep. 408; *Shippers' Compress, etc., Co. v. Davidson*, 35 Tex. Civ. App. 558; *Missouri, etc., R. Co. v. Owens*, (Tex. Civ. App. 1903) 75 S. W. Rep. 579; *Missouri, etc., R. Co. v. Taff*, 31 Tex. Civ. App. 657.

Washington. — *Green v. Western American Co.*, 30 Wash. 87.

Violation Conclusive by Terms of Statute. — *Chicago, etc., R. Co. v. Mochell*, 193 Ill. 208, 86 Am. St. Rep. 318; *Illinois Cent. R. Co. v. Jordan*, (Ky. 1904) 78 S. W. Rep. 426.

3. *Lee v. Sterling Silk Mfg. Co.*, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 182.

4. Violation of Statute or Ordinance Not Conclusive of Negligence. — *Oddie v. Mendenhall*, 84 Minn. 58; *Ziegler v. Brennan*, 75 N. Y. App. Div. 584.

5. *Pecos Valley, etc., R. Co. v. Cazier*, (N. Mex. 1905) 79 Pac. Rep. 714, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 481.

7. Compare *Kelley v. Anderson*, 15 S. Dak. 107, wherein it was held to be proper to exclude evidence tending to show that a disobedience of the fire statute was not negligent in view of the wet condition of the ground.

482. 1. Consequences Provided Against — *Alabama.* — *Central of Georgia R. Co. v. Martin*, 138 Ala. 531; *Louisville, etc., R. Co. v. Sullivan Timber Co.*, 138 Ala. 379.

Georgia. — See *Louisville, etc., R. Co. v. Hairston*, 122 Ga. 372.

Illinois. — See *Himrod Coal Co. v. Stevens*, 203 Ill. 115; *Cleveland, etc., R. Co. v. Cline*, 111 Ill. App. 416.

Indiana. — *New York, etc., R. Co. v. Martin*, (Ind. App. 1904) 72 N. E. Rep. 654.

Kentucky. — See *Dorsey v. Louisville, etc., R. Co.*, (Ky. 1904) 80 S. W. Rep. 1131.

Maine. — *Neal v. Rendall*, 98 Me. 69.

Nebraska. — See *Heist v. Jacoby*, (Neb. 1904) 98 N. W. Rep. 1058.

Ohio. — *Lake Shore, etc., R. Co. v. Liidtkke*, 69 Ohio St. 384; *Lake Shore, etc., R. Co. v. Harris*, 23 Ohio Cir. Ct. 400.

South Carolina. — *Ringstaff v. Lancaster, etc., R. Co.*, 64 S. Car. 546.

Texas. — *Mercher v. Texas Midland R. Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 468.

2. *Ludtke v. Lake Shore, etc., R. Co.*, 24 Ohio Cir. Ct. 120; *Galveston, etc., R. Co. v. Levy*, 35 Tex. Civ. App. 107.

Evidence of Want of Due Care. — Failure to give the statutory signals may be given in evidence as showing that a railroad train was not run with due care, although such failure did not cause the injury. *Davis v. Southern R. Co.*, 68 S. Car. 446.

482. *b.* WHETHER QUESTION OF LAW OR OF FACT. — See notes 3, 4, 5.

8. Necessity for Duty to Plaintiff. — See note 6.

483. **9.** Fact that Statute or Ordinance Does Not Specifically Impose Civil Liability. — See note 1.

10. Statutes or Ordinances Imposing Penalty for Violation. — See note 2.

Injunction to Prevent in Addition to Penalty for Violation. — See note 3.

11. Alleged Distinction Between Statute and Ordinance. — See notes 4, 5.

12. Contributory Negligence. — See notes 6, 7.

482. **3.** *Cleveland, etc., R. Co. v. Johns*, 106 Ill. App. 427.

4. When Question of Law. — *Wilder v. Concord*, 72 N. H. 259; *Galveston, etc., R. Co. v. Levy*, 35 Tex. Civ. App. 107.

5. Instructions. — See *Healy v. Johnson*, 127 Iowa 221; *Galveston, etc., R. Co. v. Levy*, 35 Tex. Civ. App. 107.

6. *Batchelder v. Boston, etc., R. Co.*, 72 N. H. 528; *Lake Shore, etc., R. Co. v. Harris*, 23 Ohio Cir. Ct. 400; *Ringstaff v. Lancaster, etc., R. Co.*, 64 S. Car. 546; *St. Louis Southwestern R. Co. v. Highnote*, (Tex. 1905) 86 S. W. Rep. 923.

A Statute to Protect Employees cannot be availed of by one not at the time in the discharge of his duty as an employee. *Coleman v. Himmelberger-Harrison Land, etc., Co.*, 105 Mo. App. 234; *Kelly v. Henry Muhs Co.*, 71 N. J. L. 358.

Trespassers have been held not to be persons to whom the statutory duty applies. *Flanagan v. Sanders*, (Mich. 1904) 101 N. W. Rep. 581; *Wickenburg v. Minneapolis, etc., R. Co.*, 94 Minn. 276.

Licenses, however, have been held to be protected. *Yazoo, etc., R. Co. v. Metcalf*, 84 Miss. 242.

483. **1.** *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149; *Marino v. Lehmaier*, 173 N. Y. 530. Compare *Nottage v. Sawmill Phoenix*, 133 Fed. Rep. 979.

2. Penalty Imposed. — *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149; *Burk v. Creamery Package Mfg. Co.*, 126 Iowa 730, 106 Am. St. Rep. 377; *Sluder v. St. Louis Transit Co.*, 189 Mo. 107; *Missouri, etc., R. Co. v. Owens*, (Tex. Civ. App. 1903) 75 S. W. Rep. 579; *Missouri, etc., R. Co. v. Taff*, 31 Tex. Civ. App. 657; *Browne v. Bachman*, 31 Tex. Civ. App. 430; *Love v. New Fairview Corp.*, 10 British Columbia 330.

3. If a Statute Confers a New Right, the remedy provided by it will be exclusive. *Heist v. Jacoby*, (Neb. 1904) 98 N. W. Rep. 1058.

4. See *Ubelmann v. American Ice Co.*, 209 Pa. St. 398. See also *Sluder v. St. Louis Transit Co.*, 189 Mo. 107, *per* Marshall, J., dissenting.

5. *Fielders v. North Jersey St. R. Co.*, 68 N. J. L. 343, 96 Am. St. Rep. 552, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 483; *Boggero v. Southern R. Co.*, 64 S. Car. 104; *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712.

6. Contributory Negligence — *United States*. — *Tomlinson v. Chicago, etc., R. Co.*, (C. C. A.) 134 Fed. Rep. 233; *Southern R. Co. v. Carroll*, (C. C. A.) 138 Fed. Rep. 638; *Shatto v. Erie R. Co.*, (C. C. A.) 121 Fed. Rep. 678. Compare

Cincinnati, etc., R. Co. v. Davis, (C. C. A.) 127 Fed. Rep. 933, decided under the *Tennessee* statute.

Delaware. — See *Queen Anne's R. Co. v. Reed*, (Del. 1905) 59 Atl. Rep. 860.

Georgia. — *Atlanta R., etc., Co. v. Owens*, 119 Ga. 833.

Illinois. — See *Illinois Terminal R. Co. v. Mitchell*, 214 Ill. 151.

Indiana. — *Van Winkle v. New York, etc., R. Co.*, 34 Ind. App. 476; *Evansville, etc., R. Co. v. Clements*, 32 Ind. App. 659.

Iowa. — *Defrieze v. Illinois Cent. R. Co.*, (Iowa 1903) 94 N. W. Rep. 505.

Louisiana. — *Hailey v. Texas, etc., R. Co.*, 113 La. 533.

Minnesota. — *McGinty v. Waterman*, 93 Minn. 242.

Missouri. — *Elliott v. Chicago, etc., R. Co.*, 105 Mo. App. 523; *Moore v. Lindell R. Co.*, 176 Mo. 528.

Nebraska. — *Union Pac. R. Co. v. Smith*, (Neb. 1904) 99 N. W. Rep. 813.

New Jersey. — *Diele v. Erie R. Co.*, 70 N. J. L. 138.

Rhode Island. — *Langlois v. Dunn Worsted Mills*, 25 R. I. 645.

Texas. — *St. Louis Southwestern R. Co. v. Matthews*, 34 Tex. Civ. App. 302.

Washington. — See *Atherton v. Tacoma R., etc., Co.*, 30 Wash. 395.

Wisconsin. — *Hogan v. Winnebago Traction Co.*, 121 Wis. 123.

Canada. — *Deyo v. Kingston, etc., R. Co.*, 8 Ont. L. Rep. 588.

And see the title CONTRIBUTORY NEGLIGENCE, **436.** 1, 2; **444.** 5.

Where the Violation of the Statute Is Equivalent to Wilfulness, the contributory negligence of the plaintiff is no defense. *Western Anthracite Coal, etc., Co. v. Beaver*, 192 Ill. 333.

7. *United States*. — See *Hemingway v. Illinois Cent. R. Co.*, 52 C. C. A. 477, 114 Fed. Rep. 843.

Alabama. — *Peters v. Southern R. Co.*, 135 Ala. 533.

Illinois. — *Wabash R. Co. v. Kamradt*, 109 Ill. App. 203.

Indiana. — Compare *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149.

Missouri. — *Story v. St. Louis Transit Co.*, 108 Mo. App. 424.

South Dakota. — See *Kelley v. Anderson*, 15 S. Dak. 107.

Tennessee. — *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712.

Texas. — *Taylor v. Houston Electric Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1019;

483. X. PROXIMATE CAUSE — NATURAL CONSEQUENCES — 1. General Rule.
— See note 8.

Missouri, etc., *R. Co. v. Matherly*, 35 Tex. Civ. App. 604; *Browne v. Bachman*, 31 Tex. Civ. App. 430.

Vermont. — *Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288.

But see *Lee v. Sterling Silk Mfg. Co.*, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 182.

483. 8. General Rule as to Proximate Cause
— *United States*. — *Columbia, etc., R. Co. v. Means*, (C. C. A.) 136 Fed. Rep. 83; *Diamond Coal, etc., Co. v. Allen*, (C. C. A.) 137 Fed. Rep. 705; *Texas, etc., R. Co. v. Coutourie*, (C. C. A.) 135 Fed. Rep. 465; *Shugart v. Atlanta, etc., R. Co.*, (C. C. A.) 133 Fed. Rep. 505; *In re Michigan Steamship Co.*, 133 Fed. Rep. 577; *Hawes v. Warren*, 119 Fed. Rep. 978; *Empire State Cattle Co. v. Atchison, etc., R. Co.*, 135 Fed. Rep. 135.

Alabama. — *Bryant v. Southern R. Co.*, 137 Ala. 488.

Arkansas. — *St. Louis, etc., R. Co. v. Boback*, 71 Ark. 427.

California. — *Shea v. Pacific Power Co.*, 145 Cal. 680.

Colorado. — *Colorado Midland R. Co. v. Robbins*, 30 Colo. 449.

Delaware. — *Foulk v. Wilmington City R. Co.*, (Del. 1905) 60 Atl. Rep. 973; *Goldstein v. People's R. Co.*, (Del. 1905) 60 Atl. Rep. 975; *Neal v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 467; *Tully v. Philadelphia, etc., R. Co.*, 3 Penn. (Del.) 455.

Florida. — *Louisville, etc., R. Co. v. Wade*, (Fla. 1903) 35 So. Rep. 863.

Georgia. — *Etheredge v. Central of Georgia R. Co.*, 122 Ga. 853; *Seaboard Air-Line R. Co. v. Phillips*, 117 Ga. 98; *Central of Georgia R. Co. v. Dorsey*, 116 Ga. 719; *Georgia R., etc., Co. v. Roberts*, 114 Ga. 387.

Illinois. — *Illinois Cent. R. Co. v. Jernigan*, 108 Ill. 297; *West Chicago St. R.-Co. v. Lieserowitz*, 197 Ill. 607; *Chicago City R. Co. v. Fennimore*, 199 Ill. 9; *O'Donnell v. Rosenthal*, 110 Ill. App. 225; *Cleveland, etc., R. Co. v. Lindsay*, 109 Ill. App. 533; *Sullivan v. Morrice*, 109 Ill. App. 650.

Indiana. — *Johnson v. Gebhauer*, 159 Ind. 271; *Indianapolis v. Cauley*, 164 Ind. 304; *Indianapolis St. R. Co. v. Hockett*, 159 Ind. 677; *Princeton Coal, etc., Co. v. Roll*, 162 Ind. 115; *Wabash R. Co. v. De Hart*, 32 Ind. App. 62.

Iowa. — *Carpenter v. Chicago, etc., R. Co.*, 126 Iowa 94; *Fishburn v. Burlington, etc., R. Co.*, 127 Iowa 483; *Stanley v. Cedar Rapids, etc., R. Co.*, 119 Iowa 526; *Glanz v. Chicago, etc., R. Co.*, 119 Iowa 611.

Kansas. — *Stephenson v. Corder*, (Kan. 1905) 80 Pac. Rep. 938; *Missouri Pac. R. Co. v. Jaffi*, 67 Kan. 81; *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 390.

Kentucky. — *Cumberland Telephone, etc., Co. v. Ware*, 115 Ky. 581; *Setter v. Maysville*, 114 Ky. 60.

Louisiana. — *Crisman v. Shreveport Belt R. Co.*, 110 La. 640.

Maine. — *Butler v. Rockland, etc., R. Co.*, 99 Me. 149, 105 Am. St. Rep. 267.

Maryland. — *Baltimore, etc., R. Co. v. Stumpf*, 97 Md. 78.

Massachusetts. — *Daniels v. New York, etc., R. Co.*, 183 Mass. 393; *Fay v. Wilmarth*, 183 Mass. 71; *Garant v. Cashman*, 183 Mass. 13.

Michigan. — *Newman v. Ann Arbor*, 134 Mich. 29; *Burrell v. Greenville*, 133 Mich. 235; *Bedell v. Detroit, etc., R. Co.*, 131 Mich. 668.

Minnesota. — *Truax v. Minneapolis, etc., R. Co.*, 89 Minn. 143; *Curran v. Olson*, 88 Minn. 307, 97 Am. St. Rep. 517.

Missouri. — *Livingston v. Wabash R. Co.*, 170 Mo. 452; *Harper v. St. Louis Merchants Bridge Terminal Co.*, 187 Mo. 575; *Trigg v. Ozark Land, etc., Co.*, 187 Mo. 227; *Fry v. St. Louis Transit Co.*, 111 Mo. App. 324; *Warner v. St. Louis, etc., R. Co.*, 178 Mo. 125; *Moore v. St. Louis Transit Co.*, 95 Mo. App. 728; *Johnson v. St. Louis, etc., R. Co.*, 173 Mo. 307; *Goodman v. Kahoka*, 100 Mo. App. 278.

Nebraska. — *Chicago, etc., R. Co. v. Roberts*, (Neb. 1902) 91 N. W. Rep. 707.

New Hampshire. — *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.*, 71 N. H. 522.

New Jersey. — *McGuire v. Central R. Co.*, 68 N. J. L. 608; *Fielders v. North Jersey St. R. Co.*, 68 N. J. L. 343, 96 Am. St. Rep. 552.

New York. — *Seifter v. Brooklyn Heights R. Co.*, 169 N. Y. 254; *Nellis v. Laughlin*, 70 N. Y. App. Div. 470; *Sundheimer v. New York*, 77 N. Y. App. Div. 53, 176 N. Y. 495.

North Carolina. — *Ramsbottom v. Atlantic Coast Line R. Co.*, 138 N. Car. 38; *Phillips v. Durham, etc., R. Co.*, 138 N. Car. 12; *Stewart v. Van Deventer Carpet Co.*, 138 N. Car. 60; *Quantz v. Southern R. Co.*, 137 N. Car. 136; *Henderson v. Durham Traction Co.*, 132 N. Car. 779.

North Dakota. — *Meehan v. Great Northern R. Co.*, 13 N. Dak. 432.

Oregon. — *Macdonald v. O'Reilly*, 45 Oregon 589.

Pennsylvania. — *Davis v. Pennsylvania Coal Co.*, 209 Pa. St. 153; *Bube v. Weatherly*, 25 Pa. Super. Ct. 88.

Rhode Island. — *Garvey v. Rhode Island Co.*, 26 R. I. 80.

South Carolina. — *Land v. Southern R. Co.*, 67 S. Car. 290; *Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1; *Cooper v. Charleston, etc., R. Co.*, 65 S. Car. 214; *Carroll v. Charleston, etc., R. Co.*, 65 S. Car. 378; *Bodie v. Charleston, etc., R. Co.*, 61 S. Car. 468.

South Dakota. — *Peterson v. Chicago, etc., R. Co.*, (S. Dak. 1905) 102 N. W. Rep. 595.

Tennessee. — *Chattanooga Light, etc., Co. v. Hodges*, 109 Tenn. 331, 97 Am. St. Rep. 844.

Texas. — *St. Louis, etc., R. Co. v. Vestal*, (Tex. Civ. App. 1905) 86 S. W. Rep. 700; *Galveston, etc., R. Co. v. Fitzpatrick*, (Tex. Civ. App. 1904) 83 S. W. Rep. 406; *Galveston, etc., R. Co. v. Levy*, 35 Tex. Civ. App. 107; *Texas, etc., R. Co. v. Kelly*, (Tex. Civ. App. 1904) 78 S. W. Rep. 372; *Missouri, etc., R. Co. v. Taff*, 31 Tex. Civ. App. 657; *St. Louis Southwestern R. Co. v. Harrison*, 32 Tex. Civ. App. 368; *Missouri, etc., R. Co. v. Gist*, 31 Tex. Civ. App. 662; *San Antonio v. Potter*, 31 Tex. Civ. App.

- 485.** Though the Defendant May Have Been Guilty of Some Negligence. — See note 1. Although There May Have Been Such an Act or Omission. — See note 2.
- 2. Proximate Cause — a. IN GENERAL.** — See note 3.

486. b. NEARNESS IN POINT OF TIME OR PHYSICAL SEQUENCE. — See notes 1, 2.

263; Denison, etc., R. Co. v. Carter, (Tex. Civ. App. 1902) 70 S. W. Rep. 322, (Tex. Civ. App. 1903) 71 S. W. Rep. 292; St. Louis Southwestern R. Co. v. Byers, (Tex. Civ. App. 1902) 70 S. W. Rep. 558; Bell v. Texas, etc., R. Co., (Tex. Civ. App. 1902) 70 S. W. Rep. 573.

Virginia. — Richmond Traction Co. v. Wilkinson, 101 Va. 394; Bowers v. Bristol Gas, etc., Co., 100 Va. 533.

Washington. — Young v. O'Brien, 36 Wash. 570; Armstrong v. Cosmopolis, 32 Wash. 110.

Wisconsin. — Yess v. Chicago Brass Co., 124 Wis. 406; Fehrman v. Pine River, 118 Wis. 150.

Canada. — Beaulieu v. St. Urbain Premier, 22 Quebec Super. Ct. 208; Godwin v. Newcombe, 1 Ont. L. Rep. 525; Bell Telephone Co. v. Chatham, 31 Can. Sup. Ct. 61.

Evidence Inadmissible. — Southern R. Co. v. McLellan, 80 Miss. 700; Fagan v. Rhode Island Co., (R. I. 1905) 60 Atl. Rep. 672.

485. 1. Defendant Guilty of Some Negligence. — Cole v. German Sav., etc., Soc., (C. C. A.) 124 Fed. Rep. 113; Lambert v. Southern Pac. R. Co., 146 Cal. 231; Simmons v. Seaboard Air-Line R. Co., 120 Ga. 225; Heidt v. Southern Telephone, etc., Co., 122 Ga. 474; Fishburn v. Burlington, etc., R. Co., (Iowa 1904) 98 N. W. Rep. 380; Griffin Wheel Co. v. Stanton, (Kan. 1905) 79 Pac. Rep. 651; Gulf, etc., R. Co. v. Sneed, 84 Miss. 252; Shore v. American Bridge Co., 111 Mo. App. 278; Fry v. St. Louis Transit Co., 111 Mo. App. 324; Suse v. Metropolitan St. R. Co., 80 N. Y. App. Div. 24; Butts v. Atlantic, etc., R. Co., 133 N. Car. 82; Lindsay v. Norfolk, etc., R. Co., 132 N. Car. 59.

The Combined Effect of All the Acts of the Defendant is to be considered in determining the question of proximate cause. Missouri, etc., R. Co. v. Gist, 31 Tex. Civ. App. 662.

2. Anderson v. Schurke, 121 Iowa 340, 100 Am. St. Rep. 358; Georgetown Telephone Co. v. McCullough, (Ky. 1904) 80 S. W. Rep. 782; Ray v. Vicksburg, etc., R. Co., 113 La. 502; Marsh v. Giles, 211 Pa. St. 17; Nichols v. Pittsfield Tp., 209 Pa. St. 240; Denison, etc., R. Co. v. Carter, 98 Tex. 196.

3. Definition of Proximate Cause. — Schwartz v. New Orleans, etc., R. Co., 110 La. 534, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 485; Strobeck v. Bren, 93 Minn. 428, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 485; Hendrix v. Cooleemee Cotton Mills, 138 N. Car. 160, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 485. And see the titles CONTRIBUTORY NEGLIGENCE, **381. 1 et seq.**; DAMAGES, **561. 3 et seq.**; and specific titles throughout the work dealing with negligence in particular relations.

"The proximate cause of an event must be held to be that which in a natural sequence, unbroken by any new cause, produces that event and without which that event would not have occurred." Rider v. Syracuse Rapid Transit R. Co., 171 N. Y. 139.

Last Negligent Act Contributing, Etc. — Brewster v. Elizabeth City, 137 N. Car. 392.

The Test of proximate cause is whether the facts constitute a continuous sequence of events so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent and the final result cannot be said to be the natural and probable consequence of the primary cause. Quinlan v. Philadelphia, 205 Pa. St. 309.

486. 1. Chronological or Physical Sequence — United States. — Texas, etc., R. Co. v. Coutourie, (C. C. A.) 135 Fed. Rep. 465.

Colorado. — Colorado Midland R. Co. v. Robbins, 30 Colo. 449.

Illinois. — Siegel v. Trecka, 115 Ill. App. 56.

Indiana. — Chicago, etc., R. Co. v. Martin, 31 Ind. App. 308.

Iowa. — Fishburn v. Burlington, etc., R. Co., 127 Iowa 483.

Kansas. — Chicago G. W. R. Co. v. Bailey, 66 Kan. 115.

Maine. — Neal v. Rendall, 98 Me. 69.

New Hampshire. — Olney v. Boston, etc., R. Co., 71 N. H. 427.

New York. — Trapp v. McClellan, 68 N. Y. App. Div. 362.

Texas. — Ray v. Pecos, etc., R. Co., (Tex. Civ. App. 1905) 88 S. W. Rep. 466; Shippers Compress, etc., Co. v. Davidson, 35 Tex. Civ. App. 558.

Vermont. — Morrisette v. Canadian Pac. R. Co., 74 Vt. 232.

Washington. — Goe v. Northern Pac. R. Co., 30 Wash. 654.

Wisconsin. — Morey v. Lake Superior Terminal, etc., Co., 125 Wis. 148.

2. Efficiency — *Indiana.* — Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 485, 486; Davis v. Mercer Lumber Co., 164 Ind. 413; Espenlaub v. Ellis, 34 Ind. App. 163; Union Traction Co. v. Buckland, 34 Ind. App. 420; Cleveland, etc., R. Co. v. Carey, 33 Ind. App. 275; Cincinnati, etc., R. Co. v. Worthington, 30 Ind. App. 663, 96 Am. St. Rep. 355.

Iowa. — Glanz v. Chicago, etc., R. Co., 119 Iowa 611.

Kansas. — St. Louis, etc., R. Co. v. League, (Kan. 1905) 80 Pac. Rep. 46; Kansas City v. Gilbert, 65 Kan. 469.

Kentucky. — Cumberland Telephone, etc., Co. v. Ware, 115 Ky. 581; Louisville v. Johnson, (Ky. 1902) 69 S. W. Rep. 803.

Maryland. — Western Maryland R. Co. v. State, 95 Md. 637.

Pennsylvania. — Gudfelder v. Pittsburg, etc., R. Co., 207 Pa. St. 629.

Texas. — Missouri, etc., R. Co. v. Scarborough, 29 Tex. Civ. App. 194; Ellyson v. International, etc., R. Co., 33 Tex. Civ. App. 1.

Virginia. — Danville R., etc., Co. v. Hodnett, 101 Va. 361.

486. 3. Natural Consequences. — See note 3.**4. Natural — Proximate — Interrelation of Terms.** — See note 5.**5. Rule of Contemplation of Consequences — a. IN GENERAL.** — See

note 7.

Washington. — *Eskildsen *v.* Seattle, 29 Wash. 583; Jordan *v.* Seattle, 30 Wash. 298.

West Virginia. — Snyder *v.* Philadelphia Co., 54 W. Va. 149.

Wisconsin. — Yess *v.* Chicago Brass Co., 124 Wis. 406.

486. 3. What Are Natural Consequences. — Cole *v.* German Sav., etc., Soc., (C. C. A.) 124 Fed. Rep. 113; Birmingham R., etc., Co. *v.* Hinton, 141 Ala. 606; Henderson *v.* O'Halaran, 114 Ky. 186, 102 Am. St. Rep. 279; Rider *v.* Syracuse Rapid Transit R. Co., 171 N. Y. 139; Newbury *v.* Luke, 68 N. J. L. 189.

5. Interrelation of Terms. — See Claypool *v.* Wigmore, 34 Ind. App. 35.

7. Rule of Contemplation of Consequences — United States. — Netherlands-American Steam Nav. Co. *v.* Diamond, (C. C. A.) 128 Fed. Rep. 570; Weisshaar *v.* Kimball Steamship Co., (C. C. A.) 128 Fed. Rep. 397.

Alabama. — Bridgeport Water Co. *v.* Goodwin, 132 Ala. 533.

Arkansas. — Little Rock Traction, etc., Co. *v.* Kimbro, (Ark. 1905) 87 S. W. Rep. 121.

California. — Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 98 Am. St. Rep. 85.

Colorado. — Union Gold Min. Co. *v.* Crawford, 29 Colo. 511.

Georgia. — Southern R. Co. *v.* Webb, 116 Ga. 152, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 486 *et seq.*; Rome *v.* Cheney, 114 Ga. 194.

Illinois. — Chicago Union Traction Co. *v.* Leach, 215 Ill. 184; Rock Island Sash, etc., Works *v.* Pohlman, 210 Ill. 133; True, etc., Co. *v.* Woda, 201 Ill. 315; Chicago Terminal Transfer R. Co. *v.* Schmelling, 197 Ill. 619; North Chicago St. R. Co. *v.* O'Donnell, 115 Ill. App. 110; Chicago City R. Co. *v.* Biederman, 102 Ill. App. 617.

Indiana. — Pennsylvania R. Co. *v.* Fertig, 34 Ind. App. 459; Tipton Light, etc., Co. *v.* Newcomer, 33 Ind. App. 42.

Iowa. — Foster *v.* Chicago, etc., R. Co., 127 Iowa 84, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 486 *et seq.*; Achey *v.* Marion, 126 Iowa 47; Harter *v.* Colfax Electric Light, etc., Co., 124 Iowa 500; Meek *v.* Barton, 123 Iowa 601. Compare Potter *v.* Cave, 123 Iowa 98.

Kansas. — Atchison, etc., R. Co. *v.* Holloway, (Kan. 1905) 80 Pac. Rep. 31; Cleghorn *v.* Thompson, 62 Kan. 727.

Kentucky. — Louisville, etc., R. Co. *v.* Logsdon, (Ky. 1904) 81 S. W. Rep. 657.

Louisiana. — Eichorn *v.* New Orleans, etc., R., etc., Co., 112 La. 236, 104 Am. St. Rep. 437.

Massachusetts. — Cunningham *v.* Atlas Tack Co., 187 Mass. 51; Glassey *v.* Worcester Consol. St. R. Co., 185 Mass. 315; Hannon *v.* Boston El. R. Co., 182 Mass. 425.

Minnesota. — Swartz *v.* Great Northern R. Co., 93 Minn. 220; Steindorff *v.* St. Paul Gaslight Co., 92 Minn. 406; Thomas *v.* Smith, 90 Minn. 379; Fewings *v.* Mendenhall, 88 Minn. 336, 97 Am. St. Rep. 510.

Missouri. — Briner *v.* Chicago, etc., R. Co.,

(Mo. App. 1905) 85 S. W. Rep. 653; Fearons *v.* Kansas City L. R. Co., 180 Mo. 208; Miller *v.* George B. Peck Dry Goods Co., 104 Mo. App. 609; Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 101 Am. St. Rep. 434.

New Hampshire. — Pittsfield Cottonwear Mfg. Co. *v.* Pittsfield Shoe Co., 72 N. H. 546.

New Jersey. — Butler *v.* Easton, etc., R. Co., (N. J. 1905) 60 Atl. Rep. 218; Walsh *v.* North Jersey St. R. Co., 71 N. J. L. 641; Miller *v.* West Jersey, etc., R. Co., 71 N. J. L. 363; Rodinan *v.* North Jersey St. R. Co., 71 N. J. L. 43.

New York. — Leeds *v.* New York Telephone Co., 178 N. Y. 118; Welle *v.* Celluloid Co., 175 N. Y. 401; Hamilton *v.* Buffalo, 173 N. Y. 72; Snowden *v.* Somerset, 171 N. Y. 99; Lichtenstein *v.* New York, 159 N. Y. 500; O'Rourke *v.* Interborough Rapid Transit Co., (Supm. Ct. App. T.) 46 Misc. (N. Y.) 453; Koszowski *v.* American Locomotive Co., 96 N. Y. App. Div. 40; Smith *v.* Donnelly, 93 N. Y. App. Div. 569; Connors *v.* Great Northern Elevator Co., 90 N. Y. App. Div. 311, *affirmed* 180 N. Y. 509; Hoffart *v.* West Turin, 90 N. Y. App. Div. 348, *affirmed* 180 N. Y. 516; McKenzie *v.* Waddell Coal Co., 89 N. Y. App. Div. 415; Tuohy *v.* Long Island R. Co., 89 N. Y. App. Div. 198; Norman *v.* Dowd, 86 N. Y. App. Div. 243; White *v.* Manhattan R. Co., 82 N. Y. App. Div. 259; Jackson *v.* Union R. Co., 77 N. Y. App. Div. 161; Hoag *v.* Williamsburgh Sav. Bank, 75 N. Y. App. Div. 306; Wilson *v.* American Bridge Co., 74 N. Y. App. Div. 596; Hennessy *v.* Forty-Second St., etc., R. Co., (Supm. Ct. App. T.) 44 Misc. (N. Y.) 198, 193 N. Y. App. Div. 384.

North Carolina. — Watkins *v.* Kaolin Mfg. Co., 131 N. Car. 536.

North Dakota. — Pewonka *v.* Stewart, 13 N. Dak. 117, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 486.

Pennsylvania. — Buttermann *v.* McClintic-Marshall Constr. Co., 206 Pa. St. 82, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 486; McKee *v.* Harrisburg Traction Co., 211 Pa. St. 47; Douglass *v.* New York Cent., etc., R. Co., 209 Pa. St. 128 Brown *v.* Schellenberg, 19 Pa. Super. Ct. 286.

Rhode Island. — Smith *v.* Naushon Co., 26 R. I. 578; Venbuhr *v.* Lafayette Worsted Mills, (R. I. 1905) 60 Atl. Rep. 770; Vizacchero *v.* Rhode Island Co., 26 R. I. 392; Dolan *v.* Calender, etc., Co., 26 R. I. 198; Bucci *v.* Waterman, 25 R. I. 125.

South Carolina. — Carroll *v.* Charleston, etc., R. Co., 65 S. Car. 3-8; Cooper *v.* Charleston, etc., R. Co., 65 S. Car. 214.

Texas. — Cruseturner *v.* International, etc., R. Co., (Tex. Civ. App. 1905) 86 S. W. Rep. 778; Denison, etc., R. Co. *v.* Barry, 98 Tex. 248; Texas, etc., R. Co. *v.* Storey, (Tex. Civ. App. 1904) 83 S. W. Rep. 852; San Antonio, etc., R. Co. *v.* Brock, 25 Tex. Civ. App. 155; Denison, etc., R. Co. *v.* Powell, 35 Tex. Civ. App. 454; Central Texas, etc., R. Co. *v.* Gibson, 35 Tex.

487. b. ANTICIPATION OF PARTICULAR CONSEQUENCES. — See notes 1, 2.

488. c. FORM OF INJURY OR MANNER OF OCCURRENCE. — See note 1.

d. PARTICULAR PERSON INJURED. — See note 2.

e. PRESUMPTION OF DEFENDANT'S CONTEMPLATION — (1) *In General.* — See note 3.

Civ. App. 66; Texas, etc., *R. Co. v. Kelly*, (Tex. Civ. App. 1904) 78 S. W. Rep. 372; Dallas Electric Co. v. Mitchell, 33 Tex. Civ. App. 424; Thweatt v. Houston, etc., R. Co., 31 Tex. Civ. App. 227; Missouri, etc., *R. Co. v. Scarborough*, 29 Tex. Civ. App. 194.

Vermont. — Duffur v. Boston, etc., R. Co., 75 Vt. 165.

Wisconsin. — Busse v. Rogers, 120 Wis. 443.

487. 1. Anticipation of Particular Consequences. — Siegel, etc., *Co. v. Trcka*, 115 Ill. App. 56; Neal v. Rendall, 98 Me. 69; Sullivan v. Boston El. R. Co., 185 Mass. 602; Bredeson v. C. A. Smith Lumber Co., 91 Minn. 317; More v. Lake Superior Terminal, etc., R. Co., 125 Wis. 148.

All Possibilities of Danger. — See Texas, etc., *R. Co. v. Carlin*, (C. C. A.) 111 Fed. Rep. 777, *affirmed* 189 U. S. 354.

2. United States. — Texas, etc., *R. Co. v. Carlin*, (C. C. A.) 111 Fed. Rep. 777, *affirmed* 189 U. S. 354.

Connecticut. — Elwood v. Connecticut R., etc., Co., 77 Conn. 145.

Illinois. — Chicago Hair, etc., *Co. v. Mueller*, 203 Ill. 558; Armour v. Golkowska, 202 Ill. 144.

Indiana. — Davis v. Mercer Lumber Co., 164 Ind. 413, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 487; Indianapolis St. R. Co. v. Schomberg, 164 Ind. 111.

Iowa. — Fishburn v. Burlington, etc., R. Co., 127 Iowa 483; Foster v. Chicago, etc., R. Co., 127 Iowa 84; Burk v. Creamery Package Mfg. Co., 126 Iowa 730, 106 Am. St. Rep. 377; Carver v. Minneapolis, etc., R. Co., 120 Iowa 346.

Kansas. — Atchison, etc., *R. Co. v. Parry*, 67 Kan. 515.

Kentucky. — Kentucky, etc., Bridge, etc., *Co. v. Shrader*, (Ky. 1904) 80 S. W. Rep. 1094.

Michigan. — Ablard v. Detroit United R. Co., (Mich. 1905) 102 N. W. Rep. 741.

Minnesota. — Peterson v. Minneapolis St. R. Co., 90 Minn. 52; Rowe v. Ehrmanntraut, 92 Minn. 17; Jensen v. Commodore Min. Co., 94 Minn. 53.

New York. — Haack v. Brooklyn Labor Lyceum Assoc., 93 N. Y. App. Div. 491; Kremer v. New York Edison Co., 102 N. Y. App. Div. 433; Moore v. Metropolitan St. R. Co., 84 N. Y. App. Div. 613; Lahne v. Seaich, 83 N. Y. App. Div. 636; Pelletreau v. Metropolitan St. R. Co., 74 N. Y. App. Div. 192, *affirmed* 174 N. Y. 503.

North Carolina. — Drum v. Miller, 135 N. Car. 204, 102 Am. St. Rep. 528, *quoting* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 487.

Ohio. — Burton Telephone Co. v. Gordon, 25 Ohio Cir. Ct. 641, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 487.

Texas. — Gulf, etc., *R. Co. v. Elmore*, 35 Tex. Civ. App. 56; St. Louis Expanded Metal Fireproofing Co. v. Dawson, 30 Tex. Civ. App. 261; Bering Mfg. Co. v. Peterson, 28 Tex. Civ. App. 194.

Virginia. — Richmond Pass., etc., *Co. v. Gordon*, 102 Va. 498.

West Virginia. — Thomas v. Wheeling Electrical Co., 54 W. Va. 395.

Wisconsin. — Euting v. Chicago, etc., R. Co., 120 Wis. 651, 116 Wis. 13, 96 Am. St. Rep. 936; Grant v. Keystone Lumber Co., 119 Wis. 229, 100 Am. St. Rep. 883; Fehrman v. Pine River, 118 Wis. 150.

Canada. — Fallis v. Gartshore, etc., Co., 4 Ont. L. Rep. 176.

488. 1. Form or Manner Need Not Be Anticipated. — Texas, etc., *R. Co. v. Carlin*, (C. C. A.) 111 Fed. Rep. 777, *affirmed* 189 U. S. 354; Central Union Telephone Co. v. Sokola, 34 Ind. App. 429; Foster v. Chicago, etc., R. Co., 127 Iowa 84; Ablard v. Detroit United R. Co., (Mich. 1905) 102 N. W. Rep. 741; Drum v. Miller, 135 N. Car. 204, 102 Am. St. Rep. 528; St. Louis Southwestern R. Co. v. Pope, 98 Tex. 535; St. Louis Southwestern R. Co. v. Duck, (Tex. Civ. App. 1903) 72 S. W. Rep. 445; Meyer v. Milwaukee Electric R., etc., Co., 116 Wis. 336.

2. Particular Person. — Sullivan v. Creed, (1904) 2 Ir. R. 317; Burk v. Creamery Package Mfg. Co., 126 Iowa 730, 106 Am. St. Rep. 377; Henderson v. O'Halaran, 114 Ky. 186, 102 Am. St. Rep. 279; Skinn v. Reutter, 135 Mich. 57, 106 Am. St. Rep. 384; Lahne v. Seaich, 83 N. Y. App. Div. 636; McHugh v. Kerr, 208 Pa. St. 225; St. Louis Southwestern R. Co. v. Pope, 98 Tex. 535; St. Louis Expanded Metal Fireproofing Co. v. Dawson, 30 Tex. Civ. App. 261; Newport News v. Scott, 103 Va. 794; Standard Oil Co. v. Wakefield, 102 Va. 824.

3. Presumption — *United States.* — Empire State Cattle Co. v. Atchison, etc., R. Co., 135 Fed. Rep. 135; Texas, etc., *R. Co. v. Coutourie*, (C. C. A.) 135 Fed. Rep. 465; Chicago, etc., *R. Co. v. Benton*, (C. C. A.) 132 Fed. Rep. 460.

Georgia. — Southern R. Co. v. Webb, 116 Ga. 152.

Illinois. — Armour v. Golkowska, 202 Ill. 144.

Indiana. — Davis v. Mercer Lumber Co., 164 Ind. 413; Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360.

Iowa. — Foster v. Chicago, etc., R. Co., 127 Iowa 84; Nugent v. Cudahy Packing Co., 126 Iowa 517; Fishburn v. Burlington, etc., R. Co., 127 Iowa 483.

Kansas. — Atchison, etc., *R. Co. v. Parry*, 67 Kan. 515.

Louisiana. — Schwartz v. New Orleans, etc., R. Co., 110 La. 534; Ortolano v. Morgan's Louisiana, etc., R., etc., Co., 109 La. 902.

Massachusetts. — Turner v. Page, 186 Mass. 600.

Michigan. — Ablard v. Detroit United R. Co., (Mich. 1905) 102 N. W. Rep. 741.

Minnesota. — Hebert v. Interstate Iron Co., 94 Minn. 257.

488. (2) Negligence in Failing to Know.—See note 4.

Missouri.—Murrell v. Missouri Pac. R. Co., 105 Mo. App. 88.

New York.—Gorney v. New York, 102 N. Y. App. Div. 259.

North Carolina.—Ramsbottom v. Atlantic Coast Line R. Co., 138 N. Car. 38; Phillips v. Durham, etc., R. Co., 138 N. Car. 12.

Pennsylvania.—Sweigert v. Klingensmith, 210 Pa. St. 565; Marsh v. Giles, 211 Pa. St. 17; Gudfelder v. Pittsburg, etc., R. Co., 207 Pa. St. 629; Buttermann v. McClintic-Marshall Constr. Co., 206 Pa. St. 82.

Texas.—Bering Mfg. Co. v. Peterson, 28 Tex. Civ. App. 194.

Vermont.—Morrisette v. Canadian Pac. R. Co., 74 Vt. 232.

Virginia.—Chesapeake, etc., R. Co. v. Smith, 103 Va. 326; Standard Oil Co. v. Wakefield, 102 Va. 824.

Washington.—Shearer v. Buckley, 31 Wash. 370; Eskildsen v. Seattle, 29 Wash. 583.

Wisconsin.—More v. Lake Superior Terminal, etc., R. Co., 125 Wis. 148; Ruscher v. Stanley, 120 Wis. 380; Grant v. Keystone Lumber Co., 119 Wis. 229, 100 Am. St. Rep. 883; Fehrman v. Pine River, 118 Wis. 150.

Probable as Well as Natural Result Essential.—Saxton v. Missouri Pac. R. Co., 98 Mo. App. 494; Bodie v. Charleston, etc., R. Co., 66 S. Car. 302; Neely v. Ft. Worth, etc., R. Co., 96 Tex. 274.

True Test — Ordinary Prudence.—Burk v. Creamery Package Mfg. Co., 126 Iowa 730, 106 Am. St. Rep. 377; Warden v. Miller, 112 Wis. 67.

488. 4. Negligence in Not Knowing Defective Conditions.—*England.*—Wright v. Leffer, 51 W. R. 149.

United States.—Southern Pac. R. Co. v. Hetzer, (C. C. A.) 135 Fed. Rep. 272; Chicago, etc., R. Co. v. Benton, (C. C. A.) 132 Fed. Rep. 460; Turnbull v. New Orleans, etc., R. Co., (C. C. A.) 120 Fed. Rep. 783; Texas, etc., R. Co. v. Carlin, (C. C. A.) 111 Fed. Rep. 777, affirmed 189 U. S. 354.

Alabama.—E. E. Jackson Lumber Co. v. Cunningham, 141 Ala. 206; Birmingham R., etc., Co. v. Brantley, 141 Ala. 614.

California.—Davis v. Diamond Carriage, etc., Co., 146 Cal. 59; Wikberg v. Olson Co., 138 Cal. 479.

Colorado.—Denver Consol. Electric Co. v. Lawrence, 31 Colo. 301.

Connecticut.—Rincicotti v. John J. O'Brien Contracting Co., 77 Conn. 617.

Delaware.—McAllister v. People's R. Co., 4 Penn. (Del.) 272; Giordano v. Brandywine Granite Co., 3 Penn. (Del.) 423.

District of Columbia.—Washington Market Co. v. Clagett, 19 App. Cas. (D. C.) 12.

Florida.—Consumers' Electric Light, etc., Co. v. Pryor, 44 Fla. 354.

Georgia.—Warren County v. Evans, 118 Ga. 200.

Illinois.—Illinois Cent. R. Co. v. Prickett, 210 Ill. 140; Chicago, etc., R. Co. v. Driscoll, 207 Ill. 9; West Chicago St. R. Co. v. Petters, 106 Ill. 103.

Indiana.—Central Union Telephone Co. v. Sokola, 34 Ind. App. 429; Doyle v. Hawkins, 34

Ind. App. 514; Connersville v. Snider, 31 Ind. App. 218; Wabash R. Co. v. De Hart, 32 Ind. App. 62.

Iowa.—Templin v. Boone, 127 Iowa 91; Belken v. Iowa Falls, 122 Iowa 430; Perry v. Clarke County, 120 Iowa 96; Barry v. Burlington R., etc., Co., 119 Iowa 62.

Kansas.—Emporia v. Burns, 67 Kan. 523; Metropolitan St. R. Co. v. Arnold, 67 Kan. 260.

Kentucky.—Illinois Cent. R. Co. v. Stith, (Ky. 1905) 85 S. W. Rep. 1173; Cincinnati, etc., R. Co. v. Burgess, (Ky. 1905) 84 S. W. Rep. 760; Kentucky, etc., Bridge, etc., Co. v. Sydor, (Ky. 1904) 82 S. W. Rep. 989; Richmond v. Martin, (Ky. 1904) 78 S. W. Rep. 219; Bromley v. Bodkin, (Ky. 1903) 77 S. W. Rep. 696; South Covington, etc., St. R. Co. v. McHugh, (Ky. 1903) 77 S. W. Rep. 202; Pirmann v. Newport, etc., Turnpike Co., (Ky. 1903) 71 S. W. Rep. 491; Covington v. Johnson, (Ky. 1902) 69 S. W. Rep. 703; Louisville, etc., R. Co. v. Pointer, 113 Ky. 952.

Louisiana.—Lorenz v. New Orleans, 114 La. 802; McClanahan v. Vicksburg, etc., R. Co., 111 La. 781. *Compare* Ortolano v. Morgan's Louisiana, etc., R., etc., Co., 109 La. 902.

Massachusetts.—Hooe v. Boston, etc., St. R. Co., 187 Mass. 67; Kingman v. Lynn, etc., R. Co., 181 Mass. 387.

Michigan.—Pearl v. Benton Tp., 136 Mich. 697; Merryman v. Hall, 136 Mich. 296; McIntyre v. Pfaunder Vacuum Fermentation Co., 133 Mich. 552; Tracey v. South Haven Tp., 132 Mich. 492; Plaut v. Heraty, 131 Mich. 619.

Minnesota.—Ljunberg v. North Mankato, 87 Minn. 484; Gray v. St. Paul City R. Co., 87 Minn. 280.

Missouri.—Deland v. Cameron, 112 Mo. App. 704; Knight v. Kansas City, 113 Mo. App. 561; Wright v. Kansas City, 187 Mo. 678; Fry v. St. Louis Transit Co., 111 Mo. App. 324; Deitring v. St. Louis Transit Co., 109 Mo. App. 524; Meng v. St. Louis, etc., R. Co., 108 Mo. App. 553; Markey v. Louisiana, etc., R. Co., 185 Mo. 348; Scullin v. Wabash R. Co., 184 Mo. 695; Brown v. St. Louis Transit Co., 108 Mo. App. 310; Udden v. O'Reilly, 180 Mo. 650; Quinlan v. Kansas City, 104 Mo. App. 616; Baxter v. St. Louis Transit Co., 103 Mo. App. 597; Jett v. Central Electric R. Co., 178 Mo. 664; Meeker v. Metropolitan St. R. Co., 178 Mo. 173; Moore v. St. Louis Transit Co., 95 Mo. App. 728; Schafstette v. St. Louis, etc., R. Co., 175 Mo. 142; Degel v. St. Louis Transit Co., 101 Mo. App. 56; Meyers v. St. Louis Transit Co., 99 Mo. App. 363; Johnson v. St. Louis, etc., R. Co., 173 Mo. 307; Butts v. National Exch. Bank, 90 Mo. App. 168; Klockenbrink v. St. Louis, etc., R. Co., 172 Mo. 678; Livingston v. Wabash R. Co., 170 Mo. 452; Tatem v. Chicago, etc., R. Co., 96 Mo. App. 448.

New Hampshire.—Laronde v. Boston, etc., R. Co., (N. H. 1905) 60 Atl. Rep. 684; Carney v. Concord St. R. Co., 72 N. H. 364.

New Jersey.—Zolpher v. Camden, etc., R. Co., 69 N. J. L. 417; Carroll v. Tide-water Oil Co., 67 N. J. L. 679; Hoboken Land, etc., Co. v. United Electric Co., 71 N. J. L. 430.

New York.—Byrne v. Eastmans Co., 163 N.

489. See notes 1, 2.

g. EXTENT AND LIMITS OF RULE. — See notes 4, 5, 6.

The Mere Fact that an Injury Might Have Been Avoided. — See note 7.

Y. 461; *Bradner v. Warwick*, 91 N. Y. App. Div. 408; *Ledrick v. Green Island*, 103 N. Y. App. Div. 71; *Wesener v. Smith*, 89 N. Y. App. Div. 211; *McGarey v. New York*, 89 N. Y. App. Div. 500; *Strauss v. Brooklyn Heights R. Co.*, 85 N. Y. App. Div. 613; *Lafferty v. Third Ave. R. Co.*, 85 N. Y. App. Div. 592, *affirmed* 176 N. Y. 594; *Lane v. Brooklyn Heights R. Co.*, 85 N. Y. App. Div. 85, *appeal dismissed* 176 N. Y. 557; *Andres v. Brooklyn Heights R. Co.*, 84 N. Y. App. Div. 596; *Geary v. Metropolitan St. R. Co.*, 84 N. Y. App. Div. 514, *affirmed* 177 N. Y. 535; *Walsh v. New York, etc., R. Co.*, 80 N. Y. App. Div. 316, *affirmed* 178 N. Y. 588; *Swenson v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 379; *Hoyt v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 249, *affirmed* 175 N. Y. 502; *Wagner v. Brooklyn Heights R. Co.*, 69 N. Y. App. Div. 349, *affirmed* 174 N. Y. 520; *Griffhahn v. Kreizer*, 62 N. Y. App. Div. 413, *affirmed* 171 N. Y. 661.

North Dakota. — *Meehan v. Great Northern R. Co.*, 13 N. Dak. 432.

Oklahoma. — *Guthrie v. Finch*, 13 Okla. 496.

Pennsylvania. — *Herron v. Pittsburg*, 204 Pa. St. 509, 93 Am. St. Rep. 798; *Jones v. United Traction Co.*, 201 Pa. St. 344.

Rhode Island. — *Cox v. American Agricultural Chemical Co.*, 24 R. I. 503.

South Dakota. — *Waterhouse v. Jos. Schlitz Brewing Co.*, 16 S. Dak. 592; *Patterson v. Jos. Schlitz Brewing Co.*, 16 S. Dak. 33.

Texas. — *San Antonio, etc., R. Co. v. Hahl*, (Tex. Civ. App. 1904) 83 S. W. Rep. 27; *Fuller v. Denison, etc., R. Co.*, 32 Tex. Civ. App. 399; *McGrew v. St. Louis, etc., R. Co.*, 32 Tex. Civ. App. 265; *San Antonio Traction Co. v. Court*, 31 Tex. Civ. App. 146; *Galveston, etc., R. Co. v. Collins*, 31 Tex. Civ. App. 70; *St. Louis Southwestern R. Co. v. Jacobson*, 28 Tex. Civ. App. 150.

Virginia. — *Danville R., etc., Co. v. Hodnett*, 101 Va. 361; *Richmond Traction Co. v. Clarke*, 101 Va. 382; *Wright v. Southern R. Co.*, 101 Va. 36.

Washington. — *Shearer v. Buckley*, 31 Wash. 370; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25.

Wisconsin. — *Ruscher v. Stanley*, 120 Wis. 380.

489. 1. Failure to Anticipate Consequences.

— *Central of Georgia R. Co. v. Duffey*, 116 Ga. 346; *Elgin, etc., R. Co. v. Thomas*, 115 Ill. App. 508; *Clear Creek Stone Co. v. Carmichael*, (Ind. App. 1905) 73 N. E. Rep. 935; *Indianapolis St. R. Co. v. Schmidt*, (Ind. App. 1904) 71 N. E. Rep. 663; *Schlensig v. Monona County*, 126 Iowa 625; *Louisville, etc., R. Co. v. Smith*, (Ky. 1905) 84 S. W. Rep. 755; *Dorsey v. Louisville, etc., R. Co.*, (Ky. 1904) 80 S. W. Rep. 1131; *Bachant v. Boston, etc., R. Co.*, 187 Mass. 392, 105 Am. St. Rep. 408; *Hebert v. Interstate Iron Co.*, 94 Minn. 257; *True v. Meredith Creamery*, 72 N. H. 154; *Steinacker v. Hills Bros. Co.*, 91 N. Y. App. Div. 521; *Berry v. Utica Belt Line St. R. Co.*, 76 N. Y. App. Div. 490; *Jones v. Swift*, 30 Wash. 462; *Meeks v. Ohio River R. Co.*, 52 W. Va. 99.

2. When Liability Excluded. — *Columbus v. Anglin*, 120 Ga. 785; *Trigg v. Ozark Land, etc., Co.*, 187 Mo. 227; *Johnson v. St. Louis, etc., R. Co.*, 173 Mo. 307; *Johnson County v. Carmen*, (Neb. 1904) 99 N. W. Rep. 502; *Quinn v. Baird*, 49 N. Y. App. Div. 270, *affirmed* 172 N. Y. 631; *Fremont v. Dunlap*, 69 Ohio St. 286; *Atlantic, etc., R. Co. v. West*, 101 Va. 13; *Robe v. Snohomish County*, 35 Wash. 475; *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67.

4. Extent and Limits of Rule — *England.* — *McDowall v. Great Western R. Co.*, (1903) 2 K. B. 331.

United States. — *Cole v. German Sav., etc., Soc.*, (C. C. A.) 124 Fed. Rep. 113; *Illinois Cent. R. Co. v. Coughlin*, (C. C. A.) 132 Fed. Rep. 801; *Empire State Cattle Co. v. Atchison, etc., R. Co.*, 135 Fed. Rep. 135; *Huset v. J. I. Case Threshing Mach. Co.*, 57 C. C. A. 237, 120 Fed. Rep. 865.

District of Columbia. — *Kight v. Metropolitan R. Co.*, 21 App. Cas. (D. C.) 494.

Illinois. — *Feldman v. Sellig*, 110 Ill. App. 130.

Indiana. — *Standard Pottery Co. v. Moudy*, (Ind. App. 1905) 73 N. E. Rep. 188; *Cleveland, etc., R. Co. v. Haas*, (Ind. App. 1905) 74 N. E. Rep. 1003.

Kansas. — *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 390.

Massachusetts. — *Mooney v. Beattie*, 180 Mass. 451.

Michigan. — *La Fond v. Detroit Citizens' St. R. Co.*, 131 Mich. 586.

Missouri. — *Trigg v. Ozark Land, etc., Co.*, 187 Mo. 227.

New York. — *Hartman v. Clarke*, 104 N. Y. App. Div. 62; *Murphy v. New York*, 89 N. Y. App. Div. 93; *Dwyer v. Hills Bros. Co.*, 79 N. Y. App. Div. 45.

Ohio. — *Scanlon v. Lake Shore, etc., R. Co.*, 24 Ohio Cir. Ct. 256.

Texas. — *G. A. Duerler Mfg. Co. v. Dullnig*, (Tex. Civ. App. 1904) 83 S. W. Rep. 889; *O'Brien v. Missouri, etc., R. Co.*, 36 Tex. Civ. App. 528.

Virginia. — *Consumers' Brewing Co. v. Doyle*, 102 Va. 399.

Washington. — *Woolf v. Washington R., etc., Co.*, 37 Wash. 491.

5. Chicago Union Traction Co. v. Browdy, 206 Ill. 615; *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 390; *O'Sullivan v. Knox*, 81 N. Y. App. Div. 438, *affirmed* 178 N. Y. 565.

6. Hebert v. Lake Charles Ice Co., 111 La. 522, 100 Am. St. Rep. 505; *Gilbert v. Duluth Gen. Electric Co.*, 93 Minn. 99, 106 Am. St. Rep. 430; *Ela v. Postal Tel. Cable Co.*, 71 N. H. 1.

Actual Knowledge of Extraordinary Conditions. — *Indianapolis v. Cauley*, 164 Ind. 304; *Diamond Block Coal Co. v. Cuthbertson*, (Ind. 1905) 73 N. E. Rep. 818.

7. Cleveland, etc., R. Co. v. Haas, (Ind. App. 1905) 74 N. E. Rep. 1003; *McFeeters v. New York*, 102 N. Y. App. Div. 32; *Trapp v. McClellan*, 68 N. Y. App. Div. 362; *Scanlon v.*

490. See notes 1, 2, 3.

6. Intervening Causes — a. IN GENERAL. — See note 4.

491. See notes 1, 2, 3.

Lake Shore, etc., *R. Co., 24 Ohio Cir. Ct. 256;
Kilbride v. Carbon Dioxide, etc., Co., 201 Pa.
St. 552, 88 Am. St. Rep. 829; Persinger v.
Allegheny Ore, etc., Co., 102 Va. 350.

490. 1. Dooling v. Deutscher Verein, 97
N. Y. App. Div. 39.

2. Johnson v. Prince Line, 104 N. Y. App.
Div. 157; Klos v. Hudson River Ore, etc., Co.,
77 N. Y. App. Div. 566.

Where an Appliance Has Been Used for a Con-
siderable Length of Time. — Trigg v. Ozark
Land, etc., Co., 187 Mo. 227; Fahner v. Brook-
lyn Heights R. Co., 86 N. Y. App. Div. 488;
Cleary v. Brooklyn Factory, etc., Co., 79 N. Y.
App. Div. 35; Keck v. American Telephone,
etc., Co., 131 N. Car. 277.

3. Barrett v. Lake Ontario Beach Imp. Co.,
174 N. Y. 310; Donnelly v. Rochester, 165 N. Y.
315; Grifhahn v. Kreizer, 62 N. Y. App. Div.
413, affirmed 171 N. Y. 661.

Evidence Inadmissible. — If the contract is
dangerous the previous absence of accidents
may not be shown. Kelley v. Parker-Washing-
ton Co., 107 Mo. App. 490. See further *infra*,
this title, **520. 3.**

Lack of Excuse Not Excused. — Swenson v.
Metropolitan St. R. Co., 78 N. Y. App. Div.
379.

4. General Rule as to Intervening Causes —
England. — Sullivan v. Creed, (1904) 2 Ir. R.
317.

United States. — Choctaw, etc., R. Co. v. Hol-
loway, 191 U. S. 334.

Colorado. — Colorado Midland R. Co. v. Rob-
bins, 30 Colo. 449.

Illinois. — Shickle-Harrison, etc., Iron Co. v.
Beck, 212 Ill. 268; Siegel v. Trcka, 115 Ill.
App. 56.

Iowa. — Burk v. Creamery Package Mfg. Co.,
126 Iowa 730, 106 Am. St. Rep. 377.

Kentucky. — Whitman McNamara Tobacco
Co. v. Wurm, (Ky. 1902) 66 S. W. Rep. 609.

Louisiana. — Hebert v. Lake Charles Ice, etc.,
Co., 111 La. 522, 100 Am. St. Rep. 505.

Minnesota. — Teal v. American Min. Co., 84
Minn. 320.

Missouri. — Hensler v. Stix, 113 Mo. App.
162; Smith v. Missouri, etc., Telephone Co.,
113 Mo. App. 429.

New Hampshire. — Ela v. Postal Tel. Cable
Co., 71 N. H. 1.

Texas. — Gulf, etc., R. Co. v. Melville, (Tex.
Civ. App. 1905) 87 S. W. Rep. 863; Shippers
Compress, etc., Co. v. Davidson, 35 Tex. Civ.
App. 558.

Virginia. — Standard Oil Co. v. Wakefield,
102 Va. 824.

Washington. — Eskildsen v. Seattle, 29 Wash.
583.

Liable for Consequences Ensuing in Ordinary
Course of Events. — Parker v. St. Louis Transit
Co., 108 Mo. App. 465.

Connected Chain Unbroken. — Sweigert v.
Klingensmith, 210 Pa. St. 565.

491. 1. Intervening Causes Induced by De-
fendant's Negligence — *Alabama.* — Birmingham
R., etc., Co. v. Hinton, 141 Ala. 606.

Georgia. — Southern R. Co. v. Webb, 116 Ga.
152.

Indiana. — Indianapolis St. R. Co. v. Schmidt,
163 Ind. 360.

Kansas. — Kansas City v. Gilbert, 65 Kan. 469.

Kentucky. — Illinois Cent. R. Co. v. Watson,
(Ky. 1904) 78 S. W. Rep. 175.

Louisiana. — Pharr v. Morgan's Louisiana,
etc., R., etc., Co., (La. 1905) 38 So. Rep. 943.

Maryland. — Consolidated Gas Co. v. Getty,
96 Md. 683, 94 Am. St. Rep. 603.

Michigan. — Skinn v. Reutter, 135 Mich. 57,
106 Am. St. Rep. 384.

Minnesota. — Teal v. American Min. Co., 84
Minn. 320.

Missouri. — Parker v. St. Louis Transit Co.,
108 Mo. App. 465; Estes v. Missouri Pac. R.
Co., 110 Mo. App. 725.

New York. — Countryman v. Fonda, etc., R.
Co., 166 N. Y. 201, 82 Am. St. Rep. 640;
Wood v. New York Cent., etc., R. Co., 83 N.
Y. App. Div. 604, affirmed 179 N. Y. 557;
Schoenfeld v. Metropolitan St. R. Co., (Supm.
Ct. App. T.) 40 Misc. (N. Y.) 201.

Pennsylvania. — Gudfelder v. Pittsburgh, etc.,
R. Co., 207 Pa. St. 629; Quinlan v. Philadel-
phia, 205 Pa. St. 309.

Virginia. — Richmond v. Gay, 103 Va. 320;
Danville R., etc., Co. v. Hodnett, 101 Va. 361;
Richmond Traction Co. v. Wilkinson, 101 Va.
394.

Washington. — Shearer v. Buckley, 31 Wash.
370.

West Virginia. — Snyder v. Philadelphia Co.,
54 W. Va. 149, 102 Am. St. Rep. 941.

Continuous Succession of Events. — Cohn v.
May, 210 Pa. St. 615, 105 Am. St. Rep. 840.

Rescuers. — See the title CONTRIBUTORY NEG-
LIGENCE, **394.** 3 *et seq.* and see Kelley v.
Boston, 180 Mass. 233; Muhs v. Fire Ins. Sal-
vage Corps, 89 N. Y. App. Div. 389; Missouri,
etc., R. Co. v. Goss, 31 Tex. Civ. App. 300;
Mobus v. Waitsfield, 75 Vt. 122.

Results of Original Injury — When Proximate
and When Remote — *United States.* — Maguire
v. Sheehan, 54 C. C. A. 642, 117 Fed. Rep. 819.

California. — Campbell v. Los Angeles Trac-
tion Co., 137 Cal. 565.

Iowa. — Schroeder v. Chicago, etc., R. Co.,
(Iowa 1905) 103 N. W. Rep. 985; Watters v.
Waterloo, 126 Iowa 109.

Massachusetts. — Snow v. New York, etc., R.
Co., 185 Mass. 321.

New York. — Seifter v. Brooklyn Heights R.
Co., 169 N. Y. 254; O'Neil v. Metropolitan St.
R. Co., 103 N. Y. App. Div. 607; Lennox v.
Interurban St. R. Co., 104 N. Y. App. Div. 110.

North Carolina. — Watkins v. Kaolin Mfg.
Co., 131 N. Car. 536.

Oregon. — Maynard v. Oregon R., etc., Co.,
(Oregon 1904) 78 Pac. Rep. 983.

Utah. — Nichols v. Oregon Short Line R. Co.,
28 Utah 319.

Washington. — Jordan v. Seattle, 30 Wash.
298.

West Virginia. — Normile v. Wheeling Trac-
tion Co., 57 W. Va. 132.

491. *b.* FACT THAT INJURIES WOULD NOT HAVE OCCURRED BUT FOR INTERVENING CAUSE. — See note 4.

492. *c.* INTERVENING ACTS OF NEGLIGENCE. — See notes 1, 2, 3, 4.
Negligence of Physician, Surgeon, or Nurse. — See note 5.

493. *d.* INTERVENING CAUSES WHICH RELIEVE EARLIER WRONGDOER. — See note 1.

e. FACT THAT INJURIES WOULD NOT HAVE OCCURRED BUT FOR NEGLIGENCE. — See note 2.

494. See note 1.

491. 2. *Southern R. Co. v. Webb*, 116 Ga. 152; *Garibaldi v. O'Connor*, 210 Ill. 284, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 491; *Chicago Terminal Transfer R. Co. v. Schmelling*, 197 Ill. 619; *Fishburn v. Burlington, etc., R. Co.*, 127 Iowa 483; *Teal v. American Min. Co.*, 84 Minn. 320; *Ela v. Postal Tel. Cable Co.*, 71 N. H. 1; *Quinlan v. Philadelphia*, 205 Pa. St. 309; *Standard Oil Co. v. Wakefield*, 102 Va. 824.

3. *Glanz v. Chicago, etc., R. Co.*, 119 Iowa 611; *Kolb v. St. Louis Transit Co.*, 102 Mo. App. 143; *El Paso, etc., R. Co. v. Kelly*, (Tex. Civ. App. 1904) 83 S. W. Rep. 855.

4. No Injuries Except for Intervening Cause. — *Indianapolis St. R. Co. v. Schmidt*, (Ind. App. 1904) 71 N. E. Rep. 663; *Fishburn v. Burlington, etc., R. Co.*, 127 Iowa 483; *Teal v. American Min. Co.*, 84 Minn. 320; *Ela v. Postal Tel. Cable Co.*, 71 N. H. 1; *Quinlan v. Philadelphia*, 205 Pa. St. 309; *Eskildsen v. Seattle*, 29 Wash. 583. Compare *Jordan v. Seattle*, 30 Wash. 298.

492. 1. Intervening Negligence of Third Person. — *Farrell v. Eastern Machinery Co.*, 77 Conn. 484, 107 Am. St. Rep. 46; *Garibaldi v. O'Connor*, 210 Ill. 284, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 492; *Indianapolis St. R. Co. v. Schmidt*, (Ind. App. 1904) 71 N. E. Rep. 663.

The Rule in Question Is Particularly Applicable where the defendant owes a positive duty. *Hebert v. Lake Charles Ice, etc., Co.*, 111 La. 522, 100 Am. St. Rep. 505.

2. *Siegel v. Trcka*, 115 Ill. App. 56; *Bussell v. Ft. Dodge*, 126 Iowa 308; *Teal v. American Min. Co.*, 84 Minn. 320.

Right of Recovery Over. — *Boston, etc., R. Co. v. Sargent*, 72 N. H. 455.

3. *Georgetown Telephone Co. v. McCullough*, (Ky. 1904) 80 S. W. Rep. 782; *Glassey v. Worcester Consol. St. R. Co.*, 185 Mass. 315; *Leeds v. New York Telephone Co.*, 178 N. Y. 118; *Berman v. Schultz*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 212; *Marsh v. Giles*, 211 Pa. St. 17; *Chattanooga Light, etc., Co. v. Hodges*, 109 Tenn. 331, 97 Am. St. Rep. 844; *Winfree v. Jones*, (Va. 1905) 51 S. E. Rep. 153.

4. *Smith v. Naushon Co.*, 26 R. I. 578; *Ellyson v. International, etc., R. Co.*, 33 Tex. Civ. App. 1.

5. Negligence of Physician, Etc. — *Chicago City R. Co. v. Saxby*, 213 Ill. 274, 104 Am. St. Rep. 218; *Chicago, etc., R. Co. v. Burrill*, 107 Ill. App. 23, 211 Ill. 9; *Elliott v. Kansas City*, 174 Mo. 554; *Texas, etc., R. Co. v. McKenzie*, 30 Tex. Civ. App. 293. See also *Louisville, etc., R. Co. v. Mason*, (Ky. 1903) 72 S. W. Rep. 27; *Indianapolis St. R. Co. v. Schmidt*, 163 Ind.

360. And see the title CONTRIBUTORY NEGLIGENCE, 388. 1, 2; 391. 1.

493. 1. Nature of Intervening Cause Which Will Be Defense — *United States*. — *Cole v. German Sav., etc., Soc.*, (C. C. A.) 124 Fed. Rep. 113; *Huset v. J. I. Case Threshing Mach. Co.*, 57 C. C. A. 237, 120 Fed. Rep. 865; *Empire State Cattle Co. v. Atchison, etc., R. Co.*, 135 Fed. Rep. 135.

Alabama. — *Alabama G. S. R. Co. v. Vail*, (Ala. 1904) 38 So. Rep. 124.

Illinois. — *Cleveland, etc., R. Co. v. Lindsay*, 109 Ill. App. 533.

Indiana. — *Nickey v. Steuder*, 164 Ind. 189; *Claypool v. Wigmore*, 34 Ind. App. 35.

Iowa. — *Watters v. Waterloo*, 126 Iowa 199; *Fishburn v. Burlington, etc., R. Co.*, (Iowa 1904) 98 N. W. Rep. 380.

Kansas. — *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 390.

Massachusetts. — *Bellino v. Columbus Constr. Co.*, 188 Mass. 430; *Glassey v. Worcester Consol. St. R. Co.*, 185 Mass. 315; *Daniels v. New York, etc., R. Co.*, 183 Mass. 393.

New York. — *Murphy v. New York*, 89 N. Y. App. Div. 93; *Berman v. Schultz*, (Supm. Ct. App. T.) 84 N. Y. Supp. 292.

Pennsylvania. — *Marsh v. Giles*, 211 Pa. St. 17.

Texas. — *Shippers Compress, etc., Co. v. Davidson*, 35 Tex. Civ. App. 558; *Texas, etc., R. Co. v. Kelly*, (Tex. Civ. App. 1904) 78 S. W. Rep. 372.

Must Supersede Original Act. — *Standard Oil Co. v. Wakefield*, 102 Va. 824.

Interruption of Natural Sequence. — *Chattanooga Light, etc., Co. v. Hodges*, 109 Tenn. 331, 97 Am. St. Rep. 844.

Must Be Responsible Cause. — See *Fishburn v. Burlington, etc., R. Co.*, 127 Iowa 483.

2. *Cole v. German Sav., etc., Soc.*, (C. C. A.) 124 Fed. Rep. 113; *Schulte v. Menke*, 111 Ill. App. 212, affirmed 210 Ill. 357, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 493; *Cleveland, etc., R. Co. v. Lindsay*, 109 Ill. App. 533; *Fishburn v. Burlington, etc., R. Co.*, (Iowa 1904) 98 N. W. Rep. 380; *Stephenson v. Corder*, (Kan. 1905) 80 Pac. Rep. 938; *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 390; *Bellino v. Columbus Constr. Co.*, 188 Mass. 430; *Glassey v. Worcester Consol. St. R. Co.*, 185 Mass. 315.

In Order to Make a Defendant Liable. — *Trapp v. McClellan*, 68 N. Y. App. Div. 362; *Morrisette v. Canadian Pac. R. Co.*, 74 Vt. 232.

494. 1. *Smith v. Missouri, etc., Telephone Co.*, 113 Mo. App. 429; *Wood v. New York Cent., etc., R. Co.*, 93 N. Y. App. Div. 53. Compare *Scott v. International Paper Co.*, 92 N. Y. App. Div. 615.

494. *f.* INDEPENDENT ILLEGAL ACTS. — See notes 2, 3.

g. DISTINCTION BETWEEN CONDITION AND CAUSE. — See note 4.

495. See notes 1, 2.

7. Contributing and Concurring Causes — *a.* IN GENERAL. — See notes 3, 4.

494. 2. *In re* Michigan Steamship Co., 133 Fed. Rep. 577; *Marsh v. Giles*, 211 Pa. St. 17.

Leaving Windows Open — No Liability for Loss by Theft. — *Andrews v. Kinsel*, 114 Ga. 390, 88 Am. St. Rep. 25.

3. Teal v. American Min. Co., 84 Minn. 320; *Eskildsen v. Seattle*, 29 Wash. 583.

4. Conditions and Causes Distinguished — *England.* — *McDowall v. Great Western R. Co.*, (1903) 2 K. B. 331.

Georgia. — *Southern R. Co. v. Webb*, 116 Ga. 152.

Iowa. — *Overhauser v. American Cereal Co.*, 118 Iowa 417.

Kansas. — *Chicago G. W. R. Co. v. Bailey*, 66 Kan. 115.

Kentucky. — *Whitman McNamara Tobacco Co. v. Wurm*, (Ky. 1902) 66 S. W. Rep. 609.

Louisiana. — *Schwartz v. New Orleans, etc.*, R. Co., 110 La. 534, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 494.

Michigan. — *Skinn v. Reutter*, 135 Mich. 57, 106 Am. St. Rep. 384.

New Hampshire. — *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.*, 72 N. H. 546.

New Jersey. — *Newbury v. Luke*, 68 N. J. L. 189.

Pennsylvania. — *Gudfelder v. Pittsburg, etc.*, R. Co., 207 Pa. St. 629.

South Carolina. — *Jones v. Charleston, etc.*, R. Co., 61 S. Car. 556.

Virginia. — *Standard Oil Co. v. Wakefield*, 102 Va. 824.

West Virginia. — *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 102 Am. St. Rep. 941, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 494.

Wisconsin. — *Yess v. Chicago Brass Co.*, 124 Wis. 406.

So the Wrongful Act of the Plaintiff. — *Laronde v. Boston, etc.*, R. Co., (N. H. 1905) 60 Atl. Rep. 684.

495. 1. *Southern R. Co. v. Webb*, 116 Ga. 152; *Glanz v. Chicago, etc.*, R. Co., 119 Iowa 611; *Skinn v. Reutter*, 135 Mich. 57, 106 Am. St. Rep. 384; *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.*, 72 N. H. 546; *Kremer v. New York Edison Co.*, 102 N. Y. App. Div. 433; *Standard Light, etc.*, Co. v. *Muncey*, 33 Tex. Civ. App. 416; *Standard Oil Co. v. Wakefield*, 102 Va. 824.

2. Defendant's Act or Omission Mere Condition — *England.* — *McDowall v. Great Western R. Co.*, (1903) 2 K. B. 331.

United States. — *In re* Michigan Steamship Co., 133 Fed. Rep. 577.

Illinois. — *Cleveland, etc.*, R. Co. v. *Lindsay*, 109 Ill. App. 533.

Indiana. — *Claypool v. Wigmore*, 34 Ind. App. 35.

Kansas. — *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 390.

Louisiana. — *Schwartz v. New Orleans, etc.*, R. Co., 110 La. 534, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 495.

Massachusetts. — *Bellino v. Columbus Constr. Co.*, 188 Mass. 430; *Daniels v. New York, etc.*, R. Co., 183 Mass. 393.

Missouri. — *Saxton v. Missouri Pac. R. Co.*, 98 Mo. App. 494.

New York. — *Murphy v. New York*, 89 N. Y. App. Div. 93; *Koch v. Zimmermann*, 85 N. Y. App. Div. 370; *Trapp v. McClellan*, 68 N. Y. App. Div. 362.

Oregon. — *Massey v. Seller*, 45 Oregon 267.

Pennsylvania. — *Marsh v. Giles*, 211 Pa. St. 17.

South Carolina. — *Land v. Southern R. Co.*, 67 S. Car. 290, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 495.

Texas. — *Ellyson v. International, etc.*, R. Co., 33 Tex. Civ. App. 1; *Hunt v. Missouri, etc.*, R. Co., (Tex. Civ. App. 1903) 74 S. W. Rep. 69.

Guilty or Irresponsible Concurrence in causing an injury involves the idea of two or more active agencies co-operating to produce it, either of which must be an efficient cause, without the operation of which the accident would not have happened. *Leeds v. New York Telephone Co.*, 178 N. Y. 118.

3. General Rule as to Concurring Causes — *United States.* — See *Cole v. German Sav., etc.*, Soc., (C. C. A.) 124 Fed. Rep. 113.

Delaware. — *Neal v. Wilmington, etc.*, Electric R. Co., 3 Penn. (Del.) 467.

Illinois. — *Armour v. Golkowska*, 202 Ill. 144; *Springfield Consol. R. Co. v. Puntenney*, 200 Ill. 9; *Chicago Terminal Transfer R. Co. v. Schmelling*, 197 Ill. 619.

Indiana. — *Espenlaub v. Ellis*, 34 Ind. App. 163.

Iowa. — *Templin v. Boone*, 127 Iowa 91.

Kentucky. — *Whitman McNamara Tobacco Co. v. Wurm*, (Ky. 1902) 66 S. W. Rep. 609.

Maryland. — *Conowingo Bridge Co. v. Hedrick*, 95 Md. 669.

Massachusetts. — *Townsend v. Boston*, 187 Mass. 283.

Michigan. — *Philip v. Heraty*, 135 Mich. 446.

Minnesota. — *Perry v. Tozer*, 90 Minn. 431, 101 Am. St. Rep. 416.

Missouri. — *Smith v. Fordyce*, 190 Mo. 1.

New York. — *Dunstan v. New York*, 91 N. Y. App. Div. 355; *Geary v. Metropolitan St. R. Co.*, 84 N. Y. App. Div. 514, affirmed 177 N. Y. 535; *Bush v. Murphy*, (Supm. Ct. App. T.) 85 N. Y. Supp. 361.

North Carolina. — *Duval v. Atlantic Coast Line R. Co.*, 134 N. Car. 331, 101 Am. St. Rep. 830.

Texas. — *Ray v. Pecos, etc.*, R. Co., 35 Tex. Civ. App. 123; *St. Louis Southwestern R. Co. v. Swinney*, 34 Tex. Civ. App. 219; *Standard Light, etc.*, Co. v. *Muncey*, 33 Tex. Civ. App. 416; *Shelton v. Northern Texas Traction Co.*, 32 Tex. Civ. App. 507; *Gulf, etc.*, R. Co. v. *Holt*, 30 Tex. Civ. App. 330.

4. Delaware. — *Farley v. Wilmington, etc.*, Electric R. Co., 3 Penn. (Del.) 581.

496. Where Two Efficient Proximate Causes Contribute. — See notes 1, 2.

b. CONCURRING NEGLIGENCE OF SEVERAL PERSONS. — See notes 3, 4.

497. See notes 1, 3, 4.

Illinois. — Christy *v.* Elliott, 216 Ill. 31; Siegel *v.* Norton, 209 Ill. 201; Missouri Malleable Iron Co. *v.* Dillon, 206 Ill. 145; Siegel *v.* Trcka, 115 Ill. App. 56.

Iowa. — Fishburn *v.* Burlington, etc., R. Co., 127 Iowa 483.

Maine. — Neal *v.* Rendall, 98 Me. 69.

Minnesota. — Teal *v.* American Min. Co., 84 Minn. 320.

Montana. — Meisner *v.* Dillon, 29 Mont. 116.

New Hampshire. — Sirois *v.* Henry, (N. H. 1905) 59 Atl. Rep. 936.

New York. — O'Keefe *v.* Great Northern Elevator Co., 105 N. Y. App. Div. 8; Demarest *v.* Forty-Second St., etc., R. Co., 104 N. Y. App. Div. 503.

Texas. — Shippers Compress, etc., Co. *v.* Davidson, 35 Tex. Civ. App. 558.

Vermont. — Kilpatrick *v.* Grand Trunk R. Co., 74 Vt. 288.

Washington. — Goe *v.* Northern Pac. R. Co., 30 Wash. 654; Eskildsen *v.* Seattle, 29 Wash. 583.

496. 1. Two Efficient Causes — *United States.* — Choctaw, etc., R. Co. *v.* Holloway, 191 U. S. 334.

Illinois. — Commonwealth Electric Co. *v.* Rose, 214 Ill. 545.

Iowa. — Fishburn *v.* Burlington, etc., R. Co., 127 Iowa 483; Templin *v.* Boone, 127 Iowa 91; Burk *v.* Creamery Package Mfg. Co., 126 Iowa 730, 106 Am. St. Rep. 377.

Kansas. — Kansas City, etc., R. Co. *v.* Matson, 68 Kan. 815.

Kentucky. — Louisville, etc., Mail Co. *v.* Barnes, (Ky. 1904) 79 S. W. Rep. 261.

Michigan. — Hinchman *v.* Pere Marquette R. Co., 136 Mich. 341.

Minnesota. — Teal *v.* American Min. Co., 84 Minn. 320.

Missouri. — Smith *v.* Fordyce, 190 Mo. 1; Dutro *v.* Metropolitan St. R. Co., 111 Mo. App. 258.

Montana. — Meisner *v.* Dillon, 29 Mont. 116.

New Jersey. — Sutphen *v.* Hedden, 67 N. J. L. 324.

New York. — Demarest *v.* Forty-second St., etc., R. Co., 104 N. Y. App. Div. 503; Geary *v.* Metropolitan St. R. Co., 84 N. Y. App. Div. 514, affirmed 177 N. Y. 535; Rider *v.* Syracuse Rapid Transit R. Co., 171 N. Y. 139.

North Carolina. — Brewster *v.* Elizabeth City, 137 N. Car. 392, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 496.

Rhode Island. — Keeler *v.* Lederer Realty Corp., 26 R. I. 524.

Texas. — San Antonio, etc., R. Co. *v.* Lester, (Tex. Civ. App. 1904) 84 S. W. Rep. 401; Shippers Compress, etc., Co. *v.* Davidson, 35 Tex. Civ. App. 558; Shelton *v.* Northern Texas Traction Co., 32 Tex. Civ. App. 507.

Compare, as to certain actions against a city under the *Massachusetts* statute, Block *v.* Worcester, 186 Mass. 526.

2 Young *v.* Missouri Pac. R. Co., 113 Mo. App. 636; Cochran *v.* Sess, 168 N. Y. 372;

Laidlaw *v.* Sage, 158 N. Y. 73; Eckert *v.* Shawangunk, 77 N. Y. App. Div. 645; Consumers' Brewing Co. *v.* Doyle, 102 Va. 399; Armstrong *v.* Cosmopolis, 32 Wash. 110.

3. Concurring Negligence of Several Persons. — *Indiana* Nitroglycerin, etc., Co. *v.* Lippincott Glass Co., (Ind. App. 1904) 72 N. E. Rep. 183; Richard *v.* Detroit, etc., R. Co., 129 Mich. 458; Teal *v.* American Min. Co., 84 Minn. 320; Schiverea *v.* Brooklyn Heights R. Co., 89 N. Y. App. Div. 340; Schumpert *v.* Southern R. Co., 65 S. Car. 332, 95 Am. St. Rep. 802.

4. All of the Negligent Parties Liable — *United States.* — Graves *v.* City, etc., Tel. Assoc., 132 Fed. Rep. 387, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 496; Hoyer *v.* Great Northern R. Co., 120 Fed. Rep. 712.

California. — Muller *v.* Hale, 138 Cal. 163.

Delaware. — Jarrell *v.* Wilmington, 4 Penn. (Del.) 454.

Illinois. — Economy Light, etc., Co. *v.* Hiller, 203 Ill. 518; Chicago, etc., R. Co. *v.* Murphy, 198 Ill. 462; Chicago, etc., R. Co. *v.* Harrington, 192 Ill. 9; Siegel *v.* Trcka, 115 Ill. App. 56.

Indiana. — Indianapolis *v.* Cauley, 164 Ind. 304; Southern Indiana R. Co. *v.* Davis, 32 Ind. App. 569; Frank Bird Transfer Co. *v.* Krug, 30 Ind. App. 602; Logansport, etc., Natural Gas Co. *v.* Coate, 29 Ind. App. 200.

Kentucky. — Sutton *v.* Wood, (Ky. 1905) 85 S. W. Rep. 201; Kentucky, etc., Bridge, etc., Co. *v.* Sydor, (Ky. 1904) 82 S. W. Rep. 989; West Kentucky Telephone Co. *v.* Pharis, (Ky. 1904) 78 S. W. Rep. 917; Cumberland Telephone, etc., Co. *v.* Ware, 115 Ky. 481.

Maine. — Maine Water Co. *v.* Knickerbocker Steam Towage Co., 99 Me. 473.

Massachusetts. — Corey *v.* Havener, 182 Mass. 250.

New York. — Demarest *v.* Forty-second St., etc., R. Co., 104 N. Y. App. Div. 503; Klinger *v.* United Traction Co., 92 N. Y. App. Div. 100, modified 181 N. Y. 521; Sternfels *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 494, affirmed 174 N. Y. 512.

South Carolina. — Matthews *v.* Seaboard Air Line R. Co., 67 S. Car. 490.

Texas. — Shelton *v.* Northern Texas Traction Co., 32 Tex. Civ. App. 507.

Vermont. — Duffur *v.* Boston, etc., R. Co., 75 Vt. 165.

That Another Is Equally or More Culpable, No Defense. — Whitman McNamara Tobacco Co. *v.* Wurm, (Ky. 1902) 66 S. W. Rep. 609; Hebert *v.* Lake Charles Ice, etc., Co., 111 La. 522, 100 Am. St. Rep. 505; Dunn *v.* Pennsylvania R. Co., 71 N. J. L. 21.

497. 1. Graves *v.* City, etc., Tel. Assoc., 132 Fed. Rep. 387, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 496; Economy Light, etc., Co. *v.* Hiller, 203 Ill. 518.

The Fact that Different Degrees of Care Are Required by the respective duties of the different tortfeasors is immaterial. Sternfels *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 494, affirmed 174 N. Y. 512.

497. 8. Inevitable Accident. — See notes 5, 6, 7.

498. See note 1.

XI. NECESSITY FOR RESULTANT DAMAGE. — See note 2.

XII. RESPECTIVE FUNCTIONS OF COURT AND JURY — 1. In General. —

See note 4.

2. Negligence as Question of Fact for Jury — a. IN GENERAL. —

See note 5.

497. 3. Concurring Negligence of Master and Fellow Servant. — *Shugart v. Atlanta, etc., R. Co.*, (C. C. A.) 133 Fed. Rep. 505; *Gibson v. Canadian Pac. Nav. Co.*, 1 Alaska 407; *Gila Valley, etc., R. Co. v. Lyon*, (Ariz. 1905) 80 Pac. Rep. 337; *Southern Bauxite Min., etc., Co. v. Fuller*, 116 Ga. 695; *Ahrens, etc., Mfg. Co. v. Rellihan*, (Ky. 1904) 82 S. W. Rep. 993; *Garant v. Cashman*, 183 Mass. 13; *Carroll v. Tidewater Oil Co.*, 67 N. J. L. 679; *Kremer v. New York Edison Co.*, 102 N. Y. App. Div. 433; *Hough v. Grants Pass Power Co.*, 41 Oregon 531; *Merrill v. Oregon Short Line R. Co.*, (Utah 1905) 81 Pac. Rep. 85. And see the title FELLOW SERVANTS, **905. 3 et seq.**

4. *Bibb Broom Corn Co. v. Atchison, etc., R. Co.*, 94 Minn. 269.

5. **Inevitable Accident** — *United States*. — See *The Drumraig*, 133 Fed. Rep. 804. *Compare Simonds v. Georgia Iron, etc., Co.*, 133 Fed. Rep. 776, *affirmed* (C. C. A.) 133 Fed. Rep. 1019.

Delaware. — *Adams v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 512; *Farley v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 581.

Illinois. — *Chicago, etc., R. Co. v. Reilly*, 212 Ill. 506.

Iowa. — *Agar v. Harbach*, (Iowa 1903) 93 N. W. Rep. 601.

Maryland. — *United Electric Light, etc., Co. v. State*, 100 Md. 634.

Michigan. — *Newman v. Ann Arbor*, 134 Mich. 29.

Missouri. — *Helm v. Missouri Pac. R. Co.*, 185 Mo. 212; *Groom v. Kavanagh*, 97 Mo. App. 362.

Nebraska. — *Frement Brewing Co. v. Hansen*, 65 Neb. 456.

New York. — *O'Sullivan v. Knox*, 81 N. Y. App. Div. 438, *affirmed* 178 N. Y. 565; *Crofoot v. Syracuse, etc., R. Co.*, 75 N. Y. App. Div. 157.

Ohio. — *Scanlon v. Lake Shore, etc., R. Co.*, 24 Ohio Cir. Ct. 256.

South Carolina. — *Bodie v. Charleston, etc., R. Co.*, 66 S. Car. 302.

West Virginia. — *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 88 Am. St. Rep. 884.

Canada. — *Guinea v. Campbell*, 22 Quebec Super. Ct. 257.

When Mistake Equivalent to Accident. — See *Harris v. Balfour Quarry Co.*, 131 N. Car. 553.

6. *Colbourn v. Wilmington*, 4 Penn. (Del.) 443; *Hunt v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1903) 74 S. W. Rep. 69.

7. **No Liability for Inevitable Accident** — *Georgia*. — *Columbus v. Anglin*, 120 Ga. 785.

Iowa. — *Anderson v. Schurke*, 121 Iowa 340, 100 Am. St. Rep. 358.

Minnesota. — *Strobeck v. Bren*, 93 Minn. 428.

Missouri. — *Compare Smith v. Fordyce*, 190 Mo. 1.

New York. — *Sundheimer v. New York*, 77 N. Y. App. Div. 53, *reversed* 176 N. Y. 495; *Necker v. Frank*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 159.

Pennsylvania. — *Dunkle v. City Pass. R. Co.*, 209 Pa. St. 125.

Texas. — *Compare Gulf, etc., R. Co. v. Boyce*, (Tex. Civ. App. 1905) 87 S. W. Rep. 395.

Severe Storm. — *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 390; *Heidt v. Southern Telephone, etc., Co.*, 122 Ga. 474.

"Cloudburst" or Unusual and Extraordinary Rain. — *Miller v. Wilson*, 104 Ill. App. 556.

It Is for the Jury to say whether a storm was of such character that it should have been foreseen. *Shaughnessy v. Pittsburg*, 20 Pa. Super. Ct. 609.

498. 1. Accident Foreseeable. — *Armour v. Golkowska*, 202 Ill. 144, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 497; *Commonwealth Electric Co. v. Rose*, 214 Ill. 545; *Herbert v. Lake Charles Ice, etc., Co.*, 111 La. 522, 100 Am. St. Rep. 505; *Sutphen v. Hedden*, 67 N. J. L. 324; *Schumacher v. New York*, 166 N. Y. 103; *Greeley v. State*, 94 N. Y. App. Div. 605; *Wolpers v. New York, etc., Electric Light, etc., Co.*, 91 N. Y. App. Div. 424; *Le Blanc v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 150; *Shaughnessy v. Pittsburg*, 20 Pa. Super. Ct. 609; *Chicago, etc., R. Co. v. Cain*, (Tex. Civ. App. 1904) 84 S. W. Rep. 682. *Compare Goe v. Northern Pac. R. Co.*, 30 Wash. 654.

2. **Damage Essential.** — *Paige Iron Works v. Hutter*, 107 Ill. App. 673. See also *Cameron v. New England Telephone, etc., Co.*, 182 Mass. 310; *Styles v. Decatur*, 131 Mich. 443.

4. **Negligence Question of Fact — Statement Explained.** — *Economy Light, etc., Co. v. Hiller*, 203 Ill. 518. See also *Adams v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 512.

Question One of Mixed Law and Fact. — *Hill v. Fair Haven, etc., R. Co.*, 75 Conn. 177; *Mill-edgeville v. Wood*, 114 Ga. 370.

5. **Negligence as Question of Fact** — *United States*. — *Louisiana, etc., R. Co. v. Crumpler*, (C. C. A.) 122 Fed. Rep. 425; *Baltimore, etc., R. Co. v. Burris*, (C. C. A.) 111 Fed. Rep. 882.

Alabama. — *Birmingham Traction Co. v. Reville*, 136 Ala. 335; *Southern R. Co. v. Crowder*, 130 Ala. 256.

California. — *Davis v. Diamond Carriage, etc., Co.*, 146 Cal. 59; *Seller v. Market St. R. Co.*, 139 Cal. 268; *Cooper v. Los Angeles Terminal R. Co.*, 137 Cal. 229.

Delaware. — *Boudwin v. Wilmington City R. Co.*, 4 Penn. (Del.) 381; *Goldstein v. People's R. Co.*, (Del. 1905) 60 Atl. Rep. 975; *Tully v. Philadelphia, etc., R. Co.*, 3 Penn. (Del.) 455.

501. See note 1.

Georgia.—*Georgia R., etc., Co. v. Blacknall*, 122 Ga. 310.

Illinois.—*Chicago City R. Co. v. Gemmill*, 209 Ill. 638; *Economy Light, etc., Co. v. Hiller*, 211 Ill. 568; *Chicago Junction R. Co. v. McGrath*, 203 Ill. 511; *Lake St. El. R. Co. v. Burgess*, 200 Ill. 628; *North Chicago St. R. Co. v. Irwin*, 202 Ill. 345; *West Chicago St. R. Co. v. Buckley*, 200 Ill. 260; *Illinois Steel Co. v. Ryska*, 200 Ill. 280; *Chicago, etc., R. Co. v. Kinnare*, 115 Ill. App. 132; *Pittsburg, etc., R. Co. v. Smith*, 110 Ill. App. 154, *reversed* 207 Ill. 486; *Swift v. Griffin*, 109 Ill. App. 414; *Leach v. Durkin*, 98 Ill. App. 415.

Indiana.—*Ft. Wayne Traction Co. v. Hardendorf*, 164 Ind. 403; *Indianapolis St. R. Co. v. Taylor*, 164 Ind. 155; *Indianapolis St. R. Co. v. Hockett*, 161 Ind. 196; *Indianapolis St. R. Co. v. Hockett*, 159 Ind. 677.

Iowa.—*Earl v. Cedar Rapids*, 126 Iowa 361, 106 Am. St. Rep. 361; *Kaiser v. Hahn*, 126 Iowa 561; *Wilsey v. Jewett*, 122 Iowa 315; *Stanley v. Cedar Rapids, etc., R. Co.*, 119 Iowa 526.

Kansas.—*Consolidated Kansas City Smelting, etc., Co. v. Sharber*, (Kan. 1905) 81 Pac. Rep. 476; *Holitz v. Kansas City*, 68 Kan. 157; *Atchison, etc., R. Co. v. Parry*, 67 Kan. 151.

Kentucky.—*House v. Covington*, (Ky. 1904) 82 S. W. Rep. 374; *Carlisle v. Secrest*, (Ky. 1903) 75 S. W. Rep. 268; *Louisville v. Bailey*, (Ky. 1903) 74 S. W. Rep. 688; *South Covington, etc., St. R. Co. v. Constans*, (Ky. 1903) 74 S. W. Rep. 705; *Louisville v. Michels*, 114 Ky. 551.

Maine.—*Marden v. Portsmouth, etc., R. Co.*, (Me. 1905) 60 Atl. Rep. 530; *Ward v. Maine Cent. R. Co.*, 96 Me. 136.

Maryland.—*Samuel v. Novak*, 99 Md. 558; *Consolidated Gas Co. v. Getty*, 96 Md. 683, 94 Am. St. Rep. 603; *Whitby v. Baltimore, etc., R. Co.*, 96 Md. 700.

Massachusetts.—*Stanford v. Hyde Park*, 185 Mass. 253; *Morris v. Whipple*, 183 Mass. 27; *Macy v. New Bedford, etc., St. R. Co.*, 182 Mass. 291.

Michigan.—*McIntyre v. Pfaudler Vacuum Fermentation Co.*, 133 Mich. 552; *Roulo v. Minot*, 132 Mich. 317; *Smalley v. Detroit, etc., R. Co.*, 131 Mich. 560.

Minnesota.—*Merrill v. Pike*, 94 Minn. 186; *Hebert v. Interstate Iron Co.*, 94 Minn. 257; *Peterson v. Minneapolis St. R. Co.*, 90 Minn. 52; *Gray v. St. Paul City R. Co.*, 87 Minn. 280.

Missouri.—*Oates v. Metropolitan St. R. Co.*, 168 Mo. 535; *McDaniels v. Royle Min. Co.*, 110 Mo. App. 706; *Luckel v. Century Bldg. Co.*, 177 Mo. 608.

Nebraska.—*Mathiesen v. Omaha St. R. Co.*, (Neb. 1903) 97 N. W. Rep. 243; *Omaha St. R. Co. v. Larson*, (Neb. 1903) 97 N. W. Rep. 824; *Riley v. Missouri Pac. R. Co.*, (Neb. 1903) 95 N. W. Rep. 20; *Chicago, etc., R. Co. v. Winfrey*, 67 Neb. 13; *Chicago, etc., R. Co. v. Krayenbuhl*, 65 Neb. 889.

New Hampshire.—*Seaton v. Dunbarton*, (N. H. 1905) 59 Atl. Rep. 444; *Haselton v. Portsmouth, etc., R. Co.*, 71 N. H. 589; *Ela v. Postal Tel. Cable Co.*, 71 N. H. 1.

New Jersey.—*Carroll v. Tidewater Oil Co.*,

67 N. J. L. 679; *Kaufman v. Bush*, (N. J. 1903) 56 Atl. Rep. 291.

New York.—*McDonald v. Metropolitan St. R. Co.*, 167 N. Y. 66; *Donnelly v. Rochester*, 166 N. Y. 315; *Finn v. Cassidy*, 165 N. Y. 584; *Solomon v. Buffalo R. Co.*, 96 N. Y. App. Div. 487; *Adsit v. Catskill Electric R. Co.*, 88 N. Y. App. Div. 167; *Murphy v. Wait*, 102 N. Y. App. Div. 121; *Ladrick v. Green Island*, 103 N. Y. App. Div. 71; *Sheridan v. Interborough Rapid Transit Co.*, 101 N. Y. App. Div. 534; *Pelzel v. Schepp*, 83 N. Y. App. Div. 444; *Robson v. Nassau Electric R. Co.*, 80 N. Y. App. Div. 301; *Wagner v. Metropolitan St. R. Co.*, 79 N. Y. App. Div. 591, *affirmed* without opinion 176 N. Y. 610; *Levine v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 426, *affirmed* 177 N. Y. 523; *Locke v. Waldron*, 75 N. Y. App. Div. 152; *Hill v. Baltimore, etc., R. Co.*, 75 N. Y. App. Div. 325; *Knight v. Lanier*, 69 N. Y. App. Div. 454.

North Carolina.—*Whisenant v. Southern R. Co.*, 137 N. Car. 349.

Ohio.—*Bloom v. Toledo*, 25 Ohio Cir. Ct. 235.

Pennsylvania.—*Holt v. Pennsylvania R. Co.*, 206 Pa. St. 356; *Olive Stove Works v. Ft. Pitt Gas Co.*, 210 Pa. St. 141; *Kelly v. Pittsburg, etc., Traction Co.*, 204 Pa. St. 623; *Wall v. Pittsburg*, 205 Pa. St. 48; *Rachmel v. Clark*, 205 Pa. St. 314; *Hershinger v. Pennsylvania R. Co.*, 25 Pa. Super. Ct. 147; *Carson v. Mackin*, 23 Pa. Super. Ct. 50.

Rhode Island.—*Bosworth v. Union R. Co.*, 25 R. I. 202; *Bucci v. Waterman*, 25 R. I. 125.

South Carolina.—*Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1.

Texas.—*Gulf, etc., R. Co. v. Boyce*, (Tex. Civ. App. 1905) 87 S. W. Rep. 395; *Texas, etc., R. Co. v. McDonald*, (Tex. Civ. App. 1905) 85 S. W. Rep. 493; *Missouri, etc., R. Co. v. Buchanan*, 31 Tex. Civ. App. 209; *Texas, etc., R. Co. v. Gray*, (Tex. Civ. App. 1902) 71 S. W. Rep. 316; *San Antonio v. Chism*, (Tex. Civ. App. 1903) 71 S. W. Rep. 606.

Utah.—*Merrill v. Oregon Short Line R. Co.*, (Utah 1905) 81 Pac. Rep. 85.

Vermont.—*Benedict v. Union Agricultural Soc.*, 74 Vt. 91.

Virginia.—*Richmond Traction Co. v. Wilkinson*, 101 Va. 394.

Washington.—*Anderson v. Seattle-Tacoma Interurban R. Co.*, 36 Wash. 387, 104 Am. St. Rep. 962; *Currans v. Seattle, etc., R., etc., Co.*, 34 Wash. 512; *Selby v. Vancouver Water Works Co.*, 32 Wash. 522; *Stone v. Seattle*, 30 Wash. 65.

Canada.—*Belyea v. Provincial Chemical Fertilizer Co.*, 37 Can. L. J. 247.

Enumeration.—When Negligence for Jury.—See *Massey v. Seller*, 45 Oregon 267; *Cohen v. Philadelphia, etc., R. Co.*, 211 Pa. St. 227.

Negligence and Its Degree.—*Elgin, etc., R. Co. v. Duffy*, 191 Ill. 489.

Gross Negligence.—See *Southern R. Co. v. Drake*, 107 Ill. App. 12. *Compare* *Memphis, etc., R. Co. v. Martin*, 131 Ala. 269.

Wilful or Wanton Negligence is a question for the jury. *Illinois Cent. R. Co. v. Leiner*, 202 Ill. 624, 95 Am. St. Rep. 266.

501. 1. Conduct Expected of Reasonable and

501. What Precautions Necessary. — See note 2.

Prudent Men — *Alabama*. — E. E. Jackson Lumber Co. v. Cunningham, 141 Ala. 206.

Colorado. — Tanner v. Harper, 32 Colo. 156.

Connecticut. — Haywood v. Hamm, 77 Conn. 158.

Delaware. — Neal v. Wilmington, etc., Electric R. Co., 3 Penn. (Del.) 467; Colbourn v. Wilmington, 4 Penn. (Del.) 443.

Georgia. — Kendrick v. Seaboard Air-Line R. Co., 121 Ga. 775.

Illinois. — Illinois Cent. R. Co. v. Behrens, 101 Ill. App. 33.

Indiana. — Indianapolis St. R. Co. v. Seerley, (Ind. App. 1904) 72 N. E. Rep. 169; Nichols v. Baltimore, etc., R. Co., 33 Ind. App. 236, 33 Ind. App. 229; Howard v. Indianapolis St. R. Co., 29 Ind. App. 514.

Iowa. — Gregory v. Wabash R. Co., 126 Iowa 230; Lanza v. Le Grand Quarry Co., 124 Iowa 659; Fitch v. Mason City, etc., Traction Co., 124 Iowa 665; Overhouser v. American Cereal Co., 118 Iowa 417.

Kentucky. — Louisville, etc., Mail Co. v. Barnes, (Ky. 1904) 79 S. W. Rep. 261.

Maine. — Butler v. Rockland, etc., R. Co., 99 Me. 149, 105 Am. St. Rep. 267.

Massachusetts. — Murphy v. New York, etc., R. Co., 187 Mass. 18; Lutolf v. United Electric Light Co., 184 Mass. 53.

Michigan. — Milliken v. St. Clair, 136 Mich. 250.

Minnesota. — Cameron v. Duluth-Superior Traction Co., 94 Minn. 104; Clarke v. Philadelphia, etc., Coal, etc., Co., 92 Minn. 418; Kennedy v. St. Cloud, 90 Minn. 523.

Mississippi. — Dennis v. New Orleans, etc., R. Co., (Miss. 1902) 32 So. Rep. 914.

Missouri. — Smith v. Fordyce, 190 Mo. 1; Shanahan v. St. Louis Transit Co., 109 Mo. App. 228; McLeland v. St. Louis Transit Co., 105 Mo. App. 473; Jett v. Central Electric R. Co., 178 Mo. 664; Reed v. Mexico, 101 Mo. App. 155; Degel v. St. Louis Transit Co., 101 Mo. App. 56; Butts v. National Exch. Bank, 99 Mo. App. 168.

Nebraska. — Chicago, etc., R. Co. v. Troyer, (Neb. 1905) 103 N. W. Rep. 680; L. W. Pomereene Co. v. White, (Neb. 1903) 97 N. W. Rep. 232.

New Hampshire. — Carney v. Concord St. R. Co., 72 N. H. 364; True v. Meredith Creamery, 72 N. H. 154.

New Jersey. — Conrad v. Elizabeth, etc., R. Co., 70 N. J. L. 676.

New York. — Barrett v. Lake Ontario Beach Imp. Co., 174 N. Y. 310; Lane v. Brooklyn Heights R. Co., 85 N. Y. App. Div. 85, appeal dismissed 176 N. Y. 557; Loder v. Metropolitan St. R. Co., 84 N. Y. App. Div. 591; Connor v. Metropolitan St. R. Co., 77 N. Y. App. Div. 384; Berry v. Utica Belt Line St. R. Co., 76 N. Y. App. Div. 490; Sesselmann v. Metropolitan St. R. Co., 76 N. Y. App. Div. 336.

North Carolina. — Peoples v. North Carolina R. Co., 137 N. Car. 96.

Oregon. — Shobert v. May, 40 Oregon 68, 91 Am. St. Rep. 453.

Pennsylvania. — Shaughnessy v. Pittsburg, 20

Pa. Super. Ct. 609; Polenske v. Lit, 18 Pa. Super. Ct. 474.

Texas. — St. Louis Southwestern R. Co. v. Hall, 98 Tex. 480; San Antonio, etc., R. Co. v. Votaw, (Tex. Civ. App. 1904) 81 S. W. Rep. 130; International, etc., R. Co. v. Hall, 35 Tex. Civ. App. 545, 98 Tex. 100; Missouri, etc., R. Co. v. Keaveney, (Tex. Civ. App. 1904) 80 S. W. Rep. 387; Welborne v. Gulf, etc., R. Co., 35 Tex. Civ. App. 401; McGrew v. St. Louis, etc., R. Co., 32 Tex. Civ. App. 265; St. Louis Southwestern R. Co. v. Harrison, 32 Tex. Civ. App. 368; Galveston, etc., R. Co. v. Collins, 31 Tex. Civ. App. 70; Galveston, etc., R. Co. v. Mortson, 31 Tex. Civ. App. 142.

Virginia. — Norfolk, etc., R. Co. v. Fritts, 103 Va. 687, 106 Am. St. Rep. 911; Danville R., etc., Co. v. Hodnett, 101 Va. 361.

Washington. — Smith v. Seattle, 33 Wash. 481.

Wisconsin. — Hughes v. Chicago, etc., R. Co., 122 Wis. 258; Heer v. Warren-Scharf Asphalt Paving Co., 118 Wis. 57.

501. 2. The Question of Necessary Precautions — *United States*. — Marande v. Texas, etc., R. Co., 184 U. S. 192; Williams v. Camden Interstate R. Co., 138 Fed. Rep. 571; Netherlands-American Steam Nav. Co. v. Diamond, (C. C. A.) 128 Fed. Rep. 570; Gloucester Electric Co. v. Kankas, (C. C. A.) 120 Fed. Rep. 490; Alaska United Gold Min. Co. v. Keating, (C. C. A.) 116 Fed. Rep. 561.

Alabama. — Montgomery St. R. Co. v. Shanks, 139 Ala. 489; Southern R. Co. v. Shelton, 136 Ala. 191.

California. — Shea v. Pacific Power Co., 145 Cal. 680.

Colorado. — Adams Express Co. v. Aldridge, (Colo. App. 1904) 77 Pac. Rep. 6.

Delaware. — Reed v. Queen Anne's R. Co., 4 Penn. (Del.) 413; Di Prisco v. Wilmington City R. Co., 4 Penn. (Del.) 527.

District of Columbia. — U. S. Electric Lighting Co. v. Sullivan, 22 App. Cas. (D. C.) 115; Domer v. District of Columbia, 21 App. Cas. (D. C.) 284.

Georgia. — Heidt v. Southern Telephone, etc., Co., 122 Ga. 474; Bullard v. Southern R. Co., 116 Ga. 644; Central of Georgia R. Co. v. Duffey, 116 Ga. 346.

Illinois. — Rogers v. Cleveland, etc., R. Co., 211 Ill. 126; Armour v. Golkowska, 202 Ill. 144; Chicago City R. Co. v. Fennimore, 199 Ill. 9; Canfield v. North Chicago St. R. Co., 98 Ill. App. 1.

Indiana. — Cleveland, etc., R. Co. v. Miles, 162 Ind. 646; Indianapolis Abattoir Co. v. Temperly, 159 Ind. 651, 95 Am. St. Rep. 330; Pittsburgh, etc., R. Co. v. Parish, 28 Ind. App. 189, 91 Am. St. Rep. 120.

Iowa. — Pierson v. Chicago, etc., R. Co., 127 Iowa 13; Williams v. Mineral City Park Assoc., (Iowa 1905) 102 N. W. Rep. 783; Templin v. Boone, 127 Iowa 91; Perry v. Clarke County, 120 Iowa 96; Smith v. Sioux City, 119 Iowa 50.

Kansas. — Keldkamp v. Kansas City, 68 Kan. 479.

Kentucky. — Madisonville v. Pemberton, (Ky. 1903) 75 S. W. Rep. 229; Louisville, etc., R. Co.

502. See note 1.

v. Walden, (Ky. 1903) 74 S. W. Rep. 694; *Chesapeake, etc.*, R. Co. *v. Ogles*, (Ky. 1903) 73 S. W. Rep. 751; *Louisville v. Brewer*, (Ky. 1903) 72 S. W. Rep. 9.

Maryland.—*Conowingo Bridge Co. v. Hedrick*, 95 Md. 669.

Massachusetts.—*Meagher v. Crawford Laundry Machinery Co.*, 187 Mass. 586; *Hyde v. Boston*, 186 Mass. 115; *Leonard v. Boston*, 183 Mass. 68; *Garant v. Cashman*, 183 Mass. 13; *Foster v. Old Colony St. R. Co.*, 182 Mass. 378.

Michigan.—*Finch v. Bangor*, 133 Mich. 149; *Rick v. Saginaw Bay Towing Co.*, 132 Mich. 237, 102 Am. St. Rep. 422; *Tracey v. South-Haven Tp.*, 132 Mich. 492.

Minnesota.—*Klugherz v. Chicago, etc.*, R. Co., 90 Minn. 17, 101 Am. St. Rep. 384; *Ljunberg v. North Mankato*, 87 Minn. 484; *Lauritsen v. American Bridge Co.*, 87 Minn. 518.

Missouri.—*Smith v. Fordyce*, 190 Mo. 1; *Heinze v. Metropolitan St. R. Co.*, 182 Mo. 528; *Story v. St. Louis Transit Co.*, 108 Mo. App. 424; *MacDonald v. St. Louis Transit Co.*, 108 Mo. App. 374; *Fearons v. Kansas City El. R. Co.*, 180 Mo. 208; *Curtis v. McNair*, 173 Mo. 270; *Goodman v. Kahoka*, 100 Mo. App. 278.

Nebraska.—*Fremont Brewing Co. v. Schulz*, (Neb. 1904) 101 N. W. Rep. 234; *Chicago, etc.*, R. Co. *v. Russell*, (Neb. 1904) 100 N. W. Rep. 156; *New Omaha Thomson-Houston Electric Light Co. v. Rombold*, (Neb. 1903) 93 N. W. Rep. 966.

New York.—*Simone v. Kirk*, 173 N. Y. 7; *Bush v. Delaware, etc.*, R. Co., 166 N. Y. 210; *Hoes v. Edison Gen. Electric Co.*, 161 N. Y. 35; *McGuire v. Interborough Rapid Transit Co.*, 104 N. Y. App. Div. 105; *Hancock v. New York Cent., etc.*, R. Co., 100 N. Y. App. Div. 161; *Nelson v. New York*, 101 N. Y. App. Div. 18; *Starer v. Stern*, 100 N. Y. App. Div. 393; *Aleckson v. Erie R. Co.*, 101 N. Y. App. Div. 395; *Haack v. Brooklyn Labor Lyceum Assoc.*, 93 N. Y. App. Div. 491; *Burke v. Brooklyn Wharf, etc.*, Co., 86 N. Y. App. Div. 296; *Ensign v. Central New York Telephone, etc.*, Co., 79 N. Y. App. Div. 244, *affirmed* 179 N. Y. 539; *Swenson v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 379; *Flanagan v. New York Cent., etc.*, R. Co., 70 N. Y. App. Div. 505, *affirmed* 173 N. Y. 631; *Dent v. Grimm*, 65 N. Y. App. Div. 81; *Baird v. New York Cent., etc.*, R. Co., 64 N. Y. App. Div. 14, *affirmed* 172 N. Y. 637.

North Carolina.—*Hedrick v. Southern R. Co.*, 136 N. Car. 1; *Edwards v. Atlantic Coast Line R. Co.*, 132 N. Car. 99.

Oregon.—*Hough v. Grants Pass Power Co.*, 41 Oregon 531.

Pennsylvania.—*Kitchen v. Riter-Conley Mfg. Co.*, 207 Pa. St. 558; *Herron v. Pittsburgh*, 204 Pa. St. 509, 93 Am. St. Rep. 798; *Strader v. Monroe County*, 202 Pa. St. 626.

Rhode Island.—*Venbuhr v. Lafayette Worsted Mills*, (R. I. 1905) 60 Atl. Rep. 770, *quoting* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 501.

South Carolina.—*Smoak v. Savannah, etc.*, R. Co., 65 S. Car. 299; *Carroll v. Charleston, etc.*, R. Co., 65 S. Car. 378.

Tennessee.—*Memphis St. R. Co. v. Haynes*, 112 Tenn. 712; *Louisville, etc.*, R. Co. *v. Sawyer*, 114 Tenn. 84.

Texas.—*Central Texas, etc.*, R. Co. *v. Gibson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 862; *Gulf, etc.*, R. Co. *v. Hall*, 34 Tex. Civ. App. 535; *Central Texas, etc.*, R. Co. *v. Gibson*, 35 Tex. Civ. App. 66; *Houston Transfer Co. v. Renard*, (Tex. Civ. App. 1904) 79 S. W. Rep. 838; *Galveston, etc.*, R. Co. *v. Levy*, 35 Tex. Civ. App. 107; *Dallas v. Moore*, 32 Tex. Civ. App. 230; *Over v. Missouri, etc.*, R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 535; *Rea v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 555; *St. Louis Southwestern R. Co. v. Eitel*, (Tex. Civ. App. 1903) 72 S. W. Rep. 205; *St. Louis Southwestern R. Co. v. Bowles*, 32 Tex. Civ. App. 118.

Washington.—*McClammy v. Spokane*, 36 Wash. 339; *Burian v. Seattle Electric Co.*, 26 Wash. 606.

Wisconsin.—*Warden v. Miller*, 112 Wis. 67.

Canada.—*Fallis v. Gartshore, etc.*, Co., 4 Ont. L. Rep. 176.

Examination and Use of Appliances, Machinery, Etc.—*Fries v. Bettendorf Axle Co.*, 126 Iowa 138; *National Enameling, etc.*, Co. *v. Cornell*, 95 Md. 524; *Lynch v. Mt. Stevens, etc.*, Co., 187 Mass. 397; *Byrne v. Eastmans Co.*, 163 N. Y. 461; *Winters v. Naughton*, 91 N. Y. App. Div. 80; *Moran v. Carlson*, 95 N. Y. App. Div. 116; *Sweigert v. Klingensmith*, 210 Pa. St. 565; *Wallace v. Henderson*, 211 Pa. St. 142; *Kepler v. Lackawanna Lumber Co.*, 209 Pa. St. 244; *Southern Pac. R. Co. v. Winton*, 27 Tex. Civ. App. 503; *Galveston, etc.*, R. Co. *v. Newport*, 26 Tex. Civ. App. 583.

Ignorance of Defective Conditions—Negligence in Failing to Know.—*Chicago, etc.*, R. Co. *v. Benton*, (C. C. A.) 132 Fed. Rep. 460; *McLeansboro v. Trammel*, 109 Ill. App. 524; *Chicago v. Gillett*, 108 Ill. App. 455; *Comerford v. Boston*, 187 Mass. 564.

Whether Premises Likely to Attract Children.—*Fink v. Des Moines*, 115 Iowa 641; *Denison, etc.*, R. Co. *v. Harlan*, (Tex. Civ. App. 1905) 87 S. W. Rep. 732; *San Antonio, etc.*, R. Co. *v. Skidmore*, 27 Tex. Civ. App. 320.

Proper Guarding of Excavation in Highway.—*Snowden v. Somerset*, 171 N. Y. 99.

Speed of Train in City.—*Boyd v. Chicago, etc.*, R. Co., 103 Ill. App. 199.

502. 1. *Birmingham R., etc.*, Co. *v. Bynum*, 139 Ala. 389; *Chicago City R. Co. v. Maloney*, 99 Ill. App. 623; *Griffin Wheel Co. v. Stanton*, (Kan. 1905) 79 Pac. Rep. 651; *McIntyre v. Pfaudler Vacuum Fermentation Co.*, 133 Mich. 552; *Carney v. Concord St. R. Co.*, 72 N. H. 364; *Siracusa v. Atlantic City R. Co.*, 68 N. J. L. 446; *Bennett v. Long Island R. Co.*, 163 N. Y. 1; *Koszlowski v. American Locomotive Co.*, 96 N. Y. App. Div. 40; *Crofoot v. Syracuse, etc.*, R. Co., 75 N. Y. App. Div. 157; *Venbuhr v. Lafayette Worsted Mills*, (R. I. 1905) 60 Atl. Rep. 770, *quoting* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 502.

It Is Error to Permit the Jury to Speculate upon what precautions might have been taken other than those pointed out by the plaintiff. *Smith v. Lehigh Valley R. Co.*, 77 N. Y. App. Div. 43.

502. Negligence Necessarily Question for Jury. — See note 2**b. WHERE EVIDENCE CONFLICTING. — See note 3.**

502. 2. Degree of Care under Particular Circumstances — United States. — *Smith v. Day*, (C. C. A.) 128 Fed. Rep. 561.

California. — *Wikberg v. Olson Co.*, 138 Cal. 479.

District of Columbia. — *Metropolitan R. Co. v. Blick*, 22 App. Cas. (D. C.) 194.

Iowa. — *Wolf v. Des Moines Elevator Co.*, 126 Iowa 659.

Louisiana. — *Haas v. New Orleans R. Co.*, 112 La. 747.

Massachusetts. — *Baker v. Fall River*, 187 Mass. 53.

Missouri. — *Holden v. Missouri R. Co.*, 108 Mo. App. 665; *Meng v. St. Louis, etc., R. Co.*, 108 Mo. App. 553; *Vancleve v. St. Louis, etc., R. Co.*, 107 Mo. App. 96; *Frank v. St. Louis Transit Co.*, 99 Mo. App. 323.

New York. — *Devoe v. New York Cent., etc., R. Co.*, 174 N. Y. 1.

Pennsylvania. — *Duffy v. Sable Iron Works*, 210 Pa. St. 326; *Farr v. Philadelphia, etc., R. Co.*, 24 Pa. Super. Ct. 332.

Rhode Island. — *Foley v. Ray*, (R. I. 1905) 61 Atl. Rep. 50.

Texas. — *Denison, etc., R. Co. v. Powell*, 35 Tex. Civ. App. 454; *International, etc., R. Co. v. Reeves*, 35 Tex. Civ. App. 162.

Virginia. — *Richmond Pass., etc., Co. v. Gordon*, 102 Va. 498; *Richmond, etc., Electric R. Co. v. Rubin*, 102 Va. 809.

Washington. — *Lynch v. Kineth*, 36 Wash. 368, 104 Am. St. Rep. 958.

Wisconsin. — *Tiborsky v. Chicago, etc., R. Co.*, 124 Wis. 243.

Qualification of Rule — Measure of Care Established by Law. — *Texas, etc., R. Co. v. Watson*, 190 U. S. 287; *Hofacre v. Monticello*, (Iowa 1905) 103 N. W. Rep. 488; *Louisville R. Co. v. French*, (Ky. 1903) 71 S. W. Rep. 486.

3. Conflict of Evidence — United States. — *Kefauver v. Philadelphia, etc., R. Co.*, 122 Fed. Rep. 966; *Minahan v. Grand Trunk Western R. Co.*, (C. C. A.) 138 Fed. Rep. 37; *Southern Electric R. Co. v. Hageman*, (C. C. A.) 121 Fed. Rep. 262.

Alabama. — *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; *Louisville, etc., R. Co. v. Sullivan Timber Co.*, 138 Ala. 379; *Alabama G. S. R. Co. v. Brooks*, 135 Ala. 401.

California. — *Powley v. Swensen*, 146 Cal. 471.

Delaware. — *Queen Anne's R. Co. v. Reed*, (Del. 1905) 59 Atl. Rep. 860.

Georgia. — *Central of Georgia R. Co. v. Henson*, 121 Ga. 462.

Illinois. — *Chicago City R. Co. v. Fennimore*, 190 Ill. 9.

Indiana. — *Southern Indiana R. Co. v. Fine*, 163 Ind. 617; *Terre Haute Electric Co. v. Kiely*, (Ind. App. 1904) 72 N. E. Rep. 658.

Iowa. — *Hensley v. Davidson Bros. Co.*, (Iowa 1905) 103 N. W. Rep. 975; *Hobbs v. Marion*, 123 Iowa 726; *Selensky v. Chicago G. W. R. Co.*, 120 Iowa 113.

Kansas. — *Chicago G. W. R. Co. v. Troup*, 60 Kan. 854; *Emporia v. Kowalski*, 66 Kan. 64; *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 390.

Kentucky. — *Guthrie v. Carney*, (Ky. 1905)

86 S. W. Rep. 1126; *Wathen v. Pool*, (Ky. 1904) 80 S. W. Rep. 439; *Louisville, etc., R. Co. v. Price*, (Ky. 1903) 76 S. W. Rep. 836; *Louisville, etc., R. Co. v. Mason*, (Ky. 1903) 72 S. W. Rep. 27.

Maryland. — *Vonderhorst Brewing Co. v. Amrhine*, 98 Md. 406; *West Virginia Cent., etc., R. Co. v. State*, 96 Md. 652; *Baltimore Boot, etc., Mfg. Co. v. Jamar*, 93 Md. 404, 86 Am. St. Rep. 428.

Massachusetts. — *McDonald v. New York Cent., etc., R. Co.*, 186 Mass. 474; *Dalton v. New York, etc., R. Co.*, 184 Mass. 344; *Leonard v. Boston*, 183 Mass. 68; *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93.

Missouri. — *Bond v. Chicago, etc., R. Co.*, 110 Mo. App. 131; *Wacher v. St. Louis Transit Co.*, 108 Mo. App. 645; *Montgomery v. Missouri Pac. R. Co.*, 181 Mo. 477; *Haller v. St. Louis*, 176 Mo. 606; *McLain v. St. Louis, etc., R. Co.*, 100 Mo. App. 374.

Nebraska. — *Fremont Brewing Co. v. Schulz*, (Neb. 1904) 101 N. W. Rep. 234; *Lincoln v. Miller*, (Neb. 1901) 96 N. W. Rep. 484.

New Jersey. — *Vrooman v. North Jersey St. R. Co.*, 70 N. J. L. 818; *Adams v. Camden, etc., R. Co.*, 69 N. J. L. 424.

New York. — *Flanagan v. New York Cent., etc., R. Co.*, 70 N. Y. App. Div. 505, *affirmed* 173 N. Y. 631.

North Carolina. — *Stewart v. Raleigh, etc., Air Line R. Co.*, 137 N. Car. 687; *Carter v. Southern R. Co.*, 135 N. Car. 498; *Butts v. Atlantic, etc., R. Co.*, 133 N. Car. 82.

Oregon. — *Massey v. Seller*, 45 Oregon 267; *Anderson v. City, etc., R. Co.*, 42 Oregon 505.

Pennsylvania. — *Kuntz v. New York, etc., R. Co.*, 206 Pa. St. 162; *Irvine v. Smith*, 204 Pa. St. 58; *Summers v. Bloomsburg, etc., R. Co.*, 24 Pa. Super. Ct. 615.

Texas. — *St. Louis Southwestern R. Co. v. Kilman*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1050; *Ft. Worth, etc., R. Co. v. Caskey*, (Tex. Civ. App. 1904) 84 S. W. Rep. 264.

Utah. — *Smith v. Centennial Eureka Min. Co.*, 27 Utah 307.

Virginia. — *Southern R. Co. v. Aldridge*, 101 Va. 142; *Richmond, etc., Electric R. Co. v. Rubin*, 102 Va. 809.

Washington. — *Atherton v. Tacoma R., etc., Co.*, 30 Wash. 395; *Nelson v. McLellan*, 31 Wash. 208, 96 Am. St. Rep. 902; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25; *Randall v. Hoquiam*, 30 Wash. 435.

Wisconsin. — *Euting v. Chicago, etc., R. Co.*, 120 Wis. 651, 116 Wis. 13, 96 Am. St. Rep. 936.

Finding of Jury Not Disturbed — Illinois. — *Cleveland, etc., R. Co. v. Baker*, 106 Ill. App. 500; *Toledo, etc., R. Co. v. Hammett*, 115 Ill. App. 268; *Mobile, etc., R. Co. v. Vallowe*, 115 Ill. App. 621.

Iowa. — *Beringer v. Dubuque St. R. Co.*, 118 Iowa 135.

Maine. — *Maxfield v. Maine Cent. R. Co.*, (Me. 1905) 60 Atl. Rep. 710; *Barnes v. Rumford*, 96 Me. 315.

Michigan. — *Richard v. Detroit, etc., R. Co.*, 129 Mich. 458.

503. See notes 1, 2.

c. CREDIBILITY OF WITNESSES. — See note 5.

Minnesota. — *Lauritsen v. American Bridge Co.*, 87 Minn. 518.

Missouri. — *Sanitary Dairy Co. v. St. Louis Transit Co.*, 98 Mo. App. 20.

Nebraska. — *South Omaha v. Meyers*, (Neb. 1902) 92 N. W. Rep. 743.

New York. — *Connor v. General Fire Extinguisher Co.*, 73 N. Y. App. Div. 624, *affirmed* 174 N. Y. 515.

Pennsylvania. — *Cromley v. Pennsylvania R. Co.*, 211 Pa. St. 429.

Rhode Island. — See *Heltzere v. Union R. Co.*, 26 R. I. 576.

South Dakota. — *Hedlun v. Holy Terror Min. Co.*, 16 S. Dak. 261.

Texas. — *El Paso Electric R. Co. v. Harry*, (Tex. Civ. App. 1904) 83 S. W. Rep. 735; *Gulf, etc., R. Co. v. Mangham*, 29 Tex. Civ. App. 486.

Wisconsin. — *Warden v. Miller*, 112 Wis. 67.

Canada. — *Scriver v. Lowe*, 32 Ont. 290; *Fallis v. Gartshore, etc., Co.*, 4 Ont. L. Rep. 176.

Not Will a Verdict for the Plaintiff. — See *Missouri, etc., R. Co. v. Edwards*, (Tex. Civ. App. 1902) 67 S. W. Rep. 891; *Champagne v. La Crosse City R. Co.*, 121 Wis. 554.

503. 1. *House v. Seaboard Air Line R. Co.*, 131 N. Car. 103.

2. *Nesbit v. Crosby*, 74 Conn. 554; *Right v. Metropolitan R. Co.*, 21 App. Cas. (D. C.) 494; *Chicago City R. Co. v. Fennimore*, 199 Ill. 9; *West Chicago St. R. Co. v. Winters*, 107 Ill. App. 221; *H. B. Phillips Co. v. Pruitt*, (Ky. 1904) 82 S. W. Rep. 628; *Ablard v. Detroit United R. Co.*, (Mich. 1905) 102 N. W. Rep. 741; *South Omaha v. Meyers*, (Neb. 1902) 92 N. W. Rep. 743; *House v. Seaboard Air Line R. Co.*, 131 N. Car. 103.

For Cases Decided on Particular Facts — *England.* — *Wright v. Lefever*, 51 W. R. 149.

United States. — *Memphis Consol. Gas, etc., Co. v. Letson*, (C. C. A.) 135 Fed. Rep. 969; *Southern Pac. R. Co. v. Schuyler*, (C. C. A.) 135 Fed. Rep. 1015; *Kansas City Southern R. Co. v. Moles*, (C. C. A.) 121 Fed. Rep. 351; *Hawes v. Warren*, 119 Fed. Rep. 978.

Arkansas. — *St. Louis, etc., R. Co. v. Evans*, (Ark. 1905) 86 S. W. Rep. 426.

California. — *Wikberg v. Olson Co.*, 138 Cal. 479.

Colorado. — *Denver Consol. Electric Co. v. Lawrence*, 31 Colo. 301; *Colorado Midland R. Co. v. Robbins*, 30 Colo. 449.

Illinois. — *Spring Valley Coal Co. v. Buzis*, 213 Ill. 341; *Henrietta Coal Co. v. Campbell*, 211 Ill. 216.

Iowa. — *Nugent v. Cudahy Packing Co.*, 126 Iowa 517; *Glanz v. Chicago, etc., R. Co.*, 119 Iowa 611.

Kansas. — *Harris v. Savage*, (Kan. 1905) 79 Pac. Rep. 113.

Kentucky. — *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 249; *Middlesborough R. Co. v. Stallard*, (Ky. 1903) 72 S. W. Rep. 17.

Louisiana. — *Hebert v. Lake Charles Ice, etc., Co.*, 111 La. 522, 100 Am. St. Rep. 505.

Maine. — *Coombs v. Mason*, 97 Me. 270.

Maryland. — *Miller v. Addison*, 96 Md. 731.

Massachusetts. — *Rosen v. Boston*, 187 Mass. 245; *Hayes v. Pitts-Kimball Co.*, 183 Mass. 262.

Michigan. — *Cutcher v. Detroit*, (Mich. 1905) 102 N. W. Rep. 629.

Minnesota. — *McDonald v. Duluth*, 93 Minn. 206; *Simonds v. Minneapolis, etc., R. Co.*, 87 Minn. 408; *Skelton v. St. Paul City R. Co.*, 88 Minn. 192.

Missouri. — *Zongker v. People's Union Mercantile Co.*, 110 Mo. App. 382; *Woods v. Wabash R. Co.*, 188 Mo. 229; *Leu v. St. Louis Transit Co.*, 110 Mo. App. 458; *Snider v. Chicago, etc., R. Co.*, 108 Mo. App. 234; *Meeker v. Metropolitan St. R. Co.*, 178 Mo. 173; *Borden v. Falk Co.*, 97 Mo. App. 566.

Nebraska. — *Fremont Brewing Co. v. Hansen*, 65 Neb. 456.

Nevada. — *Powell v. Nevada, etc., R. Co.*, (Nev. 1904) 78 Pac. Rep. 978.

New Jersey. — *Wolcott v. New York, etc., R. Co.*, 68 N. J. L. 421; *Harmer v. Reed Apartment, etc., Co.*, 68 N. J. L. 332.

New York. — *Hancock v. New York Cent., etc., R. Co.*, 100 N. Y. App. Div. 161; *Scheider v. American Bridge Co.*, 78 N. Y. App. Div. 163; *Stevens v. Union R. Co.*, 75 N. Y. App. Div. 602, *affirmed* 176 N. Y. 607; *Cosgrove v. Metropolitan St. R. Co.*, 74 N. Y. App. Div. 166, *affirmed* 173 N. Y. 628; *Hoyt v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 249, *affirmed* 175 N. Y. 502; *Norton v. Webber*, 69 N. Y. App. Div. 130, *affirmed* 174 N. Y. 514.

Ohio. — *Lake Shore, etc., R. Co. v. Johnston*, 25 Ohio Cir. Ct. 41.

Pennsylvania. — *Prinz v. Lucas*, 210 Pa. St. 620; *Levinson v. Myers*, 24 Pa. Super. Ct. 481; *Hoon v. Beaver Valley Traction Co.*, 204 Pa. St. 369.

Rhode Island. — *Cummings v. National, etc., Worsteds Mills*, 24 R. I. 390.

Tennessee. — *Memphis St. R. Co. v. Kartright*, 110 Tenn. 277, 100 Am. St. Rep. 807.

Texas. — *Chicago, etc., R. Co. v. Jones*, (Tex. Civ. App. 1905) 88 S. W. Rep. 445; *St. Louis Southwestern R. Co. v. Kilman*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1050; *Gulf, etc., R. Co. v. Dolson*, (Tex. Civ. App. 1905) 85 S. W. Rep. 444; *Texas Portland Cement, etc., Co. v. Lee*, 36 Tex. Civ. App. 482; *St. Louis Southwestern R. Co. v. Pope*, (Tex. Civ. App. 1904) 82 S. W. Rep. 360; *Missouri, etc., R. Co. v. Cannady*, 36 Tex. Civ. App. 646; *Pecos, etc., R. Co. v. Bowman*, 34 Tex. Civ. App. 98; *Ft. Worth, etc., R. Co. v. Partin*, 33 Tex. Civ. App. 173; *Galveston, etc., R. Co. v. Tirres*, 33 Tex. Civ. App. 362; *Texas, etc., R. Co. v. Russell*, (Tex. Civ. App. 1903) 74 S. W. Rep. 560; *Dallas Consol. Electric St. R. Co. v. Illo*, 32 Tex. Civ. App. 290; *Missouri, etc., R. Co. v. Goss*, 31 Tex. Civ. App. 300; *Texas, etc., R. Co. v. Wright*, 31 Tex. Civ. App. 249.

Virginia. — *Virginia, etc., R. Co. v. Bailey*, 103 Va. 205; *Richmond Traction Co. v. Clarke*, 101 Va. 382.

Washington. — *Halverson v. Seattle Electric Co.*, 35 Wash. 600.

5. For the General Principles, applicable in neg-

503. 3. When Question for Court — a. IN GENERAL. — See note 8.**504. See note 1.**

ligence as in other cases, as to the province of the jury in passing on the credibility of witnesses and the weight of testimony, see the titles EVIDENCE, **498. 2 et seq.**; QUESTIONS OF LAW AND FACT, **565. 3 et seq.**, **572. 2 et seq.**; WITNESSES, **1064. 1 et seq.** See also ENCYC. OF PL. AND PR. and the Supplement thereto, titles DIRECTING VERDICT; DISMISSAL, DISCONTINUANCE, AND NONSUIT; INSTRUCTIONS; JURY; TRIAL; and the various titles dealing with the power of reviewing courts to pass on the evidence, such as APPEALS; BILLS OF EXCEPTIONS; CERTIORARI; ERROR, WRIT OF; NEW TRIAL.

As to the Texas Statute see San Antonio Traction Co. v. Bryant, 30 Tex. Civ. App. 437; Kroeger v. Texas, etc., R. Co., 30 Tex. Civ. App. 87; Robertson v. Trammell, (Tex. Civ. App. 1904) 83 S. W. Rep. 258; Central Texas, etc., R. Co. v. Gibson, 35 Tex. Civ. App. 66; Galveston, etc., R. Co. v. Tirres, 33 Tex. Civ. App. 362.

503. 8. When Court May Take Issue from Jury — United States. — Marande v. Texas, etc., R. Co., 184 U. S. 192; Busby v. Anderson Water, etc., Co., (C. C. A.) 136 Fed. Rep. 156; Riley v. Louisville, etc., R. Co., (C. C. A.) 133 Fed. Rep. 904; Marquardt v. Ball Engine Co., (C. C. A.) 122 Fed. Rep. 374; Thomason v. Southern R. Co., (C. C. A.) 113 Fed. Rep. 80; Texas, etc., R. Co. v. Carlin, (C. C. A.) 111 Fed. Rep. 777, affirmed 189 U. S. 354.

Illinois. — Chicago Title, etc., Co. v. Standard Fashion Co., 106 Ill. App. 135.

Indiana. — Cleveland, etc., R. Co. v. Stewart, 161 Ind. 242.

Mississippi. — Rhymes v. Jackson Electric R., etc., Co., 85 Miss. 140.

Washington. — Woolf v. Washington R., etc., Co., 37 Wash. 491.

West Virginia. — Williams v. Belmont Coal, etc., Co., 55 W. Va. 84.

But as Holding that Where the Evidence Is Conflicting. — See City, etc., R. Co. v. Svedborg, 194 U. S. 201; Shugart v. Atlanta, etc., R. Co., (C. C. A.) 133 Fed. Rep. 505; Endicott v. Triple State Natural Gas, etc., Co., (Ky. 1903) 76 S. W. Rep. 516; McDonald v. Metropolitan St. R. Co., 167 N. Y. 66; Allison v. Long Clove Trap Rock Co., 75 N. Y. App. Div. 267.

504. 1. For Cases Where, under the Particular Facts of Each, a Finding of Negligence Was Held Not Warranted — United States. — Diamond Coal, etc., Co. v. Allen, (C. C. A.) 137 Fed. Rep. 705.

Illinois. — Illinois Cent. R. Co. v. Haecker, 110 Ill. App. 102; People's Gas Light, etc., Co. v. Porter, 102 Ill. App. 461; Swafford v. Rosenbloom, 102 Ill. App. 578; Chicago City R. Co. v. Maloney, 99 Ill. App. 623.

Indiana. — Toledo, etc., R. Co. v. Parks, 163 Ind. 592.

Kansas. — Atchison, etc., R. Co. v. Judah, 65 Kan. 474.

Kentucky. — Louisville R. Co. v. Colston, (Ky. 1904) 79 S. W. Rep. 243; Louisville, etc., R. Co. v. Howerton, 115 Ky. 89; Louisville, etc., Mail Co. v. Gilliland, (Ky. 1903) 72 S. W. Rep. 1101; Triple-State Natural Gas, etc., Co. v.

Wellman, 114 Ky. 79; Louisville, etc., R. Co. v. Hart, (Ky. 1902) 70 S. W. Rep. 830.

Louisiana. — Greve v. New Orleans, etc., R., etc., Co., 114 La. 974.

Maine. — Moore v. Stetson, 96 Me. 197.

Massachusetts. — Johnson v. Holmes, 188 Mass. 170; Miller v. North Adams, 182 Mass. 569.

Minnesota. — Phillips v. Great Northern R. Co., 94 Minn. 110; Griffin v. Minnesota Transfer R. Co., 94 Minn. 191; Wickenburg v. Minneapolis, etc., R. Co., 94 Minn. 276; Fewings v. Mendenhall, 88 Minn. 336, 97 Am. St. Rep. 519.

Missouri. — Carey v. Kansas City, 187 Mo. 715; Harper v. St. Louis Merchants Bridge Terminal Co., 187 Mo. 575; Trigg v. Ozark Land, etc., Co., 187 Mo. 227; Whitley v. Chicago, etc., R. Co., 109 Mo. App. 123; Hesselbach v. St. Louis, 179 Mo. 505; Spiro v. St. Louis Transit Co., 102 Mo. App. 250.

Nebraska. — New Omaha Thomson-Houston Electric Light Co. v. Anderson, (Neb. 1905) 102 N. W. Rep. 89.

New Jersey. — Furey v. New York Cent., etc., R. Co., 67 N. J. L. 270; Conway v. Vezzetti, 69 N. J. L. 235.

New York. — Smith v. New York Cent., etc., R. Co., 164 N. Y. 491; Hughes v. Russell, 104 N. Y. App. Div. 144; Hartman v. Clarke, 104 N. Y. App. Div. 62; McFeeters v. New York, 102 N. Y. App. Div. 32; Owen v. Retsof Min. Co., 102 N. Y. App. Div. 130; Gunther v. Metropolitan St. R. Co., (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 117; Shepard v. Bellew, etc., Co., 101 N. Y. App. Div. 257; Fahner v. Brooklyn Heights R. Co., 86 N. Y. App. Div. 488; Fremont v. Metropolitan St. R. Co., 83 N. Y. App. Div. 414; Adams v. Metropolitan St. R. Co., 82 N. Y. App. Div. 354; Schooler v. New York Cent., etc., R. Co., 81 N. Y. App. Div. 646; Lee v. Berne, 79 N. Y. App. Div. 214; Schubkegel v. Butler, 76 N. Y. App. Div. 10; Larkin v. United Traction Co., 76 N. Y. App. Div. 238.

North Carolina. — Moore v. Charlotte Electric R., etc., Co., 136 N. Car. 554.

Pennsylvania. — McKee v. Harrisburg Traction Co., 211 Pa. St. 47; Kilbride v. Carbon Dioxide, etc., Co., 201 Pa. St. 552, 88 Am. St. Rep. 829; Bube v. Weatherly, 25 Pa. Super. Ct. 88.

Texas. — G. A. Duerler Mfg. Co. v. Dullnig, (Tex. Civ. App. 1904) 83 S. W. Rep. 889; International, etc., R. Co. v. Wear, 33 Tex. Civ. App. 492.

Virginia. — Norfolk, etc., R. Co. v. Johnson, 103 Va. 787; Chesapeake, etc., R. Co. v. Heath, 103 Va. 64; Seaboard, etc., R. Co. v. Hickey, 102 Va. 394; Southern R. Co. v. Hall, 102 Va. 135; Richmond Pass., etc., Co. v. Racks, 101 Va. 487.

Washington. — Wilson v. Northern Pac. R. Co., 31 Wash. 67.

West Virginia. — Richards v. Riverside Iron Works, 56 W. Va. 510.

Wisconsin. — Grams v. C. Reiss Coal Co., 125 Wis. 1.

504. *b.* WHERE ACT OR OMISSION OBVIOUSLY DANGEROUS OR REVERSE. — See note 2.

c. WHERE NO EVIDENCE OF NEGLIGENCE. — See note 3.

505. See notes 1, 2, 3.

506. 4. Where Facts Undisputed. — See notes 1, 2, 3, 4, 5.

504. 2. When Question for Court — *United States*. — *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64.

Illinois. — See *Chicago v. Murdock*, 212 Ill. 9.

Indiana. — *Cleveland, etc., R. Co. v. Miles*, 162 Ind. 646.

Missouri. — *Luckel v. Century Bldg. Co.*, 177 Mo. 608.

North Carolina. — *Phillips v. Durham, etc., R. Co.*, 138 N. Car. 12; *Clark v. Durham Traction Co.*, 138 N. Car. 77, 107 Am. St. Rep. 509; *Peoples v. North Carolina R. Co.*, 137 N. Car. 96; *Hedrick v. Southern R. Co.*, 136 N. Car. 510.

Oregon. — *Schleiger v. Northern Terminal Co.*, 43 Oregon 4.

Pennsylvania. — *Hyman v. Tilton*, 208 Pa. St. 641.

West Virginia. — *Thomas v. Wheeling Electrical Co.*, 54 W. Va. 395.

Where Precise Measure of Care Determinate. — *Sansom v. Southern R. Co.*, (C. C. A.) 111 Fed. Rep. 887.

Question Must Be Entirely Free from Doubt. — *Cohen v. Philadelphia, etc., R. Co.*, 211 Pa. St. 227.

3. Where There Is No Evidence of Negligence — *Alabama*. — *Louisville, etc., R. Co. v. Lewis*, 141 Ala. 466; *Bridgeport Water Co. v. Goodwin*, 132 Ala. 533.

Colorado. — *Burlington, etc., R. Co. v. Campbell*, (Colo. App. 1904) 78 Pac. Rep. 1072.

Delaware. — *Queen Anne's R. Co. v. Reed*, (Del. 1905) 59 Atl. Rep. 860.

Indiana. — *Jordan v. Grand Rapids, etc., R. Co.*, 162 Ind. 464, 102 Am. St. Rep. 217.

Iowa. — *Eakins v. Chicago, etc., R. Co.*, 126 Iowa 324; *Harter v. Colfax Electric Light, etc., Co.*, 124 Iowa 500; *Horn v. Chicago, etc., R. Co.*, 124 Iowa 281.

Kansas. — *Maxwell v. Coffeyville Min., etc., Co.*, 68 Kan. 821; *Fowler v. Brooks*, 65 Kan. 861, 70 Pac. Rep. 600.

Kentucky. — *Witten v. Bell, etc., Co.*, (Ky. 1905) 85 S. W. Rep. 1094; *Manning v. Illinois Cent. R. Co.*, (Ky. 1905) 84 S. W. Rep. 565; *Dorsey v. Louisville, etc., R. Co.*, (Ky. 1904) 80 S. W. Rep. 1131; *Louisville, etc., R. Co. v. Logdon*, (Ky. 1904) 81 S. W. Rep. 657; *Green v. Maysville, etc., R. Co.*, (Ky. 1904) 78 S. W. Rep. 439; *Kendall v. Louisville, etc., R. Co.*, (Ky. 1903) 76 S. W. Rep. 376.

Maryland. — *United Electric Light, etc., Co. v. State*, 100 Md. 634; *South Baltimore Car Works v. Schaefer*, 96 Md. 88, 94 Am. St. Rep. 560.

Michigan. — *Coessens v. Rapid R. Co.*, 136 Mich. 481; *Secombe v. Detroit Electric R. Co.*, 133 Mich. 170.

Missouri. — *Lee v. Jones*, 181 Mo. 201.

Nebraska. — *U. P. Steam Baking Co. v. Omaha St. R. Co.*, (Neb. 1903) 94 N. W. Rep. 533.

New Jersey. — *McGuire v. Central R. Co.*, 68 N. J. L. 608.

New York. — *McDonald v. Metropolitan St. R. Co.*, 167 N. Y. 66; *Welsh v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 166.

North Carolina. — *Foy v. Winston*, 135 N. Car. 439.

Pennsylvania. — *Morgan v. Pennsylvania R. Co.*, 209 Pa. St. 25; *Lyons v. Union Traction Co.*, 209 Pa. St. 72; *Greis v. Hazard Mfg. Co.*, 209 Pa. St. 276; *Kilbride v. Carbon Dioxide, etc., Co.*, 201 Pa. St. 552, 88 Am. St. Rep. 829.

Rhode Island. — *White v. New York, etc., R. Co.*, 25 R. I. 19; *Gallowshaw v. Lonsdale Co.*, 25 R. I. 383.

South Dakota. — *Strait v. Eureka*, 17 S. Dak. 326.

Utah. — *Fares v. Rio Grande Western R. Co.*, 28 Utah 132.

Virginia. — *Carson Lime Co. v. Rutherford*, 102 Va. 244; *Southern R. Co. v. Hall*, 102 Va. 135.

Washington. — *Dunn v. Kemp*, 36 Wash. 183.

Wisconsin. — *Grams v. C. Reiss Coal Co.*, 125 Wis. 1.

505. 1. Texas, etc., R. Co. v. Carlin, (C. C. A.) 111 Fed. Rep. 777, *affirmed* 189 U. S. 354; *Gibson v. Canadian Pac. Nav. Co.*, 1 Alaska 407; *Cleghorn v. Thompson*, 62 Kan. 727; *Carey v. Kansas City*, 187 Mo. 715; *Reno v. St. Louis, etc., R. Co.*, 180 Mo. 469; *Jones v. John Kroder, etc., Co.*, 95 N. Y. App. Div. 140; *Glennon v. Erie R. Co.*, 86 N. Y. App. Div. 397, *appeal withdrawn* 176 N. Y. 552; *Bonn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 808; *Thweatt v. Houston, etc., R. Co.*, 31 Tex. Civ. App. 227.

2. Johnson v. Prince Line, 104 N. Y. App. Div. 157.

3. Mere Scintilla Not Sufficient. — *Nothdurft v. Lincoln*, 66 Neb. 434; *Dotson v. Erie R. Co.*, 68 N. J. L. 679; *Williams v. Belmont Coal, etc., Co.*, 55 W. Va. 84. But see *McFarland v. Harbison, etc., Co.*, (Ky. 1904) 82 S. W. Rep. 430; *Chaperson v. Portland Electric Co.*, 41 Oregon 39.

Evidence Exceeding Scintilla Should Go to Jury. — *Butts v. Atlantic, etc., R. Co.*, 133 N. Car. 82.

Controverted Facts should be taken in the plaintiff's favor in determining the question whether he has made out a case for the jury. *Hartung v. North Chicago St. R. Co.*, 102 Ill. App. 470; *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1; *Marden v. Portsmouth, etc., R. Co.*, (Me. 1905) 60 Atl. Rep. 530; *Isherwood v. H. L. Jenkins Lumber Co.*, 84 Minn. 423; *Cohen v. Philadelphia, etc., R. Co.*, 211 Pa. St. 227.

506. 1. Facts Undisputed. — *Bostock-Ferari Amusement Co. v. Brocksmith*, 34 Ind. App. 566, 107 Am. St. Rep. 213; *Cleveland, etc., R. Co. v. Haas*, (Ind. App. 1905) 74 N. F. Rep. 1003; *Lancaster v. Walter*, (Ky. 1904) 80 S. W. Rep. 189; *Maine Water Co. v. Knickerbocker*

507. 5. Inferences from Facts Proved. — See notes 2, 3.

Steam Towage Co., 99 Me. 473; *Carey v. Kansas City*, 187 Mo. 715; *Lake Shore, etc., R. Co. v. Lidtke*, 69 Ohio St. 384; *Custer v. Baltimore, etc., R. Co.*, 206 Pa. St. 529; *Mason v. Philadelphia*, 205 Pa. St. 177; *Paolino v. McKendall*, 24 R. I. 432, 96 Am. St. Rep. 736. *Compare Greenlaw v. Louisville, etc., R. Co.*, (Tenn. 1905) 86 S. W. Rep. 1072.

506. 2. See *Graves v. Norfolk, etc., R. Co.*, 136 N. Car. 3.

3. Questions of Reasonable Care and Contemplation of Consequences for Jury. — *Illinois Cent. R. Co. v. Behrens*, 101 Ill. App. 33; *Van Cleve v. St. Louis, etc., R. Co.*, 107 Mo. App. 96; *Anderson v. City, etc., R. Co.*, 42 Oregon 505; *Tiborsky v. Chicago, etc., R. Co.*, 124 Wis. 243; *Zimmer v. Fox River Valley Electric R. Co.*, 118 Wis. 614.

4. Different Conclusions Possible. — *Garrett v. Illinois Cent. R. Co.*, 126 Fed. Rep. 406; *Northern Pac. R. Co. v. Tynan*, (C. C. A.) 119 Fed. Rep. 288; *Queen Anne's R. Co. v. Reed*, (Del. 1905) 59 Atl. Rep. 860; *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524; *McLain v. St. Louis, etc., R. Co.*, 100 Mo. App. 374; *Fremont Brewing Co. v. Schulz*, (Neb. 1904) 101 N. W. Rep. 234; *Farr v. Philadelphia, etc., R. Co.*, 24 Pa. Super. Ct. 332; *Tiborsky v. Chicago, etc., R. Co.*, 124 Wis. 243.

5. Instructions. — *Georgia.* — *Central of Georgia R. Co. v. McKinney*, 118 Ga. 535; *Robert Portner Brewing Co. v. Cooper*, 116 Ga. 171; *Mill-edgeville v. Wood*, 114 Ga. 370.

Illinois. — *Pittsburg, etc., R. Co. v. Banfill*, 206 Ill. 553; *Chicago, etc., R. Co. v. Condon*, 108 Ill. App. 639; *West Chicago St. R. Co. v. Winters*, 107 Ill. App. 221; *Illinois Cent. R. Co. v. Behrens*, 101 Ill. App. 33.

Kentucky. — *Midway v. Lloyd*, (Ky. 1903) 74 S. W. Rep. 195.

Missouri. — *Cramer v. Springfield Traction Co.*, 112 Mo. App. 350.

New York. — *Pelzel v. Schepp*, 83 N. Y. App. Div. 444; *Muessman v. Metropolitan St. R. Co.*, 76 N. Y. App. Div. 1.

North Carolina. — See *Ramsbottom v. Atlantic Coast Line R. Co.*, 138 N. Car. 38. *Compare Myers v. Concord Lumber Co.*, 129 N. Car. 252; *Cresler v. Asheville*, 134 N. Car. 311.

Texas. — *Missouri, etc., R. Co. v. Smith*, (Tex. Civ. App. 1904) 82 S. W. Rep. 787; *Over v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 535.

Wyoming. — *Union Pac. R. Co. v. Gilland*, 4 Wyo. 395.

But see *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572.

In *Georgia* it seems the court may not charge that any given facts will constitute negligence unless by statute or municipal ordinance they are so declared. *Savannah, etc., R. Co. v. Evans*, 115 Ga. 315, 90 Am. St. Rep. 116; *Thomas v. Central of Georgia R. Co.*, 121 Ga. 38.

Constitutional Prohibition Against Charging on Facts. — *Jones v. Charleston, etc., R. Co.*, 61 S. Car. 556.

Under the *Oregon Constitution* a verdict is necessary even if the inferences to be drawn are not conflicting. *Shobert v. May*, 40 Oregon 68, 91 Am. St. Rep. 453.

507. 2. Inferences from Facts Proved. — *United States.* — *Texas, etc., R. Co. v. Carlin*, (C. C. A.) 111 Fed. Rep. 777, *affirmed* 189 U. S. 354.

Alabama. — *Tennessee Coal, etc., R. Co. v. Garrett*, 140 Ala. 563.

Arkansas. — *St. Louis, etc., R. Co. v. Coombs*, (Ark. 1905) 88 S. W. Rep. 595.

Colorado. — *United Oil Co. v. Miller*, 19 Colo. App. 46.

Connecticut. — *Nesbit v. Crosby*, 74 Conn. 554.

Georgia. — *Chenall v. Palmer Brick Co.*, 117 Ga. 106.

Illinois. — *North Chicago St. R. Co. v. Roderert*, 203 Ill. 413; *Chicago Terminal Transfer R. Co. v. Kotoski*, 199 Ill. 383; *Chicago City R. Co. v. Tuohy*, 196 Ill. 410.

Indiana. — *La Porte Carriage Co. v. Sullender*, (Ind. App. 1904) 71 N. E. Rep. 922; *Indianapolis St. R. Co. v. Bordenchecker*, 33 Ind. App. 138; *Indianapolis St. R. Co. v. Darnell*, 32 Ind. App. 687.

Iowa. — *Purcell v. Chicago, etc., R. Co.*, 117 Iowa 667.

Kentucky. — *Wilmurth v. Illinois Cent. R. Co.*, (Ky. 1903) 76 S. W. Rep. 193; *Endicott v. Triple State Natural Gas, etc., Co.*, (Ky. 1903) 76 S. W. Rep. 516; *Louisville, etc., Mail Co. v. Gilliland*, (Ky. 1903) 72 S. W. Rep. 1101.

Massachusetts. — *Foster v. New York, etc., R. Co.*, 187 Mass. 21; *Cassady v. Old Colony St. R. Co.*, 184 Mass. 156.

Michigan. — *Stowell v. Standard Oil Co.*, (Mich. 1905) 102 N. W. Rep. 227; *Hinchman v. Pere Marquette R. Co.*, 136 Mich. 341; *Robinson v. Chicago, etc., R. Co.*, 135 Mich. 254; *Graham v. Evening Press Co.*, 135 Mich. 298; *Bartle v. Houghton County St. R. Co.*, 132 Mich. 290.

Missouri. — *Klockenbrink v. St. Louis, etc., R. Co.*, 172 Mo. 678; *Shanks v. Springfield Traction Co.*, 101 Mo. App. 702; *Johnson v. St. Louis, etc., R. Co.*, 173 Mo. 307; *Franklin v. Missouri, etc., R. Co.*, 97 Mo. App. 473.

Nebraska. — *Chicago, etc., R. Co. v. Sporer*, (Neb. 1903) 94 N. W. Rep. 991.

New Hampshire. — *Gilbert v. Burque*, 72 N. H. 521.

New Jersey. — *Rodinan v. North Jersey St. R. Co.*, 71 N. J. L. 43; *Zolpher v. Camden, etc., R. Co.*, 69 N. J. L. 417.

New York. — *Peck v. New York Cent., etc., R. Co.*, 165 N. Y. 347; *Powles v. Halstead*, 93 N. Y. App. Div. 549; *Wolpers v. New York, etc., Electric Light, etc., Co.*, 91 N. Y. App. Div. 424; *McGuire v. Moran*, 76 N. Y. App. Div. 325; *Pelletreau v. Metropolitan St. R. Co.*, 74 N. Y. App. Div. 192, *affirmed* 174 N. Y. 503.

North Carolina. — *Womble v. Merchants' Grocery Co.*, 135 N. Car. 474.

Ohio. — *Burton Telephone Co. v. Gordon*, 25 Ohio Cir. Ct. 641.

Pennsylvania. — *Booth v. Dorsey*, 208 Pa. St. 276; *Freel v. Wanamaker*, 208 Pa. St. 279.

South Carolina. — *McKeown v. South Carolina, etc., R. Co.*, 68 S. Car. 483.

Washington. — *Goe v. Northern Pac. R. Co.*, 30 Wash. 654.

Wisconsin. — *Tiborsky v. Chicago, etc., R.*

508. See note 1.

6. Presumptions. — See notes 2, 3.

7. Violation of Statute or Ordinance. — See notes 4, 5, 6, 7.

8. Proximate Cause — *a.* QUESTION FOR JURY. — See note 8.

Co., 124 Wis. 243; *Morgan v. Pleshek*, 120 Wis. 306; *Hupfer v. National Distilling Co.*, 119 Wis. 417.

Wyoming. — *Union Pac. R. Co. v. Gilland*, 4 Wyo. 395.

507. 3. No Inference of Negligence Warranted — *Chicago Title, etc., Co. v. Standard Fashion Co.*, 106 Ill. App. 135; *Carney v. Concord St. R. Co.*, 72 N. H. 364; *Faul v. North Jersey St. R. Co.*, 70 N. J. L. 795; *Johnson v. Prince Line*, 104 N. Y. App. Div. 157; *Csatlos v. Metropolitan St. R. Co.*, 92 N. Y. App. Div. 620; *Massey v. Seller*, 45 Oregon 267; *Conner v. Fleer*, 28 Pa. Co. Ct. 499; *Galveston, etc., R. Co. v. Tirres*, 33 Tex. Civ. App. 362; *Houston, etc., R. Co. v. Bulger*, 35 Tex. Civ. App. 478; *Williams v. Belmont Coal, etc., Co.*, 55 W. Va. 84; *Taylor v. Seil*, 120 Wis. 32.

Evidence Against Negligence of Overwhelming Weight. — *Hajsek v. Chicago, etc., R. Co.*, (Neb. 1903) 97 N. W. Rep. 327.

508. 1. Irresistible Conclusion of Negligence. — *Chanute v. Higgins*, 65 Kan. 680; *Lancaster v. Walter*, (Ky. 1904) 80 S. W. Rep. 189; *San Antonio, etc., R. Co. v. Votaw*, (Tex. Civ. App. 1904) 81 S. W. Rep. 130; *Missouri, etc., R. Co. v. Gist*, 31 Tex. Civ. App. 662.

2. Presumptions. — *Levinson v. Myers*, 24 Pa. Super. Ct. 481.

3. Question of Overcoming Presumption for Jury — *United States.* — *Louisiana, etc., R. Co. v. Crumpler*, (C. C. A.) 122 Fed. Rep. 425; *Wilmington Steamboat Co. v. Walker*, (C. C. A.) 120 Fed. Rep. 97; *Walker v. Wilmington Steamboat Co.*, 117 Fed. Rep. 784.

California. — *Osgood v. Los Angeles Traction Co.*, 137 Cal. 280, 92 Am. St. Rep. 171.

District of Columbia. — *Kohner v. Capital Traction Co.*, 22 App. Cas. (D. C.) 181.

Illinois. — *Chicago, etc., R. Co. v. Crose*, 214 Ill. 602, 105 Am. St. Rep. 135; *Chicago City R. Co. v. Barker*, 209 Ill. 321; *Chicago City R. Co. v. Eick*, 111 Ill. App. 452, affirmed 209 Ill. 321.

Iowa. — *German Ins. Co. v. Chicago, etc., R. Co.*, (Iowa 1905) 104 N. W. Rep. 361; *Larkin v. Chicago, etc., R. Co.*, 118 Iowa 652.

Mississippi. — *New Orleans, etc., R. Co. v. Brooks*, 85 Miss. 269.

Missouri. — *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558.

New York. — *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380; *Wolpers v. New York, etc., Electric Light, etc., Co.*, 61 N. Y. App. Div. 424; *Travers v. Murray*, 87 N. Y. App. Div. 552; *Duerr v. Consolidated Gas Co.*, 86 N. Y. App. Div. 14; *Scheider v. American Bridge Co.*, 78 N. Y. App. Div. 163; *Ludwig v. Metropolitan St. R. Co.*, 71 N. Y. App. Div. 210, 174 N. Y. 546.

Oregon. — *Chaperon v. Portland Electric Co.*, 41 Oregon 30.

Rhode Island. — *Murray v. Pawtuxet Valley St. R. Co.*, 25 R. I. 200.

Virginia. — *Norfolk R., etc., Co. v. Spratley*, 103 Va. 379.

Contrary Doctrine. — See *Southern R. Co. v. Pace*, 114 Ga. 712; *Young v. Mason Stable Co.*, 96 N. Y. App. Div. 305; *Richmond R., etc., Co. v. Hudgins*, 100 Va. 409; *Klitzke v. Webb*, 120 Wis. 254.

4. *St. Louis, etc., R. Co. v. Boback*, 71 Ark. 427; *Donk Bros. Coal, etc., Co. v. Stroff*, 200 Ill. 483; *Chicago, etc., R. Co. v. Condon*, 108 Ill. App. 639; *Selensky v. Chicago G. W. R. Co.*, 120 Iowa 113; *Daniels v. New York, etc., R. Co.*, 183 Mass. 393; *McDaniels v. Royle Min. Co.*, 110 Mo. App. 706; *Elliott v. Chicago, etc., R. Co.*, 105 Mo. App. 523; *Bretsch v. Plate*, 82 N. Y. App. Div. 399; *International, etc., R. Co. v. Haddox*, 36 Tex. Civ. App. 385.

5. *Perry v. Tozer*, 90 Minn. 431, 101 Am. St. Rep. 416; *Galveston, etc., R. Co. v. Levy*, 35 Tex. Civ. App. 107; *Missouri, etc., R. Co. v. Taff*, 31 Tex. Civ. App. 657; *Missouri, etc., R. Co. v. Gist*, 31 Tex. Civ. App. 662.

6. Violation of Statute or Ordinance. — *Neal v. St. Louis, etc., R. Co.*, 71 Ark. 445; *Chicago, etc., R. Co. v. Crose*, 214 Ill. 602, 105 Am. St. Rep. 135; *Junction Min. Co. v. Ench*, 111 Ill. App. 346; *Baltimore, etc., R. Co. v. Reynolds*, 33 Ind. App. 219; *Burk v. Creamery Package Mfg. Co.*, 126 Iowa 730, 106 Am. St. Rep. 377; *Defrieze v. Illinois Cent. R. Co.*, (Iowa 1903) 94 N. W. Rep. 505; *Pelin v. New York Cent., etc., R. Co.*, 102 N. Y. App. Div. 71; *Henderson v. Durham Traction Co.*, 132 N. Car. 779; *Denison, etc., R. Co. v. Powell*, 35 Tex. Civ. App. 454; *Galveston, etc., R. Co. v. Levy*, 35 Tex. Civ. App. 107; *Missouri, etc., R. Co. v. Taff*, 31 Tex. Civ. App. 657.

7. *Nashville, etc., R. Co. v. Harris*, (Ala. 1904) 37 So. Rep. 794; *Davis v. Pennsylvania Coal Co.*, 209 Pa. St. 153.

8. Proximate Cause as Question for Jury — *United States.* — *Shugart v. Atlanta, etc., R. Co.*, (C. C. A.) 133 Fed. Rep. 505; *Southern Electric R. Co. v. Hageman*, (C. C. A.) 121 Fed. Rep. 262.

Alabama. — *Montgomery St. R. Co. v. Shanks*, 139 Ala. 489; *E. E. Jackson Lumber Co. v. Cunningham*, 141 Ala. 206; *Birmingham R., etc., Co. v. Brantley*, 141 Ala. 614; *Scholz v. Sloss-Sheffield Steel, etc., Co.*, 138 Ala. 339; *Birmingham Traction Co. v. Reville*, 136 Ala. 335.

Arizona. — *Gila Valley, etc., R. Co. v. Lyon*, (Ariz. 1905) 80 Pac. Rep. 337.

Arkansas. — *St. Louis, etc., R. Co. v. Boback*, 71 Ark. 427.

California. — *Anderson v. Seropian*, 147 Cal. 201; *Shea v. Pacific Power Co.*, 145 Cal. 680.

Colorado. — *Colorado Midland R. Co. v. Robbins*, 30 Colo. 449.

Delaware. — *Goldstein v. People's R. Co.*, (Del. 1905) 60 Atl. Rep. 975; *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527; *Jarrell v. Wilmington*, 4 Penn. (Del.) 454; *Neal v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 467; *Snyder v. People's R. Co.*, 4 Penn. (Del.) 145; *Cox v. Wilmington City R. Co.*, 4 Penn. (Del.) 162; *Giordano v. Brandywine*

Granite Co., 3 Penn. (Del.) 423; Adams v. Wilmington, etc., Electric R. Co., 3 Penn. (Del.) 512; Boyd v. Blumenthal, 3 Penn. (Del.) 564.

Illinois. — Armour v. Golkowska, 202 Ill. 144, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508; Rock Island Sash, etc., Works v. Pohlman, 210 Ill. 133, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508; Central Union Bldg. Co. v. Kolander, 212 Ill. 27; Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145; Chicago Hair, etc., Co. v. Mueller, 203 Ill. 558; True, etc., Co. v. Woda, 201 Ill. 315; D. Sinclair Co. v. Waddill, 200 Ill. 17; Chicago, etc., R. Co. v. Corson, 198 Ill. 98; Chicago, etc., R. Co. v. Harrington, 192 Ill. 9; Chicago, etc., R. Co. v. Mocheil, 193 Ill. 208, 86 Am. St. Rep. 318; O'Donnell v. Rosenthal, 110 Ill. App. 225; Southern R. Co. v. Drake, 107 Ill. App. 12; Cohen v. Chicago, etc., R. Co., 104 Ill. App. 314; Canfield v. North Chicago St. R. Co., 98 Ill. App. 1.

Indiana. — Davis v. Mercer Lumber Co., 164 Ind. 413; Terre Haute Electric Co. v. Kiely, (Ind. App. 1904) 72 N. E. Rep. 658; Indianapolis St. R. Co. v. Schmidt, (Ind. App. 1904) 71 N. E. Rep. 663; Harris v. Pittsburg, etc., R. Co., 32 Ind. App. 600; Indianapolis, etc., Rapid Transit Co. v. Haines, 33 Ind. App. 63; Chicago, etc., R. Co. v. Martin, 31 Ind. App. 308.

Iowa. — Fishburn v. Burlington, etc., R. Co., 127 Iowa 483; Schroeder v. Chicago, etc., R. Co., (Iowa 1905) 103 N. W. Rep. 985; Young v. People's Gas, etc., Co., (Iowa 1905) 103 N. W. Rep. 788; Kuehl v. Chicago, etc., R. Co., 126 Iowa 638; Brown v. Chillicothe, 122 Iowa 640.

Kansas. — Atchison, etc., R. Co. v. Holloway, (Kan. 1905) 80 Pac. Rep. 31; St. Louis, etc., R. Co. v. League, (Kan. 1905) 80 Pac. Rep. 46; Atchison, etc., R. Co. v. Parry, 67 Kan. 515.

Kentucky. — Louisville v. Bailey, (Ky. 1903) 74 S. W. Rep. 688; Chesapeake, etc., R. Co. v. Ogles, (Ky. 1903) 73 S. W. Rep. 751.

Maine. — Neal v. Rendall, 98 Me. 69.

Maryland. — Samuel v. Novak, 99 Md. 558.

Massachusetts. — Hyde v. Boston, 186 Mass. 115.

Minnesota. — Cody v. Duluth St. R. Co., 94 Minn. 77.

Mississippi. — Kansas City, etc., R. Co. v. McShan, 81 Miss. 460.

Missouri. — Livingston v. Wabash R. Co., 170 Mo. 452; Holden v. Missouri R. Co., 108 Mo. App. 665; Murray v. St. Louis Transit Co., 108 Mo. App. 501; Riska v. Union Depot R. Co., 180 Mo. 168; Baxter v. St. Louis Transit Co., 103 Mo. App. 597; Johnson v. St. Louis, etc., R. Co., 173 Mo. 307; Frank v. St. Louis Transit Co., 99 Mo. App. 323; Goodman v. Kahoka, 100 Mo. App. 278; Rawlings v. Wabash R. Co., 97 Mo. App. 511.

Nebraska. — Lincoln Traction Co. v. Heller, (Neb. 1904) 100 N. W. Rep. 197; Omaha St. R. Co. v. Larson, (Neb. 1903) 97 N. W. Rep. 824.

New Hampshire. — Gilbert v. Burque, 72 N. H. 521; Haselton v. Portsmouth, etc., R. Co., 71 N. H. 589; Olney v. Boston, etc., R. Co., 71 N. H. 427; Ela v. Postal Tel. Cable Co., 71 N. H. 1.

New Jersey. — Sutphen v. Hedden, 67 N. J. L. 324; Ferguson v. Central R. Co., 71 N. J. L. 647.

New York. — O'Keefe v. Great Northern Elevator Co., 105 N. Y. App. Div. 8; Aleckson v. Erie R. Co., 101 N. Y. App. Div. 395; Steinacker v. Hills Bros. Co., 91 N. Y. App. Div. 521; Browne v. New York Cent., etc., R. Co., 87 N. Y. App. Div. 206, affirmed 179 N. Y. 582; Wood v. New York Cent., etc., R. Co., 83 N. Y. App. Div. 604, affirmed 179 N. Y. 557; Short-sleeve v. Stebbins, 77 N. Y. App. Div. 588; Schoenfeld v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 40 Misc. (N. Y.) 201.

North Carolina. — Ramsbottom v. Atlantic Coast Line R. Co., 138 N. Car. 38; Stewart v. Raleigh, etc., Air Line R. Co., 137 N. Car. 687; Peoples v. North Carolina R. Co., 137 N. Car. 96; Whisenant v. Southern R. Co., 137 N. Car. 349; Watkins v. Kaolin Mfg. Co., 131 N. Car. 536.

Oregon. — Macdonald v. O'Reilly, 45 Oregon 589.

Pennsylvania. — Pollock v. Pennsylvania R. Co., 210 Pa. St. 631, 105 Am. St. Rep. 843; Gudfelder v. Pittsburg, etc., R. Co., 207 Pa. St. 629; Shaughnessy v. Pittsburg, 20 Pa. Super. Ct. 609.

South Carolina. — Williams v. Southern R. Co., 68 S. Car. 369; McKeown v. South Carolina, etc., R. Co., 68 S. Car. 483; Oliver v. Columbia, etc., R. Co., 65 S. Car. 1; Carroll v. Charleston, etc., R. Co., 65 S. Car. 378.

South Dakota. — Hedlun v. Holy Terror Min. Co., 16 S. Dak. 261.

Texas. — St. Louis Southwestern R. Co. v. Lowe, (Tex. Civ. App. 1905) 86 S. W. Rep. 1059; San Antonio, etc., R. Co. v. Lester, (Tex. Civ. App. 1904) 84 S. W. Rep. 401; Galveston, etc., R. Co. v. Fitzpatrick, (Tex. Civ. App. 1904) 83 S. W. Rep. 406; International, etc., R. Co. v. Quinones, (Tex. Civ. App. 1904) 81 S. W. Rep. 757; Houston, etc., R. Co. v. Bulger, 35 Tex. Civ. App. 478; Houston Transfer Co. v. Renard, (Tex. Civ. App. 1904) 79 S. W. Rep. 838; Gulf, etc., R. Co. v. Phillips, 32 Tex. Civ. App. 238; San Antonio, etc., R. Co. v. Anker-son, 31 Tex. Civ. App. 327; Texas, etc., R. Co. v. Gray, (Tex. Civ. App. 1902) 71 S. W. Rep. 316; Galveston, etc., R. Co. v. Mortson, 31 Tex. Civ. App. 142; St. Louis Southwestern R. Co. v. Byers, (Tex. Civ. App. 1902) 70 S. W. Rep. 558; Gulf, etc., R. Co. v. Holt, 30 Tex. Civ. App. 330; Missouri, etc., R. Co. v. Hawk, 30 Tex. Civ. App. 142.

Utah. — Christensen v. Oregon Short Line R. Co., (Utah 1905) 80 Pac. Rep. 746.

Vermont. — Morrisette v. Canadian Pac. R. Co., 74 Vt. 232.

Virginia. — Danville, R., etc., Co. v. Hodnett, 101 Va. 361; Richmond Traction Co. v. Wilkinson, 101 Va. 394.

Washington. — Goe v. Northern Pac. R. Co., 30 Wash. 654; Roberts v. Port Blakely Mill Co., 30 Wash. 25.

West Virginia. — Parrish v. Huntington, 57 W. Va. 286.

Wisconsin. — Lightfoot v. Winnebago Trac-tion Co., 123 Wis. 479; Segall v. Padlasky, 123 Wis. 207; Hughes v. Chicago, etc., R. Co., 122 Wis. 258; O'Brien v. Wisconsin Cent. R. Co., 119 Wis. 7.

509. *b.* RULE OF CONTEMPLATION OF CONSEQUENCES. — See note 1.
c. WHEN QUESTION FOR COURT. — See note 2.

510. See notes 1, 2, 3.

9. Duty and Breach Thereof. — See notes 4, 5, 6, 7, 8, 9, 10.

Conclusiveness of Finding. — See *Georgia R., etc., Co. v. Roberts*, 114 Ga. 387; *Cicero, etc., St. R. Co. v. Reiser*, 115 Ill. App. 146; *Bowen v. Boston, etc., R. Co.*, 179 Mass. 524; *Brown v. Waterous Engine Works Co.*, 8 Ont. L. Rep. 37.

509. 1. Contemplation of Consequences for Jury. — *Armour v. Golkowska*, 202 Ill. 144, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 509; *Rock Island Sash, etc., Works v. Pohlman*, 210 Ill. 133, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 509; *Westcott v. Boston*, 186 Mass. 540; *Graham v. Evening Press Co.*, 135 Mich. 298; *McClure v. Feldmann*, 184 Mo. 710; *Montgomery v. Missouri Pac. R. Co.*, 181 Mo. 477; *Freeman v. Carter*, 28 Tex. Civ. App. 571.

2. Proximate Cause as Question for Court — United States. — *Cole v. German Sav., etc., Soc., (C. C. A.)* 124 Fed. Rep. 113.

Alabama. — *Bryant v. Southern R. Co.*, 137 Ala. 488.

Kansas. — *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 390.

Kentucky. — *Georgetown Telephone Co. v. McCullough*, (Ky. 1904) 80 S. W. Rep. 782.

Massachusetts. — *Glasse v. Worcester Consol. St. R. Co.*, 185 Mass. 315; *Daniels v. New York, etc., R. Co.*, 183 Mass. 393.

New York. — *Laidlaw v. Sage*, 158 N. Y. 73; *Seifter v. Brooklyn Heights R. Co.*, 169 N. Y. 254; *Murphy v. New York, 89 N. Y. App. Div.* 93; *Fink v. Slade*, 66 N. Y. App. Div. 105.

Pennsylvania. — *Douglass v. New York Cent., etc., R. Co.*, 209 Pa. St. 128; *Nichols v. Pittsfield Tp.*, 209 Pa. St. 240; *Elliott v. Allegheny County Light Co.*, 204 Pa. St. 568; *Bube v. Weatherly*, 25 Pa. Super. Ct. 88.

South Carolina. — *Cooper v. Charleston, etc., R. Co.*, 65 S. Car. 214.

Tennessee. — *Greenlaw v. Louisville, etc., R. Co.*, (Tenn. 1905) 86 S. W. Rep. 1072.

Texas. — *Texas, etc., R. Co. v. Shoemaker*, 98 Tex. 451; *Texas, etc., R. Co. v. Kelly*, (Tex. Civ. App. 1904) 78 S. W. Rep. 372.

Virginia. — *Winfree v. Jones*, (Va. 1905) 51 S. E. Rep. 153.

Whether There Is Any Evidence of causal connection is a question for the court. *Davis v. Pennsylvania Coal Co.*, 209 Pa. St. 153.

Where the Facts Are Undisputed or Conceded the question of proximate cause is held to be for the court. *Hoffman v. King*, 160 N. Y. 618, 73 Am. St. Rep. 715; *Trapp v. McClellan*, 68 N. Y. App. Div. 362; *Lake Shore, etc., R. Co. v. Liidtkke*, 69 Ohio St. 384.

510. 1. Mere Speculation or Conjecture. — *Webster Mfg. Co. v. Goodrich*, 104 Ill. App. 76; *Ray v. Vicksburg, etc., R. Co.*, 113 La. 502; *Truax v. Minneapolis, etc., R. Co.*, 80 Minn. 143; *Swenson v. Erlandson*, 86 Minn. 263; *Seifter v. Brooklyn Heights R. Co.*, 169 N. Y. 254; *Kohn v. Interborough Rapid Transit Co.*, 104 N. Y. App. Div. 237.

2. No Evidence of Contemplation of Consequences. — *Missouri Pac. R. Co. v. Columbia*,

65 Kan. 390; *Murphy v. New York, 89 N. Y. App. Div.* 93; *Strait v. Eureka*, 17 S. Dak. 326.

3. Evidence of Proximate Cause Clear. — *Kilpatrick v. Grand Trunk R. Co.*, 74 Vt. 288.

Facts "Fairly Incontrovertible." — *Chattanooga Light, etc., Co. v. Hodges*, 109 Tenn. 331, 97 Am. St. Rep. 844.

4. Duty and Breach Thereof. — *Fredenburg v. Baer*, 89 Minn. 241; *Downes v. Elmira Bridge Co.*, 179 N. Y. 136; *Clarke v. New York Cent., etc., R. Co.*, 104 N. Y. App. Div. 167; *Baltimore, etc., R. Co. v. Cox*, 66 Ohio St. 276, 90 Am. St. Rep. 583; *White v. New York, etc., R. Co.*, 25 R. I. 19; *Benedict v. Union Agricultural Soc.*, 74 Vt. 91; *Hughes v. Chicago, etc., R. Co.*, 122 Wis. 258.

The Question What the Relations of the Parties Were, on which the duty would depend, is for the jury. *Chicago Terminal Transfer R. Co. v. Kotoski*, 199 Ill. 383; *Chicago Terminal Transfer R. Co. v. Gruss*, 200 Ill. 195; *Chicago Terminal Transfer R. Co. v. Schmelling*, 197 Ill. 619; *Cleveland, etc., R. Co. v. Surrells*, 115 Ill. App. 615; *Citizens St. R. Co. v. Jolly*, 161 Ind. 80; *Aga v. Harbach*, 127 Iowa 144; *Brower v. Timreck*, 66 Kan. 770; *Cumberland Telephone, etc., Co. v. Ware*, 115 Ky. 581; *Brown v. Pontiac, etc., R. Co.*, 133 Mich. 371; *Klughertz v. Chicago, etc., R. Co.*, 90 Minn. 17, 101 Am. St. Rep. 384; *Norman v. Middlesex, etc., Traction Co.*, 71 N. J. L. 652; *McKeown v. South Carolina, etc., R. Co.*, 68 S. Car. 483; *Oliver v. Columbia, etc., R. Co.*, 65 S. Car. 1; *Trinity, etc., R. Co. v. Simpson*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1034; *Gulf, etc., R. Co. v. Carter*, (Tex. Civ. App. 1902) 71 S. W. Rep. 73. And see the title QUESTIONS OF LAW AND FACT, 577. 1.

5. E. E. Jackson Lumber Co. v. Cunningham, 141 Ala. 206; *Williams v. Mineral City Park Assoc.*, (Iowa 1905) 102 N. W. Rep. 783; *Klughertz v. Chicago, etc., R. Co.*, 90 Minn. 17, 101 Am. St. Rep. 384; *Perrigo v. St. Louis*, 185 Mo. 274; *Walger v. Jersey City, etc., R. Co.*, 71 N. J. L. 356; *McKeown v. South Carolina, etc., R. Co.*, 68 S. Car. 483.

6. Sanitary Dairy Co. v. St. Louis Transit Co., 98 Mo. App. 20; *New Omaha Thomson-Houston Electric Light Co. v. Rombold*, (Neb. 1903) 93 N. W. Rep. 966; *Rea v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 555; *Galveston, etc., R. Co. v. Mortson*, 31 Tex. Civ. App. 142.

7. South Covington, etc., St. R. Co. v. Constans, (Ky. 1903) 74 S. W. Rep. 705; *Spencer v. St. Louis Transit Co.*, 111 Mo. App. 653; *Sanitary Dairy Co. v. St. Louis Transit Co.*, 98 Mo. App. 20; *Custer v. Baltimore, etc., R. Co.*, 206 Pa. St. 520; *St. Louis Southwestern R. Co. v. Harrison*, 32 Tex. Civ. App. 368; *Chicago, etc., R. Co. v. Buie*, 31 Tex. Civ. App. 654.

Standard of Conduct — How Fixed. — *Chicago, etc., R. Co. v. Lagerkrans*, 65 Neb. 566.

Where the Law Has Fixed the Standard of duty the court should so instruct the jury. *Memphis St. R. Co. v. Shaw*, 110 Tenn. 467; *St.*

510. XIII. PRESUMPTIONS AND BURDEN OF PROOF — 1. Negligence Not Presumed — a. GENERAL RULE. — See note 11.

511. See note 1.

Louis Southwestern R. Co. *v.* Parks, (Tex. Civ. App. 1903) 73 S. W. Rep. 439; Woolf *v.* Washington R., etc., Co., 37 Wash. 491.

510. 8. See Franklin *v.* St. Louis Transit Co., 99 Mo. App. 323.

9. Neal *v.* Wilmington, etc., Electric R. Co., 3 Penn. (Del.) 467. Compare Western, etc., R. Co. *v.* Burnham, 123 Ga. 28.

10. Western, etc., R. Co. *v.* Vaughan, 113 Ga. 354; Indianapolis St. R. Co. *v.* O'Donnell, (Ind. App. 1905) 73 N. E. Rep. 163; Indianapolis St. R. Co. *v.* Taylor, 164 Ind. 155; Chicago, etc., R. Co. *v.* Kraysenbuhl, 65 Neb. 889; Suse *v.* Metropolitan St. R. Co., 80 N. Y. App. Div. 24; Connor *v.* Metropolitan St. R. Co., 77 N. Y. App. Div. 384; Union Pac. R. Co. *v.* Gilland, 4 Wyo. 395. But see Missouri, etc., R. Co. *v.* Gist, 31 Tex. Civ. App. 662.

11. No Presumption of Negligence — United States. — Rosney *v.* Erie R. Co., (C. C. A.) 135 Fed. Rep. 311; Diamond Coal, etc., Co. *v.* Allen, (C. C. A.) 137 Fed. Rep. 705; Mountain Copper Co. *v.* Van Buren, (C. C. A.) 133 Fed. Rep. 1; Simonds *v.* Georgia Iron, etc., Co., 133 Fed. Rep. 776, affirmed (C. C. A.) 133 Fed. Rep. 1019; Denver *v.* Porter, (C. C. A.) 126 Fed. Rep. 288; Wabash Screen Door Co. *v.* Black, (C. C. A.) 126 Fed. Rep. 721.

Arkansas. — Fordyce *v.* Key, (Ark. 1905) 84 S. W. Rep. 797; St. Louis, etc., R. Co. *v.* Haist, 71 Ark. 258, 100 Am. St. Rep. 65.

Delaware. — Goldstein *v.* People's R. Co., (Del. 1905) 60 Atl. Rep. 907; Queen Anne's R. Co. *v.* Reed, (Del. 1905) 59 Atl. Rep. 860; Reed *v.* Queen Anne's R. Co., 4 Penn. (Del.) 413; Di Prisco *v.* Wilmington City R. Co., 4 Penn. (Del.) 527; Colbourn *v.* Wilmington, 4 Penn. (Del.) 443; Wilman *v.* People's R. Co., 4 Penn. (Del.) 260; McAllister *v.* People's R. Co., 4 Penn. (Del.) 272; Neal *v.* Wilmington, etc., Electric R. Co., 3 Penn. (Del.) 467; Adams *v.* Wilmington, etc., Electric R. Co., 3 Penn. (Del.) 512; Boyd *v.* Blumenthal, 3 Penn. (Del.) 564; Farley *v.* Wilmington, etc., Electric R. Co., 3 Penn. (Del.) 581; Tully *v.* Philadelphia, etc., R. Co., 3 Penn. (Del.) 455.

District of Columbia. — Metropolitan R. Co. *v.* Blick, 22 App. Cas. (D. C.) 194.

Georgia. — Simmons *v.* Seaboard Air-Line R. Co., 120 Ga. 225; Chenall *v.* Palmer Brick Co., 117 Ga. 106.

Illinois. — Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140.

Indiana. — Lake Erie, etc., R. Co. *v.* McFall, (Ind. 1904) 72 N. E. Rep. 552; Indianapolis St. R. Co. *v.* Bordenchecker, 33 Ind. App. 138; Indianapolis St. R. Co. *v.* Darnell, 32 Ind. App. 687.

Iowa. — Eakins *v.* Chicago, etc., R. Co., 26 Iowa 324; Whittlesey *v.* Burlington, etc., R. Co., 121 Iowa 597.

Kentucky. — Early *v.* Louisville, etc., R. Co., 115 Ky. 13; Brooks *v.* Louisville, etc., R. Co., (Ky. 1903) 71 S. W. Rep. 507.

Minnesota. — Thomas *v.* Smith, 90 Minn. 379.

Missouri. — Freymark *v.* St. Louis Transit Co., 111 Mo. App. 208; Wilbur *v.* Southwest

Missouri Electric R. Co., 110 Mo. App. 689; Brock *v.* St. Louis Transit Co., 107 Mo. App. 109; Lee *v.* Jones, 181 Mo. 291; Warner *v.* St. Louis, etc., R. Co., 178 Mo. 125; Spiro *v.* St. Louis Transit Co., 102 Mo. App. 250.

Nebraska. — New Omaha Thomson-Houston Electric Light Co. *v.* Rombold, (Neb. 1903) 93 N. W. Rep. 966; Vansyoc *v.* Freewater Cemetery Assoc., 63 Neb. 143.

New Hampshire. — Hughes *v.* Boston, etc., R. Co., 71 N. H. 279, 93 Am. St. Rep. 518.

New Jersey. — Butler *v.* Easton, etc., R. Co., (N. J. 1905) 60 Atl. Rep. 218; Weeks *v.* Chosen Freeholders, 68 N. J. L. 622; Dotson *v.* Erie R. Co., 68 N. J. L. 679; McGuire *v.* Central R. Co., 68 N. J. L. 608.

New York. — Travell *v.* Bannerman, 174 N. Y. 47; Holland House Co. *v.* Baird, 169 N. Y. 136; Welsh *v.* Cornell, 168 N. Y. 508; Schapiro *v.* Levy, 101 N. Y. App. Div. 444; Crowley *v.* Rochester Fireworks Co., 95 N. Y. App. Div. 13; Sundheimer *v.* New York, 77 N. Y. App. Div. 53, 176 N. Y. 495; Dwyer *v.* Hills Bros. Co., 79 N. Y. App. Div. 45; Fink *v.* Slade, 66 N. Y. App. Div. 105; Welsh *v.* Metropolitan St. R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 166; Klyachko *v.* Central Crosstown R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 1073; Summerman *v.* Interurban St. R. Co., (Supm. Ct. App. T.) 87 N. Y. Supp. 427.

North Carolina. — Stewart *v.* North Carolina R. Co., 136 N. Car. 385; Womble *v.* Merchants' Grocery Co., 135 N. Car. 474.

Oregon. — Duntley *v.* Inman, 42 Oregon 334.

Pennsylvania. — Greis *v.* Hazard Mfg. Co., 209 Pa. St. 276; Booth *v.* Dorsey, 208 Pa. St. 276; Osterheldt *v.* Peoples, 208 Pa. St. 310; Drinkwater *v.* Quaker City Cooperage Co., 208 Pa. St. 649; Anderson *v.* Hays Mfg. Co., 207 Pa. St. 106; Bube *v.* Weatherly, 25 Pa. Super. Ct. 88.

Rhode Island. — Venbuhr *v.* Lafayette Worsted Mills, (R. I. 1905) 60 Atl. Rep. 770.

South Carolina. — Land *v.* Southern R. Co., 67 S. Car. 290.

South Dakota. — Strait *v.* Eureka, 17 S. Dak. 326.

Texas. — G. A. Duerler Mfg. Co. *v.* Dullnig, (Tex. Civ. App. 1904) 83 S. W. Rep. 889; Talley *v.* Beever, 33 Tex. Civ. App. 675.

Utah. — Wells *v.* Utah Constr. Co., 27 Utah 524; Downey *v.* Gemini Min. Co., 24 Utah 431, 91 Am. St. Rep. 798.

Virginia. — Carson Lime Co. *v.* Rutherford, 102 Va. 244; Richmond Pass., etc., Co. *v.* Gordon, 102 Va. 498; Southern R. Co. *v.* Hall, 102 Va. 135; Richmond R., etc., Co. *v.* Hudgins, 100 Va. 409.

But See as to Railroads under the Florida statute, Consumers' Electric Light, etc., Co. *v.* Pryor, 44 Fla. 354.

511. 1. Chicago, etc., R. Co. *v.* Benton, (C. C. A.) 132 Fed. Rep. 460; Toledo, etc., R. Co. *v.* Parks, 163 Ind. 592; Seecombe *v.* Detroit Electric Co., 133 Mich. 170; Sykes *v.* St. Louis, etc., R. Co., 178 Mo. 603; Riska *v.* Union Depot R. Co., 180 Mo. 168; Franklin *v.* Mis-

512. Exclusion of Contributory Negligence. — See note 1.

b. RES IPSA LOQUITUR — (1) *In General.* — See note 2.

souri, etc., R. Co., 97 Mo. App. 473; Atkinson v. Fisher, (Neb. 1903) 93 N. W. Rep. 211; Hilton v. Fitchburg R. Co., (N. H. 1904) 59 Atl. Rep. 625; Dougherty v. Milliken, 163 N. Y. 527, 79 Am. St. Rep. 608; Klos v. Hudson River Ore, etc., Co., 77 N. Y. App. Div. 566; East Tennessee, etc., R. Co. v. Lindamood, 111 Tenn. 457.

512. 1. Goldstein v. People's R. Co., (Del. 1905) 60 Atl. Rep. 975; Obertoni v. Boston, etc., R. Co., 186 Mass. 481.

2. Circumstances Warranting Presumption — England. — Snee v. Durkie, Sc. Ct. of Sess. 6 F. 42.

United States. — Whitten v. Nevada Power, etc., Co., 132 Fed. Rep. 782, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 512; Louisiana, etc., R. Co. v. Crumpler, (C. C. A.) 122 Fed. Rep. 425; Wilmington Steamboat Co. v. Walker, (C. C. A.) 120 Fed. Rep. 97; Walker v. Wilmington Steamboat Co., 117 Fed. Rep. 784.

California. — Harlow v. Standard Imp. Co., 145 Cal. 477.

Iowa. — Fitch v. Mason City, etc., Traction Co., 124 Iowa 665.

Kentucky. — Louisville, etc., R. Co. v. Steenberger, (Ky. 1902) 69 S. W. Rep. 1094; Louisville, etc., R. Co. v. Reynolds, (Ky. 1903) 71 S. W. Rep. 516.

Louisiana. — Hebert v. Lake Charles Ice, etc., Co., 111 La. 522, 100 Am. St. Rep. 505, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 512.

Massachusetts. — Cassidy v. Old Colony St. R. Co., 184 Mass. 156.

Michigan. — McLean v. Pere Marquette R. Co., (Mich. 1904) 100 N. W. Rep. 748.

Missouri. — Willis v. St. Joseph R., etc., Co., 111 Mo. App. 586; Winkelman v. Kansas City Electric Light Co., 110 Mo. App. 184; Raney v. La Chance, 96 Mo. App. 479.

New York. — Weber v. Lieberman, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 593; Cox v. Mason, 89 N. Y. App. Div. 219; Smith v. Brooklyn Heights R. Co., 82 N. Y. App. Div. 531; Ramson v. Metropolitan St. R. Co., 78 N. Y. App. Div. 101, affirmed 177 N. Y. 578; Ludwig v. Metropolitan St. R. Co., 71 N. Y. App. Div. 210, reversed 174 N. Y. 546.

Texas. — St. Louis Southwestern R. Co. v. Harkey, (Tex. Civ. App. 1905) 88 S. W. Rep. 506; Dallas Consol. Electric St. R. Co. v. Broadhurst, 28 Tex. Civ. App. 630.

Leaving Horse and Wagon Unattended. — Braud v. Borden's Condensed Milk Co., 80 N. Y. App. Div. 188; Gorsuch v. Swan, 100 Tenn. 36, 97 Am. St. Rep. 836.

Where Nothing Is Done Out of the Usual Course of Business, negligence cannot be presumed unless that course itself is improper. Chicago, etc., R. Co. v. Reilly, 212 Ill. 506.

Collapse of Building Without Apparent Cause. — Patterson v. Jos. Schlitz Brewing Co., 16 S. Dak. 33.

Falling Things in General. — Smith v. Jackson, 70 N. J. L. 183; Wolf v. American Tract Soc., 164 N. Y. 30; Travers v. Murray, 87 N. Y. App. Div. 552; Scheider v. American Bridge

Co., 78 N. Y. App. Div. 163; Loughrain v. Autophone Co., 77 N. Y. App. Div. 542; Mentz v. Shieren, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 813; Ahern v. Melvin, 21 Pa. Super. Ct. 462.

Master and Servant. — As illustrating the various views of the maxim in injuries to employees, see Spring Valley Coal Co. v. Buzis, 115 Ill. App. 196, affirmed 213 Ill. 341; Baltimore, etc., R. Co. v. Greer, 103 Ill. App. 448; Buttner v. South Baltimore Steel Car, etc., Co., (Md. 1905) 60 Atl. Rep. 597; South Baltimore Car Works v. Schaefer, 96 Md. 88, 94 Am. St. Rep. 560; Drum v. New England Cotton Yarn Co., 180 Mass. 113; Rickaly v. O'Brien Boiler Works Co., 108 Mo. App. 130; Stewart v. Ferguson, 164 N. Y. 553; Young v. Mason Stable Co., 96 N. Y. App. Div. 305; Starer v. Stern, 100 N. Y. App. Div. 393; Nolan v. Brooklyn Heights R. Co., 68 N. Y. App. Div. 219; Fink v. Slade, 66 N. Y. App. Div. 105; Stewart v. Raleigh, etc., Air Line R. Co., 137 N. Car. 687; Womble v. Merchants' Grocery Co., 135 N. Car. 474; Meehan v. Great Northern R. Co., 13 N. Dak. 432; Missouri, etc., R. Co. v. Hawk, 30 Tex. Civ. App. 142; G. A. Duerler Mfg. Co. v. Dullnig, (Tex. Civ. App. 1904) 83 S. W. Rep. 889. And see the title MASTER AND SERVANT, *passim*.

Circumstances Not Warranting Presumption — United States. — Standard Oil Co. v. Murray, (C. C. A.) 119 Fed. Rep. 572.

Alabama. — Louisville, etc., R. Co. v. Lewis, 141 Ala. 466.

California. — Harrison v. Sutter St. R. Co., 134 Cal. 549; Rowe v. Such, 134 Cal. 573.

Illinois. — Chicago, etc., R. Co. v. Reilly, 212 Ill. 506; Illinois Cent. R. Co. v. Swift, 213 Ill. 307; Chicago Transit Co. v. Campbell, 110 Ill. App. 366.

Iowa. — Harter v. Colfax Electric Light, etc., Co., 124 Iowa 500.

Maryland. — State v. Green, 95 Md. 217; South Baltimore Car Works v. Schaefer, 96 Md. 88, 94 Am. St. Rep. 560; State v. United R., etc., Co., (Md. 1905) 60 Atl. Rep. 249.

Massachusetts. — Obertoni v. Boston, etc., R. Co., 186 Mass. 481; Faulkner v. Boston, etc., R. Co., 187 Mass. 254.

Michigan. — Conroy v. Detroit United R. Co., (Mich. 1905) 102 N. W. Rep. 641.

Minnesota. — Fewings v. Mendenhall, 88 Minn. 336, 97 Am. St. Rep. 519; Thomas v. Smith, 90 Minn. 379.

Missouri. — Coffey v. Carthage, 186 Mo. 573; Lee v. Jones, 181 Mo. 291; Groom v. Kavanaugh, 97 Mo. App. 362.

New York. — Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380; Crowley v. Rochester Fireworks Co., 95 N. Y. App. Div. 13; Boyd v. U. S. Mortgage, etc., Co., 94 N. Y. App. Div. 413; Adams v. Metropolitan St. R. Co., 82 N. Y. App. Div. 354; Johnson v. Yellow Pine Co., 67 N. Y. App. Div. 528; McDonough v. James Reilly Repair, etc., Co., (Supm. Ct. App. T.) 45 Misc. (N. Y.) 334.

North Carolina. — Holland v. Seaboard Air Line R. Co., 137 N. Car. 368.

513. (2) *When Maxim Applies.* — See notes 1, 2.

(3) *Nature of Presumption.* — See notes 3, 4.

Rhode Island. — *Fagan v. Rhode Island Co.*, (R. I. 1905) 60 Atl. Rep. 672.

South Carolina. — *Edgens v. Gaffney Mfg. Co.*, 69 S. Car. 529, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 512.

Texas. — *Talley v. Beever*, 33 Tex. Civ. App. 675; *Texas Midland R. Co. v. Johnson*, (Tex. Civ. App. 1901) 65 S. W. Rep. 388.

West Virginia. — *Veith v. Hope Salt, etc.*, Co., 51 W. Va. 96.

Wisconsin. — *Tiborsky v. Chicago, etc.*, R. Co., 124 Wis. 243.

It Is Only When the Defendant Is under an Absolute Duty to prevent results that their appearance shows negligence. *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, (Neb. 1905) 102 N. W. Rep. 89.

Where the Inferences For or Against Negligence Are Equal the maxim does not apply. *Wadsworth v. Boston El. R. Co.*, 182 Mass. 572. See also *Price v. St. Louis, etc.*, R. Co., (Ark. 1905) 88 S. W. Rep. 575.

Issue as to Person Causing Injury. — *Huneke v. West Brighton Amusement Co.*, 80 N. Y. App. Div. 268.

513. 1. Depends on Particular Circumstances. — *Kohner v. Capital Traction Co.*, 22 App. Cas. (D. C.) 181; *Blake v. Camden Interstate R. Co.*, 57 W. Va. 300.

Application Not Dependent on Relations of Parties. — *Lincoln Traction Co. v. Webb*, (Neb. 1905) 102 N. W. Rep. 258; *Lincoln Traction Co. v. Heller*, (Neb. 1905) 102 N. W. Rep. 262; *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630.

Presumption Applied with Caution. — *Kight v. Metropolitan R. Co.*, 21 App. Cas. (D. C.) 494.

Exclusion of All Inconsistent Theories — Not Necessary. — *Chaperon v. Portland Electric Co.*, 41 Oregon 39.

2. When Mere Happening of Injury Warrants Submission. — *Kahn v. Triest Rosenberg Cap Co.*, 139 Cal. 340; *Denver Consol. Electric Co. v. Lawrence*, 31 Colo. 381; *Whittlesey v. Burlington, etc.*, R. Co., 121 Iowa 597; *Louisville, etc.*, R. Co. *v. Davis*, 115 Ky. 270; *Thompson v. St. Louis, etc.*, R. Co., 111 Mo. App. 465; *Klinger v. United Traction Co.*, 92 N. Y. App. Div. 100, modified 181 N. Y. 521; *D'Arcy v. Westchester Electric R. Co.*, 82 N. Y. App. Div. 263; *Simpson v. Enfield Lumber Co.*, 133 N. Car. 95; *Alexander v. Nanticoke Light Co.*, 209 Pa. St. 571; *Levinson v. Myers*, 24 Pa. Super. Ct. 481; *Richmond R., etc.*, Co. *v. Hudgins*, 100 Va. 409.

Under Defendant's Control. — In cases where the maxim applies it is frequently said that the cause or instrumentality of the accident is under the defendant's control. *Chenall v. Palmer Brick Co.*, 117 Ga. 106; *Chicago City R. Co. v. Barker*, 209 Ill. 321; *Isherwood v. H. L. Jenkins Lumber Co.*, 84 Minn. 423; *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558; *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630; *Wolpers v. New York, etc.*, Electric Light, etc., Co., 91 N. Y. App. Div. 424; *Fisher v. New York Dock Co.*, 91 N. Y. App. Div. 526, affirmed 181 N. Y. 570; *Kahn v. Burette*, (Supm. Ct. App. T.) 42 Misc. (N.

Y.) 541; *Chaperon v. Portland Electric Co.*, 41 Oregon 39; *Murray v. Pawtuxet Valley St. R. Co.*, 25 R. I. 209; *Laforrest v. O'Driscoll*, 26 R. I. 547.

Rule by Statute. — See *Kemp v. Central of Georgia R. Co.*, 122 Ga. 559; *Chicago, etc.*, R. Co. *v. Winfrey*, 67 Neb. 13. And see the title CARRIERS OF PASSENGERS, 623. 1 et seq.

3. Prima Facie Presumption — Alabama. — *Southern R. Co. v. Crowder*, 130 Ala. 256.

Minnesota. — *Isherwood v. H. L. Jenkins Lumber Co.*, 84 Minn. 423.

Missouri. — *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558; *Aston v. St. Louis Transit Co.*, 105 Mo. App. 226. Compare *Geismann v. Missouri-Edison Electric Co.*, 173 Mo. 654.

New York. — *Wolpers v. New York, etc.*, Electric Light, etc., Co., 91 N. Y. App. Div. 424; *Connor v. Koch*, 89 N. Y. App. Div. 33.

North Carolina. — *Simpson v. Enfield Lumber Co.*, 133 N. Car. 95.

Oregon. — *Chaperon v. Portland Electric Co.*, 41 Oregon 39; *Duntley v. Inman*, 42 Oregon 334.

Rhode Island. — *Murray v. Pawtuxet Valley St. R. Co.*, 25 R. I. 209.

South Carolina. — *Stembridge v. Southern R. Co.*, 65 S. Car. 440.

South Dakota. — *Patterson v. Jos. Schlitz Brewing Co.*, 16 S. Dak. 33.

Tennessee. — *Gorsuch v. Swan*, 109 Tenn. 36, 97 Am. St. Rep. 836.

Texas. — *St. Louis Southwestern R. Co. v. Parks*, (Tex. Civ. App. 1903) 73 S. W. Rep. 439.

4. Shifting Burden of Proof — District of Columbia. — *Kohner v. Capital Traction Co.*, 22 App. Cas. (D. C.) 181; *Kight v. Metropolitan R. Co.*, 21 App. Cas. (D. C.) 494.

Illinois. — *Chicago Union Traction Co. v. Newmiller*, 215 Ill. 383.

Indiana. — *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360.

Iowa. — *Whittlesey v. Burlington, etc.*, R. Co., 121 Iowa 597.

Louisiana. — *Hebert v. Lake Charles Ice, etc.*, Co., 111 La. 522, 100 Am. St. Rep. 505, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 513.

Missouri. — *Wilbur v. Southwest Missouri Electric R. Co.*, 110 Mo. App. 689; *Cleary v. St. Louis Transit Co.*, 108 Mo. App. 433; *Tateman v. Chicago, etc.*, R. Co., 96 Mo. App. 448; *Estes v. Missouri Pac. R. Co.*, 110 Mo. App. 725; *Logan v. Metropolitan St. R. Co.*, 183 Mo. 582.

Pennsylvania. — *Alexander v. Nanticoke Light Co.*, 209 Pa. St. 571; *Levinson v. Myers*, 24 Pa. Super. Ct. 481.

Rhode Island. — *Reynolds v. Narragansett Electric Lighting Co.*, 26 R. I. 457.

Tennessee. — *Memphis St. R. Co. v. Kartright*, 110 Tenn. 277, 100 Am. St. Rep. 807; *Hydes Ferry Turnpike Co. v. Yates*, 108 Tenn. 428.

Virginia. — *Norfolk R., etc.*, Co. *v. Spratley*, 103 Va. 379.

Wisconsin. — *Klitzke v. Webb*, 120 Wis. 254.

511. 2. Burden of Proof — a. TO SHOW NEGLIGENCE. — See note 1.**515. See note 1.****Failure to Observe Statutory Precautions. — See note 3.**

Canada.—Royal Electric Co. v. Hevé, 11 Quebec K. B. 436.

Doctrine that Statement of Shifting Burden Technically Inaccurate.—Kahn v. Triest Rosenberg Cap Co., 139 Cal. 340; Osgood v. Los Angeles Traction Co., 137 Cal. 280, 92 Am. St. Rep. 171; Sambuck v. Southern Pac. Co., 138 Cal. xix, 71 Pac. Rep. 174; Patterson v. San Francisco, etc., Electric R. Co., 147 Cal. 173; Chenall v. Palmer Brick Co., 117 Ga. 106; Lincoln Traction Co. v. Webb, (Neb. 1905) 102 N. W. Rep. 258; Kay v. Metropolitan St. R. Co., 163 N. Y. 447; Kerr v. Consolidated Gas Co., 86 N. Y. App. Div. 14; Maher v. Metropolitan St. R. Co., 102 N. Y. App. Div. 517; Adams v. Union R. Co., 80 N. Y. App. Div. 136; Holahan v. Metropolitan St. R. Co., 73 N. Y. App. Div. 164; Womble v. Merchants Grocery Co., 135 N. Car. 474; Chaperon v. Portland Electric Co., 41 Oregon 39. And see the title **BURDEN OF PROOF**, **30. 3 et seq.**

The Burden Is Not That of Satisfactorily Accounting for the Accident, but of showing freedom from fault. Baran v. Reading Iron Co., 202 Pa. St. 274.

Explanation.—Many of the cases say that an "explanation" is called for or that it is for the defendant "to explain." Chicago City R. Co. v. Barker, 209 Ill. 321; Winheim v. Field, 107 Ill. App. 145; Klinger v. United Traction Co., 92 N. Y. App. Div. 100, modified 181 N. Y. 521; Fisher v. New York Dock Co., 91 N. Y. App. Div. 526, affirmed 181 N. Y. 579; Clancy v. New York, etc., R. Co., 82 N. Y. App. Div. 563; Richmond R., etc., Co. v. Hudgins, 100 Va. 409.

514. 1. Burden of Proof to Show Negligence on Plaintiff — United States.—Southern Pac. R. Co. v. Hetzer, (C. C. A.) 135 Fed. Rep. 272; Memphis Consol. Gas, etc., Co. v. Letson, (C. C. A.) 135 Fed. Rep. 969; Wabash Screen Door Co. v. Black, (C. C. A.) 126 Fed. Rep. 721; Standard Oil Co. v. Murray, (C. C. A.) 119 Fed. Rep. 572; Thomason v. Southern R. Co., (C. C. A.) 113 Fed. Rep. 80; Simonds v. Georgia Iron, etc., Co., 133 Fed. Rep. 776, affirmed (C. C. A.) 133 Fed. Rep. 1019; Kefauver v. Philadelphia, etc., R. Co., 122 Fed. Rep. 966.

Arkansas.—Hot Springs St. R. Co. v. Hildreth, 72 Ark. 572.

Delaware.—Foulk v. Wilmington City R. Co., (Del. 1905) 60 Atl. Rep. 973; Queen Anne's R. Co. v. Reed, (Del. 1905) 59 Atl. Rep. 860; Jarrell v. Wilmington, 4 Penn. (Del.) 454; Colbourn v. Wilmington, 4 Penn. (Del.) 443; Neal v. Wilmington, etc., Electric R. Co., 3 Penn. (Del.) 467; Snyder v. People's R. Co., 4 Penn. (Del.) 145; Farley v. Wilmington, etc., Electric R. Co., 3 Penn. (Del.) 581.

Illinois.—Aledo v. Honeyman, 208 Ill. 415; North Chicago St. R. Co. v. O'Donnell, 115 Ill. App. 110; Western Wheel Works v. Stachnick, 102 Ill. App. 420.

Indiana.—M. S. Huey Co. v. Johnston, 164 Ind. 489; Toledo, etc., Western R. Co. v. Fenstermaker, 163 Ind. 534; Lake Erie, etc., R. Co. v. McFall, (Ind. 1904) 72 N. E. Rep. 552.

Kentucky.—Witten v. Bell, etc., Co., (Ky. 1905) 85 S. W. Rep. 1094.

Louisiana.—McDonnell v. New Orleans Cypress Co., (La. 1905) 38 So. Rep. 896; Buechner v. New Orleans, 112 La. 599, 104 Am. St. Rep. 455.

Maine.—Butler v. Rockland, etc., St. R. Co., 99 Me. 149, 105 Am. St. Rep. 267.

Massachusetts.—Black v. Boston El. R. Co., 187 Mass. 172; Obertoni v. Boston, etc., R. Co., 186 Mass. 481.

Michigan.—Secombe v. Detroit Electric R. Co., 133 Mich. 170.

Minnesota.—Fewings v. Mendenhall, 88 Minn. 336, 97 Am. St. Rep. 519.

Missouri.—Carey v. Kansas City, 187 Mo. 715; Jones v. Kansas City, etc., R. Co., 178 Mo. 528, 101 Am. St. Rep. 434.

Nebraska.—Atkinson v. Fisher, (Neb. 1903) 93 N. W. Rep. 211.

New Jersey.—Carroll v. Tidewater Oil Co., 67 N. J. L. 679; Solatinow v. Jersey City, etc., R. Co., 70 N. J. L. 154.

New York.—Rider v. Syracuse Rapid Transit R. Co., 171 N. Y. 139; Wieland v. Delaware, etc., Canal Co., 167 N. Y. 19, 82 Am. St. Rep. 707; Eastland v. Clarke, 165 N. Y. 420; Luria v. Cusick, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 126; Gentile v. New York City R. Co., (Supm. Ct. App. T.) 92 N. Y. Supp. 264; Adams v. Union R. Co., 80 N. Y. App. Div. 136; Sweet v. Poughkeepsie, 75 N. Y. App. Div. 274; German-American Ins. Co. v. Standard Gas Light Co., 67 N. Y. App. Div. 539, affirmed 174 N. Y. 508; Johnson v. Yellow Pine Co., 67 N. Y. App. Div. 528.

Pennsylvania.—Coolbroth v. Pennsylvania R. Co., 209 Pa. St. 433; Kilbride v. Carbon Dioxide, etc., Co., 201 Pa. St. 552, 88 Am. St. Rep. 829.

Tennessee.—East Tennessee, etc., R. Co. v. Lindamood, 111 Tenn. 457.

Texas.—McCabe v. San Antonio Traction Co., (Tex. Civ. App. 1905) 88 S. W. Rep. 387; Gulf, etc., R. Co. v. Hall, 34 Tex. Civ. App. 535; Gillum v. New York, etc., Steamship Co., (Tex. Civ. App. 1903) 76 S. W. Rep. 232; Missouri, etc., R. Co. v. Gist, 31 Tex. Civ. App. 662; Luna v. Missouri, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 1061.

Utah.—Fares v. Rio Grande Western R. Co., 28 Utah 132.

Virginia.—Norfolk, etc., R. Co. v. Johnson, 103 Va. 787; Southern R. Co. v. Hall, 102 Va. 135; Humphrey v. Valley R. Co., 100 Va. 749.

Wisconsin.—Lightfoot v. Winnebago Traction Co., 123 Wis. 479; Tiborsky v. Chicago, etc., R. Co., 124 Wis. 243.

Wyoming.—Union Pac. R. Co. v. Gilland, 4 Wyo. 395.

Canada.—Oatman v. Michigan Cent. R. Co., 1 Ont. L. Rep. 145; Young v. Owen Sound Dredge Co., 27 Ont. App. 649.

515. 1. Compare Connor v. Koch, 63 N. Y. App. Div. 257.

3. Where Presumption Attaches to Certain Facts Proved.—Wilmington Steamboat Co. v.

515. Whether Burden Sustained Question for Jury. — See note 4.*Prima Facie Case.* — See notes 5, 6.**516.** See note 1.*b.* TO SHOW CAUSAL CONNECTION. — See note 2.*c.* WHERE PROOF EQUALLY BALANCED. — See notes 4, 5.

Walker, (C. C. A.) 120 Fed. Rep. 97; Sambuck v. Southern Pac. R. Co., 138 Cal. xix, 71 Pac. Rep. 174; Osgood v. Los Angeles Traction Co., 137 Cal. 280, 92 Am. St. Rep. 171; German Ins. Co. v. Chicago, etc., R. Co., (Iowa 1905) 104 N. W. Rep. 361; Magrane v. St. Louis, etc., R. Co., 183 Mo. 119. See also *supra*, this title, **513**, 3, 4.

515. 4. Conner v. Missouri Pac. R. Co., 181 Mo. 397; Drinkwater v. Quaker City Co-operative Co., 208 Pa. St. 649.

5. *Prima Facie Case by Plaintiff Sufficient.* — St. Louis, etc., R. Co. v. Coombs, (Ark. 1905) 88 S. W. Rep. 595; Osgood v. Los Angeles Traction Co., 137 Cal. 280, 92 Am. St. Rep. 171; Chicago, etc., R. Co. v. Crose, 214 Ill. 602, 105 Am. St. Rep. 135; Larkin v. Chicago, etc., R. Co., 118 Iowa 652; Cramer v. Springfield Traction Co., 112 Mo. App. 350; Sack v. St. Louis Car Co., 112 Mo. App. 476; O'Neill v. St. Louis Transit Co., 108 Mo. App. 453; Richmond R., etc., Co. v. Hudgins, 100 Va. 409.

6. Sambuck v. Southern Pac. R. Co., 138 Cal. xix, 71 Pac. Rep. 174; Louisville, etc., R. Co. v. Davis, 115 Ky. 270; Tatem v. Chicago, etc., R. Co., 96 Mo. App. 448; Lincoln Traction Co. v. Heller, (Neb. 1904) 100 N. W. Rep. 197; Chaperon v. Portland Electric Co., 41 Oregon 39; Rauch v. Smedley, 208 Pa. St. 175; Mansfield v. Northcut, 112 Tenn. 536; St. Louis Southwestern R. Co. v. Moss, (Tex. Civ. App. 1904) 84 S. W. Rep. 281.

516. 1. Wabash Screen Door Co. v. Black, (C. C. A.) 126 Fed. Rep. 721; Williams v. Southern R. Co., 68 S. Car. 369.

2. *Causal Connection — Burden of Proof — United States.* — Southern Pac. R. Co. v. Schuyler, (C. C. A.) 135 Fed. Rep. 1015; Shugart v. Atlanta, etc., R. Co., (C. C. A.) 133 Fed. Rep. 505; Cole v. German Sav., etc., Soc., (C. C. A.) 124 Fed. Rep. 113; Texas, etc., R. Co. v. Coutourie, (C. C. A.) 135 Fed. Rep. 465; Sansom v. Southern R. Co., (C. C. A.) 111 Fed. Rep. 887.

Delaware. — Cox v. Wilmington City R. Co., 4 Penn. (Del.) 162.

Georgia. — Georgia R., etc., Co. v. Roberts, 114 Ga. 387.

Illinois. — O'Donnell v. Rosenthal, 110 Ill. App. 225.

Indiana. — Nickey v. Sleuder, 164 Ind. 189; Davis v. Mercer Lumber Co., 164 Ind. 413; Toledo, etc., R. Co. v. Parks, 163 Ind. 592.

Iowa. — Wissler v. Atlantic, 123 Iowa 11.

Louisiana. — Crisman v. Shreveport Belt R. Co., 110 La. 640.

Maine. — Neal v. Rendall, 98 Me. 69.

Maryland. — Baltimore, etc., R. Co. v. State, (Md. 1905) 61 Atl. Rep. 189.

Massachusetts. — Daniels v. New York, etc., R. Co., 183 Mass. 393; Garant v. Cashman, 183 Mass. 13.

Minnesota. — Thomas v. Smith, 90 Minn. 379.

Missouri. — Trigg v. Ozark Land, etc., Co.,

187 Mo. 227; Shore v. American Bridge Co., 111 Mo. App. 278; Riska v. Union Depot Co., 180 Mo. 168; Warner v. St. Louis, etc., R. Co., 178 Mo. 125; Sykes v. St. Louis, etc., R. Co., 178 Mo. 693; Groom v. Kavanagh, 97 Mo. App. 362.

Nebraska. — Lincoln Traction Co. v. Webb, (Neb. 1905) 102 N. W. Rep. 258.

New Hampshire. — Reynolds v. Burgess Sulphite Fibre Co., (N. H. 1904) 59 Atl. Rep. 615.

New York. — Seifter v. Brooklyn Heights R. Co., 169 N. Y. 254; Laidlaw v. Sage, 158 N. Y. 73; McQuade v. Metropolitan St. R. Co., 84 N. Y. App. Div. 637; Koch v. Zimmermann, 85 N. Y. App. Div. 370; Nellis v. Laughlin, 79 N. Y. App. Div. 470; Berman v. Schultz, (Supm. Ct. App. T.) 84 N. Y. Supp. 292.

North Carolina. — Hendrix v. Cooleemee Cotton Mills, 138 N. Car. 169; Phillips v. Durham, etc., R. Co., 138 N. Car. 12.

North Dakota. — Meehan v. Great Northern R. Co., 13 N. Dak. 432; Balding v. Andrews, 12 N. Dak. 267.

Pennsylvania. — Herron v. Pittsburg, 204 Pa. St. 509, 93 Am. St. Rep. 798; Shaughnessy v. Pittsburg, 20 Pa. Super. Ct. 609.

South Carolina. — Land v. Southern R. Co., 67 S. Car. 290; Oliver v. Columbia, etc., R. Co., 65 S. Car. 1; Boggero v. Southern R. Co., 64 S. Car. 104.

South Dakota. — Peterson v. Chicago, etc., R. Co., (S. Dak. 1905) 102 N. W. Rep. 595.

Tennessee. — Greenlaw v. Louisville, etc., R. Co., (Tenn. 1905) 86 S. W. Rep. 1072.

Texas. — Texas, etc., R. Co. v. Shoemaker, 98 Tex. 451; G. A. Duerler Mfg. Co. v. Dullnig, (Tex. Civ. App. 1904) 83 S. W. Rep. 889.

Virginia. — Bowers v. Bristol Gas, etc., Co., 100 Va. 533.

Washington. — Roberts v. Port Blakely Mill Co., 30 Wash. 25; Stratton v. C. H. Nichols Lumber Co., (Wash. 1905) 81 Pac. Rep. 831.

Canada. — Brown v. Waterous Engine Works Co., 8 Ont. L. Rep. 37.

4. *Where Proof Equally Balanced — United States.* — Illinois Cent. R. Co. v. Coughlin, (C. C. A.) 132 Fed. Rep. 801.

Illinois. — Chicago v. Murdock, 212 Ill. 9.

Massachusetts. — Wadsworth v. Boston El. R. Co., 182 Mass. 572.

Missouri. — Parker v. St. Louis Transit Co., 108 Mo. App. 465; Warner v. St. Louis, etc., R. Co., 178 Mo. 125.

New Hampshire. — Reynolds v. Burgess Sulphite Fibre Co., (N. H. 1904) 50 Atl. Rep. 615.

New York. — Kay v. Metropolitan St. R. Co., 163 N. Y. 447; Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380; Adams v. Metropolitan St. R. Co., 82 N. Y. App. Div. 354; Nellis v. Laughlin, 79 N. Y. App. Div. 470; Thies v. Thomas, (Supm. Ct. Tr. T.) 77 N. Y. Supp. 276.

North Dakota. — Meehan v. Great Northern R. Co., 13 N. Dak. 432.

516. *d.* PREPONDERANCE OF EVIDENCE. — See notes 6, 7.

517. See note 1.

c. SPECULATION OR CONJECTURE. — See notes 2, 3.

Utah. — Wells *v.* Utah Constr. Co., 27 Utah 524; Downey *v.* Gemini Min. Co., 24 Utah 431, 91 Am. St. Rep. 798.

Virginia. — Chesapeake, etc., R. Co. *v.* Heath, 103 Va. 64; Consumers' Brewing Co. *v.* Doyle, 102 Va. 399.

Canada. — Brown *v.* Waterous Engine Works Co., 8 Ont. L. Rep. 37.

516. 5. Cincinnati, etc., R. Co. *v.* Worthington, 30 Ind. App. 663, 96 Am. St. Rep. 355; Newcomb *v.* New York Cent., etc., R. Co., 132 Mo. 687; Strader *v.* Monroe County, 202 Pa. St. 626.

6. Fair Preponderance of Evidence — *United States.* — Southern Pac. R. Co. *v.* Schuyler, (C. C. A.) 135 Fed. Rep. 1015; Mountain Copper Co. *v.* Van Buren, (C. C. A.) 133 Fed. Rep. 1; Texas, etc., R. Co. *v.* Coutourie, (C. C. A.) 135 Fed. Rep. 465; Southern Electric R. Co. *v.* Hageman, (C. C. A.) 121 Fed. Rep. 262; Hawes *v.* Warren, 119 Fed. Rep. 978.

Arkansas. — St. Louis, etc., R. Co. *v.* Evans, (Ark. 1905) 86 S. W. Rep. 426.

California. — Kahn *v.* Triest Rosenberg Cap Co., 139 Cal. 340.

Delaware. — Goldstein *v.* People's R. Co., (Del. 1905) 60 Atl. Rep. 975; Di Prisco *v.* Wilmington City R. Co., 4 Penn. (Del.) 527; Wilman *v.* People's R. Co., 4 Penn. (Del.) 260; McAllister *v.* People's R. Co., 4 Penn. (Del.) 272; Karczewski *v.* Wilmington City R. Co., 4 Penn. (Del.) 24; Betts *v.* Wilmington City R. Co., 3 Penn. (Del.) 448.

District of Columbia. — Metropolitan R. Co. *v.* Blick, 22 App. Cas. (D. C.) 194.

Illinois. — Illinois Cent. R. Co. *v.* Prickett, 210 Ill. 140.

Indiana. — Indianapolis *v.* Cauley, 164 Ind. 304; Terre Haute Electric Co. *v.* Kiely, (Ind. App. 1904) 72 N. E. Rep. 658; Indianapolis St. R. Co. *v.* Hockett, 159 Ind. 677.

Maryland. — Miller *v.* Addison, 96 Md. 731.

Michigan. — Newman *v.* Ann Arbor, 134 Mich. 29.

Missouri. — Freymark *v.* St. Louis Transit Co., 111 Mo. App. 208; Holden *v.* Missouri R. Co., 108 Mo. App. 665; Goodman *v.* Kahoka, 100 Mo. App. 278; McLain *v.* St. Louis, etc., R. Co., 100 Mo. App. 374; Groom *v.* Kavanagh, 97 Mo. App. 362.

Nebraska. — Minden *v.* Vedene, (Neb. 1904) 101 N. W. Rep. 330; Lincoln Traction Co. *v.* Heller, (Neb. 1904) 100 N. W. Rep. 197; New Omaha Thomson-Houston Electric Light Co. *v.* Rombold, (Neb. 1903) 93 N. W. Rep. 966; South Omaha *v.* Meyers, (Neb. 1902) 92 N. W. Rep. 743.

New York. — Welsh *v.* Cornell, 168 N. Y. 508; Duerr *v.* Consolidated Gas Co., 86 N. Y. App. Div. 14; Gunther *v.* Metropolitan St. R. Co., (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 117; Tereszko *v.* New York Cent., etc., R. Co., 96 N. Y. App. Div. 615; Copeland *v.* Degnon-McLean Contracting Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 827.

North Carolina. — Lewis *v.* Norfolk, etc., R. Co., 132 N. Car. 382.

North Dakota. — Meehan *v.* Great Northern R. Co., 13 N. Dak. 432.

Oregon. — Chaperon *v.* Portland Electric Co., 41 Oregon 39.

Pennsylvania. — Conner *v.* Fleer, 28 Pa. Co. Ct. 499.

South Carolina. — Bodie *v.* Charleston, etc., R. Co., 66 S. Car. 302; Oliver *v.* Columbia, etc., R. Co., 65 S. Car. 1; Boggero *v.* Southern R. Co., 64 S. Car. 104; Davis *v.* Southern R. Co., 68 S. Car. 446.

Texas. — International, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1905) 84 S. W. Rep. 669; Southern Kansas R. Co. *v.* Sage, (Tex. Civ. App. 1904) 80 S. W. Rep. 1038.

Utah. — Downey *v.* Gemini Min. Co., 24 Utah 431, 91 Am. St. Rep. 798.

Virginia. — Richmond Traction Co. *v.* Wilkinson, 101 Va. 394.

Washington. — Roberts *v.* Port Blakely Mill Co., 30 Wash. 25.

7. Louisville, etc., R. Co. *v.* Lewis, 141 Ala. 466; Decatur Car Wheel, etc., Co. *v.* Mehaffey, 128 Ala. 242; Shore *v.* American Bridge Co., 111 Mo. App. 278; Kennealy *v.* Westchester Electric R. Co., 86 N. Y. App. Div. 293, *affirmed* 181 N. Y. 582; Serra *v.* Brooklyn Heights R. Co., 95 N. Y. App. Div. 159.

The Benefit of Any Doubt is to be given against the person on whom the burden of proof rests. Lauer *v.* Palms, 129 Mich. 671. See also Nickey *v.* Steuder, 164 Ind. 189.

Reasonable Satisfaction of Jury Sufficient. — Birmingham R., etc., Co. *v.* Lindsey, 140 Ala. 312; Giordano *v.* Brandywine Granite Co., 3 Penn. (Del.) 423; Boyd *v.* Blumenthal, 3 Penn. (Del.) 564; Adams *v.* Wilmington, etc., Electric R. Co., 3 Penn. (Del.) 512; Tully *v.* Philadelphia, etc., R. Co., 3 Penn. (Del.) 455; Atchison *v.* Wills, 21 App. Cas. (D. C.) 548; Bliss *v.* F. & M. Schaeffer Brewing Co., 67 N. J. L. 29; Ludwig *v.* Metropolitan St. R. Co., 71 N. Y. App. Div. 210, 174 N. Y. 546; Thies *v.* Thomas, (Supm. Ct. Tr. T.) 77 N. Y. Supp. 276; Chesapeake, etc., R. Co. *v.* Heath, 103 Va. 64; Nagle *v.* Hake, 123 Wis. 256.

517. 1. **Where Negligent Act Criminal Offense.** — See Missouri, etc., R. Co. *v.* Owens, (Tex. Civ. App. 1903) 75 S. W. Rep. 579. And see the title EVIDENCE, 492. 2.

2. **Speculation or Conjecture Insufficient** — *United States.* — Standard Oil Co. *v.* Murray, (C. C. A.) 119 Fed. Rep. 572.

Indiana. — Toledo, etc., R. Co. *v.* Parks, 163 Ind. 592.

Kansas. — Atchison, etc., R. Co. *v.* Morris, 64 Kan. 411.

Kentucky. — Hurt *v.* Louisville, etc., R. Co., 116 Ky. 545.

Louisiana. — Romano *v.* Seidel Furniture Mfg. Co., 114 La. 432.

Maine. — McTaggart *v.* Maine Cent. R. Co., (Me. 1905) 60 Atl. Rep. 1027.

Maryland. — Baltimore, etc., R. Co. *v.* State, (Md. 1905) 61 Atl. Rep. 189.

Massachusetts. — McGee *v.* Boston El. R. Co.,

517. XIV. EVIDENCE — 1. In General. — See notes 4, 5, 6.**2. Condition of Appliance, Structure, or Premises — a. IN GENERAL.**

— See note 7.

518. See notes 1, 2, 3.

187 Mass. 569; *Wadsworth v. Boston El. R. Co.*, 182 Mass. 572.

Michigan. — *Conroy v. Detroit United R. Co.*, (Mich. 1905) 102 N. W. Rep. 641; *Fuller v. Ann Arbor R. Co.*, (Mich. 1905) 104 N. W. Rep. 414.

Minnesota. — *Carleton v. Great Northern R. Co.*, 93 Minn. 378; *Thomas v. Smith*, 90 Minn. 379; *Truax v. Minneapolis, etc., R. Co.*, 89 Minn. 143; *Swenson v. Erlandson*, 86 Minn. 263.

Missouri. — *Purcell v. Tennent Shoe Co.*, 187 Mo. 276; *Trigg v. Ozark Land, etc., Co.*, 187 Mo. 227; *Spiro v. St. Louis Transit Co.*, 102 Mo. App. 250.

Nebraska. — *Nothdurft v. Lincoln*, 66 Neb. 434.

New Hampshire. — *Reynolds v. Burgess Sulphite Fibre Co.*, (N. H. 1904) 59 Atl. Rep. 615; *Hughes v. Boston, etc., R. Co.*, 71 N. H. 279, 93 Am. St. Rep. 518.

New York. — *Holland House Co. v. Baird*, 169 N. Y. 136; *Seifter v. Brooklyn Heights R. Co.*, 169 N. Y. 254; *Welsh v. Cornell*, 168 N. Y. 508; *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380; *Laidlaw v. Sage*, 158 N. Y. 73; *Wallace v. New Albion*, 107 N. Y. App. Div. 172; *Owen v. Retsof Min. Co.*, 102 N. Y. App. Div. 130; *Boyd v. U. S. Mortgage, etc., Co.*, 94 N. Y. App. Div. 413; *Eckert v. Shawangunk*, 77 N. Y. App. Div. 645; *Crofoot v. Syracuse, etc., R. Co.*, 75 N. Y. App. Div. 157; *Loushay v. Erie R. Co.*, 75 N. Y. App. Div. 619; *Fink v. Slade*, 66 N. Y. App. Div. 105.

North Dakota. — *Balding v. Andrews*, 12 N. Dak. 267.

Pennsylvania. — *Morgan v. Pennsylvania R. Co.*, 209 Pa. St. 25; *Bube v. Weatherly*, 25 Pa. Super. Ct. 88.

South Dakota. — *Peterson v. Chicago, etc., R. Co.*, (S. Dak. 1905) 102 N. W. Rep. 595.

Texas. — *G. A. Duerler Mfg. Co. v. Dullnig*, (Tex. Civ. App. 1904) 83 S. W. Rep. 889; *Gulf, etc., R. Co. v. Matthews*, 32 Tex. Civ. App. 137.

Virginia. — *Chesapeake, etc., R. Co. v. Heath*, 103 Va. 64; *Southern R. Co. v. Hall*, 102 Va. 135; *Humphrey v. Valley R. Co.*, 100 Va. 749.

Washington. — *Reidhead v. Skagit County*, 33 Wash. 174; *Armstrong v. Cosmopolis*, 32 Wash. 110.

Canada. — *Brown v. Waterous Engine Works Co.*, 8 Ont. L. Rep. 37.

A Mere Probability of Negligence is not enough. *Norfolk, etc., R. Co. v. Johnson*, 103 Va. 87.

517. 3. When Rule Does Not Apply. — *Wabash Screen Door Co. v. Black*, (C. C. A.) 126 Fed. Rep. 721; *Stowell v. Standard Oil Co.*, (Mich. 1905) 102 N. W. Rep. 227; *McDaniels v. Royle Min. Co.*, 110 Mo. App. 706; *Conner v. Missouri Pac. R. Co.*, 181 Mo. 397; *Olney v. Boston, etc., R. Co.*, 71 N. H. 427; *McHugh v. Manhattan R. Co.*, 179 N. Y. 378; *Ahern v. Melvin*, 21 Pa. Super. Ct. 462.

4. Direct Proof Unnecessary. — *Texas, etc., R.*

Co. v. Carlin, (C. C. A.) 111 Fed. Rep. 777, affirmed 189 U. S. 354; *St. Louis, etc., R. Co. v. Evans*, (Ark. 1905) 86 S. W. Rep. 426; *Chenall v. Palmer Brick Co.*, 117 Ga. 106; *Slack v. Harris*, 200 Ill. 96; *Swenson v. Erlandson*, 86 Minn. 263; *Franklin v. Missouri, etc., R. Co.*, 97 Mo. App. 473; *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630; *Peck v. New York Cent., etc., R. Co.*, 165 N. Y. 347; *Stewart v. Ferguson*, 164 N. Y. 553.

5. *Southern R. Co. v. Crowder*, 130 Ala. 256; *St. Louis Nat. Stock Yards v. Godfrey*, 198 Ill. 288; *Kleiner v. Third Ave. R. Co.*, 162 N. Y. 193; *Green v. Western American Co.*, 30 Wash. 87; *Nagle v. Hake*, 123 Wis. 256.

Evidence of Proprietorship. — *Isherwood v. H. L. Jenkins Lumber Co.*, 84 Minn. 423; *Spaine v. Stiner*, 51 N. Y. App. Div. 481, affirmed 168 N. Y. 666; *Crowe v. Nanticoke Light Co.*, 209 Pa. St. 580; *Lynchburg Telephone Co. v. Booker*, 103 Va. 594. *Compare* *Citizens St. R. Co. v. Stockdell*, 159 Ind. 25; *Werner v. Hearst*, 177 N. Y. 63.

Evidence of the recent procuring of an insurance policy by the defendant is admissible to show proprietorship. *Perkins v. Rice*, 187 Mass. 28.

6. *Hurt v. Louisville, etc., R. Co.*, 116 Ky. 545; *Shelly v. Philadelphia, etc., R. Co.*, 211 Pa. St. 160.

7. Conditions Other than at Time and Place Inadmissible. — *Davis v. Alexander City*, 137 Ala. 206; *Decatur Car Wheel, etc., Co. v. Mehaffey*, 128 Ala. 242; *Muller v. Hale*, 138 Cal. 163; *Chicago, etc., R. Co. v. Corson*, 198 Ill. 98; *Merchants L. & T. Co. v. Boucher*, 115 Ill. App. 101; *Sprague v. Atchison, etc., R. Co.*, 70 Kan. 359; *Republic Iron, etc., Works v. Gregg*, (Ky. 1903) 71 S. W. Rep. 900; *United Electric Light, etc., Co. v. State*, 100 Md. 634; *Luria v. Cusick*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 126; *East Tennessee, etc., R. Co. v. Lindamood*, 109 Tenn. 407, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 517; *Dallas v. Moore*, 32 Tex. Civ. App. 230; *Hannum v. Hill*, 52 W. Va. 166.

518. 1. Evidence of Prior or Subsequent Conditions Remaining Unchanged — California. — *Dyas v. Southern Pac. R. Co.*, 140 Cal. 296, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 517; *Shea v. Pacific Power Co.*, 145 Cal. 680.

Indiana. — *Creamery Package Mfg. Co. v. Hotsenpiller*, 159 Ind. 99.

Iowa. — *Compare* *Considine v. Dubuque*, 126 Iowa 283.

Maine. — *Babb v. Oxford Paper Co.*, 99 Me. 298.

Massachusetts. — *Kingman v. Lynn, etc., R. Co.*, 181 Mass. 387.

Michigan. — *Johnson v. Detroit, etc., R. Co.*, 135 Mich. 353.

Missouri. — *Smith v. Missouri, etc., Telephone Co.*, 113 Mo. App. 429; *Logan v. Metropolitan St. R. Co.*, 183 Mo. 582.

Tennessee. — *Nashville R. Co. v. Howard*, 112 Tenn. 107. See also *East Tennessee, etc., R.*

518. *b.* ACTUAL NOTICE OF DEFECTIVE CONDITIONS. — See note 5.

3. Other Acts of Negligence. — See note 6.

519. See notes 1, 2.

Authorship of Alleged Negligent Act — Evidence of Other Similar Acts. — See note 4.

4. Other Injuries under Similar Conditions. — See note 5.

Co. v. Lindamood, 109 Tenn. 407, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 518.

Texas. — *San Antonio v. Talerico*, (Tex. Civ. App. 1903) 78 S. W. Rep. 28.

Washington. — *Bell v. Spokane*, 30 Wash. 508.

Prior Defects — Continuous Condition. — *Chamber of Commerce Bldg. Co. v. Klussman*, 25 Ohio Cir. Ct. 728.

Evidence of Slightly Changed Condition may be admissible under some circumstances. *Gloucester Electric Co. v. Kankas*, (C. C. A.) 120 Fed. Rep. 490.

Prior Condition Admissible on Question of Notice. — *Hofacre v. Monticello*, (Iowa 1905) 103 N. W. Rep. 488; *Burt v. Utah Light, etc., Co.*, 26 Utah 157.

518. 2. Conditions Shortly Before Accident — *Alabama*. — *E. E. Jackson Lumber Co. v. Cunningham*, 141 Ala. 206.

Illinois. — *Slack v. Harris*, 200 Ill. 96.

Indiana. — *Terre Haute Electric Co. v. Kiely*, (Ind. App. 1904) 72 N. E. Rep. 658.

Iowa. — *Wissler v. Atlantic*, 123 Iowa 11.

Kansas. — *Emporia v. Kowalski*, 66 Kan. 64.

Michigan. — *Lindley v. Detroit*, 131 Mich. 8.

Minnesota. — *Gilbert v. Duluth Gen. Electric Co.*, 93 Minn. 99, 106 Am. St. Rep. 430.

New York. — *Nelson v. Young*, 91 N. Y. App. Div. 457, affirmed 180 N. Y. 523.

Tennessee. — See *East Tennessee, etc., R. Co. v. Lindamood*, 109 Tenn. 407, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 518.

West Virginia. — *Compare Foley v. Huntington*, 51 W. Va. 396.

Evidence of Conditions at Another Time May Be Admissible in Rebuttal to fix the time of the accident, and the conditions then existing. *Devaney v. Degnon-McLean Constr. Co.*, 79 N. Y. App. Div. 62, affirmed 178 N. Y. 620.

3. Evidence as to Other Portions of Premises. — *Whittlesey v. Burlington, etc., R. Co.*, 121 Iowa 603; *Emporia v. Kowalski*, 66 Kan. 64; *Styles v. Decatur*, 131 Mich. 443; *Brown v. Owosso*, 130 Mich. 107. But see *United Electric Light, etc., Co. v. State*, 100 Md. 634. *Compare* *Nothdurst v. Lincoln*, 66 Neb. 434.

Admissible as Showing Notice. — *Taylorville v. Stafford*, 196 Ill. 288; *Logansport, etc., Natural Gas Co. v. Coate*, 29 Ind. App. 209; *Kircher v. Larchwood*, 120 Iowa 578; *Beaver v. Eagle Grove*, 116 Iowa 485; *Huff v. Marshall*, 97 Mo. App. 542; *Shearer v. Buckley*, 31 Wash. 370; *Pumorio v. Merrill*, 125 Wis. 102; *Lyon v. Grand Rapids*, 121 Wis. 609.

Rebutting Contributory Negligence. — It has been held that evidence of the general defective condition of a sidewalk is admissible to show that the plaintiff had no better place on which to walk. *Hoffman v. North Milwaukee*, 118 Wis. 278.

5. Evidence of Notice of Defective Conditions. — *Houston Biscuit Co. v. Dial*, 135 Ala. 168; *Siegel v. Norton*, 209 Ill. 201; *Beardstown v.*

Clark, 204 Ill. 524; *Wilson v. Cedar Rapids*, 123 Iowa 10; *Nelson v. Young*, 91 N. Y. App. Div. 457, affirmed 180 N. Y. 523; *Nelson v. Union R. Co.*, 26 R. I. 251; *Dallas v. Moore*, 32 Tex. Civ. App. 230; *Franklin v. Engel*, 34 Wash. 480. See also *Texas, etc., R. Co. v. Coutourie*, (C. C. A.) 135 Fed. Rep. 465.

Evidence Tending to Show Notice. — *Dutro v. Metropolitan St. R. Co.*, 111 Mo. App. 258.

6. Evidence of Other Acts of Negligence — *Kentucky*. — *Chesapeake, etc., R. Co. v. Riddle*, (Ky. 1903) 72 S. W. Rep. 22.

Maine. — *Wilkins v. Monson Consol. Slate Co.*, 96 Me. 385.

Missouri. — *Franklin v. Missouri, etc., R. Co.*, 97 Mo. App. 473, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 518.

North Carolina. — *Moore v. Charlotte Electric R., etc., Co.*, 136 N. Car. 554.

Pennsylvania. — *Shelly v. Philadelphia, etc., R. Co.*, 211 Pa. St. 160.

Rhode Island. — *Dyer v. Union R. Co.*, 25 R. I. 221.

Utah. — *Whitmore v. Rio Grande Western R. Co.*, 24 Utah 215.

519. 1. United Electric Light, etc., Co. v. State, 100 Md. 634; *Duntley v. Inman*, 42 Oregon 334.

2. Inference from Collateral Fact. — *Texas, etc., R. Co. v. Watson*, 190 U. S. 287; *Franklin v. Missouri, etc., R. Co.*, 97 Mo. App. 473; *Green v. Western American Co.*, 30 Wash. 87. *Compare* *Sprague v. Atchison, etc., R. Co.*, 70 Kan. 359.

Other Defects — Issue as to Inspection. — See *Gustafson v. Young*, 91 N. Y. App. Div. 433.

Evidence of Custom to Permit Riding on Running-board. — *Stone v. Lewiston, etc., St. R. Co.*, 99 Me. 243.

Evidence of Usual Speed of Cars. — *Union Traction Co. v. Vandercook*, 32 Ind. App. 621.

Evidence of Frequent Emission of Sparks by Engine. — *Manchester Assur. Co. v. Oregon R., etc., Co.*, (Oregon 1905) 79 Pac. Rep. 60; *Nolan v. Great Northern R. Co.*, 31 Wash. 430.

4. Where Issue Is as to Authorship of Alleged Negligent Act. — See *White v. Keystone Telephone Co.*, 211 Pa. St. 455. *Compare* *Sprague v. Atchison, etc., R. Co.*, 70 Kan. 359.

5. Evidence of Prior Injuries under Like Conditions — *Alabama*. — *Davis v. Kornman*, 141 Ala. 479; *Birmingham R., etc., Co. v. Bynum*, 139 Ala. 389.

Illinois. — *Framke v. Hanly*, 215 Ill. 216; *Taylorville v. Stafford*, 196 Ill. 288; *Galt v. Woliver*, 103 Ill. App. 71.

Iowa. — *Yeager v. Spirit Lake*, 115 Iowa 593. *Compare* *Bailey v. Centerville*, 115 Iowa 271.

Kentucky. — *Crigler v. Ford*, (Ky. 1904) 82 S. W. Rep. 500.

Nevada. — *Powell v. Nevada, etc., R. Co.*, (Nev. 1904) 78 Pac. Rep. 978.

New York. — *Vandecar v. Universal Trust*

520. *Similarity of Conditions.* — See note 1.

5. *No Injuries to Others under Conditions Complained Of.* — See notes

3, 4, 5.

521. *6. Subsequent Repairs and Precautions — a. GENERAL RULE.* — See notes 1, 2.

522. See notes 1, 2.

Subsequent Discharge of Servant. — See note 3.

b. QUALIFICATIONS. — See note 4.

Co., 80 N. Y. App. Div. 274; *Withers v. Brooklyn Real Estate Exch.*, 106 N. Y. App. Div. 255.
North Carolina. — *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. Car. 254.

Oklahoma. — *Kingfisher v. Altizer*, 13 Okla. 121.

Pennsylvania. — *Reid v. Linck*, 206 Pa. St. 109.

South Dakota. — *Waterhouse v. Jos. Schlitz Brewing Co.*, 16 S. Dak. 592.

Tennessee. — *Nashville R. Co. v. Howard*, 112 Tenn. 107, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 519; *Mansfield v. Northcut*, 112 Tenn. 536.

Texas. — *Dallas Consol. Electric St. R. Co. v. Broadhurst*, 28 Tex. Civ. App. 630.

Evidence Admissible to Show Dangerous Condition. — *Yates v. Covington*, (Ky. 1904) 83 S. W. Rep. 592; *Smith v. Seattle*, 33 Wash. 481.

But as Maintaining a Doctrine Contrary to That Announced Above. — *Potter v. Cave*, 123 Iowa 98; *Cohen v. Hamblin, etc., Mfg. Co.*, 186 Mass. 544.

520. 1. Similarity of Conditions Essential. — *Vander Velde v. Leroy*, (Mich. 1905) 103 N. W. Rep. 812; *Morrow v. Westchester Electric R. Co.*, 54 N. Y. App. Div. 592, affirmed 172 N. Y. 638.

It Must Be Clear that the Defendant Was Responsible for the other accident and that it was due to a like cause. *Brauer v. New York*, 74 N. Y. App. Div. 210.

3. Evidence of Absence of Injuries to Others. — *Mobile, etc., R. Co. v. Vallowe*, 214 Ill. 124; *Republic Iron, etc., Works v. Gregg*, (Ky. 1903) 71 S. W. Rep. 900; *Kelley v. Parker-Washington Co.*, 107 Mo. App. 490; *Newcomb v. New York Cent., etc., R. Co.*, 182 Mo. 687; *Garske v. Ridgeville*, 123 Wis. 503. See also *supra*, this title, 490. 2.

4. Admissible to Show Reasonable Care. — *Southern R. Co. v. McLellan*, 80 Miss. 700; *Landau v. New York*, 90 N. Y. App. Div. 50. See also *Schnable v. Providence Public Market*, 24 R. I. 477, intimating that evidence showing that similar safeguards had proved efficient on a single prior occasion was admissible.

5. Grifhahn v. Kreizer, 62 N. Y. App. Div. 413, affirmed 171 N. Y. 661.

521. 1. As Adverting to the Conflict of Authority. — See *Georgia Southern, etc., R. Co. v. Cartledge*, 116 Ga. 164; *Baran v. Reading Iron Co.*, 202 Pa. St. 274, wherein the former rule in *Pennsylvania* was abandoned; *McGarr v. National, etc., Worsteds Mills*, 24 R. I. 447, 96 Am. St. Rep. 749.

2. Evidence of Subsequent Repairs or Precautions — Alabama. — *Going v. Alabama Steel, etc., Co.*, 141 Ala. 537; *Davis v. Kornman*, 141 Ala. 479.

Colorado. — *Zimmerman v. Denver Consol. Tramway Co.*, 18 Colo. App. 480.

Illinois. — *Merchants L. & T. Co. v. Boucher*, 115 Ill. App. 101.

Iowa. — See *v. Wabash R. Co.*, 123 Iowa 443.

Michigan. — *Zibbell v. Grand Rapids*, 129 Mich. 659; *Wager v. Lamont*, 135 Mich. 521.

Missouri. — *Schermer v. McMahon*, 108 Mo. App. 36.

Montana. — *Compare Coleman v. Perry*, 28 Mont. 1.

New York. — *Russell v. New York Cent., etc., R. Co.*, 96 N. Y. App. Div. 151; *Young v. Mason Stable Co.*, 96 N. Y. App. Div. 305.

North Carolina. — *Myers v. Concord Lumber Co.*, 129 N. Car. 252.

Pennsylvania. — *Elias v. Lancaster*, 203 Pa. St. 638.

Rhode Island. — *Morancy v. Hennessey*, 24 R. I. 205.

Texas. — *St. Louis Southwestern R. Co. v. Arnold*, (Tex. Civ. App. 1905) 87 S. W. Rep. 173.

Incidental Disclosure of Repairs. — Evidence which is admittedly material cannot be excluded because the circumstances attending its production may disclose subsequent repairs. *Dyas v. Southern Pac. R. Co.*, 140 Cal. 296; *Achey v. Marion*, 126 Iowa 47.

522. 1. Helling v. Schindler, 145 Cal. 303; *Kahn v. Triest Rosenberg Cap Co.*, 139 Cal. 340; *Waterbury v. Waterbury Traction Co.*, 74 Conn. 152; *Georgia Southern, etc., R. Co. v. Cartledge*, 116 Ga. 164; *Baran v. Reading Iron Co.*, 202 Pa. St. 274; *McGarr v. National, etc., Worsteds Mills*, 24 R. I. 447, 96 Am. St. Rep. 749.

2. Helling v. Schindler, 145 Cal. 303; *Waterbury v. Waterbury Traction Co.*, 74 Conn. 152; *Stevens v. Boston El. R. Co.*, 184 Mass. 476; *Baran v. Reading Iron Co.*, 202 Pa. St. 274; *McGarr v. National, etc., Worsteds Mills*, 24 R. I. 447, 96 Am. St. Rep. 749. *Compare Chicago, etc., R. Co. v. Kraysenbuhl*, 65 Neb. 889.

3. Winters v. Naughton, 91 N. Y. App. Div. 80.

4. Showing Actual Conditions at Time of Injury. — *Chicago, etc., R. Co. v. Kraysenbuhl*, 65 Neb. 889.

Remedy for Defects. — In *Russell v. New York Cent., etc., R. Co.*, 96 N. Y. App. Div. 151, which was an action for injuries to the plaintiff by being struck, when on a car, by the projecting roof of a toolhouse, the admission of evidence that the defendant had moved the toolhouse further from the track since the injury was held to be error even though offered only upon the question of feasibility of removal and though the jury was instructed accordingly.

Rebuttal — Cross-examination, Etc. — It is ad-

523. *c.* JURISDICTION OVER PREMISES—DUTY TO REPAIR.—See note 1.

7. Character and Reputation. — See notes 3, 4.

524. **8.** Usage and Custom. — See notes 1, 2, 3, 4, 5. See also the title USAGES AND CUSTOMS, **418.** *1 et seq.*

525. See note 1.

NEGOTIABLE INSTRUMENTS. — See notes 2, 3.

missible in rebuttal to show subsequent repairs in contradiction of the defendant's evidence that no change had been made. *Taylorville v. Stafford*, 196 Ill. 288; *McDonald v. Duluth*, 93 Minn. 206; *Galveston, etc., R. Co. v. Newport*, 26 Tex. Civ. App. 583; *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708.

Showing Value of Measurements. — A subsequent change may be shown to enable the jury to ascertain the value of measurements offered by the defendant, where the jurors are cautioned that no inference of negligence can be drawn from the change. *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64.

Showing Strength of Structure. — Evidence of subsequent repairs has been held to be admissible in contradiction of the defendant's evidence as to the strength of a broken bridge, when limited to that point. *Bush v. Delaware, etc., R. Co.*, 166 N. Y. 210.

523. 1. Duty and Practicability of Taking Precautions. — Where the negligence charged was a failure to guard machinery as required by a statute, it was held that evidence that it was afterwards guarded was competent as tending to prove that it was of a character that could have been safeguarded, and that the defendant recognized the device as one which the statute required should be safeguarded. *La Porte Carriage Co. v. Sullender*, (Ind. App. 1904) 71 N. E. Rep. 922.

3. Evidence of the Good Character or Reputation of the defendant's servants is generally inadmissible. *Butler v. South Carolina, etc., Extension R. Co.*, 130 N. Car. 15; *McFarland v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1905) 88 S. W. Rep. 450. And see the title CHARACTER (IN EVIDENCE), **861.** **2.**

4. *Missouri, etc., R. Co. v. Jones*, (Tex. Civ. App. 1903) 75 S. W. Rep. 53; *Shoemaker v. Texas, etc., R. Co.*, 29 Tex. Civ. App. 578. See also *Texas, etc., R. Co. v. Coutourie*, (C. C. A.) 135 Fed. Rep. 465.

Evidence of Specific Acts of Negligence by the servant in similar conditions and known to the master may be admitted on the question of character. *Giordano v. Brandywine Granite Co.*, 3 Penn. (Del.) 423; *Conover v. Neher-Ross Co.*, 38 Wash. 172, 107 Am. St. Rep. 741. But special acts of negligence unknown to the master are not admissible. *Southern Pac. R. Co. v. Hetzer*, (C. C. A.) 135 Fed. Rep. 272. Compare *Date v. New York Glucose Co.*, 104 N. Y. App. Div. 207. Nor is evidence of former specific acts admissible to show the negligence of the servant in the particular case. *Green v. Western American Co.*, 30 Wash. 87.

524. 1. Usage and Custom. — *Illinois Cent. R. Co. v. Colly*, (Ky. 1905) 86 S. W. Rep. 536.

2. *Snowden v. Somerset*, 171 N. Y. 90; *Texas, etc., R. Co. v. Adams*, 32 Tex. Civ. App. 112;

Richmond, etc., Electric R. Co. v. Rubin, 102 Va. 809; *Stone v. Seattle*, 33 Wash. 644.

The Test of Negligence. — See *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140; *Anderson v. Fielding*, 92 Minn. 42, 104 Am. St. Rep. 665.

3. *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399. See also *Chicago, etc., R. Co. v. Kinmare*, 115 Ill. App. 132; *Kelley v. Parker Washington Co.*, 107 Mo. App. 490; *Smith v. Hecla Min. Co.*, 38 Wash. 454.

Custom as Imposing Duty. — See *Foulk v. Wilmington City R. Co.*, (Del. 1905) 60 Atl. Rep. 973; *Hecker v. Oregon R. Co.*, 40 Oregon 6; *O'Reilly v. Brooklyn Heights R. Co.*, 82 N. Y. App. Div. 492; *McGovern v. Smith*, 73 Vt. 52.

4. Defendant's Previous Employment of Precaution May Be Shown. — *Hyland v. Southern Bell Telephone, etc., Co.*, 70 S. Car. 315, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 524.

Antiquity of Usage. — It need not be shown that the rule has prevailed for such a length of time as to give it the force of a common-law custom. *Pence v. California Min. Co.*, 27 Utah 378; *Fritz v. Western Union Tel. Co.*, 25 Utah 263.

5. *Illinois Cent. R. Co. v. Coughlin*, (C. C. A.) 132 Fed. Rep. 801; *Going v. Alabama Steel, etc., Co.*, 141 Ala. 537; *Louisville, etc., R. Co. v. Howerton*, 115 Ky. 89; *Carr v. St. Clair Tunnel Co.*, 131 Mich. 592; *Southern R. Co. v. McLellan*, 80 Miss. 700; *Smith v. Fordyce*, 190 Mo. 1; *Heiss v. Lancaster*, 203 Pa. St. 260; *Carr v. American Locomotive Co.*, 26 R. I. 180; *Collins v. George*, 102 Va. 509; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25.

525. 1. *Central of Georgia R. Co. v. Martin*, 138 Ala. 531; *Northern Alabama R. Co. v. Mansell*, 138 Ala. 548; *Chicago, etc., R. Co. v. Harrington*, 192 Ill. 9; *Schroeder v. Chicago, etc., R. Co.*, (Iowa 1905) 103 N. W. Rep. 985; *Jenks v. Thompson*, 179 N. Y. 20; *O'Leary v. Erie R. Co.*, 169 N. Y. 289; *Scheider v. American Bridge Co.*, 78 N. Y. App. Div. 163; *Devaney v. Degnon-McLean Constr. Co.*, 70 N. Y. App. Div. 62, affirmed 178 N. Y. 620; *Fritz v. Western Union Tel. Co.*, 25 Utah 263; *Crocker v. Pacific Lounge, etc., Co.*, 34 Wash. 191, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 524.

Evidence of Proper Manner of Performance. — *Pittsburgh, etc., R. Co. v. Lamphere*, (C. C. A.) 137 Fed. Rep. 20; *Waterhouse v. Jos. Schlitz Brewing Co.*, 16 S. Dak. 592. But see *Conner v. Fleer*, 28 Pa. Co. Ct. 409, holding that the ordinary usage of the business is "the test to disprove negligence, not to prove it."

2. Negotiable Instrument — Definition. — *Joergenson v. Joergenson*, 28 Wash. 477.

3. Broad Sense. — See *Meyer v. Weber*, 133 Cal. 681.

Negotiable Words — Order or Bearer. — *Ellis v. Hahn*, 29 Tex. Civ. App. 395.

527. NEIGHBORHOOD. — See notes 3, 4.

528. NEPHEW — NIECE. — See note 2.

529. NET. — See note 2.

530. NET PROCEEDS. — See note 3.

531. NEW. — See note 3.

527. 3. Neighborhood. — *Madison v. Morristown Gaslight Co.*, 65 N. J. Eq. 356.

Neighborhood Road. — Where a road runs from one public road across to another public road, and all the people travel it for all purposes generally, it is often called a *neighborhood road*. *Kirby v. Southern R. Co.*, 63 S. Car. 494.

4. Not Arbitrary Term. — *State v. Meek*, 26 Wash. 405.

Neighborhood and Vicinity Compared. — *Wilson v. Ford*, 190 Ill. 614.

528. 2. Primary Meaning. — *Willard v. Darrah*, 168 Mo. 660; *Harrison's Estate*, 202 Pa. St. 331.

529. 2. Net. — *Gibbs v. People's Nat. Bank*, 198 Ill. 307.

530. 3. Net Proceeds. — *Dallas County v. Club Land, etc., Co.*, 95 Tex. 200.

531. 3. By New Acquisition is meant an estate which the intestate has acquired by his own exertions and industry, or by will or deed of a stranger to his blood. *Frick Coke Co. v. Laughead*, 203 Pa. St. 168.

New Street. — *Property Exch. v. Wandsworth Board of Works*, (1902) 2 K. B. 61; *Clerkenwell Vestry v. Edmondson*, (1902) 1 K. B. 336; *Devonport v. Tozer*, (1902) 2 Ch. 182, *affirmed* (1903) 1 Ch. 759.

NEWSPAPERS.

533. I. DEFINITION. — See note 1.

II. LEGAL PAPER, ETC. — See note 2.

534. NEW TRIAL. — See note 1.

NEXT. — See note 2.

535. Computation of Time. — See note 1.

The Phrases "Next Session," "Next Term" and the Like. — See note 2.

533. 1. Newspaper. — *Puget Sound Pub. Co. v. Times Printing Co.*, 33 Wash. 551, *quoting* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 533; *Hall v. Milwaukee*, 115 Wis. 479, *quoting* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 533. See also *Kansas City v. Overton*, 68 Kan. 560; *Turney v. Blomstrom*, 62 Neb. 616; *U. S. Mortgage, etc., Co. v. Marquam*, 41 Oregon 391.

2. Legal Newspaper. — *Turney v. Blomstrom*, 62 Neb. 616; *Puget Sound Pub. Co. v. Times Printing Co.*, 33 Wash. 551.

534. 1. New Trial. — *Mobile Light, etc., Co. v. Hansen*, 135 Ala. 284; *Dossett v. St. Paul, etc., Lumber Co.*, 28 Wash. 618.

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2. Next Election. — *State v. Kiewel*, 86 Minn. 136.

Next Port. — In *Bullock v. White Star Steamship Co.*, 30 Wash. 448, the court said: "The *next port reached*' clearly means the port beyond the place of destination reasonably near on the line of voyage."

535. 1. Computation of Time — Intention Governs. — *Daly v. Concordia F. Ins. Co.*, 16 Colo. App. 349.

2. Next Term — Whether General or Special. — *Stultz v. Pratt*, 103 Va. 536.

Next Term Excludes Current Term from computation. *State v. Breaw*, 45 Oregon 586.

NEXT OF KIN.

- 537.** I. DEFINITION. — See note 1.
538. II. BLOOD RELATIONS. — See notes 3, 5.
539. III. STATUTE OF DISTRIBUTIONS. — See note 1.
540. IV. PERIOD AT WHICH NEXT OF KIN ARE TO BE ASCERTAINED. — See note 1.

NIGHT — NIGHT-TIME. — See note 4.

- 541.** NIL DICIT. — See note 3.

NO. — See note 6.

- 543.** NOLO CONTENDERE. — See note 1.

NOMINAL. — See note 3.

NOMINAL DAMAGES. — See note 4.

NOMINAL PARTNERS. — See note 5.

- 544.** NON COMPOS — NON COMPOS MENTIS. — See note 5.

- 545.** NONFEASANCE. — See note 4.

NONNEGOTIABLE. — See note 6.

- 546.** NON OBSTANTE VEREDICTO. — See note 1.

- 547.** NONSUIT — Definition. — See note 5.

Voluntary and Involuntary Nonsuits. — See note 8.

- 548.** NONTTEXTILE. — See note 6.

- 550.** NOSCITUR A SOCIIS. — See note 1.

NOT. — See note 2.

537. 1. Definition. — *Graham v. Whitridge*, 99 Md. 289, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 537.

538. 3. Adopted Child. — See *Van Derlyn v. Mack*, (Mich. 1904) 100 N. W. Rep. 278.

5. Husband and Wife Not Next of Kin. — *Matter of Devoe*, 171 N. Y. 281, affirming 66 N. Y. App. Div. 1; *Tiffany v. Emmet*, 24 R. I. 411.

539. 1. Next of Kin According to Statute of Distributions — Equivalent to Distributees. — *Lusby v. Cobb*, 80 Miss. 715; *Duffy v. Hargan*, 63 N. J. Eq. 802, affirming 62 N. J. Eq. 588; *May v. Lewis*, 132 N. Car. 117, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 539.

540. 1. Date of Death. — *Arnot v. Arnot*, 75 N. Y. App. Div. 234, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 540.

4. Night-time. — *Petit v. Colmery*, 4 Penn. (Del.) 271.

Night-time in a burglary statute held to mean period between sunset and sunrise. *State v. Miller*, 24 Utah 312.

541. 3. Nil Dicit — Judgments. — *Morgan-town Second Nat. Bank v. Ralphsnyder*, 54 W. Va. 234, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 541.

6. No Evidence Equivalent to Insufficient Evidence. — *Cassidy v. Uhlmann*, 170 N. Y. 505.

543. 1. Nolo Contendere. — *State v. La Rose*, 71 N. H. 435.

3. Nominal Horse Power of Boiler. — *Francis*

v. Heine Safety-Boiler Co., 112 Fed. Rep. 899, affirmed (C. C. A.) 117 Fed. Rep. 235.

4. Nominal Damages. — *Maher v. Wilson*, 139 Cal. 514; *Armstrong v. Rhoads*, 4 Penn. (Del.) 151.

5. Nominal Partner. — See *In re Swift*, 118 Fed. Rep. 348.

544. 5. Total Deprivation. — *Jacks v. Estes*, 139 Cal. 507.

545. 4. Nonfeasance. — *Dudley v. Flemingsburg*, 115 Ky. 5; *Com. v. Boyle County Fiscal Ct.*, 113 Ky. 325.

6. Nonnegotiable. — *National Bank v. Baltimore, etc.*, R. Co., 99 Md. 675, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 675.

546. 1. Non Obstante Veredicto. — *Hill v. Ragland*, 114 Ky. 209.

547. 5. Nonsuit — Definition. — *Kelly v. Strouse*, 116 Ga. 872; *Deeley v. Heintz*, 169 N. Y. 129.

8. Voluntary and Involuntary. — *Deeley v. Heintz*, 169 N. Y. 129.

548. 6. Nontextile Factory. — *Hoare v. Truman*, 86 L. T. N. S. 417 (beer bottling plant).

550. 1. Noscitur a Sociis. — *Foster v. Monroe*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 452, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 550; *Latimer v. Sovereign Camp Woodmen of the World*, 62 S. Car. 145.

2. Not Less. — *McQueen v. Jackson*, (1903) 2 K. B. 163.

NOTARY PUBLIC.

By H. O'B. COOPER.

- 555.** III. NATURE OF OFFICE — 1. Public. — See note 9.
- 556.** 2. Ministerial Functions. — See note 1.
- 557.** IV. APPOINTMENT — 5. Holding Incompatible Office. — See note 11.
- 558.** VII. BOND — 1. Statutory Requirements. — See note 2.
- VIII. JURISDICTION — 2. Jurisdiction Throughout State. — See note 7.
3. Jurisdiction Confined to County. — See note 8.
- 559.** 5. Presumption as to Jurisdiction. — See note 2.
- IX. SEAL — 2. Requisites and Sufficiency — *a.* HOW DETERMINED — (1) *By Law of Notary's Domicil.* — See note 5.
- 560.** *b.* STATUTORY REQUIREMENTS — A Substantial Compliance. — See note 2.
3. Acts Requiring Seal. — See note 6.
- 561.** 6. Effect — As Evidence of Official Character of Foreign Notary. — See note 8.
- 562.** X. POWERS — 2. Under Federal Statutes — *b.* TO ADMINISTER OATHS AND TAKE AFFIDAVITS — (1) *General Authority.* — See note 5.
- 564.** 3. Under State Statutes — *b.* TO TAKE ACKNOWLEDGMENTS — (2) *Notaries of Other States.* — See note 8.
- 565.** *c.* TO TAKE AFFIDAVITS — (1) *In General.* — See note 1.
- (2) *Notaries of Other States.* — See note 2.
- 566.** *d.* TO TAKE DEPOSITIONS — (1) *Authority in General* — (a) Domestic Notaries — For Use Within State. — See note 1.
- (b) *Notaries of Other States.* — See notes 3, 5.
- Presumptions. — See note 6.
- 555.** 9. Public Office. — Bettman *v.* Warwick, (C. C. A.) 108 Fed. Rep. 46; Midland Steel Co. *v.* Citizens Nat. Bank, 34 Ind. App. 107; Stork *v.* American Surety Co., 109 La. 713.
- 556.** 1. Ministerial Officer. — Sackett *v.* McCaffrey, (C. C. A.) 131 Fed. Rep. 219.
- Administrative and Judicial Duties. — See Bettman *v.* Warwick, (C. C. A.) 108 Fed. Rep. 46.
- Taking Affidavit of Renewal of Mortgage. — See Fair *v.* Citizens' State Bank, 70 Kan. 612.
- 557.** 11. Incompatible Offices — *Notary and Judge.* — Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101.
- 558.** 2. Purpose of Bond. — See Stork *v.* American Surety Co., 109 La. 713.
7. General Jurisdiction Throughout State. — Lamb *v.* Lamb, (Mich. 1905) 102 N. W. Rep. 645.
3. Jurisdiction Limited to County. — Evans *v.* Dickenson, (C. C. A.) 114 Fed. Rep. 284 (a case arising under the Florida statute); Schiff *v.* Leipziger Bank, 65 N. Y. App. Div. 33.
- 559.** 2. Jurisdiction Presumed. — Black *v.* Minneapolis, etc., R. Co., 122 Iowa 32.
5. Law of Domicil Controls. — See Ramsay *v.* People, 197 Ill. 594.
- 560.** 2. Substantial Compliance Sufficient. — See Baskowitz *v.* Guthrie, 99 Mo. App. 304; Criffin *v.* Catlin, 25 Wash. 474, 87 Am. St. Rep. 782.
6. Seal Necessary. — Koch *v.* West, 118 Iowa 468, 96 Am. St. Rep. 394.
- 561.** 8. Seal Prima Facie Evidence. — *In re* Pancoast, 129 Fed. Rep. 643, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 561; Midland Steel Co. *v.* Citizens Nat. Bank, 34 Ind. App. 107; Yarnal *v.* Hupp, (Neb. 1902) 90 N. W. Rep. 645.
- 562.** 5. Powers as to Oaths and Affidavits. — See Simpson *v.* Wicker, 120 Ga. 418.
- 564.** 8. Power of Nonresident Notaries. — Ramsay *v.* People, 197 Ill. 594.
- 565.** 1. Statutory Provisions. — See Simpson *v.* Wicker, 120 Ga. 418; Midland Steel Co. *v.* Citizens Nat. Bank, 34 Ind. App. 107; People *v.* Martin, 175 N. Y. 315, 96 Am. St. Rep. 628.
- Affidavit of Chattel Mortgagor. — See Campbell *v.* State, 43 Tex. Crim. 602.
2. Nonresident Notaries. — See Simpson *v.* Wicker, 120 Ga. 418, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 565; Browne *v.* Palmer, 66 Neb. 287; Manheimer *v.* Dash, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 857.
- 566.** 1. Power of Domestic Notaries to Take Depositions. — See Olmsted *v.* Edson, (Neb. 1904) 98 N. W. Rep. 415.
3. Powers of Nonresident Notaries as to Depositions. — Midland Steel Co. *v.* Citizens Nat. Bank, 34 Ind. App. 107.
5. Compare Midland Steel Co. *v.* Citizens Nat. Bank, 34 Ind. App. 107.
6. Authority of Nonresident Notary Not Presumed. — Midland Steel Co. *v.* Citizens Nat. Bank, 34 Ind. App. 107.

566. (2) *Enforcement of Authority*—(b) *By Attachment for Contempt*.—See note 10.

567. *c. TO ADMINISTER OATHS*—(1) *In General*.—See notes 4, 5.

(2) *What Oaths May Be Administered*.—See note 6.

(3) *Notaries of Other States*—*Presumption as to Authority*.—See note 9.

568. **XI. JUDICIAL NOTICE**.—See note 9.

XII. DISQUALIFICATIONS—1. **Interest**—*a. IN GENERAL*.—See note 11.

569. *c. TO TAKE ACKNOWLEDGMENTS*—*Illustrations*.—See notes 5, 6, 8.

Stockholders in Corporations.—See note 10.

Officers of Corporations.—See note 11.

Clerks in Corporations.—See note 12.

570. *Agents or Attorneys of Parties*.—See note 2.

d. TO TAKE AFFIDAVITS—(1) *When Acting as Attorney*—(a) *View that Notary Is Disqualified*.—See note 5.

Restrictions on Rule.—See note 6.

571. (2) *When Employee of Party Interested*.—See note 4.

566. 10. *Refusal to Answer Incompetent or Irrelevant Questions*.—*Ex p. Turner*, 11 Ohio Dec. 251, 8 Ohio N. P. 241.

Ohio Statute Authorizes Notary to Punish for Contempt.—*Ex p. Miller*, 11 Ohio Dec. 69, 8 Ohio N. P. 142.

Ohio Statute Authorizes Punishment for Contempt for Disobedience to Subpoena Duces Tecum.—*Ex p. Miller*, 11 Ohio Dec. 69, 8 Ohio N. P. 142, *overruling In re Sims*, 4 Ohio Dec. (Reprint) 473, 2 Cleve. L. Rep. 210, 4 Cinc. L. Bul. 457, 7 Ohio Dec. (Reprint) 633; *In re Rauh* 65 Ohio St. 128.

Superior Court May Punish for Contempt Before Notary.—*Burns v. Superior Ct.*, 140 Cal. 1, *overruling Lezinsky v. Superior Ct.*, 72 Cal. 510.

567. 4. *Power Statutory*.—*Midland Steel Co. v. Citizens Nat. Bank*, 34 Ind. App. 107; *Fawcett v. Chicago, etc., R. Co.*, 113 Tenn. 246, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 567, and holding that a foreign notary had no authority to administer a pauper oath.

5. *Authority Conferred by Statute*.—*Midland Steel Co. v. Citizens Nat. Bank*, 34 Ind. App. 107; *Neuhauser v. Banish*, 84 Minn. 286; *Campbell v. State*, 43 Tex. Crim. 602.

6. *Administration of Oaths*.—See *Campbell v. State*, 43 Tex. Crim. 602.

Oaths Required by the Quebec Municipal Code may be taken before a notary. *Mondoux v. Corporation, etc.*, 22 Quebec Super. Ct. 148.

Notary May Administer Oath Required by Ordinance.—*State v. Scatena*, 84 Minn. 281.

9. *No Presumption Arises*.—*Midland Steel Co. v. Citizens Nat. Bank*, 34 Ind. App. 107.

568. 9. *Judicial Notice*.—*Black v. Minneapolis, etc., R. Co.*, 122 Iowa 32. See also *People v. Martin*, (Ct. Gen. Sess.) 38 Misc. (N. Y.) 67, *reversed* on other grounds 77 N. Y. App. Div. 396, 175 N. Y. 315.

11. *Disqualification to Act*.—*State v. Chatterton*, 11 Wyo. 1, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 568.

Appeal Bond—Principal May Take Affidavit of Surety.—*McLean v. Roller*, 33 Wash. 166.

569. 5. *Person Beneficially Interested in Deed of Trust*.—*Russell v. Bosworth*, 106 Ill. App. 314; *Lance v. Tainter*, 137 N. Car. 249.

6. *Farmers, etc., Bank v. Stockdale*, 121 Iowa 748.

8. *Member of Partnership*.—*Farmers, etc., Bank v. Stockdale*, 121 Iowa 748.

10. *Stockholder in Corporation*.—*Farmers Sav., etc., Assoc. v. Greenwood*, 137 Ala. 257; *Jenkins v. Jonas Schwab Co.*, 138 Ala. 664; *Ogden Bldg., etc., Assoc. v. Mensch*, 196 Ill. 559; *Steger v. Traveling Men's Bldg., etc., Assoc.*, 208 Ill. 236, 100 Am. St. Rep. 225; *Fugman v. Jiri Washington Bldg., etc., Assoc.*, 209 Ill. 176; *Chadron Loan, etc., Assoc. v. O'Linn*, (Neb. 1901) 95 N. W. Rep. 368; *Sheridan First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925. *Contra*, *Read v. Toledo Loan Co.*, 68 Ohio St. 280, 96 Am. St. Rep. 663, *affirming* 23 Ohio Cir. Ct. 25.

11. *Officer of Corporation*.—*Farmers, etc., Assoc. v. Greenwood*, 137 Ala. 257; *Jenkins v. Jonas Schwab Co.*, 138 Ala. 664; *Ogden Bldg., etc., Assoc. v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330; *Steger v. Traveling Men's Bldg., etc., Assoc.*, 208 Ill. 236, 100 Am. St. Rep. 225; *Fugman v. Jiri Washington Bldg., etc., Assoc.*, 209 Ill. 176; *Keene Guaranty Sav. Bank v. Lawrence*, 32 Wash. 572; *Sheridan First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925.

12. *Employee in Private Bank*.—*Banking House v. Stewart*, (Neb. 1904) 98 N. W. Rep. 34.

570. 2. *Attorney of Party*.—*Ogden Bldg., etc., Assoc. v. Mensch*, 196 Ill. 559.

5. *Attorney for Party Disqualified to Take Affidavit*.—*Moultrie Lumber Co. v. Jenkins*, 121 Ga. 721.

Michigan Statute.—*Thomas E. Lynch Co. v. Wayne Circuit Judge*, 129 Mich. 110.

6. *An Affidavit of Renewal of Chattel Mortgage* in favor of a corporation after it is received and filed by the register of deeds of a county is not void, so as not to impart constructive notice of the lien of the mortgage, by reason of the fact that the affidavit is sworn to by an officer of the corporation before a notary who is an officer and stockholder in the corporation. *Fair v. Citizens' State Bank*, 70 Kan. 612.

571. 4. *Employee of Party*.—See *Fair v. Citizens' State Bank*, 70 Kan. 612.

571. *f.* TO ADMINISTER OATHS. — See note 6.

572. XIII. LIABILITIES — 1. Civil Liability — *a.* IN GENERAL — Statutory Provisions. — See note 3.

d. FOR MAKING FALSE CERTIFICATE OF ACKNOWLEDGMENT. — See note 10.

573. *g.* FOR FAILURE TO PERFORM DUTIES IN REGARD TO NEGOTIABLE PAPER — (3) *Notice of Protest or Dishonor* — (a) IN GENERAL. — See note 8.

575. *j.* ACTIONS — (4) *Limitations*. — See note 1.

XV. NOTARIAL ACTS AS EVIDENCE — 1. IN GENERAL — In Connection with All Commercial Affairs. — See note 9.

2. Official Certificates — *a.* STATUTORY PROVISIONS. — See note 10.

576. *c.* CERTIFICATE OF PROTEST. — See note 1.

XVI. FEES — 1. STATUTORY PROVISIONS. — See note 4.

577. XIX. DE FACTO NOTARIES — 2. Validity of Acts. — See note 10.

578. XX. OTHER OFFICERS AS NOTARIES. — See note 1.

NOTE. — See note 3.

571. 6. Attorney for Party Disqualified to Administer Oath. — *Thomas' E. Lynch Co. v. Wayne Circuit Judge*, 129 Mich. 110 (by statute).

572. 3. See *Stork v. American Surety Co.*, 109 La. 713.

10. Measure of Damages. — *Mahoney v. Dixon* 31 Mont. 107.

573. 8. Failure to Give Notice of Protest. — *Williams v. Parks*, 63 Neb. 747.

575. 1. Fraudulent Concealment. — Where a notary fraudulently conceals a false acknowledgment, certified by him, the running of the statute of limitations is postponed until discovery of the fraud. *State v. Hawkins*, 103 Mo. App. 251.

Missouri Statute — From Accrual of Cause of Action. — *State v. Hawkins*, 103 Mo. App. 251.

9. A Notary Should Not Be Allowed to Impeach His Certificate of acknowledgment, which constitutes his official statement and declaration, made at the time of his act, as to the truth and accuracy thereof. *Hailey First Nat. Bank v. Glenn*, 10 Idaho 224.

Grantor's Unsupported Testimony Insufficient to Disprove. — *Gritten v. Dickerson*, 202 Ill. 372.

10. Statutory Provisions. — *Ramsay v. People*, 197 Ill. 594; *Midland Steel Co. v. Citizens Nat. Bank*, 34 Ind. App. 107; *Baskowitz v. Guthrie*, 99 Mo. App. 304; *Union Safe Deposit Bank v. Strauch*, 20 Pa. Super. Ct. 196.

576. 1. Protest. — See *Williams v. Parks*, 63 Neb. 747.

4. Ordinance Depriving City Officer of Fees Void. — *Wood v. Kansas City*, 162 Mo. 303.

577. 10. Acts of De Facto Notary Valid. — *Schiff v. Leipziger Bank*, 65 N. Y. App. Div. 33, wherein the notary had failed to file the required certificate of qualification; *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101, a case of a notary accepting an incompatible office.

578. 1. Consuls. — *Browne v. Palmer*, 66 Neb. 287.

3. Orders — Notes Used for Circulation. — See *Martin-Alexander Lumber Co. v. Johnson*, 70 Ark. 215.

NOTICE.

BY H. N. ELDRIDGE.

581. II. CLASSIFICATION AND DEFINITIONS — 2. Definitions — *a.* GENERAL DEFINITION. — See note 4.

b. ACTUAL NOTICE. — See note 5.

582. *c.* CONSTRUCTIVE NOTICE. — See note 1.

581. 4. Notice Defined. — *Kirklin v. Atlas Sav., etc., Assoc.*, (Tenn. Ch. 1900) 60 S. W. Rep. 149. See also *Cheney v. State*, (Ind. 1905) 74 N. E. Rep. 892.

"Notice" and "Knowledge" Are Not Synonymous Terms. — *Osborne v. Alabama Steel, etc., Co.*, 135 Ala. 571; *Southern R. Co. v. Bunt*, 131 Ala. 591.

5. Actual Notice Defined. — *Fuller v. McMahon*, (Iowa 1903) 94 N. W. Rep. 205.

Knowledge and Actual Notice Held Not Syn-

onymous. — *Kirkhan v. Moore*, 30 Ind. App. 553 [citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 581]; *Merrill v. Pacific Transfer Co.*, 131 Cal. 582; *Schnavely v. Bishop*, 8 Kan. App. 301; *Kirklin v. Atlas Sav., etc., Assoc.*, (Tenn. Ch. 1900) 60 S. W. Rep. 149; *Clark v. Sayers*, 55 W. Va. 512.

"Express" or "Implied" Actual Notice. — See also *Pope v. Nichols*, 61 Kan. 230.

582. 1. Constructive Notice Defined. — *Fuller v. McMahon*, (Iowa 1903) 94 N. W. Rep. 205;

583. III. NATURE AND SUFFICIENCY OF NOTICE — 2. Notice by Direct Communication — *b.* NOTICE REQUIRED BY STATUTE. — See note 3.

584. 3. Notice Implied from Circumstances — *a.* GENERAL RULE. — See note 1.

585. *b.* QUALIFICATIONS OF RULE — Reasonable Time to Be Allowed for Making Inquiries. — See note 2.

586. *c.* SUFFICIENCY OF CIRCUMSTANCES — (3) *Notoriety of Fact.* — See note 4.

589. 5. When Notice Is Question of Fact and When Question of Law — *a.* HOW NOTICE ESTABLISHED — (1) *General Rule.* — See note 3.

590. *c.* WHEN INFERENCE OF NOTICE BECOMES CONCLUSIVE. — See note 2.

Keen *v.* Havre de Grace, 93 Md. 34; Kirklin *v.* Atlas Sav., etc., Assoc., (Tenn. Ch. 1900) 60 S. W. Rep. 149.

583. 3. Notice Required by Statute Must Be Personal. — Williams *v.* Dittenhoefer, 188 Mo. 144, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 583; Dalton *v.* St. Louis, etc., R. Co., 113 Mo. App. 71, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 583; K. B. Co. *v.* Batie, 25 Ohio Cir. Ct. 486, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 583; Hari *v.* Ohio Tp., 62 Kan. 315.

584. 1. Whatever Puts Person upon Inquiry Is Sufficient Notice. — Kenniff *v.* Caulfield, 140 Cal. 46, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 584; De Camp *v.* Wallace, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 439, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 584; U. S. *v.* Detroit Timber, etc., Co., (C. C. A.) 131 Fed. Rep. 668; Parker *v.* Parker, (N. J. 1904)

56 Atl. Rep. 1094; Webb *v.* John Hancock Mut. L. Ins. Co., 162 Ind. 616; Tabor Street (No. 1), 26 Pa. Super. Ct. 167; Clark *v.* Sayers, 55 W. Va. 512. See also Blair *v.* Whittaker, 31 Ind. App. 664.

585. 2. See Hadaway *v.* Smedley, 119 Ga. 270, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 585.

586. 4. Notoriety of Fact Held Admissible. — Dallas *v.* Moore, 32 Tex. Civ. App. 235, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 586; Wright *v.* Stewart, 130 Fed. Rep. 905.

589. 3. Notice Fact to Be Established by Direct or Circumstantial Evidence. — Henry C. Werner *Co. v.* Calhoun, 55 W. Va. 246.

590. 2. Inference of Notice Conclusive. — Jeffray *v.* Towar, 63 N. J. Eq. 542, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590; Prewitt *v.* Prewitt, 188 Mo. 675.

NOTICE OF PENDENCY AND LIS PENDENS.

BY ALFRED PIZEY.

594. I. TERMINOLOGY AND SCOPE OF TITLE — 2. Lis Pendens. — See notes 5, 6, 8, 9.

595. II. DOCTRINE GENERALLY — 1. Statement of Rule. — See note 1.

596. 2. Reasons Assigned for Rule — *a.* EQUITABLE NOTICE — (1) *In General.* — See note 1.

594. 5. Lis Pendens Means "Pending Suit." — Noyes *v.* Crawford, 118 Iowa 15, 96 Am. St. Rep. 363.

6. Lis Pendens No Application to Mere Dispute in Pais. — Noyes *v.* Crawford, 118 Iowa 15, 96 Am. St. Rep. 363.

8. Thus, etc. — Conner *v.* Pozo, 114 La. 562; McNeile's Estate, 14 Pa. Dist. 299, 31 Pa. Co. Ct. 519.

9. Lis Pendens and Maxim Pendente Lite Nihil Innovetur. — Powell *v.* National Bank of Commerce, 19 Colo. App. 57, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 594; Clergue *v.* McKay, 6 Ont. L. Rep. 51, affirmed 8 Ont. L. Rep. 84.

595. 1. Purchaser Pendente Lite Bound by Judgment or Decree. — Hargrove *v.* Cherokee Nation, (C. C. A.) 129 Fed. Rep. 186, affirming 4 Indian Ter. 129, citing 21 AM. AND ENG.

ENCYC. OF LAW (2d ed.) 595; Di Nola *v.* Allison, 143 Cal. 106, 101 Am. St. Rep. 84; Powell *v.* National Bank of Commerce, 19 Colo. App. 57, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 595; Rubel *v.* Title Guarantee, etc., Co., 101 Ill. App. 439, affirmed 199 Ill. 110; Sinclair *v.* Auxiliary Realty Co., 99 Md. 223; Martin *v.* Abbott, (Neb. 1904) 100 N. W. Rep. 142; Bergman *v.* Inman, 43 Oregon 456, 99 Am. St. Rep. 771; Hicks *v.* Porter, (Tex. Civ. App. 1905) 85 S. W. Rep. 437; Virginia Iron, etc., Co. *v.* Roberts, 103 Va. 661.

Right of Purchaser Pendente Lite to Be Heard. — Hibernia Sav., etc., Soc. *v.* Cochran, 141 Cal. 653.

596. 1. Discussed as Phase of Law of Notice. — Joslyn *v.* Schwend, 89 Minn. 71; West Mis-sabe Land Co. *v.* Berg, 92 Minn. 2; Martin *v.* Abbott, (Neb. 1904) 100 N. W. Rep. 142.

597. (2) *Lis Pendens and Notice Distinguished.* — See note 1.

598. By the *Lis Pendens*. — See notes 3, 4, 5.

600. (4) *How Far Lis Pendens Coextensive with Notice.* — See note 2.

602. *d.* LAW OF RES JUDICATA. — See note 2.

603. See notes 1, 2, 4.

604. 3. *Origin and History* — *a.* LIS PENDENS, SALE OF LITIGIOUS RIGHTS, AND CHAMPERTY — (2) *Under Modern Law* — (*a*) *Sale of Litigious Rights.* — See note 4.

605. See note 1.

b. LAW AND CHANCERY — (1) *In General.* — See note 7.

606. (3) *Lord Bacon's Ordinance.* — See notes 3, 4.

607. III. COMMENCEMENT, CONTINUITY, AND TERMINATION OF LIS PENDENS

— 1. *Requisites in General.* — See notes 2, 3.

608. See notes 1, 2.

597. 1. *Purchaser with Notice Bound by Judgment or Decree.* — *Di Nola v. Allison*, 143 Cal. 106, 101 Am. St. Rep. 84, citing *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Powell v. National Bank of Commerce*, 19 Colo. App. 57. *Actual Notice.* — *Martin v. Abbott*, (Neb. 1904) 100 N. W. Rep. 142.

598. 3. *Lis Pendens Notice of Facts Contained in Pleadings and Exhibits.* — *Davis v. Miller Signal Co.*, 105 Ill. App. 657.

4. *Lis Pendens Notice of Material Facts of Which Suit Furnishes Means of Information.* — *Johnson v. McKay*, 121 Ga. 763. See also *King v. Davis*, 137 Fed. Rep. 222.

5. *Lis Pendens Not Notice of Collateral Matters.* — *Goodwynne v. Bellerby*, 116 Ga. 901; *Bristow v. Thackston*, 187 Mo. 332, 106 Am. St. Rep. 472, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 598; *Virginia Iron, etc., Co. v. Roberts*, 103 Va. 661.

600. 2. *Interests Acquired Pendente Lite Without Notice and for Value Affected by Lis Pendens.* — *Wells v. Goss*, 110 La. 347; *Tice v. Hamilton*, 188 Mo. 298.

Want of actual notice is immaterial where there is notice by *lis pendens*. The very purpose of the rule is to charge with notice in law where there is no notice in fact. *Johnson v. McKay*, 121 Ga. 763. And see *Kelley v. Culver*, 116 Ky. 241.

602. 2. *Lis Pendens an Arbitrary Rule of Law Necessary to Render Judgments and Decrees Effective.* — *Hargrove v. Cherokee Nation*, (C. C. A.) 129 Fed. Rep. 186, affirming 4 Indian Ter. 129; *Farmers' L. & T. Co. v. Meridian Waterworks Co.*, 139 Fed. Rep. 661; *Farmers Bank v. Frankfort First Nat. Bank*, 30 Ind. App. 520; *Rothschild v. Leonhard*, 33 Ind. App. 452; *Sinclair v. Auxiliary Realty Co.*, 99 Md. 223; *Merrill v. Wright*, 65 Neb. 794, 101 Am. St. Rep. 645; *Virginia Iron, etc., Co. v. Roberts*, 103 Va. 661; *Syndicat Lyonnais v. McGrade*, 36 Can. Sup. Ct. 251; *Peck v. Sun L. Assur. Co.*, 11 British Columbia 215; *Clergue v. McKay*, 6 Ont. L. Rep. 61, affirmed 8 Ont. L. Rep. 84, citing *Bellamy v. Sabine*, 1 De G. & J. 566.

Immaterial Whether Rule Called One of Notice or of Public Policy. — *Noyes v. Crawford*, 118 Iowa 15, 96 Am. St. Rep. 363.

603. 1. *Judgments and Decrees Res Judicata as to Purchasers Pendente Lite as Well as Parties and Privies.* — *Wetzstein v. Boston, etc., Consol. Copper, etc., Min. Co.*, 28 Mont. 451, citing 21

AM. AND ENG. ENCYC. OF LAW (2d ed.) 602; *Lockhart v. Leeds*, (N. Mex. 1904) 76 Pac. Rep. 312.

2. *Lis Pendens Purchaser Privy.* — *Wetzstein v. Boston, etc., Consol. Copper, etc., Min. Co.*, 28 Mont. 451, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 602; *Lockhart v. Leeds*, (N. Mex. 1904) 76 Pac. Rep. 312.

4. *Effect of Fraudulent or Collusive Decree.* — *Hibernia Sav., etc., Soc. v. Cochran*, 141 Cal. 653; *Jones v. Robb*, 35 Tex. Civ. App. 263.

604. 4. *Purchase of Litigious Rights by Public Officers* — *French Law* — *Louisiana.* — The purchase of property in litigation is the purchase of a litigious right, and is prohibited by article 2447, Civil Code. *Wells v. Goss*, 110 La. 347.

605. 1. *Sale of Litigious Rights Not Generally Null and Void, but May Be Affected by Lis Pendens.* — *State v. New Orleans Warehouse Co.*, 109 La. 64.

7. *Lis Pendens Originated at Common Law and Applies to Both Legal and Equitable Proceedings.* — *Bristow v. Thackston*, 187 Mo. 332, 106 Am. St. Rep. 472, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 605.

606. 3. *Lis Pendens Applied in Chancery Before Lord Bacon's Ordinance.* — *Bristow v. Thackston*, 187 Mo. 332, 106 Am. St. Rep. 472, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 605.

4. *Lord Bacon's Ordinance.* — *Syndicat Lyonnais v. McGrade*, 36 Can. Sup. Ct. 251.

607. 2. *Only Cases Within Reasons for Existence of Law of Lis Pendens.* — *Virginia Iron, etc., Co. v. Roberts*, 103 Va. 661.

3. *Slips and Irregularities in the Conduct of the Suit.* — *Kelley v. Culver*, 116 Ky. 241.

608. 1. *Character of Suit* — *Property* — *Jurisdiction* — *Alabama.* — *Moragne v. Moragne*, (Ala. 1905) 39 So. Rep. 161.

Arkansas. — *Rogers v. Winds Lumber Co.*, (Ark. 1904) 80 S. W. Rep. 584.

California. — *McLean v. Baldwin*, 136 Cal. 565.

Georgia. — *Goodwynne v. Bellerby*, 116 Ga. 901; *Mashburn v. Dannenberg Co.*, 117 Ga. 567; *Johnson v. McKay*, 121 Ga. 763.

Illinois. — *Davis v. Miller Signal Co.*, 105 Ill. App. 657.

Kentucky. — *Kelley v. Culver*, 116 Ky. 241; *Graham v. Kitchen*, 80 S. W. Rep. 464, 25 Ky. L. Rep. 2224.

- 609.** 2. Commencement of Lis Pendens—*a.* TRANSFERS BY DEFENDANTS—
 —(1) *Early Rules.* — See note 4.
610. (2) *Statute 4 Anne, c. 16, § 22* — (a) *In General.* — See notes 1, 2.
611. See note 1.
 (b) *Voluntary Appearance — Publication of Service.* — See notes 4, 5.
 (3) *Lis Pendens Statutes* — (a) *General Laws.* — See note 7.
612. See note 1.
613. (b) *Notice of Pendency Statutes* — *aa.* STATUTORY PROVISIONS. — See notes 1, 2.
bb. PURPOSE AND GENERAL SCOPE OF STATUTES. — See note 5.
614. “Purchasers or Incumbrancers.” — See note 2.
615. *cc.* FILING OF PLEADINGS. — See note 2.
dd. SERVICE OF PROCESS. — See notes 4, 5.

Nebraska. — Hillebrand *v.* Nelson, (Neb. 1901) 95 N. W. Rep. 1068.

Ohio. — Caldwell Bldg. Loan Assoc. *v.* Bigley, 25 Ohio Cir. Ct. 431.

Texas. — Austin *v.* Lauderdale, (Tex. Civ. App. 1904) 83 S. W. Rep. 413.

West Virginia. — Woods *v.* Douglass, 52 W. Va. 517.

Wisconsin. — Allen *v.* Ellis, 125 Wis. 565.

Filing Notice of Pendency Against Land Not Involved in Suit. — Griffin *v.* Gingell, 79 S. W. Rep. 284, 25 Ky. L. Rep. 2031.

608. 2. What Judgment or Decree Necessary to Lis Pendens. — Davis *v.* Willson, 115 Ky. 639; Allen *v.* Ellis, 125 Wis. 565.

Personal Judgment for Money Instead of One Against Property. — Goodwynne *v.* Bellerby, 116 Ga. 901.

Consent Decrees — Decree for Purchaser Pendente Lite. — See Jones *v.* Robb, 35 Tex. Civ. App. 263.

609. 4. Lis Pendens from Service of Subpœna. — Morgan *v.* Bostic, 132 N. Car. 743.

610. 1. Morgan *v.* Bostic, 132 N. Car. 743, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 609, 610.

2. Pleading on File and Service of Process Necessary to Commencement of Lis Pendens. — Courtney *v.* Henry, 114 Ill. App. 635; Morgan *v.* Bostic, 132 N. Car. 743, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 610; Caldwell Bldg. Loan Assoc. *v.* Bigley, 25 Ohio Cir. Ct. 431.

Amending Return of Service. — King *v.* Davis, 137 Fed. Rep. 222.

611. 1. Action or Suit Lis Pendens from Date of Technical Commencement. — Page *v.* W. W. Chase Co., 145 Cal. 578; Becker *v.* Stroher, 167 Mo. 306. But see *Missouri* cases, 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) p. 610, notes 2 and 3.

4. Voluntary Appearance of Defendant. — Hibernia Sav., etc., Soc. *v.* Cochran, 141 Cal. 653; Powell *v.* National Bank of Commerce, 19 Colo. App. 57, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 611; Jones *v.* Robb, 35 Tex. Civ. App. 263, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 611.

5. Publication of Service. — Fernwood Lumber Co. *v.* Meehan-Rounds Lumber Co., 85 Miss. 54.

Service by Publication Sufficient Though Irregular. — Alabama, etc., R. Co. *v.* Thomas, 86 Miss. 27.

7. Statutes Declaratory of Pre-existing Law. — Security Trust Co. *v.* Root, 72 Ohio St. 535, affirming 25 Ohio Cir. Ct. 614.

Civil Law — Louisiana. — By Act No. 134, Acts 1898, p. 215, notice of pendency of actions concerning immovable property situated within the corporate limits of cities of more than fifty thousand inhabitants is required to be made and recorded. Thomas's Succession, 114 La. 693.

612. 1. Lis Pendens from Time When Petition Filed and Docketed. — Noyes *v.* Crawford, 118 Iowa 15, 96 Am. St. Rep. 363; Cooney *v.* Coppock, 119 Iowa 486.

613. 1. Form and Sufficiency of Various Notices of Pendency. — McLean *v.* Baldwin, 136 Cal. 565.

2. Notice of Pendency Statutes. — Page *v.* W. W. Chase Co., 145 Cal. 578; Joslyn *v.* Schwend, 89 Minn. 71; West Missabe Land Co. *v.* Berg, 92 Minn. 2; Shandley *v.* Levine, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 23; Payson *v.* Jacobs, 38 Wash. 203.

Under the Indiana Statute, 1 Burns's Annot. Stat. Ind. 1901, § 328, a notice is not required where the suit is founded upon an instrument executed by a party to the suit, having the legal title to the real estate, as appears from the proper records of the county, and recorded as required by law. Rothschild *v.* Leonhard, 33 Ind. App. 452.

5. Purpose and General Scope of Statutes. — Page *v.* W. W. Chase Co., 145 Cal. 578; Fernwood Lumber Co. *v.* Meehan-Rounds Lumber Co., 85 Miss. 54; Morgan *v.* Bostic, 132 N. Car. 743; Dow *v.* Ballard, 28 Wash. 87. See also West Missabe Land Co. *v.* Berg, 92 Minn. 2.

Effect of Statutes. — Clergue *v.* McKay, 6 Ont. L. Rep. 51, affirmed 8 Ont. L. Rep. 84.

Penalty for Failure to File Notice. — Haag *v.* Ward, 186 Mo. 325.

614. 2. “Purchasers or Incumbrancers” under Notice of Pendency Statutes. — Fernwood Lumber Co. *v.* Meehan-Rounds Lumber Co., 85 Miss. 54.

615. 2. Notice Filed Before Complaint. — Morgan *v.* Bostic, 132 N. Car. 753, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 615.

4. Service of Process Necessary to Commence Lis Pendens. — H. L. Spencer Co. *v.* Koell, 91 Minn. 226, citing Hokanson *v.* Gunderson, 54 Minn. 499, 40 Am. St. Rep. 354.

616. (4) *Indexing or Recording Notice or Pleadings.* — See note 2.

(5) *Defective Pleadings — Amendments.* — See note 4.

617. See note 2.

b. TRANSFERS BY PLAINTIFFS AND CODEFENDANTS — (1) *In General.* — See note 4.

618. See note 2.

(2) *Notices of Pendency.* — See note 3.

3. Continuity and Termination of Lis Pendens — *a.* UNDER GENERAL LAW — (1) *In General.* — See note 4.

619. (2) *Rights Acquired After Judgment or Decree* — (a) **Under Voluntary Transfers** — *aa.* BEFORE INSTITUTION OF APPELLATE OR OTHER PROCEEDINGS. — See note 3.

620. See note 1.

bb. AFTER APPELLATE OR OTHER PROCEEDINGS ARE INSTITUTED AND PENDING. — See note 2.

cc. BETWEEN ENTRY AND EXECUTION OF FINAL JUDGMENT. — See note 3.

621. *dd.* DISMISSAL WITHOUT TRIAL ON MERITS. — See note 1.

(b) *Under Judicial Sales.* — See note 2.

622. (3) *Failure to Make "Full Prosecution"* — (a) **General Rule.** — See note 2.

Filing Notice Before Service of Process. — A *lis pendens* filed before the commencement of a proper action can have no effect until the action is actually pending. *Joslyn v. Schwend*, 89 Minn. 71.

615. 5. **Service of Process Not Necessary to Commence Lis Pendens.** — See *Hibernia Sav., etc., Soc. v. Cochran*, 141 Cal. 653.

616. 2. **Recording or Indexing** — *Notices of Pendency.* — *Bigelow v. Brewer*, 29 Wash. 670. *Pleadings.* — *Armstrong v. Ashley*, 22 App. Cas. (D. C.) 468.

4. **New Parties Defendant.** — *Virginia Iron, etc., Co. v. Roberts*, 103 Va. 661.

Property. — *Compare Armstrong v. Ashley*, 22 App. Cas. (D. C.) 368.

Changes in Nature of Case. — *Davis v. Willson*, 115 Ky. 639.

617. 2. **Amended Pleading Having Same General Purpose and Object as Original.** — *Caldwell Bldg. Loan Assoc. v. Bigley*, 25 Ohio Cir. Ct. 431; *Jones v. Robb*, 35 Tex. Civ. App. 263.

4. **Transfers by Codefendant.** — *Jones v. Standiferd*, 69 Kan. 513; *Virginia Iron, etc., Co. v. Roberts*, 103 Va. 661.

618. 2. **Lis Pendens Only from Time When Gross Suit Is Lis Pendens.** — *Virginia Iron, etc., Co. v. Roberts*, 103 Va. 661. See also *Jones v. Standiferd*, 69 Kan. 513.

3. **Notice by Defendant Without Regard to Character of Pleading.** — *West Missabe Land Co. v. Berg*, 92 Minn. 2.

4. **After Judgment Actions Neither Lis Pendens Nor Notice.** — *Wood Sash, etc., Co. v. Burrows*, 25 Ohio Cir. Ct. 781.

619. 3. **Lis Pendens Continues** — *Appeals.* — *Farmers Bank v. Frankfort First Nat. Bank*, 30 Ind. App. 520.

Application to Set Aside Decree Entered on Constructive Service of Process. — *Glaze v. Johnson*, 27 Tex. Civ. App. 116.

Petition for Rehearing. — *Green v. Green*, 23 Ohio Cir. Ct. 323.

Statutory Provisions. — Code Civ. Pro. Cal., § 1040, declares that "an action is deemed to be pending from the time of its commencement

until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." *Di Nola v. Allison*, 143 Cal. 106, 101 Am. St. Rep. 84.

620. 1. **Action Lis Pendens After Judgment Only When Prosecution Continued with Diligence.** — *Boice v. Conover*, (N. J. 1905) 61 Atl. Rep. 159.

2. **Appellate Proceedings.** — *Martin v. Abbott*, (Neb. 1904) 100 N. W. Rep. 142, modifying *Parker v. Courtney*, 28 Neb. 605, 26 Am. St. Rep. 360.

Supersedeas Not Requisite to Lis Pendens — Appeal or Error Effectual. — *Di Nola v. Allison*, 143 Cal. 106, 101 Am. St. Rep. 84. See also *Martin v. Abbott*, (Neb. 1904) 100 N. W. Rep. 142.

3. **Action Lis Pendens or Judgment Constructive Notice until Execution.** — *Peck v. Sun L. Assur. Co.*, 11 British Columbia 215.

Trust Deed Executed After Decree for Sale of Land. — *Senft v. Vanek*, 209 Ill. 361, reversing 110 Ill. App. 117.

621. 1. **Dismissal Without Trial on Merits — New Action Brought.** — *Bristow v. Thackston*, 187 Mo. 332, 106 Am. St. Rep. 472, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 621.

A Voluntary Abandonment or Discontinuance. — *Bristow v. Thackston*, 187 Mo. 332, 106 Am. St. Rep. 472.

2. **Under Judgments or Decrees Subsequently Reversed.** — *Di Nola v. Allison*, 143 Cal. 106, 101 Am. St. Rep. 84.

622. 2. **Lis Pendens Terminated by Failure to Make "Full Prosecution."** — *Farmers' L. & T. Co. v. Meridian Waterworks Co.*, 139 Fed. Rep. 661; *Kelley v. Culver*, 116 Ky. 241; *Boice v. Conover*, (N. J. 1905) 61 Atl. Rep. 159.

For Decisions Involving Excuses. — What lapse of time would amount to negligence sufficient to defeat the force of the suit as a pending action is a question to be determined with reference to the circumstances of each particular case. *Jones v. Robb*, 35 Tex. Civ. App. 263.

623. (b) Origin and Scope of Rule. — See note 2.

(4) *Abatement of Action or Suit by Death of Party.* — See note 4.

624. b. UNDER NOTICE OF PENDENCY AND RECORDING ACTS —

(2) *Cancellation or Discharge of Notice* — (a) In General. — See note 4.

625. See note 1.

(b) Statutory Provisions. — See notes 2, 3.

626. IV. PROPERTY WITHIN LAW OF LIS PENDENS — 2. Personal Property

— a. VIEW THAT LIS PENDENS APPLIES TO PERSONALTY. — See note 4.

627. See note 2.

628. e. NEGOTIABLE PAPER. — See note 3.

629. f. MORTGAGE NOTES AND BONDS. — See note 1.

g. ARTICLES OF ORDINARY COMMERCE. — See note 3.

630. V. ACTIONS, SUITS, AND PROCEEDINGS WITHIN LAW OF LIS PENDENS

— 1. Under General Law — a. ACTIONS AND SUITS INVOLVING REAL PROPERTY. — See note 2.

b. ACTIONS AND SUITS INVOLVING PERSONAL PROPERTY. — See note 3.

c. ACTIONS AND SUITS NOT INVOLVING PROPERTY. — See note 4.

631. 2. Under Lis Pendens Statutes. — See notes 2, 3.

623. 2. Presumption of Abandonment — *Es-toppel.* — *Farmers' L. & T. Co. v. Meridian Waterworks Co.*, 139 Fed. Rep. 661.

4. Abatement of Action or Suit by Death of Party. — *Jones v. Robb*, 35 Tex. Civ. App. 263.

624. 4. Notice Properly Filed Cannot Be Canceled Pendente Lite unless Power Conferred by Statute. — *Joslyn v. Schwend*, 89 Minn. 71, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 624; *Shandley v. Levine*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 23.

Failure to Make "Full Prosecution." — *Clergue v. McKay*, 6 Ont. L. Rep. 51, affirmed 8 Ont. L. Rep. 84, citing *Smith v. Hughes*, 5 Ont. L. Rep. 238.

Application by Party Registering Notice. — *McGillivray v. Williams*, 4 Ont. L. Rep. 454.

625. 1. Canceling Unauthorized or Insufficient Notices. — *Joslyn v. Schwend*, 89 Minn. 71; *Smadbeck v. Law*, 106 N. Y. App. Div. 552; *Shandley v. Levine*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 23; *O'Flynn v. Middleton*, 5 Ont. L. Rep. 621.

2. Form of Remedy. — *Joslyn v. Schwend*, 89 Minn. 71.

Notice of Pendency Cloud upon Title. — *King v. Branscheid*, 32 Wash. 634. See also *Peck v. Sun L. Assur. Co.*, 11 British Columbia 215.

3. New York. — *Shandley v. Levine*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 23.

Where the ground relied upon in the motion to cancel is the unreasonable neglect "to proceed in the action," the judge before whom the motion is made is called upon to exercise a legal discretion in determining whether or not he will grant the motion. In the other instances the defendant is entitled as matter of right to have the notice canceled. *Jarvis v. American Forcite Powder Mfg. Co.*, 93 N. Y. App. Div. 234.

The fact that the judgment is subject to be set aside on certain conditions being complied with does not destroy its character as a final determination in that particular suit of the rights of the parties. *Jarvis v. American Forcite Powder Mfg. Co.*, 93 N. Y. App. Div. 234.

626. 4. Personal Property Other than Choses in Action. — *Powell v. National Bank of Commerce*, 19 Colo. App. 57.

Choses in Action. — *Hacker v. White*, 64 S. W. Rep. 446, 23 Ky. L. Rep. 849.

627. 2. Property Affixed with Statutory Lien. — *Bergman v. Inman*, 43 Oregon 456, 99 Am. St. Rep. 771.

628. 3. Negotiable Paper Not Subject to Lis Pendens. — *Powell v. National Bank of Commerce*, 19 Colo. App. 57; *Davis v. Miller Signal Co.*, 105 Ill. App. 657; *American Press Assoc. v. Brantingham*, 75 N. Y. App. Div. 435, affirming (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 426; *Kimbrough v. Hornsby*, 113 Tenn. 605.

629. 1. Mortgage Notes and Bonds Subject to Lis Pendens. — *Steger v. Traveling Men's Bldg., etc., Assoc.*, 208 Ill. 236, 100 Am. St. Rep. 225.

3. Articles of Ordinary Commerce Not Subject to Lis Pendens. — *Powell v. National Bank of Commerce*, 19 Colo. App. 57.

630. 2. Illustrations — *Suit to Reform Deed and Quiet Title.* — *Rothschild v. Leonhard*, 33 Ind. App. 452.

Suit for Specific Performance. — *Shandley v. Levine*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 23.

Suit to Reform and Enforce Mortgage. — *Caldwell Bldg. Loan Assoc. v. Bigley*, 25 Ohio Cir. Ct. 431.

3. There seems to be much conflict among the authorities as to whether the doctrine of *lis pendens* is applicable to personal property of any character. The doctrine seems to extend to purchasers at judicial sales under judgments or decrees. *Mashburn v. Dannenberg Co.*, 117 Ga. 567, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 626 *et seq.*, 645, 646.

4. Actions or Suits to Recover Money Judgments. — *Moragne v. Moragne*, (Ala. 1905) 39 So. Rep. 161, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 630; *Goodwynne v. Bellerby*, 116 Ga. 901; *Bayley v. Bayley*, 66 N. J. Eq. 84.

631. 2. Actions Not Within Lis Pendens Statutes Unaffected by Them. — *Powell v. National Bank of Commerce*, 19 Colo. App. 57, citing

633. 3. Particular Actions and Suits — a. CREDITORS' SUITS — (2) Involving Real Property. — See note 1.

635. (5) By Simple Contract Creditor. — See note 3.

636. (7) Against Insolvent Corporations. — See note 1.

(10) *Statutes Affecting Lien or Lis Pendens.* — See note 5.

637. b. ATTACHMENTS AND RECEIVERSHIPS — (1) In General. — See note 5.

638. (2) Notice of Pendency — Filing or Recording Attachment. — See note 3.

c. **SUITS TO FORECLOSE OR ENFORCE LIENS — (1) In General.** — See notes 6, 7.

639. d. ACTIONS OF EJECTMENT OR IN NATURE OF EJECTMENT — (1) Right to Possession of Premises — (a) Persons Coming in under Defendant. — See note 5.

(b) **Expiration and Alienation of Plaintiff's Right and Title.** — See note 3.

642. f. SUITS FOR PARTITION — (1) In General. — See note 1.

g. **SUITS FOR DIVORCE AND ALIMONY.** — See note 3.

i. **SUITS ON UNRECORDED INSTRUMENTS.** — See note 6.

644. 4. Special Proceedings. — See notes 3, 4, 7.

5. **Collateral Proceedings in Actions.** — See note 8.

645. VI. WHO ARE PURCHASERS PENDENTE LITE — 1. Incumbrancers and Purchasers at Judicial Sales. — See notes 5, 6.

21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 631; *Rothschild v. Leonhard*, 33 Ind. App. 452; *Bayley v. Bayley*, 66 N. J. Eq. 84.

631. 3. For Other Cases. — *Steele v. Robertson*, (Ark. 1905) 87 S. W. Rep. 117.

633. 1. Creditor's Bill Involving Specific Real Property Lis Pendens. — *Atlas R. Supply Co. v. Lake, etc.*, R. Co., 134 Fed. Rep. 503; *Boss v. Jordan*, 118 Iowa 204; *Wahlheimer v. Truslow*, 106 N. Y. App. Div. 73; *Syndicat Lyonnais v. McGrade*, 36 Can. Sup. Ct. 251.

635. 3. Bills by Simple Contract Creditors. — *Powell v. National Bank of Commerce*, 19 Colo. App. 57; *Friedman v. Janssen*, 66 S. W. Rep. 752, 23 Ky. L. Rep. 2151.

636. 1. Creditors' Bill Against Insolvent Corporation. — *Atlas R. Supply Co. v. Lake, etc.*, R. Co., 134 Fed. Rep. 503; *Powell v. National Bank of Commerce*, 19 Colo. App. 57.

5. **Illustrations — Mississippi.** — *Fernwood Lumber Co. v. Meehan-Rounds Lumber Co.*, 85 Miss. 54.

Tennessee. — *Broughton v. Slusher*, 2 Tenn. Ch. App. 305.

637. 5. Where a Creditor's Bill Is Lis Pendens. — *Friedman v. Janssen*, 66 S. W. Rep. 752, 23 Ky. L. Rep. 2151.

638. 3. Attachment Laws Requiring Record of Attachment. — *White v. Manning*, (Ky. 1904) 82 S. W. Rep. 607.

6. **Mortgage Liens.** — *Cooney v. Coppock*, 119 Iowa 486.

Mortgage Lien on Railroad Property. — *Alabama, etc., R. Co. v. Thomas*, 86 Miss. 27.

7. **Street Assessment Liens.** — An action to foreclose the lien of a street assessment is as fully included within the terms of the general statute as is an action for the foreclosure of a mortgage or of any other lien. *Page v. W. W. Chase Co.*, 145 Cal. 578.

639. 5. Ejectment Lis Pendens as to Right to Possession. — *Baum v. Roper*, (Cal. 1905) 82 Pac. Rep. 390.

Ejectment Against Tenant — Purchase from Landlord. — *King v. Davis*, 137 Fed. Rep. 222.

640. 3. Judgment for Value of Improvements — Incidental Judgment for Costs. — *Tice v. Hamilton*, 188 Mo. 298.

642. 1. Suits for Partition. — *Becker v. Stroeder*, 167 Mo. 306.

Heirs of Deceased Party Not Purchasers. — *Virginia Iron, etc., Co. v. Roberts*, 103 Va. 661.

3. **Actions Involving No Claim to Specific Property Not Lis Pendens.** — *Mayberry v. Whittier*, 144 Cal. 322.

6. **Suits on Unrecorded Instruments Lis Pendens.** — *Caldwell Bldg. Loan Assoc. v. Bigley*, 25 Ohio Cir. Ct. 431.

644. 3. Condemnation Proceedings. — *Compare Ashley v. Burt County*, (Neb. 1905) 102 N. W. Rep. 272.

4. **Condemnation Proceedings.** — *Rubel v. Title Guarantee, etc., Co.*, 101 Ill. App. 439, affirmed 199 Ill. 110.

7. **Statutory Provision for Lis Pendens in Condemnation Proceedings.** — *Waterford Electric Light, etc., Co. v. Reed*, (Supm. Ct. Spec. T.) 47 Misc. (N. Y.) 406.

A statute making the filing of a notice of pendency essential to the validity of proceedings in the exercise of the power of eminent domain on "application to any court, county board, common council, village board, or town board, for laying out, widening, extending, or vacating any street, alley, water channel, park, highway, or other public place," does not apply to a proceeding before the supervisors of a town acting in the exercise of a police power conferred on them as public or governmental officers by statute, and not as a town board. *Rude v. St. Marie*, 121 Wis. 634.

8. **Bill in Equity for Trespass to Land Through Mining Operations.** — *Heinze v. Butte, etc., Consol. Min. Co.*, (C. C. A.) 129 Fed. Rep. 274.

645. 5. Mortgage Lienors. — *Parrotte v. Dryden*, (Neb. 1905) 102 N. W. Rep. 610.

- 646.** See note 1.
 2. Lessees of Real Estate. — See note 2.
- 647.** 4. Alienees of Plaintiffs. — See note 3.
- 648.** 6. Transfers Between Parties to Action or Suit. — See note 2.
 7. Persons Acquiring Rights Before Lis Pendens Commences — *a. GENERAL RULE.* — See note 3.
b. PRIOR LIENS AND LIKE INTERESTS. — See note 1.
649. *c. TAX TITLES.* — See note 2.
d. UNDER EXECUTORY CONTRACTS FOR SALE OF LAND. — See notes 3, 4.
e. UNDER INSTRUMENTS NOT RECORDED — (1) General Rule. — See note 5.
- 651.** (2) *Notice of Pendency Statutes — (a) In General.* — See note 2.
 (b) *Effect of Notice upon Statute.* — See note 3.
- 652.** *f. UNDER RECORDING ACTS.* — See note 1.
g. STATUTES RELATING TO PARTIES TO ACTIONS. — See note 2.
- 653.** IX. LIS PENDENS AND LIMITATION OF ACTIONS. — See note 4.

645. 6. Judgment Creditors. — Cooney *v* Coppock, 119 Iowa 486; Caldwell Bldg. Loan Assoc. *v*. Bigley, 25 Ohio Cir. Ct. 431.

646. 1. Purchasers at Judicial Sales Enforcing Rights That Are Affected by Lis Pendens. — Bates *v*. Boston El. R. Co., 187 Mass. 328; Hicks *v*. Porter, (Tex. Civ. App. 1905) 85 S. W. Rep. 437. See also Mashburn *v*. Dannenberg Co., 117 Ga. 567, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 626 *et seq.*, 645, 646.

2. Crops Grown by Lessee. — Tittle *v*. Kennedy, 71 S. Car. 1.

647. 3. Action or Suit Lis Pendens in Favor of Successful Defendant. — Tice *v*. Hamilton, 188 Mo. 298.

648. 2. Lis Pendens No Application to Transfers Between Parties. — Wilkins *v*. McCorkle, 112 Tenn. 688, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 648.

3. Rights Acquired Prior to Commencement of Lis Pendens. — National Foundry, etc., Works *v*. Oconto City Water Supply Co., (C. C. A.) 113 Fed. Rep. 793; Farmers' L. & T. Co. *v*. Meridian Waterworks Co., 139 Fed. Rep. 661; Noyes *v*. Crawford, 118 Iowa 15, 96 Am. St. Rep. 363; Graham *v*. Kitchen, 80 S. W. Rep. 464, 25 Ky. L. Rep. 2224; West Missabe Land Co. *v*. Berg, 92 Minn. 2; Merrill *v*. Wright, 65 Neb. 794, 101 Am. St. Rep. 645; Peck *v*. Sun L. Assur. Co., 11 British Columbia 215.

Independent Title Obtained from Party to Suit. — King *v*. Davis, 137 Fed. Rep. 222.

649. 1. Title Acquired at a Judicial Sale under a Judgment. — Bacon *v*. Early, 116 Iowa 532.

650. 2. Purchaser at Tax Sale Not Affected by Lis Pendens. — Merrill *v*. Wright, 65 Neb. 794, 101 Am. St. Rep. 645; Security Trust Co. *v*. Root, 72 Ohio St. 535, affirming 25 Ohio Cir. Ct. 614.

Contra. — Hicks *v*. Porter, (Tex. Civ. App. 1905) 85 S. W. Rep. 437.

3. Prior Equitable Title under Contract of Sale Unaffected by Lis Pendens. — See Austin *v*. Lauderdale, (Tex. Civ. App. 1904) 83 S. W. Rep. 413.

4. A Payment of Purchase Money does not constitute a "dealing with land" within the purview of a statute providing that "the regis-

tration of a charge shall give notice to every person dealing with the real estate against which such charge has been registered of the estate or interest in respect of which such charge has been registered but not of the contents of such instrument." Peck *v*. Sun L. Assur. Co., 11 British Columbia 215.

5. Rights under Instruments Delivered Before Lis Pendens Not Affected Thereby Though Subsequently Recorded. — Noyes *v*. Crawford, 118 Iowa 15, 96 Am. St. Rep. 363; West Missabe Land Co. *v*. Berg, 92 Minn. 2; Clergue *v*. McKay, 6 Ont. L. Rep. 51, affirmed 8 Ont. L. Rep. 84, citing Sanderson *v*. Burdett, 16 Grant Ch. (U. C.) 119. Compare Townsend *v*. Blanchard, 117 Iowa 36.

651. 2. Notice of Pendency Statutes Subordinating to Lis Pendens Rights Acquired under Subsequently Recorded Instruments. — Payson *v*. Jacobs, 38 Wash. 203.

3. Notice by Party Entitled to Benefit of Lis Pendens Prevents Application of Statute. — This is only true where the claim under the unrecorded instrument is superior and paramount to the mortgage. In other words, it only applies to cases where the claimant under the unrecorded instrument would not be affected if made a party to the action. Payson *v*. Jacobs, 38 Wash. 203, quoting and discussing text 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 651.

Notice acquired subsequent to the commencement of the action and the filing of the notice will not have this effect. Hibernia Sav., etc., Soc. *v*. Cochran, 141 Cal. 653.

652. 1. Recording Acts Making Holder of Conveyance Unrecorded Before Lis Pendens, Pendente Lite Purchaser. — Atchison County *v*. Lips, 69 Kan. 252; Jones *v*. Standifer, 69 Kan. 513; Wilkins *v*. McCorkle, 112 Tenn. 688.

2. Actions for Foreclosure of Mortgages. — Code Civ. Pro. Cal., § 726; Hibernia Sav., etc., Soc. *v*. Cochran, 141 Cal. 653.

653. 4. Lis Pendens and Limitation of Actions. — McLean *v*. Baldwin, 136 Cal. 565; Louisville *v*. Jacob, 84 S. W. Rep. 772, 27 Ky. L. Rep. 175.

A Person Who Is Not a Party to the Suit and Whose Title Was Not Acquired from a Party. — See Page *v*. W. W. Chase Co., 145 Cal. 578.

654. XI. EXTRATERRITORIAL EFFECT OF LIS PENDENS — 1. In General. — See note 4.

2. Between Domestic and Foreign States and Countries. — See note 5.

655. 3. Between Districts in State — a. IN GENERAL. — See note 1.

b. NOTICE OF PENDENCY. — See note 2.

c. BETWEEN UNITED STATES AND STATES. — See note 5.

657. NOTIFICATION. — See note 1.

654. 4. Federal Courts. — A suit in a federal court is constructive notice of *lis pendens* with respect to property situated within the district and division in which the court sits. *Atlas R. Supply Co. v. Lake, etc., R. Co.*, 134 Fed. Rep. 503.

Statutory Notices of Pendency. — The English statutes restricting the law of *lis pendens* by requiring the filing of a notice of pendency are purely local in character, and are not carried into Canadian territory by the general introduction there of English law. *Syndicat Lyonnais v. McGrade*, 36 Can. Sup. Ct. 251.

5. Actions in State Other than That in Which Property Is Situated. — See *Kimbrough v. Hornsby*, 113 Tenn. 605.

655. 1. Change of Venue. — *Jones v. Robb*, 35 Tex. Civ. App. 263.

2. North Carolina — No Notice Required in County Where Land Situated. — *Harris v. Dav-enport*, 132 N. Car. 697; *Morgan v. Bostic*, 132 N. Car. 743.

5. Filing Notice on Attaching Real Estate. — *Contra, King v. Davis*, 137 Fed. Rep. 222, where the court held that Congress did not intend, when adopting state laws as rules of decision in trials at common law (Rev. Stat. U. S., § 721), to adopt such as have the effect of limiting or controlling the jurisdiction and power of the federal courts, when such effect can only be obviated by the voluntary act of state officials, over whom the federal courts have no power; they not being required by the state statute to file a notice of pendency of actions brought in federal courts. If the state legislature were to enact a statute making it the duty of state court clerks to record memoranda of pending suits and attachments in the federal courts, there might possibly be no further difficulty.

657. 1. Notification — Assessment Due on Insurance Policy. — *Milwaukee Trust Co. v. Farmers' Mut. F. Ins. Co.*, 115 Wis. 371.

NOVATION.

BY F. G. BAMMAN.

660. I. DEFINITION AND SCOPE OF TITLE — 1. Definition. — See note 1.

661. II. HISTORY OF DOCTRINE — 2. In Civil Law. — See note 6.

662. III. FORMS OF NOVATION — 2. Substitution of New Debtor. — See note 2.

3. Substitution of New Creditor. — See note 3.

663. IV. ESSENTIAL ELEMENTS OF NOVATION — 1. In General. — See note 2.

2. Parties — Number and Identity of Parties. — See note 5.

664. Parties to Substituted Note. — See notes 1, 2.

660. 1. Definition. — "A novation is the substitution of one obligation for another." *Tilden v. Gordon*, 34 Wash. 92. See also *Bowen v. Young*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y. 547; *Clark v. Delaware, etc., R. Co.*, 138 N. Car. 25; *Sutter v. Moore Invest. Co.*, 30 Wash. 333.

Statutory Definitions. — See *Kyle v. Hamilton*, 136 Cal. xix, 68 Pac. Rep. 484.

661. 6. Sutter v. Moore Invest. Co., 30 Wash. 333.

662. 2. Substitution of Debtors — Delegatio and Expromissio. — See *Bailey v. Gillies*, 4 Ont. L. Rep. 182; *Veilleux v. Atlantic, etc., R. Co.*, 23 Quebec Super. Ct. 217.

3. See Osborne v. West, (Iowa 1905) 103 N. W. Rep. 118, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 662; *Montreal Loan, etc., Co. v. Flourde*, 23 Quebec Super. Ct. 399.

663. 2. Piehl v. Piehl, (Mich. 1904) 101 N. W. Rep. 628, 11 Detroit Leg. N. 666, citing 11 [21] AM. AND ENG. ENCYC. OF LAW (2d ed.) 663; *Cutting v. Whittemore*, 72 N. H. 107, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 663; *Izzo v. Ludington*, 79 N. Y. App. Div. 272, affirmed 178 N. Y. 621, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 663; *Bowen v. Young*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 547; *Wright v. Hanna*, 210 Pa. St. 349; *Sutter v. Moore Invest. Co.*, 30 Wash. 333. See also *Brackenbridge v. Cummings*, 18 Pa. Super. Ct. 64.

5. Netterstrom v. Gallist, 110 Ill. App. 352.

664. 1. Renewal Not Novation. — *Sucker State Drill Co. v. Loewer*, 114 La. 403; *Hummelstown Brownstone Co. v. Knerr*, 25 Pa. Super. Ct. 465; *Sheridan First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 62, 100 Am. St.

665. 3. Valid Prior Obligation. — See note 1.

666. A Void Contract Acquires No Validity. — See note 2.

4. Assent of Parties — *b.* RULE THAT ALL PARTIES MUST ASSENT.

— See note 3.

667. *c.* EXCEPTIONS TO RULE — (2) *At Common Law.* — See note 4.

668. *d.* ASSENT EXPRESS OR IMPLIED — (1) *In Civil Law* — *The Louisiana Code.* — See note 3.

Illustrations of Louisiana Rule. — See notes 6, 8.

669. (2) *At Common Law* — Implied Assent. — See notes 4, 5.

e. NECESSITY FOR CONTEMPORANEOUS ASSENT OF ALL PARTIES.

— See note 8.

670. *f.* CONDITIONAL ASSENT. — See note 1.

g. EVIDENCE OF ASSENT. — See note 2.

671. See notes 1, 2, 3.

5. Consideration — *b.* EXTINGUISHMENT OF PRIOR OBLIGATION —

(1) *As Consideration for New Obligation.* — See note 5.

672. (2) *As Effect of Novation.* — See note 4.

Rep. 925, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 664. See also Brackenbridge v. Cummings, 18 Pa. Super. Ct. 64.

664. 2. See Wright v. Hanna, 210 Pa. St. 349.

665. 1. Necessity of Valid Existing Obligation. — See Georgia Home Ins. Co. v. Boykin, 137 Ala. 350.

666. 2. See *In re Lemerisé*, 73 Vt. 304.

3. All Parties Must Assent. — Illinois Car, etc., Co. v. Linstroth Wagon Co., 50 C. C. A. 504, 112 Fed. Rep. 737; Anglo-American Land, etc., Co. v. Lombard, (C. C. A.) 132 Fed. Rep. 721; Netterstrom v. Gallistel, 110 Ill. App. 352, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 666; Mount v. Dehaven, 29 Ind. App. 127; Osborne v. West, (Iowa 1905) 103 N. W. Rep. 118; Stowell v. Gram, 184 Mass. 562; Piehl v. Pichl, (Mich. 1904) 101 N. W. Rep. 628, 11 Detroit Leg. N. 666; Held v. Caldwell-Easton Co., 97 N. Y. App. Div. 301; Leggat v. Leggat, 79 N. Y. App. Div. 141, affirmed 176 N. Y. 590; Clark v. Delaware, etc., R. Co., 138 N. Car. 25; Wright v. Hanna, 210 Pa. St. 349. See also Brackenbridge v. Cummings, 18 Pa. Super. Ct. 64.

667. 4. Common-law Assent Presumed. — See Georgia Home Ins. Co. v. Boykin, 137 Ala. 350.

668. 3. Proof Must Leave No Doubt of Novation. — Hughes v. Mattes, 104 La. 218; Sucker State Drill Co. v. Loewer, 114 La. 403.

6. No Novation by New Note or Receipt. — Hughes v. Mattes, 104 La. 218.

8. Surrender of Old Note. — See Hughes v. Mattes, 104 La. 218.

669. 4. Assent Must Be Express. — Mount v. Dehaven, 29 Ind. App. 127. See also Henry v. Caruthers, 196 Ill. 136; Griffin v. Cunningham, 183 Mass. 505.

5. Assent May Be Express or Implied. — Cutting v. Whittemore, 72 N. H. 107, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 669; Union Cent. L. Ins. Co. v. Hoyer, 66 Ohio St. 344. See also Castle v. Persons, 54 C. C. A. 133, 117 Fed. Rep. 835; Illinois Car, etc., Co. v. Linstroth Wagon Co., 50 C. C. A. 504, 112 Fed. Rep. 737; Nickerson v. Leader Mercantile Co., 90 Mo. App. 336; Jarmusch v. Otis Iron, etc., Co., 23 Ohio Cir. Ct. 122.

8. Assent of One May Be Subsequent. — See Georgia Home Ins. Co. v. Boykin, 137 Ala. 350.

670. 1. Agreement Dependent on Condition. — Ellis v. Conrad Seipp Brewing Co., 207 Ill. 291.

2. Intention Question for Jury. — Cutting v. Whittemore, 72 N. H. 107; Ceballos v. Munson Steamship Line, 93 N. Y. App. Div. 593; Union Cent. L. Ins. Co. v. Hoyer, 66 Ohio St. 344; Jarmusch v. Otis Iron, etc., Co., 23 Ohio Cir. Ct. 122; Hummelstown Brownstone Co. v. Knerr, 25 Pa. Super. Ct. 465; Sutter v. Moore Invest. Co., 30 Wash. 333.

671. 1. Sufficiency of Evidence. — Compare Henry v. Caruthers, 196 Ill. 136, affirming 95 Ill. App. 582, to the same effect as Walker v. Wood, 170 Ill. 463, stated in the original note.

2. Bringing Action as Evidence of Assent. — See Anglo-American Land, etc., Co. v. Lombard, (C. C. A.) 132 Fed. Rep. 721.

Where the Creditor Makes a Demand on the New Debtor for payment of the debt there can be no question of his assent. Lyon v. Clochessy, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 67.

3. Burden of Proof. — Henry v. Caruthers, 196 Ill. 136, affirming 95 Ill. App. 582; Crowell v. Moley, (Mass. 1905) 74 N. E. Rep. 329; Cutting v. Whittemore, 72 N. H. 107; Dibble v. Richardson, 171 N. Y. 131. See also Sucker State Drill Co. v. Loewer, 114 La. 403.

5. Extinguishment of Old as Consideration for New. — Griffin v. Cunningham, 183 Mass. 505; Clark v. Delaware, etc., R. Co., 138 N. Car. 25; Bowen v. Young, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 547; Ceballos v. Munson Steamship Line, 93 N. Y. App. Div. 593; Phoenix Assur. Co. v. Fristoe, 53 W. Va. 366, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 671. See also Kyle v. Hamilton, 136 Cal. xix, 68 Pac. Rep. 484.

672. 4. Extinguishment of Old Debt — Effect of Novation. — Griffin v. Cunningham, 183 Mass. 505; Cutting v. Whittemore, 72 N. H. 107, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 672; Schlicher v. Vogel, 61 N. J. Eq. 158, affirmed (N. J. 1903) 54 Atl. Rep. 1125; Union Cent. L. Ins. Co. v. Hoyer, 66 Ohio St. 344; Jarmusch v. Otis Iron, etc., Co., 23 Ohio Cir.

674. V. CONSEQUENCES OF NOVATION — 1. Irrevocability of Contract. — See note 7.

675. VI. NOVATION AND STATUTE OF FRAUDS. — See note 5.

676. VII. NOVATION DISTINGUISHED FROM OTHER TITLES — 2. Payment by Note. — See note 4.

3. Collateral Security. — See note 5.

NOW. — See note 8.

677. NOXIOUS. — See note 1.

Ct. 122; *Phoenix Assur. Co. v. Fristoe*, 53 W. Va. 366. See also *Lyon v. Clochessy*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 67; *Hummels-town Brownstone Co. v. Knerr*, 25 Pa. Super. Ct. 465; *Hubbard v. Pettay*, (Tex. Civ. App. 1904) 85 S. W. Rep. 509.

674. 7. Irrevocability of Contract. — *Georgia Home Ins. Co. v. Boykin*, 137 Ala. 350; *Dillard v. Dillard*, 118 Ga. 97. See also *Nickerson v. Leader Mercantile Co.*, 90 Mo. App. 336; *Schuwirth v. Thumma*, (Tex. Civ. App. 1902) 66 S. W. Rep. 691.

675. 5. Whether Novation by Delegation Within Statute of Frauds. — *Castle v. Persons*, 54 C. C. A. 133, 117 Fed. Rep. 835; *Griffin v. Cunningham*, 183 Mass. 505; *Lyon v. Clochessy*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 67. See also *Netterstrom v. Gallistel*, 110 Ill. App. 352; *Stowell v. Gram*, 184 Mass. 562.

676. 4. Payment by New Evidence of Debt.

— Where a creditor holding notes against the estate of a deceased person took the notes of the decedents' sons in lieu of them and surrendered the original notes, it was held that there was no evidence to show that the creditor accepted the sons' notes in payment of his original claim. *Mount v. Dehaven*, 29 Ind. App. 127.

5. Novation as Distinguished from Collateral Security. — *Sucker State Drill Co. v. Loewer*, 114 La. 403; *Stowell v. Gram*, 184 Mass. 562; *Cutting v. Whittemore*, 72 N. H. 107; *Dibble v. Richardson*, 171 N. Y. 131. See also *Rines v. New York, etc., Brewing Co.*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 415; *In re Lemerise*, 73 Vt. 304.

8. Statute. — *Fischer v. Simon*, 95 Tex. 234.

677. 1. Noxious Potion or Substance a Broader Term than Poison. — *Runnels v. State*, 45 Tex. Crim. 446.

NUISANCES.

BY H. O'B. COOPER.

682. I. DEFINITION AND NATURE — 1. In General. — See note 2.

2. Private Nuisance. — See note 5.

683. 3. Public Nuisance. — See notes 1, 3.

682. 2. Nuisance Defined. — *Acme Fertilizer Co. v. State*, 34 Ind. App. 346, 107 Am. St. Rep. 166, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 682; *St. Louis v. Galt*, 179 Mo. 8, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 682.

A nuisance is defined to be the unreasonable, unwarrantable, or unlawful use of one's own property, to the annoyance, inconvenience, discomfort, or damage of another. *Bly v. Edison Electric Illuminating Co.*, 172 N. Y. 9; *American Ice Co. v. Catskill Cement Co.*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 221.

Statutory Definitions. — *McCarthy v. Gaston Ridge Mill, etc., Co.*, 144 Cal. 542; *Spring Valley Water Works v. Fifield*, 136 Cal. 14; *Shroyer v. Campbell*, 31 Ind. App. 83; *Russell v. State*, 32 Ind. App. 243; *Percival v. Yousling*, 120 Iowa 451; *Hollenbeck v. Marion*, 116 Iowa 69; *Rhoades v. Cook*, 122 Iowa 336; *Chessman v. Hale*, 31 Mont. 577; *Reaves v. Territory*, 13 Okla. 396; *Stockdale v. Rio Grande Western R. Co.*, 28 Utah 201; *Wilcox v. Henry*, 35 Wash. 591.

5. Private Nuisance Defined. — *Russell v. State*, 32 Ind. App. 243.

Blackstone's Definition — *Missouri, etc., R. Co. v. Anderson*, 36 Tex. Civ. App. 121. See also *Eller v. Koehler*, 68 Ohio St. 51.

Other Definitions. — See *Lazarus v. Parmly*, 113 Ill. App. 624; *Braasch v. Cemetery Assoc.*, (Neb. 1903) 95 N. W. Rep. 646.

683. 1. Common or Public Nuisance Defined. — *Chicago v. Gunning System*, 214 Ill. 628, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 683; *Kuhn v. Illinois Cent. R. Co.*, 111 Ill. App. 323; *Russell v. State*, 32 Ind. App. 243; *Foley v. Doddridge County Ct.*, 54 W. Va. 16, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 683.

Statutory Definitions. — *Savannah, etc., R. Co. v. Parish*, 117 Ga. 893; *Acme Fertilizer Co. v. State*, 34 Ind. App. 346, 107 Am. St. Rep. 166; *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21; *State v. Estep*, 66 Kan. 416; *Reaves v. Territory*, 13 Okla. 396; *Wilcox v. Henry*, 35 Wash. 591.

A Prize Fight has been held to be a public nuisance.

684. 5. Nuisances per Se — Lawful Business as Nuisance per Se. — See notes 5, 6.

686. See note 1.

II. ELEMENTS AND GENERAL PRINCIPLES — 1. Character of Injury Requisite — a. IN GENERAL. — See notes 3, 4, 5, 6, 7, 8.

sance. *Com. v. McGovern*, 116 Ky. 212. And see the title PRIZE FIGHTS, 105. 1.

683. 3. Tendency to Annoy Public in Enjoyment of Common Right. — *Chicago v. Gunning System*, 214 Ill. 628, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 683.

684. 5. Keeping Explosives Near Residence or Public Highway. — *Kleebauer v. Western Fuse, etc., Co.*, (Cal. 1902) 69 Pac. Rep. 246.

Dynamite. — The keeping of upwards of one hundred pounds of dynamite in the city of New York is a nuisance both at common law and under the provisions of the city charter. *Ricker v. McDonald*, 89 N. Y. App. Div. 300.

Transportation of Explosives by Carrier. — See *Ft. Worth, etc., R. Co. v. Beauchamp*, 95 Tex. 496, 93 Am. St. Rep. 864.

Privy Held to Be Nuisance per Se on Account of Manner in Which It Was Kept. — *Finkelstein v. Huner*, 77 N. Y. App. Div. 424, affirmed 179 N. Y. 548.

Melting or Rendering Establishments are *prima facie* nuisances. *Rhoades v. Cook*, 122 Iowa 336.

Material Obstruction of Street Nuisance per Se. — *Hall v. Breyfogle*, 162 Ind. 494.

Pool Selling. — See *People v. Condon*, 102 Ill. App. 449.

6. Business or Erection Lawful in Itself Cannot Be Nuisance per Se. — *Canal Melting Co. v. Columbia Park Co.*, 99 Ill. App. 215.

Automobile Station. — *Stein v. Lyon*, 91 N. Y. App. Div. 593.

Bakery. — *Alexander v. Stewart Bread Co.*, 21 Pa. Super. Ct. 526.

Baseball Game. — *Alexander v. Tebeau*, (Ky. 1903) 71 S. W. Rep. 427.

Blacksmith Shop. — *Marrs v. Fiddler*, (Ky. 1902) 69 S. W. Rep. 953.

Blowing Whistle of Factory. — *Redd v. Edna Cotton Mills*, 136 N. Car. 342.

Bowling Alley. — *Harrison v. People*, 101 Ill. App. 224.

Brickmaking. — *Powell v. Brookfield Pressed Brick, etc., Mfg. Co.*, 104 Mo. App. 713.

Cemetery. — *Braasch v. Cemetery Assoc.*, (Neb. 1903) 95 N. W. Rep. 646.

Cooking Onions and Cabbage. — *Shroyer v. Campbell*, 31 Ind. App. 83.

Discharge of Sewage on Premises. — *Vickers v. Durham*, 132 N. Car. 880.

Dumping Board Authorized by Statute. — *Coleman v. New York*, 70 N. Y. App. Div. 218, affirmed 173 N. Y. 612.

Fireworks Exhibition. — *Bianki v. Greater American Exposition Co.*, (Neb. 1902) 92 N. W. Rep. 615; *Crowley v. Rochester Fireworks Co.*, 95 N. Y. App. Div. 13.

Guano Factory. — *Duffy v. Meadows*, 131 N. Car. 31.

Hitching Rack. — *Mercer County v. Harrodsburg*, 114 Ky. 851.

Hospital. — *Deaconess Home, etc., v. Bontjes*, 104 Ill. App. 484.

Keeping Explosives in Public Place or Near Residences Is Not Nuisance per Se. — *Reilly v. Erie R. Co.*, 72 N. Y. App. Div. 476, affirmed 177 N. Y. 547; *Kleebauer v. Western Fuse, etc., Co.*, 138 Cal. 497, 94 Am. St. Rep. 62.

Liquor Saloon. — *DeBlanc v. New Iberia*, 106 La. 680.

Pest House. — *Anable v. Montgomery County*, 34 Ind. App. 72, 107 Am. St. Rep. 148; *Lorain v. Rolling*, 24 Ohio Cir. Ct. 82.

Planing Mill. — *Rogers v. John Week Lumber Co.*, 117 Wis. 5.

Roundhouse. — *Louisville, etc., Terminal Co. v. Jacobs*, 109 Tenn. 727.

Stable (Whether Public or Private). — *Albany Christian Church v. Wilborn*, 112 Ky. 507; *King v. Hamill*, 97 Md. 103; *Gallagher v. Flury*, 99 Md. 181.

686. 1. Lawful Business Becomes Nuisance Only When Improperly Located or Conducted. — *Georgia, R., etc., Co. v. Maddox*, 116 Ga. 64; *Vickers v. Durham*, 132 N. Car. 880; *Duffy v. Meadows*, 131 N. Car. 31; *Lorain v. Rolling*, 24 Ohio Cir. Ct. 82; *Rogers v. John Week Lumber Co.*, 117 Wis. 5. See also *Lord v. De Witt*, 116 Fed. Rep. 713.

3. Violation of Legal Rights Necessary. — *Lazarus v. Parmly*, 113 Ill. App. 624, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 686; *Powell v. Brookfield Pressed Brick, etc., Mfg. Co.*, 104 Mo. App. 713.

4. Injury Must Be Real, Not Fanciful. — *Veraguth v. Denver*, 19 Colo. App. 473; *Lazarus v. Parmly*, 113 Ill. App. 624, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 686; *Flood v. Consumers Co.*, 105 Ill. App. 559; *Deaconess Home, etc., v. Bontjes*, 207 Ill. 553; *Froelicher v. Oswald Ironworks*, 111 La. 705; *St. Louis Safe Deposit, etc., Bank v. Kennett Estate*, 101 Mo. App. 370; *Braasch v. Cemetery Assoc.*, (Neb. 1903) 95 N. W. Rep. 646; *Martin v. New York*, (Supm. Ct. Spec. T.) 77 N. Y. Supp. 1013; *Wilmot v. Bell*, 76 N. Y. App. Div. 252; *Eller v. Koehler*, 68 Ohio St. 51; *Alexander v. Stewart Bread Co.*, 21 Pa. Super. Ct. 526; *Rogers v. John Week Lumber Co.*, 117 Wis. 5.

5. *Veraguth v. Denver*, 19 Colo. App. 473; *Lazarus v. Parmly*, 113 Ill. App. 624, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 686.

6. Unpleasantness Insufficient. — *Akers v. Marsh*, 19 App. Cas. (D. C.) 28; *Duffy v. Meadows*, 131 N. Car. 31.

7. Annoyance Insufficient. — *Akers v. Marsh*, 19 App. Cas. (D. C.) 28; *Wilmot v. Bell*, 76 N. Y. App. Div. 252; *Eller v. Koehler*, 68 Ohio St. 51; *Alexander v. Stewart Bread Co.*, 21 Pa. Super. Ct. 526.

8. Unsightly Appearance Insufficient. — *Flood v. Consumers Co.*, 105 Ill. App. 559; *Houston, etc., R. Co. v. Reasonover*, 36 Tex. Civ. App. 274.

Unsightly Division Fence Not Nuisance. — *Gilbert v. West*, 162 Ind. 17.

686. *b.* INJURY TO HEALTH UNNECESSARY. — See note 9.

687. *c.* EFFECT ON PERSONS OF ORDINARY HEALTH AND SENSIBILITIES. — See note 2.

688. 2. Motive or Intent. — See notes 4, 6.

3. Effect of Exercise of Care. — See note 10.

689. 4. Nuisance Arising from Lawful Business. — See note 1.

5. Balancing Conveniences. — See note 5.

690. 6. Locality. — See note 6.

7. Existence of Similar Nuisances. — See note 10.

691. 8. Coming to Nuisance. — See note 3.

9. Whether Question of Law or of Fact. — See note 4.

692. III. SPECIFIC NUISANCES — 1. Odors, Vapors, Etc. — *a.* IN GENERAL. — See note 1.

693. *b.* PRODUCED BY LAWFUL BUSINESS OR ERECTION — (1) *In General.* — See note 1.

686. 9. Injury to Health Not Necessary — Interference with Physical Comfort. — *Rhoades v. Cook*, 122 Iowa 336; *Froelicher v. Oswald Ironworks*, 111 La. 705.

687. 2. Nuisance Determined by Effect upon Ordinary Persons. — *Lord v. De Witt*, 116 Fed. Rep. 713; *Rogers v. John Week Lumber Co.*, 117 Wis. 5.

688. 4. Intention Immaterial. — *Russell v. State*, 32 Ind. App. 243.

6. Malevolent Motive Immaterial. — *Giller v. West*, 162 Ind. 17; *Russell v. State*, 32 Ind. App. 243.

10. Effect of Exercise of Care. — *Atty.-Gen. v. Cole*, (1901) 1 Ch. 205; *Rhoades v. Cook*, 122 Iowa 336; *Schaub v. Perkinson Bros. Constr. Co.*, 108 Mo. App. 122; *Powell v. Brookfield Pressed Brick, etc.*, Mfg. Co., 104 Mo. App. 713; *Longtin v. Persell*, 30 Mont. 306, 104 Am. St. Rep. 723; *Missouri, etc., R. Co. v. Anderson*, 36 Tex. Civ. App. 132, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 688.

689. 1. Legality of Business or Erection Does Not Excuse Nuisance Arising Therefrom. — *Powell v. Brookfield Pressed Brick, etc.*, Mfg. Co., 104 Mo. App. 713; *Missouri, etc., R. Co. v. Anderson*, 36 Tex. Civ. App. 121.

5. Benefit to Public No Defense to Civil Action. — *Bowman v. Humphrey*, 124 Iowa 744.

690. 6. Thing May Be Nuisance in One Place and Not in Another. — *Lord v. De Witt*, 116 Fed. Rep. 713; *Harrison v. People*, 101 Ill. App. 224; *Anable v. Montgomery County*, 34 Ind. App. 72, 107 Am. St. Rep. 148; *Powell v. Brookfield Pressed Brick, etc.*, Mfg. Co., 104 Mo. App. 713; *Duffy v. Meadows*, 131 N. Car. 31; *Eller v. Koehler*, 68 Ohio St. 51; *Faulkenbury v. Wells*, 28 Tex. Civ. App. 621. See also *Ft. Worth, etc., R. Co. v. Beauchamp*, 95 Tex. 496, 93 Am. St. Rep. 864.

10. Existence of Similar Nuisances No Defense. — *Richards v. Daugherty*, 133 Ala. 569; *Pittsburgh, etc., R. Co. v. Crothersville*, 159 Ind. 330, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 690; *Neville v. Mitchell*, 28 Tex. Civ. App. 89.

691. 3. Effect of Coming to Nuisance. — See *Cusson v. Galibert*, 22 Quebec Super. Ct. 493.

4. Question of Nuisance Held to Be One of Law. — *Richards v. Daugherty*, 133 Ala. 569; *Powell v. Brookfield Pressed Brick, etc.*, Mfg. Co., 104 Mo. App. 713.

Question of Nuisance Held to Be One of Fact. — *Flood v. Consumers Co.*, 105 Ill. App. 559; *Chessman v. Hale*, 31 Mont. 577; *Nutter v. Pearl*, 71 N. H. 247; *Landau v. New York*, 90 N. Y. App. Div. 50; *Mackay-Smith v. Crawford*, 56 N. Y. App. Div. 136, affirmed 171 N. Y. 662; *Farver v. American Car, etc., Co.*, 24 Pa. Super. Ct. 579; *Louisville, etc., Terminal Co. v. Jacobs*, 109 Tenn. 727; *Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 90 Am. St. Rep. 819. See also *Barrett v. Henderson*, (Ky. 1902) 69 S. W. Rep. 1101.

Question of Nuisance Held to Be Mixed One of Law and Fact. — The question whether a given state of facts, if found to exist by a jury, constitutes a nuisance is ordinarily one of law for the court, or is at least a mixed question of law and fact. *Frostburg v. Hitchins*, 99 Md. 617.

692. 1. Gases, Vapors, etc., Nuisances. — *Rhoades v. Cook*, 122 Iowa 336; *Perry v. Howe Co-operative Creamery Co.*, 125 Iowa 415; *Peacock Distillery Co. v. Com.*, (Ky. 1904) 78 S. W. Rep. 893; *Leeds v. Bohemian Art Glass Works*, 63 N. J. Eq. 619, affirmed (N. J. 1903) 54 Atl. Rep. 1124; *Friedman v. Columbia Machine Works, etc., Co.*, 99 N. Y. App. Div. 504; *Duffy v. Meadows*, 131 N. Car. 31, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 692; *Kolb v. Knoxville*, 111 Tenn. 311; *Missouri, etc., R. Co. v. Anderson*, 36 Tex. Civ. App. 132, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 692; *Houston, etc., R. Co. v. Reasonover*, 36 Tex. Civ. App. 274. See also *Farver v. American Car, etc., Co.*, 24 Pa. Super. Ct. 579.

Dams, etc., Causing Stagnant Pools and Deposits of Filth. — *Richards v. Daugherty*, 133 Ala. 569.

Deposit of Garbage or Filth on Surface of Ground Within City Limits. — *Stephenville v. Bower*, (Tex. Civ. App. 1902) 68 S. W. Rep. 833.

Putting Dead Animal Near Another's Dwelling. — *Stephenville v. Bower*, (Tex. Civ. App. 1902) 68 S. W. Rep. 833.

Maintenance of Smelter. — *Sterrett v. Northport Min., etc., Co.*, 30 Wash. 164.

693. 1. Location Rendering Business a Nuisance. — *Missouri, etc., R. Co. v. Anderson*, 36 Tex. Civ. App. 132, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 693.

Oil Well. — *Cline v. Kirkbride*, 12 Ohio Cir. Dec. 517, 22 Ohio Cir. Ct. 527.

- 694.** See note 1.
 2. Dust, Smoke, Etc. — See notes 4, 5.
695. Brick-burning. — See note 2.
 3. Noise and Vibration — *a.* NOISE — (1) *In General.* — See note 3.
696. (2) *Of Lawful Business or Occupation.* — See notes 2, 3, 4.
 Necessary Noise from Business May Be Nuisance. — See note 7.
697. See note 4.
 (4) *Of Animals.* — See note 9.
698. *b.* VIBRATION. — See note 4.
700. 8. Drainage of Offensive Matter on Another's Premises. — See note 6.
702. 15. Overhanging Trees. — See note 3.
703. IV. REMEDIES — 1. Abatement and Injunction — *b.* JURISDICTION OF EQUITY TO ENJOIN THREATENED NUISANCE. — See note 6.
704. See notes 1, 2, 3.
c. WHEN GRANTED OR DENIED. — See note 4.

694. 1. Privies. — *Finkelstein v. Huner*, 77 N. Y. App. Div. 424, *affirmed* 179 N. Y. 548.

Stockyards. — *Anderson v. Chicago*, etc., R. Co., 85 Minn. 337. See also *Dolan v. Chicago*, etc., R. Co., 118 Wis. 362, in which case a new trial was granted in the absence of evidence of negligent or improper maintenance.

4. Smoke Not a Nuisance per Se. — *Downing v. Elliott*, 182 Mass. 28.

5. Actual Nuisance Produced by Smoke. — *Ponder v. Quitman Ginney*, 122 Ga. 29; *Kuhn v. Illinois Cent. R. Co.*, 111 Ill. App. 323; *Froelicher v. Oswald Ironworks*, 111 La. 705; *State v. Tower*, 185 Mo. 79; *Leeds v. Bohemian Art Glass Works*, 63 N. J. Eq. 619; *American Ice Co. v. Catskill Cement Co.*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 221, *reversed* on another point 99 N. Y. App. Div. 31; *Friedman v. Columbia Mach. Works*, etc., Co., 99 N. Y. App. Div. 504; *Faulkenbury v. Wells*, 28 Tex. Civ. App. 621; *Stockdale v. Rio Grande Western R. Co.*, 28 Utah 201; *Rogers v. John Week Lumber Co.*, 117 Wis. 5; *Montreal St. R. Co. v. Gareau*, 13 Quebec Pr. 12. See also *Farver v. American Car, etc., Co.*, 24 Pa. Super. Ct. 579.

695. 2. Brick-burning as an Actual Nuisance. — *Powell v. Brookfield Pressed Brick, etc., Mfg. Co.*, 104 Mo. App. 713, supporting the whole text paragraph.

3. Noise as Nuisance. — *Metropolitan West Side El. R. Co. v. Goll*, 100 Ill. App. 323; *Froelicher v. Oswald Ironworks*, 111 La. 705; *Redd v. Edna Cotton Mills*, 136 N. Car. 342; *Faulkenbury v. Wells*, 28 Tex. Civ. App. 621. See also *Rogers v. John Week Lumber Co.*, 117 Wis. 5.

696. 2. Whether Noise Produced by Business Is Nuisance Depends on Circumstances. — *Lord v. De Witt*, 116 Fed. Rep. 713.

3. Ordinary Operation of Railroad. — *Illinois Cent. R. Co. v. Ferrell*, 108 Ill. App. 659; *Friedman v. New York, etc., R. Co.*, 89 N. Y. App. Div. 38, *affirmed* 180 N. Y. 550.

Noise Incidental to Operation of Street Railway. — *State v. Hartford St. R. Co.*, 76 Conn. 174.

4. Blacksmith Shop. — *Fancher v. Trudel*, 71 N. H. 621.

7. Noisy Business in Residence Neighborhood. — *Leeds v. Bohemian Art Glass Works*, 63 N. J. Eq. 619 (glass works); *Stockdale v. Rio*

Grande Western R. Co., 28 Utah 201. See also *Redd v. Edna Cotton Mills*, 136 N. Car. 342.

697. 4. Unreasonable Noise by Railway. — *Stockdale v. Rio Grande Western R. Co.*, 28 Utah 201.

9. Noise Made by Animals in Cattle Pen, Stock Yard, or Slaughter House. — See *Dolan v. Chicago*, etc., R. Co., 118 Wis. 362.

698. 4. Vibration of Machinery. — *Colwell v. St. Pancras Borough Council*, (1904) 1 Ch. 707; *Adami v. Montreal*, 25 Quebec Super. Ct. 1; *Hopkin v. Hamilton Electric Light, etc., Co.*, 2 Ont. L. Rep. 240, *affirmed* 4 Ont. L. Rep. 258; *Montreal St. R. Co. v. Gareau*, 13 Quebec Pr. 12; *Friedman v. Columbia Mach. Works, etc., Co.*, 99 N. Y. App. Div. 504; *Farver v. American Car, etc., Co.*, 24 Pa. Super. Ct. 579.

Blasting. — *Longtin v. Persell*, 30 Mont. 306, 104 Am. St. Rep. 723.

700. 6. Drainage of Offensive Matter on Another's Land. — *Waycross v. Houk*, 113 Ga. 963; *Chessman v. Hale*, 31 Mont. 577; *Hentz v. Mt. Vernon*, 78 N. Y. App. Div. 515.

702. 3. Overhanging Trees. — See *Smith v. Giddy*, (1904) 2 K. B. 448.

703. 6. Equity Has Jurisdiction to Enjoin. — *Com. v. McGovern*, 116 Ky. 212, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 703; *Holke v. Herman*, 87 Mo. App. 125; *Pierce v. Gibson County*, 107 Tenn. 224, 89 Am. St. Rep. 946. See also *Davis v. Auld*, 96 Me. 559.

704. 1. Foundation of Jurisdiction. — *Perry v. Howe Co-operative Creamery Co.*, 125 Iowa 415; *Com. v. McGovern*, 116 Ky. 212, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 704; *Davis v. Auld*, 96 Me. 559; *Keppel v. Lehigh Coal, etc., Co.*, 200 Pa. St. 649.

2. Remedy by Indictment Does Not Preclude Injunction. — *Com. v. McGovern*, 116 Ky. 212, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 704.

3. Right to Demand Abatement Not Adequate Remedy at Law. — *Com. v. McGovern*, 116 Ky. 212, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 704.

4. Enjoining What Will Necessarily Be Nuisance. — *Flood v. Consumers Co.*, 105 Ill. App. 550; *King v. Hamill*, 97 Md. 103; *Gallagher v. Flury*, 99 Md. 181; *Vickers v. Durham*, 132

705. See note 1.

706. What Other Complainants Must Show. — See notes 1, 2, 3.

707. See notes 1, 2, 3.

708. Diminution of Value. — See notes 2, 3.

Restraining Erection of Building. — See notes 4, 5.

709. *d. PARTIES* — (1) *Complainant*. — See notes 2, 3.

710. Municipal Corporation. — See notes 2, 3.

711. (2) *Defendant*. — See note 3.

N. Car. 880; Keppel v. Lehigh Coal, etc., Co., 200 Pa. St. 649.

705. 1. When Injunction Will Be Denied — Flood v. Consumers Co., 105 Ill. App. 559; Gallagher v. Flury, 99 Md. 181; West v. Ponca City Milling Co., 14 Okla. 646.

705. 1. Right to Relief Must Be Clearly Shown — Flood v. Consumers Co., 105 Ill. App. 559; Braasch v. Cemetery Assoc., (Neb. 1903) 95 N. W. Rep. 646; West v. Ponca City Milling Co., 14 Okla. 646, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 706.

2. Act Contemplated Must Constitute Legal Nuisance. — Alexander v. Tebeau, (Ky. 1903) 71 S. W. Rep. 427; Holke v. Herman, 87 Mo. App. 125; Vickers v. Durham, 132 N. Car. 880; West v. Ponca City Milling Co., 14 Okla. 646, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 706.

3. Injury Apprehended Must Be Real and Substantial. — Canal Melting Co. v. Columbia Park Co., 99 Ill. App. 215; Flood v. Consumers Co., 105 Ill. App. 559; Perry v. Howe Co-operative Creamery Co., 125 Iowa 415; Bates v. Holbrook, 171 N. Y. 460; Vickers v. Durham, 132 N. Car. 880; West v. Ponca City Milling Co., 14 Okla. 646, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 706.

707. 1. Danger of Injury Irreparable in Damages or Irremediable at Law Must Be Shown. — Robinson v. Baltimore, etc., R. Co., (C. C. A.) 129 Fed. Rep. 753; Dewey Hotel Co. v. U. S. Electric Lighting Co., 17 App. Cas. (D. C.) 356; Canal Melting Co. v. Columbia Park Co., 99 Ill. App. 215; Flood v. Consumers Co., 105 Ill. App. 559; Perry v. Howe Co-operative Creamery Co., 125 Iowa 415; Com. v. McGovern, 116 Ky. 212; King v. Hamill, 97 Md. 103; Vickers v. Durham, 132 N. Car. 880; Cline v. Kirkbride, 12 Ohio Cir. Dec. 517, 22 Ohio Cir. Ct. 527; Standard Bag, etc., Co. v. Cleveland, 25 Ohio Cir. Ct. 380; West v. Ponca City Milling Co., 14 Okla. 646, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 707; Pierce v. Gibson County, 107 Tenn. 224, 89 Am. St. Rep. 946.

What Is Irreparable Mischief. — Richards v. Daugherty, 133 Ala. 569.

Irreparable Damages Defined. — Montgomery First Nat. Bank v. Tyson, 133 Ala. 459, 91 Am. St. Rep. 46.

2. Injury Must Be Natural Consequence of Act Sought to Be Restrained. — Holke v. Herman, 87 Mo. App. 125; Braasch v. Cemetery Assoc., (Neb. 1903) 95 N. W. Rep. 646; West v. Ponca City Milling Co., 14 Okla. 646, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 707; Pope v. Bridgewater Gas Co., 52 W. Va. 252; Priewe v. Fitzsimons, etc., Co., 117 Wis. 497.

The Degree of Certainty required has been held to be sufficiently established where upon the

evidence there is a probability that the act complained of is or will be a nuisance if permitted to remain or be committed. Vickers v. Durham, 132 N. Car. 880.

3. Danger Must Be Imminent. — Robinson v. Baltimore, etc., R. Co., (C. C. A.) 129 Fed. Rep. 753; Com. v. McGovern, 116 Ky. 212; Vickers v. Durham, 132 N. Car. 880; West v. Ponca City Milling Co., 14 Okla. 646, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 707; Pierce v. Gibson County, 107 Tenn. 224, 89 Am. St. Rep. 946; Pope v. Bridgewater Gas Co., 52 W. Va. 252.

708. 2. Depreciation of Property Values Insufficient Ground. — West v. Ponca City Milling Co., 14 Okla. 646, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 708.

3. Increase of Fire Insurance Rates Insufficient Ground. — West v. Ponca City Milling Co., 14 Okla. 646, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 708.

4. Erection Will Not Be Enjoined Where Injury Is Apprehended from Use Thereof Only. — Flood v. Consumers Co., 105 Ill. App. 565, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 708; Marrs v. Fiddler, (Ky. 1902) 69 S. W. Rep. 953; King v. Hamil, 97 Md. 103; Rainey v. Red River, etc., R. Co., (Tex. Civ. App. 1904) 80 S. W. Rep. 95.

5. When Erection of Building Enjoined. — Marrs v. Fiddler, (Ky. 1902) 69 S. W. Rep. 953; Youngstown Tp. v. Youngstown, 25 Ohio Cir. Ct. 518; West v. Ponca City Milling Co., 14 Okla. 646.

Erection of Planing Mill. — Rogers v. John Week Lumber Co., 117 Wis. 5.

709. 2. Private Person Who Will Sustain Special Damages May Enjoin. — E. A. Chatfield Co. v. New Haven, 110 Fed. Rep. 788; Lowndale v. Gray's Harbor Boom Co., 117 Fed. Rep. 983; Richards v. Daugherty, 133 Ala. 569; Montgomery First Nat. Bank v. Tyson, 133 Ala. 459, 91 Am. St. Rep. 46; Dewey Hotel Co. v. U. S. Electric Lighting Co., 17 App. Cas. (D. C.) 356; Strunk v. Pritchett, 27 Ind. App. 582; Tilly v. Mitchell, etc., Co., 121 Wis. 1, 105 Am. St. Rep. 1007; Rogers v. John Week Lumber Co., 117 Wis. 5.

3. Private Person Suffering Common Injury Only Not Entitled to Enjoin. — Humphreys v. Eastlack, 63 N. J. Eq. 136; Rhymer v. Fretz, 206 Pa. St. 230, 98 Am. St. Rep. 777. See also Kelly v. Pittsburgh, etc., R. Co., 28 Ind. App. 457, 91 Am. St. Rep. 134.

710. 2. Special Injury Will Sustain Suit by Municipality. — Yuba County v. Kate Hayes Min. Co., 141 Cal. 360; Winthrop v. New England Chocolate Co., 180 Mass. 464.

3. County May Enjoin Obstruction of Highway. — Sierra County v. Butler, 136 Cal. 547.

711. 3. State or Municipal Corporation May

- 711.** 2. Criminal Prosecution — *a.* IN GENERAL. — See note 4.
b. PUNISHMENT. — See note 8.
- 712.** *d.* PERSONS LIABLE — (3) *Corporation.* — See note 6.
 3. Action for Damages — *b.* PRIVATE NUISANCE. — See notes 12, 13.
- 713.** *c.* PUBLIC NUISANCE — (1) *In General.* — See note 1.
- 714.** Injury Must Be Different in Kind. — See note 1.
 (2) *Obstructions on Highways.* — See notes 3, 6.
- 715.** See note 3.
- 716.** (3) *Application of Rule to Other Nuisances.* — See note 7.
 (4) *Injury Must Be Direct.* — See note 11.
- 717.** (5) *Injury Must Be Substantial.* — See note 1.
d. PERSONS LIABLE — (2) *Principal for Nuisance Created by Agent.*
 — See note 6.
 (3) *Agent.* — See note 8.
 (4) *Where Nuisance Erected by Independent Contractor.* — See note 9.
 (5) *Municipal Corporations* — (a) *In General.* — See note 11.
- 718.** See note 1.

Be Enjoined. — *Colwell v. St. Pancras Borough Council*, (1904) 1 Ch. 707; *Deaconess Home, etc., v. Bontjes*, 104 Ill. App. 484; *Pierce v. Gibson County*, 107 Tenn. 224, 89 Am. St. Rep. 946; *Ennis v. Gilder*, 32 Tex. Civ. App. 351. See also *Sammons v. Gloversville*, 175 N. Y. 346.

711. 4. Criminal Prosecution for Public Nuisance. — *Kuhn v. Illinois Cent. R. Co.*, 111 Ill. App. 323; *Cella v. People*, 112 Ill. App. 376; *O'Brien v. Central Iron, etc., Co.*, 158 Ind. 218, 92 Am. St. Rep. 305; *Com. v. Packard*, 185 Mass. 64; *Reyburn v. Sawyer*, 135 N. Car. 328, 102 Am. St. Rep. 555; *Mason v. Ohio River R. Co.*, 51 W. Va. 183. See also *State v. Shaffer*, 31 Wash. 305.

8. Similar Punishment under Statute. — *Reyburn v. Sawyer*, 135 N. Car. 328, 102 Am. St. Rep. 555.

712. 6. Liability of Private Corporation. — *Acme Fertilizer Co. v. State*, 34 Ind. App. 346, 107 Am. St. Rep. 166.

Liability of Municipal Corporation to Indictment. — See the title MUNICIPAL CORPORATIONS, 1231. 5.

12. Action on the Case the Remedy for a Private Nuisance. — *Powell v. Brookfield Pressed Brick, etc., Mfg. Co.*, 104 Mo. App. 713.

13. Proof of Special Damage Unnecessary. — *Powell v. Brookfield Pressed Brick, etc., Mfg. Co.*, 104 Mo. App. 713; *Montreal St. R. Co. v. Gareau*, 13 Quebec Pr. 12.

713. 1. Private Action for Damages Arising from Public Nuisance. — *Savannah, etc., R. Co. v. Parish*, 117 Ga. 893; *Kuhn v. Illinois Cent. R. Co.*, 111 Ill. App. 323; *O'Brien v. Central Iron, etc., Co.*, 158 Ind. 218, 92 Am. St. Rep. 305; *Baker v. McDaniel*, 178 Mo. 447; *Scheurich v. Southwest Missouri Light Co.*, 109 Mo. App. 406; *Reyburn v. Sawyer*, 135 N. Car. 328, 102 Am. St. Rep. 555; *Farver v. American Car, etc., Co.*, 24 Pa. Super. Ct. 570; *Wilson v. West, etc., Mill Co.*, 28 Wash. 312; *Tilly v. Mitchell, etc., Co.*, 121 Wis. 1, 105 Am. St. Rep. 1007.

714. 1. Injury Must Be Different in Kind. — *O'Brien v. Central Iron, etc., Co.*, 158 Ind. 218, 92 Am. St. Rep. 305; *Wilson v. West, etc.,*

Mill Co., 28 Wash. 312; *Tilly v. Mitchell, etc., Co.*, 121 Wis. 1, 105 Am. St. Rep. 1007. See also *Rhymer v. Fretz*, 206 Pa. St. 230, 98 Am. St. Rep. 777.

3. Obstructions on Highways. — *Savannah, etc., R. Co. v. Parish*, 117 Ga. 893; *O'Brien v. Central Iron, etc., Co.*, 158 Ind. 218, 92 Am. St. Rep. 305; *Wilson v. West, etc., Mill Co.*, 28 Wash. 312.

6. Obstructions Interfering with Access. — *Bourbon Stockyard Co. v. Woolley*, (Ky. 1903) 76 S. W. Rep. 28; *Tilly v. Mitchell, etc., Co.*, 121 Wis. 1, 105 Am. St. Rep. 1007.

715. 3. Obstruction Merely Causing Delay. — *Tilly v. Mitchell, etc., Co.*, 121 Wis. 1, 105 Am. St. Rep. 1007.

716. 7. Injury to Private Property or Health Special in Its Nature. — *Savannah, etc., R. Co. v. Parish*, 117 Ga. 893, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 716, and supporting the text paragraph generally.

11. Distinction Repudiated. — *Kuhn v. Illinois Cent. R. Co.*, 111 Ill. App. 323.

717. 1. Injury Must Be Substantial. — *Downing v. Elliott*, 182 Mass. 28; *Eller v. Koehler*, 68 Ohio St. 51.

6. Liability of Principal for Nuisance Created by Agent. — *Alford v. Carver*, 31 Tex. Civ. App. 607.

8. Liability of Agent. — *Terry v. State*, 24 Ohio Cir. Ct. 111.

9. Liability of Owner for Nuisance Created by Independent Contractor. — *Alford v. Carver*, 31 Tex. Civ. App. 607.

Employer Liable. — *Keyes v. Second Baptist Church*, 99 Me. 308.

11. Liability of Municipal Corporation for Private Nuisance. — *Holmes v. Atlanta*, 113 Ga. 961; *Pettit v. Grand Junction*, 119 Iowa 352; *Arnold v. Stanford*, 113 Ky. 852; *Bembe v. Anne Arundel County*, 94 Md. 321; *Hentz v. Mt. Vernon*, 78 N. Y. App. Div. 515; *Kolb v. Knoxville*, 111 Tenn. 311; *Pierce v. Gibson County*, 107 Tenn. 224, 89 Am. St. Rep. 946; *Stephenville v. Bower*, (Tex. Civ. App. 1902) 68 S. W. Rep. 8.; *Weber v. Berlin*, 8 Ont. L. Rep. 302.

718. 1. Liability of Municipality for Special

718. (6) *Failure to Suppress Nuisance.* — See note 6.

719. (7) *Private Corporations.* — See note 1.

(10) *Two or More Persons Contributing to Same Nuisance.* — See notes 6, 7, 8, 9, 10.

720. (11) *Grantor and Grantee of Lands* — (b) *Liability of Grantee* — *aa. IN GENERAL.* — See note 4.

bb. NECESSITY OF NOTICE. — See note 5.

721. (13) *Owner's Liability for Nuisance Created by Another.* — See note 7.

c. BY WHOM ACTION IS MAINTAINABLE — (1) *In General.* — See note 10.

722. See note 4.

(3) *Grantee of Lands Affected.* — See notes 8, 11, 12.

(4) *Municipality.* — See note 13.

723. *f. CONTRIBUTORY ACT OR NEGLIGENCE.* — See note 1.

g. ACQUIESCENCE. — See note 5.

724. *i. LIMITATION OF ACTIONS* — (1) *For Continuing or Temporary Nuisances.* — See note 4.

Damage from Public Nuisance — Birmingham *v. Land*, 137 Ala. 538.

718. 6. *Nonliability for Failure to Suppress Nuisance.* — Dalton *v. Wilson*, 118 Ga. 100, 98 Am. St. Rep. 101; Arnold *v. Stanford*, 113 Ky. 852; Board of Councilmen *v. Com.*, (Ky. 1903) 75 S. W. Rep. 217; Miller *v. Newport News*, 101 Va. 432.

Nuisance in a Near Public Street. — In Georgia, where a nuisance is in or near a public street, the municipality is liable to one who uses the streets and thereby suffers special damage from the existence of the nuisance and from the failure of the municipality to abate it. Dalton *v. Wilson*, 118 Ga. 100, 98 Am. St. Rep. 101.

719. 1. *Liability of Private Corporations.* — Kleebauer *v. Western Fuse, etc., Co.*, (Cal. 1902) 69 Pac. Rep. 246. See also Louisville Terminal Co. *v. Jacobs*, 109 Tenn. 727.

6. *All Contributors to Nuisance Liable.* — Watson *v. Colusa-Parrot Min., etc., Co.*, 31 Mont. 513; Wilson *v. West, etc., Mill Co.*, 28 Wash. 312.

Lessor and Lessee. — Pickens *v. Coal River Boom, etc., Co.*, 51 W. Va. 445, 90 Am. St. Rep. 819.

7. *Augmentation of Nuisance by Others No Defense.* — Illinois Cent. R. Co. *v. Ferrell*, 108 Ill. App. 659; Pittsburgh, etc., R. Co. *v. Crothersville*, 159 Ind. 330, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 719; West Muncie Strawboard Co. *v. Slack*, 164 Ind. 21.

8. Pittsburgh, etc., R. Co. *v. Crothersville*, 159 Ind. 330, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 719.

9. *Person Acting Independently Liable for His Act Only.* — Watson *v. Colusa-Parrot Min., etc., Co.*, 31 Mont. 513.

10. Watson *v. Colusa-Parrot Min., etc., Co.*, 31 Mont. 513.

720. 4. *Liability of Grantee of Lands for Nuisance Thereon.* — Ingersoll *v. Rousseau*, 35 Wash. 92.

Not Liable for Damage Caused by Predecessor in Interest. — Watson *v. Colusa-Parrot Min., etc., Co.*, 31 Mont. 513.

5. *Notice of Nuisance Required.* — Blackstock *v. Southern R. Co.*, 120 Ga. 414.

When Notice Necessary. — Notice is necessary only when the nuisance itself existed before the person sought to be charged with its continuance became the owner of the premises. Finkelstein *v. Huner*, 77 N. Y. App. Div. 424, affirmed 179 N. Y. 548.

Under the Montana Statute notice is unnecessary. Watson *v. Colusa-Parrot Min., etc., Co.*, 31 Mont. 513.

721. 7. *Owner Aware of Nuisance* — Knowledge of Agent. — See State *v. Collins*, 74 Vt. 43; State *v. Lundergan*, 74 Vt. 48.

10. *Action by Lessee.* — Bly *v. Edison Electric Illuminating Co.*, 172 N. Y. 1.

722. 4. *Contra.* — Ft. Worth, etc., R. Co. *v. Glenn*, 97 Tex. 586, 104 Am. St. Rep. 894, distinguishing the New York and Texas cases and disapproving the Missouri case cited in the original note, and holding that an action was maintainable by an infant to recover damages for sickness caused by a nuisance maintained near his father's residence.

8. *Action by Grantee of Lands Affected.* — Birmingham *v. Land*, 137 Ala. 538.

Lessee. — Hoffman *v. Edison Electric Illuminating Co.*, 87 N. Y. App. Div. 371.

11. Watson *v. Colusa-Parrot Min., etc., Co.*, 31 Mont. 513.

12. Mallott *v. Johnston*, 106 Ill. App. 545; Illinois Cent. R. Co. *v. Ferrell*, 108 Ill. App. 659.

13. *Action by Municipality.* — Merritt Tp. *v. Harp*, 131 Mich. 174.

723. 1. *Effect of Plaintiff's Act Contributing to Injury.* — Pinnix *v. Durham*, 130 N. Car. 360.

5. *Protest Against Nuisance Unnecessary.* — See St. Louis Safe Deposit, etc., Bank *v. Kennett Estate*, 101 Mo. App. 370; Faulkenbury *v. Wells*, 28 Tex. Civ. App. 621.

724. 4. *Damages Recoverable for Continuance of Nuisance Although Original Cause Barred.* — Kuhn *v. Illinois Cent. R. Co.*, 111 Ill. App. 323; West Muncie Strawboard Co. *v. Slack*, 164 Ind. 21; Bennett *v. Marion*, 119 Iowa 473; Vogt *v. Grinnell*, 123 Iowa 332; Sterrett *v. Northport Min., etc., Co.*, 30 Wash. 164.

724. (2) *For Permanent Injuries.* — See notes 7, 8.

725. *k. DAMAGES RECOVERABLE* — (1) *Measure of Damages and Elements of Recovery* — (a) *In General.* — See notes 6, 7.

726. See note 1.

(b) *Measure of Damages* — *aa. FOR DESTRUCTION OF OR PERMANENT INJURY TO PROPERTY.* — See notes 3, 4.

727. *Cost of Repairing Injury.* — See note 1.

bb. FOR TEMPORARY OR ABATABLE NUISANCE. — See notes 2, 3.

If the Nuisance Causes Physical Injury to Property. — See note 5.

cc. CONSIDERATION OF PURPOSE FOR WHICH PROPERTY WAS USED. — See note 7.

728. (c) *Elements of Recovery* — *aa. INJURY TO HEALTH OR COMFORT.* — See notes 3, 4.

724. 7. *Statute Runs from Completion of Permanent Nuisance.* — Illinois Cent. R. Co. v. Ferrell, 108 Ill. App. 650. See also West Muncie Strawboard Co. v. Slack, 164 Ind. 21; Pettit v. Grand Junction, 119 Iowa 352.

8. *For Consequential Injury Statute Runs from Infliction of Injury.* — Sterrett v. Northport Min., etc., Co., 30 Wash. 164.

725. 6. *Only Actual Compensation Allowed Ordinarily.* — Bates v. Holbrook, 171 N. Y. 460.

7. *Injury Must Be Natural and Direct Result of Defendant's Act.* — Pickens v. Coal River Boom, etc., Co., 51 W. Va. 445, 90 Am. St. Rep. 819. See also Mineral Wells v. Russell, 30 Tex. Civ. App. 232.

726. 1. *Double Compensation Not Recoverable.* — Vogt v. Grinnell, 123 Iowa 332; Watson v. Colusa-Parrot Min., etc., Co., 31 Mont. 513.

3. *Measure of Damages for Destruction or Injury of Property.* — Dennis v. Mobile, etc., R. Co., 137 Ala. 649, 97 Am. St. Rep. 69; Illinois Cent. R. Co. v. Ferrell, 108 Ill. App. 650; Baltimore, etc., R. Co. v. Quillen, 34 Ind. App. 330, 107 Am. St. Rep. 158; Watson v. Colusa-Parrot Min., etc., Co., 31 Mont. 513; B. Stroth Brewing Co. v. Schmitt, 25 Ohio Cir. Ct. 231; Daniel v. Ft. Worth, etc., R. Co., (Tex. Civ. App. 1902) 69 S. W. Rep. 198; Umscheid v. San Antonio, (Tex. Civ. App. 1902) 69 S. W. Rep. 496; Missouri, etc., R. Co. v. McGehee, (Tex. Civ. App. 1903) 75 S. W. Rep. 841; Cane Belt R. Co. v. Ridgeway, (Tex. Civ. App. 1905) 85 S. W. Rep. 496.

Pollution of Stream — Cost of Removal of Culm. — Stevenson v. Ebervale Coal Co., 201 Pa. St. 112, 88 Am. St. Rep. 805, 203 Pa. St. 316.

The Right of Recovery Is Not Limited to Depreciation in Value of property, but recovery may be had for discomfort to the owner and his family in the use of his home. Daniel v. Ft. Worth, etc., R. Co., 96 Tex. 327.

4. *Difference in Market Value Rule for Measure.* — Dennis v. Mobile, etc., R. Co., 137 Ala. 649, 97 Am. St. Rep. 69; Watson v. Colusa-Parrot Min., etc., Co., 31 Mont. 513; B. Stroth Brewing Co. v. Schmitt, 25 Ohio Cir. Ct. 231; Missouri, etc., R. Co. v. Dennis, (Tex. Civ. App. 1905) 84 S. W. Rep. 860; Cane Belt R. Co. v. Ridgeway, (Tex. Civ. App. 1905) 85 S. W. Rep. 496.

727. 1. *Amount in Excess of Value of Land Not Recoverable.* — Watson v. Colusa-Parrot Min., etc., Co., 31 Mont. 513; Stevenson v. Ebervale Coal Co., 201 Pa. St. 112, 88 Am. St. Rep. 805, 203 Pa. St. 316.

2. *Depreciation of Rental Value Is Measure of Damages.* — Swift v. Broyles, 115 Ga. 885; Atchison, etc., R. Co. v. Jones, 110 Ill. App. 626; Baltimore, etc., R. Co. v. Quillen, 34 Ind. App. 330, 107 Am. St. Rep. 158; Bennett v. Marion, 119 Iowa 473; Hollenbeck v. Marion, 116 Iowa 69; Vogt v. Grinnell, 123 Iowa 332; Bates v. Holbrook, 89 N. Y. App. Div. 548; People v. Davey, 149 N. Y. 345; Pritchard v. Edison Electric Illuminating Co., 179 N. Y. 364; B. Stroth Brewing Co. v. Schmitt, 25 Ohio Cir. Ct. 231; Umscheid v. San Antonio, (Tex. Civ. App. 1902) 69 S. W. Rep. 496; Cane Belt R. Co. v. Ridgeway, (Tex. Civ. App. 1905) 85 S. W. Rep. 496; Pickens v. Coal River Boom, etc., Co., 51 W. Va. 445, 90 Am. St. Rep. 819. *Usable Value to Lessee.* — Bates v. Holbrook, 89 N. Y. App. Div. 548.

Election as to Measure of Damages. — Where premises are injuriously affected by a nuisance consisting of vibrations, noises, smoke, and gases from an electric-light plant, the owner or tenant has an election whether to have his damages measured by the depreciation in the rental value of the premises as a whole or by the loss in the usable value of the premises. Hoffman v. Edison Electric Illuminating Co., 87 N. Y. App. Div. 371.

3. *Expenses Occasioned by Sickness.* — Swift v. Broyles, 115 Ga. 885.

5. *Injury to Crops.* — Watson v. Colusa-Parrot Min., etc., Co., 31 Mont. 513.

7. *Damages Allowed for Use to Which Property Was Put.* — Pettit v. Grand Junction, 119 Iowa 352; Hoffman v. Edison Electric Illuminating Co., 87 N. Y. App. Div. 371.

728. 3. *Injury to Health of Plaintiff and Family May Be Considered.* — Anderson v. Chicago, etc., R. Co., 85 Minn. 337; Farver v. American Car, etc., Co., 24 Pa. Super. Ct. 579; Missouri, etc., R. Co. v. Anderson, 36 Tex. Civ. App. 121.

Loss of Society of Wife. — Neville v. Mitchell, 28 Tex. Civ. App. 80.

4. *Inconvenience and Discomfort Elements of Damage.* — Swift v. Broyles, 115 Ga. 885; Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323; Mahan v. Doggett, (Ky. 1905) 84 S. W. Rep. 525; Anderson v. Chicago, etc., R. Co., 85 Minn. 337; Farver v. American Car, etc., Co., 24 Pa. Super. Ct. 579; Louisville, etc., Terminal Co. v. Jacobs, 100 Tenn. 727; Daniel v. Ft. Worth, etc., R. Co., 96 Tex. 327; Houston, etc., R. Co. v. Charwaine, 30 Tex. Civ. App. 633; Houston, etc., R. Co. v. Reason-

728. *bb.* MENTAL ANGUISH. — See note 5.

729. (2) *Discretion of Jury* — (a) In Fixing Amount of Damag-s. — See note 3.

(b) In Awarding Punitive Damages. — See note 7.

730. (4) *Time to Which Damages Are Assessable* — (a) For Temporary or Abatable Nuisance — *aa.* IN GENERAL. — See note 8.

731. See notes 1, 2, 3.

732. *bb.* IN INJUNCTION SUIT FOR ABATEMENT. — See note 7.

(b) For Permanent Nuisance or Irreparable Injury to Person or Property. — See note 9.

733. V. PRESCRIPTION AS DEFENSE — 1. Public Nuisances. — See note 4.

734. 2. Private Nuisances — *a.* IN GENERAL. — See note 5.

b. NECESSITY FOR ADVERSE USER. — See note 6.

735. *c.* EXTENT AND CHARACTER OF USER. — See notes 2, 3.

736. VI. LEGISLATIVE CONTROL — 1. Legalizing Nuisances — *a.* AS DEFENSE TO ACTION BY STATE. — See notes 5, 6.

737. *b.* NUISANCE INJURIOUSLY AFFECTING PRIVATE PROPERTY — (1) *In General* — But in the United States. — See notes 5, 6.

738. (2) *Necessity for Clear Statutory Sanction.* — See notes 2, 3.

739. 2. Declaring Nuisances. — See notes 1, 2, 4.

over, 36 Tex. Civ. App. 274; Missouri, etc., R. Co. v. Anderson, 36 Tex. Civ. App. 121.

Permanent Injury — No Separate Recovery for Personal Annoyance. — Daniel v. Ft. Worth, etc., R. Co., (Tex. Civ. App. 1902) 69 S. W. Rep. 198.

728. 5. Mental Anguish Element of Damage. — Houston, etc., R. Co. v. Reasonover, 36 Tex. Civ. App. 274.

729. 3. Jury Have Discretion in Fixing Damages. — Swift v. Broyles, 115 Ga. 885; N. K. Fairbank Co. v. Bahre, 112 Ill. App. 290, reversed and remanded 213 Ill. 636; Watson v. Colusa-Parrot Min., etc., Co., 31 Mont. 513.

7. Punitive Damages Allowed in Second Action for Same Nuisance. — Pickens v. Coal River Boom, etc., Co., 51 W. Va. 445, 90 Am. St. Rep. 819.

730. 8. Continuance of Nuisance Is New Nuisance Authorizing New Action. — Southern R. Co. v. Cook, 117 Ga. 286; N. K. Fairbank Co. v. Bahre, 213 Ill. 636; Kuhn v. Illinois Cent. R. Co., 111 Ill. App. 323; Gilbert v. Boak Fish Co., 86 Minn. 365.

731. 1. Recovery Does Not Bar for Continuance. — Southern R. Co. v. Cook, 117 Ga. 286; Mulligan v. Augusta, 115 Ga. 337; Tennett v. Marion, 119 Iowa 473; Hartman v. Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360.

2. Admissibility of Judgment. — See Bennett v. Marion, 119 Iowa 473; Hartman v. Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360.

3. Recovery Limited to Damages Prior to Commencement of Action. — N. K. Fairbank Co. v. Bahre, 213 Ill. 636; Gilbert v. Boak Fish Co., 86 Minn. 365; Miller v. Edison Electric Illuminating Co., 66 N. Y. App. Div. 470; Alexander v. Stewart Bread Co., 21 Pa. Super. Ct. 526; Hartman v. Pittsburg Inclined Plane Co., 23 Pa. Super. Ct. 360. See also Southern R. Co. v. Cook, 117 Ga. 286.

732. 7. Damages Assessed to Entry of Decree. — Gilbert v. Boak Fish Co., 86 Minn. 365.

9. But One Action for Permanent Injury to Property. — Southern R. Co. v. Cook, 117 Ga. 286; N. K. Fairbank Co. v. Bahre, 213 Ill. 636.

733. 4. Prescription No Defense to Proceeding by Public for Common Nuisance. — Birmingham v. Land, 137 Ala. 538; Kelly v. Pittsburgh, etc., R. Co., 28 Ind. App. 457, 91 Am. St. Rep. 134; Isham v. Broderick, 89 Minn. 397. See also Pettit v. Grand Junction, 119 Iowa 352.

734. 5. Prescription as Defense to Private Nuisance. — Schumacher v. Shawhan, 93 Mo. App. 573.

6. Adverse User Necessary. — Schumacher v. Shawhan, 93 Mo. App. 573; Chillicothe v. Bryan, 103 Mo. App. 409; Chessman v. Hale, 31 Mont. 577.

735. 2. Extent and Character of User Requisite. — Chessman v. Hale, 31 Mont. 577; Standard Bag, etc., Co. v. Cleveland, 25 Ohio Cir. Ct. 380, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 735.

3. Prescription No Defense for Increased User. — Standard Bag, etc., Co. v. Cleveland, 25 Ohio Cir. Ct. 380, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 735.

736. 5. Legislative Sanction as Defense to Action by State. — Com. v. Packard, 185 Mass. 64.

6. Statutory Authority Necessary. — Com. v. Packard, 185 Mass. 64.

737. 5. Redress for Nuisance Amounting to Taking of Property. — Sadlier v. New York, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 78, reversed on other grounds 104 N. Y. App. Div. 82.

6. Legislative Sanction as Bar to Damages. — Com. v. Packard, 185 Mass. 64; Dolan v. Chicago, etc., R. Co., 118 Wis. 362, holding injuries arising from the maintenance of a railroad stockyard, under legislative compulsion and with proper diligence and care, to be *damnum absque injuria*.

On the Principle Above Stated. — Georgia R., etc., Co. v. Maddox, 116 Ga. 64.

738. 2. Sanction Must Be Clear. — Sammons v. Gloversville, 175 N. Y. 346; Louisville, etc., Terminal Co. v. Jacobs, 100 Tenn. 727.

3 Sammons v. Gloversville, 175 N. Y. 346.

739. 1. A Statute Declaring All Common

739. VII. MUNICIPAL CONTROL — 2. Declaring Nuisances. — See note 9.

740. See note 4.

3. Power to Punish. — See note 5.

NULLA BONA. — See note 7.

741. NULL AND VOID. — See note 1.

NUNC PRO TUNC. — See note 5.

742. [NURSE. — See note *a*.]

Nuisances to Be Criminal is to be construed as prohibiting every act which was by the common law indictable as a nuisance. *State v. De Wolfe*, 67 Neb. 321.

739. 2. Large Discretion Vested in Legislature. — *Com. v. Packard*, 185 Mass. 64.

Declaring Common-law Nuisance One per Se. — *State v. Tower*, 185 Mo. 79.

4. *Com. v. Packard*, 185 Mass. 64; *Pittsburg v. W. H. Keech Co.*, 21 Pa. Super. Ct. 548.

9. Municipal Declaration of Nuisance. — *Whitmier, etc.*, *Co. v. Buffalo*, 118 Fed. Rep. 773; *Langel v. Bushnell*, 197 Ill. 20; *Chicago v. Gunning System*, 214 Ill. 628; *Rushville Natural Gas Co. v. Morristown*, 30 Ind. App. 455; *Pittsburg v. W. H. Keech Co.*, 21 Pa. Super. Ct. 548.

740. 4. Arbitrary Declaration of Nuisance. — *Rushville Natural Gas Co. v. Morristown*, 30 Ind. App. 455; *Arnold v. Stanford*, 113 Ky. 852; *Boyd v. Board of Councilmen*, (Ky. 1903)

77 S. W. Rep. 660; *St. Louis v. Galt*, 179 Mo. 8; *Pittsburg v. W. H. Keech Co.*, 21 Pa. Super. Ct. 548.

Ordinance Void. — See *Munsell v. Carthage*, 105 Ill. App. 119, *affirmed* 203 Ill. 474.

5. Power of Municipality to Punish for Nuisance. — *Chicago v. Gunning System*, 214 Ill. 628; *St. Louis v. Galt*, 179 Mo. 8.

7. Nulla Bona. — *Merrick v. Carter*, 205 Ill. 73.

741. 1. Null and Void. — *Forrester v. Boston, etc.*, *Consol. Copper, etc.*, Min. Co., 29 Mont. 397.

5. Nunc pro Tunc. — *Burns v. Skelton*, 29 Tex. Civ. App. 453.

742. *a.* In *Van Hook v. Young*, 29 Ind. App. 471, the court said: "The verb to *nurse* used with reference to an adult conveys the idea that the object of care is sick or is an invalid; it means more than general watchfulness."

OATHS AND AFFIRMATIONS.

By C. T. GREEN.

745. III. KINDS OF OATHS — A Judicial Oath. — See note 5.

746. IV. RIGHT TO AFFIRM — Not Extended Beyond Terms of Statute. — See note 1.

747. V. WHO MAY TAKE OATH. — See note 3.

VI. ADMINISTRATION — 1. What Constitutes Administration. — See notes 4, 5.

2. Who May Administer — *a.* IN GENERAL. — See note 7.

748. *b.* DESIGNATION OF PERSONS AUTHORIZED TO ADMINISTER — (2) *Where Officer Not Specifically Designated*. — See note 8.

749. *c.* DE FACTO OFFICER. — See note 1.

745. 5. Extrajudicial Oath. — See *State v. Scatena*, 84 Minn. 281.

746. 1. The Term Oath Includes Affirmation by statute in *California*. See *People v. Simpson*, 133 Cal. 367.

747. 3. If a Deaf Person Is Conscious that He Is Being Sworn it is sufficient, whether he actually hears the words of the officer or not. *Texas, etc.*, *R. Co. v. Reid*, (Tex. Civ. App. 1903) 74 S. W. Rep. 99.

4. Valid Oath in Law of Perjury. — *Craft v. State*, 42 Fla. 567. See also *People v. Ennis*, 137 Cal. 263.

"It is necessary to the validity of every oath or affirmation not alone that it shall be binding upon the conscience of the affiant, but that it be made under the pains and penalties of

perjury." *Sullivan v. Flatonia First Nat. Bank*, (Tex. Civ. App. 1904) 83 S. W. Rep. 421.

5. Oath Cannot Be Administered Through Telephone. — *Sullivan v. Flatonia First Nat. Bank*, (Tex. Civ. App. 1904) 83 S. W. Rep. 421.

7. Courts and Judges. — *State v. Townley*, 67 Ohio St. 21, 93 Am. St. Rep. 636.

748. 8. Before Any Officer Authorized to Administer Oaths. — *In re Grin*, 112 Fed. Rep. 790, *affirmed* 187 U. S. 181.

749. 1. Oath by De Facto Officer. — There can be no officer *de facto* where there is no office; and so an oath is invalid when administered by a "deputy district recorder," if there is no such office and the district recorder has no authority to appoint a deputy. *Van Buren v. McKinley*, 8 Idaho 93.

749. *d.* DELEGATION OF AUTHORITY TO ADMINISTER — Where th Oath Is Administered by a Third Person in the Presence. — See note 4.

750. 3. Formalities and Ceremonies — How Administered to Persons Not Christians. — See note 7.

751. Effect of Statutory Directions as to Ceremonies. — See note 3.
Presumption as to Manner. — See note 4.

VII. FORM. — See note 6.

752. Substantial Compliance with Prescribed Form Sufficient. — See notes 1, 4.
The Omission of the Words "So Help Me God." — See note 5.
Test of Sufficiency as to Form. — See note 7.

753. VIII. REDUCTION TO WRITING AND CERTIFICATE OF ADMINISTRATION
— 1. Necessity of Reduction to Writing. — See note 1.
2. Certificate of Administration — *b.* OF OATH. — See note 4.

756. OBJECT. — See note 2.

757. OBLIGATION. — See note 1.

749. 4 Oath Administered in Presence of Person Authorized. — State *v.* Townley, 67 Ohio St. 21, 93 Am. St. Rep. 636. See also People *v.* Simpton, 133 Cal. 367.

750. 7. Administered to Nonchristians by Ceremonies of Their Own Religion — *Oath of Chinamen.* — Rex *v.* Ah Wooley, 9 British Columbia 569.

751. 3. Kissing the Bible or Raising the Hand is merely the sanction of the oath, and does not affect the substance. See People *v.* Parent, 139 Cal. 600.

4. Presumption of Legality. — See State *v.* Nelson, 166 Mo. 191.

6. Court May Follow Statute Literally. — State *v.* Allen, 63 Kan. 598.

752. 1. Substantial Compliance Sufficient. — People *v.* Swist, 136 Cal. 520; Wells *v.* Smith, 49 W. Va. 78. See also Matter of David, (County Ct.) 44 Misc. (N. Y.) 192; Caldwell

v. Brooks Elevator Co., 10 N. Dak. 575; Greer *v.* Ford, 31 Tex. Civ. App. 389.

4. Substance of Oath Cannot Be Dispensed with. — Sisson *v.* Pittman, 113 Ga. 166; Hayter *v.* Benner, 67 N. J. L. 359.

5. Omission of Words "So Help Me God." — People *v.* Swist, 136 Cal. 520; People *v.* Parent, 139 Cal. 600.

7. Test of Sufficiency as to Form. — See People *v.* Simpton, 133 Cal. 367.

753. 1. Need Not Be Reduced to Writing Unless Required by Statute. — Caldwell *v.* Brooks Elevator Co., 10 N. Dak. 575.

4. Presumption as to Form of Oath. — Caldwell *v.* Brooks Elevator Co., 10 N. Dak. 575.

756. 2. Object and Subject Distinguished. — State *v.* DeHart, 109 La. 570; McNeeley *v.* South Penn Oil Co., 52 W. Va. 616.

757. 1. Technical Sense. — Maxwell *v.* Jacksonville Loan, etc., Co., 45 Fla. 425.

OBSCENITY.

759. I. DEFINITION. — See note 2.

760. II. AS AN INDICTABLE OFFENSE — 2. Under Statutes — *d.* CONSTRUCTION. — See note 12.

761. 3. Test of Obscenity. — See note 2.

In the Case of Language. — See note 4.

Coarse and Opprobrious Language. — See note 6.

763. OBSERVE. — See note 4.

759. 2. Definition. — See U. S. *v.* Wyatt, 122 Fed. Rep. 316; U. S. *v.* Wroblenski, 118 Fed. Rep. 495.

760. 12. Construction of Statutes. — See U. S. *v.* Wroblenski, 118 Fed. Rep. 495.

The Word "Youth" within the meaning of the Texas statute which provides that "if any person shall make, publish, or print any indecent and obscene print, picture, or written composition, manifestly designed to corrupt the morals of youth, * * * he shall be fined

not exceeding one hundred dollars," does not include a person twenty-one years of age. Edwards *v.* State, (Tex. Crim. 1905) 85 S. W. Rep. 797.

761. 2. Test of Obscenity. — U. S. *v.* Wroblenski, 118 Fed. Rep. 495.

4. Obscene Idea. — U. S. *v.* Moore, 129 Fed. Rep. 159. See also Roberts *v.* State, 129 Ga. 177.

6. See U. S. *v.* Wyatt, 122 Fed. Rep. 316.

763. 4. Observe. — Rock Island Sash, etc., Works *v.* Pohlman, 210 Ill. 133.

- 763.** OBSOLETE. — See note 5.
OBSTRUCT — OBSTRUCTION. — See note 7.
764. OBTAIN. — See note 1.
765. OBVIOUS. — See note 1.
OCCASION — OCCASIONED, ETC. — See note 2.
766. OCCUPANCY — OCCUPY — OCCUPANT — OCCUPIER — To Occupy. — See note 2.
 An Occupier or Occupant. — See note 3.
767. Synonymous with Possession. — See note 2.
768. See notes 1, 2.
769. OCCUPATION. — See note 4.
- 763.** 5. Obsolete—Wills. — Howard *v.* Hunter, 115 Ga. 357.
 7. Obstruction. — Overhouser *v.* American Cereal Co., 118 Iowa 417.
 Under a statute of limitations a debtor's absenting himself from the state is such an *obstruction* of the statute as suspends its operation. Southern Contract Co. *v.* Newhouse, (Ky. 1902) 66 S. W. Rep. 730.
764. 1. Obtaining Judgment. — *In re* Darwin, (C. C. A.) 117 Fed. Rep. 407.
765. 1. In the Sense of "Readily Seen." — Missouri, etc., R. Co. *v.* Johnson, 95 Tex. 409.
 2. "Occasioned" Used in Sense of "Caused." — Union Gold Min. Co. *v.* Crawford, 29 Colo. 511.
 "Occasionally" Equivalent to "from Time to Time." — State *v.* McBride, 29 Wash. 335.
766. 2. Hall *v.* Roberts, (Ky. 1903) 74 S. W. Rep. 199; Lyons *v.* Andry, 106 La. 356; Ball *v.* Houston, 11 Okla. 233.
 Residence Imported. — See Handley's Estate, 208 Pa. St. 388.
 3. Occupier — Occupant. — Thompson *v.* Berlin,

87 Minn. 7 (notice of location of highway); Gill *v.* Wallis, 11 N. Mex. 481; Twiggs *v.* Land Com'rs, 27 Utah 241.

Under the Montana Forcible Entry and Detainer Act an *occupant* is one who within five days preceding such unlawful entry was in the peaceable and undisputed possession of such lands. Kennedy *v.* Dickie, 27 Mont. 70.

767. 2. Synonymous with Possession. — Hall *v.* Roberts, (Ky. 1903) 74 S. W. Rep. 199; Lyons *v.* Andry, 106 La. 356; Gill *v.* Wallis, 11 N. Mex. 481.

768. 1. Residence Not Necessary. — Lyons *v.* Andry, 106 La. 356; Twiggs *v.* Land Com'rs, 27 Utah 246, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 767 [768].

2. Occupancy as Signifying Residence. — Edwards *v.* Begole, (C. C. A.) 121 Fed. Rep. 7, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 768, notes 1, 2.

769. 4. Morgan *v.* Illinois Ins. Co., 130 Mich. 427.

OCCUPATION BUSINESS, AND PRIVILEGE TAXES.

BY R. N. CHAFFEE.

- 773.** I. DEFINITIONS AND GENERAL PRINCIPLES — 1. Definitions — A License — See note 1.
774. 2. Difference Between License Fee and Tax. — See note 3.
775. 3. Occupation Taxes Distinguished from Other Taxes — Not Property Taxes. — See note 2.
776. Tax on Sales — Tax on Article Sold. — See note 3.
 II. POWER TO REQUIRE LICENSE OR IMPOSE TAX — 2. Of States —
 a. IN GENERAL. — See note 7.
777. Expediency of Legislation Not for Courts. — See note 3.
- 773.** 1. License Defined — Carbondale *v.* Wade, 106 Ill. App. 654; Standard Oil Co. *v.* Com., (Ky. 1904) 82 S. W. Rep. 1020.
774. 3. Taxes Imposed for Revenue and Licenses for Regulation. — State *v.* Boyd, 63 Neb. 829.
775. 2. Not Property Taxes. — Phillips *v.* Barnhart, 27 Pa. Super. Ct. 26.
776. 3. Tax on Sale — Tax on Article Sold. — Kehrre *v.* Stewart, 117 Ga. 969.
7. State May License or Tax. — Jones *v.* Stewart, 117 Ga. 977; Price *v.* People, 193 Ill. 114, 86 Am. St. Rep. 306; *In re* Lipschitz, (N. Dak. 1903) 95 N. W. Rep. 157, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 776; *In re* Watson, 17 S. Dak. 486; Norfolk *v.* Griffith-Powell Co., 102 Va. 115.
777. 3. Expediency of Legislation Not for Courts — Rosenbloom *v.* State, 61 Neb. 342; Lacy *v.* Armour Packing Co., 134 N. Car. 567.

778. *b.* LIMITATIONS OF POWER — Agencies and Instruments of Federal Government. — See note 1.

c. WHAT OCCUPATIONS MAY BE TAXED. — See note 3.

d. PROHIBITORY LEGISLATION. — See note 5.

779. *i.* POWER TO IMPOSE BUSINESS TAX IN ADDITION TO OTHER TAXES. — See note 6.

780. *l.* DELEGATION OF POWER — (1) *In General.* — See notes 4, 6, 7.

782. *3.* Of Subdivisions of State and Boards Created by Statute — *a.* COUNTIES AND OTHER SUBDIVISIONS OF STATE — *In General.* — See note 1.

4. Of Municipal Corporations — *a.* *IN GENERAL.* — See note 12.

783. See notes 1, 2.

b. LIMITATIONS OF THE POWER — (1) *Ordinances Must Be Reasonable and Not in Restraint of Trade.* — See note 5.

784. See note 1.

(2) *Discrimination Forbidden.* — See note 4.

785. (4) *No Power to Tax Business Outside of City Limits.* — See note 1.

Where the Principal Part of a Business. — See note 3.

The Residence of the Person Who Pursues the Business Is Immaterial. — See note 4.

787. *f.* POWER TO IMPOSE OCCUPATION TAX IN ADDITION TO PROPERTY TAX. — See note 12.

788. *h.* DISTINCTION BETWEEN POWER TO LICENSE AND POWER TO TAX — (1) *In General.* — See note 2.

789. (2) *As to Amount of License Fee or Tax.* — See notes 11, 12.

790. See note 1.

778. *1.* Cannot Tax Business of National Bank. — *Western Union Tel. Co. v. Wakefield*, (Neb. 1903) 95 N. W. Rep. 659.

3. What Occupations May Be Taxed — *In General.* — *Compare Price v. People*, 193 Ill. 114, 86 Am. St. Rep. 306.

5 *Standard Oil Co. v. Com.*, (Ky. 1904) 82 S. W. Rep. 1020.

779. *6.* May Impose Business Tax in Addition to Property Tax. — *Levy v. State*, 161 Ind. 251.

780. *4.* Power to License or Tax Delegated to Municipal Corporation. — *In re Watson*, 17 S. Dak. 486; *Norfolk v. Griffith-Powell Co.*, 102 Va. 115.

6. *Newport News, etc., R., etc., Co. v. Newport News*, 100 Va. 157.

7. *Newport News, etc., R., etc., Co. v. Newport News*, 100 Va. 157.

782. *1.* Village May Tax. — *Western Union Tel. Co. v. Wakefield*, (Neb. 1903) 95 N. W. Rep. 659.

12. Cities May Impose When Authorized By Statute. — *Troy v. Harris*, 102 Mo. App. 51. See also *Ross v. East Missouri Tp.*, 1 Ont. L. Rep. 353; *English v. O'Neill*, 4 N. W. Ter. 74.

783. *1.* No Power in Absence of Statute. — *Sonora v. Curtin*, 137 Cal. 583; *Terre Haute v. Kersey*, 159 Ind. 300, 95 Am. St. Rep. 298; *Independence v. Cleveland*, 167 Mo. 384; *State v. Ray*, 131 N. Car. 814, 92 Am. St. Rep. 795; *Winston v. Beeson*, 135 N. Car. 271; *Lent v. Portland*, 42 Oregon 488.

2. Statutes Strictly Construed — Doubts Resolved Against City. — *Terre Haute v. Kersey*, 159 Ind. 300, 95 Am. St. Rep. 298; *St. Paul v.*

Briggs, 85 Minn. 290, 89 Am. St. Rep. 554; *Independence v. Cleveland*, 167 Mo. 384; *Lent v. Portland*, 42 Oregon 488. See also *Cedar Falls v. Gentzer*, 123 Iowa 670.

5. Void When Unreasonable or in Restraint of Trade. — *Evers v. Mayfield*, (Ky. 1905) 85 S. W. Rep. 697; *Springfield v. Jacobs*, 101 Mo. App. 339.

784. *1.* Ordinances Presumed to Be Reasonable. — *Springfield v. Jacobs*, 101 Mo. App. 339.

4. Discrimination Against Nonresidents or Dealers in Foreign Products. — *Evers v. Mayfield*, (Ky. 1905) 85 S. W. Rep. 697; *Columbus v. Jeffrey*, 13 Ohio Dec. 645, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 784.

785. *1.* Cannot Tax Business Outside of City Limits. — *Evers v. Mayfield*, (Ky. 1905) 85 S. W. Rep. 697.

3. Where Principal Part of Business Is Within City Limits. — *Wilson v. Greenville*, 65 S. Car. 426.

4. Residence of Person Who Pursues Business Immaterial. — *Wilson v. Greenville*, 65 S. Car. 426.

787. *12.* Business Tax in Addition to Property Tax. — *Troy v. Harris*, 102 Mo. App. 51.

788. *2.* Police Power or Power to License Not Power to Tax. — *New York v. Twenty-Third St. R. Co.*, 77 N. Y. App. Div. 373.

789. *11.* *Columbus v. Jeffrey*, 13 Ohio Dec. 643, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 789.

12. Courts Will Not Ordinarily Interfere. — See *Springfield v. Jacobs*, 101 Mo. App. 339.

790. *1.* Fees Held Excessive under Power to

791. *j.* DELEGATION OF POWER TO LICENSE. — See note 2.

III. CONSTITUTIONALITY OF STATUTES AND ORDINANCES — 1. General Principles — *a.* PRESUMPTION IN FAVOR OF CONSTITUTIONALITY. — See note 8.

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2. Under United States Constitution — *a.* COMMERCE CLAUSE — (1) *In General* — (a) Direct Interference with Commerce. — See note 7.

793. (b) Remote and Incidental Interference with Commerce — The Business of an Immigrant Agent. — See note 3.

795. (4) *Taxation of Merchants and Peddlers.* — See note 2.

796. (5) *Taxation of Telegraph and Telephone Companies.* — See note 3.

(6) *Taxation of Railroad, Express, and Sleeping-car Companies.* — See note 6.

799. *d.* PROVISION GUARANTEEING PRIVILEGES AND IMMUNITIES OF CITIZENS IN SEVERAL STATES — (1) *In General.* — See notes 7, 8.

800. *e.* FOURTEENTH AMENDMENT — (1) *In General* — Equal Protection of Laws. — See notes 3, 4.

802. **3. Under State Constitutions —** *a.* REQUIREMENT THAT TAXES SHALL BE EQUAL AND UNIFORM — (1) *In General.* — See note 9.

803. See notes 1, 2.

804. Unreasonable Classification. — See note 1.

License. — *Springfield v. Jacobs*, 101 Mo. App. 339; *State v. Angelo*, 71 N. H. 224.

791. **2. Power to Determine Amount of Fee and Other Discretionary Matters.** — *Thurlow Medical Co. v. Salem*, 67 N. J. L. 111.

8. Presumption in Favor of Constitutionality. — *Levy v. State*, 161 Ind. 251, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 791; *State v. McKinney*, 29 Mont. 375; *In re Watson*, 17 S. Dak. 486.

792. **2. Statutes Partly Unconstitutional.** — *In re Abel*, 10 Idaho 288.

7. Statute Void as to Interstate Commerce Only. — *Kehrer v. Stewart*, 117 Ga. 969.

793. **3. Tax on Immigrant Agent Valid.** — *State v. Napier*, 63 S. Car. 60.

795. **2. Tax on Merchants and Peddlers Valid Where No Discrimination Is Made.** — *Muskegon v. Zeeryp*, 134 Mich. 181; *In re Lipschitz*, (N. Dak. 1903) 95 N. W. Rep. 157.

796. **3. Taxes on Telegraph and Telephone Companies Held Valid.** — See *Kehrer v. Stewart*, 117 Ga. 969.

6. Tax Exempting Interstate and Foreign Business Valid. — *Nashville, etc., R. Co. v. Alabama City*, 134 Ala. 414.

799. **7. Statutes Discriminating Against Nonresidents Invalid.** — *In re Jarvis*, 66 Kan. 329.

8. Statutes Valid in Absence of Discrimination. — *State v. Hammond Packing Co.*, 110 La. 180, 98 Am. St. Rep. 459; *Kansas City v. Richardson*, 90 Mo. App. 450; *State v. Napier*, 63 S. Car. 60.

800. **3. Fourteenth Amendment — Reasonable Classification of Occupations Not Forbidden.** — *Stewart v. Kehrer*, 115 Ga. 184; *Kersey v. Terre Haute*, 161 Ind. 471; *Lacy v. Armour Packing Co.*, 134 N. Car. 567.

4. Statutes Valid in Absence of Discrimination. — *Stewart v. Kehrer*, 115 Ga. 184.

802. **9. Provisions Not Applicable to Occupation Taxes or Licenses —** *Alaska.* — *In re Wynn-Johnson*, 1 Alaska 630.

Arkansas. — *Ft. Smith v. Scruggs*, 70 Ark. 549, 91 Am. St. Rep. 100.

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Idaho. — *State v. Union Cent. L. Ins. Co.*, 8 Idaho 240.

Indiana. — *Terre Haute v. Kersey*, 159 Ind. 300, 95 Am. St. Rep. 298; *Levy v. State*, 161 Ind. 251.

Kentucky. — *Strater Bros. Tobacco Co. v. Com.*, (Ky. 1904) 78 S. W. Rep. 871.

Missouri. — *Kansas City v. Richardson*, 90 Mo. App. 450.

Nebraska. — *Rosenbloom v. State*, 64 Neb. 342.

North Carolina. — *State v. Carter*, 129 N. Car. 560; *Lacy v. Armour Packing Co.*, 134 N. Car. 567.

North Dakota. — *In re Lipschitz*, (N. Dak. 1903) 95 N. W. Rep. 157, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 802.

Pennsylvania. — *Mechanicsburg v. Koons*, 18 Pa. Super. Ct. 131.

South Carolina. — *State v. Napier*, 63 S. Car. 60.

South Dakota. — *In re Watson*, 17 S. Dak. 486.

803. **1. Not Essential that All Occupations Should Be Taxed.** — *Levy v. State*, 161 Ind. 251; *Kansas City v. Overton*, 68 Kan. 560; *State v. Carter*, 129 N. Car. 560; *In re Watson*, 17 S. Dak. 486.

2. Reasonable Classification of Occupations Not Forbidden. — *Stewart v. Kehrer*, 115 Ga. 184; *Kansas City v. Overton*, 68 Kan. 560; *Rosenbloom v. State*, 64 Neb. 342; *Lacy v. Armour Packing Co.*, 134 N. Car. 567; *Mechanicsburg v. Koons*, 18 Pa. Super. Ct. 131; *Standard Oil Co. v. Spartanburg*, 66 S. Car. 37; *Cowart v. Greenville*, 67 S. Car. 35; *In re Watson*, 17 S. Dak. 486.

804. **1. Unreasonable Classification Invalid.** — *Beckett v. Savannah*, 118 Ga. 58; *State v. Whitcom*, 122 Wis. 110.

804. (2) *Uniformity as Regards All Persons Belonging to Same Class.* — See note 2.

805. *b.* REQUIREMENT THAT TAXES SHALL BE AD VALOREM. — See note 2.

806. *d.* PROHIBITION OF SPECIAL LEGISLATION. — See note 1.

807. IV. HOW IMPOSED — DETERMINATION OF AMOUNT — 2. Determination of Amount — *a.* IN GENERAL — (1) *State Taxes and Licenses.* — See note 4.

(2) *Municipal Taxes and Licenses.* — See note 9.

808. *b.* HOW SCALED OR APPORTIONED — Method Generally Adopted. — See note 7.

809. V. CONSTRUCTION OF STATUTES AND ORDINANCES — 1. In General. — See note 8.

810. 2. To Whom Applicable — *a.* IN GENERAL. — See note 4.

811. Who Is Dealer or Trader. — See note 1.

b. WHAT CONSTITUTES DOING BUSINESS — (1) *In General.* — See notes 6, 7, 8.

813. *d.* WHETHER PAYABLE BY EMPLOYER OR BY EMPLOYEE — As Regards Prosecution for Failure to Obtain License. — See note 8.

814. *e.* DOUBLE TAXATION OR REQUIREMENT OF SEVERAL LICENSES — (1) *In General* — Where Same Person Pursues Several Occupations. — See notes 5, 6, 7.

815. Vehicle Licenses or Taxes. — See note 2.

818. VII. COLLECTION OF LICENSE FEE OR TAX — ISSUANCE OF LICENSE — 3. Collection by Suit or Summary Process. — See note 9.

801. 2. Tax Must Be Uniform as Regards All Members of Class. — *Beckett v. Savannah*, 118 Ga. 58; *Lacy v. Armour Packing Co.*, 134 N. Car. 567; *Columbus v. Jeffrey*, 13 Ohio Dec. 645, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 804. See also *Newport News, etc., R., etc., Co. v. Newport News*, 100 Va. 157.

805. 2. Ad Valorem Requirement Not Applicable to Licenses and Business Taxes. — *Kansas City v. Richardson*, 90 Mo. App. 450; *Newport News, etc., R., etc., Co. v. Newport News*, 100 Va. 157.

806. 1. Prohibition of Special Legislation — What Tax Laws Valid. — *Kersey v. Terre Haute*, 161 Ind. 471.

807. 4. Amount of Tax in Discretion of Legislature. — *Price v. People*, 193 Ill. 114, 86 Am. St. Rep. 306; *State v. Hunt*, 129 N. Car. 686, 85 Am. St. Rep. 758.

9. *Brewster v. Pine Bluff*, 70 Ark. 28.

808. 7. Receipts or Income. — *Ex p. Lemon*, 143 Cal. 558.

809. 8. Statutes and Ordinances Construed Strictly. — *Washington Electric Vehicle Transp. Co. v. District of Columbia*, 19 App. Cas. (D. C.) 462; *Egan v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 273.

810. 4. For Definitions of Particular Terms — *Broker.* — *Black v. Snook*, 204 Pa. St. 119. *Business.* — *Hewin v. Atlanta*, 121 Ga. 723. *Gift Enterprise.* — *Winston v. Beeson*, 135 N. Car. 271.

Hawkers or Peddlers. — *In re Pringle*, 67 Kan. 364; *Potts v. State*, 45 Tex. Crim. 45.

Mercantile Establishment. — *In re Pacific Cold Storage Co.*, 1 Alaska 429.

Merchant. — *Cedar Falls v. Gentzler*, 123 Iowa 670; *Kansas City v. Ferd Heim Brewing Co.*, 98 Mo. App. 590; *Troy v. Harris*, 102 Mo. App. 51.

Note Shaver or Security Dealer. — *Trent-ham v. Moore*, 111 Tenn. 346.

Selling by Retail. — *Standard Oil Co. v. Com.*, (Ky. 1904) 82 S. W. Rep. 970.

811. 1. Who Is Dealer or Trader. — *Egan v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 273.

6. Performance of Single Act Does Not Constitute Carrying on Business. — *Evers v. Mayfield*, (Ky. 1905) 85 S. W. Rep. 697, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 811; *State v. Napier*, 63 S. Car. 60.

7. Intent Decisive. — *Evers v. Mayfield*, (Ky. 1905) 85 S. W. Rep. 697, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 811.

8. Individual Acts for Private Benefit Not Taxable. — *Evers v. Mayfield*, (Ky. 1905) 85 S. W. Rep. 697, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 811; *Raeder v. Butler*, 19 Pa. Super. Ct. 604.

813. 8. Agent of Unlicensed Principal Liable to Prosecution. — *Farmington v. Rutherford*, 94 Mo. App. 328.

When Agent Not Liable. — Fines will not be imposed upon agents where the violated ordinance was designed to enforce the payment of a property tax and did not name agents as subject to its penalties. *Troy v. Harris*, 102 Mo. App. 51.

814. 5. Where Several Distinct Occupations Are Pursued, Separate Licenses and Taxes Are Payable. — *State v. Rombotis*, 110 La. 433.

6. Wholesaling and Retailing. — *Murrell v. Bolsenfohr*, 108 La. 19.

7. Same Business Conducted at Several Different Places. — *Murrell v. Bolsenfohr*, 108 La. 19.

815. 2. *Ft. Smith v. Scruggs*, 70 Ark. 549, 91 Am. St. Rep. 100.

816. 9. Civil Action Lies for Occupation Taxes. — *Lexington v. Wilson*, (Ky. 1904) 80 S. W. Rep. 811.

- 820.** 7. Injunction to Restrain Collection. — See note 1.
821. 10. Issuance and Delivery of License — *b.* MANDAMUS TO COMPEL ISSUANCE. — See note 7.
824. IX. EFFECT OF FAILURE TO PROCURE LICENSE OR PAY TAX — FINES AND PENALTIES — 1. Effect on Contracts and Claims for Services Rendered — *b.* CONTRACTS VOID BY IMPLICATION — Failure of One Member of a Firm to Pay a Privilege Tax. — See note 3.
825. X. TRANSFER OR ASSIGNMENT OF LICENSES. — See note 12.
826. XI. REVOCATION OF LICENSES — In General. — See notes 2, 3.
827. XII. RECOVERY BACK OF MONEY ILLEGALLY EXACTED. — See note 3.
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831. OFFENSE — OFFENDER — OFFENDING. — See note 1.
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832. OFFER. — See notes 1, 2.
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820. 1. Where There Is No Law Authorizing the Collection of the tax, equity will enjoin an attempt to collect it. *Hewin v. Atlanta*, 121 Ga. 723.

821. 7. When Refusal to Issue Is Unlawful. — *Wise v. State Veterinary Board*, (Mich. 1904) 101 N. W. Rep. 562.

824. 3. *Contra*, *Schnaier v. Navarre Hotel, etc., Co.*, 182 N. Y. 83, reversing 82 N. Y. App. Div. 25.

825. 12. License for Regulation Not Transferable. — *Southern Car, etc., Co. v. State*, 133 Ala. 624; *Southern Car, etc., Co. v. Calhoun County*, 141 Ala. 250.

826. 2. License Not Contract. — *Bishoff v. State*, 43 Fla. 67.

3. License Revocable at Any Time. — *Wallace v. Reno*, 27 Nev. 71.

827. 3. No Recovery Allowed Where Payment Was Voluntary. — *In re Hill's Bottling License*, 1 Alaska 436; *Cushen v. Hamilton*, 4 Ont. L. Rep. 265. See also *Fuselier v. St. Landry Parish*, 107 La. 221.

829. 1. "Of" Construed to Mean "Or." — *Kitchen v. Southern R. Co.*, 68 S. Car. 554.

Of a Place. — *State v. Cunningham*, 75 Vt. 332.

831. 1. Offense. — *Cruthers v. State*, 161 Ind. 139; *State v. Blitz*, 171 Mo. 530; *Matter of Jones*, 101 N. Y. App. Div. 63, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 830, 831.

Offense and Crime Synonymous. — *Cruthers v. State*, 161 Ind. 139.

2. Offensive. — *Moller v. Presbyterian Hospital*, 65 N. Y. App. Div. 134.

832. 1. Offer. — *State v. Woodward*, 182 Mo. 408, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832.

2. Attempt. — *State v. Woodward*, 182 Mo. 408, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 832.

4. Officer of the United States. — A West Point cadet is not an *officer* in the army of the United States and may be dismissed by the President if delinquent without court-martial. *Hartigan v. U. S.*, 196 U. S. 169.

OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

BY M. G. BEAMAN.

- 836.** I. IN GENERAL. — See note 1.
 II. ELECTION OF OFFICERS — 1. Power of Corporation to Elect Officers — Election of Directors After Organization. — See note 7.

The Right of Stockholders to Elect Directors. — See note 8.

- 837.** 2. Qualifications and Eligibility of Directors — *a.* IN GENERAL — Officer of Another Corporation. — See note 4.

b. AS TO RESIDENCE OR CITIZENSHIP — A Nonresident. — See note 9.

836. 1. Corporation Can Act Only Through Agents. — *Fidelity, etc., Co. v. Courtney*, 186 U. S. 342; *Egbert v. Sun Co.*, 126 Fed. Rep. 568; *Bay State Gas Co. v. State*, 4 Penn. (Del.) 497.

7. Until an Election Is Held the original directors have full powers. *Middleton v. Arastaville Min. Co.*, 146 Cal. 219.

8. Right of Stockholders to Elect Directors. — *State v. Anderson*, 31 Ind. App. 34.

837. 4. Corporation Cannot Be Director. — See *O'Connor v. International Silver Co.*, (N. J. 1904) 59 Atl. Rep. 321.

9. Election of Alien Is Revocation of Resolution Prohibiting Such Election. — *Sorrentino v. Ciletti*, 75 N. Y. App. Div. 507.

- 837.** *c.* AS TO OWNERSHIP OF STOCK. — See note 13.
- 838.** See note 4.
- 3.** ELECTIONS — *a.* IN GENERAL — Quorum Necessary to Hold Election. — See note 9.
- 839.** *b.* CALLING AND NOTICE. — See note 2.
- 841.** *e.* CONDUCT OF ELECTIONS — (3) *Votes and Voting* — How Election Is Determined. — See note 9.
- 842.** (4) *Effect of Irregularities or Fraud*. — See note 7.
- 843.** *f.* PROCEEDINGS TO REVIEW ELECTIONS — (1) *In Equity* — A Court of Equity. — See note 7.
- (2) *Statutory Remedy*. — See note 8.
- 845.** *g.* NUMBER OF DIRECTORS — (2) *Partial Election*. — See note 1.
- (4) *Filling Vacancies*. — See note 3.
- III. ACCEPTANCE OF OFFICE.** — See note 6.
- Acceptance Need Not Be Express. — See note 7.
- 846.** **IV. QUALIFICATION** — 1. Oath. — See note 2.
2. Bond — Construction of Bond — Breach — Discharge of Sureties. — See note 9.
- 847.** Duration of Liability. — See note 1.
- 848.** **V. TERM OF OFFICE** — Officer Holding Over. — See notes 3, 5.
- VI. RESIGNATION.** — See note 7.
- 849.** Conditional Resignation. — See note 6.
- 850.** **VII. REMOVAL AND VACATION OF OFFICE** — If There Is a Fixed Term of Office. — See note 2.
- Removal under Statutes or By-laws. — See note 6.

837. 13. Director Generally Required to Be Stockholder. — *Sutton v. English, etc., Produce Co.*, (1902) 2 Ch. 502; *Molineaux v. London, etc., Ins. Co.*, (1902) 2 K. B. 589; *Oudin, etc., Fire Clay Min., etc., Co. v. Conlan*, 34 Wash. 216. See also *Buck v. Troy Aqueduct Co.*, 76 Vt. 75.

838. 4. Contra under Peculiar By-law. — *Com. v. Stevenson*, 200 Pa. St. 509.

9. In the Absence of Statute the majority of those present may elect officers. *Gilchrist v. Collopy*, (Ky. 1904) 82 S. W. Rep. 1018. And see generally the title QUORUM.

839. 2. If There Is a By-Law Members Must Take Notice of the time and place therein prescribed. *Jones v. Hilldale Cemetery Soc.*, (Ky. 1901) 65 S. W. Rep. 838.

841. 9. Person Receiving Majority or Plurality of Votes Elected. — See *Darrin v. Hoff*, 99 Md. 491.

842. 7. Election Not Affected by Mere Irregularities. — See *British Asbestos Co. v. Boyd*, (1903) 2 Ch. 439.

843. 7. Incidental Equitable Jurisdiction. — *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 843.

8. Statutory Remedy to Review Election. — *In re Powell*, (Del. 1904) 58 Atl. Rep. 831; *Matter of Jersey City Park Co.*, 69 N. J. L. 594; *Stratford v. Mallory*, 70 N. J. L. 294.

The Validity of an Election Cannot Be Determined in an Action of Replevin for the personality of the corporation. *Standard Gold Min. Co. v. Byers*, 31 Wash. 100.

845. 1. Partial Election. — See *Gilchrist v. Collopy*, (Ky. 1904) 82 S. W. Rep. 1018.

3. Filling Vacancies. — See *British Asbestos Co. v. Boyd*, (1903) 2 Ch. 439; *Gold Bluff Min., etc., Corp. v. Whitlock*, 75 Conn. 669.

6. Acceptance of Office Necessary. — *Bramblett v. Commonwealth Land, etc., Co.*, (Ky. 1904) 83 S. W. Rep. 599.

7. Acceptance Presumed from Serving After Election. — *Union Bank v. Keim*, 52 N. Y. App. Div. 135, affirmed 169 N. Y. 587.

846. 2. Officer Required to Be Sworn. — *Hatch v. Lucky Bill Min. Co.*, 25 Utah 405.

9. Discharge of Sureties. — *Coombs v. Harford*, 99 Me. 426.

847. 1. Duration of Liability. — See *North St. Louis Bldg., etc., Assoc. v. Obert*, 169 Mo. 507.

848. 3. Officers Hold Over in Default of New Election. — *Yoree v. Home Town Mut. Ins. Co.*, 180 Mo. 153; *Hatch v. Lucky Bill Min. Co.*, 25 Utah 405. See also *O'Neal v. F. A. Neider Co.*, (Ky. 1904) 80 S. W. Rep. 451.

5. Holding Over under Express Provisions. — *Appleton v. American Malting Co.*, 65 N. J. Eq. 375.

7. Cannot Resign in Body for Simple Purpose of Having Receiver Appointed. — *Zeltner v. Henry Zeltner Brewing Co.*, 174 N. Y. 247, 95 Am. St. Rep. 574, affirming 79 N. Y. App. Div. 136.

849. 6. Conditional Resignation. — *Joseph v. Raff*, 82 N. Y. App. Div. 47, affirmed 176 N. Y. 611, holding it lawful to impose a condition that the officer's stock should be bought and his accrued salary paid.

850. 2. Cause Must Affect Capacity or Fitness. — *Street Com'rs v. Williams*, 96 Md. 232, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 850.

6. Express Power of Removal. — *In re Bodega Co.*, (1904) 1 Ch. 276; *Selley v. American Lubricator Co.*, 119 Iowa 591; *O'Neal v. F. A. Neider Co.*, (Ky. 1904) 80 S. W. Rep. 451; *Darrah v. Wheeling Ice, etc., Co.*, 50 W. Va. 417.

851. Vacation of Office of Director by Disposal of Stock. — See notes 1, 2.
The Failure of a Director to Attend Board Meetings. — See note 8.

852. IX. AUTHORITY AND POWERS — 1. In General — Authority Derived from Governing Board. — See note 3.

Corporate Agents Acting Within Scope of Duty. — See note 4.
In the Absence of Special Authority. — See note 5.

853. 2. Implied Authority. — See note 3.
3. Estoppel of Corporation to Deny Authority. — See note 4.
4. Ratification of Unauthorized Acts. — See notes 5, 6.
Who May Ratify. — See note 8.

854. Mode of Ratification. — See notes 2, 3, 4.

851. 1. Directorship Vacated by Disposal of Stock. — *Oudin, etc., Fire Clay Min., etc., Co. v. Conlan*, 34 Wash. 216.

Where It Is Expressly So Provided. — *Anderson Carriage Co. v. Pungs*, 127 Mich. 543.

2. Office Not Ipso Facto Vacated by Disposal of Stock. — *Howle v. Scarbrough*, 138 Ala. 148.

8. Failure to Attend Board Meetings. — See *In re London, etc., Bank*, (1901) 1 Ch. 728.

852. 3. Coney Island Automobile Race Co. *v. Boyton*, 87 N. Y. App. Div. 251; *Bradford Belting Co. v. Gibson*, 68 Ohio St. 442; *Patton v. Ligonier Coal Co.*, 12 Pa. Dist. 456, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 852; *Scott v. Farmers', etc., Nat. Bank*, 97 Tex. 31, 104 Am. St. Rep. 835, reversing (Tex. Civ. App. 1902) 66 S. W. Rep. 485, 67 S. W. Rep. 343; *Cobb v. Glenn Boom, etc., Co.*, 57 W. Va. 49.

Same Rule Applies to Change of Contract. — *Aliunde Consol. Min. Co. v. Arnold*, 16 Colo. App. 542.

4. *Patton v. Ligonier Coal Co.*, 12 Pa. Dist. 456, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 852.

5. Officer Can Bind Corporation Only by Acts Within Official Duty. — *Bright v. Bell*, 113 La. 810; *Skene v. Union Casualty, etc., Co.*, 91 Mo. App. 120; *Trephayen v. South Omaha*, (Neb. 1903) 96 N. W. Rep. 248; *Patton v. Ligonier Coal Co.*, 12 Pa. Dist. 456, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 852.

853. 3. Formal Resolution Not Always Necessary to Confer Authority. — *Black v. West Minister First Nat. Bank*, 96 Md. 399; *Mathews v. Hardt*, 79 N. Y. App. Div. 570, affirming (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 653; *Kirkpatrick v. Eastern Milling, etc., Co.*, 135 Fed. Rep. 146.

4. Authority Established by Holding Out. — *Burnell v. San Francisco Sav. Union*, 136 Cal. 499; *Fisk Min., etc., Co. v. Reed*, 32 Colo. 506; *Woodward v. Nelligan*, 19 App. Cas. (D. C.) 550; *Rosenbaum v. Gillian*, 101 Mo. App. 126; *Carter White Lead Co. v. Pounds*, 65 N. Y. App. Div. 476; *Pescia v. Societa, etc.*, 91 N. Y. App. Div. 506; *Culver v. Pocono Spring Water Ice Co.*, 206 Pa. St. 481; *Merchant's, etc., Cotton Oil Co. v. Lufkin Nat. Bank*, 34 Tex. Civ. App. 551; *West Seattle Land, etc., Co. v. Novelty Mill Co.*, 31 Wash. 435; *Coolidge v. Schering*, 32 Wash. 557; *St. Clair v. Rutledge*, 115 Wis. 583, 95 Am. St. Rep. 964; *Batavian Bank v. Minneapolis, etc., R. Co.*, 123 Wis. 380.

5. Ratification of Unauthorized Acts — *United States*. — *Blanton v. Kentucky Distilleries, etc., Co.*, 120 Fed. Rep. 318.

Indiana. — *Marion Trust Co. v. Crescent Loan, etc., Co.*, 27 Ind. App. 451, 87 Am. St. Rep. 257.

Iowa. — *Wisconsin Lumber Co. v. Greene, etc., Telephone Co.*, 127 Iowa 350.

Kentucky. — *Herring v. Dix River, etc., Turnpike Road Co.*, (Ky. 1901) 63 S. W. Rep. 576; *Warren Deposit Bank v. Fidelity, etc., Co.*, 116 Ky. 38.

Michigan. — *Michigan Cent. R. Co. v. Chicago, etc., R. Co.*, 132 Mich. 324.

Montana. — *Trent v. Sherlock*, 26 Mont. 85.

New Hampshire. — *Manchester St. R. Co. v. Williams*, 71 N. H. 312.

New Jersey. — *Breslin v. Fries-Breslin Co.*, 70 N. J. L. 274; *Clement v. Young-McShea Amusement Co.*, (N. J. 1905) 60 Atl. Rep. 419.

New York. — *Jenkins v. John Good Cordage, etc., Co.*, 56 N. Y. App. Div. 573, affirmed 168 N. Y. 679; *Great Western Turnpike Co. v. Shafer*, 57 N. Y. App. Div. 331, affirmed 172 N. Y. 662; *Curtis v. Natalie Anthracite Coal Co.*, 89 N. Y. App. Div. 61, affirmed 181 N. Y. 543; *McVity v. E. D. Albro Co.*, 90 N. Y. App. Div. 109, affirmed 180 N. Y. 554; *Anderson v. Conner*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 384; *Hooke v. Financier Co.*, 99 N. Y. App. Div. 186.

South Carolina. — *Hutchison v. Rock Hill Real Estate, etc., Co.*, 65 S. Car. 45.

Texas. — *Clark v. Elmendorf*, (Tex. Civ. App. 1904) 78 S. W. Rep. 538.

Washington. — *Kirwin v. Washington Match Co.*, 37 Wash. 285.

West Virginia. — *Cumberland Third Nat. Bank v. Laboringman's Mercantile, etc., Co.*, 56 W. Va. 446.

Canada. — *Adams v. Montreal Bank*, 8 British Columbia 314, affirmed 32 Can. Sup. Ct. 719.

6. Ratification Equivalent to Prior Authority. — *Beacon Trust Co. v. Souther*, 183 Mass. 413; *Roe v. Versailles Bank*, 167 Mo. 406; *McAlpin v. Universal Tobacco Co.*, (N. J. 1904) 57 Atl. Rep. 802; *Washington State Bank v. Dickson*, 35 Wash. 641.

8. Ratification by Officer. — *Joseph Wolf Co. v. Bank of Commerce*, 107 Ill. App. 58.

854. 2. *State v. Perkins*, 90 Mo. App. 603.

3. Ratification by Acquiescence. — *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, (C. C. A.) 112 Fed. Rep. 239; *Alaska, etc., Commercial Co. v. Solner*, (C. C. A.) 123 Fed. Rep. 855; *Egbert v. Sun Co.*, 126 Fed. Rep. 568; *Joseph Wolf Co. v. Bank of Commerce*, 107 Ill. App. 58; *Franklin Sav. Bank v. Cochrane*,

854. 5. Proof of Authority — *a.* IN GENERAL. — See note 5.

855. *b.* PRESUMPTION OF AUTHORITY. — See note 4.

Authority Not Presumed from Exercise. — See note 5.

c. NOTICE OF AUTHORITY. — See notes 7, 8.

856. 6. Delegation of Authority — *a.* IN GENERAL — EMPLOYMENT OF AGENTS. — See note 2.

b. EXECUTIVE COMMITTEE. — See note 4.

857. 7. Estoppel of Officer or Agent to Deny Authority. — See note 8.

8. Authority and Powers of Particular Officers — *a.* PRESIDENT —

(1) *In General.* — See note 9.

858. See notes 1, 2, 4, 5.

182 Mass. 586; *Smith v. New England Bank*, 72 N. H. 4; *Murray v. Beal*, 23 Utah 548; *Pullman First Nat. Bank v. Gaddis*, 31 Wash. 596. See also *Beacon Trust Co. v. Souther*, 183 Mass. 413.

854. 4. Acceptance of Benefits. — *Washington Irrigation Co. v. Krutz*, (C. C. A.) 119 Fed. Rep. 279; *Singleton v. Monticello Bank*, 113 Ga. 527; *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737; *Neosho Valley Invest. Co. v. Hannum*, 63 Kan. 621; *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370; *Bennett v. Millville Imp. Co.*, 67 N. J. L. 320; *Hunt v. Northwestern Mortg. Trust Co.*, 16 S. Dak. 241; *Windsor v. St. Paul, etc., R. Co.*, 37 Wash. 156; *Kirwin v. Washington Match Co.*, 37 Wash. 285; *Cumberland Third Nat. Bank v. Laboringman's Mercantile, etc., Co.*, 56 W. Va. 446. And see the title AGENCY, **1197**. *1 et seq.*

Ratification Must Be with Knowledge of Material Facts. — *Extension Gold Min., etc., Co. v. Skinner*, 28 Colo. 237; *Savannah, etc., R. Co. v. Humphreys*, 114 Ga. 681; *Butler v. Standard Guaranty, etc., Co.*, 122 Ga. 371; *Bristol Sav. Bank v. Judd*, 116 Iowa 26; *McConnell v. Combination Min., etc., Co.*, 30 Mont. 239, 31 Mont. 563; *Lester Agricultural Chemical Works v. Selby*, (N. J. 1904) 59 Atl. Rep. 247; *Giebler Mfg. Co. v. Kranenberg*, 102 N. Y. App. Div. 471; *Bangor, etc., R. Co. v. American Bangor Slate Co.*, 203 Pa. St. 6. And see the title AGENCY, **1189**. 2.

5. Authority Need Not Be Shown in Any Particular Manner. — *Sun Printing, etc., Assoc. v. Moore*, 183 U. S. 642; *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, (C. C. A.) 112 Fed. Rep. 239; *Campbell v. National Broadway Bank*, (C. C. A.) 130 Fed. Rep. 699; *Henderson v. Raymond Syndicate*, 183 Mass. 443; *Brown v. British American Mortg. Co.*, (Miss. 1905) 38 So. Rep. 312; *Smith v. New England Bank*, 72 N. H. 4; *Clement v. Young-McShea Amusement Co.*, (N. J. 1905) 60 Atl. Rep. 419; *Magowan v. Groneweg*, 16 S. Dak. 29; *Lowe v. Ring*, 115 Wis. 575.

As to Evidence of Authority see *Albro Min., etc., Co. v. Chinn*, (Colo. App. 1904) 77 Pac. Rep. 1097; *Long v. Powell*, 120 Ga. 621.

Mere Want of Authority in Fact will not relieve a corporation from the burden of a contract made in reasonable reliance on appearance of such authority. *St. Clair v. Rutledge*, 115 Wis. 583, 95 Am. St. Rep. 964.

855. 4. Presumption of Authority. — *Hartford, etc., Transp. Co. v. Plymmer*, (C. C. A.) 120 Fed. Rep. 624; *Egbert v. Sun Co.*, 126 Fed.

Rep. 568; *Clarke v. Lexington Stove Works*, (Ky. 1903) 72 S. W. Rep. 286; *Burkamp v. Healey*, (Ky. 1903) 72 S. W. Rep. 759; *Bennett v. Millville Imp. Co.*, 67 N. J. L. 320; *St. Clair v. Rutledge*, 115 Wis. 583, 95 Am. St. Rep. 964.

5. Authority Not Presumed from Mere Exercise of It. — *Manhattan Web Co. v. Aquidneck Nat. Bank*, 133 Fed. Rep. 76. See also *Lyons, etc., Toll Road Co. v. People*, 29 Colo. 434.

7. Third Persons Chargeable with Notice of Charter, Etc. — *Columbia Bldg., etc., Assoc. v. Lyttle*, 16 Colo. App. 423; *Sturdevant v. Farmers', etc., Bank*, (Neb. 1903) 95 N. W. Rep. 819; *Louchheim v. Somerset Bldg., etc., Assoc.*, 25 Pa. Super. Ct. 325; *Harvey v. Schuylkill Real Estate Title Ins., etc., Co.*, 24 Pa. Co. Ct. 593. *Contra*, as to by-laws, *Rosenbaum v. Gillian*, 101 Mo. App. 126; *Powers v. Schlicht Heat, etc., Co.*, 23 N. Y. App. Div. 380, *affirmed* 165 N. Y. 662.

8. Strangers Not Affected by Secret Limitations on Authority. — *Domestic Bldg. Assoc. v. Guadiano*, 195 Ill. 222; *Groeltz v. Armstrong*, 125 Iowa 39; *Forked Deer Pants Co. v. Shipley*, (Ky. 1904) 80 S. W. Rep. 476; *Powers v. Schlicht Heat, etc., Co.*, 23 N. Y. App. Div. 380, *affirmed* 165 N. Y. 662.

856. 2. *Cullinan v. Bowker*, 180 N. Y. 93, *per Vann, J., dissenting*, citing 21 AM. AND ENG. OF LAW (2d ed.) 856. See also *Russell v. Stevenson*, 34 Wash. 166.

4. Directors May Delegate Powers to Executive Committee. — *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, (C. C. A.) 112 Fed. Rep. 239; *John A. Roebling's Sons Co. v. Barre, etc., Traction, etc., Co.*, 76 Vt. 131.

857. 8. Estoppel of Officer or Agent to Deny Authority. — *Manchester St. R. Co. v. Williams*, 71 N. H. 312; *Aransas Pass Harbor Co. v. Manning*, 94 Tex. 558. See also *Savaria v. Paquette*, 20 Quebec Super. Ct. 314.

9. Power of President Not Greater than That of Director. — *Patton v. Ligonier Coal Co.*, 12 Pa. Dist. 456. See also *Minnesota Lumber Co. v. Hobbs*, 122 Ga. 20; *Commercial Nat. Bank v. Cuero First Nat. Bank*, 97 Tex. 536, 104 Am. St. Rep. 879, *reversing* (Tex. Civ. App. 1903) 77 S. W. Rep. 239.

858. 1. Authority to Act for Corporation Must Be Specifically Conferred or Delegated. — *Robins Min. Co. v. Murdock*, 69 Kan. 596; *Rockefeller v. Lamora*, 96 N. Y. App. Div. 91.

2. Acts of President Relating to Corporate Business Presumptively Legal. — *Sun Printing, etc., Assoc. v. Moore*, 183 U. S. 642; *Chicago Pneumatic Tool Co. v. H. W. Johns Mfg. Co.*, 101 Ill. App. 349; *Chicago Pneumatic Tool Co.*

858. (2) *Under Special Authority.* — See notes 6, 7.

859. (3) *In Particular Cases.* — See note 2.

Purchase or Sale of Property. — See notes 4, 5.

Execution or Indorsement of Commercial Paper. — See note 7.

860. See notes 1, 2, 3, 4.

Power to Sue and Defend in Behalf of Corporation. — See notes 9, 10.

b. VICE-PRESIDENT. — See note 11.

861. *c. SECRETARY.* — See note 3.

v. Munsell, 107 Ill. App. 344; *Burkamp v. Healey*, (Ky. 1903) 72 S. W. Rep. 759; *Roe v. Versailles Bank*, 167 Mo. 406; *Bennett v. Millville Imp. Co.*, 67 N. J. L. 320. See also *Cozzens, etc., Typesetting Co. v. Western Ranch, etc.*, Co., 112 Ill. App. 309; *Rapp v. Hutchinson Stair Elevator Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 459.

Release of Contract. — *Louisville, etc., R. Co. v. Dickey*, (Ky. 1903) 72 S. W. Rep. 332.

858. 4. *President Cannot Act Beyond His Authority.* — *Leigh v. American Brake-Beam Co.*, 205 Ill. 147.

5. *Friedman v. Leshner*, 198 Ill. 21, 92 Am. St. Rep. 255; *Groeltz v. Armstrong Real Estate Co.*, 115 Iowa 602; *Ida County Sav. Bank v. Seidensticker*, (Iowa 1902) 92 N. W. Rep. 862. See also *Granite Bldg. Corp. v. Greene*, 25 R. I. 586.

6. *Special Authority Conferred on President.* — *Rubie v. Combination Gold Min. Co. v. Princess Alice Gold Min. Co.*, 31 Colo. 158; *National State Bank v. Sandford Fork, etc., Co.*, 157 Ind. 10; *Hooke v. Financier Co.*, 99 N. Y. App. Div. 186. See also *Taylor Gas Producer Co. v. Wood*, 119 Fed. Rep. 966, *affirmed* (C. C. A.) 125 Fed. Rep. 337.

7. *President Acting as General Manager.* — *Pettibone v. Lake View Town Co.*, 134 Cal. 227; *Chicago Pneumatic Tool Co. v. H. W. Johns Mfg. Co.*, 101 Ill. App. 349; *Cozzens, etc., Typesetting Co. v. Western Ranch, etc., Co.*, 112 Ill. App. 309; *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370; *Rosewater v. Glen Telephone Co.*, 81 N. Y. App. Div. 275; *Meating v. Tigerton Lumber Co.*, 113 Wis. 379; *St. Clair v. Rutledge*, 115 Wis. 583, 95 Am. St. Rep. 964. See also *Curtis v. Natalie Anthracite Coal Co.*, 89 N. Y. App. Div. 61, *affirmed* 181 N. Y. 543.

859. 2. *Powers of President — Particular Instances.* — *U. S. Fidelity, etc., Co. v. Muir*, (C. C. A.) 115 Fed. Rep. 264; *In re Winston*, 122 Fed. Rep. 187; *Arbogast v. American Exch. Nat. Bank*, (C. C. A.) 125 Fed. Rep. 518; *Conn v. Church of the Redeemer*, 111 Mo. App. 164; *Demarest v. Spiral Riveted Tube Co.*, 71 N. J. L. 14; *Lester Agricultural Chemical Works v. Selby*, (N. J. 1904) 59 Atl. Rep. 247; *Bangor, etc., R. Co. v. American Bangor Slate Co.*, 203 Pa. St. 6.

Cannot Lend Money for Private Purposes. — *Leigh v. American Brake-Beam Co.*, 205 Ill. 147.

Cannot Make Gift of Corporate Property. — *Worthington v. Worthington*, 100 N. Y. App. Div. 332.

Cannot Assign Account Due to Corporation. — *Cogan v. Conover Mfg. Co.*, (N. J. 1905) 60 Atl. Rep. 408.

4. *Sale of Corporate Property.* — *Bloch Queensware Co. v. Metzger*, 70 Ark. 232; *State v. Perkins*, 90 Mo. App. 603; *Consolidated Water Power Co. v. Nash*, 109 Wis. 490.

Appointment of Agent to Sell. — See *Groeltz v. Armstrong Real Estate Co.*, 115 Iowa 602.

Cannot Make Assignment for Benefit of Creditors. — *Friedman v. Leshner*, 198 Ill. 21, 92 Am. St. Rep. 255; *Degnan v. Thoroughman*, 88 Mo. App. 62.

5. *Express Verbal Authority Sufficient.* — *National State Bank v. Sandford Fork, etc., Co.*, 157 Ind. 10.

7. *Gould v. Gould*, 134 Mich. 515, 104 Am. St. Rep. 624, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 859.

860. 1. *President and Secretary Have No Inherent Power to Execute Notes, etc., for Corporation.* — See *Cumberland Third Nat. Bank v. Laboringman's Mercantile, etc., Co.*, 56 W. Va. 446.

2. *No Authority to Indorse Notes.* — See *Karsch v. Pottier, etc., Mfg., etc., Co.*, 82 N. Y. App. Div. 230.

3. *President May Execute Corporation Notes, etc., When So Authorized.* — *Schreyer v. Bailey*, 97 N. Y. App. Div. 185.

4. *Authority to Indorse.* — *Jones v. Stoddart*, 8 Idaho 210; *Iowa Nat. Bank v. Sherman*, 17 S. Dak. 396.

9. *Confession of Judgment.* — See *Fogg v. Ellis*, 61 Neb. 829.

10. *Employment of Counsel.* — *Russell v. Washington Sav. Bank*, 23 App. Cas. (D. C.) 398; *Breathitt Coal, etc., Co. v. Gregory*, (Ky. 1904) 78 S. W. Rep. 148; *Campbell v. Pittsburgh Bridge Co.*, 23 Pa. Super. Ct. 138; *Fernald v. Spokane, etc., Telephone, etc., Co.*, 31 Wash. 672.

11. *Powers and Duties of Vice-President.* — *Russell v. Washington Sav. Bank*, 23 App. Cas. (D. C.) 398; *Friedman v. Leshner*, 198 Ill. 21, 92 Am. St. Rep. 255; *Fernald v. Spokane, etc., Telephone, etc., Co.*, 31 Wash. 672. See also *Vincent v. Soper Lumber Co.*, 113 Ill. App. 463.

Vice-President Also Manager. — See *Drew v. Billings-Drew Co.*, 132 Mich. 65.

861. 3. *Officer with Limited Powers.* — *Whitechurch v. Cavanagh*, (1902) A. C. 117.

No Power to Contract for Corporation. — *Greene v. Iroquois Hotel, etc., Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 591; *Cobb v. Glenn Boom, etc., Co.*, 57 W. Va. 49.

No Power to Sell Property of Corporation. — *California Winemakers' Corp. v. Sciaroni*, 139 Cal. 277; *Consolidated Water Power Co. v. Nash*, 109 Wis. 490.

No Power to Borrow Money and Assign Collateral. — *Alabama Nat. Bank v. O'Neil*, 128 Ala. 192.

- 861.** *d.* TREASURER. — See notes 4, 5.
e. GENERAL OR MANAGING AGENT. — See note 6.
862. See note 1.
f. BANK CASHIER. — See note 2.
863. See notes 1, 2.

No Authority to Make Contracts to Pay Commission. — Extension Gold Min., etc., Co. v. Skinner, 28 Colo. 237.

Indorsement of Note. — See Karsch v. Pottier, etc., Mfg., etc., Co., 82 N. Y. App. Div. 230.

Power to Indorse Inferred. — Peoples' Sav. Bank v. Hine, 131 Mich. 181.

Authority to Extend Credit Includes Authority to Guarantee Customers' Note. — Hess v. Sloane, 66 N. Y. App. Div. 522, *affirmed* 173 N. Y. 616.

No Authority to Accept Anything but Money in Satisfaction of Judgment. — Good Hope Bldg. Assoc. v. Amweg, 22 Pa. Super. Ct. 145.

Secretary Acting as General Manager Has Powers of Sale. — Betts v. Southern California Fruit Exch., 144 Cal. 402; Woodward v. Nelligan, 19 App. Cas. (D. C.), 550; Ring v. Long Island Real Estate Exch., etc., Co., 93 N. Y. App. Div. 442.

861. 4. See Generally, as to the Power and Authority of a Treasurer in particular cases, Albro Min., etc., Co. v. Chinn, (Colo. App. 1904) 77 Pac. Rep. 1097; Manhattan Web Co. v. Aquidneck Nat. Bank, 133 Fed. Rep. 76.

Power to Indorse. — Black v. West Minster First Nat. Bank, 96 Md. 399.

No Authority to Make Accommodation Indorsement. — Pelton v. Spider Lake Sawmill, etc., Co., 117 Wis. 569, 98 Am. St. Rep. 946.

Cannot Pledge Credit of Corporation for Another. — *In re* Prospect Worsted Mills, 126 Fed. Rep. 1011.

Cannot Contract for Work and Labor. — Connell v. Ernst-Marx-Nathan Co., (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 133.

No Power to Estop Corporation from Joining in Petition for Bankruptcy Against Debtor. — *In re* Winston, 122 Fed. Rep. 187.

5. Treasurer Mere Depositary. — Sanitary Can Co. v. Mullins, 86 N. Y. App. Div. 450; Jennie Clarkson Home v. Chesapeake, etc., R. Co., 92 N. Y. App. Div. 491; Backer v. U. S. Gas Fixture Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 149.

6. Power and Authority of General Agents — United States. — W. L. Wells Co. v. Avon Mills, 118 Fed. Rep. 190, *reversed* on another point (C. C. A.) 128 Fed. Rep. 369, 198 U. S. 177.

California. — Muller v. Swanton, 140 Cal. 249; Centerville, etc., Irrigation Ditch Co. v. Sanger Lumber Co., 140 Cal. 385; Betts v. Southern California Fruit Exch., 144 Cal. 402.

Colorado. — Fisk Min., etc., Co. v. Reed, 32 Colo. 506.

Georgia. — Minnesota Lumber Co. v. Hobbs, 122 Ga. 20.

Kansas. — Kansas City v. Cullinan, 65 Kan. 68.

Michigan. — Constantine v. Kalamazoo Beet Sugar Co., 132 Mich. 480.

Missouri. — Skene v. Union Casualty, etc., Co., 91 Mo. App. 120; Chenoweth v. Pacific

Express Co., 93 Mo. App. 185; Rosenbaum v. Gilliam, 101 Mo. App. 126; Hasler v. Ozark Land, etc., Co., 101 Mo. App. 136.

Montana. — Spelman v. Gold Coin Min., etc., Co., 26 Mont. 76, 91 Am. St. Rep. 402; Trent v. Sherlock, 26 Mont. 85.

Nebraska. — Fidelity, etc., Co. v. Field, (Neb. 1902) 89 N. W. Rep. 249; Trephagen v. South Omaha, (Neb. 1903) 96 N. W. Rep. 248.

Pennsylvania. — Smith v. Crum Lynne Iron, etc., Co., 208 Pa. St. 462.

Utah. — Sandberg v. Victor Gold, etc., Min. Co., 24 Utah 1.

Wisconsin. — Lowe v. Ring, 115 Wis. 575.

Indorsement of Commercial Paper. — Baines v. Coos Bay, etc., R., etc., Co., 45 Oregon 307.

Conveyance of Real Estate. — St. Augustine First Nat. Bank v. Kirkby, 43 Fla. 376.

Employment of Agents. — Forked Deer Pants Co. v. Shipley, (Ky. 1904) 80 S. W. Rep. 476; Whitman v. Koted Silk Underwear Co., (N. Y. City Ct. Gen. T.) 38 Misc. (N. Y.) 796.

Cannot Engage Employees for Long Period Without Express Authority. — Reupke v. D. H. Stuhr, etc., Grain Co., 126 Iowa 632.

No Power to Indorse Commercial Paper. — Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 93 Am. St. Rep. 113.

No Power to Issue Note. — Sanford Cattle Co. v. Williams, 18 Colo. App. 378.

Cannot Give Away Corporate Assets. — Cassville Roller Milling Co. v. Aetna Ins. Co., 105 Mo. App. 146.

No Authority to Agree to Take Services in Payment for Goods. — Bowditch Furniture Co. v. Jones, 74 Conn. 149.

862. 1. Managing Agent Defined. — Kansas City v. Cullinan, 65 Kan. 68.

2. Authority and Powers of Bank Cashier. — Abbott v. Jack, 136 Cal. 510; Duncan First Nat. Bank v. Anderson, (Indian Ter. 1904) 82 S. W. Rep. 693; Citizens Bank v. Fromholz, 64 Neb. 284; Taylor v. Commercial Bank, 174 N. Y. 181, 95 Am. St. Rep. 564, *reversing* 68 N. Y. App. Div. 458; German-American Bank v. Schwinger, 75 N. Y. App. Div. 393, *affirmed* 178 N. Y. 569; National Bank v. Fridenberg, 206 Pa. St. 243; Ellis v. Woonsocket First Nat. Bank, 22 R. I. 565; Flatonia First Nat. Bank v. Ratliff, 33 Tex. Civ. App. 279.

As to Cashiers of National Banks see the title NATIONAL BANKS, 354. 10 *et seq.*

863. 1. Acts of Cashier Prima Facie Authorized. — Goshen v. People's Nat. Bank, 32 Ind. App. 428, 102 Am. St. Rep. 248; Campbell v. Upton, 66 N. Y. App. Div. 434, *affirmed* 171 N. Y. 644; Knapp v. Saunders, 15 S. Dak. 464.

2. Hier v. Miller. 68 Kan. 258; Sturdevant v. Farmers', etc., Bank, (Neb. 1903) 95 N. W. Rep. 819.

Cannot Issue Drafts for Private Use. — Mendel v. Boyd, (Neb. 1904) 99 N. W. Rep. 493.

- 863.** *g. DIRECTORS — (1) In General.* — See note 3.
- 864.** Directors Must Act as a Board. — See note 2.
- 865.** **X. DIRECTORS' MEETINGS — 1. Necessity for Meetings.** — See note 3.
- 866.** See note 2.
- 867.** **5. Notice — a. NECESSITY FOR NOTICE — A Special Meeting.** — See note 5.
- 868.** See note 3.
- 869.** Waiver of Want of Notice. — See note 1.
c. PRESUMPTION OF NOTICE. — See note 10.
- 870.** **6. Quorum — General Rule — Majority Constitutes Quorum.** — See note 1.
See also the title **QUORUM.**
Quorum Must Attend. — See note 4.
- 872.** Effect of Vacancies in Board. — See note 4.
7. Voting — Director Interested. — See note 7.
- 873.** **XI. DUTIES AND LIABILITIES OF DIRECTORS AND OFFICERS — 1. To Corporation and Stockholders — a. GENERAL NATURE OF RELATION OF DIRECTORS TO CORPORATION.** — See note 8.
- 874.** The Conflict Between the Authorities. — See note 4.
b. DEGREE OF CARE REQUIRED — LIABILITY FOR NEGLIGENCE — Officers Bound to Exercise Ordinary Care. — See note 7.

No Right to Accept Worthless Check. — Van Buren County Sav. Bank *v.* Stirling Woolen Mills Co., (Iowa 1903) 94 N. W. Rep. 945.

863. **3. Powers of Directors — Generally.** — Collier *v.* Consolidated R., etc., Co., 70 N. J. L. 313; Savaria *v.* Paquette, 20 Quebec Super. Ct. 314.

May Incur Expense in Notifying Stockholders of Proposed Scheme for Exchange of Stock. — Ras-covor *v.* American Linseed Co., (C. C. A.) 135 Fed. Rep. 341.

Power to Make Lease. — Mosher *v.* Sinnot, (Colo. App. 1905) 79 Pac. Rep. 742.

May Employ Counsel. — Breathitt Coal, etc., Co. *v.* Gregory, (Ky. 1904) 78 S. W. Rep. 148.

Cannot Pledge Credit of Corporation for Price of Goods Sold to Another Corporation. — *In re* Prospect Worsted Mills, 126 Fed. Rep. 1011.

864. **2. No Power in Director as Individual.** — Extension Gold Min., etc., Co. *v.* Skinner, 28 Colo. 237; Sias *v.* Consolidated Lighting Co., 73 Vt. 35. See further *infra*, this title, **865.**

Collective Power Cannot Be Waived by Corporation. — Audenried *v.* East Coast Milling Co., (N. J. 1904) 59 Atl. Rep. 577.

865. **3. Directors Must Act as a Board.** — Demarest *v.* Spiral Riveted Tube Co., 71 N. J. L. 14. And see *supra*, this title, **864.** 2.

866. **2. Directors Must Act at Lawful Meeting.** — Omaha First Nat. Bank *v.* East Omaha Box Co., (Neb. 1902) 90 N. W. Rep. 223.

867. **5. Notice of Special Meeting Necessary.** — State *v.* Perkins, 90 Mo. App. 603; Omaha First Nat. Bank *v.* East Omaha Box Co., (Neb. 1902) 90 N. W. Rep. 223; Hatch *v.* Lucky Bill Min. Co., 25 Utah 405.

868. **3. Meeting of Quorum Held Lawful Though Other Directors Not Notified.** — Buck *v.* Troy Aqueduct Co., 76 Vt. 75.

869. **1. Waiver of Want of Notice.** — See Anderson Carriage Co. *v.* Pungs, 127 Mich. 543.

10. Notice Presumed. — Mills *v.* Boyle Min.

Co., 132 Cal. 95. See also Stradley *v.* Cargill Elevator Co., 135 Mich. 367.

Notice Not Presumed Unless Record Made of Conference. — New Haven Trust Co. *v.* Doherty, 75 Conn. 555, 96 Am. St. Rep. 239.

870. **1. Majority of Directors May Act.** — Marshall *v.* Industrial Federation of America, (Supm. Ct. App. T.) 14 N. Y. Annot. Cas. 100.
4. Quorum of Directors Required to Act. — Omaha First Nat. Bank *v.* East Omaha Box Co., (Neb. 1902) 90 N. W. Rep. 223; Leary *v.* Interstate Nat. Bank, (Tex. Civ. App. 1901) 63 S. W. Rep. 149.

872. **4. Power Given by Charter to Continuing Members.** — See *In re* Syria Bank, (1900) 2 Ch. 272, affirmed (1901) 1 Ch. 115.

7. Resolution Dependent upon Vote of Interested Director Void. — *In re* Greymouth Point Elizabeth R., etc., Co., (1904) 1 Ch. 32; Leary *v.* Interstate Nat. Bank, (Tex. Civ. App. 1901) 63 S. W. Rep. 149; Triplett *v.* Fauver, 103 Va. 123.

873. **8. Directors Held to Be Trustees of Corporation and Stockholders.** — Barber *v.* Martin, 67 Neb. 445; Barry *v.* Moeller, (N. J. 1904) 59 Atl. Rep. 97.

874. **4. Directors Occupy Fiduciary Relation.** — Wyman *v.* Bowman, (C. C. A.) 127 Fed. Rep. 257; Oliver *v.* Oliver, 118 Ga. 362; Stewart *v.* Harris, 69 Kan. 498, 105 Am. St. Rep. 178; Central Bank *v.* Thayer, 184 Mo. 61; Coombs *v.* Barker, 31 Mont. 526; Bosworth *v.* Allen, 168 N. Y. 157, 85 Am. St. Rep. 667, reversing 57 N. Y. App. Div. 633; Hinds *v.* Fishkill, etc., Gas Co., 96 N. Y. App. Div. 14; Consolidated Vinegar Works *v.* Brew, 112 Wis. 610.

7. Officers Bound to Exercise Ordinary Care and Prudence. — Brinkerhoff *v.* Roosevelt, 131 Fed. Rep. 955; New Haven Trust Co. *v.* Doherty, 75 Conn. 555, 96 Am. St. Rep. 239; Stone *v.* Rottman, 183 Mo. 552; Johnson *v.* Stoughton Wagon Co., 118 Wis. 438, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 874.

- 875.** Bank Directors. — See note 3.
 Only Ordinary Care Required. — See note 4.
 No Liability for Mere Mistakes or Mismanagement. — See note 5.
- 876.** See note 1.
 Liability for Gross Negligence. — See note 2.
c. LIABILITY IN PARTICULAR CASES — (1) *For Abuse of Trust.* — See note 6.
- 878.** (2) *For Acts Done in Excess of Powers.* — See note 2.
d. WHO MAY SUE. — See note 8.
- 879.** *e.* JURISDICTION OF COURT OF EQUITY. — See note 2.
f. STATUTE OF LIMITATIONS. — See note 4.
- 880.** 2. Liability to Third Persons — *a.* ON CORPORATE CONTRACTS — (2) *On Contracts Prior to Complete Organization of Corporation.* — See note 1.
b. LIABILITY FOR TORTS — (1) *In General.* — See note 4.
 (2) *Fraud and Deceit* — *False Representations.* — See note 6.
- 881.** See notes 2, 3, 4.
c. LIABILITY TO CREDITORS OF CORPORATION — (1) *In General.* — See note 6.
 No Liability for Negligence or Mismanagement. — See note 7.
- 882.** Liability for Fraud. — See note 1.

875. 3. Bank Directors. — *Western Bank v. Coldewey*, (Ky. 1904) 83 S. W. Rep. 629; *Campbell v. Watson*, 62 N. J. Eq. 396; *Hanna v. Lyon*, 179 N. Y. 107.

As to Directors of National Banks see the title NATIONAL BANKS, 353. 3, 4, 355. 5 *et seq.*

4. Only Ordinary Care Required. — *Dovey v. Cory*, (1901) A. C. 477; *Pineville First Nat. Bank v. Reese*, (Ky. 1903) 76 S. W. Rep. 384.

5. No Liability for Mere Mismanagement or Mistake. — *Cannon v. Brush Electric Co.*, 96 Md. 446, 94 Am. St. Rep. 584; *Warren v. Robison*, 25 Utah 205; *Cushing Sulphite Fibre Co. v. Cushing*, 2 New Bruns. Eq. Rep. 539.

876. 1. Directors Liable for Want of Skill and Judgment. — *Hanna v. Lyon*, 179 N. Y. 107.

2. Liability for Gross Negligence — Indiana Statute. — *Coddington v. Canaday*, 157 Ind. 243.

6. Liability for Abuse of Trust. — *MacGinness v. Boston*, etc., *Consol. Copper*, etc., *Min. Co.*, 29 Mont. 428; *Saranac*, etc., *R. Co. v. Arnold*, 167 N. Y. 368, *reversing* 41 N. Y. App. Div. 482; *Bosworth v. Allen*, 168 N. Y. 157, 85 Am. St. Rep. 667, *reversing* 57 N. Y. App. Div. 633; *Jacobus v. Diamond Soda Water Mfg. Co.*, 94 N. Y. App. Div. 366; *Moneuse v. Riley*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 110; *Luther v. C. J. Luther Co.*, 118 Wis. 112, 99 Am. St. Rep. 977. See also *Giveen v. Gans*, 91 N. Y. App. Div. 37, *affirmed* 181 N. Y. 538.

878. 2. Liability for Unauthorized Acts. — *Brinkerhoff v. Roosevelt*, 131 Fed. Rep. 955.

8. Who May Sue. — *Hanna v. Lyon*, 179 N. Y. 107; *Fallon v. U. S. Directory Co.*, 86 N. Y. App. Div. 29; *Loewenstein v. Diamond Soda Water Mfg. Co.*, 94 N. Y. App. Div. 383; *Stoddard v. Bell*, 100 N. Y. App. Div. 389.

Receiver May Sue. — *Coddington v. Canaday*, 157 Ind. 243.

New York Statute. — Under Code Civ. Pro. N. Y., §§ 1781, 1782, a director or a trustee may sue in behalf of the corporation. *Green v. Compton*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 21.

879. 2. Jurisdiction of Equity. — *Campbell v. Watson*, 62 N. J. Eq. 396.

4. Cause of Action Barred by Statute of Limitations. — *Central Bank v. Thayer*, 184 Mo. 61.

880. 1. Immaterial that Corporation Exists De Facto. — *Seymour v. O. S. Richardson Fueling Co.*, 103 Ill. App. 625, *reversed* on other grounds 205 Ill. 77.

4. Officers and Directors Personally Liable for Torts. — *Groeltz v. Armstrong*, 125 Iowa 39; *Sweet v. Montpelier Sav. Bank, etc., Co.*, 69 Kan. 641; *Stickel v. Atwood*, 25 R. I. 456.

6. Directors and Officers Personally Liable for Fraud and Misrepresentation. — *McConnel v. Wright*, (1903) 1 Ch. 546; *Squiers v. Thompson*, 73 N. Y. App. Div. 552, *affirmed* 172 N. Y. 652; *Mack v. Latta*, 178 N. Y. 525; *Lyon v. James*, 97 N. Y. App. Div. 385, *affirmed* 181 N. Y. 512; *Stickel v. Atwood*, 25 R. I. 456. See also *Worthington v. Griesser*, 77 N. Y. App. Div. 203.

**881. 2. Hoole v. Speak, (1904) 2 Ch. 732.
3. Representations Must Be Made with Knowledge of Their Falsity. — *Vokes v. Eaton*, (Ky. 1905) 85 S. W. Rep. 174; *Worthington v. Herrmann*, 89 N. Y. App. Div. 627, *affirmed* 180 N. Y. 559; *Lyon v. James*, 97 N. Y. App. Div. 385, *affirmed* 181 N. Y. 512.**

4. The English Companies Act of 1867, § 38, charges the rule of the common law, and a director may be liable even if not guilty of fraud. *Shepherd v. Broome*, (1904) A. C. 342, *affirming* (1903) 1 Ch. 586; *Watts v. Bucknall*, (1903) 1 Ch. 766; *Tait v. MacLeay*, (1904) 2 Ch. 631.

6. Not Liable to Receiver for His Compensation. — *Ephraim v. Pacific Bank*, 136 Cal. 646.

7. Officers Not Liable to Creditors for Negligence or Mismanagement. — *Force v. Age-Herald Co.*, 136 Ala. 271; *Dietrich v. Rothenberger*, (Ky. 1903) 75 S. W. Rep. 271; *Penney v. Bryant*, (Neb. 1903) 96 N. W. Rep. 1033.

Statutory Liability. — See *Fletcher v. Eagle*, (Ark. 1905) 86 S. W. Rep. 810.

882. 1. Fraudulent Diversion of Assets. —

- 882.** *Liability of Bank Officers to Depositors.* — See note 2.
 (2) *Statutor; Liability* — (a) *In General.* — See note 5.
 (b) *Nature of Statutes as Penal or Remedial.* — See note 6.
- 883.** See notes 1, 3, 4.
Statute of Limitations. — See notes 5, 6.
- 884.** (c) *Liability in Particular Cases* — *aa. FOR VIOLATION OF CHARTER.* — See note 5.
bb. FOR FRAUD OR MISMANAGEMENT. — See note 6.
cc. FOR FAILURE TO FILE REPORTS — (*aa*) *In General.* — See note 7.
- 885.** See note 1.
- 886.** *Conditions of Liability.* — See note 1.
 (*bb*) *Requirements and Sufficiency of Reports.* — See notes 5, 6.
- 887.** (*cc*) *Effect of Dissolution of Corporation or Suspension of Business* — *Where a Corporation Is Dissolved.* — See note 3.
Dissolution After Default. — See note 4.
dd. FOR SIGNING FALSE REPORTS. — See note 5.

See *Fishel v. Goddard*, 30 Colo. 147; *Frellsen v. Strader Cypress Co.*, 110 La. 877; *Hayes v. Pierson*, 65 N. J. Eq. 353.

No Liability for Acts Prior to Extension of Credit. — *Commercial Bank v. Warthen*, 119 Ga. 990.

Directors Who Induce Suits Against the Corporation to collect claims guaranteed by them are not thereby rendered personally liable to holders of other claims. *Emanuel v. Barnard*, (Neb. 1904) 99 N. W. Rep. 666.

Statute Permitting Director to Bring Suit. — *Miller v. Barlow*, 78 N. Y. 1 pp. Div. 331.

882. 2. Liability of Bank Officers to Depositors. — *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153.

5. Statute Must Be Strictly Complied With. — *Legg v. Dewing*, 25 R. I. 568.

6. Statutes of Penal Nature. — *International Paper Co. v. Gazette Co.*, 182 Mass. 578.

883. 1. Statutes Construed Strictly. — *International Paper Co. v. Gazette Co.*, 182 Mass. 578; *Lilienthal v. Betz*, 61 N. Y. App. Div. 601, *affirmed* 172 N. Y. 643.

3. Statutes Held Remedial. — *Appleton v. American Malting Co.*, 65 N. J. Eq. 375.

Statutory Liability to Stockholder for False Report Not Penal. — *Hutchinson v. Young*, 80 N. Y. App. Div. 246.

4. Statutes Penal as to Officers but Remedial as to Creditors. — *Audenried v. East Coast Milling Co.*, (N. J. 1904) 59 Atl. Rep. 577. See also *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153.

5. Statutes Held Penal Within Statute of Limitations. — *Brown v. Clow*, 158 Ind. 403.

6. Statutes Held Not Penal Within Statute of Limitations. — *Continental Nat. Bank v. Buford*, (C. C. A.) 114 Fed. Rep. 290.

884. 5. Liability for Violation of Charter. — *Citizens' State Bank v. Story Specialty Mfg. Co.*, 84 Minn. 408.

6. Liability for Official Mismanagement. — *Winchester v. Howard*, 136 Cal. 432, 89 Am. St. Rep. 153.

7. Personal Liability of Officers Failing to File Reports. — *Continental Nat. Bank v. Buford*, (C. C. A.) 114 Fed. Rep. 290; *Brown v. Clow*, 158 Ind. 403; *Beckman Lumber Co. v. Ahern*, (Ark. 1905) 86 S. W. Rep. 842; *Staten Island*

Midland R. Co. v. Hinchliffe, 170 N. Y. 473; *Union Bank v. Keim*, 52 N. Y. App. Div. 135, *affirmed* 169 N. Y. 587; *Ginsburg v. Von Seggern*, 59 N. Y. App. Div. 595, *affirmed* 172 N. Y. 662; *Stevenson v. Cowan*, 84 N. Y. App. Div. 135.

Commencement of Action. — See *Continental Nat. Bank v. Buford*, 107 Fed. Rep. 188, *affirmed* (C. C. A.) 114 Fed. Rep. 290.

885. 1. Certificate of Payments on Capital Stock. — See *Bay State Gas Co. v. State*, 4 Penn. (Del.) 497.

886. 1. Notice of Intention to Claim Liability. — See *Staten Island Midland R. Co. v. Hinchliffe*, 170 N. Y. 473; *Boynton v. Sprague*, 100 N. Y. App. Div. 443; *Shepard v. Fulton*, 171 N. Y. 184, *affirming* 55 N. Y. App. Div. 329.

Essential that Creditors Be Misled. — Under the *Indiana* statute no liability is incurred unless the creditors are actually deceived and misled by the omission. *Stafford v. St. John*, 164 Ind. 277; *Brown v. Clow*, 158 Ind. 403.

Must Be Corporation. — *Emery v. De Peyster*, 77 N. Y. App. Div. 65.

5. As to What Is or Is Not a Sufficient Compliance. — *Lilienthal v. Betz*, 61 N. Y. App. Div. 601, *affirmed* 172 N. Y. 643.

As to What Officers. — *Rhodes v. Hinds*, 79 N. Y. App. Div. 379.

As to the Place of Filing Reports. — *Uptegrove v. Schwarzwaelder*, 46 N. Y. App. Div. 20, *affirmed* 167 N. Y. 587.

6. Time of Making and Filing Report. — *Canon v. Breckenridge Mercantile Co.*, 18 Colo. App. 38; *Stafford v. St. John*, 164 Ind. 277; *West v. Grosvenor*, 102 N. Y. App. Div. 266; *Continental Nat. Bank v. Buford*, 107 Fed. Rep. 188, *affirmed* (C. C. A.) 114 Fed. Rep. 290.

887. 3. Cessation of Business Must Be Without Prospect of Resumption. — *Horrocks Desk Co. v. Fangel*, 71 N. Y. App. Div. 313; *Stevenson v. Cowan*, 84 N. Y. App. Div. 135; *Matty v. Sampson*, 64 N. Y. App. Div. 1.

4. Dissolution After Incurring Debt and Making Default. — *Ginsburg v. Von Seggern*, 59 N. Y. App. Div. 595, *affirmed* 172 N. Y. 662; *Stieffel v. Tolhurst*, 67 N. Y. App. Div. 521.

5. Officers Signing False Report Liable for Corporate Debts. — *Heard v. Pictorial Press*,

- 888.** Intent to Defraud. — See note 4.
cc. FOR CONTRACTING EXCESSIVE INDEBTEDNESS. — See note 6.
- 890.** The Statutory Liability Is for the Benefit of All the Creditors. — See note 1.
 (a) Debts to Which Liability Extends. — See note 2.
 Time of Contraction or Maturity of Debt. — See note 5.
- 891.** (e) Persons Liable. — See note 1.
 A Person Who Has Ceased to Be an Officer. — See note 3.
- 892.** (f) Who May Enforce Liability. — See note 6.
 Enforcement by Director. — See note 8.
 A Single Creditor. — See note 9.
- 893.** (g) Necessity for Judgment Against Corporation. — See notes 1, 2.
 Where, However, the Liability of Officers Is Secondary. — See note 3.
 (j) Liability of Officers of Corporations Not for Profit. — See note 8.
- 894.** (3) *Officers of Insolvent Corporation.* — See notes 1, 3.
 3. Liability for Wrongful Acts of Agents and Appointees. — See notes 5, 7.
- 895.** See note 1.
 4. Liability for Impairing Capital Stock. — See note 4.

182 Mass. 530; *Hutchinson v. Young*, 80 N. Y. App. Div. 246.

888. 4. *International Paper Co. v. Gazette Co.*, 182 Mass. 578.

Immaterial that Plaintiff Not Deceived. — *Heard v. Pictorial Press*, 182 Mass. 530.

6. Directors Liable for Incurring Excessive Indebtedness. — *Irving Nat. Bank v. Moynihan*, 84 N. Y. App. Div. 301; *Rice v. Kennedy*, 76 Vt. 380.

890. 1. Action Must Be for Benefit of All Creditors. — See *Bauer v. Parker*, 82 N. Y. App. Div. 289.

2. As to What Are Debts. — See *Matty v. Sampson*, 64 N. Y. App. Div. 1.

5. Time of Contraction or Maturity of Debt. — *Flint v. Boston Woven Hose, etc., Co.*, 183 Mass. 114; *Beekman Lumber Co. v. Ahern*, (Ark. 1905) 86 S. W. Rep. 842; *Matty v. Sampson*, 64 N. Y. App. Div. 1; *Ginsburg v. Von Seggern*, 59 N. Y. App. Div. 595, *affirmed* 172 N. Y. 662; *Stieffel v. Tolhurst*, 67 N. Y. App. Div. 521; *Thistle v. Jones*, (County Ct.) 45 Misc. (N. Y.) 215.

891. 1. What Constitutes Proof of Acceptance. — See *Union Bank v. Keim*, 52 N. Y. App. Div. 135, *affirmed* 169 N. Y. 587.

3. Debts Contracted or Defaults Made After Director Ceased to Be Such. — *Stafford v. St. John*, 164 Ind. 277. *Contra*, *Citizens State Bank v. Story Specialty Mfg. Co.*, 84 Minn. 408.

Acting as Agent After Resignation Imposes No Liability. — *Brown v. Clow*, 158 Ind. 403.

892. 6. Enforcement by Assignee. — *Boyn-ton v. Sprague*, 100 N. Y. App. Div. 443.

8. Enforcement by Director or His Assignee. — See *contra*, *Ginsburg v. Von Seggern*, 59 N. Y. App. Div. 595, *affirmed* 172 N. Y. 662.

9. Action by One Creditor for Benefit of All. — *Bauer v. Parker*, 82 N. Y. App. Div. 289.

893. 1. Recovery of Judgment Against Corporation Not Necessary. — *Stieffel v. Tolhurst*, 67 N. Y. App. Div. 521; *Ginsburg v. Van Seggern*, 59 N. Y. App. Div. 595, *affirmed* 172 N. Y. 662.

2. Judgment Against Corporation Not Evidence. — *Stieffel v. Tolhurst*, 67 N. Y. App. Div. 521. See also *Audenried v. East Coast Milling Co.*,

68 N. J. Eq. 450 (judgment of another state). *Contra*, under the *Massachusetts* statute, *Old Colony Boot, etc., Co. v. Parker-Sampson-Adams Co.*, 183 Mass. 557.

3. See *Edwards v. National Window-Glass Jobbers Assoc.*, (N. J. 1904) 58 Atl. Rep. 527.

8. Liability of Officers of Corporations Not for Profit. — See *Kelley v. Bender*, 12 Ohio Cir. Dec. 181, 22 Ohio Cir. Ct. 144.

894. 1. Officers of Insolvent Corporation Trustees for Creditors. — *City Nat. Bank v. Goshen Woollen Mills Co.*, (Ind. App. 1903) 69 N. E. Rep. 206; *Keen v. Maple Shade Land, etc., Co.*, 63 N. J. Eq. 321; *Joseph v. Raff*, 82 N. Y. App. Div. 47, *affirmed* 176 N. Y. 611.

Not Trustees of Express Trust — Statute of Limitations Runs in Their Favor. — *Boyd v. Mutual F. Assoc.*, 116 Wis. 155, 96 Am. St. Rep. 948.

3. *Davenport v. Line*, 77 Conn. 473.

5. Directors Not Liable for Acts of Officers and Agents. — *Sweet v. Montpelier Sav. Bank, etc., Co.*, 69 Kan. 641; *Blanki v. Greater American Exposition Co.*, (Neb. 1902) 92 N. W. Rep. 615.

7. *Dovey v. Cory*, (1901) A. C. 477.

895. 1. Liability When Negligent in Exercising Due Supervision. — *New Haven Trust Co. v. Doherty*, 74 Conn. 353; *Stone v. Rottman*, 183 Mo. 552; *Campbell v. Watson*, 62 N. J. Eq. 356.

4. Improper Declaration of Dividends. — *Boyd v. Schneider*, (C. C. A.) 131 Fed. Rep. 223; *Siegmán v. Maloney*, 63 N. J. Eq. 422, *affirmed* 65 N. J. Eq. 374; *Appleton v. American Malt-ing Co.*, 65 N. J. Eq. 375; *Schoenfeld v. American Can Co.*, (N. J. 1903) 55 Atl. Rep. 1044; *Williams v. Brewster*, 117 Wis. 370.

Liability Not Reduced by Profits Subsequently Made under New Management. — *Hutchinson v. Curtiss*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 484.

Stockholder Receiving Dividends Cannot Sue. — *Towers v. African Tug Co.*, (1904) 1 Ch. 558.

Statutory Liability to Corporation. — *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424.

896. 6. How Far Chargeable with Knowledge of Corporate Affairs. — See notes 2, 3.

7. Criminal Liability — *a. IN GENERAL.* — See note 5.

Defendant Must Be Implicated in Illegal Act. — See note 7.

b. STATUTORY LIABILITY — See note 8.

897. Making and Publishing False Reports. — See note 3.

XII. CONTRACTS AND DEALINGS WITH CORPORATION — 1. In General.

— See notes 4, 5.

898. Trust Relation Not Extended to Private Dealings. — See notes 6, 7.

899. 2. Contracts Between Corporations Having Common Directors or Members. — See note 1.

Directors Shareholders of Another Corporation. — See note 2.

3. Contracts with Corporation Voidable Merely. — See note 3.

896. 2. Officer Chargeable with Knowledge of Corporate Affairs. — Sun Printing, etc., *Assoc. v. Moore*, 183 U. S. 642. See also *Coolidge v. Schering*, 32 Wash. 557.

See *Chick v. Fuller*, (C. C. A.) 114 Fed. Rep. 22.

5. Criminal Liability — Generally. — *Crall v. Com.*, 103 Va. 855.

7. Defendant Must Have Participated in Illegal Act. — *Crall v. Com.*, 103 Va. 855.

8. Bank Officer Receiving Deposits Knowing Bank to Be Insolvent. — *State v. Stevens*, 16 S. Dak. 309.

Falsifying Books. — *Qualey v. Territory*, (Ariz. 1902) 68 Pac. Rep. 546.

Refusal to Exhibit Stock Book. — *Walcott v. Little*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 96.

No Liability Where No Book in Existence. — *Billingham v. E. P. Gleason Mfg. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 681.

897. 3. False Reports, Etc. — *State v. Ware*, 71 N. J. L. 53.

4. Officers Cannot Represent Corporation When Personally Interested. — *Pacific Vinegar, etc., Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42; *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737; *Crichton v. Webb Press Co.*, 113 La. 167, 104 Am. St. Rep. 500; *U. S. Steel Corp. v. Hodge*, 64 N. J. Eq. 807; *Booth v. Land Filling, etc., Co.*, (N. J. 1905) 59 Atl. Rep. 767. See also *Telegraph Co. v. Loetscher*, 127 Iowa 383.

Openness of Transaction Not Enough. — *Goodell v. Verdugo Cañon Water Co.*, 138 Cal. 308.

5. Duty of Director to Promote Interests of Corporation. — *Kroegher v. Calivada Colonization Co.*, (C. C. A.) 119 Fed. Rep. 641; *Bramblet v. Commonwealth Land, etc., Co.*, (Ky. 1904) 83 S. W. Rep. 599; *Mendel v. Boyd*, (Neb. 1904) 99 N. W. Rep. 493; *Hartley v. Pioneer Iron Works*, 87 N. Y. App. Div. 107, *reversed* on other points 181 N. Y. 73; *Le Roy Bank v. Purdy*, 100 N. Y. App. Div. 64; *U. S. Board, etc., Co. v. Browne*, 25 Ohio Cir. Ct. 347; *Scott v. Farmers', etc., Nat. Bank*, 97 Tex. 31, 104 Am. St. Rep. 835, *reversing* (Tex. Civ. App. 1902) 66 S. W. Rep. 485, (Tex. Civ. App. 1902) 67 S. W. Rep. 343; *Wallace v. Oceanic Packing Co.*, 25 Wash. 143. See also *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257; *Leigh v. American Brake-Beam Co.*, 205 Ill. 147; *Hier v. Miller*, 68 Kan. 258.

898. 6. Trust Relation Not Extended to Pri-

vate Dealings. — *Percival v. Wright*, (1902) 2 Ch. 421; *Walsh v. Goulden*, 130 Mich. 531; *O'Neile v. Ternes*, 32 Wash. 528, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 898. *Contra*, *Oliver v. Oliver*, 118 Ga. 362; *Stewart v. Harris*, 69 Kan. 498, 105 Am. St. Rep. 178. 7. *McDermott Min. Co. v. McDermott*, 27 Mont. 143.

Not Breach of Trust to Take Lease of Property Which Landlord Will Not Lease to Corporation. — *Crittenden, etc., Co. v. Cowles*, 66 N. Y. App. Div. 95.

899. 1. Contracts Between Corporations Having Common Directors. — *McLeod v. Lincoln Medical College*, (Neb. 1904) 98 N. W. Rep. 672; *Hinds v. Fishkill, etc., Gas Co.*, 96 N. Y. App. Div. 14; *Parsons v. Tacoma Smelting, etc., Co.*, 25 Wash. 492.

Transaction Upheld if Good Faith and Openness Shown. — *Aldine Mfg. Co. v. Phillips*, 129 Mich. 240.

Transaction Not Absolutely Void, but Subject to Close Scrutiny. — See *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673.

Directors of Contracting Corporations Appointed by Holding Corporation. — The mere fact that the directors of the contracting corporations are appointed by a third corporation which holds the majority of stock in each does not invalidate the contract, in the absence of proof that the directors so appointed are mere dummies. *Pierce v. Old Dominion Copper Min., etc., Co.*, 67 N. J. Eq. 399.

2. Directors of One Corporation Shareholders of Another. — *Montgomery Traction Co. v. Harmon*, 140 Ala. 505. See also *Goodell v. Verdugo Cañon Water Co.*, 138 Cal. 308.

3. Contracts with Directors, etc., Voidable Only. — *Salem Iron Co. v. Lake Superior Consol. Iron Mines*, (C. C. A.) 112 Fed. Rep. 239; *Copsey v. Sacramento Bank*, 133 Cal. 650, 85 Am. St. Rep. 238; *Schnittger v. Old Home Consol. Min. Co.*, 144 Cal. 603; *Snediker v. Ayers*, 146 Cal. 407; *Manley v. Mayer*, 68 Kan. 377; *U. S. Steel Corp. v. Hodge*, 64 N. J. Eq. 807; *Veeder v. Horstmann*, 85 N. Y. App. Div. 154, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 899; *Polhemus v. Polhemus*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 141; *Tenison v. Patton*, 95 Tex. 284; *Farwell v. Babcock*, 27 Tex. Civ. App. 162; *Griffith v. Blackwater Boom, etc., Co.*, 55 W. Va. 604. See also *Relender v. Riggs*, (Colo. App. 1905) 79 Pac. Rep. 328; *Hartley v. Pioneer Iron Works*, 87 N. Y.

900. See notes 1, 2.

4. Avoidance of Contract by Corporation or Stockholders. — See notes

4, 7, 9.

901. Burden of Proof. — See note 1.

5. Ratification of Contracts with Officers. — See notes 2, 3, 4.

A Director May Vote as a Shareholder. — See note 5.

6. Personal Profit from Official Position. — See note 6.

902. Secret Profits or Commissions. — See note 1.

Personal Profit Allowed in Some Cases. — See notes 2, 3.

7. Particular Transactions Considered — *a.* SALE TO CORPORATION. —

See note 4.

903. Purchase and Resale to Corporation. — See note 2.

b. PURCHASE FROM CORPORATION. — See notes 3, 4, 7.

App. Div. 107, *reversed* on another point 181 N. Y. 73.

Director May Borrow Money if He Does Not Act for Corporation. — *St. John's Nat. Bank v. Steel*, 135 Mich. 165.

900. 1. Burden *v.* Burden Iron Co., (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 559.

2. Contracts with Directors and Officers Closely Scrutinized. — *Robotham v. Prudential Ins. Co.*, 64 N. J. Eq. 673.

4. Contracts with Directors Vacated at Suit of Corporation or Stockholder. — *Hicks v. Steel*, 126 Mich. 408; *Coombs v. Barker*, 31 Mont. 526; *Booth v. Land Filling, etc., Co.*, (N. J. 1905) 59 Atl. Rep. 767; *United Gold, etc., Mines Co. v. Smith*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 567.

7. Director Must Be Placed in Statu Quo. — *Griffith v. Blackwater Boom, etc., Co.*, 55 W. Va. 604. See also *Bramblet v. Commonwealth Land, etc., Co.*, (Ky. 1904) 83 S. W. Rep. 599; *Insurance Press v. Montauk Fire Detecting Wire Co.*, 103 N. Y. App. Div. 472.

9. Right to Avoid Contract Must Be Exercised Within Reasonable Time. — *Polhemus v. Polhemus*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 141.

Two Years Not Unreasonable Time. — *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596.

901. 1. Burden of Proof. — *Coombs v. Barker*, 31 Mont. 526; *Barber v. Martin*, 67 Neb. 445; *Booth v. Land Filling, etc., Co.*, (N. J. 1905) 59 Atl. Rep. 767.

2. Ratification of Contract. — *Robertson v. Bucklen*, 107 Ill. App. 369; *Kessler v. Ensley Land Co.*, 129 Fed. Rep. 397.

Ratification Must Be by Majority of Disinterested Stockholders. — *Booth v. Land Filling, etc., Co.*, (N. J. 1905) 59 Atl. Rep. 767.

3. Ratification Must Be with Full Knowledge. — *Pacific Vinegar, etc., Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42; *Kelsey v. New England St. R. Co.*, 62 N. J. Eq. 742.

4. Ratifying Directors Must Be Disinterested. — *Goodell v. Verdugo Cañon Water Co.*, 138 Cal. 308; *McConnell v. Combination Min., etc., Co.*, 30 Mont. 239, 31 Mont. 563; *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596.

5. Interested Director May Vote as Stockholder. — *U. S. Steel Corp. v. Hodge*, 64 N. J. Eq. 807.

6. Officer Not Permitted to Make Personal Profit from Company's Business — *England*. — *Costa Rica R. Co. v. Forwood*, (1901) 1 Ch. 746.

United States. — See *Metcalf v. American School Furniture Co.*, 122 Fed. Rep. 115.

Alabama. — *De Bardeleben v. Bessemer Land, etc., R. Co.*, 140 Ala. 621.

California. — *Pacific Vinegar, etc., Works v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42.

Colorado. — *Fishel v. Goddard*, 30 Colo. 147.

Illinois. — *Robertson v. Bucklen*, 107 Ill. App. 369.

Kentucky. — *Bramblet v. Commonwealth Land, etc., Co.*, (Ky. 1904) 83 S. W. Rep. 599.

Montana. — *McConnell v. Combination Min., etc., Co.*, 30 Mont. 239, 31 Mont. 563; *Coombs v. Barker*, 31 Mont. 526.

New Jersey. — *Barry v. Moeller*, (N. J. 1904) 59 Atl. Rep. 97.

New York. — *Bosworth v. Allen*, 168 N. Y. 157, 85 Am. St. Rep. 667, *reversing* 57 N. Y. App. Div. 933; *Marshall v. Industrial Federation of America*, (Supm. Ct. App. T.) 14 N. Y. Annot. Cas. 100.

Ohio. — *U. S. Board, etc., Co. v. Browne*, 25 Ohio Cir. Ct. 347.

Tennessee. — *D. M. Steward Mfg. Co. v. Steward*, 109 Tenn. 288; *Attalla Iron Ore Co. v. Virginia Iron, etc., Co.*, 111 Tenn. 527.

902. 1. Officer Not Permitted to Make Secret Commissions or Profits. — *Barber v. Martin*, 67 Neb. 445.

2. Personal Profit Allowed in Some Cases. — *Tenison v. Patton*, 95 Tex. 284.

3. Agreement for Personal Profit or Commission Held Lawful. — *Goldshear v. Barron*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 198.

4. Sale by Officer or Director to Corporation. — *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184; *Polhemus v. Polhemus*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 141.

Contract Not Binding as to Price, Though Enforceable. — *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596.

903. 2. Corporation Cannot Both Rescind Sale and Hold Director for Profits. — *Burland v. Earle*, (1902) A. C. 83.

3. Officers May Purchase Corporate Property. — *Compare Mosher v. Sinnott*, (Colo. App. 1905) 79 Pac. Rep. 742.

4. Sale by Officers to Themselves Not Binding on Corporation. — *Fishel v. Goddard*, 30 Colo. 147; *Miller v. Brown*, (Neb. 1901) 95 N. W. Rep. 797; *Barry v. Moeller*, (N. J. 1904) 59 Atl. Rep. 97.

Fairness of Transaction Not Subject of Inquiry.

- 903.** *c.* LOAN TO CORPORATION. — See note 9.
- 904.** *d.* PURCHASE AT EXECUTION OR JUDICIAL SALE. — See notes 2, 3.
- e.* PURCHASE OF OUTSTANDING CLAIM. — See note 5.
- 905.** See note 1.
- f.* EMPLOYMENT FOR SPECIAL SERVICES. — See note 2.
- XIII. RIGHTS OF OFFICERS AND AGENTS AS AGAINST CORPORATION —**
- 1. Compensation — a. RIGHT TO COMPENSATION — (1) Where There Is Provision or Agreement for Compensation — Ordinarily No Right to Compensation.**
- See notes 3, 4.
- 906.** Compensation Illegally Paid. — See note 2.
- (2) *Compensation by Express Provision or Agreement.* — See note 3.
- 907.** Implied Contract. — See note 2.
- The Power to Fix the Compensation of Corporate Officers. — See notes 3, 4.
- Acceptance by Officer. — See note 7.
- Officer Must Establish Right to Office. — See note 8.
- 908.** (3) *Compensation for Past Services.* — See note 7.
- 909.** *b.* COMPENSATION FOR EXTRA SERVICES. — See notes 2, 4.
- 910.** See note 1.

— Pacific Vinegar, etc., *Co. v. Smith*, 145 Cal. 352, 104 Am. St. Rep. 42.

903. 7. *Chandler Mortg. Co. v. Loring*, 113 Ill. App. 423.

9. *Loan to Corporation.* — *Anglo-American Provision Co. v. Davis Provision Co.*, 112 Fed. Rep. 574; *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257; *Schnittger v. Old Home Consol. Min. Co.*, 144 Cal. 603; *Off v. Jack*, 204 Ill. 79; *Heidbreder v. Superior Ice, etc., Co.*, 184 Mo. 446; *Mechanics' Bldg., etc., Assoc. Assigned Estate*, 202 Pa. St. 589.

901. 2. *Purchase at Execution Sale.* — *Coombs v. Barker*, 31 Mont. 526.

3. *Purchase by Director—Creditor at Foreclosure or Execution Sale.* — *Relender v. Riggs*, (Colo. App. 1905) 79 Pac. Rep. 328; *Snediker v. Ayers*, 146 Cal. 407.

5. *Purchase of Outstanding Claim.* — *Telegraph Co. v. Lee*, 125 Iowa 17; *Bramblet v. Commonwealth Land, etc., Co.*, (Ky. 1904) 83 S. W. Rep. 599; *Kroegher v. Calivada Colonization Co.*, (C. C. A.) 119 Fed. Rep. 641.

905. 1. *Purchase by Officer When Relieved from Obligations as Trustee.* — *McIntyre v. Ajax Min. Co.*, 28 Utah 162.

May Enforce Claim After Cessation of Business. — *Stanton v. Gilpin*, 38 Wash. 191.

2. *Employment of Director for Special Services.* — *Given v. Gans*, 91 N. Y. App. Div. 37, affirmed 181 N. Y. 538.

3. *Director Not Entitled to Compensation.* — *Alston Mfg. Co. v. Squair*, 105 Ill. App. 238; *Taussig v. St. Louis, etc., R. Co.*, 166 Mo. 28; *Grafner v. Pittsburgh, etc., St. R. Co.*, 207 Pa. St. 217; *Maxon v. Maxon-Miller Co.*, 53 W. Va. 150.

4. *Officer Not Entitled to Compensation.* — *Eddy v. Barry*, 99 Ill. App. 266 (by statute); *Harvard Brewing Co. v. Pratt*, 185 Mass. 406; *Whittemore v. Kent Scientific Institute*, 128 Mich. 518; *McConnell v. Combination Min., etc., Co.*, 30 Mont. 239, 31 Mont. 563; *Baines v. Coos Bay Nav. Co.*, 41 Oregon 135; *Lowe v. Ring*,

123 Wis. 370. See also *Selley v. American Lubricator Co.*, 119 Iowa 591.

906. 2. *Recovery of Illegal Compensation.* — *In re Bodega Co.*, (1904) 1 Ch. 276.

3. *Express Agreement or Provision for Compensation.* — *Inman v. Ackroyd*, (1901) 1 K. B. 613; *Ryan v. Pacific Axle Co.*, 136 Cal. xx, 68 Pac. Rep. 498; *Bevier Black Diamond Coal Co. v. Watson*, 107 Mo. App. 451; *Dunne v. Portland St. R. Co.*, 40 Oregon 295.

907. 2. *Contract Implied from Acceptance of Benefits.* — See *Smith v. New Hartford Water Co.*, 73 Conn. 626.

3. *Time of Payment.* — Where the articles of association provide that the salaries shall be paid at such times as the directors may determine, no suit can be brought for a salary unless the directors have determined a time for payment thereof. *Caridad Copper Min. Co. v. Swallow*, (1902) 2 K. B. 44.

4. *Virginia Statute.* — *Triplett v. Fauver*, 103 Va. 123.

7. *Acceptance by Officer.* — *Mosher v. Sinnott*, (Colo. App. 1905) 79 Pac. Rep. 742.

8. *Proof of Official Character.* — *Birney v. Toronto Milk Co.*, 5 Ont. L. Rep. 1.

908. 7. *Agreement to Pay for Past Services.* — *Crichton v. Webb Press Co.*, 113 La. 167, 104 Am. St. Rep. 500.

909. 2. *Compensation for Extra Services.* — *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 909; *Taussig v. St. Louis, etc., R. Co.*, 166 Mo. 28, 186 Mo. 269; *Hooke v. Financier Co.*, 99 N. Y. App. Div. 186; *Baines v. Coos Bay, etc., Nav. Co.*, 41 Oregon 135; *Lowe v. Ring*, 115 Wis. 575. See also *In re South Western of Venezuela R. Co.*, (1902) 1 Ch. 701; *Given v. Gans*, 91 N. Y. App. Div. 37, affirmed 181 N. Y. 538.

4. See *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 312, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 909.

910. 1. *Stout v. Security Trust, etc., Co.*, 82 N. Y. App. Div. 129.

910. c. POWER OF OFFICERS TO VOTE THEMSELVES COMPENSATION.

— See notes 2, 3.

911. d. AMOUNT OF COMPENSATION. — See notes 3, 4, 5.

Deductions for Absence. — See note 6.

2. As Creditors of Corporation. — See note 7.

912. 3. Right to Engage in Competing Business. — See note 1.**XIV. LIABILITY OF CORPORATION FOR ACTS OF OFFICERS AND AGENTS**

— 1. Liability on Contracts — a. IN GENERAL. — See notes 2, 3.

913. 4. Admissions and Declarations of Officers and Agents. — See note 4.

5. Notice to Officer or Agent as Notice to Corporation. — See note 5.

910. 2. Officers Cannot Award Themselves Compensation. — *Young v. Naval, etc., Co-operative Soc.,* (1905) 1 K. B. 687, 92 L. T. N. S. 458; *Quintance v. Farmers' Mut. Aid Assoc.,* 77 S. W. Rep. 1121, 25 Ky. L. Rep. 1379; *Davis v. Thomas, etc., Co.,* 63 N. J. Eq. 572.

Salary Voted by Subservient Board Is Void. — *Strouse v. Sylvester,* 134 Cal. xx, 66 Pac. Rep. 660.

3. Resolution Fixing Salary Dependent on Vote of Interested Party Void. — *Adams v. Burke,* 201 Ill. 395; *McConnell v. Combination Min., etc., Co.,* 30 Mont. 239, 31 Mont. 563; *Marshall v. Industrial Federation of America, (Supm. Ct. App. T.)* 14 N. Y. Annot. Cas. 100. See also *United Gold, etc., Mines Co. v. Smith, (Supm. Ct. Spec. T.)* 44 Misc. (N. Y.) 567.

911. 3. Compensation Fixed by Contract or Otherwise. — See *Wiltbank v. Automatic Amusement Mach. Co.,* 69 N. J. L. 236.

When Compensation Fixed, No Allowance for Expenses. — *Young v. Naval, etc., Co-operative Soc.,* (1905) 1 K. B. 687, 92 L. T. N. S. 458.

4. Reasonable Compensation. — *Davis v. Thomas, etc., Co.,* 63 N. J. Eq. 572; *Stacy v. Cherokee Foundry, etc., Works,* 70 S. Car. 178.

5. Equity Has Power to Determine Reasonableness. — *Lillard v. Oil, etc., Co., (N. J. 1903)* 56 Atl. Rep. 254.

6. If the Contract Is for Personal Services, the officer, it has been held, is not entitled to salary for a period during which he is incapacitated by illness from performing his duties. *Raley v. Victor Co.,* 86 Minn. 438, distinguishing in this respect between officers of private corporations and public officers.

7. Rights of Officer as Creditor. — See *Coombs v. Barker,* 31 Mont. 526.

912. 1. As to Rights After Severance of Connection with the Corporation see *Dodge Stationery Co. v. Dodge,* 145 Cal. 380.

2. Corporation Liable for Authorized Acts of Officers and Agents. — *Egbert v. Sun Co.,* 126 Fed. Rep. 568; *Allen v. West Point Min., etc., Co.,* 132 Ala. 292; *Betts v. Southern California Fruit Exch.,* 144 Cal. 402; *Russell v. Washington Sav. Bank,* 23 App. Cas. (D. C.) 398; *Milledgeville Water Co. v. Edwards,* 121 Ga. 555; *Domestic Bldg. Assoc. v. Guadiano,* 195 Ill. 222; *Ross v. Saylor,* 104 Ill. App. 19; *Huntington First Nat. Bank v. Arnold,* 156 Ind. 487; *Albany Mill Co. v. Huff, (Ky. 1903)* 72 S. W. Rep. 820; *Fidelity, etc., Co. v. Field, (Neb. 1902)* 89 N. W. Rep. 249; *Ring v. Long Island Real Estate Exch., etc., Co.,* 93 N. Y. App. Div. 442; *Phillips v. International Text Book Co.,* 26 Pa. Super. Ct. 230.

3. Corporation Not Bound by Unauthorized Acts. — *Sullivan v. Louisville, etc., R. Co.,* 128 Ala. 77; *Savannah, etc., R. Co. v. Humphreys,* 114 Ga. 681; *Shavaliar v. Grand Rapids Bark, etc., Co.,* 128 Mich. 230; *Spelman v. Gold Coin Min., etc., Co.,* 26 Mont. 76, 91 Am. St. Rep. 402; *Wagner v. St. Peter's Hospital,* 32 Mont. 206; *Jones v. Lincoln First Nat. Bank, (Neb. 1902)* 90 N. W. Rep. 912; *H. J. Mohlman Co. v. Reikers, (Supm. Ct. App. T.)* 36 Misc. (N. Y.) 770; *Jones v. Keeler, (Supm. Ct. App. T.)* 40 Misc. (N. Y.) 221; *Allen v. Somerset Hotel Co., (Supm. Ct. App. T.)* 88 N. Y. Supp. 944; *Reisig v. Grand Theatre Co., (Supm. Ct. App. T.)* 91 N. Y. Supp. 14; *Harris v. Vienna Ice Cream Co., (Supm. Ct. App. T.)* 46 Misc. (N. Y.) 125. See also *Western Realty, etc., Co. v. Haase,* 75 Conn. 436.

Rule Applies to Modifications of Existing Contracts. — *New York Metal Ceiling Co. v. Raub, (Supm. Ct. App. T.)* 86 N. Y. Supp. 249.

913. 4. For Additional Cases. — *Chicago Pneumatic Tool Co. v. H. W. Johns Mfg. Co.,* 101 Ill. App. 349; *Vincent v. Soper Lumber Co.,* 113 Ill. App. 463; *Robins Min. Co. v. Murdock,* 69 Kan. 596; *Rider, etc., Pub. Co. v. Rough Rider Horseshoe Co.,* 84 N. Y. App. Div. 283; *Rapp v. Hutchinson Stair Elevator Co., (Supm. Ct. App. T.)* 87 N. Y. Supp. 459; *White Hall Co. v. Hall,* 102 Va. 284.

5. Notice to Officers, etc., Notice to Corporation. — *Montecito Valley Water Co. v. Santa Barbara,* 144 Cal. 578; *Fresno St. R. Co. v. Southern Pac. R. Co.,* 135 Cal. 202; *Sproul v. Standard Plate Glass Co.,* 201 Pa. St. 103.

Knowledge Acquired Where Officer's Interests Are Adverse. — *Overton Bank v. Thompson, (C. C. A.)* 118 Fed. Rep. 798; *Levy, etc., Mule Co. v. Kauffman, (C. C. A.)* 114 Fed. Rep. ; *English-American L. & T. Co. v. Hiers,* 112 Ga. 823; *Wyeth v. Renz-Bowles Co., (Ky. 1902)* 66 S. W. Rep. 825; *Davis v. Boone County Deposit Bank, (Ky. 1904)* 80 S. W. Rep. 161; *State Sav. Bank v. Montgomery,* 126 Mich. 327; *Schneider v. Sellers,* 98 Tex. 380, *modifying (Tex. Civ. App. 1904)* 81 S. W. Rep. 126.

Knowledge Acquired in Private Capacity. — *Peoples Bank v. Exchange Bank,* 116 Ga. 820, 94 Am. St. Rep. 144; *Metcalf v. Draper,* 98 Ill. App. 399; *Black v. West Minster First Nat. Bank,* 96 Md. 399; *Tate v. Security Trust Co.,* 63 N. J. Eq. 559; *Gilkeson v. Thompson,* 210 Pa. St. 355; *Smith v. Carmack, (Tenn. Ch. 1901)* 64 S. W. Rep. 372.

Two Corporations Dealing Through Common Officer. — *In re Payne, (1904)* 2 Ch. 608; *In re Fenwick, (1902)* 1 Ch. 507; *Sullivan County*

- 914. OFFICIAL ACT.** — See note 1.
OFFSET. — See note 2.
915. O. K. — See note 2.
916. OLEOMARGARINE. — See note 1.
917. ONE. — See note 1.
ONEROUS. — See note 2.
918. OPEN. — See note 3.
920. OPEN POLICY. — See note 2.
OPERATE—OPERATING—OPERATION. — See note 4.
922. OPERATIVE. — See note 2.
OPINION. — See note 3.
923. OPPOSITE. — See note 3.

R. Co. v. Connecticut River Lumber Co., 76 Conn. 464; Germania Safety Vault, etc., Co. v. Driskell, (Ky. 1902) 66 S. W. Rep. 610; People's Sav. Bank v. Hine, 131 Mich. 181; Berry v. Rood, 168 Mo. 316; Asbury Park Bldg., etc., Assoc. v. Shepherd, (N. J. 1901) 50 Atl. Rep. 65; Easton Nat. Bank v. American Brick, etc., Co., (N. J. 1905) 60 Atl. Rep. 54; Mason v. United Press, 94 N. Y. App. Div. 617; Iowa Nat. Bank v. Sherman, 17 S. Dak. 396.

Corporation Bound by Composite Knowledge of All Agents. — Neal v. Cincinnati Union Stock Yards Co., 25 Ohio Cir. Ct. 290.

914. 1. Official Act. — See Maddox v. Hudgens, 31 Tex. Civ. App. 291.

2. Offset Equivalent to Counterclaim. — Cable Flax Mills v. Early, 72 N. Y. App. Div. 215.

915. 2. O. K. — Getchell, etc., Lumber, etc., Co. v. Peterson, 124 Iowa 599.

916. 1. Braun v. Coyne, 125 Fed. Rep. 331.

917. 1. One Building. — See Humphery v. Young, (1903) 1 K. B. 44.

One House. — A building structurally divided into two tenements on different floors with no internal communication constitutes two houses within the meaning of a covenant not to erect more than *one* house on the site. Ilford Park Estates v. Jacobs, (1903) 2 Ch. 522.

The Phrase "One or More Years" in a lease, in the absence of a stipulation of any option in the lessee, constitutes a term of two years. Boston Clothing Co. v. Solberg, 28 Wash. 262.

2. The lexicographers define *onerous* as burdensome or oppressive. In this case the term was applied to a liquor dealer's bond. Meador v. Adams, 33 Tex. Civ. App. 167.

918. 3. Sunday Law. — Jebeles v. State, 131 Ala. 41.

920. 2. Open Policy. — Riggs v. Home Mut. F. Protection Assoc., 61 S. Car. 448.

4. Railroads. — Perez v. San Antonio, etc., R. Co., 28 Tex. Civ. App. 255 (working hand car); Callahan v. St. Louis Merchants' Bridge Terminal R. Co., 170 Mo. 473 (repairing road-bed and bridges).

Operation in Medicine. — As to what constitutes, see Akridge v. Noble, 114 Ga. 949.

922. 2. Operative. — *In re* City Trust Co., (C. C. A.) 121 Fed. Rep. 706.

3. Opinion and Decision Distinguished. — Craig v. Bennett, 158 Ind. 9; Coffey v. Gamble, 117 Iowa 545.

Opinion and Impression Distinguished. — State v. Roysse, 24 Wash. 440.

923. 3. Opposite Party. — White v. Wansey, (C. C. A.) 116 Fed. Rep. 346.

OPTIONS.

By E. C. ELLSBREE.

- 924. I. DEFINITION AND SCOPE OF TITLE — 1. Definition.** — See note 1.
925. 2. Options Distinguished from Other Contracts. — See note 2.
926. II. VALIDITY OF CONTRACT FOR OPTION — 1. Competence of Parties —
Death of Party. — See note 1.
2. Consideration. — See note 4.

924. 1. The Obligation by Which One Binds Himself to Sell. — See Fulenwider v. Rowan, 136 Ala. 287; Myers v. Stone, (Iowa 1905) 102 N. W. Rep. 507; Hopwood v. McCausland, 120 Iowa 218; Womack v. Coleman, 92 Minn. 328; McLaurin v. Cuba Co., 87 N. Y. App. Div. 558.

925. 2. Option Implies Exclusive Right in Holder. — McLaurin v. Cuba Co., 87 N. Y. App. Div. 558, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 925.

For Agreements Held to Constitute Options. — Womack v. Coleman, 92 Minn. 328.

926. 1. See Mueller v. Nortmann, 116 Wis. 468, 96 Am. St. Rep. 997. And see *infra*, this title, **935. 8.**

4. Consideration. — Stigler v. Jaap, 83 Miss. 351. See also Yuill v. White, 5 N. W. Ter. 275.

An Agreement to Hire and Pay Rent is a sufficient consideration for an option of purchase as to adjoining land as well as to the land

- 927.** 3. Definiteness of Terms -- Extrinsic Evidence. — See note 6.
- 928.** III. MUTUALITY — 2. Modern View. — See note 3.
- 929.** 3. After Exercise of Option. — See note 1.
- IV. REVOCATION OF OPTION. — See notes 3, 4.
- Extension of Option. — See note 5.
- 930.** V. EXERCISE OF OPTION — 1. In General. — See note 1.
2. Manner of Acceptance — *b.* ACCEPTANCE MUST ACCORD WITH TERMS OF CONTRACT. — See note 4.
- Writing. — See note 5.
- Waiver. — See note 6.
3. Performance of Conditions Precedent. — See note 7.
- 931.** See note 1.
4. Time as Element in Options — *a.* SPECIFIED TIME. — See note 5.
- 932.** Conveyance and Payment of Purchase Price. — See note 5.
- Where Value Fluctuating — Time Important. — See note 6.
- 933.** Party Has Whole of Last Day Named in Which to Act. — See note 1.
- Notice of Expiration. — See note 2.

directly covered by the lease. *Heyward v. Willmarth*, 87 N. Y. App. Div. 125.

Consideration Unnecessary When Purchaser Accepts Offer. — *Wilson v. Clark*, 35 Tex. Civ. App. 92.

Time of Paying Consideration Immaterial. — *Cummins v. Beavers*, 103 Va. 230, 106 Am. St. Rep. 881.

927. 6. *Heyward v. Willmarth*, 87 N. Y. App. Div. 125.

928. 3. Modern View. — *Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. Rep. 972; *Tidball v. Challburg*, 67 Neb. 524; *Cummins v. Beavers*, 103 Va. 230, 106 Am. St. Rep. 881; *Rease v. Kittle*, 56 W. Va. 269; *Frank v. Stratford-Handcock*, 13 Wyo. 37.

929. 1. Mutuality After Exercise of Option. — *Carter v. Love*, 206 Ill. 310; *De Camp v. Wallace*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 436, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 929; *Peterson v. Chase*, 115 Wis. 239.

3. Revocability. — *Larned v. Wentworth*, 114 Ga. 208; *Tilton v. Sterling Coal, etc., Co.*, 28 Utah 173; *Cummins v. Beavers*, 103 Va. 230, 106 Am. St. Rep. 881; *Tibbs v. Zirkle*, 55 W. Va. 49, 104 Am. St. Rep. 977, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 929; *Peterson v. Chase*, 115 Wis. 239; *Frank v. Stratford-Handcock*, 13 Wyo. 37. See also *Mueller v. Nortmann*, 116 Wis. 468, 96 Am. St. Rep. 997.

4. Agreement Without Consideration Revocable at Will. — *Snow v. Nelson*, 113 Fed. Rep. 353; *Brown v. San Francisco Sav. Union*, 134 Cal. 448; *Tidball v. Challburg*, 67 Neb. 524; *Cummins v. Beavers*, 103 Va. 230, 106 Am. St. Rep. 881; *Tibbs v. Zirkle*, 55 W. Va. 49, 104 Am. St. Rep. 977, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 929; *Frank v. Stratford-Handcock*, 13 Wyo. 37.

5. Where Option Extended. — *Cummins v. Beavers*, 103 Va. 230, 106 Am. St. Rep. 881.

930. 1. Notice by Offeree of Option. — *Washington v. Rosario Min., etc., Co.*, 28 Tex. Civ. App. 430; *Sizer v. Clark*, 116 Wis. 534, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 930.

4. Acceptance Must Be in Terms of Option Contract. — *Larned v. Wentworth*, 114 Ga. 208;

Washington v. Rosario Min., etc., Co., 28 Tex. Civ. App. 430; *Tilton v. Sterling Coal, etc., Co.*, 28 Utah 173, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 930; *Kreutzer v. Lynch*, 122 Wis. 474. See also *Mueller v. Nortmann*, 116 Wis. 468, 96 Am. St. Rep. 997.

Mere Request for Departure Immaterial. — Acceptance according to the terms of the option contract, although accompanied by a request for a departure from its terms as to the time and place of performance, is an unconditional acceptance, and converts the option into an executory contract of sale. *Turner v. McCormick*, 56 W. Va. 161, 107 Am. St. Rep. 801.

5. Notice in Writing Not Necessary. — *Turner v. McCormick*, 56 W. Va. 161, 107 Am. St. Rep. 801; *Sizer v. Clark*, 116 Wis. 534, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 930.

6. *Wood v. Edison Electric Illuminating Co.*, 184 Mass. 523; *Jones v. Sowers*, 204 Pa. St. 329.

7. Conditions Precedent. — *Frank v. Stratford-Handcock*, 13 Wyo. 37.

931. 1. Option to Buy — Payment. — *Lockman v. Anderson*, 116 Iowa 236; *Verstine v. Yeane*, 210 Pa. St. 109.

5. Option for Specified Time. — *Woods v. McGraw*, (C. C. A.) 127 Fed. Rep. 914; *Larned v. Wentworth*, 114 Ga. 208; *Clark v. American Developing, etc., Co.*, 28 Mont. 468; *Page v. Shainwald*, 169 N. Y. 246. See also *Mueller v. Mortmann*, 116 Wis. 468, 96 Am. St. Rep. 997.

932. 5. Where Payment Within the Time Obligatory. — *Lockman v. Anderson*, 116 Iowa 236; *Verstine v. Yeane*, 210 Pa. St. 109.

Where Time of Payment Not of Essence of Contract. — *Pennsylvania Min. Co. v. Smith*, 207 Pa. St. 210; *Pennsylvania Min. Co. v. Martin*, 210 Pa. St. 53.

6. Values Fluctuating. — *Clark v. American Developing, etc., Co.*, 28 Mont. 468; *Merk v. Bowery Min. Co.*, 31 Mont. 298.

933. 1. *Holmes v. Myles*, 141 Ala. 401; *Tilton v. Sterling Coal, etc., Co.*, 28 Utah 173.

2. *Tilton v. Sterling Coal, etc., Co.*, 28 Utah 173. See also *Mueller v. Nortmann*, 116 Wis. 468, 96 Am. St. Rep. 997.

933. *b. REASONABLE TIME.* — See note 3.

5. Effect of Acceptance. — See notes 4, 6.

934. **VI. INTEREST OF PARTIES IN SUBJECT-MATTER OF OPTION** — Interest of Vendee under Contract of Sale. — See note 2.

Personal Nature of Contract. — See note 5.

935. **VII. RIGHT TO GOOD TITLE.** — See note 1.

X. REMEDIES. — See note 8.

936. **OR.** — See notes 4, 5.

933. *3. Acceptance in Reasonable Time.* — See *Fulenwider v. Rowan*, 136 Ala. 287.

4. Effect of Acceptance. — *King v. Raab*, 123 Iowa 632; *De Camp v. Wallace*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 436, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933; *Pennsylvania Min. Co. v. Smith*, 210 Pa. St. 49; *Tilton v. Sterling Coal, etc., Co.*, 28 Utah 173; *Frank v. Stratford-Handcock*, 13 Wyo. 37.

The Contract Takes Effect from the Date of Acceptance, and binds the grantee only to a conveyance of the property in its present condition. *Caldwell v. Frazier*, 65 Kan. 24.

6. Holmes v. Myles, 141 Ala. 401; *Carter v. Love*, 206 Ill. 310.

934. *2. Interest of Parties.* — *Pennsylvania Min. Co. v. Smith*, 210 Pa. St. 49. See also *Sizer v. Clark*, 116 Wis. 534.

Holder of Option Not Entitled to Possession of Property. — *Frank v. Stratford-Handcock*, 13 Wyo. 37.

5. Rease v. Kittle, 56 W. Va. 269.

Assignable Interest. — An option to purchase land creates such an interest as may be assigned. *Kreutzer v. Lynch*, 122 Wis. 474. But an option granted to a person named and to no other person is not assignable. *Myers v.*

Stone, (Iowa 1905) 102 N. W. Rep. 507. See also *Snow v. Nelson*, 113 Fed. Rep. 353.

935. *1. Holder Entitled to Good Title.* — *Pennsylvania Min. Co. v. Smith*, 210 Pa. St. 49.

8. See Reynolds v. Hooker, 76 Vt. 184.

The Option May Be Enforced Against the Personal Representative of the person granting it. *Yuill v. White*, 5 I. W. Ter. 275.

936. *4. Alternative.* — *Brown v. Rushing*, 70 Ark. 111; *Springfield Third Nat. Bank v. Bond*, 64 Kan. 346; *Koch v. Fox*, 71 N. Y. App. Div. 288.

Fine or Imprisonment. — *Carter v. McClaughry*, 183 U. S. 365.

Wills. — See *Condit v. Bigalow*, 64 N. J. Eq. 504.

5. Not Always Disjunctive. — *Blumenthal v. Berkshire L. Ins. Co.*, 134 Mich. 219, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 936.

"Or" in the Sense of "To Wit." — *People v. Latham*, 203 Ill. 9; *Blumenthal v. Berkshire L. Ins. Co.*, 134 Mich. 219.

"Or" Read "Nor." — See *Smith v. Com.*, 113 Ky. 19.

Or — *Ejusdem Generis.* — *Cleveland, etc., R. Co. v. Bergschicker*, 162 Ind. 112.

ORDERS.

940. **III. ORDERS AS ASSIGNMENTS OF PROPERTY** — 1. In General. — See note 2.

941. **IV. RIGHTS OF ORIGINAL PARTIES** — 2. Payee's Right of Action Against Drawee — Acceptance — Consideration for Acceptor's Promise. — See note 2.

The Validity of a Verbal Acceptance. — See note 4.

940. *2. Order Drawn on Particular Fund an Equitable Assignment.* — *Izzo v. Ludington*, 79 N. Y. App. Div. 272; affirmed 178 N. Y. 621; *Willard v. Bullen*, 41 Oregon 25; *Dickerson v. Spokane*, 26 Wash. 292.

Delivery of the Order to the Payee is essential to effect an equitable assignment of the

fund in the hands of the drawee. *Duryea v. Harvey*, 183 Mass. 429.

941. *2. Consideration for Acceptance Necessary.* — See also *Spann v. Lowndes County*, 141 Ala. 314.

4. Verbal Acceptance — With or Without Funds. — See *Spann v. Lowndes County*, 141 Ala. 314.

ORDINANCES.

BY J. E. BRADY.

947. II. DEFINITIONS — 1. Ordinance. — See note 3.

2. By-law. — See note 4.

3. Resolution. — See notes 6, 8.

III. PROPRIETY OF ACTION BY ORDINANCE OR RESOLUTION. — See

note 9.

948. See notes 1, 2, 3, 4.

947. 3. Ordinance. — *Pensacola v. Southern Bell Telephone Co.*, (Fla. 1905) 37 So. Rep. 820, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 947. See also *Holst v. Savannah Electric Co.*, 131 Fed. Rep. 940, reversed on another point (C. C. A.) 132 Fed. Rep. 901.

4. By-law. — *Holst v. Savannah Electric Co.*, 131 Fed. Rep. 940, reversed on another point (C. C. A.) 132 Fed. Rep. 901; *State v. McMahon*, 76 Conn. 97; *Winthrop v. New England Chocolate Co.*, 180 Mass. 464; *Outwater v. Carlstadt*, 66 N. J. L. 510. See also *Liverpool v. Liverpool*, etc., R. Co., 35 Nova Scotia 233, reversed on other grounds 33 Can. Sup. Ct. 180.

6. Resolution. — *Pensacola v. Southern Bell Telephone Co.*, (Fla. 1905) 37 So. Rep. 820, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 947; *McDowell v. People*, 204 Ill. 499.

8. Resolution Less Formal than Ordinance. — *Ehrhardt v. Seattle*, 33 Wash. 664.

Distinction Between Ordinance and Resolution. — A by-law is passed after certain formalities, and while in force is general in its application; it is published and is known to the ratepayers of the municipality, whereas a resolution may be passed without such publicity. *Ste.-Agathe-des-Monts v. Reid*, 26 Quebec Super. Ct. 379, reversing 24 Quebec Super. Ct. 461.

9. Powers May Be Exercised by Either Ordinance or Resolution. — *Holst v. Savannah Electric Co.*, 131 Fed. Rep. 931, reversed on another point (C. C. A.) 132 Fed. Rep. 901; *Earl v. Bowen*, 146 Cal. 754; *London Mills v. Fairview-London Telephone Circuit*, 105 Ill. App. 146, affirmed 208 Ill. 289; *Langan v. Bitzer*, (Ky. 1904) 82 S. W. Rep. 280; *State v. Allen*, 178 Mo. 555; *Central Valley R. Co. v. Pittston*, 13 Pa. Dist. 675; *Ogden City v. Bear Lake*, etc., Waterworks, etc., Co., 28 Utah 25; *Humberstone v. Dinner*, 2 N. W. Ter. 106, affirmed 26 Can. Sup. Ct. 252. See also *Martin v. Oskaloosa*, 126 Iowa 680; *Fox v. Clark*, (N. J. 1904) 59 Atl. Rep. 224; *Ehrhardt v. Seattle*, 33 Wash. 664.

A Police Justice May Be Elected without the passage of an ordinance. *Rich v. McLaurin*, 83 Miss. 95.

948. 1. Charter Requiring Action by Ordinance — *United States*. — *Morristown v. East Tennessee Telephone Co.*, (C. C. A.) 115 Fed. Rep. 304; *Holst v. Savannah Electric Co.*, 131 Fed. Rep. 931, reversed on another point (C. C. A.) 132 Fed. Rep. 901.

Colorado. — *Sauer v. Gillett*, (Colo. App. 1904) 78 Pac. Rep. 1068.

Indiana. — *Meyer v. Boonville*, 162 Ind. 165.

Iowa. — *Martin v. Oskaloosa*, 126 Iowa 680; *Citizens' Bank v. Spencer*, 126 Iowa 101.

Kansas. — See *Root v. Topeka*, 63 Kan. 129.

Missouri. — *Unionville v. Martin*, 95 Mo. App. 28; *State v. Allen*, 178 Mo. 555.

New Jersey. — *Platt v. Englewood*, 68 N. J. L. 231; *Essen v. Cape May*, (N. J. 1905) 60 Atl. Rep. 1131.

Pennsylvania. — See *Central Valley R. Co. v. Pittston*, 13 Pa. Dist. 675.

Texas. — *Mills v. San Antonio*, (Tex. Civ. App. 1901) 65 S. W. Rep. 1121; *Tyler v. Tyler Bldg., etc., Assoc.*, (Tex. 1905) 86 S. W. Rep. 750.

Canada. — *In re Allen*, 4 Ont. L. Rep. 582;

In re Dundas St. Bridges, 8 Ont. L. Rep. 52;

Beauregard v. Roxton Falls, 24 Quebec Super.

Ct. 474; *Ste.-Agathe-des-Monts v. Reid*, 26 Que-

bec Super. Ct. 379, reversing 24 Quebec Super.

Ct. 461.

Implied Requirement. — A statute conferring power to pass by-laws impliedly excludes the power to legislate relative to the subjects included within the power otherwise than by by-law. *Liverpool, etc., R. Co. v. Liverpool*, 33 Can. Sup. Ct. 180, reversing 35 Nova Scotia 233, *Davies, J., dissenting*.

Estoppel Against Setting Up Requirement. — See *Citizens' Light, etc., Co. v. St. Louis*, 34 Can. Sup. Ct. 495, reversing 13 Quebec K. B. 19, which reversed 21 Quebec Super. Ct. 241; *Notre-Dame v. Bessette*, 9 Quebec Q. B. 423.

2. Compliance with Formalities. — *Gleason v. Barnett*, 115 Ky. 890. See also *Washington v. Steiner*, 25 Pa. Super. Ct. 392.

3. When Ordinance Proper. — *McDowell v. People*, 204 Ill. 499; *Ehrhardt v. Seattle*, 33 Wash. 664.

In the Exercise of Legislative Functions a city has power to act by ordinance only. *Martin v. Oskaloosa*, (Iowa 1904) 99 N. W. Rep. 557.

4. When Resolution Proper. — *Hull Electric Co. v. Ottawa Electric Co.*, (1902) A. C. 237, 12 Quebec K. B. 549, affirming 10 Quebec K. B. 35, which reversed 16 Quebec Super. Ct. 1, and affirmed 14 Quebec Super. Ct. 124; *Emerson v. Wright*, 14 Manitoba 636; *Ex p. Grant*, 35 N. Bruns. 45; *Reg. v. Patterson*, 33 Nova Scotia 425; *In re Dundas St. Bridges*, 8 Ont. L. Rep. 52; *McDowell v. People*, 204 Ill. 499;

Shelby v. Burlington, 125 Iowa 343; *Ehrhardt*

v. Seattle, 33 Wash. 664.

948. IV. AUTHORITY TO ENACT — 1. General Powers of Municipality. — See note 6.

949. See notes 1, 2, 3.

2. Powers Limited by Terms of Grant. — See notes 4, 5.

950. 4. Construction of Grants. — See notes 3, 4.

Particular Grants. — See note 5.

948. 3. Legislative Grant. — *In re English*, 3 Indian Ter. 523; *Stafford v. Chippewa Valley Electric R. Co.*, 110 Wis. 331; *Hamel v. St. Jean Deschailions Parish*, 20 Quebec Super. Ct. 301. And see the title MUNICIPAL CORPORATIONS, **1139**, 7.

949. 1. Implied Powers. — *Porter v. Vinzant*, (Fla. 1905) 38 So. Rep. 607; *Walker v. Towle*, 156 Ind. 639; *Stone v. Paducah*, (Ky. 1905) 86 S. W. Rep. 531; *Cambridge v. Cambridge Water Co.*, 99 Md. 501; *State v. Ray*, 131 N. Car. 814, 92 Am. St. Rep. 795; *State v. Sheboygan*, 111 Wis. 23; *Ogden v. Madison*, 111 Wis. 413.

English Common-law Corporations. — See *Atty.-Gen. v. London County Council*, (1901) 1 Ch. 781, 84 L. T. N. S. 245, *affirmed* (1902) A. C. 165, 86 L. T. N. S. 161.

2. General Powers of Municipality. — *Walker v. Towle*, 156 Ind. 639; *State v. Ray*, 131 N. Car. 814, 92 Am. St. Rep. 795; *State v. Sheboygan*, 111 Wis. 23; *Ogden v. Madison*, 111 Wis. 413. And see the title MUNICIPAL CORPORATIONS, **1140**, 1.

3. Power to Make Ordinances Implied. — *Zalesky v. Cedar Rapids*, 118 Iowa 714; *State v. Butler*, 178 Mo. 272; *St. Louis v. J. E. Kaime, etc.*, Real Estate Co., 180 Mo. 309. See also *Chicago v. Chicago Union Traction Co.*, 199 Ill. 259. But see *In re Van Tuyl*, (Kan. 1905) 81 Pac. Rep. 181; *Wellsville v. O'Connor*, 24 Ohio Cir. Ct. 689.

4. Power Limited by Terms of Grant. — *Gambill v. Schmuck*, 131 Ala. 321; *Assaria v. Wells*, 68 Kan. 787; *In re Van Tuyl*, (Kan. 1905) 81 Pac. Rep. 181; *Winthrop v. New England Chocolate Co.*, 180 Mass. 464; *St. Louis v. J. E. Kaime, etc.*, Real Estate Co., 180 Mo. 309; *Wellsville v. O'Connor*, 24 Ohio Cir. Ct. 689; *Re Lambert*, 7 British Columbia 396; *Hayes v. Thompson*, 9 British Columbia 249; *Rex v. License Com'rs*, 14 Manitoba 535. See also *Madison v. Morristown Gaslight Co.* 63 N. J. Eq. 120.

5. Exclusion by Implication. — *Chicago v. Banker*, 112 Ill. App. 94; *St. Louis v. J. E. Kaime, etc.*, Real Estate Co., 180 Mo. 309. See also *Stone v. Paducah*, (Ky. 1905) 86 S. W. Rep. 531.

950. 3. Strict Construction. — *Chicago v. Banker*, 112 Ill. App. 94; *St. Paul v. Briggs*, 85 Minn. 290, 89 Am. St. Rep. 554; *Carthage v. Carthage Light Co.*, 97 Mo. App. 20; *State v. Butler*, 178 Mo. 272; *Coaticook v. Lothrop*, 22 Quebec Super. Ct. 225.

Construed with Reference to Purposes of Incorporation. — *Porter v. Vinzant*, (Fla. 1905) 38 So. Rep. 607.

4. Power Denied Where Reasonable Doubt Exists. — *Elkhart v. Lipschitz*, 164 Ind. 671; *Cambridge v. Cambridge Water Co.*, 99 Md. 501; *St. Louis v. J. E. Kaime, etc.*, Real Estate Co., 180 Mo. 309; *State v. Butler*, 178 Mo. 272;

Carthage v. Carthage Light Co., 97 Mo. App. 20; *State v. Ray*, 131 N. Car. 814, 92 Am. St. Rep. 795; *State v. Godfrey*, 54 W. Va. 54; *State v. Sheboygan*, 111 Wis. 23; *Ogden v. Madison*, 111 Wis. 413.

5. Illustrative Cases on Construction of Particular Grants — *England*. — *Rossi v. Edinburgh*, (1905) A. C. 21, *reversing* Sc. Ct. of Sess. 5 F. 480; *Municipal Council v. Austral Freezing Works*, (1905) A. C. 161; *Batchelor v. Sturley*, 93 L. T. N. S. 539; *Davies v. Jeans*, Sc. Ct. of Just. 6 F. 37.

Canada. — *Rex v. Munn*, 15 Manitoba 288; *Re Knudsen*, 15 Manitoba 317; *Reg. v. Patterson*, 33 Nova Scotia 425; *Re Martin*, 1 Ont. L. Rep. 645; *Gaul v. Ellice Tp.*, 3 Ont. L. Rep. 438; *Sutton v. Port Carling*, 3 Ont. L. Rep. 445; *Re Markham*, 3 Ont. L. Rep. 609, *appeal refused* 32 Can. Sup. Ct. 457; *Rex v. St. Pierre*, 4 Ont. L. Rep. 76; *Rex v. McGregor*, 4 Ont. L. Rep. 198, 5 Can. Crim. Cas. 485; *In re Allen*, 4 Ont. L. Rep. 582; *Rex v. Myers*, 6 Ont. L. Rep. 120; *Atty.-Gen. v. Toronto*, 6 Ont. L. Rep. 159; *Lane v. Toronto*, 7 Ont. L. Rep. 423; *Fensom v. Canadian Pac. R. Co.*, 8 Ont. L. Rep. 688, *affirming* 7 Ont. L. Rep. 254; *Rex v. Spiegelman*, 9 Ont. L. Rep. 75, 9 Can. Crim. Cas. 169; *Re Inglis*, 9 Ont. L. Rep. 562; *Cleary v. Windsor*, 10 Ont. Rep. 333; *Reg. v. Banks*, 2 N. W. Ter. 81; *English v. O'Neil*, 4 N. W. Ter. 74; *Paquet v. St. Nicholas*, 13 Quebec K. B. 1; *Martin v. Montreal*, 18 Quebec Super. Ct. 30; *Roy v. St. Anselme*, 19 Quebec Super. Ct. 119; *Coaticook v. People's Telephone Co.*, 19 Quebec Super. Ct. 535; *Hamel v. St. Jean Deschailions Parish*, 20 Quebec Super. Ct. 301; *Coaticook v. Lothrop*, 22 Quebec Super. Ct. 225; *Real Estate Invest. Co. v. Richmond*, 23 Quebec Super. Ct. 151; *Bell v. Parent*, 23 Quebec Super. Ct. 235; *Fontaine v. Sherrington*, 23 Quebec Super. Ct. 532; *Therriault v. Notre-Dame du Lac*, 24 Quebec Super. Ct. 217; *Wilder v. Quebec*, 25 Quebec Super. Ct. 128; *Ste.-Agathe-des Monts v. Reid*, 26 Quebec Super. Ct. 379, *reversing* 24 Quebec Super. Ct. 461; *McLaughlin v. Recorder's Ct.*, 4 Quebec Pr. 304; *Beauchamp v. Montreal*, 7 Quebec Pr. 174.

United States. — *Richmond Safety Gate Co. v. Ashbridge*, 116 Fed. Rep. 220; *Whitmier, etc., Co. v. Buffalo*, 118 Fed. Rep. 773; *Glucose Refining Co. v. Chicago*, 138 Fed. Rep. 209; *Columbus v. Union Pac. R. Co.*, (C. C. A.) 137 Fed. Rep. 869.

Alabama. — *Gambill v. Schmuck*, 131 Ala. 321.

Arkansas. — *Belding v. Rector*, 71 Ark. 463; *Pate v. Jonesboro*, (Ark. 1905) 87 S. W. Rep. 437; *Morrilton v. Comes*, (Ark. 1905) 87 S. W. Rep. 1021; *Dewitt v. La Cotts*, (Ark. 1905) 88 S. W. Rep. 877; *Ex p. Foote*, 70 Ark. 12, 91 Am. St. Rep. 63; *Wills v. Ft. Smith*, 70 Ark. 221.

951. 5. Injunction Against Enactment. — See note 1.

Ultra Vires. — See note 2.

952. 6. Duty to Enact and Enforce. — See note 4.

California. — Denninger v. Recorder's Ct., 145 Cal. 629; Sonora v. Curtin, 137 Cal. 583.

Colorado. — Cutshaw v. Denver, 19 Colo. App. 341; Litch v. People, 19 Colo. App. 421.
Connecticut. — State v. Wightman, (Conn. 1905) 61 Atl. Rep. 56.

Florida. — Porter v. Vinzant, (Fla. 1905) 38 So. Rep. 607; Tampa v. Tampa Waterworks Co., 45 Fla. 600.

Georgia. — Epping v. Columbus, 117 Ga. 263; Watson v. Thomson, 116 Ga. 546, 94 Am. St. Rep. 137; Tucker v. Moultrie, 122 Ga. 160; Littlejohn v. Stells, 123 Ga. 427; Crum v. Bray, 121 Ga. 709; Fitts v. Atlanta, 121 Ga. 567, 104 Am. St. Rep. 167.

Illinois. — Standard Oil Co. v. Danville, 101 Ill. App. 65, affirmed 199 Ill. 50; Chicago v. Gunning System, 114 Ill. App. 377, affirmed 214 Ill. 628; Chicago, etc., R. Co. v. Carlinville, 103 Ill. App. 251, affirmed 200 Ill. 314; Wice v. Chicago, etc., R. Co., 193 Ill. 351; Spiegler v. Chicago, 216 Ill. 114; U. S. Brewing Co. v. Stoltenberg, 211 Ill. 531; Chicago v. Brown, 205 Ill. 568; People v. Latham, 203 Ill. 9; Washburn v. Chicago, 202 Ill. 210; People v. Birch, 201 Ill. 81.

Indiana. — Rushville Natural Gas Co. v. Morristown, 30 Ind. App. 455; Elkhart v. Lipschitz, 164 Ind. 671; Rosedale v. Hanner, 157 Ind. 390.

Indian Territory. — In re English, 3 Indian Ter. 523; Tahlequah v. Guinn, (Indian Ter. 1904) 82 S. W. Rep. 886.

Iowa. — State v. Smith, 123 Iowa 654; Sibley v. Lastrico, 122 Iowa 211; Lovilia v. Cobb, 126 Iowa 557; Des Moines v. Bolton, (Iowa 1905) 102 N. W. Rep. 1045.

Kansas. — Assaria v. Wells, 68 Kan. 787.

Kentucky. — Paducah v. Evitts, (Ky. 1905) 86 S. W. Rep. 1123; Stone v. Paducah, (Ky. 1905) 86 S. W. Rep. 531; Evers v. Mayfield, (Ky. 1905) 85 S. W. Rep. 697; Boyd v. Board of Councilmen, (Ky. 1903) 77 S. W. Rep. 669; Muir v. Bardstown, (Ky. 1905) 87 S. W. Rep. 1096; Louisville v. Wehmhoff, 116 Ky. 812; Neumeyer v. Krakel, 110 Ky. 624; Chesapeake, etc., R. Co. v. Maysville, (Ky. 1902) 69 S. W. Rep. 728.

Louisiana. — Crowley v. Ellsworth, 114 La. 308; Ruston v. Perkins, 114 La. 851; Crowley v. Rucker, 107 La. 213.

Maryland. — Mason v. Cumberland, 92 Md. 451; Bostock v. Sams, 95 Md. 400, 93 Am. St. Rep. 394.

Massachusetts. — Winthrop v. New England Chocolate Co., 180 Mass. 464.

Michigan. — People v. Schneider, (Mich. 1905) 103 N. W. Rep. 172; Love v. Judge, 128 Mich. 545.

Minnesota. — State v. Scaffer, (Minn. 1905) 104 N. W. Rep. 139; St. Paul v. Briggs, 85 Minn. 290, 89 Am. St. Rep. 554; Fairmont v. Meyer, 83 Minn. 456.

Missouri. — Orrick v. Akers, 109 Mo. App. 662; Doniphan v. White, 110 Mo. App. 504; St. Louis v. Galt, 179 Mo. 8; Carpenter v. Re-

liance Realty Co., 103 Mo. App. 480; *Ex p.* Hinkle, 104 Mo. App. 104; St. Louis v. J. E. Kaime, etc., Real Estate Co., 180 Mo. 309; Lebanon v. Gordon, 99 Mo. App. 277; Carthage v. Carthage Light Co., 97 Mo. App. 20; Glasgow v. Bazan, 96 Mo. App. 412.

Montana. — Butte v. Paltrovich, 30 Mont. 18.

Nebraska. — Iler v. Ross, 64 Neb. 710, 97 Am. St. Rep. 676.

New Jersey. — Belmar v. Barkalow, 67 N. J. L. 504; Madison v. Morristown Gaslight Co., 63 N. J. Eq. 120; Atlantic City v. Feretti, 70 N. J. L. 489; Central R. Co. v. Elizabeth, 70 N. J. L. 578; Fonsler v. Atlantic City, 70 N. J. L. 125; Ivins v. Trenton, 68 N. J. L. 501; Suburban Land, etc., Co. v. Vailsburg, 67 N. J. L. 461; Young v. Crane, 67 N. J. L. 453; Atlantic City v. Brown, 71 N. J. L. 81; Passaic v. Paterson Bill Posting, etc., Co., 71 N. J. L. 75.

New York. — Gunning System v. Buffalo, 75 N. Y. App. Div. 31; New York v. Reesing, 77 N. Y. App. Div. 417; Buffalo v. Hill, 79 N. Y. App. Div. 402; People v. Pierce, 85 N. Y. App. Div. 125.

Ohio. — Wellsville v. O'Connor, 24 Ohio Cir. Ct. 689; Walton v. Toledo, 23 Ohio Cir. Ct. 547; Lockyear v. Covert, 25 Ohio Cir. Ct. 486.

Oregon. — Portland v. Yick, 44 Oregon 439, 102 Am. St. Rep. 633.

Pennsylvania. — Taggart v. Allegheny City, 12 Pa. Dist. 796; Philadelphia v. Brabender, 17 Pa. Sup. Ct. 331, affirmed 201 Pa. St. 574; Mt. Carmel v. Fisher, 21 Pa. Super. Ct. 643.

South Carolina. — Abbeville v. Leopard, 61 S. Car. 99.

Texas. — Houston, etc., R. Co. v. Dallas. (Tex. Civ. App. 1904) 78 S. W. Rep. 525; *Ex p.* Vance, 42 Tex. Crim. 619.

Virginia. — Roanoke v. Bolling, 101 Va. 182; Blanchard v. Bristol, 100 Va. 469.

Washington. — Shook v. Sexton, 37 Wash. 509.

Wisconsin. — State v. Nohl, 113 Wis. 15; State v. Sheboygan, 111 Wis. 23; Ogden v. Madison, 111 Wis. 413.

951. 1. Courts Will Not Enjoin Passage of Ordinance. — Atty.-Gen. v. Halifax, 36 Nova Scotia 177. See also Glide v. Superior Ct., 147 Cal. 21. But see Wilder v. Quebec, 25 Quebec Super. Ct. 128.

Void Ordinance. — An injunction will not be granted restraining the enactment of an ordinance even though the ordinance be void under the city charter. Kadderly v. Portland, 44 Oregon 118.

2. Ultra Vires. — Leverich v. Mobile, 110 Fed. Rep. 170; Shrimpton v. Winnipeg, 13 Manitoba 211. See also Atty.-Gen. v. Rickmansworth Urban Dist. Council, 86 L. T. N. S. 521.

952. 4. No Liability for Failure to Enact. — Arnold v. Stanford, 113 Ky. 852; Rogers v. Binghamton, 101 N. Y. App. Div. 352; Lan-

952. **No Liability for Failure to Enforce.** — See note 6.

7. Subjects of Municipal Legislation — *a.* **IN GENERAL.** — See note 9.
Police Power. — See note 10.

953. See notes 1, 2, 3, 5, 6, 7.

954. See notes 1, 2, 3, 4, 6, 9.

dau v. New York, 180 N. Y. 48, 105 Am. St. Rep. 709; *McGuinness v. Allison Realty Co.*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 8; *Bryant v. Orangeburg*, 70 S. Car. 137. See also *Georgetown v. Com.*, 115 Ky. 382.

953. 6. No Liability for Failure to Enforce. — *Veraguth v. Denver*, 19 Colo. App. 473; *Arnold v. Stanford*, 113 Ky. 852; *Rogers v. Binghamton*, 101 N. Y. App. Div. 352; *Landau v. New York*, 180 N. Y. 48, 105 Am. St. Rep. 709; *McGuinness v. Allison Realty Co.*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 8; *Brown v. Hamilton*, 4 Ont. L. Rep. 249. See also *Georgetown v. Com.*, 115 Ky. 382.

9. Must Be for Authorized Purpose. — *New Iberia v. Weeks*, 104 La. 489.

Must Be Made Pursuant to Granted Power. — *Cain v. Elkins*, 57 W. Va. 9.

10. Police Power — *United States*. — *Duluth Brewing, etc., Co. v. Superior*, (C. C. A.) 123 Fed. Rep. 353.

Arkansas. — *Gibson v. Harrison*, 69 Ark. 385.

California. — *In re Smith*, 143 Cal. 368; *Ex p. McClain*, 134 Cal. 110, 86 Am. St. Rep. 243.

District of Columbia. — *Ullman v. District of Columbia*, 21 App. Cas. (D. C.) 241.

Georgia. — *Stephens v. Henderson*, 120 Ga. 218.

Idaho. — *State v. Quong*, 8 Idaho 191.

Illinois. — *Spigler v. Chicago*, 216 Ill. 114; *Wice v. Chicago, etc.*, R. Co., 193 Ill. 351.

Minnesota. — *St. Paul v. Hangbro*, 93 Minn. 59, 106 Am. St. Rep. 427.

Missouri. — *Orrick v. Akers*, 109 Mo. App. 662; *Centralia v. Smith*, 103 Mo. App. 438; *Reed v. St. Louis, etc.*, R. Co., 107 Mo. App. 238; *Jeans v. Morrison*, 99 Mo. App. 208.

Nebraska. — *Anderson v. State*, (Neb. 1903) 96 N. W. Rep. 149.

New Jersey. — *Stowe v. Kearney*, (N. J. 1905) 59 Atl. Rep. 1058; *Hoboken v. Goodman*, 68 N. J. L. 217; *Margolies v. Atlantic City*, 67 N. J. L. 82.

North Carolina. — *Paul v. Washington*, 134 N. Car. 363.

Oregon. — *Ex p. Wygant*, 39 Oregon 429, 87 Am. St. Rep. 673.

Pennsylvania. — *Meadville v. Miller*, 29 Pa. Co. Ct. 517; *Edison Electric Illuminating Co. v. Tamaqua*, 13 Pa. Dist. 86; *New Hope v. Western Union Tel. Co.*, 16 Pa. Super. Ct. 306; *Lansdowne v. Springfield Water Co.*, 16 Pa. Super. Ct. 490; *Hafer v. McKelvey*, 23 Pa. Super. Ct. 205; *Pittsburg v. Biggert*, 23 Pa. Super. Ct. 540.

953. 1. General Welfare and Convenience. — *People v. Detroit United R. Co.*, 134 Mich. 682; *Butte v. Paltrovich*, 30 Mont. 18; *Taggart v. Allegheny City*, 12 Pa. Dist. 796; *State v. City of Sheboygan*, 111 Wis. 23.

2. Public Safety. — *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.)

126 Fed. Rep. 29; *Ft. Smith v. Hunt*, 72 Ark. 556, 105 Am. St. Rep. 51; *Dobbins v. Los Angeles*, 139 Cal. 179, 96 Am. St. Rep. 95; *State v. McMahon*, 76 Conn. 97; *Crum v. Bray*, 121 Ga. 709; *Chicago v. Gunning System*, 114 Ill. App. 377, *affirmed* 214 Ill. 628; *Standard Oil Co. v. Danville*, 101 Ill. App. 65, *affirmed* 199 Ill. 50; *Rosedale v. Hanner*, 157 Ind. 390; *Des Moines v. Keller*, 116 Iowa 648, 93 Am. St. Rep. 268; *People v. Detroit United R. Co.*, 134 Mich. 682; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647; *State v. Sheboygan*, 111 Wis. 23.

3. Preservation of Peace and Order. — *St. Anthony v. Brandon*, 10 Idaho 205; *Glasgow v. Bazan*, 96 Mo. App. 412.

5. Sanitary Regulations. — *Dupont v. District of Columbia*, 20 App. Cas. (D. C.) 477; *Chicago v. Chicago Union Traction Co.*, 199 Ill. 259; *Maydwell v. Louisville*, 116 Ky. 885, 105 Am. St. Rep. 245; *St. Louis v. Galt*, 179 Mo. 8; *Kelley v. Broadwell*, (Neb. 1902) 92 N. W. Rep. 643; *Iler v. Ross*, 64 Neb. 710, 97 Am. St. Rep. 676; *Mechanicsburg v. Koons*, 18 Pa. Super. Ct. 131.

Regulating Collection and Removal of Garbage. — *In re Gughmini*, 147 Cal. xvi, 81 Pac. Rep. 958; *In re Zhizhuzza*, 147 Cal. 328; *State v. Robb*, (Me. 1905) 60 Atl. Rep. 874.

6. Regulating Slaughter Houses. — *Elkhart v. Lipschitz*, 104 Ind. 671.

Regulating Dairies and Cow Stables. — *St. Louis v. Fischer*, 167 Mo. 654, 99 Am. St. Rep. 614.

7. Interment of the Dead. — See also *Wyse v. Police Com'rs*, 68 N. J. L. 127.

954. 1. An Ordinance Imposing a Fee for Each Water Plug in the streets or alleys of a town is not a valid exercise of the police power. *Cambridge v. Cambridge Water Co.*, 99 Md. 501.

2. Regulating Streets and Use of Streets. — *Montz v. District of Columbia*, 20 App. Cas. (D. C.) 568; *Pensacola v. Southern Bell Telephone Co.*, (Fla. 1905) 37 So. Rep. 820; *Chicago v. Chicago Union Traction Co.*, 199 Ill. 259; *Osburn v. Chicago*, 105 Ill. App. 217; *Rosedale v. Hanner*, 157 Ind. 390; *Lee v. Port Huron*, 128 Mich. 533; *Haller v. St. Louis*, 176 Mo. 606; *Gagnier v. Fargo*, 11 N. Dak. 73; *Springfield Water Co. v. Darby*, 199 Pa. St. 400; *New Castle City v. Central Dist., etc.*, Tel. Co., 207 Pa. St. 371; *Erie v. Erie Electric Motor Co.*, 24 Pa. Super. Ct. 82; *Houston, etc., R. Co. v. Dallas*, (Tex. Civ. App. 1904) 78 S. W. Rep. 525; *State v. Sheboygan*, 111 Wis. 23; *Styles v. Victoria*, 8 British Columbia 406.

3. Regulating Speed of Railway Trains and Other Vehicles. — *Bowles v. District of Columbia*, 22 App. Cas. (D. C.) 321; *Chicago, etc., R. Co. v. Carlinville*, 200 Ill. 314, 93 Am. St. Rep. 190; *Pittsburg, etc., R. Co. v. Lightciser*, 163 Ind. 247; *Chittenden v.*

955. See note 3.

b. SUBJECTS COVERED BY STATE LEGISLATION. — See notes 4, 5.

956. See note 1.

957. V. ENACTMENT — 1. Introductory. — See note 2.

2. Rules of Council — Rules of Order. — See note 5.

3. Presumption of Regularity. — See note 7.

Columbus, 26 Ohio Cir. Ct. 531. See also United Traction Co. v. Watervliet, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 392.

954. 4. Regulating Hacks and Public Vehicles. — Bray v. State, 140 Ala. 172; Brewster v. Pine Bluff, 70 Ark. 28; Good v. Ehrlich, 67 Kan. 94; Combs v. Lakewood Tp., 68 N. J. L. 582; New York v. Reesing, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 129, *affirmed* 77 N. Y. App. Div. 417.

Street Cars. — Snouffer v. Cedar Rapids, etc., R. Co., 118 Iowa 287; People v. Detroit United R. Co., 134 Mich. 682; Nagel v. St. Louis Transit Co., 104 Mo. App. 438; Riska v. Union Depot R. Co., 180 Mo. 168; Sluder v. St. Louis Transit Co., 189 Mo. 107; Lockyear v. Covert, 25 Ohio Cir. Ct. 486; Shenandoah v. Schuylkill Traction Co., 27 Pa. Co. Ct. 465; Reg. v. Toronto R. Co., 21 Can. L. T. 120.

Automobiles. — Chicago v. Banker, 112 Ill. App. 94; People v. Schneider, (Mich. 1905) 103 N. W. Rep. 172.

6. Regulating Occupations — Arkansas. — Pate v. Jonesboro, (Ark. 1905) 87 S. W. Rep. 437.

California. — Dobbins v. Los Angeles, 139 Cal. 179, 96 Am. St. Rep. 95.

Idaho. — St. Anthony v. Brandon, 10 Idaho 205.

Iowa. — Lovilia v. Cobb, 126 Iowa 557; Des Moines v. Bolton, (Iowa 1905) 102 N. W. Rep. 1045.

Louisiana. — New Orleans v. Kee, 107 La. 762; New Orleans v. Hop Lee, 104 La. 601; New Orleans v. Faber, 105 La. 208; New Orleans v. Vidalat, 105 La. 132; Shreveport v. Schulsinger, 113 La. 9.

Maryland. — Mason v. Cumberland, 92 Md. 451.

Michigan. — People v. Detroit United R. Co., 134 Mich. 682.

Minnesota. — State v. Jensen, 93 Minn. 88.

Montana. — Butte v. Paltrovich, 30 Mont. 18.

New York. — Buffalo v. Hill, 79 N. Y. App. Div. 402.

North Carolina. — Paul v. Washington, 134 N. Car. 363.

Pennsylvania. — Mechanicsburg v. Koons, 18 Pa. Super. Ct. 131.

Regulating Curbstone Markets. — Mt. Carmel v. Fisher, 21 Pa. Super. Ct. 643.

Cannot Prohibit Business on Christmas Day. — Watson v. Thomson, 116 Ga. 546, 94 Am. St. Rep. 137.

9. Prevention of Immorality. — Hoboken v. Greiner, 68 N. J. L. 592.

Regulating Gambling. — Matter of Ah Cheung, 136 Cal. 678; Louisville v. Wehmhoff, 116 Ky. 812; Ruston v. Perkins, 114 La. 851.

955. 3. Abatement or Prevention of Nuisances. — Glucose Refining Co. v. Chicago, 138 Fed. Rep. 209; Whitmier, etc., Co. v. Buffalo, 118 Fed. Rep. 773; Dewitt v. La Cotts, (Ark. 1905) 88 S. W. Rep. 877; *Ex p.* Foote, 70

Ark. 12, 91 Am. St. Rep. 63; Crum v. Bray, 121 Ga. 709; Patterson v. Johnson, 214 Ill. 481; St. Louis v. Gault, 179 Mo. 8; Iler v. Ross, 64 Neb. 710, 97 Am. St. Rep. 676; Pittsburg v. W. H. Keech Co., 21 Pa. Super. Ct. 548.

Ordinance Cannot Declare to Be Nuisance That Which Is Not So in Fact. — Dewitt v. La Cotts, (Ark. 1905) 88 S. W. Rep. 877; Campbell v. District of Columbia, 19 App. Cas. (D. C.) 131; Chicago v. Gunning System, 114 Ill. App. 377, *affirmed* 214 Ill. 628; Munsell v. Carthage, 105 Ill. App. 119, *affirmed* 203 Ill. 474; Boyd v. Board of Councilmen, (Ky. 1903) 77 S. W. Rep. 669; Frostburg v. Wineland, 98 Md. 239; Gallagher v. Flury, 99 Md. 181; Carpenter v. Reliance Realty Co., 103 Mo. App. 480; Griffin v. Gloversville, 67 N. Y. App. Div. 403; Pittsburg v. W. H. Keech Co., 21 Pa. Super. Ct. 548; Roanoke v. Bolling, 101 Va. 182; Richmond v. Caruthers, 103 Va. 774.

4. Same Act Offense Against Both State and Municipality. — Talladega v. Fitzpatrick, 133 Ala. 613; Ogden v. Madison, 111 Wis. 413.

5. Ordinance May Cover Same Ground as Statute. — Bowles v. District of Columbia, 22 App. Cas. (D. C.) 321; State v. Quong, 8 Idaho 191; Glasgow v. Bazan, 96 Mo. App. 412; Lebanon v. Jordan, 99 Mo. App. 277; Jordan v. Nicolin, 84 Minn. 367; Abbeville v. Leopard, 61 S. Car. 99; Ogden v. Madison, 111 Wis. 413. See also Rosedale v. Hanner, 157 Ind. 390; Lovilia v. Cobb, 126 Iowa 557.

Ordinance Cannot Cover Same Ground as Statute. — Littlejohn v. Stells, 123 Ga. 427; Wells-ville v. O'Connor, 24 Ohio Cir. Ct. 689; State v. Godfrey, 54 W. Va. 54; Judy v. Lashley, 50 W. Va. 628 (in the absence of express authority). See also Thomas v. Sutters, (1900) 1 Ch. 10, 19 Cox C. C. 418, 81 L. T. N. S. 469; Gentel v. Rapps, (1902) 1 K. B. 160, 20 Cox C. C. 104, 85 L. T. N. S. 683; Hayes v. Thompson, 9 British Columbia 249.

956. 1. Conflict of Authority. — See Judy v. Lashley, 50 W. Va. 628.

957. 2. Necessity for Compliance with Statutory Requirements. — *In re* Van Tuyl, (Kan. 1905) 81 Pac. Rep. 181; McFarlain v. Jennings, 106 La. 541; People v. Geneva, 98 N. Y. App. Div. 383; Knauss v. Columbus, 13 Ohio Dec. 200; *In re* Third St., 13 Pa. Dist. 563; Farwell v. Sherbrooke, 25 Quebec Super. Ct. 203.

Irregularities in the enactment of resolutions by municipal councils will not invalidate the action of the councils, unless the irregularities are of such a nature as to cause prejudice or are due to the absence of essential formalities. Duhaime v. St. François du Lac Parish, 19 Quebec Super. Ct. 162.

5. Rules of Order. — Heffernan v. Walkerton, 6 Ont. L. Rep. 79, Street, J., *dissenting*; Re Kelly, 8 Ont. L. Rep. 162.

7. Presumption of Regularity. — Fletcher v. Hickman, (C. C. A.) 136 Fed. Rep. 568; Susan-

- 957.** 4. Meetings of Council. — See note 8.
958. 5. Notice. — See notes 1, 2, 3, 6, 8.
 Requirement Jurisdictional. — See note 11.
959. 6. Report and Recommendation. — See note 3.
 Amendment Suggested by City Council. — See note 4.
 7. Vote Necessary to Pass. — See note 7.
960. In Case of a Tie Vote. — See note 1.
 8. Readings — *a*. REQUIREMENT OF READING. — See note 4.

ville v. Long, 144 Cal. 362; *Chicago Telephone Co. v. Northwestern Telephone Co.*, 100 Ill. App. 57, *affirmed* 199 Ill. 324; *Weatherhead v. Cody*, (Ky. 1905) 85 S. W. Rep. 1099; *Muir v. Bardstown*, (Ky. 1905) 87 S. W. Rep. 1096; *Dollar Sav. Bank v. Ridge*, 183 Mo. 506; *Ex p. Hinkle*, 104 Mo. 10; *Kelley v. Broadwell*, (Neb. 1902) 92 N. W. Rep. 643; *Portland v. Yick*, 44 Oregon 439, 102 Am. St. Rep. 633; *Gove v. Tacoma*, 34 Wash. 434. See also *Markham v. Anamosa*, 122 Iowa 689.

957. 8. Meetings. — See *Robinson v. Gregory*, (1905) 1 K. B. 534; *Forbes v. Grimsby Public School Board*, 7 Ont. L. Rep. 137; *Filiatrault v. Coteau Landing*, 21 Quebec Super. Ct. 302; *Martin v. Windsor*, 24 Quebec Super. Ct. 40; *Farwell v. Sherbrooke*, 5 Quebec Super. Ct. 350; *Gage v. Chicago*, 195 Ill. 490; *Schofield v. Tampico*, 98 Ill. App. 324; *Moore v. Perry*, 119 Iowa 423; *Bybee v. Smith*, (Ky. 1901) 61 S. W. Rep. 15; *Richardson v. Omaha*, (Neb. 1905) 104 N. W. Rep. 172; *State v. Bowers*, 26 Ohio Cir. Ct. 326; *Fitzgerald v. Pawtucket St. R. Co.*, 24 R. I. 201. And see the title MUNICIPAL CORPORATIONS, **1209**. 9 *et seq.*

Presence of Parties Interested as Dispensing with Notice. — See *Paquet v. Durham Tp.*, 22 Quebec Super. Ct. 233, 5 Quebec Pr. 229.

Requisites of Notice. — See *Forbes v. Grimsby Public School Board*, 7 Ont. L. Rep. 137.

958. 1. Notice Required. — *Delaware, etc., Tel., etc., Co. v. Pensauken*, 67 N. J. L. 531; *Jersey City, etc., St. R. Co. v. Passaic*, 68 N. J. L. 110; *Ackerman v. Nutley*, 70 N. J. L. 438; *Newark, etc., Traction Co. v. North Arlington*, 67 N. J. L. 161; *Delaware, etc., Telephone Co. v. Pensauken Tp.*, 67 N. J. L. 91; *Nelson v. Megantic County*, 20 Quebec Super. Ct. 334, *following* *St. André Avellin v. Ripon Tp.*, 4 Quebec Q. B. 167.

Notice Necessary Though Not Required by Charter. — *Sears v. Atlantic City*, (N. J. 1905) 60 Atl. Rep. 1093.

2. Action Judicial Rather than Legislative. — *Sears v. Atlantic City*, (N. J. 1905) 60 Atl. Rep. 1093.

3. Revoking Franchise. — *Newark, etc., Traction Co. v. North Arlington*, 67 N. J. L. 161; *Jersey City, etc., St. R. Co. v. Passaic*, 68 N. J. L. 110.

Assessing Cost of Street Improvement. — *Sears v. Atlantic City*, (N. J. 1905) 60 Atl. Rep. 1093.

6. Municipal Improvements. — *Dumars v. Denver*, 16 Colo. App. 375; *Walker v. Chicago*, 202 Ill. 531.

Notice of Intention to Undertake Improvement Provided for by By-laws. — *In re McCrae*, 8 Ont. L. Rep. 156, *reversing* 7 Ont. L. Rep. 146.

8. Right of Property Owner to Be Heard. —

Delaware, etc., Telephone Co. v. Pensauken Tp., 67 N. J. L. 91; *Jersey City, etc., St. R. Co. v. Passaic*, 68 N. J. L. 110. See also *Ackerman v. Nutley*, 70 N. J. L. 438.

11. Requirement of Notice Jurisdictional. — *Dumars v. Denver*, 16 Colo. App. 375; *Zalesky v. Cedar Rapids*, 118 Iowa 714; *Sears v. Atlantic City*, (N. J. 1905) 60 Atl. Rep. 1093.

959. 3. Report and Recommendation. — *State v. St. Louis*, 161 Mo. 371. See also *Wetmore v. Chicago*, 206 Ill. 367; *Becker v. Chicago*, 208 Ill. 126, holding an ordinance to be void for failure of the resolution to comply with requirements as to an itemized estimate of cost of an improvement directed.

Ordinance Differing from Recommendation Invalid. — *Smith v. Chicago*, 214 Ill. 155.

Requisition by School Board. — *Forbes v. Grimsby Public School Board*, 7 Ont. L. Rep. 137.

Petition by Landowners or Rate Payers. — *In re Dundas St. Bridges*, 8 Ont. L. Rep. 52; *Challoner v. Lobo Tp.*, 32 Ont. 247; *Hanson v. Grand'Mère*, 11 Quebec K. B. 77, *affirmed* 33 Can. Sup. Ct. 50, which was *affirmed* (1904) A. C. 789; *Lord v. Maskinongé County*, 10 Quebec Q. B. 20.

4. Recommendation by Council. — See *Chicago Union Traction Co. v. Chicago*, 202 Ill. 576.

7. Vote Necessary to Pass. — *Marion Water Co. v. Marion*, 121 Iowa 306; *Com. v. Williams*, (Ky. 1905) 86 S. W. Rep. 553; *Crickenberger v. Westfield*, 71 N. J. L. 467; *Young v. Crane*, 67 N. J. L. 453; *Reed v. Woodcliff*, (N. J. 1905) 60 Atl. Rep. 1128. See also *Gage v. Chicago*, 195 Ill. 490.

In the Absence of Statute a majority of a quorum is sufficient to pass an ordinance. *Thurston v. Huston*, 123 Iowa 157.

960. 1. Vote of Presiding Officer. — *Bybee v. Smith*, (Ky. 1901) 61 S. W. Rep. 15; *Com. v. Williams*, (Ky. 1905) 86 S. W. Rep. 553; *People v. Bresler*, 70 N. Y. App. Div. 294, *affirmed* 171 N. Y. 302. See also *Griffin v. Messenger*, 114 Iowa 99.

4. Requirement of Three Readings. — *Griffin v. Messenger*, 114 Iowa 99; *Landes v. State*, 160 Ind. 479; *Jersey City, etc., St. R. Co. v. Passaic*, 68 N. J. L. 110; *Bill Posting Sign Co. v. Atlantic City*, 71 N. J. L. 72; *McGuire v. East Cleveland*, 25 Ohio Cir. Ct. 497; *Portland v. Yick*, 44 Oregon 439, 102 Am. St. Rep. 633; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647. See also *Gallaher v. Jefferson*, 125 Iowa 324.

One Reading. — See *Chicago Telephone Co. v. Northwestern Telephone Co.*, 199 Ill. 324.

Two Readings. — See *Emerson v. Wright*, 14 Manitoba 636.

Formal Motion for Second Reading Not Required. — *Re Kelly*, 8 Ont. L. Rep. 162.

960. *b.* REQUIREMENT MANDATORY. — See note 5.

c. METHOD OF READING. — See note 7.

d. READING AT ADJOURNED MEETINGS. — See note 8.

961. *g.* SUSPENSION OF REQUIREMENT — (1) *Power to Suspend.* — See note 3.

(3) *Vote Necessary to Suspend.* — See note 5.

962. 9. Delay Between Introduction and Final Passage — *a.* REQUIREMENT OF DELAY. — See notes 2, 4.

10. Calling and Recording Yeas and Nays — *a.* THE REQUIREMENT. — See note 9.

b. WHETHER MANDATORY OR DIRECTORY. — See note 10.

963. *d.* TO WHAT ORDINANCES RULE APPLIES. — See note 3.

e. METHOD OF VOTING — *Separate Passage of Ordinances.* — See note 6.

f. SUFFICIENCY OF RECORD. — See notes 7, 8, 9, 11.

964. *g.* EVIDENCE — (1) *Burden of Proof.* — See note 1.

(2) *Parol Evidence.* — See note 2.

11. Approval or Veto — Signing — *a.* REQUIREMENT OF APPROVAL. — See notes 3, 5.

960. 5. Requirement Mandatory. — McGuire *v.* East Cleveland, 25 Ohio Cir. Ct. 497.

Lack of Continuance in Proceedings. — Where an ordinance, after two readings, was laid over to a certain date, upon which no meeting was held, and was subsequently read a third time and passed, it was held that the passage was irregular and the ordinance void. Jersey City, etc., *St. R. Co. v. Passaic*, 68 N. J. L. 110.

7. Three Readings by Title. — See Portland *v.* Yick, 44 Oregon 439, 102 Am. St. Rep. 633.

Where the Title Does Not Disclose the Object of the ordinance, a reading by title is insufficient. Bill Posting Sign Co. *v.* Atlantic City, 71 N. J. L. 72.

Presumption of Reading. — Where it may be inferred from the record that the ordinance was properly read it will be presumed that the reading took place. Chicago Telephone Co. *v.* Northwestern Telephone Co., 199 Ill. 324.

8. Reading at Special Meeting. — Knoxville *v.* Knoxville Water Co., 107 Tenn. 647.

961. 3. Suspension of Requirement. — Landes *v.* State, 160 Ind. 479; Société, etc., *v.* Montreal, 19 Quebec Super. Ct. 148.

5. Vote Necessary to Suspend. — A requirement of a three-fourths vote to suspend is not complied with by a vote of five of a council consisting of six members besides the mayor, he having been made by law a constituent part of the council. Griffin *v.* Messenger, 114 Iowa 99.

962. 2. Delay After Introduction. — Chicago Telephone Co. *v.* Northwestern Telephone Co., 199 Ill. 324.

Where the Statute Makes No Provision as to Time the fact that an ordinance is not passed until more than a year after its introduction does not render it void. McLaughlin *v.* Chicago, 198 Ill. 518.

4. Provisions Mandatory. — Delaware, etc., Tel., etc., Co. *v.* Pensauken Tp., 67 N. J. L. 91, affirmed 67 N. J. L. 531.

9. Requirement of Calling and Recording Yeas and Nays. — Chicago Telephone Co. *v.* Northwestern Telephone Co., 199 Ill. 324; Boyd *v.*

Chicago, etc., R. Co., 103 Ill. App. 199; Landes *v.* State, 160 Ind. 479; Portland *v.* Yick, 44 Oregon 439, 102 Am. St. Rep. 633.

10. Requirement Mandatory. — Schofield *v.* Tampico, 98 Ill. App. 324; Markham *v.* Anamosa, 122 Iowa 689; Pickton *v.* Fargo, 10 N. Dak. 469.

963. 3. Requirement Restricted to Class of Ordinances. — White *v.* Clarksville, (Ark. 1905) 87 S. W. Rep. 630.

6. Separate Vote. — Markham *v.* Anamosa, 122 Iowa 689.

In the Absence of Statute more than one ordinance may be voted on at the same time. Corry *v.* Corry Chair Co., 18 Pa. Super. Ct. 271.

7. Marion Water Co. *v.* Marion, 121 Iowa 306. But see Pickton *v.* Fargo, 10 N. Dak. 469.

8. See State *v.* Nebraska Telephone Co., 127 Iowa 194.

Sufficient Record. — Where the record shows the names of the members present at a meeting, and that upon the call of the roll there was a unanimous affirmative vote, it is sufficient. Marion Water Co. *v.* Marion, 121 Iowa 306.

9. See Schofield *v.* Tampico, 98 Ill. App. 324.

11. Compare Gove *v.* Tacoma, 34 Wash. 434.

964. 1. Certificate of Clerk Prima Facie Evidence. — Pensacola *v.* Southern Bell Tele.

2. Parol Evidence Inadmissible. — Compare Pickton *v.* Fargo, 10 N. Dak. 469.

3. Requirement of Approval. — Landes *v.* State, 160 Ind. 479; Moore *v.* Perry, 119 Iowa 423; Broderick *v.* St. Paul, 90 Minn. 443, 89 Am. St. Rep. 554; State *v.* Butler, 178 Mo. 272; People *v.* Geneva, 98 N. Y. App. Div. 383. See also Reed *v.* Louisville, (Ky. 1901) 61 S. W. Rep. 11.

Approval by Provincial or Dominion Government. — In Canada the approval by the governor or some other official of the provincial government is frequently necessary to the validity of by-laws dealing with certain classes of subjects. Liverpool, etc., R. Co. *v.* Liverpool, 33 Can. Sup. Ct. 180, reversing on other grounds 35 Nova Scotia 233; *In re Edmonton By-Law*, 4 N. W. Ter. 450; Beauregard *v.* Roxton Falls, 24 Quebec Super. Ct. 474; Pointe Gatineau *v.* Hanson, 10 Quebec K. B.

965. *b.* REQUIREMENT OF SIGNING — There Is a Broad Distinction. — See note 1.

The True Rule. — See notes 2, 3.

966. *d.* HOW APPROVAL SIGNIFIED. — See note 2.

e. APPROVAL MUST BE BY MAYOR IN OFFICE WHEN ORDINANCE PASSED. — See note 4.

g. APPROVAL BY ACTING MAYOR. — See notes 6, 7.

967. *j.* TIME FOR DELIBERATION. — See note 3.

968. *l.* PASSAGE OVER VETO. — See note 1.

969. 13. Depositing or Filing with Proper Officer. — See note 1.

14 Recording — Entry in Minutes. — See notes 2, 3.

15. Publication — *a.* REQUIREMENT OF PUBLICATION. — See note 10.

970. See note 1.

b. WHETHER MANDATORY OR DIRECTORY. — See notes 2, 3.

346, *affirmed* 11 Quebec K. B. 77; Hanson v. Grand'Mère, 11 Quebec K. B. 77, *affirmed* 33 Can. Sup. Ct. 50, which was *affirmed* (1904) A. C. 789. See also *In re John Inglis Co.*, 8 Ont. L. Rep. 570. But approval by the proper officer will not have the effect of making valid a by-law which is otherwise bad. *Re Knudsen*, 15 Manitoba 317.

964. 5. Approval Necessary to Give Effect to Ordinances. — *Pensacola v. Southern Bell Telephone Co.*, (Fla. 1905) 37 So. Rep. 820; *Moore v. Perry*, 119 Iowa 423; *New Iberia v. Moss Hotel Co.*, 112 La. 525; *Baltimore v. Gorter*, 93 Md. 1; *State v. Butler*, 178 Mo. 272.

965. 1. Distinction Between Signature and Approval. — *Moore v. Perry*, 119 Iowa 423; *Com. v. Williams*, (Ky. 1905) 86 S. W. Rep. 553, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 964, 965.

Mandamus will not lie in a proper case to compel the mayor to sign an ordinance. *State v. Taylor*, 36 Wash. 607.

2. Requirement as to Signing Directory Only. — *Com. v. Williams*, (Ky. 1905) 86 S. W. Rep. 553, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 965; *New Iberia v. Moss Hotel Co.*, 112 La. 525; *Ephrata Water Co. v. Ephrata*, 16 Pa. Super. Ct. 484; *State v. Taylor*, 36 Wash. 607. See also *Moore v. Perry*, 119 Iowa 423.

Signature Unnecessary to Validity of "Order." — *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29.

3. Mandatory Requirement. — *Moore v. Perry*, 119 Iowa 423; *Com. v. Williams*, (Ky. 1905) 86 S. W. Rep. 553, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 965; *New Iberia v. Moss Hotel Co.*, 112 La. 525; *Jones v. Schuylkill Light, etc., Co.*, 202 Pa. St. 164; *Tasse v. Beaubien*, 4 Quebec Pr. 372. See also *Platt v. Englewood*, 68 N. J. L. 231; *Matter of Vivian*, 14 Manitoba 153; *In re Houghton*, 14 Manitoba 526.

966. 2. Express Requirement that Mayor Shall Sign Ordinances. — *Moore v. Perry*, 119 Iowa 423.

4. Approval of Mayor in Office When Ordinance Passed Necessary. — See *Moore v. Perry*, 119 Iowa 423.

6. Approval by Acting Mayor. — *Chesapeake, etc., R. Co. v. Maysville*, (Ky. 1902) 69 S. W. Rep. 728. But see *Moore v. Perry*, 119 Iowa 423.

7. Circumstances Showing Authority to Act. — *Chesapeake, etc., R. Co. v. Maysville*, (Ky. 1902) 69 S. W. Rep. 728, upholding the authority of a mayor *pro tempore* where the regular mayor had been absent from the county for three days.

967. 3. Failure to Return Within Prescribed Time. — *Landes v. State*, 160 Ind. 479.

968. 1. Passage over Veto. — *Reed v. Louisville*, (Ky. 1901) 61 S. W. Rep. 11; *Diefenderfer v. State*, 13 Wyo. 387.

Construction of Provision as to Vote Required. — *Pollasky v. Schmid*, 128 Mich. 699.

What Amounts to Passage over Veto. — *People v. Geneva*, 98 N. Y. App. Div. 383.

Ordinance Passed over Veto Must Be Substantially Unchanged. — *People v. Geneva*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 237, *affirmed* 98 N. Y. App. Div. 383.

969. 1. Proof of Deposit. — Compliance with a requirement that an ordinance be deposited with the village clerk is *prima facie* proved by the production of the ordinance by that officer. *Schofield v. Tampico*, 98 Ill. App. 324.

2. Requirement of Recording. — *Fletcher v. Hickman*, (C. C. A.) 136 Fed. Rep. 568; *Gove v. Tacoma*, 34 Wash. 434.

3. Requirement Directory Only. — *Landes v. State*, 160 Ind. 479; *Crowley v. Rucker*, 107 La. 213; *Martin v. Windsor*, 24 Quebec Super. Ct. 40.

10. Requirement of Publication. — *Pierson v. People*, 204 Ill. 456; *Kansas City v. Overton*, 68 Kan. 560; *Reed v. Louisville*, (Ky. 1901) 61 S. W. Rep. 11. And see the cases cited in the notes following.

Only Ordinances Imposing a Penalty or Forfeiture have been held to be included in a requirement of publication. *State v. Noblesville*, 157 Ind. 31.

Effect of Publication. — Promulgation will not make valid a by-law not within the power of the council to pass. *Re Knudsen*, 15 Manitoba 317.

970. 1. Object of Publication. — *Meyer v. Boonville*, 162 Ind. 165; *East Orange v. Richardson*, 71 N. J. L. 458.

2. Requirement of Publication Mandatory. — *Dumars v. Denver*, 16 Colo. App. 375; *Ullman v. District of Columbia*, 21 App. Cas. (D. C.) 241; *People v. Florville*, 207 Ill. 79; *Meyer v. Boonville*, 162 Ind. 165; *Bybee v. Smith*,

971. *c.* MODE AND SUFFICIENCY OF PUBLICATION — (1) *Usual Methods.* — See note 6.

972. (4) *Typographical Errors.* — See note 1.

973. (6) *In What Newspaper Publication Made* — Sunday Newspaper. — See note 2.

e. ORDER FOR PUBLICATION. — See note 7.

f. AMENDMENT AFTER PUBLICATION. — See note 8.

h. EVIDENCE — (1) *Presumption.* — See notes 10, 11.

974. See note 2.

16. Approval of Voters. — See notes 7, 8.

VI. FORM — 1. In General. — See note 11.

975. 2. Title — Subject-matter. — See notes 1, 2.

4. Statement of Reasons or Necessity for Enactment. — See note 5.

5. Enacting Clause. — See note 7.

(Ky. 1901) 61 S. W. Rep. 15; *Shaw v. New York Cent., etc., R. Co.*, 85 N. Y. App. Div. 137; *Carpenter v. Yeadon*, 208 Pa. St. 396.

Curing Defect. — The re-enactment and publication of an ordinance cure the defect of not publishing the ordinance originally. *Muir v. Bardstown*, (Ky. 1905) 87 S. W. Rep. 1096.

970. 3. *Reed v. Louisville*, (Ky. 1901) 61 S. W. Rep. 11.

971. 6. Posting. — See *Robinson v. Gregory*, (1905) 1 K. B. 534; *In re Salter*, 4 Ont. L. Rep. 51.

972. 1. Mistake in Punctuation. — See *Chittenden v. Columbus*, 26 Ohio Cir. Ct. 531.

973. 2. Publication in a Sunday Newspaper has been held to be valid in *Colorado and Tennessee*. *Dumars v. Denver*, 16 Colo. App. 375; *Denver v. Dumars*, 33 Colo. 94; *Denver v. Londoner*, 33 Colo. 104; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647.

7. A Formal Resolution directing publication is not essential to the validity of the by-law, if the publication is otherwise sufficient. *In re Sater*, 4 Ont. L. Rep. 51, citing *Re Pickett*, 28 Ont. 464.

8. Amendment After Publication. — Where an ordinance is amended by a second ordinance it is not necessary to republish the original ordinance along with the amendment. *People v. Burke*, 206 Ill. 358.

10. Presumption of Publication. — *Fletcher v. Hickman*, (C. C. A.) 136 Fed. Rep. 568; *Ullman v. District of Columbia*, 21 App. Cas. (D. C.) 241; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201; *Muir v. Bardstown*, (Ky. 1905) 87 S. W. Rep. 1096.

11. *Muir v. Bardstown*, (Ky. 1905) 87 S. W. Rep. 1096.

Presumption Rebuttable. — *Ullman v. District of Columbia*, 21 App. Cas. (D. C.) 241.

974. 2. *Fletcher v. Hickman*, (C. C. A.) 136 Fed. Rep. 568; *Muir v. Bardstown*, (Ky. 1905) 87 S. W. Rep. 1096.

7. Submission to Voters. — *Hanson v. Grand Mère*, (1904) A. C. 789, affirming 33 Can. Sup. Ct. 50, which affirmed 11 Quebec K. B. 77; *Shrimpton v. Winnipeg*, 13 Manitoba 211; *In re Salter*, 4 Ont. L. Rep. 51; *Rex v. Hamill*, 7 Ont. L. Rep. 600; *Re Kelly*, 8 Ont. L. Rep. 162; *Cleary v. Windsor*, 10 Ont. L. Rep. 333; *Real Estate Invest. Co. v. Richmond*, 23 Quebec Super. Ct. 151; *Gagnon v. Pointe-au-Pic*, 22 Quebec Super. Ct. 396;

Beauregard v. Roxton Falls, 24 Quebec Super. Ct. 474; *Mercier v. Warwick*, 6 Quebec Pr. 78; *Carthage v. Carthage Light Co.*, 97 Mo. App. 20; *State v. Wauwatosa*, 124 Wis. 451. See also *Meyer v. Boonville*, 162 Ind. 165.

8. Publication Necessary Only Where Expressly Required. — *State v. Wauwatosa*, 124 Wis. 451; *Hunt v. Palmerston*, 5 Ont. L. Rep. 76.

Discretion of Council to Submit Ordinances to Voters. — Though there is nothing in a municipal act permitting the council to take a plebiscite or prohibiting it from doing so, where the subject is one wholly within the discretion of the council, the propriety of the practice is questionable. *King v. Toronto*, 5 Ont. L. Rep. 163.

11. Omission of Matters Required to Be Set Out. — *Knauss v. Columbus*, 13 Ohio Dec. 200.

975. 1. Constitutional Provisions Not Applicable to Municipal Legislation. — *Chicago Union Traction Co. v. Chicago*, 207 Ill. 544, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 975; *Corry v. Corry Chair Co.*, 18 Pa. Super. Ct. 271.

2. Statutory Provisions as to Title and Subject-Matter — *California*. — *Law v. San Francisco*, 144 Cal. 384.

Idaho. — *St. Anthony v. Brandon*, 10 Idaho 205.

Iowa. — *Marion Water Co. v. Marion*, 121 Iowa 306. See also *Des Moines v. Keller*, 116 Iowa 648, 93 Am. St. Rep. 268; *Lovilia v. Cobb*, 126 Iowa 557; *Gallaher v. Jefferson*, 125 Iowa 324.

Kansas. — *Kansas City v. Overton*, 68 Kan. 560.

Kentucky. — *Silva v. Newport*, (Ky. 1905) 84 S. W. Rep. 741; *Louisville v. Wehmhoff*, 116 Ky. 812; *Louisville v. Park Com'rs*, 112 Ky. 409; *Lowry v. Lexington*, 113 Ky. 763; *McNulty v. Toof*, 116 Ky. 202.

Missouri. — See *State v. St. Louis*, 169 Mo. 31.

Nebraska. — *Ray v. Colby*, (Neb. 1903) 97 N. W. Rep. 591.

Ohio. — *Wellsville v. O'Connor*, 24 Ohio Cir. Ct. 689; *Chittenden v. Columbus*, 26 Ohio Cir. Ct. 531.

Washington. — *Seattle v. Barto*, 31 Wash. 141.

And see the title STATUTES. **574.** 2, 3.

5. Statement of Reasons for Enactment Not Necessary. — *Crowley v. Ellsworth*, 114 La. 308.

7. Failure to Follow Prescribed Form. — *Peo-*

976. See note 1.

9. Definiteness. — See notes 7, 9.

977. VII. VALIDITY — 1. Power of Courts to Inquire Into. — See notes 1, 2.

Motives of Council. — See notes 3, 4.

2. How Validity Tested. — See notes 7, 8, 9.

978. 3. Presumption of Validity. — See notes 1, 2, 4, 5.

ple v. Burke, 206 Ill. 358, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 975; *State v. Nohl*, 113 Wis. 15.

976. 1. Omission of Enacting Clause from Ordinances Published in Book Form. — *San Antonio, etc., R. Co. v. Gray*, (Tex. Civ. App. 1901) 66 S. W. Rep. 229, reversed on other grounds 95 Tex. 424.

7. Must Be Definite and Certain. — *McChesney v. Chicago*, 213 Ill. 592; *De Witt County v. Clinton*, 194 Ill. 521; *Walker v. Chicago*, 202 Ill. 531. See also *Fay v. Chicago*, 194 Ill. 136.

9. Ordinances Sufficiently Definite and Certain. — *Colorado*. — *Spalding v. Denver*, 33 Colo. 172.

Connecticut. — *State v. Wightman*, (Conn. 1905) 61 Atl. Rep. 56; *State v. McMahon*, 76 Conn. 97.

Illinois. — *Halsey v. Lake View*, 188 Ill. 540; *Hyman v. Chicago*, 188 Ill. 462; *Jones v. Chicago*, 213 Ill. 92; *Lamphere v. Chicago*, 212 Ill. 440; *Chicago Union Traction Co. v. Chicago*, 207 Ill. 544; *McChesney v. Chicago*, 205 Ill. 611; *Perry v. People*, 206 Ill. 334; *People v. Burke*, 206 Ill. 358; *Pierson v. People*, 204 Ill. 456; *Gage v. Chicago*, 201 Ill. 93; *Chicago v. Singer*, 202 Ill. 75; *Walker v. Chicago*, 202 Ill. 531; *Gage v. Chicago*, 195 Ill. 490; *Smythe v. Chicago*, 197 Ill. 311; *Duane v. Chicago*, 198 Ill. 471; *McChesney v. Chicago*, 201 Ill. 344; *Fay v. Chicago*, 194 Ill. 136; *Commonwealth Electric Co. v. Rose*, 214 Ill. 545; *McChesney v. Chicago*, 213 Ill. 592; *Chicago Union Traction Co. v. Chicago*, 215 Ill. 410; *Houston v. Chicago*, 191 Ill. 559; *Peters v. Chicago*, 192 Ill. 437; *Ronan v. People*, 193 Ill. 631; *Chicago v. Hulbert*, 205 Ill. 346; *Gage v. Chicago*, 203 Ill. 26.

Iowa. — *Thurston v. Huston*, 123 Iowa 157.

Kentucky. — *Richardson v. Mehler*, 111 Ky. 408.

Missouri. — *Ex p. Hinkle*, 104 Mo. App. 104; *Allen v. La Force*, 95 Mo. App. 324.

Nebraska. — *Richardson v. Omaha*, (Neb. 1905) 104 N. W. Rep. 172.

Ohio. — *Chittenden v. Columbus*, 26 Ohio Cir. Ct. 531.

Texas. — *Chimene v. Baker*, 32 Tex. Civ. App. 520.

Canada. — *Esquimalt Water Works Co. v. Victoria*, 10 British Columbia 193, *Irving, J., dissenting*; *Stark v. Schuster*, 14 Manitoba 672; *In re Salter*, 4 Ont. L. Rep. 51.

Ordinances Void for Uncertainty — *England*. — *Nash v. Finlay*, 20 Cox C. C. 101, 85 L. T. N. S. 682.

Illinois. — *Wetmore v. Chicago*, 206 Ill. 367; *McDowell v. People*, 204 Ill. 499; *People v. Birch*, 201 Ill. 81; *Washburn v. Chicago*, 202 Ill. 210; *De Witt County v. Clinton*, 194 Ill. 521; *Nichols v. Chicago*, 192 Ill. 290; *Kelly v. Chicago*, 193 Ill. 324; *Moll v. Chicago*, 194 Ill. 28; *Beach v. Chicago*, 193 Ill. 369; *People v.*

Hills, 193 Ill. 281; *Gage v. Chicago*, 191 Ill. 210; *Willis v. Chicago*, 189 Ill. 103.

New Jersey. — *Central R. Co. v. Elizabeth*, 70 N. J. L. 578.

West Virginia. — *Pence v. Bryant*, 54 W. Va. 263.

977. 1. Necessity and Propriety for Legislative Determination. — See *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29; *In re Smith*, 143 Cal. 368; *Re Inglis*, 9 Ont. L. Rep. 562.

2. Character and Validity for Courts. — *Stiles v. Galinski*, (1904) 1 K. B. 615, 90 L. T. N. S. 437; *Piché v. Portneuf County*, 17 Quebec Super. Ct. 589, correcting judgment 17 Quebec Super. Ct. 131; *Martin v. d'Arthabaska*, 20 Quebec Super. Ct. 329, reversed on other grounds 21 Quebec Super. Ct. 119; *Therriault v. Notre-Dame du Lac*, 24 Quebec Super. Ct. 217; *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29; *In re Smith*, 143 Cal. 368; *District of Columbia v. Sargeant*, 17 App. Cas. (D. C.) 64; *State v. Birch*, 186 Mo. 205; *Margolies v. Atlantic City*, 67 N. J. L. 82; *Passaic v. Paterson Bill Posting, etc., Co.*, 71 N. J. L. 75; *Pittsburg v. W. H. Keech Co.*, 21 Pa. Super. Ct. 548.

Misapplication of Public Funds by ordinance may be restrained by the courts. *Atty.-Gen. v. London County Council*, (1901) 1 Ch. 781, 84 L. T. N. S. 245, affirmed (1902) A. C. 165, 86 L. T. N. S. 161.

3. No Inquiry as to Motive of Legislation. — *Glucose Refining Co. v. Chicago*, 138 Fed. Rep. 217; *Dobbins v. Los Angeles*, 139 Cal. 179, 96 Am. St. Rep. 95; *In re Smith*, 143 Cal. 368; *Tilly v. Mitchell, etc., Co.*, 121 Wis. 1, 105 Am. St. Rep. 1007.

4. Fraud. — See *Tilly v. Mitchell, etc., Co.*, 121 Wis. 1, 105 Am. St. Rep. 1007.

7. Reasonable Construction. — *Montz v. District of Columbia*, 20 App. Cas. (D. C.) 568; *People v. Burke*, 206 Ill. 358; *Wyse v. Police Com'rs*, 68 N. J. L. 127; *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712; *Von Diest v. San Antonio Traction Co.*, 33 Tex. Civ. App. 577.

Penal Ordinances Strictly Construed. — *Board of Health v. Werner*, 67 N. J. L. 103. See also *Contas v. Bradford*, 206 Pa. St. 291.

8. Inclination to Sustain Ordinances. — *Blanchard v. Benton*, 109 Ill. App. 569.

9. Construction Consistent with Validity Preferred. — *Madderom v. Chicago*, 194 Ill. 572; *Spiegler v. Chicago*, 216 Ill. 114; *Berry v. Chicago*, 192 Ill. 154; *Atty.-Gen. v. Remick*, (N. H. 1904) 58 Atl. Rep. 871; *Oak Cliff v. Etheridge*, (Tex. Civ. App. 1903) 76 S. W. Rep. 602. See also *State v. Butler*, 178 Mo. 272; *Piqua v. Cron*, 14 Ohio Dec. 500; *Pittsburg v. W. H. Keech Co.*, 21 Pa. Super. Ct. 548; *Stafford v. Chippewa Valley Electric R. Co.*, 110 Wis. 331.

978. 1. Presumption as to Power. — See *In*

978. 4. Who May Raise Question of Validity — The Validity of an Ordinance Not Penal. — See notes 6, 8.

979. Estoppel. — See note 3.

5. In What Proceeding Validity May Be Questioned — a. PROSECUTION UNDER ORDINANCE. — See notes 5, 6.

b. HABEAS CORPUS. — See note 7.

c. QUO WARRANTO. — See note 8.

d. INJUNCTION. — See notes 9, 10.

980. f. CERTIORARI. — See note 1.

re Zhizhuzza, 147 Cal. 328; *In re Gughmini*, 147 Cal. xvi, 81 Pac. Rep. 958. But see *Chicago v. Gunning System*, 114 Ill. App. 377, affirmed 214 Ill. 28.

Presumption of Proper Motive. — *Buffalo v. Hill*, 79 N. Y. App. Div. 402.

978. 2. Presumption of Validity — United States. — *Fletcher v. Hickman*, (C. C. A.) 136 Fed. Rep. 568.

Arkansas. — *Ft. Smith v. Hunt*, 72 Ark. 556, 105 Am. St. Rep. 51.

California. — *In re Smith*, 143 Cal. 368; *In re Zhizhuzza*, 147 Cal. 328; *In re Gughmini*, 147 Cal. xvi, 81 Pac. Rep. 958.

District of Columbia. — *Montz v. District of Columbia*, 20 App. Cas. (D. C.) 568.

Florida. — *Pensacola v. Southern Bell Telephone Co.*, (Fla. 1905) 37 So. Rep. 820, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 978.

Illinois. — *Berry v. Chicago*, 192 Ill. 154; *Madderom v. Chicago*, 194 Ill. 572; *Chicago, etc., R. Co. v. Carlinville*, 200 Ill. 314, 93 Am. St. Rep. 190; *Chicago, etc., R. Co. v. Carlinville*, 103 Ill. App. 251.

Michigan. — *People v. Detroit United R. Co.*, 134 Mich. 682, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 978.

Missouri. — *Ruschenberg v. Southern Electric R. Co.*, 161 Mo. 70.

Montana. — *Butte v. Paltrovich*, 30 Mont. 18.

Nebraska. — *Kelley v. Broadwell*, (Neb. 1902) 92 N. W. Rep. 643.

New Jersey. — *Ivins v. Trenton*, 68 N. J. L. 501; *Lathrop v. Morristown*, 67 N. J. L. 247; *Wyse v. Police Com'rs*, 68 N. J. L. 127.

New York. — *New York v. Hewitt*, 91 N. Y. App. Div. 445.

Pennsylvania. — *Kittanning v. Kittanning Consol. Natural Gas Co.*, 26 Pa. Super. Ct. 355; *Kittanning v. Western Union Tel. Co.*, 26 Pa. Super. Ct. 346; *Lansdowne v. Springfield Water Co.*, 16 Pa. Super. Ct. 490.

Wisconsin. — *Stafford v. Chippewa Valley Electric R. Co.*, 110 Wis. 331.

4. Burden of Proof. — *Chicago, etc., R. Co. v. Carlinville*, 103 Ill. App. 251; *People v. Detroit United R. Co.*, 134 Mich. 682; *Kittanning v. Western Union Tel. Co.*, 26 Pa. Super. Ct. 346; *Kittanning v. Kittanning Consol. Natural Gas Co.*, 26 Pa. Super. Ct. 355.

5. Doubts Resolved in Favor of Validity. — *Thomas v. Sutters*, (1900) 1 Ch. 10, 19 Cox C. C. 418, 81 L. T. N. S. 469; *Stiles v. Galinski*, (1904) 1 K. B. 615, 90 L. T. N. S. 437; *Liverpool v. Liverpool, etc., R. Co.*, 35 Nova Scotia 233, reversed on other grounds 33 Can. Sup. Ct. 180; *People v. Detroit United R. Co.*, 134 Mich. 682.

6. Persons Affected. — *Rossi v. Edinburgh*, (1905) A. C. 21, reversing Sc. Ct. of Sess. 5 F. 480; *Hamel v. St. Jean Deschailions Parish*, 20 Quebec Super. Ct. 301; *Gagnon v. Pointe-au-Pic*, 22 Quebec Super. Ct. 396; *St-Ignace Parish v. Soulanges County*, 25 Quebec Super. Ct. 153; *Guay v. Malbaie*, 25 Quebec Super. Ct. 263; *Boyd v. Board of Councilmen*, (Ky. 1903) 77 S. W. Rep. 669.

8. Persons Not Affected. — *Patton v. Chattanooga*, 108 Tenn. 197; *Duhaime v. St. Francois du Lac Parish*, 19 Quebec Super. Ct. 162; *Samson v. Montreal*, 23 Quebec Super. Ct. 500, reversing 23 Quebec Super. Ct. 256.

An Ordinance Making the Operation of Billiard Halls Unlawful cannot be questioned, as to its validity, by one who has not applied for a license and been refused. *Flick v. Broken Bow*, 67 Neb. 529.

979. 3. Estoppel. — *Armour Packing Co. v. Metropolitan Water Co.*, (C. C. A.) 130 Fed. Rep. 851; *Cleveland Electric R. Co. v. Cleveland*, 135 Fed. Rep. 368; *Commonwealth Electric Co. v. Rose*, 214 Ill. 545; *Postal Tel. Cable Co. v. Newport*, (Ky. 1903) 76 S. W. Rep. 159; *Charles Simon's Sons Co. v. Maryland Telephone, etc., Co.*, 99 Md. 141; *Kansas City v. Kansas City Belt R. Co.*, 187 Mo. 146; *Jersey City v. North Jersey St. R. Co.*, (N. J. 1905) 61 Atl. Rep. 95.

5. Attack in Criminal Action. — See *People v. Croot*, (Colo. App. 1904) 78 Pac. Rep. 310; *Beckett v. Savannah*, 118 Ga. 58; *Glasgow v. Bazan*, 96 Mo. App. 412.

Action of Replevin. — *Shook v. Sexton*, 37 Wash. 509.

6. Proceeding to Enforce Claim Arising under Ordinance. — *State v. Birch*, 186 Mo. 205.

7. Habeas Corpus. — See *In re Snyder*, 10 Idaho 682; *In re Stegengar*, 133 Mich. 55; *Anderson v. State*, (Neb. 1903) 96 N. W. Rep. 149; *Ex p. Powell*, 43 Tex. Crim. 391. But see *People v. District Ct.*, 33 Colo. 328.

8. Quo Warranto. — An ordinance will not be declared void in quo warranto proceedings where the power of the city to pass it is conceded. *State v. Nebraska Telephone Co.*, 127 Iowa 194.

"Quo Warranto Will Not Lie to Determine the Constitutionality of a municipal law; but the proper mode to challenge such law would be to interpose an objection as a defense to the enforcement of the ordinance." *Ex p. Lewis*, 45 Tex. Crim. 1, 107 Am. St. Rep. 970.

9. Injunction. — *Boyd v. Board of Councilmen*, (Ky. 1903) 77 S. W. Rep. 669; *Pease v. Moosomin*, 5 N. W. Ter. 207.

10. Paul v. Washington, 134 N. Car. 363.

980. 1. Certiorari. — *Combs v. Lakewood*

980. *h.* COLLATERAL ATTACK. — See note 4.

6. Conformity to Charter. — See note 6.

7. Conformity to Public Policy. — See note 7.

8. Consistency with Constitution and General Laws — *a.* GENERAL RULE STATED. — See note 9.

981. See note 1.

982. See notes 1, 2, 3, 4, 5, 6, 7, 8.

Tr., 68 N. J. L. 582; *Kemble v. Millville*, 69 N. J. L. 637; *Reed v. Woodcliff*, (N. J. 1905) 60 Atl. Rep. 1128. See also *Jersey City, etc., St. R. Co. v. Garfield*, 68 N. J. L. 587.

Certiorari will not be allowed for the purpose of setting aside an ordinance providing for a public improvement after the contract therefor has been awarded. *Rosell v. Neptune City*, 68 N. J. L. 509.

Laches. — A writ of *certiorari* to question the validity of an ordinance will not be granted to one guilty of laches. *Rosell v. Neptune City*, 68 N. J. L. 509; *Budd v. Camden*, 69 N. J. L. 193.

980. 4. Collateral Attack. — *Johnson v. People*, 202 Ill. 306; *Chicago Telephone Co. v. Northwestern Telephone Co.*, 199 Ill. 324; *Ackerman v. Nutley*, 70 N. J. L. 438.

6. Conformity to Charter. — *Cutshaw v. Denver*, 19 Colo. App. 341; *People v. Hummel*, 215 Ill. 43; *Chicago v. Hanreddy*, 102 Ill. App. 1, affirmed 211 Ill. 24; *New Iberia v. Weeks*, 104 La. 489; *Bostock v. Sams*, 95 Md. 400, 93 Am. St. Rep. 394; *Haag v. Ward*, 186 Mo. 325; *St. Louis v. Meyer*, 185 Mo. 583; *Asphalt, etc., Constr. Co. v. Haeussler*, (Mo. 1904) 80 S. W. Rep. 5; *Kemp v. Monett*, 95 Mo. App. 452; *Marshall, etc., Co. v. Nashville*, 109 Tenn. 495; *Alden v. Campbell*, 30 Wash. 392.

7. Public Policy. — *Marshall, etc., Co. v. Nashville*, 109 Tenn. 495.

9. Consistency with Constitution and General Laws — *United States.* — *In re Hicks*, 133 Fed. Rep. 739; *Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574; *Humes v. Little Rock*, 138 Fed. Rep. 929.

Alabama. — *Montgomery v. Kelly*, (Ala. 1905) 38 So. Rep. 67; *Mitchell v. State*, 134 Ala. 392.

Arkansas. — *Morrilton v. Comes*, (Ark. 1905) 87 S. W. Rep. 1024.

California. — *In re Smith*, 143 Cal. 368.

Georgia. — *Beckett v. Savannah*, 118 Ga. 58.

Idaho. — *In re Snyder*, 10 Idaho 682; *State v. Nelson*, 10 Idaho 522.

Illinois. — *Imes v. Chicago, etc., R. Co.*, 105 Ill. App. 37; *Robinson v. Park Ridge*, 100 Ill. App. 409, reversed 198 Ill. 571.

Iowa. — *Des Moines v. Keller*, 116 Iowa 648, 93 Am. St. Rep. 268.

Kansas. — *Richardson v. Junction City*, 69 Kan. 664.

Kentucky. — *Bailey v. Com.*, (Ky. 1901) 64 S. W. Rep. 995; *Paducah v. Evitts*, (Ky. 1905) 86 S. W. Rep. 1123; *Lucas v. Com.*, (Ky. 1904) 82 S. W. Rep. 440; *Louisville, etc., R. Co. v. Com.*, (Ky. 1904) 78 S. W. Rep. 124.

Michigan. — *In re Stegengar*, 133 Mich. 55.

Minnesota. — *Jordan v. Nicolin*, 84 Minn. 367.

Missouri. — *Glasgow v. Bazan*, 96 Mo. App. 412; *St. Louis v. Meyer*, 185 Mo. 583; *Ford*

v. Kansas City, 181 Mo. 137; *Carpenter v. Reliance Realty Co.*, 103 Mo. App. 480.

New Jersey. — *Outwater v. Carlstadt*, 66 N. J. L. 510.

New York. — *Rochester, etc., Water Co. v. Rochester*, 176 N. Y. 36.

Ohio. — *Piqua v. Cron*, 14 Ohio Dec. 500.

Pennsylvania. — *Harrisburg v. Dauphin Deposit Bank*, 27 Pa. Co. Ct. 401.

Tennessee. — *Jones v. Nashville*, 109 Tenn. 550.

Texas. — *Curtis v. Gulf, etc., R. Co.*, 26 Tex. Civ. App. 304; *Ex p. Cross*, 44 Tex. Crim. 376; *Ex p. Ogden*, 43 Tex. Crim. 531; *Ex p. Powell*, 43 Tex. Crim. 391; *Clark v. State*, 46 Tex. Crim. 566.

Washington. — *Matter of Camp*, 38 Wash. 393; *Shook v. Sexton*, 37 Wash. 509. See also *Seattle v. Barto*, 31 Wash. 141.

Mere Omission of the Word "Wilfully," used in the state statute authorizing an ordinance, has been held not to invalidate the ordinance. *Talladega v. Fitzpatrick*, 133 Ala. 613.

Resolution Abolishing Fees Given by Statute Invalid. — *Rex v. Roberts*, (1901) 2 K. B. 117, 84 L. T. N. S. 530.

Instance of Ordinances Held to Be Constitutional. — *Glucose Refining Co. v. Chicago*, 138 Fed. Rep. 209; *Matter of Ah Cheung*, 136 Cal. 678; *In re Gughmini*, 147 Cal. xvi, 81 Pac. Rep. 958; *In re Zhizhuzza*, 147 Cal. 328; *People v. Croot*, (Colo. App. 1904) 78 Pac. Rep. 310; *State v. Wightman*, (Conn. 1905) 61 Atl. Rep. 56; *Ruston v. Perkins*, 114 La. 851; *Crowley v. Ellsworth*, 114 La. 308; *Allen v. Labsap*, 188 Mo. 692; *Buffalo v. Hill*, 79 N. Y. App. Div. 402; *Sterling v. Bowling Green*, 26 Ohio Cir. Ct. 581; *Walton v. Toledo*, 23 Ohio Cir. Ct. 547; *Meadville v. Miller*, 29 Pa. Co. Ct. 517; *Com. v. Barker*, 211 Pa. St. 610.

981. 1. Impairment of Obligation of Contracts. — *Cleveland Electric R. Co. v. Cleveland*, 135 Fed. Rep. 368.

982. 1. Due Process of Law. — *Dobbins v. Los Angeles*, 195 U. S. 223; *Daly v. Elton*, 195 U. S. 242; *Ex p. Hutchinson*, 137 Fed. Rep. 949; *Ex p. Hutchinson*, 137 Fed. Rep. 950; *Chicago v. Rogers Park Water Co.*, 214 Ill. 212; *Bauer v. Casey*, 26 Ohio Cir. Ct. 598; *Marshall, etc., Co. v. Nashville*, 109 Tenn. 495; *Richmond v. Caruthers*, 103 Va. 774. See also *People v. Gardner*, 136 Mich. 693; *People v. Detroit United R. Co.*, 134 Mich. 682.

Ordinances Held to Be Valid. — See *Ah Sin v. Wittman*, 198 U. S. 500; *State v. Robb*, (Me. 1905) 60 Atl. Rep. 874; *People v. Schneider*, (Mich. 1905) 103 N. W. Rep. 172; *Allen v. Labsap*, 188 Mo. 692; *Matter of Broad*, 36 Wash. 449.

2. Taking Property of One Person for Another's Benefit. — *Campbell v. District of Columbia*, 19 App. Cas. (D. C.) 131.

- 982.** *b.* ORDINANCES MAY DIFFER FROM STATUTES. — See note 11.
983. 9. Generality and Impartiality — *a.* RULE STATED. — See note 7.
984. See note 1.
b. REASONABLE DISCRIMINATION. — See note 2.
c. ILLUSTRATIVE CASES. — See note 7.
985. See note 1.
 10. Reasonableness — *a.* RULE STATED. — See note 2.

982. 3. Taking Private Property Without Compensation. — *Bill Posting Sign Co. v. Atlantic City*, 71 N. J. L. 72. See also *Crum v. Bray*, 121 Ga. 709, upholding an ordinance providing for the seizure and sale of animals at large; *State v. Robb*, (Me. 1905) 60 Atl. Rep. 874.

4. Personal Liberty. — *Rossi v. Edinburgh*, (1905) A. C. 21, reversing Sc. Ct. of Sess. 5 F. 480; *Ex p. Hutchinson*, 137 Fed. Rep. 949.

5. Equal Protection of Laws. — *Ex p. Hutchinson*, 137 Fed. Rep. 949; *Ex p. Hutchinson*, 137 Fed. Rep. 950.

Ordinances Held to Be Valid. — *Allen v. Labsap*, 188 Mo. 692; *Butte v. Paltrovich*, 30 Mont. 18; *Hoboken v. Goodman*, 68 N. J. L. 217; *Belmar v. Barkalow*, 67 N. J. L. 504.

6. Right of Jury Trial. — See *Stone v. Paducah*, (Ky. 1905) 86 S. W. Rep. 531.

7. Interstate Commerce. — *Chicago, etc., R. Co. v. Carlinville*, 200 Ill. 314; *In re Julius*, 26 Ohio Cir. Ct. 423. See also *Hofmayer v. Blakely*, 116 Ga. 777; *Waters v. Johnson*, 134 Mich. 436; *Postal Tel. Cable Co. v. Norfolk*, 101 Va. 125.

Ordinances Held to Be Valid. — *Duluth Brewing, etc., Co. v. Superior*, (C. C. A.) 123 Fed. Rep. 353; *Allen v. Labsap*, 188 Mo. 692; *New Hope v. Western Union Tel. Co.*, 16 Pa. Super. Ct. 306; *Oilure Mfg. Co. v. Pidduck-Ross Co.*, 38 Wash. 137.

8. Free Speech. — See *Fitts v. Atlanta*, 121 Ga. 567, 104 Am. St. Rep. 167; *Anderson v. State*, (Neb. 1903) 96 N. W. Rep. 149.

11. Ordinances May Differ from General Laws. — *Jordan v. Nicolin*, 84 Minn. 367; *Walter v. Bowling Green*, 26 Ohio Cir. Ct. 756; *Gentel v. Rapps*, (1902) 1 K. B. 160, 20 Cox C. C. 104, 85 L. T. N. S. 683.

983. 7. Must Be General and Impartial. — *United States.* — *Dobbins v. Los Angeles*, 195 U. S. 223.

California. — See *In re Smith*, 143 Cal. 368; *In re Zhizhuzza*, 147 Cal. 328; *In re Gughmini*, 147 Cal. xvi, 81 Pac. Rep. 958.

Georgia. — *Toney v. Macon*, 119 Ga. 83; *Beckett v. Savannah*, 118 Ga. 58.

Idaho. — *State v. Nelson*, 10 Idaho 522; *In re Snyder*, 10 Idaho 682; *St. Anthony v. Brandon*, 10 Idaho 205.

Illinois. — *Harrison v. People*, 97 Ill. App. 421, 195 Ill. 466; *Danville v. Noone*, 103 Ill. App. 290; *Chicago v. Gunning System*, 114 Ill. App. 377, affirmed 214 Ill. 628.

Maryland. — *Gallagher v. Flury*, 99 Md. 181.
New Jersey. — *Ivins v. Trenton*, 68 N. J. L. 501.

Ohio. — *Columbus v. Jeffrey*, 13 Ohio Dec. 639; *Brunner v. Harrison*, 25 Ohio Cir. Ct. 247.

Oregon. — *Ex p. Wygant*, 39 Oregon 429, 87 Am. St. Rep. 673.

Pennsylvania. — *Mechanicsburg v. Koons*, 18 Pa. Super. Ct. 131.

Tennessee. — *Jones v. Nashville*, 109 Tenn. 550.

Texas. — *Ex p. Vance*, 42 Tex. Crim. 619.

Washington. — *Matter of Camp*, 38 Wash. 393.

West Virginia. — *Pence v. Bryant*, 54 W. Va. 263.

984. 1. Class Legislation. — *People v. Blocki*, 203 Ill. 363; *Marshall, etc., Co. v. Nashville*, 109 Tenn. 495. See also *Chicago v. Banker*, 112 Ill. App. 94.

2. Reasonable Discrimination. — *Des Moines v. Keller*, 116 Iowa 648, 93 Am. St. Rep. 268; *Des Moines v. Bolton*, (Iowa 1905) 102 N. W. Rep. 1045; *Kansas City v. Overton*, 68 Kan. 560; *Evers v. Mayfield*, (Ky. 1905) 85 S. W. Rep. 697; *Com. v. Rearick*, 26 Pa. Super. Ct. 384.

An Ordinance Prohibiting the Maintenance of Dairies and Cow Stables within the limits of a city except by the consent of the municipal assembly is valid. *St. Louis v. Fischer*, 167 Mo. 654, 99 Am. St. Rep. 614.

Discrimination Must Be Between Persons of the Same Class to render an ordinance void. *Carthage v. Carlton*, 90 Ill. App. 338.

7. Ordinances Held Sufficiently General and Impartial. — *Glucose Refining Co. v. Chicago*, 138 Fed. Rep. 209; *Duluth Brewing, etc., Co. v. Superior*, (C. C. A.) 123 Fed. Rep. 353; *State v. McMahon*, 76 Conn. 97; *Chicago v. Chicago Union Traction Co.*, 199 Ill. 259; *Crowley v. Ellsworth*, 114 La. 308; *Butte v. Paltrovich*, 30 Mont. 18; *Combs v. Lakewood Tp.*, 68 N. J. L. 582; *Belmar v. Barkalow*, 67 N. J. L. 504; *Hoboken v. Goodman*, 68 N. J. L. 217; *Sterling v. Bowling Green*, 26 Ohio Cir. Ct. 581; *Taggart v. Allegheny City*, 12 Pa. Dist. 796; *Philadelphia v. Brabender*, 17 Pa. Super. Ct. 331, affirmed 201 Pa. St. 574; *Mt. Carmel v. Fisher*, 21 Pa. Super. Ct. 643.

985. 1. Ordinances Held Void for Partiality or Lack of Generality. — *Montreal v. Fortier*, 6 Can. Crim. Cas. (Montreal) 340; *Ste.-Agathe-des-Monts v. Reid*, 26 Quebec Super. Ct. 379, reversing 24 Quebec Super. Ct. 461.

2. Must Be Reasonable. — *England.* — *Stiles v. Galinski*, (1904) 1 K. B. 615, 90 L. T. N. S. 437. See also *Pomeroy v. Malvern Urban Dist. Council*, 89 L. T. N. S. 555.

United States. — *Richmond Safety Gate Co. v. Ashbridge*, 116 Fed. Rep. 220.

California. — See *Dobbins v. Los Angeles*, 139 Cal. 179, 96 Am. St. Rep. 95.

District of Columbia. — *District of Columbia v. Sargeant*, 17 App. Cas. (D. C.) 264; *Weigand v. District of Columbia*, 22 App. Cas. (D. C.) 559.

Georgia. — *Toney v. Macon*, 119 Ga. 83.

Idaho. — *State v. Nelson*, 10 Idaho 522,

986. b. TESTS OF REASONABLENESS — (2) *Harmony with Principles of Common Law.* — See note 2.

(4) *General Operation.* — See note 4.

(5) *Surrounding Circumstances.* — See notes 5, 6, 7.

(6) *Illustrative Cases.* — See note 8.

quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985.

Illinois. — *Wice v. Chicago*, etc., R. Co., 193 Ill. 351; *Vandersyde v. People*, 195 Ill. 200; *Walker v. Chicago*, 202 Ill. 531; *Chicago v. Brown*, 205 Ill. 568; *Chicago*, etc., R. Co. v. *Carlinville*, 103 Ill. App. 251, affirmed 200 Ill. 314.

Indian Territory. — *Tablequah v. Guinn*, (Indian Ter. 1904) 82 S. W. Rep. 886.

Iowa. — *Des Moines v. Keller*, 116 Iowa 648, 93 Am. St. Rep. 268.

Minnesota. — *St. Paul v. Briggs*, 85 Minn. 290, 89 Am. St. Rep. 554.

Nebraska. — *Iler v. Ross*, 64 Neb. 710, 97 Am. St. Rep. 676.

New Hampshire. — *Lane v. Concord*, 70 N. H. 485, 85 Am. St. Rep. 643.

New Jersey. — *Jersey City v. Abercrombie*, (N. J. 1904) 58 Atl. Rep. 73.

New York. — *Buffalo v. Hill*, 79 N. Y. App. Div. 402.

Ohio. — *Wellsville v. O'Connor*, 24 Ohio Cir. Ct. 692.

Oregon. — *Ex p. Wygant*, 39 Oregon 429, 87 Am. St. Rep. 673.

Pennsylvania. — *Philadelphia v. Brabender*, 17 Pa. Super. Ct. 331, affirmed 201 Pa. St. 574; *Mechanicsburg v. Koons*, 18 Pa. Super. Ct. 131.

South Carolina. — *State v. Earle*, 66 S. Car. 194, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985.

Tennessee. — *Jones v. Nashville*, 109 Tenn. 550, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985.

Virginia. — *Danville v. Hatcher*, 101 Va. 523.

Wisconsin. — See *Detroit v. Detroit R. Co.*, 134 Wis. 11, 104 Am. St. Rep. 600.

986. 2. *Harmony with Principles of Common Law.* — *Jones v. Nashville*, 109 Tenn. 550, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 986.

4. *General Operation.* — *Washburn v. Chicago*, 198 Ill. 506.

5. *The Circumstances.* — *In re Smith*, 143 Cal. 368; *State v. Earle*, 66 S. Car. 194, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 986.

Existing Circumstances. — *Chicago*, etc., R. Co. v. *Carlinville*, 200 Ill. 314, 93 Am. St. Rep. 190, affirming 103 Ill. App. 251.

6. *In re Smith*, 143 Cal. 368; *State v. Earle*, 66 S. Car. 194, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 986.

7. *Hafer v. McKelvey*, 23 Pa. Super. Ct. 205; *State v. Earle*, 66 S. Car. 194, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 986.

An Ordinance Restricting the Speed of Railroad Trains was held to be reasonable as to the thickly settled portion of the territory covered by the ordinance, and unreasonable as to that portion where the inhabitants were few and

where it would be necessary to double the trains in order to run at the rate of speed required. *Plattsburg v. Hagenbush*, 98 Mo. App. 669.

8 Cases Illustrative of Ordinances and By-Laws Held Reasonable and Valid — England. — *Thomas v. Sutters*, (1900) 1 Ch. 10, 19 Cox C. C. 418, 81 L. T. N. S. 469; *Salt v. Scott Hall*, (1903) 2 K. B. 245, 20 Cox C. C. 492, 88 L. T. N. S. 868; *Pomeroy v. Malvern Urban Dist. Council*, 89 L. T. N. S. 555.

Canada. — *Styles v. Victoria*, 8 British Columbia 406; *Liverpool v. Liverpool*, etc., R. Co., 35 Nova Scotia 233, reversed on other grounds 33 Can. Sup. Ct. 180.

United States. — *Whitmier*, etc., Co. v. *Buffalo*, 118 Fed. Rep. 773.

Alabama. — *Johnson v. State*, 132 Ala. 43; *Talladega v. Fitzpatrick*, 133 Ala. 613.

Arkansas. — *Brewster v. Pine Bluff*, 70 Ark. 28; *Wills v. Ft. Smith*, 70 Ark. 221; *Ft. Smith v. Hunt*, 72 Ark. 556, 105 Am. St. Rep. 51.

California. — *Matter of Ah Cheung*, 136 Cal. 678; *In re Zhizhuzza*, 147 Cal. 328; *In re Gughmini*, 147 Cal. xvi, 81 Pac. Rep. 958; *Denninger v. Recorder's Ct.*, 145 Cal. 629.

Connecticut. — *State v. Wightman*, (Conn. 1905) 61 Atl. Rep. 56.

District of Columbia. — *Dupont v. District of Columbia*, 20 App. Cas. (D. C.) 477; *Ullman v. District of Columbia*, 21 App. Cas. (D. C.) 241; *Montz v. District of Columbia*, 20 App. Cas. (D. C.) 568.

Georgia. — *Fitts v. Atlanta*, 121 Ga. 567, 104 Am. St. Rep. 167; *Epping v. Columbus*, 117 Ga. 263; *Smith v. Collier*, 118 Ga. 306.

Illinois. — *Spiegler v. Chicago*, 216 Ill. 114; *Jones v. Chicago*, 213 Ill. 92; *Walker v. Chicago*, 202 Ill. 531; *Wells v. Chicago*, 202 Ill. 448; *Chicago*, etc., R. Co. v. *Carlinville*, 200 Ill. 314, affirming 103 Ill. App. 251; *Chicago v. Chicago Union Traction Co.*, 199 Ill. 259; *Washburn v. Chicago*, 198 Ill. 506; *Duane v. Chicago*, 198 Ill. 471; *Smythe v. Chicago*, 197 Ill. 311; *Gage v. Chicago*, 195 Ill. 490; *Vandersyde v. People*, 195 Ill. 200; *Wice v. Chicago*, etc., R. Co., 193 Ill. 351; *Hyman v. Chicago*, 188 Ill. 462.

Indiana. — *Rosedale v. Hanner*, 157 Ind. 390.

Iowa. — *Des Moines v. Bolton*, (Iowa 1905) 102 N. W. Rep. 1045.

Kansas. — *Kansas City v. Overton*, 68 Kan. 560; *Good v. Ehrlich*, 67 Kan. 94.

Kentucky. — *Chesapeake*, etc., R. Co. v. *Maysville*, (Ky. 1902) 69 S. W. Rep. 728; *Evers v. Mayfield*, (Ky. 1905) 85 S. W. Rep. 697.

Louisiana. — *Crowley v. Ellsworth*, 114 La. 308; *New Orleans v. Hop Lee*, 104 La. 601; *Strohmyer v. Consumers' Electric Co.*, 111 La. 506; *Crowley v. Rucker*, 107 La. 213.

Maine. — *State v. Robb*, (Me. 1905) 60 Atl. Rep. 874.

Michigan. — *Love v. Judge*, 128 Mich. 545;

988. See note 1.

989. c. QUESTION OF LAW.—See notes 1, 2.

In re Stegenga, 133 Mich. 55; *Waters v. Johnson*, 134 Mich. 436; *People v. Detroit United R. Co.*, 134 Mich. 682; *People v. Gardner*, 136 Mich. 693.

Minnesota.—*State v. Rohart*, 83 Minn. 257; *State v. Jensen*, 93 Minn. 88.

Mississippi.—*Forbes v. Meridan*, 86 Miss. 243.

Missouri.—*State v. Kent*, 98 Mo. App. 281; *Ex p. Hinkle*, 104 Mo. App. 104; *Kansas City v. Kansas City Belt R. Co.*, 187 Mo. 146.

Montana.—*Butte v. Paltrovich*, 30 Mont. 18.

Nebraska.—*Anderson v. State*, (Neb. 1903) 96 N. W. Rep. 149.

New Jersey.—*Passaic v. Paterson Bill Posting, etc., Co.*, 71 N. J. L. 75; *Atlantic City v. Feretti*, 70 N. J. L. 489; *Fonsler v. Atlantic City*, 70 N. J. L. 125; *Kemble v. Millville*, 69 N. J. L. 637; *Ivins v. Trenton*, 68 N. J. L. 501; *Hoboken v. Greiner*, 68 N. J. L. 592; *Combs v. Lakewood Tp.*, 68 N. J. L. 582; *Suburban Land, etc., Co. v. Vailsburg*, 67 N. J. L. 461.

New York.—*New York v. Hewitt*, 91 N. Y. App. Div. 445.

North Carolina.—*Paul v. Washington*, 134 N. Car. 363.

Ohio.—*Walton v. Toledo*, 23 Ohio Cir. Ct. 547; *Chittenden v. Columbus*, 26 Ohio Cir. Ct. 531; *Sterling v. Bowling Green*, 26 Ohio Cir. Ct. 581; *Walter v. Bowling Green*, 26 Ohio Cir. Ct. 756.

Pennsylvania.—*Mt. Carmel v. Fisher*, 21 Pa. Super. Ct. 643; *Lansdowne v. Springfield Water Co.*, 16 Pa. Super. Ct. 490; *New Hope v. Western Union Tel. Co.*, 16 Pa. Super. Ct. 306; *Meadville v. Miller*, 29 Pa. Co. Ct. 517; *Kittanning v. Kittanning Consol. Natural Gas Co.*, 26 Pa. Super. Ct. 355; *Shenandoah v. Schuylkill Traction Co.*, 27 Pa. Co. Ct. 465; *Kittanning v. Western Union Tel. Co.*, 26 Pa. Super. Ct. 346; *Springfield Water Co. v. Darby*, 199 Pa. St. 400. See also *Hafer v. McKelvey*, 23 Pa. Super. Ct. 205.

Tennessee.—*Jones v. Nashville*, 109 Tenn. 550, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985-987; *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712.

Texas.—*Browne v. Bachman*, 31 Tex. Civ. App. 430; *St. Louis Southwestern R. Co. v. Bolton*, 36 Tex. Civ. App. 87.

Washington.—*Smith v. Sullivan*, 33 Wash. 30.

Wisconsin.—*Stafford v. Chippewa Valley Electric R. Co.*, 110 Wis. 331; *State v. Sheboygan*, 111 Wis. 23.

988. 1. Cases Illustrative of Ordinances or By-laws Held Unreasonable and Void—England.—*Nokes v. Islington*, (1904) 1 K. B. 610, 90 L. T. N. S. 22; *Stiles v. Galinski*, (1904) 1 K. B. 615, 90 L. T. N. S. 437; *Scott v. Pilliner*, (1904) 2 K. B. 855, 91 L. T. N. S. 658, *Phillimore, J., dissenting*; *Parker v. Bournemouth*, 86 L. T. N. S. 449; *Ennisworthy Urban Council v. Field*, (1904) 2 Ir. R. 518.

Canada.—*Montreal v. Fortier*, 6 Can. Crim. Cas. (Montreal) 340; *In re Song Lee*, 5 N. W. Ter. 466; *Martin v. d'Arthabaska*, 20 Quebec

Super. Ct. 329, *reversed* on other grounds 21 Quebec Super. Ct. 119; *Coaticook v. Lothrop*, 22 Quebec Super. Ct. 225; *Montreal v. Garon*, 23 Quebec Super. Ct. 363.

United States.—*Spring Valley Waterworks v. San Francisco*, 124 Fed. Rep. 574; *Palatka Waterworks v. Palatka*, 127 Fed. Rep. 161; *Ex p. Hutchinson*, 137 Fed. Rep. 949; *Ex p. Hutchinson*, 137 Fed. Rep. 950; *Humes v. Little Rock*, 138 Fed. Rep. 929.

California.—*Ex p. McClain*, 134 Cal. 110, 86 Am. St. Rep. 243; *In re Smith*, 143 Cal. 368.

District of Columbia.—*Campbell v. District of Columbia*, 19 App. Cas. (D. C.) 131.

Idaho.—*In re Snyder*, 10 Idaho 682.

Illinois.—*Chicago v. Brown*, 205 Ill. 568; *Chicago v. Gunning System*, 214 Ill. 628, *affirming* 114 Ill. App. 377; *Chicago v. Rogers Park Water Co.*, 214 Ill. 212; *Danville v. Noone*, 103 Ill. App. 290; *Munsell v. Carthage*, 105 Ill. App. 119, *affirmed* 203 Ill. 474; *Pagames v. Chicago*, 111 Ill. App. 590; *Chicago v. Banker*, 112 Ill. App. 94.

Indiana.—*Scott v. Laporte*, 162 Ind. 34.

Iowa.—*Hall v. Cedar Rapids*, 115 Iowa 199. *Massachusetts*.—*Winthrop v. New England Chocolate Co.*, 180 Mass. 464.

Michigan.—*Auditor-Gen. v. Hoffman*, 129 Mich. 541; *Detroit v. Detroit R. Co.*, 134 Mich. 11, 104 Am. St. Rep. 600.

Missouri.—*Plattsburg v. Hagenbush*, 98 Mo. App. 669; *St. Louis v. J. E. Kaime, etc., Real Estate Co.*, 180 Mo. 309.

New Jersey.—*Jersey City v. Abercrombie*, (N. J. 1904) 58 Atl. Rep. 73; *Bill Posting Sign Co. v. Atlantic City*, 71 N. J. L. 72; *Central R. Co. v. Elizabeth*, 70 N. J. L. 578; *Margolies v. Atlantic City*, 67 N. J. L. 82; *Madison v. Morristown Gaslight Co.*, 63 N. J. Eq. 120.

New York.—*United Traction Co. v. Water-vliet*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 392.

North Carolina.—*Plymouth v. Cooper*, 135 N. Car. 1.

Ohio.—*Brunner v. Harrison*, 25 Ohio Cir. Ct. 247.

Pennsylvania.—*Pittsburg v. W. H. Keech Co.*, 21 Pa. Super. Ct. 548; *Hafer v. McKelvey*, 23 Pa. Super. Ct. 205.

Tennessee.—*Marshall, etc., Co. v. Nashville*, 109 Tenn. 495.

Texas.—*Ex p. Vance*, 42 Tex. Crim. 619.

Wisconsin.—*Le Feber v. West Allis*, 119 Wis. 608, 100 Am. St. Rep. 917.

989. 1. Question of Law.—*State v. Nelson*, 10 Idaho 522; *Chicago v. Brown*, 205 Ill. 568; *Wice v. Chicago, etc., R. Co.*, 193 Ill. 351; *People v. Detroit United R. Co.*, 134 Mich. 682; *New Hope v. Western Union Tel. Co.*, 16 Pa. Super. Ct. 306; *State v. Earle*, 66 S. Car. 194, *quoting* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 989; *Ex p. Vance*, 42 Tex. Crim. 619. See also *Chimene v. Baker*, 32 Tex. Civ. App. 520.

Question for Municipal Authorities.—*Kansas City v. Overton*, 68 Kan. 560; *Butte v. Paltrovich*, 30 Mont. 18.

989. d. ORDINANCES PASSED UNDER EXPRESS LEGISLATIVE GRANT.

— See note 3.

990. See notes 1, 2.**11. Contravention of Common Right.** — See notes 3, 6.**991. 12. Restraint of Trade.** — See notes 1, 2, 4.**13. Creation of Monopoly.** — See note 6.**992. 14. Authorizing Creation of Nuisance.** — See note 2.**15. Delegation of Legislative Power — Enforcement.** — See note 3.
Enforcement. — See note 5.**993. 17. Ordinances Void in Part.** — See note 3.**989. 2. Jury Must Pass on Facts.** — *State v. Earle*, 66 S. Car. 194, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 989. See also *People v. Detroit United R. Co.*, 134 Mich. 682.**3. Express Power.** — *Weigand v. District of Columbia*, 22 App. Cas. (D. C.) 559; *Chicago, etc., R. Co. v. Carlinville*, 103 Ill. App. 251, affirmed 200 Ill. 314, 93 Am. St. Rep. 190; *Tahlequah v. Guinn*, (Indian Ter. 1904) 82 S. W. Rep. 886; *Chesapeake, etc., R. Co. v. Maysville*, (Ky. 1902) 69 S. W. Rep. 728; *Anderson v. State*, (Neb. 1903) 96 N. W. Rep. 149; *Chimene v. Baker*, 32 Tex. Civ. App. 520; *Houston, etc., R. Co. v. Dallas*, (Tex. Civ. App. 1904) 78 S. W. Rep. 525; *Danville v. Hatcher*, 101 Va. 523; *Stark v. Schuster*, 14 Manitoba 672. See also *Frostburg v. Wine-land*, 98 Md. 239; *Lane v. Concord*, 70 N. H. 485, 85 Am. St. Rep. 643.**990. 1. General Grant.** — *Chicago, etc., R. Co. v. Carlinville*, 103 Ill. App. 251; affirmed 200 Ill. 314, 93 Am. St. Rep. 190; *Love v. Judge*, 128 Mich. 545; *Plattsburg v. Hagenbush*, 98 Mo. App. 669.**2. Implied Powers.** — *Danville v. Hatcher*, 101 Va. 523.**3. Must Not Contravene Common Right.** — *Humes v. Little Rock*, 138 Fed. Rep. 929; *State v. Nelson*, 10 Idaho 522, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 990; *Wice v. Chicago, etc., R. Co.*, 193 Ill. 351; *Lane v. Concord*, 70 N. H. 485, 85 Am. St. Rep. 643; *State v. Ray*, 131 N. Car. 814, 92 Am. St. Rep. 795.**6. An Ordinance Prohibiting Women from Entering Saloons for immoral purposes is valid.** *State v. Nelson*, 10 Idaho 522.**991. 1. Must Not Be in Restraint of Trade.** — *In re Snyder*, 10 Idaho 682; *Chicago v. Gunning System*, 214 Ill. 628; *Brunner v. Harrison*, 25 Ohio Cir. Ct. 247.**2. Reasonable Regulations Permissible.** — *State v. Smith*, 123 Iowa 654.**4. Ordinances Held Not to Be in Undue Restraint of Trade.** — *State v. Robb*, (Me. 1905) 60 Atl. Rep. 874; *Butte v. Paltrovich*, 30 Mont. 18; *Buffalo v. Hill*, 79 N. Y. App. Div. 402; *Philadelphia v. Brabender*, 17 Pa. Super. Ct. 331, affirmed 201 Pa. St. 574; *Meadville v. Miller*, 29 Pa. Co. Ct. 517; *Matter of Camp*, 38 Wash. 393.**Ordinances Void as in Undue Restraint of Trade.** — *Chicago v. Gunning System*, 214 Ill. 628; *Brunner v. Harrison*, 25 Ohio Cir. Ct. 247.**6. Power to Regulate, License, Etc.** — *Iler v. Ross*, 64 Neb. 710, 97 Am. St. Rep. 676.**992. 2. Nuisance.** — *Augusta v. Reynolds*, 122 Ga. 754, 106 Am. St. Rep. 147; *People v. Har-**ris*, 203 Ill. 272, 96 Am. St. Rep. 304; *Young v. Rothrock*, 121 Iowa 588; *Alexander v. Cincinnati, etc., R. Co.*, 14 Ohio Dec. 102; *Richmond v. Smith*, 101 Va. 161. See also *John Anisfield Co. v. Grossman*, 98 Ill. App. 180.**3. Ordinances Attempting to Delegate Legislative Power Void — California.** — *Thompson v. Alameda*, 144 Cal. 281.*Illinois.* — *Johnson v. People*, 202 Ill. 306; *People v. Birch*, 201 Ill. 81; *Chicago v. Chicago Union Traction Co.*, 199 Ill. 259; *De Witt County v. Clinton*, 194 Ill. 521. See also *Commonwealth Electric Co. v. Rose*, 214 Ill. 545.*Indiana.* — See *Walker v. Towle*, 156 Ind. 639.*Iowa.* — See *Snouffer v. Cedar Rapids, etc., R. Co.*, 118 Iowa 287.*Kentucky.* — *Lowery v. Lexington*, 116 Ky. 157.*Maryland.* — See *Mason v. Cumberland*, 92 Md. 451.*Missouri.* — *State v. St. Louis*, 161 Mo. 371.*New Jersey.* — *Driscoll v. Salem*, 67 N. J. L. 113. See also *Stowe v. Kearney*, (N. J. 1905) 59 Atl. Rep. 1058.*Virginia.* — *Roanoke v. Bolling*, 101 Va. 182.*Canada.* — *Samson v. Montreal*, 23 Quebec Super. Ct. 256, reversed on other grounds 23 Quebec Super. Ct. 500.**Discretionary Power.** — *Bluffton v. Miller*, 33 Ind. App. 521.**Ordinance Delegating Slight Discretion to City Officials Not Invalid.** — *Swift v. St. Louis*, 180 Mo. 80.**An Ordinance Requiring the Consent of the Mayor to authorize the setting off of fireworks is not a delegation of legislative power.** *Centralia v. Smith*, 103 Mo. App. 438.**An Ordinance Delegating Authority to Establish a Sewer Grade is not void, the power delegated being executive rather than legislative.** *Rich v. Woods*, (Ky. 1904) 82 S. W. Rep. 578.**Examples of Ordinances Held Not to Delegate Legislative Power.** — *Spiegler v. Chicago*, 216 Ill. 114; *Guyer v. Rock Island*, 215 Ill. 144; *Reed v. Ottawa*, 21 Can. L. T. 470.**5. Enforcement.** — *In re Dundas St. Bridges*, 8 Ont. L. Rep. 52.**993. 3. Ordinance Void in Part Only — England.** — *Livingstone v. Westminster*, (1904) 2 K. B. 109.*Canada.* — *Rex v. License Com'rs*, 14 Manitoba 535; *Richvière v. Richmond*, 21 Quebec Super. Ct. 37.*Idaho.* — *Johnston v. Savidge*, (Idaho 1905) 81 Pac. Rep. 616, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 993.

994. See note 1.

Inseparable Provisions. — See notes 2, 3.

995. 18. Legislative Ratification of Invalid Ordinances. — See note 8.

996. See note 1.

VIII. CONSTRUCTION. — See note 2.

IX. OPERATION AND EFFECT — 1. In General. — See note 4.

2. Territorial Effect. — See notes 5, 6, 7.

997. **3. On Whom Binding.** — See notes 1, 2.

4. Time of Taking Effect. — See note 3.

998. See note 1.

Illinois. — *Imes v. Chicago*, etc., R. Co., 105 Ill. App. 37; *Johnson v. People*, 202 Ill. 306.

Indiana. — *Helm v. Witz*, (Ind. App. 1905) 73 N. E. Rep. 846. See also *Meyer v. Boonville*, 162 Ind. 165.

Iowa. — *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa 234.

Kentucky. — *McNulty v. Toof*, 116 Ky. 202.

Maine. — *State v. Robb*, (Me. 1905) 60 Atl. Rep. 874, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 993.

Maryland. — *Bostock v. Sams*, 95 Md. 400, 93 Am. St. Rep. 394.

Missouri. — *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637.

New Hampshire. — *Lane v. Concord*, 70 N. H. 485, 85 Am. St. Rep. 643.

Ohio. — *Sterling v. Bowling Green*, 26 Ohio Cir. Ct. 581.

Pennsylvania. — *Lansdowne v. Springfield Water Co.*, 16 Pa. Super. Ct. 490.

Washington. — *Shook v. Sexton*, 37 Wash. 509.

994. 1. Valid Portion Must Contain All Essentials of Complete Ordinance. — *McNulty v. Toof*, 116 Ky. 202; *State v. Robb*, (Me. 1905) 60 Atl. Rep. 874; *Sterling v. Bowling Green*, 26 Ohio Cir. Ct. 581. See also *Johnston v. Savidge*, (Idaho 1905) 81 Pac. Rep. 616.

2. Inseparable Provisions. — *Meyer v. Boonville*, 162 Ind. 165; *Lansdowne v. Springfield Water Co.*, 16 Pa. Super. Ct. 490.

3. Ordinance Void in Toto. — *Mitchell v. State*, 134 Ala. 392; *Chicago v. Gunning System*, 114 Ill. App. 377, affirmed 214 Ill. 628; *Grenada v. Wood*, 81 Miss. 308; *Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637; *Lane v. Concord*, 70 N. H. 485, 85 Am. St. Rep. 643; *Le Feber v. West Allis*, 119 Wis. 608, 100 Am. St. Rep. 917; *Hamel v. St. Jean Deschailions Parish*, 20 Quebec Super. Ct. 301; *Gagnon v. Pointe-au-Pic*, 22 Quebec Super. Ct. 396.

995. 8. Legislative Ratification. — *Standard L. Assur. Co. v. Tweed*, 6 Ont. L. Rep. 653.

996. 1. Statute Continuing Ordinances in Force. — *King v. Hamill*, 97 Md. 103, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 996; *Rex v. Nunn*, 15 Manitoba 288.

2. Rules for Construction of Statutes Apply. — *People v. Hummel*, 215 Ill. 43; *People v. Sloane*, 98 N. Y. App. Div. 450. See also *State v. Butler*, 178 Mo. 272.

Retroactive Effect will not be given to an ordinance in the absence of express intent. *People v. Hummel*, 215 Ill. 43, 74 N. E. Rep. 68; *Martin v. Oskaloosa*, (Iowa 1904) 99 N. W. Rep. 557; *Jackson v. Miller*, (N. J. 1905) 60 Atl. Rep. 1019.

4. Ordinance Has Same Effect as Statute—Alabama. — *Talladega v. Fitzpatrick*, 133 Ala. 613; *Johnson v. State*, 132 Ala. 43.

California. — *In re Zhizhuzza*, 147 Cal. 328; *In re Gughmini*, 147 Cal. xvi, 81 Pac. Rep. 958.

Colorado. — *Wolff v. Denver*, (Colo. App. 1904) 77 Pac. Rep. 364.

Illinois. — *Hope v. Alton*, 214 Ill. 102, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 996; *Commonwealth Electric Co. v. Rose*, 214 Ill. 545; *Lindblom v. Doherty*, 102 Ill. App. 15.

Indiana. — *Ristine v. Clements*, 31 Ind. App. 338.

Kentucky. — *Muir v. Bardstown*, (Ky. 1905) 87 S. W. Rep. 1096.

Louisiana. — *State v. Nicholas*, 109 La. 84.

Minnesota. — *Fairmont v. Meyer*, 83 Minn. 456.

New York. — *McGuinness v. Allison Realty Co.*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 8; *Griffin v. Gloversville*, 67 N. Y. App. Div. 403.

Wisconsin. — *State v. Sheboygan*, 111 Wis. 23; *Lange v. La Crosse*, etc., R. Co., 118 Wis. 558.

5. No Extraterritorial Effect. — *Schofield v. Tampico*, 98 Ill. App. 324; *St. Paul v. Cook*, 22 Quebec Super. Ct. 498.

6. Ordinance Applies to All Territory Within Corporate Limits. — *Indiana R. Co. v. Hoffman*, 161 Ind. 593.

7. Enlargement of City Limits. — *Indiana R. Co. v. Hoffman*, 161 Ind. 593.

997. 1. Ordinances Binding on All Persons Within Corporate Limits. — *Hope v. Alton*, 214 Ill. 102, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 997; *Pittsburgh*, etc., R. Co. v. Lightheiser, 163 Ind. 247. See also *State v. Jensen*, 93 Minn. 88.

A "Vigilant Watch Ordinance" applicable to motormen on street cars is binding on such corporations as come within its scope whether accepted or not by the corporations. *Riska v. Union Depot R. Co.*, 180 Mo. 168; *Nagel v. St. Louis Transit Co.*, 104 Mo. App. 438.

2. All Persons Chargeable with Notice of Ordinances. — *Hope v. Alton*, 214 Ill. 102 citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 997.

3. Statutory and Charter Provisions. — *Robinson v. Gregory*, (1905) 1 K. B. 534; *Filiatrault v. Coteau Landing*, 21 Quebec Super. Ct. 302; *People v. Florville*, 207 Ill. 79; *Pierson v. People*, 204 Ill. 456; *Laugel v. Bushnell*, 197 Ill. 20; *Meyer v. Boonville*, 162 Ind. 165; *Knauss v. Columbus*, 13 Ohio Dec. 200.

998. 1. Taking Effect upon Passage. — *Com. v. Williams*, (Ky. 1905) 86 S. W. Rep. 553.

998. Taking Effect upon Happening of Contingent Event. — See note 2.

X. DURATION. — See note 6.

XI. INJUNCTION AGAINST ENFORCEMENT. — See note 9.

999. See note 1.

XII. INJUNCTION AGAINST VIOLATION. — See notes 3, 4.

XIII. PENALTIES FOR VIOLATION — 1. Authority to Provide. — See notes 5, 6, 7.

1000. 2. Duty to Provide. — See note 1.

XIV. CIVIL LIABILITY FOR VIOLATION. — See notes 2, 3.

An Ordinance Is Prima Facie in Force on a date subsequent to that on which it is shown to have been adopted. *O'Leary v. Chicago*, etc., R. Co., (Iowa 1905) 103 N. W. Rep. 362.

To Support a Conviction under an Ordinance it must be shown that the violation took place after the passage of the ordinance. *Battle v. Marietta*, 118 Ga. 242.

998. 2. Happening of Contingency. — *Bradley-Ramsey Lumber Co. v. Perkins*, 109 La. 317.

6. Ordinance in Force Until Repealed. — *Fineran v. Central Bitulithic Paving Co.*, 116 Ky. 495.

9. Enforcement of Ordinance May Be Enjoined. — *Dobbins v. Los Angeles*, 195 U. S. 223; *Mills v. Chicago*, 127 Fed. Rep. 731; *Palatka Waterworks v. Palatka*, 127 Fed. Rep. 161; *Chicago v. Banker*, 112 Ill. App. 94; *Spiegler v. Chicago*, 216 Ill. 114; *McFarlain v. Jennings*, 106 La. 541; *United Traction Co. v. Watervliet*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 392; *Pease v. Moosomin*, 5 N. W. Ter. 207; *Jodoin v. Beloeil*, 6 Quebec Pr. 430.

Action of Declarator — Scotland. — See *Rossi v. Edinburgh*, (1905) A. C. 21, reversing Sc. Ct. of Sess. 5 F. 480.

999. 1. No Irreparable Injury Resulting from Enforcement. — *Orange City v. Thayer*, 45 Fla. 502.

Adequate Remedy at Law. — *Orange City v. Thayer*, 45 Fla. 502.

No Special or Private Interest in Petitioner. — *Hope v. Hamilton Park Com'rs*, 1 Ont. L. Rep. 477.

Granting of Injunction Discretionary with Court. — *Heffernan v. Walkerton*, 6 Ont. L. Rep. 79.

A Federal Court has no authority to restrain the enforcement of a municipal ordinance on the ground that it was beyond the power of the municipality to enact it. *Glucose Refining Co. v. Chicago*, 13 Fed. Rep. 209.

3. Atty.-Gen. v. Toronto, 6 Ont. L. Rep. 159; *Reed v. Ottawa*, 21 Can. L. T. 470; *Perron v. Beloeil*, 6 Quebec Pr. 408.

Procès-Verbaux — Quebec. — Municipal corporations may be compelled to execute improvements ordered by a procès-verbal. *Rousseau v. Blandford*, 21 Quebec Super. Ct. 464; *Gauvin v. St. Patrice Parish*, 23 Quebec Super. Ct. 318.

4. When Injunction May Be Granted. — *Atty.-Gen. v. Ashborne Recreation Ground Co.*, (1903) 1 Ch. 101, 87 L. T. N. S. 561; *Devenport v. Tozer*, (1903) 1 Ch. 759, 88 L. T. N. S. 113, affirming (1902) 2 Ch. 182, 86 L. T. N. S. 612; *Ste.-Agatha-des-Monts v. Reid*, 24 Quebec Super. Ct. 461, reversed on other grounds 26 Quebec Super. Ct. 379. See also *Wells v. Peo-*

ple, 201 Ill. 435; *Liverpool v. Liverpool*, etc., R. Co., 35 Nova Scotia 233, reversed on other grounds 33 Can. Sup. Ct. 180.

5. Grants of Authority to Provide Penalties. — *Denninger v. Recorder's Ct.*, 145 Cal. 629; *Little v. State*, (Ga. 1905) 51 S. E. Rep. 501; *Stone v. Paducah*, (Ky. 1905) 86 S. W. Rep. 531; *Owensboro Waterworks Co. v. Owensboro*, (Ky. 1903) 75 S. W. Rep. 268; *Hoboken v. Goodman*, 68 N. J. L. 217; *Atlantic City v. Crandol*, 67 N. J. L. 488; *Walter v. Bowling Green*, 26 Ohio Cir. Ct. 756; *State v. Nohl*, 113 Wis. 15; *Rex v. Myers*, 6 Ont. L. Rep. 120; *Reg. v. Duggan*, 21 Can. L. T. 35.

Where the Legislature Prescribes the Penalty, in granting power to enact ordinances, a city, in passing an ordinance thereunder must conform to the limits fixed by statute. *Assaria v. Wells*, 68 Kan. 787.

Authority to Impose Penalty Must Be Literally Followed. — *In re Van Tuyl*, (Kan. 1905) 81 Pac. Rep. 181.

An Opportunity for Judicial Investigation must be afforded. *Shook v. Sexton*, 37 Wash. 509.

6. Imprisonment. — In *Coaticook v. Lothrop*, 22 Quebec Super. Ct. 225, it was held that power to enact a by-law containing a penal clause, with an alternative of imprisonment, requires direct and specific authority from the legislature.

7. Implied Power to Create Penalties. — *Crum v. Bray*, 121 Ga. 709; *Sibley v. Lastrico*, 122 Iowa 211. See also *Bray v. State*, 140 Ala. 172; *Blanchard v. Bristol*, 100 Va. 469.

1000. 1. Dispensing with Penalty. — See *New York v. Hewitt*, 91 N. Y. App. Div. 445.

2. No Civil Liability for Violation. — *Buffalo v. Preston*, 81 N. Y. App. Div. 480. See also *Chicago*, etc., R. Co. v. *Stone*, 109 Ill. App. 517; *Frontier Steam Laundry Co. v. Connolly*, (Neb. 1904) 101 N. W. Rep. 995. But see *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712; *McBean v. Wyllie*, 14 Manitoba 135.

3. Violation as Negligence. — *True*, etc., Co. v. *Woda*, 104 Ill. App. 15, affirmed 201 Ill. 315; *Sluder v. St. Louis Transit Co.*, 189 Mo. 107; *Texas*, etc., R. Co. v. *Ball*, (Tex. Civ. App. 1905) 85 S. W. Rep. 456; *Patterson v. Fanning*, 1 Ont. L. Rep. 412, affirmed 2 Ont. L. Rep. 462; *Mitchell v. Hamilton*, 2 Ont. L. Rep. 58. See also *Riska v. Union Depot R. Co.*, 180 Mo. 168; *Nagel v. St. Louis Transit Co.*, 104 Mo. App. 438; *Frontier Steam Laundry Co. v. Connolly*, (Neb. 1904) 101 N. W. Rep. 995.

Where One Has Waived Compliance with an ordinance by taking part in its violation there can be no recovery in the absence of negligence. *Martin v. Chicago*, etc., R. Co., 118 Iowa 148, 96 Am. St. Rep. 371.

1000. XV. AMENDMENT — 1. Power to Amend. — See note 4.

Contractual Ordinance. — See note 5.

1001. 2. Form of Amendment — Amendment of Ordinance by Resolution. — See note 4.

4. Amendment of Invalid Ordinance. — See note 6.

XVI. RE-ENACTMENT. — See note 8.**XVII. ANNULMENT — 2. Effect of Change in Charter or Statute. —**

See note 9.

1002. XVIII. REPEAL — 1. Power to Repeal. — See notes 3, 4, 5.**1003. 2. Form of Repeal. — See note 2.**

Repeal by Implication. — See note 4.

But Repeals by Implication Are Not Favored by Law. — See note 5.

3. Effect of Repeal. — See note 7.

1004. XIX. EVIDENCE. — See notes 4, 5.

The Usual Methods. — See notes 6, 7, 8, 9, 10.

1000. 4. Only the Body That Had Power to Pass an ordinance has power to amend it. Chicago Union Traction Co. v. Chicago, 208 Ill. 187; American Hide, etc., Co. v. Chicago, 203 Ill. 451.

5. Contractual Ordinance Secure Against Impairment by Subsequent Municipal Action. — Rushville v. Rushville Natural Gas Co., 164 Ind. 162.

1001. 4. Ordinance Cannot Be Amended by Resolution. — People v. Latham, 203 Ill. 9; Paxton v. Bogardus, 201 Ill. 628.

6. See In re John Inglis Co., 8 Ont. L. Rep. 570; Mondoux v. d' Yamaska, 22 Quebec Super. Ct. 148.

8. Effect of Re-enactment. — Kittanning v. Western Union Tel. Co., 26 Pa. Super. Ct. 346.

Validating Irregular Ordinance. — Marion Water Co. v. Marion, 121 Iowa 306.

9. Existing Ordinances Not Annulled. — Rex v. License Com'rs, 14 Manitoba 535.

Saving Clause in New Statute. — Stark v. Schuster, 14 Manitoba 672; Montreal v. Hatton, 21 Quebec Super. Ct. 68.

1002. 3. General Power to Repeal. — Snouffer v. Cedar Rapids, etc., R. Co., 118 Iowa 287; Landau v. New York, 90 N. Y. App. Div. 50; Atty.-Gen. v. Toronto, 6 Ont. L. Rep. 159.

4. Impairment of Obligation of Contract. — Livingstone v. Westminster, (1904) 2 K. B. 109; London Mills v. Fairview-London Telephone Circuit, 105 Ill. App. 146, affirmed 208 Ill. 289. See also Jersey City, etc., St. R. Co. v. Garfield, 68 N. J. L. 587; Atty.-Gen. v. Halifax, 36 Nova Scotia 177.

5. Vested Rights. — Newark, etc., Traction Co. v. North Arlington, 67 N. J. L. 161. See also White v. Sunderland, 88 L. T. N. S. 592; Harrogate v. Dickinson, 88 L. T. N. S. 299.

1003. 2. Ordinance Cannot Be Repealed by Resolution. — People v. Latham, 203 Ill. 9.

A Special Ordinance operating as an exception to a prior general ordinance does not repeal such general ordinance. Ruschenberg v. Southern Electric R. Co., 161 Mo. 70.

4. Repeal by Implication. — Crowley v. Ellsworth, 114 La. 308.

5. Repeal by Implication Not Favored. — In re Bailey, 64 Kan. 887, 68 Pac. Rep. 53; Gulf, etc., R. Co. v. Melville, (Tex. Civ. App. 1905) 87 S. W. Rep. 863; Hull Electric Co. v. Ottawa Electric Co., (1902) A. C. 237, 12 Quebec K. B. 549, affirming 10 Quebec K. B. 35, which re-

versed 16 Quebec Super. Ct. 1 and affirmed 14 Quebec Super. Ct. 124; Morel v. Morel, 19 Quebec Super. Ct. 123; Montreal v. Hatton, 21 Quebec Super. Ct. 68.

Where One Ordinance Refers to Another Previously Passed, as being in full force, the first ordinance is not thereby repealed, it being the manifest purpose of the second ordinance to increase the scope of the first. Jeans v. Morrison, 99 Mo. App. 208.

7. The Suspension of an Ordinance Is Not a License to do the acts previously prohibited. Landau v. New York, 90 N. Y. App. Div. 50.

1004. 4. Statutory Methods. — Chicago, etc., R. Co. v. Beaver, 199 Ill. 34; Ackerman v. Nutley, 70 N. J. L. 438; Boyd v. Chicago, etc., R. Co., 103 Ill. App. 199; Gove v. Tacoma, 34 Wash. 434.

5. Parol Evidence. — See Weatherhead v. Cody, (Ky. 1905) 85 S. W. Rep. 1099; Gove v. Tacoma, 34 Wash. 434.

Evidence as to Contents of Ordinance by Attorney Who Wrote It. — Cavanaugh v. Milan, 99 Mo. App. 672.

6. Original Ordinance. — People v. Smith, 201 Ill. 454; Shaw v. New York Cent., etc., R. Co., 85 N. Y. App. Div. 137.

No Judicial Notice of Ordinances. — Lasher v. Littell, 104 Ill. App. 211, affirmed 202 Ill. 551; Gibbs v. Manchester, (N. H. 1905) 61 Atl. Rep. 128; New York v. Knickerbocker Trust Co., 104 N. Y. App. Div. 223; Boston v. Abraham, 91 N. Y. App. Div. 417; Barrett v. Smith, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 825; Chittenden v. Columbus, 26 Ohio Cir. Ct. 531.

A Municipal Court Will Take Judicial Notice of the ordinances of the municipality in a proceeding to enforce such ordinances. Taylor v. Saundersville, 118 Ga. 63. See also *Ex p. Childs*, (Cal. 1905) 81 Pac. Rep. 667.

7. Certified Copy. — Robinson v. Gregory, (1905) 1 K. B. 534; Florida Cent., etc., R. Co. v. Seymour, 44 Fla. 557; Boyd v. Chicago, etc., R. Co., 103 Ill. App. 199; Illinois Cent. R. Co. v. Kief, 111 Ill. App. 354; Chicago, etc., R. Co. v. Beaver, 199 Ill. 34; Chicago Telephone Co. v. Northwestern Telephone Co., 199 Ill. 324; Weatherhead v. Cody, (Ky. 1905) 85 S. W. Rep. 1099. See also Ackerman v. Nutley, 70 N. J. L. 438.

Record Copy. — Selma St., etc., R. Co. v. Owen, 132 Ala. 420.

- 1005. ORDINARY—ORDINARILY.**—See note 1.
1008. ORIGINAL—ORIGINALLY—ORIGINALITY.—See note 3.
1011. OSTENSIBLE.—See note 2.
OSTEOPATHY.—See note 3.
OTHER.—See note 5.
1012. Ejusdem Generis.—See note 1.
1014. See notes 1, 2.
1016. OTHERWISE.—See notes 1, 2.
1017. See note 1.
1019. OUT.—See note 1.
1020. OUTGOING.—See note 2.
1023. OVERFLOW—OVERFLOWING, ETC.—See note 4.
[OVERRATED.—See note 6a.]
1024. OVERSEE—OVERSEER.—See note 2.
[OWLING.—See note 6a.]
1028. PAPER.—See note 8.

1001. 8. Records.—Fletcher v. Hickman, (C. C. A.) 136 Fed. Rep. 568; Blanchard v. Benton, 109 Ill. App. 569; Webb City v. Parker, 103 Mo. App. 295. But see Shaw v. New York Cent., etc., R. Co., 85 N. Y. App. Div. 137.

Amended Record.—White v. Clarksville, (Ark. 1905) 87 S. W. Rep. 630.

9. Journal of City Council.—Com. v. Williams, (Ky. 1905) 86 S. W. Rep. 553; Ackerman v. Nutley, 70 N. J. L. 438; Gove v. Tacoma, 34 Wash. 434.

10. Published Copy.—Illinois Cent. R. Co. v. Burke, 112 Ill. App. 415; Gallaher v. Jefferson, 125 Iowa 324; Campbell v. St. Louis, etc., R. Co., 175 Mo. 161; San Antonio, etc., R. Co. v. Gray, (Tex. Civ. App. 1901) 66 S. W. Rep. 229.

A Published Copy Must Be Proved in order to be admissible. International, etc., R. Co. v. Hall, 35 Tex. Civ. App. 545.

1005. 1. Ordinary Course of Business.—St. Thomas First Nat. Bank v. Flath, 10 N. Dak. 281.

1008. 3. Original Construction.—Catlettburg v. Self, 115 Ky. 669.

1011. 2. Ostensible Agency.—An agency is *ostensible* when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him. Fargo First Nat. Bank v. Minneapolis, etc., Elevator Co., 11 N. Dak. 280.

3. Osteopathy.—See Parks v. State, 159 Ind. 211, for definition.

5. Knight v. Johnson, 13 Ohio Dec. 718, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1011.

Other Than.—See Diamond Match Co. v. Ontonagon, 188 U. S. 82.

1012. 1. Ejusdem Generis—General Rule.—Denman v. Webster, (Cal. 1902) 70 Pac. Rep. 1063; People v. Chretien, 137 Cal. 450; Standard Oil Co. v. Swanson, 121 Ga. 415, *quoting* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1012; Davis v. Dougherty County, 116 Ga. 491; Cleveland, etc., R. Co. v. Bergschicker, 162 Ind. 112, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1012; Miller v. Demory, 64 Kan. 584; State v. Longfellow, 93 Mo. App. 364, 95

Mo. App. 660; Knight v. Johnson, 13 Ohio Dec. 715; National Bank v. Gulf, etc., R. Co., 95 Tex. 176. See Michels v. State, 115 Wis. 43.

1014. 1. Intention Prevails.—State v. Poole, 65 Kan. 713.

2. Comprehensive Sense.—State v. Poole, 65 Kan. 713; State v. McGregor, 88 Minn. 74.

Wills.—Hyde v. Hyde, 64 N. J. Eq. 6.

1016. 1. Otherwise.—Contra Costa Water Co. v. Breed, 139 Cal. 432; People v. Feitner, 71 N. Y. App. Div. 479.

2. Ejusdem Generis—General Rule.—Paulin v. Windsor, 36 Nova Scotia 446, *citing* 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1016; Chesapeake, etc., R. Co. v. Hammer, (Ky. 1902) 66 S. W. Rep. 376; State v. West, 106 La. 274; State v. Scott, 87 Minn. 313; People v. Feitner, 71 N. Y. App. Div. 479.

1017. 1. Comprehensive Sense.—Paulin v. Windsor, 36 Nova Scotia 446; Territory v. Gutierrez, (N. Mex. 1904) 78 Pac. Rep. 139. See also Com. v. Dickert, 195 Pa. St. 234.

1019. 1. Accident Arising Out of and in the Course of Employment.—Pomfret v. Lancashire, etc., R. Co., (1903) 2 K. B. 719.

1020. 2. Outgoing.—Valpy v. St. Leonard's Wharf Co., 1 Local Gov. Rep. 305, *distinguished* in Stockdale v. Ascherberg, (1903) 1 K. B. 873, *affirmed* (1904) 1 K. B. 447; Morris v. Beal, (1904) 2 K. B. 585; Harris v. Hickman, (1904) 1 K. B. 13.

1023. 4. Overflow.—McDade v. Bossier Levee Board, 109 La. 625.

6a. Under the *Maine* statute, providing for the abatement of taxes, *overrated* means *overrated* with reference to the fair value of the property in question, and not by comparison with the valuation placed upon some other specific piece of property in the town. Penobscot Chemical Fibre Co. v. Bradley, 99 Me. 263.

1024. 2. Overseer and Agent Convertible Terms.—Faircloth v. Borden, 130 N. Car. 263.

6a. The common-law offense of *owling* applied to the unlawful exportation of wool. State v. Tuten, 131 N. Car. 701.

1028. 8. Paper Envelopes—Customs Duties Act.—Hunter v. U. S., (C. C. A.) 134 Fed. Rep. 361.

1029. PAR.—See note 1.

PARAGRAPH.—See note 3.

1031. PARCEL.—See note 1.

1029. 1. Interest.—See *People v. Miller*, 84 N. Y. App. Div. 170.

3. Paragraph.—Hill *v. Fair Haven*, etc., R. Co., 75 Conn. 177.

1031. 1. A parcel sale is of a definite

quantity of grain placed in an ocean vessel with any other freight, to be delivered at a definite port to which the vessel is bound by its charter. *Heyworth v. Miller Grain*, etc., Co., 174 Mo. 176.

PARENT AND CHILD.

BY E. G. CHILTON.

1035. I. IN GENERAL—DEFINITIONS.—See note 2.

1036. II. RIGHTS OF PARENT—1. Right to Control.—See notes 1, 2, 3.

3. Right of Custody—*a.* FATHER'S RIGHT PARAMOUNT AT COMMON LAW.—See note 5.

1037. See note 1.

***b.* WHEN MOTHER BECOMES ENTITLED.**—See note 3.

Mother's Remarriage.—See notes 4, 5.

1038. *c.* CHILD'S WELFARE GUIDING CONSIDERATION OF COURT.—See note 1.

1035. 2. See *State v. Shaw*, 64 S. Car. 566.

1036. 1. Right to Chastise.—Clasen *v. Pruhs*, (Neb. 1903) 95 N. W. Rep. 640.

A Parent May Delegate to a Third Person, under some circumstances, the authority to administer moderate punishment. *Simmons v. State*, 115 Ga. 574; *Rowe v. Rugg*, 117 Iowa 606, 94 Am. St. Rep. 318.

2. No Civil Redress for Injuries Inflicted by Parent.—*McKelvey v. McKelvey*, 111 Tenn. 388, 102 Am. St. Rep. 787; *Roller v. Roller*, 37 Wash. 242, 107 Am. St. Rep. 708. But see *Treschman v. Treschman*, 28 Ind. App. 206; *Clasen v. Pruhs*, (Neb. 1903) 95 N. W. Rep. 640.

3. Misuse of Right to Chastise.—*McAfee v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 376; *Livingston v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 1111. See also *Clasen v. Pruhs*, (Neb. 1903) 95 N. W. Rep. 640; *McKelvey v. McKelvey*, 111 Tenn. 388, 102 Am. St. Rep. 787.

4. Father's Right at Common Law—Georgia.—*Lamar v. Harris*, 117 Ga. 993.

Illinois.—*Donk Bros. Coal*, etc., Co. *v. Leavitt*, 109 Ill. App. 385.

Indiana.—*Leibold v. Leibold*, 158 Ind. 60.

Kansas.—*Modern Woodmen of America v. Hester*, 66 Kan. 129.

Kentucky.—*Crabtree v. Crabtree*, (Ky. 1905) 85 S. W. Rep. 211.

Minnesota.—*State v. Martin*, (Minn. 1905) 103 N. W. Rep. 888.

Nebraska.—See *In re Thomsen*, (Neb. 1901) 95 N. W. Rep. 805.

New Jersey.—*In re Wilson*, (N. J. 1903) 55 Atl. Rep. 160.

New York.—*People v. Rubens*, (County Ct.) 92 N. Y. Supp. 121.

Tennessee.—*McKelvey v. McKelvey*, 111 Tenn. 388, 102 Am. St. Rep. 787.

Texas.—See *Sancho v. Martin*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1015.

Virginia.—*Taylor v. Taylor*, 103 Va. 750.

Washington.—*Carey v. Hertel*, 37 Wash. 27. See also *Russner v. McMillan*, 37 Wash. 416.

West Virginia.—*Fletcher v. Hickman*, 50 W. Va. 244.

1037. 1. Foundation of Right.—*McKelvey v. McKelvey*, 111 Tenn. 388, 102 Am. St. Rep. 787. See also *Wadleigh v. Newhall*, 136 Fed. Rep. 941.

3. When Mother Becomes Entitled to Custody.—*Beall v. Bibb*, 19 App. Cas. (D. C.) 311; *Modern Woodmen of America v. Hester*, 66 Kan. 129; *In re Thomsen*, (Neb. 1901) 95 N. W. Rep. 805; *Sancho v. Martin*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1015.

Mother Cannot Assign Her Right of Guardianship.—*Matter of Waring*, (Surrogate Ct.) 46 Misc. (N. Y.) 222.

Statute Giving Preferential Rights to Mother Where Child Is of Tender Years.—See *Carson v. Carson*, (N. J. 1903) 54 Atl. Rep. 149.

4. Remarriage and Change of Religion—Custody Refused.—See *In re Grey*, (1902) 2 Ir. R. 684.

5. Right Not Forfeited by Second Marriage.—*Beall v. Bibb*, 19 App. Cas. (D. C.) 311.

1038. 1. Child's Welfare Guiding Consideration.—*Pearce v. Pearce*, 136 Ala. 188; *Beall v. Bibb*, 19 App. Cas. (D. C.) 311; *Hadley v. Forrest*, 112 Iowa 125; *State v. Greenwood*, 84 Minn. 203; *State v. Anderson*, 89 Minn. 198; *Carson v. Carson*, (N. J. 1903) 54 Atl. Rep. 149; *People v. Cooper*, 75 N. Y. App. Div. 620; *Ward v. Ward*, 34 Tex. Civ. App. 104; *Carey v. Hertel*, 37 Wash. 27; *Willett v. Warren*, 34 Wash. 647; *Russner v. McMillan*, 37 Wash. 416; *Jones v. Bowman*, 13 Wyo. 79; *Robert v. Veronneau*, 5 Quebec Pr. 426. See also *In re Thomsen*, (Neb. 1901) 95 N. W. Rep. 805.

The Child's Own Wishes.—*Israel v. Israel*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 335. But see *Beall v. Bibb*, 19 App. Cas. (D. C.) 311.

1038. *d.* FORFEITURE OF RIGHT — **The Father.** — See notes 2, 3.

1039. See note 1.

A Mother. — See note 2.

e. VALIDITY OF CONTRACT TRANSFERRING CUSTODY. — See note 3.

4. Right to Child's Services and Earnings — a. GENERAL RULES. —

See note 4.

1040. It Follows as a Corollary. — See note 1.

1041. See notes 1, 2.

1042. See note 1.

b. RIGHT OF MOTHER. — See notes 4, 6.

1043. Remarriage. — See note 1.

1038. 2. Father's Right to Custody Forfeited by His Unfitness. — *Stickel v. Stickel*, 18 App. Cas. (D. C.) 149; *Hall v. Hall*, (Ky. 1903) 77 S. W. Rep. 668; *McKelvey v. McKelvey*, 111 Tenn. 388, 102 Am. St. Rep. 787; *Plahn v. Dribred*, 36 Tex. Civ. App. 600; *State v. Rhoades*, 29 Wash. 61. See also *Kirkbride v. Harvey*, 139 Ala. 231; *In re Wilson*, (N. J. 1903) 55 Atl. Rep. 160.

The Parent's Right Is Subject to the Paramount Right of the State to interfere when the welfare of the children requires. *Wadleigh v. Newhall*, 136 Fed. Rep. 541.

3. Illustrations — Sufficient Grounds — Father Rendered Unfit by Inebriety. — *Million v. Million*, 106 Mo. App. 680. See also *Russner v. McMillan*, 37 Wash. 416.

By Abandonment. — *Power v. Power*, 66 N. J. Eq. 320.

Father and Mother Both Immoral Persons. — *Richardson v. Richardson*, 36 Wash. 272.

1039. 1. Grounds Held Insufficient — Poverty and Inability to Provide Comforts for Child. — *Matter of Salter*, 142 Cal. 412; *Dunkin v. Seifert*, 123 Iowa 64.

Father Sentenced to Imprisonment for Theft. — *A. C. v. B. C.*, Sc. Ct. of Sess. 5 F. 108.

2. Where Mother, by Reason of Unfitness, Deprived of Child's Custody. — *De Lemos's Application*, 143 Cal. 313; *Hadley v. Forrest*, 112 Iowa 125. See also *Ward v. Ward*, 34 Tex. Civ. App. 104.

Mother Lewd and Abandoned Woman. — *Kirkland v. Canty*, 122 Ga. 261.

Wife's Desertion of Family. — *Taylor v. Taylor*, 103 Va. 750.

3. Agreement of Parent Awarding Custody Revocable. — *Modern Woodmen of America v. Hester*, 66 Kan. 129; *Carey v. Hertel*, 37 Wash. 27; *Fletcher v. Hickman*, 50 W. Va. 244. See also *Plahn v. Dribred*, 36 Tex. Civ. App. 600; *But compare Monk v. McDaniel*, 116 Ga. 108; *Ring v. Weinman*, 116 Ga. 798.

Contra — Agreement of Parent Awarding Custody Irrevocable. — *Lamar v. Harris*, 117 Ga. 993.

4. Parent's Right to Child's Service and Earnings — Arkansas. — See *King v. Moore*, 72 Ark. 469.

Georgia. — *Chastain v. Johns*, 120 Ga. 970.

Kansas. — *Kansas City v. Siese*, (Kan. 1905) 80 Pac. Rep. 626. See also *Ping Min., etc., Co. v. Grant*, 68 Kan. 732.

Minnesota. — *Bredeson v. C. A. Smith Lumber Co.*, 91 Minn. 317.

Missouri. — *Scamell v. St. Louis Transit Co.*, 103 Mo. App. 504; *Eickhoff v. Sedalia, etc., R. Co.*, 106 Mo. App. 541.

Nebraska. — *In re Thomsen*, (Neb. 1901) 95 N. W. Rep. 805.

New Hampshire. — *Crowley v. Crowley*, 72 N. H. 241.

New Jersey. — *Callaghan v. Lake Hopatcong Ice Co.*, 69 N. J. L. 100.

New York. — *Nemorofskie v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 463; *People v. Rubens*, (County Ct.) 92 N. Y. Supp. 121.

Rhode Island. — *McGarr v. National, etc., Worsteds Mills*, 24 R. I. 447, 96 Am. St. Rep. 749.

Texas. — *Galveston, etc., R. Co. v. Jackson*, 31 Tex. Civ. App. 342.

Washington. — *Daly v. Everett Pulp, etc., Co.*, 31 Wash. 252.

As to the Child's Duty to Support His Parent see *Falls v. Jones*, 107 Mo. App. 357; *Belknap v. Whitmire*, 43 Oregon 75; and the title POOR AND POOR LAWS, 1015. 4 *et seq.*

1040. 1. Parent's Right to Recover Wages. — *Blivin v. Wheeler*, 25 R. I. 313; *Galveston, etc., R. Co. v. Jackson*, 31 Tex. Civ. App. 342. See also *King v. Moore*, 72 Ark. 469.

1041. 1. When Child Authorized to Contract for and Collect Wages. — *Ping Min., etc., Co. v. Grant*, 68 Kan. 732. See also *Berla v. Meisel*, (N. J. 1902) 52 Atl. Rep. 909.

2. Express Agreement Relinquishing Right to Child's Services and Earnings. — *McGarr v. National, etc., Worsteds Mills*, 24 R. I. 447, 96 Am. St. Rep. 749. See also *Crowley v. Crowley*, 72 N. H. 241.

1042. 1. Neglect or Refusal to Furnish Child with Home and Maintenance. — See *Scamell v. St. Louis Transit Co.*, 103 Mo. App. 504.

4. Right of Widowed Mother in Child's Services, Etc. — *Scamell v. St. Louis Transit Co.*, 103 Mo. App. 504; *McGarr v. National, etc., Worsteds Mills*, 24 R. I. 447, 96 Am. St. Rep. 749. See also *Eickhoff v. Sedalia, etc., R. Co.*, 106 Mo. App. 541; *In re Thomsen*, (Neb. 1901) 95 N. W. Rep. 805.

6. Entitled Only While Child Provided for by Her. — *Scamell v. St. Louis Transit Co.*, 103 Mo. App. 504; *Blivin v. Wheeler*, 25 R. I. 313.

1043. 1. Right of Stepfather. — At common law the remarriage of the mother vested in the stepfather the right to the earnings of his wife's minor children. *Eickhoff v. Sedalia, etc., R. Co.*, 106 Mo. App. 541.

1044. 5. Rights as to Property of Child — b. PROPERTY OVER WHICH PARENT HAS NO CONTROL. — See note 1.

6. Right to Recover for Injury to Child — a. RULE STATED. — See notes 3, 4.

1045. • See notes 1, 3.

1044. 1. Parent Without Right to Child's Property. — While the father has no right to receive moneys belonging to his minor children, yet he may take the necessary steps to protect their property where they have no legal guardian. *Varnado v. Lewis*, 113 La. 72.

3. Right of Minor Child to Recover for Personal Injuries — United States. — Delaware, etc., R. Co. v. Devore, (C. C. A.) 114 Fed. Rep. 155.

Delaware. — *Kennedy v. Delaware Cotton Co.*, 4 Penn. (Del.) 477.

Georgia. — See *Robinson v. Georgia R.*, etc., Co., 117 Ga. 168, 97 Am. St. Rep. 156.

Illinois. — *Chicago City R. Co. v. Tuohy*, 196 Ill. 410; *Chicago Screw Co. v. Weiss*, 203 Ill. 541.

Kentucky. — See *Smith v. Middleton*, 112 Ky. 588, 99 Am. St. Rep. 308.

Minnesota. — *Bredeson v. C. A. Smith Lumber Co.*, 91 Minn. 317.

Missouri. — *Eickhoff v. Sedalia*, etc., R. Co., 106 Mo. App. 541.

Nebraska. — See *Omaha v. Bowman*, 63 Neb. 333.

New York. — *Wessel v. Gerken*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 221; *Lafferty v. Third Ave. R. Co.*, 85 N. Y. App. Div. 592, affirmed 176 N. Y. 594; *Nemorofskie v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 463; *Fagan v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 340. See also *O'Shea v. Lehigh Valley R. Co.*, 79 N. Y. App. Div. 254.

North Carolina. — *Jeffries v. Seaboard Air Line R. Co.*, 129 N. Car. 236; *Snider v. Newell*, 132 N. Car. 614.

Oregon. — *Macdonald v. O'Reilly*, 45 Oregon 589.

Pennsylvania. — *Kelly v. Pittsburg*, etc., Traction Co., 204 Pa. St. 623. See also *Pollock v. Pennsylvania R. Co.*, 210 Pa. St. 631, 105 Am. St. Rep. 843.

Texas. — *San Antonio*, etc., R. Co. v. Skidmore, 27 Tex. Civ. App. 329; *Texas*, etc., R. Co. v. Kingston, 30 Tex. Civ. App. 24; *Galveston*, etc., R. Co. v. Jackson, 31 Tex. Civ. App. 342; *Gulf*, etc., R. Co. v. Hall, 34 Tex. Civ. App. 535; *Gulf*, etc., R. Co. v. Grisom, 36 Tex. Civ. App. 630.

Washington. — *Birkel v. Chandler*, 26 Wash. 241.

Infant May Recover for Physical or Mental Pain. — *St. Louis South Western R. Co. v. Gregory*, (Tex. Civ. App. 1903) 73 S. W. Rep. 28.

4. Parent's Right to Recover for Injury to Child — Alabama. — *Dimmick Pipe Works v. Wood*, 139 Ala. 282; *Bube v. Birmingham R.*, etc., Co., 140 Ala. 276.

Illinois. — *Brookside Coal Min. Co. v. Dolph*, 101 Ill. App. 174.

Kentucky. — *Thomas v. Maysville Gas Co.*, 112 Ky. 569; *Illinois Cent. R. Co. v. Henon*, 68 S. W. Rep. 456, 24 Ky. L. Rep. 298.

Louisiana. — *Le Blanc v. Sweet*, 107 La. 355, 90 Am. St. Rep. 303.

Massachusetts. — *Cook v. Bartlett*, 179 Mass. 576.

Minnesota. — *Nyman v. Lynde*, 93 Minn. 257; *Bredeson v. C. A. Smith Lumber Co.*, 91 Minn. 317.

Missouri. — *Brunke v. Missouri*, etc., Telephone Co., 112 Mo. App. 623.

New Jersey. — *Callaghan v. Lake Hopatcong Ice Co.*, 69 N. J. L. 100.

New York. — *Fagan v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 340.

North Carolina. — *Willeford v. Bailey*, 132 N. Car. 402.

Oregon. — *Schleiger v. Northern Terminal Co.*, 43 Oregon 10, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1044.

Pennsylvania. — *Kelly v. Pittsburg*, etc., Traction Co., 204 Pa. St. 623; *Haggerty v. Pittston*, 17 Pa. Super. Ct. 151.

Tennessee. — *Central Mfg. Co. v. Cotton*, 108 Tenn. 63.

Texas. — *Gulf*, etc., R. Co. v. Hall, 34 Tex. Civ. App. 535; *St. Louis South Western R. Co. v. Shiftlet*, (Tex. Civ. App. 1904) 84 S. W. Rep. 247.

Utah. — *Corbett v. Oregon Short Line R. Co.*, 25 Utah 449.

Stepfather May Recover. — *Wessel v. Gerken*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 221.

The Father May Estop Himself to Recover by instigating and participating in a previous suit brought by his minor son. *Daly v. Everett Pulp*, etc., Co., 31 Wash. 252.

1045. 1. Theory of Recovery — Loss of Services — Alabama. — *Dimmick Pipe Works v. Wood*, 139 Ala. 282; *Bube v. Birmingham R.*, etc., Co., 140 Ala. 276.

Illinois. — *Brookside Coal Min. Co. v. Dolph*, 101 Ill. App. 174.

Kentucky. — *Illinois Cent. R. Co. v. Henon*, 68 S. W. Rep. 456, 24 Ky. L. Rep. 298.

Minnesota. — *Bredeson v. C. A. Smith Lumber Co.*, 91 Minn. 317.

Missouri. — *Eickhoff v. Sedalia*, etc., R. Co., 106 Mo. App. 541. See also *Scamell v. St. Louis Transit Co.*, 103 Mo. App. 504.

New Jersey. — *Callaghan v. Lake Hopatcong Ice Co.*, 69 N. J. L. 100.

New York. — *Wessel v. Gerken*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 221.

Oregon. — *Schleiger v. Northern Terminal Co.*, 43 Oregon 10, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1044 [1045].

Pennsylvania. — *Kelly v. Pittsburg*, etc., Traction Co., 204 Pa. St. 623.

Tennessee. — *Central Mfg. Co. v. Cotton*, 108 Tenn. 63.

Texas. — *St. Louis South Western R. Co. v. Gregory*, (Tex. Civ. App. 1903) 73 S. W. Rep. 28.

Washington. — *Birkel v. Chandler*, 26 Wash. 241. See also *Daly v. Everett Pulp*, etc., Co., 31 Wash. 252.

3. Rule in United States as to Parent's Right of Recovery. — *Cook v. Bartlett*, 179 Mass. 576; *Fagan v. Interurban St. R. Co.*, (Supm. Ct.

- 1046.** *b. WHICH PARENT ENTITLED* — (1) *Father*. — See note 8.
 (2) *Mother*. — See note 11.
- 1047.** See note 2.
- c. MEASURE OF DAMAGES* — (1) *General Rule*. — See note 4.
- 1048.** See note 1.
 If the Child Dies in Consequence of the Injury. — See note 3.
 (2) *Prospective Diminution of Laboring Capacity*. — See note 4.
- 1049.** *III. DUTIES OF PARENT* — 1. *Maintenance* — *a. DUTY OF PARENT TO SUPPORT CHILD* — (1) *In General*. — See notes 3, 4, 5.
- 1050.** *Statutory Provisions*. — See note 2.
 (2) *Duty of Mother*. — See note 4.
- 1051.** (3) *Stepchildren*. — See note 1.

App. T.) 85 N. Y. Supp. 340; Corbett v. Oregon Short Line R. Co., 25 Utah 449.

1046. 8. *Right of Father to Sue*. — Kelly v. Pittsburg, etc., Traction Co., 204 Pa. St. 623.

11. *Right of Widowed Mother to Recover for Injury to Child*. — Southern Indiana R. Co. v. Moore, 34 Ind. App. 154; Scamell v. St. Louis Transit Co., 103 Mo. App. 504; McGarr v. National, etc., Worsted Mills, 24 R. I. 447, 96 Am. St. Rep. 749.

In the Case of Remarriage of the widow the right passed, at common law, to the stepfather. Eickhoff v. Sedalia, etc., R. Co., 106 Mo. App. 541.

The Pennsylvania Rule is that a widow has no right to sue for injuries to her minor child not resulting in death. Kelly v. Pittsburg, etc., Traction Co., 204 Pa. St. 623.

Under the Louisiana Statute by which the right of action to recover damage for the death of the minor child survives in the "father and mother," or "either of them," it was held that a mother who has secured a divorce and to whom has been awarded the custody of minor children may maintain such action alone. Wilson v. Banner Lumber Co., 108 La. 590.

1047. 2. *Father's Right of Action Does Not Survive*. — See McGarr v. National, etc., Worsted Mills, 24 R. I. 447, 96 Am. St. Rep. 749, where the father's right of action was held to survive to the mother, it appearing that there was an arrangement between them that the mother should receive the minor's earnings.

4. *Measure of Damages in General*. — Bube v. Birmingham R., etc., Co., 140 Ala. 276; Scamell v. St. Louis Transit Co., 103 Mo. App. 504; McGarr v. National, etc., Worsted Mills, 24 R. I. 447, 96 Am. St. Rep. 749; Central Mfg. Co. v. Cotton, 108 Tenn. 63. See also Brede-son v. C. A. Smith Lumber Co., 91 Minn. 317; Corbett v. Oregon Short Line R. Co., 25 Utah 449.

Expenses Occasioned by Injury. — Illinois Cent. R. Co. v. Henon, 68 S. W. Rep. 456, 24 Ky. L. Rep. 298; Scamell v. St. Louis Transit Co., 103 Mo. App. 504; Callaghan v. Lake Hopatcong Ice Co., 69 N. J. L. 100; St. Louis South Western R. Co. v. Gregory, (Tex. Civ. App. 1903) 73 S. W. Rep. 28.

No Damages for Loss of Society of Child. — McGarr v. National, etc., Worsted Mills, 24 R. I. 447, 96 Am. St. Rep. 749; Schnable v. Providence Public Market, 24 R. I. 477. *Contra*, Corbett v. Oregon Short Line R. Co., 25 Utah 449.

1048. 1. *Punitive Damages Not Recoverable*. — Bube v. Birmingham R., etc., Co., 140 Ala. 276.

3. *Injuries Resulting in Death of Child*. — Southern Indiana R. Co. v. Moore, 34 Ind. App. 154; Le Blanc v. Sweet, 107 La. 355, 90 Am. St. Rep. 303; Barnes v. Columbia Lead Co., 107 Mo. App. 608; Brunke v. Missouri, etc., Telephone Co., 112 Mo. App. 623; Schleiger v. Northern Terminal Co., 43 Oregon 10; Corbett v. Oregon Short Line R. Co., 25 Utah 449. Compare St. Louis South Western R. Co. v. Shiflet, (Tex. Civ. App. 1904) 84 S. W. Rep. 247.

4. *Prospective Loss of Earnings*. — Le Blanc v. Sweet, 107 La. 355, 90 Am. St. Rep. 303; Gulf, etc., R. Co. v. Hall, 34 Tex. Civ. App. 535. See also St. Louis South Western R. Co. v. Gregory, (Tex. Civ. App. 1903) 73 S. W. Rep. 28; Scamell v. St. Louis Transit Co., 103 Mo. App. 504.

1049. 3. *Parent Bound to Support Child*. — Leibold v. Leibold, 158 Ind. 60; Eldred v. Eldred, 62 Neb. 613; Hazard v. Taylor, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 774; Cory v. Cook, 24 R. I. 421. See also State v. Miller, 3 Penn. (Del.) 518; McGarr v. National, etc., Worsted Mills, 24 R. I. 447, 96 Am. St. Rep. 749.

4. *Duty to Support Child Moral Obligation Only*. — See Trayer v. Setzer, (Neb. 1904) 101 N. W. Rep. 989.

5. *Father Legally Bound to Support Child*. — Leach v. Williams, 30 Ind. App. 415, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1049; Scamell v. St. Louis Transit Co., 103 Mo. App. 504; Lukowski v. Lukowski, 108 Mo. App. 204; Matter of Davis, 98 N. Y. App. Div. 546, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1049; People v. Rubens, (County Ct.) 92 N. Y. Supp. 121; Fletcher v. Hickman, 50 W. Va. 244. See also Ostheimer v. Ostheimer, 125 Iowa 523.

No Legal Duty as to Illegitimate Child. — State v. Tieman, 32 Wash. 294.

1050. 2. *Statutory Duty to Support*. — State v. Miller, 3 Penn. (Del.) 518; Finn v. Adams, (Mich. 1904) 101 N. W. Rep. 533.

4. *Liability of Mother After Death of Father*. — Modern Woodmen of America v. Hester, 66 Kan. 129; Scamell v. St. Louis Transit Co., 103 Mo. App. 504; McGarr v. National, etc., Worsted Mills, 24 R. I. 447, 96 Am. St. Rep. 740.

1051. 1. *Stepfather Liable When Standing in Loco Parentis*. — Eickhoff v. Sedalia, etc., R. Co., 106 Mo. App. 541.

1051. (4) *Allowance Out of Child's Estate.* — See note 5.

1052. (5) *Effect of Divorce or Separation.* — See note 1.

Where a Wife Leaves Her Husband. — See note 3.

(6) *Enforcement of Duty.* — See note 5.

(7) *Criminal Liability for Failure to Support.* — See note 8.

1053. *b. LIABILITY OF PARENT TO THIRD PERSONS — (1) In General*

— *Liability on Contract.* — See note 2.

Inferred or Implied Authority or Promise. — See note 4.

1054. *Conflict of Authority.* — See note 2.

Where Father Not in Default. — See note 4.

1055. (2) *Where Child Is Living Away from Home.* — See note 7.

1056. (3) *Adult Children.* — See note 5.

(4) *What Are Necessaries.* — See note 8.

1057. 3. *Education — a. IN GENERAL.* — See note 4.

IV. *LIABILITIES OF PARENT — 1. For Torts of Child — The General*

Rule. — See note 11.

1058. See note 2.

1059. V. *AGENCY.* — See note 2.

VI. *EMANCIPATION — 3. By Consent of Parent — a. GENERAL*

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1051. 5. *Allowance Out of Child's Estate.* — *Clay v. Clay*, (Ky. 1905) 87 S. W. Rep. 807; *McGeary v. McGeary*, 181 Mass. 539. See also *Matter of Davis*, 98 N. Y. App. Div. 546.

Past Maintenance. — *Hedges v. Hedges*, (Ky. 1902) 67 S. W. Rep. 835.

1052. 1. *Effect of Divorce.* — *Selfridge v. Paxton*, 145 Cal. 713; *Ostheimer v. Ostheimer*, 125 Iowa 523; *Miles v. Miles*, 65 Kan. 676; *Hall v. Hall*, (Ky. 1903) 77 S. W. Rep. 668; *Brown v. Brown*, 135 Mich. 141. See also *Israel v. Israel*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 335.

3. *Wife Leaving Husband for Cause.* — *Leibold v. Leibold*, 158 Ind. 60.

5. *Duty to Support Child Not Enforceable in Equity.* — *Compare Leibold v. Leibold*, 158 Ind. 60; *Eldred v. Eldred*, 62 Neb. 613.

8. *Criminal Liability.* — *State v. Beers*, (Conn. 1904) 58 Atl. Rep. 745; *Dalton v. State*, 118 Ga. 196; *Baldwin v. State*, 118 Ga. 328; *State v. Block*, (Mo. App. 1904) 82 S. W. Rep. 1103; *State v. Peabody*, 25 R. I. 178, 544. See also *People v. Rubens*, (County Ct.) 92 N. Y. Supp. 121.

Statutes — Abandonment — Cruelty. — *Richie v. Com.*, (Ky. 1901) 64 S. W. Rep. 979; *Williams v. State*, 121 Ga. 195; *Brown v. State*, 122 Ga. 568.

Refusing Medicine to Sick Child. — Under the Georgia statute making it a misdemeanor to deprive a child of "necessary sustenance," a parent cannot be punished for refusal to permit the administering of medicine to his sick child. *Justice v. State*, 116 Ga. 605.

1053. 2. *Obligation to Support Consideration for Promise.* — *Trayer v. Setzer*, (Neb. 1904) 101 N. W. Rep. 989, applying the rule where the child was a bastard.

4. *Express Authority or Promise Unnecessary.* — See *Selfridge v. Paxton*, 145 Cal. 713.

1054. 2. *Authority or Promise Implied from Omission of Duty by Parent.* — *Finn v. Adams*, (Mich. 1904) 101 N. W. Rep. 533. See also *Humphreys v. Bush*, 118 Ga. 628; *Cory v. Cook*, 24 R. I. 421.

4. *No Liability Where Father Is Not in Default.* — *Cory v. Cook*, 24 R. I. 421.

1055. 7. *Remaining Abroad Against Father's Wish.* — *Compare Bradley v. Keen*, 101 Ill. App. 519, holding that a father may be liable for necessities furnished to his minor child who left home with his consent but remains abroad against such consent.

1056. 5. *In Quebec* it seems that a father is liable for goods sold to his adult daughter without authorization by himself where it is proved that the goods were necessary for her proper support, and that she was unable to earn her own support by her work, and was not possessed of any property or revenue out of which she could provide for herself. *Simard v. Baller*, 18 Quebec Super. Ct. 287.

8. *What Are Necessaries.* — See *Leach v. Williams*, 30 Ind. App. 415.

1057. 4. See *Scamell v. St. Louis Transit Co.*, 103 Mo. App. 504.

Question for Jury. — Whether schooling furnished to a child on the credit of a father who has abandoned her was reasonably necessary presents a question for the jury. *Cory v. Cook*, 24 R. I. 421.

11. *Parent Not Generally Liable.* — *Chastain v. Johns*, 120 Ga. 979, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1057.

When Not Liable for Injury Caused by Firearms in Hands of Minor. — *Miller v. Meche*, 111 La. 143; *Taylor v. Seil*, 120 Wis. 32.

Liability for Torts of Insane Adult Son. — See *Theroux v. Carrier*, 21 Quebec Super. Ct. 156.

1058. 2. *When Parent Liable.* — *Chastain v. Johns*, 120 Ga. 979, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1057 and supporting the whole text paragraph.

1059. 2. *Agency.* — *Hickox v. Bacon*, 17 S. Dak. 563; *Grotjan v. Rice*, 124 Wis. 253.

8. *Emancipation by Agreement.* — *Chicago Screw Co. v. Weiss*, 203 Ill. 541, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1059; *Grotjan v. Rice*, 124 Wis. 253.

Definition of Emancipation. — *Emancipation*

1059. *b.* IMPLIED FROM CIRCUMSTANCES. — See note 9.

1060. See note 1.

4. By Marriage — Marriage of Daughter. — See note 7.

1061. **5.** By Enlistment in Military or Naval Service. — See note 1.

6. Wages of Emancipated Child — Rights of Parent's Creditors. — See note 3.

VII. PAYMENT FOR SERVICES BETWEEN PARENT AND ADULT CHILD

— **1.** Where Parent and Child Constitute One Family. — See note 6.

1063. See note 1.

2. Where Parent and Child Do Not Constitute One Family. — See note 3.

1064. PARESIS. — See note 2.

is the voluntary surrender of all right to the care, custody, and earnings of a child, and the renunciation of all future parental duties. *Carthage v. Canton*, 97 Me. 473.

1059. **9.** Emancipation Implied from Conduct and Circumstances. — *Chicago Screw Co. v. Weiss*, 203 Ill. 541, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1059; *Carthage v. Canton*, 97 Me. 473; *Crowley v. Crowley*, 72 N. H. 241; *Berla v. Meisel*, (N. J. 1902) 52 Atl. Rep. 999; *Grotjan v. Rice*, 124 Wis. 253.

1060. **1.** Failure to Support Does Not Show Emancipation. — *Carthage v. Canton*, 97 Me. 473.

7. Consent of Parent to Marriage Necessary. — *Guillebert v. Grenier*, 107 La. 614.

1061. **1.** Minor Has No Right to Enlist Against Parent's Wishes. — See *Ex p. Reaves*, (C. C. A.) 126 Fed. Rep. 127, reversing 121 Fed. Rep. 848.

3. Emancipated Child Entitled to His Own Wages. — *Grotjan v. Rice*, 124 Wis. 253. See also *Chicago Screw Co. v. Weiss*, 203 Ill. 541.

6. Presumption Against Payment. — *Borum v.*

Bell, 132 Ala. 85; *Terry v. Warder*, 78 S. W. Rep. 154, 25 Ky. L. Rep. 1486; *Falls v. Jones*, 107 Mo. App. 357; *Stallings v. Ellis*, 136 N. Car. 71, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1061; *Wessinger v. Roberts*, 67 S. Car. 243; *Nicholas v. Nicholas*, 100 Va. 660.

1063. **1.** Facts and Circumstances Determine Question of Payment. — *Stallings v. Ellis*, 136 N. Car. 71, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1061 [1063]. See also *Wessinger v. Roberts*, 67 S. Car. 243.

3. Compare *Wessinger v. Roberts*, 67 S. Car. 243, wherein the court, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1063, held that the presumption against payment is not destroyed by the fact that the parent and child were living separate and apart, but that such fact may give color and support to evidence of other circumstances tending to establish an implied contract.

1064. **2.** Paresis. — See *Philips v. Philips*, 77 N. Y. App. Div. 113.

PARKS AND PUBLIC SQUARES.

1065. I. DEFINITIONS — **1.** Parks — *a.* IN ENGLISH LAW. — See notes 1, 3.

1066. *b.* IN UNITED STATES LAW. — See notes 1, 2.

II. TAKING LAND FOR PARKS. — See note 8.

1067. III. TITLE TO PARK LANDS. — See notes 5, 8.

IV. ASSESSMENTS — Statutes Authorizing the Establishment of Parks and Squares. — See note 12.

1070. VI. CONTROL OF PARKS AND SQUARES. — See notes 8, 9, 10.

1065. **1.** Park Defined. — See *Laird v. Pittsburg*, 205 Pa. St. 1.

3. Vert, Venison, and Inclosure. — *Pease v. Courtney*, (1904) 2 Ch. 503.

1066. **1.** A Public Park may be defined as a public pleasure ground. *Laird v. Pittsburg*, 205 Pa. St. 1.

2. *Kurtz v. Clausen*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 105. See also *Hartford v. Maslen*, 76 Conn. 599; *Ewing v. Minneapolis*, 86 Minn. 51; *Matter of Rochester*, 102 N. Y. App. Div. 181.

8. Eminent Domain. — *Albright v. Sussex*

County Lake, etc., Commission, 68 N. J. L. 523; *Matter of Riverside Park*, 95 N. Y. App. Div. 552; *Laird v. Pittsburg*, 205 Pa. St. 1.

1067. **5.** Purchase — Title in Commissioners. — *Theurer v. People*, 211 Ill. 296.

8. Condemnation — Fee in City. — *Driscoll v. New Haven*, 75 Conn. 92.

12. Assessments. — *Matthews v. Kimball*, 70 Ark. 451.

1070. **8.** Delegation of Control. — *Hartford v. Maslen*, 76 Conn. 599; *Chicago v. Carpenter*, 201 Ill. 402.

9. *Hartford v. Maslen*, 76 Conn. 599.

1071. See notes 4, 6.

VII. PARK COMMISSIONERS — 1. Nature of Commission. — See notes 7, 10.

2. Powers. — See notes 11, 13, 14.

1072. **VIII. BUILDINGS IN PARKS AND SQUARES** — General Rule as to Parks. — See note 2.

1074. **X. NUISANCES IN PARKS AND SQUARES** — Injunction. — See notes 1, 2.

XI. LIABILITY FOR INJURIES RECEIVED IN PARKS AND SQUARES — The General Rule. — See note 3.

1075. **PARLIAMENTARY LAW.** — See note 8.

1070. 10. See *Sherburne v. Portsmouth*, 72 N. H. 539.

1071. 4. Right of Access. — *Brodline v. Revere*, 182 Mass. 598.

Protection from Encroachments of Travel. — See *Martin v. Williamsport*, 208 Pa. St. 590.

6. *Guttery v. Glenn*, 201 Ill. 275.

7. Nature of Park Board. — *Theurer v. People*, 211 Ill. 296; *American Steel House Co. v. Willcox*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 571. See also *Brodline v. Revere*, 182 Mass. 598; *People v. Green*, 85 N. Y. App. Div. 400.

10. Appointment of Commissioner. — See *Atty.-Gen. v. Bolger*, 128 Mich. 355; *Ross v. Chosen Freeholders*, 69 N. J. L. 291.

11. Power to Receive Grants. — *Barney v. Lincoln Park*, 203 Ill. 397.

Power to Set Out Trees, Etc. — *Guttery v. Glenn*, 201 Ill. 275.

No Power to Alienate Park Lands. — *Driscoll v. New Haven*, 75 Conn. 92.

13. See *People v. Green*, 85 N. Y. App. Div. 400.

14. *Theurer v. People*, 211 Ill. 296. See also *Chicago v. Carpenter*, 201 Ill. 402.

1072. 2. When Buildings in Park Public Nuisance. — *Fessler v. Union*, (N. J. 1903) 56 Atl. Rep. 272.

1074. 1. Injunctive Relief. — *Fessler v. Union*, (N. J. 1903) 56 Atl. Rep. 272; *Bryant v. Logan*, 56 W. Va. 141.

2. See *Bryant v. Logan*, 56 W. Va. 141.

3. Liability for Injuries. — *Blair v. Granger*, 24 R. I. 17.

1075. 8. *Landes v. State*, 160 Ind. 479.

PAROL EVIDENCE.

BY J. SIMPSON.

1078. **I. GENERAL STATEMENT OF RULE** — SCOPE OF TITLE — Merger of Prior and Contemporaneous Agreements. — See note 2.

1079. **II. TWO DIFFERENT VIEWS OF RULE** — 1. View that Rule Is One of Substantive Law. — See note 2.

Merger of Prior and Contemporaneous Negotiations. — See note 4.

1078. 2. Merger of Verbal Agreements. — *Rucker v. Bolles*, (C. C. A.) 133 Fed. Rep. 858; *Union Selling Co. v. Jones*, (C. C. A.) 128 Fed. Rep. 672; *Harrington v. F. W. Brockman Commission Co.*, 107 Mo. App. 418; *Sims v. Greenfield, etc.*, R. Co., 102 Mo. App. 29; *Mefford v. Sell*, (Neb. 1902) 92 N. W. Rep. 148; *Lozier v. Hill*, (N. J. 1904) 59 Atl. Rep. 234; *Hatfield v. Thomas Iron Co.*, 208 Pa. St. 478; *Streator v. Paxton*, 201 Pa. St. 135; *Minnesota Sandstone Co. v. Clark*, 35 Wash. 466.

Merger of Written Negotiations. — *U. S. v. Conkling*, (C. C. A.) 135 Fed. Rep. 508.

1079. 2. View that Rule Is One of Substantive Law. — *Pitcairn v. Philip Hiss Co.*, (C. C. A.) 125 Fed. Rep. 110, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1079.

4. Presumption as to Merger of Negotiations in Writing — *United States*. — *Kessler v. Perilloux*, (C. C. A.) 132 Fed. Rep. 903. See also *Kilby Mfg. Co. v. Hinchman-Renton Fireproofing Co.*, (C. C. A.) 132 Fed. Rep. 957.

Alabama. — *Sullivan v. Louisville, etc., R. Co.*,

138 Ala. 650; *Forbes v. Taylor*, 139 Ala. 286; *Bomar v. Rosser*, 131 Ala. 215.

Colorado. — *Nesmith v. Martin*, 32 Colo. 77; *Oil Creek Gold Min. Co. v. Fairbanks*, 19 Colo. App. 142; *Flick v. Hahn's Peak, etc., Canal, etc.*, Min. Co., 16 Colo. App. 485.

Connecticut. — *New Idea Pattern Co. v. Whelan*, 75 Conn. 455.

District of Columbia. — *Owens v. Wilkinson*, 20 App. Cas. (D. C.) 51.

Georgia. — *Butler v. Standard Guaranty, etc., Co.*, 122 Ga. 371; *Arnold v. Malsby*, 120 Ga. 586; *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124.

Idaho. — *Tyson v. Neill*, 8 Idaho 603.

Illinois. — *Silberschmidt v. Silberschmidt*, 112 Ill. App. 58; *Smith v. Rust*, 112 Ill. App. 84; *Union Special Sewing Mach. Co. v. Lockwood*, 110 Ill. App. 387; *Borggard v. Gale*, 107 Ill. App. 128, affirmed 205 Ill. 511; *Colwell v. Brown*, 103 Ill. App. 22; *Telluride Power Transmission Co. v. Crane Co.*, 103 Ill. App. 647, affirmed 208 Ill. 218; *Rector v. Hartford*

1080. 2. Considered as Rule of Evidence — a. AT LAW. — See note 2.

Deposit Co., 102 Ill. App. 554; *Schneider v. Sulzer*, 212 Ill. 87; *Osgood v. Skinner*, 211 Ill. 229; *Davis v. Fidelity F. Ins. Co.*, 208 Ill. 375; *Ellis v. Conrad Seipp Brewing Co.*, 207 Ill. 291; *Christopher, etc., Architectural Iron, etc., Co. v. Yeager*, 202 Ill. 486; *Rubel v. Title Guarantee, etc., Co.*, 199 Ill. 110.

Indiana. — *Roehrs v. Timmons*, 28 Ind. App. 578; *Ayres v. Blevins*, 28 Ind. App. 101; *Ralya v. Atkins*, 157 Ind. 331.

Kentucky. — *Lanham v. Louisville, etc., R. Co.*, (Ky. 1905) 86 S. W. Rep. 680; *Singer Mfg. Co. v. Witt*, (Ky. 1904) 80 S. W. Rep. 1124; *Johnson v. Zweigart*, 114 Ky. 545; *Linn v. East Eagle, etc., Turnpike Co.*, (Ky. 1902) 70 S. W. Rep. 401.

Michigan. — *Wolff v. Alpena Nat. Bank*, 131 Mich. 634; *Sax v. Detroit, etc., R. Co.*, 129 Mich. 502.

Missouri. — *Poindexter v. McDowell*, 110 Mo. App. 233; *Pickett v. Mercer*, 106 Mo. App. 689; *Neville v. Hughes*, 104 Mo. App. 455; *Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co.*, 177 Mo. 559; *First State Bank v. Noel*, 94 Mo. App. 498; *Walther v. Stampfli*, 91 Mo. App. 398. See also *Laclede Constr. Co. v. T. J. Moss Tie Co.*, 185 Mo. 25.

Montana. — *Riddell v. Peck-Williamson Heating, etc., Co.*, 27 Mont. 44; *Armington v. Stelle*, 27 Mont. 13, 94 Am. St. Rep. 811.

Nebraska. — *Nebraska Land, etc., Co. v. Trauerman*, (Neb. 1904) 98 N. W. Rep. 37; *Bradley v. Basta*, (Neb. 1904) 98 N. W. Rep. 697; *Norfolk Beet Sugar Co. v. Berger*, (Neb. 1901) 95 N. W. Rep. 336; *Stanisics v. McMurry*, 64 Neb. 761.

New Jersey. — *Drishman v. McManemin*, 68 N. J. L. 337.

New York. — *Dady v. O'Rourke*, 172 N. Y. 447; *Van Pub. Co. v. Westinghouse*, 72 N. Y. App. Div. 121; *Byars v. Bennington, etc., R. Co.*, 99 N. Y. App. Div. 34; *Liebeskind v. Moore Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 850; *Finck v. Bauer*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 218; *Gray v. Meyer*, 88 N. Y. App. Div. 359.

North Dakota. — *Johnson v. Kindred State Bank*, 12 N. Dak. 336; *Reeves v. Bruening*, 13 N. Dak. 157.

Ohio. — *J. Weller Co. v. Gordon*, 24 Ohio Cir. Ct. 407.

Oklahoma. — *Moorehead v. Davis*, 13 Okla. 166; *Liverpool, etc., Ins. Co. v. T. M. Richardson Lumber Co.*, 11 Okla. 585.

Pennsylvania. — *American Home Sav. Bank Co. v. Guardian Trust Co.*, 210 Pa. St. 320; *Vito v. Birkel*, 209 Pa. St. 206.

Rhode Island. — *Zanturjian v. Boornazian*, 25 R. I. 151.

South Carolina. — *Cape Fear Lumber Co. v. Evans*, 69 S. Car. 93.

South Dakota. — *Anderson v. Matheny*, 17 S. Dak. 225.

Texas. — *Harris-Hearin Fountain Co. v. Pressler*, 35 Tex. Civ. App. 360; *Slaughter v. De Vitt*, 30 Tex. Civ. App. 589; *Greenhill v. Hunton*, (Tex. Civ. App. 1902) 69 S. W. Rep. 440; *J. I. Case Threshing Mach. Co. v. Hall*, 32 Tex. Civ. App. 214.

Utah. — *McCall Co. v. Jennings*, 26 Utah 459.

West Virginia. — *Maupin v. Scottish Union, etc., Ins. Co.*, 53 W. Va. 557.

Wisconsin. — *Excelsior Wrapper Co. v. Mesinger*, 116 Wis. 549.

1080. 2. Rule that Parol Evidence Is Not Admissible to Vary or Contradict Writing — United States. — *Whaley v. Graham*, 122 Fed. Rep. 192; *Keith v. Parker*, 115 Fed. Rep. 397; *Levy, etc., Mule Co. v. Kauffman*, (C. C. A.) 114 Fed. Rep. 170; *Gill v. General Electric Co.*, (C. C. A.) 129 Fed. Rep. 349; *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 308.

Alabama. — *Morningstar v. Querens*, (Ala. 1904) 37 So. Rep. 825; *Blanks v. Moore*, 139 Ala. 624; *Rutter v. Hanover F. Ins. Co.*, 138 Ala. 202.

California. — *Arnold v. Arnold*, 137 Cal. 291.

Delaware. — *Gaw v. Cordrey*, 4 Penn. (Del.) 143.

Georgia. — *Bullard v. Brewer*, 118 Ga. 918; *Heard v. Tappan*, 116 Ga. 930; *Wilson v. Hinant*, 117 Ga. 46; *National Computing Scale Co. v. Eaves*, 116 Ga. 511.

Illinois. — *Wheaton v. Bartlett*, 105 Ill. App. 326; *Over v. Walzer*, 103 Ill. App. 104; *Sexton v. Barrie*, 102 Ill. App. 586; *Smith v. McEvoy*, 98 Ill. App. 330.

Indiana. — *Henry School Tp. v. Meredith*, 32 Ind. App. 607.

Iowa. — *Western Electric Co. v. Baerthel*, 127 Iowa 467; *Plano Mfg. Co. v. Eich*, (Iowa 1904) 97 N. W. Rep. 1106; *Nystuen v. Hanson*, (Iowa 1902) 91 N. W. Rep. 1071.

Kansas. — *Brown v. St. John Trust Co.*, (Kan. 1905) 80 Pac. Rep. 37; *Atchison, etc., R. Co. v. Truckett*, 67 Kan. 26; *Robieson v. Royce*, 63 Kan. 886, 66 Pac. Rep. 646.

Kentucky. — *Voss v. Schebeck*, (Ky. 1903) 76 S. W. Rep. 21.

Louisiana. — *Bagley v. Rose Hill Sugar Co.*, 111 La. 249; *Welsh's Succession*, 111 La. 801; *Clark v. Hedden*, 109 La. 147; *Ackerman v. Peters*, 113 La. 156.

Maine. — *McLeod v. Johnson*, 96 Me. 271.

Massachusetts. — *Finnigan v. Shaw*, 184 Mass. 112; *Taylor v. Goding*, 182 Mass. 231; *Maynard v. Weeks*, 181 Mass. 368; *Tripp v. Smith*, 180 Mass. 122.

Michigan. — *Carter v. Weber*, (Mich. 1904) 101 N. W. Rep. 818.

Mississippi. — *Hightower v. Henry*, 85 Miss. 476; *Illinois Cent. R. Co. v. Harris*, 81 Miss. 208, 95 Am. St. Rep. 466.

Missouri. — *Connersville Buggy Co. v. Lowry*, 104 Mo. App. 186; *McCormick Harvesting Mach. Co. v. Mackey*, 100 Mo. App. 400; *Christian University v. Hoffman*, 95 Mo. App. 488; *Koffman v. Southwest Missouri Electric R. Co.*, (Mo. 1902) 68 S. W. Rep. 212; *Tufts v. Morris*, 87 Mo. App. 98.

Montana. — *Riddell v. Peck-Williamson Heating, etc., Co.*, 27 Mont. 44; *Largey v. Leggat*, 30 Mont. 148.

Nebraska. — *Aultman v. Hawk*, (Neb. 1903) 95 N. W. Rep. 695; *Stanisics v. McMurry*, 64 Neb. 761; *Peterson v. Ferbrache*, (Neb. 1903) 93 N. W. Rep. 1011; *Kummer v. Dubuque Turbine, etc., Co.*, (Neb. 1903) 93 N. W. Rep. 938.

1082. *b.* IN EQUITY. — See note 1.

1083. *c.* PENNSYLVANIA DOCTRINE. — See notes 1, 2, 3.

1084. III. LEGAL IMPORT OF CONTRACT WITHIN PROTECTION OF RULE —
1. In General. — See notes 3, 5.

1085. 3. Obligations Payable in Money. — See notes 3, 4.

New York. — *Beadleston v. Furrer*, 102 N. Y. App. Div. 544; *Cluster Gaslight Co. v. Baker*, (Supm. Ct. App. T.) 90 N. Y. Supp. 1034; *Gerry v. Siebrecht*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1034; *Eden v. Silberberg*, 89 N. Y. App. Div. 259; *Rooney v. Thomson*, (Supm. Ct. App. T.) 84 N. Y. Supp. 263; *Equitable L. Assur. Soc. v. Schum*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 657; *Townsend v. Greenwich Ins. Co.*, 86 N. Y. App. Div. 323, *affirming* (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 87; *Jackson v. Helmer*, 73 N. Y. App. Div. 134; *Block v. Stevens*, 72 N. Y. App. Div. 246; *Prosser v. Miller*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 841; *Jamestown Business College Assoc. v. Allen*, 172 N. Y. 291, 92 Am. St. Rep. 740.

North Dakota. — *Dowagiac Mfg. Co. v. Mahon*, 13 N. Dak. 516.

Ohio. — *Richards v. Hale*, 24 Ohio Cir. Ct. 468; *Grand Lodge, etc., v. Bunkers*, 23 Ohio Cir. Ct. 487.

Oregon. — *Ruckman v. Imbler Lumber Co.*, 42 Oregon 231.

Rhode Island. — *Russell v. Morgan*, 24 R. I. 134; *Kenney v. Theodore W. Foster, etc., Co.*, 25 R. I. 474.

Texas. — *Schmidt v. Brittain*, (Tex. Civ. App. 1905) 84 S. W. Rep. 677; *Moore-Cortes Canal Co. v. Gyle*, 36 Tex. Civ. App. 442; *Cauble v. Worsham*, 96 Tex. 86; *Sloan v. King*, 29 Tex. Civ. App. 599; *Bruel v. Liggett, etc., Tobacco Co.*, 29 Tex. Civ. App. 405; *Johnson v. Morton*, 28 Tex. Civ. App. 296; *De Vitt v. Kaufman County*, 27 Tex. Civ. App. 332; *Hopkins v. Woldert Grocery Co.*, (Tex. Civ. App. 1902) 66 S. W. Rep. 63; *Kalteyer v. Wipff*, (Tex. Civ. App. 1901) 65 S. W. Rep. 207; *Keller v. Liverpool, etc., Ins. Co.*, 27 Tex. Civ. App. 102. See also *Missouri, etc., R. Co. v. Harrison*, 97 Tex. 611.

Vermont. — *Rickard v. Dana*, 74 Vt. 74; *Nelson v. Godfrey*, 74 Vt. 470.

Washington. — *Ross v. Portland Coffee, etc., Co.*, 30 Wash. 647; *Hindle v. Holcomb*, 34 Wash. 336.

Wisconsin. — *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989; *Coman v. Wunderlich*, 122 Wis. 138; *Hyde v. German Nat. Bank*, 115 Wis. 170.

Canada. — *McPherson v. Moody*, 35 N. Bruns. 51.

Applicable Against Party Pleading Instrument. — Where the party who seeks to vary the terms of the instrument himself pleads it the rule applies *a fortiori*. *Kraus v. Smolen*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 463.

When the Action Is Not Based on Contract, but on tort for negligence, the rule does not apply. *International, etc., R. Co. v. McGehee*, (Tex. Civ. App. 1904) 81 S. W. Rep. 804.

Rule Not Applicable in Criminal Cases. — *People v. Walker*, 85 N. Y. App. Div. 556, *affirmed* 178 N. Y. 563.

1082. 1. Rule in Equity — United States. — *De Sola v. Pomares*, 119 Fed. Rep. 373;

Ferguson Contracting Co. v. Manhattan Trust Co., (C. C. A.) 118 Fed. Rep. 791; *Dennis v. Slyfield*, (C. C. A.) 117 Fed. Rep. 474; *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U. S. 308.

Arkansas. — *Tisdale v. Mallett*, 73 Ark. 431.

Indiana. — *Coppes v. Union Nat. Sav., etc., Assoc.*, (Ind. App. 1903) 67 N. E. Rep. 1022.

Kansas. — *Thisler v. Mackey*, 65 Kan. 464.

Kentucky. — *Danville, etc., Turnpike Road Co. v. Lincoln County Fiscal Ct.*, (Ky. 1903) 77 S. W. Rep. 379.

Minnesota. — *Calmenson v. Equitable Mut. F. Ins. Co.*, 92 Minn. 390.

New Jersey. — *Mott v. Rutter*, (N. J. 1903) 54 Atl. Rep. 159; *Russell v. Russell*, 63 N. J. Eq. 282, *affirming* 60 N. J. Eq. 282; *Camden, etc., R. Co. v. Adams*, 62 N. J. Eq. 656.

New York. — *Uihlein v. Matthews*, 172 N. Y. 154.

Texas. — *W. C. Belcher Land Mortg. Co. v. Norris*, 34 Tex. Civ. App. 111.

See also *Tobriner v. White*, 19 App. Cas. (D. C.) 163.

1083. 1. Rule in Pennsylvania. — *Butler v. Keller*, 19 Pa. Super. Ct. 472; *Cox v. Burdett*, 23 Pa. Super. Ct. 346; *Tranter Davison Mfg. Co. v. Pittsburg Trolley Pole Co.*, 23 Pa. Super. Ct. 46.

2. *Kaufmann v. Friday*, 201 Pa. St. 178; *McCormick Harvesting Mach. Co. v. Nicholson*, 17 Pa. Super. Ct. 188.

3. *Homewood People's Bank v. Heckert*, 207 Pa. St. 231; *Hatfield v. Thomas Iron Co.*, 208 Pa. St. 478; *Fuller v. Law*, 207 Pa. St. 101; *Commonwealth Title, etc., Co. v. Folz*, 19 Pa. Super. Ct. 28; *Patton v. Fox*, 22 Pa. Super. Ct. 416.

1084. 3. Legal Import of Contract. — *Union Selling Co. v. Jones*, (C. C. A.) 128 Fed. Rep. 672; *Forbes v. Taylor*, 139 Ala. 286; *Brewer v. Grogan*, 116 Ga. 60; *Union Special Sewing Mach. Co. v. Lockwood*, 110 Ill. App. 387; *Morrill v. Morrill*, (Mich. 1904) 101 N. W. Rep. 209; *Kinney v. McBride*, 88 N. Y. App. Div. 92; *Kaven v. Chrystie*, (Supm. Ct. App. T.) 84 N. Y. Supp. 470; *Douglass v. Campbell*, 24 Ohio Cir. Ct. 241; *Mahanoy City First Nat. Bank v. Dick*, 22 Pa. Super. Ct. 445. Compare *American Alkali Co. v. Bean*, (C. C. A.) 134 Fed. Rep. 57, *reversing* 125 Fed. Rep. 823.

5. Performance Within Reasonable Time. — *Ferguson v. Arthur*, 128 Mich. 297.

But in *Pennsylvania*, where the agreement is silent as to the time during which it is to continue in force, parol evidence is admissible to prove the intention of the parties. *Russell v. Pittsburg, etc., R. Co.*, 17 Pa. Super. Ct. 195.

1085. 3. Obligations Payable in Money. — *Vandenburg v. Johnson*, (Neb. 1902) 91 N. W. Rep. 496.

4. Payment Out of Particular Fund. — *Keith v. Parker*, 115 Fed. Rep. 397; *McKee v. Needles*, 123 Iowa 195.

1086. 4. Matters Excluded by Implication of Law. — See note 4.**IV. EXCEPTIONS TO GENERAL RULE — 1. Nature of Paper in Evidence**— *a. SIMPLE MEMORANDA, ETC.* — See note 5.**1087.** See note 3.**1088. c. RECEIPTS** — Acknowledgment of Receipt of Consideration in Deed. — See note 3.**1089. 2. Where Only Part of Transaction Is Reduced to Writing.** — See notes 3, 4.**1090.** Essentials for Introducing Parol. — See notes 2, 3.

The Writing Is Presumed to Contain the Whole of the Contract. — See note 4.

1086. 4. What Contract Excluded by Implication. — *Standard Sanitary Mfg. Co. v. Arrott*, (C. C. A.) 135 Fed. Rep. 750; *Neale v. American Electric Vehicle Co.*, 186 Mass. 303. And see the title IMPLIED OR QUASI CONTRACTS, **1078. 10 et seq.**

5. Simple Memoranda. — *Morton v. Clark*, 181 Mass. 134; *Hopkins v. Harlan*, 110 Mo. App. 465; *Lichtenstein v. Rabolinsky*, 75 N. Y. App. Div. 66; *Smith v. Williams*, 90 N. Y. App. Div. 507; *Haines v. Cadwell*, 40 Oregon 229. See also *Huffman v. Ellis*, 64 Neb. 623.

1087. 3. Orders for Goods. — *Sutton v. Weber*, 127 Iowa 361. But see *American Home Sav. Bank Co. v. Guardian Trust Co.*, 210 Pa. St. 320.

But an order for goods may contain the essentials of a complete contract so that it will not be subject to variation or contradiction by parol evidence. See *Welsh's Succession*, 111 La. 801, refusing parol evidence to contradict an order for goods containing a stipulation that it was accepted by an agent subject to approval by his principal; *Hess v. Liebmann*, (Supm. Ct. App. T.) 84 N. Y. Supp. 178, wherein an order for goods to be shipped at the seller's earliest convenience contained a provision that "no agreement other than above set forth shall be binding either upon purchaser or seller," and evidence of an oral agreement that the goods were to be delivered for the Christmas trade was held to be inadmissible. So an unqualified order for goods cannot be controlled by evidence of a verbal agreement whereby the purchaser was to sell whatever he could to his customers and was only to be liable for the amount so sold. *Grabfelder v. Vosburgh*, 90 N. Y. App. Div. 307.

1088. 3. Receipt Clause in Deeds of Conveyance. — *Brosseau v. Lowy*, 209 Ill. 405; *Lloyd v. Sandusky*, 203 Ill. 621; *Mowry v. Mowry*, (Mich. 1904) 100 N. W. Rep. 388; *Johnson v. Johnson*, 92 Minn. 167, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088; *Fowlkes v. Lea*, 84 Miss. 509; See *v. Mallonee*, 107 Mo. App. 721; *Tucker v. Dolan*, 109 Mo. App. 442; *Deaver v. Deaver*, 137 N. Car. 240.

1089. 3. Contract Partly Reduced to Writing, Parol Evidence Admissible. — *Messenger v. Woge*, (Colo. App. 1904) 78 Pac. Rep. 314; *Huxford v. Meinhart*, 119 Ga. 610; *Henry v. Herschey*, 9 Idaho 548; *Courtney v. William Knabe*, etc., Mfg. Co., 97 Md. 499, 99 Am. St. Rep. 456; *Locke v. Wilson*, 135 Mich. 593; *Lawrence v. Sullivan*, 79 N. Y. App. Div. 453; *Foreign Hardwood Log Co. v. Coffin*, 130 N. Car. 432; *Ashe v. Carolina*, etc., R. Co., 65 S.

Car. 134; *Knowles v. Rogers*, 27 Wash. 211; *Fosha v. O'Donnell*, 120 Wis. 336.

4. Parol Evidence as to Place of Payment. — *Lathrop v. Humble*, 120 Wis. 331. *Contra*, *Baily v. Birkhofer*, 123 Iowa 59.

Parol Evidence as to Place of Performance. — *Cook v. Todd*, (Ky. 1903) 72 S. W. Rep. 779.

1090. 2. Requisites for Application of the Limitation. — *New Idea Pattern Co. v. Whelan*, 75 Conn. 455; *Stowell v. Greenwich Ins. Co.*, 163 N. Y. 298; *Doolittle v. Fitchett*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 529; *Mead v. Dunlevie*, 174 N. Y. 108; *Brantingham v. Huff*, 174 N. Y. 53, 95 Am. St. Rep. 545; *Jamestown Business College Assoc. v. Allen*, 172 N. Y. 291, 92 Am. St. Rep. 740.

3. Writing Test of Its Own Completeness. — *Johnson v. D. H. Bibb Lumber Co.*, 140 Cal. 95.

4. How Completeness Determined — United States. — *Arthur v. Baron De Hirsch Fund*, (C. C. A.) 121 Fed. Rep. 791; *Sun Printing, etc., Assoc. v. Edwards*, (C. C. A.) 113 Fed. Rep. 446.

California. — *Johnson v. D. H. Bibb Lumber Co.*, 140 Cal. 95.

Illinois. — *Naugle v. Harreld*, 100 Ill. App. 524. See also *Kane v. Farrelly*, 192 Ill. 521.

Kansas. — *Thisler v. Mackey*, 65 Kan. 464; *Ehram v. Brown*, 65 Kan. 466.

Michigan. — *Thayer v. Gibbs*, (Mich. 1905) 103 N. W. Rep. 526; *Kibler v. Caplis*, (Mich. 1905) 103 N. W. Rep. 531.

Missouri. — *Koffman v. Southwest Missouri Electric R. Co.*, (Mo. 1902) 68 S. W. Rep. 212.

Montana. — *Armington v. Stelle*, 27 Mont. 13, 94 Am. St. Rep. 811.

New York. — *Jamestown Business College Assoc. v. Allen*, 172 N. Y. 291, 92 Am. St. Rep. 740; *Mead v. Dunlevie*, 174 N. Y. 108; *Brantingham v. Huff*, 174 N. Y. 53, 95 Am. St. Rep. 545; *Thomas v. Dingleman*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 379; *Abramson-Engesser Co. v. McCafferty*, (Supm. Ct. App. T.) 86 N. Y. Supp. 185; *Atwater v. Orford Copper Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 426; *Lillis v. Mertz*, 89 N. Y. App. Div. 289; *Gray v. Meyer*, 88 N. Y. App. Div. 359; *McGarrigle v. McCosker*, 83 N. Y. App. Div. 184, affirmed 178 N. Y. 637; *Townsend v. Greenwich Ins. Co.*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 87, affirmed 86 N. Y. App. Div. 323; *Globe Soap Co. v. Liss*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 199. See also *Hess v. Liebmann*, (Supm. Ct. App. T.) 84 N. Y. Supp. 178.

North Dakota. — *Johnson v. Kindred State Bank*, 12 N. Dak. 336.

1091. When the Writing Does Not Purport to Disclose the Complete Contract. — See note 1.

1092. Entire Contract Must Be Proved. — See note 1.

1093. Matters in Parol Must Not Be Inconsistent with Matters in Writing. — See note 1.

Illustrations of Instruments Explained by Parol. — See notes 4, 5, 7.

1094. 3. Collateral Parol Agreements. — See note 3.

1096. Any Independent Fact or Collateral Parol Agreement. — See note 1.

Washington. — Puget Sound Iron, etc., Works v. Clemmons, 32 Wash. 36.

Wisconsin. — John O'Brien Lumber Co. v. Wilkinson, 117 Wis. 468.

1091. 1. When Contract Incomplete — *England.* — Lloyd v. Sturgeon Falls Pulp Co., 85 L. T. N. S. 162.

United States. — Ronan v. 155,453 Feet Lumber, 131 Fed. Rep. 345.

Arizona. — Pringle v. King, (Ariz. 1904) 78 Pac. Rep. 367.

Arkansas. — Bloch Queensware Co. v. Metzger, 70 Ark. 232.

California. — Williams v. Ashurst Oil, etc., Co., 144 Cal. 619; Ames v. Southern Pac. Co., 141 Cal. 728, 99 Am. St. Rep. 98.

District of Columbia. — Tobriner v. White, 19 App. Cas. (D. C.) 163.

Georgia. — Morrison v. Dickey, 119 Ga. 698; Carter v. Griffin, 114 Ga. 321.

Illinois. — Halliday v. Mulligan, 113 Ill. App. 177; Osgood v. Skinner, 111 Ill. App. 606, affirmed 211 Ill. 229; Trimble v. Beardstown First Nat. Bank, 101 Ill. App. 75.

Iowa. — Oakland Cemetery Assoc. v. Lakins, 126 Iowa 121; Sutton v. Weber, 127 Iowa 361; Ingram v. Dailey, 123 Iowa 188.

Mississippi. — Illinois Cent. R. Co. v. Harper, 83 Miss. 560, 102 Am. St. Rep. 469.

Missouri. — Van Ravenswaay v. Covenant Mut. L. Ins. Co., 89 Mo. App. 73.

Nebraska. — Bell v. Wiltson, (Neb. 1904) 98 N. W. Rep. 1049; Huffman v. Ellis, 64 Neb. 623.

New York. — Guttentag v. Whitney, 79 N. Y. App. Div. 596; Lawrence v. Sullivan, 79 N. Y. App. Div. 453; Medical College Laboratory v. State University, 76 N. Y. App. Div. 48, affirmed 178 N. Y. 153; Lichtenstein v. Rabo-linsky, 75 N. Y. App. Div. 66.

North Carolina. — Foreign Hardwood Log Co. v. Coffin, 130 N. Car. 432.

Texas. — Blair v. Slosson, 27 Tex. Civ. App. 403.

Vermont. — Gilman v. Williams, 74 Vt. 327.

Washington. — Windell v. Readman Ware-house Co., 30 Wash. 469.

West Virginia. — Rymer v. South Penn Oil Co., 54 W. Va. 530.

Wisconsin. — Hurlbert v. T. D. Kellogg Lum-ber, etc., Co., 115 Wis. 225.

1092. 1. Entire Contract. — Pringle v. King, (Ariz. 1904) 78 Pac. Rep. 367.

1093. 1. Parol Parts of Agreement Must Consist with Writing. — Wilson v. Union Dis-tilling Co., 16 Colo. App. 429; Halliday v. Mul-ligan, 113 Ill. App. 177; Koffman v. Southwest Missouri Electric R. Co., (Mo. App. 1902) 68 S. W. Rep. 212; Hess v. Liebmann, (Supm. Ct. App. T.) 84 N. Y. Supp. 178; Patterson v. Cap-pon, 125 Wis. 198.

4. Bills of Sale. — J. G. Shaw Blank Book Co. v. Maybell, 86 Minn. 241.

5. Leases. — Ingram v. Dailey, 123 Iowa 188; Rymer v. South Penn Oil Co., 54 W. Va. 530.

7. Deeds. — Northern Assur. Co. v. Chicago Mut. Bldg., etc., Assoc., 198 Ill. 474; Chandler v. Morey, 195 Ill. 596; Le Bleu v. Savoie, 109 La. 680; Dubay v. Kelly, (Mich. 1904) 100 N. W. Rep. 677; Johnson v. McClure, 92 Minn. 257, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1093.

1094. 3. Collateral Parol Agreements — *England.* — De Lassalle v. Guildford, (1901) 2 K. B. 215, 70 L. J. K. B. 533, 84 L. T. N. S. 549; Lloyd v. Sturgeon Falls Pulp Co., 85 L. T. N. S. 162.

United States. — Sun Printing, etc., Assoc. v. Edwards, (C. C. A.) 113 Fed. Rep. 446.

Colorado. — Cerrusite Min. Co. v. Steele, 18 Colo. App. 216.

Indiana. — Equitable Trust Co. v. Mulligan, 31 Ind. App. 20.

Iowa. — Sutton v. Griebel, 118 Iowa 78.

Massachusetts. — Drew v. Wiswall, 183 Mass. 554.

Michigan. — Wolff v. Alpena Nat. Bank, 131 Mich. 634.

Missouri. — Roe v. Versailles Bank, 167 Mo. 406; New York L. Ins. Co. v. Smucker, 106 Mo. App. 304.

Nebraska. — Huffman v. Ellis, 64 Neb. 623.

New Jersey. — See Miller v. Home Ins. Co., 71 N. J. L. 175.

New York. — Lawrence v. Sullivan, 79 N. Y. App. Div. 453; Medical College Laboratory v. State University, 76 N. Y. App. Div. 48, af-firmed 178 N. Y. 153.

North Carolina. — Hinton v. Mutual Reserve Fund L. Assoc., 135 N. Car. 314, 102 Am. St. Rep. 545.

South Carolina. — Robert Buist Co. v. Lan-caster Mercantile Co., 68 S. Car. 523, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1094.

Vermont. — See Reynolds v. Hooker, 76 Vt. 184.

Washington. — Welever v. Advance Shingle Co., 34 Wash. 331, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1094.

Wyoming. — Lonabaugh v. Morrow, 11 Wyo. 17.

1096. 1. Collateral Agreement May Refer to Same Subject-matter. — Sutton v. Griebel, 118 Iowa 78; Cook v. Littlefield, 98 Me. 299; Roe v. Versailles Bank, 167 Mo. 406; Hamblen v. German, 93 N. Y. App. Div. 464, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1095; Lewis v. Portland First Nat. Bank, (Oregon 1904) 78 Pac. Rep. 900; Blair v. Slosson, 27 Tex. Civ. App. 403; Brockway v. Abbott, 37 Wash. 263.

1096. Whether Collateral Agreement Admissible — General Test. — See note 2.

1097. Illustrations. — See note 1.

4. Evidence to Show Nonexistence of Contractual Relation — a. IN GENERAL. — See note 3.

b. DELIVERY UPON CONDITION. — See note 4

1098. *c. IMPEACHING VALIDITY OF INSTRUMENT — (1) Upon Issue as to Execution and Delivery.* — See note 1.

1100. *(4) Mistake.* — See note 1.

1101. Parol Evidence Not Admitted to Affect Rights of Third Persons. — See note 1.
The Presumption that the Written Instrument Was Carefully and Deliberately Prepared. — See note 2.

1102. 6. Evidence as to Date of Instrument. — See note 4.

7. Evidence to Prove Subsequent Agreements. — See note 5.

1103. V. LIMITATION OF RULE TO PARTIES AND PRIVIES. — See note 2.

1096. 2. Matters Within Scope of Writing. — *Sun Printing, etc., Assoc. v. Edwards*, (C. C. A.) 113 Fed. Rep. 445; *Stickney v. Hughes*, 12 Wyo. 397.

1097. 1. Covenant to Repair. — *Thompson Foundry, etc., Co. v. Glass*, 136 Ala. 648; *Hallenbeck v. Chapman*, 71 N. J. L. 477; *Smith v. Smull*, 69 N. Y. App. Div. 452; *Van Derhoef v. Hartmann*, 63 N. Y. App. Div. 419. See also *Hightower v. Henry*, 85 Miss. 476.

An Agreement to Erect Buildings and Improvements for the use of the lessee during the term of the lease cannot be shown by parol where the lease is complete in itself and contains no reference to such agreement. *Moore-Cortes Canal Co. v. Gyle*, 36 Tex. Civ. App. 442.

Exception — Where Parol Agreement as to Repairs Condition Precedent. — In *Donaldson v. Uhlfelder*, 21 App. Cas. (D. C.) 489, it was held that it was competent for a tenant to show by parol evidence that he signed his lease on condition that the premises should be repaired before the lease should take effect, this being the condition of his consent, without which there was no contract.

3. To Show Nonexistence of Contractual Relation. — *Lytle v. Scottish-American Mortg. Co.*, 122 Ga. 458; *Hartley v. Gilhofer*, 109 Ill. App. 527; *Wheeler v. Metropolitan Stock Exch.*, 72 N. H. 315; *Schwarz v. Lee Gon*, (Oregon 1905) 80 Pac. Rep. 110.

4. Delivery upon Condition. — *Mosier v. Ker-show*, 16 Colo. App. 453; *Donaldson v. Uhlfelder*, 21 App. Cas. (D. C.) 489; *Cannon v. Michigan Mut. L. Ins. Co.*, 103 Ill. App. 414; *McCormick Harvesting Mach. Co. v. Morlan*, 121 Iowa 451; *Sutton v. Weber*, 127 Iowa 361; *Oakland Cemetery Assoc. v. Lakins*, 126 Iowa 121; *Elastic Tip Co. v. Graham*, 185 Mass. 597; *Mendenhall v. Ulrich*, 94 Minn. 100; *Holbrook v. Truesdell*, 100 N. Y. App. Div. 9; *Pratt v. Chaffin*, 136 N. Car. 350; *State v. Chamber of Commerce*, 121 Wis. 110. But see *Findley v. Means*, 71 Ark. 280.

Where a Condition Precedent Is Expressed in the Contract, it will be presumed that the written provision is exhaustive, and parol evidence to prove other conditions precedent will be excluded. *United Engineering, etc., Co. v. Broadnax*, (C. C. A.) 136 Fed. Rep. 351.

Delivery of a Deed Affecting Real Estate is absolute under the *North Dakota* statute, and the instrument takes effect discharged of any con-

dition on which the delivery was made. *Sargent v. Cooley*, 12 N. Dak. 1.

1098. 1. Upon Issue as to Execution and Delivery. — *Waid v. Hobson*, 17 Colo. App. 54; *Haughton v. Aetna L. Ins. Co.*, (Ind. 1905) 73 N. E. Rep. 592; *Gribble v. Everett*, 98 Mo. App. 32; *Sargent v. Cooley*, 12 N. Dak. 1.

Upon Issue as to Sealing. — *Strain v. Fitzgerald*, 130 N. Car. 600.

1100. 1. Mistake. — *Kee v. Davis*, 137 Cal. 456; *Sheppard v. Reese*, 114 Ga. 411; *Wollschlaeger v. McEldowney*, 96 Ill. App. 34; *Gray v. Merchants' Ins. Co.*, 113 Ill. App. 537; *Equitable Trust Co. v. Milligan*, 31 Ind. App. 20; *Wieneke v. Deputy*, 31 Ind. App. 621; *Hausbrandt v. Hoffer*, 117 Iowa 103, 94 Am. St. Rep. 289; *Locke v. Lyon Medicine Co.*, (Ky. 1905) 84 S. W. Rep. 307; *Le Bleu v. Savoie*, 109 La. 680; *Patterson v. Yancey*, 97 Mo. App. 681; *Boren v. Boren*, (Tex. Civ. App. 1902) 68 S. W. Rep. 184.

1101. 1. Rights of Third Persons Protected. — *In re Luckenbill*, 127 Fed. Rep. 984.

2. Writing Presumed to Be Accurate. — *Streator v. Paxton*, 201 Pa. St. 135; *Guaranty Safe Deposit, etc., Co. v. Liebold*, 207 Pa. St. 399.

1102. 4. Wrong Date on Face of Instrument. — *Cutter v. Pierson*, 26 Pa. Super. Ct. 10; *Pacific Mut. Ins. Co. v. Shaffer*, 30 Tex. Civ. App. 313; *Furst v. Galloway*, 56 W. Va. 246.

5. Subsequent Parol Agreement. — *Palmer v. Bennett*, 96 Ill. App. 281; *Hill v. Maxwell*, (Kan. 1905) 79 Pac. Rep. 1088; *Illinois Cent. R. Co. v. Manion*, 113 Ky. 7, 101 Am. St. Rep. 345; *Steidl v. Minneapolis, etc., R. Co.*, 94 Minn. 233; *Strahl v. Western Grocer Co.*, (Neb. 1904) 98 N. W. Rep. 1043; *Wadge v. Kittleston*, 12 N. Dak. 452; *Putnam Foundry, etc., Co. v. Canfield*, 25 R. I. 548; *Liner v. J. B. Watkins Land Mortg. Co.*, (Tex. Civ. App. 1902) 68 S. W. Rep. 311. See also *Rutter v. Hanover F. Ins. Co.*, 138 Ala. 202; *Martens v. Pittock*, (Neb. 1902) 92 N. W. Rep. 1038.

1103. 2. Rule Applicable Only to Parties and Privies — United States. — *Central Coal, etc., Co. v. Good*, (C. C. A.) 120 Fed. Rep. 793.

Alabama. — *British, etc., Mortg. Co. v. Codv*, 135 Ala. 622.

Illinois. — *Northern Assur. Co. v. Chicago Mut. Bldg., etc., Assoc.*, 198 Ill. 474.

Iowa. — *Livingston v. Stevens*, 122 Iowa 62; *Livingston v. Heck*, 122 Iowa 74; *Clark v. Shannon, etc., Co.*, 117 Iowa 645.

1104. See notes 1, 4.

VI. TO AID INTERPRETATION — 1. Explaining Meaning of Terms —

a. IN GENERAL. — See note 5.

1105. b. TECHNICAL TERMS OF BUSINESS OR TRADE. — See note 5.

1107. *g. WHEN WORDS SHOULD BE TAKEN IN THEIR POPULAR SENSE. — See notes 1, 2.

1108. h. WITNESS NOT PERMITTED TO CONSTRUE INSTRUMENT. — See note 1.

2. Explaining Circumstances of Case. — See note 2.

Kentucky. — Provident Sav. L. Assur. Soc. v. Johnson, 115 Ky. 84.

Massachusetts. — Wilson v. Mulloney, 185 Mass. 430; Walker Ice Co. v. American Steel, etc., Co., 185 Mass. 463.

Nebraska. — Barbar v. Martin, 67 Neb. 445; Wayne First Nat. Bank v. Tollerton, (Neb. 1903) 97 N. W. Rep. 248.

New Hampshire. — French v. Westgate, 71 N. H. 510.

New York. — Dumois v. New York, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 614; City Trust, etc., Co. v. American Brewing Co., 70 N. Y. App. Div. 511, affirmed 174 N. Y. 486.

Oregon. — Pacific Coast Biscuit Co. v. Dugger, 42 Oregon 513.

Utah. — Olmstead v. Oregon Short Line R. Co., 27 Utah 515.

Washington. — Carmack v. Drum, 32 Wash. 236, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1103; Corbin v. Oriental Trading Co., 32 Wash. 668.

West Virginia. — Rymer v. South Penn Oil Co., 54 W. Va. 530.

1104. 1. Party Not Bound in Contest with Stranger. — Ramsey v. Capshaw, 71 Ark. 408; Bickerdike v. State, 144 Cal. 681; Moore v. Moore, (Ky. 1904) 78 S. W. Rep. 141; Marks v. Hardy, (Ky. 1904) 78 S. W. Rep. 864; Crockett v. Miller, (Neb. 1902) 96 N. W. Rep. 491; Kahle v. Stone, 95 Tex. 106; Carmack v. Drum, 32 Wash. 236, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1103. See also Illinois Cent. R. Co. v. Manion, 113 Ky. 7, 101 Am. St. Rep. 345.

In an Action for Commissions for Procuring a Contract between the defendant and a third party, the plaintiff may testify to a conversation between himself and the defendant relative to such contract. Corbin v. Oriental Trading Co., 32 Wash. 668.

4. Johnston v. Charles Abresch Co., 123 Wis. 130, 107 Am. St. Rep. 890.

5. Explanation of Terms. — Williams v. Ashurst Oil, etc., Co., 144 Cal. 619; Bertig-Smythe Co. v. Bonsack Lumber Co., (Mo. 1905) 86 S. W. Rep. 870; Kitching v. Brown, 180 N. Y. 414; Britton v. Marks, 105 N. Y. App. Div. 85; Bowery Bank v. Hart, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 412, reversed on another point 77 N. Y. App. Div. 121; Murray v. Northwestern R. Co., 64 S. Car. 520; Perkins v. Owen, 123 Wis. 238; Andrews v. Robertson, 111 Wis. 334, 87 Am. St. Rep. 870.

1105. 5. Technical Terms of Trade. — Hinote v. Brigman, 44 Fla. 589; Cannon v. Hunt, 116 Ga. 452; Rodger v. Toilettos Co., (Supm. Ct. App. T.) 37 Misc. (N. Y.) 779; Barnes v. Leidigh, (Oregon 1905) 79 Pac. Rep. 51; Glenn

v. Strickland, 21 Pa. Super. Ct. 88; Chicago, etc., R. Co. v. Chicago, etc., R. Co., 113 Wis. 168; Hesser-Milton-Renahan Coal Co. v. La Cross Fuel Co., 114 Wis. 654.

1107. 1. Words Taken in Their Popular Sense. — Sullivan v. Louisville, etc., R. Co., 138 Ala. 650; Cameron v. Sexton, 110 Ill. App. 381, reversed on another point 212 Ill. 146; Chase v. Ainsworth, 135 Mich. 119; Burton v. Forest Oil Co., 204 Pa. St. 349. See also Jordan v. Neal, (Miss. 1902) 33 So. Rep. 17; Ijams v. Provident Sav. L. Assur. Soc., 185 Mo. 466; Rooney v. Thomson, (Supm. Ct. App. T.) 84 N. Y. Supp. 263.

2. Words Having Both Popular and Technical Meaning. — Rastetter v. Reynolds, 160 Ind. 133; Haltiesburg Plumbing Co. v. Carmichael, 80 Miss. 66.

When Ordinary Meaning Rather than Technical May Be Shown. — Where by giving to a word its strict technical legal meaning, a contract will be rendered entirely meaningless, it is competent to show by parol the sense in which it was used, if it is used by laymen in a different sense, or has a popular or common meaning, if by so doing force and effect may be given to the contract. Kohl v. Frederick, 115 Iowa 517.

1108. 1. Witness May Not Construe Instrument as Whole. — Kessler v. Perilloux, (C. C. A.) 132 Fed. Rep. 903.

2. United States. — Wolff v. Wells, (C. C. A.) 115 Fed. Rep. 32; Sun Printing, etc., Assoc. v. Edwards, (C. C. A.) 113 Fed. Rep. 445.

Arizona. — R. H. Burmister, etc., Co. v. Empire Gold Min., etc., Co., (Ariz. 1903) 71 Pac. Rep. 961.

California. — Daly v. Ruddell, 137 Cal. 671; Snyder v. Holt Mfg. Co., 134 Cal. 324; Curtin v. Ingle, 137 Cal. 95, rehearing denied 137 Cal. 100.

Florida. — L'Engle v. Scottish Union, etc., F. Ins. Co., (Fla. 1904) 37 So. Rep. 462.

Georgia. — Wells v. Gress, 118 Ga. 566.

Illinois. — Davenport First Nat. Bank v. Rothschild, 107 Ill. App. 133.

Kansas. — Jenkins v. Kirtley, 70 Kan. 801.

Kentucky. — Illinois Cent. R. Co. v. Eblin, 114 Ky. 817.

Michigan. — Gregory v. Lake Linden, 130 Mich. 368.

Minnesota. — J. G. Shaw Blank Book Co. v. Maybell, 86 Minn. 241.

Missouri. — Laclede Constr. Co. v. T. J. Moss Tie Co., 185 Mo. 25.

New Jersey. — Boulevard Globe, etc., Co. v. Kern Incandescent Gaslight Co., 67 N. J. L. 279.

New York. — Kitching v. Brown, 180 N. Y. 414.

1109. See note 1.

1110. See note 1.

1111. 4. To Show Purpose for Which Instrument Was Executed — *a.* IN GENERAL. — See note 4.

1112. *c.* WHETHER CONTRACT OF PURCHASE OR OF SECURITY. — See note 3.

1113. *d.* TO SHOW PURPOSE OF ASSIGNMENT. — See note 1.

Oregon. — *Oliver v. Oregon Sugar Co.*, 42 Oregon 276; *Baker County v. Huntington*, (Oregon 1905) 79 Pac. Rep. 187.

Pennsylvania. — *Douthett v. Ft. Pitt Gas Co.*, 202 Pa. St. 416.

Texas. — *American Cotton Co. v. Collier*, 30 Tex. Civ. App. 105.

West Virginia. — *Newman v. Kay*, 57 W. Va. 98; *Uhl v. Ohio River R. Co.*, 51 W. Va. 106.

Wisconsin. — *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 113 Wis. 168; *Edwards v. Wisconsin Invest. Co.*, 124 Wis. 315; *Rib River Lumber Co. v. Ogilvie*, 113 Wis. 482.

The "Surrounding Circumstances" Do Not Include the Prior Representations, proposals, and negotiations of a promissory character leading up to, and superseded by, the written agreement. These cannot be shown by parol under the rule. *Union Selling Co. v. Jones*, (C. C. A.) 128 Fed. Rep. 672.

1109. 1. Evidence of Negotiations and Acts of Parties. — *Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co.*, (C. C. A.) 132 Fed. Rep. 957; *Wolff v. Wells*, (C. C. A.) 115 Fed. Rep. 32; *Eastern Power Co. v. Sterlingworth R. Supply Co.*, 22 Pa. Super. Ct. 538; *Colvin v. McCormick Cotton Oil Co.*, 66 S. Car. 61; *Sherman Oil, etc., Co. v. Dallas Oil, etc., Co.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 961. See also *Sanitary Dist. v. McMahon, etc., Co.*, 110 Ill. App. 510.

1110. 1. Writing Clear and Unambiguous — *United States.* — *United Engineering, etc., Co. v. Broadnax*, (C. C. A.) 136 Fed. Rep. 351; *Kessler v. Perilloux*, (C. C. A.) 132 Fed. Rep. 903; *McManus v. Chollar*, (C. C. A.) 128 Fed. Rep. 902; *Morris v. Chesapeake, etc., Steamship Co.*, 125 Fed. Rep. 62; *De Sola v. Pomares*, 119 Fed. Rep. 373; *Dennis v. Slyfield*, (C. C. A.) 117 Fed. Rep. 474; *Cold Blast Transp. Co. v. Kansas City Bolt, etc., Co.*, (C. C. A.) 114 Fed. Rep. 77.

Alabama. — *Cox v. O'Neil*, (Ala. 1904) 37 So. Rep. 674.

Arkansas. — *Rhodes v. Purvis*, (Ark. 1905) 85 S. W. Rep. 235.

Colorado. — *Oil Creek Gold Min. Co. v. Fairbanks*, 19 Colo. App. 142.

Georgia. — *Bullard v. Brever*, 118 Ga. 918; *Southern Bell Telephone, etc., Co. v. Harris*, 117 Ga. 1001; *Foote v. Malony*, 115 Ga. 985.

Illinois. — *Davis v. Fidelity F. Ins. Co.*, 208 Ill. 375; *Telluride Power Transmission Co. v. Crane Co.*, 208 Ill. 218; *Fidelity F. Ins. Co. v. Illinois Trust, etc., Bank*, 110 Ill. App. 92, affirmed 208 Ill. 375.

Kansas. — *Barrett v. Kansas, etc., Coal Co.*, 70 Kan. 649; *Rose v. Lanyon Zinc Co.*, 68 Kan. 126; *Atchison, etc., R. Co. v. Vanordstrand*, 67 Kan. 386; *Drumm-Flato Commission Co. v. Barnard*, 66 Kan. 568.

Michigan. — *Helper v. MacKinnon Mfg. Co.*,

(Mich. 1904) 101 N. W. Rep. 804; *Haynes v. Hobbs*, 136 Mich. 117; *Walker v. Mack*, 129 Mich. 527.

Missouri. — *Ijams v. Provident Sav. L. Assur. Soc.*, 185 Mo. 466.

Nebraska. — *Agnew v. Montgomery*, (Neb. 1904) 99 N. W. Rep. 820.

New Jersey. — *Simpson v. Moorehead*, 65 N. J. Eq. 623.

New York. — *Southampton v. Jessup*, 173 N. Y. 84; *Byars v. Bennington, etc., R. Co.*, 99 N. Y. App. Div. 34; *Eichenauer v. Rentz Candy Co.*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 151; *Home Ins. Co. v. Continental Ins. Co.*, 89 N. Y. App. Div. 1, affirmed 180 N. Y. 389; *Kinney v. McBride*, 88 N. Y. App. Div. 92; *Liebeskind v. Moore Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 850; *Rooney v. Thomson*, (Supm. Ct. App. T.) 84 N. Y. Supp. 263; *Bowery Bank v. Hart*, 77 N. Y. App. Div. 121.

North Carolina. — *McKenzie v. Houston*, 130 N. Car. 566.

Oklahoma. — *Liverpool, etc., Ins. Co. v. T. M. Richardson Lumber Co.*, 11 Okla. 585.

Pennsylvania. — *Fry v. National Glass Co.*, 207 Pa. St. 505; *King v. New York, etc., Gas Coal Co.*, 204 Pa. St. 628.

Rhode Island. — *Vaughan v. Mason*, 23 R. I. 348.

South Carolina. — *Cape Fear Lumber Co. v. Evans*, 69 S. Car. 93.

Texas. — *Presidio County v. Clarke*, (Tex. Civ. App. 1905) 85 S. W. Rep. 475; *Jamison v. New York, etc., Land Co.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 969; *Giddings v. Winfree*, 32 Tex. Civ. App. 99; *Chew v. Zweib*, 29 Tex. Civ. App. 311.

Virginia. — *Oriental Lumber Co. v. Blades Lumber Co.*, 103 Va. 730; *Consumers' Ice Co. v. Jennings*, 100 Va. 719.

West Virginia. — *Uhl v. Ohio River R. Co.*, 51 W. Va. 106.

Wisconsin. — *Newell v. New Holstein Canning Co.*, 119 Wis. 635; *Bohm Mfg. Co. v. Reif*, 116 Wis. 471; *Kruse v. Koelzer*, 124 Wis. 536; *Schmidt v. Schmidt*, 123 Wis. 295.

The Resources of the Paper Itself Must Be Exhausted before parol evidence is admitted. *Harmon v. Thompson*, (Ky. 1905) 84 S. W. Rep. 569.

1111. 4. Purpose — In General. — *Louisville Tobacco Warehouse Co. v. Stewart*, (Ky. 1902) 70 S. W. Rep. 285; *Landt v. Schneider*, 31 Mont. 15; *Humphrey v. Timken Carriage Co.*, 12 Okla. 413; *Clark v. Ducheneau*, 26 Utah 97; *Richmond Ice Co. v. Crystal Ice Co.*, 103 Va. 465.

1112. 3. Whether Contract of Purchase or of Security. — *Welborn v. Dixon*, 70 S. Car. 108; *Gross v. Heckert*, 120 Wis. 314; *Matthews v. Capital F. Ins. Co.*, 115 Wis. 272; *Walker v. Brown*, 19 Quebec Super. Ct. 23.

1113. 1. To Show Purpose of Assignment. —

1113. 5. To Show Interpretation by Parties. — See note 4.

1114. See notes 1, 4.

1115. See notes 1, 6.

1116. 6. Connecting and Explaining Contemporaneous Writings. — See notes 1, 2.

1117. See note 1.

7. To Identify Parties and Show Their Relations — a. IDENTIFICATION IN GENERAL. — See note 4.

1118. See notes 2, 4, 6, 7.

1119. See note 1.

8. Identification of Subject-matter — a. IN GENERAL. — See note 6.

Robinson v. Blood, 64 Kan. 290; Bell v. Wiltson, (Neb. 1904) 98 N. W. Rep. 1049.

1113. 4. Interpretation by Parties. — Lloyd v. Sturgeon Falls Pulp Co., 85 L. T. N. S. 162; Delaware Indians v. Cherokee Nation, 193 U. S. 127; McCall v. Wilkes, 121 Ga. 722; Morehouse v. Terrill, 111 Ill. App. 460; Wheaton v. Bartlett, 105 Ill. App. 326; Chase v. Ainsworth, 135 Mich. 119; Althouse v. McMillan, 132 Mich. 145; Hogan v. Kelly, 29 Mont. 485; Marotto v. McCotter, (Supm. Ct. App. T.) 85 N. Y. Supp. 431; Fletcher v. Underhill, (Tex. Civ. App. 1904) 83 S. W. Rep. 726; Ford v. Boone, 32 Tex. Civ. App. 550; Hart v. Hart, 117 Wis. 639; Milwaukee Carnival Assoc. v. King, etc., Co., 112 Wis. 647. See also Coppes v. Union Nat. Sav., etc., Assoc., 33 Ind. App. 367.

1114. 1. Intention at Time. — Wikle v. Johnson Laboratories, 132 Ala. 268; Swift v. Occidental Min., etc., Co., 141 Cal. 161; Wear v. Schmelzer, 92 Mo. App. 314; Riehman v. Field, 81 N. Y. App. Div. 526; Wylie v. Commercial, etc., Bank, 63 S. Car. 406.

4. Secret Intention of Party Not Admissible. — Wikle v. Johnson Laboratories, 132 Ala. 268; Johnson v. Kindred State Bank, 12 N. Dak. 336.

1115. 1. Practical Construction by Parties. — Davenport First Nat. Bank v. Rothschild, 107 Ill. App. 133; Creedon v. Patrick, (Neb. 1902) 91 N. W. Rep. 872.

But the practical construction put upon the contract by the parties themselves is not admissible in evidence to control the clear language of the contract, especially where the action is not that of all the parties to the contract. Kinney v. McBride, 88 N. Y. App. Div. 92.

6. Not Admissible unless Meaning Is Doubtful. — Morehouse v. Terrill, 111 Ill. App. 460; Kinney v. McBride, 88 N. Y. App. Div. 92; Uihlein v. Matthews, 172 N. Y. 154.

1116. 1. Admissibility of Contemporaneous Writings. — Gould v. Magnolia Metal Co., 207 Ill. 172; Masterson v. Burnett, 27 Tex. Civ. App. 370.

2. Identification of Writing Referred To. — Mann v. Bergmann, 203 Ill. 406; Nelson v. Willey, 97 Md. 373; Thompson v. Cobb, 95 Tex. 140, 93 Am. St. Rep. 820.

1117. 1. Rule Applies to Agreement in Several Papers. — Coulter v. Blatchley, 51 W. Va. 163.

4. Identification of Parties. — Harlan County v. Whitney, 65 Neb. 105, 101 Am. St. Rep. 610; La Vie v. Tooze, 43 Oregon 590; McCann v.

McCrea, 18 Pa. Super. Ct. 456. See also Dunn v. Mayo Mills, (C. C. A.) 134 Fed. Rep. 804.

1118. 2. Contract in Copartnership Name. — *In re* Weisenberg, 131 Fed. Rep. 517; Woolsey v. Henke, 125 Wis. 134; Huguenot Mills v. Jempson, 68 S. Car. 363, 102 Am. St. Rep. 673; Young v. Stevenson, 73 Ark. 480; Markham v. Cover, 99 Mo. App. 83.

4. No Signature at All. — Where a note was signed by officers of a corporation with the addition of the words "President," "Vice President," "Secretary," and "Treasurer" after their names, and the note nowhere contained the name of the corporation, it was held, in an action by the payee, that the defendants could not by parol evidence show that they acted merely as officers of the corporation, and were not liable individually. Lawrence County Bank v. Arndt, 69 Ark. 406.

Parol evidence is not admissible to give the benefit of the contract to one who was not a party to it. Thompson v. Erie R. Co., 96 N. Y. App. Div. 539.

6. Mistake in Name of Grantee, Devisee, or Promisee. — White v. Simonton, 34 Tex. Civ. App. 464.

7. Name of Wrong Person as Grantee. — State v. Elmore, 68 S. Car. 140; Moore v. Boyd, 34 Tex. Civ. App. 408.

1119. 1. Want of Signature. — See Dunn v. Mayo Mills, (C. C. A.) 134 Fed. Rep. 804, where it was held that the fact that parol evidence was necessary to identify a person signing with his surname only as a partner in the defendant firm did not render parol evidence admissible to contradict the terms of the contract by adding to it a new condition.

6. Identification of Subject-matter — *Alabama*. — Alabama Mut. F. Ins. Co. v. Minchener, 133 Ala. 632.

Idaho. — Henry v. Herschey, 9 Idaho 548.

Illinois. — Parish v. Vance, 110 Ill. App. 57.

Indiana. — Burke v. Mead, 159 Ind. 252.

Louisiana. — Bagley v. Rose Hill Sugar Co., 111 La. 249.

Michigan. — Gregory v. Lake Linden, 130 Mich. 368.

Minnesota. — J. G. Shaw Blank Book Co. v. Maybell, 86 Minn. 241.

Nebraska. — Harlan County v. Whitney, 65 Neb. 105, 101 Am. St. Rep. 610.

New Hampshire. — Gill v. Ferrin, 71 N. H. 421.

New York. — McIlvaine v. Steinson, 90 N. Y. App. Div. 77; Rooney v. Thomson, (Supm. Ct. App. T.) 84 N. Y. Supp. 263; *People's*

1120. *b.* DEFECTIVE DESCRIPTION OF REAL ESTATE. — See note 1.

1122. *c.* EQUIVOCAL DESCRIPTION OF PERSONAL PROPERTY. — See notes 1, 2.

d. IDENTIFICATION OF DEBT SECURED BY MORTGAGE. — See note 3.

Guaranty, etc., *Co. v. Doernberg*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 809.

Pennsylvania. — *Cox v. Wilson*, 25 Pa. Super. Ct. 635.

Texas. — *Ascarete v. Pfaff*, 34 Tex. Civ. App. 375; *Connecticut F. Ins. Co. v. Hilbrant*, (Tex. Civ. App. 1903) 73 S. W. Rep. 558.

Virginia. — *New River Mineral Co. v. Painter*, 100 Va. 507.

1120. 1. Defective Description of Real Estate — *Alabama.* — *Dorlan v. Westervitch*, 140 Ala. 283; *Hereford v. Hereford*, 131 Ala. 573.

District of Columbia. — *Okie v. Person*, 23 App. Cas. (D. C.) 170.

Georgia. — *Johnson v. McKay*, 121 Ga. 763; *Georgia, etc., R. Co. v. Shiver*, 121 Ga. 708; *Leverett v. Bullard*, 121 Ga. 534.

Indiana. — *Wieneke v. Deputy*, 31 Ind. App. 621.

Iowa. — *Colean Implement Co. v. Strong*, 126 Iowa 598.

Kansas. — *Powers v. Scharling*, 64 Kan. 339. *Massachusetts.* — *Graves v. Broughton*, 185 Mass. 174.

Mississippi. — See *Crawford v. McLaurin*, 83 Miss. 265; *Levenworth v. Greenville Wharf, etc., Co.*, 82 Miss. 578.

Nebraska. — *Keplinger v. Woolsey*, (Neb. 1903) 93 N. W. Rep. 1008.

New York. — *Mittler v. Herter*, (N. Y. City Ct. Gen. T.) 39 Misc. (N. Y.) 843; *Smith v.*

Stacey, 68 N. Y. App. Div. 521. See also *Heyward v. Willmarth*, 87 N. Y. App. Div. 125.

North Carolina. — *Ward v. Gay*, 137 N. Car. 397; *Southern Finishing, etc., Co. v. Ozment*, 132 N. Car. 839; *Farthing v. Rochelle*, 131 N. Car. 563.

Oklahoma. — *Powers v. Rude*, 14 Okla. 381; *Halsell v. Renfrow*, 14 Okla. 674.

Oregon. — *Knight v. Alexander*, 42 Oregon 521.

South Carolina. — *Welborn v. Dixon*, 70 S. Car. 108.

Texas. — *Wilkins v. Clawson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 732; *Henning v. Wren*, 32 Tex. Civ. App. 538. See also *Chew v. Zweib*, 29 Tex. Civ. App. 311.

Vermont. — *Goodsell v. Rutland-Canadian R. Co.*, 75 Vt. 375.

West Virginia. — *Newman v. Kay*, 57 W. Va. 98; *Snooks v. Wingfield*, 52 W. Va. 441.

1122. 1. Equivocal Description of Personal Property. — *National Mechanical Directory Co. v. Polk*, (C. C. A.) 121 Fed. Rep. 742; *Henry v. Herschey*, 9 Idaho 548; *Edwards v. Wisconsin Invest. Co.*, 124 Wis. 315; *Perkins v. Owen*, 123 Wis. 238; *Excelsior Wrapper Co. v. Messinger*, 116 Wis. 549.

2. *Augustine v. McDowell*, 120 Iowa 401.

3. Identification of Debt Secured by Mortgage. — *Davis v. Turner*, (C. C. A.) 120 Fed. Rep. 605; *Stancill v. Spain*, 133 N. Car. 76.

PARTITION.

By J. HAVILAND SMITH.

1132. II. PARTITION BY ACT OF PARTIES — 1. Right to Make — c. WHEN PARTITION MAY BE MADE. — See note 4.

1133. 2. What May Be Partitioned — c. PARTITION OF PART ONLY. — See note 2.

3. Who May Make Partition — a. IN GENERAL — COTENANT. — See note 10.

c. PERSONS UNDER DISABILITY. — See note 13.

1131. g. LIFE TENANTS. — See note 15.

1135. j. PARTITION BETWEEN HUSBAND AND WIFE. — See notes 3, 4.

1137. 5. How Partition Effected — h. PAROL PARTITION — (2) Since Statute of Frauds — (a) At Law. — See note 8.

1132. 4. See *Hall v. Gabbert*, 213 Ill. 208.

1133. 2. See *Robbins v. Penn Gas Coal Co.*, 28 Pa. Co. Ct. 49, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1132, 1133, and sup-
porting the whole text paragraph.

10. Must Show Ownership of Undivided Interest in Property. — *Owen v. Brookport*, 208 Ill. 35.

13. Disability. — *McCullough v. Finley*, 69 Kan. 705.

1131. 15. Remainderman Not Bound by Vol-

untary Partition. — *Milligan v. Masden*, 74 S. W. Rep. 1049, 25 Ky. L. Rep. 144.

1135. 3. *Wescoat v. Wilson*, 62 N. J. Eq. 177, affirmed 64 N. J. Eq. 795.

4. Compare *Merritt v. Whitlock*, 200 Pa. St. 50.

1137. 8. Partition Within Statute of Frauds. — *Wescoat v. Wilson*, 62 N. J. Eq. 177, affirmed 64 N. J. Eq. 795; *Bacon v. Fay*, 63 N. J. Eq. 411. See further the title VERBAL

- 1138.** See note 1.
 This Rule Is Denied. — See note 4.
- 1139.** (b) In Equity. — See note 7.
- 1140.** See notes 1, 3.
- 1141.** 6. Evidence — *b.* SUFFICIENCY. — See note 10.
 7. Attacking and Setting Aside — *a.* WHO MAY ATTACK. — See note 11.
- 1142.** III. PARTITION BY JUDICIAL PROCEEDINGS — 1. Introductory. — See notes 10, 12.
- 1143.** See notes 1, 2.
 2. Jurisdiction over Partition — *a.* IN ENGLAND. — See notes 3, 4.
 Exclusive Chancery Jurisdiction. — See note 6.
 Superiority of Chancery Jurisdiction. — See note 7.
- 1144.** *b.* IN UNITED STATES — Jurisdiction of Certain Courts. — See note 4.
- 1145.** Partition of Personal Property. — See note 1.
 3. Right to Compel — *a.* UNDER EARLY COMMON LAW. — See notes 2, 3.
- 1146.** *b.* ONLY PARCENERS, JOINT TENANTS, AND TENANTS IN COMMON ENTITLED. — See note 1.
 The Alienee or Grantee of a Cotenant. — See note 3.
c. MATTER OF RIGHT. — See note 4.

AGREEMENTS (STATUTE OF FRAUDS), 879. 1 *et seq.*

1138. 1. Parol Partition Cannot Vest Legal Title. — *Wescoat v. Wilson*, 62 N. J. Eq. 177, affirmed 64 N. J. Eq. 795.

4. Partition Not Within Statute of Frauds. — *Merritt v. Whitlock*, 200 Pa. St. 50. See also *McBroom v. Whitefield*, 108 Tenn. 422.

1139. 7. Parol Partition Valid and Binding on Parties. — *Hays v. Marsh*, 123 Iowa 81; *Edwards v. Latimer*, 183 Mo. 610; *Bonner v. Bonner*, 34 Tex. Civ. App. 348. See also *McCullough v. Finley*, 69 Kan. 705.

1140. 1. Parol Partition Enforceable in Equity. — *Edwards v. Latimer*, 183 Mo. 610.

3. Estoppel. — *McCullough v. Finley*, 69 Kan. 705, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1137 *et seq.*; *Wescoat v. Wilson*, 62 N. J. Eq. 177, affirmed 64 N. J. Eq. 795.

1141. 10. Illustrative Cases on Sufficiency of Evidence. — *Edwards v. Latimer*, 183 Mo. 610; *Johnson v. Franklin*, (Tex. Civ. App. 1903) 76 S. W. Rep. 611.

11. The Trustee in Bankruptcy of a Legatee cannot attack, as against public policy, a voluntary partition among all the legatees made in violation of a testamentary provision. *Rapier v. O'Donnell*, 106 La. 98.

1142. 10. *Parkinson v. Parkinson*, (Mich. 1905) 102 N. W. Rep. 1002.

12. *Parkinson v. Parkinson*, (Mich. 1905) 102 N. W. Rep. 1002.

1143. 1. *Robbins v. Penn Gas Coal Co.*, 28 Pa. Co. Ct. 49.

2. See *Parkinson v. Parkinson*, (Mich. 1905) 102 N. W. Rep. 1002; *Le Sage v. Le Sage*, 52 W. Va. 323.

3. Early Equity Jurisdiction. — See *Bearden v. Benner*, 120 Fed. Rep. 690.

4. Equity Jurisdiction Extended. — See *Parkinson v. Parkinson*, (Mich. 1905) 102 N. W. Rep. 1002.

6. By the Supreme Court of Judicature Act. — See *Bearden v. Benner*, 120 Fed. Rep. 690;

Parkinson v. Parkinson, (Mich. 1905) 102 N. W. Rep. 1002.

7. Superiority of Chancery Jurisdiction. — See *Grove v. Grove*, 100 Va. 556.

1144. 4. Circuit Court. — *Le Sage v. Le Sage*, 52 W. Va. 323; *Reynolds v. Nielson*, 116 Wis. 483, 96 Am. St. Rep. 1000.

County Court. — *Schick v. Whitcomb*, (Neb. 1903) 94 N. W. Rep. 1023; *Henry v. Henry*, 1 Tenn. Ch. App. 240; *Apple v. Owens*, 1 Tenn. Ch. App. 135.

District Court. — *Raynsford v. Holman*, 68 Kan. 813; *Schick v. Whitcomb*, (Neb. 1903) 94 N. W. Rep. 1023.

Probate Court. — *McCarty v. Patterson*, 186 Mass. 1; *Penn v. Case*, 36 Tex. Civ. App. 4.

Superior Court. — *Romy v. State*, 32 Ind. App. 146; *McCarty v. Patterson*, 186 Mass. 1.

Federal District Court. — *Reynolds v. Nielson*, 116 Wis. 483, 96 Am. St. Rep. 1000.

1145. 1. Partition of Personal Property. — *Reynolds v. Nielson*, 116 Wis. 483, 96 Am. St. Rep. 1000.

2. Only Parceners Entitled to Partition at Early Common Law. — *Parkinson v. Parkinson*, (Mich. 1905) 102 N. W. Rep. 1002.

3. Right to Partition Extended to Joint Tenants and Tenants in Common. — *Parkinson v. Parkinson*, (Mich. 1905) 102 N. W. Rep. 1002; *Robbins v. Penn Gas Coal Co.*, 28 Pa. Co. Ct. 49, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1145.

1146. 1. Only Parceners, Joint Tenants, and Tenants in Common Entitled. — *Beetson v. Stoops*, 91 N. Y. App. Div. 185; *Wells v. Sweeney*, 16 S. Dak. 489; *Turner v. Barraud*, 102 Va. 324; *Ullrich v. Ullrich*, 123 Wis. 176.

Partition Cannot Be Made Between Life Tenant and Remainderman. — *Turner v. Barraud*, 102 Va. 324.

3. Alienee or Grantee of Cotenant. — *Mylin v. King*, 139 Ala. 319.

4. Partition Matter of Absolute Right. — *Hall v. Gabbert*, 213 Ill. 208, citing 21 AM. AND ENG.

1147. *d.* NECESSITY OF CLEAR TITLE AND ACTUAL OR CONSTRUCTIVE POSSESSION. — See notes 6, 7, 8.

1148. See note 1.

Reason of Rule. — See notes 2, 4.

1149. See notes 2, 3.

1150. Right of Entry Sufficient to Maintain Partition. — See notes 1, 2, 3.

1151. *e.* NECESSITY OF RIGHT TO IMMEDIATE POSSESSION — (2) *Application of Doctrine under Particular Titles* — (a) *Mortgagors*. — See note 3.

(b) *Mortgagees*. — See note 8.

1152. (d) *Remaindermen and Reversioners*. — See notes 6, 7.

1153. Right of Entry for Condition Broken. — See note 6.

(e) *Tenants for Life or Years*. — See note 7.

ENCYC. OF LAW (2d ed.) 1146; *Dee v. Dee*, 212 Ill. 338; *Miller v. Lanning*, 211 Ill. 620; *Glancey's Succession*, 108 La. 414; *Sallier v. Rosteet*, 108 La. 378; *Robbins v. Penn Gas Coal Co.*, 28 Pa. Co. Ct. 49; *Ryan v. Egan*, 26 Utah 241; *Reynolds v. Nielson*, 116 Wis. 483, 96 Am. St. Rep. 1000.

Personal Property. — *Reynolds v. Nielson*, 116 Wis. 483, 96 Am. St. Rep. 1000.

1147. 6. See *Camp Phosphate Co. v. Anderson*, (Fla. 1904) 37 So. Rep. 722.

7. *Clear and Undisputed Title Necessary*. — *Bearden v. Benner*, 120 Fed. Rep. 690; *Roller v. Clarke*, 19 App. Cas. (D. C.) 539; *Coberly v. Coberly*, 189 Mo. 1, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1147. See also *Eagle v. Franklin*, 71 Ark. 544; *Camp Phosphate Co. v. Anderson*, (Fla. 1904) 37 So. Rep. 722.

8. *Actual or Constructive Possession*. — *Bearden v. Benner*, 120 Fed. Rep. 690; *Eagle v. Franklin*, 71 Ark. 544. See also *Denton v. Fyfe*, 65 Kan. 1, 93 Am. St. Rep. 272; *Bishop's Estate*, 200 Pa. St. 598.

1148. 1. *Rule Applies at Law and in Equity*. — *Landon v. Morris*, (Ark. 1905) 86 S. W. Rep. 672; *Head v. Phillips*, 70 Ark. 432; *Coberly v. Coberly*, 189 Mo. 1; *Sterling v. Sterling*, 43 Oregon 200.

Mere Denial of Complainant's Title Not Sufficient. — *Camp Phosphate Co. v. Anderson*, (Fla. 1904) 37 So. Rep. 722; *Bishop's Estate*, 200 Pa. St. 598.

2. *Reason of Rule*. — The principal reason for courts of equity remitting the parties to their action at law was that there was no adequate provision for a jury trial of issues involving questions of title. *Satterlee v. Kobbe*, 173 N. Y. 91.

4. *Title Cannot Be Litigated in Equity*. — *Bearden v. Benner*, 120 Fed. Rep. 690; *Eagle v. Franklin*, 71 Ark. 544; *Woglom v. Kant*, (N. J. 1905) 61 Atl. Rep. 9; *Ellis v. Feist*, 65 N. J. Eq. 548; *Hanneman v. Richter*, 62 N. J. Eq. 365. See also *Camp Phosphate Co. v. Anderson*, (Fla. 1904) 37 So. Rep. 722.

Necessity for an Accounting does not confer jurisdiction in equity. *Bearden v. Benner*, 120 Fed. Rep. 690.

1149. 2. *Disputed Equitable Title*. — *Heinze v. Butte*, etc., Consol. Min. Co., (C. C. A.) 126 Fed. Rep. 1, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1149; *Camp Phosphate Co. v. Anderson*, (Fla. 1904) 37 So. Rep. 722; *Woglom v. Kant*, (N. J. 1905) 61 Atl. Rep. 9; *Ellis v. Feist*, 65 N. J. Eq. 548; *Bacon v. Fay*, 63 N. J. Eq. 411.

3. *When Incidental to Exercise of Chancery Jurisdiction*. — *Snyder v. Arn*, 187 Mo. 165.

1150. 1. *Strangers to Plaintiff's Title*. — See *Camp Phosphate Co. v. Anderson*, (Fla. 1904) 37 So. Rep. 722.

Under the Illinois Statute. — *Glos v. Carlin*, 207 Ill. 192.

2. *Disseized Cotenant*. — *Girtman v. Starbuck*, (Fla. 1904) 37 So. Rep. 731; *Camp Phosphate Co. v. Anderson*, (Fla. 1904) 37 So. Rep. 722, holding the statute not to be unconstitutional; *Drake v. Drake*, 61 N. Y. App. Div. 1. See also *Booth v. Fordham*, 73 N. Y. App. Div. 109.

Alabama Decisions. — See *Berry v. Tennessee*, etc., R. Co., 134 Ala. 618.

New York Rule. — Under Code Civ. Pro. N. Y., § 1543, all questions of title may be put in controversy and determined in an action for partition, and this applies to persons claiming title adverse to the plaintiff, whether or not they were originally cotenants. *Satterlee v. Kobbe*, 173 N. Y. 91, reversing 66 N. Y. App. Div. 306; *Place v. Kennedy*, 89 N. Y. App. Div. 167; *Dixon v. Dixon*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 652, reversed on other grounds 89 N. Y. App. Div. 603; *Kurtz v. Wiechmann*, 75 N. Y. App. Div. 26; *Place v. Rogers*, 101 N. Y. App. Div. 193.

3. *Possession Held Not Necessary under Code System*. — *Adams v. Hopkins*, (Cal. 1902) 69 Pac. Rep. 228, 144 Cal. 19; *Moorehead v. Robinson*, 68 Kan. 534; *Chandler v. Richardson*, 65 Kan. 152; *Heinze v. Butte*, etc., Consol. Min. Co., (C. C. A.) 126 Fed. Rep. 1 (under the *Montana Code*). See also *Denton v. Fyfe*, 65 Kan. 1, 93 Am. St. Rep. 272, stating the *California law*; *Sheehan v. Allen*, 67 Kan. 712; *McNulty v. Exchange Bank*, 69 Kan. 51.

1151. 3. *Mortgagor May Maintain Partition*. — See *Stevens v. Stevens*, 172 Mo. 28.

8. *Mortgagee After Foreclosure on Default May Maintain Partition*. — *Toledo Loan Co. v. Larkin*, 25 Ohio Cir. Ct. 209.

1152. 6. *Remaindermen and Reversioners*. — *Mersereau v. Camp*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 253; *Croston v. Male*, 56 W. Va. 205, 107 Am. St. Rep. 813.

7. *Statutory Authorization of Partition by Remaindermen and Reversioners*. — *Dee v. Dee*, 212 Ill. 338; *Miller v. Lanning*, 211 Ill. 620. See also *Sterling v. Sterling*, 43 Oregon 200.

1153. 6. *Right of Entry for Condition Broken*. — *Bouvier v. Baltimore*, etc., R. Co., 67 N. J. L. 281.

7. *Tenants for Life or Years*. — *Milligan v.*

- 1154.** See note 3.
 (g) *Heirs and Devisees.* — See note 8.
- 1155.** *f. TENANTS IN DOWER.* — See notes 2, 3, 4.
h. EXECUTORS AND ADMINISTRATORS. — See note 7.
- 1156.** See note 1.
i. TRUSTEES. — See note 2.
j. EQUITABLE OWNERS. — See note 4.
Cestui Que Trust. — See note 8.
- 1157.** *l. INFANTS AND LUNATICS.* — See note 2.
- 1158.** *o. RESTRICTIONS ON RIGHT TO PARTITION* — (1) *Agreements Not to Partition.* — See note 3.
 (2) *Testamentary Restrictions.* — See notes 7, 8, 11.
- 1159.** See note 2.
 (3) *Previous Voluntary Partition* — *The Burden of Proof.* — See note 7.
 4. *What Subject to Partition* — *a. IN GENERAL* — (1) *All Property Held in Cotenancy.* — See note 8.
 (2) *Necessity that Property Be Held in Cotenancy.* — See note 9.
- 1160.** (3) *Effect of Difficulty in Division.* — See notes 2, 3, 4.
b. ENUMERATION OF SPECIES OF PROPERTY — (1) *Personalty.* — See note 9.
 (2) *Incorporeal Hereditaments.* — See note 10.
- 1161.** (7) *Property Subject to Liens.* — See note 7.

Masden, 74 S. W. Rep. 1049, 25 Ky. L. Rep. 144; Windham v. Howell, 68 S. Car. 478.

1154. 3. See Milligan v. Masden, 74 S. W. Rep. 1049, 25 Ky. L. Rep. 144.

8. *Heirs and Devisees.* — Keim's Estate, 201 Pa. St. 609. See also Wachter v. Doerr, 210 Ill. 242. But see Hall v. Gabbert, 213 Ill. 208; Watke v. Stine, 214 Ill. 563; Robertson v. Brown, 187 Mo. 452, 106 Am. St. Rep. 485; Schick v. Whitcomb, (Neb. 1903) 94 N. W. Rep. 1023.

An After-born Child May Maintain Partition, and is not merely a creditor of the estate, where it is not provided for under a will. Weiland v. Muntz, 25 Ohio Cir. Ct. 185.

1155. 2. *Tenants in Dower.* — Ullrich v. Ullrich, 123 Wis. 176.

3. Schick v. Whitcomb, (Neb. 1903) 94 N. W. Rep. 1023.

4. *A Divorced Wife* whose contingent dower interest becomes absolute by the divorce may maintain partition. Keith v. Mellenthin, 92 Minn. 527.

7. *Statutory Authorization of Partition by Executor.* — In Louisiana an administrator may maintain the action. Wilson v. Wilson, 107 La. 139.

1156. 1. *Executors Who Are Trustees* and have title with the power to sell may maintain partition. Noecker v. Noecker, 66 Kan. 347.

2. *Receiver in Supplementary Proceedings Cannot Maintain Partition.* — Steenberge v. Low, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 285.

4. *Equitable Owner May Maintain.* — Mylin v. King, 139 Ala. 319; Stein v. McGrath, 128 Ala. 175; Fitch v. Miller, 200 Ill. 170.

8. *Cestui Que Trust Cannot Maintain.* — Owens v. Naughton, 23 Pa. Super. Ct. 639.

1157. 2. *Chancery Court Will Not Award When Prejudicial to Infant Plaintiff.* — Miller v. Lanning, 211 Ill. 620.

1158. 3. *Agreement Not to Partition.* — Gardiner v. Cord, 145 Cal. 157; Dee v. Dee, 212

Ill. 338, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1158.

The Fact that a Cotenant's Interest Is Subject to a Lien or incumbrance will not estop him from bringing a partition action. Gardiner v. Cord, 145 Cal. 157.

7. *Testamentary Restriction.* — Dee v. Dee, 212 Ill. 338, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1158. See also Spratt v. Lawson, 176 Mo. 175.

8. *Glancey's Succession*, 112 La. 430.

11. *Ukiah Bank v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118; Cahill v. Cahill, 62 N. J. Eq. 157. See also Keim's Estate, 201 Pa. St. 609.

1159. 2. *Cahill v. Cahill*, 62 N. J. Eq. 157.

7. *Burden of Proof.* — Hurley v. O'Neill, (Mont. 1905) 79 Pac. Rep. 242.

8. *General Rule.* — Robbins v. Penn Gas Coal Co., 28 Pa. Co. Ct. 49, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1159.

9. *Property Must Be Held in Cotenancy.* — Beetson v. Stoops, 91 N. Y. App. Div. 185; Wells v. Sweeney, 16 S. Dak. 489; Turner v. Borraud, 102 Va. 324.

1160. 2. *Difficulty in Division.* — Mylin v. King, 139 Ala. 319; Robbins v. Penn Gas Coal Co., 28 Pa. Co. Ct. 49, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1160.

3. *Detriment to Property.* — Truth Lodge No. 213 v. Barton, 119 Iowa 230, 97 Am. St. Rep. 303.

4. *Destruction.* — Truth Lodge No. 213 v. Barton, 119 Iowa 230, 97 Am. St. Rep. 303.

9. *Personalty.* — Caldwell v. Wright, 88 Mo. App. 604; Reynolds v. Nielson, 116 Wis. 483, 96 Am. St. Rep. 1000.

10. *Incorporeal Hereditaments.* — See Zinn v. Zinn, 54 W. Va. 483, per Poffenbarger, J., dissenting, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1160.

1161. 7. *Property Subject to Liens.* — Mylin v. King, 139 Ala. 319; Gardiner v. Cord, 145 Cal. 157; Stevens v. Stevens, 172 Mo. 28.

- 1161.** (8) *Property Subject to Easements.* — See note 8.
- 1162.** (14) *Homestead.* — See note 10.
c. PARTITION IN PART ONLY. — See note 12.
- 1164.** 5. *Actual Division of Property* — *c.* EQUALITY IN VALUE RATHER THAN IN AREA. — See note 4.
- 1165.** *e.* ASSIGNMENT OF SHARES — (2) *Advantage of Parties to Be Considered* — Assignment of Adjoining Parcel. — See note 2.
- 1170.** 6. *Equitable Relief Incidental to Partition* — *a.* GENERAL RULE. — See note 9.
- 1171.** *b.* ALLOWANCE FOR PAYMENTS MADE ON ACCOUNT OF PROPERTY. — See note 1.
c. ACCOUNTING FOR RENTS AND PROFITS. — See note 4.
- 1172.** *Purpart Subject to Mortgage.* — See note 3.
The Value of Improvements. — See note 4.
d. DISPOSITION OF AND ALLOWANCE FOR IMPROVEMENTS. — See note 5.
- 1173.** *e.* EQUALIZING ADVANCEMENTS. — See note 2.
f. APPOINTMENT OF RECEIVER. — See note 4.
- 1174.** 7. *Time for Institution of Proceedings* — *a.* WHEN PREMATURE. — See notes 1, 2.

Redemption from Foreclosure Sale. — A cotenant may maintain partition against another cotenant who has redeemed the property from a foreclosure sale. *Wettlaufer v. Ames*, 133 Mich. 201, 10 Detroit Leg. N. 150.

1161. 8. *Property Set Off as Appurtenant to Partitioned Property.* — Where property held in common has been partitioned and a strip of land used as means of access to the parts to be held in severalty has been set off in common as appurtenant to the parts, partition of this strip cannot be subsequently enforced. *Putnam v. Putnam*, 77 N. Y. App. Div. 554.

1162. 10. *No Partition of Homestead.* — *Walker v. Walker*, 195 Ill. 409; *Wells v. Sweeney*, 16 S. Dak. 489; *McAnulty v. Ellison*, (Tex. Civ. App. 1903) 71 S. W. Rep. 670. But see *Saunders v. Strobel*, 64 S. Car. 489. *Compare Powell v. Naylor*, 32 Tex. Civ. App. 340; *King v. Summerville*, (Tex. Civ. App. 1904) 80 S. W. Rep. 1050.

Partition Subject to the Homestead Estate may be decreed to the heir. *Turnage v. Craig*, 203 Ill. 167.

12. *Entire Property Must Be Included.* — *Maguire v. Fluker*, 112 La. 76; *Beetson v. Stoops*, 91 N. Y. App. Div. 185. See also *Robbins v. Penn Gas Coal Co.*, 28 Pa. Co. Ct. 49.

1164. 4. *Partition with Regard to Value.* — *Shearer v. Shearer*, 125 Iowa 394.

1165. 2. *Where Party Owns Adjacent Property.* — See *Talhott v. Campbell*, 67 S. W. Rep. 53, 23 Ky. L. Rep. 2108.

1170. 9. *Equitable Rights Will Be Adjusted.* — *Gardiner v. Cord*, 145 Cal. 157; *Shearer v. Shearer*, 125 Iowa 394; *Coffman v. Gates*, 110 Mo. App. 475; *Schick v. Whitcomb*, (Neb. 1903) 94 N. W. Rep. 1023.

1171. 1. *Allowance for Payments.* — *McClintock v. Fontaine*, 119 Fed. Rep. 448; *Case v. Case*, 103 Ill. App. 177; *Glos v. Clark*, 97 Ill. App. 609, *appeal dismissed* 199 Ill. 147; *Sharp v. Zeller*, 114 La. 549; *Walker v. Williams*, 84 Miss. 392; *Coffman v. Gates*, 110 Mo. App. 475; *Hanson v. Hanson*, (Neb. 1903) 97 N. W. Rep.

23; *Grove v. Grove*, 100 Va. 556. See also *Satterlee v. Kobbe*, 173 N. Y. 91; *Roberts v. Powell*, 210 Pa. St. 594.

Interest Allowed. — *Hanson v. Hanson*, (Neb. 1903) 97 N. W. Rep. 23.

4. *Accounting for Rents and Profits.* — *Stein v. McGrath*, 128 Ala. 175; *Sharp v. Zeller*, 114 La. 549; *Cole v. Cole*, (N. J. 1905) 59 Atl. Rep. 895; *Hanneman v. Richter*, 63 N. J. Eq. 753; *Willes v. Loomis*, 94 N. Y. App. Div. 67; *Omohundro v. Elkins*, 109 Tenn. 711. See also *Thomas v. Hamill*, 106 Ill. App. 524; *Bennett v. Bennett*, 84 Miss. 493.

When Interest Not Allowed. — *Glos v. Clark*, 97 Ill. App. 609, *appeal dismissed* 199 Ill. 147.

Accounting for Use and Occupation. — *Walker v. Williams*, 84 Miss. 392; *Hanson v. Hanson*, (Neb. 1903) 97 N. W. Rep. 23.

1172. 3. See *Omohundro v. Elkins*, 109 Tenn. 711.

4. *Setting Off Value of Improvements.* — *Bennett v. Bennett*, 84 Miss. 493.

5. *Right to Allowance for Improvements.* — *Pesqueira v. Kellogg*, (Ariz. 1903) 71 Pac. Rep. 915; *Glos v. Clark*, 97 Ill. App. 609, *appeal dismissed* 199 Ill. 147; *Pulse v. Osborn*, 30 Ind. App. 631; *Butrick, Petitioner*, 185 Mass. 107; *Bennett v. Bennett*, 84 Miss. 493; *Legg v. Legg*, 34 Wash. 132. See also *Satterlee v. Kobbe*, 173 N. Y. 91. But see *Porter v. Osmun*, 135 Mich. 361, 10 Detroit Leg. N. 1013; *Wells v. Sweeney*, 16 S. Dak. 489.

That the Improvements Were Made During the Existence of a Preceding Life Estate does not change the rule. *Shipman v. Shipman*, 65 N. J. Eq. 556.

1173. 2. *Equalizing Advancements.* — *Schick v. Whitcomb*, (Neb. 1903) 94 N. W. Rep. 1023.

4. *In Interest of Cotenants.* — *Heinze v. Butte*, etc., *Consol. Min. Co.*, (C. C. A.) 126 Fed. Rep. 1. See also *Mesnager v. De Leonis*, 140 Cal. 402.

1174. 1. *Partition May Be Made Before the Time for Contesting the Will Has Expired*, notwith-

- 1174.** *b.* WHEN BARRED. — See notes 4, 5.
8. Jury Trial. — See note 6.
1175. **9.** Costs and Fees in Partition — *a.* IN ENGLAND. — See note 2.
1176. *b.* IN UNITED STATES — (1) *Costs Usually Discretionary.* — See note 1.
Discretion Limited. — See note 4.
Costs as Depending upon Successful Defense. — See notes 5, 6.
(2) In Proportion to Interest. — See note 7.
1177. *(3) Counsel Fees.* — See note 2.
In Amicable Proceedings Only. — See note 3.
1178. Attorney's Fee Matter of Agreement. — See note 1.
A Judgment in a Suit Against Unknown and Nonresident Heirs. — See note 2.
(4) Fees of Other Persons — Commissioners — Referee. — See note 10.
1179. **IV. OWELTY OF PARTITION** — **1.** Definition. — See note 3.
2. When Allowed — *a.* IN GENERAL. — See note 7.

standing the *Missouri* statute. *Robertson v. Brown*, 187 Mo. 452, 106 Am. St. Rep. 485.

Action by Widow Claiming Interest Under Statute. — Where a widow claims her interest in land under the statute, and not under the will of her deceased husband, she need not wait until the lapse of five years from the date of the will before maintaining partition proceedings. *Spratt v. Lawson*, 176 Mo. 175.

1174. 2. When Proceeding Premature. — *Serena v. Moore*, (N. J. 1905) 60 Atl. Rep. 953; *Keim's Estate*, 201 Pa. St. 609. See also *Wachter v. Doerr*, 210 Ill. 242, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1174. Compare *Schick v. Whitcomb*, (Neb. 1903) 94 N. W. Rep. 1023; *O'Brien v. Ash*, 169 Mo. 283. *Contra*, *Watke v. Stine*, 214 Ill. 563; *Hall v. Gabbert*, 213 Ill. 208.

4. Statute of Limitations Not Applicable. — *Adams v. Hopkins*, 144 Cal. 19; *Dresser v. Travis*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 358, affirmed 87 N. Y. App. Div. 632. See also *Rhodes v. Cooper*, 113 La. 600.

Laches Cannot Be Invoked. — *Brumback v. Brumback*, 198 Ill. 66.

5. When Statute Begins to Run. — *Rhodes v. Cooper*, 113 La. 600.

6. Jury Trial. — *Chandler v. Richardson*, 65 Kan. 152; *Fairweather v. Burling*, 181 N. Y. 117; *Levine v. Goldsmith*, 71 N. Y. App. Div. 204. See also *Satterlee v. Kobbe*, 173 N. Y. 91.

Where an Issue Can Be Determined from the Pleadings the parties are not entitled to a jury trial. *Adams v. Hopkins*, 144 Cal. 19. See also *Adams v. Hopkins*, (Cal. 1902) 69 Pac. Rep. 228.

Jury Not Matter of Right. — *Chandler v. Richardson*, 65 Kan. 152.

In New York any party may insist on a jury trial, and may resist an application to refer. *Fairweather v. Burling*, 181 N. Y. 117.

Findings of Jury Merely Advisory. — *Chandler v. Richardson*, 65 Kan. 152.

1175. 2. Since Partition Acts. — *Hills v. Archer*, 91 L. T. N. S. 166.

1176. 1. Costs Usually Discretionary. — See *Chilvers v. Race*, 196 Ill. 71.

Costs Allowed Only After Final Judgment. — *Harrington v. Goldsmith*, 136 Cal. 168.

4. Such Discretion Limited. — See *Chilvers v. Race*, 196 Ill. 71; *Crossman v. Wyckoff*, 64 N. Y. App. Div. 554.

5. Costs Taxed Against Unsuccessful Defendant. — *Powell v. Naylor*, 32 Tex. Civ. App. 340.

6. No Fees Taxed in Adversary Proceedings. — *Poage v. Smith*, 101 Ill. App. 261; *Joest v. Adel*, 209 Ill. 432.

7. In Proportion to Interest. — *Poage v. Smith*, 101 Ill. App. 261.

1177. 2. Counsel Fees as Costs. — *McMullen v. Doughty*, (N. J. 1903) 55 Atl. Rep. 115; *Keeney v. Henning*, (N. J. 1903) 55 Atl. Rep. 88; *Hogg's Estate*, 206 Pa. St. 415; *Robinson v. Robinson*, 24 R. I. 222. See also *McMullen v. Reynolds*, 209 Ill. 504; *Wachter v. Doerr*, 210 Ill. 242.

Where There Is No Partition the court cannot allow a fee to the plaintiff's attorney to be charged against the whole estate. See *Whitsett v. Wamack*, 95 Mo. App. 296.

Where Counsel Is Not Necessarily Employed counsel fees will not be allowed. *Girtman v. Starbuck*, (Fla. 1904) 37 So. Rep. 731; *Case v. Case*, 103 Ill. App. 177.

When Counsel Fees Settled Between Counsel and Client. — See *Robinson v. Robinson*, 24 R. I. 222.

3. Not in Adversary Proceedings. — *McMullen v. Reynolds*, 209 Ill. 504; *Poage v. Smith*, 101 Ill. App. 261; *Loveland v. Loveland*, 96 Ill. App. 488; *St. Clair v. Marquell*, 161 Ind. 56; *Fristoe v. Gillen*, 80 S. W. Rep. 823, 26 Ky. L. Rep. 149; *Walker v. Williams*, 84 Miss. 392.

1178. 1. Attorney's Fee Matter of Agreement. — *Legg v. Legg*, 34 Wash. 132. But see *Forsee v. McGuire*, 109 Mo. App. 701.

2. Liens. — See *Virginia Iron, etc., Co. v. Roberts*, 103 Va. 661.

10. Discretion Allowed to Court in Determining Referee's Fees. — *Mesnager v. De Leonis*, 140 Cal. 402.

Fees May Be Allowed to a Guardian ad Litem in *Missouri*, even though no partition is had, and they may be taxed against the plaintiff, where he is the losing party. *Whitsett v. Wamack*, 95 Mo. App. 296.

1179. 3. Owelty of Partition. — *Stone v. McGregor*, (Tex 1905) 87 S. W. Rep. 334, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1179.

7. Owelty Awarded to Equalize Shares. — *Nichols v. Nichols*, 181 Mass. 490; *Robinson v. Robinson*, 24 R. I. 222.

Must Be Equitably Necessary and Amount Must

1180. 3. Lien Created By — *a. NATURE OF.* — See note 8.

c. EFFECT ON VESTING OF TITLE. — See note 11.

1182. *f.* ENFORCEMENT OF LIEN — (3) *Defenses* — (a) *Statutes of Limitations and Presumptions.* — See notes 11, 12.

1183. V. EFFECT OF PARTITION — JUDGMENTS AND DECREES REFUSING PARTITION — 1. *General Rules* — *a. PARTIES, PRIVIES, AND PERSONS NOT INTERESTED.* — See note 14.

1184. See note 1.

1185. See note 2.

1186. *b.* PERSONS NOT PARTIES. — See note 2.

1187. *c.* EQUITABLE RELIEF. — See note 2.

1188. 2. Purchasers Pendente Lite. — See note 1.

1189. 4. Persons under Disability. — See notes 1, 2.

5. *Incumbrancers of Undivided Shares.* — See note 3.

1192. 10. Void Partition as Color of Title. — See note 2.

1193. 11. Title, Possession, and Equitable Rights — *a. IN GENERAL.* — See note 1.

b. VOLUNTARY PARTITION. — See note 2.

Be Fair. — *Udike v. Adams*, 24 R. I. 220, 96 Am. St. Rep. 711.

Party Not Paying Owelty Cannot Object to Its Amount. — *Robinson v. Robinson*, 24 R. I. 222.

A Decree for the Sale of Property to be partitioned does not provide a substitute for owelty, but covers cases in which owelty is impracticable. *Udike v. Adams*, 24 R. I. 220, 96 Am. St. Rep. 711.

1180. 8. Where One Is Unable to Make Payment at the time of division, it should be a charge or lien upon his share, and a reasonable time should be given for payment. *Udike v. Adams*, 24 R. I. 220, 96 Am. St. Rep. 711. See also *Robinson v. Robinson*, 24 R. I. 222.

11. When Decree of Prepayment Proper. — Where a person upon whose share owelty has been imposed is entitled to insurance money owing on the partitioned property, the decree should provide for a prepayment to the extent of the insurance before a vesting of title. *Robinson v. Robinson*, 24 R. I. 222.

1182. 11. Limitations. — *Contra, Ex p. Smith*, 134 N. Car. 495.

12. Presumption of Payment Within Ten Years under North Carolina Code. — See *Ex p. Smith*, 134 N. Car. 495.

1183. 14. Voluntary Partition. — *Milligan v. Masden*, 25 Ky. L. Rep. 144, 74 S. W. Rep. 1049, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1183.

1184. 1. Judicial Partition. — *Martin v. People's Bank*, 115 Fed. Rep. 226; *Ivanovich v. Weilenman*, 144 Cal. 757; *Tobin v. Larkin*, 187 Mass. 279; *Perkins v. Goddin*, 111 Mo. App. 429; *Sparks v. Clay*, 185 Mo. 393; *Bartley v. Bartley*, 172 Mo. 208; *Dresser v. Travis*, 177 N. Y. 371; *Parish v. Parish*, 175 N. Y. 181.

1185. 2. Judgment Not Subject to Collateral Attack. — *Ivanovich v. Weilenman*, 144 Cal. 757; *Brack v. Boyd*, 211 Ill. 290; *Bartley v. Bartley*, 172 Mo. 208; *Place v. Rogers*, 101 N. Y. App. Div. 193; *Norwood v. Greeg*, 67 S. Car. 224; *Moor v. Moor*, 31 Tex. Civ. App. 137. See also *Allen v. Foster*, 32 Tex. Civ. App. 332.

As to Facts Incorrectly Stated and incompatible with each other a decree in a former

partition suit has no binding force. *Cronkhite v. Strain*, 210 Ill. 331.

1186. 2. Judicial Partition. — *Wachter v. Doerr*, 210 Ill. 242; *Hays v. Marsh*, 123 Iowa 81; *Smith v. Piper*, 118 Iowa 363; *Perkins v. Goddin*, 111 Mo. App. 429; *Bacon v. Fay*, 63 N. J. Eq. 411; *Perrine v. Kohr*, 205 Pa. St. 602; *Walters v. Bray*, (Tex. Civ. App. 1902) 70 S. W. Rep. 443. See also *Blue v. Waters*, 114 Ky. 659; *Carter v. White*, 134 N. Car. 466, 101 Am. St. Rep. 853, per *Clark, C. J., dissenting*, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1186.

Voluntary Partition. — *Monro v. Toronto R. Co.*, 4 Ont. L. Rep. 36.

1187. 2. Cases Held Insufficient to Warrant Relief. — *Hamilton v. McLean*, 169 Mo. 51; *Allen v. Foster*, 32 Tex. Civ. App. 332; *Cross v. Cross*, 56 W. Va. 185.

1188. 1. Interests Acquired Before Judgment or Decree in Trial Court. — *Macgregor v. Malarkey*, 96 Ill. App. 421.

1189. 1. Married Women and Infants. — *Milligan v. Masden*, 74 S. W. Rep. 1049, 25 Ky. L. Rep. 144.

2. Married Women — Infants. — *McCullough v. Finley*, 69 Kan. 705; *Milligan v. Masden*, 74 S. W. Rep. 1049, 25 Ky. L. Rep. 144.

3. Incumbrancers of Undivided Shares. — *Emrich v. Gilbert Mfg. Co.*, 138 Ala. 326, citing 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1189; *Macgregor v. Malarkey*, 96 Ill. App. 421; *Jeanette Bank v. Stansbury*, 110 La. 301; *Jolliffe v. Maxwell*, (Neb. 1902) 91 N. W. Rep. 563; *Childers v. Loudin*, 51 W. Va. 559. See also *Stevens v. Stevens*, 172 Mo. 28.

1192. 2. Void Partition as Color of Title. — *Jellerson v. Pettus*, 132 Ala. 671; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959.

1193. 1. Title Not Created or Divested by Partition. — *Sharp v. Stewart*, 185 Mo. 518; *Perrine v. Kohr*, 205 Pa. St. 602; *Owens v. Naughton*, 23 Pa. Super. Ct. 639. See also *Carter v. White*, 134 N. Car. 466, 101 Am. St. Rep. 853, per *Clark, C. J., dissenting*, quoting 21 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1193.

2. Voluntary Partition. — *Harrington v. Rawls*, 136 N. Car. 65; *Snyder v. Elliott*, 171 Mo. 362.

1193. *c.* JUDICIAL PARTITION — (1) *At the Early Law.* — See note 3.

1194. See note 1.

1195. (2) *Under Statutes.* — See note 1.

1197. VI. PARTITION SALES — 2. Right to Order — *a.* STATUTES AUTHORIZING SALE. — See note 2.

1199. *b.* CIRCUMSTANCES AUTHORIZING SALE — (2) *American Rule.* — See notes 4, 5, 6.

1201. 4. What May Be Sold — *c.* ESTATES IN POSSESSION AND EXPECTANCY. — See notes 5, 10*a*.

1202. *h.* PROPERTY NOT OWNED IN COTENANCY. — See note 6.

1203. 6. Who May Purchase — *c.* GUARDIANS. — See note 5.

1193. 3. Judicial Proceedings for Partition Possessory Only. — See *Sharp v. Stewart*, 185 Mo. 518.

1194. 1. Judicial Proceedings for Partition Involve and Adjudicate Rights of Property. — *Parkinson v. Parkinson*, (Mich. 1905) 102 N. W. Rep. 1002; *Carter v. White*, 134 N. Car. 466, 101 Am. St. Rep. 853.

1195. 1. Under Indiana Statute. — *Sauer v. Schenck*, 159 Ind. 373.

1197. 2. Sale and Division of Proceeds — *United States*. — *East Coast Cedar Co. v. People's Bank*, (C. C. A.) 111 Fed. Rep. 446.

Alabama. — *Stein v. McGrath*, 128 Ala. 175.

California. — *Gardiner v. Cord*, 145 Cal. 157.

Illinois. — *Watke v. Stine*, 214 Ill. 563; *Miller v. Lanning*, 211 Ill. 620; *Kloss v. Wylezalek*, 207 Ill. 328, 99 Am. St. Rep. 220; *Donaldson v. Duncan*, 199 Ill. 167.

Iowa. — *Truth Lodge No. 213 v. Barton*, 119 Iowa 230, 97 Am. St. Rep. 303.

Kansas. — *Hazen v. Webb*, 65 Kan. 38, 93 Am. St. Rep. 276.

Kentucky. — *Atherton v. Warren*, (Ky. 1905) 85 S. W. Rep. 1100; *Gill v. Lane*, 80 S. W. Rep. 1176, 26 Ky. L. Rep. 267; *Bell v. Smith*, 71 S. W. Rep. 433, 24 Ky. L. Rep. 1328; *Talbott v. Campbell*, 67 S. W. Rep. 53, 23 Ky. L. Rep. 2198. See also *Larrabee v. Larrabee*, 71 S. W. Rep. 645, 24 Ky. L. Rep. 1423; *Berry v. Lewis*, 82 S. W. Rep. 252, 26 Ky. L. Rep. 530.

Maryland. — *Wickes v. Wickes*, 98 Md. 307.

Massachusetts. — *Tobin v. Larkin*, 187 Mass. 279.

Michigan. — *Gilman v. Boden*, 136 Mich. 125, 10 Detroit Leg. N. 1012.

Montana. — *Hurley v. O'Neill*, (Mont. 1905) 79 Pac. Rep. 242.

Missouri. — *Carpenter v. Coats*, 183 Mo. 52.

New Jersey. — *Bouvier v. Baltimore, etc.*, R. Co., 67 N. J. L. 281.

New York. — *Dresser v. Travis*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 358, affirmed 87 N. Y. App. Div. 632.

Oregon. — *Sterling v. Sterling*, 43 Oregon 200.

Pennsylvania. — *Black v. Black*, 206 Pa. St. 116.

South Carolina. — *Heyward v. Middleton*, 65 S. Car. 493.

Utah. — *Ryan v. Egan*, 26 Utah 241.

West Virginia. — *Croston v. Male*, 56 W. Va. 205, 107 Am. St. Rep. 813; *Stewart v. Tennant*, 52 W. Va. 559.

Wisconsin. — *Reynolds v. Nielson*, 116 Wis. 483, 96 Am. St. Rep. 1000.

Canada. — *Ontario Power Co. v. Whattler*, 7 Ont. L. Rep. 198.

Order of Sale Not Final Judgment. — *Compare Camp Phosphate Co. v. Anderson*, (Fla. 1904) 37 So. Rep. 722.

Right to Sale Purely Statutory. — *Croston v. Male*, 56 W. Va. 205, 107 Am. St. Rep. 813.

The Test to determine the propriety of a sale is to inquire whether the aggregate value of the separate parcels in case of actual partition would be materially less than the value of the property if held in one parcel. *Croston v. Male*, 56 W. Va. 205, 107 Am. St. Rep. 813.

Interests of All Owners Must Be Promoted by Sale. — *Croston v. Male*, 56 W. Va. 205, 107 Am. St. Rep. 813.

1199. 4. Partition Favored Rather than Sale. — *Watke v. Stine*, 214 Ill. 563; *Kloss v. Wylezalek*, 207 Ill. 328, 99 Am. St. Rep. 220.

5. *Division Must Be Impossible or Injurious.* — *Donaldson v. Duncan*, 199 Ill. 167; *Kloss v. Wylezalek*, 207 Ill. 328, 99 Am. St. Rep. 220.

Affirmative Showing Necessary. — *Talbott v. Campbell*, 67 S. W. Rep. 53, 23 Ky. L. Rep. 2198; *Stewart v. Tennant*, 52 W. Va. 559.

Property Held Susceptible of Actual Partition. — *Donaldson v. Duncan*, 199 Ill. 167; *Talbott v. Campbell*, 67 S. W. Rep. 53, 23 Ky. L. Rep. 2198; *Taylor v. Webber*, 83 S. W. Rep. 567, 26 Ky. L. Rep. 1199.

Presumption as to Impairment of Value. — See *Bell v. Smith*, 71 S. W. Rep. 433, 24 Ky. L. Rep. 1328; *Talbott v. Campbell*, 67 S. W. Rep. 53, 23 Ky. L. Rep. 2198.

Inconvenience of Partition, as one of the circumstances authorizing a sale, does not contemplate physical impossibility of division, but the requirement is not satisfied by anything short of a real and substantial obstacle to a division in kind, such as would make it injurious to the owners. *Croston v. Male*, 56 W. Va. 205, 107 Am. St. Rep. 813.

6. *Absolute Right to Sale.* — *Stewart v. Tennant*, 52 W. Va. 559.

1201. 5. *Kentucky Statute.* — See generally *Liter v. Fishback*, 75 S. W. Rep. 232, 25 Ky. L. Rep. 260; *Hughes v. Bent*, 81 S. W. Rep. 931, 26 Ky. L. Rep. 453; *Berry v. Lewis*, 82 S. W. Rep. 252, 26 Ky. L. Rep. 530, rehearing denied 84 S. W. Rep. 526, 27 Ky. L. Rep. 109; *Atherton v. Warren*, (Ky. 1905) 85 S. W. Rep. 1100.

10*a.* *Community Property*, in Louisiana, cannot be partitioned by licitation during the life of the survivor of the community. *Glancey's Succession*, 112 La. 430.

1202. 6. *Kentucky Statute — Limit of Value of Individual Shares.* — See *Berry v. Lewis*, 82 S. W. Rep. 252, 26 Ky. L. Rep. 530.

1203. 5. *A Guardian Who Bids by Permis-*

- 1203.** 7. Conduct of Sale — *a.* NOTICE. — See note 7.
1204. *e.* SALE EN MASSE OR IN PARCELS. — See note 8.
1205. 9. Purchase Money — *a.* NECESSITY FOR PAYMENT. — See note 2.
 10. Confirmation. — See notes 7, 8.
1206. 11. Setting Aside and Resale — *b.* WHEN ORDERED — (1) *In General* — Illustrations. — See notes 11, 12.
 (2) *Fraud or Misconduct on Part of Purchaser.* — See note 13.
1207. (3) *Negligence and Mismanagement.* — See notes 3, 4.
 (4) *Mistake or Surprise.* — See note 8.
 (5) *Unfavorable Circumstances Attendant upon Sale.* — See note 12.
 (6) *Inadequacy of Price as Affecting Sale* — (a) *In General.* — See notes 13, 14.
1208. See note 1.
 (b) *In Case of Infant Owners.* — See notes 3, 6.
1209. (9) *Offer of Advance Price.* — See note 2.
 12. Rights of Purchasers — *a.* RIGHT TO GOOD TITLE. — See notes 5, 6.
1210. *c.* INSUFFICIENT GROUND FOR RELIEF. — See note 24.
1211. See note 5a.
d. RIGHT TO RENT. — See note 6.
 13. Liabilities of Purchasers — *a.* FOR LIENS. — See note 8.

sion of the Chancellor stands with reference to the sale as any other purchaser. *Larrabee v. Larrabee*, 71 S. W. Rep. 645, 24 Ky. L. Rep. 1423.

1203. 7. Time of Publication. — *Brillhart v. Mish*, 99 Md. 447.

1204. 8. When Sale en Masse Proper. — *Kieran v. Lynch*, 112 La. 555; *Walker v. Killian*, 62 S. Car. 482.

Mortgaged Premises Consisting of Separate Lots cannot be sold in *Michigan* in one parcel, but must be sold separately. *O'Connor v. Keenan*, 132 Mich. 646, 10 Detroit Leg. N. 51.

1205. 2. See *Schick v. Whitcomb*, (Neb. 1903) 94 N. W. Rep. 1023.

7. *Dunn v. Dunn*, 137 Cal. 51.

1206. 11. *Sallier v. Rosteet*, 108 La. 378.

12. Error in Description of Property. — *Bethea v. Bethea*, 136 Ala. 584.

Advance Offer of Five Hundred Dollars. — *Bethea v. Bethea*, 136 Ala. 584.

13. Fraud on Part of Purchaser. — *Schwaman v. Truax*, 179 N. Y. 35.

1207. 3. Puffing Bids. — *Columbia Finance, etc., Co. v. Bates*, 74 S. W. Rep. 248, 24 Ky. L. Rep. 2412.

4. Selling for Cash Instead of Credit. — *Columbia Finance, etc., Co. v. Bates*, 74 S. W. Rep. 248, 24 Ky. L. Rep. 2412.

8. Mistake or Surprise. — See *Columbia Finance, etc., Co. v. Bates*, 74 S. W. Rep. 248, 24 Ky. L. Rep. 2412.

12. Unfavorable Circumstances. — *Lipp v. Allphin*, 77 S. W. Rep. 1105, 25 Ky. L. Rep. 1382.
13. Gross Inadequacy. — *Dunn v. Dunn*, 137 Cal. 51; *Thibodeaux v. Thibodeaux*, 112 La. 906.

14. Inadequacy Immaterial. — *Lipp v. Allphin*, 77 S. W. Rep. 1105, 25 Ky. L. Rep. 1382; *Larrabee v. Larrabee*, 71 S. W. Rep. 645, 24 Ky. L. Rep. 1423.

1208. 1. *Lipp v. Allphin*, 77 S. W. Rep.

1105, 25 Ky. L. Rep. 1382; *Columbia Finance, etc., Co. v. Bates*, 74 S. W. Rep. 248, 24 Ky. L. Rep. 2412.

Value at Time of Sale Controls. — *Dunn v. Dunn*, 137 Cal. 51.

3. Inadequacy Where Infants Are Owners. — See *Lipp v. Allphin*, 77 S. W. Rep. 1105, 25 Ky. L. Rep. 1382.

When Infants May Have Sale Set Aside. — Where land capable of actual partition was sold for one-fifth of its real value, on the ground that it could not be divided without impairing its value, it was held that infants who had no statutory guardian might have the sale set aside. *Taylor v. Webber*, 83 S. W. Rep. 567, 26 Ky. L. Rep. 1199.

6. See *Larrabee v. Larrabee*, 71 S. W. Rep. 645, 24 Ky. L. Rep. 1423, where a ward's share proceeding was brought by the guardian.

1209. 2. See *Dunn v. Dunn*, 137 Cal. 51; *Columbia Finance, etc., Co. v. Bates*, 74 S. W. Rep. 248, 24 Ky. L. Rep. 2412.

5. Right to Good Title. — *MacRae v. Smith*, 112 La. 715.

6. Caveat Emptor the Rule. — *Greunewald v. Neu*, 215 Ill. 132; *Hall v. Gabbert*, 213 Ill. 208.

1210. 24. A Lease Is Not a Cloud where the lessee is a party to the proceedings. *Dresser v. Travis*, 177 N. Y. 376.

1211. 5a. Other Insufficient Grounds for Relief — *Existence of Taxes Which Are a Lien.* — *Wise v. Wolfe*, (Ky. 1905) 85 S. W. Rep. 1191.

Mere Possibility of Title Being Unmarketable. — *Boyle v. Boyle*, 114 Fed. Rep. 517.

Guardians ad Litem Improperly Appointed. — *Parish v. Parish*, 175 N. Y. 181.

Fact that Only Part of Property Was Partitioned. — *Friedrich v. Friedrich*, 111 La. 26.

6. The Purchaser May Recover the Value of the Use and Occupation from persons unlawfully occupying the property. *Bethea v. Bethea*, 139 Ala. 505.

8. Liability for Liens. — In *Pennsylvania*,

- 1212.** *a.* RIGHTS OF REMAINDERMEN. — See note 3.
14. Enforcement of Bid. — See note 12.
1213. **15.** Distribution of Proceeds — *b.* METHOD OF DISTRIBUTION — Costs and Fees of Sale. — See note 5.
1214. *g.* SHARE OF LIFE TENANT. — See note 10.
h. SHARE OF WIDOW. — See note 11.
1215. *k.* DEDUCTION OF CHARGES AGAINST FUND. — See notes 4, 9.
1216. **16.** Appraisement. — See note 7.
1217. **18.** Effect of Agreement to Purchase. — See note 4.

where a decedent's real estate is sold in partition proceedings, a lien for his debts is not divested by the sale. *Bricker's Estate*, 22 Pa. Super. Ct. 12. But an agreement that municipal liens shall be paid out of the proceeds of the sale divests the property of such liens. *Sneathen's Estate*, 22 Pa. Super. Ct. 45.

Purchaser Takes Title Subject to Claims of Creditors of Estate. — *Hall v. Gabbert*, 213 Ill. 208; *Wachter v. Doerr*, 210 Ill. 242.

1212. 3. Rights of Remaindermen. — *Compare Sneathen's Estate*, 22 Pa. Super. Ct. 45.

12. Resale at Risk of Bidder. — *Dunn v. Dunn*, 137 Cal. 51.

1213. 5. Costs and Fees. — See *Re Vase*, 84 L. T. N. S. 761; *Keeney v. Henning*, (N. J. 1903) 55 Atl. Rep. 88.

1214. 10. Interest for Life. — The *North Carolina* statute provides that the life tenant shall receive the interest on the value of his share annually, or in lieu of this the value of his share during his probable life shall be ascertained, and paid out of the proceeds to him

absolutely. *Martin v. People's Bank*, 115 Fed. Rep. 226.

11. Shares of Widows. — *Wise v. Wolfe*, (Ky. 1905) 85 S. W. Rep. 1191.

1215. 4. The Fund Is Not Liable for Debts Which Were a Lien on the partitioned property. *Bricker's Estate*, 22 Pa. Super. Ct. 12.

Fund Cannot Be Distributed to Pay Debts of Cotenant Without Consent. — *Heyward v. Middleton*, 65 S. Car. 493.

9. Creditors. — *McKinley v. Coe*, 66 N. J. Eq. 70.

Liens by Judgment or otherwise on the interest of any party may be discharged by the court applying the dividends of such party in the proceeds of sale. *Grove v. Grove*, 100 Va. 556.

1216. 7. When Unnecessary. — *Columbia Finance, etc., Co. v. Bates*, 74 S. W. Rep. 248, 24 Ky. L. Rep. 2412.

1217. 4. See *Columbia Finance, etc., Co. v. Bates*, 74 S. W. Rep. 248, 24 Ky. L. Rep. 2412.

PARTNERSHIP.

BY BASIL JONES.

13. I. WHAT CONSTITUTES PARTNERSHIP — 1. Partnership Defined. — See notes I, 2, 3, 4.

14. 2. Essential Elements — b. CONTRACT BETWEEN PARTNERS — (1) Contract Always Necessary. — See notes 3, 4.

15. See note 2.

(2) *Conclusion of Agreement.* — See note 3.

(3) *Delectus Personarum* — (a) *Statement of Rule.* — See note 6.

16. (b) *Consequences of Rule.* — See notes I, 3.

(c) *How Consent May Be Given.* — See note 5.

17. (4) *Subpartnerships.* — See notes 6, 7, 9, 11.

13. 1. Definitions. — In *re* Beckwith, 130 Fed. Rep. 475, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 13; *Terre Haute Brewing Co. v. Newland*, 33 Ind. App. 544, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 13; *Blackmarr v. Williamson*, 57 W. Va. 249, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 13.

For Further Definitions see *Garside v. Norval*, 1 Alaska 19; *Barnes v. Collins*, 16 Hawaii 340; *Field v. Eilers*, 103 Ill. App. 374; *McMurtrie v. Guiler*, 183 Mass. 451; *Weeks v. Hutchinson*, 135 Mich. 160; *Willis v. Crawford*, 38 Oregon 522; *Hanthorn v. Quinn*, 42 Oregon 1; *Gore v. Benedict*, (Tenn. Ch. 1901) 61 S. W. Rep. 1054; *Sullivan v. Sullivan*, 122 Wis. 326.

Definition Must Include Purposes of Business and Profit. — *Teed v. Parsons*, 202 Ill. 455.

Partnership Law Founded on Custom of Merchants. — *Lord v. Hull*, 178 N. Y. 9, 102 Am. St. Rep. 484. See also *Teed v. Parsons*, 202 Ill. 455.

Partnership Status Dependent on Contract. — *Hartford F. Ins. Co. v. McClain*, (Ky. 1905) 85 S. W. Rep. 699.

2. Defined So as to Make Profit Sharing Test. — See *H. B. Claffin Co. v. Gross*, (C. C. A.) 112 Fed. Rep. 386; *Fechtelor v. Palm*, (C. C. A.) 133 Fed. Rep. 462.

3. Statutory Definitions. — See *Lott v. Young*, (C. C. A.) 109 Fed. Rep. 798; *Krasky v. Wollpert*, 134 Cal. 338; *Huggins v. Huggins*, 117 Ga. 151.

4. Criticism of Usual Definitions. — *Sullivan v. Sullivan*, 122 Wis. 326.

14. 3. Contract Necessary — Not Formed by Operation of Law — United States. — See *Lott v. Young*, (C. C. A.) 109 Fed. Rep. 798.

Alabama. — *Sabel v. Savannah Rail, etc., Co.*, 135 Ala. 380; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 Am. St. Rep. 907.

Georgia. — *Huggins v. Huggins*, 117 Ga. 151.
Illinois. — *Reynolds v. Radke*, 112 Ill. App. 575.

Kansas. — *Rider v. Hammell*, 63 Kan. 733.

Maine. — *Winslow v. Young*, 94 Me. 145.

Maryland. — *Lighthiser v. Allison*, 100 Md. 103.

Massachusetts. — See *McMurtrie v. Guiler*, 183 Mass. 451.

Michigan. — *Weeks v. Hutchinson*, 135 Mich. 160.

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New York. — *Smith v. Dunn*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 288; *Levine v. Goldsmith*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 7, reversed on other grounds 71 N. Y. App. Div. 204.

Ohio. — *Russell v. Fenner*, 11 Ohio Cir. Dec. 754, 21 Ohio Cir. Ct. 527.

Oregon. — See *Willis v. Crawford*, 38 Oregon 522.

Rhode Island. — *Egan v. Wirth*, 26 R. I. 363.

4. Hartford F. Ins. Co. v. McClain. (Ky. 1905) 85 S. W. Rep. 699.

15. 2. Consent Necessary. — *Lighthiser v. Allison*, 100 Md. 103; *Dow v. State Bank*, 88 Minn. 355; *Bolton v. Prather*, 35 Tex. Civ. App. 295. See also *Garrett v. Republican Pub. Co.*, 61 Neb. 541.

3. Agreement Must Have Been Concluded. — *Sabel v. Savannah Rail, etc., Co.*, 135 Ala. 380; *Morrison v. Dickey*, 122 Ga. 353, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 15.

6. Unanimous Consent Necessary. — *Morrison v. Austin State Bank*, 213 Ill. 472, 104 Am. St. Rep. 225; *Forst v. Kirkpatrick*, 64 N. J. Eq. 578; *Blackmarr v. Williamson*, 57 W. Va. 249, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 15.

16. 1. Transfer of Partner's Interest. — *Forst v. Kirkpatrick*, 64 N. J. Eq. 578.

3. Contract of Agent. — The fact that property which one partner puts into the partnership enterprise belongs to a third person, who has consented that it may be so used for his benefit, but whose interest is not disclosed, does not make such concealed principal a partner. *Morrison v. Dickey*, 122 Ga. 353.

5. Consent in Advance. — *Byrne v. Reid*, (1902) 2 Ch. 735, holding that equity will compel the admission as a partner of one who is nominated in pursuance of an agreement in the articles of partnership.

17. 6. Subpartnership Defined. — *Morrison v. Dickey*, 122 Ga. 353, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 17.

7. Subpartner Not Member of Principal Firm. — *Moore v. Hammond*, 110 Fed. Rep. 897; *Morri-*

18. c. SHARING PROFITS—(1) Former Doctrine—(a) Statement of Rule.— See note 1.

19. (b) Applications of Rule.— See note 1.

20. (2) Modern Doctrine—(a) Statement of Rule.— See note 3.

21. See note 1.

22. d. TESTS OF PARTNERSHIP—(1) Profit Sharing.— See note 5.

23. See notes 1, 2.

(2) *Mutual Agency.*—See notes 4, 6, 7.

24. See notes 1, 2.

(3) *Intention of Parties—(a) General Rule.*—See note 5.

son v. Dickey, 122 Ga. 553, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 17. See also Boimare v. St. Geme, 113 La. 808.

17. 9. Subpartner Not Liable for Debts of Principal Firm.—Morrison v. Dickey, 122 Ga. 353, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 17.

11. Morrison v. Dickey, 122 Ga. 353, holding that a valid gift of part of the profits may be made between the subpartners.

18. 1. View that Profit Sharing Creates Partnership as to Third Persons.—See Willis v. Crawford, 38 Oregon 522.

19. 1. Partners as to Third Persons, but Not Inter Se.—Brandon v. Conner, 117 Ga. 759.

20. 3. Profit-sharing Rule Abandoned.—Fechteler v. Palm, (C. C. A.) 133 Fed. Rep. 462; Leonard v. Sparks, 109 La. 543; Hughes v. Ewing, 162 Mo. 261; Glore v. Dawson, 106 Mo. App. 107; Bauer v. Wilson, (Tex. Civ. App. 1904) 79 S. W. Rep. 364.

21. 1. Sharing Profits Not Conclusive of Partnership Liability—United States.—Gentry v. Singleton, (C. C. A.) 128 Fed. Rep. 679; McKinley v. Lloyd, 128 Fed. Rep. 519; Fechteler v. Palm, (C. C. A.) 133 Fed. Rep. 462. See also Lott v. Young, (C. C. A.) 109 Fed. Rep. 798.

Alabama.—Gulf City Shingle Mfg. Co. v. Boyles, 129 Ala. 192.

California.—Baldwin v. Hart, 136 Cal. 222.

Georgia.—Huggins v. Huggins, 117 Ga. 151; Padgett v. Ford, 117 Ga. 508.

Hawaii.—Barnes v. Collins, 16 Hawaii 340.

Illinois.—Pierpont v. Lamphere, 104 Ill. App. 232.

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Louisiana.—Houston River Canal Co. v. Kopke, 106 La. 609; Cameron v. Orleans, etc., R. Co., 108 La. 83; Leonard v. Sparks, 109 La. 543.

Missouri.—Torbert v. Jeffrey, 161 Mo. 645; Gille Hardware, etc., Co. v. McCleverty, 89 Mo. App. 154; Glore v. Dawson, 106 Mo. App. 107.

Nebraska.—Garrett v. Republican Pub. Co., 61 Neb. 541.

New Jersey.—Cornell v. Redrow, 60 N. J. Eq. 251.

New York.—Clark v. Rumsey, 59 N. Y. App. Div. 435; McPhillips v. Fitzgerald, 76 N. Y. App. Div. 15, affirmed without opinion 177 N. Y. 543; Schultz v. Brackett Bridge Co., (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 595; Smith v. Dunn, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 288.

North Carolina.—Lance v. Butler, 135 N. Car. 419.

Oregon.—Willis v. Crawford, 38 Oregon 522; Hanthorn v. Quinn, 42 Oregon 1.

Rhode Island.—State v. Hunt, 25 R. I. 69.

Texas.—Moore v. Williams, 31 Tex. Civ. App. 287; Shute v. McVitie, (Tex. Civ. App. 1903) 72 S. W. Rep. 433; Bauer v. Wilson, (Tex. Civ. App. 1904) 79 S. W. Rep. 364; Masterson v. Heitmann, (Tex. Civ. App. 1905) 87 S. W. Rep. 227.

Vermont.—Deavitt v. Hooker, 73 Vt. 143.

22. 5. Profit Sharing Essential Element.—Paris Mercantile Co. v. Hunter, (Ark. 1905) 86 S. W. Rep. 808; Rider v. Hammell, 63 Kan. 733; Hartford F. Ins. Co. v. McClain, (Ky. 1905) 85 S. W. Rep. 699; McMurtrie v. Guiler, 183 Mass. 451; Hughes v. Ewing, 162 Mo. 261; Wakeman v. Somarindyck, 73 N. Y. App. Div. 601; Ludowieg v. Talcott, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 77; Baker v. Brennan, 12 Ohio Cir. Dec. 211; Willis v. Crawford, 38 Oregon 522; Fulton's Estate, 12 Pa. Dist. 725; Gore v. Benedict, (Tenn. Ch. 1901) 61 S. W. Rep. 1054; Deavitt v. Hooker, 73 Vt. 143. See also Hodges v. Rogers, 115 Ga. 951; Whittingham v. Darrin, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 478.

23. 1. Absence of Profit Sharing.—Paris Mercantile Co. v. Hunter, (Ark. 1905) 86 S. W. Rep. 808; Rider v. Hammell, 63 Kan. 733; Hartford F. Ins. Co. v. McClain, (Ky. 1905) 85 S. W. Rep. 699; Wakeman v. Somarindyck, 73 N. Y. App. Div. 601; Whittingham v. Darrin, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 478; Ludowieg v. Talcott, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 77; Baker v. Brennan, 12 Ohio Cir. Dec. 211; Fulton's Estate, 12 Pa. Dist. 725. See also Hodges v. Rogers, 115 Ga. 951.

2. Character of Profit Sharing Controlling.—Willis v. Crawford, 38 Oregon 522. See also Fechteler v. Palm, (C. C. A.) 133 Fed. Rep. 462.

4. Mutual Agency as Test.—See Pierpont v. Lamphere, 104 Ill. App. 232.

6. The Agency Follows from the Fact of Partnership.—Fechteler v. Palm, (C. C. A.) 133 Fed. Rep. 462.

7. Persons Sharing Profits as Principals Are Partners.—Fechteler v. Palm, (C. C. A.) 133 Fed. Rep. 462; Weeks v. Hutchinson, 135 Mich. 160; Willis v. Crawford, 38 Oregon 522; Hanthorn v. Quinn, 42 Oregon 1. See also Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176.

24. 1. See Rider v. Hammell, 63 Kan. 733.

2. Absence of Authority to Act for Associates.—Winslow v. Young, 94 Me. 145.

5. Intention Controlling Inter Se.—Leonard

25. See note 2.

26. (b) Legal and Not Expressed Intent Controlling. — See note 2.

27. See notes 1, 3.

(4) *Common Ownership of Profits* — (a) Statement of Rule. — See note 6.

29. See note 3.

Sharing as Principals — Community of Interest. — See note 5.

30. See note 1.

(b) Application of Rule — *bb.* PAYMENT OF DEBT OUT OF PROFITS. — See note 5.

v. Sparks, 109 La. 543. See also *Fleming v. Lay*, (C. C. A.) 109 Fed. Rep. 952.

25. 2. Intention Always Controlling under Modern Doctrine — United States. — *Shea v. Nilima*, (C. C. A.) 133 Fed. Rep. 209; *Fechteler v. Palm*, (C. C. A.) 133 Fed. Rep. 462.

Alabama. — *Gulf City Shingle Mfg. Co. v. Boyles*, 129 Ala. 192; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 Am. St. Rep. 907.

Arkansas. — *Rector v. Robins*, (Ark. 1905) 86 S. W. Rep. 667.

Georgia. — *Huggins v. Huggins*, 117 Ga. 151.

Hawaii. — *Barnes v. Collins*, 16 Hawaii 340.

Illinois. — *Leeds v. Townsend*, 89 Ill. App. 646.

Indiana. — *Shrum v. Simpson*, 155 Ind. 160.

Iowa. — *Johnson v. Carter*, 120 Iowa 355.

Kansas. — *Rider v. Hammell*, 63 Kan. 733.

Louisiana. — *Cameron v. Orleans, etc., Co.*, 108 La. 83; *Leonard v. Sparks*, 109 La. 543.

Maine. — *Winslow v. Young*, 94 Me. 145.

Maryland. — *Cannon v. Brush Electric Co.*, 96 Md. 446, 94 Am. St. Rep. 584; *Lighthiser v. Allison*, 100 Md. 103.

Massachusetts. — *McMurtrie v. Guiler*, 183 Mass. 451.

Mississippi. — *Fewell v. American Surety Co.*, 80 Miss. 782, 92 Am. St. Rep. 625.

Missouri. — *Torbert v. Jeffrey*, 161 Mo. 645; *Hughes v. Ewing*, 162 Mo. 261; *Hazell v. Clark*, 89 Mo. App. 78; *Gille Hardware, etc., Co. v. McCleverty*, 89 Mo. App. 154.

Nebraska. — *Garrett v. Republican Pub. Co.*, 61 Neb. 541.

New Jersey. — *Jones v. Beekman*, (N. J. 1900) 47 Atl. Rep. 71.

New York. — *McPhillins v. Fitzgerald*, 76 N. Y. App. Div. 15, affirmed without opinion 177 N. Y. 543; *Schultz v. Brackett Bridge Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 595; *Smith v. Dunn*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 288.

Oregon. — *Willis v. Crawford*, 38 Oregon 522, 531; *Hanthorn v. Quinn*, 42 Oregon 1.

Sufficiency of Evidence to Show Intention. — See *North Pac. Lumber Co. v. Spore*, 41 Oregon 462.

26. 2. Legal and Not Expressed Intent Controlling — United States. — *Fleming v. Lay*, (C. C. A.) 109 Fed. Rep. 952; *H. B. Claflin Co. v. Gross*, (C. C. A.) 112 Fed. Rep. 386.

Georgia. — *Brandon v. Conner*, 117 Ga. 759.

Hawaii. — *Barnes v. Collins*, 16 Hawaii 340.

Indiana. — *Shrum v. Simpson*, 155 Ind. 160.

Iowa. — *Johnson v. Carter*, 120 Iowa 355.

Louisiana. — *Cameron v. Orleans, etc., Co.*, 108 La. 83.

Michigan. — *City Nat. Bank v. Stone*, 131 Mich. 588.

Missouri. — *Hazell v. Clark*, 89 Mo. App. 78.

New Hampshire. — *Mason v. Gibson*, (N. H. 1905) 60 Atl. Rep. 96.

New York. — *Griffin v. Carr*, 21 N. Y. App. Div. 51, affirmed without opinion 165 N. Y. 621. See also *Marcus v. Segeal*, 94 N. Y. App. Div. 326.

Oregon. — *North Pac. Lumber Co. v. Spore*, 44 Oregon 462; *Hanthorn v. Quinn*, 42 Oregon 1. See also *Willis v. Crawford*, 38 Oregon 522.

Canada. — *School Trustees v. Oland*, 35 Nova Scotia 409.

Character of Undertaking Controls. — Before the law will imply partnership contrary to the intention of the parties, it must appear not only that funds were contributed to a common object, but that the enterprise contemplated is of such character that it cannot result in a successful issue if the proprietors are treated as tenants in common and not as copartners. *Winslow v. Young*, 94 Me. 145.

27. 1. No Partnership Although Expressly Intended. — *Barnes v. Collins*, 16 Hawaii 340; *Hazell v. Clark*, 89 Mo. App. 78.

3. When Expressed Intent Controls. — See *Huggins v. Huggins*, 117 Ga. 151, holding that where some of the essential elements of a partnership are present, and both parties agree to become partners, a partnership is created.

6. Sharing Profits as Common Owners or Joint Proprietors Constitutes Partnership. — *In re Beckwith*, 130 Fed. Rep. 475, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 27; *Overton Bank v. Thompson*, (C. C. A.) 118 Fed. Rep. 798; *Gulf City Shingle Mfg. Co. v. Boyles*, 129 Ala. 192; *Rector v. Robins*, (Ark. 1905) 86 S. W. Rep. 667; *Brandon v. Conner*, 117 Ga. 759; *Barnes v. Collins*, 16 Hawaii 340; *Winslow v. Young*, 94 Me. 145; *McMurtrie v. Guiler*, 183 Mass. 451; *Johnson v. Alexander*, 46 N. Y. App. Div. 6, affirmed without opinion 167 N. Y. 605; *Hull v. Barth*, 48 N. Y. App. Div. 590; *Burkardt v. Walsh*, 49 N. Y. App. Div. 634; *School Trustees v. Oland*, 35 Nova Scotia 409. See also *Willis v. Crawford*, 38 Oregon 522.

Sharing Need Not Be in Manner Implied by Law. — *Huggins v. Huggins*, 117 Ga. 151.

29. 3. Sharing Profits as Profits. — See *Johnson v. Alexander*, 46 N. Y. App. Div. 6, affirmed 167 N. Y. 605; *Willis v. Crawford*, 38 Oregon 522.

5. Sharing Profits as Principal Traders. — *Leeds v. Townsend*, 89 Ill. App. 646.

30. 1. Community of Interest in Profits. — *Rector v. Robins*, (Ark. 1905) 86 S. W. Rep. 667; *Paris Mercantile Co. v. Hunter*, (Ark. 1905) 86 S. W. Rep. 808. See also *Hanthorn v. Quinn*, 42 Oregon 1.

Community of Interest Not Sufficient Alone. — *Winslow v. Young*, 94 Me. 145.

5. Payment of Debt Out of Profits. — *Hartford*

31. *cc.* SHARE OF PROFITS IN LIEU OF COMPENSATION FOR SERVICES. — See note 1.

32. See note 1.

33. See note 1.

A Stipulated Liability for Losses or Expenses. — See note 4.

34. The Investment of Capital in the Business. — See note 1.

cc. SHARE OF PROFITS IN LIEU OF OR IN ADDITION TO INTEREST ON MONEY LENT. —

See note 4.

36. *ff.* SHARE OF PROFITS IN LIEU OF RENT. — See note 4.

37. *gg.* FIXED SUM AS COMPENSATION. — See note 7.

38. 3. Evidence of Partnership — *a.* IN GENERAL. — See notes 1, 3.

F. Ins. Co. v. McClain, (Ky. 1905) 85 S. W. Rep. 699. See also *Gulf City Shingle Mfg. Co. v. Boyles*, 129 Ala. 192.

31. 1. Profits in Lieu of Compensation — United States. — *Gentry v. Singleton*, (C. C. A.) 128 Fed. Rep. 679; *Fechteler v. Palm*, (C. C. A.) 133 Fed. Rep. 462.

Arkansas. — *Rector v. Robins*, (Ark. 1905) 86 S. W. Rep. 667.

Georgia. — *Huggins v. Huggins*, 117 Ga. 151; *Padgett v. Ford*, 117 Ga. 508.

Hawaii. — *Barnes v. Collins*, 16 Hawaii 340, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 31.

Illinois. — *Smythe v. Evans*, 209 Ill. 376; *Leeds v. Townsend*, 89 Ill. App. 646; *Pierpont v. Lanphere*, 104 Ill. App. 232.

Louisiana. — *Cameron v. Orleans, etc., R. Co.*, 108 La. 83; *Leonard v. Sparks*, 109 La. 543.

Missouri. — *Torbert v. Jeffrey*, 161 Mo. 645. *Nebraska.* — *Agnew v. Montgomery*, (Neb. 1904) 99 N. W. Rep. 820.

New York. — *Wolf v. Lawrence*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 481; *Schultz v. Brackett Bridge Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 595; *Hunt v. McCabe*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 461; *Smith v. Dunn*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 288; *Ludowieg v. Talcott*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 77; *Johnson v. Alexander*, 46 N. Y. App. Div. 6, affirmed without opinion 167 N. Y. 605.

North Carolina. — *Lance v. Butler*, 135 N. Car. 419.

Texas. — *Moore v. Williams*, 26 Tex. Civ. App. 142; *Shute v. McVitie*, (Tex. Civ. App. 1903) 72 S. W. Rep. 433.

Vermont. — *Deavitt v. Hooker*, 73 Vt. 143.

32. 1. Dawson Nat. Bank v. Ward, 120 Ga. 861; *Johnson v. Carter*, 120 Iowa 355; *Glore v. Dawson*, 106 Mo. App. 107; *Strode v. Gilpin*, 187 Mo. 383; *Cornell v. Redrow*, 60 N. J. Eq. 251; *State v. Hunt*, 25 R. I. 69; *Gore v. Benedict*, (Tenn. Ch. 1901) 61 S. W. Rep. 1054; *Murray Ginning System Co. v. Exchange Nat. Bank*, (Tex. Civ. App. 1901) 61 S. W. Rep. 508; *Texas, etc., R. Co. v. Smissen*, 31 Tex. Civ. App. 549.

33. 1. Cases of Partnership under Modern Doctrine. — *Gentry v. Singleton*, 3 Indian Ter. 516; *Torbert v. Jeffrey*, 161 Mo. 645. See also *Dawson Nat. Bank v. Ward*, 120 Ga. 861.

4. Liability for Losses or Expenses. — *Barnes v. Collins*, 16 Hawaii 340. See also *In re Dair*, 2 Ohio Dec. 362, 7 Ohio N. P. 309; *Marcus v. Segeal*, 94 N. Y. App. Div. 326.

34. 1. Investment of Capital. — If one who originally contributed no capital, but was to receive a part of the profits as compensation for his services, permits a portion of such profits to remain in the business as firm assets, he thereby becomes a partner. *Huggins v. Huggins*, 117 Ga. 151.

4. Profits in Lieu of Interest. — *Gentry v. Singleton*, (C. C. A.) 128 Fed. Rep. 679; *Fechteler v. Palm*, (C. C. A.) 133 Fed. Rep. 462; *Slater v. Van der Hoogt*, 23 App. Cas. (D. C.) 417; *Barnes v. Collins*, 16 Hawaii 340; *Leeds v. Townsend*, 89 Ill. App. 646; *Pierpont v. Lanphere*, 104 Ill. App. 232; *Johnson v. Carter*, 120 Iowa 355; *Rider v. Hammell*, 63 Kan. 733; *Scholtz v. Freud*, 128 Mich. 72; *Hazell v. Clark*, 89 Mo. App. 78; *Gille Hardware, etc., Co. v. McCleverty*, 89 Mo. App. 154; *Wakeman v. Somarindych*, 73 N. Y. App. Div. 601; *Jordan v. Patrick*, 207 Pa. St. 245; *Altgelt v. Elmen-dorf*, (Tex. Civ. App. 1905) 86 S. W. Rep. 41. *Compare Rahl v. Parlin, etc., Co.*, 27 Tex. Civ. App. 72 (as to third persons).

36. 4. Profits in Lieu of Rent. — *Fechteler v. Palm*, (C. C. A.) 133 Fed. Rep. 462; *Paris Mercantile Co. v. Hunter*, (Ark. 1905) 86 S. W. Rep. 808; *Barnes v. Collins*, 16 Hawaii 340; *Leeds v. Townsend*, 89 Ill. App. 646; *Pierpont v. Lanphere*, 104 Ill. App. 232; *Randall v. Ditch*, 123 Iowa 582; *Garrett v. Republican Pub. Co.*, 61 Neb. 541; *Hanthorn v. Quinn*, 42 Oregon 1.

37. 7. Compensation Independent of Profits. — *Hodges v. Rogers*, 115 Ga. 951; *Rider v. Hammell*, 63 Kan. 733; *Ryan v. Riddle*, 109 Mo. App. 115. See also *Tate v. Crooks*, 64 Kan. 887, 68 Pac. Rep. 74.

38. 1. Evidence. — See *Barwick v. Alderman*, (Fla. 1903) 35 So. Rep. 13; *Weeks v. Hutchinson*, 135 Mich. 160; *Matter of Dusen-bery*, 106 N. Y. App. Div. 235; *Wagner v. Sanders*, 62 S. Car. 73; *Moore v. Dickson*, 121 Wis. 591.

Newspaper Article Admissible. — *Stevens v. Walton*, 17 Colo. App. 440.

Sufficiency of Evidence to Show Partnership. — *In re Beckwith*, 130 Fed. Rep. 475; *In re Grant*, 106 Fed. Rep. 496; *Lapp v. Clark*, (Ky. 1905) 85 S. W. Rep. 717; *Griffiths v. Cope-land*, 183 Mass. 548; *Haynes v. Foley*, 82 N. Y. App. Div. 629; *Matter of Muller*, 96 N. Y. App. Div. 619.

3. Evidence Showing Nature and Ground of Profit Sharing. — See *Boon v. Turner*, 96 Mo. App. 635.

Evidence of Intent. — *Leeds v. Townsend*, 89 Ill. App. 646.

38. b. AS BETWEEN PARTNERS AND AS TO THIRD PERSONS.—See notes 4, 7.

39. See note 1.

c. BURDEN OF PROOF. — See note 2.

d. CONTRACT OR ARTICLES OF PARTNERSHIP. — See notes 5, 6, 7.

40. See notes 1, 2.

e. SHARING PROFITS AND LOSSES — (1) *Sharing Both Profits and Losses.* — See note 7.

41. See notes 1, 3.

(2) *Sharing Profits, Nothing Said About Losses.* — See note 4.

43. See notes 1, 3, 4.

44. (3) *Sharing Profits with Stipulation Against Losses.* — See notes 1, 2.

38. 4. Proof by Partners.—Daugherty v. Heckard, 189 Ill. 239; Shrum v. Simpson, 155 Ind. 160; Willis v. Crawford, 38 Oregon 522. Compare Lawrence v. Westlake, 28 Mont. 503.

Evidence of Partners Admissible in Action Against Alleged Firm.—Scholtz v. Freud, 128 Mich. 72.

7. Compare Lawrence v. Westlake, 28 Mont. 503.

39. 1. Partnership by Holding Out.—Daugherty v. Heckard, 189 Ill. 239.

2. Burden of Proof.—United States. — Fechteler v. Palm, (C. C. A.) 133 Fed. Rep. 462.

Alabama.—Sullivan v. Louisville, etc., R. Co., 128 Ala. 77.

Illinois.—Arnold v. Northwestern Telephone Co., 199 Ill. 201; Van Winkle v. Van Winkle, 200 Ill. 136. See also Dazey v. Field, 112 Ill. App. 371.

Iowa.—Davenport v. Brown, (Iowa 1903)

93 N. W. Rep. 578.

New Jersey.—Cornell v. Redrow, 60 N. J. Eq. 251.

New York.—Cashman v. Lawson, 73 N. Y. App. Div. 419, affirmed without opinion 175 N. Y. 488; Barrett v. Warren, (Supm. Ct. App. T.) 84 N. Y. Supp. 578; Smith v. Dunn, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 288. See also Schultz v. Berger, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 764.

Oklahoma.—Strickler v. Gitchel, 14 Okla. 523.

Oregon.—Willis v. Crawford, 38 Oregon 522, 531.

Pennsylvania.—Scranton Traction Co. v. Schlichter, 202 Pa. St. 6. See also Mason v. Smith, 200 Pa. St. 270.

Texas.—Clifton v. Royse Cotton Oil Co., (Tex. Civ. App. 1905) 87 S. W. Rep. 182.

Admission by Pleadings.—Under the Missouri Code proof of partnership alleged in a pleading is dispensed with unless the partnership is denied under oath by the other party. Drumm Flato Commission Co. v. Summers, 89 Mo. App. 300.

5. Contract Admissible and Best Evidence.—Boon v. Turner, 96 Mo. App. 635. See also Marcus v. Segeal, 94 N. Y. App. Div. 326.

6. Surrounding Circumstances.—Boon v. Turner, 96 Mo. App. 635.

7. *In re Beckwith*, 130 Fed. Rep. 475, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 39.

40. 1. Circumstantial Evidence Sufficient.—*In re Beckwith*, 130 Fed. Rep. 475, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 40; Heyman v. Heyman, 210 Ill. 524. See also Matter of Muller, 96 N. Y. App. Div. 619.

2. Parol Evidence.—Pierpont v. Lanphere, 104 Ill. App. 232; Agnew v. Montgomery, (Neb. 1904) 99 N. W. Rep. 820; Hull v. Barth, 48 N. Y. App. Div. 590; Hanthorn v. Quinn, 42 Oregon 1.

7. Usually Held to Constitute Partnership.—Atchison, etc., R. Co. v. Hucklebridge, 62 Kan. 506.

41. 1. Rule under Former Doctrine.—See Gentry v. Singleton, 3 Indian Ter. 516.

3. Prima Facie Evidence of Partnership.—United States.—U. S. v. Guerber, 124 Fed. Rep. 823; Gentry v. Singleton, (C. C. A.) 128 Fed. Rep. 679; Fechteler v. Palm, (C. C. A.) 133 Fed. Rep. 462. See also H. B. Claffin Co. v. Gross, (C. C. A.) 112 Fed. Rep. 386.

Arkansas.—Rector v. Robins, (Ark. 1905) 86 S. W. Rep. 667.

California.—See Krasky v. Wollpert, 134 Cal. 338.

Georgia.—Huggins v. Huggins, 117 Ga. 151.

Hawaii.—Barnes v. Collins, 16 Hawaii 340.

Illinois.—Pierpont v. Lanphere, 104 Ill. App. 232.

Kansas.—Beard v. Rowland, (Kan. 1905) 81 Pac. Rep. 188.

Massachusetts.—Berry v. Pelneault, 188 Mass. 413.

Missouri.—Torbert v. Jeffrey, 161 Mo. 645; Glore v. Dawson, 106 Mo. App. 107.

Nebraska.—Garrett v. Republican Pub. Co., 61 Neb. 541.

New Jersey.—Jones v. Beekman, (N. J. 1900) 47 Atl. Rep. 71.

4. Profit Sharing Prima Facie Evidence of Partnership.—Pierpont v. Lanphere, 104 Ill. App. 232; Johnson v. Carter, 120 Iowa 355; Torbert v. Jeffrey, 161 Mo. 645; Tamblyn v. Scott, 111 Mo. App. 46; Lawton Saw Co. v. Machum, 2 N. Bruns. Eq. Rep. 112. See also Johnson v. Alexander, 46 N. Y. App. Div. 6, affirmed without opinion 167 N. Y. 605.

43. 1. Presumption Not Conclusive.—Leeds v. Townsend, 89 Ill. App. 646; Willis v. Crawford, 38 Oregon 522; Lawton Saw Co. v. Machum, 2 N. Bruns. Eq. Rep. 112.

3. Sufficient in Absence of Other Evidence.—Fleming v. Lay, (C. C. A.) 109 Fed. Rep. 952.

4. Presumption as to Sharing of Losses.—Fleming v. Lay, (C. C. A.) 109 Fed. Rep. 952; Gentry v. Singleton, 3 Indian Ter. 516; Johnson v. Carter, 120 Iowa 355. See also Johnson v. Alexander, 46 N. Y. App. Div. 6, affirmed without opinion 167 N. Y. 605.

44. 1. Prima Facie Evidence of Partnership.—Leeds v. Townsend, 89 Ill. App. 646; Wolf v.

- 44.** (4) *Sharing Gross Returns* — (a) *Statement of Rule*. — See note 5.
45. (b) *Application and Illustration of Rule* — *Division in Kind*. — See notes 3, 4.
46. See note 1.
f. COMMON STOCK OR CAPITAL. — See note 6.
47. *g. CONDUCT OF PARTIES*. — See note 6.
48. See note 1.
49. *i. USE OF FIRM NAME*. — See notes 2, 3.
j. DOCUMENTARY EVIDENCE. — See note 4.
50. *m. GENERAL REPUTATION*. — See notes 5, 8.
Reports from a Mercantile Agency. — See note 9.
51. 4. *Questions of Law and Fact*. — See notes 1, 2, 3, 4.
5. *Contract for Present or Future Partnership* — *a. IN GENERAL*. —

See note 7.

- 52.** See note 1.

b. CONTRACT FOR FUTURE PARTNERSHIP. — See notes 2, 3.

Lawrence, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 481.

44. 2. *View that Sharing in Losses Is Essential*. — Johnson *v.* Carter, 120 Iowa 355.

5. *Sharing Gross Returns No Evidence of Partnership*. — Fechteler *v.* Palm, (C. C. A.) 133 Fed. Rep. 462. See also Fewell *v.* American Surety Co., 80 Miss. 782, 92 Am. St. Rep. 625.

45. 3. *Division of Gross Product in Kind*. — Hodges *v.* Rogers, 115 Ga. 951; Baker *v.* Brennan, 12 Ohio Cir. Dec. 211.

4. *Farming on Shares*. — Shrum *v.* Simpson, 155 Ind. 160.

46. 1. *Cases of Partnership*. — See Baker *v.* Brennan, 12 Ohio Cir. Dec. 211.

6. *Common Stock or Joint Interest in Capital Unnecessary*. — See Sturgeon *v.* Apollo Oil, etc., Co., 203 Pa. St. 369.

47. 6. *Course of Conduct Admissible*. — Heyman *v.* Heyman, 210 Ill. 524; Leeds *v.* Townsend, 89 Ill. App. 646; Jones *v.* Beekman, (N. J. 1900) 47 Atl. Rep. 71; Willis *v.* Crawford, 38 Oregon 522; Moore *v.* Dickson, 121 Wis. 591. See also Rhodes *v.* Lowry, (Ky. 1904) 78 S. W. Rep. 459; Hallenbeck *v.* Smith, 51 N. Y. App. Div. 344.

48. 1. *Control of Business*. — Krasky *v.* Wollpert, 134 Cal. 338; Johnson *v.* Carter, 120 Iowa 355; Schroth *v.* Gedney, (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 808; Ludowieg *v.* Talcott, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 77; Hanthorn *v.* Quinn, 42 Oregon 1; Egan *v.* Wirth, 26 R. I. 363. See also Mason *v.* Smith, 200 Pa. St. 270.

Control of Sales by One Partner will not prevent the association from being a partnership. Field *v.* Eilers, 103 Ill. App. 374.

49. 2. *Use of Firm Name as Evidence of Partnership*. — Haug *v.* Haug, 193 Ill. 645; Heyman *v.* Heyman, 210 Ill. 524. See also Gulf City Shingle Mfg. Co. *v.* Boyles, 129 Ala. 192; Reynolds *v.* Radke, 112 Ill. App. 575.

Addition of "and Co." to Name Not Conclusive of Partnership. — Frazier *v.* Murphy, 133 Cal. 91.

3. *Name Part of Firm Name*. — Reynolds *v.* Radke, 112 Ill. App. 575.

Presumption Not Conclusive. — Willey *v.* Crocker-Woolworth Nat. Bank, 141 Cal. 508.

4. *Documentary Evidence*. — Parker *v.* Painé, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 768.

4 Supp. E. of L.—22

See also Ludowieg *v.* Talcott, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 77.

50. 5. *General Reputation Inadmissible*. — Owensboro Wagon Co. *v.* Bliss, 132 Ala. 253, 90 Am. St. Rep. 907; Marks *v.* Hardy, 117 Ky. 663, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 50. See also Gulf City Shingle Mfg. Co. *v.* Boyles, 129 Ala. 192.

8. Marks *v.* Hardy, 117 Ky. 663, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 50 and supporting the whole text paragraph.

9. *Mercantile Reports*. — Marks *v.* Hardy, 117 Ky. 663, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 50; Sinsheimer *v.* Hartman, 19 Pa. Super. Ct. 494.

51. 1. *Mixed Question of Law and Fact*. — Hughes *v.* Ewing, 162 Mo. 261; Baker *v.* Brennan, 12 Ohio Cir. Dec. 211; Rogers *v.* Edmund, 12 Ohio Cir. Dec. 291.

2. *Question for Court Where Facts Undisputed*. — Barnes *v.* Collins, 16 Hawaii 340; Berry *v.* Pelneault, 188 Mass. 413.

3. *Construction of Contract for Court*. — Dugger *v.* Tutwiler, 129 Ala. 258; Rider *v.* Hammell, 63 Kan. 733; Hanthorn *v.* Quinn, 42 Oregon 1. See also Wagner *v.* Sanders, 62 S. Car. 73.

4. *Question for Jury Where Facts Are Disputed*. — Haug *v.* Haug, 193 Ill. 645; Gentry *v.* Singleton, 3 Indian Ter. 516; Adamson *v.* Guild, 177 Mass. 331; Scholtz *v.* Freud, 128 Mich. 72; Cassidy *v.* Saline County Bank, 14 Okla. 532; North Pac. Lumber Co. *v.* Spore, 44 Oregon 462; Haydenville Min., etc., Co. *v.* Steffler, 17 Pa. Super. Ct. 609; Providence Mach. Co. *v.* Browning, 68 S. Car. 1; Merchants' Nat. Bank *v.* Stebbins, 15 S. Dak. 280; Ehrlich *v.* Brucker, 121 Wis. 495. See also Field *v.* Eilers, 103 Ill. App. 374; Wyckoff *v.* Luse, 67 N. J. L. 218.

7. *Future or Contingent Partnership*. — Dow *v.* State Bank, 88 Minn. 355; Whimbey *v.* Clark, 22 Quebec Super. Ct. 453. See also Davenport *v.* Brown, (Iowa 1903) 93 N. W. Rep. 578.

52. 1. *Intention Controlling*. — Dow *v.* State Bank, 88 Minn. 355.

2. *Contract for Future Partnership—No Partnership Meanwhile*. — Davenport *v.* Brown, (Iowa 1903) 93 N. W. Rep. 578; Harlan *v.* Treasy, (Ky. 1901) 62 S. W. Rep. 266; Dow *v.* State Bank, 88 Minn. 355; Hanthorn *v.* Quinn, 42 Oregon 1; State *v.* Mendenhall, 24 Wash.

- 53. 6. Associations Not for Profit.** — See note 3.
7. Co-ownership Distinguished from Partnership. — See notes 5, 6.
54. See notes 1, 2, 3.
55. 11. Partnership by Estoppel or Holding Out — *a.* STATEMENT OF RULE. — See note 4.
56. See note 2.
b. WHAT CONSTITUTES HOLDING OUT. — See note 3.

12; *Whimbey v. Clark*, 22 Quebec Super. Ct. 453.

52. 3. Abandonment or Refusal to Perform. — *Sabel v. Savannah Rail, etc., Co.*, 135 Ala. 380, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 52; *Harlan v. Treasy*, (Ky. 1901) 62 S. W. Rep. 266; *State v. Mendenhall*, 24 Wash. 12.

Failure of Party to Pay in Share of Capital — Partnership Not Prevented. — *Whimbey v. Clark*, 22 Quebec Super. Ct. 453.

Damages Recoverable for Failure to Comply with Agreement. — See *Tevis v. Carter*, 111 Ky. 938; *Owen v. Meroney*, 136 N. Car. 475; *Lampert v. Ravid*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 115.

Death Before Happening of Contingency Annuls Agreement. — *Dow v. State Bank*, 88 Minn. 355.

53. 3. See Teed v. Parsons, 202 Ill. 455.

5. Co-ownership Does Not Create Partnership. — *Williams v. Tam*, 131 Cal. 64; *Loetscher v. Dillon*, 119 Iowa 202; *Houssels v. Jacobs*, 178 Mo. 579, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 53; *Industrial Lumber Co. v. Texas Pine Land Assoc.*, 31 Tex. Civ. App. 375, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 53; *School Trustees v. Oland*, 35 Nova Scotia 409. See also *Volney v. Nixon*, 67 N. J. Eq. 457; *McPhillips v. Fitzgerald*, 76 N. Y. App. Div. 15, affirmed without opinion 177 N. Y. 543; *Corotinsky v. Maimin*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 777, affirming (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 871.

6. Agreement as to Management and Use of Common Property. — *Houssels v. Jacobs*, 178 Mo. 579, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 54; *Clark v. Rumsey*, 59 N. Y. App. Div. 435; *Industrial Lumber Co. v. Texas Pine Land Assoc.*, 31 Tex. Civ. App. 375, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 53; *School Trustees v. Oland*, 35 Nova Scotia 409. See also *Williams v. Tam*, 131 Cal. 64; *Volney v. Nixon*, 67 N. J. Eq. 457; *McPhillips v. Fitzgerald*, 76 N. Y. App. Div. 15, affirmed without opinion 177 N. Y. 543.

54. 1. Sharing Profits and Losses of Joint Venture. — *Houssels v. Jacobs*, 178 Mo. 579, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 54.

2. Joint Purchase to Hold. — *Beatty v. Clarkson*, 110 Mo. App. 1.

3. Purchase for Division in Kind. — *Beatty v. Clarkson*, 110 Mo. App. 1.

55. 4. Holding Out as Partner Imposes Partnership Liability — United States. — *Fechtel v. Palm*, (C. C. A.) 133 Fed. Rep. 462. See also *Lott v. Young*, (C. C. A.) 109 Fed. Rep. 798; *In re Beckwith*, 130 Fed. Rep. 475.

Alabama. — *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 Am. St. Rep. 907.

Arkansas. — *Rector v. Robins*, (Ark. 1905) 86 S. W. Rep. 667.

Colorado. — *Stevens v. Walton*, 17 Colo. App. 440.

Georgia. — *Smith v. Ferrario*, 113 Ga. 872.

Illinois. — *Weise v. Gray's Harbor Commercial Co.*, 111 Ill. App. 647; *Reynolds v. Radke*, 112 Ill. App. 575.

Iowa. — *Sheldon v. Bigelow*, 118 Iowa 586.

Kansas. — *Rider v. Hammell*, 63 Kan. 733.

Kentucky. — *Fennell v. Myers*, (Ky. 1903) 76 S. W. Rep. 136.

Louisiana. — *Houston River Canal Co. v. Kopke*, 106 La. 609; *Johnson v. Levy*, 109 La. 1036.

Maryland. — *Lighthiser v. Allison*, 100 Md. 103.

Massachusetts. — See *McMurtrie v. Guiler*, 183 Mass. 451.

Missouri. — *Huyssen v. Lawson*, 90 Mo. App. 82; *Boon v. Turner*, 96 Mo. App. 635; *Gamble v. Grether*, 108 Mo. App. 340.

New Jersey. — *Carey v. Marshall*, 67 N. J. L. 236.

New York. — *Marks v. Samuels*, 54 N. Y. App. Div. 249; *Clark v. Rumsey*, 59 N. Y. App. Div. 435; *Taylor v. Meyer*, 47 N. Y. App. Div. 455; *Hallenbeck v. Smith*, 51 N. Y. App. Div. 344; *Hamilton v. Davis*, (Supm. Ct. App. T.) 90 N. Y. Supp. 370; *Griffin v. Carr*, 21 N. Y. App. Div. 51, affirmed without opinion 165 N. Y. 621.

Pennsylvania. — *Sturgeon v. Apollo Oil, etc., Co.*, 203 Pa. St. 369; *Daniel v. Lance*, 21 Pa. Super. Ct. 474.

Texas. — *Bonnet v. Tips Hardware Co.*, (Tex. Civ. App. 1900) 59 S. W. Rep. 59; *Altgelt v. Sullivan*, (Tex. Civ. App. 1903) 79 S. W. Rep. 333.

Canada. — *Grady v. Tierney*, 4 N. W. Ter. 133.

Use of Firm Name by One Person Does Not Estop Denial of Partnership. — *Frazier v. Murphy*, 133 Cal. 91.

Where the Partnership Would Be in Violation of Law the rule does not apply. *Murray Ginning System Co. v. Exchange Nat. Bank*, (Tex. Civ. App. 1901) 61 S. W. Rep. 508.

56. 2. Effect Inter Se. — *Neefus v. Eccles*, (Supm. Ct. App. T.) 85 N. Y. Supp. 635.

3. Failure to Give Notice of Retirement. — *Rector v. Robins*, (Ark. 1905) 86 S. W. Rep. 667; *Huggins v. Huggins*, 117 Ga. 151; *Davenport Gas, etc., Co. v. Reimers*, (Iowa 1903) 96 N. W. Rep. 1084; *Johnson v. Levy*, 109 La. 1036; *Johanning v. Wilson*, (Supm. Ct. App. T.) 86 N. Y. Supp. 7; *Gilbert v. Warren*, 56 N. Y. App. Div. 289, affirmed 171 N. Y. 665; *Bonnet v. Tips Hardware Co.*, (Tex. Civ. App. 1900) 59 S. W. Rep. 59; *Henry C. Werner Co. v. Calhoun*, 55 W. Va. 246. See also *In re Cinque*, 109 Fed. Rep. 455; *Birckhead v. De Forest*, (C. C. A.) 120 Fed. Rep. 645.

- 57.** See notes 1, 2, 5.
Question of Fact. — See note 6.
- 58.** *a.* CONSENT OF PERSON TO BE CHARGED. — See notes 1, 2, 3.
d. KNOWLEDGE AND RELIANCE OF CREDITOR. — See note 7.
- 59.** See notes 1, 2.
e. TORTS. — See note 4.
- 61.** II. CLASSIFICATION AND DEFINITIONS — 1. Partnerships — *b.* WITH REFERENCE TO EXTENT — (2) *General.* — See note 2.
(3) *Special or Particular.* — See note 3.
c. WITH REFERENCE TO THEIR BUSINESS — (2) *Trading or Commercial* — In General. — See note 9.
- 62.** Illustrations of Trading Partnerships. — See note 6.
(3) *Nontrading.* — See notes 7, 8.
- 63.** 2. Partners — *b.* SECRET. — See note 11.
e. DORMANT. — See note 14.
- 64.** See note 4.
- 65.** III. CONTRACT OF PARTNERSHIP — 2. Formalities — *a.* IN GENERAL. — See note 3.
b. CONTRACT MAY BE EXPRESS OR IMPLIED. — See notes 6, 7.
- 57.** 1. Continuance of Business in Old Name. — Henry C. Werner Co. v. Calhoun, 55 W. Va. 246.
- 2.** Doctrine of Holding Out Not Applied on Death of Partner. — Stevens v. Walton, 17 Colo. App. 440.
- 5.** What Constitutes Holding Out. — Huyssen v. Lawson, 90 Mo. App. 82; Russell v. Fenner, 11 Ohio Cir. Dec. 754, 21 Ohio Cir. Ct. 527; Tisch v. Rockafellow, 209 Pa. St. 419; Barkley v. Beckwith, 90 N. Y. App. Div. 570; Gore v. Benedict, (Tenn. Ch. 1901) 61 S. W. Rep. 1054. See also Sumner v. Gardiner, 184 Mass. 433.
- 6.** Question of Fact. — Swofford Bros. Dry Goods Co. v. Cowgill, (Neb. 1902) 96 N. W. Rep. 215; Haydenville Min., etc., Co. v. Steffler, 17 Pa. Super. Ct. 609. See also Lighthiser v. Allison, 100 Md. 103.
- 58.** 1. Connecting Defendant with Holding Out. — Johnson v. Carter, 120 Iowa 355.
- 2.** Act Either Authorized or Ratified. — Johnson v. Carter, 120 Iowa 355; Lighthiser v. Allison, 100 Md. 103; Carey v. Marshall, 67 N. J. L. 236. See also Swofford Bros. Dry Goods Co. v. Cowgill, (Neb. 1902) 96 N. W. Rep. 215.
- 3.** Authority May Be Inferred. — Stevens v. Walton, 17 Colo. App. 440; Dooley v. Vance, 97 Ill. App. 42.
- 7.** Holding Out to All the World. — See Johnson v. Levy, 109 La. 1036.
- 59.** 1. Actual Knowledge of and Reliance on Holding Out Essential. — Smith v. Ferrario, 113 Ga. 872; Sheldon v. Bigelow, 118 Iowa 586; Lighthiser v. Allison, 100 Md. 103; Carey v. Marshall, 67 N. J. L. 236; Ludowieg v. Talcott, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 77; Clark v. Rumsey, 59 N. Y. App. Div. 435; Grady v. Tierney, 4 N. W. Ter. 133. See also Johanning v. Wilson, (Supm. Ct. App. T.) 86 N. Y. App. Supp. 7; Barkley v. Beckwith, 90 N. Y. App. Div. 570.
- 2.** Creditor Not Mised. — Matter of Baldwin, 170 N. Y. 156; Hagmayer v. Armbruster, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 378; Henry C. Werner Co. v. Calhoun, 55 W. Va. 246. See also Clark v. Rumsey, 59 N. Y. App. Div. 435.
- 4.** Liability for Torts. — Brudi v. Luhrman, 26 Ind. App. 221.
- 61.** 2. General Partnership. — Spool Cotton Co. v. King, 68 S. Car. 196, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 61 and supporting the whole text paragraph.
- 3.** Special or Particular Partnership Defined. — See Leeds v. Ward, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 674.
- 9.** Trading or Commercial Partnership Defined. — Marsh v. Wheeler, 77 Conn. 449; Schele v. Wagner, 163 Ind. 20, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 61; Masterson v. Mansfield, 25 Tex. Civ. App. 262.
- 62.** 6. Manufacture and Sale of Commodities. — Marsh v. Wheeler, 77 Conn. 449.
- Buying and Selling Real Estate.** — Adams v. Long, 114 Ill. App. 277.
- 7.** Partnerships of Employment or Occupation Classed as Nontrading Partnerships. — Schele v. Wagner, 163 Ind. 20, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 62; Gutheil v. Gilmer, 23 Utah 84.
- Banking and Real Estate Agency Nontrading Partnerships.** — Masterson v. Mansfield, 25 Tex. Civ. App. 262.
- Religious Community.** — See Teed v. Parsons, 202 Ill. 455.
- 8.** Partnership Between Attorneys. — Alley v. Bowen-Merrill Co., (Ark. 1905) 88 S. W. Rep. 838.
- 63.** 11. Secret Partner Defined. — See Willard v. Bullen, 41 Oregon 25.
- 14.** Dormant Partner Defined. — Allen v. Davids, 70 S. Car. 260, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 63.
- 64.** 4. Confusion in Use of Term. — See Willard v. Bullen, 41 Oregon 25.
- 65.** 3. No Particular Formalities Necessary. — Haug v. Haug, 193 Ill. 645; Johnson v. Carter, 120 Iowa 355.
- 6.** May Be Express or Implied. — In re Beckwith, 130 Fed. Rep. 475, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 65; Haug v. Haug, 193 Ill. 645; Huggins v. Huggins, 117 Ga. 151.
- 7.** Neither Articles Nor Written Contract Necessary. — In re Beckwith, 130 Fed. Rep. 475,

65. *c.* NECESSITY OF WRITING UNDER STATUTE OF FRAUDS — (1) *General Rule.* — See note 8.

66. (2) *Partnership Owning or Dealing in Realty* — View that Writing Is Unnecessary. — See notes 2, 3.

View that Writing Is Essential in Such Cases. — See note 4.

68. 3. Who May Become Partners — *c.* INFANTS — In General. — See note 6.

69. Interest in Property Liable for Debts Notwithstanding Disaffirmance. — See note 4
e. MARRIED WOMEN — But under Modern Statutes. — See note 9.

70. See note 1.

f. CORPORATIONS — General Rule. — See note 3.

De Facto Partnership. — See note 5.

g. PARTNERSHIPS. — See note 6.

72. 6. Purpose of Partnership — *a.* IN GENERAL. — See note 3.

c. ILLEGAL PARTNERSHIPS — (1) *In General.* — See note 6.

73. See note 1.

Illustrations. — See note 3.

74. Partial Illegality. — See note 3.

(2) *Effect of Illegality* — Courts Will Not Assist in Carrying Out Illegal Objects. — See note 4.

Recovery of Assets in Hands of Partner — Accounting. — See note 5.

75. See note 2.

As to Third Persons Not Connected with the Illegality. — See note 6.

citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 65; *Huggins v. Huggins*, 117 Ga. 151; *Haug v. Haug*, 193 Ill. 645; *McCabe v. Sinclair*, 66 N. J. Eq. 24; *Russell v. Fenner*, 11 Ohio Cir. Dec. 754, 21 Ohio Cir. Ct. 527.

65. 8. May Be Oral or Written. — *Huggins v. Huggins*, 117 Ga. 151; *Haug v. Haug*, 193 Ill. 645; *Snyder v. O'Beirne*, 132 Mich. 342; *McCabe v. Sinclair*, 66 N. J. Eq. 24.

Agreement for Mining Partnership May Be Oral. — *Shea v. Nilima*, (C. C. A.) 133 Fed. Rep. 209.

66. 2. Contracts of Partnership to Deal in Realty Need Not Be in Writing — *Larkin v. Martin*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 179. See also *Winslow v. Young*, 94 Me. 145.

3. Reason for View. — *Garth v. Davis*, (Ky. 1905) 85 S. W. Rep. 692.

4. Writing Deemed Essential. — *McKinley v. Lloyd*, 128 Fed. Rep. 519.

68. 6. Infant May Be Partner. — *Gordon v. Miller*, 111 Mo. App. 342.

69. 4. Interest in Firm Property Liable Notwithstanding Disaffirmance. — *Gordon v. Miller*, 111 Mo. App. 342.

9. Disability Generally Removed under Modern Statutes. — *Morrison v. Dickey*, 122 Ga. 353; *Hoaglin v. Henderson*, 119 Iowa 720, 97 Am. St. Rep. 335.

70. 1. May Enter into Partnership with Husband. — *Morrison v. Dickey*, 122 Ga. 353, holding that a subpartnership may exist between husband and wife; *Heyman v. Heyman*, 210 Ill. 524; *Hoaglin v. Henderson*, 119 Iowa 720, 97 Am. St. Rep. 335.

3. Power of Corporations. — *Wallerstein v. Ervin*, (C. C. A.) 112 Fed. Rep. 124; *Fechteler v. Palm*, (C. C. A.) 133 Fed. Rep. 462; *Mestier v. A. Chevalier Pavement Co.*, 108 La. 562; *Powell Hardware Co. v. Mayer*, 110 Mo. App. 14; *Geurinck v. Alcott*, 66 Ohio St. 94; *Corralitos Co. v. Mackay*, 31 Tex. Civ. App. 316; *Murray Ginning System Co. v. Exchange Nat.*

Bank, (Tex. Civ. App. 1901) 61 S. W. Rep. 508. See also *Huguenot Mills v. Jempson*, 68 S. Car. 363, 102 Am. St. Rep. 673.

5. Power to Make Contracts Imposing Liability of Partner. — See *Mestier v. A. Chevalier Pavement Co.*, 108 La. 562.

6. Power of Firm to Enter into Partnership Contracts. — *Willson v. Morse*, 117 Iowa 581. See also *Robertson v. Winslow*, 99 Mo. App. 546.

72. 3. May Exist for Single Transaction. — *Willis v. Crawford*, 38 Oregon 522.

5. Contracts of Partnership for Illegal Purposes Void. — *Central Trust, etc., Co. v. Respass*, 112 Ky. 606, 99 Am. St. Rep. 317; *Willis v. Crawford*, 38 Oregon 522. See also *Wishek v. Hammond*, 10 N. Dak. 72.

73. 1. Illegality Must Plainly Appear. — See *Blalock v. Copeland*, (Ky. 1901) 65 S. W. Rep. 349.

Burden of Proof on Person Asserting Illegality. — *Willson v. Morse*, 117 Iowa 581.

Partnership for Raising, Training, and Racing Horses Not Illegal. — *Central Trust, etc., Co. v. Respass*, 112 Ky. 606, 99 Am. St. Rep. 317.

3. Partnerships in Public Offices Against Public Policy. — *Wishek v. Hammond*, 10 N. Dak. 72.

74. 3. Where Legal and Illegal Transactions Separable. — *Wishek v. Hammond*, 10 N. Dak. 72.

4. No Aid from Courts. — *Smythe v. Evans*, 209 Ill. 376.

5. Where a Corporation Has Attempted to Form a Partnership with an individual or with another corporation, an accounting may be had. *Corralitos Co. v. Mackay*, 31 Tex. Civ. App. 316.

75. 2. Weight of Authority Forbids Such Recovery. — *Central Trust, etc., Co. v. Respass*, 112 Ky. 606, 99 Am. St. Rep. 317.

6. *Huguenot Mills v. Jempson*, 68 S. Car. 363, 102 Am. St. Rep. 673.

- 75. IV. FIRM CONSIDERED AS ENTITY — 1. At Common Law.** — See note 7.
- 76. Partner Cannot Be Debtor or Creditor of Firm.** — See note 2.
Any Charge in Membership. — See note 3.
2. Limited Recognition as Entity. — See note 5.
- 77. V. FIRM NAME — 1. Necessity for — In General.** — See note 1.
2. Purpose and Use — b. WHEN PROPERLY USED — (2) Contracts — In General. — See note 7.
- 78. Use of Partner's Own Name to Bind Firm.** — See note 4.
- 80. 3. What Name May Be Adopted — a. IN ABSENCE OF STATUTE.** — See notes 5, 7, 12.
- 81. b. STATUTORY PROVISIONS — (1) In General.** — See note 3.
The Object of These Statutory Regulations. — See notes 4, 5.
(2) *Representative Provisions* — Name of Former Partner. — See note 6.
- 82. Use of " & Co." to Represent Actual Partner.** — See note 2.
4. Displaying Name of Principal or Partner. — See notes 4, 5.
- 83. 5. Filing and Publishing Certificate — Filing Certificate.** — See notes 1, 2.
Publication. — See note 4.
- 84. 3. Right to Trade Name — Transfer of Right.** — See note 1.
Right to Continued Use of Firm Name. — See note 2.
- 75. 7. Firm Not Regarded as an Entity at Common Law.** — *Schneider v. Sellers*, 98 Tex. 380.
- 76. 2. Partner Cannot Be Debtor or Creditor of Firm.** — See *Newman v. Eldridge*, 107 La. 315.
- 3. Change in Membership Works Dissolution.** — *Forst v. Kirkpatrick*, 64 N. J. Eq. 578.
- 5. Firm Often Spoken of as an Entity.** — See *Newman v. Eldridge*, 107 La. 315.
- 77. 1. A Firm Name Usually Adopted but Not Essential.** — *Barnes v. Collins*, 16 Hawaii 340; *Johnson v. Carter*, 120 Iowa 355; *Sullivan v. Sullivan*, 122 Wis. 326.
- 7. General Rule — Partner Can Bind Firm Only by Firm Name.** — *Masterson v. Mansfield*, 25 Tex. Civ. App. 262.
- 78. 4. Use of Partner's Own Name to Bind Firm.** — *Faris v. Cook*, 110 Ky. 867.
- 80. 5. Any Name May Be Adopted in Absence of Restraining Statutes.** — *Kahn v. Thomson*, 113 Ga. 957; *Daugherty v. Heckard*, 189 Ill. 239.
- 7. Fanciful Names.** — *Kahn v. Thomson*, 113 Ga. 957.
- 12. Name of One Partner Used as Firm Name.** — *Daugherty v. Heckard*, 189 Ill. 239, holding further that parol evidence is admissible to show that the name is that of the firm.
- 81. 3. North v. Moore, 135 Cal. 621; *Cobble v. Farmers' Bank*, 63 Ohio St. 528.**
- 4. Object Is to Prevent Fraud upon Persons Dealing with Firm.** — *Castle v. Graham*, 87 N. Y. App. Div. 97, affirmed 180 N. Y. 553; *Doyle v. Shuttleworth*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 42.
- 5. Not Intended to Prevent Giving of Credit Nor to Furnish Debtors with Defense.** — *Castle v. Graham*, 87 N. Y. App. Div. 97, affirmed 180 N. Y. 553; *McArdle v. Thames Iron Works*, 96 N. Y. App. Div. 139; *Doyle v. Shuttleworth*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 42.
- 6. New York Statute — Rights of Surviving Partner.** — *Slater v. Slater*, 78 N. Y. App. Div. 449, modified 175 N. Y. 143, 96 Am. St. Rep. 605.
- 82. 2. Use of Suffix " & Co." When Not Representing Actual Partner.** — *Loeb v. Firemen's Ins. Co.*, 78 N. Y. App. Div. 113, affirming (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 107; *Doyle v. Shuttleworth*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 42.
- 4. Duty to Display Name of Principal or Partner on Business Sign.** — *Dale v. Harrahan*, 85 Miss. 49; *Brister v. Joseph Bowling Co.*, (Miss. 1901) 29 So. Rep. 830.
- South Carolina Statute Not Applicable to General Partnerships.** — *Kaufman v. Carter*, 67 S. Car. 312.
- 5. Effect of Failure to Comply with Provision.** — *Dale v. Harrahan*, 85 Miss. 49.
- 83. 1. Duty to File Certificate Containing Names and Residences of Partners.** — *Lander v. Sheehan*, 32 Mont. 25; *Rogers v. Edmund*, 12 Ohio Cir. Dec. 291; *Choctaw Lumber Co. v. Gilmore*, 11 Okla. 462. See also *Ridgeway v. Collier*, 21 Quebec Super. Ct. 473.
- What Does Not Constitute Fictitious Name.** — The use by a partnership of the name "Castle Bros.," the firm being composed of brothers of that name, does not constitute a violation of the statute. *Castle v. Graham*, 87 N. Y. App. Div. 97, affirmed 180 N. Y. 553.
- Ohio Statute Applies to "Banking Partnership."** — *Cobble v. Farmers' Bank*, 63 Ohio St. 528.
- Compliance Presumed — Statute Penal and Strictly Construed.** — *K. B. Co. v. Batie*, 25 Ohio Cir. Ct. 482.
- When Certificate Not Necessary.** — See *Clark v. Doe*, 8 Ohio Dec. 685, 7 Ohio N. P. 613.
- 2. Old Members Liable in Case of Change in Name until New Certificate Filed.** — *Cobble v. Farmers' Bank*, 63 Ohio St. 528.
- 4. Publication of Certificate Necessary.** — *Lander v. Sheehan*, 32 Mont. 25.
- Oklahoma Statute Mandatory.** — *Choctaw Lumber Co. v. Gilmore*, 11 Okla. 462.
- 84. 1. Use by Assignee of Good Will.** — See *Townsend v. Jarman*, (1900) 2 Ch. 608.
- 2. Right to Continued Use of Firm Name.** — *Steinfeld v. National Shirt Waist Co.*, 99 N. Y. App. Div. 286.
- Upon the Dissolution of a Partnership, without any sale or assignment of the good will of the business, and without any provision as to the use of the firm name, each of the partners is**

85. VI. FIRM CAPITAL — 2. What May Be Contributed — In General. — See note 2.

Money, Property, or Use of Property. — See note 3.

Contributions May Be Equal or Unequal. — See notes 5, 6.

86. 3. Rights of Partners as to Capital — a. IN GENERAL — INCREASE OR DIMINUTION. — See notes 3, 4.

b. RETURN ON DISSOLUTION OF FIRM — (1) Necessity For. — See note 8.

87. Where One Partner Has Advanced Capital in Excess of Another. — See note 2.

(2) *Distribution in Proportion to Contribution. —* See note 4.

One Contributing No Capital Entitled to None. — See note 6.

Deficiencies in Assets to Be Borne Proportionately. — See note 8.

88. Liability of Partner Contributing No Capital. — See note 1.

(3) *Presumption as to Equality of Contributions. —* See note 3.

VII. PARTNERSHIP PROPERTY — 1. What Constitutes — a. IN GENERAL. — See note 4.

b. INTENTION GOVERNS. — See notes 5, 6.

entitled to carry on business under that name, provided that he does not by so doing expose his former partners to any risk of liability. Whether there be any such risk is a matter to be determined having regard to the circumstances of each case. *Burchell v. Wilde*, (1900) 1 Ch. 551.

85. 2. May Consist of Anything Which Partners Agree to Contribute and Receive. — *Haug v. Haug*, 193 Ill. 645; *Huggins v. Huggins*, 117 Ga. 151; *Atchison, etc., R. Co. v. Hucklebridge*, 62 Kan. 506; *Hartford F. Ins. Co. v. McClain*, (Ky. 1905) 85 S. W. Rep. 699.

3. Money, Property, or Use of Property. — *Hartford F. Ins. Co. v. McClain*, (Ky. 1905) 85 S. W. Rep. 699. See also *Mason v. Gibson*, (N. H. 1905) 60 Atl. Rep. 96.

5. Contributions May Be Equal or Unequal. — *Buckingham v. Chicago First Nat. Bank*, (C. C. A.) 131 Fed. Rep. 192; *Huggins v. Huggins*, 117 Ga. 151; *Hartford F. Ins. Co. v. McClain*, (Ky. 1905) 85 S. W. Rep. 699.

6. Some May Contribute Nothing. — *Buckingham v. Chicago First Nat. Bank*, (C. C. A.) 131 Fed. Rep. 192; *Huggins v. Huggins*, 117 Ga. 151.

86. 3. One Partner Not Bound by Capital Placed in Firm by Other in Violation of Agreement. — *Lovett v. Perry*, 98 Va. 604.

Effect of Failure to Pay in Capital. — Where one of the partners has failed to make the advances essential to the success of the partnership undertaking, his copartner is thereby relieved from all obligations to carry on the partnership, and the partner failing to advance his proportion cannot claim the profits which might have resulted from the successful operation of the enterprise. *Snyder v. O'Beirne*, 132 Mich. 340.

4. Partner's Interest in Firm Not Terminated by Failure to Contribute Capital. — *Leonard v. Boyd*, (Ky. 1903) 71 S. W. Rep. 508; *Stuart v. Harmon*, (Ky. 1903) 72 S. W. Rep. 365; *McCabe v. Sinclair*, 66 N. J. Eq. 24.

8. Return of Capital to Those Contributing. — *Archer v. Barry*, (Ky. 1901) 62 S. W. Rep. 485.

Estoppel to Deny Partnership. — Persons who have held a third person out to the world as being a partner may be estopped, on dissolution of the firm and distribution of the assets, to

deny the partnership. *Sturgeon v. Apollo Oil etc., Co.*, 203 Pa. St. 369.

87. 2. Excess of Capital Advanced Should Be Restored from Firm Assets to Partner Advancing. — *Brandt v. Edwards*, 91 Minn. 505. See also *Rule v. McGregor*, 115 Iowa 323.

4. Unequal Contribution Sufficient to Contradict Idea of Equal Division of Capital. — *Corbin v. Henry*, (Ind. App. 1905) 74 N. E. Rep. 1096.

6. Compensation for Time and Services Confined to Partnership Profits. — *Atchison, etc., R. Co. v. Hucklebridge*, 62 Kan. 506.

8. Presumption that Such Losses Are Shared Equally. — *Garner v. Murray*, (1904) 1 Ch. 57; *Mallett v. Kellar*, 91 N. Y. App. Div. 505, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 87, affirmed 181 N. Y. 543; *Lawton Saw Co. v. Machum*, 2 N. Bruns. Eq. Rep. 112.

88. 1. Partner Contributing Only Time and Services Liable for Share of Lost Capital. — *Lawton Saw Co. v. Machum*, 2 N. Bruns. Eq. Rep. 191.

3. Presumption as to Equality of Contribution. — *Lamb v. Rowan*, 83 Miss. 45.

4. Property Acquired by Partner After Dissolution Not Firm Property. — *Whipple v. Stuart*, 26 Mont. 219.

Purchase of Realty by One Partner. — The fact that in the original purchase of realty for partnership uses one partner advances all the cash payments made is not alone sufficient to overcome the presumption of partnership property, as he, as a partner, has a lien on the partnership property to repay the advances. *Jones v. Beckman*, (N. J. 1900) 47 Atl. Rep. 71.

5. Intention Governs. — *In re Groetzinger*, 110 Fed. Rep. 366, affirmed (C. C. A.) 127 Fed. Rep. 814; *In re Swift*, 118 Fed. Rep. 348; *Bennett v. Hough*, (Mich. 1905) 104 N. W. Rep. 414; *Jones v. Beckman*, (N. J. 1900) 47 Atl. Rep. 71; *School Trustees v. Oland*, 35 Nova Scotia 409.

Partners Are Estopped, as to Third Persons, by Their Representations that certain property is partnership property, but this estoppel does not operate as between individual and partnership creditors, and the true nature of the title may be shown. *Pontius v. Walls*, 197 Pa. St. 223.

Parol Evidence Admissible to Show Intention. — *Bernheimer v. Schmid*, (Supm. Ct. Spec. T.)

89. See note 1.

c. PROPERTY ORIGINALLY BROUGHT IN OR SUBSEQUENTLY ACQUIRED FOR PARTNERSHIP PURPOSES. — See note 2.

90. See notes 1, 2.

91. See note 3.

Property Purchased with Firm Assets. — See notes 4, 5, 6.

92. Property Bought with Firm Funds or Used by Firm Remaining Individual Property. — See notes 1, 3.

d. WHERE CO-OWNERS ARE PARTNERS IN PROFITS FROM COMMON PROPERTY — Land Purchased from Profits of Land Held as Co-owners. — See note 6.

93. 2. How Title Is Held — *a.* PARTNERSHIP PERSONALTY — Property Acquired in Name of Partner. — See notes 3, 4.

b. PARTNERSHIP REALTY — (1) *General Rule as to Legal Title to Realty.* — See note 6.

36 Misc. (N. Y.) 456, *affirmed* 73 N. Y. App. Div. 434.

88. 6. Intention Evidenced by Express Agreement. — *In re* Groetzinger, 110 Fed. Rep. 366, *affirmed* (C. C. A.) 127 Fed. Rep. 814; *In re* Swift, 118 Fed. Rep. 348; *School Trustees v. Oland*, 35 Nova Scotia 409.

89. 1. Intention Implied from Circumstances. — *In re* Groetzinger, 110 Fed. Rep. 366, *affirmed* (C. C. A.) 127 Fed. Rep. 814; *In re* Swift, 118 Fed. Rep. 348; *Bennett v. Hough*, (Mich. 1905) 104 N. W. Rep. 414; *Lamb v. Rowan*, 83 Miss. 45; *Jones v. Beekman*, (N. J. 1900) 47 Atl. Rep. 71; *School Trustees v. Oland*, 35 Nova Scotia 409. See also *McCarthy v. Donnelly*, 90 Minn. 104.

In a Dormant Partnership the funds of the visible partner and those purporting to be his, although actually belonging to the partnership, are, with respect to the rights of innocent third parties, to be regarded as his sole property. *White v. Farnham*, 99 Me. 100, 105 Am. St. Rep. 261.

Extraneous Evidence Admissible to Show Ownership of Bank Deposit. — *Gansevoort Bank v. Caragan*, 69 N. J. L. 404.

2. Property Originally Brought in or Subsequently Acquired for Partnership Purposes. — *Southwestern Georgia Bank v. McGarrah*, 120 Ga. 944; *Hartnett v. Stillwell*, 121 Ga. 386, 104 Am. St. Rep. 151; *Hargadine-McKittrick Dry Goods Co. v. Sappington*, 105 Mo. App. 655; *Burkardt v. Walsh*, 49 N. Y. App. Div. 634. See also *Ulrich v. McConaughy*, (Neb. 1903) 96 N. W. Rep. 645.

Grass on Government Land May Become Partnership Property. — *Whipple v. Stuart*, 26 Mont. 219.

A Quitclaim Deed Executed by One Partner to the Other to expedite the sale of the partnership property to a third person does not destroy its character as partnership property. *Bennett v. Hough*, (Mich. 1905) 104 N. W. Rep. 414.

90. 1. Realty as Partnership Property. — *Hartnett v. Stillwell*, 121 Ga. 386, 104 Am. St. Rep. 151. See also *Ulrich v. McConaughy*, (Neb. 1903) 96 N. W. Rep. 645.

Use for Partnership Purposes Not Essential. — *Foster v. Sargent*, 72 N. H. 170.

2. Partnership in Personality. — *Southwestern Georgia Bank v. McGarrah*, 120 Ga. 944.

91. 3. Right to Use Firm Name a Partnership Asset. — *Slater v. Slater*, 175 N. Y. 143, 96 Am. St. Rep. 605.

Transfer by Retiring Partner. — See *Markert v. Jefferson*, 122 Ga. 471.

4. Property Bought with Firm Money Prima Facie Partnership Property. — *Southwestern Georgia Bank v. McGarrah*, 120 Ga. 944; *Hartnett v. Stillwell*, 121 Ga. 386, 104 Am. St. Rep. 151; *Comstock v. McDonald*, 126 Mich. 142; *Ulrich v. McConaughy*, (Neb. 1903) 96 N. W. Rep. 645; *Foster v. Sargent*, 72 N. H. 170. See also *Bernheimer v. Schmid*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 456, *affirmed* 73 N. Y. App. Div. 434.

5. Immaterial that Title Taken in Individual Names of Partners. — *Ulrich v. McConaughy*, (Neb. 1903) 96 N. W. Rep. 645; *Foster v. Sargent*, 72 N. H. 170.

6. Land Bought or Improved with Partnership Funds. — *Hartnett v. Stillwell*, 121 Ga. 386, 104 Am. St. Rep. 151; *Ulrich v. McConaughy*, (Neb. 1903) 96 N. W. Rep. 645; *Foster v. Sargent*, 72 N. H. 170.

Land Not Used for the Regular Business of the Partnership, but purchased with partnership funds and held for partnership profit, is partnership property. *Southwestern Georgia Bank v. McGarrah*, 120 Ga. 944. *Compare Williams v. Meyer*, (Tex. Civ. App. 1901) 64 S. W. Rep. 68.

92. 1. Property Purchased with Firm Funds Held by Partners as Individuals. — *Morse v. Pacific R. Co.*, 191 Ill. 356.

3. Property Used for Partnership Purpose May Remain Individual Property. — *Doyle v. Burns*, 123 Iowa 488. See also *Lamb v. Rowan*, 83 Miss. 45; *Bernheimer v. Schmid*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 456, *affirmed* 73 N. Y. App. Div. 434.

6. Lands Purchased from Profits. — See *Levine v. Goldsmith*, 71 N. Y. App. Div. 204, *reversing* (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 7.

93. 3. Property Acquired in Individual Names of Some Partners. — *Fretwell v. Branyon*, 67 S. Car. 95, *quoting* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 93.

Burden of Proof on Persons Claiming that Property Belongs to Partnership. — *Tregea v. Mills*, 11 Wyo. 438.

4. Legal and Beneficial Ownership in Firm as Such. — *Fretwell v. Branyon*, 67 S. Car. 95, *quoting* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 93.

6. Partnership as Such Cannot Hold Legal Title to Realty. — *Southwestern Georgia Bank v. Mc-*

- 93.** Effect of Deed to Partnership in Firm Name. — See note 8.
Where the Firm Name Does Not Contain the Name of Any Individual Partner. — See note 9.
- (2) *Immaterial in Equity in Whose Name Title Taken.* — See note 10.
- 94.** See notes 1, 2.
- 95.** (3) *Effect of Bona Fide Purchase from Partner Holding Legal Title.* — See note 1.
- 3. Partner's Interest in Firm Property — a. NATURE OF INTEREST —**
- (1) *In General.* — See note 3.
Each Has Interest in Whole. — See note 4.
- 96.** Upon the Death of a Partner the Firm Assets Vest in the Survivor. — See note 1.
Survivor Takes Assets Charged with Trust. — See note 2.
- 97.** See notes 1, 3.

Garrah, 120 Ga. 944; Riffel v. Ozark Land, etc., Co., 81 Mo. App. 177.

Legal Title Vests in Partners as Tenants in Common. — Hartnett v. Stillwell, 121 Ga. 386, 104 Am. St. Rep. 151.

93. 8. Title Held in Trust for Firm. — Riffel v. Ozark Land, etc., Co., 81 Mo. App. 177.

9. Title in Grantor in Trust for Firm. — Riffel v. Ozark Land, etc., Co., 81 Mo. App. 177.

10. Immaterial in Equity in Whose Name Legal Title Stands. — Richards v. Fraser, 136 Cal. 460; Kringle v. Rhomberg, 120 Iowa 472; Jones v. Beekman, (N. J. 1900) 47 Atl. Rep. 71; Foster v. Sargent, 72 N. H. 170; Burkardt v. Walsh, 49 N. Y. App. Div. 634; Fretwell v. Branyon, 67 S. Car. 95, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 93.

Parol Evidence Admissible to Show Title. — Kringle v. Rhomberg, 120 Iowa 472.

Parol Evidence Inadmissible to Show that Conveyance to Tenant in Common Was in Fact to Partnership. — Cundey v. Hall, 208 Pa. St. 335, 101 Am. St. Rep. 938.

Sufficiency of Evidence to Show Title to Property. — See Foster v. Sargent, 72 N. H. 170.

94. 1. Subject to All Incidents of Partnership Property. — Kringle v. Rhomberg, 120 Iowa 472; Fretwell v. Branyon, 67 S. Car. 95, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 94.

2. Equity Will Treat Property as Partnership Property. — Fretwell v. Branyon, 67 S. Car. 95, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 94.

95. 1. Bona Fide Purchaser Without Notice Takes Free from Trust. — See McCoy v. McCoy, 202 Pa. St. 497.

3. Partner's Interest. — Morrison v. Austin State Bank, 213 Ill. 473, 104 Am. St. Rep. 225; Winslow v. Young, 94 Me. 145. See also Smith v. Proskey, 82 N. Y. App. Div. 19, reversed on another point 177 N. Y. 526.

4. Each Has Joint Interest in Whole, but Not Separate Interest in Any Part. — Morrison v. Austin State Bank, 213 Ill. 472, 104 Am. St. Rep. 225; Milligan v. MacKinlay, 108 Ill. App. 609, affirmed 209 Ill. 358; Proper v. Lambert, (Iowa 1903) 95 N. W. Rep. 251; McKee v. Covalt, (Kan. 1905) 81 Pac. Rep. 475; Riddell v. Ramsey, (Mont. 1904) 78 Pac. Rep. 597. See also Mansur-Tebbetts Implement Co. v. Ritchie, 159 Mo. 213.

96. 1. Property Vests in Survivor — California. — See Frazier v. Murphy, 133 Cal. 91.

Georgia. — Hartnett v. Stillwell, 121 Ga. 386, 104 Am. St. Rep. 151.

Illinois. — Morrison v. Austin State Bank, 213 Ill. 472, 104 Am. St. Rep. 225. See also Douthart v. Logan, 190 Ill. 243.

Indiana. — Newman v. Gates, (Ind. App. 1903) 67 N. E. Rep. 468; Newman v. Gates, (Ind. 1904) 72 N. E. Rep. 638.

Maine. — Winslow v. Young, 94 Me. 145.

Michigan. — People's Nat. Bank v. Wilcox, 136 Mich. 567.

Missouri. — American Hardwood Lumber Co. v. Nickey, 101 Mo. App. 20.

New York. — Secor v. Tradesmen's Nat. Bank, 92 N. Y. App. Div. 294.

Oregon. — Willis v. Crawford, 38 Oregon 522; Hanthorn v. Quinn, 42 Oregon 1.

Rhode Island. — See Egan v. Wirth, 26 R. I. 363.

Texas. — Altgelt v. Alamo Nat. Bank, 98 Tex. 252.

See also *infra*, this title, **220. 2 et seq.**

Court Cannot Order Summary Sale of Decedent's Share of Partnership Property. — *In re Auerbach*, 23 Utah 529.

2. Survivor Takes Assets Charged with Trust — *Arkansas.* — Coolidge v. Burke, 69 Ark. 237.

Illinois. — Douthart v. Logan, 190 Ill. 243.

Indiana. — Newman v. Gates, (Ind. App. 1903) 67 N. E. Rep. 468.

Kentucky. — Jones v. Dulaney, (Ky. 1905) 86 S. W. Rep. 547.

Mississippi. — See Lance v. Calhoun, 85 Miss. 375.

New York. — Bush Co. v. Gibbons, 87 N. Y. App. Div. 576; Rosenthal v. Hasberg, (Supm. Ct. App. T.) 84 N. Y. Supp. 290; Secor v. Tradesmen's Nat. Bank, 92 N. Y. App. Div. 294; Bauchle v. Smylie, 104 N. Y. App. Div. 513; McCann v. Hazard, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 7; Matter of Mertens, (Surrogate Ct.) 39 Misc. (N. Y.) 512.

Ohio. — Enck v. Gerding, 67 Ohio St. 245.

Texas. — Altgelt v. Alamo Nat. Bank, 98 Tex. 252.

Utah. — *In re Auerbach*, 23 Utah 529.

See also *infra*, this title, **220. 2 et seq.**

Partner Quasi Trustee. — Poppleton v. Jones, 42 Oregon 24.

97. 1. Survivor Must Account to Representatives of Deceased Partner. — Douthart v. Logan, 190 Ill. 243; Newman v. Gates, (Ind. App. 1903) 67 N. E. Rep. 468; Secor v. Tradesmen's Nat.

97. Legal Title to Realty — Held as Tenants in Common. — See note 5.

98. See note 1.

Legal Title of Realty Descends to Heirs. — See note 3.

(2) *Real and Actual Interest of Partner.* — See note 4.

99. (3) *Right to Have Sale or Partition*—(a) General Rule.—See notes 2, 3, 4. Conflicting Views as to Realty. — See note 6.

100. See note 2.

(b) Provisions in Partnership Articles. — See note 4.

b. SHARES OF EACH PARTNER — (1) *How Regulated* — Relative Shares Regulated by Agreement. — See note 6.

101. See note 1.

(2) *Presumption of Equality* — In General. — See note 3.

102. The Presumption May Be Rebutted. — See note 3.

c. ATTACHMENT OR EXECUTION FOR INDIVIDUAL DEBT — (1) *In General.* — See note 4.

103. (3) *What Acquired by Separate Creditor or Purchaser* — Only Beneficial Interest of Debtor. — See note 3.

Bank, 92 N. Y. App. Div. 294; Matter of Mertens, (Surrogate Ct.) 39 Misc. (N. Y.) 512; *In re Auerbach*, 23 Utah 529.

97. 3. View that Fiduciary Relation Exists. — See *Jones v. Dulaney*, (Ky. 1905) 86 S. W. Rep. 547.

5. Realty Held as Tenants in Common. — *Southwestern Georgia Bank v. McGarrah*, 120 Ga. 944; *Hartnett v. Stillwell*, 121 Ga. 386, 104 Am. St. Rep. 151.

98. 1. Chargeable with Firm Debts and Balances Due on Winding Up. — *Hartnett v. Stillwell*, 121 Ga. 386, 104 Am. St. Rep. 151; *McKee v. Covalt*, (Kan. 1905) 81 Pac. Rep. 475; *Jones v. Beekman*, (N. J. 1900) 47 Atl. Rep. 71.

3. Heirs Hold Title in Trust. — See *Southwestern Georgia Bank v. McGarrah*, 120 Ga. 944. And see *infra*, this title, **220.** 2 *et seq.*

4. Balance Due After Debts Paid and Equities Between Partners Adjusted. — *Cobb v. Benedict*, 27 Colo. 342; *Brandt v. Edwards*, 91 Minn. 505; *Mansur-Tebbetts Implement Co. v. Ritchie*, 159 Mo. 213; *Harvey v. Stephens*, 159 Mo. 486; *House v. Davies*, 14 Ohio Dec. 105, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98.

Interest of Old Firm in Succeeding Firm. — Where the assets of an old firm are used in a business conducted by a new firm, which, though having the same name as the old, is a distinct entity, the old firm is entitled to a share in the profits of the new firm, but not necessarily to the ownership of all of the assets acquired by the new firm. Its ownership of such assets is proportionate to the value of the assets of the old firm used as compared with the value of the money or services contributed by the new firm. *Painter v. Painter*, 133 Cal. xix, 65 Pac. Rep. 135.

99. 2. Property to Be Sold on Dissolution and Proceeds Divided. — *Fleming v. Carson*, 37 Oregon 252; *Kelley v. Shay*, 206 Pa. St. 208.

Sale of Property Incapable of Partition. — See *Watson v. Williamson*, (Tex. Civ. App. 1903) 76 S. W. Rep. 793.

Right to Compel Sale of Right to Use Firm Name. — See *Slater v. Slater*, 175 N. Y. 143, 96 Am. St. Rep. 605.

3. May Compel Sale but Not Partition. — See *Fleming v. Carson*, 37 Oregon 252.

4. May Not Insist that Part Remain Unsold. —

Arthur v. Sire, 105 N. Y. App. Div. 454, applying the rule to contracts forming part of the partnership assets, though they contained restrictions against subletting and assigning.

When Partition Decreed. — Where the partnership debts are all paid, and in case of a sale the partners would not be upon an equality in bidding for the property, the court will decree a partition of the property and give to each partner his share *in specie*. *Kelley v. Shay*, 206 Pa. St. 208.

6. Right to Partition as Affected by Notice of Partnership Agreement. — See *Ingraham v. Mariner*, 194 Ill. 269.

Power of Court to Order Sale for Payment of Partnership Debts. — *State v. Neal*, 29 Wash. 391.

100. 2. Partition Compellable Where No Outstanding Firm Debts or Where Realty Not Needed for Payment. — *Comstock v. McDonald*, 126 Mich. 142.

4. Manner of Ascertainment Fixed by Contract. — See *Proper v. Lambert*, (Iowa 1903) 95 N. W. Rep. 251.

6. Entries in Books as to Shares Conclusive. — Safe Deposit, etc., *Co. v. Turner*, 98 Md. 22.

101. 1. Agreements as to Profits Presumed to Apply to Losses. — Safe Deposit, etc., *Co. v. Turner*, 98 Md. 22.

3. Presumption as to Equal Division of Profits and Losses. — Safe Deposit, etc., *Co. v. Turner*, 98 Md. 22. See also *McMurtrie v. Guiler*, 183 Mass. 451; *Gius v. Coffinberry*, 39 Oregon 414.

102. 3. Presumption Rebuttable by Evidence of Circumstances Showing Different Intention. — Safe Deposit, etc., *Co. v. Turner*, 98 Md. 22; *McMurtrie v. Guiler*, 183 Mass. 451.

4. Interest Liable to Seizure and Sale for Individual Debt. — *O. S. Kelly Co. v. Zarecor*, (Tenn. Ch. 1901) 62 S. W. Rep. 189; *Adoue v. Wettermark*, 36 Tex. Civ. App. 585. See also *Weber v. Hertz*, 188 Ill. 68; *Kleinsmith v. Kempner*, (Tex. Civ. App. 1904) 83 S. W. Rep. 409.

Levy Not Allowed under Georgia Code. — *Jolley v. Hardeman*, 111 Ga. 749.

Garnishment. — See *Hoaglin v. Henderson*, 119 Iowa 720, 97 Am. St. Rep. 335, in which case the court was held to be without jurisdiction. See generally the title GARNISHMENT, **798.** 6 *et seq.*

103. 3. Separate Creditor Acquires Only Bene-

104. *d.* TRANSFER OF INTEREST — (1) *To Third Person* — (a) *In General*. — See notes 6, 7.

105. (b) *Effect*. — See notes 2, 3, 4.

106. (2) *To Copartner* — Must Be for Fair Consideration and Without Deception. — See note 1.

Purchase as Extinguishment of Vendor's Debt to Firm. — See note 3.

4. Conversion of Firm Realty into Personalty — *a.* IN ENGLAND — In General — Conversion upon Facts for All Purposes. — See note 4.

b. IN UNITED STATES — (1) *Conversion Only So Far as Necessary* — (a) *General Rule*. — See note 9.

107. See notes 1, 2.

109. (d) *Dower Rights in Partnership Realty* — In General. — See note 2.

111. VIII. PARTNERS' RIGHTS AND LIABILITIES INTER SE — 1. Articles of Partnership — *d.* OPERATION AND EFFECT — (1) *In General*. — See note 10.

112. *e.* MODIFICATION, ALTERATION, OR WAIVER. — See note 6.

114. 2. Right to Participate in Management — *a.* IN ABSENCE OF AGREEMENT. — See note 2.

3. Duty to Observe Good Faith — *a.* IN GENERAL. — See note 7.

ficial Interest of Debtor. — Hargadine-McKittrick Dry Goods Co. v. Sappington, 105 Mo. App. 655. See also Weber v. Hertz, 188 Ill. 68; Cowan v. Leming, 111 Mo. App. 253.

Firm Creditors Have Priority over Creditors of One Partner. — Hargadine-McKittrick Dry Goods Co. v. Sappington, 105 Mo. App. 655.

104. 6. May Transfer to Third Person. — Leader v. Plante, 95 Me. 343, 85 Am. St. Rep. 418; Holmes v. Ferguson-McKinney Dry Goods Co., 86 Miss. 782.

7. Cannot Introduce Purchaser as Copartner. — Morrison v. Austin State Bank, 213 Ill. 472, 104 Am. St. Rep. 225.

105. 2. What Transferee Entitled to Receive. — Cobb v. Benedict, 27 Colo. 342; Moore v. Dickenson, 117 Ga. 887, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 105; Morrison v. Austin State Bank, 213 Ill. 472, 104 Am. St. Rep. 225; McKee v. Covalt, (Kan. 1905) 81 Pac. Rep. 475; Leader v. Plante, 95 Me. 343, 85 Am. St. Rep. 418; Doll v. Hennessy Mercantile Co., (Mont. 1905) 81 Pac. Rep. 625; House v. Davies, 14 Ohio Dec. 105. See also Hartnett v. Stillwell, 121 Ga. 386, 104 Am. St. Rep. 151.

3. Takes Only Right to Accounting. — Lamb v. Hall, 147 Cal. 44.

Purchaser's Remedy by Suit in Equity. — Leader v. Plante, 95 Me. 343, 85 Am. St. Rep. 418.

4. Remaining Partner's Right to Settle Affairs Not Affected. — Lamb v. Hall, 147 Cal. 44.

106. 1. Fair Consideration and Full Disclosure Required. — See Burgess v. Deierling, 113 Mo. App. 383; McKinley v. Lynch, (W. Va. 1905) 51 S. E. Rep. 4.

3. Purchase Extinguishes Vendor's Debt to Firm. — Nystuen v. Hanson, (Iowa 1902) 91 N. W. Rep. 1071; Fielder v. Beekman, (N. J. 1903) 54 Atl. Rep. 156; Schlicher v. Vogel, 61 N. J. Eq. 158. See also Cobb v. Benedict, 27 Colo. 342; McAreavy v. Magril, 123 Iowa 605.

4. Firm Realty Ipso Facto Converted into Personalty in Absence of Agreement. — *Re Fulton*, 7 Ont. L. Rep. 445.

9. Firm Realty Is Considered as Realty. — *Garside v. Norval*, 1 Alaska 19; *Hauptmann v.*

Hauptmann, 91 N. Y. App. Div. 197; *Huber v. Case*, 93 N. Y. App. Div. 479; *Barney v. Pike*, 94 N. Y. App. Div. 199. See also *Bernheimer v. Schmid*, 73 N. Y. App. Div. 434, affirming 71 N. Y. App. Div. 244.

Sufficiency of Evidence to Show Express Agreement. — See *Barney v. Pike*, 94 N. Y. App. Div. 199.

107. 1. Realty Deemed Personalty When Necessary for Adjusting Firm Obligations and Equities Inter Se. — *Coolidge v. Burke*, 69 Ark. 237; *Comstock v. McDonald*, 126 Mich. 142; *Bernheimer v. Schmid*, 73 N. Y. App. Div. 434, affirming 71 N. Y. App. Div. 244; *Smith v. Cowles*, 81 N. Y. App. Div. 328; *Hauptmann v. Hauptmann*, 91 N. Y. App. Div. 197; *Huber v. Case*, 93 N. Y. App. Div. 479. See also *Barney v. Pike*, 94 N. Y. App. Div. 199.

2. Disturbs Legal Title No Further than Is Necessary. — *Bernheimer v. Schmid*, 73 N. Y. App. Div. 434, affirming 71 N. Y. App. Div. 244; *Smith v. Cowles*, 81 N. Y. App. Div. 328.

109. 2. Interest Only in Net Remainder After Firm Debts Discharged. — *Hauptmann v. Hauptmann*, 91 N. Y. App. Div. 197.

111. 10. Parol Evidence Incompetent in Absence of Fraud or Mistake. — See also *Hart v. Hart*, 117 Wis. 639.

112. 6. Sufficiency of Consideration. — See *Melville v. Kruse*, 174 N. Y. 306.

114. 2. Right to Participate Equally in Management of Concern. — See *Harris v. Harris*, 132 Ala. 208.

7. Duty of Partners to Observe Good Faith Towards Each Other. — *Miles City First Nat. Bank v. State Nat. Bank*, (C. C. A.) 131 Fed. Rep. 422, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 114; *Morrison v. Austin State Bank*, 213 Ill. 472, 104 Am. St. Rep. 225; *Muir v. Samuels*, 110 Ky. 605; *Moore v. Rawson*, 185 Mass. 264; *Comstock v. McDonald*, 136 Mich. 480; *Burgess v. Deierling*, 113 Mo. App. 383; *Castle v. Marks*, 50 N. Y. App. Div. 320; *Bauchle v. Smylie*, 104 N. Y. App. Div. 513; *Duffy v. Gilmore*, 7 Lack. Leg. N. (Pa.) 114; *Bingham v. Kaylor*, 25 Wash. 156; *McKinley v. Lynch*, (W. Va. 1905) 51 S. E. Rep. 4; *Gates v. Paul*, 117 Wis. 170.

115. See notes 1, 2.

b. PRIVATE BENEFITS FROM FIRM TRANSACTIONS — (1) *General*

Rule. — See note 7.

116. Purchase of Claims Against Firm. — See note 1.

117.* Purchasing or Dealing in Firm Property for Private Benefit. — See note 2.

118. (2) *Information Acquired as Partner.* — See note 1.

4. Right to Carry On Separate Business — *b.* NONCOMPETING BUSINESS. — See note 5.

119. 5. Right to Contribution and Indemnity — *a.* WHEN PARTNER ENTITLED — (1) *In General.* — See note 1.

A Purchaser of a Partner's Share. — See note 2.

(2) *Losses and Expenses Incurred in Ordinary Conduct of Business* — *General Rule.* — See note 3.

120. (3) *Expenses Incurred in Preserving Firm Business or Property.* — See note 3.

(4) *Effect of Agreement to Assume Liabilities on Dissolution.* — See note 6.

b. RIGHT TO CONTRIBUTION FROM INDIVIDUAL PROPERTY. — See note 8.

121. *c.* RIGHT AS AFFECTED BY ILLEGALITY OF TRANSACTION. — See note 3.

d. LIMIT AS TO AMOUNT — *As Affected by Share in Firm.* — See note 6.

Limit as Fixed by Agreement. — See note 8.

e. MANNER AND TIME OF ENFORCEMENT. — See note 9.

6. Right to Compensation for Services in Firm Business — *a.* GENERAL RULE — *No Right in Absence of Agreement.* — See note 10.

115. 1. Relation Fiduciary. — *Miles City First Nat. Bank v. State Nat. Bank*, (C. C. A.) 131 Fed. Rep. 422, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 115; *Muir v. Samuels*, 110 Ky. 605; *Moore v. Rawson*, 185 Mass. 264; *Castle v. Marks*, 50 N. Y. App. Div. 320; *Bauchle v. Smylie*, 104 N. Y. App. Div. 513; *Bingham v. Keylor*, 25 Wash. 156; *McKinley v. Lynch*, (W. Va. 1905) 51 S. E. Rep. 4.

2. Governed by Rules Applicable to Trustees and Agents. — *Muir v. Samuels*, 110 Ky. 605; *Bauchle v. Smylie*, 104 N. Y. App. Div. 513.

7. Partner May Not Obtain Private Benefit from Firm Transactions. — *Gates v. Paul*, 117 Wis. 170. See also *Comstock v. McDonald*, 136 Mich. 489; *Burgess v. Deierling*, 113 Mo. App. 383; *Bingham v. Keylor*, 25 Wash. 156.

Remedies of the Defrauded Partner include the right to sue at law for damages, or to rescind the transaction and sue to recover all the money paid, or to sue in equity for a rescission of the transaction with an incidental accounting, or for an accounting only. *Gates v. Paul*, 117 Wis. 170.

116. 1. May Not Buy Up Claim Against Firm. — Compare *Dufur v. Paulson*, 110 Wis. 281.

117. 2. Dealing in Firm Property for Private Benefit. — See *Comstock v. McDonald*, 136 Mich. 489; *Burgess v. Deierling*, 113 Mo. App. 383.

118. 1. Information Used for Purpose Within Scope of Firm Business or Competing Therewith. — *Gates v. Paul*, 117 Wis. 170.

5. As to Third Persons, the fact that one is associated with another as a partner does not restrict his right to contract individually so as to exclude all others, even his copartner, from participation. *Sullivan v. Louisville, etc., R. Co.*, 128 Ala. 77.

Partner May Purchase Stock in Corporation in Which Firm Is Stockholder. — *Kelley v. Shay*, 206 Pa. St. 208.

119. 1. Contribution from Copartners as Joint Principals. — *Bunting v. Bunting*, 199 Pa. St. 27; *Erben v. Heston*, 202 Pa. St. 406; *Finletter v. Baum*, 207 Pa. St. 361.

2. A surviving partner may recover from the successors of the deceased partner where the partnership is continued by such successors in accordance with provisions in the articles. *Hax v. Burnes*, 98 Mo. App. 707.

3. Losses and Expenses Incurred in Ordinary Conduct of Firm Business. — *Erben v. Heston*, 202 Pa. St. 406; *Knipe v. Livingston*, 209 Pa. St. 49.

120. 3. Expenses Incurred in Preserving Firm Business or Property. — *Finletter v. Baum*, 207 Pa. St. 361.

6. Payment by One Partner After Dissolution and Agreement by Other to Assume Debts. — *Fairfield v. Day*, 71 N. H. 63.

8. Settlement of Partnership Accounts Prerequisite. — *Worley v. Smith*, 26 Tex. Civ. App. 270.

121. 3. Where Partnership Illegal, or Illegal Act Committed by Claimant Knowingly. — See *Taylor v. Thompson*, 74 N. Y. App. Div. 320, affirmed 176 N. Y. 168.

6. Not Limited to Sum Proportionate to Share in Firm. — See *Bunting v. Bunting*, 199 Pa. St. 27.

8. Amount of Outlay Will Not Affect Agreement. — *Bunting v. Bunting*, 199 Pa. St. 27.

9. Jurisdiction of Equity. — See *Bruns v. Heise*, (Md. 1905) 60 Atl. Rep. 604.

10. Not Entitled to Compensation in Absence of Agreement Therefor. — *McFarland v. McCor-*

- 122.** Rule Not Altered by Disproportionate Services. — See notes 2, 3.
 A Managing Partner Is Not Entitled to a Salary. — See note 4.
- 123.** Surviving Partners. — See notes 1, 2.
b. EFFECT OF CONTRACTS EXPRESS OR IMPLIED. — See note 5.
- 124.** See note 1.
c. EXTRA SERVICES NECESSITATED BY WILFUL NEGLIGENCE OF COPARTNER. — See note 2.
 7. Right to Interest on Balances — *a.* IN GENERAL. — See notes 3, 4.
b. IN CASE OF EXPRESS OR IMPLIED CONTRACT. — See note 5.
- 125.** *c.* IN ABSENCE OF AGREEMENT — (1) *Capital* — Capital Actually Paid. — See note 4.
 Where Stipulated Capital of One Not Paid In. — See note 7.
 (2) *Advances, Overdrafts, and Undivided Profits* — General Rule. — See note 11.
- 126.** See note 1.
 View that Interest Should Be Allowed. — See note 2.
 Balance Retained by One Partner After Dissolution. — See note 3.

mick, 114 Iowa 368; Barber *v.* Murphy, (Ky. 1901) 62 S. W. Rep. 894; Lell *v.* Hardesty, (Ky. 1902) 66 S. W. Rep. 643; Whitney *v.* Whitney, (Ky. 1905) 88 S. W. Rep. 311; Hoag *v.* Alderman, 184 Mass. 217; Lamb *v.* Wilson, (Neb. 1904) 98 N. W. Rep. 37; Wisner *v.* Field, 11 N. Dak. 257; Scott *v.* Boyd, 101 Va. 28. See also Bowen *v.* Day, 71 S. Car. 492.

Surviving Partners Continuing Firm Not Entitled to Compensation. — Barber *v.* Murphy, (Ky. 1901) 62 S. W. Rep. 894; Evans *v.* Weatherhead, 24 R. I. 394.

Burden of Proof on Partner Claiming Compensation. — Nevills *v.* Moore Min. Co., 135 Cal. 561; Michael *v.* Tracy, 15 Colo. App. 312.

122. 2. Rule Not Altered by Disparity in Services. — Whitney *v.* Whitney, (Ky. 1905) 88 S. W. Rep. 311; Hoag *v.* Alderman, 184 Mass. 217; Wisner *v.* Field, 11 N. Dak. 257.

3. No Inquiry as to Equality and Value of Services. — Hoag *v.* Alderman, 184 Mass. 217; Miller *v.* Hale, 96 Mo. App. 427.

4. Managing Partner Not Entitled to Salary in Absence of Agreement. — Nevills *v.* Moore Min. Co., 135 Cal. 561.

123. 1. No Compensation for Services of Survivors in Winding Up. — Consaul *v.* Cummings, 24 App. Cas. (D. C.) 36; Hoag *v.* Alderman, 184 Mass. 217; Clifton *v.* Clark, 83 Miss. 446, 102 Am. St. Rep. 458; Slater *v.* Slater, 78 N. Y. App. Div. 449, modified 175 N. Y. 143, 96 Am. St. Rep. 605; Matter of Dummett, (Surrogate Ct.) 38 Misc. (N. Y.) 477.

2. Entitled to Compensation under Special Circumstances. — Hoag *v.* Alderman, 184 Mass. 217.

5. Express or Implied Contract for Compensation. — *In re* Garwoods, (1903) 1 Ch. 236; Wisner *v.* Field, 11 N. Dak. 257.

Compensation Recoverable for Services Outside Firm Business. — Lell *v.* Hardesty, (Ky. 1902) 66 S. W. Rep. 643.

Salary Agreement Terminated by Death of Partner. — Comstock *v.* McDonald, 126 Mich. 142.

Agreement Implied from Nature of Partnership. — Hoag *v.* Alderman, 184 Mass. 217.

Insufficient Evidence to Show Implied Contract. — Nevills *v.* Moore Min. Co., 135 Cal. 561.

Damages Recoverable for Breach of Agreement. — Lamb *v.* Wilson, (Neb. 1903) 97 N. W. Rep. 325.

124. 1. Contract Not Implied Merely from Rendition of Excessive Services. — Wisner *v.* Field, 11 N. Dak. 257.

Burden of Proof on One Claiming Compensation. — Scott *v.* Boyd, 101 Va. 28.

2. Wilful Neglect of Duties by Copartner. — Miller *v.* Hale, 96 Mo. App. 427.

3. Kelley *v.* Shay, 206 Pa. St. 215.

4. Cannot Be Governed by Any Fixed Rules. — Lamb *v.* Rowan, 83 Miss. 45; Brenner *v.* Carter, 203 Pa. St. 75.

5. Express or Implied Agreement to Pay. — See Buckingham *v.* Chicago First Nat. Bank, (C. C. A.) 131 Fed. Rep. 192; Ingraham *v.* Mariner, 194 Ill. 269; Whimbey *v.* Clark, 22 Quebec Super. Ct. 453.

Interest Not Allowed on Open Account. — McFarland *v.* McCormick, 114 Iowa 368.

Waiver of Right to Interest. — Hayne *v.* Sealy, 71 N. Y. App. Div. 418.

125. 4. No Interest in Absence of Agreement on Paid Contributions to Capital of Firm. — Grant *v.* Smith, 70 N. Y. App. Div. 301.

7. Interest Not Allowed on Excess of Capital. — Compare Duffy *v.* Gilmore, 7 Lack. Leg. N. (Pa.) 114.

11. Interest Not Allowed on Advances, Overdrafts, etc., in Absence of Agreement. — Lamb *v.* Rowan, 83 Miss. 45. See also Evans *v.* Weatherhead, 24 R. I. 394.

No Interest Where Accounting Has Not Been Demanded. — Brenner *v.* Carter, 203 Pa. St. 75.

126. 1. Such Transactions Merely Items in Firm Accounts. — See Lamb *v.* Rowan, 83 Miss. 45.

2. Transaction Considered as Loan — Agreement for Interest Implied. — Grant *v.* Smith, 70 N. Y. App. Div. 301.

3. Partner Retaining Balance Liable for Interest from Time of Dissolution. — See Kelley *v.* Shay, 206 Pa. St. 208. See Bingham *v.* Keylor, 25 Wash. 156.

Interest Allowed Where Accounting Delayed by Misconduct. — Corralitos Co. *v.* Mackey, 37 Tex. Civ. App. 316.

127. 8. Rights as to Partnership Accounts — *a. DUTY TO KEEP AND RIGHT OF ACCESS.* — See notes 1, 2, 3.

128. 9. Duty to Conform to Articles of Partnership. — See note 3.

10. Duty to Exercise Care and Skill — *b. LOSSES NOT CAUSED BY NEGLIGENCE OR BAD FAITH.* — See notes 6, 7.

Liability for Acts of Competent Agents. — See note 9.

129. 11. Power of Majority — *a. REGULATION BY EXPRESS AGREEMENT IN ARTICLES.* — See note 2.

b. IN ABSENCE OF AGREEMENT — (2) *As to Matters Within Scope of Firm Business* — Implied Understanding that Acts of Majority Shall Prevail. — See note 4.

Acts Must Be in Good Faith and for Benefit of Firm. — See note 5.

130. (3) Changes in Business or Terms of Association — Majority Cannot Lawfully Bind Firm. — See note 2.

12. Division of Profits — *a. REGULATION OF MODE, TIME, AND AMOUNT, IN ABSENCE OF AGREEMENT.* — See note 5.

13. Power to Expel Partner — *b. NECESSITY FOR EXERCISE OF GOOD FAITH* — In General. — See note 9.

131. The Partner Whom It Is Sought to Expel Must Have Notice. — See note 1.

Power Strictly Construed. — See note 5.

14. Right to Partner's Lien — *a. IN GENERAL* — Definition. — See note 8.

127. 1. Duty to Keep and Right of Access. — *Hughes v. Ewing*, 162 Mo. 261. See also *Bevan v. Webb*, (1901) 2 Ch. 59.

2. All Partners Presumed to Have Access to and to Know of Entries. — *Miles City First Nat. Bank v. State Nat. Bank*, (C. C. A.) 131 Fed. Rep. 422; *Burchell v. Voght*, 35 N. Y. App. Div. 190, affirmed without opinion 164 N. Y. 602.

Right of Inspection May Be Exercised Through Agent. — *Bevan v. Webb*, (1901) 2 Ch. 59.

3. Circumstances Rebutting Presumption of Access to Books and Knowledge of Contents. — *Miles City First Nat. Bank v. State Nat. Bank*, (C. C. A.) 131 Fed. Rep. 422.

128. 3. Partner Causing Loss by Failure to Conform Must Indemnify Copartners. — *Miller v. Freeman*, 111 Ga. 654.

Measure of Recovery for Failure to Give Time as Agreed. — See *Brandt v. Edwards*, 91 Minn. 505.

6. Firm Must Share Losses Not Caused by Negligence or Bad Faith. — *Lyons v. Lyons*, 207 Pa. St. 7, 99 Am. St. Rep. 779. See also *Markle v. Wilbur*, 200 Pa. St. 457.

7. Not Liable for Honest Errors in Judgment, Etc. — *Lyons v. Lyons*, 207 Pa. St. 7, 99 Am. St. Rep. 779.

9. Liability for Acts of Competent Agents. — See *Duffy v. Gilmore*, 7 Lack. Leg. N. (Pa.) 114.

Not Liable Even Where Agent Is Son of Partner. — *Archer v. Barry*, (Ky. 1901) 62 S. W. Rep. 485.

129. 2. Express Provision in Articles. — See *Markle v. Wilbur*, 200 Pa. St. 457.

4. Will of Majority Prevails as to Matters Within Scope of Firm Business. — *Markle v. Wilbur*, 200 Pa. St. 457.

6. Act Must Be in Good Faith and Not for Private Benefit. — See *Markle v. Wilbur*, 200 Pa. St. 457.

130. 2. Cannot Engage Firm in Different

Business. — See *Markle v. Wilbur*, 200 Pa. St. 457.

5. Division Regulated by Terms of Agreement. — *Lyle v. Howard*, (Ky. 1902) 68 S. W. Rep. 144.

Sufficiency of Evidence to Show Agreement for Equal Division. — *Larkin v. Martin*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 179.

Presumption of Equal Division Obtains. — *Broadfoot v. Fraser*, 73 Vt. 313.

Forfeiture of Right to Profits. — A partner — especially one for a special purpose — may abandon the contract, and thereby forfeit his right to an equal share of the proceeds of the business. *Miller v. Hale*, 96 Mo. App. 427.

9. Must Be Exercised in Good Faith for Benefit of Firm. — *Carmichael v. Evans*, (1904) 1 Ch. 486.

131. 1. Notice Fixed by Articles May Be Waived. — *Proper v. Lambert*, (Iowa 1903) 95 N. W. Rep. 251.

5. Power to Be Strictly Construed. — *Carmichael v. Evans*, (1904) 1 Ch. 486.

8. Right to Partner's Lien in General — *United States*. — *Henderson v. Ries*, (C. C. A.) 108 Fed. Rep. 709.

Colorado. — *Ellsberry v. Block*, 28 Colo. 477.

Kansas. — *Kincaid v. National Wall-Paper Co.*, 63 Kan. 288, 88 Am. St. Rep. 243.

Kentucky. — *Hatchell v. Chew*, (Ky. 1900) 58 S. W. Rep. 816. See also *Walter v. Herman*, 110 Ky. 800.

Minnesota. — *Brandt v. Edwards*, 91 Minn. 505.

Mississippi. — *Mechanics' Sav. Bank v. Fargason*, 79 Miss. 64.

Missouri. — *Freedman v. Holberg*, 89 Mo. App. 340; *Hargadine-McKittrick Dry Goods Co. v. Sappington*, 105 Mo. App. 655.

New Jersey. — *Jones v. Beekman*, (N. J. 1900) 47 Atl. Rep. 71.

New Mexico. — See *Flournoy v. Bullock*, 11 N. Mex. 87.

- 132.** Whatever Due to or from Firm by or to Members. — See note 1.
b. AGAINST WHOM AVAILABLE. — See note 4.
- 133.** *c.* TO WHAT PROPERTY LIEN ATTACHES — All Firm Assets at Time of Dissolution. — See note 2.
d. HOW LOST — By Conversion into Separate Property. — See note 8.
- 134.** *e.* APPLICATION OF FIRM PROPERTY TO PRIVATE USE. — See note 3.
- 135.** See notes 1, 3, 4.
- 136.** IX. RIGHTS AND LIABILITIES OF PARTNERS AS TO THIRD PERSONS —
 1. Power of Partner to Bind Firm — *a.* ACTUAL AUTHORITY — (1) *In General* — Any Act Within Actual Scope Binding. — See note 3.
 And a Subsequent Ratification. — See note 4.
- 137.** Express or Implied. — See notes 1, 2.
 (3) *Presumption in Absence of Agreement* — (a) Authority Presumed as to All Acts Necessary to Carry on Business. — See note 4.
- 138.** Each Partner Is the Agent of the Partnership. — See note 1.
- 139.** (c) Question as to Scope of Authority for Jury. — See note 4.

New York. — *Morrisey v. Berman*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 586; *United Nat. Bank v. Weatherby*, 70 N. Y. App. Div. 279.
Texas. — *Williams v. Meyer*, (Tex. Civ. App. 1901) 64 S. W. Rep. 66; *Blackwell v. Farmers*, etc., Nat. Bank, 97 Tex. 445.
Wisconsin. — *Reddington v. Franey*, 124 Wis. 590.

Secret Partner Has No Title as Against Creditors of Ostensible Firm. — *Willard v. Bullen*, 41 Oregon 25.

Dormant Partner Estopped to Deny Creditor's Right of Set Off. — *Wiley v. Crocker-Woolworth Nat. Bank*, 141 Cal. 508.

132. 1. Extends to Whatever Due to or from Firm by or to Members. — *McGillis v. Hogan*, 190 Ill. 176.

4. Against Partner or One Claiming Through Him. — *Henderson v. Ries*, (C. C. A.) 108 Fed. Rep. 709; *Brandt v. Edwards*, 91 Minn. 505; *Williams v. Meyer*, (Tex. Civ. App. 1901) 64 S. W. Rep. 66.

Rights of Special Partner under New York Statute. — See *Matter of Price*, 171 N. Y. 15, reversing 60 N. Y. App. Div. 37.

133. 2. All Partnership Assets at Dissolution or Ascertainment of Share. — *Blackwell v. Farmers, etc.*, Nat. Bank, 97 Tex. 445.

8. Purchase by Partner of Copartner's Interest. — *Blackwell v. Farmers, etc.*, Nat. Bank, 97 Tex. 445.

134. 3. Partner May Not Apply Firm Property to Individual Use or Debts. — *Pollock v. Jones*, (C. C. A.) 124 Fed. Rep. 163; *Miles City First Nat. Bank v. State Nat. Bank*, (C. C. A.) 131 Fed. Rep. 422; *Morrison v. Austin State Bank*, 213 Ill. 472, 104 Am. St. Rep. 225; *Talbott v. Great Western Plaster Co.*, 86 Mo. App. 558; *Freeman v. Holberg*, 89 Mo. App. 340.

135. 1. Recovery of Property Applied by Partner to Private Use. — *Morrison v. Austin State Bank*, 213 Ill. 472, 104 Am. St. Rep. 225.

3. A Deposit by a Partner Acting Within the Scope of His Authority cannot be recovered by the other partner from the bank in which it was made, even though the bank had notice that the funds were those of the firm. *Overton Bank v. Thompson*, (C. C. A.) 118 Fed. Rep. 708.

4. Ratification Not Bar to Recovery Where Firm

Insolvent. — *Mechanics' Sav. Bank v. Fargason*, 79 Miss. 64.

136. 3. Acts Within Actual Scope of Agency Binding. — *Alley v. Bowen-Merrill Co.*, (Ark. 1905) 88 S. W. Rep. 838; *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 113 Ga. 1142; *Standard Wagon Co. v. Few*, 119 Ga. 293; *Fennell v. Myers*, (Ky. 1903) 76 S. W. Rep. 136; *Kelley-Goodfellow Shoe Co. v. Long-Bell Lumber Co.*, 86 Mo. App. 438; *Hefferlin v. Karlman*, 29 Mont. 139; *Cashman v. Lawson*, 73 N. Y. App. Div. 419, affirmed without opinion 175 N. Y. 488; *Cassidy v. Saline County Bank*, 14 Okla. 532; *Salt Lake City Brewing Co. v. Hawke*, 24 Utah 199.

4. Subsequent Ratification Equivalent to Antecedent Authority. — *Cassidy v. Saline County Bank*, 14 Okla. 522, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 136; *Guthiel v. Gilmer*, 27 Utah 496, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 136. See also *Myers v. Sprengle*, 14 York Leg. Rec. (Pa.) 124.

137. 1. Ratification May Be Express or Implied. — *Stewart v. Brubaker*, 112 Ill. App. 408; *Guthiel v. Gilmer*, 27 Utah 496.

Ratification Question of Fact. — *Cassidy v. Saline County Bank*, 14 Okla. 532.

2. Silence Not Per Se Ratification. — *Miles City First Nat. Bank v. State Nat. Bank*, (C. C. A.) 131 Fed. Rep. 422.

4. Presumption of Authority. — *Garth v. Davis*, (Ky. 1905) 85 S. W. Rep. 692; *Boice v. Jones*, 86 N. Y. App. Div. 613; *Salt Lake City Brewing Co. v. Hawke*, 24 Utah 199.

138. 1. Each Partner Agent of Firm as to All Matters Within Scope of Firm Business. — *Garth v. Davis*, (Ky. 1905) 85 S. W. Rep. 692; *Kelley-Goodfellow Shoe Co. v. Long-Bell Lumber Co.*, 86 Mo. App. 438; *Hefferlin v. Karlman*, 29 Mont. 139; *Taylor v. Thompson*, 62 N. Y. App. Div. 159; *Lord v. Hull*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 83, affirmed 80 N. Y. App. Div. 194. See also *Brown v. Foster*, 137 Mich. 35.

139. 4. Questions as to Scope or Consent for Jury. — *Beckwith v. Mace*, (Mich. 1905) 103 N. W. Rep. 559; *Hefferlin v. Karlman*, 29 Mont. 139; *Cassidy v. Saline County Bank*, 14 Okla. 532.

- 139.** (d) Evidence to Show Scope of Partnership — Course of Business. — See note 6.
(4) Notice to Partner as Notice to Firm. — See note 7.

140. See note 1.

(5) Admissions and Representations by Partner — General Rule. — See note 3.

142. b. APPARENT OR IMPLIED AUTHORITY — (1) General Rule as to Power to Bind Firm. — See notes 1, 2.

(2) Restriction by Agreement — (a) In General. — See note 4.

143. (b) Effect as Dependent on Notice of Restriction. — See notes 1, 2.

144. (3) To What Acts Limited — (a) Acts Necessary for Carrying on Business in Usual Way. — See note 2.

(b) Acts Apparently Not Connected with Ordinary Business. — See note 3.

145. See note 1.

146. See notes 1, 2.

139. 6. Evidence that Act Was Warranted by Course Pursued in Managing Firm Business. — See *Guthiel v. Gilmer*, 27 Utah 496.

7. Notice to Partner Notice to Firm. — *Loeb v. Stern*, 108 Ill. 371; *Ryan v. Riddle*, 109 Mo. App. 115; *Randall v. Knevals*, 27 N. Y. App. Div. 146, affirmed without opinion 161 N. Y. 632; *Adams v. Ashman*, 203 Pa. St. 536; *Youmans v. Moore*, 69 S. Car. 350.

140. 1. Fraud Committed by or with Consent of Partner Having Notice. — *Jones v. Draper*, 26 Ohio Cir. Ct. 785.

3. Admissions and Representations as Evidence Against Firm. — *Caris v. Nimmons*, 92 Mo. App. 66; *Parker v. Paine*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 768; *Randall v. Knevals*, 27 N. Y. App. Div. 146, affirmed without opinion 161 N. Y. 632; *Myers v. Sprenkle*, 20 Pa. Super. Ct. 549; *Robinson v. Marietta First Nat. Bank*, 98 Tex. 184. See also *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 Am. St. Rep. 907.

142. 1. Apparent or Implied Authority — General Rule. — *Krasky v. Wollpert*, 134 Cal. 338; *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 113 Ga. 1142, 116 Ga. 176; *Standard Wagon Co. v. Few*, 119 Ga. 293; *Morrison v. Austin State Bank*, 213 Ill. 472, 104 Am. St. Rep. 225; *Schele v. Wagner*, 163 Ind. 20; *Cohen v. Miller*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 106; *Wise v. Loeb*, 15 Pa. Super. Ct. 601; *Salt Lake City Brewing Co. v. Hawke*, 24 Utah 199; *Woolsey v. Henke*, 125 Wis. 134. See also *Parker v. Parker*, (Ky. 1904) 80 S. W. Rep. 209; *Huyssen v. Lawson*, 90 Mo. App. 82; *Sullivan v. Sullivan*, 122 Wis. 326.

2. See *Salt Lake City Brewing Co. v. Hawke*, 24 Utah 199.

4. Right to Restrict Authority by Agreement. — *Barwick v. Alderman*, (Fla. 1903) 35 So. Rep. 13, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 142.

143. 1. Persons Having Notice of Restriction. — *Barwick v. Alderman*, (Fla. 1903) 35 So. Rep. 13, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 143; *Johnson v. Haws*, 47 N. Y. App. Div. 597, affirmed without opinion 168 N. Y. 654.

2. Persons Without Notice of Restriction. — *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 113 Ga. 1142; *Standard Wagon Co. v. Few*, 119 Ga. 293; *Tamblyn v. Scott*, 111 Mo. App. 46; *Industrial Lumber Co. v. Texas Pine Land*

Assoc., 31 Tex. Civ. App. 375, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 143; *Moore v. May*, 117 Wis. 192.

144. 2. Limited to Acts Necessary for Conducting Business in Usual Way. — *Kelley-Goodfellow Shoe Co. v. Long-Bell Lumber Co.*, 86 Mo. App. 438. See also *Standard Wagon Co. v. Few*, 119 Ga. 293; *Weeks v. Hutchinson*, 135 Mich. 160.

3. Acts Apparently Not Connected with Ordinary Firm Business Not Binding — *United States*. — *Miles City First Nat. Bank v. State Nat. Bank*, (C. C. A.) 131 Fed. Rep. 422.

Colorado. — *Lewin v. Barry*, 15 Colo. App. 461; *King v. Mecklenburg*, 17 Colo. App. 312. *Georgia*. — *Standard Wagon Co. v. Few*, 119 Ga. 293.

Iowa. — *Sutton v. Weber*, 127 Iowa 361.

Missouri. — *Kelley-Goodfellow Shoe Co. v. Long-Bell Lumber Co.*, 86 Mo. App. 438; *Frowein v. Haysler*, 87 Mo. App. 310.

New York. — *Taylor v. Thompson*, 62 N. Y. App. Div. 159, 74 N. Y. App. Div. 320, affirmed 176 N. Y. 168.

Texas. — *Beatty v. Bulger*, 28 Tex. Civ. App. 117.

Utah. — *Cavanaugh v. Salisbury*, 22 Utah 465; *Gutheil v. Gilmer*, 23 Utah 84; *Peterson v. Armstrong*, 24 Utah 96.

No Apparent Authority Where Consideration Moves to Partner Acting. — *Remington v. Eastern R. Co.*, 109 Wis. 154.

Third Persons Charged with Notice of Character of Business. — *Standard Wagon Co. v. Few*, 119 Ga. 293.

145. 1. Actual Authority. — *Frowein v. Haysler*, 87 Mo. App. 310. See also *Lewin v. Barry*, 15 Colo. App. 461.

146. 1. Ratification. — *Lewin v. Barry*, 15 Colo. App. 461; *King v. Mecklenburg*, 17 Colo. App. 312; *Golding v. Brennan*, 183 Mass. 286; *Kelley-Goodfellow Shoe Co. v. Long-Bell Lumber Co.*, 86 Mo. App. 438; *Cavanaugh v. Salisbury*, 22 Utah 465; *Gutheil v. Gilmer*, 23 Utah 84. See also *McCullough's Estate*, 10 Pa. Dist. 353; *Sutton v. Weber*, 127 Iowa 361; *Jamison v. Cullom*, 110 La. 781.

Insufficient Evidence of Ratification. — See *Peterson v. Armstrong*, 24 Utah 96.

2. Pledge of Firm Credit to Pay Private Debts. — *Miles City First Nat. Bank v. State Nat. Bank*, (C. C. A.) 131 Fed. Rep. 422; *People's Sav. Bank v. Smith*, 114 Ga. 185.

147. See notes 1, 2.

148. (4) *Particular Powers*—(b) *Acts Within Implied Authority in Absence of Agreement*—*aa. OF PARTNERS GENERALLY—Power to Receive Payment and Give Receipt.*—See note 2.

Assignment of Choses in Action.—See note 6.

A Partner May Draw Checks.—See note 7.

149. Purchase and Sale of Goods for Firm.—See note 9.

150. See notes 1, 2.

Transfer of Property in Payment of Firm Debts.—See note 3.

A Partner May Engage Servants or Agents.—See note 5.

151. One Partner Can Bind His Firm by Taking a Lease.—See note 1.

bb. AS TO NEGOTIABLE PAPER—(a) *Trading Partnerships.*—See note 5.

152. See note 1.

The Burden of Proof.—See note 2.

153. Transfer of Bill of Exchange by Indorsement of Individual Name.—See note 1.

(*bb Nontrading Partnerships.*—See notes 6, 7.

154. Presumption Rebuttable.—See note 8.

147. 1. Burden of Proving Authority on Creditor.—*Lewin v. Barry*, 15 Colo. App. 461; *Standard Wagon Co. v. Few*, 119 Ga. 293; *Cavanaugh v. Salisbury*, 22 Utah 465; *Gutheil v. Gilmer*, 23 Utah 84; *Peterson v. Armstrong*, 24 Utah 96.

2. Estoppel to Deny Authority of Partner.—*Jamison v. Cullom*, 110 La. 781. See also *Monongahela Valley Bank v. Weston*, 172 N. Y. 259.

148. 2. Power to Receive Payment of Firm Debts and Give Receipts.—See *Collins v. Collins*, (Ky. 1904) 83 S. W. Rep. 99.

6. Assignment of Choses in Action.—*Sullivan v. Visconti*, 68 N. J. L. 543. See also *American Hardwood Lumber Co. v. Nickey*, 101 Mo. App. 20.

7. Authority to Draw and Indorse Checks.—*Sullivan v. Sullivan*, 122 Wis. 326.

149. 9. Sale of Goods Not Dealt in by Firm.—A partner has no authority to dispose of firm property without the consent of his co-partner where the goods sold are not those dealt in by the firm. *Plimpton v. Taylor*, 11 Ohio Cir. Dec. 570.

150. 1. Sale of Entire Property Operating to Discontinue Firm Business.—*Doll v. Hennessy Mercantile Co.*, (Mont. 1905) 81 Pac. Rep. 625, holding it to be immaterial that the purchase price was applied to the liquidation of firm debts; *Freeman v. Abramson*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 101; *Franklin Bank v. Williams*, 14 Ohio Dec. 651.

Oklahoma Statute.—See *Phillips v. Thorpe*, 12 Okla. 617.

2. Interest of Nonassenting Partners Recoverable from Purchaser.—*Phillips v. Thorpe*, 12 Okla. 617. See also *Plimpton v. Taylor*, 11 Ohio Cir. Dec. 570.

3. Transfer of Firm Property in Payment of Firm Debts.—*Williams v. Meyer*, (Tex. Civ. App. 1901) 64 S. W. Rep. 66.

5. Engagement of Servants or Agents for Firm Business.—*Gentry v. Singleton*, 3 Indian Ter. 516.

151. 1. May Take Lease to Firm of Realty Necessary for Firm Purposes.—*Woolsey v. Henke*, 125 Wis. 134.

5. Authority to Draw, Accept, and Indorse Bills

and Notes in Firm Name.—*Marsh v. Wheeler*, 77 Conn. 449; *Schele v. Wagner*, 163 Ind. 20; *McAreavy v. Magril*, 123 Iowa 605; *Ketcham Nat. Bank v. Hagen*, 164 N. Y. 446; *Richardson v. Hinck*, 53 N. Y. App. Div. 127, affirmed without opinion 169 N. Y. 588; *Masterson v. Mansfield*, 25 Tex. Civ. App. 262; *Moore v. Williams*, 26 Tex. Civ. App. 142; *Pettyjohn v. National Exch. Bank*, 101 Va. 111. See also *Krasky v. Wollpert*, 134 Cal. 338; *Adams v. Long*, 114 Ill. App. 277.

Managing Partner Has Power to Execute and Renew Notes.—*Mankato First Nat. Bank v. Grignon*, 7 Idaho 646; *Citizens' Commercial, etc., Bank v. Platt*, 135 Mich. 267.

152. 1. Firm Paper Issued for Individual Benefit of Partner.—*Richardson v. Erckens*, 53 N. Y. App. Div. 127, affirmed without opinion 169 N. Y. 588. See also *King v. Mecklenburg*, 17 Colo. App. 312.

No Liability Where Notice Appears.—*Miles City First Nat. Bank v. State Nat. Bank*, (C. C. A.) 131 Fed. Rep. 422; *Adams v. Long*, 114 Ill. App. 277; *Kahn v. Overstolz*, 82 Mo. App. 235; *Lucker v. Iba*, 54 N. Y. App. Div. 566.

2. Burden of Proof on Partner Not Signing.—*Richardson v. Erckens*, 53 N. Y. App. Div. 127, affirmed without opinion 169 N. Y. 588.

153. 1. Transfer of Bill of Exchange by Indorsement in Individual Name.—See *Miller v. Berry*, (S. Dak. 1905) 104 N. W. Rep. 311.

6. No Implied Authority in Case of Nontrading Firms.—*Alley v. Bowen-Merrill Co.*, (Ark. 1905) 88 S. W. Rep. 838; *Teed v. Parsons*, 202 Ill. 455; *Schele v. Wagner*, 163 Ind. 20; *Powell Hardware Co. v. Mayer*, 110 Mo. App. 14.

A note executed by a partner in the name of a nontrading firm of which he is a member is not validated by reason of his having implied authority as a partner of a trading firm, composed of the same persons as the other, to execute notes in behalf of the trading firm. *Masterson v. Mansfield*, 25 Tex. Civ. App. 262.

7. Burden of Proof upon One Seeking to Hold Firm Liable.—*Teed v. Parsons*, 202 Ill. 455; *Schele v. Wagner*, 163 Ind. 20.

154. 8. Presumption as to Lack of Authority Rebuttable.—*Teed v. Parsons*, 202 Ill. 455;

154. *cc.* POWER OF PARTNER IN TRADING FIRM TO BORROW ON FIRM'S CREDIT.— See note 9.

Power to Pledge or Mortgage Firm Property.— See note 10.

155. (e) Acts as to Which No Authority Implied — *aa.* IN GENERAL — Submission to Arbitration.— See note 1.

157. Other Cases.— See notes 1, 2, 3, 5.

158. *bb.* POWER TO BIND FIRM BY SEALED INSTRUMENT.— See note 1.

159. Effect of Seal on Instrument Otherwise Valid.— See note 1.

160. (5) *Restriction of Authority by Dissent* — (d) *Waiver of Dissent*.— See note 10.

163. 2. Liability of Firm on Contracts Made by One Partner — *b.* CONDITIONS NECESSARY TO LIABILITY — (3) *Agency for Firm*.— See note 3.

Agency Question of Fact.— See note 6.

164. (4) *Liability of Firm as Affected by Reception of Benefit*.— See note 1.

c. FIRM BILLS AND NOTES — (1) *Necessity for Use of Firm Name* — *Use of Individual Name of One Partner*.— See note 6.

165. Signature of Individual Names of Partners.— See notes 1, 2.

Schele v. Wagner, 163 Ind. 20; *Masterson v. Mansfield*, 25 Tex. Civ. App. 262. See also *Alley v. Bowen-Merrill Co.*, (Ark. 1905) 88 S. W. Rep. 838.

154. 9. Borrowing Money on Credit of Firm.— *Parker v. Parker*, (Ky. 1904) 80 S. W. Rep. 209; *Cohen v. Miller*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 106; *Salt Lake City Brewing Co. v. Hawke*, 24 Utah 199.

Power Exists Only When Necessary for Transaction of Partnership Business in Usual Way.— *Burchell v. Voght*, 35 N. Y. App. Div. 190, affirmed without opinion 164 N. Y. 602.

10. Power to Pledge or Mortgage Firm Personality.— *Cohen v. Miller*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 106; *Matthies v. Herth*, 31 Wash. 665. See also *Dingwall v. McBean*, 30 Can. Sup. Ct. 441; *Hardin v. Dolge*, 46 N. Y. App. Div. 416.

Power of Partner to Mortgage Firm Property under Power of Attorney.— *Morris v. Hubbard*, 14 S. Dak. 525.

No Power to Mortgage Firm Property for Individual Debt.— *Lance v. Butler*, 135 N. Car. 419.

Firm Not Bound by Mortgage Accepted by Mortgagee After Dissolution.— *Meyer v. Michaels*, (Neb. 1903) 95 N. W. Rep. 63.

155. 1. Partner Not Bound by Unauthorized Compromise.— *Busby v. Rooks*, (Ark. 1904) 81 S. W. Rep. 1056.

157. 1. Conveyance of Firm Realty.— *Kahn v. Bechel*, 108 La. 296.

Conveyance by Partner under Parol Authority Valid.— *Williams v. Meyer*, (Tex. Civ. App. 1901) 64 S. W. Rep. 66.

Mortgage of Firm Realty.— Compare *Matthies v. Hearth*, 31 Wash. 665.

Subsequent Ratification Validates Incumbrance.— *Williams v. Meyer*, (Tex. Civ. App. 1901) 64 S. W. Rep. 66.

Acts Constituting Ratification of Incumbrance.— See *Allen v. Meyer*, (Tex. Civ. App. 1901) 65 S. W. Rep. 645.

2. No Implied Power to Give Guaranty on Behalf of Firm.— *Gunderson v. Hasterlik*, 100 Ill. App. 429; *McCullogh's Estate*, 10 Pa. Dist.

353; *Kelley-Goodfellow Shoe Co. v. Long-Bell Lumber Co.*, 86 Mo. App. 438.

3. *King v. Mecklenburg*, 17 Colo. App. 312. Estoppel to Deny Partner's Authority.— See *Monongahela Valley Bank v. Weston*, 172 N. Y. 259.

5. To Make Copartners Partners in Another Business.— *North Pac. Lumber Co. v. Spore*, 44 Oregon 462, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 157; *Cavanaugh v. Salisbury*, 22 Utah 465; *Gutheil v. Gilmer*, 23 Utah 84.

158. 1. No Implied Authority to Bind Firm by Sealed Instrument.— *Pollock v. Jones*, (C. C. A.) 124 Fed. Rep. 163.

159. 1. Seal Held Not to Vitiating Instrument Otherwise Valid.— *Woolsey v. Henke*, 125 Wis. 134. See also *Davis v. Turner*, (C. C. A.) 120 Fed. Rep. 605.

160. 10. Waiver of Dissent by Accepting Benefit of Act.— See *Matthies v. Herth*, 31 Wash. 665.

163. 3. Must Have Acted in Character of Agent and Not as Principal.— *Monongahela Valley Bank v. Weston*, 172 N. Y. 259. See also *Altgelt v. Elmendorf*, (Tex. Civ. App. 1904) 84 S. W. Rep. 412.

6. Parol Evidence Admissible.— *Huguenot Mills v. Jempson*, 68 S. Car. 363, 102 Am. St. Rep. 673.

164. 1. Firm Not Bound Merely by Having Obtained Benefit of Act.— *Fraser v. Sweet*, 13 Manitoba 147.

Acceptance of Benefit as Evidence of Ratification.— *Mechanics*, etc., *Bank v. Oppenheim*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 846.

6. Signature in Individual Name Binding on Firm.— *Beckwith v. Mace*, (Mich. 1905) 103 N. W. Rep. 559; *Salt Lake City Brewing Co. v. Hawke*, 24 Utah 199.

165. 1. Signature of Individual Names of Members.— See *Davis v. Turner*, (C. C. A.) 120 Fed. Rep. 605.

2. Signature of Individual Names by Partner.— Compare *Pettyjohn v. National Exch. Bank*, 101 Va. 111, holding that one partner could not bind another partner individually by indorsing his name on a note.

165. (2) *Effect of Use of Name* — (a) *As Raising Presumption of Firm Liability.* — See note 4.

166. See note 1.

(b) *Equivalent to Signature of Names of All Liable as Partners* — *bb* *WHERE BUSINESS CARRIED ON IN NAME OF INDIVIDUAL.* — See note 3.

3. *Liability for Partner's Torts, Frauds, and Breaches of Trust* — *a.* *WHEN COMMITTED IN COURSE OF EMPLOYMENT* — *Application of Principles of Agency.* — See note 9.

168. *b.* *TORTS OUTSIDE SCOPE OF AUTHORITY* — *General Rule.* — See note 6.

169. See note 1.

Where the Act Is Subsequently Adopted and the Benefit Thereof Is Received. — See note 3.

c. *MISAPPLICATION OF MONEY OR PROPERTY RECEIVED FOR FIRM OR IN FIRM'S CUSTODY* — (1) *Money Received and Misapplied by Partner* — *Received Within Scope of Authority.* — See note 4.

Money Received Outside of Scope of Authority. — See note 5.

170. *d.* *EMPLOYMENT OF TRUST MONEY FOR PARTNERSHIP PURPOSES* — *In General.* — See note 1.

But Partners Who Are Implicated in a Breach of Trust. — See note 3.

4. *Nature of Liability* — *a.* *ON CONTRACTS* — (1) *Whether Joint or Joint and Several.* — See note 5.

171. See note 1.

165. **4.** *Presumption that Paper of Trading Firm Was Given in Firm Transaction.* — *Sheldon v. Bigelow*, 118 Iowa 586; *Calvert Bank v. Katz*, (Md. 1905) 61 Atl. Rep. 411; *Richardson v. Hinck*, 48 N. Y. App. Div. 531. See also *Fordville Banking Co. v. Thompson*, (Ky. 1904) 82 S. W. Rep. 251; *Miller v. Knight Mfg. Co.*, (Ky. 1904) 83 S. W. Rep. 631; *Citizens' Commercial, etc., Bank v. Platt*, 135 Mich. 267.

166. **1.** *Burden of Proof.* — *Richardson v. Hinck*, 48 N. Y. App. Div. 531.

Partner Indorsing Firm Name on Individual Note — *Burden of Proof on Holder.* — *Lowry v. Tivy*, 70 N. J. L. 457.

3. *Moore v. Williams*, 26 Tex. Civ. App. 142.

9. *General Rule as to Liability for Wrongful Act of Partner in Course of Employment.* — *Hamlyn v. Houston*, (1903) 1 K. B. 81; *Miller v. Phenix Ins. Co.*, 109 Ill. App. 624; *Barrett v. McCrummen*, 128 N. Car. 81.

Individual Members of Firm Liable — *Want of Knowledge No Defense.* — *Guarantee Trust, etc., Co. v. E. C. Drew Invest. Co.*, 107 La. 251.

Rule Changed by Statute in Georgia. — *Martin v. Simkins*, 116 Ga. 254.

168. **6.** *No Liability for Wilful or Negligent Tort Outside Scope of Authority.* — *Wolfeley v. Brown*, 7 Ariz. 157; *Maxwell v. Habel*, 92 Ill. App. 510; *Taylor v. Thompson*, 62 N. Y. App. Div. 159; *Barrett v. McCrummen*, 128 N. Car. 81. See also *Tendring Hundred Waterworks Co. v. Jones*, (1903) 2 Ch. 615.

Partner Not Liable for Criminal Act of Copartner Done Without His Knowledge. — *U. S. v. Cohn*, 128 Fed. Rep. 615.

Firm Not Liable for Slander by Member. — *Hendricks v. W. G. Middlebrooks Co.*, 118 Ga. 131.

169. **1.** *Liability for Malicious Prosecution by*

One Partner. — *Martin v. Simkins*, 116 Ga. 254; *Noblett v. Bartsch*, 31 Wash. 24, 96 Am. St. Rep. 886.

3. *Liability Where Act Adopted and Its Benefit Received.* — *Levy v. Abramsohn*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 781.

4. *Liability for Money Received by Partner Acting Within Scope of Authority.* — *Collins v. Collins*, (Ky. 1904) 83 S. W. Rep. 99. See also *Baron v. Archambault*, 19 Quebec Super. Ct. 1.

5. *Money Received Outside Scope of Authority.* — *Sitter v. Karraker*, 100 Ill. App. 669; *Powell Hardware Co. v. Mayer*, 110 Mo. App. 14.

170. **1.** *Notice of Breach of Trust Must Be Brought Home to Each Partner Individually.* — See *Powell Hardware Co. v. Mayer*, 110 Mo. App. 14.

3. *Partners Implicated Liable Though They Have Not Employed Trust Money in Firm Business.* — *Hibberd v. Hubbard*, 211 Pa. St. 331.

Assumption by Partner of Individual Liability Binding. — *McIntyer v. Houseman*, 98 Ill. App. 76.

5. *Liability Usually Joint, Not Joint and Several.* — *Carstens v. Frye-Bruhn*, 1 Alaska 140; *Blythe v. Cordingly*, (Colo. App. 1905) 80 Pac. Rep. 494; *Hefferlin v. Karlman*, 29 Mont. 139; *Wood v. Carter*, 67 Neb. 133; *Wyckoff v. Luse*, 67 N. J. L. 218; *North Pac. Lumber Co. v. Spore*, 44 Oregon 462, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 170; *Poppleton v. Jones*, 42 Oregon 24; *Drouin v. Gauthier*, 12 Quebec K. B. 442. See also *Cameron v. Orleans, etc., R. Co.*, 108 La. 83; *Barton Nat. Bank v. Atkins*, 72 Vt. 33. Compare *Fennell v. Myers*, (Ky. 1903) 76 S. W. Rep. 136.

171. **1.** *Partnership Debts Deemed in Equity Several as Well as Joint.* — *Henry v. Caruthers*, 95 Ill. App. 582, affirmed 106 Ill. 136. See also *Poppleton v. Jones*, 42 Oregon 24.

171. (4) *Statutory Provisions Making Joint Contracts Joint and Several* — Held to Be Applicable to Partnership Contracts. — See note 4.

b. FOR TORTS AND BREACHES OF TRUST — (1) *In General*. — See note 6.

172. 5. *Extent of Liability* — a. *GENERAL RULE* — Each Partner Liable for Whole Amount of Firm Obligation. — See note 3.

173. d. *LIMITED PARTNERSHIPS AND JOINT-STOCK COMPANIES*. — See note 5.

174. 6. *Beginning of Liability* — a. *LIABILITY FOR ACTS PRIOR TO BECOMING PARTNER* — General Rule. — See note 1.

Liability for New Debts Arising under Continuing Contract. — See note 3.

175. b. *ASSUMPTION OF DEBTS OF OLD FIRM* — (1) *In General*. — See note 2.

176. (3) *Relief from Assumption Procured by Fraud*. — See note 2.

7. *Termination of Liability* — a. *FOR FUTURE ACTS* — (1) *In General* — Liability Terminated by Dissolution or Retirement. — See note 3.

177. (2) *Notice of Dissolution or Retirement* — (a) *When Necessary*. — See note 5.

171. 4. *Statutes Held to Be Applicable to Partnership Contracts*. — *Hodel-Mutti Mfg. Co. v. Ham*, 112 Mo. App. 718; *Moore v. Williams*, 26 Tex. Civ. App. 142. See also *Eau Claire-St. Louis Lumber Co. v. Gray*, 81 Mo. App. 337; *Cowan v. Leming*, 111 Mo. App. 253.

6. *Liability for Torts, etc., Joint and Several*. — *Murphy v. Coppieters*, 136 Cal. 317; *Grissom v. Hofius*, (Wash. 1905) 80 Pac. Rep. 1002.

172. 3. *Each Partner Liable for Entire Debt Due from Firm*. — *Carstens v. Frye-Bruhn*, 1 Alaska 140; *Christian v. Illinois Malleable Iron Co.*, 92 Ill. App. 320.

173. 5. *Industrial Lumber Co. v. Texas Pine Land Assoc.*, 31 Tex. Civ. App. 375, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 173.

174. 1. *No Liability for Acts Prior to Becoming Member of Firm*. — *Leppel v. Lumley*, 19 Colo. App. 413; *Karraker v. Eddleman*, 101 Ill. App. 23; *Flour City Nat. Bank v. Widener*, 163 N. Y. 276; *Matter of Hoagland*, 79 N. Y. App. Div. 56; *Strickler v. Gitchel*, 14 Okla. 523.

3. *Contract Entered into Before Partnership — Liability of New Partner for Fraud of Copartner*. — Where one person has a contract with a second, and the second takes a third into partnership, giving notice to the first person, the first person has an option whether he will abide by the contract with the second alone or accept the liability of the partnership. If he elect to abide by his contract with the individual, the new partner is not liable for a fraud committed by his copartner in respect of the contract, though the copartner was acting within the scope of the partnership business. *British Home Assur. Corp. v. Paterson*, (1902) 2 Ch. 404.

175. 2. *May Agree to Become Liable for Prior Debts*. — *Karraker v. Eddleman*, 101 Ill. App. 23; *Bartlett v. Smith*, (Neb. 1903) 95 N. W. Rep. 661; *Flour City Nat. Bank v. Widener*, 163 N. Y. 276; *Strickler v. Gitchel*, 14 Okla. 523.

Agreement Not Within Statute of Frauds. — *Bartlett v. Smith*, (Neb. 1904) 98 N. W. Rep. 687.

Sufficiency of Evidence to Show Assumption. — See *Karraker v. Eddleman*, 101 Ill. App. 23.

Evidence Insufficient to Show Assumption. — See *Miles City First Nat. Bank v. State Nat. Bank*, (C. C. A.) 131 Fed. Rep. 422.

Assumption of Existing Liabilities Presumed. — *Dodson v. Downey*, (1901) 2 Ch. 620.

Assumption Not Presumed. — *Karraker v. Eddleman*, 101 Ill. App. 23.

Liabilities Assumed by New Firm. — See *Bessemmer Sav. Bank v. Rosenbaum Grocery Co.*, 137 Ala. 530.

176. 2. *Relief from Assumption Procured by Fraud*. — *Muir v. Samuels*, 110 Ky. 605, holding that equity will relieve where an outstanding debt is fraudulently concealed from a new partner.

Remedy Must Be in Equity — When Firm Not Liable. — See *Taylor v. Thompson*, 176 N. Y. 168.

3. *Termination of Liability by Dissolution*. — *Danforth v. Hertel*, 3 Penn. (Del.) 57.

Mere Notice Without Actual Retirement Insufficient. — *Spragans v. Lawson*, (Ky. 1901) 60 S. W. Rep. 373.

177. 5. *Notice of Termination of Partnership*. — *In re Cinque*, 109 Fed. Rep. 455; *Neal v. Smith*, (C. C. A.) 116 Fed. Rep. 20; *Birckhead v. De Forest*, (C. C. A.) 120 Fed. Rep. 645; *Rector v. Robins*, (Ark. 1905) 86 S. W. Rep. 667; *Danforth v. Hertel*, 3 Penn. (Del.) 57; *Pyron v. Ruohs*, 120 Ga. 1060; *Mankato First Nat. Bank v. Grignon*, 7 Idaho 646; *Byers v. Hickman Grain Co.*, 112 Iowa 451; *Davenport Gas, etc., Co. v. Reimers*, (Iowa 1903) 96 N. W. Rep. 1084; *Gilbert v. Warren*, 56 N. Y. App. Div. 289, affirmed 171 N. Y. 665; *Johanning v. Wilson*, (Supm. Ct. App. T.) 86 N. Y. Supp. 7; *Bonnet v. Tips Hardware Co.*, (Tex. Civ. App. 1900) 59 S. W. Rep. 50.

Where an Existing Partnership Becomes Incorporated the members thereof may still be liable as partners to persons without notice, actual or constructive. *Weise v. Gray's Harbor Commercial Co.*, 111 Ill. App. 647.

Where the Partnership Has Long Ceased to Exist, the fact that no notice was given of the dissolution does not render a partner liable on a note given by the other partner, to one who had never dealt with the firm, for money for

- 178.** (b) When Unnecessary — *aa.* DISSOLUTION BY OPERATION OF LAW. — See note 1.
- 179.** (d) Sufficiency of Notice — *aa.* AS TO PERSONS HAVING DEALINGS WITH FIRM BEFORE DISSOLUTION. — See note 3.
- 180.** See notes 2, 3, 4.
Manner of Giving Immaterial. — See note 5.
Notice May Be Shown by Any Direct or Circumstantial Evidence. — See note 6.
- 181.** *b.* FOR PAST ACTS — (1) *In General.* — See note 2.
- 182.** (2) *How Discharged* — (b) Release. — See note 3.
- 183.** (c) Novation and Assumption of Debts — *aa.* GENERAL STATEMENT OF RULE — Agreement by New Firm to Assume Liabilities. — See note 1.
Consideration. — See notes 3, 4, 5.
bb. APPLICATION OF RULE — (*bb.*) *No Presumption of Novation Created by Mere Retirement.* — See note 8.
- 184.** (*cc.*) Silence of Creditor as Assent. — See notes 1, 2.
(*dd.*) Delay in Demand of Payment. — See notes 3, 4.
(*ee.*) Demand or Receipt of Payment from New Firm. — See note 5.

his individual use. *Puritan Trust Co. v. Coffey*, 180 Mass. 510.

178. 1. Notice of Dissolution by Operation of Law Not Necessary. — *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 116 Ga. 176; *National Bank v. Hollingsworth*, 135 N. Car. 556.

179. 3. Actual Notice to Persons Having Had Dealings with Firm. — *Gilbert v. Warren*, 56 N. Y. App. Div. 289, *affirmed* 171 N. Y. 665; *Johanning v. Wilson*, (Supm. Ct. App. T.) 86 N. Y. Supp. 7; *Henry C. Werner Co. v. Calhoun*, 55 W. Va. 246. See also *Rector v. Robbins*, (Ark. 1905) 86 S. W. Rep. 667; *Weise v. Gray's Harbor Commercial Co.*, 111 Ill. App. 647.

Notice Must Be Given Before Liability Incurred. — *Robertson v. Wood*, 10 Kulp (Pa.) 76.

To Whom Given. — See *Cowan v. Roberts*, 133 N. Car. 629.

What Constitutes Sufficient Notice. — See *Edwards v. Wheeler*, 130 Mich. 219.

Change of Firm Signature as Notice. — See *Byers v. Hickman Grain Co.*, 112 Iowa 451.

180. 2. Publication in Newspaper Insufficient. — *Henry C. Werner Co. v. Calhoun*, 55 W. Va. 246.

3. Not Enough that Fact Is Notorious. — *Henry C. Werner Co. v. Calhoun*, 55 W. Va. 246, discussing the sufficiency of evidence.

4. Sufficiency Question of Fact. — *Danforth v. Hertel*, 3 Penn. (Del.) 57.

5. Manner of Giving Notice Not Material. — *Danforth v. Hertel*, 3 Penn. (Del.) 57; *Henry C. Werner Co. v. Calhoun*, 55 W. Va. 246.

Notice to Agent Not Notice to Corporation. — *Neal v. Smith*, (C. C. A.) 116 Fed. Rep. 20.

6. Facts Held Sufficient to Prove Notice. — *Danforth v. Hertel*, 3 Penn. (Del.) 57.

Notice to Agent as Notice to Principal. — See *Marsh v. Wheeler*, 77 Conn. 449; *Tobias v. Wierck*, 30 N. Y. App. Div. 486, *affirming* without opinion 163 N. Y. 584.

Burden of Proof on One Alleging Notice. — *Neal v. Smith*, (C. C. A.) 116 Fed. Rep. 20.

181. 2. Retiring Partner Liable for Debts Incurred Previously. — *McAvery v. Magril*, 123 Iowa 605; *Grotte v. Weil*, 62 Neb. 478; *Gilbert v. Warren*, 56 N. Y. App. Div. 289, *affirmed* 171 N. Y. 665; *Woodverton v. Austin*, 57 N. Y. App. Div. 347. See also *Preston v. Putnam County Banking Co.*, 120 Ga. 546; *Corbin v. Henry*, (Ind. App. 1905) 74 N. E. Rep. 1096.

182. 3. Sufficiency of Evidence to Show Release. — *Isaac Goldman Co. v. Wilkes*, (Supm. Ct. App. T.) 88 N. Y. Supp. 390.

183. 1. Release by Agreement of New Firm with Assent of Creditor to Assume Liabilities. — *Jones v. Austin*, 26 Ind. App. 399. See also *Henry v. Caruthers*, 95 Ill. App. 582, *affirmed* 196 Ill. 136; *Noyes v. Nichols*, 63 Kan. 453; *Karraker v. Eddleman*, 101 Ill. App. 23.

Express Consent of Creditor Not Essential. — *Jones v. Austin*, 26 Ind. App. 399.

Partial Consent. — It cannot be shown that the creditors consented to the novation in so far as it rendered the remaining partner individually liable, and refused it in so far as it gave to him possession of the copartnership assets. *In re Worth*, 130 Fed. Rep. 927.

3. Consideration. — *Jones v. Austin*, 26 Ind. App. 399.

4. Necessity of New Consideration. — *Bronx Metal Bed Co. v. Wallerstein*, (Supm. Ct. App. T.) 84 N. Y. Supp. 924, *quoting* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 183.

5. Release After Dissolution. — *Henry v. Caruthers*, 95 Ill. App. 582, *affirmed* 196 Ill. 136; *Bronx Metal Bed Co. v. Wallerstein*, (Supm. Ct. App. T.) 84 N. Y. Supp. 924, *quoting* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 183.

8. See *Henry v. Caruthers*, 95 Ill. App. 582, *affirmed* 196 Ill. 136.

184. 1. Silence of Creditor. — *Jones v. Austin*, 26 Ind. App. 399. See also *Henry v. Caruthers*, 95 Ill. App. 582, *affirmed* 196 Ill. 136.

2. Arrangement Not Sufficient Evidence of Discharge. — See *Bronx Metal Bed Co. v. Wallerstein*, (Supm. Ct. App. T.) 84 N. Y. Supp. 924.

3. Delay in Demand of Payment. — *Henry v. Caruthers*, 95 Ill. App. 582, *affirmed* 196 Ill. 136.

4. *Jones v. Austin*, 26 Ind. App. 399.

Dealing with New Firm and Extension of Time on the indebtedness of the old firm does not show a release, where the creditor, though he knew of the dissolution, did not know of the terms thereof. *Norman v. Jackson Fertilizer Co.*, 70 Miss. 747.

Only Reasonable Diligence and Caution Required. — *Grotte v. Weil*, 62 Neb. 478.

5. Demand or Receipt of Payment from New Firm. — *Henry v. Caruthers*, 95 Ill. App. 582, *affirmed* 196 Ill. 136.

184. *cc.* AGREEMENTS BETWEEN PARTNERS INDEPENDENT OF CREDITOR'S ASSENT — (*aa*) *In General.* — See note 10.

185. (*bb*) *Effect as Extinguishment of Indebtedness to Firm.* — See note 3.

(*cc*) *Effect as Creating Relation of Principal and Surety.* — See note 4.

dd. IMPLIED UNDERTAKINGS — To Save Retiring Partner Harmless. — See note 6.

186. 8. Application of Assets to Liabilities — *a.* APPLICATION BY PARTNERS — (*1*) *In General.* — See notes 5, 7.

187. (*2*) *Application of Firm Property to Other than Firm Debts* — (*a*) *In General* — *In Payment of Debt of Individual Member.* — See notes 1, 2, 3.

188. (*b*) *Insolvency of Firm.* — See notes 1, 2, 3.

(*3*) *Sale of Firm Property.* — See note 4.

(*4*) *Conversion of Firm Property into Individual Property* — (*a*) *General Rule.* — See note 5.

189. See notes 1, 2.

184. 10. Agreements Between Partners Without Creditor's Assent. — *Cobb v. Benedict*, 27 Colo. 342; *Fielder v. Beekman*, (N. J. 1903) 54 Atl. Rep. 156.

Only Liabilities Incidental to Firm Business Assumed. — *Dorwin v. Laughlin*, 117 Wis. 617.

Creditor's Rights Not Affected by Agreement Between Partners. — *Preston v. Putnam County Banking Co.*, 120 Ga. 546; *McAreavy v. Magril*, 123 Iowa 605; *Grotte v. Weil*, 62 Neb. 478.

Duty of Creditor with Notice to Resort First to Assets of Continuing Firm. — *Morrissey v. Berman*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 586.

185. 3. Extinguishment of Partner's Indebtedness to Firm. — *Cobb v. Benedict*, 27 Colo. 342; *Preston v. Garrard*, 120 Ga. 689, 102 Am. St. Rep. 124, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 185; *McAreavy v. Magril*, 123 Iowa 605; *Nystuen v. Hanson*, (Iowa 1902) 91 N. W. Rep. 1071; *Grotte v. Weil*, 62 Neb. 478; *Fielder v. Beekman*, (N. J. 1903) 54 Atl. Rep. 156.

4. Relation of Principal and Surety Created by Assumption of Debts. — *Preston v. Garrard*, 120 Ga. 689, 102 Am. St. Rep. 124, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 185; *Doxey v. Service*, 30 Ind. App. 174; *McAreavy v. Magril*, 123 Iowa 605; *Norman v. Jackson Fertilizer Co.*, 79 Miss. 747; *Grotte v. Weil*, 62 Neb. 478. See also *Meyer v. Parsons*, 129 Cal. 653.

Actual Notice to Creditor of Suretyship Essential. — *Preston v. Garrard*, 120 Ga. 689, 102 Am. St. Rep. 124.

6. *Cobb v. Benedict*, 27 Colo. 342.

186. 5. Power of Disposal in General. — See *Merchants' Bank v. Thomas*, (C. C. A.) 121 Fed. Rep. 306; *Denver First Nat. Bank v. Follett*, (Colo. App. 1904) 80 Pac. Rep. 147; *Freedman v. Holberg*, 89 Mo. App. 340; *House v. Davies*, 14 Ohio Dec. 105; *Griswold v. Nichols*, 117 Wis. 267; *Reddington v. Franey*, 124 Wis. 590. See also *Bartlett v. Smith*, (Neb. 1904) 98 N. W. Rep. 687; *Ulrich v. McConaughy*, (Neb. 1903) 96 N. W. Rep. 645.

7. Conveyance in Fraud of Creditors. — See *Denver First Nat. Bank v. Follett*, (Colo. App. 1904) 80 Pac. Rep. 147; *Merchants' Bank v. Thomas*, (C. C. A.) 121 Fed. Rep. 306; *Bartlett v. Smith*, (Neb. 1904) 98 N. W. Rep. 687.

187. 1. Application in Payment of Individual

Debt. — *Merchants' Bank v. Thomas*, (C. C. A.) 121 Fed. Rep. 306; *Mansur-Tebbetts Implement Co. v. Ritchie*, 159 Mo. 213; *Hutchinson v. Brassfield*, 86 Mo. App. 40.

Consent of Partners Necessary to Authorize Application. — *Columbia Finance, etc., Co. v. First Nat. Bank*, 116 Ky. 364; *Clippinger v. Starr*, 130 Mich. 463; *Ulrich v. McConaughy*, (Neb. 1903) 96 N. W. Rep. 645.

Unauthorized Application — Effect on Rights of Other Partner. — Where one partner, without the knowledge of his copartner, misappropriates partnership goods and applies them to the payment of an individual debt, the copartner is under no duty, relatively to the person whose debt is thus discharged under an agreement between him and the other partner, to exercise diligence in keeping informed as to partnership transactions, nor is he estopped from asserting his rights in the premises simply because he has failed to avail himself of his opportunities to know that his partner was misapplying the partnership assets. *Murphey v. Bush*, 122 Ga. 715.

Ratification of Unauthorized Use by Failure to Object. — *Clippinger v. Starr*, 130 Mich. 463.

Surviving Partner Cannot Apply Firm Property to Payment of His Individual Debt. — *Jones v. Dulaney*, (Ky. 1905) 86 S. W. Rep. 547.

2. Mortgage to Secure Individual Debts. — *Mansur-Tebbetts Implement Co. v. Ritchie*, 159 Mo. 213.

3. Assignment of Share to Individual Creditors. — *House v. Davies*, 14 Ohio Dec. 105.

188. 1. *Insolvency of Firm Held to be Immaterial.* — *Kincaid v. National Wall-Paper Co.*, 63 Kan. 288, 88 Am. St. Rep. 243.

2. *Fraudulent and Void as to Firm Creditors unless Firm Solvent.* — *Denver First Nat. Bank v. Follett*, (Colo. App. 1904) 80 Pac. Rep. 147.

3. *Only Existing Creditors May Complain.* — *Merchants' Bank v. Thomas*, (C. C. A.) 121 Fed. Rep. 306.

4. *Insolvent Firm May Convey Good Title to Purchaser.* — See *Franklin Bank v. Williams*, 14 Ohio Dec. 651.

5. *Conversion into Individual Property.* — *Lee v. Bradley Fertilizer Co.*, 44 Fla. 787.

189. 1. *Sale of One Partner's Interest to Copartner.* — *Lee v. Bradley Fertilizer Co.*, 44 Fla. 787.

2. *Division of Firm Property.* — *Lee v. Bradley Fertilizer Co.*, 44 Fla. 787.

189. (b) Effect of Firm's Insolvency — View that Solvency Is Immaterial. — See note 5.

View that Conversion Void Where Firm Insolvent or in Absence of Consideration. — See note 6.

190. (5) Application of Individual Property to Payment of Firm Debts — (a) In General. — See note 3.

b. APPLICATION BY COURT — (1) At Law — (a) Priority of Firm Creditors. — See note 5.

191. (b) Priority of Individual Creditor. — See notes 5, 6, 8.

192. A Mortgage. — See note 3.

(2) In Equity — (a) In General. — See note 6.

(b) Priorities in Firm Property — aa. GENERAL RULE AS TO APPLICATION OF FIRM ASSETS. — See note 7.

194. bb. BASIS OF RULE. — See notes 1, 2, 3.

189. 5. Solvency Immaterial Where Act in Good Faith. — *Lee v. Bradley Fertilizer Co.*, 44 Fla. 787.

6. Conversion Void Where Firm Insolvent or in Absence of Consideration. — See *Reynolds v. Radke*, 112 Ill. App. 575; *Mansur-Tebbetts Implement Co. v. Ritchie*, 159 Mo. 213, holding that a transferee of a partner's interest with notice that the transaction is for the purpose of defrauding the firm's creditors stands in no better position than the partner.

190. 3. Rights of Creditor. — "If one partner mortgage his own property for a debt of the firm, the creditor is allowed to prove for his whole debt against the firm, and retain the mortgage security given by the partner." *Lawson v. Dunn*, 66 N. J. Eq. 90.

5. Priority of Firm Creditor First Levying on Property. — *Hutchinson v. Brassfield*, 86 Mo. App. 40.

Mortgage of Firm Property by Surviving Partner — Priority over Subsequent Executions by Individual Creditors. — *People's Nat. Bank v. Wilcox*, 136 Mich. 567.

191. 5. Priority in Individual Assets. — *Hargadine-McKittrick Dry Goods Co. v. Sappington*, 105 Mo. App. 655; *O. S. Kelly Co. v. Zarecor*, (Tenn. Ch. 1901) 62 S. W. Rep. 189. See also *Pontius v. Walls*, 197 Pa. St. 223.

6. Prior Execution Gives No Priority over Firm Creditors in Firm Assets. — *Hargadine-McKittrick Dry Goods Co. v. Sappington*, 105 Mo. App. 655; *Sedalia Nat. Bank v. Cassidy Bros. Commission Co.*, 109 Mo. App. 249. See also *Freedman v. Holberg*, 80 Mo. App. 340.

A Mortgage on the Firm Property for a Partner's Indebtedness Assumed as a Firm Liability has priority over a mortgage subsequently given by the partnership to firm creditors. *Tobias v. Commercial Sav. Bank*, 136 Mich. 135.

8. Individual Attachment Subordinate to Subsequent Attachment by Firm Creditors. — *Hargadine-McKittrick Dry Goods Co. v. Sappington*, 105 Mo. App. 655.

192. 3. Subordinate to Subsequent Mortgage for Firm Debt. — *Sedalia Nat. Bank v. Cassidy Bros. Live Stock Commission Co.*, 109 Mo. App. 249.

6. Administration of Partnership Estates in Equity. — *George v. Morison*, 93 Md. 132.

7. Firm Assets First Applied to Payment of Firm Creditors — *Kansas*. — *Kincaid v. National*

Wall-Paper Co., 63 Kan. 288, 88 Am. St. Rep. 243.

Kentucky. — *Walter v. Herman*, 110 Ky. 800. *Maryland*. — *George v. Morison*, 93 Md. 132. *Mississippi*. — *Mechanics' Sav. Bank v. Fargason*, 79 Miss. 64; *George v. Derby Lumber Co.*, 81 Miss. 725.

Missouri. — *Harvey v. Stephens*, 159 Mo. 486; *Freedman v. Holberg*, 89 Mo. App. 340; *Barnes v. Stanley*, 95 Mo. App. 688; *Hargadine-McKittrick Dry Goods Co. v. Sappington*, 105 Mo. App. 655.

New Hampshire. — *Foster v. Sargent*, 72 N. H. 170.

New Jersey. — *Jones v. Beekman*, (N. J. 1900) 47 Atl. Rep. 71; *Lawson v. Dunn*, 66 N. J. Eq. 90; *Case v. McGill*, (N. J. 1905) 60 Atl. Rep. 569.

New York. — *United Nat. Bank v. Weatherby*, 70 N. Y. App. Div. 279; *Bush Co. v. Gibbons*, 87 N. Y. App. Div. 576.

Tennessee. — *Wright v. Market Bank*, (Tenn. Ch. 1900) 60 S. W. Rep. 623.

Vermont. — *Barton Nat. Bank v. Atkins*, 72 Vt. 33.

Washington. — *Matthies v. Herth*, 31 Wash. 665.

West Virginia. — *Lewis v. Crane*, 50 W. Va. 230.

Priority Obtained though Creditor Is Also Partner. — *Walter v. Herman*, 110 Ky. 800.

Chattel Mortgage on Partner's Interest Void as Against Firm Creditors. — *Harvey v. Stephens*, 159 Mo. 486.

Mortgage by Firm to Secure Individual Debt Void as Against Firm Creditors. — *Enck v. Gerding*, 67 Ohio St. 245.

Realty Apparently Individual Property. — See *Cooperstown First Nat. Bank v. State Sav. Bank*, 130 Mich. 332.

194. 1. Creditors of Firm Have No Lien on Firm Assets. — *Kincaid v. National Wall-Paper Co.*, 63 Kan. 288, 88 Am. St. Rep. 243; *Freedman v. Holberg*, 89 Mo. App. 340; *Flournoy v. Bullock*, 11 N. Mex. 87; *House v. Davies*, 14 Ohio Dec. 105, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 98; *Reddington v. Franey*, 124 Wis. 590.

2. Priority Results from Partner's Lien. — *In re Grootzinger*, 110 Fed. Rep. 366, affirmed (C. C. A.) 127 Fed. Rep. 814; *Kincaid v. National Wall-Paper Co.*, 63 Kan. 288, 88 Am. St. Rep. 243; *Mansur-Tebbetts Implement Co. v. Ritchie*,

195. *cc.* APPLICATION OF RULE — **A Partner Who Is a Creditor of a Firm.** — See note 8.

196. *dd.* EXCEPTIONS TO GENERAL RULE — (*aa.*) *In General.* — See note 4.

(*c.*) **Priorities in Separate Property** — *aa.* RULE STATED. — See note 9.

197. *cc.* EXCEPTIONS TO RULE — (*aa.*) *No Priority in Some Jurisdictions.* — See note 4.

198. (*bb.*) *Where No Joint Estate nor Living Solvent Partner.* — See note 4.

199. *dd.* PREFERENCE OF INDIVIDUAL DEBTS TO THOSE OF PARTNER TO FIRM — (*aa.*) *General Rule.* — See note 2.

X. DISSOLUTION — **1. How Effected** — *a.* **BY OPERATION OF LAW** — (*i.*) *Death of Partner* — (*a.*) *In General.* — See note 9.

200. See note 3.

201. (*b.*) **Provisions as to Continuance** — *aa.* *IN GENERAL.* — See notes 1, 2, 3.

159 Mo. 213; *Freedman v. Holberg*, 89 Mo. App. 340; *Hargadine-McKittrick Dry Goods Co. v. Sappington*, 105 Mo. App. 655; *Flournoy v. Bullock*, 11 N. Mex. 87; *United Nat. Bank v. Weatherby*, 70 N. Y. App. Div. 279; *House v. Davies*, 14 Ohio Dec. 105; *Reddington v. Franey*, 124 Wis. 590.

194. 3. Subrogation of Firm Creditor to Partner's Lien. — *In re Groetzing*, 110 Fed. Rep. 366, *affirmed* (C. C. A.) 127 Fed. Rep. 814; *Kincaid v. National Wall-Paper Co.*, 63 Kan. 288, 88 Am. St. Rep. 243; *Hargadine-McKittrick Dry Goods Co. v. Sappington*, 105 Mo. App. 655; *Mansur-Tebbetts Implement Co. v. Ritchie*, 159 Mo. 213; *Hutchinson v. Brassfield*, 86 Mo. App. 40; *Freedman v. Holberg*, 89 Mo. App. 340; *Flournoy v. Bullock*, 11 N. Mex. 87; *United Nat. Bank v. Weatherby*, 70 N. Y. App. Div. 279; *House v. Davies*, 14 Ohio Dec. 105; *Reddington v. Franey*, 124 Wis. 590.

195. 8. Partner Postponed to Other Creditors. — *Henderson v. Ries*, (C. C. A.) 108 Fed. Rep. 709; *Wallerstein v. Ervin*, (C. C. A.) 112 Fed. Rep. 124.

Liability of Partner Assumed as Firm Debt. — Where, upon the organization of a partnership, a debt of one of the members is, by the partnership contract, assumed as a firm liability, the other partner cannot acquire any equity superior to the deed. *Wilkerson v. Tichenor*, (Ky. 1901) 62 S. W. Rep. 870.

Estate of Deceased Partner Retained in Business Without Authority Preferred to Creditor of Continuing Firm. — *Matter of Talmage*, 39 N. Y. App. Div. 466, *affirmed* without opinion 161 N. Y. 643.

196. 4. Secret Partnerships. — *Case v. McGill*, (N. J. 1905) 60 Atl. Rep. 569.

9. Priority of Separate Creditors in Distribution of Separate Estate. — *In re Worth*, 130 Fed. Rep. 927; *Buckingham v. Chicago First Nat. Bank*, (C. C. A.) 131 Fed. Rep. 192; *George v. Morison*, 93 Md. 132; *Very v. Clarke*, 177 Mass. 52, 83 Am. St. Rep. 260; *Mechanics' Sav. Bank v. Fargason*, 79 Miss. 64; *Matter of Price*, 171 N. Y. 15, *reversing* 69 N. Y. App. Div. 37; *Matter of Baldwin*, 170 N. Y. 156; *Cundey v. Hall*, 208 Pa. St. 335, 101 Am. St. Rep. 938.

197. 4. View that Firm Creditors May Share Pari Passu. — *Barton Nat. Bank v. Atkins*, 72 Vt. 33.

198. 4. See *Very v. Clarke*, 177 Mass. 52, 83 Am. St. Rep. 260.

199. 2. Firm Cannot Compete with Partner's Individual Creditors. — *George v. Morison*, 93 Md. 132.

9. Death Ipso Facto Dissolves Firm — *United States*. — *Lincoln v. Orthwein*, (C. C. A.) 120 Fed. Rep. 880.

Arkansas. — *Coolidge v. Burke*, 69 Ark. 237.

Georgia. — *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 116 Ga. 176.

Illinois. — *Douthart v. Logan*, 190 Ill. 243.

Massachusetts. — *Kelly v. Morrison*, 176 Mass. 531.

Michigan. — *Comstock v. McDonald*, 126 Mich. 142; *Porter v. Long*, 136 Mich. 150.

Mississippi. — *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458.

Missouri. — *Richardson v. O'Connell*, 88 Mo. App. 12.

New Jersey. — *Forst v. Kirkpatrick*, 64 N. J. Eq. 578.

New York. — *Rosenthal v. Hasberg*, (Supm. Ct. App. T.) 84 N. Y. Supp. 290.

North Carolina. — *National Bank v. Hollingsworth*, 135 N. Car. 556.

Ohio. — *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258.

Pennsylvania. — *Little v. Hazlett*, 197 Pa. St. 591.

Texas. — *Altgelt v. Sullivan*, (Tex. Civ. App. 1903) 79 S. W. Rep. 333; *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252.

200. 3. Community of Interest Between Representatives and Survivors. — *Coolidge v. Burke*, 69 Ark. 237.

Relation Not That of Partners. — *City Nat. Bank v. Stone*, 131 Mich. 588.

201. 1. Exceptions to Rule. — *Lincoln v. Orthwein*, (C. C. A.) 120 Fed. Rep. 880; *Egan v. Wirth*, 28 R. I. 363; *Altgelt v. Sullivan*, (Tex. Civ. App. 1903) 79 S. W. Rep. 333. See also *In re Auerbach*, 23 Utah 529.

Acts of Administrator Showing Intent to Continue Partnership. — See *City Nat. Bank v. Stone*, 131 Mich. 588.

2. Provisions for Continuance of Firm Business. — *Lincoln v. Orthwein*, (C. C. A.) 120 Fed. Rep. 880; *Hax v. Burnes*, 98 Mo. App. 707; *Matter of Marx*, 106 N. Y. App. Div. 212.

Continuance in Accordance with Will of Deceased Partner — **Liability of Firm for Loan Secured by Surviving Partner.** — *Barber v. Murphy*, (Ky. 1901) 62 S. W. Rep. 894.

Provision that Survivor May Take Over Decedent's Share. — *Hibben v. Collister*, 30 Can. Sup. Ct. 459.

3. Agreement Must Be Distinctly Shown. — *Altgelt v. Sullivan*, (Tex. Civ. App. 1903) 79 S. W. Rep. 333.

- 201.** *bb.* EFFECT AS PREVENTING DISSOLUTION. — See note 4.
- 202.** *cc.* UPON WHOM BINDING. — See notes 1, 2.
(2) *Insolvency or Bankruptcy* — In General. — See notes 4, 5.
Effect of Continuance under Firm Name. — See note 6.
- 203.** *b.* BY ACT OF PARTIES — (1) *Where Stipulated Term Expired* —
(b) Continuance Beyond Term by Agreement. — See note 3.
(2) *Where Object of Partnership Accomplished*. — See note 6.
(3) *Dissolution by Mutual Consent* — (a) Right to Dissolve at Any Time. — See note 7.
- 204.** (b) Form of Agreement — A Specific Agreement Is Not Necessary. — See note 1.
Evidence of Dissolution. — See notes 2, 3, 7.
(4) *Dissolution by Act of One Partner* — (a) Where No Time Fixed — In General. — See note 10.
- 205.** See notes 1, 2.
Renunciation to Be in Good Faith and Not at Unreasonable Time. — See note 4.
(b) Partnership for Certain Definite Objects. — See note 5.
- 206.** (c) Partnership for Fixed Term — *bb.* VIEW THAT PARTNER MAY DISSOLVE AT WILL. — See note 2.

Agreement for Continuance Implied. — Moore v. May, 117 Wis. 192.

201. 4. View that Death Does Not in Such Case Dissolve Partnership. — Hax v. Burnes, 98 Mo. App. 707. See also Matter of Marx, 106 N. Y. App. Div. 212.

202. 1. Provision Binding upon Survivor to Admit Person Specified. — See Egan v. Wirth, 26 R. I. 363.

Testamentary Provision Authorizing Continuance for Specified Time Binding on Executors. — In re Auerbach, 23 Utah 529.

Cannot Be Extension by Testator Without Consent of Surviving Partner. — Altgelt v. Sullivan, (Tex. Civ. App. 1903) 79 S. W. Rep. 333.

2. Admission Optional with Those Entitled. — See Egan v. Wirth, 26 R. I. 363.

4. *Insolvency or Bankruptcy of Partner or Firm*. — Heyman v. Heyman, 210 Ill. 524, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202; Taylor v. Hotchkiss, 81 N. Y. App. Div. 470, affirmed without opinion 179 N. Y. 546.

Dissolution by Foreclosure of Mortgage on Firm Property. — Dugger v. Tutwiler, 129 Ala. 258.

A Sheriff's Sale of all the partnership goods and fixtures dissolves the partnership. Harkins v. Buxton, 11 Pa. Dist. 159.

5. Assignment for Benefit of Creditors. — Franklin Bank v. Williams, 14 Ohio Dec. 651, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202.

6. Continuance under Firm Name New Partnership. — Compare Taylor v. Hotchkiss, 81 N. Y. App. Div. 470, affirmed without opinion 179 N. Y. 546.

203. 3. Continuation by Express or Tacit Agreement. — See Matter of Marx, 106 N. Y. App. Div. 212.

Parol Evidence Admissible to Show Continuance. — Harzburg v. Southern R. Co., 65 S. Car. 539.

Continuing Partners Not Entitled to Compensation. — Evans v. Weatherhead, 24 R. I. 394.

6. Accomplishment of Object of Partnership. — Hanna v. McLaughlin, 158 Ind. 292. See also Taylor v. Wells, 113 Iowa 326.

7. Dissolution by Mutual Consent at Any Time. — Dun v. Germania F. Ins. Co., 10 Ohio Dec. 667.

204. 1. Specific Agreement Unnecessary. — Lendholm v. Bailey, 16 Colo. App. 190; Dun v. Germania F. Ins. Co., 10 Ohio Dec. 667.

2. Abandonment of Partnership Business. — Lendholm v. Bailey, 16 Colo. App. 190.

Removal of Partner from State Not Alone Sufficient to Show Dissolution. — Dun v. Germania F. Ins. Co., 10 Ohio Dec. 667.

3. Ceasing Business and Division of Firm Property. — Lendholm v. Bailey, 16 Colo. App. 190. See also Harris v. Harris, 132 Ala. 208.

7. Firm Not Dissolved by Sale of Assets. — Franklin Bank v. Williams, 14 Ohio Dec. 651.

10. Partnership at Will — Partner May Dissolve at Pleasure. — Meysenburg v. Littlefield, 135 Fed. Rep. 184; Leonard v. Sparks, 109 La. 543; Castle v. Marks, 50 N. Y. App. Div. 320; Dun v. Germania F. Ins. Co., 10 Ohio Dec. 667; Wright v. Ross, 30 Tex. Civ. App. 207. See also Egan v. Wirth, 26 R. I. 363.

Circumstances Admissible to Show Intended Duration of Partnership. — Wright v. Ross, 30 Tex. Civ. App. 207.

Partnerships Prima Facie Determinable at Will. — Wright v. Ross, 30 Tex. Civ. App. 207.

205. 1. By Notification to Copartners. — Leonard v. Sparks, 109 La. 543; Wright v. Ross, 30 Tex. Civ. App. 207.

2. Exclusive Possession with Notice to Copartner. — Heyman v. Heyman, 210 Ill. 524, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 205.

4. Essentials of Renunciation. — See Leonard v. Sparks, 109 La. 543. *Contra*, Meysenburg v. Littlefield, 135 Fed. Rep. 184.

Sufficiency of Evidence to Show Bad Faith. — See McCollum v. Carlucci, 206 Pa. St. 312, 98 Am. St. Rep. 780.

5. Partner May Dissolve on Accomplishment of Object. — Hanna v. McLaughlin, 158 Ind. 292.

206. 2. Liability to Copartner for Breach of Contract. — Miller v. Freeman, 111 Ga. 654; Hagenaers v. Herbst, 30 N. Y. App. Div. 546, affirming without opinion 164 N. Y. 603.

The Measure of Damages in such case is the value of the copartnership to the partner at the time his contract was dissolved by the other.

206. (5) *Changes in Membership.* — See notes 5, 6.

Effect of Continuance of Business. — See note 7.

(6) *Transfer of One Partner's Interest* — *As a General Rule.* — See note 9.

207. *A Sale by One Partner to His Copartner.* — See note 4.

208. *c. BY DECREE OF COURT* — (1) *In General.* — See notes 5, 7.

209. (4) *Grounds for Dissolution by Decree* — (c) *Impossibility of Success.* — See notes 10, 11.

210. (a) *Partner's Misconduct* — *aa. IN GENERAL.* — See note 1.

bb. WHAT CONSTITUTES — *Illustrations of Misconduct Justifying Dissolution.* —

See notes 4, 5, 6, 8.

211. 2. *Rights, Powers, and Liabilities After Dissolution* — *a. PARTNERS GENERALLY* — (1) *General Rule.* — See note 5.

212. See note 1.

Duty of Each to Give Time and Attention to Winding Up. — See note 2.

McCollum v. Carlucci, 206 Pa. St. 312, 98 Am. St. Rep. 780.

206. 5. *Retirement.* — *Cobb v. Benedict*, 27 Colo. 342; *Forst v. Kirkpatrick*, 64 N. J. Eq. 578. See also *Fielder v. Beekman*, (N. J. 1903) 54 Atl. Rep. 156.

6. *Substitution of New for Old or Addition of New Member.* — *Forst v. Kirkpatrick*, 64 N. J. Eq. 578.

7. *New Firm Though under Same Name.* — *Painter v. Painter*, 133 Cal. xix, 65 Pac. Rep. 135; *Forst v. Kirkpatrick*, 64 N. J. Eq. 578.

9. *Transfer of Partner's Interest in Any Manner.* — *Lamb v. Hall*, 147 Cal. 44; *Cobb v. Benedict*, 27 Colo. 342; *Durham v. Edwards*, (Fla. 1905) 38 So. Rep. 926; *Pease v. Dawson*, 197 Ill. 340; *Friedman v. Engel*, 93 Mo. App. 464; *Fielder v. Beekman*, (N. J. 1903) 54 Atl. Rep. 156; *Reddington v. Franey*, 124 Wis. 590, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 206.

207. 4. *Sale to Copartner.* — *Cobb v. Benedict*, 27 Colo. 342; *Durham v. Edwards*, (Fla. 1905) 38 So. Rep. 926; *Reddington v. Franey*, 124 Wis. 590.

208. 5. *Jurisdiction of Equity to Dissolve.* — *Gillett v. Higgins*, (Ala. 1905) 38 So. Rep. 664.

Appointment of Receiver in Discretion of Court. — *Silveria v. Reese*, 138 Cal. xix, 71 Pac. Rep. 515.

Grounds for Appointment of Receiver. — See *Gillett v. Higgins*, (Ala. 1905) 38 So. Rep. 664; *Joselove v. Bohman*, 119 Ga. 204; *Redding v. Anderson*, 37 Wash. 209; *Wood v. Wood*, 50 W. Va. 570.

Effect of Appointment of Receiver. — *Merrick v. Merchants' Nat. Bank*, 11 Ohio Dec. 293.

Powers of Receiver Appointed for Dissolution. — *Rochat v. Gee*, 137 Cal. 497.

7. *Contract for Future Partnership* — *Remedy by Action at Law.* — *Wachter v. Heman*, 82 Mo. App. 243.

209. 10. *Circumstances Rendering Success Hopeless.* — *Heyman v. Heyman*, 210 Ill. 524, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 209.

11. *Term Unexpired.* — *Waite v. Aborn*, 60 N. Y. App. Div. 521.

210. 1. *Serious Misconduct of Partner.* — *Heyman v. Heyman*, 210 Ill. 524, quoting 22

AM. AND ENG. ENCYC. OF LAW (2d ed.) 210; *Hanna v. McLaughlin*, 158 Ind. 202; *Carroll v. Cunningham*, (Neb. 1905) 102 N. W. Rep. 608.

4. *Excluding from Management and Disregard of Wishes.* — *Gillett v. Higgins*, (Ala. 1905) 38 So. Rep. 664; *Heyman v. Heyman*, 210 Ill. 524, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 210; *Redding v. Anderson*, 37 Wash. 209; *Whimbey v. Clark*, 22 Quebec Super. Ct. 453.

5. *Irreconcilable Differences and Personal Ill Will.* — *Whalen v. Stephens*, 193 Ill. 121; *Heyman v. Heyman*, 210 Ill. 524, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 210; *Durham v. Lathrop*, 95 Ill. App. 429.

6. *Refusal to Keep Open Accounts.* — *Heyman v. Heyman*, 210 Ill. 524, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 210.

8. *Misappropriation of Funds and Refusal to Account.* — *Carroll v. Cunningham*, (Neb. 1905) 102 N. W. Rep. 608.

211. 5. *Acts Proper or Necessary for Winding Up Firm's Affairs.* — *Evans v. Superior Steel Co.*, 114 Ill. App. 505; *Corbin v. Henry*, (Ind. App. 1905) 74 N. E. Rep. 1096; *McKee v. Covalt*, (Kan. 1905) 81 Pac. Rep. 475, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 211; *Castle v. Marks*, 50 N. Y. App. Div. 320; *Smith v. Proskey*, 82 N. Y. App. Div. 19, 177 N. Y. 526; *Johnson v. Judge*, 16 Pa. Super. Ct. 137; *Hale v. People's Bank*, 2 N. Bruns. Eq. Rep. 433.

No Power to Engage in Litigation Against Objection of Partners. — *Richard v. Mouton*, 109 La. 465.

Right to Share in Salary of Government Office. — Even though it is agreed that an appointment of a member of a firm to a government office shall be for the benefit of the firm, the other partner will not have any right to share in the salary pertaining to the office after the dissolution of the firm unless there is a special agreement to that effect. *Cane v. Macdonald*, 10 British Columbia 444, affirming 9 British Columbia 297.

212. 1. *Partnership Continues until Firm Affairs Wound Up.* — *Hamilton v. Smith*, 120 Iowa 93.

2. *Duty of All Partners to Give Time and Attention.* — *Chretien v. Giron*, (La. 1905) 38 So. Rep. 881.

212. (2) *Rights and Duties as to Firm Assets* — (a) *In General*. — See note 3.

(b) *Power to Sell or Mortgage*. — See note 5.

213. (3) *Authority to Collect Debts, Receive Payment, and Grant Discharges* — *General Rule*. — See note 1.

214. (4) *Payment and Settlement of Firm Liabilities* — *In General*. — See note 1.

(5) *Power to Incur New Obligations Incidental to Those Existing* — (a) *General Rule*. — See note 6.

(6) *Authority as to Negotiable Paper* — (a) *General Rule as to Making, Indorsing, and Renewing*. — See note 8.

217. (11) *Rights and Liabilities as to Subsisting Contracts*. — See notes 3, 4.

Power to Complete Unperformed Engagements. — See note 5.

b. LIQUIDATING PARTNERS — (1) *In General*. — See note 8.

218. *Administrator of Liquidating Partner Succeeds to His Right*. — See note 4.

212. 3. *Right to Possession and Duty to Apply to Firm Debts*. — See *Dugger v. Tutwiler*, 129 Ala. 258; *Blackwell v. Farmers, etc., Nat. Bank*, 97 Tex. 445; *Hale v. People's Bank*, 2 N. Bruns. Eq. Rep. 433.

Sale of One Partner's Interest — Right of Remaining Partner to Wind Up Firm. — *Lamb v. Hall*, 147 Cal. 44.

Interest in Assets Several, Subject to Payment of Debts and Settlement of Accounts. — *Moore v. Rawson*, 185 Mass. 264.

Where Dissolution Arises from the Bankruptcy of One Partner possession and control of the partnership effects pass to the other. *Heyman v. Heyman*, 210 Ill. 524.

Disposition of Property and Settlement Between Partners Not Necessarily Involved. — *Hamilton v. Smith*, 120 Iowa 93.

Grounds for Appointment of Receiver Pending Dissolution. — See *Fink v. Montgomery*, 162 Ind. 424.

5. *May Sell Firm Assets*. — *Pease v. Dawson*, 197 Ill. 340. See also *Hale v. People's Bank*, 2 N. Bruns. Eq. Rep. 433.

213. 1. *May Collect Debts, Receive Payment, and Grant Discharges*. — *Dugger v. Tutwiler*, 129 Ala. 258.

214. 1. *Payment and Settlement of Firm Liabilities*. — *Dugger v. Tutwiler*, 129 Ala. 258; *Hale v. People's Bank*, 2 N. Bruns. Eq. Rep. 433.

May Confess Judgment for Firm Liabilities. — *Bartlett v. Smith*, (Neb. 1903) 95 N. W. Rep. 661.

6. *Expenses of Necessary Litigation* are a proper charge against the partnership funds. *Fleming v. Carson*, 37 Oregon 252.

8. *No Authority to Make or Indorse Negotiable Paper*. — *Cooperstown First Nat. Bank v. State Sav. Bank*, 130 Mich. 332; *Friedman v. Engel*, 93 Mo. App. 464; *National Bank v. Hollingsworth*, 135 N. Car. 556, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 214. See also *Eastham v. Patty*, 29 Tex. Civ. App. 473.

217. 3. *Rights and Liabilities on Subsisting Contracts*. — *Lincoln v. Orthwein*, (C. C. A.) 120 Fed. Rep. 880; *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458; *Castle v. Marks*, 50 N. Y. App. Div. 320; *Johnson v. Judge*, 16 Pa. Super. Ct. 137; *Malshy v. Lanark Fuel Co.*, 55 W. Va. 484, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 217.

Contract of Employment Terminated by Dissolution. — *Meysenburg v. Littlefield*, 135 Fed. Rep. 184.

Provision in Contract for Termination. — Where a contract of a partnership contains the provision that it shall be terminated without notice by the death of one of the partners, it is immediately terminated by the happening of that event. *Shelton v. Baer*, 90 Mo. App. 286.

According to the English Rule, in order to determine whether a contract is terminated by the dissolution of the partnership through the death of one of the partners, it must be considered with reference to its terms, to the relation between the parties, and to the nature of the engagement. If the performance of the contract is dependent on the continued existence of the partnership business, or on the personal honesty or capacity of the particular partner, the death of one partner will put an end to the contract altogether, otherwise it must be completed by the surviving partners. *Phillips v. Alhambra Palace Co.*, (1901) 1 K. B. 59.

4. *Contract of Sale*. — One member of a firm, which is the owner of valuable contracts having still some time to run, cannot surrender them, after notice of the dissolution of the partnership, without the consent of his copartner, and by so doing procure contracts in which he alone has a personal interest. *Castle v. Marks*, 50 N. Y. App. Div. 320.

Liability of Estate of Deceased Partner. — In England the estate of a deceased partner is not liable in an action for the price of goods sold and delivered where the order for the goods was given in the lifetime of the deceased partner, but delivery did not take place until after his death. *Bagel v. Miller*, (1903) 2 K. B. 212.

5. *Completion of Unperformed Engagements*. — *Lincoln v. Orthwein*, (C. C. A.) 120 Fed. Rep. 880; *Malshy v. Lanark Fuel Co.*, 55 W. Va. 484, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 217.

8. *Mode of Liquidation Governed by Express Agreement*. — *Meyer v. Reimers*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 307, affirmed 49 N. Y. App. Div. 638.

218. 4. *Administrator Succeeds to Liquidating Partner*. — Compare *Smith v. Proskey*, 177 N. Y. 526, reversing 82 N. Y. App. Div. 19.

218. (2) *Powers and Duties* — (a) General Rule — Powers Limited as Are Those of Other Partners After Dissolution. — See notes 5, 6.

219. (4) *Liability for Interest or Profits*. — See notes 7, 8, 9, 10.

220. (5) *Right to Compensation*. — See note 1.

c. SURVIVING PARTNERS — (1) *In General* — As to Title to Firm Property. — See note 2.

Exclusive Right to Act in Settling Estate. — See note 3.

221. Appointment of Receiver by Court. — See notes 1, 2.

Right Passes to Personal Representative. — See note 3.

(2) *Statutory Provisions*. — See note 5.

(3) *Powers and Authority* — (a) *Limitation of Powers* — *aa. IN GENERAL* — Acts Necessary and Proper to Winding Up the Partnership. — See note 6.

222. *bb. AS TO NEW CONTRACTS OR CONTINUANCE OF BUSINESS*. — See notes 1, 3.

218. 5. May Collect and Adjust Debts, Pay Liabilities, Etc. — *Smith v. Proskey*, 82 N. Y. App. Div. 19, reversed on other grounds 177 N. Y. 526. See also *Chretien v. Giron*, (La. 1905) 38 So. Rep. 881; *Esterly v. Bressler*, 15 Pa. Super. Ct. 455, holding that the liquidating partner's rights are not affected by a resumption of business relations or even by the forming of a new partnership.

6. Same Powers as Other Partners After Dissolution. — See *Matter of Browne, etc., Co.*, 106 La. 486; *Smith v. Proskey*, 82 N. Y. App. Div. 19, 177 N. Y. 526.

No Liability for Losses Not Caused by Culpable Negligence. — *Lyons v. Lyons*, 207 Pa. St. 7, 99 Am. St. Rep. 779.

219. 7. Not Chargeable with Interest or Profits. — See *Hart v. Hart*, 117 Wis. 639.

8. When Chargeable with Interest. — *Moore v. Rawson*, 185 Mass. 264.

9. Duty to Account for Profits. — *Moore v. Rawson*, 185 Mass. 264.

10. Charged with Interest on Fund. — *Moore v. Rawson*, 185 Mass. 264.

220. 1. No Right to Compensation. — *Stockdale v. Maginn*, 207 Pa. St. 226; *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252.

Compensation Allowed Where Business Continued by Consent. — *Moore v. Rawson*, 185 Mass. 264.

Compensation Allowed for Special Services. — *Lamb v. Wilson*, (Neb. 1902) 92 N. W. Rep. 167.

2. Survivor's Title. — *Whitley v. Hudson*, 114 Ga. 668; *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 116 Ga. 176; *Huggins v. Huggins*, 117 Ga. 151; *Hodgin v. People's Nat. Bank*, 128 N. Car. 110. See also *North Pac. Lumber Co. v. Spore*, 44 Oregon 462.

Failure of Survivor to Take Possession — Probate Court May Make Appointment. — *Barnes v. Stanley*, 95 Mo. App. 688, upholding the appointment of the public administrator.

The Fact that the Surviving Partner Is Indebted to the Deceased Partner does not affect his right to administer the partnership assets. *Lance v. Calhoun*, 85 Miss. 375.

3. Right to Settle Estate Without Interference from Decedent's Representatives. — *Frazier v. Murphy*, 133 Cal. 91; *Hartnett v. Stillwell*, 121 Ga. 386, 104 Am. St. Rep. 151; *Newman v. Gates*, (Ind. 1904) 72 N. E. Rep. 638; *American Hardwood Lumber Co. v. Nickey*, 101 Mo. App. 20; *Secor v. Tradesmen's Nat. Bank*, 92

N. Y. App. Div. 294; *Willis v. Crawford*, 38 Oregon 522; *Milam v. Hill*, 29 Tex. Civ. App. 573; *In re Auerbach*, 23 Utah 529.

Surviving Partner Entitled to Custody of Books. — *Stief's Estate*, 10 Pa. Dist. 446.

Texas Statute Does Not Authorize Continuation of Business by Executor. — *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252.

221. 1. Chancery Will Not Deprive Survivor Acting in Good Faith of Right. — *Hodgin v. People's Nat. Bank*, 128 N. Car. 110, holding that preference of creditors by a surviving partner was not ground for the appointment of a receiver. See also *Huggins v. Huggins*, 117 Ga. 151; *Fleming v. Carson*, 37 Oregon 252.

2. Coercion or Removal for Want of Diligence and Unreasonable Delay. — See *Milam v. Hill*, 29 Tex. Civ. App. 573.

Power of Equity to Assume Control. — See *Moyers v. Cummings*, 17 App. Cas. (D. C.) 269.

Liquidation Must Be in Reasonable Time. — *Secor v. Tradesmen's Nat. Bank*, 92 N. Y. App. Div. 294.

3. Right Passes to Representative of Last Survivor. — *Franklin v. Trickey*, (Ariz. 1905) 80 Pac. Rep. 352; *McCann v. Hazard*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 7.

Court of Equity May Appoint Receiver on Death of Survivor. — *Gomez v. Higgins*, 130 Ala. 493.

5. As to Statutory Provisions. — *Byers v. Weeks*, 105 Mo. App. 72; *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258; *Poppleton v. Jones*, 42 Oregon 24; *Brigham-Hopkins Co. v. Gross*, 30 Wash. 277.

6. Notice of Limitation of Authority. — The limitations on the powers of surviving partners in closing up the affairs of the partnership are imposed by law, and all persons are charged with notice of them. *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 116 Ga. 176.

222. 1. New Contracts or Continuance of Business. — *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 116 Ga. 176; *Douthart v. Logan*, 190 Ill. 243; *Cooperstown First Nat. Bank v. State Sav. Bank*, 130 Mich. 332; *Richardson v. O'Connell*, 88 Mo. App. 12.

Survivor Bound to Act with Reasonable Promptness. — *Huggins v. Huggins*, 117 Ga. 151.

Injunction Against Continuance Allowed. — *Huggins v. Huggins*, 117 Ga. 151.

3. Power to Borrow Money for Use of Firm. — See *Rosenthal v. Hasberg*, (Supm. Ct. App. T.) 84 N. Y. Supp. 290.

222. By Express Agreement, or by Provision in the Will of the Deceased Partner. — See note 4.

(b) Particular Powers — *aa.* APPLICATION OF FUNDS TO FIRM OBLIGATIONS — (aa) *In General.* — See note 5.

223. (bb) *Power to Sell or Mortgage Firm Assets* — *In General.* — See notes 2, 3.

224. *cc.* POWER TO RECEIVE PAYMENT, SETTLE CLAIMS, ETC. — See note 1.

ee. ENFORCEMENT OF CONTRACTS WITH THIRD PERSONS. — See note 3.

ff. REVIVAL OF OUTLAWED DEBTS. — See note 5.

(4) *Rights and Liabilities as to Estate of Decedent* — (a) *Duty to Exercise Good Faith.* — See notes 7, 8.

(b) *Liability in Case of Continuance of Business.* — See note 9.

225. (c) *Liability for Losses.* — See note 3.

(d) *Liability for Interest.* — See note 5.

(e) *Right to Set Off Debt of Decedent Against Share in Assets.* — See note 6.

(5) *Right to Compensation.* — See note 9.

226. (6) *Right to Contribution for Defending Suit.* — See note 4.

222. 4. Express Agreement or Testamentary Provision. — *Henry v. Caruthers*, 95 Ill. App. 582, affirmed 196 Ill. 136; *Egan v. Wirth*, 26 R. I. 363; *In re Auerbach*, 23 Utah 529. See also *Lincoln v. Orthwein*, (C. C. A.) 120 Fed. Rep. 880.

5. Application of Funds in Liquidation of Firm Obligations. — *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 116 Ga. 176; *People's Nat. Bank v. Wilcox*, 136 Mich. 567.

Application of Property to Survivor's Individual Debts Unauthorized. — *Jones v. Dulaney*, (Ky. 1905) 86 S. W. Rep. 547.

Surviving Partner May Prefer Firm Creditors. — *Hodgin v. People's Nat. Bank*, 128 N. Car. 110.

223. 2. May Sell Firm Assets. — *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 116 Ga. 176; *Hartnett v. Stillwell*, 121 Ga. 386, 104 Am. St. Rep. 151.

May Assign Chose in Action. — *American Hardwood Lumber Co. v. Nickey*, 101 Mo. App. 20.

Sale of Realty of Insolvent Firm. — Upon the dissolution of an insolvent partnership, by the death of one of the partners, the survivor may convey such an equitable interest in the entire property as will enable his vendee to compel a conveyance by the heirs of the deceased partner of the legal title to the interest of their decedent. *Southwestern Georgia Bank v. McGarrah*, 120 Ga. 944. See also *Hartnett v. Stillwell*, 121 Ga. 386, 104 Am. St. Rep. 151.

3. May Pledge or Mortgage. — *People's Nat. Bank v. Wilcox*, 136 Mich. 567.

224. 1. Collection and Settlement of Claims. — See *Gamble v. Rural Independent School Dist.*, 132 Fed. Rep. 514; *Newman v. Gates*, (Ind. 1904) 72 N. E. Rep. 638.

3. May Enforce Firm Contracts. — *Newman v. Gates*, (Ind. App. 1903) 67 N. E. Rep. 468.

5. Revival of Debts Barred by Statute. — See *Matter of Cogswell*, 93 Mo. App. 482.

7. Liable for Perfect Good Faith. — *Welbourn v. Kleinle*, 92 Md. 114; *Matter of Cogswell*, 93 Mo. App. 482; *Bauchle v. Smylie*, 104 N. Y. App. Div. 513; *Blanchard v. Jefferson*, 13 N. Y. App. Liv. 314, affirmed without opin-

ion 162 N. Y. 630; *In re Auerbach*, 23 Utah 529; *Rowell v. Rowell*, 122 Wis. 1.

Rule Applied Where Surviving Partner Was Executor. — *Egan v. Wirth*, 26 R. I. 363.

8. Private Profit. — *Bauchle v. Smylie*, 104 N. Y. App. Div. 513; *Rowell v. Rowell*, 122 Wis. 1.

The Burden of Showing Good Faith in transactions with the deceased partner's representative is on the surviving partner. *Bauchle v. Smylie*, 104 N. Y. App. Div. 513.

9. Continuance Is at Survivor's Own Risk. — *Huggins v. Huggins*, 117 Ga. 151; *Douthart v. Logan*, 190 Ill. 243. See also *Moore v. Rawson*, 185 Mass. 264; *Rowell v. Rowell*, 122 Wis. 1.

Liability to Third Persons. — See *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 116 Ga. 176.

Liability Where Partnership Funds Intermingled with Other Property. — Where a surviving partner continues the partnership business and so intermingles the partnership funds with his own that they cannot be separated, the whole becomes, both at law and in equity, the property of the partnership estate. *Tufts v. Latshaw*, 172 Mo. 359.

225. 3. Credited with Losses from Bad Debts. — *Evans v. Weatherhead*, 24 R. I. 394.

5. Interest Allowed Where Surviving Partner Misappropriated Firm Funds. — *Porter v. Long*, 136 Mich. 150.

6. May Set Off Debt of Deceased. — See *Cochran v. Cutter*, 18 Pa. Super. Ct. 282.

Set-off Not Allowed Where Claim Barred by Limitation. — *Matter of Cogswell*, 93 Mo. App. 482.

9. No Right to Compensation in General. — *Consaul v. Cummings*, 24 App. Cas. (D. C.) 36; *Hancock v. Hancock*, (Ky. 1902) 69 S. W. Rep. 757; *Hoag v. Alderman*, 184 Mass. 217; *Comstock v. McDonald*, 126 Mich. 142; *Clifton v. Clark*, 83 Miss. 446, 102 Am. St. Rep. 458; *Slater v. Slater*, 78 N. Y. App. Div. 449, modified 175 N. Y. 143, 96 Am. St. Rep. 605; *Matter of Dummatt*, (Surrogate Ct.) 38 Misc. (N. Y.) 477.

226. 4. Expense of Resisting Claim Against Estate. — See *Consaul v. Cummings*, 24 App. Cas. (D. C.) 36.

226. XI. MINING PARTNERSHIPS — 1. Definition and Nature — a. WHAT CONSTITUTES.— See note 5.

227. See note 3.

In England.— See note 5.

b. DISTINGUISHED FROM ORDINARY PARTNERSHIPS.— See notes

6, 7.

228. See notes 3, 4.

d. EVIDENCE OF PARTNERSHIP.— See note 8.

229. 2. Rights and Liabilities Inter Se — Power of Majority.— See note 6.

230. 3. Rights and Liabilities as to Third Persons — *a.* POWER OF PARTNER TO BIND FIRM — General Rules.— See notes 8, 9.

232. 4. Partnership Property — What Constitutes.— See note 3.

5. Dissolution and Winding Up.— See note 10.

233. PARTY.— See note 2.

226. 5. Mining Partnership Defined.— Dale *v.* Hodge, (Mo. 1905) 85 S. W. Rep. 929; Blackmarr *v.* Williamson, 57 W. Va. 249, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 226.

227. 3. Profit Sharing.— Blackmarr *v.* Williamson, 57 W. Va. 249, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 227 and supporting the whole text paragraph.

5. Tenants in Common of Mine as Partners.— See Garside *v.* Norval, 1 Alaska 19; Doyle *v.* Burns, 123 Iowa 488.

6. Contract Between Partners.— Dale *v.* Hodge, (Mo. 1905) 85 S. W. Rep. 929; Blackmarr *v.* Williamson, 57 W. Va. 249, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 227.

7. No Delectus Personarum.— Blackmarr *v.* Williamson, 57 W. Va. 249, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 227. See also Altgelt *v.* Sullivan, (Tex. Civ. App. 1903) 79 S. W. Rep. 333.

228. 3. Blackmarr *v.* Williamson, 57 W. Va. 249, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 228 and supporting the text paragraph generally.

4. Ordinary Partnership for Mining.— Doyle *v.* Burns, 123 Iowa 488.

8. Evidence of Partnership.— Shea *v.* Nilima, (C. C. A.) 133 Fed. Rep. 209.

229. 6. Power of Majority.— Blackmarr *v.* Williamson, 57 W. Va. 249.

230. 8. Express Authority Implied.— See Guthiel *v.* Gilmer, 27 Utah 496.

9. Ratification.— See Guthiel *v.* Gilmer, 27 Utah 496.

232. 3. Ground Not Actually Worked.— See McKenzie *v.* Coslett, (Nev. 1904) 78 Pac. Rep. 976.

10. Equity Jurisdiction.— See Blackmarr *v.* Williamson, 57 W. Va. 249, holding that in order to dissolve a mining partnership by decree in equity clear and good grounds for equitable interposition must appear.

233. 2. Adverse Party.— Hartford F. Ins. Co. *v.* King, 31 Tex. Civ. App. 636.

Party Interested.— *In re* Jones, (1904) 2 Ch. 363; *In re* Conroy, 134 Fed. Rep. 764; Crook *v.* Newborg, 124 Ala. 479.

The Parties Litigant mean the antagonistic sides of the controversy. Cumberland Telephone, etc., Co. *v.* Ware, 115 Ky. 581.

PARTY WALLS.

By E. G. CHILTON.

237. I. DEFINITIONS.— See note 1.

239. III. NATURE OF PROPERTY OR RIGHT IN WALL ON DIVISION LINE.— See note 5.

240. IV. CREATION — 3. By Contract — a. IN GENERAL.— See note 7.

237. 1. "Party Wall" and "Partition Wall."— By usage the terms "party wall" and "partition wall" have come to mean a solid wall, without openings. Bonney *v.* Greenwood, 96 Me. 335.

239. 5. Adjoining Owners Not Tenants in Common.— Johnson *v.* Minnesota Tribune Co., 91 Minn. 480, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 239.

Nature of Easement.— The easement is the right of each owner to have his building supported by the portion of the wall which stands on the land of the other. Springer *v.* Darlington, 207 Ill. 244.

240. 7. Adjoining Owners May by Agreement Contract for Erection.— Lagomarsino *v.* Crowe, 134 Ala. 377; Evans *v.* Howell, 211 Ill. 85; Lukens *v.* Lasher, 202 Pa. St. 327.

242. *c.* BY PRESCRIPTION — Prescription Does Not Give a Strictly Party Wall. — See notes 3, 4.

243. V. RIGHTS AND LIABILITIES OF ADJOINING OWNERS — 1. Right to Build Wall Partly on Adjoining Land — *a.* RIGHT STATUTORY OR FOUNDED ON CONTRACT. — See note 1.

c. EXTENT OF ENCROACHMENT. — See note 10.

244. *d.* CHARACTER OF WALL AND MATERIAL USED IN ITS CONSTRUCTION — (1) *Under Statutes.* — See note 2.

2. Right to Use Wall — *a.* IN GENERAL. — See notes 6, 7.

245. *d.* RIGHT TO EXTEND FRONT AND REAR WALLS TO MIDDLE OF PARTY WALL. — See note 8.

246. *e.* DISPLAYING SIGN ON CO-OWNER'S VACANT SIDE OF WALL. — See note 5.

f. RIGHT TO MAINTAIN WINDOWS IN WALL. — See notes 6, 7, 8, 9. Injunction. — See note 10.

247. *g.* RIGHT TO MAINTAIN CHIMNEY FLUES IN WALL. — See notes 9, 11.

3. Right to Add to, Rebuild, or Change Existing Wall — *a.* RIGHT TO ADD TO PARTY WALL. — See notes 12, 13.

248. See note 1.

b. RIGHT TO EXTEND WALL FRONT AND REAR. — See note 7.

c. RIGHT TO DIMINISH OR INCREASE THICKNESS OF WALL — (2) *Increasing Thickness.* — See note 10.

249. 4. Liability for Injury Caused by Falling of Wall. — See note 5.

242. 3. Prescriptive Right Does Not Constitute Wall a Strict Party Wall. — *Bright v. Allan*, 203 Pa. St. 394.

4. Easement Limited to User. — *Bright v. Allan*, 203 Pa. St. 394.

243. 1. Right to Build on Neighbor's Land Purely Statutory. — See *Sicotte v. Martin*, 20 Quebec Super. Ct. 36.

Existence by Custom. — See *Roy v. Strubbe*, 24 Quebec Super. Ct. 520.

10. Excess Encroachment May Be Abated. — *Pokorny v. Pratt*, 110 La. 609.

244. 2. See *Roy v. Strubbe*, 24 Quebec Super. Ct. 520.

6. Both Owners of Wall Entitled to Equal Use Thereof. — *Payne v. Moore*, 31 Ind. App. 360.

Use of Wall Does Not Constitute Adverse Possession. — *Kastner v. Benz*, 67 Kan. 488.

7. Joining House to Party Wall. — *Payne v. Moore*, 31 Ind. App. 360.

245. 8. Cannot Extend Front Wall Beyond Middle of Party Wall. — *Johnson v. Minnesota Tribune Co.*, 91 Minn. 480, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 245, and holding that ejectment was maintainable against one who extended his wall beyond the middle of a party wall. See also *Cautley v. Morgan*, 51 W. Va. 304.

246. 5. Displaying Advertising Sign. — One of the owners of a party wall cannot enjoin the painting of signs on the other's side of the wall. *Lappan v. Glunz*, (Mich. 1905) 104 N. W. Rep. 26.

6. No Right to Maintain Windows. — *Springer v. Darlington*, 207 Ill. 244, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 246; *Bonney v. Greenwood*, 96 Me. 335; *Paul v. Cook*, (Neb. 1903) 94 N. W. Rep. 997.

7. Equity Will Enjoin Maintenance of Windows. — *Springer v. Darlington*, 207 Ill. 244; *Paul v. Cook*, (Neb. 1903) 94 N. W. Rep. 997.

8. Restoration of Solid Wall. — *Springer v. Darlington*, 207 Ill. 244.

9. Right to Close Window in Party Wall. — *Bonney v. Greenwood*, 96 Me. 335.

10. Need Not Show Irreparable Injury. — See *Springer v. Darlington*, 207 Ill. 244.

247. 9. Restriction as to Use of Chimney Flues. — The use of a party wall to maintain chimney flues is subject to the restriction that it shall not be detrimental to the adjoining owner. *Batt v. Kelly*, 75 N. Y. App. Div. 321.

11. Both Parties May Use Flue in Middle of Wall. — *Compare Koolbeck v. Baughn*, 126 Iowa 194, holding that the subsequent builder is not entitled to the use of chimney flues built only for the convenience of the other unless such use will in no way be detrimental to the other's use.

12. Right to Increase Height of Wall. — *Frowenfeld v. Casey*, 139 Cal. 421; *Kastner v. Benz*, 67 Kan. 488, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 247; *Bright v. Allan*, 203 Pa. St. 394; *Demers v. Lemieux*, 21 Quebec Super. Ct. 26.

13. Underpinning and Deepening Foundations. — See *Roy v. Strubbe*, 24 Quebec Super. Ct. 520.

248. 1. Where Owner Increasing Height of Wall Not Liable. — The owner increasing the height of a party wall is not liable for damages resulting, not from the increased height, but from the removal of the support afforded by his house. *Demers v. Lemieux*, 21 Quebec Super. Ct. 26. See generally the title LATERAL AND SUBJACENT SUPPORT, 553. 2 *et seq.*

7. Right Existing under Contract. — *Kastner v. Benz*, 67 Kan. 488, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 248; *Schmidt v. Lewis*, 63 N. J. Eq. 565.

10. Increasing Thickness of Wall. — *Pokorny v. Pratt*, 110 La. 609.

249. 5. Builder Liable for Injury Caused by

250. 5. Contribution Between Adjoining Owners to Cost of Erecting —
a. RIGHT TO CONTRIBUTION DEPENDENT ON CONTRACT OR STATUTE. —
 See notes 2, 4, 5.

252. *c.* WHAT USE MAKES USER LIABLE TO CONTRIBUTE — (5) *Effect of Conveyance by Promisor. —* See note 6.

254. 6. Contribution Between Adjoining Owners to Cost of Rebuilding. —
 See note 10.

255. VI. RIGHTS AND LIABILITIES OF PURCHASERS — 1. Whether Purchaser from Promisor Bound to Contribute — *a.* UNDER TERMS OF PARTY-WALL CONTRACT. — See note 3.

256. 2. Whether Grantee of Builder Can Enforce Contribution — *a.* UNDER TERMS OF PARTY-WALL AGREEMENT. — See notes 8, 9.

257. 3. Whether Party Walls or Party-wall Agreements Constitute Incumbrances — A Party Wall Standing Equally on the Land of Two Adjoining Owners. — See note 5.

Party-wall Agreements. — See note 7.

VII. TERMINATION OF RIGHT TO MAINTENANCE — Destruction of Wall. — See note 8.

PASS — PASSING — PASSAGE. — See note 10.

[PASSAGEWAY. — See note 10*a.*]

Falling of Defective Wall. — *Payne v. Moore*, 31 Ind. App. 360.

250. 2. Contribution Dependent on Statute or Contract. — *Griffin v. Sansom*, 31 Tex. Civ. App. 560.

4. Agreement to Contribute Implied. — *Griffin v. Sansom*, 31 Tex. Civ. App. 560.

5. Presumption that Wall Was Erected at Joint Expense. — *Griffin v. Sansom*, 31 Tex. Civ. App. 560.

252. 6. Effect of Conveyance by Promisor. — See *Kastner v. Benz*, 67 Kan. 488.

254. 10. Where the Wall Is Destroyed by Natural Causes, one adjoining owner cannot, in the absence of an agreement, require the other to contribute to the cost of rebuilding. — *Griffin v. Sansom*, 31 Tex. Civ. App. 560.

255. 3. Naked Promise to Contribute Not Binding on Purchaser. — *Mayer v. Martin*, 83 Miss. 322. See also *Paul v. Cook*, (Neb. 1903) 94 N. W. Rep. 997.

A Purchaser from Tenants in Common is not bound by a party-wall agreement which created covenants running with the land, where the agreement was between his grantors as tenants in common and one of them as sole owner of the adjoining lot. — *Kinnear v. Moses*, 32 Wash. 215.

256. 8. Right to Enforce Contribution Personal to Builder. — *Schwenker v. Picken*, 91 N. Y. App. Div. 367.

9. Promise to Pay in Nature of Covenant Running with Land. — *Loyal Mystic Legion v. Jones*, (Neb. 1905) 102 N. W. Rep. 621. But see *Schwenker v. Picken*, 91 N. Y. App. Div. 367.

257. 5. Existing Party Wall Held No Incumbrance. — See *Paul v. Cook*, (Neb. 1903) 94 N. W. Rep. 997.

7. Party-wall Agreements as Incumbrances. — *Finck v. Bauer*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 218. Compare *Cook v. Paul*, (Neb. 1903) 93 N. W. Rep. 430.

8. Casual Destruction of Wall Terminates Right to Maintenance. — *Bonney v. Greenwood*, 96 Me. 335.

10. Passage of Statute. — *Mills v. Osteopathic Registration, etc.*, 115 Mich. 525.

Pass by Will — Collateral Inheritance Tax. — *In re Joyslin*, 76 Vt. 88.

Passable Highway. — A covenant in a deed for a *passable* highway means a way suitable to the particular locality. *Vanatta v. Waterhouse*, 33 Ind. App. 516.

10*a.* Passageway of Theatre — Obstruction. — See *Sturgis v. Grau*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 330.

PATENTS.

BY H. N. ELDRIDGE.

270. I. DEFINITION, ORIGIN, AND NATURE — 2. Statutory Origin — At Common Law. — See note 7.

271. 4. Construction of Statutes — The Statute Should Be Liberally Interpreted. — See note 8.

5. Nature of Patent Right — a. AS MONOPOLY. — See note 12.

273. 6. Right of Inventor in Unpatented Invention — b. UNDER PATENT STATUTES. — See note 4.

II. PATENTABILITY OF INVENTIONS — 2. Subjects of Patents — b. ART OR PROCESS — Definition. — See note 14.

274. Patentability in General. — See note 3.

Patentable and Unpatentable Processes. — See note 6.

275. See note 1.

c. MACHINES. — See note 4.

276. e. COMPOSITION OF MATTER. — See note 2.

f. DESIGNS. — See notes 3, 4, 5.

g. PRINCIPLE OR LAW OF NATURE. — See note 6.

270. 7. At Common Law. — Standard Computing Scale Co. v. Computing Scale Co., (C. C. A.) 126 Fed. Rep. 639; Standard Scale, etc., Co. v. McDonald, 127 Fed. Rep. 709.

271. 8. General Electric Co. v. Winsted Gas Co., 110 Fed. Rep. 963.

12. Patents Are Monopolies. — Brunswick-Balke-Collender Co. v. Koehler, 115 Fed. Rep. 648; General Electric Co. v. Wise, 119 Fed. Rep. 922; Victor Talking Mach. Co. v. The Fair, (C. C. A.) 123 Fed. Rep. 425; Cortelyou v. Johnson, 138 Fed. Rep. 114. See also National Phonograph Co. v. Schlegel, (C. C. A.) 128 Fed. Rep. 733.

273. 4. No Rights Against Public. — Victor Sporting Goods Co. v. Harold A. Wilson Co., 7 Ont. L. Rep. 581, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 273.

14. Art or Process Defined. — U. S. v. Allen, 22 App. Cas. (D. C.) 56. See also *In re* Weston, 17 App. Cas. (D. C.) 431.

274. 3. Art Patentable Irrespective of Means. — Dayton Fan, etc., Co. v. Westinghouse Electric, etc., Co., (C. C. A.) 118 Fed. Rep. 562; Expanded Metal Co. v. Bradford, 136 Fed. Rep. 870; *In re* Weston, 17 App. Cas. (D. C.) 431.

6. What Patentable as Art or Process. — Maurer v. Dickerson, (C. C. A.) 113 Fed. Rep. 870; U. S. Mitis Co. v. Midvale Steel Co., 135 Fed. Rep. 103.

275. 1. Purely Mechanical Operation Not a Patentable Process. — *In re* Weston, 17 App. Cas. (D. C.) 431.

4. Machine Defined. — See U. S. v. Allen, 22 App. Cas. (D. C.) 56.

276. 2. "Composition of Matter" Defined. — See Kearsbey, etc., Co. v. Philip Carey Mfg. Co., 139 Fed. Rep. 571.

A patentable compound or composition of matter is one that is produced by the inter-

mixture of two or more specific ingredients and possesses properties pertaining to none of those ingredients separately, thereby accomplishing a new and useful result. *Lane v. Levi*, 21 App. Cas. (D. C.) 168.

3. Design Patents. — See *Royal Metal Mfg. Co. v. Art Metal Works*, (C. C. A.) 130 Fed. Rep. 178; *Bradley v. Eccles*, 122 Fed. Rep. 873, affirmed (C. C. A.) 126 Fed. Rep. 945.

As High a Degree of Invention Is Required in the Case of a Design Patent as is required in the case of a mechanical patent. *Perry v. Hoskins*, 111 Fed. Rep. 1002.

4. Rowe v. Blodgett, etc., Co., (C. C. A.) 112 Fed. Rep. 61; *Bevin Bros. Mfg. Co. v. Starr Bros. Bell Co.*, 114 Fed. Rep. 362; *Marvel Co. v. Pearl*, 114 Fed. Rep. 946; *Eaton v. Lewis*, 115 Fed. Rep. 635; *Royal Metal Mfg. Co. v. Art Metal Works*, 121 Fed. Rep. 128, affirmed (C. C. A.) 130 Fed. Rep. 778; *Young v. Clipper Mfg. Co.*, 121 Fed. Rep. 560, affirmed (C. C. A.) 130 Fed. Rep. 150; *American Saddle Co. v. Sager Gear Co.*, 122 Fed. Rep. 645; *Bradley v. Eccles*, (C. C. A.) 126 Fed. Rep. 945; *Tyler v. St. Amand*, 17 App. Cas. (D. C.) 464; *In re* Tournier, 17 App. Cas. (D. C.) 481; *In re* Freeman, 23 App. Cas. (D. C.) 226.

The Attempt to Patent a Mechanical Function, under cover of a design, is a perversion of the privilege given by the statute. *Weisgerber v. Clowney*, 131 Fed. Rep. 480. See also *Kline Chair Co. v. Kochs*, 138 Fed. Rep. 91.

5. Mechanical and Design Patents Distinguished. — *Williams Calk Co. v. Neverslip Mfg. Co.*, 136 Fed. Rep. 210.

6. Principle, Idea, or Natural Law Not Patentable. — *Daylight Prism Co. v. Marcus Prism Co.*, 110 Fed. Rep. 980; *Manhattan Gen. Constr. Co. v. Helios-Upton Co.*, 135 Fed. Rep. 785.

277. See note 2.

h. FUNCTION OR RESULT. — See notes 4, 6.

278. *i.* PRODUCT. — See note 1.

j. IMPROVEMENTS. — See notes 4, 5.

279. 3. Invention — *a.* NECESSITY — *Invention Necessary.* — See note 3.

280. See note 1.

277. 2. Method or Means of Application Patentable. — Westinghouse Electric, etc., Co. v. Stanley Instrument Co., (C. C. A.) 133 Fed. Rep. 167.

Means of Application Patentable Though Not Patentable if Considered Without Reference to Utilized Force. — Mahler v. Animarium Co., (C. C. A.) 111 Fed. Rep. 530.

4. Result Not Patentable. — Manhattan Gen. Constr. Co. v. Helios-Upton Co., 135 Fed. Rep. 785. See also Masseth v. Larkin, (C. C. A.) 119 Fed. Rep. 171.

6. Function, Result, or Operation of Machine. — Cleveland Foundry Co. v. Detroit Vapor Stove Co., 131 Fed. Rep. 740; American Crayon Co. v. Sexton, (C. C. A.) 139 Fed. Rep. 564; *In re Cunningham*, 21 App. Cas. (D. C.) 29.

278. 1. Product Patentable if New in Itself. — Maurer v. Dickerson, (C. C. A.) 113 Fed. Rep. 870; Sanitas Nut Food Co. v. Voigt, (C. C. A.) 139 Fed. Rep. 551.

4. Improvement Defined. — Standard Computing Scale Co. v. Computing Scale Co., (C. C. A.) 126 Fed. Rep. 639.

5. Improvements Patentable. — General Electric Co. v. Star Brass Works, 109 Fed. Rep. 950; Goodyear Shoe Machinery Co. v. Spaulding, (C. C. A.) 110 Fed. Rep. 393; Goss Printing-Press Co. v. Scott, (C. C. A.) 110 Fed. Rep. 402; Walker Patent Pivoted Bin Co. v. Brown, 110 Fed. Rep. 649; Burnham v. Union Mfg. Co., (C. C. A.) 110 Fed. Rep. 765; General Electric Co. v. Winsted Gas Co., 110 Fed. Rep. 963; Diamond Stone Sawing Mach. Co. v. Dean, 111 Fed. Rep. 380; Wilfley v. Denver Engineering Works Co., 111 Fed. Rep. 760; American Ordnance Co. v. Driggs-Seabury Gum, etc., Co., (C. C. A.) 114 Fed. Rep. 936; Ide v. Trorlicht, etc., Carpet Co., (C. C. A.) 115 Fed. Rep. 137; U. S. Envelope Co. v. Sherman Envelope Co., 116 Fed. Rep. 200; Schreiber, etc., Mfg. Co. v. Adams Co., (C. C. A.) 117 Fed. Rep. 830; Davis v. Perry, (C. C. A.) 120 Fed. Rep. 941; L. E. Waterman Co. v. Forsyth, 121 Fed. Rep. 107, *affirmed* (C. C. A.) 128 Fed. Rep. 926; Drake Castle Pressed Steel Lug Co. v. Brownell, (C. C. A.) 123 Fed. Rep. 86; Marcus v. Sutton, 124 Fed. Rep. 74; Aquarama Co. v. Old Mill Co., 124 Fed. Rep. 229; Merrimac Mattress Mfg. Co. v. Schlesinger, 124 Fed. Rep. 237; Canda v. Michigan Malleable Iron Co., (C. C. A.) 124 Fed. Rep. 486; Brookfield v. Novelty Glass Mfg. Co., 124 Fed. Rep. 551; Scriven v. North, 124 Fed. Rep. 894, *modified* (C. C. A.) 134 Fed. Rep. 366; Dececo Co. v. George E. Gilchrist Co., (C. C. A.) 125 Fed. Rep. 293; Windle v. Parks, etc., Mach. Co., 128 Fed. Rep. 58, *reversed* (C. C. A.) 134 Fed. Rep. 381; American Delinter Co. v. American Machinery, etc., Co., (C. C. A.) 128 Fed. Rep. 709; Weston Electrical Instrument Co. v. Jewell, 128 Fed. Rep. 939; McCarthy v. Westfield Plate Co., (C. C. A.) 129 Fed. Rep. 128;

Diamond Stone Sawing Mach. Co. v. Brown, 130 Fed. Rep. 896; Bechtold v. Nowacke, 131 Fed. Rep. 275; Fries v. Leeming, 131 Fed. Rep. 765; Western Electric Co. v. North Electric Co., (C. C. A.) 135 Fed. Rep. 79; Loew Supply, etc., Co. v. Fred Miller Brewing Co., (C. C. A.) 138 Fed. Rep. 886; Wessel v. United Mattress Mach. Co., (C. C. A.) 139 Fed. Rep. 11; Pope Mfg. Co. v. H. P. Snyder Mfg. Co., 139 Fed. Rep. 49. See also Dowagiac Mfg. Co. v. Superior Drill Co., (C. C. A.) 115 Fed. Rep. 886; *In re Klemm*, 21 App. Cas. (D. C.) 186.

An Improvement Which Is Not an Invention is not patentable. Crown Cork, etc., Co. v. Standard Stopper Co., (C. C. A.) 136 Fed. Rep. 841.

Improvement Eliminating Complications in Mechanism Patentable. — Brown v. Huntington Piano Co., (C. C. A.) 134 Fed. Rep. 735.

279. 3. Patents Void for Want of Invention. — Morrison v. Sonn, 111 Fed. Rep. 172; Galvin v. Grand Rapids, (C. C. A.) 115 Fed. Rep. 511; Hocke v. New York Cent., etc., R. Co., 117 Fed. Rep. 320; Johnson Co. v. Toledo Traction Co., (C. C. A.) 119 Fed. Rep. 885; Calhoun v. Southern Cotton Oil Co., 120 Fed. Rep. 513; Regent Mfg. Co. v. Penn Electrical, etc., Co., (C. C. A.) 121 Fed. Rep. 80; Wolff v. Du Pont de Nemours, 122 Fed. Rep. 944; Chisholm, etc., Co. v. Anderson Foundry, etc., Works, (C. C. A.) 123 Fed. Rep. 427; Wilson v. Townley Shingle Co., (C. C. A.) 125 Fed. Rep. 491; L. E. Waterman Co. v. Lockwood, (C. C. A.) 125 Fed. Rep. 497; Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co., (C. C. A.) 125 Fed. Rep. 761; Mallon v. Gregg, 126 Fed. Rep. 377; Standard Computing Scale Co. v. Computing Scale Co., (C. C. A.) 126 Fed. Rep. 639; Jones v. Cyphers, (C. C. A.) 126 Fed. Rep. 753; Bradley v. Eccles, (C. C. A.) 126 Fed. Rep. 945; National Casket Co. v. Stoltz, 127 Fed. Rep. 158; Fay v. Mason, (C. C. A.) 127 Fed. Rep. 325; Neptune Meter Co. v. National Meter Co., (C. C. A.) 127 Fed. Rep. 563; Standard Scale, etc., Co. v. McDonald, 127 Fed. Rep. 709; Heekin v. Baker, 127 Fed. Rep. 828; Buchanan v. Bryant Electric Co., (C. C. A.) 128 Fed. Rep. 922; Felt, etc., Mfg. Co. v. Mechanical Accountant Co., 129 Fed. Rep. 386; Regensberg v. American Exch. Cigar Co., 130 Fed. Rep. 549; National Tube Co. v. Spang, (C. C. A.) 135 Fed. Rep. 351; Lauman v. Urschel White Lime Co., (C. C. A.) 136 Fed. Rep. 190. See also Faries Mfg. Co. v. Brown, (C. C. A.) 121 Fed. Rep. 547; Lorain Steel Co. v. New York Switch, etc., Co., 124 Fed. Rep. 548.

280. 1. Product of Mechanical Skill Not Patentable. — Ballou v. Potter, 110 Fed. Rep. 969; Metz v. Johnson, 112 Fed. Rep. 1014; Standard Caster, etc., Co. v. Caster Socket Co.,

281. See note 1.

b. WHAT CONSTITUTES INVENTION — (1) *In General* — (a) *Definition*. — See notes 2, 4.

(b) *Invention Distinguished from Mechanical Skill* — *The True Test*. — See note 8.

Prior State of the Art. — See note 9.

(C. C. A.) 113 Fed. Rep. 162; Edison *v.* American Mutoscope Co., (C. C. A.) 114 Fed. Rep. 926; Stanley Rule, etc., Co. *v.* Ohio Tool Co., 115 Fed. Rep. 813, *affirmed* (C. C. A.) 125 Fed. Rep. 947; Hanifen *v.* Armitage, 117 Fed. Rep. 845; United Blue-Flame Oil Stove Co. *v.* Glazier, (C. C. A.) 119 Fed. Rep. 157; Hurlbut *v.* U. S. Mailing Tube Co., 119 Fed. Rep. 188; Sanford Mills *v.* Massachusetts Mohair Plush Co., (C. C. A.) 119 Fed. Rep. 355; Thompson Scenic R. Co. *v.* Chestnut Hill Casino Co., 119 Fed. Rep. 359; Union Special Sewing Mach. Co. *v.* American Raveller Co., 119 Fed. Rep. 367; George Frost Co. *v.* Cohn, (C. C. A.) 119 Fed. Rep. 505; Johnson Co. *v.* Toledo Traction Co., (C. C. A.) 119 Fed. Rep. 885; Seiler *v.* Fuller, etc., Mfg. Co., (C. C. A.) 121 Fed. Rep. 85; McMichael, etc., Mfg. Co. *v.* Ruth, (C. C. A.) 128 Fed. Rep. 706; Eck *v.* Kutz, 132 Fed. Rep. 758; Voightmann *v.* Weis, etc., Cornice Co., 133 Fed. Rep. 298; Loew Supply, etc., Co. *v.* Fred Miller Brewing Co., (C. C. A.) 138 Fed. Rep. 886; Bradley *v.* Eccles, 138 Fed. Rep. 917; Wessel *v.* United Mattress Mach. Co., (C. C. A.) 139 Fed. Rep. 11; Sloan Filter Co. *v.* Portland Gold Min. Co., (C. C. A.) 139 Fed. Rep. 23; Eastman Kodak Co. *v.* Anthony, etc., Co., 139 Fed. Rep. 36; Imperial Bottle Cap, etc., Co. *v.* Crown Cork, etc., Co., (C. C. A.) 139 Fed. Rep. 312; *In re* Weston, 17 App. Cas. (D. C.) 431; *In re* Iwan, 17 App. Cas. (D. C.) 566; *In re* Seabury, 23 App. Cas. (D. C.) 377.

281. 1. Utility Without Invention Not Patentable. — Lamb Knit Goods Co. *v.* Lamb Glove, etc., Co., (C. C. A.) 120 Fed. Rep. 267; Union Biscuit Co. *v.* Peters, (C. C. A.) 125 Fed. Rep. 601; Wilce *v.* Bush Temple of Music Co., (C. C. A.) 134 Fed. Rep. 389; National Tube Co. *v.* Spang, (C. C. A.) 135 Fed. Rep. 351.

2. Mental Element. — Inventive discovery involves the intelligent apprehension of relations not before recognized by others, although actually existing, followed by the conception of how they can be practically utilized. Eck *v.* Kutz, 132 Fed. Rep. 779.

4. Discovery Not of Itself Patentable. — National Meter Co. *v.* Neptune Meter Co., 122 Fed. Rep. 82, *affirmed* (C. C. A.) 129 Fed. Rep. 124.

8. True Test. — See *Ideal Stopper Co. v. Crown Cork, etc., Co.*, (C. C. A.) 131 Fed. Rep. 244.

"The appreciation of unexpected possibilities of adaptations to meet exigent demands which result in successful operation and effect." Marconi Wireless Tel. Co. *v.* De Forest Wireless Tel. Co., 138 Fed. Rep. 674.

9. Prior State of the Art. — Timolat *v.* Manning, 110 Fed. Rep. 206; Star Brass Works *v.* General Electric Co., (C. C. A.) 111 Fed. Rep. 398; Brickill *v.* New York City, (C. C. A.) 112 Fed. Rep. 65; Western Electric Co.

v. Anthracite Telephone Co., 113 Fed. Rep. 834; Covert *v.* Covert, (C. C. A.) 115 Fed. Rep. 493; Galvin *v.* Grand Rapids, (C. C. A.) 115 Fed. Rep. 511; Johnson *v.* Chisholm, (C. C. A.) 115 Fed. Rep. 625; Dowagiac Mfg. Co. *v.* Superior Drill Co., (C. C. A.) 115 Fed. Rep. 886; West Coast Safety Faucet Co. *v.* Jackson Brewing Co., (C. C. A.) 117 Fed. Rep. 295; Wellman *v.* Midland Steel Co., (C. C. A.) 117 Fed. Rep. 825; Schreiber, etc., Mfg. Co. *v.* Adams Co., (C. C. A.) 117 Fed. Rep. 830; Hanifen *v.* Armitage, 117 Fed. Rep. 845; H. W. Butterworth, etc., Co. *v.* Winsor, etc., Mfg. Co., 117 Fed. Rep. 856; New Departure Mfg. Co. *v.* Sargent, 118 Fed. Rep. 41, *affirmed* (C. C. A.) 127 Fed. Rep. 152; Snow *v.* Enterprise Mfg. Co., 118 Fed. Rep. 54; Armat Moving Picture Co. *v.* American Mutoscope Co., 118 Fed. Rep. 840; Durfee *v.* Bawo, 118 Fed. Rep. 853; United Blue-Flame Oil Stove Co. *v.* Glazier, (C. C. A.) 119 Fed. Rep. 157; Hurlbut *v.* U. S. Mailing Tube Co., 119 Fed. Rep. 188, *affirmed* (C. C. A.) 124 Fed. Rep. 66; Coates *v.* Boker, (C. C. A.) 119 Fed. Rep. 358; Thompson Scenic R. Co. *v.* Chestnut Hill Casino Co., 119 Fed. Rep. 359; Union Special Sewing Mach. Co. *v.* American Raveller Co., 119 Fed. Rep. 367; Globe-Wernicke Co. *v.* Fred Macey Co., (C. C. A.) 119 Fed. Rep. 696; Johnson Co. *v.* Toledo Traction Co., (C. C. A.) 119 Fed. Rep. 885; L. E. Waterman Co. *v.* Forsyth, 121 Fed. Rep. 103, *affirmed* (C. C. A.) 127 Fed. Rep. 1020; Eames *v.* Worcester Polytechnic Institute, (C. C. A.) 123 Fed. Rep. 67; Bettendorf Patents Co. *v.* J. R. Little Metal Wheel Co., (C. C. A.) 123 Fed. Rep. 433; Lorain Steel Co. *v.* New York Switch, etc., Co., 124 Fed. Rep. 548; Paramore *v.* Stein, 125 Fed. Rep. 19, *affirmed* 133 Fed. Rep. 228; National Tube Co. *v.* Spang, 125 Fed. Rep. 22; Greist Mfg. Co. *v.* Parsons, (C. C. A.) 125 Fed. Rep. 116; U. S. Peg-Wood, etc., Co. *v.* B. F. Sturtevant Co., (C. C. A.) 125 Fed. Rep. 378; L. E. Waterman Co. *v.* Lockwood, (C. C. A.) 125 Fed. Rep. 497; Union Biscuit Co. *v.* Peters, (C. C. A.) 125 Fed. Rep. 601; Wisconsin Compressed Air House Cleaning Co. *v.* American Compressed Air Cleaning Co., (C. C. A.) 125 Fed. Rep. 761; Stanley Rule, etc., Co. *v.* Ohio Tool Co., (C. C. A.) 125 Fed. Rep. 947; National Casket Co. *v.* Stoltz, 127 Fed. Rep. 158; Hammer *v.* Cutler-Hammer Mfg. Co., (C. C. A.) 128 Fed. Rep. 730; Perkins Electric Switch Mfg. Co. *v.* Buchannan, 129 Fed. Rep. 134; General Electric Co. *v.* Wagner Electric Mfg. Co., (C. C. A.) 130 Fed. Rep. 772; Young *v.* Wolfe, (C. C. A.) 130 Fed. Rep. 801; Weston Electrical Instrument Co. *v.* Empire Electrical Instrument Co., 131 Fed. Rep. 82; Brunswick-Balke-Collender Co. *v.* Klumpp, (C. C. A.) 131 Fed. Rep. 255; Cleveland Foundry Co. *v.* Detroit Vapor Stove Co., 131 Fed. Rep. 740; General Electric Co. *v.* Yost Electric Mfg. Co.,

282. See note 1.

(d) **Definition an Impracticable Test — Illustration and Exclusion the Accepted Method.** — See note 5.

284. See note 1.

131 Fed. Rep. 874; *United Blue Flame Oil Stove Co. v. Silver*, 133 Fed. Rep. 47; *Lattimore Mfg. Co. v. Jones*, 133 Fed. Rep. 550; *Wolff v. Du Pont de Nemours*, (C. C. A.) 134 Fed. Rep. 862; *Library Bureau v. Fred Macey Co.*, 134 Fed. Rep. 886; *Buchanan v. Perkins Electric Switch Mfg. Co.*, (C. C. A.) 135 Fed. Rep. 90; *Rowley v. Koeber*, 135 Fed. Rep. 363; *Manhattan Gen. Constr. Co. v. Helios-Upton Co.*, 135 Fed. Rep. 785; *Solmsen v. Bredin*, (C. C. A.) 136 Fed. Rep. 187; *Mills v. Russell Mfg. Co.*, 136 Fed. Rep. 874; *Panzl v. Battle Island Paper Co.*, (C. C. A.) 138 Fed. Rep. 48; *American Caramel Co. v. Mills*, 138 Fed. Rep. 143; *Moore v. Meyer-Sniffen Co.*, (C. C. A.) 138 Fed. Rep. 402; *McKenzie Furnace Co. v. Green Engineering Co.*, (C. C. A.) 138 Fed. Rep. 830; *Regina Co. v. New Century Music Box Co.*, 138 Fed. Rep. 903; *Eastman Kodak Co. v. Anthony, etc., Co.*, 139 Fed. Rep. 36; *In re Iwan*, 17 App. Cas. (D. C.) 566; *In re McNeill*, 20 App. Cas. (D. C.) 294; *In re Klemm*, 21 App. Cas. (D. C.) 186; *In re Butterfield*, 23 App. Cas. (D. C.) 84.

282. 1. *Bradley v. Eccles*, 138 Fed. Rep. 917.

Where the Advance Toward Perfection in an Art Consists of Many Intermediate Steps, and several inventors form different combinations or improvements, which score decided advances in the art, and accomplish the desired result with varying degrees of success, each is entitled to his own combination, so long as it differs from those of his competitors and does not include theirs. *Anderson v. Collins*, (C. C. A.) 122 Fed. Rep. 451.

5. **Definition Not a Practicable Test.** — *Kinloch Telephone Co. v. Western Electric Co.*, (C. C. A.) 113 Fed. Rep. 659; *Buchanan v. Perkins Electric Switch Mfg. Co.*, (C. C. A.) 135 Fed. Rep. 90.

Each Case Depends on Its Own Facts. — *Rumford Chemical Works v. New York Baking Powder Co.*, (C. C. A.) 134 Fed. Rep. 385.

284. 1. **Patentable Invention — Illustrations.** — *Westinghouse Electric Mfg. Co. v. New England Granite Co.*, (C. C. A.) 110 Fed. Rep. 753; *Coddington v. Propfe*, (C. C. A.) 111 Fed. Rep. 378; *Lanyon Zinc Co. v. Brown*, (C. C. A.) 119 Fed. Rep. 918; *Australian Knitting Co. v. Wright's Health Underwear Co.*, (C. C. A.) 119 Fed. Rep. 921, *affirming* 115 Fed. Rep. 577; *Greene v. Manhattan Refrigerating Co.*, 120 Fed. Rep. 952; *Fuller v. Gilmore*, 121 Fed. Rep. 129; *Doig v. Morgan Mach. Co.*, (C. C. A.) 122 Fed. Rep. 460; *Bradley v. Eccles*, 122 Fed. Rep. 867, *affirmed* (C. C. A.) 126 Fed. Rep. 945; *Crown Cork, etc., Co. v. Ideal Stopper Co.*, 123 Fed. Rep. 666, *affirmed* (C. C. A.) 131 Fed. Rep. 244; *Reed Mfg. Co. v. Smith, etc., Co.*, (C. C. A.) 123 Fed. Rep. 878; *Cutler-Hammer Mfg. Co. v. Hammer*, 124 Fed. Rep. 222, *affirmed* (C. C. A.) 128 Fed. Rep. 730; *Aquarama Co. v. Old Mill Co.*, 124 Fed. Rep. 229; *Merrimac Mattress Mfg. Co. v. Schlesinger*, 124 Fed. Rep. 237; *Wheel Truing*

Brake Shoe Co. v. Car Wheel Trueing Brake Shoe Co., 124 Fed. Rep. 902; *Crane Co. v. Baker*, (C. C. A.) 125 Fed. Rep. 1; *Standard Scales, etc., Co. v. Fairbanks*, (C. C. A.) 125 Fed. Rep. 4; *Rumford Chemical Works v. New York Baking Powder Co.*, 125 Fed. Rep. 231, *modified* (C. C. A.) 134 Fed. Rep. 385; *Smeeth v. Perkins*, (C. C. A.) 125 Fed. Rep. 285; *L. E. Waterman Co. v. Lockwood*, (C. C. A.) 125 Fed. Rep. 290; *U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co.*, (C. C. A.) 125 Fed. Rep. 378; *National Phonograph Co. v. Lambert Co.*, (C. C. A.) 125 Fed. Rep. 922; *George Frost Co. v. Crandall Wedge Co.*, (C. C. A.) 125 Fed. Rep. 942; *MacWilliam v. Connecticut Web Co.*, 126 Fed. Rep. 192; *Colt's Patent Firearms Mfg. Co. v. Wesson*, (C. C. A.) 127 Fed. Rep. 333; *Cary Mfg. Co. v. Patterson*, 127 Fed. Rep. 357; *Stromberg-Carlson Telephone Mfg. Co. v. American Electric Telephone Co.*, (C. C. A.) 127 Fed. Rep. 704; *Nutter v. Mossberg*, 128 Fed. Rep. 55; *Hutter v. De Q. Bottle Stopper Co.*, (C. C. A.) 128 Fed. Rep. 283; *Klauder-Weldon Dyeing Mach. Co. v. Steadwell Dyeing Mach. Co.*, (C. C. A.) 128 Fed. Rep. 724; *Hammer v. Cutler-Hammer Mfg. Co.*, (C. C. A.) 128 Fed. Rep. 730; *Buchanan v. Bryant Electric Co.*, (C. C. A.) 128 Fed. Rep. 922; *Weston Electrical Instrument Co. v. Jewell*, 128 Fed. Rep. 939; *McCarthy v. Westfield Plate Co.*, (C. C. A.) 129 Fed. Rep. 128; *Georgia Pine Turpentine Co. v. Bilfinger*, 129 Fed. Rep. 131; *Perkins Electric Switch Mfg. Co. v. Buchanan*, 129 Fed. Rep. 134; *Hale, etc., Mfg. Co. v. Oneonta, etc., R. Co.*, 129 Fed. Rep. 598; *Westinghouse Air Brake Co. v. Christensen Engineering Co.*, (C. C. A.) 130 Fed. Rep. 144; *General Electric Co. v. Wagner Electric Mfg. Co.*, (C. C. A.) 130 Fed. Rep. 772; *Young v. Wolfe*, (C. C. A.) 130 Fed. Rep. 891; *Diamond Stone Sawing Mach. Co. v. Brown*, 130 Fed. Rep. 896; *Western Telephone Mfg. Co. v. American Electric Telephone Co.*, (C. C. A.) 131 Fed. Rep. 75; *Weston Electrical Instrument Co. v. Empire Electrical Instrument Co.*, 131 Fed. Rep. 82; *Brunswick-Balke-Collender Co. v. Klumpp*, (C. C. A.) 131 Fed. Rep. 255; *Albright v. Langfeld*, 131 Fed. Rep. 473; *Wilkin v. Hill*, 131 Fed. Rep. 762; *Fries v. Leeming*, 131 Fed. Rep. 765; *Spear v. Keystone Lantern Co.*, 131 Fed. Rep. 879; *Fitz v. Leadam*, 132 Fed. Rep. 659; *Westinghouse Electric, etc., Co. v. Electric Appliance Co.*, 133 Fed. Rep. 396; *Kenney Mfg. Co. v. Wells, etc., Co.*, 135 Fed. Rep. 101; *Cayuta Wheel, etc., Co. v. Kennedy Valve Mfg. Co.*, (C. C. A.) 135 Fed. Rep. 537; *Baker Lead Mfg. Co. v. National Lead Co.*, 135 Fed. Rep. 546; *Cleveland Pneumatic Tool Co. v. Chicago Pneumatic Tool Co.*, (C. C. A.) 135 Fed. Rep. 783; *Brill v. Peckham Mfg. Co.*, (C. C. A.) 135 Fed. Rep. 784; *Chisholm v. Randolph Canning Co.*, 135 Fed. Rep. 815; *Bernard, etc., Mfg. Co. v. Ferno Co.*, 136 Fed. Rep. 229; *Van Epps v. United Box Board, etc., Co.*, 137 Fed. Rep. 418; *Curtain Supply Co. v. Keeler*, (C. C. A.) 137 Fed.

286. (2) *Particular Tests of Invention* — (a) *Nature and Degree of Skill.* — See notes 3, 4.

287. (b) *Simplicity or Obviousness of Device.* — See notes 1, 2.

(c) *Change in Size, Proportions, or Degree.* — See note 5.

288. See note 1.

(d) *Change in Form.* — See notes 3, 4.

Rep. 911; American Electric Novelty, etc., Co. v. Howard Electric Novelty Co., (C. C. A.) 137 Fed. Rep. 913; Hemolin Co. v. Harway Dye-wood, etc., Mfg. Co., (C. C. A.) 138 Fed. Rep. 54; Mygatt v. Zalinski, 138 Fed. Rep. 88; American Writing Mach. Co. v. Wagner Type-writer Co., 138 Fed. Rep. 108; Virgil Practice Clavier Co. v. Virgil, 138 Fed. Rep. 807; Miller v. Walker Patent Pivoted Bin Co., (C. C. A.) 139 Fed. Rep. 134; Marlin Firearms Co. v. Dinnan, 139 Fed. Rep. 658; *In re Weiss*, 21 App. Cas. (D. C.) 214.

Want of Invention — Illustrations. — Fowler v. New York City, 110 Fed. Rep. 749, *affirmed* (C. C. A.) 121 Fed. Rep. 747; Redgrave v. Singer, 120 Fed. Rep. 306; Calhoun v. Southern Cotton Oil Co., 120 Fed. Rep. 513; Seiler v. Fuller, etc., Mfg. Co., (C. C. A.) 121 Fed. Rep. 85; Rubber-Tire Wheel Co. v. Victor Rubber-Tire Co., (C. C. A.) 123 Fed. Rep. 85; L. E. Waterman Co. v. Lockwood, 123 Fed. Rep. 300, *affirmed* (C. C. A.) 125 Fed. Rep. 290; L. E. Waterman Co. v. Johnson, 123 Fed. Rep. 303, *affirmed* (C. C. A.) 125 Fed. Rep. 497; Brunswick Balke-Collender Co. v. Klumpp, 124 Fed. Rep. 554; National Tube Co. v. Spang, 125 Fed. Rep. 22; Victor Talking Mach. Co. v. American Graphophone Co., 125 Fed. Rep. 30, *affirmed* (C. C. A.) 131 Fed. Rep. 67; Moore v. Myer-Sniffen Co., 126 Fed. Rep. 101; Ludington Novelty Co. v. Leonard, (C. C. A.) 127 Fed. Rep. 155; L. A. Thompson Scenic R. Co. v. Chestnut Hill Casino Co., (C. C. A.) 127 Fed. Rep. 698; Golden Gate Mfg. Co. v. Newark Faucet Co., (C. C. A.) 130 Fed. Rep. 112; Eaton, etc., Co. v. Wadsworth, (C. C. A.) 130 Fed. Rep. 702; Spencer Elevator Safety Guard Co. v. Beifeld, (C. C. A.) 130 Fed. Rep. 888; American Electrical Novelty, etc., Co. v. Howard Electrical Novelty Co., 131 Fed. Rep. 495; Higgin Mfg. Co. v. Murdock, (C. C. A.) 132 Fed. Rep. 810; Western Electric Co. v. Rochester Telephone Co., 132 Fed. Rep. 814; I. B. Kleinart Rubber Co. v. Stein, (C. C. A.) 133 Fed. Rep. 228; Folger v. Dow Portable Electric Co., (C. C. A.) 133 Fed. Rep. 295; Western Electric Co. v. Anthracite Telephone Co., (C. C. A.) 133 Fed. Rep. 547; Decker v. Sanford, 135 Fed. Rep. 112; Jenkins v. Mahoney, 135 Fed. Rep. 550; Voightmann v. Perkinson, (C. C. A.) 138 Fed. Rep. 56; *In re Colton*, 21 App. Cas. (D. C.) 17; Kemp v. Chown, 7 Can. Exch. 306.

286. 3. *Valvona v. D'Adamo*, 135 Fed. Rep. 544.

4. Slight Invention Patentable. — Hale, etc., Mfg. Co. v. Onconta, etc., R. Co., 124 Fed. Rep. 514; Bechtold v. Nowacke, 131 Fed. Rep. 275.

287. 1. *Simplicity or Obviousness Not Necessarily a Bar.* — Galvin v. Grand Rapids, (C. C. A.) 115 Fed. Rep. 511; Hanifen v. Armitage, 117 Fed. Rep. 845; Armat Moving Picture Co. v. American Mutoscope Co., 118 Fed. Rep. 840;

Weston Electrical Instrument Co. v. Stevens, 119 Fed. Rep. 181; Regent Mfg. Co. v. Penn Electrical, etc., Co., (C. C. A.) 121 Fed. Rep. 80; Faries Mfg. Co. v. Brown, (C. C. A.) 121 Fed. Rep. 547; Doig v. Morgan Mach. Co., (C. C. A.) 122 Fed. Rep. 460; Marcus v. Sutton, 124 Fed. Rep. 74; Farmers' Mfg. Co. v. Spruks Mfg. Co., (C. C. A.) 127 Fed. Rep. 691; Albright v. Langfeld, 131 Fed. Rep. 473; Manhattan Gen. Constr. Co. v. Helios-Upton Co., 135 Fed. Rep. 785; Curtis v. Atlas Co., 136 Fed. Rep. 222; H. C. Cook Co. v. Little River Mfg. Co., 136 Fed. Rep. 414; Bates Mach. Co. v. Wetter Numbering Mach. Co., 136 Fed. Rep. 776; Bradley v. Eccles, 138 Fed. Rep. 917; Keasbey, etc., Co. v. Philip Carey Mfg. Co., 139 Fed. Rep. 571.

Simplicity of Process Not Test of Invention. — U. S. Mitis Co. v. Midvale Steel Co., 135 Fed. Rep. 103.

2. *Brunswick-Balke-Collender Co. v. Klumpp*, (C. C. A.) 131 Fed. Rep. 255; Wilkin v. Hill, 131 Fed. Rep. 762; Buchanan v. Perkins Electric Switch Mfg. Co., (C. C. A.) 135 Fed. Rep. 00. See also *Ferry v. Waring Hat Mfg. Co.*, 120 Fed. Rep. 380.

5. *Change in Size or Proportions.* — Galvin v. Grand Rapids, (C. C. A.) 115 Fed. Rep. 511; Hurlbut v. U. S. Mailing Tube Co., 119 Fed. Rep. 188; Eames v. Worcester Polytechnic Institute, (C. C. A.) 123 Fed. Rep. 67; Fay v. Mason, (C. C. A.) 127 Fed. Rep. 325; Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co., 132 Fed. Rep. 614; Crown Cork, etc., Co. v. Standard Stopper Co., (C. C. A.) 136 Fed. Rep. 841.

288. 1. *Carrying Forward Old Idea.* — Galvin v. Grand Rapids, (C. C. A.) 115 Fed. Rep. 511; Eames v. Worcester Polytechnic Institute, (C. C. A.) 123 Fed. Rep. 67; Fay v. Mason, (C. C. A.) 127 Fed. Rep. 325; Sanitas Nut Food Co. v. Voigt, (C. C. A.) 139 Fed. Rep. 551; Voightmann v. Weis, etc., Cornice Co., 133 Fed. Rep. 208; Sloan Filter Co. v. Portland Gold Min. Co., (C. C. A.) 139 Fed. Rep. 23; *In re Iwan*, 17 App. Cas. (D. C.) 566; *In re Klemm*, 21 App. Cas. (D. C.) 186.

3. *More Change of Form Not Invention.* — Ide v. Trolicht, etc., Carpet Co., (C. C. A.) 115 Fed. Rep. 137; Durfee v. Bawo, 118 Fed. Rep. 853; Adam v. Folger, (C. C. A.) 120 Fed. Rep. 260; Drake Castle Pressed Steel Lug Co. v. Brownell, (C. C. A.) 123 Fed. Rep. 86; Julius King Optical Co. v. Bilhoefer, 124 Fed. Rep. 521; Rumford Chemical Works v. New York Baking Powder Co., 125 Fed. Rep. 231, *modified* (C. C. A.) 134 Fed. Rep. 385; Fay v. Mason, (C. C. A.) 127 Fed. Rep. 325; Albright v. Langfeld, 131 Fed. Rep. 473; Calculagraph Co. v. Wilson, 132 Fed. Rep. 20; Bredin v. Solmson, 132 Fed. Rep. 161; Solmson v. Bredin, (C. C. A.) 136 Fed. Rep. 187; Crown Cork, etc., Co. v. Standard Stopper Co., (C. C. A.) 136 Fed.

289. See notes 1, 3.

(e) Change in Location of Parts or Sequence of Operation. — See notes 5, 6.

290. (f) Change of Material. — See notes 1, 2, 3, 5.

291. (g) Duplication or Multiplication of Parts. — See note 2.

(h) Omission of Parts. — See notes 4, 6, 7.

(i) Substitution of Equivalents — *aa*. STATEMENT OF RULE. — See note 10.

292. *bb*. WHAT CONSTITUTE EQUIVALENTS. — See note 2.

293. (j) Combination and Aggregation — Statement of Rule. — See notes 2, 3.

Rep. 841; Pennsylvania Globe Gaslight Co. v. Best, 137 Fed. Rep. 940; International Mfg. Co. v. H. F. Brammer Mfg. Co., (C. C. A.) 138 Fed. Rep. 396; Capewell v. Goldsmith, 138 Fed. Rep. 682; *In re Iwan*, 17 App. Cas. (D. C.) 566. See also Westinghouse Air Brake Co. v. New York Air Brake Co., 112 Fed. Rep. 424; Weston Electrical Instrument Co. v. Stevens, 119 Fed. Rep. 181; Sanitas Nut Food Co. v. Voigt, (C. C. A.) 139 Fed. Rep. 551.

288. 4. Change Involving Mechanical Improvement. — *Galvin v. Grand Rapids*, (C. C. A.) 115 Fed. Rep. 511; *Pettibone v. Pennsylvania Steel Co.*, 133 Fed. Rep. 730.

289. 1. New Principles, Mode of Operation, or Effect. — *Hirsch v. Union Stoveworks*, 126 Fed. Rep. 189; *Rumford Chemical Works v. New York Baking Powder Co.*, (C. C. A.) 134 Fed. Rep. 385.

3. Form the Substance of the Invention. — *Ide v. Trorlicht, etc.*, Carpet Co., (C. C. A.) 115 Fed. Rep. 137.

5. Change in Location of Parts. — *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, (C. C. A.) 118 Fed. Rep. 136; *Tripold v. Myers*, 120 Fed. Rep. 301; *Parramore v. Stein*, 125 Fed. Rep. 19, *affirmed* 133 Fed. Rep. 228; *National Automatic Weighing Mach. Co. v. Daab*, 136 Fed. Rep. 891; *Pennsylvania Globe Gaslight Co. v. Best*, 137 Fed. Rep. 940.

6. *Adam v. Folger*, (C. C. A.) 120 Fed. Rep. 260; *Pettibone v. Pennsylvania Steel Co.*, 133 Fed. Rep. 730.

290. 1. Substitution of Material Not Invention. — *Union Hardware Co. v. Selchow*, 112 Fed. Rep. 1006; *Anderson v. Collins*, (C. C. A.) 122 Fed. Rep. 451; *Daniel v. Renstein*, 131 Fed. Rep. 469; *Crown Cork, etc., Co. v. Standard Stoooper Co.*, (C. C. A.) 136 Fed. Rep. 841.

The Mere Substitution of Steel or Wrought Iron for Cast Iron is not invention. *Drake Castle Pressed Steel Lug Co. v. Brownell*, (C. C. A.) 123 Fed. Rep. 86.

2. New Device Cheaper and Better. — *Union Hardware Co. v. Selchow*, 112 Fed. Rep. 1006; *National Tooth Crown Co. v. Macdonald*, 117 Fed. Rep. 617; *Drake Castle Pressed Steel Lug Co. v. Brownell*, (C. C. A.) 123 Fed. Rep. 86.

3. Change Producing New Result. — *George Frost Co. v. Cohn*, 112 Fed. Rep. 1009, *affirmed* (C. C. A.) 119 Fed. Rep. 505; *National Tooth Crown Co. v. Macdonald*, 117 Fed. Rep. 617; *Drake Castle Pressed Steel Lug Co. v. Brownell*, (C. C. A.) 123 Fed. Rep. 86.

5. Substitution Producing New Properties. — See *Union Hardware Co. v. Selchow*, 112 Fed. Rep. 1006.

291. 2. Duplication of Parts Not Invention. — *Burnham v. Union Mfg. Co.*, (C. C. A.) 110 Fed. Rep. 765.

4. Omission of Useless Parts Not Invention. —

U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co., (C. C. A.) 125 Fed. Rep. 378; *Solmsion v. Bredin*, (C. C. A.) 136 Fed. Rep. 187; *Curtis v. Atlas Co.*, 136 Fed. Rep. 222; *General Electric Co. v. Yost Electric Mfg. Co.*, (C. C. A.) 139 Fed. Rep. 568; *Eames v. Worcester Polytechnic Institute*, (C. C. A.) 123 Fed. Rep. 67. See also *Standard Caster, etc., Co. v. Caster Socket Co.*, (C. C. A.) 113 Fed. Rep. 162.

Making in One Piece an Article Formerly Made in Two Parts involves no invention. *General Electric Co. v. Yost Electric Mfg. Co.*, 131 Fed. Rep. 874.

6. *Davis v. Perry*, (C. C. A.) 120 Fed. Rep. 941; *Dececo Co. v. George E. Gilchrist Co.*, (C. C. A.) 125 Fed. Rep. 298.

7. See *U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co.*, (C. C. A.) 125 Fed. Rep. 378.

10. Substitution of Equivalents Not Invention. — *Crane Co. v. Baker*, (C. C. A.) 125 Fed. Rep. 1; *U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co.*, (C. C. A.) 125 Fed. Rep. 378; *Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co.*, (C. C. A.) 125 Fed. Rep. 761; *Fay v. Mason*, (C. C. A.) 127 Fed. Rep. 325; *Neptune Meter Co. v. National Meter Co.*, (C. C. A.) 127 Fed. Rep. 563; *Oehrle v. William H. Horstmann Co.*, 131 Fed. Rep. 487; *National Automatic Weighing Mach. Co. v. Daab*, 136 Fed. Rep. 891; *Sloan Filter Co. v. Portland Gold Min. Co.*, (C. C. A.) 139 Fed. Rep. 23; *American Carriage Co. v. Wyeth*, (C. C. A.) 139 Fed. 389; *In re Iwan*, 17 App. Cas. (D. C.) 566. See also *Crown Cork, etc., Co. v. Imperial Bottle Cap, etc., Co.*, 123 Fed. Rep. 669.

292. 2. What Are Equivalents. — *Kinloch Telephone Co. v. Western Electric Co.*, (C. C. A.) 113 Fed. Rep. 652; *Dowagiac Mfg. Co. v. Brennan*, (C. C. A.) 127 Fed. Rep. 143.

293. 2. Patentable Combination — *England*. *Consolidated Car Heating Co. v. Came*, (1903) A. C. 509, *affirming* 11 Quebec K. B. 103.

Canada. — *Jones v. Galbraith*, 9 British Columbia 521; *Griffin v. Toronto R. Co.*, 7 Can. Exch. 411.

United States. — *Tuscarawas Mfg. Co. v. Cole*, 109 Fed. Rep. 161; *Brown v. Puget Sound Reduction Co.*, 110 Fed. Rep. 383; *Burnham v. Union Mfg. Co.*, (C. C. A.) 110 Fed. Rep. 765; *Sperry Mfg. Co. v. J. L. Owens Co.*, (C. C. A.) 111 Fed. Rep. 388; *Star Brass Works v. General Electric Co.*, (C. C. A.) 111 Fed. Rep. 398; *R. Thomas, etc., Co. v. Electric Porcelain, etc., Co.*, 111 Fed. Rep. 923; *Rolfe Electric Co. v. Sterling Electric Co.*, 113 Fed. Rep. 430; *Severy Process Co. v. Harper*, 113 Fed. Rep. 581; *Hendey Mach. Co. v. Prentiss Tool, etc., Co.*, 113 Fed. Rep. 592; *Kinloch Telephone Co. v. Western Electric Co.*, (C. C. A.) 113 Fed. Rep. 659; *Ide v. Trorlicht, etc.*,

294. Joint Operation Necessary. — See note 1.

295. A Mere Aggregation or Juxtaposition of Devices. — See note 1.

Carpet Co., (C. C. A.) 115 Fed. Rep. 137; Scott v. Tecktonius, 115 Fed. Rep. 157; Cimiotti Unhairing Co. v. American Unhairing Mach. Co., (C. C. A.) 115 Fed. Rep. 498; Galvin v. Grand Rapids, (C. C. A.) 115 Fed. Rep. 511; Dowagiac Mfg. Co. v. Superior Drill Co., (C. C. A.) 115 Fed. Rep. 886; Goodyear Tire, etc., Co. v. Rubber Tire Wheel Co., (C. C. A.) 116 Fed. Rep. 363; Emerson Electric Mfg. Co. v. Van Nort Bros. Electric Co., 116 Fed. Rep. 974; Stillwell-Bierce, etc., Co. v. Eufaula Cotton Oil Co., (C. C. A.) 117 Fed. Rep. 410; Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., (C. C. A.) 118 Fed. Rep. 136; United Shoe Mach. Co. v. Thomas G. Plant Co., 118 Fed. Rep. 163; Moore v. Schaw, 118 Fed. Rep. 602; Weston Electrical Instrument Co. v. Stevens, 119 Fed. Rep. 181; Diamond Drill, etc., Co. v. Kelly, 120 Fed. Rep. 295; Thomson-Houston Electric Co. v. Ohio Brass Co., 129 Fed. Rep. 378; Anderson v. Collins, (C. C. A.) 122 Fed. Rep. 451; Klauder-Weldon Dyeing Mach. Co. v. Steadwell Dyeing Mach. Co., 122 Fed. Rep. 640, *affirmed* (C. C. A.) 128 Fed. Rep. 724; Eames v. Worcester Polytechnic Institute, (C. C. A.) 123 Fed. Rep. 67; Lamson Consol. Store Service Co. v. Hillman, (C. C. A.) 123 Fed. Rep. 416; Hale, etc., Mfg. Co. v. Oneonta, etc., R. Co., 124 Fed. Rep. 514; Van Epps v. International Paper Co., 124 Fed. Rep. 542; Brill v. North Jersey St. R. Co., 124 Fed. Rep. 778, (C. C. A.) 134 Fed. Rep. 580; Crane Co. v. Baker, (C. C. A.) 125 Fed. Rep. 1; Milwaukee Carving Co. v. Brunswick-Balke Collender Co., (C. C. A.) 126 Fed. Rep. 171; Rodiger v. Thaddeus Davids Mfg. Co., 126 Fed. Rep. 960, *affirmed* 133 Fed. Rep. 1021; Boyer v. Keller Tool Co., (C. C. A.) 127 Fed. Rep. 130; National Casket Co. v. Stoltz, 127 Fed. Rep. 158; Cayuta Wheel, etc., Co. v. Kennedy Valve Mfg. Co., 127 Fed. Rep. 355; Farmers' Mfg. Co. v. Spruks Mfg. Co., (C. C. A.) 127 Fed. Rep. 691; Heekin v. Baker, 127 Fed. Rep. 828; Sanders v. Hancock, (C. C. A.) 128 Fed. Rep. 424; McMichael, etc., Mfg. Co. v. Ruth, (C. C. A.) 128 Fed. Rep. 706; Perkins Electric Switch Mfg. Co. v. Buchanan, 129 Fed. Rep. 134; Hale, etc., Mfg. Co. v. Oneonta, etc., R. Co., 129 Fed. Rep. 508; Golden Gate Mfg. Co. v. Newark Faucet Co., (C. C. A.) 130 Fed. Rep. 112; Eldred v. Kirkland, (C. C. A.) 130 Fed. Rep. 343; Thomson-Houston Electric Co. v. Ohio Brass Co., 130 Fed. Rep. 542; Westinghouse Electric, etc., Co. v. American Transformer Co., 130 Fed. Rep. 550; Timolat v. Philadelphia Pneumatic Tool Co., 131 Fed. Rep. 258; Bechtold v. Nowacke, 131 Fed. Rep. 275; Daniel v. Restein, 131 Fed. Rep. 460; Eck v. Kutz, 132 Fed. Rep. 758; National Waistband Co. v. Monheit, 133 Fed. Rep. 310; A. R. Milner Seating Co. v. Yesbera, (C. C. A.) 133 Fed. Rep. 916; Raymond v. Keystone Lantern Co., (C. C. A.) 134 Fed. Rep. 866; J. Stevens Arms, etc., Co. v. Davenport, (C. C. A.) 134 Fed. Rep. 869; Thomson-Houston Electric Co. v. Black River Traction Co., (C. C. A.) 135 Fed. Rep. 750; Ries v. Barth Mfg. Co., (C. C. A.) 136 Fed.

Rep. 851; Universal Winding Co. v. Foster Mach. Co., 136 Fed. Rep. 879; Kotten v. Knight, 137 Fed. Rep. 597; James Heekin Co. v. Baker, (C. C. A.) 138 Fed. Rep. 63; Iron-clad Mfg. Co. v. Dairymen's Mfg. Co., 138 Fed. Rep. 123; United Shirt, etc., Co. v. Beattie, 138 Fed. Rep. 136; International Mfg. Co. v. H. F. Brammer Mfg. Co., (C. C. A.) 138 Fed. Rep. 396; Loew Supply, etc., Co. v. Fred Miller Brewing Co., (C. C. A.) 138 Fed. Rep. 886; Bradley v. Eccles, 138 Fed. Rep. 917; Eastman Kodak Co. v. Anthony, etc., Co., 139 Fed. Rep. 36; Imperial Bottle Cap, etc., Co. v. Crown Cork, etc., Co., (C. C. A.) 139 Fed. Rep. 312. See also Virgil Practice Clavier Co. v. Virgil, 138 Fed. Rep. 897.

District of Columbia. — *In re McNeill*, 20 App. Cas. (D. C.) 294; *In re Klemm*, 21 App. Cas. (D. C.) 186. See also Blackford v. Wilder, 21 App. Cas. (D. C.) 1.

293. 3. Combination Involving Only Mechanical Skill. — *J. L. Mott Iron Works v. Hoffman, etc., Mfg. Co.*, 110 Fed. Rep. 772, *affirmed* (C. C. A.) 120 Fed. Rep. 1019; *Wilfley v. Denver Engineering Works Co.*, 111 Fed. Rep. 760; *Western Electric Co. v. Anthracite Telephone Co.*, 113 Fed. Rep. 834; *Consolidated Rubber Tire Co. v. Finley Rubber Tire Co.*, 116 Fed. Rep. 629; *American Saddle Co. v. Sager Gear Co.*, 122 Fed. Rep. 645; *Fairbanks, etc., Co. v. Stickney*, (C. C. A.) 123 Fed. Rep. 79; *Wilson v. Townley Shingle Co.*, (C. C. A.) 125 Fed. Rep. 491; *L. A. Thompson Scenic R. Co. v. Chestnut Hill Casino Co.*, (C. C. A.) 127 Fed. Rep. 698; *American Delinter Co. v. American Machinery, etc., Co.*, (C. C. A.) 128 Fed. Rep. 709; *Western Electric Co. v. North Electric Co.*, (C. C. A.) 135 Fed. Rep. 79; *Van Epps v. United Box Board, etc., Co.*, 137 Fed. Rep. 418; *American Caramel Co. v. Mills*, 138 Fed. Rep. 143; *Marconi Wireless Tel. Co. v. De Forest Wireless Tel. Co.*, 138 Fed. Rep. 657; *Capewell v. Goldsmith*, 138 Fed. Rep. 682; *McKenzie Furnace Co. v. Green Engineering Co.*, (C. C. A.) 138 Fed. Rep. 830.

294. 1. Patentable Combinations — Joint Operation Necessary. — *Diamond Match Co. v. Ruby Match Co.*, 127 Fed. Rep. 341, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 204; *J. L. Mott Iron Works v. Hoffmann, etc., Mfg. Co.*, 110 Fed. Rep. 772, *affirmed* (C. C. A.) 120 Fed. Rep. 1019; *Regent Mfg. Co. v. Penn Electrical, etc., Co.*, (C. C. A.) 121 Fed. Rep. 80; *Brookfield v. Novelty Glass Mfg. Co.*, 124 Fed. Rep. 551; *L. A. Thompson Scenic R. Co. v. Chestnut Hill Casino Co.*, (C. C. A.) 127 Fed. Rep. 698; *Pennsylvania Globe Gaslight Co. v. Best*, 137 Fed. Rep. 940; *Voightmann v. Weis, etc., Cornice Co.*, 133 Fed. Rep. 298; *Voightman v. Perkinson*, 133 Fed. Rep. 934; *Buchanan v. Perkins Electric Switch Mfg. Co.*, (C. C. A.) 135 Fed. Rep. 00; *West Boylston Mfg. Co. v. Wallace*, 137 Fed. Rep. 022.

295. 1. Aggregation Not Patentable Invention. — *Walker Patent Pivoted Bin Co. v. Brown*, 110 Fed. Rep. 640; *Sperry Mfg. Co. v. I. L. Owens Co.*, (C. C. A.) 111 Fed. Rep. 388; *Wilfley v. Denver Engineering Works Co.*, 111

296. (k) Application to New Use — *aa*. ORDINARILY NOT PATENTABLE. — See note 1.

297. See note 1.

bb EXCEPTION TO RULE. — See notes 7, 9.

298. See notes 1, 2.

(1) Designs. — See note 5.

299. (m) Reduction to Practical Use or Operation. — See notes 1, 3.

What Constitutes Reduction to Practical Use or Operation. — See note 6.

300. See note 2.

Fed. Rep. 760; West Coast Safety Faucet Co. *v.* Jackson Brewing Co., (C. C. A.) 117 Fed. Rep. 295; Wisconsin Compressed Air House Cleaning Co. *v.* American Compressed Air Cleaning Co., (C. C. A.) 125 Fed. Rep. 761; Self-Sealing Can Co. *v.* Hocker, 136 Fed. Rep. 418; Regina Co. *v.* New Century Music Box Co., 138 Fed. Rep. 903; *In re* McNeill, 20 App. Cas. (D. C.) 294; *In re* Davenport, 23 App. Cas. (D. C.) 370; *In re* Seabury, 23 App. Cas. (D. C.) 377; *In re* Adams, 24 App. Cas. (D. C.) 275.

296. 1. Application to Analogous Use Not Patentable. — *De Lamar v. De Lamar Min. Co.*, 110 Fed. Rep. 538, *affirmed* (C. C. A.) 117 Fed. Rep. 240; Standard Caster, etc., Co. *v.* Caster Socket Co., (C. C. A.) 113 Fed. Rep. 162; Sanford Mills *v.* Massachusetts Mohair Plush Co., (C. C. A.) 119 Fed. Rep. 355; Coates *v.* Boker, (C. C. A.) 119 Fed. Rep. 358; Diamond Drill, etc., Co. *v.* Kelly, 120 Fed. Rep. 289; Farrell *v.* Boston, etc., Consol. Copper, etc., Min. Co., 121 Fed. Rep. 841; Colts' Patent Firearms Mfg. Co. *v.* Wesson, 122 Fed. Rep. 90, *affirmed* (C. C. A.) 127 Fed. Rep. 333; Antisdel *v.* Bent, 122 Fed. Rep. 811; Westinghouse Electric, etc., Co. *v.* Roberts, 125 Fed. Rep. 6; Brown *v.* Crane Co., 125 Fed. Rep. 34, (C. C. A.) 133 Fed. Rep. 235; Cleveland Foundry Co. *v.* Kaufmann, 126 Fed. Rep. 658; Kip-Armstrong Co. *v.* King Philip Mills, 130 Fed. Rep. 28; Cook *v.* Heywood Bros., etc., Co., 131 Fed. Rep. 755; Capewell *v.* Goldsmith, 138 Fed. Rep. 682; Sanitary Fireproofing, etc., Co. *v.* Sprickerhoff, (C. C. A.) 139 Fed. Rep. 801; *In re* Foster, 19 App. Cas. (D. C.) 391.

The Discovery of an Enlarged Use is not of itself a patentable invention. Voightman *v.* Perkinson, (C. C. A.) 138 Fed. Rep. 56.

297. 1. Bryant Electric Co. *v.* Electric Protection Co., 110 Fed. Rep. 215; R. Thomas, etc., Co. *v.* Electric Porcelain, etc., Co., 111 Fed. Rep. 923; Metz *v.* Johnson, 112 Fed. Rep. 1014; Dowagiac Mfg. Co. *v.* Superior Drill Co., (C. C. A.) 115 Fed. Rep. 886; Eames *v.* Worcester Polytechnic Institute, (C. C. A.) 123 Fed. Rep. 67; Neptune Meter Co. *v.* National Meter Co., (C. C. A.) 127 Fed. Rep. 563; Cleveland Foundry Co. *v.* Detroit Vapor Stove Co., (C. C. A.) 131 Fed. Rep. 853; Mallon *v.* Gregg, (C. C. A.) 137 Fed. Rep. 68; Scott *v.* Fisher Knitting Mach. Co., 139 Fed. Rep. 137.

7. Application Producing New and Different Result Patentable. — Diamond Drill, etc., Co. *v.* Kelly, 120 Fed. Rep. 289; Hale, etc., Mfg. Co. *v.* Oneonta, etc., R. Co., 124 Fed. Rep. 514. See also Howell Torpedo Co. *v.* E. W. Bliss Co., 111 Fed. Rep. 906.

9. New Use Involving Only Mechanical Skill. —

Johnson Co. *v.* Toledo Traction Co., (C. C. A.) 119 Fed. Rep. 885; Thomson-Houston Electric Co. *v.* Ohio Brass Co., 130 Fed. Rep. 542; Mallon *v.* Gregg, (C. C. A.) 137 Fed. Rep. 68.

298. 1. New Use Involving Invention. — Johnson Co. *v.* Toledo Traction Co., (C. C. A.) 119 Fed. Rep. 885; Cleveland Foundry Co. *v.* Kauffman, (C. C. A.) 135 Fed. Rep. 360; Mallon *v.* Gregg, (C. C. A.) 137 Fed. Rep. 68; Kip-Armstrong Co. *v.* King Philip Mills, 130 Fed. Rep. 28.

2. Nature of Changes Required. — Thomson-Houston Electric Co. *v.* Ohio Brass Co., 130 Fed. Rep. 542.

5. Design Patents Void for Want of Invention. — General Gaslight Co. *v.* Matchless Mfg. Co., 129 Fed. Rep. 137.

299. 1. Reduction to Practical Use or Operation Necessary. — Diamond Drill, etc., Co. *v.* Kelly, 120 Fed. Rep. 289; Fowler *v.* New York City, (C. C. A.) 121 Fed. Rep. 747; National Meter Co. *v.* Neptune Meter Co., 122 Fed. Rep. 82, *affirmed* (C. C. A.) 129 Fed. Rep. 124; Electric Smelting, etc., Co. *v.* Pittsburg Reduction Co., (C. C. A.) 125 Fed. Rep. 926; Diamond Match Co. *v.* Ruby Match Co., 127 Fed. Rep. 341; Standard Scale, etc., Co. *v.* McDonald, 127 Fed. Rep. 709; Kirchberger *v.* American Acetylene Burner Co., (C. C. A.) 128 Fed. Rep. 599; Voightmann *v.* Perkinson, (C. C. A.) 138 Fed. Rep. 56; Manhattan Gen. Constr. Co. *v.* Helios-Upton Co., 135 Fed. Rep. 785. See also General Electric Co. *v.* Brooklyn Heights R. Co., 118 Fed. Rep. 154; Murray *v.* Orr, etc., Hardware Co., (C. C. A.) 138 Fed. Rep. 564.

Presumption Exists that Patented Device Is Operative. — Schlicht, etc., Co. *v.* Æolipyle Co., 117 Fed. Rep. 299.

Patent for Inoperative Machine Void. — See Continental Wire Fence Co. *v.* Pendergast, 126 Fed. Rep. 381.

3. First Reduction to Practical Use. — Kalamazoo R. Supply Co. *v.* Duff Mfg. Co., (C. C. A.) 113 Fed. Rep. 264; Van Epps *v.* International Paper Co., 124 Fed. Rep. 542; Hale, etc., Mfg. Co. *v.* Oneonta, etc., R. Co., 129 Fed. Rep. 598; Letson *v.* Alaska Packers' Assoc., (C. C. A.) 130 Fed. Rep. 129; Marconi Wireless Tel. Co. *v.* De Forest Wireless Tel. Co., 138 Fed. Rep. 657. See also Lorain Steel Co. *v.* New York Switch, etc., Co., 124 Fed. Rep. 548.

6. Highest Degree of Perfection Unnecessary. — Westinghouse Electric, etc., Co. *v.* Stanley Instrument Co., (C. C. A.) 133 Fed. Rep. 167.

300. 2. Application for Patent. — Westinghouse Electric, etc., Co. *v.* Stanley Instrument Co., (C. C. A.) 133 Fed. Rep. 167.

300. *c. EVIDENCE OF INVENTION — (1) Presumptions and Burden of Proof.* — See notes 5, 7, 8.

(2) *Prior State of Art.* — See note 10.

301. (3) *Novelty and Utility* — General Rule Stated. — See notes 4, 5, 8.

300. 5. *Patent Prima Facie Evidence of Invention.* — *White v. Peerless Rubber Mfg. Co.*, 111 Fed. Rep. 190; *Kinloch Telephone Co. v. Western Electric Co.*, (C. C. A.) 113 Fed. Rep. 659; *Hutter v. Broome*, 114 Fed. Rep. 655; *Consolidated Rubber Tire Co. v. Finley Rubber Tire Co.*, 116 Fed. Rep. 629; *American Sales Book Co. v. Bullivant*, (C. C. A.) 117 Fed. Rep. 255; *Calhoun v. Southern Cotton Oil Co.*, 120 Fed. Rep. 513; *American Saddle Co. v. Sager Gear Co.*, 122 Fed. Rep. 645; *Wheel Truing Brake Shoe Co. v. Car Wheel Truing Brake Shoe Co.*, 124 Fed. Rep. 902; *National Tube Co. v. Spang*, 125 Fed. Rep. 22; *Mallon v. Gregg*, 126 Fed. Rep. 377; *McMichael, etc., Mfg. Co. v. Ruth*, (C. C. A.) 128 Fed. Rep. 706; *De Laval Separator Co. v. Vermont Farm Mach. Co.*, (C. C. A.) 135 Fed. Rep. 772; *Atwood-Morrison Co. v. Sipp Electric, etc., Co.*, 136 Fed. Rep. 859; *General Electric Co. v. Campbell*, 137 Fed. Rep. 600; *Kline Chair Co. v. Kochs*, 138 Fed. Rep. 90; *Ironclad Mfg. Co. v. Dairymen's Mfg. Co.*, 138 Fed. Rep. 123; *United Shirt, etc., Co. v. Beattie*, 138 Fed. Rep. 136. See also *Bowers v. Bucyrus Co.*, 132 Fed. Rep. 39.

7. *Doubts Resolved in Favor of Patentee.* — *Cleveland Foundry Co. v. Kauffman*, (C. C. A.) 135 Fed. Rep. 360.

A Patent Is to Be Declared Void upon Its Face only when there is no room for thinking that any evidence can be adduced which would, if put into the case, alter the clear conviction of the court that there is no patentable invention in the production patented. *Drake Castle Pressed Steel Lug Co. v. Brownell*, (C. C. A.) 123 Fed. Rep. 86.

8. *Prior and Subsequent Patents.* — *Doig v. Morgan Mach. Co.*, 117 Fed. Rep. 305, *affirmed* (C. C. A.) 122 Fed. Rep. 460; *Milwaukee Carving Co. v. Brunswick-Balke Collender Co.*, (C. C. A.) 126 Fed. Rep. 171; *New Jersey Wire Cloth Co. v. Buffalo Expanded Metal Co.*, 131 Fed. Rep. 265. See also *American Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co.*, 123 Fed. Rep. 891; *Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co.*, (C. C. A.) 125 Fed. Rep. 761.

How Presumption Overcome by Presumption of Correctness of Court's Finding. — *Anderson v. Collins*, (C. C. A.) 122 Fed. Rep. 451.

10. *Prior State of Art Considered.* — *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 198 U. S. 399; *Smidth v. Gates Iron Works*, 110 Fed. Rep. 751; *Kinloch Telephone Co. v. Western Electric Co.*, (C. C. A.) 113 Fed. Rep. 659; *Brookfield v. Novelty Glass Mfg. Co.*, 124 Fed. Rep. 551; *Ajax Forge Co. v. Pettibone*, (C. C. A.) 125 Fed. Rep. 748; *Milwaukee Carving Co. v. Brunswick-Balke Collender Co.*, (C. C. A.) 126 Fed. Rep. 171; *Evans v. Newark Rivet Works*, (C. C. A.) 126 Fed. Rep. 492; *Jones v. Cyphers*, (C. C. A.) 126 Fed. Rep. 753; *Westinghouse Mach. Co. v. Press Pub. Co.*, 127 Fed. Rep. 822; *Folger v. Dow Portable Electric Co.*, 128 Fed. Rep. 45, *affirmed* (C. C. A.) 133 Fed. Rep. 295; *American Delinter Co.*

v. American Machinery, etc., Co., (C. C. A.) 128 Fed. Rep. 709; *American Soda Fountain Co. v. Sample*, (C. C. A.) 130 Fed. Rep. 145; *Thomson-Houston Electric Co. v. Ohio Brass Co.*, 130 Fed. Rep. 542; *Western Telephone Mfg. Co. v. American Electric Telephone Co.*, (C. C. A.) 131 Fed. Rep. 75; *Ideal Stopper Co. v. Crown Cork, etc., Co.*, (C. C. A.) 131 Fed. Rep. 244; *New Jersey Wire Cloth Co. v. Buffalo Expanded Metal Co.*, 131 Fed. Rep. 265; *Oehrle v. William H. Horstmann Co.*, 131 Fed. Rep. 487; *American Electrical Novelty, etc., Co. v. Howard Electrical Novelty Co.*, 131 Fed. Rep. 495; *Cook v. Heywood Bros., etc., Co.*, 131 Fed. Rep. 755; *Fries v. Leeming*, 131 Fed. Rep. 765; *Western Electric Co. v. Rochester Telephone Co.*, 132 Fed. Rep. 814; *Brown v. Crane Co.*, (C. C. A.) 133 Fed. Rep. 235; *Parsons v. New Home Sewing Mach. Co.*, (C. C. A.) 134 Fed. Rep. 394; *U. S. Whip Co. v. Hassler*, 134 Fed. Rep. 398; *Weston Electrical Instrument Co. v. Stevens*, (C. C. A.) 134 Fed. Rep. 574; *North Jersey St. R. Co. v. Brill*, (C. C. A.) 134 Fed. Rep. 580; *J. Stevens Arms, etc., Co. v. Davenport*, (C. C. A.) 134 Fed. Rep. 869; *Æolian Co. v. Hallett, etc., Piano Co.*, 134 Fed. Rep. 872; *Western Electric Co. v. North Electric Co.*, (C. C. A.) 135 Fed. Rep. 79; *Decker v. Sanford*, 135 Fed. Rep. 112; *Kahn v. Starrells*, (C. C. A.) 135 Fed. Rep. 532; *Crown Cork, etc., Co. v. Standard Stopper Co.*, 136 Fed. Rep. 199, 841; *Universal Winding Co. v. Foster Mach. Co.*, 136 Fed. Rep. 889; *Shepard v. Excelsior Steel Furnace Co.*, (C. C. A.) 137 Fed. Rep. 399; *Van Epps v. United Box Board, etc., Co.*, 137 Fed. Rep. 418; *American Electric Novelty, etc., Co. v. Howard Electric Novelty Co.*, (C. C. A.) 137 Fed. Rep. 913; *Mica Insulator Co. v. Union Mica Co.*, 137 Fed. Rep. 928; *Pennsylvania Globe Gaslight Co. v. Best*, 137 Fed. Rep. 940; *Hemolin Co. v. Harway Dyewood, etc., Mfg. Co.*, (C. C. A.) 138 Fed. Rep. 54; *Ironclad Mfg. Co. v. Dairymen's Mfg. Co.*, 138 Fed. Rep. 123; *In re Millett*, 18 App. Cas. (D. C.) 186; *Stapleton v. Kinney*, 18 App. Cas. (D. C.) 394; *In re Adams*, 24 App. Cas. (D. C.) 275; *Servis Railroad Tie Plate Co. v. Hamilton Steel, etc., Co.*, 8 Can. Exch. 381. See also *General Electric Co. v. Campbell*, 137 Fed. Rep. 600; *McGill v. Whitehead, etc., Co.*, 137 Fed. Rep. 97.

301. 4. *Novelty and Utility Evidence of Invention.* — *Brickill v. New York City*, (C. C. A.) 112 Fed. Rep. 65; *American Sales Book Co. v. Bullivant*, (C. C. A.) 117 Fed. Rep. 255; *Regent Mfg. Co. v. Penn Electrical, etc., Co.*, (C. C. A.) 121 Fed. Rep. 80; *Cleveland Foundry Co. v. Detroit Vapor Stove Co.*, (C. C. A.) 131 Fed. Rep. 853; *Buchanan v. Perkins Electric Switch Mfg. Co.*, (C. C. A.) 135 Fed. Rep. 90; *Manhattan Gen. Constr. Co. v. Helios-Upton Co.*, 135 Fed. Rep. 785; *Bates Mach. Co. v. Wetter Numbering Machine Co.*, 136 Fed. Rep. 776; *Imperial Bottle Cap, etc., Co. v. Crown Cork, etc., Co.*, (C. C. A.) 139 Fed. Rep. 312. See also *New Jersey Wire Cloth*

302. See note 2.(4) *Ineffectual Attempts by Former Experimenters.* — See notes

9, 11.

303. (5) *Extent of Adoption and Use.* — See notes 4, 5.**304.** See notes 1, 2, 4, 7.(6) *Other Matters* — *The History of the Alleged Invention.* — See note 13.**305.** Continued Experiment. — See note 1.

Failure to Claim a Specific Element. — See note 4.

Co. v. Buffalo Expanded Metal Co., 131 Fed. Rep. 265; United Shoe Machinery Co. v. Greene, 115 Fed. Rep. 155, (C. C. A.) 132 Fed. Rep. 973; Chicago Wooden Ware Co. v. Miller Ladder Co., (C. C. A.) 133 Fed. Rep. 541.

301. 5. Reason for Rule. — Davis v. Perry, (C. C. A.) 120 Fed. Rep. 941.

8. Novelty and Utility Not Final Test. — Cleveland Foundry Co. v. Detroit Vapor Stove Co., 131 Fed. Rep. 740.

302. 2. Utility Decisive Only in Cases of Doubt. — Sperry Mfg. Co. v. J. L. Owens Co., (C. C. A.) 111 Fed. Rep. 388. See also Union Biscuit Co. v. Peters, (C. C. A.) 125 Fed. Rep. 601.

9. Previous Unsuccessful Experiments. — Star Brass Works v. General Electric Co., (C. C. A.) 111 Fed. Rep. 398; Hobbs Mfg. Co. v. Gooding, (C. C. A.) 111 Fed. Rep. 403; Wilfley v. Denver Engineering Works Co., 111 Fed. Rep. 760; Brunswick Balke-Collender Co. v. Thum, (C. C. A.) 111 Fed. Rep. 904; Hutter v. Broome, 114 Fed. Rep. 655; Ide v. Trorlicht, etc., Carpet Co., (C. C. A.) 115 Fed. Rep. 137; Dowagiac Mfg. Co. v. Superior Drill Co., (C. C. A.) 115 Fed. Rep. 886; Thomson-Houston Electric Co. v. Lorain Steel Co., (C. C. A.) 117 Fed. Rep. 249; Hanifen v. Armitage, 117 Fed. Rep. 845; Armat Moving Picture Co. v. American Mutoscope Co., 118 Fed. Rep. 840; George Frost Co. v. Cohn, (C. C. A.) 119 Fed. Rep. 505; Faries Mfg. Co. v. Brown, (C. C. A.) 121 Fed. Rep. 547; Anderson v. Collins, (C. C. A.) 122 Fed. Rep. 451; Doig v. Morgan Mach. Co., (C. C. A.) 122 Fed. Rep. 460; Bradley v. Eccles, 122 Fed. Rep. 867, *affirmed* (C. C. A.) 126 Fed. Rep. 945; Hale, etc., Mfg. Co. v. Oneonta, etc., R. Co., 124 Fed. Rep. 514; Standard Scales, etc., Co. v. Fairbanks, (C. C. A.) 125 Fed. Rep. 4; Electric Smelting, etc., Co. v. Pittsburg Reduction Co., (C. C. A.) 125 Fed. Rep. 926; Farmers' Mfg. Co. v. Spruks Mfg. Co., (C. C. A.) 127 Fed. Rep. 691; Letson v. Alaska Packers Assoc., (C. C. A.) 130 Fed. Rep. 129; Brown v. Huntington Piano Co., 131 Fed. Rep. 273, *affirmed* (C. C. A.) 134 Fed. Rep. 735; Albright v. Langfeld, 131 Fed. Rep. 473; Eck v. Kutz, 132 Fed. Rep. 758; Imperial Bottle Cap, etc., Co. v. Crown Cork, etc., Co., (C. C. A.) 139 Fed. Rep. 312.

11. See Brill v. North Jersey St. R. Co., 124 Fed. Rep. 778, *reversed on the facts* (C. C. A.) 134 Fed. Rep. 580.

303. 4. General and Extensive Use Is Evidence of Invention. — A. R. Milner Seating Co. v. Yesbera, (C. C. A.) 111 Fed. Rep. 386; Starr Brass Works v. General Electric Co., (C. C. A.) 111 Fed. Rep. 400; Brunswick Balke-Collender Co. v. Thum, (C. C. A.) 111 Fed. Rep. 904; Faries Mfg. Co. v. Brown, (C. C. A.) 121 Fed.

Rep. 547; Van Epps v. International Paper Co., 124 Fed. Rep. 542; Brookfield v. Novelty Glass Mfg. Co., 124 Fed. Rep. 551; Burdon Wire, etc., Co. v. Williams, 128 Fed. Rep. 927; Thomson-Houston Electric Co. v. Ohio Brass Co., 130 Fed. Rep. 542; Ideal Stopper Co. v. Crown Cork, etc., Co., (C. C. A.) 131 Fed. Rep. 244; Albright v. Langfeld, 131 Fed. Rep. 473; Cleveland Foundry Co. v. Detroit Vapor Stove Co., (C. C. A.) 131 Fed. Rep. 853; Solmsion v. Bredin, (C. C. A.) 136 Fed. Rep. 187; Crown Cork, etc., Co. v. Standard Stopper Co., 136 Fed. Rep. 199; Curtis v. Atlas Co., 136 Fed. Rep. 222; Ironclad Mfg. Co. v. Dairymen's Mfg. Co., 138 Fed. Rep. 123; Revere Rubber Co. v. Consolidated Hoof Pad Co., 138 Fed. Rep. 899. See also Chicago Wooden Ware Co. v. Miller Ladder Co., (C. C. A.) 133 Fed. Rep. 541; Hobbs Mfg. Co. v. Gooding, (C. C. A.) 111 Fed. Rep. 403.

Conversely, lack of commercial support and favorable consideration is evidence of absence of invention. Raymond v. Keystone Lantern Co., 132 Fed. Rep. 34.

5. Not Conclusive Evidence. — Sanford Mills v. Massachusetts Mohair Plush Co., (C. C. A.) 119 Fed. Rep. 355; Doig v. Morgan Mach. Co., (C. C. A.) 122 Fed. Rep. 460; Union Biscuit Co. v. Peters, (C. C. A.) 125 Fed. Rep. 601; Voightmann v. Weis, etc., Cornice Co., 133 Fed. Rep. 298; Eastman Kodak Co. v. Anthony, etc., Co., 139 Fed. Rep. 36.

304. 1. Reason for Rule. — See Ideal Stopper Co. v. Crown Cork, etc., Co., (C. C. A.) 131 Fed. Rep. 244; Globe-Wernicke Co. v. Fred Macey Co., (C. C. A.) 119 Fed. Rep. 696.

2. Decisive in Doubtful Cases. — Standard Caster, etc., Co. v. Caster Socket Co., (C. C. A.) 113 Fed. Rep. 162; Kalamazoo R. Supply Co. v. Duff Mfg. Co., (C. C. A.) 113 Fed. Rep. 264; Seiler v. Fuller, etc., Mfg. Co., (C. C. A.) 121 Fed. Rep. 85; James Keekin Co. v. Baker, (C. C. A.) 138 Fed. Rep. 63. See also General Electric Co. v. Yost Electric Mfg. Co., 131 Fed. Rep. 874.

4. Regent Mfg. Co. v. Penn Electrical, etc., Co., (C. C. A.) 121 Fed. Rep. 80.

7. Failure of Device to Go into General Use. — Ideal Stopper Co. v. Crown Cork, etc., Co., (C. C. A.) 131 Fed. Rep. 244.

13. The Granting of a Patent After Protracted Examination and Discussion is some evidence of invention. Cleveland Foundry Co. v. Detroit Vapor Stove Co., (C. C. A.) 131 Fed. Rep. 853.

305. 1. Continued Experiments. — Hemolin Co. v. Harway Dyewood, etc., Mfg. Co., 131 Fed. Rep. 483.

4. Windle v. Parks, etc., Mach. Co., (C. C. A.) 134 Fed. Rep. 381.

305. 4. Novelty and Anticipation — *a.* NECESSITY OF NOVELTY. — See note 11.

306. See note 1.

307. *c.* ANTICIPATION — (2) *What Constitutes* — (b) Prior Knowledge or Use — *bb.* NATURE AND EXTENT OF KNOWLEDGE OR USE — In the United States. — See note 8.

In Foreign Country. — See notes 11, 12.

308. *cc.* ACCIDENTAL OR UNINTENTIONAL PRODUCTION. — See note 6.

309. *ee.* CONCEALED INVENTIONS. — See note 1.

ff. REDUCTION TO PRACTICAL USE OR OPERATION. — See notes 6, 10.

305. 11. Novelty Essential. — Daylight Prism Co. *v.* Marcus Prism Co., 110 Fed. Rep. 980; Mahler *v.* Animarium Co., (C. C. A.) 111 Fed. Rep. 530; Brickill *v.* New York City, (C. C. A.) 112 Fed. Rep. 65; Cimiotti Unhairing Co. *v.* American Unhairing Mach. Co., (C. C. A.) 115 Fed. Rep. 498; American Sales Book Co. *v.* Bullivant, (C. C. A.) 117 Fed. Rep. 255; New Departure Mfg. Co. *v.* Sargent, 118 Fed. Rep. 41, *affirmed* (C. C. A.) 127 Fed. Rep. 152; Armat Moving Picture Co. *v.* American Mutoscope Co., 118 Fed. Rep. 840; Redgrave *v.* Singer, 120 Fed. Rep. 306; F. C. Austin Mfg. Co. *v.* American Wellworks, (C. C. A.) 121 Fed. Rep. 76; Mayo Knitting Mach., etc., Co. *v.* Jenckes Mfg. Co., 121 Fed. Rep. 110, *affirmed* (C. C. A.) 133 Fed. Rep. 527; Farrel *v.* United Verde Copper Co., 121 Fed. Rep. 551; Fowler *v.* New York City, (C. C. A.) 121 Fed. Rep. 747; Farrell *v.* Boston, etc., Consol. Copper, etc., Min. Co., 121 Fed. Rep. 841; Anderson *v.* Collins, (C. C. A.) 122 Fed. Rep. 451; American Saddle Co. *v.* Sager Gear Co., 122 Fed. Rep. 645; Antisdel *v.* Bent, 122 Fed. Rep. 811; Wolff *v.* Du Pont de Nemours, 122 Fed. Rep. 944; Sanitas Nut Food Co. *v.* Voigt, (C. C. A.) 139 Fed. Rep. 551; General Electric Co. *v.* Yost Electric Mfg. Co., (C. C. A.) 139 Fed. Rep. 568; Morris Electric Co. *v.* Mayer, etc., Co., 123 Fed. Rep. 311; Tompkins *v.* Terwilliger, 124 Fed. Rep. 545; Jones *v.* Cyphers, (C. C. A.) 126 Fed. Rep. 753; Rodiger *v.* Thaddeus Davids Mfg. Co., 126 Fed. Rep. 960, *affirmed* 133 Fed. Rep. 1021; Cayuta Wheel, etc., Co. *v.* Kennedy Valve Mfg. Co., 127 Fed. Rep. 355; Standard Scale, etc., Co. *v.* McDonald, 127 Fed. Rep. 709; Hale *v.* World Mfg. Co., (C. C. A.) 127 Fed. Rep. 964; Co-operating Merchants' Co. *v.* Hallock, (C. C. A.) 128 Fed. Rep. 596; American Delinter Co. *v.* American Machinery, etc., Co., (C. C. A.) 128 Fed. Rep. 709; National Meter Co. *v.* Neptune Meter Co., (C. C. A.) 129 Fed. Rep. 124; Perkins Electric Switch Mfg. Co. *v.* Buchanan, 129 Fed. Rep. 134; Felt, etc., Mfg. Co. *v.* Mechanical Accountant Co., 129 Fed. Rep. 386; American Soda Fountain Co. *v.* Sample, (C. C. A.) 130 Fed. Rep. 145; Eldred *v.* Kirkland, (C. C. A.) 130 Fed. Rep. 343; Smeeth *v.* Fox Copper, etc., Co., (C. C. A.) 130 Fed. Rep. 455; Western Electric Co. *v.* North Electric Co., (C. C. A.) 130 Fed. Rep. 457; Young *v.* Wolfe, (C. C. A.) 130 Fed. Rep. 891; Diamond Stone Sawing Machine Co. *v.* Brown, 130 Fed. Rep. 896; Lackawanna Iron, etc., Co. *v.* Davis-Colby Ore Roaster Co., (C. C. A.) 131 Fed. Rep. 68; Weston Electrical Instrument Co. *v.* Empire Electrical Instrument Co., 131 Fed. Rep. 82; Daniel *v.* Restein, 131 Fed. Rep. 469; Drewson

v. Hartje Paper Mfg. Co., (C. C. A.) 131 Fed. Rep. 734; Fries *v.* Leeming, 131 Fed. Rep. 765; Lincoln Ironworks *v.* W. H. McWhirter Co., 131 Fed. Rep. 860; Scriven *v.* North, (C. C. A.) 134 Fed. Rep. 366; Crown Cork, etc., Co. *v.* Standard Stopper Co., (C. C. A.) 136 Fed. Rep. 841; Regensburg *v.* Juan F. Portuondo Cigar Mfg. Co., 136 Fed. Rep. 866; Mallon *v.* Gregg, (C. C. A.) 137 Fed. Rep. 68; McGill *v.* Whitehead, etc., Co., 137 Fed. Rep. 97; Shepard *v.* Excelsior Steel Furnace Co., (C. C. A.) 137 Fed. Rep. 399; West Boylston Mfg. Co. *v.* Wallace, 137 Fed. Rep. 922; United Shirt, etc., Co. *v.* Beattie, 138 Fed. Rep. 136; Pettibone *v.* Verona Tool Works, 138 Fed. Rep. 909; *In re* Locke, 17 App. Cas. (D. C.) 314; *In re* Iwan, 17 App. Cas. (D. C.) 566; *In re* Klemm, 21 App. Cas. (D. C.) 186. See also Acetylene Illuminating Co. *v.* United Alkali Co., (1902) 1 Ch. 494; National Folding Box, etc., Co. *v.* Robertson, 112 Fed. Rep. 1013; Hurlbut *v.* U. S. Mailing-Tube Co., 119 Fed. Rep. 188; Merrimac Mattress Mfg. Co. *v.* Schlesinger, 124 Fed. Rep. 237; Murray *v.* Orr, etc., Hardware Co., (C. C. A.) 138 Fed. Rep. 564.

306. 1. See Seiler *v.* Fuller, etc., Mfg. Co., (C. C. A.) 121 Fed. Rep. 85; Lanson Consol. Store Service Co. *v.* Hillman, (C. C. A.) 123 Fed. Rep. 416; National Tube Co. *v.* Spang, 125 Fed. Rep. 22.

307. 8. Prior Knowledge or Use by Single Person. — Merrimac Mattress Mfg. Co. *v.* Feldman, 133 Fed. Rep. 64.

11. Foreign Knowledge or Use — When Immaterial. — Pettibone *v.* Pennsylvania Steel Co., 133 Fed. Rep. 730.

12. Rousseau *v.* Brown, 21 App. Cas. (D. C.) 73.

308. 6. Accidental Production Not Understood. — National Meter Co. *v.* Neptune Meter Co., 122 Fed. Rep. 82, *affirmed* (C. C. A.) 129 Fed. Rep. 124.

309. 1. Concealed Invention Not an Anticipation. — Thomson *v.* Weston, 19 App. Cas. (D. C.) 373; Meyer *v.* Sarfert, 21 App. Cas. (D. C.) 26; Quist *v.* Ostrom, 23 App. Cas. (D. C.) 69. See also Brown *v.* Blood, 22 App. Cas. (D. C.) 216.

6. Reduction of Prior Device to Use or Operation. — Severy Process Co. *v.* Harper, 113 Fed. Rep. 581; Funk *v.* Haines, 20 App. Cas. (D. C.) 285; Smith *v.* Brooks, 24 App. Cas. (D. C.) 75; McKenzie *v.* Cummings, 24 App. Cas. (D. C.) 137; Richards *v.* Meissner, 24 App. Cas. (D. C.) 305.

Long Delay in Making Use of an Invention claimed to have been reduced to practice, or in applying for a patent, is evidence tending to show that the alleged reduction to practice

310. See notes 2, 3, 6.*gg.* EXPERIMENTS AND INCOMPLETE INVENTIONS. — See note 9.**311.** See note 2.**312.** See notes 1, 2.*hh.* UNSUCCESSFUL DEVICES. — See notes 4, 5.**314.** (c) Prior Patents — *aa.* IN GENERAL. — See note 2.**315.** See notes 8, 9.

was nothing more than an unsatisfactory or abandoned experiment, especially where, in the meantime, the inventor has been engaged in the prosecution of similar inventions, or others, without reasonable explanation, have been adopted for manufacture and commercial use. *Paul v. Hess*, 24 App. Cas. (D. C.) 468.

309. 10. First Reducer to Practicable Form Entitled to Patent. — *Merrimac Mattress Mfg. Co. v. Feldman*, 133 Fed. Rep. 64.

310. 2. Drawing or Model Sufficient. — See *Ideal Stopper Co. v. Crown Cork, etc., Co.*, (C. C. A.) 131 Fed. Rep. 244.

3. A Full-sized Device, capable of practical use, constitutes a reduction to practice notwithstanding it may be termed a "model." *Norden v. Spaulding*, 24 App. Cas. (D. C.) 286; *Hammond v. Basch*, 24 App. Cas. (D. C.) 473.

6. Actual Use Unnecessary. — *Merrimac Mattress Mfg. Co. v. Feldman*, 133 Fed. Rep. 64; *Lindemeyr v. Hoffman*, 18 App. Cas. (D. C.) 1; *Loomis v. Hauser*, 19 App. Cas. (D. C.) 401; *Couch v. Barnett*, 23 App. Cas. (D. C.) 446.

9. Experiments Not an Anticipation. — *Westinghouse Electric, etc., Co. v. Saranac Lake Electric Light Co.*, (C. C. A.) 113 Fed. Rep. 884; *Funk v. Haines*, 20 App. Cas. (D. C.) 285.

311. 2. Abandoned Experiments. — *R. Thomas, etc., Co. v. Electric Porcelain, etc., Co.*, 111 Fed. Rep. 923; *Latham v. Armat*, 17 App. Cas. (D. C.) 345; *Eastman v. Houston*, 18 App. Cas. (D. C.) 135; *Howard v. Hey*, 18 App. Cas. (D. C.) 142; *Tripler v. Linde*, 21 App. Cas. (D. C.) 32; *Hallwood v. Lalor*, 21 App. Cas. (D. C.) 61; *Quist v. Ostrom*, 23 App. Cas. (D. C.) 69; *Lemp v. Mudge*, 24 App. Cas. (D. C.) 282.

312. 1. Complete Inventions Subsequently Abandoned. — *Miller v. Walker Patent Pivoted Bin Co.*, 138 Fed. Rep. 919.

Mechanical Perfection Is Not Necessary for a complete presentation and illustration of the thought of the inventor. *Merrimac Mattress Mfg. Co. v. Feldman*, 133 Fed. Rep. 67.

2. Use Not Experimental. — The charging of an unremunerative price for the product of the combination raises a presumption against experimental use which can be overcome only by clear and convincing evidence. *Westinghouse Electric, etc., Co. v. Saranac Lake Electric Light Co.*, (C. C. A.) 113 Fed. Rep. 888.

4. Unsuccessful Device Not an Anticipation. — *Cimioti Unhairing Co. v. American Unhairing Mach. Co.*, (C. C. A.) 115 Fed. Rep. 498; *General Electric Co. v. Wise*, 119 Fed. Rep. 922; *Timolat v. Philadelphia Pneumatic Tool Co.*, 131 Fed. Rep. 261, declaring an exception to the rule where the objections to the prior patent relate merely to details of construction.

or where an ordinary skilled mechanic may convert an impractical or unsuccessful device into a practical success.

5. Application for Patent for Unsuccessful Device Rejected. — See *Miller v. Walker Patent Pivoted Bin Co.*, 138 Fed. Rep. 919.

314. 2. Prior Domestic Patents. — *DeLamar v. DeLamar Min. Co.*, 110 Fed. Rep. 538, *affirmed* (C. C. A.) 117 Fed. Rep. 240; *Industrial Mfg. Co. v. Wilcox, etc., Sewing Mach. Co.*, (C. C. A.) 112 Fed. Rep. 535; *Stetson v. Herreshoff Mfg. Co.*, 113 Fed. Rep. 952; *Chisholm, etc., Co. v. Anderson Foundry, etc., Works*, 115 Fed. Rep. 738, *affirmed* (C. C. A.) 123 Fed. Rep. 427; *Snow v. Enterprise Mfg. Co.*, 118 Fed. Rep. 54; *Moore v. Schaw*, 118 Fed. Rep. 602; *United Blue-Flame Oil Stove Co. v. Glazier*, (C. C. A.) 119 Fed. Rep. 157; *Greene v. Manhattan Refrigerating Co.*, 120 Fed. Rep. 952; *Wolff v. Du Pont de Nemours*, 122 Fed. Rep. 944; *Bettendorf Patents Co. v. J. R. Little Metal Wheel Co.*, (C. C. A.) 123 Fed. Rep. 433; *Brunswick-Balke-Collender Co. v. Klumpp*, 124 Fed. Rep. 554; *McCarthy v. Westfield Plate Co.*, 124 Fed. Rep. 897, *affirmed* (C. C. A.) 129 Fed. Rep. 128; *Parsons v. New Home Sewing Mach. Co.*, 125 Fed. Rep. 386, *affirmed* (C. C. A.) 134 Fed. Rep. 394; *Chisholm v. Fleming*, 133 Fed. Rep. 924; *Crown Cork, etc., Co. v. Standard Stopper Co.*, (C. C. A.) 136 Fed. Rep. 841; *In re Verley*, 19 App. Cas. (D. C.) 597; *Keasbey, etc., Co. v. American Magnesite, etc., Co.*, 137 Fed. Rep. 602. See also *Schaum v. Riehl*, 124 Fed. Rep. 320; *Van Epps v. International Paper Co.*, 124 Fed. Rep. 542; *Badische Anilin, etc., Fabrik v. Klipstein*, 125 Fed. Rep. 543.

A Combination of Which a Patented Device Forms an Element is not rendered unpatentable because of a prior patent for such device alone. *Spear v. Keystone Lantern Co.*, 131 Fed. Rep. 879.

Claim of Specific Machine Included in Claim of Genus. — See *Otis Elevator Co. v. Portland Co.*, (C. C. A.) 127 Fed. Rep. 559; *Sawyer Spindle Co. v. Carpenter*, 133 Fed. Rep. 240.

A Presumption Exists that a Subsequent Patent Is Not an Infringement of a Prior Patent, the presumption being strengthened where it appears that the patent examiners had had the prior patent called to their attention. *Hale, etc., Mfg. Co. v. Oneonta, etc., R. Co.*, 129 Fed. Rep. 598.

315. 8. Minor Patents Pending Application for Main Patent. — When the patent first granted is distinctly and only for an improvement on another invention which is already the subject of a prior application then pending, and on which a later patent is granted, the patent for the improvement in no wise interferes with the other application or the patent issued thereon, for the reason that the patents are for separate and distinct inventions. *Cleveland Foundry*

- 315.** *bb.* FOREIGN PATENTS. — See note 10.
316. *cc.* PRIOR PATENTS TO SAME PERSON. — See notes 2, 4.
dd. SUFFICIENCY OF DESCRIPTION IN PRIOR PATENT. — See note 8.
317. (d) Prior Description in Printed Publication — *aa.* IN GENERAL. — See note 5.
318. *bb.* SUFFICIENCY OF PUBLICATION. — See notes 1, 2.
cc. SUFFICIENCY OF DESCRIPTION. — See note 9.
319. (e) Priority of Anticipation to Date of Invention. — See note 9.
320. See note 1.
321. (f) Identity of Anticipating Devices. — See notes 1, 2, 3, 5, 7, 9, 10.
322. (g) Knowledge by Inventor of Prior Device or Description. — See note 2.
(h) Question of Fact. — See note 5.

Co. v. Detroit Vapor Stove Co., (C. C. A.) 131 Fed. Rep. 853.

315. 9. Thomson-Houston Electric Co. v. Black River Traction Co., 124 Fed. Rep. 495.

10. Prior Foreign Patent. — *Smidth v. Bonneville Cement Co., (C. C. A.) 114 Fed. Rep. 262.*

316. 2. Prior Patent to Same Person. — *Doig v. Morgan Mach. Co., (C. C. A.) 122 Fed. Rep. 460; Bradley v. Eccles, (C. C. A.) 126 Fed. Rep. 945; Victor Talking Mach. Co. v. American Graphophone Co., (C. C. A.) 131 Fed. Rep. 67; Cleveland Foundry Co. v. Detroit Vapor Stove Co., 131 Fed. Rep. 740; Davis Calyx Drill Co. v. Plunger Elevator Co., 135 Fed. Rep. 119; Roberts v. Bennett, (C. C. A.) 136 Fed. Rep. 193; Crown Cork, etc., Co. v. Standard Stopper Co., (C. C. A.) 136 Fed. Rep. 841; McCaslin v. Link Belt Machinery Co., 139 Fed. Rep. 393; *In re* Carpenter, 24 App. Cas. (D. C.) 110. See also Thomson-Houston Electric Co. v. Mahar, 112 Fed. Rep. 534; Otis Elevator Co. v. Portland Co., 119 Fed. Rep. 928, *affirmed* (C. C. A.) 127 Fed. Rep. 557.*

Several Applications Pending at Same Time. — Where each of several applications which subsequently ripen into patents to the same inventor discloses all the inventions claimed in all the applications, and they are all pending at the same time, no one of the applications or patents can be used to anticipate any of the claims of any of the others which it does not itself claim and secure. *Anderson v. Collins, (C. C. A.) 122 Fed. Rep. 451.*

A Design Patent Anticipates a Mechanical Patent, where everything to be found in the latter is portrayed in the former; and it makes no difference that the design patent is invalid. *Williams Calk Co. v. Neverslip Mfg. Co., 136 Fed. Rep. 210.*

4. Patent for Improvement. — *Aquarama Co. v. Old Mill Co., 124 Fed. Rep. 229.*

8. Sufficiency of Description in General. — *Ideal Stopper Co. v. Crown Cork, etc., Co., (C. C. A.) 131 Fed. Rep. 244. See also Cimiotti Unhairing Co. v. Comstock Unhairing Co., 115 Fed. Rep. 524.*

317. 5. Description in Prior Printed Publication. — *Chisholm v. Fleming, 133 Fed. Rep. 924; Westinghouse Electric, etc., Co. v. Catskill Illuminating, etc., Co., (C. C. A.) 121 Fed. Rep. 831; In re Klemm, 21 App. Cas. (D. C.) 186. See also De Lamar v. De Lamar Min. Co., 110 Fed. Rep. 538, affirmed (C. C. A.) 117 Fed. Rep. 240; Westinghouse Electric, etc., Co. v. Mutual L. Ins. Co., 129 Fed. Rep. 213; *In re* Millett, 18 App. Cas. (D. C.) 186.*

318. 1. Application for Patent. — *Thomson-Houston Electric Co. v. Ohio Brass Co., 130 Fed. Rep. 542.*

2. Rejected Applications for Patents. — *Thomson-Houston Electric Co. v. Black River Traction Co., (C. C. A.) 135 Fed. Rep. 759.*

9. Sufficiency of Description to Enable Practice of Invention. — *Electric Smelting, etc., Co. v. Pittsburg Reduction Co., (C. C. A.) 125 Fed. Rep. 926; Pettibone v. Pennsylvania Steel Co., 133 Fed. Rep. 730; Valvona v. D'Adamo, 135 Fed. Rep. 544; Crown Cork, etc., Co. v. Standard Stopper Co., 136 Fed. Rep. 199. See also Goss Printing-Press Co. v. Scott, (C. C. A.) 110 Fed. Rep. 402.*

319. 9. See *Bettendorf Patents Co. v. J. R. Little Metal Wheel Co., (C. C. A.) 123 Fed. Rep. 433.*

320. 1. Date of Actual Invention, Not of Patent, Controlling. — *Westinghouse Electric, etc., Co. v. Mutual L. Ins. Co., 129 Fed. Rep. 213. See also Wilson v. Townley Shingle Co., (C. C. A.) 125 Fed. Rep. 491.*

321. 1. Absolute Identity Not Necessary to Anticipation. — *Kahn v. Starrells, (C. C. A.) 135 Fed. Rep. 532.*

2. Substantial Identity Sufficient. — *U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co., (C. C. A.) 125 Fed. Rep. 378; Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co., (C. C. A.) 125 Fed. Rep. 761; Ideal Stopper Co. v. Crown Cork, etc., Co., (C. C. A.) 131 Fed. Rep. 244.*

3. Colorable Variation. — *Crown Cork, etc., Co. v. Standard Stopper Co., 136 Fed. Rep. 207, holding that no one can evade a patent by simply constructing the patented thing so imperfectly that its utility is diminished.*

5. Crown Cork, etc., Co. v. Standard Stopper Co., 136 Fed. Rep. 199.

7. Anticipating Device Must Enable One to Practice Later Invention. — *Ideal Stopper Co. v. Crown Cork, etc., Co., (C. C. A.) 131 Fed. Rep. 244.*

9. *Star Brass Works v. General Electric Co., (C. C. A.) 131 Fed. Rep. 78.*

10. What Infringes if Later, Anticipates if Earlier. — *Peerless Rubber Mfg. Co. v. White, (C. C. A.) 118 Fed. Rep. 827; Electric Smelting, etc., Co. v. Pittsburg Reduction Co., (C. C. A.) 125 Fed. Rep. 926; Eames v. Worcester Polytechnic Institute, (C. C. A.) 123 Fed. Rep. 67.*

322. 2. Knowledge of Anticipation Immaterial. — *Sanders v. Hancock, (C. C. A.) 128 Fed. Rep. 424.*

5. Novelty and Anticipation Questions of Fact.

324. (i) Particular Classes of Inventions — *bb.* PROCESS. — See note 1.

cc. COMBINATIONS. — See note 13.

326. See note 3.

dd. DESIGNS. — See notes 9, 11.

327. See note 3.

*d.** EVIDENCE OF NOVELTY OR ANTICIPATION — (i) *Presumptions and Burden of Proof* — (a) *In General.* — See note 9.

328. (3) *Date of Invention.* — See note 9.

329. (6) *Long-felt Want.* — See note 6.

(7) *Success, Utility, Recognition, and Adoption.* — See notes 7, 8, 9.

— American Sales Book Co. *v.* Bullivant, (C. C. A.) 117 Fed. Rep. 255.

324. 1. Panzl *v.* Battle Island Paper, etc., Co., 132 Fed. Rep. 607.

13. *Novelty in Combinations.* — Bryant Electric Co. *v.* Electric Protection Co., 110 Fed. Rep. 215.

326. 3. *Substitution of Equivalents.* — Press Pub. Co. *v.* Westinghouse Mach. Co., (C. C. A.) 135 Fed. Rep. 767.

9. *Designs.* — Kruttschnitt *v.* Simmons, 118 Fed. Rep. 851, *affirmed* (C. C. A.) 122 Fed. Rep. 1020.

11. *Old Designs Applied to New Purposes.* — Perry *v.* Hoskins, 111 Fed. Rep. 1002; Kline Chair Co. *v.* Kocns, 138 Fed. Rep. 90.

327. 3. See Perry *v.* Hoskins, 111 Fed. Rep. 1002; *In re Freeman*, 23 App. Cas. (D. C.) 226.

9. *Patent Prima Facie Evidence of Novelty.* — De Lamar *v.* De Lamar Min. Co., 110 Fed. Rep. 538, *affirmed* (C. C. A.) 117 Fed. Rep. 240; Barr Car Co. *v.* Chicago, etc., R. Co., (C. C. A.) 110 Fed. Rep. 972; White *v.* Peerless Rubber Mfg. Co., 111 Fed. Rep. 190; A. R. Milner Seating Co. *v.* Yesbera, (C. C. A.) 111 Fed. Rep. 386; Seidenberg *v.* Davidson, 112 Fed. Rep. 431; Chinnock *v.* Paterson, etc., Tel. Co., (C. C. A.) 112 Fed. Rep. 531; Kalamazoo R. Supply Co. *v.* Duff Mfg. Co., (C. C. A.) 113 Fed. Rep. 264; Kinloch Telephone Co. *v.* Western Electric Co., (C. C. A.) 113 Fed. Rep. 659; Brunswick-Balke-Collender Co. *v.* Koehler, 115 Fed. Rep. 648; Hocke *v.* New York Cent., etc., R. Co., 117 Fed. Rep. 320; American Sales Book Co. *v.* Bullivant, (C. C. A.) 117 Fed. Rep. 255; Cimiotti Unhairing Co. *v.* American Fur Refining Co., 117 Fed. Rep. 623; Moore *v.* Schaw, 118 Fed. Rep. 602; Young *v.* Wolfe, 120 Fed. Rep. 956, *affirmed* (C. C. A.) 130 Fed. Rep. 891; F. C. Austin Mfg. Co. *v.* American Wellworks, (C. C. A.) 121 Fed. Rep. 76; Westinghouse Electric, etc., Co. *v.* Catskill Illuminating, etc., Co., (C. C. A.) 121 Fed. Rep. 831; American Saddle Co. *v.* Sager Gear Co., 122 Fed. Rep. 645; Fairbanks, etc., Co. *v.* Stickney, (C. C. A.) 123 Fed. Rep. 79; Merrimac Mattress Mfg. Co. *v.* Schlesinger, 124 Fed. Rep. 237; Brookfield *v.* Novelty Glass Mfg. Co., 124 Fed. Rep. 551; Wheel Truing Brake Shoe Co. *v.* Car Wheel Truing Brake Shoe Co., 124 Fed. Rep. 902; Hale, etc., Mfg. Co. *v.* Lehigh Valley Traction Co., 126 Fed. Rep. 653; Cleveland Foundry Co. *v.* Kaufmann, 126 Fed. Rep. 658; Brunswick-Balke-Collender Co. *v.* Klumpp, 126 Fed. Rep. 765, *affirmed* (C. C. A.) 131 Fed. Rep. 255; Rodwell Sign Co. *v.* F. Tuchfarber Co., (C.

C. A.) 127 Fed. Rep. 138; Farmers' Mfg. Co. *v.* Spruks Mfg. Co., (C. C. A.) 127 Fed. Rep. 691; American Delinter Co. *v.* American Machinery, etc., Co., (C. C. A.) 128 Fed. Rep. 709; Hale, etc., Mfg. Co. *v.* Oneonta, etc., R. Co., 129 Fed. Rep. 598; Timolat *v.* Philadelphia Pneumatic Tool Co., 131 Fed. Rep. 257; Goss Printing-Press Co. *v.* Scott, 134 Fed. Rep. 880; H. C. Cook Co. *v.* Little River Mfg. Co., 136 Fed. Rep. 414; Atwood-Morrison Co. *v.* Sipp Electric, etc., Co., 136 Fed. Rep. 859; Loew Supply, etc., Co. *v.* Fred Miller Brewing Co., (C. C. A.) 138 Fed. Rep. 886; Imperial Bottle Cap, etc., Co. *v.* Crown Cork, etc., Co. (C. C. A.) 139 Fed. Rep. 312; Bonsall *v.* Hamilton-Noyes Co., 139 Fed. Rep. 403; Anderson *v.* Metropolitan Finance Co., 139 Fed. Rep. 451. See also Westinghouse Electric, etc., Co. *v.* Roberts, 125 Fed. Rep. 6.

That the File Wrapper Discloses the Patent to Have Been Granted as First Applied for, Without Any Reference, does not add any force to the presumption of novelty arising from the grant. American Soda Fountain Co. *v.* Sample, (C. C. A.) 130 Fed. Rep. 145.

Prior Use Must Be Proved Beyond Reasonable Doubt. — United Shirt, etc., Co. *v.* Beattie, 138 Fed. Rep. 136.

328. 9. *The Mere Say-so of the Inventor and His Son* is not sufficient evidence of the date of the invention. Eck *v.* Kutz, 132 Fed. Rep. 758.

329. 6. Farmers' Mfg. Co. *v.* Spruks Mfg. Co., (C. C. A.) 127 Fed. Rep. 691; Crown Cork, etc., Co. *v.* Standard Stopper Co., (C. C. A.) 136 Fed. Rep. 841.

7. *Success and Adoption as Evidence of Novelty.* — Kalamazoo R. Supply Co. *v.* Duff Mfg. Co., (C. C. A.) 113 Fed. Rep. 264; Kinloch Telephone Co. *v.* Western Electric Co., (C. C. A.) 113 Fed. Rep. 659; Hale, etc., Mfg. Co. *v.* Lehigh Valley Traction Co., 126 Fed. Rep. 653; Farmers' Mfg. Co. *v.* Spruks Mfg. Co., (C. C. A.) 127 Fed. Rep. 691; Bechtold *v.* Nowacke, 131 Fed. Rep. 275; Albright *v.* Langfeld, 131 Fed. Rep. 473; Bredin *v.* Solmson, 132 Fed. Rep. 161. See also Tompkins *v.* Terwilliger, 124 Fed. Rep. 545.

8. *Decision in Doubtful Cases.* — Dowagiac Mfg. Co. *v.* Superior Drill Co., (C. C. A.) 115 Fed. Rep. 886; L. E. Waterman Co. *v.* Forsyth, 121 Fed. Rep. 107, *affirmed* (C. C. A.) 128 Fed. Rep. 926.

9. *Clear Want of Novelty.* — Goodyear Tire, etc., Co. *v.* Rubber Tire Wheel Co., (C. C. A.) 116 Fed. Rep. 363; American Sales Book Co. *v.* Bullivant, (C. C. A.) 117 Fed. Rep. 255. See also Cleveland Foundry Co. *v.* Detroit Vapor Stove Co., 131 Fed. Rep. 740.

- 329.** (8) *Expert and Opinion Evidence*. — See note 14.
- 330.** (11) *Judicial Notice*. — See note 12.
- 331.** (14) *Weight and Sufficiency* — (a) *In General*. — See notes 4, 5.
(b) *Oral Testimony*. — See note 10.
- 332.** See notes 2, 3.
- 5. Utility — a NECESSITY — (1) In General**. — See note 8.
- 333.** (2) *Design Patents*. — See note 1.
b. NATURE AND KIND. — See notes 2, 3.
- 334.** *c. DEGREE AND EXTENT — Later Inventions Better or Cheaper*. — See note 2.
- Capability of Improvement or Use with Other Devices*. — See note 5.
- 335.** *d. EVIDENCE AS TO UTILITY — General and Extensive Use or Sale*. — See note 4.
- 336.** *6. Prior Public Use or Sale — a. IN GENERAL*. — See note 1.
Design Patents. — See note 2.

329. 14. Expert Testimony Admissible. — Fay v. Mason, (C. C. A.) 127 Fed. Rep. 325.

Opinions of Experts Not Conclusive. — American Delinter Co. v. American Machinery, etc., Co., (C. C. A.) 128 Fed. Rep. 709.

330. 12. Judicial Notice. — Fowler v. New York City, (C. C. A.) 121 Fed. Rep. 747; Merrimac Mattress Mfg. Co. v. Schlesinger, 124 Fed. Rep. 237; Wilson v. Townley Shingle Co., (C. C. A.) 125 Fed. Rep. 491; Roberts v. Bennett, (C. C. A.) 136 Fed. Rep. 193.

331. 4. Anticipation Must Be Clearly Proved. — Merrimac Mattress Mfg. Co. v. Feldman, 133 Fed. Rep. 64; Pettibone v. Pennsylvania Steel Co., 133 Fed. Rep. 730.

5. Evidence of a Single Witness has been held to be insufficient to show anticipation. Pettibone v. Pennsylvania Steel Co., 133 Fed. Rep. 730.

10. Unsatisfactory Oral Testimony. — Caster Socket Co. v. Clark, 110 Fed. Rep. 976.

332. 2. Reasonable Doubt. — Emerson Electric Mfg. Co. v. Van Nort Bros. Electric Co., 116 Fed. Rep. 974; Merrimac Mattress Mfg. Co. v. Brown, 122 Fed. Rep. 87; Rodwell Sign Co. v. F. Tuchfarber Co., (C. C. A.) 127 Fed. Rep. 138.

3. Unsupported Oral Testimony. — See Arrott v. Standard Sanitary Mfg. Co., 131 Fed. Rep. 457.

8. Utility of Invention Requisite. — Burdon Wire, etc., Co. v. Williams, 128 Fed. Rep. 927; Higgin Mfg. Co. v. Murdock, (C. C. A.) 132 Fed. Rep. 810; Eastman v. New York, (C. C. A.) 134 Fed. Rep. 844; *In re Klemm*, 21 App. Cas. (D. C.) 186. See also *Armat Moving Picture Co. v. American Mutoscope Co.*, 118 Fed. Rep. 840; *American Bell Telephone Co. v. National Telephone Mfg. Co.*, (C. C. A.) 119 Fed. Rep. 893; *Anderson v. Collins*, (C. C. A.) 122 Fed. Rep. 451; *Merrimac Mattress Mfg. Co. v. Schlesinger*, 124 Fed. Rep. 237; *Henry Huber Co. v. J. L. Mott Ironworks*, (C. C. A.) 125 Fed. Rep. 944; *Boyer v. Keller Tool Co.*, (C. C. A.) 127 Fed. Rep. 130; *National Waistband Co. v. Monheit*, 133 Fed. Rep. 310; *General Electric Co. v. Campbell*, 137 Fed. Rep. 600.

Necessity for Demonstration of Practical Utility. — See Paul v. Hess, 24 App. Cas. (D. C.) 467.

333. 1. Design Patents. — Mygatt v. Zalinski, 138 Fed. Rep. 88. See also *supra*, this title, 276. 4.

Utility Intended Is Artistic, Not Practical. — Williams Calk Co. v. Neverslip Mfg. Co., 136 Fed. Rep. 210.

Originality and Beauty Essential. — Roberts v. Bennett, (C. C. A.) 136 Fed. Rep. 193.

2. Useful in Contradistinction to Mischievous or Injurious. — Fuller v. Berger, (C. C. A.) 120 Fed. Rep. 274.

3. Frivolous Invention Without Utility. — See Williams Calk Co. v. Neverslip Mfg. Co., 136 Fed. Rep. 210.

334. 2. Superiority of Later Inventions Unimportant. — See Greist Mfg. Co. v. Parsons, (C. C. A.) 125 Fed. Rep. 116.

5. Capability of Improvement or Use with Other Devices Unobjectionable. — Lamson Consol. Store Service Co. v. Hillman, (C. C. A.) 123 Fed. Rep. 416.

335. 4. General Use Evidence of Utility. — Bryant Electric Co. v. Buchanan, 124 Fed. Rep. 537, *affirmed* (C. C. A.) 128 Fed. Rep. 922; Van Epps v. International Paper Co., 124 Fed. Rep. 542; Rumford Chemical Works v. New York Baking Powder Co., (C. C. A.) 134 Fed. Rep. 385.

336. 1. Two Years Prior Public Use or Sale Defeats Patent. — Swain v. Holyoke Mach. Co., (C. C. A.) 111 Fed. Rep. 408; Thomson-Houston Electric Co. v. Lorain Steel Co., (C. C. A.) 117 Fed. Rep. 249; Lay v. Indianapolis Brush, etc., Mfg. Co., (C. C. A.) 120 Fed. Rep. 831; Tompkins v. Terwilliger, 124 Fed. Rep. 545; U. S. Mineral Wool Co. v. Manville Covering Co., (C. C. A.) 125 Fed. Rep. 770; Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 130 Fed. Rep. 900; Eck v. Kutz, 132 Fed. Rep. 758; Eastman v. New York, (C. C. A.) 134 Fed. Rep. 844; Hayes-Young Tie Plate Co. v. St. Louis Transit Co., (C. C. A.) 137 Fed. Rep. 80; Bradley v. Eccles, 138 Fed. Rep. 911; Jenner v. Bowen, (C. C. A.) 139 Fed. Rep. 556; Thomson v. Weston, 10 App. Cas. (D. C.) 373. See also *National Waistband Co. v. Monheit*, 133 Fed. Rep. 310; *L. E. Waterman Co. v. McCutcheon*, (C. C. A.) 128 Fed. Rep. 926; *Ferry v. Waring Hat Mfg. Co.*, 129 Fed. Rep. 389.

2. Design Patents. — Young v. Clipper Mfg. Co., 121 Fed. Rep. 560, *affirmed* (C. C. A.) 130 Fed. Rep. 150, holding that the use of a design by the engraver for the purpose of making an electrotype of it for printing letter heads, and the use of such letter heads by the inventor,

- 337.** *b. WHAT CONSTITUTES — (1) In General.* — See note 11.
338. *(2) Experimental Use.* — See notes 2, 5.
339. See note 4.
(3) Consent and Allowance of Inventor. — See note 5.
340. *c. TIME AND CONTINUANCE OF USE OR SALE.* — See notes 5, 6.
d. EVIDENCE. — See note 8.
341. See notes 1, 2.
7. Abandonment — b. WHAT CONSTITUTES — (1) Definition. — See note 8.
(2) Question of Intention. — See note 9.
342. *(4) Before Application for Patent.* — See note 5.
343. See note 3.
(5) After Application for Patent — (a) In General. — See note 7.
344. See note 2.
(b) Failure to Claim. — See note 6.
345. *c. EVIDENCE.* — See note 7.

in his correspondence, constitute a public use. *In re Tournier*, 17 App. Cas. (D. C.) 481.

337. 11. Not Dependent on Number of Persons. — *Daniel v. Restein*, 131 Fed. Rep. 469; *Jenner v. Bowen*, (C. C. A.) 139 Fed. Rep. 556.
338. 2. Experimental Use Not a Public Use. — *Swain v. Holyoke Mach. Co.*, (C. C. A.) 111 Fed. Rep. 408; *Thomson-Houston Electric Co. v. Lorain Steel Co.*, (C. C. A.) 117 Fed. Rep. 249; *Jenner v. Bowen*, (C. C. A.) 139 Fed. Rep. 556; *Conway v. Ottawa Electric R. Co.*, 8 Can. Exch. 432.

Judicial Summary of Rules. — In *Eastman v. New York*, (C. C. A.) 134 Fed. Rep. 858, the following propositions were laid down as following from a consideration of cases on the law of experimental use: First. An inventor has a reasonable time in which to experiment for the purpose of perfecting the invention and demonstrating its utility. Second. The time thus spent, if in good faith, is no part of the two-year statute of limitations. Third. The experiments must be made in perfecting the invention as described and shown. Fourth. Experiments made in testing parts of the machine not covered by the invention will not have the effect of extending the two-year period. Fifth. As soon as the invention is completed, viz., "in such a condition that the inventor can apply for a patent for it," the two-year period begins to run, and the application must be made within this period. Sixth. The fact that the invention has been improved since its original embodiment does not demonstrate that it was then embryonic or incomplete. Seventh. When a clear case of prior public use is established the burden is on the inventor to prove by convincing proof that the use was experimental.

5. What Is an Experimental Use. — *Thomson-Houston Electric Co. v. Lorain Steel Co.*, (C. C. A.) 117 Fed. Rep. 249; *Bradley v. Eccles*, 138 Fed. Rep. 911.

339. 4. See *Swain v. Holyoke Mach. Co.*, (C. C. A.) 111 Fed. Rep. 408.

5. Consent or Allowance of Inventor Immaterial. — *Eastman v. New York*, (C. C. A.) 134 Fed. Rep. 844.

340. 5. Single Sale or Use. — *Bradley v. Eccles*, 138 Fed. Rep. 911.

6. Successive Applications. — See *Lay v. Indianapolis Brush, etc., Mfg. Co.*, (C. C. A.) 120 Fed. Rep. 831.

8. Burden of Proof. — *Armat Moving Picture Co. v. American Mutoscope Co.*, 118 Fed. Rep. 840; *Ferry v. Waring Hat Mfg. Co.*, 129 Fed. Rep. 389.

341. 1. Reasonable Doubt. — *Durfee v. Bawo*, 118 Fed. Rep. 853; *Greene v. Manhattan Refrigerating Co.*, 120 Fed. Rep. 952; *Young v. Wolfe*, 120 Fed. Rep. 956, *affirmed* (C. C. A.) 130 Fed. Rep. 891; *Atwood-Morrison Co. v. Sipp Electric, etc., Co.*, 136 Fed. Rep. 859; *Revere Rubber Co. v. Consolidated Hoof Pad Co.*, 138 Fed. Rep. 899; *Bradley v. Eccles*, 138 Fed. Rep. 911.

2. Unsupported Oral Testimony. — *Albright v. Langfeld*, 131 Fed. Rep. 473. See also *Swain v. Holyoke Mach. Co.*, (C. C. A.) 111 Fed. Rep. 408; *Arrott v. Standard Sanitary Mfg. Co.*, 131 Fed. Rep. 457.

8. See *Rumford Chemical Works v. New York Baking Powder Co.*, (C. C. A.) 134 Fed. Rep. 385.

9. Intention of Inventor the Test. — *Burdon Wire, etc., Co. v. Williams*, 128 Fed. Rep. 927.

342. - 5. Allowing Invention to Go into Public Use. — See *Thomson-Houston Electric Co. v. Lorain Steel Co.*, (C. C. A.) 117 Fed. Rep. 249.

343. 3. Delay in Application for Patent. — *Eck v. Kutz*, 132 Fed. Rep. 758.

7. A Failure to Prosecute an Application Rejected by the Patent Office does not constitute an abandonment where it appears that such failure was due to lack of means. *Shepherd v. Deitsch*, 138 Fed. Rep. 83.

344. 2. Abandonment of Application Not Abandonment of Invention. — *Hayes-Young Tie Plate Co. v. St. Louis Transit Co.*, (C. C. A.) 137 Fed. Rep. 80.

6. Methods Described but Not Claimed in Application. — *Ide v. Trorlicht, etc., Carpet Co.*, (C. C. A.) 115 Fed. Rep. 137; *Durfee v. Bawo*, 118 Fed. Rep. 853; *In re Millett*, 18 App. Cas. (D. C.) 186.

345. 7. Weight and Sufficiency of Evidence. — *Ide v. Trorlicht, etc., Carpet Co.*, (C. C. A.) 115 Fed. Rep. 137.

346. *d.* OPERATION AND EFFECT. — See note 1.

III. PERSONS ENTITLED TO PATENTS — 1. Original Inventors — a. IN GENERAL. — See note 2.

b. PRIORITY BETWEEN INVENTORS. — See note 7.

347. See notes 1, 2, 4.

348. *c.* SUGGESTIONS, INFORMATION, OR AID FROM OTHERS. — See note 7.

d. EVIDENCE AS TO ORIGINALITY AND PRIORITY. — See notes 9, 12.

349. See notes 1, 5.

2. Employers and Employees. — See note 8.

350. See notes 1, 3.

346. 1. Abandonment Inures to Benefit of Public. — *In re Millett*, 18 App. Cas. (D. C.) 186.

2. First and Original Inventors. — *Upson Nut Co. v. H. Chapin Sons Co.*, 117 Fed. Rep. 318; *Tyler v. Kelch*, 19 App. Cas. (D. C.) 180.

7. Priority in Reduction to Practice. — *Reichenbach v. Kelley*, 17 App. Cas. (D. C.) 333; *Latham v. Armat*, 17 App. Cas. (D. C.) 345; *Eastman v. Houston*, 18 App. Cas. (D. C.) 135; *Howard v. Hey*, 18 App. Cas. (D. C.) 142; *Adams v. Murphy*, 18 App. Cas. (D. C.) 172; *Scott v. Scott*, 18 App. Cas. (D. C.) 420; *Tyler v. Kelch*, 19 App. Cas. (D. C.) 180; *Roe v. Hanson*, 19 App. Cas. (D. C.) 559; *Swihart v. Mauldin*, 19 App. Cas. (D. C.) 570; *Oliver v. Felbel*, 20 App. Cas. (D. C.) 255; *Slaughter v. Halle*, 21 App. Cas. (D. C.) 19; *Hallwood v. Lalor*, 21 App. Cas. (D. C.) 61; *Whitney v. Howard*, 21 App. Cas. (D. C.) 218; *Sachs v. Hundhausen*, 21 App. Cas. (D. C.) 511; *Macdonald v. Edison*, 21 App. Cas. (D. C.) 527; *Shaffer v. Dolan*, 23 App. Cas. (D. C.) 79; *Paul v. Johnson*, 23 App. Cas. (D. C.) 187; *Herman v. Fullman*, 23 App. Cas. (D. C.) 259; *Couch v. Barnett*, 23 App. Cas. (D. C.) 446; *Morden v. Spaulding*, 24 App. Cas. (D. C.) 286; *Corner v. Kyle*, 24 App. Cas. (D. C.) 291. See also *Greenwood v. Dover*, 23 App. Cas. (D. C.) 251.

347. 1. If Neither Inventor Has Reduced His Conception to Practice, priority of conception will confer priority of right to a patent. *Furman v. Dean*, 24 App. Cas. (D. C.) 277. See also *Lindemeyer v. Hoffman*, 18 App. Cas. (D. C.) 1.

2. Diligence in Reduction to Practice. — *Newton v. Woodward*, 17 App. Cas. (D. C.) 34; *Silverman v. Hendrickson*, 19 App. Cas. (D. C.) 381; *Sendelbach v. Gillette*, 22 App. Cas. (D. C.) 168; *Brown v. Blood*, 22 App. Cas. (D. C.) 216; *Trissel v. Thomas*, 23 App. Cas. (D. C.) 219; *Liberman v. Williams*, 23 App. Cas. (D. C.) 223; *Hillard v. Brooks*, 23 App. Cas. (D. C.) 526; *Seeburger v. Dodge*, 24 App. Cas. (D. C.) 476. See also *Garrels v. Freeman*, 21 App. Cas. (D. C.) 207.

The Diligence Required is diligence rather in the reduction of the invention to practice than in application to the patent office or in manufacturing the device for public use. *Oliver v. Felbee*, 20 App. Cas. (D. C.) 262.

The Date of Conception in the Case of a Foreign Inventor who seeks a patent in the United States is the date when the invention is first communicated in the country. *Harris v. Stern*, 22 App. Cas. (D. C.) 164.

4. Unreasonable Delay in Reduction to Practice — *Locke v. Boch*, 17 App. Cas. (D. C.) 75; *Christensen v. Ellis*, 17 App. Cas. (D. C.) 498; *Miehle v. Read*, 18 App. Cas. (D. C.) 128; *Adams v. Murphy*, 18 App. Cas. (D. C.) 172; *Stapleton v. Kinney*, 18 App. Cas. (D. C.) 394; *Thomson v. Weston*, 19 App. Cas. (D. C.) 373; *Petrie v. De Schweinitz*, 19 App. Cas. (D. C.) 386; *Hallwood v. Lalor*, 21 App. Cas. (D. C.) 61; *Wyman v. Donnelly*, 21 App. Cas. (D. C.) 81; *Harris v. Stern*, 22 App. Cas. (D. C.) 164; *Watson v. Thomas*, 23 App. Cas. (D. C.) 65; *Liberman v. Williams*, 23 App. Cas. (D. C.) 223; *Lotterhand v. Hanson*, 23 App. Cas. (D. C.) 372; *Robinson v. Copeland*, 24 App. Cas. (D. C.) 68; *Ritter v. Krakau*, 24 App. Cas. (D. C.) 271. See also *Corner v. Kyle*, 24 App. Cas. (D. C.) 291.

Delay for the Purpose of Procuring Capital to engage in manufacturing the device may forfeit the right to priority. *Seeburger v. Dodge*, 24 App. Cas. (D. C.) 485.

Deliberate Concealment of Invention by the First Inventor may amount to a forfeiture of priority. *Matthes v. Burt*, 24 App. Cas. (D. C.) 265.

348. 7. Conception of Invention Furnished by Others. — *Warner Bros. Co. v. Robert N. Bassett Co.*, 136 Fed. Rep. 411; *Asencio v. Russell*, 24 App. Cas. (D. C.) 105.

9. *Sharer v. McHenry*, 19 App. Cas. (D. C.) 158; *Garrels v. Freeman*, 21 App. Cas. (D. C.) 207. See also *Robinson v. Copeland*, 24 App. Cas. (D. C.) 68; *Petrie v. De Schweinitz*, 19 App. Cas. (D. C.) 389.

12. *Funk v. Haines*, 20 App. Cas. (D. C.) 285; *Whitney v. Howard*, 21 App. Cas. (D. C.) 218; *Flora v. Powrie*, 23 App. Cas. (D. C.) 195; *Herman v. Fullman*, 23 App. Cas. (D. C.) 259. See also *Cobb v. Goebel*, 23 App. Cas. (D. C.) 75.

349. 1. Issuance of Patent. — *Hall Signal Co. v. Union Switch, etc., Co.*, 115 Fed. Rep. 638; *American Delinor Co. v. American Machinery, etc., Co.*, (C. C. A.) 128 Fed. Rep. 709; *Sendelbach v. Gillette*, 22 App. Cas. (D. C.) 168.

5. See *Smith v. Brooks*, 24 App. Cas. (D. C.) 75.

8. When Employer Entitled to Patent. — *Gedge v. Cromwell*, 19 App. Cas. (D. C.) 102; *Gallagher v. Hastings*, 21 App. Cas. (D. C.) 88.

Presumption that Employer Conceived Idea. — See *Miller v. Kelley*, 18 App. Cas. (D. C.) 163.

350. 1. Inventions of Employee. — *Pressed Steel Car Co. v. Hansen*, (C. C. A.) 137 Fed.

350. 6. Aliens. — See note 10.

351. 8. Joint Inventions — *b*. RIGHT TO JOINT OR SEVERAL PATENT. — See note 7.

352. *a*. EVIDENCE. — See note 3.

V. PROCEEDINGS TO OBTAIN PATENT — 3. Specification and Description — *a*. CONTENTS AND SUFFICIENCY — In General. — See note 9.

353. See note 1.

The Essential Features. — See note 2.

Certainty of Description. — See notes 4, 5.

Prior State of the Art. — See notes 6, 7.

Addressed to Persons Skilled in Art. — See note 8.

354. See note 1.

So the Drawings and Models. — See notes 2, 3.

The Scientific Principles or Theory. — See note 4.

355. *b*. QUESTIONS FOR COURT AND JURY. — See note 1.

c. PARTICULAR CLASSES OF INVENTIONS — (2) *Composition of Matter*. — See notes 10, 11.

356. (4) *Art or Process*. — See notes 2, 3.

Rep. 403; *Gallagher v. Hastings*, 21 App. Cas. (D. C.) 88; *Sendelbach v. Gillette*, 22 App. Cas. (D. C.) 168.

350. 3. Employment to Exercise Inventive Skill. — *Barber v. National Carbon Co.*, (C. C. A.) 129 Fed. Rep. 370. See also *Pressed Steel Car Co. v. Hansen*, (C. C. A.) 137 Fed. Rep. 403; *Sendelbach v. Gillette*, 22 App. Cas. (D. C.) 168.

10. Alien Inventors. — See *Harris v. Stern*, 22 App. Cas. (D. C.) 164.

351. 7. Joint Patent for Sole Invention Void. — *De Laval Separator Co. v. Vermont Farm Mach. Co.*, 126 Fed. Rep. 536, (C. C. A.) 135 Fed. Rep. 772.

352. 3. *Metz v. Johnson*, 112 Fed. Rep. 1014.

9. Necessity and Sufficiency in General. — *Morrison v. Sonn*, 111 Fed. Rep. 172; *Panzl v. Battle Island Paper Co.*, (C. C. A.) 138 Fed. Rep. 48; *Manhattan Gen. Constr. Co. v. Helios-Upton Co.*, 135 Fed. Rep. 785. See also *Wolff v. Du Pont de Nemours*, 112 Fed. Rep. 944.

Features of Construction Which the Specification Recommends or Describes as Preferable do not thereby become essential parts of the patent, or limitations of the claim. *Smeeth v. Perkins*, (C. C. A.) 125 Fed. Rep. 285.

The Invention of the Patent Is Presumed to Be Identical with That Disclosed by the Application, in the absence of other evidence. *Drewson v. Hartje Paper Mfg. Co.*, (C. C. A.) 131 Fed. Rep. 734.

353. 1. Further Experiment Necessary. — *Panzl v. Battle Island Paper Co.*, (C. C. A.) 138 Fed. Rep. 48.

2. Not Every Detail need be specified. *American Delinter Co. v. American Machinery, etc., Co.*, (C. C. A.) 128 Fed. Rep. 709.

4. Fatal Uncertainty in Description. — See *Thomson-Houston Electric Co. v. Dayton Fan, etc., Co.*, 137 Fed. Rep. 917; *Panzl v. Battle Island Paper Co.*, (C. C. A.) 138 Fed. Rep. 48.

5. Immaterial Defects in Description. — *Cimioti Unhairing Co. v. American Unhairing Mach. Co.*, (C. C. A.) 115 Fed. Rep. 498.

6. Prior State of the Art. — *Daylight Prism Co. v. Marcus Prism Co.*, 110 Fed. Rep. 980.

7. Things Well Known or in Common Use. — *Western Telephone Mfg. Co. v. American Electric Telephone Co.*, (C. C. A.) 131 Fed. Rep. 75. See also *Hobbs Mfg. Co. v. Gooding*, (C. C. A.) 111 Fed. Rep. 403.

8. Sufficiency for Construction and Practice of Invention. — *Ballou v. Potter*, 110 Fed. Rep. 969; *Doig v. Morgan Mach. Co.*, 117 Fed. Rep. 305, *affirmed* 122 Fed. Rep. 460.

354. 1. Addressed to Persons Skilled in Art. — *Keller v. Piesen*, 114 Fed. Rep. 608; *Dowagiac Mfg. Co. v. Superior Drill Co.*, (C. C. A.) 115 Fed. Rep. 886; *Dade v. Boorum, etc., Co.*, 121 Fed. Rep. 135; *Weston Electrical Instrument Co. v. Empire Electrical Instrument Co.*, 131 Fed. Rep. 82; *Chicago Wooden Ware Co. v. Miller Ladder Co.*, (C. C. A.) 133 Fed. Rep. 541; *Wolff v. Du Pont de Nemours*, (C. C. A.) 134 Fed. Rep. 862; *Crown Cork, etc., Co. v. Standard Stopper Co.*, (C. C. A.) 136 Fed. Rep. 841.

2. Drawings or Models. — *Windle v. Parks, etc., Mach. Co.*, (C. C. A.) 134 Fed. Rep. 381.

3. Specifications in Connection with Drawings or Models. — *American Delinter Co. v. American Machinery, etc., Co.*, (C. C. A.) 128 Fed. Rep. 709.

4. The Assignment of a Wrong Rule of Physics. — *U. S. Mitis Co. v. Midvale Steel Co.*, 135 Fed. Rep. 103.

Failure to State the Causes Which Produce the Operation, or a mistaken statement as to the reasons therefor, will not invalidate the patent. *Hemolin Co. v. Harway Dyewood, etc., Mfg. Co.*, (C. C. A.) 138 Fed. Rep. 54.

355. 1. Sufficiency a Question for Jury. — *Dade v. Boorum, etc., Co.*, 121 Fed. Rep. 135.

10. Manner or Process of Compounding. — *Lane v. Levi*, 21 App. Cas. (D. C.) 168.

11. Experiment. — *Panzl v. Battle Island Paper Co.*, (C. C. A.) 138 Fed. Rep. 48.

356. 2. Sufficiency of Description of Art or Process. — *Wolff v. Du Pont de Nemours*, 122 Fed. Rep. 944. See also *National Enameling, etc., Co. v. New England Enameling Co.*, 139 Fed. Rep. 643.

3. Description of One Mode Sufficient. — *Burdon Wire, etc., Co. v. Williams*, 128 Fed. Rep.

- 356.** (5) *Improvements.* — See note 8.
- 357.** 4. *Drawings.* — See notes 7, 8.
- 358.** 7. *Claim* — *a.* NECESSITY AND PURPOSE. — See note 4.
b. FORM AND GENERAL REQUISITES — (1) *In General.* — See note 6.
- 359.** (2) *Conformity to Description.* — See notes 1, 2, 3, 5.
 (3) *Complete Invention.* — See notes 6, 7.
- 360.** (5) *Limitation to What Is New.* — See note 1.
 (9) *Number of Claims.* — See note 12.
- 361.** See note 2.
 (10) *Generic and Specific Claims.* — See note 4.
- 362.** *c.* RULES APPLICABLE TO PARTICULAR CLASSES OF INVENTIONS — (3) *Combination.* — See notes 1, 3, 4.
- 363.** (5) *Improvements.* — See notes 3, 5.

927; *Manhattan Gen. Constr. Co. v. Helios-Upton Co.*, 135 Fed. Rep. 785.

A Claim for a Chemical Product Is Not Limited to the Described Process merely because the evidence shows that it cannot be made in any other way than by the process recited. *Maurer v. Dickerson*, (C. C. A.) 113 Fed. Rep. 870.

356. 8. Particular Description of Machine Improved. — *Thomson-Houston Electric Co. v. Black River Traction Co.*, (C. C. A.) 135 Fed. Rep. 228.

357. 7. Irregularities in the Signing of the Drawings are no defense to an action for infringement, whatever effect they might have in a direct proceeding to set aside the patent. *Hallock v. Babcock Mfg. Co.*, 124 Fed. Rep. 228.

8. Sufficiency of Drawings. — *American Delin-ter Co. v. American Machinery, etc., Co.*, (C. C. A.) 128 Fed. Rep. 709; *Western Telephone Mfg. Co. v. American Electric Telephone Co.*, (C. C. A.) 131 Fed. Rep. 75.

358. 4. Matters Not Claimed Not Covered by Patent. — *Morrison v. Sonn*, 111 Fed. Rep. 172; *Morgan v. Pennsylvania Rubber Co.*, (C. C. A.) 126 Fed. Rep. 952; *Lanyon Zinc Co. v. Brown*, (C. C. A.) 129 Fed. Rep. 912; *Westinghouse Electric, etc., Co. v. Stanley Instrument Co.*, (C. C. A.) 138 Fed. Rep. 823.

6. Sufficiency in General. — See *U. S. Peg Wood, etc., Co. v. B. F. Sturtevant Co.*, 122 Fed. Rep. 476.

Inventor May Choose His Own Form of Expression. — *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 108 U. S. 410.

359. 1. Claim Limited by Description. — *Durfee v. Bawo*, 118 Fed. Rep. 853.

General Language in a Claim Which Points to an Element or Device More Fully Described in the Specification is limited to such an element or device as is there described. *Expanded Metal Co. v. Board of Education*, (C. C. A.) 111 Fed. Rep. 397.

A Claim Is Not Limited by the Amendment of the Specification due to objections made by the patent office, the claim itself being left unchanged. *Manhattan Gen. Constr. Co. v. Helios-Upton Co.*, 135 Fed. Rep. 785.

2. Claim Not Expanded by Description. — *Durfee v. Bawo*, 118 Fed. Rep. 853; *Canda v. Michigan Malleable Iron Co.*, (C. C. A.) 124 Fed. Rep. 486; *Manhattan Gen. Constr. Co. v.*

Helios-Upton Co., 135 Fed. Rep. 785. See also *Porter v. Single-Tube Automobile, etc., Tire Co.*, (C. C. A.) 112 Fed. Rep. 423.

3. Claim Narrower than Description. — *Anderson v. Collins*, (C. C. A.) 122 Fed. Rep. 451; *Smeeth v. Perkins*, (C. C. A.) 125 Fed. Rep. 285; *Penfield v. Potts*, (C. C. A.) 126 Fed. Rep. 475.

5. Anderson v. Collins, (C. C. A.) 122 Fed. Rep. 451.

6. Complete Operative Invention. — See *Mayo Knitting Mach., etc., Co. v. Jenckes Mfg. Co.*, 121 Fed. Rep. 110, *affirmed* (C. C. A.) 133 Fed. Rep. 527.

7. Immaterial Omissions. — *Thomson-Houston Electric Co. v. Black River Traction Co.*, (C. C. A.) 135 Fed. Rep. 759; *Shepherd v. Deitsch*, 138 Fed. Rep. 83.

An Inventor Is Not Required to Describe in Full All the Beneficial Functions to be performed by his machine. *Stillwell-Bierce, etc., Co. v. Eufaula Cotton Oil Co.*, (C. C. A.) 117 Fed. Rep. 415.

360. 1. Claim Limited to What Is New. — *Oehrle v. William H. Horstman Co.*, 131 Fed. Rep. 487.

12. See Sanitas Nut Food Co. v. Voigt, (C. C. A.) 139 Fed. Rep. 551; *Maurer v. Dickerson*, (C. C. A.) 113 Fed. Rep. 870.

361. 2. Multiplication of Claims. — *In re Carpenter*, 24 App. Cas. (D. C.) 110; *Norden v. Spaulding*, 24 App. Cas. (D. C.) 286.

4. Generic and Specific Claims. — *Radische Anilin, etc., Fabrik v. Klipstein*, 125 Fed. Rep. 543. See also *Thomson-Houston Electric Co. v. Black River Traction Co.*, 124 Fed. Rep. 495.

362. 1. Combination. — *Thomas v. Spencer*, 122 Fed. Rep. 879, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 361 [362].

3. Claim of Complete Patentable Combination. — *McCaslin v. Link Belt Machinery Co.*, 139 Fed. Rep. 393.

4. Claiming Unessential Features. — *American Can Co. v. Hickmott Asparagus Canning Co.*, 137 Fed. Rep. 86.

363. 3. Improvements. — *Western Electric Co. v. North Electric Co.*, (C. C. A.) 135 Fed. Rep. 79.

5. Improvement Inoperative Alone. — *Canda v. Michigan Malleable Iron Co.*, (C. C. A.) 124 Fed. Rep. 486.

- 363.** (7) *Designs*. — See note 13.
- 364.** 9. Oath — *e*. EFFECT AS EVIDENCE. — See note 14.
10. Filing Application. — See note 15.
- 366.** 14. Amendment of Application — *a*. IN GENERAL. — See note 7.
- b*. WHAT AMENDMENTS PROPER. — See notes 9, 11, 12.
- 367.** *e*. AMENDMENTS RELATE BACK. — See note 7.
15. Abandonment of Application. — See note 8.
- 368.** See note 1.
16. Renewal of Application — *a*. AFTER ABANDONMENT. — See notes 4, 5.
- b*. AFTER WITHDRAWAL OR REJECTION. — See notes 6, 7.
- 369.** *c*. AFTER ALLOWANCE AND FORFEITURE. — See notes 5, 6.
- 370.** 17. Interferences — *b*. WHEN INTERFERENCE MAY BE DECLARED — (2) *Identity of Interfering Claims*. — See note 3.
- (3) *Successive Interferences*. — See note 5.
- e*. PRELIMINARY STATEMENTS. — See notes 9, 10, 12.
- f*. ISSUES INVOLVED. — See note 15.
- 371.** See notes 1, 2.
- 363.** 13. *Designs*. — In *re* Freeman, 23 App. Cas. (D. C.) 226.
- 364.** 14. A Patentee Is Not Estopped from Contradicting the Oath in an infringement suit. De Laval Separator Co. *v*. Vermont Farm Mach. Co., (C. C. A.) 135 Fed. Rep. 772.
15. Date in Printed Copies of Patent Prima Facie Evidence of Date of Filing of Application. — Drewson *v*. Hartje Paper Mfg. Co., (C. C. A.) 131 Fed. Rep. 734.
- 366.** 7. Amendments Binding on Applicant. — Farrel *v*. United Verde Copper Co., 121 Fed. Rep. 551.
9. Improper Amendments. — Cleveland Foundry Co. *v*. Detroit Vapor Stove Co., 131 Fed. Rep. 740.
- Principles Discerned or New Uses Discovered pending the application may be included in an amendment. Cleveland Foundry Co. *v*. Detroit Vapor Stove Co., (C. C. A.) 131 Fed. Rep. 853.
11. Proper Amendments. — Kirchberger *v*. American Acetylene Burner Co., (C. C. A.) 128 Fed. Rep. 599.
- Amendments Permissible to Conform to Art. — Keasbey, etc., Co. *v*. Philip Carey Mfg. Co., 139 Fed. Rep. 578.
12. Keasbey, etc., Co. *v*. Philip Carey Mfg. Co., 139 Fed. Rep. 571.
- Applicant Not Entitled to Benefit of Original Claim After Amendment. — McGill *v*. Whitehead, etc., Co., 137 Fed. Rep. 97.
- 367.** 7. Amendments Relate Back. — Badische Anilin, etc., Fabrik *v*. Klipstein, 125 Fed. Rep. 543.
8. Delay Amounting to Abandonment. — Hayes-Young Tie Plate Co. *v*. St. Louis Transit Co., 130 Fed. Rep. 900.
- Negligence of the Attorney does not constitute unavoidable delay. Lay *v*. Indianapolis Brush, etc., Mfg. Co., (C. C. A.) 120 Fed. Rep. 831.
- 368.** 1. Miller *v*. Walker Patented Bin Co., 138 Fed. Rep. 910.
4. Renewal After Abandonment. — Hayes-Young Tie Plate Co. *v*. St. Louis Transit Co., (C. C. A.) 137 Fed. Rep. 80. See also Lotterhand *v*. Hanson, 23 App. Cas. (D. C.) 372.
5. Hayes-Young Tie Plate Co. *v*. St. Louis Transit Co., (C. C. A.) 137 Fed. Rep. 80. See also Lay *v*. Indianapolis Brush, etc., Mfg. Co., (C. C. A.) 120 Fed. Rep. 831.
6. Renewal After Withdrawal or Rejection. — See Daylight Prism Co. *v*. Marcus Prism Co., 110 Fed. Rep. 980.
7. Continuity of Original and Renewed Applications — Reasonable and Unreasonable Delay. — Hayes-Young Tie Plate Co. *v*. St. Louis Transit Co., (C. C. A.) 137 Fed. Rep. 80.
- 369.** 5. Only One Renewal Application May Be Made. — Weston Electrical Instrument Co. *v*. Empire Electrical Instrument Co., 131 Fed. Rep. 90.
6. See Weston Electrical Instrument Co. *v*. Empire Electrical Instrument Co., (C. C. A.) 136 Fed. Rep. 599.
- 370.** 3. Substantial Identity of Interfering Claims. — See Furman *v*. Dean, 24 App. Cas. (D. C.) 277. See further *infra*, this title.
- 374.** 9.
5. See Richards *v*. Meissner, 24 App. Cas. (D. C.) 305.
9. Sworn Preliminary Statements Constitute Pleadings. — Hammond *v*. Basch, 24 App. Cas. (D. C.) 473.
10. Funk *v*. Haines, 20 App. Cas. (D. C.) 285; Hammond *v*. Basch, 24 App. Cas. (D. C.) 469.
12. Whether an Amendment Shall Be Allowed is within the discretion of the commissioner, and such discretion is reviewable only for gross abuse. Hammond *v*. Basch, 24 App. Cas. (D. C.) 472.
15. Priority Between Parties the Sole Issue. — Latham *v*. Armat, 17 App. Cas. (D. C.) 345; Swihart *v*. Mauldin, 19 App. Cas. (D. C.) 570. See also Schupphaus *v*. Stevens, 17 App. Cas. (D. C.) 548.
- 371.** 1. Priority of Third Person. — Brown *v*. Blood, 22 App. Cas. (D. C.) 216; Prindle *v*. Brown, 24 App. Cas. (D. C.) 114.
2. Patentability Not Determined. — Newton *v*. Woodward, 17 App. Cas. (D. C.) 34; Latham *v*. Armat, 17 App. Cas. (D. C.) 345; Tyler *v*. St. Amand, 17 App. Cas. (D. C.) 464; Schupphaus *v*. Stevens, 17 App. Cas. (D. C.) 548;

- 372.** *i. EVIDENCE — (2) Burden of Proof.* — See notes 3, 4, 5, 6.
(3) Admissibility and Sufficiency. — See notes 8, 9.
- 373.** See notes 1, 2.
 19. Appeals from Commissioner of Patents. — See note 6.
- 374.** 21. Conclusiveness and Effect of Decisions of Patent Office — *b. PARTICULAR APPLICATIONS OF RULES — Decision of Patent Office Not Conclusive.* — See note 9.
- 375.** 22. Joinder of Inventions — Statement of Rule. — See note 10.
- 376.** See note 1.
 23. Division of Inventions — *a. IN GENERAL.* — See note 14.
- 377.** *b. SPECIFIC RULES — Where Several Distinct Inventions Are Dependent.* — See note 4.
- 382.** VI. TERM — 1. Date. — See note 1.
 The Date of Application. — See note 3.
 2. Duration — *a. DURATION AS DETERMINED BY STATUTE.* — See note 7.

Stone *v.* Pupin, 19 App. Cas. (D. C.) 396;
 Luger *v.* Browning, 21 App. Cas. (D. C.) 201.

372. 3. Burden on Junior Applicant. — Tyler *v.* Kelch, 19 App. Cas. (D. C.) 180; Swihart *v.* Mauldin, 19 App. Cas. (D. C.) 570; Funk *v.* Haines, 20 App. Cas. (D. C.) 285; Meyer *v.* Sarfert, 21 App. Cas. (D. C.) 26; Hallwood *v.* Lalor, 21 App. Cas. (D. C.) 61; Gallagher *v.* Hastings, 21 App. Cas. (D. C.) 88; Flather *v.* Weber, 21 App. Cas. (D. C.) 179; Garrels *v.* Freeman, 21 App. Cas. (D. C.) 207; Whitney *v.* Howard, 21 App. Cas. (D. C.) 218; MacDonald *v.* Edison, 21 App. Cas. (D. C.) 527; Harris *v.* Stern, 22 App. Cas. (D. C.) 164; Sendelbach *v.* Gillette, 22 App. Cas. (D. C.) 168; McKnight *v.* Pohle, 22 App. Cas. (D. C.) 219; Cobb *v.* Goebel, 23 App. Cas. (D. C.) 75; Talbot *v.* Monell, 23 App. Cas. (D. C.) 108; Paul *v.* Johnson, 23 App. Cas. (D. C.) 187; Flora *v.* Powrie, 23 App. Cas. (D. C.) 195; Herman *v.* Fullman, 23 App. Cas. (D. C.) 259; Prindle *v.* Brown, 24 App. Cas. (D. C.) 114; Murphy *v.* Meissner, 24 App. Cas. (D. C.) 260; Paul *v.* Hess, 24 App. Cas. (D. C.) 462; Seeberger *v.* Dodge, 24 App. Cas. (D. C.) 476.

The Inventor Last to File His Application is the junior applicant. Tyler *v.* Kelch, 19 App. Cas. (D. C.) 180. And this is so even though his application is the first to go to patent. Miehle *v.* Read, 18 App. Cas. (D. C.) 128.

If Neither Applicant Has Reduced the Invention to Practice the junior applicant has the burden of showing the earlier conception of the invention. Furman *v.* Dean, 24 App. Cas. (D. C.) 277.

4. Herman *v.* Fullman, 23 App. Cas. (D. C.) 259. See also Greenwood *v.* Dover, 23 App. Cas. (D. C.) 251.

5. Prior Unexpired Patent. — Locke *v.* Boch, 17 App. Cas. (D. C.) 75; Reichenbach *v.* Kelley, 17 App. Cas. (D. C.) 333; Sharer *v.* McHenry, 19 App. Cas. (D. C.) 158; Gedge *v.* Cromwell, 19 App. Cas. (D. C.) 192; Quist *v.* Ostran, 23 App. Cas. (D. C.) 60; Harter *v.* Barrett, 24 App. Cas. (D. C.) 300.

6. Inadvertent Issue of Patent to Junior Applicant. — Watson *v.* Thomas, 23 App. Cas. (D. C.) 65; Shaffer *v.* Dolan, 23 App. Cas. (D. C.)

79. See also Furman *v.* Dean, 24 App. Cas. (D. C.) 277.

8. As Between Pending Applications. — Flather *v.* Weber, 21 App. Cas. (D. C.) 179.

9. As Against Prior Patent. — Locke *v.* Boch, 17 App. Cas. (D. C.) 75; Reichenbach *v.* Kelley, 17 App. Cas. (D. C.) 333; Sharer *v.* McHenry, 19 App. Cas. (D. C.) 158; Gedge *v.* Cromwell, 19 App. Cas. (D. C.) 192; Meyer *v.* Sarfert, 21 App. Cas. (D. C.) 26; Sendelbach *v.* Gillette, 22 App. Cas. (D. C.) 168; Talbot *v.* Monell, 23 App. Cas. (D. C.) 108; Robinson *v.* Copeland, 24 App. Cas. (D. C.) 68; Lemp *v.* Mudge, 24 App. Cas. (D. C.) 282; Corner *v.* Kyle, 24 App. Cas. (D. C.) 291; Harter *v.* Barrett, 24 App. Cas. (D. C.) 300.

373. 1. See Watson *v.* Thomas, 23 App. Cas. (D. C.) 65.

2. Laches or Delay. — Harter *v.* Barrett, 24 App. Cas. (D. C.) 300; Paul *v.* Hess, 24 App. Cas. (D. C.) 462. See also Sendelbach *v.* Gillette, 22 App. Cas. (D. C.) 168.

6. Appeals from Commissioners. — See Prindle *v.* Brown, 136 Fed. Rep. 616.

374. 9. Decisions of the Patent Office as to Identity of Claims in interference cases are ordinarily accepted as conclusive, but may be reversed in case of palpable error. Seeberger *v.* Dodge, 24 App. Cas. (D. C.) 481.

375. 10. U. S. *v.* Allen, 192 U. S. 543.

376. 1. The Discretion Is Not Unlimited, and a rule of the patent office which prevents a joinder of inventions in all cases is invalid. U. S. *v.* Allen, 192 U. S. 543.

14. Two Patents for Same Invention. — Williams Calk Co. *v.* Neverslip Mfg. Co., 136 Fed. Rep. 210.

377. 4. Distinct Related Inventions — Joinder or Division Optional. — See Thomson-Houston Electric Co. *v.* Ohio Brass Co., 130 Fed. Rep. 547.

382. 1. Provision as to Date Directory Only. — Western Electric Co. *v.* North Electric Co., (C. C. A.) 135 Fed. Rep. 79.

3. Prindle *v.* Brown, 136 Fed. Rep. 616.

7. Duration. — See Victor Talking Mach. Co. *v.* The Fair, (C. C. A.) 123 Fed. Rep. 425; National Phonograph Co. *v.* Schlegel, (C. C. A.) 128 Fed. Rep. 733.

382. *b.* DURATION AS DETERMINED BY FOREIGN PATENT. — See note 8.

383. Identity of the Two Patents. — See note 8.

384. *c.* EXTENSIONS. — See note 12.

386. VII. SURRENDER AND REISSUE — 1. Right to Surrender and Obtain Reissue — *a.* IN GENERAL. — See note 5.

b. ERRORS OR DEFECTS AUTHORIZING REISSUE — (2) *Insufficient Description.* — See note 8.

(4) *Claims Too Narrow.* — See note 10.

388. *c.* CONDITIONS OF REISSUE — (2) *Inadvertence, Accident, or Mistake.* — See note 4.

389. 2. Application and Proceedings Thereon — *b.* TIME OF APPLICATION — (1) *In General.* — See note 15.

390. (2) *Delay in Applying for Enlargement of Claims.* — See note 3.

391. 3. Identity of Invention in Original and Reissued Patents — *a.* NECES-SITY OF IDENTITY. — See note 7.

393. *c.* WHAT CONSTITUTES IDENTITY — (2) *Inclusion of Disclaimed, Rejected, or Abandoned Matter.* — See notes 1, 2.

(3) *Enlargement of Claims.* — See note 4.

395. (6) *Combinations.* — See notes 1, 3.

d. EVIDENCE OF IDENTITY. — See note 6.

399. 6. Operation and Effect of Surrender and Reissue. — See note 3.

400. VIII. DISCLAIMERS — 1. In General. — See note 2.

2. Conditions of Disclaimer — *a.* INADVERTENCE, ACCIDENT, OR MIS-TAKE. — See note 4.

382. 8. John R. Williams Co. *v.* Miller, etc., Mfg. Co., 115 Fed. Rep. 526; Sawyer Spindle Co. *v.* Carpenter, 133 Fed. Rep. 238; United Shoe Machinery Co. *v.* Caunt, 134 Fed. Rep. 239. See also Aquarama Co. *v.* Old Mill Co., 124 Fed. Rep. 229.

Duration under English and Canadian Statutes. — See Acetylene Illuminating Co. *v.* United Alkali Co., (1902) 1 Ch. 494; Dominion Cotton Mills Co. *v.* General Engineering Co., (1902) A. C. 570.

383. 8. The Duration of a United States Patent Is Not Affected by a Foreign Patent Which Describes, but Does Not Claim, the same invention. Westinghouse Electric, etc., Co. *v.* Stanley Instrument Co., (C. C. A.) 138 Fed. Rep. 823.

384. 12. In England an Application for an Extension of a Patent Is an Application for an Indulgence, and for an indulgence of a very extraordinary kind. Peach's Patent, (1902) A. C. 414.

386. 5. Reissue Mandatory on Commissioner. — Thomson-Houston Electric Co. *v.* Black River Traction Co., (C. C. A.) 135 Fed. Rep. 759.

8. Defective Specification. — Weston Electrical Instrument Co. *v.* Stevens, 119 Fed. Rep. 181.

10. Claims Too Narrow. — Pittsburg Meter Co. *v.* Pittsburg Supply Co., (C. C. A.) 109 Fed. Rep. 644.

388. 4. A Mistake as to the Meaning of a Disclaimer Which Is Deliberately Made to meet a requirement of the patent office, and which does meet such requirement, and thereby avoids an interference, is not a mistake inadvertently committed, within the meaning of the statute. Westinghouse Electric, etc., Co. *v.* Stanley Electric Mfg. Co., 115 Fed. Rep. 810.

389. 15. Right Lost by Laches. — United Blue-Flame Oil Stove Co. *v.* Glazier, (C. C. A.) 119 Fed. Rep. 157.

390. 3. Rule of Two Years' Delay. — *In re* Starkey, 21 App. Cas. (D. C.) 519.

391. 7. Identity of Invention Essential. — Edison *v.* American Mutoscope, etc., Co., 127 Fed. Rep. 361; Franklin *v.* Illinois Moulding Co., 128 Fed. Rep. 48; Weston Electrical Instrument Co. *v.* Stevens, (C. C. A.) 134 Fed. Rep. 574; Thomson-Houston Electric Co. *v.* Black River Traction Co., (C. C. A.) 135 Fed. Rep. 759.

393. 1. Disclaimed or Rejected Matter. Troy Laundry Machinery Co. *v.* Adams Laundry Machinery Co., 112 Fed. Rep. 437.

2. Abandoned Claims. — Westinghouse Electric, etc., Co. *v.* Saranac Lake Electric Light Co., (C. C. A.) 113 Fed. Rep. 884; Ide *v.* Thorlicht, etc., Carpet Co., (C. C. A.) 115 Fed. Rep. 137.

4. Illegal Enlargement of Claims. — Marconi Wireless Tel. Co. *v.* De Forest Wireless Tel. Co., 138 Fed. Rep. 657.

395. 1. Claiming Elements Separately. — See Thomson-Houston Electric Co. *v.* Black River Traction Co., 124 Fed. Rep. 495.

3. Subcombinations. — Thomson-Houston Electric Co. *v.* Black River Traction Co., (C. C. A.) 135 Fed. Rep. 759.

6. Reissue Prima Facie Evidence of Identity. — Franklin *v.* Illinois Moulding Co., (C. C. A.) 138 Fed. Rep. 58.

399. 3. Reissue Granted. — Franklin *v.* Illinois Moulding Co., 128 Fed. Rep. 48.

400. 2. Statute Liberally Construed. — Manhattan Gen. Constr. Co. *v.* Helios-Upton Co., 135 Fed. Rep. 785.

4. Inadvertence, Accident, or Mistake Essential.

- 400.** *b.* EXCESS MUST BE SEPARABLE. — See note 6.
c. TIME OF FILING. — See note 8.
- 401.** *3.* Necessity and Propriety of Disclaimer. — See note 4.
- 402.** See note 6.
6. Operation and Effect of Disclaimer. — See note 17.
- 403.** See note 1.
- 404.** IX. ANNULMENT AND REPEAL OF PATENTS — *3.* Void and Fraudulent Patents. — See note 3.
- X. CONSTRUCTION OF LETTERS PATENT — *1.* In General. — See notes 7, 8.
- 405.** *2.* Construction to Sustain Patent. — See notes 2, 3.
- 406.** See note 1.
3. Construction in Favor of Patentee. — See note 2.
- 407.** See note 1.
- 408.** See note 2.

— Manhattan Gen. Constr. Co. *v.* Helios-Upton Co., 135 Fed. Rep. 785.

400. *6.* Excess Must Be Separable. — Otis Elevator Co. *v.* Portland Co., (C. C. A.) 127 Fed. Rep. 557; Manhattan Gen. Constr. Co. *v.* Helios-Upton Co., 135 Fed. Rep. 785.

8. Disclaimer May Be Filed After Hearing on Appeal. — Sample *v.* American Soda Fountain Co., 134 Fed. Rep. 402.

401. *4.* When Necessary. — Lamb Knit Goods Co. *v.* Lamb Glove, etc., Co., (C. C. A.) 120 Fed. Rep. 267; Westinghouse Air Brake Co. *v.* New York Air Brake Co., 139 Fed. Rep. 265.

402. *6.* Multifariousness in Patent. — Manhattan Gen. Constr. Co. *v.* Helios-Upton Co., 135 Fed. Rep. 785.

17. Construction of Patent After Disclaimer. — Manhattan Gen. Constr. Co. *v.* Helios-Upton Co., 135 Fed. Rep. 785, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 402; Thomson-Houston Electric Co. *v.* Black River Traction Co., (C. C. A.) 135 Fed. Rep. 759.

403. *1.* Merely Limits Existing Patent. — See Société Fabriques, etc., *v.* Lueders, 135 Fed. Rep. 102.

404. *3.* Suit by Inventor Against Fraudulent Patentee. — In *Murjahn v. Hall*, 119 Fed. Rep. 186, a bill for an accounting and to obtain a decree declaring the invalidity of the patent was held to lie at the suit of an inventor against one to whom he had disclosed the secret of the invention and who had it patented in fraud of his rights.

7. Patent Void if Indefinite. — See *U. S. Mineral Wool Co. v. Manville Covering Co.*, (C. C. A.) 125 Fed. Rep. 770.

8. Question of Law for Court. — *Simplex Railway Appliance Co. v. Wands*, (C. C. A.) 115 Fed. Rep. 517.

405. *2.* Construction to Sustain Patent. — *Daylight Prism Co. v. Marcus Prism Co.*, 110 Fed. Rep. 980; *Scott v. Tecktonius*, 115 Fed. Rep. 157; *Kip-Armstrong Co. v. King Philip Mills*, 130 Fed. Rep. 28; *Shepherd v. Deitsch*, 138 Fed. Rep. 83.

3. Language to Be Given Its Obvious Effect. — *Jones v. Davis*, (C. C. A.) 138 Fed. Rep. 62.

406. *1.* Limitation in View of Prior State of the Art. — *Luxfer Prism Co. v. Webster*, 8 Can. Exch. 59. See also *Ryder v. Schlichter*,

(C. C. A.) 126 Fed. Rep. 487; *In re Seabury*, 23 App. Cas. (D. C.) 377.

2. Liberal Construction in Favor of Patentee. — *Wilfley v. Denver Engineering Works Co.*, 111 Fed. Rep. 760; *General Electric Co. v. Brooklyn Heights R. Co.*, 117 Fed. Rep. 613; *American Street Car Advertising Co. v. Jones*, 122 Fed. Rep. 803; *Smeeth v. Perkins*, (C. C. A.) 125 Fed. Rep. 285; *Electric Smelting, etc., Co. v. Pittsburg Reduction Co.*, (C. C. A.) 125 Fed. Rep. 926; *Eck v. Kutz*, 132 Fed. Rep. 758; *Thomson-Houston Electric Co. v. Black River Traction Co.*, (C. C. A.) 135 Fed. Rep. 759. See also *Lamb Knit Goods Co. v. Lamb Glove, etc., Co.*, (C. C. A.) 120 Fed. Rep. 267.

Separate Claims Are Not to Be Construed as Identical unless such construction is fairly unavoidable. *Lamson Consol. Store Service Co. v. Hillman*, (C. C. A.) 123 Fed. Rep. 416.

407. *1.* Patentee Bound by Language Used. — *Wilfley v. Denver Engineering Works Co.*, 111 Fed. Rep. 760; *Schreiber, etc., Mfg. Co. v. Adams Co.*, (C. C. A.) 117 Fed. Rep. 830; *Durfee v. Bawo*, 118 Fed. Rep. 853; *Lamb Knit Goods Co. v. Lamb Glove, etc., Co.*, (C. C. A.) 120 Fed. Rep. 267; *U. S. Peg Wood, etc., Co. v. B. F. Sturtevant Co.*, 122 Fed. Rep. 470, affirmed (C. C. A.) 125 Fed. Rep. 382; *Schaum v. Riehl*, 124 Fed. Rep. 320; *Hale v. World Mfg. Co.*, (C. C. A.) 127 Fed. Rep. 964; *Standard Elevator Interlock Co. v. Ramsay*, 139 Fed. Rep. 28; *Marlin Firearms Co. v. Kellogg*, 139 Fed. Rep. 31.

The Court Will Not Import into a Claim a Feature of Construction Protected by Another Claim, merely for the purpose of upholding the claim and sustaining a charge of infringement. *Metallic Extraction Co. v. Brown*, (C. C. A.) 110 Fed. Rep. 665.

The Claim Amounts to a Disclaimer and Abandonment to the public of all other combinations and improvements that are not mere invasions of the device, combination, or improvement which the patentee claims. *Kinloch Telephone Co. v. Western Electric Co.*, (C. C. A.) 113 Fed. Rep. 653.

408. *2.* Construed to Cover Actual Invention. — *Smeeth v. Perkins*, (C. C. A.) 125 Fed. Rep. 285; *Ryder v. Schlichter*, (C. C. A.) 126 Fed. Rep. 487; *Mossberg v. Nutter*, (C. C. A.) 135 Fed. Rep. 99, declaring that the language of

408. 4. Construction as a Whole. — See notes 3, 4.

409. See notes 1, 2.

410. See note 2.

5. Prior State of Art. — See note 3.

411. 6. Pioneer and Subsidiary or Secondary Inventions. — See notes 1, 2.

the claims is to be construed in the light of what is shown and described in the specifications and drawings.

408. 3. The Effort Should Be to Ascribe a Purpose to Each Claim, and to avoid a construction that would deprive a claim of a distinct purpose. Thomson-Houston Electric Co. *v.* Nassau Electric R. Co., 110 Fed. Rep. 648.

4. Unambiguous Claims Controlling. — Kip-Armstrong Co. *v.* King Philip Mills, 130 Fed. Rep. 28; Westinghouse Air Brake Co. *v.* New York Air Brake Co., (C. C. A.) 119 Fed. Rep. 884.

409. 1. Reference to Descriptive Parts of Specification. — General Fire Extinguisher Co. *v.* Mallers, (C. C. A.) 110 Fed. Rep. 529; United Shoe Machinery Co. *v.* Greene, 115 Fed. Rep. 155, reversed on other points (C. C. A.) 132 Fed. Rep. 973; Stillwell-Bierce, etc., Co. *v.* Eufaula Cotton Oil Co., (C. C. A.) 117 Fed. Rep. 410; Weston Electrical Instrument Co. *v.* Stevens, 119 Fed. Rep. 181; Lamb Knit Goods Co. *v.* Lamb Glove, etc., Co., (C. C. A.) 120 Fed. Rep. 267; Canda *v.* Michigan Malleable Iron Co., (C. C. A.) 124 Fed. Rep. 486; Penfield *v.* Potts, (C. C. A.) 126 Fed. Rep. 475; Sanders *v.* Hancock, (C. C. A.) 128 Fed. Rep. 424; Weston Electrical Instrument Co. *v.* Empire Electrical Instrument Co., 131 Fed. Rep. 82.

2. Limitation or Enlargement of Claims by Specifications. — General Fire Extinguisher Co. *v.* Mallers, (C. C. A.) 110 Fed. Rep. 529; Lamb Knit Goods Co. *v.* Lamb Glove, etc., Co., (C. C. A.) 120 Fed. Rep. 267; Penfield *v.* Potts, (C. C. A.) 126 Fed. Rep. 475; General Electric Co. *v.* International Specialty Co., (C. C. A.) 126 Fed. Rep. 759.

410. 2. Construction and Limitation by Express Reference to Specification. — Singer Mfg. Co. *v.* Cramer, 192 U. S. 265; Canda *v.* Michigan Malleable Iron Co., (C. C. A.) 124 Fed. Rep. 486; Carnegie Steel Co. *v.* Brislin, (C. C. A.) 124 Fed. Rep. 213, holding further that where the claim immediately follows the description of the invention, it may be construed in connection with the explanation contained in the specification.

"Substantially as Described," in a claim, means "as described in the specification." Stillwell-Bierce, etc., Co. *v.* Eufaula Cotton Oil Co., (C. C. A.) 117 Fed. Rep. 410.

3. Prior State of the Art. — Simplex Railway Appliance Co. *v.* Wands, (C. C. A.) 115 Fed. Rep. 517; U. S. Peg-Wood, etc., Co. *v.* B. F. Sturtevant Co., (C. C. A.) 125 Fed. Rep. 378; Raymond *v.* Keystone Lantern Co., (C. C. A.) 134 Fed. Rep. 866; Universal Winding Co. *v.* Foster Mach. Co., 136 Fed. Rep. 879; Moore *v.* Meyer-Sniffen Co., (C. C. A.) 138 Fed. Rep. 402; Oehrle *v.* William H. Horstman Co., (C. C. A.) 138 Fed. Rep. 561, affirming 131 Fed. Rep. 487.

411. 1. Pioneer Inventions — Patent Broadly Construed. — Singer Mfg. Co. *v.* Cramer, 192

U. S. 265; Timolat *v.* Manning, 110 Fed. Rep. 206; General Fire Extinguisher Co. *v.* Mallers, 110 Fed. Rep. 528; Morrison *v.* Sonn, 111 Fed. Rep. 172; Wilfley *v.* Denver Engineering Works Co., 111 Fed. Rep. 760; Electric Storage Battery Co. *v.* Belknap, 112 Fed. Rep. 538; Electric Storage Battery Co. *v.* Buffalo Electric Carriage Co., 117 Fed. Rep. 314; Reed Mfg. Co. *v.* Smith, etc., Co., 117 Fed. Rep. 322; George Frost Co. *v.* Crandall Wedge Co., (C. C. A.) 125 Fed. Rep. 942; Otis Elevator Co. *v.* Portland Co., (C. C. A.) 127 Fed. Rep. 557; American Chocolate Machinery Co. *v.* Helmstetter, 129 Fed. Rep. 919; Letson *v.* Alaska Packers' Assoc., (C. C. A.) 130 Fed. Rep. 129; American Crayon Co. *v.* Sexton, (C. C. A.) 139 Fed. Rep. 564.

2. Patents for Improvements — United States. — Kokomo Fence Machine Co. *v.* Kitselman, 189 U. S. 8; Goodyear Shoe-Machinery Co. *v.* Spaulding, (C. C. A.) 110 Fed. Rep. 393; General Fire Extinguisher Co. *v.* Mallers, 110 Fed. Rep. 528; Cary Mfg. Co. *v.* Patterson, 110 Fed. Rep. 750; Smidth *v.* Gates Iron Works, 110 Fed. Rep. 751; General Electric Co. *v.* Winsted Gas Co., 110 Fed. Rep. 963; Caster Socket Co. *v.* Clark, 110 Fed. Rep. 976; A. R. Milner Seating Co. *v.* Yesbera, (C. C. A.) 111 Fed. Rep. 386; National Automatic Mach. Co. *v.* Automatic Weighing, etc., Mach. Co., (C. C. A.) 111 Fed. Rep. 401; Bradley Pulverizer Co. *v.* Bowker Fertilizer Co., 111 Fed. Rep. 537; Peifer *v.* Brown, (C. C. A.) 112 Fed. Rep. 435; Rosenblatt *v.* Fraser Tablet Triturate Mfg. Co., (C. C. A.) 112 Fed. Rep. 677; Kalamazoo R. Supply Co. *v.* Duff Mfg. Co., (C. C. A.) 113 Fed. Rep. 264; Hendey Mach. Co. *v.* Prentiss Tool, etc., Co., 113 Fed. Rep. 592; Henry Huber Co. *v.* J. L. Mott Iron Works, 113 Fed. Rep. 599, affirmed (C. C. A.) 125 Fed. Rep. 944; General Electric Co. *v.* Webster, etc., St. R. Co., (C. C. A.) 113 Fed. Rep. 756; American Electrical Novelty, etc., Co. *v.* Newgold, (C. C. A.) 113 Fed. Rep. 877; Bradford *v.* Belknap Motor Co., (C. C. A.) 115 Fed. Rep. 711; Bryce Bros. Co. *v.* National Glass Co., (C. C. A.) 116 Fed. Rep. 186; De Lamar *v.* De Lamar Min. Co., (C. C. A.) 117 Fed. Rep. 240; Schlicht Heat, etc., Co. *v.* Æolipyle Co., 117 Fed. Rep. 299; Doig *v.* Morgan Mach. Co., 117 Fed. Rep. 305, affirmed 122 Fed. Rep. 460; Schreiber, etc., Mfg. Co. *v.* Adams Co., (C. C. A.) 117 Fed. Rep. 830; H. W. Butterworth, etc., Co. *v.* Winsor, etc., Mfg. Co., 117 Fed. Rep. 856; Boston Towboat Co. *v.* Chase Mach. Co., (C. C. A.) 118 Fed. Rep. 36; Rawson *v.* Western Sand Blast Co., (C. C. A.) 118 Fed. Rep. 575, affirmed 194 U. S. 627; Durfee *v.* Bawo, 118 Fed. Rep. 853; United Blue-Flame Oil Stove Co. *v.* Glazier, (C. C. A.) 119 Fed. Rep. 157; Thomson-Houston Electric Co. *v.* Wagner Electric Mfg. Co., 119 Fed. Rep. 178, affirmed (C. C. A.) 126 Fed. Rep. 170; Westinghouse Air Brake Co. *v.* New York Air Brake Co., (C. C.

412. See note 1.7. **Meaning of Words and Phrases.** — See note 2.8. **Extrinsic Evidence in General.** — See note 5.9. **Expert and Opinion Evidence.** — See note 7**413.** 10. **Proceedings in Patent Office.** — See notes 1, 2.

A.) 119 Fed. Rep. 874; American Bell Telephone Co. v. National Telephone Mfg. Co., (C. C. A.) 119 Fed. Rep. 893; Otis Elevator Co. v. Portland Co., 119 Fed. Rep. 928, *affirmed* (C. C. A.) 127 Fed. Rep. 557; Ludington Novelty Co. v. Leonard, 119 Fed. Rep. 939, *affirmed* (C. C. A.) 127 Fed. Rep. 155; Davis v. Perry, (C. C. A.) 120 Fed. Rep. 941; Cary Mfg. Co. v. Standard Metal Strap Co., (C. C. A.) 120 Fed. Rep. 945; Seiler v. Fuller, etc., Mfg. Co., (C. C. A.) 121 Fed. Rep. 85; L. E. Waterman Co. v. Forsyth, 121 Fed. Rep. 107, *affirmed* (C. C. A.) 128 Fed. Rep. 926; Mayo Knitting Mach., etc., Co. v. Jenckes Mfg. Co., 121 Fed. Rep. 110, *affirmed* (C. C. A.) 133 Fed. Rep. 527; Evans v. Newark Rivet Works, 121 Fed. Rep. 133, *affirmed* (C. C. A.) 126 Fed. Rep. 492; Sander v. Rose, (C. C. A.) 121 Fed. Rep. 840; Lowell Mach. Shop v. Saco, etc., Mach. Shops, (C. C. A.) 122 Fed. Rep. 632; American Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co., 123 Fed. Rep. 891; Force v. Independent Mfg. Co., 124 Fed. Rep. 72; Carnegie Steel Co. v. Brislín, (C. C. A.) 124 Fed. Rep. 213; Schaum v. Riehl, 124 Fed. Rep. 320; Golden Gate Mfg. Co. v. Newark Faucet Co., 124 Fed. Rep. 531, *affirmed* (C. C. A.) 130 Fed. Rep. 112; Bryant Electric Co. v. Buchanan, 124 Fed. Rep. 537, *affirmed* (C. C. A.) 128 Fed. Rep. 922; Lorain Steel Co. v. New York Switch etc., Co., 124 Fed. Rep. 548; Brookfield v. Novelty Glass Mfg. Co., 124 Fed. Rep. 551; Little Gem Mfg. Co. v. Strauss, 124 Fed. Rep. 900; L. E. Waterman Co. v. Lockwood, (C. C. A.) 125 Fed. Rep. 290; Wilson v. Townley Shingle Co., (C. C. A.) 125 Fed. Rep. 491; Henry Huber Co. v. J. L. Mott Ironworks, (C. C. A.) 125 Fed. Rep. 944; Milwaukee Carving Co. v. Brunswick-Balke-Collender Co., (C. C. A.) 126 Fed. Rep. 171; H. C. White Co. v. Walbridge, (C. C. A.) 126 Fed. Rep. 373; Ryder v. Schlichter, (C. C. A.) 126 Fed. Rep. 487; Evans v. Newark Rivet Works, (C. C. A.) 126 Fed. Rep. 492; Bradley v. Eccles, (C. C. A.) 126 Fed. Rep. 945; Julius King Optical Co. v. Bilhoefer, (C. C. A.) 127 Fed. Rep. 127; Diamond Match Co. v. Ruby Match Co., 127 Fed. Rep. 341; Coup v. McConway, etc., Co., 127 Fed. Rep. 351; Cary Mfg. Co. v. Patterson, 127 Fed. Rep. 357; Felt, etc., Mfg. Co. v. Mechanical Accountant Co., 129 Fed. Rep. 386; Young v. Clipper Mfg. Co., (C. C. A.) 130 Fed. Rep. 150; Eldred v. Kirkland, (C. C. A.) 130 Fed. Rep. 343; Western Electric Co. v. North Electric Co., (C. C. A.) 130 Fed. Rep. 457; American Acetylene Burner Co. v. Kirchner, 131 Fed. Rep. 94; New Jersey Wire Cloth Co. v. Buffalo Expanded Metal Co., 131 Fed. Rep. 265; Simmons Mfg. Co. v. Southern Spring Bed Co., 131 Fed. Rep. 278; Fries v. Leeming, 131 Fed. Rep. 765; Weisgerber v. Clowney, 131 Fed. Rep. 477; Cleveland Foundry Co. v. Detroit Vapor Stove Co., 131 Fed. Rep. 740; King Philip Mills v. Kip-Armstrong Co., (C. C. A.) 132 Fed. Rep. 975; Mayo

Knitting Mach., etc., Co. v. E. Jenckes Mfg. Co., (C. C. A.) 133 Fed. Rep. 527; Rich v. Baldwin, (C. C. A.) 133 Fed. Rep. 920; Mesick v. Hassler, 134 Fed. Rep. 395; Brown v. Huntington Piano Co., (C. C. A.) 134 Fed. Rep. 735; Raymond v. Keystone Lantern Co., (C. C. A.) 134 Fed. Rep. 866; Greene v. Buckley, (C. C. A.) 135 Fed. Rep. 520; National Phonograph Co. v. American Graphophone Co., 135 Fed. Rep. 809; Kenney Mfg. Co. v. J. L. Mott Iron Works, 137 Fed. Rep. 431; Coup v. McConway, etc., Co., (C. C. A.) 138 Fed. Rep. 411; Loew Supply, etc., Co. v. Fred Miller Brewing Co., (C. C. A.) 138 Fed. Rep. 886; Virgil Practice Clavier Co. v. Virgil, 138 Fed. Rep. 897; Pettibone v. Verona Tool Works, 138 Fed. Rep. 909; Wessel v. United Mattress Mach. Co., (C. C. A.) 139 Fed. Rep. 11; Marlin Firearms Co. v. Kellogg, 139 Fed. Rep. 31; Scott v. Fisher Knitting Mach. Co., 139 Fed. Rep. 137; McCaslin v. Link Belt Machinery Co., 139 Fed. Rep. 393; Bonsall v. T. J. Hamilton Mfg. Co., 139 Fed. Rep. 399; Langfeld v. Albright, (C. C. A.) 139 Fed. Rep. 387; Bradley v. Eccles, (C. C. A.) 139 Fed. Rep. 447. *Compare* Kip-Armstrong Co. v. King Philip Mills, 130 Fed. Rep. 31.

District of Columbia. — McKnight v. Pohle, 22 App. Cas. (D. C.) 219. See also Blackford v. Wilder, 21 App. Cas. (D. C.) 1; Slaughter v. Halle, 21 App. Cas. (D. C.) 19.

Canada. — Griffin v. Toronto R. Co., 7 Can. Exch. 411; Luxfer Prism Co. v. Webster, 8 Can. Exch. 59.

412. 1. Difference in Range of Equivalents. — Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 406; Marconi Wireless Tel. Co. v. De Forest Wireless Tel. Co., 138 Fed. Rep. 657.

2. Particular Words and Phrases. — Lanyon Zinc Co. v. Brown, (C. C. A.) 129 Fed. Rep. 912.

5. Extrinsic Evidence. — Simplex Railway Appliance Co. v. Wands, (C. C. A.) 115 Fed. Rep. 517.

7. Expert and Opinion Evidence. — Simplex Railway Appliance Co. v. Wands, (C. C. A.) 115 Fed. Rep. 517.

413. 1. Limitations Imposed by Patent Office. — Safety Oiler Co. v. Scovill Mfg. Co., 110 Fed. Rep. 203; General Fire Extinguisher Co. v. Mallers, (C. C. A.) 110 Fed. Rep. 529; Rembert Roller Compress Co. v. American Cotton Co., (C. C. A.) 129 Fed. Rep. 355; Eck v. Kutz, 132 Fed. Rep. 758; Greene v. Buckley, (C. C. A.) 135 Fed. Rep. 531; Westinghouse Electric, etc., Co. v. Cutter Electric, etc., Co., 136 Fed. Rep. 221.

2. The Scope of the Claim of a Patent may be affected by proceedings taken in the patent office while an application for the patent is under consideration. Simplex Railway Appliance Co. v. Wands, (C. C. A.) 115 Fed. Rep. 517.

414. See note 1.

11. Contemporaneous Construction of Inventor. — See note 4.

XI. TITLE, CONVEYANCES, AND CONTRACTS — 2. Legal or Equitable Title. — See note 6.

415. **3. Co-ownership — License by One Co-owner.** — See note 5.

417. **6. Transfer of Patent Rights — a. ASSIGNMENTS — (1) In General — Definition — An Exclusive Right.** — See note 1.

Nature of Transfer Determined by Its Legal Effect. — See note 6.

418. **(4) What Constitutes Assignment — (a) Execution — aa. IN GENERAL — Necessity for Writing.** — See notes 2, 5.

Acknowledgment. — See note 9.

bb. RECORDING. — See notes 10, 12, 13.

419. See note 1.

421. **(5) Assignment Before Patent.** — See note 8.

422. **(7) Conditional Assignment.** — See note 10.

423. **(8) Partial Assignments — (a) In General.** — See note 3.

(9) Agreement to Assign. — See note 8.

424. See notes 2, 4.

Specific Performance Will Not Be Decreed. — See note 7.

(10) Cancellation and Rescission of Assignment. — See note 15.

427. **(11) Construction and Operation — (b) What Passes by Assignment — ff. ASSIGNEE TAKES ONLY TITLE OF ASSIGNOR.** — See note 9.

428. **Assignee Takes Subject to Licenses.** — See note 1.

414. **1. Thomson-Houston Electric Co. v. Wagner Electric Mfg. Co.,** 119 Fed. Rep. 178, *affirmed* (C. C. A.) 126 Fed. Rep. 170. See also Thomson-Houston Electric Co. v. Black River Traction Co., (C. C. A.) 135 Fed. Rep. 759; Donchian v. Kingston, 138 Fed. Rep. 890.

4. **Contemporaneous Construction of Inventor.** — Thomson-Houston Electric Co. v. Black River Traction Co., (C. C. A.) 135 Fed. Rep. 759.

Inventor Estopped to Repudiate His Own Construction. — Westinghouse Electric, etc., Co. v. Wagner Electric Mfg. Co., 129 Fed. Rep. 604.

6. Arrott v. Standard Sanitary Mfg. Co., 131 Fed. Rep. 457.

415. **5. License by One Co-owner.** — Paulus v. M. M. Buck Mfg. Co., (C. C. A.) 129 Fed. Rep. 594.

417. **1. Exclusive Right Defined.** — Atwood Lock Co. v. Yale, etc., Mfg. Co., 115 Fed. Rep. 332.

6. Paulus v. M. M. Buck Mfg. Co., (C. C. A.) 129 Fed. Rep. 594.

418. **2. Assignment Must Be in Writing.** — Ormsby v. Connors, 133 Fed. Rep. 548.

5. Ormsby v. Connors, 133 Fed. Rep. 548. See also Cook v. Sterling Electric Co., 118 Fed. Rep. 45.

9. Acknowledgment Prima Facie Evidence of Execution. — Lanyon Zinc Co. v. Brown, (C. C. A.) 115 Fed. Rep. 150.

10. Recording. — See National Cash Register Co. v. New Columbus Watch Co., (C. C. A.) 129 Fed. Rep. 114.

12. Paulus v. M. M. Buck Mfg. Co., (C. C. A.) 129 Fed. Rep. 594.

13. Record Unnecessary as Between Parties. — Pinney v. Concordia First Nat. Bank, 68 Kan. 229, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 418.

419. **1. Infringers.** — Ormsby v. Connors, 133 Fed. Rep. 548.

421. **8. Assignment Before Patent.** — Cook v. Sterling Electric Co., 118 Fed. Rep. 45.

422. **10. If the Assignment Is Absolute,** the assignor cannot, by a notice on the patented article, impose a condition, the breach of which shall cause the title to the article to revert to the assignor. Victor Talking Mach. v. The Fair, 118 Fed. Rep. 609.

423. **3. Partial Assignments.** — D. M. Sechler Carriage Co. v. Deere, etc., Co., (C. C. A.) 113 Fed. Rep. 285; Atwood Lock Co. v. Yale, etc., Mfg. Co., 115 Fed. Rep. 332; Excelsior Wooden Pipe Co. v. Seattle, (C. C. A.) 117 Fed. Rep. 140.

8. As to the Construction of Particular Agreements. — American Tube Works v. Bridge-water Iron Co., 124 Fed. Rep. 782, *affirmed* (C. C. A.) 132 Fed. Rep. 16; McMichael, etc., Mfg. Co. v. Ruth, (C. C. A.) 128 Fed. Rep. 706.

424. **2. Contract to Assign Future Improvements.** — See Vocalion Organ Co. v. Wright, 137 Fed. Rep. 313.

4. Statute of Frauds. — See Schmitt v. Nelson Valve Co., 121 Fed. Rep. 93.

7. Clear Proof of Agreement Required. — Pressed Steel Car Co. v. Hansen, 128 Fed. Rep. 444, *affirmed* (C. C. A.) 137 Fed. Rep. 403.

15. Cancellation for Fraud. — See Duff v. Gililand, (C. C. A.) 139 Fed. Rep. 16.

427. **9. Assignee Takes Subject to Equities, Etc.** — Bradford Belting Co. v. Kisinger-Ison Co., (C. C. A.) 113 Fed. Rep. 814, holding, however, that the assignee comes under no affirmative obligation to make good the previous contracts of his assignor.

428. **1. Assignee Takes Subject to Licenses.** — Whitson v. Columbia Phonograph Co., 18 App. Cas. (D. C.) 565.

- 428.** (d) *Estoppel of Assignor.* — See note 10.
- 429.** See note 2.
- 430.** 7. *Licenses — a. DEFINITION.* — See notes 7, 8.
- 431.** See notes 5, 7.
- 432.** c. *IMPLIED LICENSE — (1) In General.* — See note 3.
- 433.** (3) *License Implied from Sale of Patented Article — Purchaser Bound by Stipulations in License.* — See note 6.
- License Before Patent. — See note 8.
- 434.** (4) *In Case of Inventions by Employees.* — See notes 3, 4.
- Extent of License. — See note 5.
- 435.** e. *GOVERNMENT AS LICENSEE — Implied Contract.* — See note 5.
- 436.** g. *DURATION OF LICENSE — (1) In General.* — See notes 11, 12.
- 437.** h. *CONSTRUCTION AND OPERATION — (1) In General.* — See notes 4, 5.
- (2) *Particular Covenants, Conditions, or Limitations.* — See note 7.
- 438.** (3) *Estoppel of Licensee.* — See note 5.
- 439.** i. *ROYALTIES AND LICENSE FEES — (1) In General — Laches.* — See note 4.
- (2) *Amount of Compensation.* — See note 8.
- 440.** (3) *Liability of Licensee — (a) In General.* — See note 2.
- 442.** j. *TERMINATION OF LICENSE — (1) By Expiration of Patent or Express Limitation.* — See note 11.
- 428.** 10. *Assignor Estopped to Deny His Own Construction of Patent.* — *Hurwood Mfg. Co. v. Wood*, 138 Fed. Rep. 835.
- 429.** 2. *Estoppel of Assignor to Deny Validity of Patent.* — *Force v. Sawyer-Boss Mfg. Co.*, 111 Fed. Rep. 902, *affirmed* (C. C. A.) 113 Fed. Rep. 1018; *Marvel Co. v. Pearl*, 114 Fed. Rep. 946; *Frank v. Bernard*, 131 Fed. Rep. 269.
- Estoppel by Agreement Not to Contest Validity of Patent.* — *United Shoe Machinery Co. v. Caunt*, 134 Fed. Rep. 239.
- 430.** 7. *License Defined.* — *Paulus v. M. M. Buck Mfg. Co.*, (C. C. A.) 129 Fed. Rep. 594. See also *D. M. Sechler Carriage Co. v. Deere, etc., Co.*, (C. C. A.) 113 Fed. Rep. 285.
8. *Independent Rights Covered by Patent.* — *Paulus v. M. M. Buck Mfg. Co.*, (C. C. A.) 129 Fed. Rep. 594.
- 431.** 5. *License to Make and Sell.* — *Atwood Lock Co. v. Yale, etc., Mfg. Co.*, 115 Fed. Rep. 332; *Excelsior Wooden Pipe Co. v. Seattle*, (C. C. A.) 117 Fed. Rep. 140; *Shepherd v. Deitsch*, 138 Fed. Rep. 83.
7. *Reservation by Grantor.* — *Bowers Hydraulic Dredging Co. v. Vare*, 112 Fed. Rep. 63.
- 432.** 3. *No Implied Contract if Express Contract Exists.* — *Standard Sanitary Mfg. Co. v. Arrott*, (C. C. A.) 135 Fed. Rep. 750.
- 433.** 6. *Purchaser Bound by Restriction in License.* — *National Phonograph Co. v. Schlegel*, 128 Fed. Rep. 733. See also *A. B. Dick Co. v. Roper*, 126 Fed. Rep. 966.
- Purchaser Bound by Notice Appearing on Machine.* — *Cortelyou v. Johnson*, 138 Fed. Rep. 110.
8. *Article Must Be Purchased from or Made with Consent of Inventor.* — *Victor Sporting Goods Co. v. Harold A. Wilson Co.*, 7 Ont. L. Rep. 581, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433.
- 434.** 3. *Implied License to Use Invention of Employee.* — *Barber v. National Carbon Co.*, (C. C. A.) 129 Fed. Rep. 370.
4. *Pressed Steel Car Co. v. Hansen*, (C. C. A.) 137 Fed. Rep. 403.
5. *Barber v. National Carbon Co.*, (C. C. A.) 129 Fed. Rep. 370.
- 435.** 5. *Implied Contract.* — *Sprague v. U. S.*, 37 Ct. Cl. 447; *Harley v. U. S.*, 39 Ct. Cl. 105; *Brooks v. U. S.*, 39 Ct. Cl. 494.
- 436.** 11. *License Continues until Forfeiture or Expiration of Patent.* — *American Street Car Advertising Co. v. Jones*, 122 Fed. Rep. 803.
12. *License Expires with Original Term.* — *New York Phonograph Co. v. Edison*, 136 Fed. Rep. 600.
- 437.** 4. *Contract Construed as a Whole.* — *Leonard v. Crocker Wheeler Co.*, 126 Fed. Rep. 375.
5. *Reservation of Right to Control Prices.* — See *Victor Talking Mach. Co. v. The Fair*, (C. C. A.) 123 Fed. Rep. 425.
7. *Extent of Use.* — See *Corbin v. Taussig*, 132 Fed. Rep. 662.
- 438.** 5. *Estoppel of Licensee.* — *Consolidated Rubber Tire Co. v. Finley Rubber Tire Co.*, 116 Fed. Rep. 629.
- Person Claiming Through Licensee Estopped to Deny Validity of Patent.* — *Regina Music Box Co. v. Newell*, 131 Fed. Rep. 606.
- Licensee Estopped to Deny Title of Licensee.* — *Seal v. Beach*, 113 Fed. Rep. 832.
- 439.** 4. *Effect of Laches.* — See *American Street Car Advertising Co. v. Jones*, 122 Fed. Rep. 803.
8. *Under a Contract for Royalties on All Machines "Sold and Delivered" the licensee is liable upon machines delivered but not paid for.* *Confectioners' Machinery, etc., Co. v. Panoualias*, (C. C. A.) 134 Fed. Rep. 394.
- 440.** 2. *Construction of Agreements as to Payment of Royalties.* — See *Taylor Gas Producer Co. v. Wood*, (C. C. A.) 125 Fed. Rep. 337; *Western Union Tel. Co. v. American Bell Telephone Co.*, (C. C. A.) 125 Fed. Rep. 342.
- 442.** 11. *For Evidence Showing Noncompli-*

443. (2) *Revocation, Rescission, or Forfeiture* — (b) *Breach of Covenant by Licensee.* — See note 6.

447. **XII. REGULATION OF DEALINGS IN PATENT RIGHTS AND PATENTED ARTICLES** — 2. *Marking Patented Articles.* — See note 7.

448. *Penalty for Failure to Mark.* — See notes 1, 3.

Nominal Damages. — See note 6.

Patent for Process. — See note 9.

449. **3. Marking Unpatented Articles "Patented"** — *Injunction Against Marking.* — See note 10.

XIII. INFRINGEMENT — 1. *Definition.* — See note 17.

451. **2. What Constitutes Infringement** — *a. ELEMENTS AND GENERAL PRINCIPLES* — (3) *Mechanical Skill or Inventive Genius as Test of Infringement.* — See note 1.

(5) *Application of Patented Invention to New Use.* — See note 10.

452. (6) *Formal Variations* — (a) *When Form Is Immaterial.* — See note 1.

453. See note 3.

(b) *When Form Is Material.* — See note 4.

454. See note 1.

(7) *Use of Equivalents* — (a) *Definitions* — *aa. EQUIVALENT.* — See note 2.

bb. MECHANICAL EQUIVALENT. — See note 4.

455. (b) *As Affected by Nature of Invention.* — See notes 2, 3, 4, 5, 7.

ance with a Renewal Privilege, see Seal v. Bookkeeper Pub. Co., (C. C. A.) 130 Fed. Rep. 449.

443. **6. License Not Forfeited by Mere Breach of Contract.** — *New York Phonograph Co. v. Edison, 136 Fed. Rep. 600. See also Duff v. Gilliland, 135 Fed. Rep. 581.*

447. **7. Marking Patented Articles.** — *Sprague v. Bramhall-Deane Co., 133 Fed. Rep. 738. See also Pettibone v. Pennsylvania Steel Co., 134 Fed. Rep. 889.*

448. **1. Penalty.** — *Dade v. Boorum, etc., Co., 121 Fed. Rep. 135. See also U. S. Mitis Co. v. Midvale Steel Co., 135 Fed. Rep. 103.*

3. Mark or Notice Necessary. — *See Westinghouse Air Brake Co. v. New York Air Brake Co., 111 Fed. Rep. 741.*

6. Nominal Damages. — *B. B. Hill Mfg. Co. v. Stewart, 116 Fed. Rep. 927.*

9. Patent for Process. — *U. S. Mitis Co. v. Midvale Steel Co., 135 Fed. Rep. 103.*

449. **10.** *See Globe-Wernicke Co. v. Brown, (C. C. A.) 121 Fed. Rep. 90.*

17. Identity of Result, Means, and Operation is necessary to sustain a claim of infringement of a patented machine. *American Can Co. v. Hickmott Asparagus Canning Co., 137 Fed. Rep. 86.*

451. **1. Inventive Genius or Mechanical Skill as Test of Infringement.** — *F. C. Austin Mfg. Co. v. American Wellworks, (C. C. A.) 121 Fed. Rep. 76.*

10. Application of Infringing Machine to New Use. — *Morrison v. Sonn, 111 Fed. Rep. 172.*

452. **1. Mere Change of Form Does Not Avoid Infringement.** — *Star Brass Works v. General Electric Co., (C. C. A.) 111 Fed. Rep. 398; Kinloch Telephone Co. v. Western Electric Co., (C. C. A.) 113 Fed. Rep. 652; Dowagiac Mfg. Co. v. Superior Drill Co., (C. C. A.) 115 Fed. Rep. 886; Greene v. Manhattan Refrigerating Co., 120 Fed. Rep. 952; Julius King Optical Co. v. Bilhoefer, 124 Fed. Rep. 521; Burdon Wire, etc., Co. v. Williams, 128 Fed. Rep. 927;*

Lourie Implement Co. v. Lenhart, (C. C. A.) 130 Fed. Rep. 122; Thomson-Houston Electric Co. v. Ohio Brass Co., 130 Fed. Rep. 542; Oehrle v. William H. Horstman Co., 131 Fed. Rep. 487; Eck v. Kutz, 132 Fed. Rep. 758.

453. **3. Mere Structural Differences Generally.** — *Hutter v. De Q. Bottle Stopper Co., (C. C. A.) 128 Fed. Rep. 283.*

4. Where Form Is Essence of Invention. — *Kinloch Telephone Co. v. Western Electric Co., (C. C. A.) 113 Fed. Rep. 652. See also Lourie Implement Co. v. Lenhart, (C. C. A.) 130 Fed. Rep. 122.*

454. **1. When Form Limited by Language of Claim.** — *See also Oehrle v. William H. Horstmann Co., 131 Fed. Rep. 487.*

2. Equivalent Has a Variable Meaning, and is measured by the character of the invention to which it is applied. *Rich v. Baldwin, (C. C. A.) 133 Fed. Rep. 920.*

4. Mechanical Equivalent Defined. — *See Alaska Packers' Assoc. v. Letson, 119 Fed. Rep. 599, modified (C. C. A.) 130 Fed. Rep. 129; Eames v. Worcester Polytechnic Institute, (C. C. A.) 123 Fed. Rep. 67.*

455. **2. Mere Improver Cannot Suppress Subsequent Substantial Improvement.** — *Milwaukee Carving Co. v. Brunswick Balke Colender Co., (C. C. A.) 126 Fed. Rep. 171; Fay v. Mason, (C. C. A.) 127 Fed. Rep. 325; Ries v. Barth Mfg. Co., (C. C. A.) 136 Fed. Rep. 851; James Heekin Co. v. Baker, (C. C. A.) 138 Fed. Rep. 63. See also Wisconsin Compressed Air House Cleaning Co. v. American Compressed Air Cleaning Co., (C. C. A.) 125 Fed. Rep. 761.*

3. Nature and Extent of Invention Determines Range. — *Adam v. Folger, (C. C. A.) 120 Fed. Rep. 260; U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co., (C. C. A.) 125 Fed. Rep. 382; Dowagiac Mfg. Co. v. Brennan, (C. C. A.) 127 Fed. Rep. 143; Mossberg v. Nutter, (C. C. A.) 135 Fed. Rep. 95. See also Calculagraph Co. v. Wilson, 132 Fed. Rep. 20.*

456. (8) *Additions to and Improvements upon Patented Invention* — (a) *Use of Patented Article by Improver.* — See note 5.

457. See note 2.

458. (b) *Use of Patented Improvement by Original Patentee.* — See note 2.

(g) *Comparative Superiority or Inferiority of Infringing Device* — (a) *In General.* — See notes 3, 9.

459. b. SPECIFIC ACTS OF INFRINGEMENT — (1) *Making, Using, or Selling Patented Invention in General* — (a) *General Rule.* — See note 1.

(e) *Using* — aa. *IN GENERAL.* — See note 9.

(d) *Selling* — aa. *IN GENERAL.* — See note 13.

460. cc. *WHEN SALE PROCURED BY PATENTEE.* — See note 9.

461. (3) *Repairing or Reconstructing Worn-out Article* — (a) *By Authorized User.* — See notes 3, 4.

(b) *By Purchaser of Old Parts.* — See note 8.

462. (6) *Contributory Infringement* — (a) *Definition.* — See note 2.

455. 4. *Pioneer Entitled to Broad Range.* — *Cimiotti Unhairs Co. v. American Fur Refining Co.*, 198 U. S. 399; *Cimiotti Unhairs Co. v. Nearseal Unhairs Co.*, (C. C. A.) 115 Fed. Rep. 507; *Schreiber, etc., Mfg. Co. v. Adams Co.*, (C. C. A.) 117 Fed. Rep. 830; *Stirling Co. v. Standard Snuff Co.*, 137 Fed. Rep. 94.

5. *Improver Restricted According to Advance in Art.* — *Westinghouse Air Brake Co. v. Christensen Engineering Co.*, 113 Fed. Rep. 594; *Henry Huber Co. v. J. L. Mott Iron Works*, 113 Fed. Rep. 599, *affirmed* (C. C. A.) 125 Fed. Rep. 944; *Lepper v. Randall*, (C. C. A.) 113 Fed. Rep. 627; *Dowagiac Mfg. Co. v. Superior Drill Co.*, (C. C. A.) 115 Fed. Rep. 886; *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, (C. C. A.) 118 Fed. Rep. 136; *North Jersey St. R. Co. v. Brill*, (C. C. A.) 134 Fed. Rep. 580; *Mallon v. Gregg*, (C. C. A.) 137 Fed. Rep. 68; *James Heekin Co. v. Baker*, (C. C. A.) 138 Fed. Rep. 63; *Shepherd v. Deitsch*, 138 Fed. Rep. 83; *Ironclad Mfg. Co. v. Dairymen's Mfg. Co.*, 138 Fed. Rep. 123; *International Mfg. Co. v. H. F. Brammer Mfg. Co.*, (C. C. A.) 138 Fed. Rep. 396.

Where a Patent Is at the Head of a Class, Though in a Well-developed Art, it is entitled to a liberal range of equivalent. *Lamson Consol. Store Service Co. v. Hillman*, (C. C. A.) 123 Fed. Rep. 416.

7. *Equivalent for Element of Combination.* — *Cook v. Heywood Bros., etc., Co.*, 131 Fed. Rep. 755; *American Can Co. v. Hicknott Asparagus Canning Co.*, 137 Fed. Rep. 88.

456. 5. *Improvement of Patented Invention Does Not Avoid Infringement.* — *Lowell Mach. Shop v. Saco, etc., Mach. Shops*, (C. C. A.) 122 Fed. Rep. 632; *American Saddle Co. v. Sager Gear Co.*, 122 Fed. Rep. 645; *American Delinter Co. v. American Machinery, etc., Co.*, (C. C. A.) 128 Fed. Rep. 709; *Walker Patent Pivoted Bin Co. v. Miller*, 132 Fed. Rep. 823; *Ries v. Barth Mfg. Co.*, (C. C. A.) 136 Fed. Rep. 851.

457. 2. *Patentee of Improvement Cannot Use Original Invention.* — *Severy Process Co. v. Harper*, 113 Fed. Rep. 581.

458. 2. *Patentee Cannot Use Patented Improvement of His Invention.* — *American Delinter Co. v. American Machinery, etc., Co.*, (C. C. A.) 128 Fed. Rep. 709.

3. *Utility Not Test of Infringement.* — *Thomson-Houston Electric Co. v. Ohio Brass Co.*, 129 Fed. Rep. 378.

9. *Less Useful Device May Infringe.* — *Lourie Implement Co. v. Lenhart*, (C. C. A.) 130 Fed. Rep. 122.

459. 1. *Infringement May Be by Making, or Using, or Selling.* — *Goodyear Shoe Machinery Co. v. Jackson*, (C. C. A.) 112 Fed. Rep. 146; *Fuller v. Berger*, (C. C. A.) 120 Fed. Rep. 274; *Victor Talking Mach. Co. v. The Fair*, (C. C. A.) 123 Fed. Rep. 425; *Van Epps v. International Paper Co.*, 124 Fed. Rep. 542; *Carter Crume Co. v. American Sales Book Co.*, 124 Fed. Rep. 903; *Bullock Electric, etc., Co. v. Westinghouse Electric, etc., Co.*, (C. C. A.) 129 Fed. Rep. 105; *Cortelyou v. Johnson*, 138 Fed. Rep. 110. See also *National Phonograph Co. v. Schlegel*, (C. C. A.) 128 Fed. Rep. 733.

9. *Unauthorized Use Is Infringement.* — *Brown v. Puget Sound Reduction Co.*, 110 Fed. Rep. 386.

13. *Mere Sale Infringement.* — See *Farbenfabriken v. Harriman*, 133 Fed. Rep. 313.

Proof of Single Sale Makes Out Prima Facie Case. — *Hutter v. De Q. Bottle Stopper Co.*, (C. C. A.) 128 Fed. Rep. 283.

Evidence Should Be Convincing. — *Marcus v. Sutton*, 124 Fed. Rep. 74.

460. 9. *Sale Procured by Patentee's Agent.* — *Compare Chicago Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co.*, 118 Fed. Rep. 852, holding that infringement may be constituted by a sale to a purchaser who bought in the interest of complainants in order to secure proof of infringement.

461. 3. *Replacement of Parts and Repairing.* — *Morrin v. Robert White Engineering Works*, 138 Fed. Rep. 81, discussing in detail the extent of repairs and replacement permissible.

4. *Building New Machine or Rebuilding Old One.* — *Goodyear Shoe Machinery Co. v. Jackson*, (C. C. A.) 112 Fed. Rep. 146.

8. *Reconstruction by Purchaser of Parts.* — See *National Phonograph Co. v. Fletcher*, 117 Fed. Rep. 149.

462. 2. *Contributory Infringement Defined.* — *Goodyear Shoe Machinery Co. v. Jackson*, (C. C. A.) 112 Fed. Rep. 148.

462. (b) By Sale of Element of Combination. — See note 3.

(c) By Sale of Appliances or Materials for Process. — See notes 4, 5.

463. (e) By Making Machine Which Becomes Infringement in Hands of Third Person. —

See note 2.

t. OF PATENTS FOR COMBINATIONS — (1) *In General*. — See notes

5, 6

464. See notes 1, 2.

(2) *Use of Part of Combination* — (a) *When Patent Covers Combination*

Only. — See notes 3, 4.

462. 3. *Contributory Infringement of Combination*. — Bishop, etc., Co. v. Levine, 119 Fed. Rep. 363; Thomson-Houston Electric Co. v. Ohio Brass Co., 130 Fed. Rep. 542; Brodrick Copy-graph Co. v. Mayhew, 131 Fed. Rep. 92; Rupp, etc., Co. v. Elliott, (C. C. A.) 131 Fed. Rep. 730; Rumford Chemical Works v. New York Baking Powder Co., (C. C. A.) 134 Fed. Rep. 385; James Heekin Co. v. Baker, (C. C. A.) 138 Fed. Rep. 63; Cortelyou v. Johnson, 138 Fed. Rep. 110; Canda v. Michigan Malleable Iron Co., (C. C. A.) 124 Fed. Rep. 486. See also Goodyear Shoe Machinery Co. v. Jackson, (C. C. A.) 112 Fed. Rep. 148; Palmer v. Landphre, 118 Fed. Rep. 52. But see Dunlop Pneumatic Tyre Co. v. Moseley, (1904) 1 Ch. 612.

Sale for Use in Country Where Patent Inoperative No Infringement. — Bullock Electric, etc., Co. v. Westinghouse Electric, etc., Co., (C. C. A.) 129 Fed. Rep. 105.

4. *Supplies for Patented Machine*. — See A. B. Dick Co. v. Roper, 126 Fed. Rep. 966.

5. See Diamond Drill, etc., Co. v. Kelley, 131 Fed. Rep. 89.

463. 2. *Infringement by Act of Third Person*. — Standard Computing Scale Co. v. Computing Scale Co., (C. C. A.) 126 Fed. Rep. 639.

5. *Substantially Identical Combination Infringes*. — Hobbs Mfg. Co. v. Gooding, (C. C. A.) 111 Fed. Rep. 403; New Departure Mfg. Co. v. Sargent, (C. C. A.) 127 Fed. Rep. 152; Galvin v. Grand Rapids, (C. C. A.) 115 Fed. Rep. 511; General Electric Co. v. Wise, 119 Fed. Rep. 922; Thomson-Houston Electric Co. v. Ohio Brass Co., 129 Fed. Rep. 378; Colt's Patent Firearms Mfg. Co. v. Wesson, 122 Fed. Rep. 90, *affirmed* (C. C. A.) 127 Fed. Rep. 333; U. S. Peg Wood, etc., Co. v. B. F. Sturtevant Co., 122 Fed. Rep. 470, *affirmed* (C. C. A.) 125 Fed. Rep. 382; Chisholm, etc., Co. v. Anderson Foundry, etc., Works, (C. C. A.) 123 Fed. Rep. 427; Hale, etc., Mfg. Co. v. Oneonta, etc., R. Co., (C. C. A.) 124 Fed. Rep. 514; Lorain Steel Co. v. New York Switch, etc., Co., 124 Fed. Rep. 548; Greist Mfg. Co. v. Parsons, (C. C. A.) 125 Fed. Rep. 116; Milwaukee Carving Co. v. Brunswick-Balke Collender Co., (C. C. A.) 126 Fed. Rep. 171; Rodiger v. Thaddeus Davids Mfg. Co., 126 Fed. Rep. 960, *affirmed* 133 Fed. Rep. 1021; National Casket Co. v. Stoltz, 127 Fed. Rep. 158; Sanders v. Hancock (C. C. A.) 128 Fed. Rep. 424; McMichael, etc., Mfg. Co. v. Ruth, (C. C. A.) 128 Fed. Rep. 706; Weston Electrical Instrument Co. v. Jewell, 128 Fed. Rep. 939; Letson v. Alaska Packers' Assoc., (C. C. A.) 130 Fed. Rep. 129; American Electric Novelty, etc., Co. v. Howard Electrical Novelty Co., 131 Fed. Rep. 495;

Cleveland Foundry Co. v. Detroit Vapor Stove Co., 131 Fed. Rep. 740; Raymond v. Keystone Lantern Co., 132 Fed. Rep. 30; A. R. Milner Seating Co. v. Yesbera, (C. C. A.) 133 Fed. Rep. 916; Rich v. Baldwin, (C. C. A.) 133 Fed. Rep. 920; Williams Calk Co. v. Neverslip Mfg. Co., 136 Fed. Rep. 210; Self-Sealing Can Co. v. Hocker, 136 Fed. Rep. 418; Crown Cork, etc., Co. v. Standard Stopper Co., (C. C. A.) 136 Fed. Rep. 841; Voightmann v. Perkinson, (C. C. A.) 138 Fed. Rep. 56; Ironclad Mfg. Co. v. Dairymen's Mfg. Co., 138 Fed. Rep. 123; O'Leary v. Utica, etc., R. Co., 139 Fed. Rep. 330. See also Westinghouse Air Brake Co. v. New York Air Brake Co., 112 Fed. Rep. 424.

Substantial Identity Between the Combinations must be found. It does not suffice to show that they will do one part of their work in substantially the same way. Westinghouse Air Brake Co. v. New York Air Brake Co. (C. C. A.) 119 Fed. Rep. 884.

6. *Different Combination of Old Elements*. — Greene v. Buckley, (C. C. A.) 135 Fed. Rep. 520.

464. 1. *Substantially Different Combination Does Not Infringe*. — Singer Mfg. Co. v. Cramer, 192 U. S. 265.

2. Wilson v. Tounley Shingle Co., (C. C. A.) 125 Fed. Rep. 491; Standard Computing Scale Co. v. Computing Scale Co., (C. C. A.) 126 Fed. Rep. 639.

3. Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399; Adam v. Folger, (C. C. A.) 120 Fed. Rep. 260; Mayo Knitting Mach., etc., Co. v. Jenckes Mfg. Co., 121 Fed. Rep. 110, *affirmed* (C. C. A.) 133 Fed. Rep. 527; Mallon v. Gregg, (C. C. A.) 137 Fed. Rep. 68.

4. *Combination Not Infringed by Use of Less than Whole* — *United States*. — Goodyear Shoe Machinery Co. v. Jackson, (C. C. A.) 112 Fed. Rep. 146; American School Furniture Co. v. J. M. Sauder Co., 113 Fed. Rep. 576; Henry Huber Co. v. J. L. Mott Iron Works, 113 Fed. Rep. 599, *affirmed* (C. C. A.) 125 Fed. Rep. 944; Boston Towboat Co. v. Chase Mach. Co., (C. C. A.) 118 Fed. Rep. 36; Westinghouse Electric, etc., Co. v. Orange County Gas, etc., Co., 119 Fed. Rep. 365; U. S. Peg Wood, etc., Co. v. B. F. Sturtevant Co., 122 Fed. Rep. 476; Thomas v. Spencer, 122 Fed. Rep. 877; American Fur Refining Co. v. Cimiotti Unhairing Mach. Co., (C. C. A.) 123 Fed. Rep. 869; Levy v. Harris, 124 Fed. Rep. 69, *affirmed* (C. C. A.) 130 Fed. Rep. 711; Bullock Electric, etc., Co. v. Westinghouse Electric, etc., Co., (C. C. A.) 120 Fed. Rep. 105; Levy v. Harris, (C. C. A.) 130 Fed. Rep. 711; Mesick v. Hassler, 134 Fed.

465. See note 2.

466. (3) *Substitution of Equivalents*. — See notes 1, 2.

467. *d.* OF PATENTS FOR COMPOSITIONS OF MATTER — (1) *In General*. — See note 1.

(2) *Omission of Ingredients and Substitution of Equivalents*. — See notes 4, 5.

e. OF PATENTS FOR DESIGNS — (1) *In General*. — See note 8.

(2) *Use of Part*. — See note 12.

(3) *Test of Identity*. — See note 13.

468. *f.* OF PATENTS FOR MACHINES — (1) *In General*. — See notes 6, 7, 8.

469. (3) *Identity of Effect or Result*. — See note 9.

Rep. 395; Keystone Lantern Co. *v.* Spear, (C. C. A.) 136 Fed. Rep. 595; Universal Winding Co. *v.* Foster Mach. Co., 136 Fed. Rep. 879; McGill *v.* Whitehead, etc., Co., 137 Fed. Rep. 97; Ironclad Mfg. Co. *v.* Dairymen's Mfg. Co., 138 Fed. Rep. 123; Cazier *v.* Mackie-Lovejoy Mfg. Co., (C. C. A.) 138 Fed. Rep. 654; Wessel *v.* United Mattress Mach. Co., (C. C. A.) 139 Fed. Rep. 11; Columbia Wire Co. *v.* Kokomo Steel, etc., Co., 139 Fed. Rep. 578.

District of Columbia. — Lane *v.* Levi, 21 App. Cas. (D. C.) 168.

Canada. — Consolidated Car Heating Co. *v.* Came, (1903) A. C. 509, *affirming* 11 Quebec K. B. 103, which *reversed* 18 Quebec Super. Ct. 44, cited as *contra* in the original note; Jones *v.* Galbraith, 9 British Columbia 521.

465. 2. *Omission of Immaterial Element Claimed as Material*. — White *v.* Peerless Rubber Mfg. Co., 111 Fed. Rep. 190; Levy *v.* Harris, (C. C. A.) 130 Fed. Rep. 711; American Can Co. *v.* Hickmott Asparagus Canning Co., 137 Fed. Rep. 86.

A Patentee Will Not Be Heard to Deny the Materiality of Any Element included in his combination claim. Adam *v.* Folger, (C. C. A.) 120 Fed. Rep. 260.

466. 1. *Use of Known Equivalents Is Infringement*. — Kinloch Telephone Co. *v.* Western Electric Co., (C. C. A.) 113 Fed. Rep. 652; General Electric Co. *v.* Wise, 119 Fed. Rep. 922; Dowagiac Mfg. Co. *v.* Fowler, (C. C. A.) 121 Fed. Rep. 688; Anderson *v.* Collins, (C. C. A.) 122 Fed. Rep. 451; North Jersey St. R. Co. *v.* Brill, (C. C. A.) 134 Fed. Rep. 580; Universal Winding Co. *v.* Foster Mach. Co., 136 Fed. Rep. 879.

2. Substitution of Substantially Different Elements. — See Diamond Drill, etc., Co. *v.* Kelly, 120 Fed. Rep. 289.

467. 1. *Substantially Identical Composition Infringes*. — Lane *v.* Levi, 21 App. Cas. (D. C.) 168.

4. Omission of Element Avoids Infringement. — Cimiotti Unhairing Co. *v.* Derbohlaw, (C. C. A.) 115 Fed. Rep. 510.

5. Substitution of Equivalent Is Infringement. — Lane *v.* Levi, 21 App. Cas. (D. C.) 168.

8. Infringement of Design — Substantial Similarity of Appearance. — General Gaslight Co. *v.* Matchless Mfg. Co., 129 Fed. Rep. 137; Jammes *v.* Carr-Lowry Glass Co., 132 Fed. Rep. 827; *In re* Freeman, 23 App. Cas. (D. C.) 226.

The Useful or Functional Features of a Design Cannot Be Resorted To in order to make out in-

fringement. Williams Calk Co. *v.* Neverslip Mfg. Co., 136 Fed. Rep. 210.

12. Taking Old Part of Combination. — See General Gaslight Co. *v.* Matchless Mfg. Co., 129 Fed. Rep. 137.

13. Test Is Eye of Ordinarily Observant Purchaser. — Hutter *v.* Broome, 114 Fed. Rep. 655; Williams Calk Co. *v.* Neverslip Mfg. Co., 136 Fed. Rep. 210; Bevin Bros. Mfg. Co. *v.* Starr Bros. Bell Co., 114 Fed. Rep. 363.

468. 6. *Substantially Identical Machine Infringes*. — Cimiotti Unhairing Co. *v.* American Unhairing Mach. Co., (C. C. A.) 115 Fed. Rep. 498; Timolat *v.* Franklin Boiler Works Co., (C. C. A.) 122 Fed. Rep. 69; American Delinter Co. *v.* American Machinery, etc., Co., (C. C. A.) 128 Fed. Rep. 709.

Noninterchangeability of the Parts in a Machine tends strongly to negative infringement. American Pneumatic Tool Co. *v.* Philadelphia Pneumatic Tool Co., 123 Fed. Rep. 891.

7. Slight or Colorable Differences. — Klauder-Weldon Dyeing Mach. Co. *v.* Steadwell Dyeing Co., 122 Fed. Rep. 640, *affirmed* (C. C. A.) 128 Fed. Rep. 124; Albright *v.* Langfeld, 131 Fed. Rep. 473.

8. Machine Producing Same Result by Same Means, Operating in Same Manner. — Cimiotti Unhairing Co. *v.* Neareal Unhairing Co., (C. C. A.) 115 Fed. Rep. 507; Bryce Bros. Co. *v.* National Glass Co., (C. C. A.) 116 Fed. Rep. 186; Stillwell-Bierce, etc., Co. *v.* Eufaula Cotton Oil Co., (C. C. A.) 117 Fed. Rep. 410; Moore *v.* Schaw, 118 Fed. Rep. 602; Diamond Drill, etc., Co. *v.* Kelly, 120 Fed. Rep. 289; Seiler *v.* Fuller, etc., Mfg. Co., (C. C. A.) 121 Fed. Rep. 85; National Mechanical Directory Co. *v.* Polk, (C. C. A.) 121 Fed. Rep. 742; U. S. Peg Wood, etc., Co. *v.* B. F. Sturtevant Co., 122 Fed. Rep. 470; *affirmed* (C. C. A.) 125 Fed. Rep. 382; American Fur Refining Co. *v.* Cimiotti Unhairing Mach. Co., (C. C. A.) 123 Fed. Rep. 869; Van Epps *v.* International Paper Co., 124 Fed. Rep. 542; Tompkins *v.* Terwilliger, 124 Fed. Rep. 545; Diamond Match Co. *v.* Ruby Match Co., 127 Fed. Rep. 341; Lourie Implement Co. *v.* Lenhart, (C. C. A.) 130 Fed. Rep. 122; Weston Electrical Instrument Co. *v.* Whitney Electrical Instrument Co., 131 Fed. Rep. 280; Weston Electrical Instrument Co. *v.* Empire Electrical Instrument Co., 131 Fed. Rep. 404; Benbow-Brammer Mfg. Co. *v.* Simpson Mfg. Co., 132 Fed. Rep. 614.

469. 9. *Identity of Result*. — Pittsburg Meter Co. *v.* Pittsburg Supply Co., (C. C. A.)

470. (4) *Substitution of Equivalents*. — See note 2.

g. OF PATENTS FOR MANUFACTURES — (1) *In General*. — See notes 3, 6.

(3) *Identity of Process*. — See note 12.

471. *See note 1.

h. OF PATENTS FOR PROCESSES — (1) *In General*. — See notes 2, 4, 5.

(2) *Identity of Means*. — See note 6.

472. (4) *Transposition of Steps*. — See note 2.

(6) *Use of Different Apparatus*. — See note 4.

3. Remedies for Infringement — b. JURISDICTION — (1) *At Law*. —

See note 10.

473. (2) *In Equity* — (a) *In General*. — See note 3.

474. (b) *Injunction* — aa. *IN GENERAL*. — See note 2.

Discretion of Court. — See note 3.

475. bb. *WHEN GRANTED*. — See note 3.

Threatened Infringement. — See note 5.

109 Fed. Rep. 644; *Diamond Drill, etc., Co. v. Kelly*, 120 Fed. Rep. 289; *American Fur Refining Co. v. Cimiotti Unhairing Mach. Co.*, (C. C. A.) 123 Fed. Rep. 869; *American Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co.*, 123 Fed. Rep. 891; *National Tube Co. v. Spang, etc., Co.*, 132 Fed. Rep. 318; *Rich v. Baldwin*, (C. C. A.) 133 Fed. Rep. 920; *Ries v. Barth Mfg. Co.*, (C. C. A.) 136 Fed. Rep. 851; *James Heekin Co. v. Baker*, (C. C. A.) 138 Fed. Rep. 63; *Scott v. Fisher Knitting Mach. Co.*, 139 Fed. Rep. 137.

470. 2. *Use of Known Equivalent*. — *Kinloch Telephone Co. v. Western Electric Co.*, (C. C. A.) 113 Fed. Rep. 652; *Campbell Printing Press, etc., Co. v. F. Wesel Mfg. Co.*, 124 Fed. Rep. 322; *Lourie Implement Co. v. Lenhart*, (C. C. A.) 130 Fed. Rep. 122. See also *Diamond Drill, etc., Co. v. Kelly*, 120 Fed. Rep. 289.

3. *Substantially Identical Manufacture*. — *Davis v. Perry*, (C. C. A.) 120 Fed. Rep. 941.

6. *Use of Equivalent*. — See *Parramore v. Taylor*, (C. C. A.) 114 Fed. Rep. 97.

12. *Patent for Product of Particular Process*. — *Expanded Metal Co. v. Board of Education*, (C. C. A.) 111 Fed. Rep. 395. See further *supra*, this title, **357**, 4, 5, 6.

471. 1. *Patent for Product Irrespective of Process*. — *Kahn v. Starrells*, 131 Fed. Rep. 464; *Société Fabriques, etc., v. Lueders*, 135 Fed. Rep. 102.

2. *Patent for Process Not Infringed by Selling Product*. — *National Phonograph Co. v. Lambert Co.*, 125 Fed. Rep. 388.

4. *Substantially Identical Process*. — *Kahn v. Starrells*, 131 Fed. Rep. 464.

5. *Colorable or Evasive Changes*. — *National Newsboard Co. v. Elkhart Egg Case Co.*, (C. C. A.) 123 Fed. Rep. 431.

6. *Similar Result by Different Means*. — *Ma-honey v. Jenkins*, (C. C. A.) 138 Fed. Rep. 404. See also *American Can Co. v. Hickmott Asparagus Canning Co.*, 137 Fed. Rep. 86.

472. 2. *Transposition of Steps*. — *Burdon Wire, etc., Co. v. Williams*, 128 Fed. Rep. 927.

4. *The Use of New, Enlarged, and Improved Apparatus* will not avoid infringement. Elec-

tric Smelting, etc., Co. v. Pittsburgh Reduction Co., (C. C. A.) 125 Fed. Rep. 926.

10. *Action on the Case*. — By Rev. Stat. U. S., § 4919, it is provided that damages for the infringement of any patent may be recovered by an action on the case. See *Peters v. Hanger*, (C. C. A.) 134 Fed. Rep. 586.

473. 3. *Patent Expiring After Suit Brought*. — *Chinnock v. Paterson, etc., Tel. Co.*, (C. C. A.) 112 Fed. Rep. 531; *Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co.*, 130 Fed. Rep. 558; *U. S. Mitis Co. v. Midvale Steel Co.*, 135 Fed. Rep. 103. And see *Miller v. Schwarnner*, 130 Fed. Rep. 561, where the process was not returnable until after the expiration of the patent, although it was issued a few days before.

474. 2. *Principles upon Which Injunction Allowed*. — See *General Electric Co. v. Wise*, 119 Fed. Rep. 922.

Preliminary Injunction Not Refused Merely Because Patent Has Not Been Adjudicated. — *Lambert Snyder Vibrator Co. v. Marvel Vibrator Co.*, 138 Fed. Rep. 82.

3. *Exercise of Court's Discretion*. — *Adam v. Folger*, (C. C. A.) 120 Fed. Rep. 260; *Fuller v. Berger*, (C. C. A.) 120 Fed. Rep. 274; *F. C. Austin Mfg. Co. v. American Wellworks*, (C. C. A.) 121 Fed. Rep. 76. See also *Weston Electrical Instrument Co. v. Stevens*, 130 Fed. Rep. 152.

Discretion Not Exercised to Detriment of Patentee. — *Electric Storage Battery Co. v. Buffalo Electric Carriage Co.*, 117 Fed. Rep. 316.

The Rule in the First Circuit, subject to modification where there are peculiar conditions, is that the patent must be supported by public acquiescence or prior adjudication in order to entitle a complainant to a temporary injunction. *Silver v. J. P. Eustis Mfg. Co.*, 130 Fed. Rep. 349.

475. 3. *No Injunction When Irreparable Injury Not Shown*. — *Silver v. J. P. Eustis Mfg. Co.*, 130 Fed. Rep. 348.

No Injunction Where Alleged Infringer Is Mere User. — *Jefferson Electric Light, etc., Co. v. Westinghouse Electric, etc., Co.*, (C. C. A.) 134 Fed. Rep. 392.

5. *Injunction Against Threatened Injury*. —

- 475.** Cessation of Infringement. — See note 6.
476. Expiration of Patent. — See notes 1, 3, 5.
478. See note 1.
cc. REFUSAL OF INJUNCTION WHEN SECURITY GIVEN. — See note 2.
479. *cc.* VIOLATION. — See note 2.
480. (3) *Federal Courts* — (a) *In General*. — See note 1.
481. *c.* WHO MAY SUE. — See note 3.
482. Assignees. — See note 1.

Westinghouse Mach. Co. *v.* Press Pub. Co., 127 Fed. Rep. 822.

475. 6. *Infringement Discontinued*. — Consolidated Fastener Co. *v.* Toppen, 113 Fed. Rep. 697; Cayuta Wheel, etc., Co. *v.* Kennedy Valve Mfg. Co., 127 Fed. Rep. 355; General Electric Co. *v.* New England Electric Mfg. Co., (C. C. A.) 128 Fed. Rep. 738; Wilkin *v.* Hill, 131 Fed. Rep. 762; Brookfield *v.* Elmer Glassworks, 132 Fed. Rep. 312; General Electric Co. *v.* Bullock Electric Mfg. Co., 138 Fed. Rep. 412. *Compare* Edison Gen. Electric Co. *v.* New England Electric Mfg. Co., 121 Fed. Rep. 125; Silver *v.* J. P. Eustis Mfg. Co., 130 Fed. Rep. 348.

476. 1. *No Injunction After Patent Expires*. — Huntington Dry Pulverizer Co. *v.* Virginia-Carolina Chemical Co., 121 Fed. Rep. 136.

Damages to the Defendant may be decreed where the plaintiff obtains a restraining order without disclosing the fact of the expiration of one of the patents sued upon. National Phonograph Co. *v.* American Graphophone Co., 136 Fed. Rep. 231.

3. Electric Storage Battery Co. *v.* Buffalo Electric Carriage Co., 117 Fed. Rep. 314.

5. *Allowance of Preliminary Injunction*. — Diehl Mfg. Co. *v.* Dayton Fan, etc., Co., 109 Fed. Rep. 566; Keasbey, etc., Co. *v.* Philip Carey Mfg. Co., 110 Fed. Rep. 747; Thomson-Houston Electric Co. *v.* Exeter, etc., St. R. Co., 110 Fed. Rep. 986; Seidenberg *v.* Davidson, 112 Fed. Rep. 431; American Coat Pad Co. *v.* Phoenix Pad Co., (C. C. A.) 113 Fed. Rep. 629; Stearns-Roger Mfg. Co. *v.* Brown, (C. C. A.) 114 Fed. Rep. 939; Brunswick-Balke-Collender Co. *v.* Koehler, 115 Fed. Rep. 648; Aquarama Co. *v.* Old Mill Co., (C. C. A.) 115 Fed. Rep. 806; Western Electric Co. *v.* Keystone Tel. Co., 115 Fed. Rep. 809; Pennsylvania Globe Gaslight Co. *v.* American Lighting Co., 117 Fed. Rep. 324; Bradley *v.* Eccles, (C. C. A.) 120 Fed. Rep. 947; Fuller *v.* Gilmore, 121 Fed. Rep. 129; National Enameling Co. *v.* New England Enameling Co., 123 Fed. Rep. 436; Hallock *v.* Babcock Mfg. Co., 124 Fed. Rep. 226; Newhall *v.* McCabe Hanger Mfg. Co., (C. C. A.) 125 Fed. Rep. 919; Armat Moving Picture Co. *v.* Edison Mfg. Co., (C. C. A.) 125 Fed. Rep. 939; Brill *v.* Peckham Mfg. Co., 129 Fed. Rep. 139; Felt, etc., Mfg. Co. *v.* Mechanical Accountant Co., 129 Fed. Rep. 386; Comptograph Co. *v.* Mechanical Accountant Co., 129 Fed. Rep. 394; Diamond Match Co. *v.* Union Match Co., 129 Fed. Rep. 602; Paul Steam System Co. *v.* Paul, 129 Fed. Rep. 757; Thomson-Houston Electric Co. *v.* Wagner Electric Mfg. Co., 130 Fed. Rep. 902; Brookfield *v.* Elmer Glassworks, 132 Fed. Rep. 312; Brookfield *v.* Novelty Glass Mfg. Co., 132 Fed. Rep. 316; Benbow-Brammer Mfg. Co. *v.* Simpson

Mfg. Co., 132 Fed. Rep. 614; Jefferson Electric Light, etc., Co. *v.* Westinghouse Electric, etc., Co., (C. C. A.) 134 Fed. Rep. 392; Cleveland Foundry Co. *v.* Silver, (C. C. A.) 134 Fed. Rep. 591; Kirchberger *v.* Natrass, 135 Fed. Rep. 121; Alphons Custodis Chimney Constr. Co. *v.* Heinicke, 135 Fed. Rep. 552; Robinson *v.* S. & B. Lederer Co., 138 Fed. Rep. 140; General Electric Co. *v.* Bullock Electric Mfg. Co., 138 Fed. Rep. 412. See also Eldred *v.* Breitwieser, 132 Fed. Rep. 251; Caunt *v.* United Shoe Machinery Co., (C. C. A.) 132 Fed. Rep. 976.

478. 1. *Solvency of Defendant*. — Bradley *v.* Eccles, 120 Fed. Rep. 947; Hallock *v.* Babcock Mfg. Co., 124 Fed. Rep. 226; Thomson-Houston Electric Co. *v.* Wagner Electric Mfg. Co., 130 Fed. Rep. 902.

2. *Bond in Lieu of Injunction*. — Marvel Co. *v.* Pearl, 114 Fed. Rep. 946.

479. 2. *Punishment for Violation*. — Schlicht Heat, etc., Co. *v.* Æolipyle Co., 121 Fed. Rep. 137; Cimiotti Unhairing Co. *v.* Froloehr, 121 Fed. Rep. 561; Westinghouse Air Brake Co. *v.* Christensen Engineering Co., 121 Fed. Rep. 562; Dowagiac Mfg. Co. *v.* Minnesota Moline Plow Co., 124 Fed. Rep. 736, *affirmed* (C. C. A.) 129 Fed. Rep. 1005; Janney *v.* Pancoast International Ventilator Co., 124 Fed. Rep. 972; *In re* Hennis, 125 Fed. Rep. 655; Paxton *v.* Brinton, 126 Fed. Rep. 542; Westinghouse Electric, etc., Co. *v.* Sangamo Electric Co., 128 Fed. Rep. 747; Bullock Electric, etc., Co. *v.* Westinghouse Electric, etc., Co., (C. C. A.) 129 Fed. Rep. 105; Brookfield *v.* Novelty Glass Mfg. Co., 132 Fed. Rep. 316; Diamond Drill, etc., Co. *v.* Kelley, 132 Fed. Rep. 978, 130 Fed. Rep. 893; Christensen Engineering Co. *v.* Westinghouse Air Brake Co., (C. C. A.) 135 Fed. Rep. 774, 128 Fed. Rep. 749; Calculagraph Co. *v.* Wilson, 136 Fed. Rep. 397; Kahm *v.* Starrells, 138 Fed. Rep. 67.

Advice of Counsel and Expert as Defense to Contempt Proceedings. — See Goss Printing Press Co. *v.* Scott, 134 Fed. Rep. 880.

480. 1. *For the Test as to whether a cause of action originates in contract or under the patent laws*, see Victor Talking Mach. Co. *v.* The Fair, (C. C. A.) 123 Fed. Rep. 424.

481. 3. *Parties Having Right to Maintain Suit*. — Schmitt *v.* Nelson Valve Co., (C. C. A.) 125 Fed. Rep. 754.

A Patent Must Have Been Issued to the Complainant before equity will take jurisdiction of a suit for infringement. It is not enough that an application for a patent is pending. Standard Scale, etc., Co. *v.* McDonald, 127 Fed. Rep. 709.

482. 1. *Suits by Assignees*. — Milwaukee Carving Co. *v.* Brunswick-Balke-Collender Co.,

482. Licensees. — See note 4.

483. *d.* WHO LIABLE TO BE SUED — Officers and Agents of Private Corporations. — See note 6.

484. *e.* EVIDENCE — (1) *Questions of Law and Fact.* — See notes 6, 7.

485. (2) *Presumptions and Burden of Proof.* — See note 1.

(3) *Expert and Opinion Evidence.* — See note 6.

486. *f.* EFFECT OF PRIOR ADJUDICATIONS — Upon Motion for Preliminary Injunction. — See note 6.

487. In Action for Infringement. — See note 7.

Matter of Comity. — See note 12.

488. See note 1.

A Prior Adjudication Will Not Be Followed. — See note 3.

489. 4. DEFENSES TO INFRINGEMENT — *a.* STATUTORY DEFENSES — The Third Defense. — See note 5.

490. *b.* DEFENSES OTHER THAN STATUTORY — (2) *Usual Defenses* — A Licensee. — See note 4.

493. Collateral Attack. — See note 8.

(3) *Limitations and Laches* — Federal Statute of Limitations. — See note 11.

494. Laches. — See note 2.

(C. C. A.) 126 Fed. Rep. 171; *Æolian Co. v. Hallett, etc., Piano Co.*, 134 Fed. Rep. 872. See also *Ormsby v. Connors*, 133 Fed. Rep. 548.

Assignee of Patent and Not Assignee of Claim for Infringement Intended by Statute. — *Webb v. Goldsmith*, 127 Fed. Rep. 572.

482. 4. Suits by Licensees. — *New York Continental Jewell Filtration Co. v. Sullivan*, 111 Fed. Rep. 179; *Bowers Hydraulic Dredging Co. v. Vare*, 112 Fed. Rep. 63; *D. M. Sechler Carriage Co. v. Deere, etc., Co.*, (C. C. A.) 113 Fed. Rep. 285; *Atwood Lock Co. v. Yale, etc., Mfg. Co.*, 115 Fed. Rep. 332; *Shepherd v. Deutsch*, 138 Fed. Rep. 83. See also *Goss Printing Press Co. v. Scott*, 134 Fed. Rep. 880.

483. 6. Liability of Officers and Agents of Corporations. — *Loomis-Manning Filter Co. v. Manhattan Filter Co.*, 117 Fed. Rep. 325; *Greene v. Buckley*, 120 Fed. Rep. 955; *Panzl v. Battle Island Paper, etc., Co.*, 132 Fed. Rep. 607; *Calculagraph Co. v. Wilson*, 132 Fed. Rep. 20; *Glucose Sugar Refining Co. v. St. Louis Syrup, etc., Co.*, 135 Fed. Rep. 540; *Cazier v. Mackie-Lovejoy Mfg. Co.*, (C. C. A.) 138 Fed. Rep. 654.

484. 6. Infringement Question of Fact. — *Willis v. Miller*, (C. C. A.) 121 Fed. Rep. 985.

7. When Question of Law for Court. — *Singer Mfg. Co. v. Cramer*, 192 U. S. 265.

485. 1. Burden of Proving Infringement on Plaintiff. — *Saccharin Corp. v. Wild*, (1903) 1 Ch. 410; *Cleveland Foundry Co. v. Kaufmann*, 126 Fed. Rep. 658; *De Laval Separator Co. v. Vermont Farm Mach. Co.*, (C. C. A.) 135 Fed. Rep. 772. See also *American Sewage Disposal Co. v. Pawtucket*, 132 Fed. Rep. 35.

6. Expert Testimony — When Admissible. — *Badische Anilin, etc., Fabrik v. Klipstein*, 125 Fed. Rep. 543; *Fay v. Mason*, (C. C. A.) 127 Fed. Rep. 325. See also *Ideal Stopper Co. v. Crown Cork, etc., Co.*, (C. C. A.) 131 Fed. Rep. 244.

486. 6. Effect of Prior Adjudications. — *Westinghouse Electric, etc., Co. v. Jefferson Electric Light, etc., Co.*, 128 Fed. Rep. 751.

See also *Eldred v. Breitwieser*, 132 Fed. Rep. 251.

487. 7. A Prior Adjudication in the Same Court, Between Different Parties, while not conclusive, will not be disturbed unless there is very palpable error. *Walker Patent Pivoted Bin Co. v. Miller*, 132 Fed. Rep. 823.

12. Matter Rather of Comity. — *Brown v. Puget Sound Reduction Co.*, 110 Fed. Rep. 383; *New York Filter Mfg. Co. v. Jackson*, 112 Fed. Rep. 679.

488. 1. *Westinghouse Electric, etc., Co. v. Stanley Instrument Co.*, (C. C. A.) 133 Fed. Rep. 167.

3. Evidence to Support New Defense. — See *Badische Anilin, etc., Fabrik v. Klipstein*, 125 Fed. Rep. 546.

489. 5. Prior Patent Must Have Been Actually Issued. — To the maintenance of the statutory defense that the device had been patented before its invention by the patentee under the patent in suit, it is indispensable that the defensive patent should have been issued before the patentee under the patent in suit made his invention. A prior application for the patent, or a prior invention by the patentee under the defensive patent, will not sustain this defense. *Anderson v. Collins*, (C. C. A.) 122 Fed. Rep. 451.

490. 4. License as Defense. — *Holmes v. Kirkpatrick*, (C. C. A.) 133 Fed. Rep. 232.

License Must Be Made Out by Fair Preponderance of Proof. — *Armat Moving Picture Co. v. Edison Mfg. Co.*, 121 Fed. Rep. 559.

493. 8. Collateral Attack. — *Calculagraph Co. v. Wilson*, 132 Fed. Rep. 20.

11. A Recent Statute, passed in March, 1897, provides that in any suit or action brought for the infringement of any patent there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill of complaint or the issuing of the writ in such suit or action. See *Peters v. Hanger*, (C. C. A.) 134 Fed. Rep. 586.

494. 2. Laches in General. — *Westinghouse Air Brake Co. v. New York Air Brake Co.*, 111

- 495.** Thus, When Other Suits for Infringement Have Been Instituted. — See note 1.
5. Compensation for Infringement — *b.* DAMAGES — (1) *In General.* — See note 14.
498. (3) *Where Test of License Fee Inapplicable* — (a) Compensation for Actual Loss. — See note 3.
499. (b) *Infringement in Conjunction with Other Devices.* — See note 2.
 (4) *Increase of Damages* — When Increase Will Be Added. — See note 8.
500. See note 1.
c. PROFITS — (1) *Recoverable in Equity.* — See note 8.
501. (3) *Estimation of Profits* — (b) *Actual Profits or Advantage Gained.* — See notes 4, 6.
502. See notes 2, 5.
 (c) *Where Complainant's Device Is Used with Other Devices or Is Merely Improvement.* — See note 7.
503. See notes 1, 2.
Exception. — See notes 5, 6.
504. (g) *Deductions Allowed to Infringer.* — See notes 3, 4.
505. (h) *Interest on Profits.* — See note 2.
d. DAMAGES IN SUITS IN EQUITY UNDER STATUTE. — See notes 3, 4.

Fed. Rep. 741; *Eck v. Kutz*, 132 Fed. Rep. 758; *Wilcox, etc., Co. v. Farrand Organ Co.*, 139 Fed. Rep. 46.

495. 1. *Pendency of Other Suits.* — *Timolat v. Franklin Boiler Works Co.*, (C. C. A.) 122 Fed. Rep. 69; *U. S. Mitis Co. v. Detroit Steel, etc., Co.*, (C. C. A.) 122 Fed. Rep. 863; *Hutter v. Koscherak*, 137 Fed. Rep. 92.

14. *Nominal Damages Only Where Invention of Slight Value.* — *Cary Mfg. Co. v. De Haven*, (C. C. A.) 139 Fed. Rep. 262.

498. 3. *Burden of Proof — Nominal Damages.* — *Kansas City Hay Press Co. v. Devol*, 127 Fed. Rep. 363.

499. 2. *Apportionment of Damages.* — *Baker v. Crane Co.*, (C. C. A.) 138 Fed. Rep. 60.

8. *Deliberate and Intentional Infringement.* — *Regina Music Box Co. v. Otto*, 114 Fed. Rep. 505; *National Folding Box, etc., Co. v. Robertson*, 125 Fed. Rep. 524.

500. 1. *Discretion of Court.* — *Kissinger-Ison Co. v. Bradford Belting Co.*, (C. C. A.) 123 Fed. Rep. 91.

Unless the Evidence Clearly Warrants It the court should not award triple damages. *Kip-Armstrong Co. v. King Philip Mills*, 130 Fed. Rep. 28.

8. *Profits of Infringer Recoverable in Equity.* — See *Westinghouse Electric, etc., Co. v. Stanley Electric Mfg. Co.*, 121 Fed. Rep. 101.

Profits from the Sale of Machines to Be Used in Making an Infringing Article cannot be recovered in a suit brought for the infringement of such article. *Diamond Drill, etc., Co. v. Kelley*, 131 Fed. Rep. 89.

501. 4. *What Constitute Profits.* — *Jennings v. Rogers Silver Plate Co.*, 118 Fed. Rep. 339.

Profits Recoverable Are Such as the Complainant Might Have Made if he had made the sales made by the defendant. *Westinghouse v. New York Air Brake Co.*, 131 Fed. Rep. 607.

Manufacturer's Profits Not Recoverable in Suit Against Seller. — *Kissinger-Ison Co. v. Bradford Belting Co.*, (C. C. A.) 123 Fed. Rep. 91.

6. *Saving Effected.* — *Doten v. Boston*, (C. C. A.) 138 Fed. Rep. 406.

502. 2. *Actual, Not Possible, Profits Recoverable.* — *Paxton v. Brinton*, 126 Fed. Rep. 541.

5. *Burden of Proof — Nominal Damages.* — *Westinghouse v. New York Air Brake Co.*, 115 Fed. Rep. 645; *Kissinger-Ison Co. v. Bradford Belting Co.*, (C. C. A.) 123 Fed. Rep. 91.

7. *Improvements of Defendant.* — *Brickill v. New York City*, (C. C. A.) 112 Fed. Rep. 65; *Lattimore v. Hardsocg Mfg. Co.*, (C. C. A.) 121 Fed. Rep. 986; *Kansas City Hay Press Co. v. Devol*, 127 Fed. Rep. 363. See also *Piaget Novelty Co. v. Headley*, 123 Fed. Rep. 897.

503. 1. *Design Patents.* — *Brinton v. Paxton*, (C. C. A.) 134 Fed. Rep. 78.

2. *Burden of Proof as to Apportionment — Nominal Damages.* — *Penfield v. Potts*, (C. C. A.) 126 Fed. Rep. 475; *Kansas City Hay Press Co. v. Devol*, 127 Fed. Rep. 363; *Brinton v. Paxton*, (C. C. A.) 134 Fed. Rep. 78; *Baker v. Crane Co.*, (C. C. A.) 138 Fed. Rep. 60. See also *Cimiotti Unhairing Co. v. Bowsky*, 113 Fed. Rep. 698.

5. *Piaget Novelty Co. v. Headley*, 123 Fed. Rep. 897; *Penfield v. Potts*, (C. C. A.) 126 Fed. Rep. 475; *Force v. Sawyer-Boss Mfg. Co.*, 131 Fed. Rep. 884. See also *Westinghouse v. New York Air Brake Co.*, 115 Fed. Rep. 645; *Lattimore v. Hardsocg Mfg. Co.*, (C. C. A.) 121 Fed. Rep. 986.

6. *Coddington v. Propfe*, 112 Fed. Rep. 1016.

504. 3. *Allowance for Cost of Business.* — *Kissinger-Ison Co. v. Bradford Belting Co.*, (C. C. A.) 123 Fed. Rep. 91; *Piaget Novelty Co. v. Headley*, 123 Fed. Rep. 897.

4. *Items Allowed — Wages.* — *Kinner v. Shepard*, 118 Fed. Rep. 48.

Items Disallowed — Salaries. — *Kansas City Hay Press Co. v. Devol*, 127 Fed. Rep. 363.

505. 2. *Interest on Profits.* — *Westinghouse v. New York Air Brake Co.*, 133 Fed. Rep. 936.

3. *Damages in Addition to Profits.* — *Kissinger-Ison Co. v. Bradford Belting Co.*, (C. C. A.) 123 Fed. Rep. 91.

Distinction Between Profits and Damages Stated. — See *Wooster v. Trowbridge*, 115 Fed. Rep. 722, affirmed (C. C. A.) 120 Fed. Rep. 667.

505. PATENT TO LAND. — See note 5.

506. PATIENT. — See note 2.

507. PAVE — PAVEMENT — PAVING, ETC. — See notes 1, 3.

Of What Substance Formed. — See note 4.

Grading. — See note 6.

505. 4. Right to Increased Damages in Equity. — *Wooster v. Trowbridge*, 115 Fed. Rep. 722, *affirmed* (C. C. A.) 120 Fed. Rep. 667.

5. Patent Synonymous with Grant. — *State v. Harman*, 57 W. Va. 447.

506. 2. Patient. — *Meyer v. Supreme Lodge, etc.*, 178 N. Y. 63.

507. 1. Pave. — *Ross v. Gates*, 183 Mo. 338.

3. Curbing Held to Be Part of Pavement. — *Jacquemin v. Finnegan*, (County Ct.) 39 Misc. (N. Y. 628).

Construction of Gutters Included in Term "Pav-

ing." — *Jacquemin v. Finnegan*, (County Ct.) 39 Misc. (N. Y.) 628.

Underground Drainage or Sewerage Not Paving. — *Mobile v. Mobile Light, etc., Co.*, 141 Ala. 442.

Sidewalks Held to Be Paving. — *Jacquemin v. Finnegan*, (County Ct.) 39 Misc. (N. Y.) 628.

4. Macadamizing. — *Ross v. Gates*, 183 Mo. 338.

Paving and Macadamizing Sometimes Distinguished. — *United R., etc., Co. v. Hayes*, 92 Md. 490.

6. Substantial Grading. — *Jacquemin v. Finnegan*, (County Ct.) 39 Misc. (N. Y.) 628.

PAWN AND PAWNBROKER.

508. I. DEFINITIONS. — See note 1.

509. III. POLICE REGULATIONS. — See note 1.

IV. USURY. — See note 5.

V. RIGHTS OF PAWNBROKER — Sale of Thing Pawned. — See note 6.

510. Cases on Certain Other Rights of the Pawnbroker. — See note 2.

PAY — PAYABLE — PAID. — See note 5.

511. See note 1.

Payment in Something Else than Money. — See note 2.

512. PAYING. — See note 2.

508. 1. Pawn Defined. — *Bernstein v. Weinstein*, 104 N. Y. App. Div. 615, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508. See also *Loftus v. Agrant*, (S. Dak. 1904) 99 N. W. Rep. 90.

509. 1. Police Power. — *Butte v. Paltrovich*, 30 Mont. 18, 104 Am. St. Rep. 698.

5. Usury Statute and Statute as to Pawnbrokers to Be Read Together. — *Lowry v. Collateral Loan Assoc.*, 172 N. Y. 394, *affirming* 62 N. Y. App. Div. 240.

6. Surplus to Be Paid Over — No Application of Surplus from One Sale to Deficiency on Another. — *Stephens v. Simpson*, 94 N. Y. App. Div. 298. See also *Bernstein v. Weinstein*, 104 N. Y. App. Div. 615.

510. 2. A Pawnbroker Selling a Pistol Pawned to Him Is Not a Dealer in Pistols within the meaning of a statute in *Alabama* requiring dealers in pistols to take out a license. *Morningstar v. State*, 135 Ala. 66.

Provisions in the Pawn Ticket Exempting the Pawnbroker from Any Loss of the Pawn by Fire or

Theft are binding on the pledgor. *Oberman v. Reece*, 95 Ill. App. 645.

5. Meaning "to Be Paid." — *Poppleton v. Jones*, 42 Oregon 24.

Paid-up Stock. — *Cashen v. Southern Mut. Bldg., etc., Assoc.*, 114 Ga. 983.

511. 1. Pay of Volunteers in Bounty Lands — Not Limited to Money. — *Haisted v. Allen*, (Tex. Civ. App. 1903) 73 S. W. Rep. 1068.

Extra Remuneration. — *Upperton v. Ridley*, (1903) A. C. 281, *affirming* (1900) 1 Q. B. 680, set out in original note. *Compare Goodwin v. Sheffield Corp.*, (1902) 1 K. B. 629.

Money Order and Pay Check Synonymous Terms. — *Barnes v. State*, 46 Fla. 96.

2. Satisfaction, Discharge. — *Galbraith v. Starks*, 117 Ky. 915; *Cleveland v. Rothschild*, 132 Mich. 625; *Clay v. Lakenan*, 101 Mo. App. 563; *State v. Towner*, 26 Mont. 339. *Compare Milwaukee Mechanics' Ins. Co. v. Russell*, 65 Ohio St. 230.

512. 2. Paying Quantities — Oil Lease. — *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501.

PAYMENT.

By B. B. CLARK.

517. I. DEFINITION. — See note 1.

518. See note 1.

II. To Whom Payment to Be Made — 1. To Creditor or Agent — a.
IN GENERAL. — See notes 3, 4, 5.

519. d. BURDEN OF PROOF AS TO AUTHORITY OF AGENT. — See note 5.

520. f. OSTENSIBLE AUTHORITY OF AGENT — (2) Possession of Securities and Evidences of Indebtedness. — See note 3.

521. (4) Authority to Collect Interest. — See note 6.

(5) *Effect of Designation of Place of Payment.* — See note 7.

529. III. TIME OF PAYMENT — 1. In General. — See note 1.

533. IV. PLACE OF PAYMENT — 1. In General — Where No Place of Payment Is Specified. — See note 5.

536. V. PAYMENT BY THIRD PERSONS — VOLUNTEERS, ETC. — 1. Effect of Payment by Third Person. — See note 3.

537. 2. Recovery of Payment by Third Person. — See notes 1, 2.

Payment at Request of Debtor. — See note 4.

538. Compulsory Payments. — See note 8.

539. VI. MODE AND MEDIUM OF PAYMENT — 1. In General. — See note 2.
The Acceptance of Payment in a Different Medium. — See note 8.

517. 1. Definition. — *La Montagne v. New York Nat. Banking Assoc. Bank*, 94 N. Y. App. Div. 234, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 517; *Root v. Kelley*, (N. Y. City Ct. Gen. T.) 39 Misc. (N. Y.) 530.

518. 1. La Montagne v. New York National Banking Assoc. Bank, 94 N. Y. App. Div. 234, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 517.

3. To Creditor or Agent. — *Gulager v. Splitnose*, 3 Indian Ter. 372.

Deposit in Bank to the Credit of the Creditor will not operate as payment unless the creditor consents thereto. *Hill v. Arnold*, 116 Ga. 45.

4. Unauthorized Agent. — *Dunphy v. Gilliam Mfg. Co.*, 11 Ohio Cir. Dec. 822, 21 Ohio Cir. Ct. 696; *Foreman v. Seeley*, 2 N. Bruns. Eq. Rep. 341.

5. To Authorized Agent. — *Indiana Trust Co. v. International Bldg., etc., Assoc.*, (Ind. App. 1905) 74 N. E. Rep. 633.

519. 5. Burden of Proof as to Authority of Agent. — *Gilbert v. Garber*, 62 Neb. 464; *Ketelman v. Chicago Brush Co.*, 65 Neb. 429.

520. 3. Indorsements or Assignments to Agents. — *De Clark v. Waters*, 10 Wyo. 31.

521. 6. Authority to Collect Interest. — *Gilbert v. Garber*, 62 Neb. 464; *Corey v. Hunter*, 10 N. Dak. 5.

7. Corey v. Hunter, 10 N. Dak. 5, *following* *Hollinshead v. John Stuart Co.*, 8 N. Dak. 35; *Stolzman v. Wyman*, 8 N. Dak. 108.

529. 1. Statute of Anne. — *Lawson v. Zinn*, 48 W. Va. 312. See also *Barker v. Wheeler*, 62 Neb. 150.

533. 5. No Place of Payment Fixed — Debtor

Must Seek Creditor. — *Prest v. Cole*, 183 Mass. 285, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 533.

536. 3. Board of Health v. Renville County, 89 Minn. 404, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 536.

537. 1. Debtor Not Liable to Reimburse Volunteer. — *Eppig v. New York*, 57 N. Y. App. Div. 114.

2. Sheldon v. Steele, 114 Iowa 616; *Stanford v. Lincoln County*, (Ky. 1901) 61 S. W. Rep. 463; *Peoples', etc., Bank v. Craig*, 63 Ohio St. 374, 81 Am. St. Rep. 639; *Sanderson v. Cream City Brick Co.*, 110 Wis. 618.

Payment of Another's Taxes. — *Seymour v. Warren*, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 316.

4. Payment at Request of Debtor. — *McNerney v. Barnes*, 77 Conn. 155; *Stanford v. Lincoln County*, (Ky. 1901) 61 S. W. Rep. 463.

538. 8. When Payment Compulsory. — *Rawle v. Renshaw*, 15 Pa. Super. Ct. 488 (payment of taxes); *Kellett v. Freeman*, 19 Pa. Super. Ct. 155; *Pither v. Manley*, 32 Can. Sup. Ct. 651.

539. 2. Creditor Bound Only to Receive Legal Tender. — *Fell v. H. Fell Poultry Co.*, 69 N. J. L. 429; *Terry v. Dale*, 27 Tex. Civ. App. 1.

8. Hamilton v. Fowler, 16 Colo. App. 76; *Edgerton v. West*, 43 Fla. 133; *Harbison v. Frazier*, (Ky. 1901) 64 S. W. Rep. 738; *Northern Cent. R. Co. v. Hering*, 93 Md. 164; *Hill v. Fuller*, 188 Mass. 195; *Buxton v. Debrecht*, 95 Mo. App. 599; *Root v. Kelley*, (N. Y. City Ct. Gen. T.) 39 Misc. (N. Y.) 530; *Pither v. Manly*, 9 British Columbia 257; *Pinder v. Cronkhite*, 34 N. Bruns. 498.

- 540.** 2. Legal Tender. — See note 1.
541. 3. Contracts for Payment in Particular Currency. — See note 2.
543. 4. Contracts for Payment in Commodities or Services — *b.* LOSS OF RIGHT TO PAY IN COMMODITIES — (1) *In General.* — See note 7.
545. 5. Confederate Money — *a.* CONTRACTS FOR PAYMENT IN CONFEDERATE MONEY. — See note 2.
550. 7. Bill of Exchange or Draft — *a.* IN GENERAL — In Absence of Agreement. — See note 5.
552. Payment of Bill or Draft. — See note 4.
553. *b.* BILL RECEIVED FOR PRESENT DEBT — Bill of Debtor. — See note 1.
c. INDEBTEDNESS SECURED BY LIENS. — See note 6.
555. 8. Promissory Note — *a.* IN THE ABSENCE OF AGREEMENT — (1) *General Doctrine* — (a) Pre-existing Debt. — See note 1.
556. See note 1.
557. See note 1.
558. Part Payment in Cash — Note for Balance. — See note 3.

540. 1. Worn Coin. — Coin issued by authority of law to circulate as money is not deprived of the quality of legality merely by being worn in the process of circulation, nor does silver coin by such wear lose its quality as legal tender, so long as it is not appreciably diminished in weight and retains the appearance of a coin duly issued from the mint. *Mobile St. R. Co. v. Walters*, 135 Ala. 227.

541. 2. Specific Currency Contracts. — *Rae v. Homestead Loan, etc., Co.*, 76 Ill. App. 548, *affirmed* 178 Ill. 369 (gold coin); *Dorr v. Hunter*, 183 Ill. 432, *affirming* 83 Ill. App. 334 (gold coin).

543. 7. Default of Debtor. — *Barrett v. Twin City Power Co.*, 118 Fed. Rep. 861, *affirmed* (C. C. A.) 126 Fed. Rep. 302, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 543.

545. 2. Scaling Acts. — *Conyers v. Road, etc., Com'rs*, 116 Ga. 101.

550. 5. Bill of Exchange or Draft — Not Payment. — *Flannery v. Harley*, 117 Ga. 483; *Chicago, etc., R. Co. v. Burns*, 61 Neb. 793.

552. 4. Payment of Bill. — *Compare Terry v. Dale*, 27 Tex. Civ. App. 1, holding that payment to the state by mailing a draft to the state treasurer, though the draft is paid, does not operate as payment from the time when the draft was mailed.

553. 1. Bill of Debtor. — *Flannery v. Harley*, 117 Ga. 483.

8. *Cutting v. Whittemore*, 72 N. H. 109, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 553.

555. 1. Promissory Note Not Payment — General Doctrine — *Illinois.* — *Stone v. Evangelical Lutheran St. Paul's Church*, 92 Ill. App. 77; *Ross v. Skinner*, 107 Ill. App. 579.

Kansas. — *Webb v. National Bank of Republic*, 67 Kan. 62.

Kentucky. — *New York L. Ins. Co. v. Johnson*, (Ky. 1903) 72 S. W. Rep. 762.

Missouri. — *Berkshire v. Hoover*, 92 Mo. App. 349.

Nebraska. — *Chicago, etc., R. Co. v. Burns*, 61 Neb. 793; *Edward Thompson Co. v. Baldwin*, 62 Neb. 530; *H. F. Cady Lumber Co. v. Greater America Exposition Co.*, (Neb. 1903) 93 N. W. Rep. 161.

New Hampshire. — *Cutting v. Whittemore*,

72 N. H. 109, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 555.

New Jersey. — *Taylor v. Wahl*, (N. J. 1905) 60 Atl. Rep. 63.

New York. — *Friberg v. Block*, 65 N. Y. App. Div. 541; *Roussel v. Mathews*, 171 N. Y. 634, *affirming* 62 N. Y. App. Div. 1; *Hilderbrandt v. Fallot*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 615.

Ohio. — *Price v. Coblitz*, 12 Ohio Cir. Dec. 34, 21 Ohio Cir. Ct. 732.

Pennsylvania. — *U. S. v. Hegeman*, 204 Pa. St. 438; *Mechanics' Nat. Bank v. Kielkopf*, 22 Pa. Super. Ct. 128; *Hummelstown Brownstone Co. v. Knerr*, 25 Pa. Super. Ct. 465; *Philadelphia v. Neill, etc., Sav., etc., Co.*, 211 Pa. St. 353.

Virginia. — *Fidelity L. & T. Co. v. Engleby*, 99 Va. 168, 3 Va. Sup. Ct. 101.

556. 1. Note of Part of Debtors. — *Valade v. Masson*, 135 Mich. 41; *Cutting v. Whittemore*, 72 N. H. 108, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 556; *Mechanics' Nat. Bank v. Kielkopf*, 22 Pa. Super. Ct. 128; *Bowman v. Rector*, (Tenn. Ch. 1900) 59 S. W. Rep. 389.

557. 1. Note of Third Person. — *Durfee v. Seale*, 139 Cal. 603; *Stone v. Evangelical Lutheran St. Paul's Church*, 92 Ill. App. 77; *Webb v. National Bank of Republic*, 67 Kan. 62; *Chamberlain Banking House v. Woolsey*, 60 Neb. 516; *Cutting v. Whittemore*, 72 N. H. 108, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 555, 556; *Vacheron v. Hildebrandt*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 61; *Lokken v. Miller*, 9 N. Dak. 512; *Mechanics' Nat. Bank v. Kielkopf*, 22 Pa. Super. Ct. 128; *Parkersburg First Nat. Bank v. Handley*, 48 W. Va. 690.

In *Finlay v. Heyward*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 266, *reversing* (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 818, it was held that in the absence of specific authority a lawyer to whom a claim is intrusted for collection has no right to accept a promissory note of a third person in payment of the claim; but that the creditor may ratify such acceptance, and that retention of the note for five years without objection is sufficient to permit the inference of ratification.

558. 3. Part Payment in Cash — Note for Balance. — *Mechanics' Nat. Bank v. Kielkopf*, 22 Pa. Super. Ct. 128.

- 558.** Note Secured by Mortgage. — See note 4.
559. (b) Contemporaneous Debt. — See notes 1, 2.
 (2) *Minority Doctrine*. — See note 3.
560. See note 2.
 Rebutting Presumption. — See notes 3, 4.
 Non-negotiable Note. — See note 6.
561. b. ACCEPTANCE AS PAYMENT — (1) *In General*. — See notes 1, 2.
562. See notes 1, 2.
563. (3) *Proof of Acceptance as Payment* — (a) *In General*. — See notes 3, 4.
564. (b) Receipt. — See notes 1, 2.
 (c) Surrender and Canceling Evidence of Indebtedness. — See note 5.
565. (d) Giving Credit. — See note 2.
566. c. EXTENSION OF TIME OF PAYMENT. — See note 4.
567. d. SURRENDER OF NOTE AS CONDITION TO RECOVERY ON ORIGINAL INDEBTEDNESS. — See notes 1, 2, 3.
 e. DILIGENCE IN ENFORCEMENT OF NOTE. — See note 4.

558. 4. Note Secured by Mortgage. — Chamberlain Banking House v. Woolsey, 60 Neb. 516.

559. 1. Gallagher v. Ruffing, 118 Wis. 284.

2. Note of Third Person. — Vacheron v. Hildebrandt, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 61; Blum v. Sadofsky, (Supm. Ct. App. T.) 86 N. Y. Supp. 22; Gallagher v. Ruffing, 118 Wis. 284. See also Burlee Dry Dock Co. v. Besse, (C. C. A.) 130 Fed. Rep. 444.

3. Minority Rule — Note of Debtor. — Scott v. Edgar, (Ind. App. 1901) 60 N. E. Rep. 468; Wade v. Curtis, 96 Me. 309; Bryant v. Grady, 98 Me. 389; Paddock, etc., Co. v. Simmons, 186 Mass. 152.

560. 2. Note of Third Person. — Scott v. Edgar, (Ind. App. 1901) 60 N. E. Rep. 468.

3. Rebutting Presumption. — Wade v. Curtis, 96 Me. 309; Bryant v. Grady, 98 Me. 389; Spooner v. Roberts, 180 Mass. 191.

4. Loss of Security. — Bryant v. Grady, 98 Me. 389; Paddock, etc., Co. v. Simmons, 186 Mass. 152.

The Note of an Insolvent Vendee for the Purchase Price of Land, title being taken in his wife's name, has been held not to create a presumption of payment. Scott v. Edgar, 159 Ind. 38.

6. Non-negotiable Note. — Wade v. Curtis, 96 Me. 309.

561. 1. Acceptance as Payment — Note of Debtor. — Boyd v. New York Security, etc., Co., 176 N. Y. 613, affirming 85 N. Y. App. Div. 581.

2. Note of Part of Debtors. — Boyd v. Daily, 85 N. Y. App. Div. 581, affirmed 176 N. Y. 613.

562. 1. Debtor and Third Persons. — Crow v. Burgin, (Miss. 1905) 38 So. Rep. 625.

2. Note of Third Persons. — Blum v. Sadofsky, (Supm. Ct. App. T.) 86 N. Y. Supp. 22; Loken v. Miller, 9 N. Dak. 512. See also Burlee Dry Dock Co. v. Besse, (C. C. A.) 130 Fed. Rep. 444.

563. 3. Question of Fact. — Stone v. Evangelical Lutheran St. Paul's Church, 92 Ill. App. 77.

4. Burden of Proof. — Webb v. National Bank of Republic, 67 Kan. 62; Finlay v. Heyward, (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 818 reversed on another point (Supm. Ct. App. T.)

35 Misc. (N. Y.) 266; Friberg v. Block, 65 N. Y. App. Div. 541; Mechanics' Nat. Bank v. Kielkopf, 22 Pa. Super. Ct. 128.

564. 1. Receipt Not Conclusive. — H. F. Cady Lumber Co. v. Greater America Exposition Co., (Neb. 1903) 93 N. W. Rep. 961. See, however, Vacheron v. Hildebrandt, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 61.

2. As Prima Facie Evidence. — Berkshire v. Hoover, 92 Mo. App. 349; Colby v. Maw, (Neb. 1901) 95 N. W. Rep. 677; H. F. Cady Lumber Co. v. Greater America Exposition Co., (Neb. 1903) 93 N. W. Rep. 961, approving Berry v. Griffin, 10 Md. 31.

5. Surrendering and Canceling Evidence of Indebtedness. — Ross v. Skinner, 107 Ill. App. 579; Fidelity L. & T. Co. v. Engleby, 99 Va. 168, 3 Va. Sup. Ct. 101. See, however, Chamberlain Banking House v. Woolsey, 60 Neb. 516.

565. 2. Giving Credit. — Friberg v. Block, 65 N. Y. App. Div. 541.

566. 4. Extension of Time of Payment. — Taylor v. Wahl, (N. J. 1905) 60 Atl. Rep. 63. See, however, Hildebrandt v. Fallot, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 615; Hummels-town Brownstone Co. v. Knerr, 25 Pa. Super. Ct. 465, following Buck v. Wilson, 113 Pa. St. 423.

567. 1. Surrender of Note. — Reehl v. Martens, 54 N. Y. App. Div. 626, 627, affirming 40 N. Y. App. Div. 231 (note of third person).

2. Stone v. Evangelical Lutheran St. Paul's Church, 92 Ill. App. 77.

Where a debtor makes a note to his own order and indorses it, and forges indorsements of the note, so as to give it negotiable value, the signature of the maker himself being of no negotiable value, and thereupon delivers the note to his creditor in payment, and the latter indorses and negotiates the note, the transaction does not constitute a payment, as the creditor is bound to return to the persons from whom he received it the money received from the negotiation of the note. Simpson v. New Orleans, 109 La. 807.

3. Bryant v. Grady, 98 Me. 389.

4. Diligence in Enforcement of Note. — Finlay v. Heyward, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 266.

- 568.** 9. Orders upon Third Persons. — See notes 2, 6.
569. See note 1.
 11. Certificates of Deposit. — See note 8.
570. 13. Checks — *a.* IN GENERAL. — See note 1.
571. See notes 2, 3.
 Rebutting Presumption. — See note 5.
572. *b.* CERTIFIED CHECK. — See note 1.
d. SURRENDER OF EVIDENCES OF ORIGINAL INDEBTEDNESS. — See note 4.
e. RECEIPT FOR PAYMENT. — See note 5.
f. LACHES IN COLLECTING CHECK. — See note 7.
573. *g.* PAYMENT OF CHECK. — See note 2.
574. 15. General Assignment of Chose in Action. — See note 5.
576. 17. Cross-demands. — See notes 3, 4.
577. 18. Acceptance of Payment by Creditor — *a.* IN GENERAL. — See note 3.
578. *c.* PAYMENT TO COMMON AGENT. — See notes 3, 4.
579. VII. PROOF OF PAYMENT — 1. Admissibility of Evidence — *a.* IN GENERAL. — See notes 1, 2.
582. *d.* BOOKS OF ACCOUNT — Affirmative Proof of Payment. — See note 5.

568. 2. Presumption Against Acceptance as Payment. — *Elm City Lumber Co. v. Mackenzie*, 77 Conn. 1; *Darby v. Miller*, 116 Ga. 952; *Trimble v. Lewis*, (Ky. 1901) 65 S. W. Rep. 117; *Chicago, etc., R. Co. v. Burns*, 61 Neb. 793; *Colby v. Maw*, (Neb. 1901) 95 N. W. Rep. 677; *J. Weller Co. v. Gordon*, 24 Ohio Cir. Ct. 407.

Receipt Not Conclusive. — *Colby v. Maw*, (Neb. 1901) 95 N. W. Rep. 677.

6. *Elm City Lumber Co. v. Mackenzie*, 77 Conn. 1.

569. 1. *J. Weller Co. v. Gordon*, 24 Ohio Cir. Ct. 407.

8. Certificates of Deposit. — *Gallagher v. Ruffing*, 118 Wis. 284.

570. 1. Payment by Check. — *Pflueger v. Lewis Foundry, etc., Co.*, 134 Fed. Rep. 28, 67 C. C. A. 102; *Sharp v. E. Nathan Mercantile Co.*, (Ark. 1905) 88 S. W. Rep. 305; *Brown v. Schintz*, 202 Ill. 509, affirming 98 Ill. App. 452; *Chapple v. Kansas Vittrified Brick Co.*, 70 Kan. 723; *Baumgardner v. Henry*, 131 Mich. 240; *J. Weller Co. v. Gordon*, 24 Ohio Cir. Ct. 407; *Mechanics' Nat. Bank v. Kielkopf*, 22 Pa. Super. Ct. 128.

Postdated Checks. — *Lockwood Trade Journal v. New York Silicate Book Slate Co.* (Supm. Ct. App. T.) 88 N. Y. Supp. 152.

The Check Must Be Presented for Payment to entitle the creditor to sue on the original indebtedness. *Bloomquist v. Johnson*, 107 Ill. App. 154.

571. 2. *Goodall v. Norton*, 88 Minn. 1; *Rines v. New York, etc., Brewing Co.* (Supm. Ct. App. T.) 45 Misc. (N. Y.) 415; *Mechanics' Nat. Bank v. Kielkopf*, 22 Pa. Super. Ct. 128; *Hummelstown Brownstone Co. v. Knerr*, 25 Pa. Super. Ct. 465; *Manitoba Mortg., etc., Co. v. Weiss*, (S. Dak. 1904) 101 N. W. Rep. 37.

3. *Harbison v. Frazier*, (Ky. 1901) 64 S. W. Rep. 738 (check of third person).

5. *Mechanics' Nat. Bank v. Kielkopf*, 22 Pa. Super. Ct. 128.

572. 1. Certified Check. — Compare *Herr-*

mann Furniture, etc., Works v. German Exch. Bank, (Supm. Ct. App. T.) 87 N. Y. Supp. 462.

4. Surrender of Evidence of Debt. — Compare *Upson v. Mt. Morris Bank*, 103 N. Y. App. Div. 367.

5. Giving Receipt. — *Steffens v. Nelson*, 94 Minn. 365.

7. Laches. — *Brown v. Schintz*, 202 Ill. 509, affirming 98 Ill. App. 452; *Manitoba Mortg., etc., Co. v. Weiss*, (S. Dak. 1904) 101 N. W. Rep. 37.

573. 2. Where Check Paid — Relation. — *Hooker v. Burr*, 137 Cal. 663, 99 Am. St. Rep. 17; *Smith Roofing, etc., Co. v. Mitchell*, 117 Ga. 772, 97 Am. St. Rep. 217; *Breck v. Barney*, 183 Mass. 133; *Sayers v. Kent*, 201 Pa. St. 38.

574. 5. Collection of Chose in Action Assigned. — *John H. Mahnken Co. v. Pelletreau*, 93 N. Y. App. Div. 420.

576. 3. Cross-demands Not Operative as Payment. — *Northington v. Granade*, 118 Ga. 584.

4. Agreement for Payment. — *White v. Costigan*, 138 Cal. 564.

577. 3. Acceptance as Payment. — *Choate v. Hoogstraet*, (C. C. A.) 105 Fed. Rep. 713; *Gallen's Estate*, 18 Pa. Super. Ct. 365.

578. 3. Where the Common Agent Expressly Agrees to apply in payment of the debt money held by him for the debtor, the payment is complete. *Millhiser v. Marr*, 128 N. Car. 318. See also *Millhiser v. Marr*, 130 N. Car. 510.

4. *Smith Roofing, etc., Co. v. Mitchell*, 117 Ga. 772, 97 Am. St. Rep. 217.

579. 1. Circumstantial Evidence. — *Drake v. Critz*, 83 Mo. App. 650.

2. Relevancy and Materiality of Evidence. — *A. A. Cooper Wagon, etc., Co. v. Barnt*, 123 Iowa 32; *Galbraith v. Starks*, 117 Ky. 915; *Palmer v. Lawrence*, 72 Vt. 14.

Not Evidence that Payment Was Made. — *Conkling v. Weatherwax*, 90 N. Y. App. Div. 585, affirmed 181 N. Y. 258.

582. 5. Affirmative Proof of Payment. — See *New York L. Ins. Co. v. Johnson*, (Ky.

- 582.** In Some Cases, However. — See note 10.
- 583.** *e.* RECEIPTS, INDORSEMENTS OF CREDITS, RETURNED CHECKS, RECITALS IN DEEDS, ETC. — (1) *Receipts*. — See notes 1, 2.
- 584.** (2) *Indorsements of Credits on Notes, Bills, Bonds, Etc.* — See note 3. *Conclusiveness of Indorsements of Credits*. — See note 7.
- 585.** (4) *Returned Checks, etc., and Stubs*. — See notes 4, 5, 6. "Check in Full." — See note 8.
- 586.** *f.* EVIDENCE OF FINANCIAL CONDITION OF PARTIES — (2) *Of Debtor*. — See note 3.
- g.* HABIT OF DEBTOR WITH REGARD TO PAYMENT OF HIS DEBTS. — See note 7.
- 587.** 2. Burden of Proof. — See note 3.

1903) 72 S. W. Rep. 762; Burk's Estate, 205 Pa. St. 332.

582. 10. *Anderson v. Davis*, 55 W. Va. 429.

583. 1. *Receipts Prima Facie Evidence*. — *Decker v. Laws*, (Ark. 1905) 85 S. W. Rep. 425; *Star Loan Assoc. v. Moore*, 4 Penn. (Del.) 308; *Fitzgerald v. Coleman*, 114 Ill. App. 25; *Cummings v. Lynn*, 121 Iowa 344; *Hudson v. Baker*, 185 Mass. 122; *Cappis v. Wiedemann*, 86 Minn. 156; *Butler v. State*, 81 Miss. 734; *Gregg v. Roaring Springs Land, etc., Co.*, 97 Mo. App. 44; *Fleck v. Neerenberg*, (Supm. Ct. App. T.) 85 N. Y. Supp. 379; *Guhl v. Frank*, 22 Pa. Super. Ct. 531; *Sherman v. Sweeny*, 29 Wash. 321; *Twohy Mercantile Co. v. McDonald*, 108 Wis. 21.

2. Not Conclusive — England. — *Ward v. Wallis*, (1900) 1 Q. B. 675, 69 L. J. Q. B. 423. *United States*. — *Corbus v. Leonhardt*, 114 Fed. Rep. 10, 51 C. C. A. 636. *Connecticut*. — *Huntington's Appeal*, 73 Conn. 582.

Delaware. — *Star Loan Assoc. v. Moore*, 4 Penn. (Del.) 308.

Illinois. — *Rork v. Minor*, 109 Ill. App. 12.

Kentucky. — *Illinois Cent. R. Co. v. Manion*, 113 Ky. 7.

Massachusetts. — *Hudson v. Baker*, 185 Mass. 122.

Minnesota. — *Cappis v. Wiedemann*, 86 Minn. 156.

New York. — *Swanson v. White*, 55 N. Y. App. Div. 631.

Pennsylvania. — *Guhl v. Frank*, 22 Pa. Super. Ct. 531.

West Virginia. — *Anderson v. Davis*, 55 W. Va. 429.

Wisconsin. — *Twohy Mercantile Co. v. McDonald*, 108 Wis. 21.

584. 3. *Gibbs v. Farmers', etc., State Bank*, 123 Iowa 736.

7. Not Conclusive. — *Gibbs v. Farmers', etc., State Bank*, 123 Iowa 736.

585. 4. *Returned Checks*. — *Boyd v. New York Security, etc., Co.*, 176 N. Y. 613, affirming 85 N. Y. App. Div. 581; *Boyd v. Daily*, 85 N. Y. App. Div. 581, affirmed 176 N. Y. 613; *Druss v. Rosen*, (Supm. Ct. App. T.) 84 N. Y. Supp. 174.

5. *Compare Baumgardner v. Henry*, 131 Mich. 240.

6. Note Indorsed by Creditor. — The debtor's possession of his note made payable to his creditor and indorsed by the latter is evidence of

payment. *Boyd v. Daily*, 85 N. Y. App. Div. 581, affirmed 176 N. Y. 613.

8. Check "in Full." — *Gregg v. Roaring Springs Land, etc., Co.*, 97 Mo. App. 44.

586. 3. *Good Financial Condition of Debtor* — See *Ryans v. Hospes*, 167 Mo. 342.

7. Habit of Debtor with Regard to Payment of Debt. — *Fleck v. Neerenberg*, (Supm. Ct. App. T.) 85 N. Y. Supp. 379.

587. 3. *Burden of Proving Payment on Debtor — California*. — *Stuart v. Lord*, 138 Cal. 672.

Illinois. — *Boon v. Bliss*, 98 Ill. App. 341; *Ross v. Skinner*, 107 Ill. App. 579; *Melink v. Coman*, 111 Ill. App. 583; *Robison v. Bailey*, 113 Ill. App. 123.

Iowa. — *Gibbs v. Farmers', etc., State Bank*, 123 Iowa 736.

Kentucky. — *Erment v. Dietz*, (Ky. 1900) 58 S. W. Rep. 442; *Combs v. Krish*, (Ky. 1905) 84 S. W. Rep. 562.

Michigan. — *Linsell v. Linsell*, (Mich. 1904) 100 N. W. Rep. 1009.

Minnesota. — *Hawver v. Ingalls*, 93 Minn. 371.

Missouri. — *Ferguson v. Dalton*, 158 Mo. 323; *Curtis v. Moore*, 162 Mo. 442; *Ryans v. Hospes*, 167 Mo. 342.

Nebraska. — *Mullally v. Dingman*, 62 Neb. 702; *Davis v. Hall*, (Neb. 1904) 97 N. W. Rep. 1023.

New Jersey. — *Fein v. Meier*, 71 N. J. L. 12. *Compare Seacoast R. Co. v. Wood*, 65 N. J. Eq. 530.

New York. — *Conkling v. Weatherwax*, 181 N. Y. 274, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 587, and affirming 90 N. Y. App. Div. 585; *Leggat v. Leggat*, 176 N. Y. 590, affirming 79 N. Y. App. Div. 141; *Barnes v. Courtright*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 60; *Storz v. Kinzler*, 73 N. Y. App. Div. 372; *Forbes v. Wheeler*, (N. Y. City Ct. Gen. T.) 39 Misc. (N. Y.) 538; *Rosenstock v. Des-sar*, 85 N. Y. App. Div. 501; *Rogers v. T. H. Simonson, etc., Co.*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 323.

North Carolina. — *Thomas v. Gwyn*, 131 N. Car. 460.

North Dakota. — *Lokken v. Miller*, 9 N. Dak. 512; *Satterlund v. Beal*, 12 N. Dak. 122.

Pennsylvania. — *Epler v. Metzger*, 17 Pa. Super. Ct. 56; *Burk's Estate*, 205 Pa. St. 332.

Tennessee. — *Rhoades v. Crozier*, (Tenn. Ch. 1000) 59 S. W. Rep. 211; *Connecticut Mut. L. Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 Am. St. Rep. 769.

589. 3. Presumptions with Regard to Payment — a. PRESUMPTION OF NONPAYMENT. — See note 2.

b. PRESUMPTION OF PAYMENT — (2) Possession by Debtor of Written Evidence of Indebtedness. — See note 5.

590. Where It Is Shown that the Debtor Had Access. — See note 6.

591. (4) *Lapse of Time* — (a) In General. — See note 5.

592. (b) Application of Presumption to Particular Kinds of Indebtedness. — See note 3.

593. See notes 1, 2.

594. See note 3.

595. See notes 2, 3.

596. (d) *Lapse of Time Less than Twenty Years.* — See note 3.

598. (e) *Rebutting Presumption* — aa. IN GENERAL. — See note 1.

599. Quantum of Proof. — See note 5.

600. bb. PARTICULAR CIRCUMSTANCES TO REBUT PRESUMPTION — (bb) *Part Payments.* —

See note 3.

601. (cc) *Acknowledgment of Indebtedness.* — See note 6.

602. (ff) *Insolvency of Debtor.* — See note 13.

606. (g) *Computation of Time Elapsed — Maturity of Indebtedness.* — See note 3.

(5) *Transactions Between Debtor and Creditor After Maturity of Indebtedness.* — See note 5.

Texas. — *Tinsley v. McIlhenny*, 30 Tex. Civ. App. 352.

Virginia. — *Allison v. Allison*, 99 Va. 472, 3 Va. Sup. Ct. 313.

Wisconsin. — *Meating v. Tigerton Lumber Co.*, 113 Wis. 379; *Meyer v. Hafemeister*, 119 Wis. 539, 100 Am. St. Rep. 900.

Canada. — *True v. Burt*, 2 N. Bruns. Eq. Rep. 497.

Sufficiency of Evidence. — See *Kelly v. Butterworth*, 103 Ill. App. 87; *Drake v. Critz*, 83 Mo. App. 650.

More than Mere Probability Required. — *Sigur v. Burguières*, 111 La. 1077.

589. 2. Not Conclusive. — *Elliott v. Banks*, 115 Ga. 926.

5. Possession by Debtor of Written Evidence of Indebtedness. — *Star Loan Assoc. v. Moore*, 4 Penn. (Del.) 308.

590. 6. Debtor's Access to Papers of Creditor. — *Star Loan Assoc. v. Moore*, 4 Penn. (Del.) 308.

591. 5. Payment Presumed After Twenty Years. — *Roberts v. Dover*, 72 N. H. 147; *Parisen v. New York, etc., R. Co.*, 65 N. J. L. 413; *Rosenstock v. Dessar*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 419; *Berger v. Waldbaum*, (Supm. Ct. Tr. T.) 46 Misc. (N. Y.) 4; *Geiger's Estate*, 14 Pa. Super. Ct. 523; *Barnhart v. Barnhart*, 22 Pa. Super. Ct. 206; *White v. White*, 200 Pa. St. 565; *O'Hara v. Corr*, 210 Pa. St. 341; *Glezen v. Haskins*, 23 R. I. 601; *Connecticut Mut. L. Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 Am. St. Rep. 769; *Fletcher v. Fletcher*, 72 Vt. 268; *Doyle v. Beasley*, 99 Va. 428, 3 Va. Sup. Ct. 298. See also *Kuhn v. Bercher*, 114 La. 602.

592. 3. Certificate of Deposit. — *Rosenstock v. Dessar*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 419.

Accounting by Guardian. — *Matter of Lewis*, (Surrogate Ct.) 36 Misc. (N. Y.) 741.

593. 1. Specialties. — *Geiger's Estate*, 14 Pa. Super. Ct. 523; *White v. White*, 200 Pa. St. 565; *O'Hara v. Corr*, 210 Pa. St. 341.

2. Indebtedness Secured by Mortgages. — *Doyle v. Beasley*, 99 Va. 428, 3 Va. Sup. Ct. 298.

594. 3. Judgments and Decrees. — *Barnhart v. Barnhart*, 22 Pa. Super. Ct. 206.

595. 2. Claims by Government. — *Ash's Estate*, 202 Pa. St. 422, 90 Am. St. Rep. 658.

3. Taxes and Assessments. — *Roberts v. Dover*, 72 N. H. 147.

596. 3. Lapse of Less than Twenty Years. — *Fletcher v. Fletcher*, 72 Vt. 268.

In Tennessee. — *Connecticut Mut. L. Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 Am. St. Rep. 769.

598. 1. Presumption of Payment Rebuttable. — *Parisen v. New York, etc., R. Co.*, 65 N. J. L. 413; *Rosenstock v. Dessar*, 85 N. Y. App. Div. 501; *Geiger's Estate*, 14 Pa. Super. Ct. 523; *White v. White*, 200 Pa. St. 565; *Ash's Estate*, 202 Pa. St. 422, 90 Am. St. Rep. 658; *O'Hara v. Corr*, 210 Pa. St. 341; *Glezen v. Haskins*, 23 R. I. 601; *Connecticut Mut. L. Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 Am. St. Rep. 769; *Fletcher v. Fletcher*, 72 Vt. 268.

599. 5. Quantum of Proof. — *Barnhart v. Barnhart*, 22 Pa. Super. Ct. 206; *Rosenstock v. Dessar*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 419.

After Twenty Years, the Presumption of Payment Strengthens with each succeeding year, and the evidence successfully to rebut it must with each succeeding year be of greater strength. *Geiger's Estate*, 14 Pa. Super. Ct. 523.

600. 3. Payments of Interest. — *Jennings v. Parr*, 62 S. Car. 306.

601. 6. Acknowledgments of Indebtedness. — *O'Hara v. Corr*, 210 Pa. St. 341.

602. 13. Insolvency of Debtor. — *Connecticut Mut. L. Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 Am. St. Rep. 769. See, however, *Geiger's Estate*, 14 Pa. Super. Ct. 523.

606. 3. Maturity of Indebtedness. — *Rosenstock v. Dessar*, 85 N. Y. App. Div. 501.

5. Payment of Subsequently Accruing Indebted-

607. Where There Has Been a General Accounting. — See note 2.

(6) *Payment or Loan.* — See note 3.

608. See note 2.

(7) *Payment or Gift.* — See note 3.

609. IX. FOLLOWING MONEY PAID. — See notes 1, 2.

X. RECOVERY OF PAYMENTS — 1. Voluntary Payments — a. IN GENERAL. — See note 3.

612. b. PAYMENTS TO OFFICERS OF COURTS. — See note 1.

g. RETENTION OF PART OF DEBT BY DEBTOR. — See note 8.

h. EXPRESS CONTRACT FOR RETURN OF MONEY VOLUNTARILY PAID. — See note 9.

ness. — Compare *Newport Ice, etc., Co. v. Lunyon*, 69 Ark. 287.

Payments by Creditor to Debtor. — Compare *Ran v. Torchiani*, (Supm. Ct. App. T.) 84 N. Y. Supp. 886.

Payment of Subsequent Instalments. — *Johnstone v. Mulcahy*, 132 Cal. 606.

607. 2. Settlements and Accountings. — *Downs v. Downs*, (Iowa 1905) 102 N. W. Rep. 431.

3. Payment Presumed Instead of Loan. — See *Korf v. Korf*, 125 Mich. 259.

608. 2. Presumption Rebuttable. — *Ringemann v. Broxtermann*, 11 Ohio Cir. Dec. 368, 21 Ohio Cir. Ct. 776.

3. Payment of Indebtedness Presumed Instead of Gift. — *Winchell v. Sanger*, 73 Conn. 399. Compare *Allison v. Allison*, 99 Va. 472.

Presumption Rebuttable. — *Brightman v. Buffington*, 184 Mass. 401.

609. 1. *Gale v. Chase Nat. Bank*, 104 Fed. Rep. 214, 43 C. C. A. 496; *Tanner v. Lee*, 121 Ga. 524; *Merchants' L. & T. Co. v. Lamson*, 90 Ill. App. 18 (stolen money); *Heidenheimer v. Boyd*, 162 N. Y. 603, affirming 15 N. Y. App. Div. 580.

2. *Shaffer v. Bacon*, 161 N. Y. 635; *Heidenheimer v. Boyd*, 162 N. Y. 603, affirming 15 N. Y. App. Div. 580.

Honesty and Good Faith, Not Diligence, Proper Test. — *Merchants' L. & T. Co. v. Lamson*, 90 Ill. App. 18.

3. Voluntary Payments Not Recoverable — *United States*. — *Elliott v. U. S.*, 37 Ct. Cl. 136.

Alabama. — *Merrill v. Brantley*, 133 Ala. 537.

Arkansas. — *Crenshaw v. Collier*, 70 Ark. 5; *Larrimer v. Murphy*, 72 Ark. 552.

California. — *Maskey v. Lackmann*, 146 Cal. 777.

Georgia. — *Williams v. Stewart*, 115 Ga. 864; *Du Vall v. Norris*, 119 Ga. 947.

Illinois. — *Morgan Park v. Knopf*, 199 Ill. 444.

Iowa. — *Manning v. Poling*, 114 Iowa 20, affirmed 114 Iowa 27; *Sheldon v. Steele*, 114 Iowa 616; *Anderson v. Cameron*, 122 Iowa 183.

Kansas. — *Cummings Harvester Co. v. Siger-son*, 63 Kan. 340.

Kentucky. — *Aultman, etc., Co. v. Mead*, 109 Ky. 583; *Hall v. Farmers' Bank*, (Ky. 1901) 65 S. W. Rep. 365.

Louisiana. — *New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co.*, 109 La. 13.

Missouri. — *American Brewing Co. v. St. Louis*, 187 Mo. 367, citing 22 AM. AND ENG.

ENCYC. OF LAW (2d ed.) 609; *Ritchie v. Carter*, 89 Mo. App. 290; *State v. Stonestreet*, 92 Mo. App. 214; *Wear v. Schmelzer*, 92 Mo. App. 314; *Flinn v. Mechanics Bldg. Assoc.*, 93 Mo. App. 444; *Rhodes v. Dickerson*, 95 Mo. App. 395.

New Jersey. — *Turner v. Barber*, 66 N. J. L. 496.

New York. — *Davis Provision Co. v. Fowler*, 163 N. Y. 580, affirming 20 N. Y. App. Div. 626; *Deshong v. New York*, 74 N. Y. App. Div. 234, affirmed 176 N. Y. 475; *Newburgh Sav. Bank v. Woodbury*, 64 N. Y. App. Div. 305, affirmed 173 N. Y. 55; *Wolff v. New York*, 179 N. Y. 580, affirming 92 N. Y. App. Div. 449; *Neufeld v. New York*, 93 N. Y. App. Div. 591; *Bosworth v. Kinghorn*, 94 N. Y. App. Div. 187, affirmed 179 N. Y. 590; *Gerry v. Siebrecht*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1034; *Consolidated Fruit Jar Co. v. Wisner*, 103 N. Y. App. Div. 453; *Foster v. Central Nat. Bank*, (Supm. Ct. Tr. T.) 93 N. Y. Supp. 603.

Pennsylvania. — *Schoenfeld v. Bradford*, 16 Pa. Super. Ct. 165; *Oliver v. Bredl*, 25 Pa. Super. Ct. 653.

Rhode Island. — *McCardell v. Miller*, 22 R. I. 96.

South Carolina. — *Shuck v. Interstate Bldg., etc., Assoc.*, 63 S. Car. 134.

Texas. — *Gaither v. Lindsey*, (Tex. Civ. App. 1904) 83 S. W. Rep. 225.

Wisconsin. — *Sanderson v. Cream City Brick Co.*, 110 Wis. 618.

Wyoming. — *Houtz v. Unita County*, 11 Wyo. 152.

Canada. — *Hughes v. Chambers*, 14 Manitoba 163.

Voluntary Payments by Municipality Not Recoverable. — *Sullivan v. Whitfield*, 109 Ill. App. 120.

Unauthorized Payments of Municipal Funds Recoverable. — *Heath v. Albrook*, 123 Iowa 559; *Wayne County v. Reynolds*, 126 Mich. 231, 86 Am. St. Rep. 541; *Wiles v. McIntosh County*, 10 N. Dak. 594; *Etsell v. Knight*, 117 Wis. 540.

612. 1. Payment to Court Officer. — *People v. New York Bldg. Loan Banking Co.*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 4.

8. Debtor's Retention of Part of Debt. — *Ward v. Wallis*, (1900) 1 Q. B. 675, 69 L. J. Q. B. 423; *Reed v. Hayward*, 82 N. Y. App. Div. 416.

9. Express Contract for Return of Payment. — *Carter v. Riggs*, 112 Iowa 245.

612. 2. Compulsory Payments — *a.* IN GENERAL. — See note 10.

613. *b.* WHEN PAYMENTS ARE TO BE CONSIDERED COMPULSORY —

(1) *In General.* — See notes 2, 3.

Necessity for Protest. — See note 4.

Compulsion Must Have Been Illegal or Oppressive. — See note 5.

614. (2) *Distinction between Unwilling and Compulsory Payments — Effect of Protest.* — See note 1.

615. (5) *Threat, Apprehension, or Institution of Judicial Proceedings —*

(a) *In General.* — See notes 2, 3.

616. (b) *Attachment of Goods.* — See note 3.

(c) *Foreclosure of Mortgage.* — See note 7.

(d) *Threat or Apprehension of Criminal Prosecution.* — See note 8.

617. (6) *Duress of Personalty* — (a) *In General.* — See note 5.

(b) *Payments to Prevent Unlawful Seizure of Property.* — See note 6.

618. (7) *Duress of Real Estate* — (a) *In General.* — See note 6.

(8) *Duress of Person.* — See note 8.

619. See note 1.

(11) *Constraint Arising Out of Business Necessities.* — See note 8.

612. 10. Compulsory Payments Recoverable. — *Woodham v. Allen*, 130 Cal. 194; *Du Vall v. Norris*, 119 Ga. 947; *Chicago v. Waukesha Imperial Spring Brewing Co.*, 97 Ill. App. 583; *Anderson v. Cameron*, 122 Iowa 183; *State v. Slayback*, 90 Mo. App. 300; *Deshong v. New York*, 176 N. Y. 475, *affirming* 74 N. Y. App. Div. 234; *Toledo v. Buechele*, 11 Ohio Cir. Dec. 479, 21 Ohio Cir. Ct. 429; *Schoenfeld v. Bradford*, 16 Pa. Super. Ct. 165.

613. 2. What Constitutes Compulsion — General Rule. — *State v. Stonestreet*, 92 Mo. App. 214; *Schoenfeld v. Bradford*, 16 Pa. Super. Ct. 165. See also *Manning v. Poling*, 114 Iowa 20.

3. *American Brewing Co. v. St. Louis*, 187 Mo. 367, *quoting* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 613; *David City First Nat. Bank v. Sargeant*, 65 Neb. 594.

4. Necessity for Protest. — *American Brewing Co. v. St. Louis*, 187 Mo. 367, *quoting* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 613. See, however, *Schoenfeld v. Bradford*, 16 Pa. Super. Ct. 165.

5. *In re Meyer*, 106 Fed. Rep. 828; *Deshong v. New York*, 176 N. Y. 475, *affirming* 74 N. Y. App. Div. 234.

614. 1. General Effect of Protest. — *Manning v. Poling*, 114 Iowa 20, *affirmed* 114 Iowa 27; *Anderson v. Cameron*, 122 Iowa 183; *New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co.*, 109 La. 13; *Deshong v. New York*, 74 N. Y. App. Div. 234, *affirmed* 176 N. Y. 475; *Gerry v. Siebrecht*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1034; *Schoenfeld v. Bradford*, 16 Pa. Super. Ct. 165; *Oliver v. Bredl*, 25 Pa. Super. Ct. 653.

615. 2. Threats and Apprehension of Judicial Proceedings. — *Ward v. Wallis*, (1900) 1 Q. B. 675, 69 L. J. Q. B. 423; *New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co.*, 109 La. 13; *Foster v. Central Nat. Bank*, (Supm. Ct. Tr. T.) 93 N. Y. Supp. 603; *Schoenfeld v. Bradford*, 16 Pa. Super. Ct. 165.

3. Institution of Judicial Proceedings. — *Turner v. Barber*, 66 N. J. L. 406.

616. 3. Libel in Admiralty Not Compulsion. — *Turner v. Barber*, 66 N. J. L. 496.

7. Foreclosure of Mortgages. — *Shuck v. Interstate Bldg., etc., Assoc.*, 63 S. Car. 134.

8. Criminal Prosecution. — *Wolff v. New York*, 179 N. Y. 580, *affirming* 92 N. Y. App. Div. 449.

Threats by Public Officers. — In *Illinois* a distinction is made between threats of prosecution by public officers clothed with authority to institute such proceedings, and threats by a private individual, and while payments under threats of the latter are not to be regarded as compulsory, still payments under threats by the former ought to be so regarded. *Chicago v. Waukesha Imperial Spring Brewing Co.*, 97 Ill. App. 583.

617. 5. Wrongful Withholding of Personalty. — *Du Vall v. Norris*, 119 Ga. 947, *quoting* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 617; *State v. Slayback*, 90 Mo. App. 300; *Deshong v. New York*, 176 N. Y. 475, *affirming* 74 N. Y. App. Div. 234; *Reed v. Hayward*, 82 N. Y. App. Div. 416.

6. Payments to Prevent Unlawful Seizure of Personalty. — *State v. Slayback*, 90 Mo. App. 300.

618. 6. General Rule. — *Manning v. Poling*, 114 Iowa 20, *affirmed* 114 Iowa 27; *Wells v. Adams*, 88 Mo. App. 215; *Teeter v. Veitch*, (N. J. 1905) 61 Atl. Rep. 14.

To Secure Loan. — *Compare Neufeld v. New York*, 93 N. Y. App. Div. 591, *following* *Redmond v. New York*, 125 N. Y. 632; *Kilpatrick v. Germania L. Ins. Co.*, 95 N. Y. App. Div. 287.

A Payment to Secure a Reconveyance from a grantee holding under an absolute deed intended as a mortgage, so as to enable the grantor to sell the land, was held to be compulsory. *David City First Nat. Bank v. Sargeant*, 65 Neb. 594.

Payment to Remove Cloud on Title Compulsory. — *Maskey v. Lackmann*, 146 Cal. 777. *Contra*, *Anderson v. Cameron*, 122 Iowa 183.

8. Threats of Unlawful Arrest. — *Deshong v. New York*, 176 N. Y. 475, *affirming* 74 N. Y. App. Div. 234.

619. 1. *Houtz v. Uinta County*, 11 Wyo. 152.

8. *Chicago v. Waukesha Imperial Spring Brewing Co.*, 97 Ill. App. 583; *New Orleans, etc., R. Co. v. Louisiana Constr., etc., Co.*, 109

621. 3. Payments under Mistake of Fact — *a.* IN GENERAL. — See note 10.

623. Payments by Banks — Mistake as to Condition of Depositor's Account. — See note 4.

624. *b.* EFFECT OF NEGLIGENCE OF PAYOR IN ASCERTAINING FACTS. — See notes 3, 4, 5, 7.

625. *c.* NECESSITY FOR MUTUALITY OF MISTAKE. — See note 5.

626. *f.* MONEY RETAINABLE IN GOOD CONSCIENCE. — See note 1.

627. *j.* NECESSITY FOR PAYMENT IN MONEY. — See note 4.

628. *p.* LIMITATION OF ACTION. — See note 4.

4. Payments under Mistake of Law — *a.* IN GENERAL. — See note 6.

629. Payments by Public Corporations. — See notes 1, 2.

La. 13; American Brewing Co. v. St. Louis, 187 Mo. 367; Toledo v. Buechele, 11 Ohio Cir. Dec. 479, 21 Ohio Cir. Ct. 429.

621. 10. Payments under Mistake of Fact Recoverable — *England.* — Continental Caoutchouc, etc., Co. v. Kleintwort, 51 W. R. 541.

United States. — Grotian v. Guarantee Trust Co., 105 Fed. Rep. 566, affirmed (C. C. A.) 114 Fed. Rep. 433; Drainage Commission v. National Contracting Co., 136 Fed. Rep. 780.

Alabama. — Merrill v. Brantley, 133 Ala. 537. See also Tuscaloosa County v. Foster, 132 Ala. 392.

California. — Wingerter v. San Francisco, 134 Cal. 547, 86 Am. St. Rep. 294.

Georgia. — Charleston, etc., R. Co. v. Augusta Stockyard Co., 115 Ga. 70; McRae Oil, etc., Co. v. Stone, 119 Ga. 516; Sheppard v. Lang, 122 Ga. 607.

Illinois. — Heath, etc., Mfg. Co. v. National Linseed Oil Co., 99 Ill. App. 90, affirmed 197 Ill. 632.

Iowa. — Slothower v. McFarland Grain Co., 117 Iowa 213; Johnson v. Saum, 123 Iowa 145.

Kentucky. — Rhodes v. Lambert, (Ky. 1900) 58 S. W. Rep. 608; Edwards v. Fuson, (Ky. 1902) 66 S. W. Rep. 715; German Security Bank v. Columbia Finance, etc., Co., (Ky. 1905) 85 S. W. Rep. 761.

Massachusetts. — Minneapolis First Nat. Bank v. City Nat. Bank, 182 Mass. 130, 94 Am. St. Rep. 637.

Michigan. — Truax v. Bliss, (Mich. 1905) 102 N. W. Rep. 635.

Missouri. — E. E. Souther Iron Co. v. Laclede Power Co., 109 Mo. App. 353; Robinson v. Betts, 85 Mo. App. 519; American Brewing Co. v. St. Louis, 187 Mo. 367.

Nebraska. — Garrison v. Murphy, (Neb. 1902) 89 N. W. Rep. 766.

New York. — Seeber v. People's Bldg., etc., Assoc., 54 N. Y. App. Div. 626, affirming 36 N. Y. App. Div. 312; Bloomingdale v. National Butchers, etc., Bank, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 594; Jaeger v. New York, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 543.

North Dakota. — Wiles v. McIntosh County, 10 N. Dak. 594.

Oregon. — Beach v. Guaranty Sav., etc., Soc., 44 Oregon 536; Scott v. Ford, 45 Oregon 531, rehearing denied 45 Oregon 550.

Pennsylvania. — Girard Trust Co. v. Harrington, 23 Pa. Super. Ct. 615, citing Meredith v. Haines, 14 W. N. C. (Pa.) 364.

South Dakota. — Iowa L. & T. Co. v. Schnose, (S. Dak. 1905) 103 N. W. Rep. 22.

Vermont. — Johnson v. Cate, 77 Vt. 218.

Mistake in Calculation of Interest. — Williams v. Carroll County, 167 Mo. 9; Montgomery County v. Fry, 127 N. Car. 258.

Independent Consideration for Payment May Prevent Recovery. — Mitchell v. Stoddard County Bank, (Ky. 1901) 65 S. W. Rep. 839.

623. 4. Payment of Check After Maker Directed Payment to Be Stopped. — National Bank v. Berrall, 70 N. J. L. 761, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623.

624. 3. Negligence in Ascertaining Facts — Payments Not Recoverable. — McCardell v. Miller, 22 R. I. 96.

4. General Rule — Payments Recoverable. — Merrill v. Brantley, 133 Ala. 537; Girard Trust Co. v. Harrington, 23 Pa. Super. Ct. 615.

5. German Security Bank v. Columbia Finance, etc., Co., (Ky. 1905) 85 S. W. Rep. 761.

7. No Recovery to Injury of Payee. — German Security Bank v. Columbia Finance, etc., Co., (Ky. 1905) 85 S. W. Rep. 761.

625. 5. Mutuality of Mistake Unnecessary. — Johnson v. Saum, 123 Iowa 145.

626. 1. Money Retainable in Good Conscience. — Dickey County v. Hicks, (N. Dak. 1905) 103 N. W. Rep. 423.

627. 4. Necessity for Payment in Money. — Johnson v. Saum, 123 Iowa 145.

628. 4. Limitation of Action. — German Security Bank v. Columbia Finance, etc., Co., (Ky. 1905) 85 S. W. Rep. 761; Ward v. Ward, 12 Ohio Cir. Dec. 59.

6. General Rule — Not Recoverable. — Heath, etc., Mfg. Co. v. National Linseed Oil Co., 99 Ill. App. 90, affirmed 197 Ill. 632; Hall v. Farmers' Bank, (Ky. 1901) 65 S. W. Rep. 365; Ruppel v. Kissel, (Ky. 1903) 74 S. W. Rep. 220; Coburn v. Neal, 94 Me. 541; Taber v. New Bedford, 177 Mass. 197; American Brewing Co. v. St. Louis, 187 Mo. 367, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 613; Williams v. Carroll County, 167 Mo. 9; Newburgh Sav. Bank v. Woodbury, 173 N. Y. 55, affirming 64 N. Y. App. Div. 305; Scott v. Ford, 45 Oregon 531, rehearing denied 45 Oregon 550; Scott v. Slaughter, 35 Tex. Civ. App. 524. Compare Ward v. Ward, 12 Ohio Cir. Dec. 59.

Mistake of Law and Mistake of Fact Distinguished. — See Girard Trust Co. v. Harrington, 23 Pa. Super. Ct. 615, and the title MISTAKE, 807. 2, 3.

629. 1. Public Moneys. — Wayne County v. Reynolds, 126 Mich. 231, 86 Am. St. Rep. 541. See also Public Library v. Board of Education, (Ky. 1903) 75 S. W. Rep. 225.

630. *b.* MISTAKE OF MIXED LAW AND FACT. — See note 4.

c. FOREIGN LAW. — See note 5.

h. STATUTORY PROVISIONS FOR RECOVERY OF PAYMENT. — See note 11.

631. *5.* Payments upon Consideration Which Has Failed. — See note 2.

635. *6.* Payments on Judgments — *b.* EFFECT OF REVERSAL OF JUDGMENT — (1) *In General.* — See note 5.

638. PEACE OFFICER. — See note 4.

PECUNIARY. — See note 7.

[PEDERASTY. — See note 7*a.*]

629. *2.* Morgan Park *v.* Knopf, 199 Ill. 444; Sullivan *v.* Whitfield, 109 Ill. App. 120. See also Heath *v.* Albrook, 123 Iowa 559.

630. *4.* Scott *v.* Ford, 45 Oregon 531, rehearing denied 45 Oregon 550.

5. Foreign Law. — Girard Trust Co. *v.* Harrington, 23 Pa. Super. Ct. 615.

11. Statutory Provisions. — Bottego *v.* Carroll, 31 Mont. 122.

631. *2.* Failure of Consideration. — See Blakeley *v.* Muller, 88 L. T. N. S. 90, refusing a recovery of the amount paid for seats from which to view a coronation procession, which failed to take place on account of the illness of the king.

Money Paid for an Option cannot be recovered back on the ground of failure of consideration merely because the holder of the option fails to exercise it. Bunch *v.* Elizabeth City Lumber Co., 134 N. Car. 116.

Failure to Furnish Support has been held not to justify a recovery, as for failure of consideration, of a payment made in consideration of a bond to furnish such support. Field *v.* Banks, 177 Mass. 36.

635. *5.* Reversal of Judgments. — Chambliss *v.* Hass, 125 Iowa 484. See, however, Manning *v.* Poling, 114 Iowa 20.

A Voluntary Payment to Prevent the Enforcement of an Execution cannot be recovered. Ritchie *v.* Carter, 89 Mo. App. 290.

638. *4.* Peace Officer Synonymous with Conservator of the Peace. — Jones *v.* State, (Tex. Crim. 1901) 65 S. W. Rep. 92.

7. Pecuniary Consideration. — Hillebrand *v.* Standard Biscuit Co., 139 Cal. 233.

Pecuniary Legacies. — See Rogers *v.* Rogers, 67 S. Car. 168.

Pecuniary Obligation. — Bromberger *v.* U. S., (C. C. A.) 128 Fed. Rep. 346.

Pecuniary Provision — Bar of Dower. — See Pinkham *v.* Pinkham, 95 Me. 71.

7a. The crime of *pederasty* is cruel and inhuman treatment within the Mississippi divorce statute, whether restricted to sodomy as commonly understood or whether it means a male addicted to bestial habits with the male sex. Crutcher *v.* Crutcher, 86 Miss. 231.

PEDIGREE.

By JOHN SIMPSON.

640. I. DEFINITION. — See note 1.

II. GENERAL RULE AS TO ADMISSIBILITY OF HEARSAY EVIDENCE IN PROOF OF PEDIGREE. — See note 3.

642. III. QUALIFICATIONS OF GENERAL RULE — 1. Relationship Necessary — Affinity. — See note 2.

643. Bastards. — See note 1.

Proof Dehors Declaration. — See note 3.

644. *2.* Declarant Must Be Dead. — See note 6.

640. *1.* Definition. — Washington *v.* Savings Bank, 171 N. Y. 166, 89 Am. St. Rep. 800.

3. General Rule. — Travelers' Ins. Co. *v.* Henderson Cotton Mills, (Ky. 1905) 85 S. W. Rep. 1090; Grand Lodge, etc., *v.* Bartes, (Neb. 1904) 98 N. W. Rep. 715, reversing (Neb. 1903) 96 N. W. Rep. 186; Washington *v.* Savings Bank, 171 N. Y. 166, 89 Am. St. Rep. 800, affirming 65 N. Y. App. Div. 338; Murray *v.* Supreme Hive, etc., 112 Tenn. 664; Sheppard *v.* Avery, 28 Tex. Civ. App. 479; Wilson *v.* Braden, 56 W. Va. 372, 107 Am. St. Rep. 822.

The Pedigree of a Jack may be proved by

reputation. Jones *v.* Memphis, etc., Packet Co., (Miss. 1902) 31 So. Rep. 201.

642. *2.* Affinity. — Grand Lodge, etc., *v.* Bartes, (Neb. 1904) 98 N. W. Rep. 715.

643. *1.* Illegitimates — Evidence Held to Be Inadmissible. — Rulofson *v.* Billings, 140 Cal. 452.

3. Relationship Must Be Established by Evidence Dehors Declaration. — Rulofson *v.* Billings, 140 Cal. 452.

644. *6.* Declarant Must Be Dead. — Locklayer *v.* Locklayer, 139 Ala. 354, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 644.

- 645.** 3. *Lis Mota* — Interest. — See note 4.
- 646.** 4. Pedigree in Issue — *a.* GENERAL RULE. — See notes 2, 3.
b. FACTS EMBRACED BY TERM "PEDIGREE." — See note 4.
- 647.** See notes 1, 3.
 Birth and Age. — See notes 5, 6.
- 648.** Death. — See notes 3, 4.
 Time and Place. — See note 6.
- 649.** IV. FORMS OF HEARSAY — 1. Oral Declarations. — See note 5.
- 650.** 2. General Repute. — See note 2.
- 652.** 4. Family Records — Entries in Bibles — Correspondence, Etc. — Public Register. — See note 4.
- 653.** Recitals. — See note 2.
- 654.** PENAL — PENALTY. — See notes 6, 7.
 PENAL LAW OR STATUTE. — See note 8.
- 655.** PENDING. — See note 1.

645. 4. Interest of Declarant Does Not Disqualify. — Compare *Rulofson v. Billings*, 140 Cal. 452.

646. 2. Pedigree Must Be in Issue. — *Bowen v. Preferred Acc. Ins. Co.*, 82 N. Y. App. Div. 458, *affirming* 68 N. Y. App. Div. 342.

3. Facts Relevant to Issue. — *Washington v. Savings Bank*, 171 N. Y. 166, 89 Am. St. Rep. 800.

4. Facts that Constitute Pedigree. — *Travelers' Ins. Co. v. Henderson Cotton Mills*, (Ky. 1905) 85 S. W. Rep. 1090.

647. 1. Heirship. — *Sheppard v. Avery*, 28 Tex. Civ. App. 479; *Wilson v. Braden*, 56 W. Va. 372, 107 Am. St. Rep. 822.

3. Race. — In *Locklayer v. Locklayer*, 139 Ala. 534, the declaration of a deceased person of color was held to be admissible as to his race.

5. Age. — *McCullum v. State*, 119 Ga. 308, 100 Am. St. Rep. 171, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 647; *Travelers' Ins. Co. v. Henderson Cotton Mills*, (Ky. 1905) 85 S. W. Rep. 1090; *Grand Lodge, etc., v. Bartes*, (Neb. 1904) 98 N. W. Rep. 715, *reversing* (Neb. 1903) 96 N. W. Rep. 186; *Bowen v. Preferred Acc. Ins. Co.*, 82 N. Y. App. Div. 458, *affirming* 68 N. Y. App. Div. 342; *Murray v. Supreme Hive, etc.*, 112 Tenn. 664.

Physician's Account Book. — In a prosecution for rape, the account book of a physician, found in his son's possession after his death, showing the entry of his fee for delivering a child, was held to be admissible in proof of the date of the child's birth. *Smith v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 401.

Testimony as to Age Is Original Evidence. — The testimony of a person as to the approximate age of his older brother is not necessarily based on hearsay, and may be legitimate original evidence, if the brothers passed their childhood together. *Hancock v. Supreme Council, etc.*, 60 N. J. L. 308.

6. Party May Testify to His Own Age. — *Travelers' Ins. Co. v. Henderson Cotton Mills*, (Ky. 1905) 85 S. W. Rep. 1090.

648. 3. Death. — *Lord v. New York L. Ins. Co.*, 27 Tex. Civ. App. 139, majority of opinion *sustained* 95 Tex. 216, 93 Am. St. Rep. 827.

4. Issue or Want of Issue. — *Washington v. Savings Bank*, 171 N. Y. 166, 89 Am. St. Rep. 800, *affirming* 65 N. Y. App. Div. 338.

But in *Rulofson v. Billings*, 140 Cal. 452, declarations to disprove relationship were held to be inadmissible because the ground of admissibility is the relationship, and their admissibility would therefore be based upon the very fact in issue.

6. Time and Place of Birth. — *Grand Lodge, etc., v. Bartes*, (Neb. 1904) 98 N. W. Rep. 715.

649. 5. Oral Declarations. — *Travelers' Ins. Co. v. Henderson Cotton Mills*, (Ky. 1905) 85 S. W. Rep. 1090; *Washington v. Savings Bank*, 171 N. Y. 166, 89 Am. St. Rep. 800, *affirming* 65 N. Y. App. Div. 338.

650. 2. Reputation in Family Admissible. *Grand Lodge, etc., v. Bartes*, (Neb. 1904) 98 N. W. Rep. 715; *Lord v. New York L. Ins. Co.*, 27 Tex. Civ. App. 139, majority of opinion *sustained* 95 Tex. 216, 93 Am. St. Rep. 827.

652. 4. Public Register. — *Murray v. Supreme Hive, etc.*, 112 Tenn. 664 *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 652.

Certificates of Births and Baptisms Admissible. — *Goodrich's Estate*, (1904) P. 138.

653. 2. Recitals in Deeds. — *Jackson v. Gunton*, 26 Pa. Super. Ct. 203; *Wilson v. Braden*, 56 W. Va. 372, 107 Am. St. Rep. 822.

654. 6. Punishment. — *Rex v. Carlisle*, 6 Ont. L. Rep. 729, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 654; *Plumb v. Griffin*, 74 Conn. 132.

7. Extraordinary Liability. — *Plumb v. Griffin*, 74 Conn. 132.

8. Penal Law or Statute. — *Plumb v. Griffin*, 74 Conn. 132; *Roby v. Newton*, 121 Ga. 683, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 654; *Hutchinson v. Young*, 80 N. Y. App. Div. 246; *Butler v. Butler*, 62 S. Car. 165.

655. 1. Pending Freight. — See *In re La Bourgogne*, 117 Fed. Rep. 265.

PENSIONS AND BOUNTIES.

By E. G. CHILTON.

- 658.** I. PENSIONS — 1. Definition and Nature. — See note 1.
Pension Mere Gratuity. — See note 3.
2. Pension Laws. — See notes 6, 7.
State Pensions. — See note 10.
- 659.** 3. Jurisdiction of Pension Matters — *a.* IN GENERAL. — See note 1.
b. PENSION BUREAU. — See note 4.
- 663.** 5. Mode of Obtaining Pension — *c.* PROOF — (3) *False Evidence* —
(b) Criminal Liability. — See notes 7, 9.
- 667.** 7. Payment of Pension — A Pension Check Issued to a Deceased Pensioner. —
See note 11.
- 668.** Death of Pensioner After Issuance but Before Receipt of Check. — See note 2.
- 669.** 9. Accrued Pensions — Death of Pensioner Leaving No Widow or Children. —
See notes 2, 3.
10. Assignment of Pension — By Statute. — See note 7.
- 670.** 11. Miscellaneous Pensions. — See notes 2, 3.
- 674.** II. BOUNTIES — 3. Bounty Contract — Right to Bounty Founded on Contract.
— See note 1.
- 675.** [PEON — PEONAGE. — See note 2*a.*]
- 677.** PERCOLATING WATERS. — See note 5.
- 658.** 1. Definitions. — Manning *v.* Spry, 121 Iowa 191.
3. Pensions Mere Bounties. — Manning *v.* Spry, 121 Iowa 191; *In re* Smith, 130 N. Car. 638.
6. Pension Policy Has Prevalled from Early Period. — Manning *v.* Spry, 121 Iowa 191.
Purpose of Pension Legislation — Future Support of Pensioner. — McIntosh *v.* Aubrey, 185 U. S. 122; *In re* Smith, 130 N. Car. 638; Gill *v.* Dixon, 131 N. Car. 87.
7. Manning *v.* Spry, 121 Iowa 191.
10. Pensions for Confederates. — *In re* Smith, 130 N. Car. 638; Gill *v.* Dixon, 131 N. Car. 87.
- 659.** 1. Manning *v.* Spry, 121 Iowa 191.
4. Pension Bureau. — See Manning *v.* Spry, 121 Iowa 191.
- 663.** 7. Penalty for False Evidence. — U. S. *v.* Wood, 127 Fed. Rep. 171; Pooler *v.* U. S., (C. C. A.) 127 Fed. Rep. 509.
- A Pensioner Who Forged an Affidavit in Resisting His Deserted Wife's Claim to one-half of his pension is not indictable under the statute. U. S. *v.* Swan, 131 Fed. Rep. 140.
9. Prosecution for Perjury. — Pooler *v.* U. S., (C. C. A.) 127 Fed. Rep. 509; Noah *v.* U. S., (C. C. A.) 128 Fed. Rep. 270.
- 667.** 11. Warrant Issued to Deceased Pensioner Should Be Returned for Cancellation. — *In re* Smith, 130 N. Car. 638.
- 668.** 2. Check Drawn and Mailed Constitutes Payment. — See Manning *v.* Spry, 121 Iowa 191.
- 669.** 2. Payment of Expenses of Sickness and Funeral. — See Manning *v.* Spry, 121 Iowa 191.
3. See Manning *v.* Spry, 121 Iowa 191.
7. Pension to Become Payable in Future Not Assignable. — Gill *v.* Dixon, 131 N. Car. 87.
- 670.** 2. Police Pensions. — Price *v.* St. Louis Police Relief Assoc., 90 Mo. App. 210; People *v.* Partridge, 172 N. Y. 305; People *v.* Coler, 173 N. Y. 103; People *v.* Police Comrs., 79 N. Y. App. Div. 82, *reversed* 174 N. Y. 450; People *v.* Greene, 87 N. Y. App. Div. 589; Friel *v.* McAdoo, 101 N. Y. App. Div. 155, *affirmed* 181 N. Y. 558; State *v.* Policemen's Pension Fund, 119 Wis. 436, 123 Wis. 245; State *v.* Policemen's Pension Fund, 121 Wis. 44.
- Pension for Life Savers. — Fulford *v.* U. S., 38 Ct. Cl. 548.
3. Firemen's Pensions. — Scott *v.* Jersey City, 68 N. J. L. 687; People *v.* Sturgis, 176 N. Y. 563.
- 674.** 1. Bounty Contract Not Against Public Policy. — A contract to pay to a person a given sum to induce him to enlist as a volunteer in the military service of the United States during a war is in the nature of a bounty contract and is not against public policy. Hard *v.* Harris, 24 Ohio Cir. Ct. 714.
- 675.** 2*a.* Peon — Peonage. — For definitions of these terms and a discussion of *peonage* in relation to the Federal Statutes and the Thirteenth Amendment to the Federal Constitution, see U. S. *v.* McClellan, 127 Fed. Rep. 971; Peonage Cases, 123 Fed. Rep. 671; U. S. *v.* Eberhart, 127 Fed. Rep. 252; *In re* Lewis, 114 Fed. Rep. 963.
- 677.** 5. Percolating Waters. — Montecito Valley Water Co. *v.* Santa Barbara, 144 Cal. 578; Deadwood Cent. R. Co. *v.* Barker, 14 S.

677. PERFECT — PERFECTING, ETC. — See note 7.

678. PERIOD. — See note 3.

679. PERIODICAL. — See note 2.

Dak. 558; Herriman Irrigation Co. v. Keel, 25 Utah 96.

677. 7. Perfect Title Synonymous with Marketable Title. — Ross v. Smiley, 18 Colo. App. 204.

Perfect Title. — Henderson v. Beatty, 124 Iowa 163.

Same — Vendor and Purchaser. — McCleary v. Chipman, 32 Ind. App. 489.

Perfect Ownership. — Sintes v. Commerford, 112 La. 706.

678. 3. Period. — See Matter of Becker, (Surrogate Ct.) 39 Misc. (N. Y.) 756.

679. 2. Periodical — Periodical Publication — Postal Laws. — Houghton v. Payne, 194 U. S. 88.

PERJURY.

BY R. N. CHAFFEE.

681. I. DEFINITION AND NATURE. — See note 1.

Statutory Definitions. — See notes 4, 5.

The Federal Statute. — See note 7.

682. False Swearing. — See note 1.

The Offense Is Complete. — See note 6.

II. ESSENTIAL ELEMENTS — 1. The Oath — a. IN GENERAL. — See note 7.

The Form of the Oath. — See note 10.

683. b. BEFORE WHAT TRIBUNAL OR OFFICER — Competent Tribunal. — See note 1.

Jurisdiction Essential — Authority to Administer Oath. — See note 2.

De Facto Officer. — See note 7.

684. Oath Administered in Open Court. — See note 1.

c. IN WHAT PROCEEDINGS OR MATTERS — (1) In General. — See note 8.

685. Under Statutes Defining Perjury or False Swearing. — See note 1.

(2) *Void or Irregular Proceedings.* — See notes 2, 3.

d. OATH MUST HAVE BEEN AUTHORIZED OR REQUIRED BY LAW. — See note 4.

681. 1. Perjury Defined. — State v. Fahey, 3 Penn. (Del.) 594; Herring v. State, 119 Ga. 709; People v. Martin, 77 N. Y. App. Div. 396, affirmed 175 N. Y. 315.

4. Statutory Definitions. — Hereford v. People, 197 Ill. 222; People v. Martin, 77 N. Y. App. Div. 396, affirmed 175 N. Y. 315. See also Rex v. Cohn, 36 Nova Scotia 240.

5. Statutory Definition — Oath Authorized or Required by Law. — State v. Miller, 26 R. I. 282.

7. U. S. v. Maid, 116 Fed. Rep. 650.

682. 1. False Swearing. — Gammage v. State, 119 Ga. 380; Williams v. Com., 113 Ky. 652; Campbell v. State, 43 Tex. Crim. 602.

6. Hereford v. People, 197 Ill. 222.

7. Defendant Must Have Been Sworn. — Markey v. State, (Fla. 1904) 37 So. Rep. 53; Parker v. State, 44 Tex. Crim. 147.

10. No Particular Form of Oath Required. — People v. Parent, 139 Cal. 600; Markey v. State, (Fla. 1904) 37 So. Rep. 53.

683. 1. Competent Tribunal or Officer. — Hereford v. People, 197 Ill. 222; People v. Martin, (Ct. Gen. Sess.) 38 Misc. (N. Y.) 67,

reversed on other grounds 77 N. Y. App. Div. 396.

2. Court Must Have Jurisdiction. — Hereford v. People, 197 Ill. 222.

7. De Facto Officer. — See Drew v. Rex, 11 Quebec K. B. 477, affirmed 33 Can. Sup. Ct. 228.

684. 1. Oath Administered in Open Court. — State v. Townley, 67 Ohio St. 21, 93 Am. St. Rep. 636.

8. Testimony Before Grand Jury. — State v. Faulkner, 185 Mo. 673.

685. 1. An Affidavit Required by the Laws of Another State, and taken before a notary in New York, may be the subject of perjury under the *New York Penal Code*. People v. Martin, 175 N. Y. 315, affirming 77 N. Y. App. Div. 396, which reversed (Ct. Gen. Sess.) 38 Misc. (N. Y.) 67.

2. Void Proceeding. — Markey v. State, (Fla. 1904) 37 So. Rep. 53; Manning v. State, 46 Tex. Crim. 326.

3. Mere Irregularities No Defense. — Markey v. State, (Fla. 1904) 37 So. Rep. 53; Manning v. State, 46 Tex. Crim. 326.

4. Oath Must Be Authorized or Required by Law.

685. *c.* OATH MUST HAVE BEEN FALSE. — See notes 5, 6.

686. 2. Materiality of False Statement — *a.* STATEMENT MUST HAVE BEEN MATERIAL. — See note 2.

Under Statutes. — See note 3.

b. WHAT CONSTITUTES MATERIALITY — (1) *In General.* — See note 4.

687. The Test of Materiality. — See note 1.

Circumstantial Materiality Sufficient. — See note 3.

Statements Affecting Collateral Issue — Credit of Witness. — See note 4.

688. The Degree of Materiality. — See note 3.

(2) *Question for Court.* — See notes 5, 6, 7.

689. 3. Knowledge of Falsity — Corrupt Intent — *a.* IN GENERAL. — See notes 3, 4.

Tests of Knowledge. — See note 5.

b. STATEMENTS MADE THROUGH MISTAKE OR INADVERTENCE. — See note 6.

c. RASH AND INCONSIDERATE STATEMENTS. — See note 8.

690. 4. Subjects of Perjury — *a.* IN GENERAL. — See note 8.

691. *c.* TESTIMONY OF INCOMPETENT WITNESS. — See note 2.

III. EVIDENCE — 1. Admissibility — *a.* IN GENERAL. — See note 10.

— U. S. *v.* Maid, 116 Fed. Rep. 650; People *v.* Martin, (Ct. Gen. Sess.) 38 Misc. (N. Y.) 67, reversed on other grounds 77 N. Y. App. Div. 396, 175 N. Y. 315.

685. 5. Oath Must Be False. — See Rex *v.* Cohn, 36 Nova Scotia 40.

6. State *v.* Carey, 159 Ind. 504.

686. 2. Testimony Must Be Material. — U. S. *v.* Maid, 116 Fed. Rep. 650; Brown *v.* State, (Fla. 1904) 36 So. Rep. 705; Gibson *v.* State, (Fla. 1904) 36 So. Rep. 706; Wilson *v.* State, 115 Ga. 206, 90 Am. St. Rep. 104; State *v.* Brown, 111 La. 170; State *v.* Booker, 84 Miss. 187; People *v.* Root, 94 N. Y. App. Div. 84; Maroney *v.* State, 45 Tex. Crim. 524; Liggett *v.* State, (Tex. Crim. 1904) 83 S. W. Rep. 807; Pyles *v.* State, (Tex. Crim. 1904) 83 S. W. Rep. 811. See also Gammage *v.* State, 119 Ga. 380.

3. Statutory Perjury. — State *v.* Miller, 26 R. I. 282.

4. Testimony Held Material. — State *v.* Brown, (Iowa 1905) 102 N. W. Rep. 799; State *v.* Lehman, 175 Mo. 619; State *v.* Faulkner, 175 Mo. 546; People *v.* Doody, 72 N. Y. App. Div. 372, affirmed 172 N. Y. 165; People *v.* Root, 94 N. Y. App. Div. 84; McLeod *v.* State, (Tex. Crim. 1903) 75 S. W. Rep. 522.

687. 1. Test of Materiality. — State *v.* Miller, 26 R. I. 282.

3. Statement Need Not Be Directly Material. — State *v.* Brown, (Iowa 1905) 102 N. W. Rep. 799; State *v.* Faulkner, 175 Mo. 546, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 687; People *v.* Root, 94 N. Y. App. Div. 84; State *v.* Miller, 26 R. I. 282, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 687; McLeod *v.* State, (Tex. Crim. 1903) 75 S. W. Rep. 522.

4. Matter Affecting Credit of Witness. — Wilson *v.* State, 115 Ga. 206, 90 Am. St. Rep. 104; State *v.* Cary, 159 Ind. 504.

688. 3. Degree of Materiality Immaterial. — State *v.* Miller, 26 R. I. 282.

5. Materiality Question for Court. — State *v.* Brown, (Iowa 1905) 102 N. W. Rep. 799; State *v.* Brown, 111 La. 170; State *v.* Faulk-

ner, 175 Mo. 546; Maroney *v.* State, 45 Tex. Crim. 524.

6. Materiality Mixed Question of Law and Fact. — State *v.* Brown, 111 La. 170.

7. Harmless Submission to Jury. — State *v.* Douette, 31 Wash. 6.

689. 3. Knowledge of Falsity Essential. — Goodwin *v.* State, 118 Ga. 770; State *v.* Brown, 110 La. 591; State *v.* Williams, 111 La. 1033; McDonough *v.* State, (Tex. Crim. 1904) 84 S. W. Rep. 594; Rex *v.* Cohn, 36 Nova Scotia 40.

4. Oath Must Be Wilfully and Corruptly False. — U. S. *v.* Lake, 129 Fed. Rep. 499; People *v.* Wong Fook Sam, 146 Cal. 114; Herring *v.* State, 119 Ga. 709; State *v.* Williams, 111 La. 1033; Luna *v.* State, 44 Tex. Crim. 482.

Rule Applies to Statutory False Swearing. — Williams *v.* Com., 113 Ky. 652.

5. As to the Effect of Defendant's Intoxication. — Williams *v.* Com., 113 Ky. 652.

6. Perjury Not Assignable upon Mistake. — Luna *v.* State, 44 Tex. Crim. 482.

8. Rash and Inconsiderate Statement. — See Herring *v.* State, 119 Ga. 709; People *v.* Doody, 72 N. Y. App. Div. 372, affirmed 172 N. Y. 165.

690. 8. A Witness Falsely Swearing that He Does Not Remember, in answer to pertinent and material questions, is guilty of perjury. People *v.* Doody, 172 N. Y. 165, affirming 72 N. Y. App. Div. 372.

691. 2. Person Erroneously Sworn or Incompetent as Witness. — State *v.* Moore, 111 La. 1006, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 691.

10. Evidence Held Admissible. — State *v.* Vandemark, 77 Conn. 201; People *v.* Albers, 137 Mich. 678; State *v.* Allen, 94 Mo. App. 508; State *v.* Faulkner, 175 Mo. 546; Freeman *v.* State, 44 Tex. Crim. 496; Luna *v.* State, 44 Tex. Crim. 482; McCoy *v.* State, (Tex. Crim. 1903) 73 S. W. Rep. 1057; Stanley *v.* State, (Tex. Crim. 1903) 74 S. W. Rep. 320; McLeod *v.* State, (Tex. Crim. 1903) 75 S. W. Rep. 522; Mahon *v.* State, 46 Tex. Crim. 234; Townley

- 692.** *b.* RECORD OF PROCEEDINGS. — See note 1.
693. 2. Competency of Witnesses. — See note 3.
 3. Quantum of Proof — *a.* IN GENERAL — Proof Must Be Beyond a Reasonable Doubt. — See note 4.
694. See notes 1, 2.
b. NUMBER OF WITNESSES REQUIRED — Modern Rule. — See note 7.
695. One Witness Insufficient. — See notes 1, 2.
 False Swearing. — See note 6.
c. CORROBORATING EVIDENCE. — See notes 7, 8, 9.
696. The Corroborating Evidence Must Be of a Strong Character. — See notes 2, 3.
697. V. SUBORNATION OR INCITEMENT OF PERJURY — Definition and Nature. — See notes 3, 5.
 What Constitutes the Offense. — See notes 7, 8.
 Proof. — See notes 9, 10.
 Incitement to Commit Perjury. — See note 12.
698. PERMANENT — PERMANENTLY, ETC. — See note 5.
700. PERMIT — PERMISSION. — See notes 1, 2.
 Knowledge. — See note 3.

v. State, (Tex. Crim. 1904) 81 S. W. Rep. 309;
 McDonough *v.* State, (Tex. Crim. 1904) 84 S. W. Rep. 594.

Evidence Held Inadmissible. — People *v.* Carpenter, 136 Cal. 391; People *v.* Albers, 137 Mich. 678; State *v.* Hunter, 181 Mo. 316; Hollins *v.* State, (Tex. Crim. 1902) 69 S. W. Rep. 594.

Hearsay Evidence. — People *v.* Jan John, 137 Cal. 220; State *v.* Brown, 111 La. 170; State *v.* Faulkner, 175 Mo. 546; Freeman *v.* State, 43 Tex. Crim. 580.

The Reporter's Notes. — Hereford *v.* People, 197 Ill. 222.

Parol Evidence. — Schmidt *v.* U. S., (C. C. A.) 133 Fed. Rep. 257; State *v.* Woolridge, 45 Oregon 389.

Admissions. — See People *v.* Jan John, 144 Cal. 284; People *v.* Doody, 172 N. Y. 165.

692. 1. Record as Evidence. — Schmidt *v.* U. S., (C. C. A.) 133 Fed. Rep. 257, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 692; State *v.* Horine, 70 Kan. 256; State *v.* Brown, 111 La. 170.

693. 3. The Witness Must Be Credible. — Curtis *v.* State, 46 Tex. Crim. 480.

4. Proof Must Be Beyond Reasonable Doubt. — State *v.* Fahey, 3 Penn. (Del.) 594; People *v.* Root, 94 N. Y. App. Div. 84; Medlock *v.* State, (Tex. Crim. 1904) 82 S. W. Rep. 508.

Evidence Held Insufficient. — Lee *v.* State, (Tex. Crim. 1902) 70 S. W. Rep. 425.

694. 1. Evidence Sufficient. — People *v.* Parent, 139 Cal. 600; Hereford *v.* People, 197 Ill. 222; State *v.* Hunter, 181 Mo. 316; State *v.* Faulkner, 185 Mo. 673; Freeman *v.* State, 44 Tex. Crim. 496; Simpson *v.* State, 46 Tex. Crim. 77.

Circumstantial Evidence Alone Sufficient. — People *v.* Doody, 172 N. Y. 165.

2. Bradford *v.* State, 134 Ala. 141; Hereford *v.* People, 197 Ill. 222; Simpson *v.* State, 46 Tex. Crim. 77.

7. Modern Rule as to Quantum of Proof. — People *v.* Doody, 72 N. Y. App. Div. 372, affirmed 172 N. Y. 165; State *v.* Courtright, 66 Ohio St. 35; Lee *v.* State, (Tex. Crim. 1902) 70 S. W. Rep. 425. See also Stone *v.* State, 118 Ga. 705, 98 Am. St. Rep. 145.

Rule Not Applicable Where Evidence Is Circumstantial — People *v.* Doody, 172 N. Y. 165.

695. 1. Testimony of One Witness Insufficient. — State *v.* Faulkner, 175 Mo. 546; State *v.* Hunter, 181 Mo. 316.

2. Lee *v.* State, (Tex. Crim. 1902) 70 S. W. Rep. 425.

6. Williams *v.* Com., 113 Ky. 652.

7. Corroboration by Independent Testimony. — State *v.* Hunter, 181 Mo. 316.

8. Proof by Circumstantial Evidence. — Maroney *v.* State, 45 Tex. Crim. 524.

9. McCoy *v.* State, (Tex. Crim. 1903) 73 S. W. Rep. 1057.

696. 2. Evidence Need Not Be Equivalent, etc. — State *v.* Hunter, 181 Mo. 316.

3. State *v.* Courtright, 66 Ohio St. 35.

697. 3. Subornation of Perjury Defined. — State *v.* Fahey, 3 Penn. (Del.) 594; Stone *v.* State, 118 Ga. 705, 98 Am. St. Rep. 145; Rex *v.* Cole, 3 Ont. L. Rep. 389.

5. Compare Stone *v.* State, 118 Ga. 705, 98 Am. St. Rep. 145.

7. Perjury Must Be Committed. — State *v.* Fahey, 3 Penn. (Del.) 594; Stone *v.* State, 118 Ga. 705, 98 Am. St. Rep. 145.

8. Scienter. — State *v.* Fahey, 3 Penn. (Del.) 594.

9. Proof by One Witness. — Stone *v.* State, 118 Ga. 705, 98 Am. St. Rep. 145.

10. Stone *v.* State, 118 Ga. 705, 98 Am. St. Rep. 145.

12. Rex *v.* Cole, 3 Ont. L. Rep. 389.

698. 5. Permanent Employment. — Davidson *v.* Laughlin, (Cal. 1902) 68 Pac. Rep. 101; Faulkner *v.* Des Moines Drug Co., 117 Iowa 120; Sullivan *v.* Detroit, etc., R. Co., 135 Mich. 661.

700. 1. Permit and Suffer — Permit Denotes Decided Assent. — *In re* Wilmington Hosiery Co., 120 Fed. Rep. 180.

Bankruptcy — Passiveness. — Bogen *v.* Protter, (C. C. A.) 129 Fed. Rep. 533.

2. Permit in the Sense of Suffer. — Murphy *v.* Roney, (Ky. 1904) 82 S. W. Rep. 396.

3. Knowledge Implied. — See Korten *v.* West Sussex County Council, 88 L. T. N. S. 466.

PERPETUITIES AND TRUSTS FOR ACCUMULATION.

By W. H. CROW.

703. I. INTRODUCTORY — 1. Perpetuity Defined. — See notes 5, 6.

704. 2. Origin and Purpose of Rule Against Perpetuities. — See note 4.

3. Statutory Rule Against Suspension of Power of Alienation. — See note 6.

4. Rule One of Law and Not of Interpretation. — See note 7.

When Language of Will Is Ambiguous. — See note 8.

705. II. INTERESTS SUBJECT TO RULE — 1. In General. — See note 1.

2. Vested Interests. — See note 2.

3. Alienable Interests. — See note 4.

4. Life Estates. — See note 6.

706. 8. Leases. — See note 4.

707. 11. Contractual Rights. — See note 2.

III. CONTINGENCY ON WHICH INTEREST IS LIMITED — 2. Happening of Contingency. — See notes 5, 6, 7, 8.

708. IV. PERIOD LIMITED BY RULE — 1. At Common Law — *a.* STATEMENT OF RULE. — See note 4.

709. The Term of Twenty-one Years. — See note 3.

b. TIME AT WHICH VALIDITY OF LIMITATIONS IS TO BE DETERMINED. — See note 7.

703. 5. Alienable Estates May Create a Perpetuity. — *Troutman v. De Boissiere Odd Fellows' Orphans' Home, etc., Assoc.*, 66 Kan. 23, *per* Cunningham, J., dissenting, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 703.

6. Perpetuity Accurately Defined. — *Graham v. Whitridge*, 99 Md. 248, adverting to the definition given in *Scatterwood v. Edge*, 1 Salk. 229, as "obviously not correct."

704. 4. Rule Enforceable in Both Law and Equity. — *Graham v. Whitridge*, 99 Md. 248.

6. Statutory Rule. — *Becker v. Chester*, 115 Wis. 90, 147.

7. Not a Rule of Interpretation. — *Towle v. Doe*, 97 Me. 427; *Graham v. Whitridge*, 99 Md. 248.

8. Interpretation — Ambiguous Clauses. — *Towle v. Doe*, 97 Me. 427.

705. 1. Interest Subject to Rule. — *Bates v. Spooner*, 75 Conn. 501.

Not Applicable to Personalty in Wisconsin. — *Becker v. Chester*, 115 Wis. 90.

2. Vested Interests. — *Flanner v. Fellows*, 206 Ill. 136; *Matter of Conger*, 81 N. Y. App. Div. 493, affirming (*Surrogate Ct.*) 40 Misc. (N. Y.) 157; *Becker v. Chester*, 115 Wis. 90. See also *Kent v. Kent*, 99 N. Y. App. Div. 112.

4. Alienable Interests Not Within Statute. — *Blakeman v. Miller*, 136 Cal. 138, 89 Am. St. Rep. 120; *Stevens v. Annex Realty Co.*, 173 Mo. 511; *Becker v. Chester*, 115 Wis. 90.

6. Life Estates. — See *Herzog v. Title Guarantee, etc., Co.*, 177 N. Y. 86, reversing 85 N. Y. App. Div. 549; *Dulin v. Moore*, 96 Tex. 135.

706. 4. A Lease which does not show the date of beginning and termination of the rights accruing under it, does not create a perpetuity, where work was actually commenced under it within a reasonable time. *Gex v. Dill*, 86 Miss. 10.

707. 2. Personal Contracts. — A condition in a grant of land requiring it not to be used for handling grain is not void as a perpetuity. *Wakefield v. Van Tassell*, 202 Ill. 41, 95 Am. St. Rep. 207.

5. Happening of the Contingency — Possible Events Considered. — *Schuknecht v. Schultz*, 212 Ill. 43; *Union Trust Co. v. Metcalfe*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 672.

6. *White v. Allen*, 76 Conn. 185; *Graham v. Whitridge*, 99 Md. 248, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 707.

7. Subsequent Events Not Considered. — *Graham v. Whitridge*, 99 Md. 248.

8. Event Must Happen Within Period. — *Thomas v. Thomas*, 87 L. T. N. S. 58.

708. 4. Statement of the Rule. — *Cribbs v. Walker*, (Ark. 1905) 85 S. W. Rep. 244; *Schuknecht v. Schultz*, 212 Ill. 43; *Hussey v. Sargent*, 116 Ky. 53; *Fidelity Trust Co. v. Lloyd*, 78 S. W. Rep. 806, 25 Ky. L. Rep. 1827; *Towle v. Doe*, 97 Me. 427; *Graham v. Whitridge*, 99 Md. 248; *Becker v. Chester*, 115 Wis. 90.

709. 3. Term of Twenty-one Years in Gross. — *Becker v. Chester*, 115 Wis. 90.

7. Validity of Testamentary Limitations Determined by Circumstances at Death of Testator. — See *In re Wilmer*, (1903) 2 Ch. 411.

710. *c. LIMITATIONS WHICH OFFEND RULE — (1) Limitations Over upon Failure of Issue.* — See note 1.

(2) *Limitations to Unborn Persons — (a) Limitations in Fee — bb. LIMITATION TO UNBORN PERSON ON ATTAINING CERTAIN AGE.* — See note 5.

711. (c) *Limitations Over After Life Interests.* — See note 7.

712. (5) *Trusts of Indefinite Duration.* — See notes 3, 7.

713. *Maintenance of Burial Place.* — See note 1.

714. (6) *Powers — (a) Creation — Power of Sale.* — See note 1.

715. 2. *Under Statutes — a. STATUTES OF NEW YORK, MICHIGAN, MINNESOTA, AND WISCONSIN — (2) Period of Suspension Must Be Measured by Lives — (a) In General.* — See note 7.

(b) *Terms of Fixed Duration.* — See note 8.

716. (c) *Terms of Indefinite Duration.* — See note 1.

(d) *Terms Indirectly Measured by Lives.* — See note 4.

717. (3) *Lives by Which Period Is Measured — (a) Must Exist at Creation of Estate.* — See note 1.

(d) *Must Not Exceed Two in Number — aa. IN GENERAL.* — See note 6.

Number of Beneficiaries Immaterial. — See note 7.

Annuitants. — See note 8.

710. 1. *Limitation Over upon Definite Failure of Issue.* — *Briscoe v. Thweatt*, (Ark. 1905) 86 S. W. Rep. 432; *Jossey v. Brown*, 119 Ga. 758; *Metzen v. Schopp*, 202 Ill. 275.

5. *Gift to Unborn Person to Vest at a Period Beyond Twenty-one Years.* — *Schuknecht v. Schultz*, 212 Ill. 43.

711. 7. *Limitation to Issue of Unborn Person Void.* — *Graham v. Whitridge*, 99 Md. 248.

Rule Not Applicable to Personal Estate. — *In re Bowles*, (1902) 2 Ch. 650.

712. 3. *Indefinite Trust for Benefit of Testator's Heirs.* — *Lee v. O'Donnell*, 95 Md. 538.

7. *Coleman v. O'Leary*, 114 Ky. 388; *Shanahan v. Kelly*, 88 Minn. 202; *Dodsworth v. Dam*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 684.

713. 1. *Maintenance of Burial Place.* — *Matter of Gay*, 138 Cal. 552, 94 Am. St. Rep. 70; *McIlvain v. Hockaday*, 36 Tex. Civ. App. 1. See the title CHARITIES AND TRUSTS FOR CHARITABLE USES, 934. 1.

714. 1. *Effect of Ordinary Power of Sale.* — A power of sale given to a trustee for purposes of distribution will not cure provisions otherwise invalid as contrary to the rule against perpetuities. *Hagemeyer v. Saulpaugh*, 97 N. Y. App. Div. 535.

715. 7. *Period Must Be Measured by Lives.* — *Casgrain v. Hammond*, 134 Mich. 419, 104 Am. St. Rep. 610, 10 Detroit Leg. N. 534; *Schlereth v. Schlereth*, 73 N. Y. 444, 93 Am. St. Rep. 616, affirming 73 N. Y. App. Div. 283; *Dresser v. Travis*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 358, affirmed 87 N. Y. App. Div. 632, 633; *Brown v. Quintard*, 177 N. Y. 75, modifying 79 N. Y. App. Div. 635; *Hagemeyer v. Saulpaugh*, 97 N. Y. App. Div. 535. See also *Phillips v. Heldt*, 33 Ind. App. 388; *Stone v. Bradley*, 183 Mass. 165.

8. *Limitations After Terms of Fixed Duration.* — *Casgrain v. Hammond*, 134 Mich. 419, 104 Am. St. Rep. 610, 10 Detroit Leg. N. 534; *Matter of Murray*, 75 N. Y. App. Div. 246; *McGuire v. McGuire*, 80 N. Y. App. Div. 63; *Brown v. Quintard*, 177 N. Y. 75, modifying 79 N. Y. App. Div. 635; *Hagemeyer v. Saulpaugh*,

97 N. Y. App. Div. 535. See also *Loomer v. Loomer*, 76 Conn. 522; *Phillips v. Heldt*, 33 Ind. App. 388; *Fidelity Trust Co. v. Lloyd*, 78 S. W. Rep. 896, 25 Ky. L. Rep. 1827.

Conveyance to Trustees to Hold and Manage Property for Fixed Term Void. — *Compare Matlock v. Lock*, (Ind. App. 1905) 73 N. E. Rep. 171.

716. 1. *Trust of Indefinite Duration Void.* — *Dodsworth v. Dam*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 684.

4. *Terms Indirectly Measured by Lives.* — Where a legatee was, by the terms of the will, to elect within three months whether he would occupy a certain house during his life, it was held that there was no unlawful suspension of alienation, since the suspension could not continue longer than his life. *Matter of Trotter*, 104 N. Y. App. Div. 188, affirmed 182 N. Y. 465.

717. 1. *Lives Must Be in Being.* — *Matter of Faile*, (Surrogate Ct.) 44 Misc. (N. Y.) 619.

6. *Lives Must Not Exceed Two in Number.* — *Schlereth v. Schlereth*, 73 N. Y. App. Div. 283, affirmed 173 N. Y. 444, 93 Am. St. Rep. 616; *Matter of Howland*, 75 N. Y. App. Div. 207; *Matter of Conger*, 81 N. Y. App. Div. 493, affirming (Surrogate Ct.) 40 Misc. (N. Y.) 157; *Mee v. Gordon*, 104 N. Y. App. Div. 520. See also under the *Kentucky* statute *Johnson v. Johnson*, 79 S. W. Rep. 293, 25 Ky. L. Rep. 2119.

Who Are Donees. — Under a deed of trust where the donor reserved to himself the exclusive right to possession and control during his life, after his death the property to vest in the trustee for the use of two successive *cestuis que trustent* for their lives, remainder over in fee, the legal life estate of the donor cannot be counted as an interest in one of the donees within whose life the ultimate fee will vest. *Middlesex Banking Co. v. Field*, 84 Miss. 646.

7. *Number of Beneficiaries Immaterial.* — *Smith v. Havens Relief Fund Soc.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 594.

8. *Annuitants.* — *Smith v. Havens Relief Fund Soc.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 594.

- 717.** *bb.* LIMITATION OF LIFE ESTATES — (*aa*) *Successive Estates.* — See note 9.
- 719.** *cc.* SUSPENSION DURING MINORITIES. — See note 10.
- 720.** Construction of Term "Youngest Child." — See note 3.
- 721.** *c.* STATUTES OF CONNECTICUT AND OHIO. — See note 10.
- 722.** V. POSTPONEMENT OF POSSESSION OR ENJOYMENT — Not a Violation of the Rule. — See note 1.
- 723.** Postponement until Termination of Trust. — See note 3.
- VI. EFFECT OF INVALIDITY ON OTHER INTERESTS** — 1. Prior Interests — *a.* IN GENERAL. — See note 6.
- Alternative Limitations. — See note 7.
- b.* VALIDITY OF PRIOR INTERESTS. — See notes 9, 10.
- 725.** 3. Interests of Persons Comprising Classes — *a.* LIMITATION TO CLASS AS A WHOLE. — See note 1.
- 726.** *b.* LIMITATION TO INDIVIDUALS OF CLASS. — See note 1.
- VII. CONFLICT OF LAWS** — 2. Personal Property. — See note 9.
- 727.** Law of Legatee's Domicil. — See note 2.
3. Property Equitably Converted from One Species to Another — *a.* REAL ESTATE CONVERTED INTO PERSONALTY. — See note 4.
- 728.** VIII. TRUSTS FOR ACCUMULATION — 1. Definition and General Principles — What Constitutes Direction to Accumulate. — See note 6.
- 729.** Conflict of Laws. — See notes 6, 7.
- 731.** 3. Statutory Regulations — *a.* IN GENERAL. — See note 2.
- Exceptions in Statutes. — See notes 5, 6.

717. 9. See *Middlesex Banking Co. v. Field*, 84 Misc. (N. Y.) 646.

719. 10. Two Lives and One Minority Valid under Pennsylvania Statute. — *Smith's Estate*, 210 Pa. St. 604.

720. 3. "Youngest Child" Descriptive of Particular Person. — See *Matteson v. Palser*, 56 N. Y. App. Div. 91, modified 173 N. Y. 404. See also *Coleman v. Coleman*, 69 Kan. 39.

721. 10. *Blakeman v. Sears*, 74 Conn. 516; *Buck v. Lincoln*, 76 Conn. 149.

722. 1. Postponement of Possession or Enjoyment Immaterial. — *Matter of Pforr*, 144 Cal. 121; *Matter of Dippel*, 71 N. Y. App. Div. 598; *Matter of Conger*, 81 N. Y. App. Div. 493, affirming (*Surrogate Ct.*) 40 Misc. (N. Y.) 157; *Nichols v. Nichols*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 381; *Becker v. Chester*, 115 Wis. 90.

723. 3. *Matlock v. Lock*, (Ind. App. 1905) 73 N. E. Rep. 171, upholding a provision in a will that the beneficiary should not be entitled to the trust estate until she should reach the age of forty years.

6. Effect of Invalidity on Prior Interests Generally. — *Towle v. Doe*, 97 Me. 427.

7. Alternative Limitations. — *Matter of Murray*, 75 N. Y. App. Div. 246.

9. Prior Interests Not Invalidated by Remoteness of Limitation Over. — *Buck v. Lincoln*, 76 Conn. 149; *Graham v. Whitridge*, 99 Md. 248; *Schlereth v. Schlereth*, 73 N. Y. App. Div. 283, affirmed 173 N. Y. 444, 93 Am. St. Rep. 616; *Denison v. Denison*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 295, affirmed 103 N. Y. App. Div. 523.

10. *Towle v. Doe*, 97 Me. 427.

725. 1. Limitation to Class. — *Coleman v. Coleman*, 69 Kan. 39.

Sufficient that Members Be Certainly Ascertainable. — *Bates v. Spooner*, 75 Conn. 501.

726. 1. Limitation to Individuals of Class. — *Mendel v. Levis*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 271; *Denison v. Denison*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 295, affirmed 103 N. Y. App. Div. 523.

9. Rule as to Personality — *Lex Domicilii Generally Governs.* — *Hussey v. Sargent*, 116 Ky. 53.

727. 2. *Schlereth v. Schlereth*, 73 N. Y. App. Div. 283, affirmed 173 N. Y. 444, 93 Am. St. Rep. 616.

4. A Conversion to Be Made After the Lives Limited and twenty-one years, by the sale of the realty by the trustees, will not extend the time beyond the rule, since equity will regard the conversion as if it were completely effected at the time of the testator's death. *Bates v. Spooner*, 75 Conn. 501.

728. 6. What Constitutes Direction to Accumulate in General. — *Dodsworth v. Dam*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 684.

729. 6. Accumulation of Income of Realty — Law of Situs Governs. — *Brigham v. Peter Bent Brigham Hospital*, 126 Fed. Rep. 796, affirmed (C. C. A.) 134 Fed. Rep. 513.

7. *Robb v. Washington, etc., College*, 103 N. Y. App. Div. 327.

731. 2. Accumulations Act, 1892. — A direction to accumulate for the purchase of real estate is a direction to accumulate "for the purchase of land only" within the meaning of the Accumulations Act, 1892, and is consequently void. *In re Clutterbuck*, (1901) 2 Ch. 285.

5. A Provision for Accumulating Income to Recoup Capital Applied in Payment of Debts is not a provision for payment of debts within section 2 of the Thellusson Act. *In re Heathcote*, (1904) 1 Ch. 826.

6. Raising Portion for Children. — *In re Stephens*, (1904) 1 Ch. 322.

- 731.** Statute Not Retrospective. — See note 10.
c. RESTRICTION AS TO BENEFICIARIES. — See note 15.
- 732.** *d.* PERIOD OF ACCUMULATION — (1) *Period in England.* — See note 5.
- 733.** (4) *Period in United States* — (a) **Minority of Beneficiaries.** — See note 4.
 Minority Is the Measure of Time. — See note 5.
 Commencement of Accumulation. — See note 9.
 Period as Affected by Number of Beneficiaries. — See note 11.
- 734.** *e.* EFFECT OF EXCEEDING STATUTORY PERIOD — (2) *Rule in United States.* — See note 8.
- 735.** 4. Disposition of Illegal Accumulations — *a.* PRESENT VESTED INTEREST — Charities. — See note 7.
- 736.** *b.* FUTURE CONTINGENT INTEREST — (1) *Real Estate* — Devolution Governed by Statute. — See note 4.
 (2) *Personal Property.* — See note 6.
 5. Gift of Principal as Affected by Discretion to Accumulate. — See note 9.
- 731.** 10. The Accumulations Act of 1892 applies to a will made before and coming into operation after its passage. *In re Llanover*, (1903) 2 Ch. 330.
15. Accumulation Generally for Exclusive Benefit of Minors in the United States. — Matter of Raymond, 73 N. Y. App. Div. 11.
- Accumulations to Pay Mortgage Void under New York Statute. — *Hafner v. Hafner*, 62 N. Y. App. Div. 316, *affirmed* 171 N. Y. 633.
- 732.** 5. Accumulation until Majority of Youngest of Several Beneficiaries Permitted. — *In re Stephens*, (1904) 1 Ch. 322.
- 733.** 4. Period of Accumulation in the United States — Minority of Beneficiaries. — *Thorn v. De Bretenil*, 179 N. Y. 64; *Dodsworth v. Dam*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 684; *McGuire v. McGuire*, 80 N. Y. App. Div. 63.
5. Minority of Beneficiary the Absolute Measure of Time. — *Dodsworth v. Dam*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 684; *Dresser v. Travis*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 358, *affirmed* 87 N. Y. App. Div. 632, 633; *Lowenhaupt v. Stanisics*, 95 N. Y. App. Div. 171.
9. Accumulations May Not Commence Before Birth of Beneficiary. — *U. S. Trust Co. v. Soher*, 178 N. Y. 442; *U. S. Trust Co. v. Soher*, 88 N. Y. App. Div. 506, *affirmed* 178 N. Y. 442.
11. Accumulation During Minority of More than Two Beneficiaries Not Permitted in New York. — *Dresser v. Travis*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 358, *affirmed* 87 N. Y. App. Div. 632, 633.
- 734.** 8. New York Statute. — *Tobin v. Graf*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 412; *Thorn v. De Bretenil*, 86 N. Y. App. Div. 405, *modified* 179 N. Y. 64.
- 735.** 7. Charities. — *Brigham v. Peter Bent Brigham Hospital*, 126 Fed. Rep. 796, *affirmed* (C. C. A.) 134 Fed. Rep. 513; *Biscoe v. Thweatt*, (Ark. 1905) 80 S. W. Rep. 432; Matter of Merchant, 143 Cal. 537; *Phillips v. Heldt*, 33 Ind. App. 388; *Coleman v. O'Leary*, 114 Ky. 388; *Pullins v. Board of Education*, 25 Ky. L. Rep. 1715, 78 S. W. Rep. 457; *Codman v. Brigham*, 187 Mass. 309, 105 Am. St. Rep. 394; *Shanahan v. Kelly*, 88 Minn. 202; *Farmers, etc., Bank v. Robinson*, 96 Mo. App. 385; *Smith v. Havens Relief Fund Soc.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 594; *Robb v. Washington, etc., College*, 103 N. Y. App. Div. 327. See also Matter of Gay, 138 Cal. 552, 94 Am. St. Rep. 70. But see *Danforth v. Oshkosh*, 119 Wis. 262.
- Accumulations for Charity to Be Subsequently Established. — *Brigham v. Peter Bent Brigham Hospital*, 126 Fed. Rep. 796, *affirmed* (C. C. A.) 134 Fed. Rep. 513.
- 736.** 4. Devolution Governed by Statute in New York. — *In re Conger*, 81 N. Y. App. Div. 493, *affirming* (Surrogate Ct.) 40 Misc. (N. Y.) 157; *U. S. Trust Co. v. Soher*, 178 N. Y. 442, *affirming* 88 N. Y. App. Div. 506.
6. Residuary Legatee. — *In re Pope*, (1901) 1 Ch. 64.
9. Absolute Gift of Principal Not Affected by Void Direction to Accumulate. — *Tobin v. Graf*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 412.

PERSON.

By H. N. ELDRIDGE.

738. I. CONSTRUCTION IN GENERAL. — See notes 1, 2.

739. Broad Meaning of Word. — See note 4.

[Trustee in Bankruptcy. — See note 4a.]

741. II. UNITED STATES, STATES, FOREIGN GOVERNMENTS, MUNICIPAL CORPORATIONS, QUASI-PUBLIC CORPORATIONS, ETC. — Municipal Corporation. — See note 1.
County — Town — School District. — See notes 2, 3.

III. PRIVATE CORPORATIONS. — See note 6.

742. See note 2.

743. See note 1.

Fourteenth Amendment. — See note 2.

[Receiver of Private Corporation. — See note 2a.]

738. 1. Living Being. — The natural and obvious signification of the word "person" in a statute is a living being. *Morrill v. Lovett*, 95 Me. 165.

"Person" and "Party" Are Often Used Synonymously. — *Ex p. Bogatsky*, 134 Ala. 384.

2. Aliens. — *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386.

739. 4. Mental Anguish Is an Injury to the Person within the meaning of a statute providing for the survival of causes of action for false imprisonment, assault and battery, or other injury to the person. *Morton v. Western Union Tel. Co.*, 130 N. Car. 299.

4a. A Nonresident Trustee in Bankruptcy Is Not a Person within the meaning of a statute providing that a "person" who is a nonresident of the state may, as a matter of right, be compelled to give security for costs. *Cole v. Manson*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 149.

741. 1. Person Held to Include Municipal Corporations. — *Chicago v. Peck*, 196 Ill. 260.

2. County Held to Be Person. — *Harris v. Stearns*, 17 S. Dak. 439.

3. Person Held Not to Include County. — *Duval County v. Charleston Lumber, etc., Co.*, 45 Fla. 236; *Buell v. Arnold*, 124 Wis. 65.

6. Liability of Corporation for Penalty. — In *Studebaker Bros. Mfg. Co. v. Morden*, 159 Ind. 173, a corporation was held not liable for a penalty imposed on any "person" refusing or neglecting to release a mortgage of record which had been satisfied.

But in *Pearks v. Ward*, (1902) 2 K. B. 1, it

was held that a joint-stock company, incorporated under the Companies' Act, could not be convicted of an offense under section 6 of the Sale of Food and Drugs Act, 1875, which enacts that no person shall sell, to the prejudice of the purchaser, any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding £20.

742. 2. Person Held to Include Corporation. — *Greenwich Ins. Co. v. Carroll*, 125 Fed. Rep. 121; *City Sav. Bank v. Enos*, 135 Cal. 167; *Overland Cotton Mill Co. v. People*, 32 Colo. 263, 105 Am. St. Rep. 74; *Southern R. Co. v. Jones*, 33 Ind. App. 333; *Matter of Adler*, 76 N. Y. App. Div. 571; *Goldzier v. Central R. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 667; *Mairs v. Baltimore, etc., R. Co.*, 73 N. Y. App. Div. 265, affirmed 175 N. Y. 409; *Union Bank, etc., Co. v. Wright*, (Tenn. Ch. 1900) 58 S. W. Rep. 755; *State v. Seattle Gas, etc., Co.*, 28 Wash. 488.

743. 1. Person Held to Include Foreign Corporation. — *Scharmann v. De Palo*, 66 N. Y. App. Div. 29.

2. Fourteenth Amendment. — *Beveridge v. Lewis*, 137 Cal. 619, 92 Am. St. Rep. 188; *North British, etc., Ins. Co. v. Craig*, 106 Tenn. 621.

2a. A Receiver of a Corporation Is Not a Person within the meaning of a statute allowing an action against any person wrongfully or negligently causing the death of another. *Parker v. Dupree*, 28 Tex. Civ. App. 341.

PERSONAL PROPERTY.

BY O. D. ESTEE.

748. II. DEFINITION AND DISTINCTIONS — 2. Distinctions — a. BETWEEN PERSONAL AND REAL PROPERTY — Thus, a Building Erected by One Man on the Land of Another. — See note 7.

749. Thus, Growing Crops. — See note 4.

A Growing Tree. — See note 5.

Fixtures. — See note 10.

750. Stocks and Bonds of a Corporation. — See note 2.

758. PERSONAL TRANSACTIONS OR COMMUNICATIONS. — See note 3.
PERSON OR PARTY AGGRIEVED. — See note 4.

759. PERSUADE. — See note 3.

PETITION. — See note 6.

760. PETROLEUM. — See note 3.

748. 7. Building Erected on Another's Land. — Sweet v. Henry, 175 N. Y. 268. See also Roberts v. Lynn Ice Co., 187 Mass. 402.

Severance of Building from Real Estate. — The owner of a building and the land on which it stands cannot convert the building into personality by a mere agreement with a third party in the absence of a severance of the building from the land. Beeler v. C. C. Mercantile Co., 8 Idaho 644.

749. 4. Crops. — See Newburn v. Lucas, 126 Iowa 85.

5. Trees. — Price, etc., Co. v. Madison, 17 S. Dak. 247.

10. Fixtures. — Hereford v. Pusch, (Ariz. 1902) 68 Pac. Rep. 547.

750. 2. Corporation Stocks and Bonds. — Champollion v. Corbin, 71 N. H. 78; Lipscomb v. Condon, 56 W. Va. 416, 107 Am. St. Rep. 832.

758. 3. Personal Transactions. — Farrar v. Farmers' L. & T. Co., 85 N. Y. App. Div. 367.

4. Person or Party Aggrieved. — Lamar v. Lamar, 118 Ga. 684; Ruff v. Montgomery, 83

Miss. 185; Tillinghast v. Brown University, 24 R. I. 179.

For Other Definitions and Illustrations. — Jowers v. Brown, 137 Ala. 581; *In re* Davis, 27 Mont. 235; New Jersey Bldg., etc., Co. v. Lord, 66 N. J. Eq. 344; Matter of Stapleton, 71 N. Y. App. Div. 1; Fox v. Interurban St. R. Co., (Supm. Ct. App. T.) 42 Misc. (N. Y.) 538; People v. Feitner, 92 N. Y. App. Div. 518; Matter of Nepperhan St., 71 N. Y. App. Div. 534.

Insane Person. — Com. v. Pitcairn, 204 Pa. St. 514.

Probate Proceedings. — Matter of Rayner, 93 N. Y. App. Div. 114; *In re* Hunt, 122 Wis. 460.

759. 3. Persuasion. — The use of the word *persuasion* instead of "threats" in the separate acknowledgment of a married woman is a fatal defect and renders a mortgage a nullity. Marx v. Threet, 131 Ala. 340.

6. Petition Distinguished from Affidavit. — Lawrey v. Sterling, 41 Oregon 518.

760. 3. Petroleum. — Wagner v. Mallory, 169 N. Y. 501.

PHOTOGRAPHS.

BY HAROLD N. ELDRIDGE.

772. I. DEFINITION. — See note 1.

773. II. As EVIDENCE — 2. When Admissible — a. ORDINARY PHOTOGRAPHS — (1) As Primary Evidence — Best Evidence. — See notes 1, 2, 3.

772. 1. Photographs Judicially Recognized as a Proper Means of Producing Correct Likenesses. — State v. Matheson, (Iowa 1905) 103 N. W. Rep. 137.

773. 1. Physical Appearance of Deceased Per-

son — To Show Wounds Inflicted by Murderer. — Smith v. Territory, 11 Okla. 660.

2. In Complaint for Cruelty to Animal — To Show Condition as to Flesh of Animal. — State v. Cook, 75 Conn. 267.

- 773.** (2) *As Secondary Evidence.* — See note 5.
774. (3) *As Explanatory or Illustrative Evidence* — (a) *In General.* — See note 2.
775. *b. ROENTGEN OR X-RAY PHOTOGRAPHS.* — See note 3.
c. NECESSITY OF PROVING ACCURACY. — See note 4.
776. *May Be Made by Any Person Familiar with Subjects.* — See note 1.
3. When Inadmissible. — See note 2.
4. Discretion as to Admission or Exclusion. — See notes 4, 5.

773. 3. Appearance of Railroad Wreck Caused by Collision. — Maynard *v. Oregon R., etc., Co.*, (Oregon 1904) 78 Pac. Rep. 983.

Photographs of the Plaintiff Taken Before and After an Accident have been held to be admissible to show physical appearance. Davis *v. Seaboard Air Line R. Co.*, 136 N. Car. 115; Houston, etc., R. Co. *v. Cluck*, (Tex. Civ. App. 1904) 84 S. W. Rep. 852.

5. To Prove Identity of Persons. — Russell *v. State*, (Ala. 1905) 38 So. Rep. 291; State *v. Hasty*, 121 Iowa 507; State *v. Fulkerson*, 97 Mo. App. 599.

Photograph of Letter Admitted. — Frank *v. Berry*, (Iowa 1905) 103 N. W. Rep. 358.

774. 2. Scene of Murder. — Mow *v. People*, 31 Colo. 351; Paulson *v. State*, 118 Wis. 89.

Scene of Accident. — Chicago, etc., R. Co. *v. Corson*, 198 Ill. 98; Chicago, etc., R. Co. *v. Lawrence*, 96 Ill. App. 635; Williams *v. Carterville*, 97 Ill. App. 160; Fitzgerald *v. Hedstrom*, 98 Ill. App. 109; La Salle *v. Evans*, 111 Ill. App. 69; Huntington *v. Lusch*, 33 Ind. App. 476; Huntington Light, etc., Co. *v. Beaver*, (Ind. App. 1905) 73 N. E. Rep. 1002; Considine *v. Dubuque*, 126 Iowa 283; Sterling *v. Detroit*, 134 Mich. 22; Smart *v. Kansas City*, 91 Mo. App. 586; Leeds *v. New York Telephone Co.*, 79 N. Y. App. Div. 121, 178 N. Y. 118; Record *v. Chickasaw Cooperage Co.*, 108 Tenn. 657; Hawkins *v. Missouri*, etc., R. Co., 36 Tex. Civ. App. 633.

In Action for Injury to Real Property. — Robinson *v. St. Joseph*, 97 Mo. App. 503.

Scene of Arson. — Com. *v. Fielding*, 184 Mass. 484.

775. 3. X-Ray Photographs Admissible as Illustrative Evidence. — Miller *v. Mintun*, 73 Ark. 183; Chicago, etc., Electric R. Co. *v. Spence*, 213 Ill. 220, 104 Am. St. Rep. 213, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 775; State *v. Matheson*, (Iowa 1905) 103 N. W. Rep. 137; Geneva *v. Burnett*, 65 Neb. 464. See also Fraser *v. California St. Cable R. Co.*, 146 Cal. 714.

4. Must Be Shown to Be Accurate Representations — Connecticut. — State *v. Cook*, 75 Conn. 267.

Illinois. — Williams *v. Carterville*, 97 Ill. App. 160; Chicago *v. Vesey*, 105 Ill. App. 191; La Salle *v. Evans*, 111 Ill. App. 69; Chicago, etc., R. Co. *v. Crose*, 113 Ill. App. 547, affirmed 214 Ill. 602, 105 Am. St. Rep. 135.

Indiana. — Huntington *v. Lusch*, 33 Ind. App. 476; Huntington Light, etc., Co. *v. Beaver*, (Ind. App. 1905) 73 N. E. Rep. 1002.

Maryland. — Martin *v. Moore*, 99 Md. 41.

Massachusetts. — Com. *v. Fielding*, 184 Mass. 484.

Michigan. — Sterling *v. Detroit*, 134 Mich. 22.

Missouri. — Smart *v. Kansas City*, 91 Mo. App. 586; Robinson *v. St. Joseph*, 97 Mo. App. 503.

New York. — Alpaugh *v. Hulse*, 72 N. Y. App. Div. 438.

Oklahoma. — Smith *v. Territory*, 11 Okla. 669.

Oregon. — State *v. Miller*, 43 Oregon 325.

Texas. — Houston, etc., R. Co. *v. Cluck*, (Tex. Civ. App. 1904) 84 S. W. Rep. 852; Hawkins *v. Missouri*, etc., R. Co., 36 Tex. Civ. App. 633.

Wisconsin. — Hupfer *v. National Distilling Co.*, 114 Wis. 279; Paulson *v. State*, 118 Wis. 89.

Photograph Should Show Appearance of Locus in Quo at Time of Occurrence Complained of. — Chicago, etc., R. Co. *v. Corson*, 198 Ill. 98; Chicago, etc., R. Co. *v. Lawrence*, 96 Ill. App. 635; Babb *v. Oxford Paper Co.*, 99 Me. 298.

But Photographs Taken at Later Date May Be Admitted When Changes Are Explained. — Fitzgerald *v. Hedstrom*, 98 Ill. App. 109. See also Leeds *v. New York Telephone Co.*, 178 N. Y. 118, reversing 79 N. Y. App. Div. 121; Maynard *v. Oregon R., etc., Co.*, (Oregon 1904) 78 Pac. Rep. 983.

What Proof of Accuracy Sufficient. — To constitute a foundation for the introduction of an X-ray photograph in evidence, it is not essential that it appear that it was taken by a competent person, nor that the condition of the apparatus with which it was taken and the circumstances under which it was taken were such as to insure an accurate picture, where it has been shown by the evidence of competent witnesses that it truly represents the object it is claimed to represent. Carlson *v. Benton*, 66 Neb. 486.

776. 1. Proof May Be Made by Person Other than Photographer. — Mow *v. People*, 31 Colo. 351; Accousi *v. G. A. Stowers Furniture Co.*, (Tex. Civ. App. 1905) 87 S. W. Rep. 861.

2. Photographs Appealing to Passions of Jury, and Neither Necessary nor Instructive, Inadmissible. — Cirello *v. Metropolitan Express Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 932; State *v. Miller*, 43 Oregon 325.

4. May Decide Whether Photograph Is Instructive. — Stone *v. Lewiston*, etc., St. R. Co., 99 Me. 243; Babb *v. Oxford Paper Co.*, 99 Me. 298.

5. Discretion Limited to Question of Verification. — State *v. Cook*, 75 Conn. 267. See also Carlson *v. Benton*, 66 Neb. 486.

Sufficiency of Verification Matter Within Trial Judge's Discretion. — Chicago *v. Vesey*, 105 Ill. App. 191; Stone *v. Lewiston*, etc., St. R. Co., 99 Me. 243; Babb *v. Oxford Paper Co.*,

777. III. UNAUTHORIZED USE OF PHOTOGRAPHS—2. By Third Persons.—
— See note 5.

PHYSICAL — PHYSICALLY.— See note 8.

99 Me. 298; Com. v. Fielding, 184 Mass. 484;
State v. Miller, 43 Oregon 325.

777. 5. Is Not Invasion of Right of Privacy.
— *Contra*, Pavesich v. New England L. Ins.
Co., 122 Ga. 190, 106 Am. St. Rep. 104.

8. Physical Impossibility — Impossible Contract.— Le Roy v. Jacobosky, 136 N. Car. 443.

Physical Occupancy of Property Distinguished from Legal Possession.— State v. King, 110 La. 962.

PHYSICIANS AND SURGEONS.

BY BASIL JONES.

780. I. DEFINITION — 1. Physicians.— See note 1.

2. Surgeons.— See note 3.

II. STATUTORY REGULATION — 1. In General.— See notes 5, 6.

2. Constitutionality.— See note 7.

781. See notes 1, 2, 3, 4, 5.

780. 1. Physician Defined.— Kansas City v. Baird, 92 Mo. App. 204.

Definition under Iowa Code.— See State v. Edmunds, 127 Iowa 333.

Christian Scientist Not Physician.— Kansas City v. Baird, 92 Mo. App. 204.

3. Surgeons and Dentists Distinguished.— Cherokee v. Perkins, 118 Iowa 405.

5. At Common Law.— People v. Pierson, 176 N. Y. 201, 98 Am. St. Rep. 666.

6. Statutory Enactment.— Parks v. State, 159 Ind. 211; State v. Wilcox, 64 Kan. 789; People v. Pierson, 176 N. Y. 201, 98 Am. St. Rep. 666. See also Meffert v. State Board of Medical Registration, etc., 66 Kan. 710, *affirmed* 195 U. S. 625.

7. Valid Exercise of Police Power—California.— *Ex p.* Whitley, 144 Cal. 167.

Colorado.— Gothard v. People, 32 Colo. 11.

Idaho.— *In re* Inman, 8 Idaho 398.

Indiana.— Parks v. State, 159 Ind. 211.

Iowa.— State v. Heath, 125 Iowa 585; State v. Edmunds, 127 Iowa 333.

Kansas.— State v. Wilcox, 64 Kan. 789; Meffert v. State Board of Medical Registration, etc., 66 Kan. 710, *affirmed* without opinion 195 U. S. 625.

Maine.— State v. Bohemier, 96 Me. 257.

New Jersey.— State v. Chapman, 69 N. J. L. 464, *affirmed* without opinion 70 N. J. L. 339.

New Mexico.— Territory v. Newman, (N. Mex. 1905) 79 Pac. Rep. 706.

North Carolina.— State v. Biggs, 133 N. Car. 729, 98 Am. St. Rep. 731.

Ohio.— State v. Marble, 72 Ohio St. 21, 106 Am. St. Rep. 570.

Washington.— State v. Board of Dental Examiners, 31 Wash. 402; State v. Sexton, 37 Wash. 110; State v. Brown, 37 Wash. 97, 107 Am. St. Rep. 700; State v. Brown, 37 Wash. 106; State v. Littooy, 37 Wash. 693.

Limits on Exercise of Power.— The legislature cannot prevent persons from using methods of treatment which do not require the

same degree of skill and learning as is requisite in the regular practice of medicine, thereby prohibiting the use of cheap and simple remedies not requiring professional knowledge and skill in their administration. State v. Briggs, 133 N. Car. 729, 98 Am. St. Rep. 731.

A Statute Prohibiting Persons from Owning, Running, and Managing a Dental Office or Department, without undergoing an examination and being licensed to do so, is not a constitutional exercise of the police power. State v. Brown, 37 Wash. 97, 107 Am. St. Rep. 700.

781. 1. Constitutionality Generally.— Bragg v. State, 134 Ala. 165; *Ex p.* Whitley, 144 Cal. 167, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 781; *In re* Inman, 8 Idaho 398; Parks v. State, 159 Ind. 211; State v. Wilcox, 64 Kan. 789; State v. Bohemier, 96 Me. 257; State v. Chapman, 69 N. J. L. 464, *affirmed* without opinion 70 N. J. L. 339; State v. Board of Dental Examiners, 31 Wash. 492; State v. Sexton, 37 Wash. 110. See also Morris v. State, 117 Ga. 1; Stone v. State, (Tex. Crim. 1905) 86 S. W. Rep. 1029.

2. Due Process of Law.— Parks v. State, 159 Ind. 211; Meffert v. State Board of Medical Registration, etc., 66 Kan. 710, *affirmed* without opinion 195 U. S. 625.

3. Privileges and Immunities.— State v. Bohemier, 96 Me. 257.

Admission of Physicians of Other States.— That the statute in terms exempts from its operation "a physician or surgeon who is called from another state to treat a particular case, and who does not otherwise practice in this state," does not bring the act in conflict with the Fourteenth Amendment of the United States Constitution. State v. Bohemier, 96 Me. 257.

4. Abridgment of Privileges.— Parks v. State, 159 Ind. 211.

5. Ex Post Facto Laws.— State v. Chapman, 69 N. J. L. 464, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 781, *affirmed* without opinion 70 N. J. L. 339.

782. See notes 1, 2, 3, 4, 5.

Instances. — See note 6.

783. 3. Admission to Practice. — See notes 1, 2, 4, 5, 6, 7.

784. See notes 2, 3, 5.

782. 1. Equal Protection of Laws. — *Parks v. State*, 159 Ind. 211.

2. Discrimination. — *Ex p. Whitley*, 144 Cal. 167; *Gothard v. People*, 32 Colo. 11; *In re Inman*, 8 Idaho 398; *State v. Bohemier*, 96 Me. 257; *Territory v. Newman*, (N. Mex. 1905) 79 Pac. Rep. 706.

Statute Designating Schools from Which Board Shall Be Chosen Not Unconstitutional as Discriminating Against Other Schools. — *Stone v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 1029.

Christian Science. — The Ohio statute is not void as discriminating against Christian Scientists in that it prescribes that any one possessing certain qualifications may practice osteopathy, and does not make especial provision for those who wish to practice Christian Science. *State v. Marble*, 72 Ohio St. 21, 106 Am. St. Rep. 570.

3. Special Privileges. — *Ex p. Gerino*, 143 Cal. 412; *Ex p. Whitley*, 144 Cal. 167; *In re Inman*, 8 Idaho 398.

4. Vested Rights. — *In re Inman*, 8 Idaho 398; *State v. Chapman*, 69 N. J. L. 464, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 782, affirmed without opinion 70 N. J. L. 339.

5. Impairment of Contract Obligations. — *State v. Bohemier*, 96 Me. 257.

Statute Not Unconstitutional as Being Retroactive. — *Stone v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 1029.

6. Statute Not Unconstitutional as Conferring Judicial Powers on Board. — *Ex p. Whitley*, 124 Cal. 167; *In re Inman*, 8 Idaho 398; *Stone v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 1029.

Does Not Confer Arbitrary Power on Board. — *State v. Wilcox*, 64 Kan. 789.

Stringency of Qualification Not Ground for Holding Statute Unconstitutional. — *Territory v. Newman*, (N. Mex. 1905) 79 Pac. Rep. 706.

Failure to Recognize All Schools in Constituting Board. — *Stone v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 1029.

Statute Not Abrogated as a Whole by Unconstitutionality of Part. — *Ex p. Gerino*, 143 Cal. 412; *In re Inman*, 8 Idaho 398; *State v. Brown*, 37 Wash. 106.

Not Unconstitutional as Interference with Right of Acquiring, Possessing, and Protecting Property. — *State v. Chapman*, 69 N. J. L. 464.

Not Unconstitutional as Making Guilt or Innocence Depend on Opinions of Physicians. — *Stone v. State* (Tex. Crim. 1905) 86 S. W. Rep. 1029.

Prohibition Against Practicing Christian Science for Fee Not Interference with Right of Worship. — *State v. Marble*, 72 Ohio St. 21, 106 Am. St. Rep. 570.

Requirement that Board Shall Be Composed of Graduates of Medical Schools Upheld. — *Territory v. Newman*, (N. Mex. 1905) 79 Pac. Rep. 706.

North Carolina Statute Unconstitutional as Attempting to Confer Monopoly on Physicians and Surgeons. — *State v. Biggs*, 133 N. Car. 729, 98 Am. St. Rep. 731.

783. 1. Statute Authorizing Appointment by Medical Society Constitutional. — *Ex p. Gerino*, 143 Cal. 412.

2. Representation of Different Schools. — *Ex p. Gerino*, 143 Cal. 412; *State v. Wilcox*, 64 Kan. 789.

4. Board Not Judicial Tribunal. — *Meffert v. State Board of Medical Registration, etc.*, 66 Kan. 710.

Powers of De Facto Board. — *Bragg v. State*, 134 Ala. 165.

5. Judgment of Board as to Qualifications Conclusive. — *Meffert v. State Board of Medical Registration, etc.*, 66 Kan. 710 (in the absence of fraud, corruption, or oppression); *State v. Brown*, 37 Wash. 106.

Appeal from Decision of Examining Board. — *In re Inman*, 8 Idaho 398; *State v. District Ct.*, 27 Mont. 103.

Mandamus Granted to Compel Issuance of License Arbitrarily Refused. — *State v. Board of Dental Examiners*, 38 Wash. 325.

Mandamus to Compel Issuance of License Generally Refused. — *Smith v. State Board of Dental Examiners*, 113 Ky. 212; *Ewbank v. Turner*, 134 N. Car. 77; *Kenney v. State Board of Dentistry*, 26 R. I. 538; *State v. Board of Dental Examiners*, 38 Wash. 325.

Remedy for Arbitrary Refusal by Action for Damages. — *Kenney v. State Board of Dentistry*, 26 R. I. 538.

6. Qualifications. — *In re Inman*, 8 Idaho 398.

Qualifications of Medical Practitioner Are Personal to Himself. — *State Electro-Medical Institute v. State*, (Neb. 1905) 103 N. W. Rep. 1078; *State Electro-Medical Institute v. Platner*, (Neb. 1905) 103 N. W. Rep. 1079.

Corporation Cannot Be Licensed to Practice Medicine under Nebraska Statute. — *State Electro-Medical Institute v. State*, (Neb. 1905) 103 N. W. Rep. 1078.

Requirements Reasonable. — *State v. Heath*, 125 Iowa 585.

7. Exemption from Examination of Holders of Diplomas of Colleges of Specified Standing. — *Ex p. Gerino*, 143 Cal. 412.

Reputability of College Issuing Diploma — Power of Board to Determine. — *Illinois State Board of Health v. People*, 102 Ill. App. 614.

Statute Authorizing Board to Determine Reputability of College Valid. — *Ex p. Whitley*, 144 Cal. 167.

Mandamus to Compel Recognition of Reputability of College Refused. — *Illinois State Board of Health v. People*, 102 Ill. App. 614.

Authority to Compel Production of Diploma. — *State v. Cooper*, (Idaho 1905) 81 Pac. Rep. 374. Diploma Alone Not Sufficient under Texas Statute. — *Stone v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 1029.

Requisites under South Carolina Statute. — *Moore v. Napier*, 64 S. Car. 564.

784. 2. Exemption of Practicing Dentists from Examination Does Not Include Those Practicing in Violation of Law. — *State v. Board of Dental Examiners*, 31 Wash. 492.

784. 4. Revocation of License. — See note 6.

785. See notes 1, 3.

5. Practicing Without License — *a.* IN GENERAL. — See note 7.

b. WHAT CONSTITUTES PRACTICING — (1) *In General.* — See note 8

786. See notes 2, 3, 4.

A Vendor of Medicines. — See note 9.

An Oculist. — See notes 12, 13.

784. 3. Registration of License. — State *v.* Morgan, 96 Mo. App. 343; Volp *v.* Saylor, 42 Oregon 546; Com. *v.* Campbell, 22 Pa. Super. Ct. 98.

Requirements as to Registration of Dentist under New York Statute. — Dental Soc. *v.* Jacobs, 103 N. Y. App. Div. 86.

Provision Requiring Registration Constitutional. — Wilson *v.* Com., (Ky. 1904) 82 S. W. Rep. 427.

Mandamus Not Granted to Compel Cancellation of Registration. — Dental Soc. *v.* Jacobs, 103 N. Y. App. Div. 86.

5. Effect of Unauthorized Grant of Temporary License. — See Volp *v.* Saylor, 42 Oregon 546.

6. Revocation of License. — See Meffert *v.* State Board of Medical Registration, etc., 66 Kan. 710.

Power to Revoke Temporary License Altered Without Authority. — Volp *v.* Saylor, 42 Oregon 546.

785. 1. Not Unconstitutional as Ex Post Facto Law. — Meffert *v.* State Board of Medical Registration, etc., 66 Kan. 710.

3. Board May Revoke Without Notice Temporary License Fraudulently Altered. — Volp *v.* Saylor, 42 Oregon 546.

7. Persons to Whom License Wrongfully Refused. — Where by statute it is provided that upon compliance with certain requirements all persons lawfully engaged in the practice of medicine, before the enactment of the statute, shall be licensed without examination to continue practice, an applicant for a license who is shown to have complied with all the provisions of the statute and to have been lawfully engaged in practice, before the enactment of the statute, is not criminally liable for practicing without a license where the board has refused to grant a license to him. State *v.* Cooper, (Idaho 1905) 81 Pac. Rep. 374.

Conviction or Acquittal Not Bar to Prosecution for Subsequent Offense. — Com. *v.* Campbell, 22 Pa. Super. Ct. 98.

8. What Constitutes Practicing. — Parks *v.* State, 159 Ind. 211; State *v.* Edmunds, 127 Iowa 333; Hayden *v.* State, 81 Miss. 291, 95 Am. St. Rep. 471; Kansas City *v.* Baird, 92 Mo. App. 204; State Electro-Medical Institute *v.* State, (Neb. 1905) 103 N. W. Rep. 1078; State *v.* Yegge, (S. Dak. 1905) 103 N. W. Rep. 17.

Statute Not Applicable to Persons Selling Mechanical Appliances. — People *v.* Lehr, 196 Ill. 261.

What Constitutes Practicing Dentistry. — State *v.* Newton, (Wash. 1905) 81 Pac. Rep. 1002; State *v.* Sexton, 37 Wash. 110.

A Mere Public Profession of an Ability to Heal is not a violation of the Iowa statute. Such

profession must be made under such circumstances as to indicate that it is made with a view of undertaking to cure the afflicted. State *v.* Heath, 125 Iowa 585.

Physicians from Other States. — The Indiana statute is not applicable to a physician in another state called in consultation or to one residing on the border of the state and duly authorized to practice under the laws thereof whose practice extends into the limits of the adjoining state. Parks *v.* State, 159 Ind. 211.

Statute Strictly Construed. — People *v.* Lehr, 196 Ill. 361.

Practice by Corporation Composed of Licensed Physicians Not Violation of Statute. — State Electro-Medical Institute *v.* State, (Neb. 1905) 103 N. W. Rep. 1078.

Statute Applies Only to Practice for Compensation. — State *v.* Wilcox, 64 Kan. 789.

Statute Applies to Practicing Ophthalmology. — State *v.* Yegge, (S. Dak. 1905) 103 N. W. Rep. 17.

"Medicine" Defined. — See Bragg *v.* State, 134 Ala. 165; Kansas City *v.* Baird, 92 Mo. App. 204.

"Practice of Medicine" Defined. — Parks *v.* State, 159 Ind. 211.

What Constitutes Practicing Question for Jury. — People *v.* Lehr, 196 Ill. 361.

Evidence — Sufficient that Fee Was Charged for Series of Acts. — State *v.* Brown, 37 Wash. 106.

Variance — Time of Commission of Offense. — See State *v.* Brown, 37 Wash. 106.

786. 2. Using "Doctor" or "M. D." Without Authority. — State *v.* Yegge, (S. Dak. 1905) 103 N. W. Rep. 17, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 786.

To Render One Liable for Assuming the Title of "Doctor," under the Wisconsin statute, it must appear that the person charged has neither a diploma from any incorporated medical college or society nor a license from the state board of medical examiners. Schaeffer *v.* State, 113 Wis. 595.

Actual Practice Not Essential. — State *v.* Heath, 125 Iowa 585.

Advertisement — Presumptions as to Authorization and Identity. — See State *v.* Dunham, 31 Wash. 636.

3. Empiricism Defined. — Parks *v.* State, 159 Ind. 211.

4. Magnetic Healers. — Parks *v.* State, 159 Ind. 211; State *v.* Heath, 125 Iowa 585; State *v.* Edmunds, 127 Iowa 333.

9. Payne *v.* State, 112 Tenn. 587.

12. Oculists. — State *v.* Yegge, (S. Dak. 1905) 103 N. W. Rep. 17.

13. Optician. — People *v.* Smith, 208 Ill. 31. See also State *v.* Edmunds, 127 Iowa 333.

- 786.** (2) *Christian Science*.—See note 14.
 (3) *Osteopathy*.—See note 15.
- 787.** (4) *Person Acting in Emergency*.—See note 1.
 6. *Duty to Report Births and Deaths*.—See note 6.
 7. *Duty to Report Contagious Diseases*.—See note 7.
- 788.** 10. *Itinerant Practitioners—To Whom Applicable*.—See notes 5, 7, 9.
- 790.** III. *COMPENSATION—1. At Common Law—b. IN THE UNITED STATES*.—See note 3.
 3. *Liability of Third Person—α. IN GENERAL*.—See note 9.
- 791.** c. *UNDER IMPLIED CONTRACT—(1) In General*.—See notes 1, 2.
 (2) *Parent and Child—Minor Child*.—See note 3.
Where Child Is of Age.—See note 5.
 (3) *Husband and Wife—Husband Liable*.—See note 6.
- 792.** *Wife as Husband's Agent or Acting for Herself*.—See note 1.
 (4) *Liability of Principal for Services Furnished Third Person at Request of Agent*.—See notes 3, 4.
- 793.** 5. *Physician's Fees as Preferred Claim*.—See note 3.
 8. *Amount Recoverable—α. UNDER EXPRESS CONTRACT*.—See note 9.

786. 14. *Christian Science*.—See *Kansas City v. Baird*, 92 Mo. App. 204. *Contra*, *State v. Marble*, 72 Ohio St. 21, 106 Am. St. Rep. 570.

Treatment According to Christian Science Not Contrary to Public Policy.—See *Spad v. Tomlinson*, (N. H. 1904) 59 Atl. Rep. 376.

A Charter for a Christian Science Church is properly refused where it is shown that one of the purposes is the inculcation of a system of treatment of diseases which is opposed to the general policy of the law of the state in that regard. *First Church of Christ, Scientist*, 205 Pa. St. 543, 97 Am. St. Rep. 753.

15. *License Not Required of Osteopaths*.—*Hayden v. State*, 81 Miss. 291, 95 Am. St. Rep. 471; *State v. Herring*, 70 N. J. L. 34, *affirmed* without opinion (N. J. 1905) 60 Atl. Rep. 1134; *State v. McKnight*, 131 N. Car. 717. See also *Payne v. State*, 112 Tenn. 587.

Osteopaths Within Purview of Act.—*Bragg v. State*, 134 Ala. 165.

Statute Requiring of Osteopaths License to Practice Medicine and Surgery Unconstitutional.—*State v. Biggs*, 133 N. Car. 729, 98 Am. St. Rep. 731.

Osteopathy Defined.—*Parks v. State*, 159 Ind. 211.

787. 1. *Emergency*.—See *Payne v. State*, 112 Tenn. 587.

6. *Reporting Births and Deaths*.—*Com. v. McConnell*, 116 Ky. 358.

Sufficiency of Compliance with New York Statute.—See *Health Dept. v. Owen*, 94 N. Y. App. Div. 425.

7. *Reporting Contagious Diseases*.—See *People v. Shurly*, 131 Mich. 177.

Statutory Prohibition of Disclosure of Privileged Communications No Defense.—*People v. Shurly*, 131 Mich. 177.

Statute Not Applicable to Christian Science.—*Kansas City v. Baird*, 92 Mo. App. 204.

788. 5. *Statute Not Applicable to Practicing Optician Who Merely Fits and Sells Glasses*.—*People v. Smith*, 208 Ill. 31.

7. See *Broiles v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 685; *Adams v. State*, 45 Tex. Crim.

566; *Howe v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 1064.

9. *State v. Edmunds*, 127 Iowa 333.

790. 3. *Implied Contract*.—*McKnight v. Detroit*, etc., R. Co., 135 Mich. 307; *Ladd v. Witte*, 116 Wis. 35. See also *Crumrine v. Austin*, 133 Mich. 283.

9. *Third Person—Promise Express or Implied*.—*Dorion v. Jacobson*, 113 Ill. App. 563.

791. 1. *Implied Liability*.—*Dorion v. Jacobson*, 113 Ill. App. 563. See also *Hasler v. Ozark Land*, etc., Co., 101 Mo. App. 136.

2. *Circumstances Controlling*.—See *Dorion v. Jacobson*, 113 Ill. App. 563.

Recovery Allowed for Service to Members of Family though Not Relative.—*Grattop v. Rowheder*, (Neb. 1901) 95 N. W. Rep. 679.

3. *Minor Child*.—*Leach v. Williams*, 30 Ind. App. 413.

5. *For Particular Circumstances held to constitute a mother liable for medical services rendered to her son at her request, though he was of full age*, see *Best v. McAuslan*, 27 R. I. 107.

6. *Sufficiency of Evidence to Show Contract by Husband*.—See *McCoy v. Fletcher*, 89 N. Y. App. Div. 623.

792. 1. *A Wife Who Has Separated from Her Husband Without Cause cannot bind him by a contract for the services of a physician*. *Morgenroth v. Spencer*, 124 Wis. 564.

3. *Authority to Employ Physician Held to Exist*.—*Hasler v. Ozark Land*, etc., Co., 101 Mo. App. 136.

Sufficiency of Evidence to Show Employment.—*Weldon v. Lehigh Valley Traction Co.*, 27 Pa. Super. Ct. 257.

Liability for Subsequent Treatment of Case by Same Physician.—*Head v. American Bridge Co.*, 88 Minn. 81.

4. *Services Only on Principal's Credit*.—*J. H. Mohlman Co. v. American Grocery Co.*, (N. J. 1905) 60 Atl. Rep. 950.

793. 3. *Last Illness Defined*.—See *Schmidt's Succession*, 108 La. 293.

9. *Recovery under Express Contract*.—Under a contract for the performance of an operation,

794. *b.* UNDER IMPLIED CONTRACT. — See notes 4, 5, 7.

795. Question of Fact. — See note 4.

9. No Recovery by Unlicensed Practitioner — a. PROHIBITION EXPRESS OR IMPLIED — Express. — See note 5.

Implied Prohibition. — See note 6.

796. *d.* FAILURE TO REGISTER OR RECORD LICENSE. — See note 13.

798. *j.* BURDEN OF PROVING AUTHORITY TO PRACTICE. — See notes 3, 4.

IV. MALPRACTICE — 1. Definition. — See note 6.

2. Civil Liability — a. IN GENERAL. — See note 7.

799. See note 1.

b. DEGREE OF CARE REQUIRED — (1) *In General.* — See note 2.

which provides that the compensation therefor shall be from two hundred dollars to four hundred dollars, the physician is entitled to recover two hundred dollars in any event, and the value of the services up to four hundred dollars upon proof of such value. *Doyle v. Edwards*, 15 S. Dak. 648.

794. 4. Right to Compensation Not Dependent on Success. — *Ladd v. Witte*, 116 Wis. 35.

5. What Plaintiff Must Show. — See *McKnight v. Detroit*, etc., R. Co., 135 Mich. 307.

7. Defendant May Show Charges Customary. — *Best v. McAuslan*, 27 R. I. 107. See also *McKnight v. Detroit*, etc., R. Co., 135 Mich. 307.

Value Determined by Expert Evidence. — *Ladd v. Witte*, 116 Wis. 35.

795. 4. Question of Fact. — *Crumrine v. Austin*, 133 Mich. 283.

5. Statutory Prohibition. — *Murray v. Williams*, 121 Ga. 64; *Cather v. Damerell*, (Neb. 1904) 99 N. W. Rep. 35.

Subsequent Correction of Defective Registration Validates Pre-existing Contract. — *Ottaway v. Lowden*, 172 N. Y. 129.

A Corporation Formed for Furnishing the Services of Licensed Physicians may recover for services so furnished. *State Electro-Medical Institute v. Platner*, (Neb. 1905) 103 N. W. Rep. 1079.

The Bona Fide Holder of a Note Given to an Unlicensed Physician for medical services may recover thereon though the instrument would not support a recovery in the hands of the practitioner himself. *Citizens State Bank v. Nore*, 67 Neb. 69.

6. Prohibition Implied. — *Murray v. Williams*, 121 Ga. 64, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 795. See also *Wickes-Nease v. Watts*, 30 Tex. Civ. App. 515.

To Recover Back Payments to an Unlicensed Physician, under the Texas statute, the plaintiff must show not only that the defendant was practicing in violation of the law, but further that he was deceived by representations made by the defendant as to his authority to practice, whereby the plaintiff was induced to employ and pay him for his professional services. *Gaither v. Lindsey*, (Tex. Civ. App. 1904) 83 S. W. Rep. 225.

796. 13. Wickes-Nease v. Watts, 30 Tex. Civ. App. 515.

798. 3. Physician Must Prove Compliance. — *Wooley v. Bell*, 33 Tex. Civ. App. 399.

Certificate of Clerk as to Registration Prima

Facie Evidence of Right to Practice. — *Trentham v. Waldrop*, 119 Ga. 152.

4. Compliance with Law Presumed. — *Good v. Lasher*, 99 Ill. App. 653; *Dorion v. Jacobson*, 113 Ill. App. 563; *Jo Daviess County v. Staples*, 108 Ill. App. 539; *Cather v. Damerell*, (Neb. 1904) 99 N. W. Rep. 35.

6. Definition. — *Grainger v. Still*, 187 Mo. 197, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 798.

7. Implied Undertaking of Physician. — *Grainger v. Still*, 187 Mo. 197, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 799; *Gillette v. Tucker*, 67 Ohio St. 106, 93 Am. St. Rep. 639.

799. 1. Gaither v. Lindsey, (Tex. Civ. App. 1904) 83 S. W. Rep. 225.

Liability of Magnetic Healer — Evidence. — See *Longan v. Weltmer*, 180 Mo. 322.

Liability for Carelessly Leaving Appliances Within Wound. — See *Akridge v. Noble*, 114 Ga. 949; *Gillette v. Tucker*, 67 Ohio St. 106, 93 Am. St. Rep. 639.

2. Average Skill of Profession Sufficient — Alabama. — *McDonald v. Harris*, 131 Ala. 359.

Indiana. — *Baker v. Hancock*, 29 Ind. App. 456; *Thomas v. Dabblemont*, 31 Ind. App. 146.

Kansas. — *Manser v. Collins*, 69 Kan. 290.

Kentucky. — *Burk v. Foster*, 114 Ky. 20.

Louisiana. — *Stern v. Lanng*, 106 La. 738.

Maine. — *Ramsdell v. Grady*, 97 Me. 319.

Minnesota. — *Martin v. Courtney*, 87 Minn. 197.

Missouri. — *Grainger v. Still*, 187 Mo. 197, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 799.

New York. — *MacKenzie v. Carman*, 103 N. Y. App. Div. 246; *Wood v. Wyeth*, 106 N. Y. App. Div. 21.

Ohio. — *Gillette v. Tucker*, 67 Ohio St. 106, 93 Am. St. Rep. 639.

Oregon. — See *Beadle v. Paine*, (Oregon 1905) 80 Pac. Rep. 903.

Pennsylvania. — *English v. Free*, 205 Pa. St. 624; *Wohlert v. Seibert*, 23 Pa. Super. Ct. 213.

Rhode Island. — *Bigney v. Fisher*, 26 R. I. 402, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 799.

West Virginia. — *Tompkins v. Pacific Mut. L. Ins. Co.*, 53 W. Va. 479, 97 Am. St. Rep. 1006, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 799.

"Skill." — "Skill," in the sense in which it is here used, includes not only the knowledge or information which the surgeon has in reference to the propriety or desirability of a given

800. See notes 1, 2.

(2) *Physician Not an Insurer.* — See note 3.

801. (3) *Care to Be Tested by Rules of Particular School.* — See notes 1, 2. A School of Medicine. — See note 3.

802. (6) *Specialists.* — See note 1.

c. DUTY TO MAKE PROPER DIAGNOSIS. — See note 4.

e. DUTY AS TO REMEDIES AND APPLIANCES. — See note 6.

operation, but also the ability to perform the operation in a proper and approved way."

Akridge v. Noble, 114 Ga. 949.
Rule Applied to Use of X-Rays. — *Henslin v. Wheaton*, 91 Minn. 219.

Competency a Question of Fact. — *Baily v. Kreutzmann*, 141 Cal. 519.

Burden of Showing Lack of Skill on Plaintiff. — *Akridge v. Noble*, 114 Ga. 949.

800. 1. Skill of Physicians in Similar Localities. — *Akridge v. Noble*, 114 Ga. 949; *Baker v. Hancock*, 29 Ind. App. 456; *Thomas v. Dabblmont*, 31 Ind. App. 146; *Grainger v. Still*, 187 Mo. 197, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 800; *Gillette v. Tucker*, 67 Ohio St. 106, 93 Am. St. Rep. 639; *Wohlert v. Seibert*, 23 Pa. Super. Ct. 213; *Bigney v. Fisher*, 26 R. I. 402, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 800; *Tompkins v. Pacific Mut. L. Ins. Co.*, 53 W. Va. 479, 97 Am. St. Rep. 1006, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 800. See also *Beadle v. Paine*, (Oregon 1905) 80 Pac. Rep. 903.

Skill and Care of Physicians in Particular Locality Not Standard. — *Burk v. Foster*, 114 Ky. 20.

Skill in Locality in Which Physician Practices Requisite. — *Wood v. Wyeth*, 106 N. Y. App. Div. 21, in which case, however, the locality was the city of New York.

2. State of Advancement of Medical Science to Be Regarded. — *Akridge v. Noble*, 114 Ga. 949; *Baker v. Hancock*, 29 Ind. App. 456; *Wohlert v. Seibert*, 23 Pa. Super. Ct. 213; *English v. Free*, 205 Pa. St. 624; *Gillette v. Tucker*, 67 Ohio St. 106, 93 Am. St. Rep. 639; *Bigney v. Fisher*, 26 R. I. 402, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 800; *Tompkins v. Pacific Mut. L. Ins. Co.*, 53 W. Va. 479, 97 Am. St. Rep. 1006, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 479.

3. Physician Does Not Insure Cure. — *Baker v. Hancock*, 29 Ind. App. 456; *Martin v. Courtney*, 87 Minn. 197; *Grainger v. Still*, 187 Mo. 197, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 800; *MacKenzie v. Carman*, 103 N. Y. App. Div. 246; *Gillette v. Tucker*, 67 Ohio St. 106, 93 Am. St. Rep. 639; *English v. Free*, 205 Pa. St. 624; *Bigney v. Fisher*, 26 R. I. 402, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 800. See also *Stern v. Lanng*, 106 La. 738; *Beadle v. Paine*, (Oregon 1905) 80 Pac. Rep. 903.

Evidence of a Statement of a Physician to a Third Person that he would guarantee a cure of the patient, who subsequently died, in a certain time is admissible only as tending to show a want of ordinary care and skill on his part, when taken in connection with other evidence going to show the incurable nature of the patient's disease, and not for the purpose of proving a contract with the patient to charge

nothing unless a cure was effected. *McDonald v. Harris*, 131 Ala. 359.

Failure to Effect Cure Not Evidence of Malpractice. — *Tomer v. Aiken*, 126 Iowa 114; *Wohlert v. Seibert*, 23 Pa. Super. Ct. 213.

801. 1. No System Exclusively Recognized. — *Grainger v. Still*, 187 Mo. 197, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 801.

2. Care Tested by Rules of Particular School. — *Martin v. Courtney*, 87 Minn. 197; *Grainger v. Still*, 187 Mo. 197, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 801.

Rule Applied to Christian Scientists. — *Spread v. Tomlinson*, (N. H. 1904) 59 Atl. Rep. 376.

Evidence of Physicians of Another School Admissible Where Mode of Treatment Shown to Be Same. — *Grainger v. Still*, 187 Mo. 197.

Use of X-Rays. — In *Minnesota* it has been held that a physician who applies X-rays, not for medical purposes, but to locate a foreign substance in the body of his patient, is not entitled to have the question of his care and skill in the application determined by the opinions of physicians of his own school. *Henslin v. Wheaton*, 91 Minn. 219.

3. What Constitutes School. — *Grainger v. Still*, 187 Mo. 197, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 801, and applying the principles there stated in an action against an osteopath.

Physicians Competent Witnesses in Action Against Magnetic Healer. — *Longan v. Weltmer*, 180 Mo. 322.

802. 1. Specialists. — *Baker v. Hancock*, 29 Ind. App. 456, 462, defining the term "specialist" and holding that the question whether a physician is a specialist is one of fact. See also *Beadle v. Paine*, (Oregon 1905) 80 Pac. Rep. 903.

4. Improper Diagnosis. — *Manser v. Collins*, 69 Kan. 290; *Grainger v. Still*, 187 Mo. 197. See also *Burk v. Foster*, 114 Ky. 20; *Ramsdell v. Grady*, 97 Me. 319.

Error in Diagnosis Immaterial Where Treatment Is Proper. — *Tomer v. Aiken*, 126 Iowa 114.

Correctness of Diagnosis Question for Jury. — *Tomer v. Aiken*, 126 Iowa 114.

Admissibility of Declarations by Physician to Show Incorrect Diagnosis. — See *McDonald v. Harris*, 131 Ala. 359.

6. Remedies and Appliances. — See *Ramsdell v. Grady*, 97 Me. 319.

A physician is not relieved from liability by the fact that the result is as good as that usually obtained in like cases similarly situated. The patient is entitled to the chance for the better results that are supposed to come from the proper treatment of the case. *Burk v. Foster*, 114 Ky. 20.

Evidence Insufficient to Show Departure from Customary Practice of School. — See *Spread v.*

- 803.** *f.* DUTY AS TO ATTENDANCE. — See notes 1, 4.
h. CONSULTATION WITH OTHERS. — See note 9.
- 804.** *i.* PHYSICIAN CHARGEABLE WITH KNOWLEDGE OF CONSEQUENCES OF INJURY. — See note 1.
j. CONDITION OF PATIENT AS AFFECTING LIABILITY. — See notes 3, 4.
k. ERRORS OF JUDGMENT. — See note 5.
- 805.** Gross Errors. — See note 1.
 Experiments. — See note 2.
m. LIABILITY FOR MALPRACTICE OF OTHERS. — See note 6.
- 806.** *o.* CONTRIBUTORY NEGLIGENCE — (1) *In General.* — See note 2.
 Plaintiff's Negligence Not Contributory. — See note 3.
 (2) *Failure to Obey Instructions.* — See note 4.
- 807.** (4) *Contributory Negligence After Malpractice.* — See note 7.
- 808.** *p.* LIMITATION OF ACTION — Accrual of Right of Action. — See note 1.
r. DAMAGES — (2) *Measure of Damages.* — See note 7.
- 809.** *s.* EVIDENCE. — See note 2.
 Results in Other Cases. — See notes 4, 5.

Tomlinson, (N. H. 1904) 59 Atl. Rep. 376 (Christian Science).

803. 1. Duty as to Attendance. — Gillette v. Tucker, 67 Ohio St. 106, 93 Am. St. Rep. 639.

A Physician Who Has Been Called in to Render a Specific Service in the absence of the patient's regular physician is not under any obligation to continue the treatment of the case. Tomer v. Aiken, 126 Iowa 114.

The Question Whether Visits Were Made with Sufficient Frequency is to be determined by the custom or practice, in similar localities, in the treatment of like cases, and not by the practice of the particular physician. Tomer v. Aiken, 126 Iowa 114.

4. Withdrawal by Physician. — See Gillette v. Tucker, 67 Ohio St. 106, 93 Am. St. Rep. 639.

9. Recommending Employment of Another. — Burk v. Foster, 114 Ky. 20.

804. 1. Knowledge of Consequences of Injury. — Allen v. Voje, 114 Wis. 1.

3. Condition of Patient as Affecting Damages. — It is no defense to an action for injuries, resulting from an incorrect diagnosis by an osteopath, that the same results would have ensued from another disease from which the patient was suffering and which was at the time of the diagnosis in its primary stages. Grainger v. Still, 187 Mo. 197.

4. Leisenring v. La Croix. (Neb. 1903) 94 N. W. Rep. 1009.

5. Errors of Judgment. — Manser v. Collins, 69 Kan. 290; MacKenzie v. Carman, 103 N. Y. App. Div. 246; English v. Free, 205 Pa. St. 624. See also Pepke v. Grace Hospital, 130 Mich. 493.

805. 1. Gross Error of Judgment. — Johnson v. Winston, (Neb. 1903) 94 N. W. Rep. 607.

2. Experiments. — Allen v. Voje, 114 Wis. 1.

6. Malpractice of Independent Physician. — Tomer v. Aiken, 126 Iowa 114.

806. 2. Patient's Contributory Negligence. — Beadle v. Paine, (Oregon 1905) 80 Pac. Rep. 903.

3. Plaintiff's Negligence Not Contributory. — See Beadle v. Paine, (Oregon 1905) 80 Pac. Rep. 903.

4. Failure to Obey Instructions. — See Beadle v. Paine, (Oregon 1905) 80 Pac. Rep. 903.

807. 7. Subsequent Negligence. — Beadle v. Paine, (Oregon 1905) 80 Pac. Rep. 903.

Patient's Refusal to Submit to Further Treatment After Malpractice No Bar to Recovery. — Morris v. Despain, 104 Ill. App. 452.

808. 1. Action Accrues upon Termination of Professional Services. — Gillette v. Tucker, 67 Ohio St. 106, 93 Am. St. Rep. 639, an action for negligently closing a wound without removing a sponge which had been placed therein in the course of treatment.

7. Compensation for Injuries. — Ramsdell v. Grady, 97 Me. 319, holding that the damages can include only such loss, expense, and suffering as were due to the defendant's default in excess of what they would have been had the case been properly diagnosed and treated; Leisenring v. La Croix, (Neb. 1903) 94 N. W. Rep. 1009; Baxter v. Campbell, 17 S. Dak. 475, holding that exemplary damages were not recoverable.

Recovery for Aggravation of Injury Caused by Acting in Compliance with Dentist's Advice. — Mernin v. Cory, 145 Cal. 573.

Mental Suffering an Element. — Manser v. Collins, 69 Kan. 290.

809. 2. Evidence as to Proper Treatment Admissible. — Leisenring v. La Croix, (Neb. 1903) 94 N. W. Rep. 1009.

Evidence of Mode of Treatment in Vicinity Admissible. — Allen v. Voje, 114 Wis. 1.

Evidence as to Subsequent Treatment by Another Physician Admissible. — Bower v. Self, 68 Kan. 825.

Sufficiency of Evidence. — Brinkman v. Kursesheet, (Supm. Ct. App. T.) 84 N. Y. Supp. 575.

Sufficiency of Evidence to Show Negligence in Operation of X-Rays. — Shockley v. Tucker, 127 Iowa 456.

Sufficiency of Evidence to Show Proper Treatment of Blood Poisoning. — Martin v. Courtney, 87 Minn. 197.

4. Evidence of Proper Practice. — See Tomer v. Aiken, 126 Iowa 114.

5. Evidence of Results in Previous Cases. — Baker v. Hancock, 20 Ind. App. 456. See also Mernin v. Cory, 145 Cal. 573; Tomer v. Aiken, 126 Iowa 114.

810. The General Reputation of a Physician for Competency and Skill Is Inadmissible. — See note 1.

811. [V. LIABILITY FOR ACTS IN EXCESS OF AUTHORITY. — The performance of a surgical operation without the express or implied consent of the patient constitutes an assault and battery.^{13a}]

812. PICKETING. — See note 2.
[PICKPOCKET. — See note 2a.]
PIER. — See note 6.

810. 1. Evidence of Similar Injuries Caused in Other Cases by Defendant's Negligence Inadmissible. — *Shockley v. Tucker*, 127 Iowa 456.

811. 13a. Unauthorized Operation — Assault. — *Mohr v. Williams*, (Minn. 1905) 104 N. W. Rep. 12, an action for damages, wherein it was further held that consent to the operation may be implied from circumstances, the question whether it is to be implied being for the jury. See further the title ASSAULT AND BATTERY, **986.** 2, note.

812. 2. Picketing. — *Mills v. U. S. Printing Co.*, 99 N. Y. App. Div. 605.

2a. Bouvier's Law Dictionary defines the word *pickpocket* as follows: "A thief; one who in a crowd or in other places steals from the pockets or person of another without putting him in fear. This is generally punished as simple larceny." *State v. Dunn*, 66 Kan. 483.

6. Pier — See *Seabright v. Allgor*, 69 N. J. L. 641.

PILOTS.

BY A. W. VARIAN.

814. II. REGULATION AND CONTROL — 2. In United States — a. RIGHT AS BETWEEN CONGRESS AND STATES. — See note 6.

815. c. STATE LEGISLATION. — See note 7.

816. III. LICENSING, SUSPENDING, AND REVOKING LICENSE — 1. Requirements as to License. — See notes 2, 3.

817. IV. OBLIGATION TO TAKE PILOT — 1. In General. — See notes 1, 2.

821. V. RIGHTS, DUTIES, AND LIABILITIES — 2. Liability for Negligence. — See note 4.

VI. COMPENSATION — 1. Amount — a. IN GENERAL. — See note 7.

822. b. EXTRA COMPENSATION. — See note 1.

2. Who Liable to Pay. — See note 4.

VII. LIEN — 1. In General. — See note 7.

824. IX. PILOT ASSOCIATIONS. — See note 4.

814. 6. Federal Statutes Paramount. — *Olsen v. Smith*, (Tex. Civ. App. 1902) 68 S. W. Rep. 320, affirmed 195 U. S. 332.

815. 7. State Pilotage Statutes. — *Darden v. Thompson*, 101 Va. 635.

816. 2. Licenses Granted by Pilot Commissioners. — *Dexter v. Pilotage Com'rs*, 70 N. J. L. 429.

3. Character and General Fitness. — In *New Jersey* the commissioners are clothed with a large discretion, and when after inquiry as to an applicant's moral character, mental balance, habits of sobriety, and the like, they are not satisfied as to his fitness, they may decline to examine him as to his educational qualifications. *Dexter v. Pilotage Com'rs*, 70 N. J. L. 429.

817. 1. Object of Obligatory Pilotage. — *Olsen v. Smith*, (Tex. Civ. App. 1902) 68 S. W. Rep. 320, affirmed 195 U. S. 332.

2. Statutes Creating Obligation to Take Pilot. — *Hagan v. Townsend*, 118 Ga. 682; *Darden v. Thompson*, 101 Va. 635.

Vessels Exempted — *Under English Statute.* — *Symons v. Baker*, (1905) 2 K. B. 723.

Under Canada Statute. — *Farquhar v. McAlpine*, 35 Nova Scotia 478.

821. 4. The Employer Need Not Contest His Liability to pay damages resulting from the negligence of the pilot in order to have a right of recovery over against the pilot. *Donald v. Guy*, 127 Fed. Rep. 228, 135 Fed. Rep. 429.

7. Rate Fixed by Statute. — *The Cervantes*, 135 Fed. Rep. 573.

822. 1. Extra Pay for Prolonged Service. — *The Cervantes*, 135 Fed. Rep. 573.

4. Vessel, Owner, and Master Liable. — *The Cervantes*, 135 Fed. Rep. 573.

7. Lien When Contract Broken by Master of Vessel. — *Baton Rouge, etc., Packet Co. v. George*, (C. C. A.) 128 Fed. Rep. 914.

824. 4. Association Liable for Negligence of Members. — *Donald v. Guy*, 127 Fed. Rep. 228.

PIPE LINES.

825. A Pipe Line. — See note 1.

828. PISTOL. — See note 7.

829. PLACE. — See note 3.

830. Political Divisions. — See note 1.

832. PLACE OF BUSINESS. — See note 1.

833. PLAIN. — See note 2.

834. PLANT. — See note 4.

835. PLANTERS. — See note 2.

825. 1. Construction of Agreement. — Where a gas company, in consideration of permission to lay its pipe lines over the plaintiff's grantor's farm, agreed to furnish the plaintiff's grantor "gas for three stoves * * * as long as said pipe line is in operation," the plaintiff cannot maintain injunction to compel such gas company to continue to furnish gas when such company has abandoned the use of the pipe lines laid upon such premises as a means of conveyance of gas, even though such plaintiff may not abandon the business of furnishing gas. *Connersville Natural Gas Co. v. Moffett*, 164 Ind. 585.

828. 7. A Rifle held not to be a *pistol* within a statute prohibiting the giving of *pistols* to minors. *Taylor v. Seil*, 120 Wis. 32.

829. 3. Master and Servant. — *Fink v. Slade*, 66 N. Y. App. Div. 105.

Public Accommodation. — A bootblack's stand is not a *place* of public accommodation within the meaning of a Civil Rights Act. *Burks v. Bosso*, 180 N. Y. 341, *reversing* 81 N. Y. App. Div. 530.

830. 1. County. — *Rex v. Justices*, (1902) 2 K. B. 101.

832. 1. One who carries on transactions at a branch establishment, separate and distinct from his home mercantile enterprise, is conducting two *places of business* within the intendment of the revenue law. *Murrell v. Bokenfohr*, 108 La. 19.

833. 2. Plain Clothes Man — A Detective. — See *People v. Glennon*, 175 N. Y. 45.

834. 4. Plant. — *Sloss-Sheffield Steel, etc., v. Mobley*, 139 Ala. 425; *Rooney v. Thomson*, (Supm. Ct. App. T.) 84 N. Y. Supp. 263.

Telegraph Pole. — *Cleveland, etc., R. Co. v. Scott*, 29 Ind. App. 519.

Water Works Plant. — *Brennan v. Sewerage, etc., Board*, 108 La. 569.

835. 2. Planters. — *Butler, etc., Co. v. Georgia, etc., R. Co.*, 119 Ga. 959.

Planter and Farmer Distinguished — *Bankruptcy Act*. — See *In re Drake*, 114 Fed. Rep. 229, *affirmed* (C. C. A.) 120 Fed. Rep. 493.

PLATE GLASS INSURANCE.

836. Insurance Companies. — See note 1.

837. PLEA. — See note 1.

PLEADING. — See note 2.

838. PLEA IN ABATEMENT. — See note 1.

831. 1. Though Plate Glass Has a Hole or Perforation in It at the Time It Is Insured, this fact does not make it uninsurable where there is nothing in the policy reciting that the glass insured must be without hole or perforation, and where the insurance inspector knew of its condition at the time the policy was issued. And the insured may recover on the policy where it appears that the glass had become broken in four parts but it does not appear that the break was in consequence of or connected with such hole or perforation. *McMyler v. Union Casualty, etc., Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 170.

The Breakage of Plate Glass by an Explosion of Gas Generated from Gasoline in use in the building, which gas was ignited by a match or

light, has been held not a breakage due to fire or to the blowing up of buildings, within the meaning of a policy insuring such glass but excepting any loss or damages which might happen by or in consequence of any fire or by the blowing up of buildings. It did not appear that the integrity of the structure of the building was destroyed by the explosion. *Vorse v. Jersey Plate Glass Ins. Co.*, 119 Iowa 555, 97 Am. St. Rep. 330.

837. 1. Grand Lodge, etc., *v. Gaddis*, 65 N. J. Eq. 1.

2. Pleading. — *Elliott v. Greeley First Nat. Bank*, 30 Colo. 279; *McDermott v. Halleck*, 65 Kan. 403.

838. 1. Plea in Abatement. — *Botto v. Botto*, (Ky. 1904) 80 S. W. Rep. 174.

PLEDGE AND COLLATERAL SECURITY.

By X. P. HUDDY.

842. I. DEFINITIONS.—1. In General.—See note 1.

843. 2. Statutory Definitions.—See note 5.

844. 4. Distinction Between Pledge and Chattel Mortgage—In General.—See note 2.

845. Difficulty of Distinguishing Between Pledges and Chattel Mortgages.—See note 1. Use of Terms "Mortgage" and "Pledge" Indifferently. — See note 2.

846. III. WHAT PROPERTY MAY BE PLEDGED—3. Choses in Action.—See note 6.

847. 4. Corporate Stock—In General.—See note 3.

848. IV. PLEDGOR'S AUTHORITY TO PLEDGE PROPERTY AND REQUISITE OWNERSHIP—1. In General.—See note 1.

2. Authority of Particular Person—*a.* AGENTS—Excess of Authority by Agent.—See note 5.

849. Authority of Wife to Pledge Husband's Property.—See note 3. Ratification of Unauthorized Pledge. — See note 4.

850. *e.* TRUSTEES.—See note 7.

851. V. THE CONTRACT—1. In General—Necessity for Contract.—See note 4.

Parol Evidence to Explain Ambiguity. — See note 7.

852. 3. Consideration—Necessity for Consideration.—See note 6.

842. 1. Pledge Defined.—See Farson *v.* Gilbert, 114 Ill. App. 17; Villere *v.* Shaw, 108 La. 73; Millot *v.* Conrad, 114 La. 193.

843. 5. Statutory Definitions.—Commercial Bank *v.* Flowers, 116 Ga. 219; Willard *v.* Monarch Elevator Co., 10 N. Dak. 400.

844. 2. Pledge and Chattel Mortgage Distinguished.—Commercial Sav. Bank *v.* Hornberger, 140 Cal. 16; Blood *v.* Shepard, 69 Kan. 752; Willard *v.* Monarch Elevator Co., 10 N. Dak. 400.

Distinction Based on Rights to Possession.—Commercial Sav. Bank *v.* Hornberger, 140 Cal. 16; Blood *v.* Shepard, 69 Kan. 752.

An Assignment and Transfer of Shares of Stock in a corporation by a debtor as security for a debt is a pledge, and not a mortgage. Irving Park Assoc. *v.* Watson, 41 Oregon 95.

845. 1. See Irving Park Assoc. *v.* Watson, 41 Oregon 95.

2. Ultimate Object of Inquiry Is to Ascertain Intention of Parties.—Willard *v.* Monarch Elevator Co., 10 N. Dak. 400.

846. 6. Choses in Action.—Bush *v.* Export Storage Co., 136 Fed. Rep. 928.

Policy of Insurance May Be Pledged.—Mechanicks' Nat. Bank *v.* Comins, 72 N. H. 12, 101 Am. St. Rep. 650.

Member's Certificate in Fraternal Society.—Where the by-laws of a fraternal benefit society prohibit the pledge of a certificate by a member, such provisions are for the benefit of the society, and advantage thereof can be taken by it alone. Coleman *v.* Anderson, (Tex. Civ. App. 1904) 82 S. W. Rep. 1057.

847. 3. Pledge of Corporate Stock.—See

Springfield Co. *v.* Ely, 44 Fla. 319; Corning *v.* Bridgewater Gas Co., 100 Ill. App. 221; Just *v.* State Sav. Bank, 132 Mich. 600.

848. 1. Authority to Pledge Property.—Just *v.* State Sav. Bank, 132 Mich. 600.

Lack of Knowledge of the Owner's Identity will not enable the pledgee to hold property which he has taken with knowledge that the pledgor was not the owner. Perth Amboy Mut. Loan, etc., Assoc. *v.* Chapman, 80 N. Y. App. Div. 556, affirmed 178 N. Y. 558.

Estoppel to Deny Authority.—May *v.* Martin, 32 Tex. Civ. App. 132.

5. Where Agent Exceeds Authority.—Wycoff *v.* Davis, 127 Iowa 399. See also Perth Amboy Mut. Loan, etc., Assoc. *v.* Chapman, 80 N. Y. App. Div. 556, affirmed 178 N. Y. 558.

849. 3. Wife May Pledge Separate Property to Secure Husband's Debt.—Just *v.* State Sav. Bank, 132 Mich. 600. And see the title SEPARATE PROPERTY OF MARRIED WOMEN, 415. 4.

4. Ratification of Unauthorized Pledge.—Compare Wycoff *v.* Davis, 127 Iowa 399.

850. 7. Trustees.—Where a trustee fraudulently transfers as collateral a trust deed and note to which he has no title, the transferee must show that the paper was taken in the capacity of a *bona fide* holder. Chicago Title, etc., Co. *v.* Brugger, 196 Ill. 96, affirming 95 Ill. App. 405.

851. 4. For an Instrument Held Not to Constitute a Pledge see Millot *v.* Conrad, 114 La. 193.

7. Transfer Absolute on Face May Be Shown to Be Pledge.—Clarke *v.* Adam, 30 Tex. Civ. App. 66.

852. 6. Pledge to Secure Note Valid Though

853. VI. DELIVERY AND POSSESSION OF PROPERTY — 1. Necessity to Deliver Property to Pledgee — a. IN GENERAL. — See note 6.

855. b. UNDER STATUTES. — See note 2.

c. AS AGAINST WHOM DELIVERY NECESSARY. — See note 3.

2. Duty of Pledgor to Deliver Property to Pledgee. — See note 5.

4. How Delivery Made — a. IN GENERAL. — See note 7.

856. Consideration of Nature of Property. — See note 1.

Delivery of Property to Third Person. — See note 3.

Necessity to Remove Property from Premises of Pledgor. — See note 4.

If the Pledgee Has the Thing Already in His Possession. — See note 5.

b. SYMBOLICAL OR CONSTRUCTIVE DELIVERY — (1) *In General.*

— See note 7.

857. See note 1.

(2) *Delivery of Warehouse Receipts.* — See note 3.

Warehouse Receipts Must Be Valid. — See note 4.

858. (3) *Delivery of Bills of Lading.* — See note 1.

Note Invalid. — *Blanc v. Germania Nat. Bank*, 114 La. 739.

853. 6. Necessity to Deliver Property to Pledgee — *United States.* — *Dunn v. Train*, (C. C. A.) 125 Fed. Rep. 221; *Bush v. Export Storage Co.*, 136 Fed. Rep. 928.

California. — *Commercial Sav. Bank v. Hornberger*, 140 Cal. 16.

Georgia. — *Commercial Bank v. Flowers*, 116 Ga. 219.

Illinois. — *Griffen v. Henry*, 99 Ill. App. 284.

Kansas. — *Blood v. Shepard*, 69 Kan. 752.

Louisiana. — *Gragard's Succession*, 106 La. 298.

Massachusetts. — *Robertson v. Robertson*, 186 Mass. 308.

Minnesota. — *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 98, 99 Am. St. Rep. 549.

Missouri. — *Chitwood v. Lanyon Zinc Co.*, 93 Mo. App. 225.

North Dakota. — *Willard v. Monarch Elevator Co.*, 10 N. Dak. 400.

Ohio. — *Hunt v. Bode*, 66 Ohio St. 255.

Oregon. — *Irving Park Assoc v. Watson*, 41 Oregon 95.

Collaterals Not in the Possession of Either Party cannot be pledged to secure an existing debt. *Storts v. Mills*, 93 Mo. App. 201.

855. 2. Statutory Provisions. — *Commercial Bank v. Flowers*, 116 Ga. 219; *Willard v. Monarch Elevator Co.*, 10 N. Dak. 400. See also *Young v. Upson*, 115 Fed. Rep. 192.

3. The Pledgor's Administrator, in Louisiana, where the succession is insolvent, may contest the validity of a pledge for want of delivery, though the pledgor himself could not have done so. *Gragard's Succession*, 106 La. 298.

5. Duty of Pledgor to Deliver Property to Pledgee. — *Commercial Sav. Bank v. Hornberger*, 140 Cal. 16.

7. General Requisites of Delivery. — *Dunn v. Train*, (C. C. A.) 125 Fed. Rep. 221, holding, however, that a written receipt is not necessary.

856. 1. *Young v. Upson*, 115 Fed. Rep. 192; *Kentucky Furnace Co. v. City Nat. Bank*, (Ky. 1903) 75 S. W. Rep. 848; *Hunt v. Bode*, 66 Ohio St. 255.

3. Delivery of Property to Third Person. — *Ken-*

tucky Furnace Co. v. City Nat. Bank, (Ky. 1903) 75 S. W. Rep. 848; *Farm Invest. Co. v. Wyoming College, etc.*, 10 Wyo. 240.

Where the Property Is in the Possession of a Third Person an order on such person is sufficient. *Porter v. Shotwell*, 105 Mo. App. 181.

4. Necessity to Remove Property from Premises of Pledgor. — *Dunn v. Train*, (C. C. A.) 125 Fed. Rep. 221; *Kentucky Furnace Co. v. City Nat. Bank*, (Ky. 1903) 75 S. W. Rep. 848.

5. Pledgee Already in Possession. — *Farson v. Gilbert*, 114 Ill. App. 17.

7. Symbolical or Constructive Delivery. — *Bush v. Export Storage Co.*, 136 Fed. Rep. 928; *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 98, 99 Am. St. Rep. 549; *Hunt v. Bode*, 66 Ohio St. 255.

Delivery Must Be Such as to Pass Property. — *Dunn v. Train*, 125 Fed. Rep. 221, 60 C. C. A. 113.

857. 1. *Bush v. Export Storage Co.*, 136 Fed. Rep. 928.

3. Delivery of Warehouse Receipts. — *Bush v. Export Storage Co.*, 136 Fed. Rep. 928; *Gragard's Succession*, 106 La. 298; *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 98, 99 Am. St. Rep. 549; *Hunt v. Bode*, 66 Ohio St. 255.

Mere Delivery of Warehouse Receipt Sufficient. — *Blanc v. Germania Nat. Bank*, 114 La. 739.

A Second Pledge of Receipts may be made, in a proper case, without any change of possession. *Hunt v. Bode*, 66 Ohio St. 267.

The Place of Performance or Enforcement is the state where the pledged property is actually situated, and its validity must be determined by the laws of that state. *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 98, 99 Am. St. Rep. 549.

4. Warehouse Receipts Must Be Valid. — *Gragard's Succession*, 106 La. 298; *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 98, 99 Am. St. Rep. 549. See further the title **WAREHOUSES AND WAREHOUSEMEN**, 69. 11.

858. 1. Delivery of Bills of Lading. — *Bush v. Export Storage Co.*, 136 Fed. Rep. 928, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 858. See also *Cuero First Nat. Bank v. San Antonio, etc.*, R. Co., 97 Tex. 201.

858. 5. Right of Pledgee to Retain Possession — *a.* IN GENERAL. — See note 3.

860. *c.* AFTER DEBT IS BARRED BY STATUTE OF LIMITATIONS. — See note 1.

—6. Necessity for Retention of Possession by Pledgee — *a.* IN GENERAL. — See note 2.

Redelivery to Pledgor for Temporary Purposes. — See note 3.

862. *c.* SUBSTITUTION OF PROPERTY. — See note 2.

VII. PLEDGEE'S DUTIES AS RESPECTS CUSTODY AND USE OF PROPERTY.

—1. In General. — See note 3.

2. Liability of Pledgee for Preservation and Safe Keeping of Property. — See note 4.

Duty of Pledgee with Respect to Collaterals. — See note 5.

863. Liability of Pledgee as Insurer. — See note 2.

What Constitutes Due Care of Property. — See note 3.

Larceny of Pledged Property. — See note 5.

864. VIII. TITLE OF PLEDGOR AFTER MAKING PLEDGE — 1. In General. — See note 5.

865. After Pledgor's Default. — See note 1.

866. IX. SPECIAL PROPERTY OF PLEDGEE IN PLEDGED GOODS — 1. In General. — See note 3.

No Pledge Where Bills of Lading Not Delivered until After Seizure of Goods. — *Cameron v. Orleans, etc., R. Co.*, 108 La. 83.

858. 3. Right of Pledgee to Retain Possession. — *Commercial Sav. Bank v. Hornberger*, 140 Cal. 16.

860. 1. After Debt Is Barred by Statute of Limitations. — *Commercial Sav. Bank v. Hornberger*, 140 Cal. 16.

2. Necessity for Retention of Possession by Pledgee. — *Harding v. Eldridge*, 186 Mass. 39.

Subpledging Property. — The pledgee does not, as against the pledgor, lose possession of the pledged property by making a subpledge of it. *Meyer v. Moss*, 110 La. 132.

What Surrender Does Not Waive Lien. — A surrender of goods to a purchaser from the pledgor under an agreement for the retention of the pledgee's lien does not effect an abandonment of the lien. *Thalman v. Capron Knitting Co.*, 100 N. Y. App. Div. 247, *affirmed* 182 N. Y. 525.

So a pledgee does not forfeit his lien by unsuccessfully contending that the equity of redemption has been extinguished by contract, or by a sale under his right as pledgee. *Wilkins v. Redding*, (Neb. 1903) 97 N. W. Rep. 238.

3. Redelivery to Pledgor for Temporary Purposes. — *Harding v. Eldridge*, 186 Mass. 39.

862. 2. Substitution of Property. — *Springfield Co. v. Ely*, 44 Fla. 319 (substitution by wife, after divorce, of separate property pledged for husband's debt before divorce).

Rule Applied to Pledge of Warehouse Receipts. — *Bush v. Export Storage Co.*, 136 Fed. Rep. 028. But see *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 98, 99 Am. St. Rep. 549. See further the title WAREHOUSES AND WAREHOUSEMEN. **70.** 3, 4, 5.

3. Duties and Liabilities of Bailee for Hire. — See *Helena First Nat. Bank v. Waddell*, (Ark. 1905) 85 S. W. Rep. 417.

4. Preservation and Safe Keeping of Property.

— *Ellis v. Conrad Seipp Brewing Co.*, 207 Ill. 291, *affirming* 107 Ill. App. 139; *Loomis v. Reimers*, 119 Iowa 169; *Adoue v. Hutches*, 32 Tex. Civ. App. 559; *C. H. Larkin Co. v. Dawson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 882.

Money Advanced by the Pledgee for Insurance, Taxes, and Expenses in protecting or collecting the collateral is a charge against the collateral. *Scott v. Tulsa First Nat. Bank*, (Indian Ter. 1904) 82 S. W. Rep. 751.

5. With Respect to Collaterals. — See *Loomis v. Reimers*, 119 Iowa 169.

863. 2. Pledgee Not Insurer. — *Helena First Nat. Bank v. Waddell*, (Ark. 1905) 85 S. W. Rep. 417; *Loomis v. Reimers*, 119 Iowa 169.

3. What Constitutes Due Care. — *Helena First Nat. Bank v. Waddell*, (Ark. 1905) 85 S. W. Rep. 417; *Loomis v. Reimers*, 119 Iowa 169.

5. Larceny of Pledged Property. — See *Scott v. Tulsa First Nat. Bank*, (Indian Ter. 1904) 82 S. W. Rep. 751.

864. 5. General Property in Pledgor. — *Brown v. Bronson*, 93 N. Y. App. Div. 312; *Harding v. Eldridge*, 186 Mass. 39. See also *White River Sav. Bank v. Capital Sav. Bank, etc.*, Co., 77 Vt. 123, 107 Am. St. Rep. 658.

Deposit of Check to Secure Performance of Contract. — See *Furth v. West Seattle*, 37 Wash. 387, and see the title MUNICIPAL CORPORATIONS, **1168.** 3 *et seq.* See also generally the title DEPOSIT.

Pledgor of Notes May Sue Thereon, Joining Pledgee. — *Liner v. J. B. Watkins Land Mortg. Co.*, 29 Tex. Civ. App. 187.

865. 1. After Pledgor's Default. — See *Brown v. Bronson*, 93 N. Y. App. Div. 312.

866. 3. Special Property of Pledgee. — *Cumming v. McDade*, 118 Ga. 612; *Harding v. Eldridge*, 186 Mass. 39; *Coleman v. Anderson*, (Tex. Civ. App. 1904) 82 S. W. Rep. 1057. See also *White River Sav. Bank v. Capital Sav. Bank, etc.*, Co., 77 Vt. 123, 107 Am. St. Rep. 658.

- 867.** When the Pledgor Dies. — See note 1.
 2. Adverse Possession by Pledgee. — See note 4.
 X. PRIORITY OF PLEDGEE'S LIEN — In General. — See note 6.

- 868.** Pledgee Takes Subject to Prior Liens. — See note 2.
 Over Subsequent Attachment. — See note 7.

- 869.** XI. WHAT DEBTS SECURED BY PLEDGE — In General. — See note 3.

- 871.** Where Property Expressly Pledged for All Debts of Pledgor. — See note 2.

- 873.** XIV. CONVERSION OF PROPERTY PLEDGED — 2. By Pledgee — In General. — See note 1.

- 874.** Conversion of Corporate Stock. — See note 1.

Necessity for Tender. — See note 4.

- 876.** 3. Damages — Recoupment by Pledgee's Assignee. — See note 2.

- XVI. PLEDGOR'S EQUITY OF REDEMPTION — 1. In General. — See note 4.

- 877.** Laches and Limitations. — See notes 2, 3.

2. Equity Jurisdiction — *a.* IN GENERAL. — See note 5.

Under Exceptional Circumstances. — See notes 6, 7.

- b.* WHERE COLLATERALS HAVE BEEN PLEDGED. — See note 8.

- 878.** 3. Requisite Tender or Payment on Part of Pledgor. — See note 1.

Pledgee Is Trustee. — *Wetherell v. Johnson*, 208 Ill. 247.

- 867.** 1. Lien Survives Pledgor's Death. — *Bell v. Mills*, (C. C. A.) 123 Fed. Rep. 24.

4. Adverse Possession of Pledgee. — See *Villere v. Shaw*, 108 La. 71, applying the rule to the statutory pledge in *Louisiana*.

6. Priority of Pledgee's Lien. — *Shinkle v. Vickery*, (C. C. A.) 130 Fed. Rep. 424; *Scribner v. Taggart*, 123 Iowa 321; *St. Johnsville First Nat. Bank v. Jones*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 68. See also *Whitesboro First Nat. Bank v. Andrews*, (Tex. Civ. App. 1903) 77 S. W. Rep. 956.

Satisfaction of Pledgee's Claim on Sale under Execution by Third Person. — See *Buena Vista Loan, etc., Bank v. Grier*, 114 Ga. 308.

- 868.** 2. Bona Fide Holder. — A lien under a clause of the articles of association of a bank providing that "no shares shall be transferable on which any call for instalment of capital or any interest on such instalment shall remain unpaid, or in which any shareholder is indebted to the bank, either as drawer or indorser or as security for any payments due the bank, unless the majority of the board of directors consent thereto," was held not to be superior to the rights of a *bona fide* transferee. *Lyman v. State Bank*, 81 N. Y. App. Div. 367, *affirmed* 179 N. Y. 577.

7. Priority of Pledgee's Lien over Subsequent Attachment. — *Mitchell v. McLeod*, 127 Iowa 733.

- 869.** 3. Property Pledged Is Not General Security. — *Iowa Nat. Bank v. Cooper*, (Iowa 1904) 101 N. W. Rep. 459; *First Nat. Bank v. Germania Safety Vault, etc., Co.*, 112 Ky. 734; *Memphis City Bank v. Smith*, 110 Tenn. 337. See also *Stoddard v. Courtright*, 130 Mich. 134.

- 871.** 2. Express Stipulations for Continuing Pledge. — *Selma Bridge Co. v. Harris*, 132 Ala. 179.

- 873.** 1. Conversion by Pledgee. — *Scribner v. Woodward*, 130 Cal. 314; *Winchester v. Joslyn*, 31 Colo. 220, 102 Am. St. Rep. 30; *Schaaf v. Fries*, 90 Mo. App. 111; *Rothschild v. Allen*, 90

N. Y. App. Div. 233, *affirmed* 180 N. Y. 561; *Memphis City Bank v. Smith*, 110 Tenn. 337.

Mere Assertion of Title Not Conversion. — *Brown v. Leary*, 100 N. Y. App. Div. 421.

- 874.** 1. A Pledge of a Customer's Stock by a Broker is not a conversion where a part of the purchase price is due from the customer and delivery can be secured by him on payment thereof; but it is otherwise where delivery cannot be secured by such payment. *Rothschild v. Allen*, 90 N. Y. App. Div. 233, *affirmed* 180 N. Y. 561. See further the title STOCKBROKERS, 1058. 4 *et seq.*

4. Tender. — *Hagan v. Continental Nat. Bank*, 182 Mo. 319; *Treadwell v. Clark*, 73 N. Y. App. Div. 473; *Memphis City Bank v. Smith*, 110 Tenn. 337. See also *Wilkins v. Redding*, (Neb. 1903) 97 N. W. Rep. 238.

- 876.** 2. Recoupment by Pledgee's Assignee. — See *Colton v. Oakland Sav. Bank*, 137 Cal. 376.

4. Pledgor's Equity of Redemption. — *White River Sav. Bank v. Capital Sav. Bank, etc., Co.*, 77 Vt. 123, 107 Am. St. Rep. 658.

- 877.** 2. Time in Which to Redeem. — *White River Sav. Bank v. Capital Sav. Bank, etc., Co.*, 77 Vt. 123, 107 Am. St. Rep. 658.

3. *Kase v. Burnham*, 206 Pa. St. 330.

Right Founded on Contract — Barred by Period of Limitation. — *Treadwell v. Clark*, 73 N. Y. App. Div. 480.

5. General Rule — Equity Has Not Jurisdiction. — *De Bevoise v. H. & W. Co.*, 67 N. J. Eq. 472.

6. Exceptional Circumstances. — *Treadwell v. Clark*, 73 N. Y. App. Div. 473.

7. Where Accounting Is Sought. — *Hagan v. Continental Nat. Bank*, 182 Mo. 319.

8. Where Collaterals Have Been Pledged. — See *Hagan v. Continental Nat. Bank*, 182 Mo. 319.

- 878.** 1. Tender or Payment. — See *De Bevoise v. H. & W. Co.*, 67 N. J. Eq. 472. See further *infra*, this title, 879. 6 *et seq.*

Where the Amount Is in Dispute, an offer in the complaint to pay the amount deemed to be due is sufficient. *Treadwell v. Clark*, 73 N. Y. App. Div. 473.

878. XVIII. ASSIGNMENTS AND INCUMBRANCES BY PLEDGOR AND PLEDGEE

— **1. Assignments by Pledgee** — *a. ASSIGNMENT OF PROPERTY PLEDGED.* — See note 3.

Repledge by Pledgee. — See note 7.

880. XIX. TENDER OF DEBT SECURED BY PLEDGE — **2. Requisites of Tender** — In General. — See note 1.

881. XX. PAYMENT OF DEBT SECURED BY PLEDGE — **1. Requisites of Payment.** — See note 1.

2. Effect of Payment — Discharge of Lien. — See note 3.

882. When Statute of Limitations Begins to Run. — See note 1.

Where Collaterals Are Pledged. — See note 5.

883. XXI. SALE OF PROPERTY PLEDGED — **1. Authority of Pledgee to Sell** — *a. AT COMMON LAW* — In General. — See note 1.

b. UNDER STATUTES. — See note 4.

884. c. UNDER EXPRESS STIPULATIONS. — See note 1.

d. WHERE CHOSES IN ACTION ARE PLEDGED — (1) *In General.* — See note 2.

(2) *Bonds.* — See note 5.

885. (3) Corporate Stock. — See note 1.

Where a Tender Would Be an Idle Ceremony equitable relief will not be refused for failure to make it. *Hagan v. Continental Nat. Bank*, 182 Mo. 319.

878. 3. Assignment by Pledgee. — *Cumming v. McDade*, 118 Ga. 612; *Hart v. Tyrrell*, 36 Tex. Civ. App. 626.

Pledged Note May Be Transferred for Collection. — *Hunt v. Bessey*, 96 Me. 429.

Bona Fide Purchaser. — If the collateral consists of negotiable instruments, a subpurchaser without notice may acquire an absolute title, the debtor's remedy being against the pledgee. *Cumming v. McDade*, 118 Ga. 612.

7. Repledge by Pledgee. — *Hart v. Tyrrell*, 36 Tex. Civ. App. 626.

By Subpledging and Redeeming the Subpledge, the pledgee does not acquire a new title to the pledged property, but merely continues his same tenure. *Meyer v. Moss*, 110 La. 132.

Repledged Stock Recoverable. — *Mould v. Importers, etc., Nat. Bank*, 72 N. Y. App. Div. 30.

880. 1. Requisites of Tender — Amount in Dispute. — See *Wilkins v. Redding*, (Neb. 1903) 97 N. W. Rep. 238. See also *supra*, this title, 874. 4, 878. 1.

881. 1. Money Received from Third Parties. — Upon a valid obligation of the maker of a note, who is also the primary debtor, the pledgee is not bound to credit the money that he has received from another person, who was only secondarily liable, upon a separate and collateral undertaking. *Brown v. Pegram*, 125 Fed. Rep. 577, 60 C. C. A. 383, *affirming* 122 Fed. Rep. 1000.

3. Right to Return of Property upon Payment. — *Scrivner v. Woodward*, 139 Cal. 314; *Houston, etc., R. Co. v. Conner*, 29 Tex. Civ. App. 259; *Union Bank v. Elliott*, 14 Manitoba 187; *Schaaf v. Fries*, 90 Mo. App. 111; *Wilkins v. Redding*, (Neb. 1903) 97 N. W. Rep. 238.

A Refusal to Return the Property is a justification for nonpayment of the note. *Schlesinger v. Wise*, 106 N. Y. App. Div. 587.

882. 1. When Statute of Limitations Begins

to Run. — See *Scrivner v. Woodward*, 139 Cal. 314.

5. After Payment of the Debt the collaterals should be returned or the pledgee should account to the debtor for the face value in the absence of a showing that they could not be collected. *Union Bank v. Elliott*, 14 Manitoba 187.

Where There Is No Provision for a Pro Tanto Release of collateral or partial payment, the creditor will not be compelled to yield up any of the security until the whole debt is paid. *Goepper v. Phoenix Brewing Co.*, 115 Ky. 708.

883. 1. Pledgee Has Power to Sell upon Default. — *Bell v. Mills*, (C. C. A.) 123 Fed. Rep. 24; *Jenckes v. Rice*, 119 Iowa 451. See also *Rothschild v. Allen*, 90 N. Y. App. Div. 235, *affirmed* 180 N. Y. 561.

Bona Fide Pledgee May Sell Notwithstanding Notice of Pledgor's Want of Authority. — *May v. Martin*, 32 Tex. Civ. App. 132.

Where a Party Holds More than One Security for the same debt, he has the right to proceed against either or both. *Wescicot v. Newman*, (Ky. 1901) 65 S. W. Rep. 808.

4. Under Statutes. — *Farmers', etc., Bank v. Copsey*, 134 Cal. 287; *Bell v. Mills*, (C. C. A.) 123 Fed. Rep. 24, holding that the power of sale under the *California* statute survives the pledgor's death; *Finnie v. Montreal*, 32 Can. Sup. Ct. 335.

Remedies of Pledgee Where Conflicting Liens Exist. — See *Buena Vista Loan, etc., Bank v. Grier*, 114 Ga. 402.

884. 1. Under Express Stipulations. — *Palmer v. Mutual L. Ins. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 318.

2. Ordinary Choses in Action Cannot Be Sold. — *Jenckes v. Rice*, 119 Iowa 451, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 884.

5. Authority of Pledgee to Sell Bonds. — See *Jenckes v. Rice*, 119 Iowa 451.

885. 1. Corporate Stock. — *White River Sav. Bank v. Capital Sav. Bank, etc., Co.*, 77 Vt. 123, 107 Am. St. Rep. 658. See also *Jenckes v. Rice*, 119 Iowa 451.

885. 2. Duty of Pledgee to Sell. — See note 3.

Stipulations as to Sale. — See note 4.

Where Pledgor Requests Pledgee to Sell. — See note 6.

886. 3. Prerequisites, Incidents, and Conduct of Sale — *a.* IN GENERAL. — See note 1.

Effect of Wrongful Sale. — See notes 5, 6, 7.

b. DEMAND BY PLEDGEE BEFORE SALE — (1) *Necessity to Make Demand.* — See note 8.

887. See note 1.

c. NOTICE OF SALE — (1) *Necessity to Give Notice* — In General. — See note 4.

888. (3) *Statutes Requiring Notice.* — See note 5.

889. (4) *Notice to Public.* — See note 1.

(5) *Requisites of Notice* — In General. — See note 2.

(6) *Waiver of Notice* — Express Stipulation in Contract that Sale May Be Without Notice. — See note 9.

890. *c.* PLACE OF SALE — In General. — See note 6.

Sale on Stock Exchange. — See note 7.

891. *g.* ADEQUACY OF PRICE. — See note 3.

i. PURCHASE OF PROPERTY BY PLEDGEE — (1) *In General.* — See note 6.

885. 3. Duty of Pledgee to Sell. — Blood *v.* Shepard, 69 Kan. 752; Crews *v.* Yowell, (Ky. 1903) 76 S. W. Rep. 127; Adoue *v.* Hutches, 32 Tex. Civ. App. 559.

4. Express Authority to Sell Does Not Deprive Pledgee of Option. — Adoue *v.* Hutches, 32 Tex. Civ. App. 559.

Special Power to Sell Negotiable Paper Not Exclusive. — Farmers', etc., Bank *v.* Copsey, 134 Cal. 287.

6. Failure to Give Notice to Sell. — If, when the debt becomes due, the debtor desires the security sold, he should so notify the creditor; and, failing to do this, he cannot hold the creditor liable for depreciation in the value of the security due to causes beyond the control of the creditor. The sureties of the debtor should have the same right to demand the sale of the property as the debtor, and their failure to exercise such right would prevent any liability of the creditor to them for depreciation in the value of the property. Adoue *v.* Hutches, 32 Tex. Civ. App. 559.

886. 1. Conduct of Sale. — Ohio Nat. Bank *v.* Central Constr. Co., 17 App. Cas. (D. C.) 524; Perkins *v.* Applegate, (Ky. 1905) 85 S. W. Rep. 723, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 885; Hagan *v.* Continental Nat. Bank, 182 Mo. 319; Schaaf *v.* Fries, 90 Mo. App. 111. See also Cammann *v.* Huntington, 89 N. Y. App. Div. 99.

5. Illegal Sale Amounts to Conversion. — Schaaf *v.* Fries, 90 Mo. App. 111.

6. See Schaaf *v.* Fries, 90 Mo. App. 16. Compare Hagan *v.* Continental Nat. Bank, 182 Mo. 319.

7. Colton *v.* Oakland Sav. Bank, 137 Cal. 376. See also Winchester *v.* Joslyn, 31 Colo. 220, 102 Am. St. Rep. 30.

Where the Sale Is Void, questions of laches, acquiescence, and implied ratification have no application. Perkins *v.* Applegate, (Ky. 1905) 85 S. W. Rep. 723.

8. Demand May Be Made on Executors. — Bell *v.* Mills, (C. C. A.) 123 Fed. Rep. 24.

887. 1. Where Time for Payment Is Fixed. — See Louisville Banking Co. *v.* W. H. Thomas, etc., Co., (Ky. 1902) 69 S. W. Rep. 1078, holding that where the time of payment of a note, secured by collateral, was indefinitely extended at maturity in consideration of the payment of interest, demand and notice of intention were not a prerequisite to a valid sale of the collateral or default in the payment of interest, notice of nonpayment being given.

4. Pledgee Must Give Pledgor Notice of Sale. — Colton *v.* Oakland Sav. Bank, 137 Cal. 376.

Notice to Executors and Not to Heirs Proper. — Bell *v.* Mills, (C. C. A.) 123 Fed. Rep. 24.

888. 5. Statutes Requiring Notice. — Bell *v.* Mills, (C. C. A.) 123 Fed. Rep. 24; Colton *v.* Oakland Sav. Bank, 137 Cal. 376.

889. 1. Notice to Public. — Hagan *v.* Continental Nat. Bank, 182 Mo. 319.

2. Requisites of Notice. — Where a statute provides that the sale shall be made "in the manner and upon notice to the public usual at the place of sale," it is not necessary that the notice should state that the property was pledged or that it was the property of the pledgor, where such statements do not appear to be usual at the place of sale. Bell *v.* Mills, (C. C. A.) 123 Fed. Rep. 24.

9. Express Stipulation Waiving Notice of Sale. — Thornton *v.* Martin, 116 Ga. 115, holding that the waiver of notice is not affected by mere delay in exercising the power of sale.

890. 6. Place of Sale. — Hagan *v.* Continental Nat. Bank, 182 Mo. 319.

Sale of Railroad Stock Need Not Be Made in County Where Railroad Situated. — Thornton *v.* Martin, 116 Ga. 115.

7. Stock Exchange Not Public Place. — Hagan *v.* Continental Nat. Bank, 182 Mo. 319.

891. 3. Collusive Sale for Less than Obtainable Is Conversion. — Schaaf *v.* Fries, 90 Mo. App. 111.

6. Purchase by Pledgee Forbidden. — Wetherell

892. Option of Pledgor to Affirm or Repudiate Purchase by Pledgee. — See note 1.

893. (2) *Express Stipulations Authorizing Purchase by Pledgee.* — See note 1.

5. Accountability of Pledgee for Proceeds of Sale. — See note 4.

6. Sales under Direction of Court — Equity Jurisdiction. — See note 5.

894. Where Shares of Stock Are Pledged. — See note 1.

Execution for Deficiency. — See note 4.

XXII. RULES PECULIARLY APPLICABLE TO PLEDGES OF CHOSSES IN ACTION — 1. Right of Pledgee to Enforce and Control Choses in Action — *a.* IN GENERAL. — See note 5.

896. Right of Pledgee to Foreclose Pledged Mortgage. — See note 1.

Right of Action in Pledgor. — See note 7.

897. *c.* BEFORE PRINCIPAL DEBT BECOMES DUE. — See note 2.

f. CONCURRENT REMEDIES OF PLEDGEE — (1) *In General.* — See note 5.

898. Stipulation Not to Proceed Against Pledgor. — See note 2.

g. AMOUNT RECOVERABLE BY PLEDGEE ON COLLATERALS — *In General.* — See note 6.

v. Johnson, 208 Ill. 247, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 891.

892. 1. Option of Pledgor to Affirm or Repudiate Purchase by Pledgee. — *Winchester v. Joslyn*, 31 Colo. 220.

893. 1. Express Stipulations Authorizing Purchase by Pledgee. — *Barry v. American White Lead, etc., Works*, 107 La. 236. See also *Phillips' Estate*, 205 Pa. St. 531.

Purchasing from Pledgor. — The pledgee of stock may purchase from the pledgor or may take the stock in satisfaction of the note for which the stock was pledged. *Wetherell v. Johnson*, 208 Ill. 247.

4. Accountability of Pledgee for Proceeds of Sale. — *White River Sav. Bank v. Capital Sav. Bank, etc., Co.*, 77 Vt. 123, 107 Am. St. Rep. 658; *Blood v. Shepard*, 69 Kan. 752. See also *Hagan v. Continental Nat. Bank*, 182 Mo. 319. Compare *Kittler v. Studabaker*, 113 Ill. App. 342, 352.

The Pledgee Is a Trustee for the pledgor, for the purpose, first, of paying the debt, and second, of paying over the surplus. *Palmer v. Mutual L. Ins. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 321.

5. Sales under Direction of the Court — Equity Jurisdiction. — *Farmers', etc., Bank v. Copsey*, 134 Cal. 287; *White River Sav. Bank v. Capital Sav. Bank, etc., Co.*, 77 Vt. 123, 107 Am. St. Rep. 658. See also *Lands Title, etc., Co. v. Asphalt Co.*, 121 Fed. Rep. 192; *Western Fly Guard Co. v. Hodges*, (Neb. 1904) 100 N. W. Rep. 407.

Proceedings in Equity Are Peculiarly Appropriate where neither the time of redemption nor the manner and time of sale is specified in the contract, and the pledgee's rights or powers are being questioned or denied by the corporation which issued the stock pledged, itself claiming a priority of lien thereon. *White River Sav. Bank v. Capital Sav. Bank, etc., Co.*, 77 Vt. 123, 107 Am. St. Rep. 658.

894. 1. Where Shares of Stock Are Pledged. — *Page v. Boggess*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 46; *White River Sav. Bank v.*

Capital Sav. Bank, etc., Co., 77 Vt. 123, 107 Am. St. Rep. 658.

4. Execution for Deficiency. — See *Commercial Nat. Bank v. Grant*, (Neb. 1905) 103 N. W. Rep. 68.

5. Right of Pledgee to Enforce and Control Choses in Action. — *Lake County v. Schradsky*, 31 Colo. 178, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 894; *Crews v. Yowell*, (Ky. 1903) 76 S. W. Rep. 127; *Mc-Crea v. Yule*, 68 N. J. L. 465, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 894; *Field v. Sibley*, 74 N. Y. App. Div. 81, affirmed 174 N. Y. 514.

896. 1. Right of Pledgee to Foreclose Pledged Mortgage. — See *Field v. Sibley*, 74 N. Y. App. Div. 81, affirmed 174 N. Y. 514, holding that the pledgee of bonds secured by mortgage could upon default co-operate with the bondholders in securing a foreclosure and agree that his proportionate expense should be a lien on the bonds.

7. By Agreement Between the Pledgor and Pledgee the pledgor may retain the right to enforce choses in action pledged; and a suit by the pledgor in such case will bar a subsequent suit by the pledgee. *Liner v. J. B. Watkins Land Mortg. Co.*, 29 Tex. Civ. App. 187.

897. 2. Before Principal Debt Becomes Due. — *Field v. Sibley*, 74 N. Y. App. Div. 81, affirmed 174 N. Y. 514.

5. Pledgee's Right of Action Against Pledgor Without First Collecting Collateral. — *Murphy v. Murphy*, 74 Conn. 198; *Crews v. Yowell*, (Ky. 1903) 76 S. W. Rep. 127. See also *Klee v. Trauerman*, 210 Pa. St. 533.

898. 2. Special Stipulations providing for the application of the collaterals in payment of the indebtedness, with an agreement to make good only the deficiency, are controlling. *Klee v. Trauerman*, 210 Pa. St. 533.

6. Right of Pledgee to Recover Entire Amount Due on Collateral. — *Palmer v. Mutual L. Ins. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 318. See also *Field v. Sibley*, 74 N. Y. App. Div. 81, affirmed 174 N. Y. 514.

899. 2. Duty of Pledgee to Pursue and Preserve Collaterals—*a.* IN GENERAL.—See note 4.

900. Counterclaim by Pledgor.—See note 2.

901. Where a Negotiable Instrument Is Pledged.—See note 3.

Duty of Pledgee to Present Paper and Give Notice of Dishonor.—See note 4.

902. *c.* WHAT DEGREE OF DILIGENCE REQUIRED OF PLEDGEE IN COLLECTING COLLATERALS—In General.—See note 7.

903. Mixed Question of Law and Fact.—See note 1.

f. BURDEN OF PROVING DILIGENCE.—See note 2.

g. MEASURE OF DAMAGES WHERE PLEDGEE NEGLIGENT IN COLLECTION OF COLLATERALS.—See note 3.

904. 4. Accountability of Pledgee for Proceeds of Collaterals—Surplus Proceeds of Collaterals.—See note 7.

905. Expenses of Collecting Collaterals.—See note 3.

XXIII. RULES PECULIARLY APPLICABLE TO PLEDGES OF CORPORATE STOCK—1. Transfer of Stock on Books of Corporation—*a.* NECESSITY FOR TRANSFER ON BOOKS OF CORPORATION.—See note 5.

906. Effect of Provisions of Charter or By-laws.—See note 2.

Statute Requiring Transfer on Books of Corporation.—See note 3.

899. 4. Duty of Pledgee to Pursue and Preserve Collaterals.—*Scott v. Tulsa First Nat. Bank*, (Indian Ter. 1904) 82 S. W. Rep. 751; *Roberts v. Farmers' Bank*, (Ky. 1904) 80 S. W. Rep. 441, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 899; *Hamilton v. Hamilton*, (Ky. 1905) 84 S. W. Rep. 1156; *Coleman v. Lewis*, 183 Mass. 485, 97 Am. St. Rep. 450; *C. H. Larkin Co. v. Dawson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 882; *Farm Invest. Co. v. Wyoming College*, etc., 10 Wyo. 240. See also *Perry v. Parrott*, 135 Cal. 238.

Pledgee Liable for Wrongful Surrender.—*Brown v. Newton First Nat. Bank*, (C. C. A.) 132 Fed. Rep. 450.

900. 2. Counterclaim by Pledgor.—*Farm Invest. Co. v. Wyoming College*, etc., 10 Wyo. 240. See also *Coleman v. Lewis*, 183 Mass. 485, 97 Am. St. Rep. 450.

901. 3. Pledged Negotiable Instruments.—*Hamilton v. Hamilton*, (Ky. 1905) 84 S. W. Rep. 1156; *C. H. Larkin Co. v. Dawson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 882; *Farm Invest. Co. v. Wyoming College*, etc., 10 Wyo. 240.

4. Duty of Pledgee to Present Paper and Give Notice of Dishonor.—See *Coleman v. Lewis*, 183 Mass. 485, 97 Am. St. Rep. 450, discussing the admissibility of evidence to show waiver of presentment and notice.

902. 7. Necessity for and Sufficiency of Reasonable Diligence.—*C. H. Larkin Co. v. Dawson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 882; *Adoue v. Hutches*, 32 Tex. Civ. App. 559.

No Liability for Mere Delay Where No Loss Follows.—*Farm Invest. Co. v. Wyoming College*, etc., 10 Wyo. 240.

903. 1. The Burden of Proving a Negligent Loss rests upon the pledgor. *Farm Invest. Co. v. Wyoming College*, etc., 10 Wyo. 240.

2. Burden of Proving Diligence.—*Scott v. Tulsa First Nat. Bank*, (Indian Ter. 1904) 82 S. W. Rep. 751, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 903; *Roberts v. Farmers' Bank*, (Ky. 1904) 80 S. W. Rep. 441, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d

ed.) 903; *Farm Invest. Co. v. Wyoming College*, etc., 10 Wyo. 240. See also *Hennessey v. Stempel*, 108 La. 159.

3. Measure of Damages.—See *C. H. Larkin Co. v. Dawson*, (Tex. Civ. App. 1904) 83 S. W. Rep. 882; *Farm Invest. Co. v. Wyoming College*, etc., 10 Wyo. 240.

904. 7. Surplus Proceeds of Collaterals.—*Crews v. Yowell*, (Ky. 1903) 76 S. W. Rep. 128; *Hennessey v. Stempel*, 108 La. 159. See also *Ohio Nat. Bank v. Central Constr. Co.*, 17 App. Cas. (D. C.) 524.

905. 3. Expenses of Collection.—*Iowa Nat. Bank v. Cooper*, (Iowa 1904) 101 N. W. Rep. 460, holding, however, that the pledgee has no right to incur unreasonable expense; *Scott v. Tulsa First Nat. Bank*, (Indian Ter. 1904) 82 S. W. Rep. 751; *Staten Island Bank v. Silvie*, 89 N. Y. App. Div. 465, citing *Field v. Sibley*, 74 N. Y. App. Div. 81, affirmed 174 N. Y. 514. See also *Commercial Sav. Bank v. Hornberger*, 140 Cal. 16.

Fees for Personal Services of the pledgee are not authorized in the absence of agreement. *Farm Invest. Co. v. Wyoming College*, etc., 10 Wyo. 240.

5. Transfer on Books of Corporation Unnecessary.—*Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483; *McClung v. Colwell*, 107 Tenn. 592, 89 Am. St. Rep. 961; *White River Sav. Bank v. Capital Sav. Bank*, etc., Co., 77 Vt. 123, 107 Am. St. Rep. 658.

Delivery of Certificate Without Indorsement Vests Equitable Title.—*Hall v. Cayot*, 141 Cal. 13.

906. 2. Immateriality of Charter or By-laws Requiring Transfer on Books.—*Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483; *White River Sav. Bank v. Capital Sav. Bank*, etc., Co., 77 Vt. 123, 107 Am. St. Rep. 658. See also *Just v. State Sav. Bank*, 132 Mich. 600.

The By-laws Are Waived by the issuance of a new certificate to the pledgee. *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483.

3. Statute Requiring Transfer on Books of Corporation.—*Hall v. Cayot*, 141 Cal. 13.

906. *b.* RIGHT OF PLEDGEE TO TRANSFER ON BOOKS OF CORPORATION. — See note 4.

907. 2. Rights of Pledgee as Stockholder — *a.* IN GENERAL. — See note 1.

b. RIGHT OF PLEDGEE TO COLLECT DIVIDENDS. — See note 2.

Accountability of Pledgee for Dividends. — See note 5.

906. 4. No Right to Transfer under Conditions Not Contemplated by Contract. — *State v. North American Land, etc., Co.*, 112 La. 441, which was a case of pledge of stock made the basis of a continuing credit, covering successive debts.

907. 1. Rights of Pledgee as Equitable Owner

of Stock. — *Gorman-Wright Co. v. Wright*, (C. C. A.) 134 Fed. Rep. 363, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 907.

2. Right of Pledgee to Collect Dividends. — *McCrea v. Yule*, 68 N. J. L. 465.

5. Accountability of Pledgee for Dividends. — *McCrea v. Yule*, 68 N. J. L. 465.

POISONS AND POISONING.

911. I. DEFINITION. — See note 1.

II. ADMINISTERING POISON — In Many States the Offense of Administering Poison or Attempting to Administer Poison. — See note 4.

911. 1. Definition. — *Boswell v. State*, 114 Ga. 40.

A "Noxious Potion" Is Defined as some hurtful or baneful liquid, and a "noxious substance" is a solid of a hurtful or baneful character. Both embrace poisons, though they are broader terms. *Runnels v. State*, 45 Tex. Crim. 446.

4. The Offense of Mingling Noxious Potions or Substances with any drink, food, or medicine with intent to kill or injure any person, is com-

plete when the mingling has taken place with that intent. And it is immaterial that not enough of the noxious potion or substance is mingled to bring about the death or injury of anybody. *Runnels v. State*, 45 Tex. Crim. 446.

Murder Perpetrated by Means of Poison is, in *Iowa*, murder in the first degree. And a homicide committed by the administration of poison with a bad motive or intent is murder in the first degree, no matter if there was no specific intent to kill. *State v. Burns*, 124 Iowa 207.

POLICE POWER.

By H. O'B. COOPER.

915. II. DEFINITION AND DISTINCTIONS — 1. Definition. — See note 1.

916. See note 2.

2. Distinguished from Eminent Domain. — See note 3.

917. A Few Illustrations. — See notes 1, 8.

915. 1. Impossibility of Exact Definition. — *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 915; *Chicago v. Jackson*, 196 Ill. 496; *State v. Armour Packing Co.*, 124 Iowa 323; *Webster v. State*, 110 Tenn. 491; *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933.

916. 2. Judicial Definitions. — *Chicago v. Rogers Park Water Co.*, 214 Ill. 212, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 916; *Wice v. Chicago, etc., R. Co.*, 193 Ill. 351; *State v. Armour Packing Co.*, 124 Iowa 323; *People v. Lochner*, 73 N. Y. App. Div. 120, affirmed 177 N. Y. 145, 101 Am. St. Rep. 773; *Webster v. State*, 110 Tenn. 491, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 916; *Young v. Com.*, 101 Va. 853; *Huber v. Merkel*, 117 Wis. 355, 98 Am. St. Rep. 933.

"Law of Overruling Necessity." — *Chicago v. Gunning System*, 214 Ill. 628.

3. Distinction Between Police Power and Eminent Domain. — *Chicago, etc., R. Co. v. People*, 212 Ill. 103, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 916; *Chicago v. Rogers Park Water Co.*, 214 Ill. 212, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 916; *Chicago v. Gunning System*, 214 Ill. 628, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 916; *Rude v. St. Marie*, 121 Wis. 634, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 916.

917. 1. *Chicago v. Rogers Park Water Co.*, 214 Ill. 212, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 917; *Chicago v. Gunning System*, 214 Ill. 628, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 917.

8. *Chicago v. Rogers Park Water Co.*, 214 Ill. 212.

918. III. GENERAL NATURE. — See note 14.

919. See note 1.

IV. WHERE LOCATED — 1. State and Federal Governments. — See note 4.

2. Delegation — *a.* TO MUNICIPALITIES. — See note 8.

920. See note 2.

Express Delegation Not Necessary. — See note 3.

921. 3. Power Cannot Be Divested. — See note 2.

922. VI. SUBJECTS OF ITS EXERCISE — 2. Preservation of Public Health — Sanitary Laws. — See note 6.

923. Prevention of Contagious Diseases. — See notes 1, 3, 4.

Pollution of Water Supply. — See note 7.

Drainage and the Like. — See notes 8, 10.

Burials — Cemeteries. — See notes 12, 13.

918. 14. Maxims on Which Power Rests. — *Bland v. People*, 32 Colo. 319, 105 Am. St. Rep. 80; *Chicago v. Rogers Park Water Co.*, 214 Ill. 212, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 918; *Chicago v. Gunning System*, 214 Ill. 628, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 918; *Chicago v. Jackson*, 196 Ill. 496; *St. Louis v. Fischer*, 167 Mo. 654, 99 Am. St. Rep. 614; *Livingston v. Ellis County*, (Tex. Civ. App. 1902) 68 S. W. Rep. 723; *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971.

919. 1. *Bland v. People*, 32 Colo. 319, 105 Am. St. Rep. 80; *Chicago v. Rogers Park Water Co.*, 214 Ill. 212, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 919; *Chicago v. Gunning System*, 214 Ill. 628, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 919; *Chicago v. Jackson*, 196 Ill. 496; *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971.

4. Federal Government Has No Police Power Within State Limits. — *Mann v. District of Columbia*, 22 App. Cas. (D. C.) 138.

8. Police Power of Municipalities. — *State v. Quong*, 8 Idaho 191; *Health Dept. v. Philip, etc.*, *Ebling Brewing Co.*, (Municipal Ct.) 38 Misc. (N. Y.) 537; *State v. Nohl*, 113 Wis. 15. And see the title MUNICIPAL CORPORATIONS, 1147. 3.

920. 2. *State v. Ray*, 131 N. Car. 814, 92 Am. St. Rep. 795; *Judy v. Lashley*, 50 W. Va. 628.

3. Express Delegation Not Necessary. — *Cambridge v. Cambridge Water Co.*, 99 Md. 501. See also *Norris v. Oakman*, 138 Ala. 411; *St. Louis v. J. E. Kaime, etc.*, *Real Estate Co.*, 180 Mo. 309.

921. 2. Power Cannot Be Divested. — *Ft. Smith v. Hunt*, 72 Ark. 556; *Chicago v. Chicago Union Traction Co.*, 199 Ill. 250; *Carbondale v. Wade*, 106 Ill. App. 654; *Bonham v. Citizens St. R. Co.*, 158 Ind. 106; *Capdevielle v. New Orleans, etc.*, R. Co., 110 La. 904; *Eric v. Erie Electric Motor Co.*, 24 Pa. Super. Ct. 77; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647; *Newport News, etc.*, R., etc., Co. v. *Hampton Roads R., etc.*, Co., 102 Va. 795; *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654.

922. 6. Preservation of Public Health — Sanitary Laws — *United States*. — *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 922.

California. — *Odd Fellows' Cemetery Assoc. v. San Francisco*, 140 Cal. 226.

District of Columbia. — *Campbell v. District of Columbia*, 19 App. Cas. (D. C.) 131.

Idaho. — *Sifers v. Johnson*, 7 Idaho 798, 97 Am. St. Rep. 271; *Sweet v. Ballentyne*, 8 Idaho 431.

Maryland. — *State v. Hyman*, 98 Md. 596.

Massachusetts. — *Com. v. Pear*, 183 Mass. 242.

Missouri. — *State v. Cantwell*, 179 Mo. 245.

Nebraska. — *Beha v. State*, 67 Neb. 27.

Nevada. — *Ex p. Boyce*, 27 Nev. 299.

New York. — *People v. Davis*, 78 N. Y. App. Div. 570; *People v. Lochner*, 73 N. Y. App. Div. 120, affirmed 177 N. Y. 145, 101 Am. St. Rep. 773; *Tenement House Dept. v. Moeschén*, 89 N. Y. App. Div. 526, affirmed 179 N. Y. 325.

Utah. — *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971.

Virginia. — *Young v. Com.*, 101 Va. 853.

Washington. — *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893.

Inspection of Factories. — *State v. Vickers*, 186 Mo. 103.

923. 1. Prevention of Contagious Diseases. — *French v. Davidson*, 143 Cal. 658; *La Porta v. Board of Health*, 71 N. J. L. 88.

Diseases of Cattle. — *Livingston v. Ellis County*, (Tex. Civ. App. 1902) 68 S. W. Rep. 723.

3. Vaccination. — *French v. Davidson*, 143 Cal. 658; *Com. v. Pear*, 183 Mass. 242; *State v. Zimmerman*, 86 Minn. 353, 91 Am. St. Rep. 351.

4. *French v. Davidson*, 143 Cal. 658; *State v. Zimmerman*, 86 Minn. 353, 91 Am. St. Rep. 351.

7. A Riparian Owner has been held to be entitled to use the waters of an inland lake or stream in an ordinary and reasonable manner by bathing in it, although a city as lower riparian owner draws its water supply from a point lower down. *People v. Hulbert*, 131 Mich. 156, 100 Am. St. Rep. 588.

8. Drainage, Etc. — *Laguna Drainage Dist. v. Charles Martin Co.*, 144 Cal. 209; *Patrick v. Omaha*, (Neb. 1901) 95 N. W. Rep. 477; *Rude v. St. Marie*, 121 Wis. 634, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 923.

10. Tenement House Dept. v. *Moeschen*, 89 N. Y. App. Div. 526, affirmed 179 N. Y. 325.

12. Burials. — See *Wyse v. Police Com'rs*, 68 N. J. L. 127. Compare *Ex p. Wygant*, 39 Oregon 429, 87 Am. St. Rep. 673.

- 924.** See notes 1, 2.
3. Public Safety. — See note 5.
 Billboards. — See note 6.
925. Fire Escapes. — See note 1.
 Distribution of Circulars. — See note 2.
4. Peace and Order. — See note 6.
 Camp Meetings. — See note 7.
926. Houses of Prostitution. — See note 1.
 Public Meetings in Streets. — See note 3.
5. Public Morals. — See note 4.
 Drunkenness. — See note 5.
 Gambling. — See note 8.
927. Liquor Traffic. — See notes 2, 3.
 Cruelty to Animals. — See note 5.
7. General Welfare. — See note 11.

923. 13. Cemeteries.—Odd Fellows' Cemetery Assoc. *v.* San Francisco, 140 Cal. 226; Palmer *v.* Hickory Grove Cemetery, 84 N. Y. App. Div. 600.

924. 1. Prohibition of Burials.—Odd Fellows' Cemetery Assoc. *v.* San Francisco, 140 Cal. 226. Compare *Ex p.* Wygant, 39 Oregon 429, 87 Am. St. Rep. 673.

2. Odd Fellows' Cemetery Assoc. v. San Francisco, 140 Cal. 226. See also *Ex p.* Wygant, 39 Oregon 429, 87 Am. St. Rep. 673.

5. Public Safety.—*Rosedale v. Hanner*, 157 Ind. 390; *Given v. State*, 160 Ind. 552; *Standard Oil Co. v. Com.*, (Ky. 1904) 82 S. W. Rep. 1020; *State v. Cantwell*, 179 Mo. 245; *State v. Vickens*, 186 Mo. 103; *Ex p. Boyce*, 27 Nev. 299; *Passaic v. Paterson Bill Posting, etc., Co.*, 71 N. J. L. 75; *People v. Lochner*, 73 N. Y. App. Div. 120, *affirmed* 177 N. Y. 145, 101 Am. St. Rep. 773; *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971; *Young v. Com.*, 101 Va. 853.

Carrying Concealed Weapons.—*Orrick v. Akers*, 109 Mo. App. 662.

Explosion of Fireworks Prohibited.—*Centralia v. Smith*, 103 Mo. App. 438.

6. Billboards.—*Whitmier, etc., Co. v. Buffalo*, 118 Fed. Rep. 773; *Chicago v. Gunning System*, 214 Ill. 628; *Passaic v. Paterson Bill Posting, etc., Co.*, 71 N. J. L. 75; *Gunning System v. Buffalo*, 75 N. Y. App. Div. 31.

925. 1. Fire Escapes.—*Louisville Public Library Co. v. Louisville*, (Ky. 1904) 80 S. W. Rep. 1169.

2. Prohibition of Distribution of Circulars in Streets Valid.—*Anderson v. State*, 69 Neb. 686, upholding an ordinance as designed to prevent danger from fire and accumulation of filth; *Philadelphia v. Brabender*, 201 Pa. St. 574, resting the decision on the danger of frightening horses as well as on general considerations of cleanliness.

6. Peace and Good Order.—*McCaffrey v. Thomas*, 4 Penn. (Del.) 437; *Sifers v. Johnson*, 7 Idaho 798, 97 Am. St. Rep. 271; *Sweet v. Ballentyne*, 8 Idaho 431.

A Statute Prohibiting the Mutilation, Defilement, etc., of the National or State Flag is a valid exercise of the police power for the preservation of peace. *People v. Van De Carr*, 91 N. Y. App. Div. 20, *affirmed* 178 N. Y. 425, holding

further that mutilation may consist of printing an advertisement on the flag itself.

7. Camp Meetings.—See *State v. Reynolds*, 77 Conn. 131.

926. 1. Prohibition of House of Ill Fame.—*Ogden v. Madison*, 111 Wis. 413.

3. Fitts v. Atlanta, 121 Ga. 567, 104 Am. St. Rep. 167; *Love v. Judge*, 128 Mich. 545; *People v. Pierce*, 85 N. Y. App. Div. 125.

4. Public Morals.—*State v. Vickens*, 186 Mo. 103; *People v. Lochner*, 73 N. Y. App. Div. 120, *affirmed* 177 N. Y. 145, 101 Am. St. Rep. 773; *Young v. Com.*, 101 Va. 853.

5. Drunkenness.—*McCaffrey v. Thomas*, 4 Penn. (Del.) 437; *Fairmont v. Meyer*, 83 Minn. 456; *Lebanon v. Gordon*, 99 Mo. App. 277.

8. Gambling.—*Louisville v. Wehmhoff*, 116 Ky. 845; *Shreveport v. Schulsinger*, 113 La. 9. See also *Moore v. State*, (Neb. 1904) 99 N. W. Rep. 249.

Lotteries.—*Portland v. Yick*, 44 Oregon 439.

Possession of Lottery Tickets.—*Ex p. McClain*, 134 Cal. 110, 86 Am. St. Rep. 243.

927. 2. Intoxicating Liquors.—*Busch v. Webb*, 122 Fed. Rep. 655; *Carbondale v. Wade*, 106 Ill. App. 654; *Iowa City v. McInnery*, 114 Iowa 586; *Lovilia v. Cobb*, 126 Iowa 557; *State v. New Orleans*, 113 La. 371; *State v. Intoxicating Liquors*, 95 Me. 140; *State v. Bixman*, 162 Mo. 1; *Hoboken v. Goodman*, 68 N. J. L. 217; *Webster v. State*, 110 Tenn. 491, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 927; *Farmville v. Walker*, 101 Va. 323, 99 Am. St. Rep. 870; *Danville v. Hatcher*, 101 Va. 523. See also *McNulty v. Toof*, 116 Ky. 202.

3. Webster v. State, 110 Tenn. 491, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 927; *Danville v. Hatcher*, 101 Va. 523.

No Discrimination Permitted.—*State v. New Orleans*, 113 La. 371.

5. Bland v. People, 32 Colo. 319, 105 Am. St. Rep. 80. See also *People v. Beattie*, 96 N. Y. App. Div. 383.

11. General Welfare.—*Sifers v. Johnson*, 7 Idaho 798, 97 Am. St. Rep. 271; *Sweet v. Ballentyne*, 8 Idaho 431; *Brady v. Mattern*, 125 Iowa 158, 106 Am. St. Rep. 291; *State v. Boehm*, 92 Minn. 374; *Buffalo v. Buffalo Gas Co.*, 81 N. Y. App. Div. 505; *Ex p. Boyce*, 27 Nev. 299; *People v. Lochner*, 73 N. Y. App. Div. 120, *affirmed* 177 N. Y. 145, 101 Am. St.

928. The Restraint of Vagrants and Beggars. — See note 2.

Fire Protection. — See notes 3, 4, 5.

Building Regulations. — See note 6.

Telegraph and Telephone Wires. — See note 7.

929. Streets, Highways, and Sidewalks. — See notes 2, 4, 5.

Game Laws — See note 6.

Sabbath Observance. — See note 7.

930. Nuisances. — See note 3.

Burning of Soft Coal. — See note 4.

Running at Large of Stock. — See note 5.

Rep. 773; *Mt. Carmel v. Fisher*, 21 Pa. Super. Ct. 643; *Livingston v. Ellis County*, (Tex. Civ. App. 1902) 68 S. W. Rep. 723; *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971.

Primary Elections are so far matters of public concern that they are, at the discretion of the legislature, proper objects of reasonable statutory regulation under its police power. *Hopper v. Stack*, 69 N. J. L. 562.

928. 2. *In re Stegenga*, 133 Mich. 55.

3. Fire Limits. — *Griffin v. Gloversville*, 67 N. Y. App. Div. 403; *Chimene v. Baker*, 32 Tex. Civ. App. 520. See also *Winthrop v. New England Chocolate Co.*, 180 Mass. 464; *Roanoke v. Bolling*, 101 Va. 182.

4. Storing Inflammable or Explosive Substances. — *Dobbins v. Los Angeles*, 139 Cal. 179, 96 Am. St. Rep. 95; *In re Daly*, 139 Cal. 216; *Standard Oil Co. v. Danville*, 199 Ill. 50. See also *People v. Lichtman*, 173 N. Y. 63, *reversing* 65 N. Y. App. Div. 76.

5. Demolition of Buildings in Path of Conflagration. — *Chicago v. Jackson*, 196 Ill. 496.

Electric Wires. — *Ft. Smith v. Hunt*, 72 Ark. 556.

Fire Escapes. — *Louisville Public Library Co. v. Louisville*, (Ky. 1904) 80 S. W. Rep. 1169.

Explosion of Fire Crackers, etc., Prohibited. — *Centralia v. Smith*, 103 Mo. App. 438.

Prohibition of Escape of Gas. — *Given v. State*, 160 Ind. 552.

6. Building Regulations. — *Louisville Public Library Co. v. Louisville*, (Ky. 1904) 80 S. W. Rep. 1169; *New York v. Herdje*, 68 N. Y. App. Div. 370; *New York v. Madison Ave. Real Estate Co.*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 535; *New York v. Burleson Hardware Co.*, 89 N. Y. App. Div. 222.

Alterations and Repairs. — *O'Brien v. Louer*, 158 Ind. 211.

7. Telegraph and Telephone Wires. — *Ft. Smith v. Hunt*, 72 Ark. 556; *Wichita v. Missouri*, etc., *Telephone Co.*, 70 Kan. 441; *Northwestern Telephone Exch. Co. v. Minneapolis*, 81 Minn. 140.

929. 2. Use of Streets. — *Love v. Judge*, 128 Mich. 545; *Combs v. Lakewood Tp.*, 68 N. J. L. 582; *New York v. Reesing*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 129, *affirmed* 77 N. Y. App. Div. 417; *Newport News*, etc., *R.*, etc., *Co. v. Hampton Roads R.*, etc., *Co.*, 102 Va. 795.

Use of Vehicles on Street. — *Simpson v. Whatcom*, 33 Wash. 392, 99 Am. St. Rep. 951, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 929.

Regulating Speed of Street Cars. — *Bonham v. Citizens St. R. Co.*, 158 In. 106.

Imposition of License Fee on Vehicles. — *Bray*

v. State, 140 Ala. 172; *Combs v. Lakewood Tp.*, 68 N. J. L. 582.

4. Sidewalks. — *Rosedale v. Hanner*, 157 Ind. 390.

5. Clearing Away Ice and Snow. — *State v. McMahon*, 76 Conn. 97; *Chicago v. Chicago Union Traction Co.*, 199 Ill. 259.

6. Game Laws. — *Ex p. Kenneke*, 136 Cal. 527, 89 Am. St. Rep. 177; *People v. Van Pelt*, 130 Mich. 621.

7. Sabbath Observance. — *Lovilia v. Cobb*, 126 Iowa 557; *People v. Hagan*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 349; *Edis v. Butler*, 11 Ohio Dec. 245, 8 Ohio N. P. 183; *Ex p. Brown*, (Tex. Crim. 1901) 61 S. W. Rep. 396; *Fay v. State*, 44 Tex. Crim. 381. See also the title SUNDAYS AND HOLIDAYS, **390. 11.**

Works of Necessity and Charity Exceptions. — *Strauss v. Conneaut*, 23 Ohio Cir. Ct. 320. And see the title SUNDAYS AND HOLIDAYS, **399. 6 et seq.**

Christmas. — Under the general welfare clause in its constitution, a city cannot prohibit the carrying on of a lawful vocation on Christmas day, when there is nothing in its character which is calculated to interfere with the peace, good order, and safety of the community. *Watson v. Thomson*, 116 Ga. 546, 94 Am. St. Rep. 137.

930. 3. Nuisances. — *Whitmier, etc., Co. v. Buffalo*, 118 Fed. Rep. 773; *Odd Fellows' Cemetery Assoc. v. San Francisco*, 140 Cal. 226; *Sifers v. Johnson*, 7 Idaho 798, 97 Am. St. Rep. 271; *Chicago v. Gunning System*, 214 Ill. 628; *St. Louis v. Fischer*, 167 Mo. 654, 99 Am. St. Rep. 614; *Patrick v. Omaha*, (Neb. 1901) 95 N. W. Rep. 477; *Health Dept. v. Philip, etc., Ebling Brewing Co.*, (Municipal Ct.) 38 Misc. (N. Y.) 537; *Rude v. St. Marie*, 121 Wis. 634.

Noxious Weeds. — See *State v. Boehm*, 92 Minn. 374; *St. Louis v. Galt*, 179 Mo. 8.

4. Soft Coal. — *Pittsburg v. W. H. Keech Co.*, 21 Pa. Super. Ct. 548. See also *People v. Horton*, (Ct. Spec. Sess.) 41 Misc. (N. Y.) 309.

Smoke Ordinances Valid. — *St. Paul v. Robbins*, 93 Minn. 138; *St. Paul v. Haugbro*, 93 Minn. 59, 106 Am. St. Rep. 427. See also *Health Dept. v. Philip, etc., Ebling Brewing Co.*, (Municipal Ct.) 38 Misc. (N. Y.) 537. But see *Jersey City v. Abercrombie*, (N. J. 1904) 58 Atl. Rep. 73.

5. Stock. — *Smith v. Collier*, 118 Ga. 306; *Crum v. Bray*, 121 Ga. 709; *Thompson v. Milten*, (Ky. 1903) 74 S. W. Rep. 288; *Jeans v. Morrison*, 99 Mo. 208; *Dorton v. Burks*, 99 Mo. App. 165; *Doniphan v. White*, 110 Mo. App. 504. See also *Sifers v. Johnson*, 7 Idaho 798, 97 Am. St. Rep. 271.

930. Dogs. — See notes 6, 7, 8.

Summary Killing. — See note 9.

931. 8. Regulation of Business and Business Enterprises — *a.* IN GENERAL. — See notes 1, 2.

Instances of Regulation by Police Power. — See notes 4, 5, 6.

932. See notes 1, 2, 7.

b. OCCUPATIONS REQUIRING SPECIAL QUALIFICATIONS. — See note 9.

Physicians and Pharmacists. — See notes 10, 11.

Practice of Law. — See note 12.

933. *c.* INSURANCE. — See note 2.

e. RAILROADS. — See notes 5, 6, 9.

934. Crossings. — See note 3.

f. MANUFACTURE AND SALE OF FOOD. — See note 4.

g. WEIGHTS AND MEASURES. — See note 7.

930. 6. Police Regulation of Dogs. — *People v. Edelstein*, 91 N. Y. App. Div. 447.

7. Dog License or Tax. — *Gibson v. Harrison*, 69 Ark. 385; *Sibley v. Lastrico*, 122 Iowa 211.

8. Muzzling. — *Sibley v. Lastrico*, 122 Iowa 211.
9. Summary Killing. — *Gibson v. Harrison*, 69 Ark. 385. See also *Sibley v. Lastrico*, 122 Iowa 211.

931. 1. Regulation of Business Enterprises. — *Denninger v. Recorder's Ct.*, 145 Cal. 629; *Sifers v. Johnson*, 7 Idaho 798, 97 Am. St. Rep. 271; *Brady v. Mattern*, 125 Iowa 158, 106 Am. St. Rep. 291; *St. Louis v. Fischer*, 167 Mo. 654, 99 Am. St. Rep. 614; *State v. Cantwell*, 179 Mo. 245; *Young v. Com.*, 101 Va. 853.

Impartiality and Absence of Unjust Discrimination Required. — *State v. New Orleans*, 113 La. 371.

Temporary Business Prohibited Within Mile of Fair. — *State v. Reynolds*, 77 Conn. 131, 58 Atl. Rep. 755.

Auctioneers. — *Margolies v. Atlantic City*, 67 N. J. L. 82.

Hacks — Rate of Hire. — *Bray v. State*, 140 Ala. 172; *Fonsler v. Atlantic City*, 70 N. J. L. 125.

Mining — Payment of Wages of Miners. — *Com. v. Reinecke Coal Min. Co.*, 117 Ky. 885.

Omnibuses, Automobiles, Etc. — *Fonsler v. Atlantic City*, 70 N. J. L. 125; *Atlantic City v. Fanslar*, 70 N. J. L. 491.

Racetracks. — *Greenberg v. Western Turf Assoc.*, 140 Cal. 357.

Sweatshops. — *State v. Hyman*, 98 Md. 596.

Water Rates. — *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647.

2. *Brady v. Mattern*, 125 Iowa 158, 106 Am. St. Rep. 291.

4. Markets. — *State v. Smith*, 123 Iowa 654; *New Orleans v. Faber*, 105 La. 208; *New Orleans v. Vidalat*, 105 La. 132; *Crowley v. Rucker*, 107 La. 213; *Buffalo v. Hill*, 79 N. Y. App. Div. 402; *Mt. Carmel v. Fisher*, 21 Pa. Super. Ct. 643.

5. Victualing Shops. — *People v. Hagan*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 349.

6. Slaughterhouses. — *Territory v. Denver, etc.*, R. Co., (N. Mex. 1904) 78 Pac. Rep. 71.

932. 1. Junkshops. — *Com. v. Mintz*, 19 Pa. Super. Ct. 283.

2. Second-hand Shops. — *Com. v. Mintz*, 19 Pa. Super. Ct. 283.

7. Hawking and Peddling. — *Kansas City v. Overton*, 68 Kan. 560; *Muskegon v. Zeeryp*, 134 Mich. 181; *Mechanicsburg v. Koons*, 18 Pa. Super. Ct. 131; *Warden's License*, 24 Pa. Super. Ct. 75.

9. *Ex p. Whitley*, 144 Cal. 167; *State v. Currens*, 111 Wis. 431.

Barbers. — *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893.

10. Physicians and Surgeons. — *People v. Reetz*, 127 Mich. 87; *State v. Biggs*, 133 N. Car. 729, 98 Am. St. Rep. 731; *State v. Currens*, 111 Wis. 431. See also *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893.

Regulating Practice of Dentistry. — *Ex p. Whitley*, 144 Cal. 167; *State v. Chapman*, 69 N. J. L. 464, affirmed 70 N. J. L. 339. See also *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893.

11. Pharmacists. — *State Board of Pharmacy v. Cassidy*, 115 Ky. 690. See also *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893.

12. See *State v. Currens*, 111 Wis. 431.

933. 2. Insurance Subject to Regulation. — *Metropolitan L. Ins. Co. v. People*, 209 Ill. 42, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 933 and supporting the whole text paragraph.

5. Railroads. — *Chicago v. Chicago Union Traction Co.*, 199 Ill. 259; *Chicago, etc., R. Co. v. People*, 212 Ill. 103; *Ottawa v. Bodley*, 67 Kan. 178; *Lexington Grocery Co. v. Southern R. Co.*, 136 N. Car. 396.

6. Fencing. — *Sanger v. Chesapeake, etc., R. Co.*, 102 Va. 86.

9. Speed. — *Chicago, etc., R. Co. v. Carlinville*, 200 Ill. 314, 93 Am. St. Rep. 190; *Plattsburg v. Hagenbush*, 98 Mo. App. 669; *Boggero v. Southern R. Co.*, 64 S. Car. 104; *Missouri, etc., R. Co. v. Owens*, (Tex. Civ. App. 1903) 75 S. W. Rep. 579.

934. 3. Abolition of Grade Crossings. — *Chicago v. Jackson*, 196 Ill. 496; *Osburn v. Chicago*, 105 Ill. App. 217.

Safety Gates. — *Chesapeake, etc., R. Co. v. Maysville*, (Ky. 1902) 69 S. W. Rep. 728.

Watchman at Crossing. — *Com. v. Philadelphia, etc., R. Co.*, 23 Pa. Super. Ct. 205.

4. Crossman *v. Lurman*, 192 U. S. 189.

7. Weights and Measures. — *Wills v. Ft. Smith*, 70 Ark. 221. See also *New York v. Hewitt*, 91 N. Y. App. Div. 445.

- 934.** *i.* HOURS OF LABOR. — See note 9.
j. PREVENTION OF FRAUD AND IMPOSITION. — See note 10.
 Food Products. — See note 11.

935. See note 1.

Payment of Wages in Scrip. — See note 5.

k. LICENSING. — See note 7.

VII. LIMITATIONS ON ITS EXERCISE — 1. In General. — See note 9.

936. See notes 1, 2, 3, 4.

2. Power of Courts. — See notes 5, 6, 7.

937. See note 1.

934. 9. Hours of Labor. — *State v. Cantwell*, 179 Mo. 245; *Wenham v. State*, 65 Neb. 394; *Ex p. Boyce*, 27 Nev. 299. But see *People v. Lochner*, 198 U. S. 45, reversing 177 N. Y. 145, 101 Am. St. Rep. 773; *Cleveland v. Clements Bros. Constr. Co.*, 67 Ohio St. 197, 93 Am. St. Rep. 670.

Child Labor. — *New York v. Chelsea Jute Mills*, (Municipal Ct.) 43 Misc. (N. Y.) 266.

10. Fraud, Imposition, and Deception. — *Bazemore v. State*, 121 Ga. 619; *State v. Rogers*, 95 Me. 94, 85 Am. St. Rep. 395; *State v. Crescent Creamery Co.*, 83 Minn. 284, 85 Am. St. Rep. 464; *State v. Williams*, 93 Minn. 155; *Buffalo v. Buffalo Gas Co.*, 81 N. Y. App. Div. 505; *Walton v. Toledo*, 23 Ohio Cir. Ct. 547.

11. Prohibition of Sale. — *Crossman v. Lurman*, 192 U. S. 189; *Arbuckle v. Blackburn*, (C. C. A.) 113 Fed. Rep. 616; *State v. Armour Packing Co.*, 124 Iowa 323; *State v. Rogers*, 95 Me. 94, 85 Am. St. Rep. 395; *People v. Rotter*, 131 Mich. 250; *State v. Rumberg*, 86 Minn. 399; *Beha v. State*, 67 Neb. 27; *People v. Meyer*, 89 N. Y. App. Div. 185; *Com. v. Seiler*, 20 Pa. Super. Ct. 260; *Com. v. Kevin*, 202 Pa. St. 23, 90 Am. St. Rep. 613; *Norfolk v. Flynn*, 101 Va. 473, 99 Am. St. Rep. 918.

935. 1. Indicating True Nature. — *Com. v. Seiler*, 20 Pa. Super. Ct. 260. See also *People v. Meyer*, 89 N. Y. App. Div. 185, wherein the court said that it was within the power of the legislature to prohibit the sale even of an artificial product, the appearance of which had been altered so as to make it look like another and wholly different substance, although the seller discloses its true character.

5. See *Com. v. Reinecke Coal Min. Co.*, 117 Ky. 885.

7. Licensing. — *Belding v. Rector*, 71 Ark. 463; *Ft. Smith v. Hunt*, 72 Ark. 556; *Kansas City v. Overton*, 68 Kan. 560; *Margolies v. Atlantic City*, 67 N. J. L. 82; *Buffalo v. Hill*, 79 N. Y. App. Div. 402; *People v. Vandecarr*, 81 N. Y. App. Div. 128, affirmed 175 N. Y. 440; *State v. Hunt*, 129 N. Car. 686, 85 Am. St. Rep. 758; *Taylor v. Postal Tel., etc., Co.*, 16 Pa. Super. Ct. 344; *New Hope v. Western Union Tel. Co.*, 16 Pa. Super. Ct. 306; *Erie v. Erie Electric Motor Co.*, 24 Pa. Super. Ct. 77; *Com. v. Andrews*, 24 Pa. Super. Ct. 571; *Norfolk, etc., R. Co. v. Suffolk*, 103 Va. 498.

9. California Reduction Co. v. Sanitary Reduction Works, (C. C. A.) 126 Fed. Rep. 29; *Sifers v. Johnson*, 7 Idaho 798, 97 Am. St. Rep. 271; *Chicago v. Jackson*, 196 Ill. 406; *State v. Armour Packing Co.*, 124 Iowa 323; *People v. Beattie*, 96 N. Y. App. Div. 383; *People v.*

Lochner, 73 N. Y. App. Div. 120, affirmed 177 N. Y. 145, 101 Am. St. Rep. 773.

936. 1. Limits Cannot Be Definitely Fixed. — *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29; *People v. Lochner*, 73 N. Y. App. Div. 120, affirmed 177 N. Y. 145, 101 Am. St. Rep. 773, but reversed on the ground that the limits were exceeded 198 U. S. 45; *Pittsburg v. W. H. Keech Co.*, 21 Pa. Super. Ct. 548; *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971.

Not Confined to Nuisances. — *Dobbins v. Los Angeles*, 139 Cal. 179, 96 Am. St. Rep. 95.

2. Limitations. — *People v. Lochner*, 73 N. Y. App. Div. 120, affirmed 177 N. Y. 145, 101 Am. St. Rep. 773, but reversed on another point 198 U. S. 45; *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971.

Must Have Relation to Promotion of "Health, Comfort, Safety, and Welfare of Society." — *People v. Beattie*, 96 N. Y. App. Div. 383.

Limited to Preservation of Public Health, Safety, and Morals. — *Ex p. Dickey*, 144 Cal. 324. *Contra*, *State v. Boehm*, 92 Minn. 374.

3. Judicial Question. — *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29; *In re Smith*, 143 Cal. 368; *Bland v. People*, 32 Colo. 319, 105 Am. St. Rep. 80; *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971.

4. California Reduction Co. v. Sanitary Reduction Works, (C. C. A.) 126 Fed. Rep. 29; *In re Smith*, 143 Cal. 368.

5. Discretion of Legislature. — *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29; *Odd Fellows' Cemetery Assoc. v. San Francisco*, 140 Cal. 226; *Bland v. People*, 32 Colo. 319, 105 Am. St. Rep. 80; *State v. Armour Packing Co.*, 124 Iowa 323; *Ex p. Boyce*, 27 Nev. 299. See also *Dobbins v. Los Angeles*, 139 Cal. 179, 96 Am. St. Rep. 95.

6. California Reduction Co. v. Sanitary Reduction Works, (C. C. A.) 126 Fed. Rep. 29; *Chicago v. Jackson*, 196 Ill. 406; *State v. Armour Packing Co.*, 124 Iowa 323; *Passaic v. Paterson Bill Posting, etc., Co.*, 71 N. J. L. 75. See also *Anderson v. State*, (Neb. 1903) 96 N. W. Rep. 149.

Courts Will Not Interfere with the discretion of the legislature in its exercise of the power to provide for the public welfare so long as it keeps within the fair and reasonable scope of its powers. *Brady v. Mattern*, 125 Iowa 158, 106 Am. St. Rep. 291.

7. California Reduction Co. v. Sanitary Reduction Works, (C. C. A.) 126 Fed. Rep. 29.

937. 1. California Reduction Co. v. Sani-

- 937. 3. Subordination to Constitution — a. IN GENERAL.** — See note 3.
b. EFFECT OF PARTICULAR CONSTITUTIONAL GUARANTIES —
(1) Due Process of Law. — See note 4.
938. (2) Equal Protection of Laws. — See note 1.
(3) Impairment of Obligation of Contracts. — See note 2.
(4) Personal Liberty — Right to Contract. — See note 4.
4. Public Good Must Be the Object. — See note 5.
939. See notes 1, 2, 5.
5. Private Rights. — See note 6.
940. See note 1.
941. POLICY. — See note 6.
 Playing Policy. — See note 7.
942. POLITICAL PARTY. — See note 1.
POLITICAL RIGHTS. — See note 2.

tary Reduction Works, (C. C. A.) 126 Fed. Rep. 29.

937. 3. Subordination to Constitution. — State *v. Armour Packing Co.*, 124 Iowa 323; State *v. Hyman*, 98 Md. 596; *Pittsburg v. W. H. Keech Co.*, 21 Pa. Super. Ct. 548; *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971.

The Fact that Some Constitutional Right May Be Incidentally Affected will not render invalid a police regulation otherwise valid and not operating unreasonably. *Anderson v. State*, (Neb. 1903) 96 N. W. Rep. 149.

4. Due Process of Law. — *Odd Fellows' Cemetery Assoc. v. San Francisco*, 140 Cal. 226; *Sifers v. Johnson*, 7 Idaho 798, 97 Am. St. Rep. 271; *Sweet v. Ballentyne*, 8 Idaho 431; *Given v. State*, 160 Ind. 552; *Shreveport v. Schulsinger*, 113 La. 9; *Ex p. Boyce*, 27 Nev. 299; *People v. Lochner*, 177 N. Y. 145, 101 Am. St. Rep. 773, *reversed* on other grounds 198 U. S. 45; *State v. Nichols*, 28 Wash. 628.

The Prohibition of a Business within four hundred feet of the administration department of a state penal institution, where the business is not inherently a nuisance and its prohibition in that locality is not required by the interests of the general public, is taking private property without due process of law. *Borger v. State*, 25 Ohio Cir. Ct. 263.

938. 1. Equal Protection of the Laws. — *Sweet v. Ballentyne*, 8 Idaho 431; *People v. Lochner*, 73 N. Y. App. Div. 120, *affirmed* 177 N. Y. 145, 101 Am. St. Rep. 773, but *reversed* on another point 198 U. S. 45; *State v. Nichols*, 28 Wash. 628; *State v. Currens*, 111 Wis. 431. See also *People v. Zimmerman*, 102 N. Y. App. Div. 103; *State v. Biggs*, 133 N. Car. 729, 98 Am. St. Rep. 731.

2. Impairment of Obligation of Contracts. — *Odd Fellows' Cemetery Assoc. v. San Francisco*, 140 Cal. 226; *Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654. See also *Com. v. Reinecke Coal Min. Co.*, 117 Ky. 885.

4. State v. Cantwell, 179 Mo. 245. See also *Ex p. Dickey*, 144 Cal. 234.

5. Public Good Must Be the Object. — *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29; *Ex p. Dickey*, 144 Cal. 234; *Iler v. Ross*, 64 Neb. 710, 97 Am. St. Rep. 676; *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971. See also *Hopper v. Stack*, 69 N. J. L. 562.

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939. 1. Provisions Must Substantially Relate to Assumed Object. — *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29; *Macfarland v. Washington, etc., R. Co.*, 18 App. Cas. (D. C.) 456; *Campbell v. District of Columbia*, 19 App. Cas. (D. C.) 131; *Iler v. Ross*, 64 Neb. 710, 97 Am. St. Rep. 676; *Signell v. Wallace*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 656. See also *Odd Fellows' Cemetery Assoc. v. San Francisco*, 140 Cal. 226.

2. California Reduction Co. v. Sanitary Reduction Works, (C. C. A.) 126 Fed. Rep. 29; *Osburn v. Chicago*, 105 Ill. App. 217; *Iler v. Ross*, 64 Neb. 710, 97 Am. St. Rep. 676; *Signell v. Wallace*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 656.

5. California Reduction Co. v. Sanitary Reduction Works, (C. C. A.) 126 Fed. Rep. 29; *People v. Zimmerman*, 102 N. Y. App. Div. 103; *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971. See also *Com. v. Reinecke Coal Min. Co.*, 117 Ky. 885.

6. Arbitrary Infringement of Private Rights. — *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29; *Signell v. Wallace*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 656.

940. 1. Personal and Property Rights Subject to Police Power. — *California Reduction Co. v. Sanitary Reduction Works*, (C. C. A.) 126 Fed. Rep. 29, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 940.

Corporations. — *Franklin L. Ins. Co. v. People*, 200 Ill. 619; *Cook v. Howland*, 74 Vt. 393, 93 Am. St. Rep. 912.

It Is of the Very Essence of the exercise by the legislature of its police power that citizens may, for the public good, be constrained in their conduct, even with respect to matters in themselves natural and otherwise right. *Hopper v. Stack*, 69 N. J. L. 562.

941. 6. State v. Pittsburg, etc., R. Co., 68 Ohio St. 9.

Old Age Endowment Policy. — *Prudential Ins. Co. v. Inland Revenue Com'rs*, (1904) 2 K. B. 658.

7. Playing Policy. — *State v. Wilkerson*, 170 Mo. 184.

942. 1. Political Party. — *Davidson v. Hanson*, 87 Minn. 211; *Independence Party Nomination*, 208 Pa. St. 108.

2. Political Rights. — *People v. Barrett*, 203 Ill.

942. POLITICS — POLITICAL. — See note 3.

943. POOL. — See note 2.

99; *Winnett v. Adams*, (Neb. 1904) 99 N. W. Rep. 681.

942. 3. Political Subdivision. — School Dist. *v. Boyle*, 182 Mo. 347.

943. 2. Gaming. — *Ex p. Powell*, 43 Tex. Crim. 391.

Pool Selling — Pool Seller — Pool Room. — See *Ex p. Powell*, 43 Tex. Crim. 391.

POOR AND POOR LAWS.

BY BRISCOE B. CLARK.

947. I. WHO ARE INCLUDED IN TERMS "POOR," "INDIGENT PERSONS," "PAUPERS," ETC. — See note 1.

948. Possession or Ownership of Property. — See note 3.

949. II. SETTLEMENT OF PAUPERS — 2. Power of Legislature to Fix Settlement. — See note 5.

951. 4. Acquisition of Settlement — b. SETTLEMENT OF RIGHT — (2) Who May Acquire Settlement of Right — (b) Persons Non Sui Juris — aa. IN GENERAL. — See note 2.

bb. MINORS. — See notes 6, 7.

952. cc. MARRIED WOMEN. — See notes 2, 4.

953. (3) Residence — (a) In General. — See note 3.
The Length of Residence. — See note 5.

954. (d) What Constitutes Residence — aa. IN GENERAL. — See note 4.

955. Control over Place of Abode. — See notes 4, 5.

bb. ANIMUS MANENDI. — See notes 7, 8.

cc. PROOF OF RESIDENCE. — See notes 11, 14.

956. Particular Facts Tending to Show Residence — Voting. — See note 2.
Storing Effects, Etc. — See note 3.

947. 1. Who Are Paupers, Etc. — *Delaware County v. Delaware*, 105 N. Y. App. Div. 129.

Proof that Bastard Child May Become Chargeable on County. — See *McTier v. Crosby*, 120 Ga. 878.

948. 3. Pauper Notwithstanding Income of One Hundred Dollars a Year. — *Old Saybrook v. Milford*, 76 Conn. 152.

949. 5. Arbitrary Power of Legislature to Fix Settlement. — *Portland v. Auburn*, 96 Me. 501; *Bradford v. Worcester*, 184 Mass. 557.

Statutory Proceedings to Fix Settlement. — See *Poor Dist. v. Poor Dist.*, 18 Pa. Super. Ct. 428.

951. 2. Persons Non Sui Juris. — *Phillips v. Boston*, 183 Mass. 314; *Jericho v. Morristown*, 77 Vt. 367.

6. Minors Incapable of Acquiring Settlement. — *Danville v. Hartford*, 73 Vt. 300; *South Burlington v. Cambridge*, 77 Vt. 289; *Jericho v. Morristown*, 77 Vt. 367.

7. Illegitimate Children. — Compare *West Ham Union v. Holbeach Union*, (1904) 2 K. B. 121.

952. 2. Married Woman. — *Winslow v. Pittsfield*, 95 Me. 53; *Williamsburg v. Adams*, 184 Mass. 263; *Jericho v. Morristown*, 77 Vt. 367.

A Woman Who Has Left Her Husband by mutual agreement cannot acquire a settlement for herself. *Essex v. Jericho*, 76 Vt. 104.

4. Williamsburg v. Adams, 184 Mass. 263; *Bradford v. Worcester*, 184 Mass. 557.

953. 3. Settlement Acquired by Residence. — *Williamsburg v. Adams*, 184 Mass. 263.

Computation of Time — Exclusion of Period of Confinement in Hospital. — See *Guardians of Poor v. Guardians of Poor*, (1903) 2 K. B. 498, affirming (1903) 1 K. B. 19.

5. Length of Residence. — *Orland v. Penobscot*, 97 Me. 29.

954. 4. Meaning of Term "Residence," Etc. — *Fairfield v. Easton*, 73 Conn. 735; *Knox v. Montville*, 98 Me. 493; *Phillips v. Boston*, 183 Mass. 314; *Bradford v. Worcester*, 184 Mass. 557.

955. 4. Control over Place of Abode. — *Monroe v. Hampden*, 95 Me. 111.

5. Fairfield v. Easton, 73 Conn. 735; *South Thomaston v. Friendship*, 95 Me. 201.

7. Animus Manendi. — *Phillips v. Boston*, 183 Mass. 314.

No Presumption as to Animus Manendi — Question of Fact. — *Monroe v. Hampden*, 95 Me. 111.

8. Fairfield v. Easton, 73 Conn. 735; *Monroe v. Hampden*, 95 Me. 111; *Palmer v. Hampden*, 182 Mass. 511.

11. Declarations of Intention. — *Knox v. Montville*, 98 Me. 493.

14. Testimony as to Intention. — *Knox v. Montville*, 98 Me. 493.

956. 2. Voting. — *Fairfield v. Easton*, 73 Conn. 735; *Monroe v. Hampden*, 95 Me. 111.

3. Storing Effects, Etc. — *Fairfield v. Easton*, 73 Conn. 735.

- 956.** (e) Continuity of Residence — *aa.* IN GENERAL. — See notes 8, 9, 11.
- 957.** *bb.* ABSENCE ANIMO REVERTENDI. — See note 4.
- 958.** Retention of Place of Habitation. — See note 2.
Proof of Animus Revertendi. — See note 5.
In Case of an Absence Without Explanation. — See note 9.
- (4) *Real Estate Qualifications* — (a) Ownership of Real Estate — *aa.* IN GENERAL. — See note 11.
- 959.** *bb.* SUFFICIENCY OF TITLE AND ESTATE. — See note 1.
- 961.** *cc.* RESIDENCE — OCCUPATION OF ESTATE. — See note 2.
- 965.** (6) *Payment of Taxes* — (a) IN GENERAL. — See note 1.
Failure to Assess Taxes. — See note 4.
(b) Character of Tax — Validity of Tax. — See note 13.
- 973.** (12) *How Acquisition of Settlement May Be Prevented* — (b) Effect of Receipt of Pauper Supplies — *aa.* IN GENERAL. — See note 5.
- 974.** Burden of Proof. — See note 2.
cc. ACTUAL RECEIPT OF SUPPLIES REQUIRED. — See note 11.
- 975.** *ff.* WHAT CONSTITUTES PAUPER SUPPLIES — Aid from Individuals. — See note 9.
Soldier Relief. — See note 13.
- 976.** Maintenance of Member of Family in Lunatic Hospital, Etc. — See note 1.
- 979.** *c.* SETTLEMENT THROUGH INCORPORATION, DIVISION, AND ANNEXATION OF TERRITORY — (2) *Division of Corporations and Creation Therefrom of New Corporation* — Special Statutory Provisions. — See note 6.
- 980.** (3) *Annexation or Change of Boundaries of Existing Corporation*. — See note 5.
- 981.** *e.* DERIVATIVE SETTLEMENT — (2) *Husband and Wife* — (b) *Derivative Settlement as Wife* — *aa.* IN GENERAL. — See note 5.

956. 8. Continuous Residence Required. — *Tendring Union v. Ipswich Union*, 67 J. P. 304; *Fairfield v. Easton*, 73 Conn. 735.

9. Departure Without Intention to Return. — *South Thomaston v. Friendship*, 95 Me. 201, holding further that a fixed intention not to return is not necessary.

11. Acquisition of Another Residence Unnecessary. — *South Thomaston v. Friendship*, 95 Me. 201.

957. 4. Absence Animo Revertendi. — *Fairfield v. Easton*, 73 Conn. 735.

A General Intent to Return in the Event of Certain Contingencies is not sufficient *animus revertendi*. *Tendring Union v. Ipswich Union*, 67 J. P. 304.

An Intention to Return at an Indefinite Time is not sufficient to prevent a break in the continuity of residence. *Palmer v. Hampden*, 182 Mass. 511.

958. 2. Retention of Place of Habitation. — *South Thomaston v. Friendship*, 95 Me. 201.

5. Declarations at Time of Removal. — *Atkinson v. Orneville*, 96 Me. 311.

9. Presumption as to Intention. — Compare *South Thomaston v. Friendship*, 95 Me. 201.

11. Ownership and Occupation of Real Estate. — *Overseer of Poor v. Overseers of Poor*, 20 Pa. Super. Ct. 629.

959. 1. Freehold Estate Required. — *Poor Dist. v. Poor Dist.*, 20 Pa. Super. Ct. 270.

961. 2. Residence — Occupation of Estate. — *Poor Dist. v. Poor Dist.*, 20 Pa. Super. Ct. 270.

965. 1. Residence and Payment of Taxes. — *East Franklin Tp. Overseers v. Rayburn Tp. Overseers*, 23 Pa. Super. Ct. 522; *Highland Tp.*

Poor Dist. v. Jefferson County Poor Dist., 25 Pa. Super. Ct. 601.

4. Assessment of Tax. — In *Maine* neither the act of the assessors in the assessment of a tax on an individual nor their omission in its nonassessment is evidence for or against a town to prove the residence of such individual. *Rockland v. Union*, (Me. 1905) 60 Atl. Rep. 705.

13. *Highland Tp. Poor Dist. v. Jefferson County Poor Dist.*, 25 Pa. Super. Ct. 601.

973. 5. In the Absence of Statutory Provision, a receipt of pauper supplies does not, it seems, prevent the acquisition of a settlement. *East Franklin Tp. Overseers v. Rayburn Tp. Overseers*, 23 Pa. Super. Ct. 522.

974. 2. Burden of Proof. — *South Thomaston v. Friendship*, 95 Me. 201. See also *Williamsburg v. Adams*, 184 Mass. 263.

11. *Orland v. Penobscot*, 97 Me. 29.

975. 9. Aid from Individuals — Private Charity. — *Orland v. Penobscot*, 97 Me. 29.

13. *Maine Statute* — *Inmates of Soldiers' Home Acquire No Settlement*. — *Winslow v. Pittsfield*, 95 Me. 53.

976. 1. Supplies to Lunatic. — *Shrewsbury v. Worcester*, 180 Mass. 38.

979. 6. Special Statutory Provisions. — *Worcester Union v. Birmingham Union*, 65 J. P. 771; *Preston Union v. Lewisham Union*, 91 L. T. N. S. 498.

980. 5. Annexation of Territory. — Compare *Guardians of Poor v. London County Council*, (1902) 1 K. B. 562, (1904) A. C. 40.

981. 5. Wife Takes Settlement of Husband. — *Portland v. Auburn*, 96 Me. 501; *Hudson v. Charleston*, 97 Me. 17; *Winslow v. Troy*, 97 Me. 130; *Bradford v. Worcester*, 184 Mass.

982. *bb.* HUSBAND SETTLED IN SISTER STATE. — See note 7.

cc. HUSBAND UNSETTLED. — See note 9.

983. *ee.* VOID MARRIAGE. — See note 4.

984. *gg.* MARRIAGE OF PAUPERS. — See note 4.

(3) *Children* — (a) Legitimate Children — *aa.* SETTLEMENT OF FATHER — (*aa*) *In General.* — See note 7.

985. See note 4.

(*bb*) *Children Non Compotes Mentis.* — See note 7.

986. (*hh*) *Effect of Emancipation of Child.* — See note 10.

987. *bb.* SETTLEMENT OF MOTHER — (*aa*) *Father Unsettled.* — See note 6.

988. (b) *Illegitimate Children* — *aa.* COMMON-LAW RULE. — See note 7.

990. *bb.* STATUTORY CHANGES. — See note 2.

991. 5. Loss of Settlement. — See note 4.

992. Power of Legislature. — See note 2.

Presumption as to Continuance of Settlements. — See note 3.

6. Proof of Settlement — *b.* BURDEN OF PROOF. — See note 12.

994. III. REMOVAL OF PAUPERS — 1. General Power of Removal. — See notes 1, 2.

996. 2. Who Are Removable — *g.* SEPARATION OF HUSBAND AND WIFE. — See note 5.

1000. 5. Conclusiveness of Removal Orders on Settlement of Pauper. — See note 1.

IV. GENERAL MUNICIPAL LIABILITY FOR SUPPORT OF PAUPERS — Liability Statutory. — See note 5.

557. See, however, *Jericho v. Morristown*, 77 Vt. 367.

982. 7. Husband Settled in Sister State. — *Portland v. Auburn*, 96 Me. 501 (by statute).

9. Husband Unsettled. — *Winslow v. Pittsfield*, 95 Me. 53.

983. 4. Where a Marriage Is Annulled on the ground of mental incapacity of the husband, the woman's pauper settlement remains as it was prior to the marriage. *Winslow v. Troy*, 97 Me. 130.

984. 4. Maine Statute. — *Hudson v. Charleston*, 97 Me. 17.

7. Derivative Settlement of Father. — *Winslow v. Pittsfield*, 95 Me. 53; *South Thomaston v. Friendship*, 95 Me. 201; *Carthage v. Canton*, 97 Me. 473.

Foster Child Held to Have Acquired Settlement of Foster Parents. — *People v. Barlow*, 134 Mich. 394.

985. 4. Settlement Acquired by Father After Birth of Child. — *Highland Tp. Poor Dist. v. Jefferson County Poor Dist.*, 25 Pa. Super. Ct. 601.

7. *Children Non Compotes Mentis.* — See *People v. Barlow*, 134 Mich. 394.

986. 10. Effect of Emancipation. — *Carthage v. Canton*, 97 Me. 473.

987. 6. Settlement of Mother When Father Unsettled. — *Winslow v. Pittsfield*, 95 Me. 53; *Bradford v. Worcester*, 184 Mass. 557.

988. 7. *Illegitimate Children*. — Place of Birth — Common Law. — *West Ham Union v. Holbeach Union*, (1903) 2 K. B. 627.

990. 2. *West Ham Union v. Holbeach Union*, (1903) 2 K. B. 627.

991. 4. Loss of Settlement. — *Carthage v. Canton*, 97 Me. 473; *Phillips v. Boston*, 183 Mass. 314; *Williamsburg v. Adams*, 184 Mass. 263.

Loss of Derivative Settlement. — Under the Maine statute providing for loss of settlement by five years' residence out of the state, a married woman loses her settlement where her husband abandons her within the state and lives for five years out of the state. *Portland v. Auburn*, 96 Me. 501.

992. 2. Statute Not Retroactive. — See *Lawrence v. Methuen*, 187 Mass. 592.

3. Presumption as to Continuance of Settlements. — *South Thomaston v. Friendship*, 95 Me. 201; *Williamsburg v. Adams*, 184 Mass. 263.

12. Burden of Proof. — *Fairfield v. Easton*, 73 Conn. 735; *Atkinson v. Orneville*, 96 Me. 311.

994. 1. General Power to Remove Paupers. — *Berks County Poor Directors v. Schuylkill County Poor Directors*, 21 Pa. Super. Ct. 627; *East Franklin Tp. Overseers v. Rayburn Tp. Overseers*, 23 Pa. Super. Ct. 522; *Franklin Tp. Poor Dist. v. Danville, etc., Poor Dist.*, 25 Pa. Super. Ct. 40.

Reasonable Care and Prudence to Be Used in Removal. — *Merrill v. Bassett*, 97 Me. 501.

2. Overseers of Poor v. Overseers of Poor, 36 Nova Scotia 326.

996. 5. Separation of Husband and Wife Not Allowed. — *Tewkesbury Union v. Birmingham Guardians*, (1904) 2 K. B. 395.

1000. 1. Conclusiveness of Removal Order. — *Uxbridge Union v. Winchester Union*, 91 L. T. N. S. 533.

5. Liability Statutory. — *Fitch v. Bermondsey Guardians*, (1904) 2 K. B. 709, affirmed (1905) 1 K. B. 524; *Orland v. Penobscot*, 97 Me. 29; *Clearwater v. Garfield*, 65 Neb. 697; *Strafford County v. Rockingham County*, 71 N. H. 37; *Wilson v. Coos County*, 72 N. H. 112; *Rockaway Tp. v. Board of Freeholders*, 68 N. J. L. 16; *Copple v. Davie County*, 138 N. Car. 127; *Danville v. Hartford*, 73 Vt. 300; *Ogden City*

- 1001.** County Paupers. — See notes 1, 2.
Unsettled and Transient Paupers. — See note 9.
- 1002.** See note 1.
- 1003.** V. ACTIONS BETWEEN MUNICIPALITIES FOR RELIEF FURNISHED TO PAUPERS — 1. In General. — See notes 2, 3.
- 1004.** See note 1.
- 1005.** See note 3.
2. Notice to Municipality to Be Charged — *a.* IN GENERAL. — See note 5.
- 1006.** *b.* FORM AND CONTENTS OF NOTICE. — See notes 3, 4.
The Notice Must Designate the Pauper. — See note 6.
- 1007.** Waiver of Defects in Notice. — See note 4.
- 1008.** VI. RECOVERY AGAINST MUNICIPALITIES BY INDIVIDUALS FURNISHING RELIEF TO PAUPERS — 1. In General. — See note 7.
- 1009.** See note 5.
Relief Furnished on Credit of Pauper or as Gratuity. — See note 7.
2. Relief Furnished at Request of Poor Officers. — See note 8.
- 1010.** 3. Failure of Poor Officers to Relieve Pauper After Notice. — See note 1.

v. Weber County, 26 Utah 129, *per* Hart, J., dissenting, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1000.

Insane Criminals. — See Boyle's Lunacy, 20 Pa. Super. Ct. 1.

Statutes Liberally Construed to Effect Benevolent Policy. — Ogden City *v.* Weber County, 26 Utah 129.

1001. 1. County Paupers. — Delaware County *v.* Delaware, 105 N. Y. App. Div. 129.
Deaf Mutes. — Western New York Deaf-Mutes Inst. *v.* Yates County, 94 N. Y. App. Div. 1.

2. Loudon *v.* Merrimack County, 71 N. H. 573.

9. Unsettled and Transient Paupers. — Strafford County *v.* Rockingham County, 71 N. H. 37; Ogden City *v.* Weber County, 26 Utah 129; Danville *v.* Hartford, 73 Vt. 300.

1002. 1. Statute Held Not to Act Retrospectively. — Rutland *v.* Chittenden, 74 Vt. 219.

1003. 2. Actions Between Municipalities — Right of Action Statutory. — Machias *v.* Wesley, 99 Me. 17; Rutland *v.* Chittenden, 74 Vt. 219. See, however, Ogden City *v.* Weber County, 26 Utah 129.

3. Statutory Right of Action. — Fairfield *v.* Newtown, 75 Conn. 515; Old Saybrook *v.* Milford, 76 Conn. 152; South Thomaston *v.* Friendship, 95 Me. 201; Palmer *v.* Hampden, 182 Mass. 511; Strafford County *v.* Rockingham County, 71 N. H. 37; Loudon *v.* Merrimack County, 71 N. H. 573; Rockaway Tp. *v.* Board of Freeholders, 68 N. J. L. 16; Luzerne County Poor Dist. *v.* Jenkins Tp. Poor Directors, 22 Pa. Super. Ct. 274; Topsham *v.* Waterbury, 73 Vt. 185; Portage County *v.* Neshkoro, 109 Wis. 520.

Repeal of Statute Abrogates Right of Recovery. — Lawrence County *v.* New Castle, 18 Pa. Super. Ct. 313.

1004. 1. Statutory Requirement to Be Complied With. — Clearwater *v.* Garfield, 65 Neb. 697; Strafford County *v.* Rockingham County, 71 N. H. 37; Brushvalley Tp. Poor Directors *v.* Allegheny County Poor Directors, 25 Pa. Super. Ct. 595.

1005. 3. Palmer *v.* Hampden, 182 Mass. 511 (fifty dollars in bank).

5. Notice to Municipality to Be Charged. — Fairfield *v.* Newtown, 75 Conn. 515; Thomaston *v.* Greenbush, 98 Me. 140; Freeman *v.* Dodge, 98 Me. 531; Essex *v.* Jericho, 76 Vt. 104.

The fact that the municipality in which the pauper had his settlement sent the pauper into the county and subsequently furnished supplies for him does not dispense with the need of notice required by the statute, where at the time of sending the pauper into the latter county he was left with relatives who agreed to support him. Rock Island County *v.* Mercer County, 96 Ill. App. 531.

Support Prior to Knowledge of Pauper Settlement. — Failure to give notice as required by statute after knowledge of the pauper's settlement does not prevent a recovery for support furnished prior to such knowledge. Fairfield *v.* Newtown, 75 Conn. 515.

1006. 3. Form and Contents of Notice. — See Essex *v.* Jericho, 76 Vt. 104, holding insufficient a notice which failed to contain a statement of the "condition" of the pauper.

4. Old Saybrook *v.* Milford, 76 Conn. 152.

6. "The Children of" P. Insufficient Description. — Thomaston *v.* Greenbush, 98 Me. 140.

1007. 4. Waiver of Defects in Notice. — Brookfield *v.* West Brookfield, 186 Mass. 524.

1008. 7. No Recovery by Individuals Aiding Pauper. — Gish *v.* St. Joseph County, 31 Ind. App. 485; Conley *v.* Woodville, 97 Me. 240; Gilligan *v.* Grattan, 63 Neb. 242; Strafford County *v.* Rockingham County, 71 N. H. 37; Wilson *v.* Coos County, 72 N. H. 112; Copple *v.* Davie County, 138 N. Car. 127; Farmer *v.* Salisbury, 77 Vt. 161.

1009. 5. Minority Rule. — Robbins *v.* Homer, (Minn. 1905) 103 N. W. Rep. 1023.

7. See Conley *v.* Woodville, 97 Me. 240.

8. Relief Furnished at Request of Poor Officers. — De Witt County *v.* Spaulding, 111 Ill. App. 364; Farmer *v.* Salisbury, 77 Vt. 161.

1010. 1. Statutory Provision. — Naas *v.* Overseers of Poor, 35 Nova Scotia 316.

No Liability to Inhabitant of Another Town. — Conley *v.* Woodville, 97 Me. 240.

1011. VII. LIABILITY OF PAUPER TO REIMBURSE MUNICIPALITY FOR RELIEF FURNISHED. — See note 7.

1012. See notes 1, 2, 3.

Limitation of Actions. — See note 5.

VIII. POORHOUSES, ALMSHOUSES, ETC. — See note 6.

1013. Labor of Paupers. — See note 9.

1014. IX. SUPPORT OF PAUPER BY KINDRED OR HUSBAND — 1. Support by Kindred — b. WHAT KINDRED LIABLE FOR SUPPORT OF EACH OTHER — (1) Kindred by Consanguinity — (a) Liability of Parent for Support of Child. — See notes 9, 11.

1015. (b) Liability of Children for Support of Parents. — See notes 4, 6.

1017. c. ENFORCEMENT OF KINDRED'S LIABILITY — (1) In General. — See notes 4, 6.

(2) *Relief Order* — Application. — See note 10.

1018. Offer of Support by Relative. — See note 12.

Enforcement of Relief Order. — See note 13.

1019. The Matter of Costs. — See note 5.

1022. X. POOR OFFICERS — SELECTION, COMPENSATION, POWERS, DUTIES, AND LIABILITIES — 1. Appointment and Election. — See note 9.

1023. 4. Powers and Duties. — See note 7.

Overseers of Poor. — See note 9.

1011. 7. No Liability of Paupers to Municipality. — *Chariton County v. Hartman*, 190 Mo. 75. See, however, *In re Taylor*, (1901) 1 Ch. 480. *Contra, In re Clabbon*, (1904) 2 Ch. 465, 73 L. J. Ch. 853, wherein an infant was held to be under a legal liability to repay, independently of statute, upon coming into money.

1012. 1. Contagious Diseases — "If Able." — *Greenville v. Beauto*, 99 Me. 214.

Application of Pauper's Property to His Support. — The *Kentucky* statute authorizing the directors of the county poorhouse to take possession of any property to which its proper inmates may be entitled and to apply it to their support during the time which they may actually be inmates of the poorhouse, does not entitle such directors to recover an estate subsequently acquired by an inmate and apply it to the discharge of his board incurred previous to the acquisition of such estate. *Mason County Infirmary v. Smith*, 111 Ky. 636.

2. Verdict of Insanity Not Conclusive Against Right to Subject Property. — *Schroer v. Central Kentucky Insane Asylum*, 113 Ky. 288; *Central Kentucky Insane Asylum v. Drane*, 113 Ky. 281.

If Able "Besides Providing for Others Naturally Dependent." — See *Central Kentucky Insane Asylum v. Drane*, 113 Ky. 281.

Guardian of Insane Person Not Liable to Reimburse County. — *Chariton County v. Hartman*, 190 Mo. 75.

3. The Value of Services Rendered by the Pauper while an inmate of the poorhouse, if equal to the cost of his support, will prevent recovery against him for such support. *Taunton v. Talbot*, 186 Mass. 341.

5. *Schroer v. Central Kentucky Insane Asylum*, 113 Ky. 288.

6. Poorhouses, Etc. — *Com. v. Summerville*, 204 Pa. St. 300; *Melvin v. Summerville*, 210 Pa. St. 41.

1013. 9. Labor of Paupers. — *Taunton v. Talbot*, 186 Mass. 341.

Prosecution of Pauper for Refusal to Work. — See *Poplar Union v. Martin*, 91 L. T. N. S. 550 (*Vagrancy Act 1824*, § 3).

1014. 9. Statutory Liability of Father. — *Overseers of Poor v. Knisely*, 17 Pa. Super. Ct. 415.

Father of Bastard Required to Support Child Though Mother Has Married Another. — *Guardians of Poor v. Gibbs*, (1903) 1 K. B. 177 (*Bastardy Laws Amendment Act, 1872*).

11. Parents Deserting Children. — *Bannister v. Sullivan*, 91 L. T. N. S. 380 (*Vagrancy Act 1824*, § 4).

1015. 4. Liability of Children — Support of Father. — *Condon v. Pomroy-Grace*, 73 Conn. 607.

6. Statutory Liability for Support of Parents. — *Condon v. Pomroy-Grace*, 73 Conn. 607.

1017. 4. Statutory Remedy. — *Freeman v. Dodge*, 98 Me. 531.

Jurisdiction of County Court. — See *Faling v. Multnomah County*, (*Oregon 1905*) 80 Pac. Rep. 1009.

Appeal. — See *Overseers of Poor v. Knisely*, 17 Pa. Super. Ct. 415.

6. Promise of Child to Pay for Past Support Unenforceable. — *Freeman v. Dodge*, 98 Me. 531.

10. Relief Orders. — *Condon v. Pomroy-Grace*, 73 Conn. 607.

1018. 12. Offer to Support. — Compare *Condon v. Pomroy-Grace*, 73 Conn. 607.

13. *Condon v. Pomroy-Grace*, 73 Conn. 607.

1019. 5. Prevailing Party Entitled to Costs. — *Condon v. Pomroy-Grace*, 73 Conn. 607.

1022. 9. Appointment and Election of Poor Officers. — *Chadduck v. Burke*, 103 Va. 694.

Directors. — *Com. v. Paine*, 207 Pa. St. 45.

1023. 7. Assignment to Superintendent of Poor of Claims on Contracts for Support of Paupers Valid. — *People v. Saratoga County*, 66 N. Y. App. Div. 117, *reversing* (*Supm. Ct. Spec. T.*) 34 Misc. (N. Y.) 740.

9. Personal Liability of Overseer for Supplies

1025. XI. PENALTY FOR BRINGING PAUPERS INTO AND LEAVING THEM IN STATE, TOWN, ETC. — See note 5.

1027. PORT. — See note 7.

1029. PORTION. — See note 1.

Furnished at His Request. — See *Brazee v. Stewart*, 59 N. Y. App. Div. 476.

Liability on Bond of Overseer. — See *Goshen v. Smith*, 173 N. Y. 597, *affirming* 61 N. Y. App. Div. 461.

Failure of Associate Overseer to Qualify. — See *South Williamsport v. Miller*, 20 Pa. Super. Ct. 266.

1025. 5. People v. Barlow, 134 Mich. 394,

holding that the keeper of a poorhouse is not relieved from liability by the fact that he acted under orders from the superintendent of the poor.

1027. 7. Port. — See *Hartwell Lumber Co. v. U. S.*, 128 Fed. Rep. 306.

1029. 1. Portions for Children — *Thellusson Act.* — *In re Stephens*, (1904) 1 Ch. 322.

POSSESSORY WARRANTS.

By H. N. ELDRIDGE.

1032. I. GENERAL CHARACTERISTICS. — See note 1.

Title Not Involved. — See note 3.

Who May Have Warrant. — See note 4.

1033. III. POSSESSION OF DEFENDANT — WRONGFUL DETENTION. — See note 3.

Consent. — See note 5.

1034. V. CERTIORARI AND APPEAL. — See note 5.

[VI. EXECUTION OF WARRANT. — See note 6a.]

1035. POST. — See note 4.

1032. 1. Where a Landlord Seeks to Obtain a Possessory Warrant Against His Cropper under *Georgia Civil Code*, § 3130, alleging that the cropper is attempting to exclude him from possession of the crop and fails to pay for supplies and advances made to him, it is not necessary to allege or prove the existence of any one of the grounds for obtaining a possessory warrant under the *Civil Code*, § 4799. *Visage v. Bowers*, 122 Ga. 760.

3. Title Not Involved. — *Broadhurst v. Carswell*, 119 Ga. 529.

4. Who May Have Warrant — *Principal and Agent.* — *Sheriff v. Thompson*, 116 Ga. 437; *Allen v. Wheeler*, 121 Ga. 277.

1033. 3. Mitcham v. Cochran, 119 Ga. 184.

A Possessory Warrant Does Not Lie unless the Defendant Acquired Possession of the Property in Dispute in One of the Modes set forth in the

Civil Code, § 4799. *Susong v. McKenna*, 121 Ga. 97; *Allen v. Printup*, 118 Ga. 630.

5. Consent. — *Mitcham v. Cochran*, 119 Ga. 184.

1034. 5. Certiorari Lies. — *Sheriff v. Thompson*, 116 Ga. 437; *Allen v. Printup*, 118 Ga. 630. See also *Mitcham v. Cochran*, 119 Ga. 184.

6a. The Officer Executing a Possessory Warrant Is the Custodian of the property involved until final judgment in the case. If he intrusts it to another, he does so at his peril; but this alone does not authorize a court of equity to interfere with him in the control of the property. *Sumner v. Bell*, 118 Ga. 240.

1035. 4. To Post. — *Allen v. Allen*, 114 Wis. 615.

Posting as Required by Law. — *Wilson v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 504.

POSTAL LAWS.

BY BASIL JONES.

1040. I. POWER OF CONGRESS. — See notes 1, 2.

Privilege of Using Mails Not Property in Constitutional Sense. — See note 7.

1041. II. POWERS AND DUTIES OF POSTMASTER-GENERAL — 5. Power to Make Extra Allowance to Postmasters. — See note 11.

1043. [14. Power to Make Classification of Mail Matter.] — See note 3a.

1044. III. POSTMASTERS — 2. Salaries and Allowances — a. SALARIES IN GENERAL. — See note 4.

1045. 3. Rights, Duties, and Liabilities — b. DUTY IN LOCATING AND RENTING OFFICE. — See note 3.

c. EMPLOYMENT OF CLERKS AND LETTER CARRIERS. — See note 5

1046. e. DUTIES AND LIABILITIES IN REGARD TO MAIL MATTER — (2) *Liability for Negligence or Misfeasance of Clerks or Assistants.* — See note 6.

1049. h. POSTMASTERS' BONDS — (4) *Liability of Postmaster and His Sureties upon Bond* — (a) In General. — See notes 5, 6.

1053. IV. COMPENSATION OF OFFICERS AND EMPLOYEES IN POSTAL SERVICE — 2. Clerks and Other Employees in Post Offices. — See note 2.

1040. 1. Public Clearing House *v.* Coyne, 194 U. S. 497; German State Bank *v.* Minneapolis, etc., R. Co., 113 Fed. Rep. 414. See also Bankers' Mut. Casualty Co. *v.* Minneapolis, etc., R. Co., (C. C. A.) 117 Fed. Rep. 434.

2. Power to Designate What May Be Carried in Mail. — Public Clearing House *v.* Coyne, 194 U. S. 497.

7. Public Clearing House *v.* Coyne, 194 U. S. 497; Missouri Drug Co. *v.* Wyman, 129 Fed. Rep. 623.

1041. 11. Postmaster May Compel Granting of Allowance. — Moffett *v.* U. S., 37 Ct. Cl. 499.

1043. 3a. Classification of Mail Matter. — See Payne *v.* U. S., 20 App. Cas. (D. C.) 581; U. S. *v.* Payne, 20 App. Cas. (D. C.) 606; Payne *v.* Houghton, 22 App. Cas. (D. C.) 234, affirmed 194 U. S. 88; Payne *v.* Bates, etc., Co., 22 App. Cas. (D. C.) 250, affirmed 194 U. S. 106; Smith *v.* Payne, 22 App. Cas. (D. C.) 463, affirmed 194 U. S. 104.

1044. 4. Mode of Readjusting Salary under Statutes. — See U. S. *v.* Ewing, 184 U. S. 140.

1045. 3. Subletting Space in Post Office — When Allowance for Rent May Be Recovered Back. — See U. S. *v.* Kearney, 116 Fed. Rep. 497.

5. Appointment and Removal by Postmaster-General. — See Corcoran *v.* U. S., 38 Ct. Cl. 341.

1046. 6. Negligence or Misfeasance of Clerks or Assistants. — Bankers' Mut. Casualty Co. *v.* Minneapolis, etc., R. Co., (C. C. A.) 117 Fed. Rep. 434.

1049. 5. Liability of Surety on Bond of Letter Carrier. — The bond of a letter carrier for the faithful discharge of the duties and trusts imposed on the carrier, "either by the postal

laws of the United States or the rules and regulations of the post office department of the United States," binds the surety for the carrier's faithful discharge of a duty imposed by an order of the post office department during the term of the bond. National Surety Co. *v.* U. S., (C. C. A.) 129 Fed. Rep. 70.

6. Liability for Loss of Stamps and Money-order Funds by Theft. — The postmaster and the sureties on his bond are liable for stamps and money-order funds stolen from the office, although the loss was not due to the fault of the postmaster, and the building and safe wherein the funds were contained were furnished by the United States. Relief from such liability is discretionary with the postmaster-general. U. S. *v.* Fordyce, 122 Fed. Rep. 962. See also *supra*, this title, **1048.** 4.

Liability for Loss of Registered Matter. — Where the bond provides that the postmaster will faithfully discharge all the duties imposed upon him, either by law or by the rules and regulations of the department, and the rules of the department provide that he will be held accountable for the registered matter coming into his office, he is liable thereunder for the loss of a registered package intrusted to him, irrespective of the question of negligence. U. S. *v.* Griswold, (Ariz. 1905) 80 Pac. Rep. 317. And the amount recoverable is the full value of the registered matter lost, the recovery being for the benefit of the sender, although the statute provides that the sender is entitled to be indemnified to the extent of \$10. U. S. *v.* Griswold, (Ariz. 1904) 76 Pac. Rep. 596.

1053. 2. Salary Determined by Official Roster. — Barrett *v.* U. S., 37 Ct. Cl. 44, holding that performance of the duties of the chief clerk

1053. 3. Letter Carriers. — See note 3.

Extra Pay. — See note 6.

1055. V. WHAT MAY BE CARRIED IN MAIL — **2. Matter Excluded from Mail** — *f. MATTER ADDRESSED TO PERSONS CONDUCTING THROUGH THE MAILS, CERTAIN IMMORAL OR FRAUDULENT SCHEMES.* — See notes 6, 7, 10.

1056. See note 1.

1058. VIII. TRANSPORTATION OF MAILS — **1. Government Monopoly.** — See note 5.

2. Post Roads — *a. WHAT ARE ESTABLISHED AS.* — See note 11.

1059. 3. Contracts for Transportation of Mail — *a. AUTHORITY OF POSTMASTER-GENERAL TO CONTRACT.* — See note 3.

1060. c. CONSTRUCTION OF CONTRACTS. — See note 3.

1064. 11. Compensation for Transportation of Mails — *a. STATUTORY REGULATIONS.* — See note 1.

c. ADDITIONAL SERVICE. — See notes 6, 7.**1065. f. DISCONTINUANCE OR REDUCTION OF SERVICE.** — See note 5.

will not entitle a clerk of lower degree to the salary of the chief clerk's office. *Barrett v. U. S.*, 37 Ct. Cl. 44.

1053. 3. Carrier Entitled to Pay During Suspension Set Aside by Postmaster-General. — *Corcoran v. U. S.*, 38 Ct. Cl. 341.

6. No Extra Pay While Waiting to Be Employed by Postmaster. — *U. S. v. McCrory*, (C. C. A.) 119 Fed. Rep. 861.

1055. 6. Missouri Drug Co. v. Wyman, 129 Fed. Rep. 623.

Mental Healing Not Per Se Unlawful. — *Post v. U. S.*, (C. C. A.) 135 Fed. Rep. 1.

The Statute Is Not Unconstitutional because letters having no connection with the prohibited enterprise may possibly be seized along with those subject to seizure. *Public Clearing House v. Coyne*, 194 U. S. 497.

Schemes Contemplated by Statute. — See *Rosenberger v. Harris*, 136 Fed. Rep. 1001.

7. Finding Must Be Based on Fact, Not on Opinion. — *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, reversing 102 Fed. Rep. 565.

10. Privilege of Using Mails Not Property. — See *Missouri Drug Co. v. Wyman*, 129 Fed. Rep. 623.

Seizure Not Confiscation. — *Public Clearing House v. Coyne*, 194 U. S. 497.

1056. 1. Findings of Fact Conclusive — *Determination of Law Reviewable.* — *Rosenberger v. Harris*, 136 Fed. Rep. 1001. See also *Missouri Drug Co. v. Wyman*, 129 Fed. Rep. 623.

No Review in Doubtful Cases. — *Public Clearing House v. Coyne*, 194 U. S. 497.

Mandamus Not Issued to Control Exercise of Discretion. — *In re Coleman*, 131 Fed. Rep. 151.

Injunction Granted to Prevent Unauthorized Detention. — *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, reversing 102 Fed. Rep. 565.

1058. 5. Boston Ins. Co. v. Chicago, etc., R. Co., 118 Iowa 423.

8. Construction of Power. — *Compare California v. Central Pac. R. Co.*, 127 U. S. 1.

11. All Railroads Post Roads. — *Boston Ins. Co. v. Chicago, etc.*, R. Co., 118 Iowa 423.

1059. 3. See Boston Ins. Co. v. Chicago, etc., R. Co., 118 Iowa 423.

Extension of Route — **Effect on Prior Contract.**

— *Rev. Stat. U. S.*, § 4002, does not require the abrogation of prior contracts when an extension is made beyond the terminal of an established route, nor preclude provisions for the extension alone. *Chicago, etc., R. Co. v. U. S.*, 198 U. S. 385.

1060. 3. Terms Construed. — The term "dispatch" is a technical one in the postal service, and means a mass of matter to be sent to a certain place at a certain time. The term "trip" is also technical, and refers to the wagon which will carry the whole or a part of the dispatch. *Utah, etc., Stage Co. v. U. S.*, 39 Ct. Cl. 420.

1064. 1. Power of Postmaster-General to Adjust and Readjust Compensation. — See *Chicago, etc., R. Co. v. U. S.*, 198 U. S. 385.

6. What Is Extra Service. — See *Utah, etc., Stage Co. v. U. S.*, 39 Ct. Cl. 420 (change that could not have been foreseen by experienced business men; service different in kind or character).

Construction of Contracts Providing for Additional Service Without Increased Compensation. — See *Slavens v. U. S.*, 38 Ct. Cl. 574, affirmed 196 U. S. 229; *Travis v. U. S.*, 38 Ct. Cl. 590, affirmed 196 U. S. 239.

Burden on Contractor to Carry Mail up Stairs of Elevated Railroad. — *Utah, etc., Stage Co. v. U. S.*, 39 Ct. Cl. 420.

Railroad Not Obligated to Accept Contract for Extension of Service. — *Chicago, etc., R. Co. v. U. S.*, 198 U. S. 385.

7. No Recovery Where Service Not Approved by Postmaster-General. — *Slavens v. U. S.*, 38 Ct. Cl. 574, affirmed 196 U. S. 229; *Travis v. U. S.*, 38 Ct. Cl. 590, affirmed 196 U. S. 239.

1065. 5. Discontinuance of Service. — Under a contract providing that "the postmaster-general may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance, but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity," the postmaster-general may discontinue the contractor's performance of it, though the service itself is not discontinued and is continuously performed by another contractor, the discontinuance having been in fact ordered because the contractor would not con-

1067. 13. Subletting of Mail Contracts — *a*. APPROVAL OF POSTMASTER-GENERAL. — See note 3.

1068. 18. Liability to Sender for Loss of Mail Matter. — See note 5.

1069. 23. Abandonment of Contract. — See note 10.

1073. IX. POSTAL CRIMES AND OFFENSES — 8. Unlawful Use of Mail — *a*. USING MAIL TO EFFECT FRAUDULENT SCHEME — (1) *Text of Statute*. — See note 3.

(2) *Nature and Elements of Offense*. — See notes 4, 5, 6, 8, 9.

1074. See note 2.

What Is a "Scheme to Defraud" Within the Statute. — See notes 3, 4, 5, 6, 7.

sent to a reduction of the service. The measure of damages for such a discontinuance is the one month's pay as provided by the contract, and not the profits which the contractor might have made. *Slavens v. U. S.*, 38 Ct. Cl. 574, *affirmed* 196 U. S. 229; *Travis v. U. S.*, 38 Ct. Cl. 590, *affirmed* 196 U. S. 239.

1067. 3. Subletting. — *McConaghy v. Clark*, 35 Wash. 689.

Contractor May Hire Another to Transport Mail According to Contract. — *Moon v. Potter*, 115 Ga. 673, holding sureties to be liable on the bond of one hired to transport mail for a contractor.

1068. 5. Liable to Government Alone — Not Liable as Common Carrier. — *German State Bank v. Minneapolis, etc., R. Co.*, 113 Fed. Rep. 414; *Boston Ins. Co. v. Chicago, etc., R. Co.*, 118 Iowa 423.

Carrier Liable for Loss Caused by Its Own Negligence. — *Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. Co.*, (C. C. A.) 117 Fed. Rep. 434.

1069. 10. Evidence of Abandonment. — *U. S. v. McCoy*, 193 U. S. 593.

1073. 3. Effect of Amendment Act of March 2, 1889. — See *Miller v. U. S.*, (C. C. A.) 133 Fed. Rep. 337; *Milby v. U. S.*, (C. C. A.) 120 Fed. Rep. 1.

4. Purpose of the Statute. — *Horman v. U. S.*, (C. C. A.) 116 Fed. Rep. 350; *U. S. v. Horman*, 118 Fed. Rep. 780; *Milby v. U. S.*, (C. C. A.) 120 Fed. Rep. 1; *U. S. v. Ryan*, 123 Fed. Rep. 634; *Post v. U. S.*, (C. C. A.) 135 Fed. Rep. 1; *Ewing v. U. S.*, (C. C. A.) 136 Fed. Rep. 53. See also *Kellogg v. U. S.*, (C. C. A.) 126 Fed. Rep. 323.

Gist of Offense Is Use of Mails as Material Part of Scheme to Defraud. — *U. S. v. Ryan*, 123 Fed. Rep. 634; *U. S. v. Clark*, 125 Fed. Rep. 92; *Harvey v. U. S.*, (C. C. A.) 126 Fed. Rep. 357; *Balliet v. U. S.*, (C. C. A.) 129 Fed. Rep. 689.

Each Letter Constitutes Separate and Distinct Offense. — *U. S. v. Clark*, 125 Fed. Rep. 92.

5. Scheme or Artifice to Defraud. — *U. S. v. Post*, 113 Fed. Rep. 852; *Horman v. U. S.*, (C. C. A.) 116 Fed. Rep. 350; *Stewart v. U. S.*, (C. C. A.) 119 Fed. Rep. 89; *Kellogg v. U. S.*, (C. C. A.) 126 Fed. Rep. 323; *Dalton v. U. S.*, (C. C. A.) 127 Fed. Rep. 544; *U. S. v. Post*, 128 Fed. Rep. 950; *O'Hara v. U. S.*, (C. C. A.) 129 Fed. Rep. 551; *Miller v. U. S.*, (C. C. A.) 133 Fed. Rep. 337; *Ewing v. U. S.*, (C. C. A.) 136 Fed. Rep. 53.

6. Intent to Use Mail to Effect the Scheme. — *U. S. v. Post*, 113 Fed. Rep. 852; *Horman v. U. S.*, (C. C. A.) 116 Fed. Rep. 350; *Stewart v. U. S.*, (C. C. A.) 119 Fed. Rep. 89; *Kellogg*

v. U. S., (C. C. A.) 126 Fed. Rep. 323; *Dalton v. U. S.*, (C. C. A.) 127 Fed. Rep. 544; *U. S. v. Post*, 128 Fed. Rep. 950; *Miller v. U. S.*, (C. C. A.) 133 Fed. Rep. 337; *Ewing v. U. S.*, (C. C. A.) 136 Fed. Rep. 53.

8. Depositing or Receiving Letter or Packet. — *U. S. v. Post*, 113 Fed. Rep. 852; *Horman v. U. S.*, (C. C. A.) 116 Fed. Rep. 350; *Stewart v. U. S.*, (C. C. A.) 119 Fed. Rep. 89; *Kellogg v. U. S.*, (C. C. A.) 126 Fed. Rep. 323; *Dalton v. U. S.*, (C. C. A.) 127 Fed. Rep. 544; *U. S. v. Post*, 128 Fed. Rep. 950; *O'Hara v. U. S.*, (C. C. A.) 129 Fed. Rep. 551; *Ewing v. U. S.*, (C. C. A.) 136 Fed. Rep. 53.

Burden of Proving Deposit in Mail by Accused Is on Prosecution. — *Melton v. U. S.*, (C. C. A.) 120 Fed. Rep. 504.

Sufficiency of Evidence to Show Depositing of Letter in Mail. — See *Hanley v. U. S.*, (C. C. A.) 127 Fed. Rep. 929, *reversing* 123 Fed. Rep. 849.

9. *U. S. v. Ryan*, 123 Fed. Rep. 634.

1074. 2. See *Milby v. U. S.*, (C. C. A.) 120 Fed. Rep. 1.

The Statute Does Not Apply to a letter sent to one engaged in the scheme to defraud where the purpose of the letter is to keep the addressee posted as to the progress of the other parties to the scheme. Nor does it apply to letters used merely for the purpose of concocting schemes to defraud, but not for the purpose of carrying them into effect nor for use as a part of the scheme. *U. S. v. Ryan*, 123 Fed. Rep. 634.

Use of Mail Must Be Essential Part of Scheme. — *U. S. v. Clark*, 121 Fed. Rep. 190.

Sufficiency of Evidence that Use of Mail Was Element of Scheme. — See *Kellogg v. U. S.*, (C. C. A.) 126 Fed. Rep. 323.

3. Intention of Defendant Determining Factor. — *U. S. v. Post*, 113 Fed. Rep. 852, 128 Fed. Rep. 950; *Miller v. U. S.*, (C. C. A.) 133 Fed. Rep. 337; *Post v. U. S.*, (C. C. A.) 135 Fed. Rep. 1; *Bass v. U. S.*, 20 App. Cas. (D. C.) 232. See also *O'Hara v. U. S.*, (C. C. A.) 129 Fed. Rep. 551.

Attempted Blackmail. — *U. S. v. Horman*, 118 Fed. Rep. 780. See also *Horman v. U. S.*, (C. C. A.) 116 Fed. Rep. 350.

4. *Miller v. U. S.*, (C. C. A.) 133 Fed. Rep. 337; *Post v. U. S.*, (C. C. A.) 135 Fed. Rep. 1; *Ewing v. U. S.*, (C. C. A.) 136 Fed. Rep. 53.

Intent by Defendant to Convert Money to His Own Use Not Essential to Conviction. — *Kellogg v. U. S.*, (C. C. A.) 126 Fed. Rep. 323.

5. Public Clearing House *v. Coyne*, 194 U. S. 497. See also *Horman v. U. S.*, (C. C. A.) 116 Fed. Rep. 350.

1074. The Question of the Defendant's Intent Is for the Jury. — See note 8.

(3) *Conspiracy to Commit Offense.* — See note 9.

(4) *Venue.* — See note 11.

b. USING MAIL TO DISSEMINATE MATTER CONCERNING LOTTERIES. — See note 13.

1075. See note 1.

1076. *c.* USING MAIL TO DISSEMINATE OBSCENE MATTER AND ARTICLES INTENDED FOR IMMORAL USES — (1) *Text of Statute.* — See note 2.

(3) *Use of Mail to Disseminate Obscene Matter — Elements of Offense* — (a) *Matter That Is Obscene, Lewd, and Lascivious* — *aa.* RULE STATED. — See note 6.

bb. WHAT MATTER IS OBSCENE, LEWD, AND LASCIVIOUS. — See note 7.

1077. See notes 1, 2, 3.

Publication Containing a Single Obscene Passage Inhibited. — See note 6.

Ordinarily It Is a Question for the Jury. — See note 7.

(b) *Deposit for Mailing or Delivery.* — See note 8.

1078. *Prepayment of Postage.* — See note 2.

(4) *Mailing Articles Designed for Preventing Conception or for Procuring Abortion.* — See note 7.

(5) *Mailing Matter Showing How Inhibited Things May Be Obtained* — *Obscenity of Matter Not an Essential Element.* — See note 9.

1079. 9. *Obstructing Mail* — *b.* NATURE AND ELEMENTS OF OFFENSE. — See note 5.

Mental Healing — Burden of Proving Ability to Perform Promised Services Not on Accused. — *Post v. U. S.*, (C. C. A.) 135 Fed. Rep. 1.

1074. 6. *A Mere Exaggeration of the Merits of Goods.* — *Rosenberger v. Harris*, 136 Fed. Rep. 1001.

7. *Mere Impossibility of Performance on the face of the scheme does not prevent it from coming within the condemnation of the statute.* *O'Hara v. U. S.*, (C. C. A.) 129 Fed. Rep. 551.

8. *Intent Question for Jury.* — *U. S. v. Post*, 113 Fed. Rep. 852, 128 Fed. Rep. 950.

Sufficiency of Evidence. — See *Balliet v. U. S.*, (C. C. A.) 129 Fed. Rep. 689.

9. *What Will Warrant Conviction on Indictment for Conspiracy.* — *Miller v. U. S.*, (C. C. A.) 133 Fed. Rep. 337. See also *U. S. v. Clark*, 121 Fed. Rep. 190.

11. *A Prosecution for Receiving Matter with Intent to Defraud should be instituted in the district wherein is situated the office from which the letter was taken.* *Stewart v. U. S.* (C. C. A.) 119 Fed. Rep. 89.

13. *What Constitutes Lottery Within Meaning of Provision.* — See *U. S. v. Rosenblum*, 121 Fed. Rep. 180.

1075. 1. *Statute Is Constitutional.* — *Public Clearing House v. Coyne*, 121 Fed. Rep. 927, affirmed 194 U. S. 497.

1076. 2. "Letter." — *U. S. v. Wroblenski*, 118 Fed. Rep. 495.

Sealed Letter Is Within Statute. — *U. S. v. Wyatt*, 122 Fed. Rep. 316.

Not Essential that Communication Be Inclosed in Envelope or Wrapper. — *U. S. v. Harris*, 122 Fed. Rep. 551.

6. *Statute Strictly Construed.* — *U. S. v. Wroblenski*, 118 Fed. Rep. 495.

7. *The Words "Obscene," "Lewd," and "Lascivious" Defined.* — *U. S. v. Wroblenski*, 118 Fed. Rep. 495; *U. S. v. Wyatt*, 122 Fed. Rep. 316.

1077. 1. *Test of Obscenity.* — *U. S. v. Wyatt*, 122 Fed. Rep. 316. See also *U. S. v. Wroblenski*, 118 Fed. Rep. 495.

2. *Letter Intended to Procure Assignment.* — *U. S. v. Moore*, 129 Fed. Rep. 159.

3. *Language Which Is Merely Coarse and Vulgar Not Inhibited.* — *U. S. v. Wyatt*, 122 Fed. Rep. 316.

6. *U. S. v. Wyatt*, 122 Fed. Rep. 316.

7. *Question for Jury.* — *U. S. v. Wyatt*, 122 Fed. Rep. 316.

Sufficiency of Evidence. — See *U. S. v. Moore*, 129 Fed. Rep. 159.

8. *Deposit in the Mail.* — *Harvey v. U. S.*, (C. C. A.) 126 Fed. Rep. 357, discussing the sufficiency of evidence to show mailing.

The Gist of the Offense consists in depositing or causing to be deposited, to be conveyed or delivered by the mail, any letter containing or relating to the prohibited matter, and the address goes only to the point of identification of the letter. *U. S. v. Harris*, 122 Fed. Rep. 551.

Immaterial that Letter Written by Request. — *U. S. v. Wyatt*, 122 Fed. Rep. 316.

1078. 2. *U. S. v. Harris*, 122 Fed. Rep. 551.

7. *Existence of Proscribed Article Essential to Constitute Offense.* — *U. S. v. Pupke*, 133 Fed. Rep. 243.

9. *De Gignac v. U. S.*, (C. C. A.) 113 Fed. Rep. 197, holding further that the information need not have been given in response to inquiry or to one desirous of receiving it.

The Offense Has Three Elements: (1) The giving of information, (2) about a certain thing, and (3) that thing must be one designed or intended to prevent conception. *U. S. v. Pupke*, 133 Fed. Rep. 243.

1079. 5. *Reasonable Regulation by Ordinance of Rate of Speed Not Interference.* — *Chicago, etc., R. Co. v. Carlinville*, 200 Ill. 314, 93 Am. St. Rep. 190.

- 1083. POSTPONE — POSTPONEMENT.** — See note 1.
POTENTIAL — POTENTIALLY. — See note 2.
 [POTION. — See note 2a.]
 [POWDER. — See note 5a.]

1083. 1. Not Synonymous with Suspended.— Hull Coal, etc., Co. v. Empire Coal, etc., Co., (C. C. A.) 113 Fed. Rep. 259.

2. Potential Existence.— Campbell v. J. E. Grant Co., 36 Tex. Civ. App. 641.

2. The term *potion* means draught used as a liquid medicine or dose. Runnels v. State, 45 Tex. Crim. 446. See *supra*, Noxious.

5a. "Technically, *powder* may be a mass of fine particles of any substance, yet, when used in connection with an allegation of shooting and the use of leaden balls, any person would know that gunpowder was meant." *Per* White, J., in Blankenship v. Com., (Ky. 1902) 66 S. W. Rep. 994.

POWER OF ATTORNEY.

1084. I. INTRODUCTORY. — See note 3.

1086. III. FORM AND CONTENTS—The Description of Real Property. — See note 2.

1084. 3. Power of Attorney Strictly Construed.— White v. Young, 122 Ga. 830. And see the title AGENCY, 999. 2 *et seq.*

1086. 2. Description of Land. — For an example of a sufficient description see Finnegan v. Brown, 90 Minn. 396.

A Power to Sell All the Principal's Real Estate in a Certain Parish sufficiently describes the property in Louisiana. Rownd v. Davidson, 113 La. 1047.

POWERS.

BY BRISCOE B. CLARK.

1091. I. DEFINITION — (a) A Power. — See note 1.

1092. II. CLASSIFICATION OF POWERS — Beneficial Powers and Powers in Trust. — See note 3.

Appendant, Appurtenant, or in Gross. — See note 6.

1093. Mandatory, Imperative, or Discretionary Powers. — See note 2.

III. CREATION OF POWER — 1. In General. — See note 5.

1095. 2. To Whom Power May Be Given. — See note 1.

5. Creation of Power and Interest Distinguished — *a.* IN GENERAL — Power of Sale over Real Estate Given to Executors — When Title Vests in Executors. — See note 10.

1096. See note 1.

***b.* INTEREST WITH SUPERADDED POWER** — General Gift with Super-added Power. — See note 4.

1091. 1. Power of Appointment. — Heine-mann v. D'Wolf, 25 R. I. 243.

1092. 3. General Powers in Trust. — Wein-stein v. Weber, 178 N. Y. 94.

6. Powers in Gross. — Young v. Sheldon, 139 Ala. 444, 101 Am. St. Rep. 44.

1093. 2. Discretionary Powers. — Kemp v. Kemp, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 79; Thomas v. Ohio State University, 70 Ohio St. 92.

5. Existence of Powers of Appointment under Settlements. — Van Grutten v. Foxwell, 84 L. T. N. S. 545.

1095. 1. To Whom Power May Be Given. — Coleman v. Cabaniss, 121 Ga. 281.

No Interest in the Subject-matter Is Necessary in order to the validity of a testamentary power of disposition, Hammond v. Croxton, 162 Ind. 353, denying rehearing (Ind. 1903) 69 N. E. Rep. 250; or of a general power of appointment conferred on an executor, Watt's Estate, 202 Pa. St. 85.

10. Estate in Executors by Implication. — Martin v. Spurrier, 23 Ohio Cir. Ct. 110.

1096. 1. Executors Taking Simple Power of Sale. — Boland v. Tiernay, 118 Iowa 59.

4. General Gift with Superadded Power. — Bodmann German Protestant Widows' Home v. Lippardt, 70 Ohio St. 261.

- 1097.** Gift of Limited Estate with Superadded Power. — See note 3.
- 1098.** See notes 1, 2.
- 1103.** IV. GENERAL EXECUTION OF POWERS — 2. By Whom Powers May Be Executed — *c.* SUBSTITUTED TRUSTEES. — See note 8.
- 1104.** See notes 1, 2, 3.
- 1106.** *f.* MARRIED WOMEN. — See note 5.
- 1107.** 3. Instrument Executing Power — *a.* IN GENERAL. — See note 12.
- 1108.** See note 2.
- 1109.** *b.* RESTRICTIONS AS TO INSTRUMENT OF EXECUTION — (1) *In General.* — See note 3.
- (3) *Writing in Nature of or Purporting to Be Will.* — See note 7.
- 1110.** *d.* RESTRICTIONS AS TO FORMALITIES IN EXECUTION — (2) *Formal Execution of Wills.* — See note 4.
- 1112.** *f.* WILLS EXECUTED PRIOR TO CREATION OF POWER. — See note 2.

Under the English Wills Act. — See note 5.

4. Reference to Power in Instrument of Execution — *a.* IN GENERAL. — See note 7.

1115. *d.* CONFINING EXECUTION TO POWER REFERRED TO. — See note 2.

e. EXECUTION BY WILL — (1) *General Devise or Bequest.* — See note 3.

1116. Expressions Taking Case Out of General Rule. — See notes 4, 5.

1097. 3. Change Affected by Statute. — See *Dickey v. Barnstable*, 122 Iowa 572; *Ward v. Stanard*, 82 N. Y. App. Div. 386.

1098. 1. Limited Power of Appointment. — *Wilson v. Van Epps*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 486.

2. *Terry v. St. Stephen's Protestant Episcopal Church*, 79 N. Y. App. Div. 527; *Bodmann German Protestant Widows' Home v. Liphardt*, 70 Ohio St. 261.

1103. 8. Substituted Trustees. — *Sells v. Delgado*, 186 Mass. 25.

1104. 1. Power Not Involving Personal Trust. — *Sells v. Delgado*, 186 Mass. 25.

2. Intention Controlling. — *Coleman v. Cabaniss*, 121 Ga. 281.

3. Statutes. — *Sells v. Delgado*, 186 Mass. 25.

1106. 5. Married Women. — *Young v. Sheldon*, 139 Ala. 449, 101 Am. St. Rep. 44, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1106, and holding that the husband need not join in a wife's execution of a power to convey land.

1107. 12. A Covenant to Exercise a Power does not operate as an exercise thereof. *In re Lawley*, (1902) 2 Ch. 799, affirmed (1903) A. C. 411, in which case the covenant in question was to exercise a power by will.

1108. 2. General Power of Appointment Executed by Will. — *Kleber v. Kleber*, (Ky. 1902) 67 S. W. Rep. 838.

1109. 3. Restrictions as to Instrument of Execution. — *In re Edmonstone*, 49 W. R. 555.

7. Writing in Nature of Will. — *In re Broad*, (1901) 2 Ch. 86, 70 L. J. Ch. 601, 84 L. T. N. S. 577.

1110. 4. Formal Execution of Will. — *In re Edmonstone*, 49 W. R. 555.

Conflict of Laws. — See *Ward v. Stanard*, 82 N. Y. App. Div. 386.

1112. 2. Wills Executed Prior to Creation of Power. — *In re Hayes*, (1901) 2 Ch. 529.

5. When Power of Appointment Is Special. — See *In re Hayes*, (1901) 2 Ch. 529.

7. Express Reference to Power Unnecessary — *In re Mayhew*, (1901) 1 Ch. 677, 84 L. T. N. S. 761, 49 W. R. 350; *Kent v. Kent*, (1902) P. 108; *Byrne v. Cullinan*, (1904) 1 Ir. R. 42; *Gulf Red Cedar Lumber Co. v. O'Neal*, 131 Ala. 117, 90 Am. St. Rep. 22; *O'Brien v. Flint*, 74 Conn. 502; *Foster v. Grey*, 96 Ill. App. 38, following *Funk v. Eggleston*, 92 Ill. 515, 34 Am. Rep. 136; *Thomas v. Wright*, (Ky. 1902) 66 S. W. Rep. 993; *Scarlett v. Montell*, 95 Md. 148; *Underwood v. Cave*, 176 Mo. 1; *Kirkman v. Wadsworth*, 137 N. Car. 453; *Herrick v. Fowler*, 108 Tenn. 410; *Matthews v. Capshaw*, 109 Tenn. 480, 97 Am. St. Rep. 854.

1115. 2. Confined to Power Referred to, and Not to Individual Rights. — *Heinemann v. D'Wolf*, 25 R. I. 243, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1115.

3. General Devise or Bequest Not Execution. — *Sykes v. Carroll*, (1903) 1 Ir. R. 17; *Lane v. Lane*, 4 Penn. (Del.) 368; *Thom v. Thom*, (Md. 1905) 61 Atl. Rep. 193; *Matter of Tenney*, 104 N. Y. App. Div. 290.

1116. 4. Expressions Sufficient to Show Intent. — *Compare Lane v. Lane*, 4 Penn. (Del.) 368, wherein a testamentary disposition of all the testator's "estate, real and personal, of whatever kind and wheresoever situate," was held not to be sufficient as an execution of a testamentary power of appointment.

5. "Any Disposing Power." — A general bequest to executors of all properties to which the testator might be entitled or of which he was possessed at the time of his death, or over which he had any disposing power, was held not to be an execution of a special power of appointment, *Sykes v. Carroll*, (1903) 1 Ir. R. 17.

1116. (2) *Reference in Will to Subject-matter of Power—Specific Bequests.*—See note 8.

1117. (3) *Will Inoperative Except as Execution of Power.*—See note 4.
f. EXECUTION OF POWERS BY DEED—(1) *Conveyance by Person Having Only Power of Sale.*—See note 7.

1118. (2) *Conveyance by Person Having Individual Interest in Addition to Power of Sale.*—See notes 2, 3.

1119. g. STATUTORY PROVISIONS—(1) *In General.*—See note 2.

1125. 7. Partial and Successive Executions of Power.—See note 5.

V. OPERATION OF EXECUTION OF POWER—1. *Relation Back to Instrument Creating Power*—a. IN GENERAL.—See note 9.

1126. b. TIME OF VESTING OF ESTATE ON EXECUTION OF POWER.—See note 1.

d. SUCCESSION TAX AND PROBATE DUTY.—See note 3.

2. Determination of Estates Subject to Power.—See note 6.

1127. VI. EQUITABLE AID IN CASE OF EXECUTION, NONEXECUTION, OR DEFECTIVE EXECUTION OF POWERS—2. Nonexecution of Power.—See note 5.

Objects of Power.—See note 8.

1128. 3. Defective Execution—a. IN GENERAL.—See note 3.

1129. b. IN WHOSE FAVOR EXECUTION AIDED—Aid Granted.—See note 15.

1131. 4. Equitable Control of Execution of Powers.—See note 1.

VII. EXTINGUISHMENT OF POWERS—1. Release of Power.—See note 2.

1132. 3. Death of Donor.—See note 2.

4. Merger.—See note 4.

1116. 8. Reference in Will to Subject-matter of Power.—*Foster v. Gray*, 96 Ill. App. 38; *Kleber v. Kleber*, (Ky. 1902) 67 S. W. Rep. 838.

1117. 4. Will Inoperative Except as Execution of Power.—*In re Marten*, (1902) 1 Ch. 314, 85 L. T. N. S. 704; *Foster v. Grey*, 96 Ill. App. 38.

Use of Word "Appoint" Sufficient Execution.—*Kent v. Kent*, (1902) P. 108; *In re Mahew*, (1901) 1 Ch. 677; *In re Swinburne*, 27 Ch. D. 696, *disapproving dicta in In re Richardson*, 17 L. R. Ir. 436.

7. Conveyance by Person Having Only Powers of Sale.—*Kirkman v. Wadsworth*, 137 N. Car. 453.

Quitclaim Deed.—*O'Brien v. Flint*, 74 Conn. 502.

1118. 2. The Rule Has Been Applied in Case of the Following:

Quitclaim Deed of Life Tenant with Power.—*Weinstein v. Weber*, 178 N. Y. 94, *affirming* 78 N. Y. App. Div. 645, 81 N. Y. Supp. 62.

3. Deeds Conveying Fee Construed as Execution of Power.—*Thomas v. Wright*, (Ky. 1902) 66 S. W. Rep. 993.

So Conveyance in Fee by Life Tenant with Power.—*Young v. Sheldon*, 139 Ala. 444, 101 Am. St. Rep. 44; *Underwood v. Cave*, 176 Mo. 1; *Matthews v. Capshaw*, 109 Tenn. 480, 97 Am. St. Rep. 854; *Auer v. Brown*, 121 Wis. 115.

A Conveyance of All Timber on Lands in which the grantor had an undivided interest, with power to sell all timber was held to be an execution of the power. *Gulf Red Cedar Lumber Co. v. O'Neal*, 131 Ala. 117, 90 Am. St. Rep. 22.

1119. 2. English Wills Act—Foreign Wills

Not Within Act.—*In re D'Este*, (1903) 1 Ch. 898, *applying In re Price*, (1900) 1 Ch. 442.

1125. 5. Partial and Successive Execution of Powers.—*O'Brien v. Flint*, 74 Conn. 502.

9. Relegation to Instruments Creating Power.—*McCook v. Mumby*, 64 N. J. Eq. 394. See however, *Thomas v. Ohio State University*, 70 Ohio St. 92.

1126. 1. Time of Vesting of Estate.—*Herrick v. Fowler*, 108 Tenn. 410.

3. Succession Tax and Probate Duty.—See *Isham v. New York Assoc.*, 78 N. Y. App. Div. 396, *affirmed* 177 N. Y. 218.

Successive Appointments Followed by Appointment of Residue—Succession Duty Ratably Imposed.—*In re Chisholm*, (1902) 1 Ch. 457, 71 L. J. Ch. 289.

6. Determination of Estates Subject to Power.—*Herrick v. Fowler*, 108 Tenn. 410.

1127. 5. Nonexecution of Power—No Equitable Aid.—*Kemp v. Kemp*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 79.

8. Powers in Trust.—*Cheney v. Stafford*, 76 Vt. 16.

1128. 3. Defective Execution.—*Ward v. Stanard*, 82 N. Y. App. Div. 386.

1129. 15. Wife.—*Ward v. Stanard*, 82 N. Y. App. Div. 386.

1131. 1. Equitable Control of Execution.—*Dickey v. Barnstable*, 122 Iowa 572.

2. Release—Power in Gross.—*In re Chisholm*, (1901) 2 Ch. 82 (release by married woman valid); *Lewis v. Howe*, 174 N. Y. 340.

1132. 2. Death of Donor—Power Coupled with Interest.—*Frank v. Colonial, etc., Mortg. Co.*, 86 Miss. 103.

4. Merger.—*Compare Spencer v. Kimball*, 98 Me. 499.

- 1133.** 8. Revocation. — See note 3.
- VIII. POWERS OF APPOINTMENT — 1. In Whose Favor Power May Be Exercised —** *a.* WHETHER POWER LIMITED OR GENERAL. — See note 5.
- 1134.** *c.* LIMITED POWERS — (1) *In General.* — See note 4.
Issue of Object. — See note 10.
- 1135.** (2) *Children.* — See note 1.
- 1137.** 2. What Estates May Be Appointed under Powers — *a.* IN GENERAL. — See note 9.
b. APPOINTMENT TO TRUSTEES. — See note 10.
- 1138.** *c.* LIMITED ESTATES. — See note 4.
d. CHARGING LANDS. — See note 5.
e. APPOINTMENT OF PROCEEDS. — See note 6.
- 1139.** 3. General Construction of Instrument Exercising Power. — See note 4.
4. Lapsed Appointments — *a.* IN GENERAL. — See note 7.
- 1140.** *b.* DISTRIBUTION OF PROPERTY IN CASE OF LAPSED APPOINTMENTS — *In Trust* — Death of Person for Whose Use Appointment Made. — See note 1.
Where the Appointment under a General Power Is Made Directly. — See note 3.
Appointment of Residue. — See note 6.
- 1143.** 6. Revocation of Appointments — *d.* REVOCATION OF TESTAMENTARY APPOINTMENTS — *By Deed.* — See note 7.
By Will. — See note 9.
- 1144.** 7. Distribution of Subject-matter of Power on Nonexecution — *a.* IN GENERAL. — See note 5.
- 1145.** *b.* GIFTS BY IMPLICATION TO OBJECTS OF POWER. — See note 5.
- 1146.** 8. Subject-matter of Power as Assets for Creditors of Donee — *Execution in Favor of Volunteer.* — See note 6.

1133. 3. Revocation. — *Taylor v. Burns*, (Ariz. 1904) 76 Pac. Rep. 623.

5. Instruments Construed to Create General Power. — *In re Richards*, (1902) 1 Ch. 76; *Dana v. Dana*, 185 Mass. 156.

Limited Power. — *Van Grutten v. Foxwell*, 84 L. T. N. S. 545; *Inglis v. McCook*, (N. J. 1904) 59 Atl. Rep. 630.

1134. 4. Limited Powers. — *Wilson v. Van Epps*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 486; *Matter of Tenney*, 104 N. Y. App. Div. 290; *Herrick v. Fowler*, 108 Tenn. 410.

10. In Favor of Issue of Object. — *Herrick v. Fowler*, 108 Tenn. 410.

1135. 1. "Children." — *Herrick v. Fowler*, 108 Tenn. 410.

1137. 9. Construction of Instruments as to Estates Appointable. — *Leslie v. Maxey*, (Ky. 1902) 67 S. W. Rep. 839; *McCook v. Mumby*, 64 N. J. Eq. 394; *Terry v. St. Stephen's Protestant Episcopal Church*, 79 N. Y. App. Div. 527; *Watts's Estate*, 202 Pa. St. 85; *Heinemann v. D'Wolf*, 25 R. I. 243.

10. Appointment to Trustees. — *Kemp v. Kemp*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 79. See also *In re Redgate*, (1903) 1 Ch. 356.

1138. 4. Appointing Limited Estates. — *Mays v. Beech*, (Tenn. 1905) 86 S. W. Rep. 713.

5. Charging Lands. — *Allder v. Jones*, 98 Md. 101.

6. Appointment of Proceeds. — *In re Redgate*, (1903) 1 Ch. 356.

1139. 4. Construction of Appointments by Will. — *In re Marten*, (1901) 1 Ch. 370, (1902) 1 Ch. 314; *In re Shuckburgh*, (1901) 2 Ch. 794; *In re Rising*, (1904) 1 Ch. 533; *Kemp v. Kemp*,

(Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 79; *Lafferty's Estate*, 209 Pa. St. 44; *Heinemann v. D'Wolf*, 25 R. I. 243.

Premiums on Leases by a Life Tenant do not pass under appointments by him of the fee of the leaseholds. *Beddington v. Baumann*, (1903) A. C. 13, approving *In re Dowsett*, (1901) 1 Ch. 398.

7. A Testamentary Appointment in Discharge of a Moral or Legal Obligation does not lapse merely by reason of the appointee predeceasing the testator, but extends to the legal personal representative of the appointee. *Stevens v. King*, (1904) 2 Ch. 30.

1140. 1. Resulting Trust. — *In re Marten*, (1902) 1 Ch. 314, 85 L. T. N. S. 704.

3. Appointments Directly to Appointee. — *In re Marten*, (1902) 1 Ch. 314, 85 L. T. N. S. 704.

6. Execution in Favor of Creditor. — See *In re Lawley*, (1902) 2 Ch. 799, affirmed (1903) A. C. 411.

1143. 7. Subsequent Appointment by Deed. — *In re Tancred*, (1903) 1 Ch. 715.

9. Subsequent Testamentary Appointment. — *Kent v. Kent*, (1902) P. 108.

1144. 5. Limitations Over in Default of Appointment. — *Graham v. Whitridge*, 99 Md. 248, 290; *Inglis v. McCook*, (N. J. 1904) 59 Atl. Rep. 630; *Ketchin v. Rion*, 68 S. Car. 260; *Hare v. Congregational Soc.*, 76 Vt. 362.

1145. 5. Russell v. Hilton, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 642, affirmed 175 N. Y. 525; *Wilson v. Van Epps*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 486.

1146. 6. Appointment in Favor of Creditor Is General Assets. — *Beyfus v. Lawley*, (1903)

- 1147.** Limited Powers. — See note 4.
Statutory Provisions. — See note 6.
- 1148.** 9. Exclusive and Illusory Appointments — *a.* IN GENERAL. — See note 2.
- 1149.** *b.* WHAT POWERS ARE EXCLUSIVE OR NONEXCLUSIVE — Non-exclusive Powers. — See note 3.
- 1150.** *c.* ILLUSORY APPOINTMENTS. — See note 1.
In the United States. — See note 9.
- 1151.** 10. Excessive or Partially Invalid Exercise of Power of Appointment. — See notes 3, 4.
- 1152.** Appointment to Both Objects and Strangers to Power. — See note 1.
Invalid Condition, Charges, and Limitations. — See note 2.
- 11.** Fraudulent Appointments — *a.* IN GENERAL — In Case, However, of a Limited Power of Appointment. — See note 4.
- 1153.** *b.* BENEFIT TO DONEE. — See note 3.
- 1156.** IX. POWER TO SELL OR MORTGAGE — 2. Creation of Power. — See note 1.
- 3.** Extent of Power. — See note 2.
Power to "Sell." — See notes 4, 5, 6.
Estate Conveyable under Power. — See note 11.
- 1158.** X. POWER TO LEASE — 3. Extent of Power — To Whom Lease May Be Granted. — See note 1.
- A. C. 411; *In re Lawley*, (1902) 2 Ch. 799, affirmed (1903) A. C. 411. See also *Long v. Long*, (Ky. 1902) 69 S. W. Rep. 804.
- 1147.** 4. Limited Powers. — *Wilson v. Van Epps*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 486.
- 6.** *Young v. Sheldon*, 139 Ala. 444, 101 Am. St. Rep. 44; *Auer v. Brown*, 121 Wis. 115.
- 1148.** 2. Appointment Must Include All Objects of Nonexclusive Powers. — *Inglis v. McCook*, (N. J. 1904) 59 Atl. Rep. 630.
- 1149.** 3. *Inglis v. McCook*, (N. J. 1904) 59 Atl. Rep. 630.
- 1150.** 1. Discretion as to Shares under Non-exclusive Power. — *Allder v. Jones*, 98 Md. 101.
- 9.** Not Recognized. — *Hawthorn v. Ulrich*, 207 Ill. 430. As to other provisions for the object receiving the illusory share, see *Herrick v. Fowler*, 108 Tenn. 410.
- 1151.** 3. Partially Invalid Exercise of Power. — *Sturgis's Estate*, 205 Pa. St. 436.
- 4.** *Ketchin v. Rion*, 68 S. Car. 270, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1148-1151.
- 1152.** 1. Appointment Including Objects of and Strangers to Power. — *In re Finch*, (1903) 2 Ch. 486; *Duncan's Trustees v. Duncan*, Sc. Ct. of Sess. 3 F. 533.
- 2.** Invalid Conditions Annexed. — *Duncan's Trustees v. Duncan*, Sc. Ct. of Sess. 3 F. 533; *Graham v. Whitridge*, 99 Md. 248, 290; *Herrick v. Fowler*, 108 Tenn. 410.
- Election.** — A case of election can be raised, if the facts admit of it, as much in the case of an appointment void for remoteness by reason of the rule against perpetuities as in the case of an appointment void for being to a person not an object of the power. *In re Bradshaw*, (1902) 1 Ch. 436.
- 4.** Covenant to Exercise Power in Particular Way. — The donee of a special power to appoint by will among children (which is a fiduciary power) is intended to and should keep the ordinary exercise of it under his control until the moment of his death, and he cannot in anticipation of his last will validly covenant that it shall be exercised in a particular way. Such a covenant is bad as calculated to defeat the object of the creation of the power. *In re Bradshaw*, (1902) 1 Ch. 436.
- 1153.** 3. Benefit to Donee. — *Saunders v. Shatto*, 91 L. T. N. S. 282.
- 1156.** 1. Instrument Construed to Create Power of Sale. — *Young v. Sheldon*, 139 Ala. 444, 101 Am. St. Rep. 44, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1155, 1156; *Simpkins v. Bales*, 123 Iowa 62; *Dexter v. Gordon*, 136 Mich. 235; *Dana v. Jones*, 91 N. Y. App. Div. 496.
- 2.** General Extent of Power. — *In re Bauernschmidt*, 97 Md. 35; *Underwood v. Cave*, 176 Mo. 1; *Bodmann German Protestant Widows' Home v. Lippardt*, 70 Ohio St. 261; *Hanbest v. Grayson*, 206 Pa. St. 59; *Matthews v. Capshaw*, 109 Tenn. 480, 97 Am. St. Rep. 854; *Wiess v. Goodhue*, 98 Tex. 274, reversing (Tex. Civ. App. 1904) 79 S. W. Rep. 873; *Cheney v. Stafford*, 76 Vt. 16.
- Taking Back a Mortgage** for a reasonable part of the purchase money is permissible under a power to sell and invest the proceeds. *McLenegan v. Yeiser*, 115 Wis. 304.
- 4.** Nominal Consideration Not Sufficient. — *O'Brien v. Flint*, 74 Conn. 502.
- 5.** *O'Brien v. Flint*, 74 Conn. 502. See also *Spencer v. Kimball*, 98 Me. 499.
- 6.** See *O'Brien v. Flint*, 74 Conn. 502.
- 11.** Estate Conveyable. — *Dickinson v. Griggsville Nat. Bank*, 111 Ill. App. 183, affirmed 209 Ill. 350.
- 1158.** 1. Lease to Self. — The donee of an ordinary power of leasing cannot validly exercise the power by leasing to himself, either alone or jointly with others. *Boyce v. Edbrooke*, (1903) 1 Ch. 836.

1159. [POX. — See note 8a.]

PRACTICABLE — PRACTICABLY. — See note 9.

1161. PRACTICE OF MEDICINE. — See note 3.

1159. 8a. In its common acceptation the word *pox* without any prefix means syphilis. This was an action for slander. *Swindell v. Harper*, 51 W. Va. 381.

9. Practicable, Etc.— *Rizer v. People*, 18 Colo. App. 40.

As Soon as Practicable.— *Williams v. Ritzenhouse, etc., Co.*, 198 Ill. 602.

1161. 3. Practice of Medicine.— *People v. Gordon*, 194 Ill. 560; *State v. Gravett*, 65 Ohio St. 289 (osteopathy held to be *practicing medicine*). But see *State v. McKnight*, 131 N. Car. 717.

Offering and Recommending a Medical Appliance for Sale is not *practicing medicine* within a licensing statute. *People v. Lehr*, 196 Ill. 361.

PRECATORY TRUSTS.

BY H. N. ELDRIDGE.

1164. III. RULES OF CONSTRUCTION — 1. Doctrine Stated — b. TENDENCY OF MODERN DECISIONS.— See notes 2, 3.

c. MODERN DOCTRINE — (2) Necessity that Precatory Words Be Used in Imperative Sense.— See note 7.

1165. See note 1.

(3) *Rule that Intention of Testator Governs.*— See note 4.

(4) *Rule Supported by Weight of Modern Authority.*— See note 7.

1166. 2. Subordinate Rules of Construction — b. PRECATORY WORDS.— See notes 3, 4.

Precatory Words and Words Expressing Motive or Purpose Distinguished.— See note 7.

1167. c. CERTAINTY AS TO SUBJECT-MATTER AND OBJECTS OF ALLEGED TRUST — (2) Modern Doctrine — (a) General Statement of Rule.— See note 4.

1169. (c) Certainty as to Object.— See note 3.

1170. e. NATURE OF ESTATE GIVEN TO DONEE.— See note 7.

1164. 2. Igo v. Irvine, (Ky. 1902) 70 S. W. Rep. 836.

3. Tendency of Modern Decisions.— *Burnes v. Burnes*, (C. C. A.) 137 Fed. Rep. 781; *Kauffman v. Gries*, 141 Cal. 295; *Igo v. Irvine*, (Ky. 1902) 70 S. W. Rep. 836.

7. Precatory Words Must Be Imperative.— *In re Oldfield*, (1904) 1 Ch. 549; *Russell v. U. S. Trust Co.*, 127 Fed. Rep. 445; *McDuffie v. Montgomery*, 128 Fed. Rep. 105; *Burnes v. Burnes*, (C. C. A.) 137 Fed. Rep. 781; *McCurdy v. McCallum*, 186 Mass. 464; *Igo v. Irvine*, (Ky. 1902) 70 S. W. Rep. 836.

1165. 1. Object of Inquiry.— *Ogden's Petition*, 25 R. I. 373.

4. Precatory Words Construed in Natural Sense.— *Kauffman v. Gries*, 141 Cal. 295; *Post v. Moore*, 181 N. Y. 15, *affirming* 89 N. Y. App. Div. 613.

7. Intention to Create Must Affirmatively Appear from Whole Will.— *In re Oldfield*, (1904) 1 Ch. 549; *Russell v. U. S. Trust Co.*, 127 Fed. Rep. 445; *Burnes v. Burnes*, (C. C. A.) 137 Fed. Rep. 781; *Kauffman v. Gries*, 141 Cal. 295; *Matter of Copeland*, (Surrogate Ct.) 38 Misc. (N. Y.) 402.

1166. 3. Words of Wish and Desire held not to create a trust. *Post v. Moore*, 181 N. Y. 15, *affirming* 89 N. Y. App. Div. 613.

4. The Testator's Expression of a "Wish and

Expectation" that his wife should "generously remember" his brother's children, and "such others as she may choose," when she should make her will, is one of hope and confidence, rather than of command. *Russell v. U. S. Trust Co.*, 127 Fed. Rep. 445, *affirmed* (C. C. A.) 136 Fed. Rep. 758.

Words of Request.— See *McCurdy v. McCallum*, 186 Mass. 464.

Words of Desire and Request do not, according to the ordinary use of the English language, import a trust or charge. *Kauffman v. Gries*, 141 Cal. 295.

Words of Desire held not precatory. *In re Oldfield*, (1904) 1 Ch. 549.

7. Words Held to Show Motive or Purpose for Giving Absolutely.— *Hutchinson's Succession*, 112 La. 656.

1167. 4. Lack of Certainty Indicative of Intent Not to Create Trust.— *In re Oldfield*, (1904) 1 Ch. 549; *McDuffie v. Montgomery*, 128 Fed. Rep. 105; *Burnes v. Burnes*, (C. C. A.) 137 Fed. Rep. 781.

1169. 3. Uncertainty of Object as Evidence of Intent.— *In re Oldfield*, (1904) 1 Ch. 549; *McDuffie v. Montgomery*, 128 Fed. Rep. 105; *Burnes v. Burnes*, (C. C. A.) 137 Fed. Rep. 781.

1170. 7. Precatory Words Ordinarily Will Not Cut Down Absolute Devise.— *Snodgrass v.*

- 1171.** PRECEDING. — See note 5.
1172. PRECINCT. — See note 2.
1173. PREJUDICE. — See notes 3, 4.
1174. PREMEDITATE — PREMEDITATED, ETC. — See notes 2, 5.
 Intent. — See note 6.
1175. See note 1.
 PREMISES. — See note 6.
1176. See note 2.
1177. PREMIUM — Building and Loan Associations. — See note 2.
 PREPONDERANCE OF EVIDENCE. — See note 6.
1178. Number of Witnesses. — See note 1.
 Necessity of Definition. — See note 2.
 PREROGATIVE. — See note 3.
1179. PRESCRIBE. — See notes 1, 2.

Brandenburg, 164 Ind. 67 [citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1170]; *Comiskey v. Bowring-Hanbury*, (1905) A. C. 84, 92 L. T. N. S. 241; *Russell v. U. S. Trust Co.*, 127 Fed. Rep. 445; *McDuffie v. Montgomery*, 128 Fed. Rep. 105; *Burnes v. Burnes*, (C. C. A.) 137 Fed. Rep. 781; *Igo v. Irvine*, (Ky. 1902) 70 S. W. Rep. 836; *Clark v. Clark*, 99 Md. 356; *Post v. Moore*, 181 N. Y. 15, affirming 89 N. Y. App. Div. 613.

1171. 5. Preceding. — *Johnson v. Johnson*, 95 Mo. App. 329.

1172. 2. Precinct — Place of Voting. — *State v. Anslinger*, 171 Mo. 600.

1173. 3. Prejudice. — *Keen v. Brown*, 46 Fla. 487.

4. Same — Change of Venue. — *Cortez v. State*, 44 Tex. Crim. 169.

1174. 2. Premeditation. — *State v. Spivey*, 132 N. Car. 989; *State v. Lindgrind*, 33 Wash. 440.

5. Thought of Beforehand for Any Length of Time, However Short. — *State v. McMullin*, 170 Mo. 608; *State v. Ashcraft*, 170 Mo. 409; *State v. Conly*, 130 N. Car. 683.

6. Premeditation Distinguished from Intent to Kill. — *State v. Bonofiglio*, 67 N. J. L. 239.

1175. 1. No Distinction. — *Olds v. State*, 44 Fla. 452.

6. Land with Its Appurtenances. — *Merchants Bldg. Imp. Co. v. Chicago Exch. Bldg. Co.*, 210

Ill. 38, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1175.

Intoxicating Liquors. — *People v. Miller*, (County Ct.) 79 N. Y. Supp. 1122.

1176. 2. Title or Interest. — *Merchants Bldg. Imp. Co. v. Chicago Exch. Bldg. Co.*, 210 Ill. 38, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1175.

Land Itself. — See *Sands v. Kaukauna Water Power Co.*, 115 Wis. 229.

1177. 2. Building and Loan Associations. — *Washington Nat. Bldg., etc., Assoc. v. Andrews*, 95 Md. 696; *Fidelity Sav. Assoc. v. Bank of Commerce*, 12 Wyo. 315.

6. Preponderance of Evidence. — *Mortimer v. McMullen*, 202 Ill. 413; *Ball v. Marquis*, 122 Iowa 665.

1178. 1. Number of Witnesses. — *West Chicago St. R. Co. v. Lieserowitz*, 197 Ill. 607; *McKee v. Verdin*, 96 Mo. App. 268; *Turner v. Overall*, 172 Mo. 271.

2. Necessity of Definition. — *Jones v. Durham*, 94 Mo. App. 51.

3. Prerogative Writs. — *Duluth Elevator Co. v. White*, 11 N. Dak. 534.

1179. 1. Prescribe. — *New York v. Hexamer*, 59 N. Y. App. Div. 4.

2. "Prescribe a Penalty" Equivalent to "Fix a Penalty." — *New York v. Hexamer*, 59 N. Y. App. Div. 4.

PREScription.

By G. W. WALSH.

1183. I. DEFINITION AND GENERAL PRINCIPLES — 2. Presumption of Grant Now Substituted for Technical Prescription. — See notes 3, 5, 6.

1184. See notes 1, 2.

3. Difference Between Presumption of Grant and Technical Prescription. — See note 5.

1185. See notes 1, 2.

5. Distinction Between Prescription and Dedication. — See note 6.

II. WHAT MAY BE PRESCRIBED FOR — 1. In General — a. INCORPOREAL RIGHTS ONLY. — See note 7.

1186. Simultaneous Acquisition of Easement by Prescription and Land by Adverse Possession. — See note 5.

1187. d. APPLICABLE ONLY TO RIGHTS WHICH MAY BE GRANTED. — See notes 1, 3.

e. NO PRESCRIPTION AGAINST CONSTITUTION OR LAWS. — See note 5.

1189. III. WHO MAY PRESCRIBE — 1. Tenants for Years or at Will. — See note 1.

[4. Corporations.] — See note 6a.

IV. AGAINST WHOM PRESCRIPTION RUNS — 2. No Prescription Against United States. — See note 8.

1183. 3. Immemorial Enjoyment Conclusive Evidence of Right. — *Boyce v. Missouri Pac. R. Co.*, 168 Mo. 583; *Wasmund v. Harm*, 36 Wash. 170.

The Time of Legal Memory. — *Oregon Constr. Co. v. Allen Ditch Co.*, 41 Oregon 209, 93 Am. St. Rep. 701.

5. Origin of Doctrine of Presumed Grant. — *Neaverson v. Peterborough Rural Dist. Council*, (1901) 1 Ch. 22, 70 L. J. Ch. 35; *Boyce v. Missouri Pac. R. Co.*, 168 Mo. 583; *Oregon Constr. Co. v. Allen Ditch Co.*, 41 Oregon 209, 93 Am. St. Rep. 701; *Wasmund v. Harm*, 36 Wash. 170.

6. Grant Presumed After Use for Statutory Period. — *Norrell v. Augusta R.*, etc., Co., 116 Ga. 313; *Riley v. Buchanan*, 116 Ky. 625; *Wathen v. Howard*, (Ky. 1905) 84 S. W. Rep. 303; *Boyce v. Missouri Pac. R. Co.*, 168 Mo. 583; *Hindley v. Metropolitan El. R. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56; *Godino v. Kane*, 26 Pa. Super. Ct. 596; *Kirby v. Southern R. Co.*, 63 S. Car. 494; *Reid v. Garnett*, 101 Va. 47; *Wasmund v. Harm*, 36 Wash. 170. See also *infra*, this title, **1213. i et seq.**

1184. 1. Hindley v. Metropolitan El. R. Co., (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56.

2. Statute of Limitations Not Directly Applicable to Incorporeal Rights. — *Boyce v. Missouri Pac. R. Co.*, 168 Mo. 583.

5. Presumption of Grant from User Alone Not Conclusive. — *Rose v. Mesmer*, 142 Cal. 322; *Reid v. Garnett*, 101 Va. 47.

1185. 1. When Presumption Conclusive. — *Riley v. Buchanan*, 116 Ky. 625; *Winne v.*

Winne, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 435; *Hindley v. Metropolitan El. R. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56.

2. Hindley v. Metropolitan El. R. Co., (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56.

6. Evans v. Scott, (Tex. Civ. App. 1904) 83 S. W. Rep. 874.

7. Incorporeal Rights. — *Oregon Constr. Co. v. Allen Ditch Co.*, 41 Oregon 209, 93 Am. St. Rep. 701.

1186. 5. Simultaneous Acquirement of Easement by Prescription and Dominant Estate by Adverse Possession. — *Cavanaugh v. Wholey*, 143 Cal. 164; *Smith v. Smith*, 78 S. W. Rep. 884, 25 Ky. L. Rep. 1790.

1187. 1. Presumption of Grant. — *Neaverson v. Peterborough Rural Dist. Council*, (1901) 1 Ch. 22, 70 L. J. Ch. 35, *reversed* on other grounds (1902) 1 Ch. 557.

3. See Sutter v. Heckman, 1 Alaska 81.

5. No Prescriptive Right to Violate Law. — *Neaverson v. Peterborough Rural Dist. Council*, (1902) 1 Ch. 557. Compare *Clements v. Watkins Land, etc., Co.*, 36 Tex. Civ. App. 339.

1189. 1. Tenant for Years or at Will. — See *Kilgour v. Gaddes*, (1904) 1 K. B. 457; *Macnaghten v. Baird*, (1903) 2 Ir. R. 731.

6a. Corporation May Prescribe. — *Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 578; *Boyce v. Missouri Pac. R. Co.*, 168 Mo. 583.

8. Against United States. — *Dastervignes v. U. S.*, (C. C. A.) 122 Fed. Rep. 30, *affirming* 118 Fed. Rep. 199; *Sutter v. Heckman*, 1 Alaska 81; *Lewis v. Johnson*, 1 Alaska 529.

1190. 3. Rule as to States of Union. — See note 1.

4. Rule as to Crown in England. — See note 3.

5. Rule Against Public — Prescriptive Rights in Property Dedicated to Public Use. — See note 7.

V. CHARACTER OF USE AND ENJOYMENT — 1. In General. — See note 8.

1191. See note 1.

1192. 2. Use Must Be Actual and Beneficial. — See note 4.

3. Use Must Be Adverse — *a.* IN GENERAL. — See note 5.

1193. See note 1.

b. WHAT USE IS ADVERSE — (1) *In General.* — See notes 3, 4, 5. Infringement of Landowner's Rights — Use Giving Cause of Action. — See note 6.

1194. See notes 1, 2, 3, 4, 5.

(2) *Claim of Right Essential.* — See note 6.

1195. (3) *Admission of Superior Right in Landowner Fatal.* — See note 6.

1190. 1. Against State. — Norrell *v.* Augusta R., etc., Co., 116 Ga. 313; State *v.* Paxson, 119 Ga. 730; Slaterry *v.* Heilperin, 110 La. 86.

3. Runs Against Crown in Canada. — McGee *v.* Rex, 7 Can. Exch. 309.

7. Rights in Property Dedicated to Public Use Cannot Be Acquired. — Norrell *v.* Augusta R., etc., Co., 116 Ga. 313; Langley *v.* Augusta, 118 Ga. 590, 98 Am. St. Rep. 133; Hall *v.* Breyfogle, 162 Ind. 494; New Basin Canal, etc., *v.* H. Weston Lumber Co., 109 La. 925; Providence, etc., Steamboat Co. *v.* Fall River, 187 Mass. 45; Washington *v.* Steiner, 25 Pa. Super. Ct. 392; Foley *v.* Doddridge County Ct., 54 W. Va. 16; Clifton *v.* Weston, 54 W. Va. 250. See also School Trustees *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1902) 67 S. W. Rep. 147.

8. General Rule as to Nature of Use and Enjoyment. — Hall *v.* Blackman, 8 Idaho 272; Rose *v.* Farmington, 196 Ill. 226.

1191. 1. Requisites of Adverse Use in General. — Jesse French Piano, etc., Co. *v.* Forbes, 135 Ala. 277; Griseza *v.* Terwilliger, 144 Cal. 456; Hall *v.* Blackman, 8 Idaho 272; Rose *v.* Farmington, 196 Ill. 226; Chicago, etc., R. Co. *v.* Ives, 202 Ill. 69; Schulenberg *v.* Zimmerman, 86 Minn. 70; Boyce *v.* Missouri Pac. R. Co., 168 Mo. 583; Talbott *v.* Butte City Water Co., 29 Mont. 17; Hindley *v.* Metropolitan El. R. Co., (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56; Schaeffer *v.* Claudia, 25 Ohio Cir. Ct. 249; Oregon Constr. Co. *v.* Allen Ditch Co., 41 Oregon 209, 93 Am. St. Rep. 701; Evans *v.* Scott, (Tex. Civ. App. 1904) 83 S. W. Rep. 874. See also the title EASEMENTS, 427. 3.

1192. 4. Beneficial Use Essential. — Chicago, etc., R. Co. *v.* Ives, 202 Ill. 69.

5. Use Must Be Adverse. — Sharpe *v.* Marcus, 137 Ala. 147; Jesse French Piano, etc., Co. *v.* Forbes, 135 Ala. 277; Strong *v.* Baldwin, 137 Cal. 432; Rose *v.* Mesmer, 142 Cal. 322; Pennington *v.* Lewis, 4 Penn. (Del.) 447; Chicago, etc., R. Co. *v.* Johnson, 205 Ill. 598; Rickels *v.* Log Owners' Booming Co., (Mich. 1905) 102 N. W. Rep. 652, 11 Detroit Leg. N. 769; Power *v.* Dean, 112 Mo. App. 288; Talbott *v.* Butte City Water Co., 29 Mont. 17; Hindley *v.* Manhattan R. Co., 103 N. Y. App. Div. 504; Schaeffer *v.* Claudia, 25 Ohio Cir. Ct.

249. See also Zook *v.* Illinois Cent. R. Co., 80 S. W. Rep. 211, 25 Ky. L. Rep. 2194. And see the title EASEMENTS, 427. 3.

1193. 1. Power *v.* Dean, 112 Mo. App. 288. See also the title EASEMENTS, 427. 3.

3. Godino *v.* Kane, 26 Pa. Super. Ct. 596.

4. Rickels *v.* Log Owners' Booming Co., (Mich. 1905) 102 N. W. Rep. 652, 11 Detroit Leg. N. 769.

5. Use Inconsistent with Interests of Landowner. — Jesse French Piano, etc., Co. *v.* Forbes, 135 Ala. 277.

6. Actual Damage Held Not Essential. — Hindley *v.* Metropolitan El. R. Co., (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56; Hall *v.* Carter, 33 Tex. Civ. App. 230.

1194. 1. Infringement of Right Essential. — Centerville, etc., Irrigation Ditch Co. *v.* Sanger Lumber Co., 140 Cal. 385; Hindley *v.* Metropolitan El. R. Co., (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56.

2. Must Be Such as to Give Right of Action to Landowner. — Schulenberg *v.* Zimmerman, 86 Minn. 70; Talbott *v.* Butte City Water Co., 29 Mont. 17; Chessman *v.* Hale, 31 Mont. 577.

3. Mere Enjoyment of Legal Right Not Sufficient — Union Lighterage Co. *v.* London Graving Dock Co., (1902) 2 Ch. 557, 71 L. J. Ch. 791; Gutierrez *v.* Wege, 145 Cal. 730.

4. Watercourses. — Walker *v.* Lillingston, 137 Cal. 401; Clark *v.* Allaman, (Kan. 1905) 80 Pac. Rep. 571; Crawford Co. *v.* Hathaway, 67 Neb. 325; Beers *v.* Sharpe, 44 Oregon 386; Harrington *v.* Demaris, (Oregon 1904) 77 Pac. Rep. 603; Dunn *v.* Thomas, (Neb. 1903) 96 N. W. Rep. 142; Lawrie *v.* Silsby, 76 Vt. 240, 104 Am. St. Rep. 927.

5. Clark *v.* Allaman, (Kan. 1905) 80 Pac. Rep. 571; Talbott *v.* Butte City Water Co., 29 Mont. 17; Meng *v.* Coffee, 67 Neb. 500.

6. Claim of Right Essential. — Pennington *v.* Lewis, 4 Penn. (Del.) 447; Rose *v.* Farmington, 196 Ill. 226; Chicago, etc., R. Co. *v.* Ives, 202 Ill. 69; Chicago, etc., R. Co. *v.* Johnson, 205 Ill. 598; Schaeffer *v.* Claudia, 25 Ohio Cir. Ct. 249. See also Zook *v.* Illinois Cent. R. Co., 80 S. W. Rep. 211, 25 Ky. L. Rep. 2194. And see the title EASEMENTS, 427. 3.

1195. 6 Admission of Superior Right in Landowner Fatal. — Hindley *v.* Manhattan R. Co., 103 N. Y. App. Div. 504.

1196. See notes 1, 2.

(4) *Permissive Use Not Adverse* — (a) *In General*. — See note 6.

1197. Under the English Statute. — See note 4.

(b) *What Use Is Permissive*. — See note 6.

1198. (c) *Use Permissive in Its Inception but Subsequently Adverse*. — See notes 1, 2.

(5) *Use under Grant, Agreement, or Reservation — Use of Way of Necessity* — (a) *In General*. — See note 3.

1199. *Use of a Way of Necessity*. — See note 1.

1200. (9) *Use of Uninclosed Land*. — See note 5.

(10) *Use of Easement for Which Rent Is Paid*. — See note 8.

1201. (12) *Use as Between Landlord and Tenant*. — See note 4.

(14) *Use as Between Tenants in Common*. — See note 7.

1202. c. *EVIDENCE* — (3) *Presumptions*. — See note 6.

(4) *Burden of Proof*. — See note 11.

1203. (5) *Question for Court or Jury*. — See note 1.

4. *Use Must Be Exclusive*. — See notes 2, 3.

1196. 1. Centerville, etc., Irrigation Ditch Co. v. Sanger Lumber Co., 140 Cal. 385; Hindley v. Metropolitan El. R. Co., (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56.

2. Hindley v. Metropolitan El. R. Co., (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56.

6. *Permissive Use Not Adverse — Alabama*. — Jesse French Piano, etc., Co. v. Forbes, 135 Ala. 277; Sharpe v. Marcus, 137 Ala. 147.

Arkansas. — Belser v. Moore, 73 Ark. 296.

California. — Patterson v. Mills, (Cal. 1902)

68 Pac. Rep. 1034.

Delaware. — Pennington v. Lewis, 4 Penn.

(Del.) 447.

Idaho. — Hall v. Blackman, 8 Idaho 272.

Illinois. — Rose v. Farmington, 196 Ill. 226;

Chicago, etc., R. Co. v. Ives, 202 Ill. 69.

Indiana. — Kibbey v. Richards, 30 Ind. App.

101, 96 Am. St. Rep. 333.

Iowa. — Hagerle v. Beebe, 123 Iowa 620.

Kentucky. — Louisville, etc., R. Co. v. Dickey,

72 S. W. Rep. 332, 24 Ky. L. Rep. 1710; Warth

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339.

Maryland. — Ross v. McGee, 98 Md. 389.

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Missouri. — Boyce v. Missouri Pac. R. Co.,

168 Mo. 583. See also Power v. Dean, 112 Mo.

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New York. — Hindley v. Metropolitan El. R.

Co., (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56;

George v. New York, (Supm. Ct. Spec. T.) 42

Misc. (N. Y.) 270; Slattery v. McCaw, (Supm.

Ct. Spec. T.) 44 Misc. (N. Y.) 426.

Texas. — Evans v. Scott, (Tex. Civ. App.

1904) 83 S. W. Rep. 874.

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1197. 4. *Verbal License Not Fatal under English Statute*. — See Easton v. Isted, 86 L. T.

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Ch. 405.

6. *Evidence of Permissive Use*. — Warth v.

Baldwin, 84 S. W. Rep. 1148, 27 Ky. L. Rep.

339; Hill v. McGinnis, 64 Neb. 187.

1198. 1. *Use Permissive in Its Inception*. —

Whelchel v. Gainesville, etc., Electric R. Co.,

116 Ga. 431; Ann Arbor Fruit, etc., Co. v. Ann Arbor R. Co., 136 Mich. 599, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1198.

2. *Burden of Proof*. — Ann Arbor Fruit, etc., Co. v. Ann Arbor R. Co., 136 Mich. 599, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1198.

3. *Where Agreement Purports to Give Perpetual Right*. — See Lawrie v. Silsby, 76 Vt. 240, 104 Am. St. Rep. 927.

1199. 1. *Use of Way of Necessity*. — See Ann Arbor Fruit, etc., Co. v. Ann Arbor R. Co., 136 Mich. 599, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1199.

1200. 5. *Uninclosed Land*. — Pennington v. Lewis, 4 Penn. (Del.) 447; Kirby v. Southern R. Co., 63 S. Car. 494.

8. *Payment of Rent*. — Gardner v. Hodgson's Kingston Brewery Co., (1903) A. C. 229.

1201. 4. *Landlord and Tenant*. — Talbott v. Butte City Water Co., 29 Mont. 17.

7. *Easement over Land of Cotenant*. — See Satterlee v. Kobbe, 173 N. Y. 91.

1202. 6. *Use Presumed to Be Adverse*. — Anderson v. Southworth, 76 S. W. Rep. 391, 25 Ky. L. Rep. 776; Brown v. Barton, 82 S. W. Rep. 405, 26 Ky. L. Rep. 711; Warth v. Baldwin, 84 S. W. Rep. 1148, 27 Ky. L. Rep. 339; Chenault v. Gravitt, 85 S. W. Rep. 184, 27 Ky. L. Rep. 403; Winne v. Winne, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 435; Godino v. Kane, 26 Pa. Super. Ct. 596; Earle v. Poat, 63 S. Car. 439; Reid v. Garnett, 101 Va. 47. And see the title EASEMENTS, 427. 3.

11. *Burden of Proving License upon Landowner*. — Anderson v. Southworth, 76 S. W. Rep. 391, 25 Ky. L. Rep. 776; Brown v. Barton, 82 S. W. Rep. 405, 26 Ky. L. Rep. 711; Wathen v. Howard, (Ky. 1905) 84 S. W. Rep. 303; Chenault v. Gravitt, 85 S. W. Rep. 184, 27 Ky. L. Rep. 403; Winne v. Winne, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 435; Baners v. Bull, (Oregon 1904) 78 Pac. Rep. 757; Godino v. Kane, 26 Pa. Super. Ct. 596.

1203. 1. *Question for Jury*. — Abbott v. Pond, 142 Cal. 303; Ross v. McGee, 98 Md. 389.

2. *Use Must Be Exclusive*. — Jesse French Piano, etc., Co. v. Forbes, 135 Ala. 277.

3. *Use Participated in by General Public Not Sufficient*. — Reid v. Garnett, 101 Va. 47.

1203. 5. Use Must Be Continuous and Uninterrupted — *a.* IN GENERAL. — See note 9.

1204. Meaning of Term Continuous. — See notes 3, 4.
b. WHAT CONSTITUTES FATAL INTERRUPTION — (1) *Voluntary Cessation of User.* — See note 11.

1205. Under the English and Canadian Statutes. — See note 1.
 (2) *Verbal Complaints and Denials of Right.* — See notes 3, 4.
 (4) *Interruption by Acts in Pais.* — See notes 9, 12.

1206. A Temporary Obstruction of a Right of Way. — See note 1.
 (6) *Unity of Ownership of Dominant and Servient Estates.* — See note 3.

1207. *c.* TACKING. — See note 8.

1208. *d.* CONTINUITY AS REGARDS EXTENT AND MANNER OF USE. — See note 5.

e. CONTINUITY AS TO LOCALITY. — See note 9.

1209. *f.* BURDEN OF PROOF. — See note 6.

g. QUESTION FOR JURY. — See note 7.

6. Use Must Be Open and Notorious. — See note 8.

7. Use Must Be Peaceable. — See note 10.

1210. 8. Use Must Be with Acquiescence and Knowledge of Landowner — In General. — See note 1.

Presumptions as to Knowledge and Acquiescence. — See notes 2, 3.

1211. Legal Disability to Acquiesce. — See note 2.

VI. EFFECT OF LEGAL DISABILITY OF OWNER OF SERVIENT TENEMENT — 2. Disability to Grant. — See note 12.

1203. 9. Use Must Be Continuous and Uninterrupted. — *Jesse French Piano, etc., Co. v. Forbes*, 135 Ala. 277; *Rose v. Mesmer*, 142 Cal. 322; *Pennington v. Lewis*, 4 Penn. (Del.) 447; *Rose v. Farmington*, 196 Ill. 226; *Rickels v. Log Owners' Booming Co.*, (Mich. 1905) 102 N. W. Rep. 652, 11 Detroit Leg. N. 769; *Flynn v. Service*, (Mich. 1905) 103 N. W. Rep. 541; *Power v. Dean*, 112 Mo. App. 288; *Talbott v. Butte City Water Co.*, 29 Mont. 17; *Schaeffer v. Claudia*, 25 Ohio Cir. Ct. 249. See also the title EASEMENTS, 427. 3.

1204. 3. Meaning of Term Continuous Dependent on Nature of Easement. — *Schaeffer v. Claudia*, 25 Ohio Cir. Ct. 249.

4. Constant Use Not Essential. — *Schaeffer v. Claudia*, 25 Ohio Cir. Ct. 249.

11. Voluntary Cessation of User. — *Cavanaugh v. Wholey*, 143 Cal. 164; *Hall v. State*, 72 N. Y. App. Div. 360.

1205. 1. English and Canadian Statutes. — See *Eisenhauer v. Whynacht*, 35 Nova Scotia 295.

3. Verbal Complaints and Denials of Right. — *Reid v. Garnett*, 101 Va. 47.

4. Oregon Constr. Co. v. Allen Ditch Co., 41 Oregon 209, 93 Am. St. Rep. 701.

9. Erection of Gate. — See *Eisenhauer v. Whynacht*, 35 Nova Scotia 295.

12. Turning Water from Ditch. — *Schofield v. Cooper*, 126 Iowa 334.

1206. 1. *Chenault v. Gravitt*, 85 S. W. Rep. 184, 27 Ky. L. Rep. 403.

3. Unity of Ownership. — *Riehman v. Field*, 81 N. Y. App. Div. 526; *Bates v. Sherwood*, 24 Ohio Cir. Ct. 146.

1207. 8. Tacking Allowed in General. — *Hindley v. Metropolitan El. R. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 66, citing 22 Am.

AND ENG. ENCYC. OF LAW (2d ed.) 1207; *Winne v. Winne*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 435; *McGee v. Rex*, 7 Can. Exch. 309.

1208. 5. Continuity as to Extent and Manner. — *Dunn v. Thomas*, (Neb. 1903) 96 N. W. Rep. 142.

9. Change in Locality of Easement. — *Dunn v. Thomas*, (Neb. 1903) 96 N. W. Rep. 142.

1209. 6. Burden of Proof. — *Pennington v. Lewis*, 4 Penn. (Del.) 447; *Feigenbaum v. Jackson*, 8 British Columbia 417.

7. Question for Jury. — See the title EASEMENTS, 427. 3.

8. Open and Notorious Use Essential. — *Union Lighterage Co. v. London Graving Dock Co.*, (1902) 2 Ch. 557, 71 L. J. Ch. 791. See also the title EASEMENTS, 427. 3.

10. Use Must Be Peaceable. — See the title EASEMENTS, 427. 3.

1210. 1. Acquiescence and Knowledge by Landowner Essential. — *Union Lighterage Co. v. London Graving Dock Co.*, (1901) 2 Ch. 300, 70 L. J. Ch. 558, affirmed (1902) 2 Ch. 557, 71 L. J. Ch. 791; *Sharpe v. Marcus*, 137 Ala. 147; *George v. New York*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 270; *Schaeffer v. Claudia*, 25 Ohio Cir. Ct. 249.

2. Express Notice Required by Statute. — *Jesse French Piano, etc., Co. v. Forbes*, 135 Ala. 277.

3. Knowledge and Acquiescence Presumed. — *Union Lighterage Co. v. London Graving Dock Co.*, (1902) 2 Ch. 557, 71 L. J. Ch. 791; *Brown v. Barton*, 82 S. W. Rep. 405, 26 Ky. L. Rep. 711; *Boyce v. Missouri Pac. R. Co.*, 168 Mo. 583. See also *Sharpe v. Marcus*, 137 Ala. 147.

1211. 2. Legal Disability. — *Boyce v. Missouri Pac. R. Co.*, 168 Mo. 583.

12. Person Unable to Grant. — *Evans v. Scott*, (Tex. Civ. App. 1904) 83 S. W. Rep. 874.

- 1212.** 3. Where Servient Estate Is in Possession of Tenant. — See note 1.
 5. Burden of Proving Disability. — See note 8.
1213. VII. PRESCRIPTIVE PERIOD — 1. In General. — See notes 1, 2, 3.
1214. 4. When Period Begins to Run. — See note 7.
1215. VIII. EXTENT AND VALIDITY OF RIGHTS ACQUIRED BY PRESCRIPTION — 1. Extent of Rights — *a.* IN GENERAL. — See note 1.
b. ALL NECESSARY INCIDENTS OF RIGHT INCLUDED. — See note 6.
1216. 2. Validity of Rights. — See note 3.
 IX. EVIDENCE — 1. In General. — See note 5.
 2. Burden of Proof. — See note 11.
1217. X. HIGHWAYS BY PRESCRIPTION — 1. In General. — See note 2.

1212. 1. Servient Estate Held by Tenant. — *Riley v. Buchanan*, 116 Ky. 625.

Where There Is a Tenant for Life in Possession of settled land, a lost grant of a right of way cannot be implied as against the reversioner merely from the user of the way during the lifetime of the tenant for life, one ground being that reversioner, not being in possession, would have no power to prevent the user; and the circumstance that the reversioner joined with the tenant for life in barring the entail, and in making a resettlement during the period of the user, does not alter the case. *Roberts v. James*, 89 L. T. N. S. 282.

8. Contra — Burden on Party Who Claims Easement. — *Evans v. Scott*, (Tex. Civ. App. 1904) 83 S. W. Rep. 874; *Wright v. Fanning*, (Tex. Civ. App. 1905) 86 S. W. Rep. 786.

1213. 1. Period Same as That of Limitation in Real Actions. — *Sharpe v. Marcus*, 137 Ala. 147; *Hall v. Blackman*, 8 Idaho 272; *Schulenberg v. Zimmerman*, 86 Minn. 70; *Boyce v. Missouri Pac. R. Co.*, 168 Mo. 583; *Oregon Constr. Co. v. Allen Ditch Co.*, 41 Oregon 209, 93 Am. St. Rep. 701; *Evans v. Scott*, (Tex. Civ. App. 1904) 83 S. W. Rep. 874; *Wasmund v. Harm*, 36 Wash. 170, citing 19 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1212. See also *supra*, this title, **1183. 6.**

2. In Utah. — *Coleman v. Hines*, 24 Utah 360.

3. Five Years. — *Gutierrez v. Wege*, 145 Cal. 730; *Rice v. Meiners*, 136 Cal. 292; *Hall v. Blackman*, 8 Idaho 272; *Talbott v. Butte City Water Co.*, 29 Mont. 17.

Ten Years. — *Power v. Dean*, 112 Mo. App. 288; *Evans v. Scott*, (Tex. Civ. App. 1904) 83 S. W. Rep. 874.

Fifteen Years. — *Zook v. Illinois Cent. R. Co.*, 80 S. W. Rep. 211, 25 Ky. L. Rep. 2194; *Brown v. Barton*, 82 S. W. Rep. 405, 26 Ky. L. Rep. 711; *Rickels v. Log Owners' Booming Co.*, (Mich. 1905) 102 N. W. Rep. 652, 11 Detroit Leg. N. 769.

Twenty Years. — *Rose v. Farmington*, 196 Ill. 226; *Chicago, etc., R. Co. v. Ives*, 202 Ill. 69; *Kelly v. Pittsburgh, etc., R. Co.*, 28 Ind. App. 457; *Hall v. State*, 72 N. Y. App. Div. 360; *Riehlman v. Field*, 81 N. Y. App. Div. 526.

Twenty-one Years. — *Bates v. Sherwood*, 24 Ohio Cir. Ct. 146; *Washington v. Steiner*, 25 Pa. Super. Ct. 392.

1214. 7. Period Runs from First Infliction of Injury. — *Centerville, etc., Irrigation Ditch Co. v. Sanger Lumber Co.*, 140 Cal. 385; *Kelley v. Pittsburgh, etc., R. Co.*, 28 Ind. App. 457;

Britt v. Reed, 42 Oregon 76. See also *Hindley v. Manhattan R. Co.*, 103 N. Y. App. Div. 504; *Oregon Constr. Co. v. Allen Ditch Co.*, 41 Oregon 209, 93 Am. St. Rep. 701.

1215. 1. Measured by Extent of Use and Enjoyment. — *Southern California Invest. Co. v. Wilshire*, 144 Cal. 68; *Gutierrez v. Wege*, 145 Cal. 730; *Whelchel v. Gainesville, etc., Electric R. Co.*, 116 Ga. 431; *Floyd v. Louisville, etc., R. Co.*, 80 S. W. Rep. 204, 25 Ky. L. Rep. 2147; *Baldwin v. Boston, etc., R. Co.*, 181 Mass. 166; *Chessman v. Hale*, 31 Mont. 577; *George v. New York*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 270; *Hall v. Carter*, 33 Tex. Civ. App. 230.

6. Right of Entry to Repair or Remove Obstructions. — *Cranson v. Snyder*, 137 Mich. 340, 11 Detroit Leg. N. 353.

1216. 3. Rights as Valid as Those Acquired by Grant. — *Evans v. Scott*, (Tex. Civ. App. 1904) 83 S. W. Rep. 874.

5. Clear Proof Required. — *Hindley v. Metropolitan El. R. Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 56; *Bauers v. Bull*, (Oregon 1904) 78 Pac. Rep. 757.

For Evidence Held Sufficient to Show a Right by Prescription. — *Brown v. Barton*, 82 S. W. Rep. 405, 26 Ky. L. Rep. 711; *McKinney v. Thompson*, (Ky. 1905) 86 S. W. Rep. 543; *Donohugh v. Lister*, 205 Pa. St. 464.

For Evidence Held Insufficient. — *Strong v. Baldwin*, 137 Cal. 432; *Chicago, etc., R. Co. v. Hammond*, 210 Ill. 187; *Evans v. Motley*, 78 S. W. Rep. 877, 25 Ky. L. Rep. 1825; *Davis v. Wheeling, etc., R. Co.*, 26 Pa. Super. Ct. 364; *Watkins Land Co. v. Clements*, 98 Tex. 578.

11. Burden of Proof upon Claimant. — *Strong v. Baldwin*, 137 Cal. 432; *Bauers v. Bull*, (Oregon 1904) 78 Pac. Rep. 757.

1217. 2. Highways May Arise by Long User. — *Alaska*. — *Sutter v. Heckman*, 1 Alaska 81. *California*. — *Hartley v. Vermillion*, 141 Cal. 339, affirming (Cal. 1902) 70 Pac. Rep. 273.

Kentucky. — *Porter v. Clinton*, 74 S. W. Rep. 232, 24 Ky. L. Rep. 2435; *Anderson v. Southworth*, 76 S. W. Rep. 391, 25 Ky. L. Rep. 776; *Riley v. Buchanan*, 116 Ky. 625.

Massachusetts. — *Clark v. Hull*, 184 Mass. 164.

Minnesota. — *Arndt v. Thomas*, 93 Minn. 1, 106 Am. St. Rep. 418.

New York. — *Smithtown v. Ely*, 75 N. Y. App. Div. 309, affirmed 178 N. Y. 624.

Oregon. — *Wallowa County v. Wade*, 43 Oregon 253.

1218. See note 1.

1219. 2. Irregular Establishment Cured by User — Statutory Provisions. — See note 1.

3. Location or Alteration of Existing Highway by User — Location Altered by Use. — See note 5.

1220. See note 2.

5. Land Subject to Prescription — Government Land. — See note 6.

Land Set Aside for Public Square. — See note 8.

Railroad Right of Way. — See note 9.

1221. 6. Nature and Requisites of Use — *a.* IN GENERAL. — See note 2.

b. PUBLIC USE. — See note 3.

c. ADVERSE USE. — See notes 6, 7.

1222. See note 1.

Use of Wild and Uninclosed Land. — See note 4.

Use of Private Way. — See note 5.

d. EXCLUSIVE USE. — See note 6.

e. USE OF DEFINITE LINE OF TRAVEL. — See note 7.

1223. *f.* CONTINUOUS USE. — See note 4.

Pennsylvania. — *Donohugh v. Lister*, 205 Pa. St. 464; *Washington v. Steiner*, 25 Pa. Super. Ct. 392.

South Carolina. — *Earle v. Poat*, 63 S. Car. 439; *Kirby v. Southern R. Co.*, 63 S. Car. 494.

Texas. — *Ft. Worth v. Cetti*, (Tex. Civ. App. 1905) 85 S. W. Rep. 826.

Washington. — *Wasmund v. Harm*, 36 Wash. 170; *Seattle v. Smithers*, 37 Wash. 119; *Van De Vanter v. Flaherty*, 37 Wash. 218; *Watson v. Adams County*, 38 Wash. 662; *Okanogan County v. Cheetham*, 37 Wash. 682.

Wisconsin. — *Rhodes v. Halvorson*, 120 Wis. 99.

1218. 1. Theory of Law. — *Hartley v. Vermillion*, 141 Cal. 339, *affirming* (Cal. 1902) 70 Pac. Rep. 273; *Cedar Rapids v. Young*, 119 Iowa 552; *Riley v. Buchanan*, 116 Ky. 625.

1219. 1. Statutory Provisions for Recording Roads Used as Highways. — *McCreery v. Fallis*, 162 Ind. 255; *Rhodes v. Halvorson*, 120 Wis. 99.

5. Location Altered by User in General. — *Shanline v. Wiltsie*, 70 Kan. 177.

1220. 2. No Right from User by Mistake. — *Shanline v. Wiltsie*, 70 Kan. 177.

6. Highway over Government Land. — *Great Northern R. Co. v. Viborg*, 17 S. Dak. 374.

8. Public Square or Common. — *McKay v. Reading*, 184 Mass. 140.

9. Right of Way of Railroad. — *Bubenzer v. Philadelphia, etc., R. Co.*, (Del. Ch. 1904) 57 Atl. Rep. 242; *Matthews v. Seaboard Air Line R. Co.*, 67 S. Car. 505, *citing* 2d AM. AND ENG. ENCYC. OF LAW (2d ed.) 1220; *Kirby v. Southern R. Co.*, 63 S. Car. 494.

1221. 2. Nature and Requisites of Use in General. — *Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176; *Cedar Rapids v. Young*, 119 Iowa 552; *Fairchild v. Stewart*, 117 Iowa 734; *Porter v. Clinton*, 74 S. W. Rep. 232, 24 Ky. L. Rep. 2435; *Stickley v. Sodus Tp.*, 131 Mich. 510, 9 Detroit Leg. N. 427; *Hill v. McGinnis*, 64 Neb. 187; *Gehris v. Fuhrman*, (Neb. 1903) 94 N. W. Rep. 133; *Coward v. Llewellyn*, 209 Pa. St. 582; *Washington v. Steiner*, 25 Pa. Super. Ct. 392; *Evans v. Scott*, (Tex. Civ.

App. 1904) 83 S. W. Rep. 874; *Reid v. Garnett*, 101 Va. 47; *Wasmund v. Harm*, 36 Wash. 170; *Seattle v. Smithers*, 37 Wash. 119.

For Evidence Held Insufficient to Show a Highway by Prescription. — *Fairchild v. Stewart*, 117 Iowa 734; *Hill v. McGinnis*, 64 Neb. 187; *Horn v. Williamson*, (Neb. 1903) 96 N. W. Rep. 178; *Marino v. Central R. Co.*, 69 N. J. L. 628; *Loughman v. Long Island R. Co.*, 83 N. Y. App. Div. 629; *Washington v. Steiner*, 25 Pa. Super. Ct. 392.

3. Public Use Essential. — *Culver v. Yonkers*, 80 N. Y. App. Div. 309, *affirmed* 180 N. Y. 524.

6. Adverse Use Essential. — *Jones v. Bright*, 140 Ala. 268; *Hartley v. Vermillion*, (Cal. 1902) 70 Pac. Rep. 273; *Shanline v. Wiltsie*, 70 Kan. 177; *Gehris v. Fuhrman*, (Neb. 1903) 94 N. W. Rep. 133; *Coward v. Llewellyn*, 209 Pa. St. 582; *Washington v. Steiner*, 25 Pa. Super. Ct. 392; *Earle v. Poat*, 63 S. Car. 439.

7. Claim of Public Right Essential. — *Jones v. Bright*, 140 Ala. 268; *Gehris v. Fuhrman*, (Neb. 1903) 94 N. W. Rep. 133; *Washington v. Steiner*, 25 Pa. Super. Ct. 392.

1222. 1. Used by Permission or Sufferance Insufficient. — *Edinburgh Corp. v. North British R. Co.*, Sc. Ct. of Sess. 6 F. 620; *Jones v. Bright*, 140 Ala. 268; *Hartley v. Vermillion*, (Cal. 1902) 70 Pac. Rep. 273.

4. User Alone Not Sufficient Where Land Is Uninclosed. — *Watson v. Adams County*, 38 Wash. 662.

5. Mere Travel over Private Way Insufficient. — *Lawson v. Shreveport Waterworks Co.*, 111 La. 73; *Stickley v. Sodus Tp.*, 131 Mich. 510, 9 Detroit Leg. N. 427; *Marino v. Central R. Co.*, 69 N. J. L. 628.

6. Use Should Be Exclusive. — *Hill v. McGinnis*, 64 Neb. 187; *Washington v. Steiner*, 25 Pa. Super. Ct. 392.

7. Definite Line of Travel Essential. — *Hill v. McGinnis*, 64 Neb. 187; *Gehris v. Fuhrman*, (Neb. 1903) 94 N. W. Rep. 133; *Wasmund v. Harm*, 36 Wash. 170.

1223. 4. Continuous and Uninterrupted Use Essential. — *Gehris v. Fuhrman*, (Neb. 1903) 94 N. W. Rep. 133; *Coward v. Llewellyn*, 209 Pa.

1223. Road Obstructed by Gates or Fences. — See note 5.

g. USE WITH KNOWLEDGE AND ACQUIESCENCE OF LAND-OWNER. — See note 8.

h. RECOGNITION AND REPAIR BY PUBLIC AUTHORITIES. — See notes 11, 12.

1224. 7. Prescriptive Period. — See notes 3, 4, 5.

8. Extent of Highway Acquired by Prescription. — See notes 6, 7.

1225. 10. Evidence — The Iowa Statute. — See note 14.

Burden of Proof. — See note 15.

1226. Question for Jury. — See note 1.

PRESENCE — PRESENT. — See note 3.

1227. **PRESENT — PRESENTMENT.** — See note 1.

Presentment and Indictment Distinguished. — See note 2.

PRESENTATION. — See note 4.

St. 582; *Washington v. Steiner*, 25 Pa. Super. Ct. 392; *Ft. Worth v. Cetti*, (Tex. Civ. App. 1905) 85 S. W. Rep. 826.

What Constitutes Fatal Interruption. — *Rolling v. Emrich*, 122 Wis. 134.

1223. 5. Erection of Gates or Fences Interruption. — *Evans v. Scott*, (Tex. Civ. App. 1904) 83 S. W. Rep. 874.

8. Use Must Be Known to Landowner. — *Watson v. Adams County*, 38 Wash. 662.

11. Recognition and Working by Public Authorities. — The rule in *Washington* seems to be the same as in Illinois. *Seattle v. Smithers*, 37 Wash. 119.

12. *Riley v. Buchanan*, 116 Ky. 625; *Hill v. McGinnis*, 64 Neb. 187; *Evans v. Scott*, (Tex. Civ. App. 1904) 83 S. W. Rep. 874.

1224. 3. Use for Full Prescriptive Period Essential. — *Coward v. Llewellyn*, 209 Pa. St. 582; *Washington v. Steiner*, 25 Pa. Super. Ct. 392.

4. *Gehris v. Fuhrman*, (Neb. 1903) 94 N. W. Rep. 133; *Seattle v. Smithers*, 37 Wash. 119.

5. User for Shorter Period Evidence of Dedication. — *Edinburgh Corp. v. North British R. Co.*, Sc. Ct. of Sess. 6 F. 620; *Washington v. Steiner*, 25 Pa. Super. Ct. 392; *Okanogan County v. Cheetham*, 37 Wash. 682.

6. Width Generally Determined by Extent of Beaten Track. — See *Washington v. Steiner*, 25 Pa. Super. Ct. 392.

7. When Width Is Not Limited to Beaten Track — Question for Jury. — *Arndt v. Thomas*, 93 Minn. 1, 106 Am. St. Rep. 418; *Smithtown v. Ely*, 75 N. Y. App. Div. 309, *affirmed* 178 N. Y. 624. See also *Konkel v. Pella*, 122 Wis. 143.

Bounded by Line of Reasonable Enjoyment. — *Van De Vanter v. Flaherty*, 37 Wash. 218.

1225. 14. Use with Knowledge Admissible to Show Dedication. — *Cedar Rapids v. Young*, 119 Iowa 552.

15. Burden of Proof upon Claimant. — *Watson v. Adams County*, 38 Wash. 662.

1226. 1. Question for Jury. — *Clark v. Hull*, 184 Mass. 164; *Ft. Worth v. Cetti*, (Tex. Civ. App. 1905) 85 S. W. Rep. 826.

3. Present Fair Consideration — Bankruptcy Act. — *In re Sawyer*, 130 Fed. Rep. 384.

1227. 1. Presentment. — *Matter of Jones*, 101 N. Y. App. Div. 55.

2. Distinguished from Indictment. — *Matter of Gardinier*, (Ct. Gen. Sess.) 31 Misc. (N. Y.) 364.

4. Presentation of Petition Equivalent to Filing. — *Bordwell v. Dills*, 70 Ark. 175.

PRESUMPTIONS.

BY BRISCOE B. CLARK.

1234. I. DEFINITION. — See note 1.

II. DIVISION OF PRESUMPTIONS — 2. Irrebuttable Presumptions, or Presumptions of Law — Knowledge of Law. — See note 4.

1235. Constructive Notice. — See note 2.

Intendment of Natural Consequences of Acts. — See note 3.

3. Rebuttable Presumptions. — See note 5.

1234. 1. Definition. — *Matter of Dailey*, (Surrogate Ct.) 43 Misc. (N. Y.) 555, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1234.

4. Presumption of Knowledge of the Law. — *Keystone Driller Co. v. Superior Ct.*, 138 Cal. 738; *People's Bank v. Hansbrough*, 89 Mo. App. 252.

1235. 2. *Johnson v. Levy*, 109 La. 1036.

3. Intendment of Natural Consequences of Acts. — *Wells v. Territory*, 14 Okla. 436.

5. Rebuttable Presumptions. — *Chicago, etc., R. Co. v. Rhoades*, 64 Kan. 553; *Cogdell v. Wilmington, etc., R. Co.*, 132 N. Car. 852, *reversing* 130 N. Car. 313.

1236. See note 1.

III. PRESUMPTION CANNOT BE BASED ON PRESUMPTION. — See note 2.

IV. CONFLICTING PRESUMPTIONS — Presumption of Innocence and Honesty.

— See note 7.

1237. See notes 2, 6, 7.

1238. V. CONTINUANCE OF EXISTING CONDITION OR STATE OF FACTS —

1. In General. — See notes 1, 4, 5.

1239. Necessity that Nature of Condition Be Continuous. — See note 2.

Presumption of Fact. — See note 3.

2. Past Existence of Condition or State of Facts. — See note 5.

4. Application of Principle to Particular Conditions and States of Facts — *a.* FINANCIAL CONDITION OF INDIVIDUAL. — See note 10.

b. HABITS AND CHARACTER. — See note 14.

1240. *c.* PERSONAL AND OFFICIAL RELATIONS — (1) *General Rule.* — See note 1.

(2) *Partnership.* — See note 2.

1236. 1. *Woodruff v. Hunter*, 65 N. Y. App. Div. 404.

2. Presumption Cannot Form Basis of Second Presumption. — *Cunard Steamship Co. v. Kelley*, (C. C. A.) 126 Fed. Rep. 610; *Chicago, etc., R. Co. v. Rhoades*, 64 Kan. 553; *Moore v. Renick*, 95 Mo. App. 202; *Parr v. Loder*, 85 N. Y. App. Div. 103, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1236; *Tull v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1905) 87 S. W. Rep. 910.

7. Presumption Against Misconduct. — *Delpit v. Cote*, 20 Quebec Super. Ct. 338.

In a Prosecution for Falsely Personating an Elector, the presumption of innocence will overcome the presumption that the registration officers, in registering the names of supposed electors, performed their duty. *State v. Shelley*, 166 Mo. 616.

1237. 2. Innocence and Continuance of Life. — *Bull v. Bull*, 29 Tex. Civ. App. 364.

6. *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322; *Howton v. Gilpin*, (Ky. 1902) 69 S. W. Rep. 766; *Scott v. Scott*, (Ky. 1904) 77 S. W. Rep. 1122.

It is otherwise, however, where there is no direct proof of the second marriage, and the existence of such second marriage is to be presumed merely from cohabitation. *Divvers's Estate*, 22 Pa. Super. Ct. 436.

7. *Summerville v. Summerville*, 31 Wash. 411. Compare *Ferrell v. State*, 45 Fla. 26, a prosecution for bigamy, wherein it was held that the validity of the first marriage might be presumed from evidence of its celebration in fact, followed by cohabitation and the birth of children, in the absence of evidence of any grounds of invalidity.

1238. 1. Continuance of Existing Conditions. — *Thornton-Thomas Mercantile Co. v. Bretherton*, 32 Mont. 80; *State v. Chittenden*, 112 Wis. 569.

Rule of Corporation Presumed to Continue in Force. — *Paquin v. St. Louis, etc., R. Co.*, 90 Mo. App. 118.

Continuance of Inoffensive Nature of Dog. — *Boler v. Sorgenfrei*, (Supm. Ct. App. T.) 86 N. Y. Supp. 180.

Illegitimacy. — Where it was shown that a child was born illegitimate, the presumption

was held to be that it remained so, rather than that it was rendered legitimate by a subsequent marriage of its father and mother. *Sandberg v. State*, 113 Wis. 578.

4. Continued Existence of Corporation. — *Anglo-Californian Bank v. Field*, 146 Cal. 644.

5. The Fact that No Administration Was Had on the estate of a decedent may raise the presumption that such decedent was insolvent and left no property to administer. *Johnson v. Burks*, 103 Mo. App. 221.

1239. 2. *People v. Findley*, 132 Cal. 301; *McPeck v. Graham*, 56 W. Va. 200.

Continuance of Signs or Placards. — See *Newcomb v. New York Cent., etc., R. Co.*, 169 Mo. 409.

3. *Branstrator v. Crow*, 162 Ind. 362.

5. Past Existence of Condition or State of Facts. — *State v. Dexter*, 115 Iowa 678; *Topeka v. Chesney*, 66 Kan. 481, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1239; *Newcomb v. New York Cent., etc., R. Co.*, 169 Mo. 409; *Jensen v. Montgomery*, (Utah 1905) 80 Pac. Rep. 504. Compare *Slack v. Harris*, 101 Ill. App. 527, affirmed 200 Ill. 96; *Creamery Package Mfg. Co. v. Hotsenpiller*, 159 Ind. 99; *Kingman v. Lynn, etc., R. Co.*, 181 Mass. 387; *Lindley v. Detroit*, 131 Mich. 8; *Weldon v. Omaha, etc., R. Co.*, 93 Mo. App. 668.

Condition Presumed to Have Existed for Reasonable Time, Dependent on Circumstances. — *Campbell v. Park*, (Iowa 1904) 101 N. W. Rep. 861, holding that proof of a corporation's insolvency at a particular time was presumptive proof that it was insolvent shortly before such time.

A Deed Reciting that the Grantor Is a Bachelor is presumptive evidence that the grantor was unmarried at a time prior thereto. *Gibson v. Brown*, 214 Ill. 330.

Tidal Shifting of Channels Presumed to Have Existed in Past. — *Sandiford v. Hempstead*, 97 N. Y. App. Div. 163.

10. Every Man Is Presumed to Be Solvent until proved to be insolvent. *Warren v. Robinson*, 25 Utah 205.

14. Bad Repute of College Presumed to Continue. — *State v. Chittenden*, 112 Wis. 569.

1240. 1. Personal and Official Relations. — *State v. Chittenden*, 112 Wis. 569.

2. Partnership. — *Mankato First Nat. Bank v. Grignon*, 7 Idaho 646.

- 1240.** (5) *Illicit Relations*. — See note 6.
 (6) *Holding Office*. — See note 7.
- 1241.** *d. MENTAL CONDITION*. — See notes 1, 3.
e. STATUS OF INDIVIDUALS — Coverture. — See note 7.
Residence, Domicil, and Settlement. — See notes 8, 9.
- 1242.** *f. TITLE AND OWNERSHIP*. — See note 2.
g. POSSESSION. — See note 6.
- 1243.** *i. CONDITION OF INANIMATE THINGS*. — See note 4.
- 1244.** VI. PRESUMPTIONS AS TO LIFE, DEATH, AND SURVIVORSHIP — 1. Continuance of Life in General. — See note 1.
- 1245.** 2. Death Presumed from Absence — *a. IN GENERAL*. — See notes 2, 3.
- 1246.** Application of Rule to Particular Instances. — See note 2.
- 1247.** Statutory Provisions. — See note 1.
 Absence for Period Short of Seven Years. — See notes 5, 6.
- 1248.** *c. ABSENCE FROM HOME OR RESIDENCE*. — See note 6.
- 1249.** *d. TIME OF DEATH*. — See notes 1, 2, 3.

1240. 6. *Illicit Relations*. — Marks *v.* Marks, 108 Ill. App. 371; Divvers's Estate, 22 Pa. Super. Ct. 436; Henry *v.* Taylor, 16 S. Dak. 424. See, however, Bull *v.* Bull, 29 Tex. Civ. App. 364, approving Blanchard *v.* Lambert, 43 Iowa 228, 22 Am. Rep. 245, where a marriage was presumed after the death of a first husband, from continued cohabitation.

Presumption Rebutted by Slight Proof. — Adger *v.* Ackerman, (C. C. A.) 115 Fed. Rep. 124.

7. *President of Private Corporation Presumed to Continue in Office*. — Sisk *v.* American Cent. F. Ins. Co., 95 Mo. App. 695.

1241. 1. *Mental Condition*. — State *v.* Chittenden, 112 Wis. 569.

3. *Continuance of Insanity of Permanent Nature*. — Davis *v.* State, 44 Fla. 32; *In re* Knox, 123 Iowa 24; Eakin *v.* Hawkins, 52 W. Va. 124.

Insanity Not of a Permanent Nature is not presumed to continue. Hempton *v.* State, 111 Wis. 127. See also People *v.* Findley, 132 Cal. 301; Branstrator *v.* Crow, 162 Ind. 362; McPeck *v.* Graham, 56 W. Va. 200.

Legislature May Change Presumption by Statute. — Hempton *v.* State, 111 Wis. 127.

7. State *v.* Chittenden, 112 Wis. 569.

8. *Residence*. — Com. *v.* Pollitt, (Ky. 1903) 76 S. W. Rep. 412; Matter of Russell, 64 N. J. Eq. 313.

9. *Domicil*. — Simmon's Succession, 109 La. 1095.

1242. 2. *Personalty*. — State *v.* Dexter, 115 Iowa 678; *In re* Fisher, (Iowa 1905) 102 N. W. Rep. 797.

6. *Personalty*. — Downs *v.* Bailey, 135 Ala. 331, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1242.

1243. 4. *Condition of Voting Machine*. — Where a voting machine was used at an election, there was held to be no presumption that its condition remained the same from the time of the close of the election until the hearing of a contest. Trumbull *v.* Board of Canvasers, (Mich. 1905) 103 N. W. Rep. 993.

1244. 1. *Continuance of Life Presumed*. — Chicago, etc., Pac. R. Co. *v.* Young, 67 Neb. 568; Czech *v.* Bean, (County Ct.) 35 Misc. (N. Y.) 729; Burnett *v.* Costello, 15 S. Dak. 89; State *v.* Chittenden, 112 Wis. 569.

1245. 2. *Death from Absence*. — Burleigh *v.* Mullen, 95 Me. 423; Matter of Barr, (Surrogate Ct.) 38 Misc. (N. Y.) 355; McNulty *v.* Mitchell, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 293.

Under the Civil Law — Absence Connected with Other Circumstances. — Sterrett *v.* Samuel, 108 La. 346.

3. *Seven Years' Absence*. — *In re* Benjamin, (1902) 1 Ch. 723; Winter *v.* Supreme Lodge, etc., 96 Mo. App. 1; Burkhardt *v.* Burkhardt, 63 N. J. Eq. 479; Czech *v.* Bean, (County Ct.) 35 Misc. (N. Y.) 729; Ruoff *v.* Greenpoint Sav. Bank, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 549; Griffin *v.* Southern R. Co., 66 S. Car. 77.

The Court Should Require the Production of All Evidence Available before presuming death. Absence alone is not sufficient where not all the available evidence is produced. Matter of Board of Education, 173 N. Y. 321, *dismissing appeal* from 74 N. Y. App. Div. 632.

1246. 2. *Absence of Heir of Distributee*. — In the distribution of a decedent's estate, the court should not act on the presumption of the death of one of the heirs of a distributee, on account of absence for twenty-nine years, so as to disregard such absentee's rights in the estate on the ground of death. Sherwood's Estate, 206 Pa. St. 465.

1247. 1. *Statutory Provisions*. — Matter of Harrington, 140 Cal. 244, 98 Am. St. Rep. 51; Burkhardt *v.* Burkhardt, 63 N. J. Eq. 479 (seven years' absence); Matter of Board of Education, 173 N. Y. 321; Burnett *v.* Costello, 15 S. Dak. 89; Latham *v.* Tombs, 32 Tex. Civ. App. 270.

5. *Absence Short of Seven Years*. — Matter of Davenport, (Surrogate Ct.) 37 Misc. (N. Y.) 455.

6. *Additional Circumstances*. — Czech *v.* Bean, (County Ct.) 35 Misc. (N. Y.) 729.

Disappearance from Ocean Vessel. — Travelers' Ins. Co. *v.* Rosch, 23 Ohio Cir. Ct. 491.

1248. 6. *Absence from House or Residence*. — Burnett *v.* Costello, 15 S. Dak. 89; Latham *v.* Tombs, 32 Tex. Civ. App. 270 (statutory presumption).

1249. 1. *Time of Death*. — Burkhardt *v.* Burkhardt, 63 N. J. Eq. 479.

1249. Peculiar Circumstances Surrounding Absence. — See note 4.

1250. *e.* REBUTTING PRESUMPTION. — See note 6.

Circumstances Rebutting Probability of Intelligence from Absentee. — See note 8.

1251. 3. Death Presumed from Grant of Administration. — See note 3.

1252. 4. Survivorship — *b.* SURVIVORSHIP IN COMMON DISASTER — (2) *Common-law Rule.* — See note 4.

1253. VII. DELIVERY OF AND ANSWERS TO LETTERS, TELEGRAMS, AND TELEPHONE CALLS — 1. Letters — *a.* DELIVERY — (1) *In General.* — See note 1.

1254. Rebutting Presumption. — See notes 1, 2, 3.

1255. (2) *Mailing.* — See note 3.

(3) *Address.* — See note 11.

(4) *Prepayment of Postage.* — See note 14.

1256. (5) *Time of Receipt of Letter.* — See notes 2, 3.

VIII. NONPRODUCTION, FABRICATION, SPOILIATION, AND SUPPRESSION OF EVIDENCE — 1. *In General.* — See note 8.

1257. See note 1.

2. Withholding Evidence — *a.* IN GENERAL. — See notes 3, 4.

1249. 2. No Presumption as to Time of Death. — *Winter v. Supreme Lodge, etc.*, 96 Mo. App. 1.

3. *In re Benjamin*, (1902) 1 Ch. 723.

4. Additional Circumstances. — *Matter of Davenport, (Surrogate Ct.)* 37 Misc. (N. Y.) 455.

1250. 6. *Winter v. Supreme Lodge, etc.*, 96 Mo. App. 1.

8. *Winter v. Supreme Lodge, etc.*, 96 Mo. App. 1 (*embezzler*).

1251. 3. *Czech v. Bean, (County Ct.)* 35 Misc. (N. Y.) 729; *Ruoff v. Greenpoint Sav. Bank, (Supm. Ct. Spec. T.)* 40 Misc. (N. Y.) 549.

Appointment of Guardian for Minor as Presumptive Proof of Death of Minor's Father. — See *Burleigh v. Mullen*, 95 Me. 423.

1252. 4. *Common-law Rule.* — *Young Women's Christian Home v. French*, 187 U. S. 401, *reversing* *Paul v. Hulick*, 18 App. Cas. (D. C.) 9 (as to construction of will); *Middeke v. Balder*, 198 Ill. 590, 92 Am. St. Rep. 284, *affirming* 98 Ill. App. 525; *U. S. Casualty Co. v. Kacer*, 169 Mo. 301, 92 Am. St. Rep. 641; *Supreme Council v. Kacer*, 96 Mo. App. 93; *Southwell v. Gray, (Supm. Ct. Spec. T.)* 35 Misc. (N. Y.) 740; *Males v. Sovereign Camp, etc.*, 30 Tex. Civ. App. 184.

1253. 1. Delivery of Letters Presumed. — *Planters' Mut. Ins. Co. v. Green*, 72 Ark. 305; *Merchants' Exch. Co. v. Sanders, (Ark. 1905)* 84 S. W. Rep. 786; *Grade v. Mariposa County*, 132 Cal. 75; *Dick v. Zimmerman*, 207 Ill. 636, *affirming* 105 Ill. App. 615; *Railway Officials', etc., Assoc. v. Beddow*, 112 Ky. 184; *Sutton v. Corning*, 59 N. Y. App. Div. 589; *G. S. Roth Clothing Co. v. Maine Steamship Co., (Supm. Ct. App. T.)* 44 Misc. (N. Y.) 237; *Williams v. Culver*, 39 Oregon 337; *American Cent. Ins. Co. v. Heath*, 29 Tex. Civ. App. 445. See also *Bloom v. Wanner, (Ky. 1904)* 77 S. W. Rep. 930 (presumption in absence of any denial of receipt).

1254. 1. Rebutting Presumption. — *Planters' Mut. Ins. Co. v. Green*, 72 Ark. 305; *American Cent. Ins. Co. v. Heath*, 29 Tex. Civ. App. 445.

2. *Grade v. Mariposa County*, 132 Cal. 75.

3. *Sutton v. Corning*, 59 N. Y. App. Div. 589.

Not Rebutted by Testimony of Nonreceipt by Addressee's Bookkeeper. — *G. S. Roth Clothing Co. v. Maine Steamship Co., (Supm. Ct. App. T.)* 44 Misc. (N. Y.) 237.

1255. 3. *Mailing.* — *National Bldg. Assoc. v. Quin*, 120 Ga. 364, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1255.

11. *Address.* — *National Bldg. Assoc. v. Quin*, 120 Ga. 364, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1255; *Westheimer v. Howard, (Supm. Ct. App. T.)* 47 Misc. (N. Y.) 145.

14. *Postage.* — *National Bldg. Assoc. v. Quin*, 120 Ga. 364, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1255.

1256. 2. *Time of Receipt.* — *Veley v. Clinger*, 18 Pa. Super. Ct. 125.

3. *Bishop v. Covenant Mut. L. Ins. Co.*, 85 Mo. App. 302.

8. *Omnia Præsumuntur Contra Spoliatores.* — See *Williamson v. Rover Cycle Co., (1901)* 2 Ir. 615, holding, however, that the maxim did not apply where the defendant, in an action for breach of warranty of a bicycle, had thrown away broken parts on replacing them with new, the broken parts having previously been examined by experts on behalf of the plaintiff.

1257. 1. *F. R. Patch Mfg. Co. v. Protection Lodge No. 215*, 77 Vt. 294.

3. Failure to Produce Evidence Within Party's Control. — *Princeville v. Hitchcock*, 101 Ill. App. 588; *East St. Louis Connecting R. Co. v. Altgen*, 112 Ill. App. 471, *affirmed* 210 Ill. 213; *Chicago, etc., R. Co. v. Newell*, 113 Ill. App. 263, *affirmed* 212 Ill. 332; *Chicago Junction R. Co. v. McAnrow*, 114 Ill. App. 501; *Westervelt v. National Mfg. Co.*, 33 Ind. App. 18; *State v. New Orleans Water Works Co.*, 107 La. 1, writ of error dismissed 185 U. S. 336; *Johnson v. Levy*, 109 La. 1036; *Battershee v. Calkins*, 128 Mich. 569; *Ludwig v. Metropolitan St. R. Co.*, 71 N. Y. App. Div. 210, *reversed* on other grounds 174 N. Y. 546; *Wills v. Hardcastle*, 19 Pa. Super. Ct. 525; *Houston Electric Co. v. Lawson, (Tex. Civ. App. 1904)* 85 S. W. Rep. 459.

Refusal of Plaintiff to Submit to Medical Examination. — *Austin, etc., R. Co. v. Cluck*, 97 Tex. 172, 104 Am. St. Rep. 863.

1258. Documentary Evidence. — See note 1.

1259. Force of Presumption. — See note 1.

b. FAILURE OF PARTY TO TESTIFY — In Civil Cases. — See notes 2, 3.

1260. See note 1.

1261. *c.* FAILURE TO CALL WITNESS. — See notes 1, 2, 3, 5.

The Rule Has Also Been Applied in Criminal Cases. — See note 7.

1262. Failure to Interrogate Witness. — See note 1.

Corroborative Witnesses. — See note 3.

1257. 4. Marriage to Suppress Testimony in Criminal Case. — *Moore v. State*, 45 Tex. Crim. 234.

1258. 1. Withholding Documentary Evidence. — *Heller v. Beal*, 23 Ohio Cir. Ct. 540; *Stout v. Sands*, 56 W. Va. 663.

Effect of Adverse Party's Failure to Complete Evidence. — Where the plaintiff's explanation as to why he did not produce documentary evidence was reasonable, and the defendant after taking out an order against him to produce the same failed to enforce the order, and on the trial examined the plaintiff fully as to the contents of such documents, and the plaintiff, apparently with the utmost freedom and to the best of his recollection, testified as to such contents, it was held that no presumption would be indulged that the contents of the documents would furnish proofs against the claims of the plaintiff. *Roberts v. Francis*, 123 Wis. 78.

So where one of the parties to a suit reads only a part of a deposition, and the other party has permission to read the remainder, and fails to do so, the presumption is that such remainder was neither useful to one nor harmful to the other. *Thompson v. Chappell*, 91 Mo. App. 297.

Where Reasonable Diligence Has Been Employed, without success, to obtain possession of documentary evidence, no unfavorable presumption can arise from failure to produce it. *Webster v. Witworth*, (Tenn. Ch. 1901) 63 S. W. Rep. 290.

1259. 1. *Wills v. Hardcastle*, 19 Pa. Super. Ct. 525; *F. R. Patch Mfg. Co. v. Protection Lodge No. 215*, 77 Vt. 294; *Stout v. Sands*, 56 W. Va. 663.

2. Failure of Party to Testify — Civil Cases. — *Safe Deposit, etc., Co. v. Turner*, 98 Md. 22; *Bunkley v. Jones*, 79 Miss. 1; *Boler v. Sorgenfrei*, (Supm. Ct. App. T.) 86 N. Y. Supp. 180; *Anker v. Smith*, (Supm. Ct. App. T.) 87 N. Y. Supp. 479. See also *People v. Webster*, 28 Colo. 223; *Stephenson v. Kilpatrick*, 166 Mo. 262.

3. *Miller v. McCuaig*, 13 Manitoba 220, approving *Barker v. Furlong*, (1891) 2 Ch. 172.

1260. 1. *Princeville v. Hitchcock*, 101 Ill. App. 588.

1261. 1. Failure to Call Witness — *United States. — In re Kellogg*, 113 Fed. Rep. 120, affirmed (C. C. A.) 121 Fed. Rep. 333.

District of Columbia. — Gallagher v. Hastings, 21 App. Cas. (D. C.) 88.

Illinois. — Board of Trade v. Central Stock, etc., Exch., 98 Ill. App. 212, affirmed 106 Ill. 396.

Kentucky. — Roseberry v. Wilson, (Ky. 1902) 68 S. W. Rep. 417.

Louisiana. — Bastrop State Bank v. Levy, 106 La. 586.

Mississippi. — Bunkley v. Jones, 79 Miss. 1.

New York. — Ludwig v. Metropolitan St. R. Co., 71 N. Y. App. Div. 210, reversed on other grounds 174 N. Y. 546; *Banagan v. Clark*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 483; *Kirkpatrick v. Allemannia F. Ins. Co.*, 102 N. Y. App. Div. 327.

Ohio. — Michigan Cent. R. Co. v. Butler, 23 Ohio Cir. Ct. 459; *Katafiasz v. Toledo Consol. Electric Co.*, 24 Ohio Cir. Ct. 127.

Pennsylvania. — Wills v. Hardcastle, 19 Pa. Super. Ct. 525.

Texas. — Galveston, etc., R. Co. v. Walker, (Tex. Civ. App. 1905) 85 S. W. Rep. 28.

West Virginia. — Garber v. Blatchley, 51 W. Va. 147; *Vandervort v. Fouse*, 52 W. Va. 214.

Refusal to Waive Privileged Communication. — *Arnold v. Maryville*, 110 Mo. App. 254 (physician and patient). See also *Brackney v. Fogle*, 156 Ind. 535; *Pronk v. Brooklyn Heights R. Co.*, 68 N. Y. App. Div. 390.

Presumption Arises from Exercise of Privilege Against Self-incriminating Testimony. — *Central Stock, etc., Exch. v. Board of Trade*, 196 Ill. 396, affirming 98 Ill. App. 212.

Witness Not Shown to Have Knowledge of Facts Need Not Be Called. — *Mowbray v. Gould*, 63 N. Y. App. Div. 158; *Fremont v. Metropolitan St. R. Co.*, 83 N. Y. App. Div. 414.

In an Action by a Street-car Passenger for Personal Injuries, where the evidence showed that the conductor of the car took the names of the passengers at the time of the accident, no presumption against the defendant was held to arise from a mere failure to call such passengers as witnesses. *Yula v. New York, etc., R. Co.*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 59.

2. *Boler v. Sorgenfrei*, (Supm. Ct. App. T.) 86 N. Y. Supp. 180.

3. *Western Union Tel. Co. v. Waller*, (Tex. Civ. App. 1905) 84 S. W. Rep. 695.

5. *Minch v. New York, etc., R. Co.*, 80 N. Y. App. Div. 324. See, however, *Arnold v. Maryville*, 110 Mo. App. 254.

7. See *Clifton v. State*, 46 Tex. Crim. 18.

1262. 1. Failure to Examine Witnesses. — *Kane v. Rochester R. Co.*, 74 N. Y. App. Div. 575; *Katafiasz v. Toledo Consol. Electric Co.*, 24 Ohio Cir. Ct. 127 (failure to interrogate physician in personal-injury case). See, however, *Erie R. Co. v. Kane*, 118 Fed. Rep. 223, 55 C. C. A. 129; *Atchison, etc., R. Co. v. Phipps*, 125 Fed. Rep. 478, 60 C. C. A. 314; *Mann v. State*, 134 Ala. 1.

3. Corroborative Witnesses. — *Sugarman v. Brangel*, 68 N. Y. App. Div. 377; *Pronk v. Brooklyn Heights R. Co.*, 68 N. Y. App. Div.

1262. Witnesses Equally Within Reach of Either Party. — See note 8.

Inability to Secure Witness. — See note 9.

1263. See note 4.

Force and Effect of Presumption. — See note 5.

3. Destruction of Documentary Evidence. — See note 7.

To Constitute a Spoliation. — See note 9.

1264. Force of Presumption. — See note 1.

4. Fabrication of Evidence. — See note 4.

IX. CONCEALMENT, ESCAPE, OR FLIGHT OF ACCUSED PERSONS. — See

note 9.

1265. See note 3.

1267. X. PRESUMPTIONS AS TO OFFICIAL ACTS — 3. Performance of Official Duty and Regularity of Official Acts — *a.* IN GENERAL. — See note 24.

1269. See notes 1, 2.

1270. Presumption Does Not Supply Proof of Independent Facts. — See note 3.

Effect of Disregard of Statute. — See note 7.

b. APPLICATION OF PRINCIPLE TO PARTICULAR OFFICERS. —

See note 10.

1271. See notes 2, 4.

390; *Baldwin v. Brooklyn Heights R. Co.*, 99 N. Y. App. Div. 496.

1262. 8. Witnesses Equally Within Reach of Either Party. — *Princeville v. Hitchcock*, 101 Ill. App. 588; *Blum v. Sadofsky*, (Supm. Ct. App. T.) 86 N. Y. Supp. 22; *Shannon v. Castner*, 21 Pa. Super. Ct. 294; *Reynolds v. International, etc.*, R. Co., (Tex. Civ. App. 1905) 85 S. W. Rep. 323.

9. Inability to Secure Witness. — *Ward v. St. Vincent's Hospital*, 65 N. Y. App. Div. 64; *Fremont v. Metropolitan St. R. Co.*, 83 N. Y. App. Div. 414; *Lichtenstein v. Case*, 99 N. Y. App. Div. 570; *State v. Buckman*, 74 Vt. 309. See also *Pittsburg, etc., R. Co. v. Robson*, 204 Ill. 254; *Gillum v. New York, etc., Steamship Co.*, (Tex. Civ. App. 1903) 76 S. W. Rep. 232.

1263. 4. Accounting for Absence. — *Western Union Tel. Co. v. Waller*, (Tex. Civ. App. 1905) 84 S. W. Rep. 695.

5. Presumption Not Conclusive. — *Shannon v. Castner*, 21 Pa. Super. Ct. 294.

7. Destruction of Documentary Evidence. — *Sullivan v. Sullivan*, 188 Mass. 380; *F. R. Patch Mfg. Co. v. Protection Lodge No. 215*, 77 Vt. 294.

9. *Irwin Bank v. American Express Co.*, 127 Iowa 1.

1264. 1. *F. R. Patch Mfg. Co. v. Protection Lodge No. 215*, 77 Vt. 294.

4. Criminal Cases. — *Cogdell v. State*, 43 Tex. Crim. 178.

9. Concealment, Escape, and Flight of Accused Persons. — *State v. Baptiste*, 105 La. 661; *Hubbard v. State*, 65 Neb. 805.

1265. 3. Flight Is Inference to Be Considered with Other Facts. — *State v. Baptiste*, 105 La. 661.

1267. 24. Performance of Official Duty — *California*. — *Robertson v. Alameda Free Public Library*, 136 Cal. 403; *Mabb v. Stewart*, 143 Cal. xviii, 77 Pac. Rep. 402.

Florida. — *Scott v. State*, 43 Fla. 396.

Illinois. — *Regent v. People*, 66 Ill. App. 189.

Iowa. — *Black v. Minneapolis, etc., R. Co.*, 122 Iowa 32.

Louisiana. — *Lauve v. Wilson*, 114 La. 699, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1267.

Missouri. — *Roberts v. Central Lead Co.*, 95 Mo. App. 581.

Nebraska. — *State v. Savage*, 65 Neb. 714; *McPherson v. Commercial Nat. Bank*, 61 Neb. 695; *Brown v. Helsley*, (Neb. 1901) 96 N. W. Rep. 187.

North Dakota. — *Pine Tree Lumber Co. v. Fargo*, 12 N. Dak. 376, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1267; *Fisher v. Betts*, 12 N. Dak. 197.

Ohio. — *A. H. Pugh Printing Co. v. Yeatman*, 12 Ohio Cir. Dec. 477, 22 Ohio Cir. Ct. 584.

Oklahoma. — *Watkins v. Havighorst*, 13 Okla. 128; *Greer County v. Gregory*, (Okla. 1905) 81 Pac. Rep. 422.

Oregon. — *McLeod v. Lloyd*, 43 Oregon 260.

South Carolina. — *Rice v. Bamberg*, 59 S. Car. 498.

Tennessee. — *Sheafer v. Mitchell*, 109 Tenn. 181.

Vermont. — *McKinstry v. Collins*, 76 Vt. 234, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1267.

Wisconsin. — *In re Marchant*, 121 Wis. 526.

1269. 1. *Lauve v. Wilson*, 114 La. 699, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1268; *Mercer County Traction Co. v. United New Jersey R., etc., Co.*, 64 N. J. Eq. 588; *Pine Tree Lumber Co. v. Fargo*, 12 N. Dak. 360.

2. *Simon v. Craft*, 182 U. S. 427.

1270. 3. The Mere Existence of a Dock on the waterfront of a municipality having power to establish dock lines does not raise a presumption that the municipality has established the line of such dock as the dock line. *DuPont v. Sanitary Dist.*, 203 Ill. 170.

7. *Lauve v. Wilson*, 114 La. 699, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1270.

10. Attorneys. — *Rice v. Bamberg*, 59 S. Car. 498.

1271. 2. Officers of Elections. — *Motley v. Wilson*, (Ky. 1904) 82 S. W. Rep. 1023.

1272. See notes 2, 3, 4, 9.

1274. *c.* APPLICATION OF PRINCIPLE TO PARTICULAR ACTS. — See note 5.

1275. See note 2.

Summary and Ex Parte Proceedings. — See note 8.

d. REBUTTING PRESUMPTION. — See note 9.

1276. XI. PRESUMPTIONS ARISING FROM ORDINARY CONDUCT OF MANKIND

— 1. In General — Delivery of Instruments. — See note 1.

1278. Orderly Conduct of Business. — See note 3.

Operation of Trains and Wagons. — See note 4.

1279. 3. Love of Life and Avoidance of Danger — Love of Life. — See note 4.

1280. Avoidance of Danger. — See note 1.

XII. PRESUMPTIONS AGAINST MISCONDUCT — 1. In General. — See note 9.

1281. 2. Innocence of Crime. — See note 1.

1271. 4. Judicial Officers. — *Stockslager v. U. S.*, (C. C. A.) 116 Fed. Rep. 590; *Johnson v. Melhousin*, 105 Ill. App. 367; *Willis v. Ruddock Cypress Co.*, 108 La. 255; *Coveney v. Phiscator*, 132 Mich. 258; *Stull v. Masilonka*, (Neb. 1905) 104 N. W. Rep. 188; *Rice v. Bamberg*, 59 S. Car. 498; *In re Marchant*, 121 Wis. 526; *Lethbridge v. Lauder*, 13 Wyo. 9.

1272. 2. Municipal Officers. — *Greer County v. Gregory*, (Okla. 1905) 81 Pac. Rep. 422.

3. Notaries Public. — *Black v. Minneapolis*, etc., R. Co., 122 Iowa 32.

4. Officers of Patent Department. — *McLeod v. Lloyd*, 43 Oregon 260.

9. Public Surveyors. — *Watkins v. Havighorst*, 13 Okla. 128.

1274. 5. Official Certificates. — *Van Winkle v. Blackford*, 54 W. Va. 621, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1274.

1275. 2. Executions — Issuance. — *Lauve v. Wilson*, 114 La. 699.

8. Where the Forfeiture of Individual Rights Is Involved in the question of the regularity of official acts, the presumption will not arise. *Irwin v. Mayes*, 31 Tex. Civ. App. 517.

9. Rebutting Presumption. — *Robertson v. Alameda Free Public Library*, 136 Cal. 403.

1276. 1. Where Instruments Were Executed on Different Days, the presumption is that they were separate and distinct. *Matter of Miller*, 77 N. Y. App. Div. 473, reversing (Surrogate Ct.) 37 Misc. (N. Y.) 449.

1278. 3. Orderly Conduct of Business. — *Farmers' Sav., etc., Assoc. v. Ferguson*, 69 Ark. 352.

Solvency of Indorsers — Banking. — Since banks do not usually buy paper of insolvent parties, it must be presumed that the indorsers of paper discounted by a bank were solvent at the time. *German Security Bank v. Columbia Finance, etc., Co.*, (Ky. 1905) 85 S. W. Rep. 761.

4. Trains — By Whom Operated. — In *East St. Louis Connecting R. Co. v. Altgen*, 112 Ill. App. 471, affirmed 210 Ill. 213, the fact that a railway train was marked with the name of a defendant was held to be *prima facie* evidence that it was owned by and operated by the defendant, though operated on the track of another railway company.

1279. 4. Presumption Against Suicide. —

Ross-Lewin v. Germania L. Ins. Co., (Colo. App. 1904) 78 Pac. Rep. 305; *Western Travelers' Acc. Assoc. v. Holbrook*, 65 Neb. 469; *Clemens v. Royal Neighbors of America*, (N. Dak. 1905) 103 N. W. Rep. 402; *Travelers Ins. Co. v. Rosch*, 23 Ohio Cir. Ct. 491.

Presumption Easily Rebuttable. — *Hardinger v. Modern Brotherhood of America*, (Neb. 1905) 103 N. W. Rep. 74, reversing (Neb. 1904) 101 N. W. Rep. 983. See also *Clemens v. Royal Neighbors of America*, (N. Dak. 1905) 103 N. W. Rep. 402.

1280. 1. Avoidance of Danger. — *Watertown v. Greaves*, 112 Fed. Rep. 183, 50 C. C. A. 172; *Hemingway v. Illinois Cent. R. Co.*, 114 Fed. Rep. 843, 52 C. C. A. 477; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564; *Davenport, etc., R. Co. v. De Yaeger*, 112 Ill. App. 537; *Wortman v. Minch*, 28 Ind. App. 31; *Nichols v. Baltimore, etc., R. Co.*, 33 Ind. App. 236; *Cogdell v. Wilmington, etc., R. Co.*, 132 N. Car. 852, reversing 130 N. Car. 313; *Lewin v. Pauli*, 19 Pa. Super. Ct. 447. See, however, *Wabash R. Co. v. Jensen*, 99 Ill. App. 312; *Ward v. Maine Cent. R. Co.*, 96 Me. 136; *Bruce v. Brooklyn Heights R. Co.*, 68 N. Y. App. Div. 242; *Thies v. Thomas*, (Supm. Ct. Tr. T.) 77 N. Y. Supp. 276; *Frounfelker v. Delaware, etc., R. Co.*, 74 N. Y. App. Div. 224.

9. Presumptions Against Misconduct. — *Fisher v. McInerney*, 137 Cal. 28, 92 Am. St. Rep. 68; *Tully v. Philadelphia, etc., R. Co.*, 3 Penn. (Del.) 455; *Adams v. Wilmington Electric R. Co.*, 3 Penn. (Del.) 512; *Diefenthaler v. Hall*, 96 Ill. App. 639; *McWethy v. Aurora Electric Light, etc., Co.*, 202 Ill. 218; *Mordhurst v. Ft. Wayne, etc., Traction Co.*, 163 Ind. 268, 106 Am. St. Rep. 222; *Brewer v. Bowersox*, 92 Md. 567; *State v. Scheve*, 65 Neb. 853, 59 L. R. A. 927; *McCreery v. Bluefield First Nat. Bank*, 55 W. Va. 663.

Presumption that Physician Has License. — *Jo Daviess County v. Staples*, 108 Ill. App. 539.

1281. 1. Innocence of Crime. — *State v. Fahey*, 3 Penn. (Del.) 594; *Wilkerson v. Com.*, (Ky. 1903) 76 S. W. Rep. 359; *Thompson v. State*, 83 Miss. 287; *State v. Shelley*, 166 Mo. 616; *Edwards v. State*, (Neb. 1903) 95 N. W. Rep. 1038; *State v. Young*, (N. J. 1903) 56 Atl. Rep. 471.

- 1282.** The Effect of the Presumption of Innocence. — See note 3.
In Civil Cases. — See note 5.
- 1283.** 3. Chastity — Legitimacy of Children. — See note 2.
Adulterous Illegitimacy. — See notes 5, 6, 8.
- 1284.** See notes 3, 6.
4. Character. — See note 10.
5. Absence of Fraud. — See note 12.
- 1285.** XIII. STATUS OF INDIVIDUALS — Infancy. — See note 2.
Citizenship. — See note 4.
[Relationship.] — See note 6a.
XIV. PHYSICAL CONDITION OF INDIVIDUALS — Capacity of Women for Childbearing. — See note 7.
- 1286.** See note 1.
Virility of Men. — See note 3.
- 1287.** XV. PRESUMPTIONS ARISING FROM TITLE AND POSSESSION OF PROPERTY — 2. Title Presumed from Possession. — See notes 3, 4.
- 1289.** 3. Grants and Conveyances Presumed from Continued Possession. — See note 2.
- 1290.** Illustrations. — See notes 2, 3.
- 1291.** XVI. EXISTENCE OF HEIRS OR ISSUE OF DECEDENTS — Heirs. — See note 5.
- 1282.** 3. Effect of Presumption. — State *v. Linhoff*, 121 Iowa 632.
5. Civil Cases Involving Commission of Crime. — *Compare* List *v. Miner*, 74 Conn. 50.
- 1283.** 2. Presumption of Marriage from Cohabitation. — *Adger v. Ackerman*, 115 Fed. Rep. 124, 52 C. C. A. 568; *Senge v. Senge*, 106 Ill. App. 140; *Scott v. Scott*, (Ky. 1904) 77 S. W. Rep. 1122; *Lewis v. Sizemore*, (Ky. 1904) 78 S. W. Rep. 122; *Heminway v. Miller*, 87 Minn. 123; *Sandberg v. State*, 113 Wis. 578.
Presumption in Favor of Marriage Negatived Only by Disproving Every Possibility. — *Delpit v. Cote*, 20 Quebec Super. Ct. 338.
Validity of Marriage Ceremony Presumed. — *Ferrell v. State*, 45 Fla. 26; *Summerville v. Summerville*, 31 Wash. 411.
Divorce Necessary to Marriage. — If a man is shown to have been married to one woman and shortly afterwards he cohabits with another woman, having separated from the former, a divorce from the former and marriage to the latter will not be presumed. *Divvers's Estate*, 22 Pa. Super. Ct. 436.
Marriage Not Presumed Where Cohabitation Secret. — *Heminway v. Miller*, 87 Minn. 123.
5. Presumption Against Adulterous Illegitimacy. — *Adger v. Ackerman*, 115 Fed. Rep. 124, 52 C. C. A. 568; *Canaan v. Avery*, 72 N. H. 591; *Ossman v. Schmitz*, 24 Ohio Cir. Ct. 709.
6. Woman Pregnant at Marriage. — *Bunel v. O'Day*, 125 Fed. Rep. 303; *Zachmann v. Zachmann*, 201 Ill. 380, 94 Am. St. Rep. 180, holding that a child born fifteen days after divorce and remarriage would be presumed to be the legitimate child of the second husband.
8. Rebutting Presumption of Legitimacy. — *Bunel v. O'Day*, 125 Fed. Rep. 303.
- 1284.** 3. *Adger v. Ackerman*, 115 Fed. Rep. 124, 52 C. C. A. 568.
Proof of Adultery Insufficient to Rebut Presumption. — *Canaan v. Avery*, 72 N. H. 591.
6. *Matter of Mills*, 137 Cal. 298, 92 Am. St. Rep. 175.
10. *Mullen v. U. S.*, 106 Fed. Rep. 892, 46 C. C. A. 22. See, however, *Gater v. State*, 141 Ala. 10; *Addison v. People*, 193 Ill. 405.
12. *Atkinson v. Washington*, etc., College, 54 W. Va. 42, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1284.
- 1285.** 2. Infancy. — *Arnold v. Limeburger*, 122 Ga. 72.
4. Plaintiff Presumed to Be Resident of County in Which He Sues. — *Traders' Mut. L. Ins. Co. v. Humphrey*, 109 Ill. App. 246, affirmed 207 Ill. 540.
6. Relationship. — Where the evidence shows that persons are brother and sister, the presumption is that they are brother and sister of the full blood. *Ossman v. Schmitz*, 24 Ohio Cir. Ct. 709.
7. Women — Capacity for Childbearing. — *In re White*, (1901) 1 Ch. 570 (at fifty-six).
- 1286.** 1. *Hill v. Spencer*, 196 Ill. 65.
3. Virility of Men. — *People v. Row*, 135 Mich. 505.
- 1287.** 3. Title to Realty Presumed from Possession. — *Stafford v. Kreinhop*, (Tex. Civ. App. 1901) 63 S. W. Rep. 166.
4. Personality. — *Montgomery First Nat. Bank v. Taylor*, (Ala. 1904) 37 So. Rep. 695; *Downey v. Arnold*, 97 Ill. App. 91.
- 1289.** 2. Grants and Conveyances of Realty. — *Dixon v. Dixon*, 89 N. Y. App. Div. 608, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1290.
- 1290.** 2. Grants from Crown or Government. — *Dixon v. Dixon*, 89 N. Y. App. Div. 609, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1290.
3. Conveyances by Administrators, Etc. — *Dixon v. Dixon*, 89 N. Y. App. Div. 609, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1290.
- 1291.** 5. Existence of Heirs Presumed. — *Sherwood's Estate*, 206 Pa. St. 465.

1291. Issue. — See notes 9, 10.

1292. PRESUMPTIVE EVIDENCE. — See note 1.

PREVAILING PARTY. — See note 7.

1294. PRIMA FACIE CASE OR EVIDENCE. — See notes 2, 3.

PRIMARILY LIABLE. — See note 5.

1295. PRIMARY ELECTION. — See note 1.

PRIME. — See note 2.

1296. PRINT — PRINTER, ETC. — See note 5.

1297. See note 1.

1291. 9. *McNulty v. Mitchell*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 293.

10. *Johnson v. Johnson*, 170 Mo. 34.

1292. 1. Presumptive Evidence. — See *State v. Kornstett*, 62 Kan. 221.

7. Prevailing Party. — *Thomas v. Thomas*, 98 Me. 184; *Singer Mfg. Co. v. Becket*, (Supm. Ct. App. T.) 85 N. Y. Supp. 391.

1294. 2. Prima Facie Case. — *State v. Hardelein*, 169 Mo. 579; *State v. Dodds*, 54 W. Va. 289.

3. Prima Facie Evidence. — *Ambs v. Atchison*,

etc., R. Co., 114 Fed. Rep. 320; *Tift v. Southern R. Co.*, 138 Fed. Rep. 753.

5. Primarily Liable — Synonym of First. — *Kittel v. Domeyer*, 70 N. Y. App. Div. 134.

1295. 1. Primary Election. — *State v. Woodruff*, 68 N. J. L. 89.

2. Prime or Top Lambs. — See *Sanders v. Bond*, (Ky. 1902) 66 S. W. Rep. 635.

1296. 5. Print. — *Hills v. Austrich*, 120 Fed. Rep. 862.

1297. 1. Typewriting Is Printing. — *State v. Oakland*, 69 Kan. 784.

PRISONS AND PRISONERS.

BY E. G. CHILTON.

1299. I. DEFINITIONS — A Prison. — See note 1.

II. ERECTION AND MAINTENANCE OF PRISONS — Use of County Jail by City. — See note 5.

Use of State Prison by Territory. — See note 8.

1300. III. MANAGEMENT AND CONTROL — 1. State Prisons or Penitentiaries. — See note 1.

2. Jails. — See note 2.

1301. IV. PLACE OF IMPRISONMENT AND REMOVAL. — See notes 1, 2.

1299. 1. Reform School Not Prison. — *Compare Marshall v. State Reformatory*, 201 Ill. 9.

Imprisonment is the deprivation of the liberty of another without his consent. *Efroymsen v. Smith*, 29 Ind. App. 451.

5. County Jail Used by City. — See *Kokomo v. Harness*, (Ind. App. 1905) 74 N. E. Rep. 270.

8. Territorial Prisoner in State Prison. — *In re Terrill*, 66 Kan. 315.

1300. 1. Management of State Prisons. — *Ackley v. Perrin*, 10 Idaho 531; *Ramsay v. People*, 197 Ill. 572, 90 Am. St. Rep. 177.

2. Sheriff in Control of Jail. — *Dakota County v. Eastcott*, (Neb. 1903) 93 N. W. Rep. 679; *Sturr v. Buckley*, (N. J. 1902) 52 Atl. Rep. 692; *Matter of Boyce*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 297; *Plunkett v. Lawrence County*, (S. Dak. 1904) 101 N. W. Rep. 35.

Statute Depriving Sheriff of Custody Unconstitutional. — *Contra*, holding that the right of the sheriff to the custody of prisoners is a statutory one, and may be taken from him by statute, *McDaniel v. Armstrong*, (Del. 1905) 59 Atl. Rep. 865; *Lang v. Walker*, (Fla. 1903) 35 So. Rep. 78; *Beasley v. Ridout*, 94 Md. 641.

Compensation of Sheriff for Keeping Jail and Maintaining Prisoners. — *Locke v. Belknap County*, 71 N. H. 208; *People v. Livingston County*, 89 N. Y. App. Div. 152; *Burton v. Erie County*, 206 Pa. St. 570; *Gilreath v. Greenville County*, 63 S. Car. 75.

Appointment of Jailer. — *Locke v. Belknap County*, 71 N. H. 208.

Salary and Fees of Jailer. — *Plunkett v. Lawrence County*, (S. Dak. 1904) 101 N. W. Rep. 35.

Sheriff Must Receive Prisoners. — *Lexington v. Gentry*, 116 Ky. 528.

Sheriff Has Power to Employ Extra Guards. — *Dakota County v. Eastcott*, (Neb. 1903) 93 N. W. Rep. 679.

There Is No Right to Chastise County Convicts for refractory conduct, in the absence of any rule or law of the board of supervisors. *Davis v. State*, 81 Miss. 56.

1301. 1. Fixed by Statute. — *Ex p. Allen*, (Mich. 1905) 103 N. W. Rep. 209; *Cunningham v. People*, 195 Ill. 550; *Dawley v. Wilcox*, 25 R. I. 297. See also *In re Jennings*, 118 Fed. Rep. 479; *In re Walters*, 128 Fed. Rep. 791; *Jamison v. Wimbish*, 130 Fed. Rep. 351; *White*

- 1301.** Removal. — See notes 3, 4.
V. MAINTENANCE OF PRISONERS — 1. Criminal Offenders. — See note 7.
1302. See note 1.
1303. VI. CONVICT LABOR — 2. Statutory Regulations. — See note 1.
1306. VII. RECOVERY BY PRISONER FOR PERSONAL INJURIES — 2. Recovery from County or Municipal Corporation. — See note 5.
 3. Recovery from Prison Officers. — See note 6.
 4. Recovery from Sheriff. — See note 8.
 5. Recovery from Lessee. — See note 10.
1307. See note 1.
VIII. GOOD CONDUCT STATUTES — 1. Reduction of Term of Sentence. — See note 2.
 United States Prisoners. — See note 3.
 2. Parole or Conditional Discharge. — See note 4.
1308. See note 1.
IX. PRISON BOUNDS, RULES OF PRISON, OR JAIL LIBERTIES —
3. Persons Entitled to Prison Bounds. — See note 9.
1309. 4. Bond for Prison Bounds — *a.* NECESSITY. — See note 1.
X. DISCHARGE. — See note 8.
1310. See note 2.

v. State, 134 Ala. 197; *People v. State Reformatory*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 233, *affirmed* 80 N. Y. App. Div. 448; *People v. State Reformatory*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 122.

1301. 2. *U. S. v. Powers*, 1 Alaska 180.

3. Transfer of Incurable Prisoner from Reformatory to Penitentiary. — *People v. Mallary*, 195 Ill. 582, 88 Am. St. Rep. 212.

4. Causes for Removal. — *O'Neil v. State*, 134 Ala. 189; *Matter of Boyce*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 297.

7. Liability of Counties. — *Mombert v. Bannock Co.*, (Idaho 1904) 75 Pac. Rep. 239; *Thomas v. Macon County*, 175 Mo. 68; *People v. Livingston County*, 89 N. Y. App. Div. 152; *Matter of Boyce*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 297; *Burton v. Erie County*, 206 Pa. St. 570.

1302. 1. Liability of Municipality. — *Kokomo v. Harness*, (Ind. App. 1905) 74 N. E. Rep. 270; *Lexington v. Gentry*, 116 Ky. 528.

1303. 1. Employment of Convict Labor. — *Griffin v. Randolph County*, 136 Ala. 310; *McQueen v. State*, 138 Ala. 63; *McConnell v. Arkansas Brick, etc., Co.*, 70 Ark. 568; *Camp v. McLin*, 44 Fla. 510; *Lang v. Walker*, (Fla. 1903) 35 So. Rep. 78; *Simmons v. Georgia Iron, etc., Co.*, 117 Ga. 305; *Dade Coal Co. v. Penitentiary Co. No. 2*, 119 Ga. 824; *State v. Mortensen*, (Neb. 1903) 95 N. W. Rep. 831; *Griffith v. Newell*, 69 S. Car. 300; *Ellis v. Ft. Bend County*, 31 Tex. Civ. App. 596; *Gonzales County v. Houston*, (Tex. Civ. App. 1904) 81 S. W. Rep. 117; *San Antonio, etc., R. Co. v. Gonzales*, 31 Tex. Civ. App. 321.

1306. 5. Liability of Municipal Corporation. — See *Rose v. Toledo*, 24 Ohio Cir. Ct. 540; *Shaw v. Charleston*, 57 W. Va. 433.

Liability of Town. — See *Mains v. Ft. Fairfield*, 99 Me. 177.

6. Officers Not Liable. — See *Rose v. Toledo*, 24 Ohio Cir. Ct. 540.

8. Liability of Constable. — In *Delaware* any

cruel or unnecessary exposure of a prisoner to cold, or deprivation of suitable clothing or covering, renders a constable or other officer liable. *Petit v. Colmery*, 4 Penn. (Del.) 266.

10. Lessee Liable. — *San Antonio, etc., R. Co. v. Gonzales*, 31 Tex. Civ. App. 321.

1307. 1. Convict's Right of Recovery Not Affected by Fact that He Was in Control of State Officer. — *San Antonio, etc., R. Co. v. Gonzales*, 31 Tex. Civ. App. 321.

2. Statutes Reducing Term. — *Ex p. Clifton*, 145 Cal. 186; *Terry v. Byers*, 161 Ind. 360; *In re Harney*, 134 Mich. 527; *Ex p. Russell*, (Supm. Ct. Spec. T.) 92 N. Y. Supp. 68. See also *People v. Deyo*, 181 N. Y. 425.

Forfeiture of Credits. — *In re Walters*, 128 Fed. Rep. 791;

Conditional Pardon Cannot Forfeit Prior Credits for Breach of Condition. — *State v. Hunter*, 124 Iowa 569. And see generally the title REPRIEVE, PARDON, AND AMNESTY, 580. 2 *et seq.*

3. Federal Prisoners Confined in State Prisons. — *In re Farrar*, 133 Fed. Rep. 254.

4. Statutes Providing for Parole or Conditional Discharge. — *In re Walters*, 128 Fed. Rep. 791.

1308. 1. Statutes Held Constitutional. — *State v. Stephenson*, 69 Kan. 405, 105 Am. St. Rep. 171, rehearing denied 69 Kan. 874. See further the titles REPRIEVE, PARDON, AND AMNESTY, 560. 4; SENTENCE AND PUNISHMENT, 303. 6.

In *Indiana*. — *Terry v. Byers*, 161 Ind. 360.

9. To Whom Prison Bounds Allowed. — See *Griffin v. Betts*, 182 Mass. 323.

1309. 1. No Bond Necessary at Common Law. — See *Terry v. Byers*, 161 Ind. 360.

8. Expiration of Sentence. — *In re Jennings*, 118 Fed. Rep. 479; *In re Farrar*, 133 Fed. Rep. 254; *In re Harney*, 134 Mich. 527; *People v. City Prison*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 635. See also *Ex p. Clifton*, 145 Cal. 186.

1310. 2. Fine and Costs Paid. — *Ex p. Brady*, 70 Ark. 376; *In re Lorkowski*, 94 Mo. App.

1310. XI. EFFECT OF IMPRISONMENT UPON CIVIL AND CRIMINAL RIGHTS AND LIABILITIES — 2. Criminal Liability. — See note 4.

623; *Ex p. Miller*, 44 Tex. Crim. 422; *Ex p. Rodriguez*, 45 Tex. Crim. 76. See also *Ex p. Biela*, 46 Tex. Crim. 487.

1310. 4. Prosecution for Other Crimes. — See *In re Jennings*, 118 Fed. Rep. 479; *Clifford v. Dryden*, 31 Wash. 545.

PRIVACY, RIGHT OF.

1312. The Phrase "Right of Privacy." — See notes 5, 6.**PRIVATE. — See note 7.**

1312. 5. In a Recent Georgia Case the doctrine of the right of privacy was recognized, and it was held that the publication of a picture of a person, without his consent, as a part of an advertisement, for the purpose of exploiting the publisher's business, was a violation of the right of privacy of the person whose picture was reproduced, and entitled him to recover without proof of special damage. *Pave-*

sich v. New England L. Ins. Co., 122 Ga. 190, 106 Am. St. Rep. 104.

6. Owen v. Partridge, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 415.

7. A Private Ferry is for the transportation of one's own property in his own boat. *Parsons v. Hunt*, (Tex. Civ. App. 1904) 81 S. W. Rep. 120.

Private Bankers. — In re Surety, etc., Co., (C. C. A.) 121 Fed. Rep. 73.

PRIVATE INTERNATIONAL LAW.

BY H. N. ELDRIDGE.

1319. I. DEFINITION AND GENERAL CONSIDERATIONS. — See note 6.

Laws Opposed to Policy of Forum. — See note 7.

1320. Lex Fori Preferred. — See note 1.**1322. VI. MOVABLES — 1. In General. — See note 1.****VII. CONTRACTS — 1. General Rule Stated. — See note 6.**

1319. 6. Operation and Effect of Comity. — *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131.

7. Laws Opposed to Policy of Forum Not Enforceable. — *Thomas v. Belleville First Nat. Bank*, 213 Ill. 261; *Rick v. Saginaw Bay Towing Co.*, 132 Mich. 237, 102 Am. St. Rep. 422; *Palmer v. Palmer*, 26 Utah 31; *Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267; *Bloomingsdale v. Weil*, 29 Wash. 611.

1320. 1. Law of Forum Preferred. — See *Bath Gas Light Co. v. Rowland*, 84 N. Y. App. Div. 563, *affirmed* 178 N. Y. 631.

1322. 1. Law Governing Movable — Lex Domicilii. — See *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 98, 99 Am. St. Rep. 549.

6. Law Governing Contracts in General — Lex Loci Contractus — England. — *Kaufman v. Gerson*, (1903) 2 K. B. 114, *reversed* on another point (1904) 1 K. B. 591.

United States. — *Schinotti v. Whitney*, 130 Fed. Rep. 781, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1322; *Parker v. Moore*, (C. C. A.) 115 Fed. Rep. 799.

Arkansas. — *Crebbin v. Deloney*, 70 Ark. 493. **Colorado. —** *Sullivan v. German Nat. Bank*, 18 Colo. App. 99.

Illinois. — *Bradley v. Peabody Coal Co.*, 99 Ill. App. 427.

Iowa. — *Born v. Home Ins. Co.*, 120 Iowa

299; *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127 Iowa 153; *McMillan v. American Express Co.*, 123 Iowa 236.

Maine. — *Emerson Co. v. Proctor*, 97 Me. 360.

Maryland. — *National Bank v. Baltimore, etc.*, R. Co., 99 Md. 661, 105 Am. St. Rep. 321.

Massachusetts. — *Mittenthal v. Mascagni*, 183 Mass. 19, 97 Am. St. Rep. 404; *Daniell v. Boston, etc., R. Co.*, 184 Mass. 337.

Missouri. — *Gaylord v. Duryea*, 95 Mo. App. 574; *Brockman Commission Co. v. Kilbourne*, 111 Mo. App. 542.

Nebraska. — *Marvel v. Marvel*, (Neb. 1903) 97 N. W. Rep. 640.

New Jersey. — *Hirsch v. C. W. Leatherbee Lumber Co.*, 69 N. J. L. 509; *Alleghany Co. v. Allen*, 69 N. J. L. 270.

New York. — *Goldstein v. Scott*, 76 N. Y. App. Div. 78; *Bath Gas Light Co. v. Rowland*, 84 N. Y. App. Div. 563, *affirmed* 178 N. Y. 631.

Pennsylvania. — *Rumsey v. New York, etc., R. Co.*, 203 Pa. St. 579.

Texas. — *Western Union Tel. Co. v. Buchanan*, 35 Tex. Civ. App. 437; *Jones v. National Cotton Oil Co.*, 31 Tex. Civ. App. 420.

Washington. — *Hunter v. Wenatchee Land Co.*, 36 Wash. 541.

Wisconsin. — See *Brown v. Gates*, 120 Wis. 353.

- 1324.** 3. Place of Celebration of Contract — *a.* IN GENERAL. — See note 4.
Place of Acceptance of Proposal. — See note 5.
Place of Delivery. — See note 7.
- 1325.** *b.* CONTRACT OF AGENT. — See note 2.
4. Place of Performance. — See notes 4, 5.
5. Place of Contract Fixed by Express Agreement. — See note 6.
6. Obligation and Construction — *a.* IN GENERAL. — See note 7.
- 1326.** *b.* CONTRACT TO BE PERFORMED PARTLY IN ONE COUNTRY AND PARTLY IN ANOTHER. — See note 1.
- 1327.** 7. Validity — *a.* FORMAL VALIDITY — (1) *In General.* — See note 4.
1328. *b.* ESSENTIAL VALIDITY — (2) *Where Place of Performance Designated.* — See note 3.
- 1329.** (5) *Presumption in Favor of Law Sustaining Validity of Contract.* — See note 2.
(6) *Effect of Violation of Public Policy of Forum.* — See notes 3, 4, 5, 6.
- 1330.** (7) *Particular Grounds of Invalidity* — (c) *Gambling Contracts.* — See notes 4, 5.

1324. 4. Place of Celebration of Contract in General. — *Emerson Co. v. Proctor*, 97 Me. 360. See also *Nashua Sav. Bank v. Sayles*, 184 Mass. 520, 100 Am. St. Rep. 573.

5. Place of Acceptance of Proposal. — *Emerson Co. v. Proctor*, 97 Me. 360; *Timossi v. Palangio*, 26 Quebec Super. Ct. 70.

Offer by Telephone — Contract Where Instrument of Acceptor Located. — *Yolo Bank v. Sperry Flour Co.*, 141 Cal. 314.

7. Place of Delivery as Place of Celebration. — See *Law v. Smith*, (N. J. 1904) 59 Atl. Rep. 327.

1325. 2. Where Sales Are Subject to Principal's Approval. — *Compare Rock City Tobacco Co. v. Girard*, 26 Quebec Super. Ct. 453.

4. Presumption of Performance at Place Where Contract Is Made. — *Smith v. Ingram*, 130 N. Car. 100; *Western Union Tel. Co. v. Christensen*, (Tex. Civ. App. 1904) 78 S. W. Rep. 744. See also *New York Security, etc., Co. v. Davis*, 96 Md. 81.

5. Place of Performance as Place of Contract. — *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 113, 99 Am. St. Rep. 549, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1325; *Smith v. Ingram*, 130 N. Car. 100; *Montana Coal, etc., Co. v. Cincinnati Coal, etc., Co.*, 69 Ohio St. 351.

Where a Contract Is Invalid at the Place of Performance, clear evidence is required in order to show that the place of execution was intended by the parties to control. *Brown v. Gates*, 120 Wis. 353.

Parol Evidence Admissible to Show Intention of Parties. — *Davis v. Tandy*, 107 Mo. App. 437.

6. Place of Contract Fixed by Express Agreement. — *Davis v. Tandy*, 107 Mo. App. 437.

Laws of Foreign State May Be Incorporated into Contract. — *Mutual L. Ins. Co. v. Hill*, 193 U. S. 551. See also *Albro v. Manhattan L. Ins. Co.*, 119 Fed. Rep. 629, affirmed (C. C. A.) 127 Fed. Rep. 281.

7. Law Controlling Obligation and Construction of Contracts. — *Krantz v. Kazenstein*, 22 Pa. Super. Ct. 275.

1326. 1. Contract to Be Performed Partly in One Country and Partly in Another. — *Banco de Sonora v. Bankers' Mut. Casualty Co.*, 124 Iowa 576, 104 Am. St. Rep. 367; *Cleveland, etc., R. Co. v. Druien*, (Ky. 1904) 80 S. W. Rep. 778; *Adams Express Co. v. Walker*, (Ky. 1904) 83 S. W. Rep. 106.

1327. 4. Law Governing Formal Validity of Contracts. — *Banco de Sonora v. Bankers' Mut. Casualty Co.*, 124 Iowa 576, 104 Am. St. Rep. 367; *Emerson Co. v. Proctor*, 97 Me. 360; *Roubicek v. Haddad*, 67 N. J. L. 522.

1328. 3. Essential Validity Held to Be Governed by Place of Performance. — *Davis v. Tandy*, 107 Mo. App. 437; *Krantz v. Kazenstein*, 22 Pa. Super. Ct. 275; *Metropolitan L. Ins. Co. v. Bradley*, (Tex. Civ. App. 1904) 79 S. W. Rep. 367.

1329. 2. Presumption in Favor of Law Making Contract Valid. — *Whitlock v. Cohn*, 72 Ark. 83; *Davis v. Tandy*, 107 Mo. App. 437.

3. Contracts Opposed to Policy of Forum. — *In re Fitzgerald*, (1904) 1 Ch. 573; *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131; *Geneva First Nat. Bank v. Shaw*, 109 Tenn. 237, 97 Am. St. Rep. 840; *Palmer v. Palmer*, 26 Utah 31. See, however, *Kaufman v. Gerson*, (1903) 2 K. B. 114, (1904) 1 K. B. 591.

Equity Will Refuse Its Aid to the Enforcement of a Foreign Contract if the relief sought is inequitable, though the state where the contract was made recognizes it as lawful. *Interstate Sav., etc., Assoc. v. Badgley*, 115 Fed. Rep. 390.

4. *Parker v. Moore*, (C. C. A.) 115 Fed. Rep. 799; *Sullivan v. German Nat. Bank*, 18 Colo. App. 99; *Bath Gas Light Co. v. Rowland*, 84 N. Y. App. Div. 563, affirmed 178 N. Y. 631.

5. Contract in Evasion of Law of Forum. — *Albro v. Manhattan L. Ins. Co.*, 119 Fed. Rep. 629, affirmed (C. C. A.) 127 Fed. Rep. 281.

6. Contract Opposed to Statute. — *Sullivan v. German Nat. Bank*, 18 Colo. App. 99. *Compare Thomas v. Belleville First Nat. Bank*, 213 Ill. 261.

1330. 4. See *Thomas v. Belleville First Nat. Bank*, 213 Ill. 261.

- 1330.** (d) *Usurious Contracts* — *aa. IN GENERAL.* — See note 8.
1331. See notes 1, 3.
1332. *Express Stipulation as to Law Governing.* — See note 1.
bb. CONTRACT SECURED BY MORTGAGE ON REALTY. — See note 3.
1333. *Contracts of Building and Loan Associations.* — See notes 2, 3, 5.
1334. *c. CAPACITY TO CONTRACT* — (1) *In General.* — See note 5.
 (2) *Married Women* — (a) *In General.* — See note 7.
1335. See notes 1, 4.
1336. (4) *Contracts Relating to Realty.* — See note 2.
1337. 9. *Particular Contracts* — *a. CONTRACTS RELATING TO REALTY*
 — (1) *Absolute Conveyances.* — See notes 2, 3.
 (2) *Mortgages.* — See note 5.
1338. (4) *Covenants* — *Construction and Effect.* — See note 6.
Validity. — See note 8.
1339. *b. TRANSFER OF PERSONALTY* — (2) *Sales* — (a) *Place of Sale.* —
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1330. 5. *Contract in Consideration of Past Gambling Transaction.* — *Sullivan v. German Nat. Bank*, 18 Colo. App. 99.

8. *Where Place of Making Contract Is Also Place of Performance.* — *Trower Bros. Co. v. Hamilton*, 179 Mo. 205.

1331. 1. *Place of Performance Held to Be Controlling.* — *Simpson v. Hefter*, (N. Y. City Ct. Tr. T.) 42 Misc. (N. Y.) 482; *Kroegher v. Calivada Colonization Co.*, (C. C. A.) 119 Fed. Rep. 641 (decided in *Pennsylvania*); *Interstate Bldg., etc., Assoc. v. Edgefield Hotel Co.*, 120 Fed. Rep. 422, *affirmed* (C. C. A.) 134 Fed. Rep. 74 (decided in *South Carolina*).

3. *Prevailing Rule.* — *Whitlock v. Cohn*, 72 Ark. 83, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1331; *Davis v. Tandy*, 107 Mo. App. 437.

1332. 1. *Express Stipulation as to Law Controlling.* — See *Middle States Loan, etc., Co. v. Baker*, 19 App. Cas. (D. C.) 1.

3. *Note Executed and Payable in One State but Secured by Mortgage on Land in Another.* — *Crebbin v. Deloney*, 70 Ark. 493. See also *Ft. Wayne Trust Co. v. Sihler*, 34 Ind. App. 140.

Chattel Mortgage. — *Trower Bros. Co. v. Hamilton*, 179 Mo. 205.

1333. 2. *Contracts of Building and Loan Association.* — *National Mut. Bldg., etc., Assoc. v. Farnham*, 81 Miss. 364; *National Mut. Bldg., etc., Assoc. v. Hulet*, (Miss. 1902) 33 So. Rep. 3; *National Mut. Bldg., etc., Assoc. v. Retzman*, (Neb. 1903) 96 N. W. Rep. 204; *People's Bldg., etc., Assoc. v. Parish*, (Neb. 1901) 96 N. W. Rep. 243. See also *Mutual Home, etc., Assoc. v. Worz*, 67 Kan. 506; *Hoskins v. Rochester Sav., etc., Assoc.*, 133 Mich. 505. *Compare Royal Loan Assoc. v. Forter*, 68 Kan. 468, wherein the evidence was held to show that a loan made in Kansas by a Missouri association was a Kansas transaction.

3. *Place of Payment Held Not Controlling.* — *Spinney v. Chapman*, 121 Iowa 38, 100 Am. St. Rep. 305; *Georgia State Bldg., etc., Assoc. v. Shannon*, 80 Miss. 642; *Hicinbotham v. Interstate Sav., etc., Assoc.*, 40 Oregon 511.

5. *Building and Loan Contracts Held Governed by Place of Payment.* — *Gale v. Southern Bldg., etc., Assoc.*, 117 Fed. Rep. 732; *Interstate Bldg., etc., Assoc. v. Edgefield Hotel Co.*, 120

Fed. Rep. 422, *affirmed* (C. C. A.) 134 Fed. Rep. 74; *Alexander v. Southern Home Bldg., etc., Assoc.*, 120 Fed. Rep. 963; *Lewis v. Clark*, (C. C. A.) 129 Fed. Rep. 570; *Monier v. Clarke*, (N. Mex. 1904) 75 Pac. Rep. 35; *Land Title, etc., Co. v. Fulmer*, 24 Pa. Super. Ct. 256; *Columbian Bldg., etc., Assoc. v. Rice*, 68 S. Car. 236. See also *American Bldg., etc., Assoc. v. McClellan*, (Ark. 1902) 70 S. W. Rep. 463.

1334. 5. *Lex Loci as Governing Capacity to Contract.* — *Geneva First Nat. Bank v. Shaw*, 109 Tenn. 237, 97 Am. St. Rep. 840.

7. *Capacity of Married Woman to Contract.* — *Ft. Wayne Trust Co. v. Sihler*, 34 Ind. App. 140.

1335. 1. *Robison v. Pease*, 28 Ind. App. 610; *Law v. Smith*, (N. J. 1904) 59 Atl. Rep. 327.

4. *Geneva First Nat. Bank v. Shaw*, 109 Tenn. 237, 97 Am. St. Rep. 840; *Young v. Hart*, 101 Va. 480.

1336. 2. *Contract of Married Woman Relating to Real Estate.* — *Linton v. Moorhead*, 209 Pa. St. 646.

1337. 2. *Law Controlling Validity of Transfer of Land.* — *Meylink v. Rhea*, 123 Iowa 310; *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 113, 99 Am. St. Rep. 549, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1337; *Smith v. Ingram*, 130 N. Car. 100; *Bowdle v. Jencks*, (S. Dak. 1904) 99 N. W. Rep. 98.

3. *Construction and Effect of Absolute Conveyance.* — *Hazen v. Matthews*, 184 Mass. 388.

Leases. — *Broadwell v. Banks*, 134 Fed. Rep. 470; *Swearingen v. Barnsdall*, 210 Pa. St. 84.

5. *Validity of Mortgages.* — *Bramblet v. Commonwealth Land, etc., Co.*, (Ky. 1904) 83 S. W. Rep. 599; *Bowdle v. Jencks*, (S. Dak. 1904) 99 N. W. Rep. 98.

1338. 6. *Construction and Effect of Covenants.* — *Dalton v. Taliaferro*, 101 Ill. App. 592.

8. *Covenant Against Competition.* — A covenant in a deed conveying a factory which binds the grantor not to engage in the same business within a certain radius for a certain number of years is personal, and is governed by the law where the contract is made, though the plant itself is located elsewhere. *Robinson v. Suburban Brick Co.*, 127 Fed. Rep. 804, 62 C. C. A. 484.

1339. 4. *Place of Delivery as Place of Sale.*

1341. (c) Effect of Knowledge of Purpose to Make Illegal Resale in Another Jurisdiction. — See notes 6, 7.

1342. (4) *Chattel Mortgages* — (a) Validity as Between Parties. — See note 2.

1343. (5) *Assignment of Choses in Action*. — See note 3.

1344. c. *BILLS AND NOTES* — (1) *Place of Making Contract*. — See note 5.

1345. *Delivery by Mail*. — See note 2.

(2) *Validity* — (a) *In General*. — See note 3.

(3) *Negotiability*. — See note 6.

1346. See note 1.

(4) *Liability of Parties* — (b) *Maker*. — See note 3.

1347. (d) *Indorser*. — See note 4.

1348. (5) *Presentment, Protest, or Notice* — *Formalities*. — See notes 6, 7.

(6) *Days of Grace*. — See note 8.

1349. (7) *Bona Fide Purchase for Value*. — See note 1.

d. *INSURANCE CONTRACTS* — (1) *Place of Execution*. — See note 3.

Place of Acceptance of Proposal. — See note 4.

Place of Delivery. — See note 6.

1350. *Place of Payment of Premium*. — See note 1.

(2) *Validity*. — See note 4.

(3) *Construction and Effect*. — See note 6.

— *Price v. Burns*, 101 Ill. App. 418; *P. Schoenhofen Brewing Co. v. Whipple*, (Neb. 1902) 89 N. W. Rep. 751.

1339. 5. *Delivery to Carrier for Purchaser*. — See *J. & J. Eager Co. v. Burke*, 74 Conn. 534.

1341. 6. *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131.

7. *P. Schoenhofen Brewing Co. v. Whipple*, (Neb. 1902) 89 N. W. Rep. 751. See also *J. & J. Eager Co. v. Burke*, 74 Conn. 534.

1342. 2. *Validity of Chattel Mortgage as Between Parties*. — *Law v. Smith*, (N. J. 1904) 59 Atl. Rep. 327.

1343. 3. *Life-insurance Policy*. — *Miller v. Manhattan L. Ins. Co.*, 110 La. 654, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1343.

1344. 5. *Place of Contract of Bill or Note*. — *Geneva First Nat. Bank v. Shaw*, 109 Tenn. 237, 97 Am. St. Rep. 840; *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18. See also *Merchants' Bank v. Brown*, 86 N. Y. App. Div. 599.

1345. 2. *Delivery to Post Office as Place of Contract*. — Compare *Nashua Sav. Bank v. Sayles*, 184 Mass. 520, 100 Am. St. Rep. 573.

3. *Law of Place of Performance Governs Validity*. — *Swedish-American Nat. Bank v. Gardner First Nat. Bank*, 89 Minn. 99, 99 Am. St. Rep. 549.

6. *Negotiability Determined by Lex Loci Contractus*. — *Clark v. Porter*, 90 Mo. App. 143; *Baird v. Vines*, (S. Dak. 1904) 99 N. W. Rep. 89.

1346. 1. *Negotiability Determined by Place of Performance*. — *Barger v. Farnham*, 130 Mich. 487.

3. *Liability of Maker*. — *Cherry v. Sprague*, 187 Mass. 113. See also *Drake v. Bigelow*, 93 Minn. 112.

1347. 4. *Liability of Indorsers*. — *Sullivan v. German Nat. Bank*, 18 Colo. App. 99; *Spies v. National City Bank*, 174 N. Y. 222.

1348. 6. *Formalities of Making Protest*. — See *State Bank v. Carr*, 130 N. Car. 479.

7. *Time of Giving Notice of Dishonor*. — *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18.

8. *Allowance of Days of Grace*. — *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18.

1349. 1. *What Amounts to Bona Fide Purchase for Value*. — *Limerick Nat. Bank v. Howard*, 71 N. H. 13, 93 Am. St. Rep. 489.

3. *Place of Execution of Insurance Contracts*. — *Midland Steel Co. v. Citizens Nat. Bank*, 34 Ind. App. 107.

4. *Place of Acceptance of Proposal*. — *Born v. Home Ins. Co.*, 120 Iowa 299.

6. *Place of Delivery*. — *Mutual L. Ins. Co. v. Hill*, 193 U. S. 551.

1350. 1. *Place of Payment of Premium*. — *Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co.*, (C. C. A.) 124 Fed. Rep. 25, affirming 115 Fed. Rep. 77; *Grevenig v. Washington L. Ins. Co.*, 112 La. 879, holding that the place of acceptance of premium by a duly authorized agent governed.

4. *Validity of Insurance Contracts*. — *Summit v. U. S. Life Ins. Co.*, 123 Iowa 681; *Washington L. Ins. Co. v. Glover*, (Ky. 1904) 78 S. W. Rep. 146; *Thompson v. Traders' Ins. Co.*, 169 Mo. 12; *Seely v. Manhattan L. Ins. Co.*, 72 N. H. 49; *Metropolitan L. Ins. Co. v. Bradley*, (Tex. Civ. App. 1904) 79 S. W. Rep. 367; *Cowen v. Equitable L. Assur. Soc.*, (Tex. Civ. App. 1905) 84 S. W. Rep. 404.

6. *Construction According to Place Agreed Upon*. — *Mutual L. Ins. Co. v. Hill*, 193 U. S. 551. See also *Spurrier v. La Cloche*, (1902) A. C. 446, 71 L. J. P. C. 101; *New York L. Ins. Co. v. Smith*, 139 Ala. 303; *Mutual Reserve Fund L. Assoc. v. Minehart*, 72 Ark. 630.

Agreement in Evasion of Law of Place of Contract. — *Albro v. Manhattan L. Ins. Co.*, 119 Fed. Rep. 620, affirmed (C. C. A.) 127 Fed. Rep. 281; *Pietri v. Seguenot*, 96 Mo. App. 258.

1351. See notes 1, 2.

e. CONTRACTS OF CARRIERS. — See note 7.

1352. Stipulations Limiting Carriers' Liability for Negligence. — See note 2.

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1354. VIII. MARRIAGE AND DIVORCE — 1. Marriage — *b.* EFFECT ON PROPERTY RIGHTS — (1) *Personalty*. — See notes 2, 3.

1355. X. WILLS, SUCCESSION, AND ADMINISTRATION — 1. Descent and Distribution — *a.* OF PERSONAL OR MOVABLE PROPERTY — (1) *General Rule*. — See note 7.

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1361. *e.* CAPACITY TO INHERIT AS AFFECTED BY STATUS — (1) *Legitimacy* — (b) *As to Realty*. — See note 6.

1364. 2. Wills — *b.* EXECUTION AND OTHER FORMAL REQUISITES — (1) *Will of Personal or Movable Property* — (a) *In General*. — See note 10.

1365. (2) *Will of Real or Immovable Property*. — See note 6.

1366. *d.* CONSTRUCTION AND INTERPRETATION — (1) *Will of Personal or Movable Property* — (a) *In General*. — See note 2.

1369. *e.* PARTICULAR TESTAMENTARY DISPOSITIONS — (1) *Trusts* — (a) *Of Personalty*. — See note 6.

1371. (2) *Gifts to Charities* — (b) *Of Realty*. — See note 4.

1373. *f.* DISTRIBUTION UNDER WILL — (1) *General Rule*. — See note 5.

1378. XI. TORTS — 1. Injuries to Person or Personalty — *a.* IN GENERAL. — See notes 5, 6.

1351. 1. Construction According to Law of Place of Performance. — See *Franklin L. Ins. Co. v. Galligan*, 71 Ark. 295, 100 Am. St. Rep. 73; *National Trust Co. v. Hughes*, 14 Manitoba 41.

2. Place of Performance Not Indicated. — *Western Union Tel. Co. v. Christensen*, (Tex. Civ. App. 1904) 78 S. W. Rep. 744.

7. Carriers of Goods. — *Nenno v. Chicago*, etc., R. Co., 105 Mo. App. 540. See also *Cappel v. Weir*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 441.

1352. 2. Limitation of Liability by Carrier of Goods. — *Cleveland*, etc., R. Co. *v. Druen*, (Ky. 1904) 80 S. W. Rep. 778. But see *Cappel v. Weir*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 441.

Law of Place Where Loss Occurred Held to Govern. — *Adams Express Co. v. Walker*, (Ky. 1904) 83 S. W. Rep. 106.

6. What Constitutes Effectual Delivery. — *Williams v. Central R. Co.*, 93 N. Y. App. Div. 582.

7. Telegraph Companies. — *Bryan v. Western Union Tel. Co.*, 133 N. Car. 603; *Hancock v. Western Union Tel. Co.*, 137 N. Car. 497; *Western Union Tel. Co. v. Cooper*, 29 Tex. Civ. App. 591; *Western Union Tel. Co. v. Waller*, (Tex. Civ. App. 1903) 72 S. W. Rep. 264; *Western Union Tel. Co. v. Buchanan*, 35 Tex. Civ. App. 457. But see *Howard v. Western Union Tel. Co.*, (Ky. 1905) 84 S. W. Rep. 764. See further the title TELEGRAPHS AND TELEPHONES, 1042. 9, 1079. 4 *et seq.*

1354. 2. Effect of Marriage on Rights in Personalty. — See *In re Bankes*, (1902) 2 Ch. 343.

3. Property Acquired Subsequent to Marriage. — *Blethen v. Bonner*, 30 Tex. Civ. App. 585.

1355. 7. Succession to Personalty Governed by *Lex Domicilii*. — *Champollion v. Corbin*, 71 N. H. 78; *Matter of Barandon*, (Surrogate Ct.) 41 Misc. (N. Y.) 380. See also *In re Johnson*, (1903) 1 Ch. 821.

1359. 1. Descent of Realty Governed by *Lex Situs*. — See *Matter of Barandon*, (Surrogate Ct.) 41 Misc. (N. Y.) 380.

5. See *Barringer v. Ryder*, 119 Iowa 121.

1361. 6. Legitimacy Dependent upon *Lex Situs*. — See *Fowler v. Fowler*, 131 N. Car. 169.

1364. 10. Execution of Will of Personalty Governed by *Lex Domicilii*. — *Davis v. Upson*, 209 Ill. 213, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1364.

1365. 6. *Lex Situs* Controls Execution of Will of Realty. — *Castens v. Murray*, 122 Ga. 396; *Coy v. Gaye*, (Tex. Civ. App. 1904) 84 S. W. Rep. 441.

1366. 2. Will of Personalty Construed by *Lex Domicilii*. — *Hussey v. Sargent*, 116 Ky. 53; *McCurdy v. McCallum*, 186 Mass. 464.

1369. 6. Trusts of Personalty Governed by *Lex Domicilii*. — *Keeney v. Morse*, 71 N. Y. App. Div. 104.

1371. 4. Devise to Charity. — *Brigham v. Peter Bent Brigham Hospital*, 126 Fed. Rep. 796, affirmed (C. C. A.) 134 Fed. Rep. 513.

1373. 5. Payment of Legacies and Distribution of Personalty under Will. — *Matter of Barandon*, (Surrogate Ct.) 41 Misc. (N. Y.) 380.

1378. 5. Action for Damages Against Person or Personalty Transitory. — *Baltimore*, etc., R. Co. *v. Ryan*, 31 Ind. App. 597; *Fabel v. Cleveland*, etc., R. Co., 30 Ind. App. 268; *Jones v. Kansas City*, etc., R. Co., 178 Mo. 528, 101 Am. St. Rep. 434. See also *Ferd Heim Brew-*

1378. *b.* ACT MUST BE UNLAWFUL ACCORDING TO LEX LOCI DELICTI. — See note 7.

1379. *c.* WHETHER LEX FORI MUST AGREE WITH LEX LOCI — (1) *Common-law Torts.* — See note 4.

(2) *Statutory Torts.* — See notes 6, 7.

1380. See note 1.

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1383. XIII. REMEDIES — 1. In General. — See note 3.

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1385. 2. Evidence. — See note 1.

4. Statute of Limitations — As Affecting Remedy. — See note 4.

ing Co. *v.* Kimber, 67 Kan. 834; Mackey *v.* Mexican Cent. R. Co., (N. Y. City Ct. Spec. T.) 78 N. Y. Supp. 966; Hedrick *v.* Southern R. Co., 136 N. Car. 510; Rosemand *v.* Southern R. Co., 66 S. Car. 91.

1378. 6. *Torts Against Person Governed by Lex Loci Delicti.* — *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127 Iowa 153; *Illinois Cent. R. Co. v. Jordan*, 117 Ky. 512; *Benedict v. Chicago G. W. R. Co.*, 104 Mo. App. 218; *Fogarty v. St. Louis Transfer Co.*, 180 Mo. 490; *Williams v. Chicago, etc., R. Co.*, 106 Mo. App. 61; *El Paso, etc., R. Co. v. McComus*, 36 Tex. Civ. App. 170. See also *Southern R. Co. v. Cunningham*, 123 Ga. 90.

7. *Act Must Be Unlawful According to Lex Loci.* — *Stratton's Independence v. Dines*, 126 Fed. Rep. 968; *Sartin v. Oregon Short Line R. Co.*, 27 Utah 447; *Johnson v. Union Pac. Coal Co.*, 28 Utah 46. See also *Rick v. Saginaw Bay Towing Co.*, 132 Mich. 240, 102 Am. St. Rep. 422.

1379. 4. *Rule in United States as to Common-law Torts.* — *Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267.

6. *Vaughn v. Bunker Hill, etc., Min., etc., Co.*, 126 Fed. Rep. 895 (decided in Oregon).

7. *Effect of Similarity of Statutes Conferring Right of Action for Tort.* — *St. Louis, etc., R. Co. v. Haist*, 71 Ark. 258, 100 Am. St. Rep. 65; *Negaubauer v. Great Northern R. Co.*, 92 Minn. 184, 104 Am. St. Rep. 674. See also *Dennis v. Atlantic Coast Line R. Co.*, 70 S. Car. 254.

1380. 1. *Statute Not Contrary to Policy of Forum Enforceable.* — *Rick v. Saginaw Bay Towing Co.*, 132 Mich. 240, 102 Am. St. Rep. 422, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1380.

2. *Law Controlling Defenses to Action for Tort.* — *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127 Iowa 153.

Effect of Contributory Negligence. — See *Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267.

1381. 4. *Rule Applied to Action for Personal Injuries Suffered by American Passenger on Foreign Vessel.* — *Elder Dempster Shipping Co. v. Poupirt*, (C. C. A.) 125 Fed. Rep. 732.

7. *West v. McClure*, 85 Miss. 296.

9. *Penal or Criminal Laws — No Extraterritorial Operation.* — *Crebbin v. Deloney*, 70 Ark. 493.

1382. 2. *Pecuniary Penalties in Favor of State.* — *Crebbin v. Deloney*, 70 Ark. 493; *Alleghany Co. v. Allen*, 69 N. J. L. 270.

1383. 3. *Lex Fori Governs Remedy.* — *The Tagus*, (1903) P. 44; *Van Schuyver v. Hartman*, 1 Alaska 431; *Crebbin v. Deloney*, 70 Ark. 493; *Banco De Sonora v. Bankers' Mut. Casualty Co.*, 124 Iowa 576, 104 Am. St. Rep. 367; *Waters v. Spencer*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 17, quoting 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1383; *Young v. Hart*, 101 Va. 480; *Ross v. Kansas City Southern R. Co.*, 34 Tex. Civ. App. 586. See also *Rosemand v. Southern R. Co.*, 66 S. Car. 91; *Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267.

Exemption Laws relate only to the remedy, and are therefore subject to the law of the forum. *Goodwin v. Claytor*, 137 N. Car. 224, 107 Am. St. Rep. 456; *National Tube Co. v. Smith*, (S. Car. 1905) 50 S. E. Rep. 717.

1384. 1. *Form of Action.* — *Seely v. Manhattan L. Ins. Co.*, 72 N. H. 49.

3. *Parties to Action.* — *Saunders v. Adams Express Co.*, 71 N. J. L. 270.

Whether Suit Is to Be Brought in Name of Assignee or Assignor. — In support of the first paragraph of the original note see *Waters v. Spencer*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 17. In support of the second paragraph see *Martin v. Wilson*, (C. C. A.) 120 Fed. Rep. 202.

1385. 1. *Lex Fori Governs as to Rules of Evidence.* — *Marvel v. Marvel*, (Neb. 1903) 97 N. W. Rep. 641; *Seely v. Manhattan L. Ins. Co.*, 72 N. H. 49; *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18. See also *Baltimore, etc., R. Co. v. Ryan*, 31 Ind. App. 597.

4. *Statute of Limitations as Defense Governed by Lex Fori.* — *Schinotti v. Whitney*, 130 Fed. Rep. 781, citing 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1385; *Van Schuyver v. Hartman*, 1 Alaska 431; *Pulsifer v. Greene*, 96 Me. 438; *Thompson v. Traders' Ins. Co.*, 169 Mo. 12; *Richmond Second Nat. Bank v. Smith*, 118 Wis. 18; *Dennis v. Atlantic Coast Line R. Co.*, 70 S. Car. 254. See also *Keagy v. Wellington Nat. Bank*, 12 Okla. 33.

Residence of Parties Does Not Affect Rule. — *Ross v. Kansas City Southern R. Co.*, 34 Tex. Civ. App. 586.

1386. Statute Operating as Extinguishment of Claim. — See note 3.

1387. By Express Enactment. — See note 1.

5. Statutes Creating Special Remedy. — See note 2.

1386. 3. Limitation Imposed by Statute Giving Right of Action. — *Pulsifer v. Greene*, 96 Me. 438; *Negaubauer v. Great Northern R. Co.*, 92 Minn. 184, 104 Am. St. Rep. 674; *Dennis v. Atlantic Coast Line R. Co.*, 70 S. Car. 254.

1387. 1. Statutes Recognizing Limitation of Actions in Other Jurisdictions. — *Martin v. Wilson*, (C. C. A.) 120 Fed. Rep. 202; *Janeway v. Burton*, 201 Ill. 78; *Strong v. Lewis*, 204

Ill. 35; *O'Donnell v. Lewis*, 104 Ill. App. 198; *Manders v. Eastern State Hospital*, (Ky. 1905) 84 S. W. Rep. 761; *Powers Mercantile Co. v. Blethen*, 91 Minn. 339; *Holmes v. Hengen*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 521, *affirmed* 94 N. Y. App. Div. 619.

2. Effect of Statutes Creating Special Remedy. — *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127 Iowa 153, 98 N. W. Rep. 922, *citing* 22 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1387.

1. PRIVATE ROADS. — See note 1.

1. 1. Private Roads. — *Hartley v. Vermillion*, 141 Cal. 339; *Madera County v. Raymond Granite Co.*, 139 Cal. 128.

PRIVATE WAYS.

By E. G. CHILTON.

4. I. DEFINITION, CHARACTERISTICS, AND DISTINCTIONS — 1. Definition. — See note 1.

2. Characteristics. — See notes 2, 3, 4.

5. Right of Passage Must Be over Another's Tenement. — See note 1.

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7. A Way Appurtenant Cannot Be Separated or Transferred Independently. — See note 2.

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5. 1. Right of Passage Must Be over Another's Tenement. — See *Warthen v. Garno*, 182 Mass. 243. Compare *Dee v. King*, 77 Vt. 230.

4. Necessity of Termini. — *Wallman v. R. Connor Co.*, 115 Wis. 617.

6. Way May Be Appurtenant or in Gross. — *West v. Louisville, etc., R. Co.*, 137 Ala. 568; *Johns v. Davis*, (Ky. 1903) 76 S. W. Rep. 187; *Dee v. King*, 77 Vt. 230.

9. Dominant and Servient Tenements Necessary. — See *West v. Louisville, etc., R. Co.*, 137 Ala. 568; *Speer v. Erie R. Co.*, 64 N. J. Eq. 601; *Dee v. King*, 77 Vt. 230.

6. 3. Characteristics of Way Appurtenant. — *Dee v. King*, 77 Vt. 230. See also *Douthitt v. Canaday*, (Ky. 1903) 73 S. W. Rep. 757; *Speer v. Erie R. Co.*, 64 N. J. Eq. 601.

7. Effect of Alienation of Subject Land. — *Dee v. King*, 77 Vt. 230.

7. 2. Way Appurtenant Not Transferable Independently of Land. — *Dee v. King*, 77 Vt. 230.

3. Determination of Question as to Character of Way. — *Johns v. Davis*, (Ky. 1903) 76 S. W. Rep. 187, holding that a way granted for the benefit of the grantee's land is appurtenant, and not in gross; *Dee v. King*, 77 Vt. 230.

5. Ways by Necessity Always Appurtenant. — See *Charleston, etc., R. Co. v. Fleming*, 118 Ga. 699; *Dee v. King*, 77 Vt. 230.

8. 3. No Presumption of Way in Gross. — *Johns v. Davis*, (Ky. 1903) 76 S. W. Rep. 187.

5. Effect of Absence of Words of Perpetuity. — See *Speer v. Erie R. Co.*, 64 N. J. Eq. 601.

8. Acquisition — In General — England. — *Baxendale v. North Lambert Liberal, etc., Club*, (1902) 2 Ch. 427, 71 L. J. Ch. 806; *Young v. Star Omnibus Co.*, 86 L. T. N. S. 41.

Arizona. — *Territory v. Richardson*, (Ariz. 1904) 76 Pac. Rep. 456.

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Idaho. — *Howes v. Barmon*, (Idaho 1905) 81 Pac. Rep. 48.

Indiana. — *Vanatta v. Waterhouse*, 33 Ind. App. 516; *Cincinnati, etc., R. Co. v. Miller*, (Ind. App. 1904) 72 S. E. Rep. 827.

Kentucky. — *Douthitt v. Canaday*, (Ky. 1903) 73 S. W. Rep. 757; *Mitchell v. Bourbon County*, 76 S. W. Rep. 16, 25 Ky. L. Rep. 512; *Johns v. Davis*, (Ky. 1903) 76 S. W. Rep. 187;

9. The Methods of Acquisition. — See note 1.

2. Express Grant or Reservation — *a. IN GENERAL* — **Reservation Equivalent to Grant.** — See note 3.

Decree in Partition. — See note 4.

Parol Grants. — See note 6.

10. Exceptions to the Rule. — See note 2.

Recording. — See note 3.

3. Prescription or Adverse Use. — See note 6.

Riley v. Buchanan, 116 Ky. 625; *Walling v. Eggers*, (Ky. 1904) 78 S. W. Rep. 428; *Zook v. Illinois Cent. R. Co.*, (Ky. 1904) 80 S. W. Rep. 211.

Massachusetts. — *Drew v. Wiswall*, 183 Mass. 554; *Eldredge v. Norfolk County*, 185 Mass. 186.

Minnesota. — *Callan v. Hause*, 91 Minn. 270.

Mississippi. — *Lott v. Payne*, 82 Miss. 218, 100 Am. St. Rep. 632.

Missouri. — *St. Louis Safe Deposit, etc., Bank v. Kennett Estate*, 101 Mo. App. 370.

Nebraska. — *Keplinger v. Woolsey*, (Neb. 1903) 93 N. W. Rep. 1008.

New Jersey. — *West Jersey, etc., R. Co. v. Atlantic City, etc., Traction Co.*, 65 N. J. Eq. 613.

New York. — *Weed v. McKeg*, 79 N. Y. App. Div. 218; *Brady v. Brady*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 411, 88 N. Y. App. Div. 427, *affirmed* (Supm. Ct. App. Div.) 84 N. Y. Supp. 1119; *Johnson v. Cox*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 301; *Andrus v. National Sugar Refining Co.*, 93 N. Y. App. Div. 377.

North Carolina. — *Leigh v. Garysburg Mfg. Co.*, 132 N. Car. 167.

Oregon. — *Hotchkiss v. Young*, 42 Oregon 446; *Lesley v. Klamath Co.*, 44 Oregon 491.

Pennsylvania. — *Bright v. Allan*, 203 Pa. St. 386; *Richmond v. Bennett*, 205 Pa. St. 470; *Mershon v. Fidelity Ins., etc., Co.*, 208 Pa. St. 292; *Dickinson Tp. Road*, 23 Pa. Super. Ct. 34.

Texas. — See also *Peden v. Crenshaw*, (Tex. Civ. App. 1904) 81 S. W. Rep. 369.

Cannot Be Laid Out by Eminent Domain. — *Wallman v. R. Connor Co.*, 115 Wis. 617.

9. 1. Distinction Only in Mode of Proof. — See *Belser v. Moore*, 73 Ark. 296; *Magruder v. Potter*, 77 S. W. Rep. 919, 25 Ky. L. Rep. 1336; *Anthony v. Kennard Bldg. Co.*, 188 Mo. 704.

3. Reservation Equivalent to Grant. — *Jackson v. Snodgrass*, 140 Ala. 369, *citing* 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 9; *Morrison v. Chicago, etc., R. Co.*, 117 Iowa 587; *Ross v. McGee*, 98 Md. 389; *Speer v. Erie R. Co.*, 64 N. J. Eq. 601; *Gibbons v. Ebding*, 70 Ohio St. 298, 101 Am. St. Rep. 900; *Dee v. King*, 77 Vt. 230.

Reservation of Way Must Be to Party to Grant. — *Jackson v. Snodgrass*, 140 Ala. 369.

4. Decree in Partition. — *Dickinson v. Crowell*, 120 Iowa 254. See also *McCullough v. Broad Exch. Co.*, 101 N. Y. App. Div. 566.

6. Grant Should Be in Writing. — *Belser v. Moore*, 73 Ark. 296; *Howes v. Barmon*, (Idaho 1905) 81 Pac. Rep. 48.

10. 2. User under Parol Agreement. — *Hey v. Collman*, 78 N. Y. App. Div. 584, *affirmed* 180 N. Y. 560; *Lowenberg v. Brown*, 79 N. Y. App. Div. 414. See also *Reid v. Garnett*, 101 Va. 47.

3. Necessity of Record. — *Dahlberg v. Haeberle*, 71 N. J. L. 514. See also *Stolts v. Tuska*, 76 N. Y. App. Div. 137.

6. Instances of Title to Private Ways by Prescription — *Alabama*. — *Jackson v. Snodgrass*, 140 Ala. 365. See also *Jesse French Piano, etc., Co. v. Forbes*, 135 Ala. 277.

California. — *Cavanaugh v. Wholey*, 143 Cal. 164.

Delaware. — *Pennington v. Lewis*, 4 Penn. (Del.) 447; *Bubenzer v. Philadelphia, etc., R. Co.*, (Del. Ch. 1904) 57 Atl. Rep. 242.

Indiana. — See *Kibbey v. Richards*, 30 Ind. App. 101, 96 Am. St. Rep. 333.

Iowa. — *O'Reagan v. Duggan*, 117 Iowa 612.

Kentucky. — *Payton v. Louisville R. Co.*, 115 Ky. 53; *Clay v. Kennedy*, (Ky. 1903) 72 S. E. Rep. 815; *Anderson v. Southworth*, (Ky. 1903) 76 S. W. Rep. 391; *Louisville, etc., R. Co. v. Brooks*, (Ky. 1903) 77 S. W. Rep. 693; *Smith v. Smith*, (Ky. 1904) 78 S. W. Rep. 884; *Brown v. Barton*, (Ky. 1904) 82 S. W. Rep. 405; *Chenault v. Gravitt*, 85 S. W. Rep. 184, 27 Ky. L. Rep. 403.

Missouri. — *Anthony v. Kennard Bldg. Co.*, 188 Mo. 704.

New York. — *Hey v. Collman*, 78 N. Y. App. Div. 584, *affirmed* 180 N. Y. 560; *Lowenberg v. Brown*, 79 N. Y. App. Div. 414; *Winne v. Winne*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 435.

Ohio. — *Bates v. Sherwood*, 24 Ohio Cir. Ct. 146; *Schaeffer v. Claudia*, 25 Ohio Cir. Ct. 249.

Pennsylvania. — *Godino v. Kane*, 26 Pa. Super. Ct. 596.

Utah. — *Thompson v. Madsen*, (Utah 1905) 81 Pac. Rep. 160.

Virginia. — *Reid v. Garnett*, 101 Va. 47.

Washington. — *Wasmund v. Harm*, 36 Wash. 170; *Van De Vanter v. Flaherty*, 37 Wash. 218.

Evidence Insufficient to Show Title by Prescription or Adverse Use. — *Sharpe v. Marcus*, 137 Ala. 147; *Chicago, etc., R. Co. v. Hammond*, 210 Ill. 187; *Chicago, etc., R. Co. v. Johnson*, 205 Ill. 598; *Hagerle v. Beebe*, 123 Iowa 620; *Evans v. Motley*, 78 S. W. Rep. 877, 25 Ky. L. Rep. 1825; *Golden v. Rupard*, (Ky. 1904) 80 S. W. Rep. 162; *Warth v. Baldwin*, 84 S. W. Rep. 1148, 27 Ky. L. Rep. 339; *Vandegriit v. Burke*, 98 Md. 230; *Graves v. Broughton*, 185 Mass. 174; *Ann Arbor Fruit, etc., Co. v. Ann Arbor R. Co.*, 136 Mich. 599. See also *Davis v. Wheeling, etc., R. Co.*, 26 Pa. Super. Ct. 364.

11. 4. Implication — a. WAYS OTHER THAN WAYS OF NECESSITY. —
See notes 1, 3, 4.

12. See notes 1, 2.

13. On the Severance of a Single Estate, a Way Other than a Way of Necessity. — See note 1.

b. WAYS BY NECESSITY — (1) In General. — See note 2.

14. See note 1.

15. See note 1.

The Presumption of Law. — See note 2.

(2) Method of Alienation. — See note 5.

11. 1. See *Teasley v. Stanton*, 136 Ala. 641, 96 Am. St. Rep. 88; *Matter of Opening Robbins Ave.*, 83 N. Y. App. Div. 513.

3. Way Continuous and Apparent by Fencing. — See *Teasley v. Stanton*, 136 Ala. 641, 96 Am. St. Rep. 88.

4. Discontinuous Easements Created by Implication. — See *Teasley v. Stanton*, 136 Ala. 641, 96 Am. St. Rep. 88.

12. 1. "Ways of Necessity" Liberally Construed. — See *Bates v. Sherwood*, 24 Ohio Cir. Ct. 146.

2. See *Teasley v. Stanton*, 136 Ala. 641, 96 Am. St. Rep. 88.

13. 1. Merger. — Compare *Wettlaufer v. Ames*, 133 Mich. 201; *Bates v. Sherwood*, 24 Ohio Cir. Ct. 146.

2. Ways by Necessity — In General — *Arkansas. —* See *Belser v. Moore*, 73 Ark. 296.

Georgia. — See *Charleston, etc., R. Co. v. Fleming*, 118 Ga. 699, 119 Ga. 995; *Gaines v. Lunsford*, 120 Ga. 370, 102 Am. St. Rep. 109.

Indiana. — *Dudgeon v. Bronson*, 159 Ind. 562, 95 Am. St. Rep. 315. See also *Thomas v. McCoy*, 30 Ind. App. 555.

Kentucky. — *Damron v. Damron*, (Ky. 1905) 84 S. W. Rep. 748.

Massachusetts. — *Worthen v. Garno*, 182 Mass. 243.

Michigan. — *Ann Arbor Fruit, etc., Co. v. Ann Arbor R. Co.*, 136 Mich. 599.

New Jersey. — See *Perth Amboy Terra Cotta Co. v. Ryan*, 68 N. J. L. 474.

New York. — *Matter of Opening East One Hundred and Forty-second St.*, 83 N. Y. App. Div. 430.

North Carolina. — *Milliken v. Denny*, 135 N. Car. 19.

Ohio. — *Bates v. Sherwood*, 24 Ohio Cir. Ct. 146.

Canada. — See *Huddleston v. Love*, 13 Manitoba 432; *Grand Trunk R. Co. v. Valliear*, 7 Ont. L. Rep. 364.

14. 1. Way by Necessity over Tenement Retained by Vendor. — *McKenzie v. Gleason*, 184 Mass. 452, 100 Am. St. Rep. 566; *Matter of Opening Robbins Ave.*, 83 N. Y. App. Div. 513; *Mosher v. Hibbs*, 24 Ohio Cir. Ct. 375; *Holman v. Patterson*, 34 Tex. Civ. App. 344; *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964. See also *Worthen v. Garno*, 182 Mass. 243.

15 1. Way by Necessity in Favor of Vendor. — *McKenzie v. Gleason*, 184 Mass. 452, 100 Am. St. Rep. 566.

2. Presumption as to Intention. — *Holman v. Patterson*, 34 Tex. Civ. App. 344.

5. Method of Alienation Not Material — Eng-

land. — *Baxendale v. North Lambeth Liberal, etc., Club*, (1902) 2 Ch. 427, 71 L. J. Ch. 806.

Arizona. — *Territory v. Richardson*, (Ariz. 1904) 76 Pac. Rep. 456.

Arkansas. — *Belser v. Moore*, 73 Ark. 296.

District of Columbia. — *Preston v. Siebert*, 21 App. Cas. (D. C.) 405.

Georgia. — *Charleston, etc., R. Co. v. Fleming*, 118 Ga. 699.

Indiana. — *Dudgeon v. Bronson*, 159 Ind. 562, 95 Am. St. Rep. 315; *Vanatta v. Waterhouse*, 33 Ind. App. 516.

Iowa. — *Morrison v. Chicago, etc., R. Co.*, 117 Iowa 587.

Kentucky. — *Douthitt v. Canaday*, (Ky. 1903) 73 S. W. Rep. 757; *Mitchell v. Bourbon County*, 76 S. W. Rep. 16, 25 Ky. L. Rep. 512; *Johns v. Davis*, (Ky. 1903) 76 S. W. Rep. 187; *Magruder v. Potter*, 77 S. W. Rep. 919, 25 Ky. L. Rep. 1336; *Walling v. Eggers*, (Ky. 1904) 78 S. W. Rep. 428. See also *Zook v. Illinois Cent. R. Co.*, (Ky. 1904) 80 S. W. Rep. 211.

Maryland. — *Ross v. McGee*, 98 Md. 389.

Massachusetts. — *Drew v. Wiswall*, 183 Mass. 554.

Minnesota. — *Callan v. Hause*, 91 Minn. 270.

Mississippi. — *Lott v. Payne*, 82 Miss. 218, 100 Am. St. Rep. 632.

Missouri. — *St. Louis Safe Deposit, etc., Bank v. Kennett Estate*, 101 Mo. App. 370.

Nebraska. — *Keplinger v. Woolsey*, (Neb. 1903) 93 N. W. Rep. 1008.

New Jersey. — *Atlantic City v. New Auditorium Pier Co.*, 63 N. J. Eq. 644; *Perth Amboy Terra Cotta Co. v. Ryan*, 68 N. J. L. 474; *Speer v. Erie R. Co.*, 64 N. J. Eq. 601; *West Jersey, etc., R. Co. v. Atlantic City, etc., Trac-tion Co.*, 65 N. J. Eq. 613.

New York. — *Brady v. Brady*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 411, 88 N. Y. App. Div. 427, affirmed (Supm. Ct. App. Div.) 84 N. Y. Supp. 1119; *Stolts v. Tuska*, 76 N. Y. App. Div. 137; *Weed v. M'Keg*, 79 N. Y. App. Div. 218; *Johnson v. Cox*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 301; *Andrus v. National Sugar Refining Co.*, 93 N. Y. App. Div. 377.

North Carolina. — *Leigh v. Garysburg Mfg. Co.*, 132 N. Car. 167.

Ohio. — *Gibbons v. Ebding*, 70 Ohio St. 298, 101 Am. St. Rep. 900; *Mosher v. Hibbs*, 24 Ohio Cir. Ct. 375; *Schaeffer v. Claudia*, 25 Ohio Cir. Ct. 249.

Oregon. — *Hotchkiss v. Young*, 42 Oregon 446.

Pennsylvania. — *Bright v. Allan*, 203 Pa. St. 386; *Richmond v. Bennett*, 205 Pa. St. 470.

Utah. — *Thompson v. Madsen*, (Utah 1905) 81 Pac. Rep. 160.

Vermont. — *Dec v. King*, 77 Vt. 230.

16. See notes 1, 2.

(3) *Essentials of Way by Necessity* — (a) *In General* — *Must Be Founded on Presumption of Grant.* — See note 6.

17. Where There Is Other Access. — See note 3.

(b) *Necessity* — *How Created.* — See note 6.

18. Degree of Necessity. — See note 3.**19.** 5. Under Statute — *a. CONSTITUTIONALITY OF STATUTES.* — See note 1.

Statutory Private Ways as Highways. — See note 2.

c. PURPOSE AND PLACE OF ESTABLISHMENT — *Purpose.* — See note 6.

Place. — See note 7.

20. *e. APPLICATION FOR WAY* — (1) *Necessity of Application.* — See note 3.

(2) *Sufficiency of Application* — (a) *Form and Verification* — *Writing.* — See note 4.

Compliance with Statutes. — See note 6.

(b) *Essential Averments* — *Description of Way.* — See note 8.

21. *f. NOTICE TO OWNER OR OCCUPANT.* — See note 1.

g. COMMISSIONERS OR VIEWERS — (1) *In General.* — See note 7.

22. (3) *Order for View.* — See note 2.

(4) *Report, Inquest, or Return* — *Sufficiency of Report.* — See notes 5, 7. *Objections May Be Made to a Report of Viewers.* — See note 8.

i. APPEAL AND CERTIORARI — *Certiorari.* — See note 14.

23. *k. DAMAGES.* — See note 3.

16. 1. *Way by Necessity Implied from Decree of Partition.* — *Dickinson v. Crowell*, 120 Iowa 254. See also *McCullough v. Broad Exch. Co.*, 101 N. Y. App. Div. 566.

2. *Sale under Execution.* — *Damron v. Damron*, (Ky. 1905) 84 S. W. Rep. 748.

6. *Presumed Grant.* — *Menzies v. Breadalbane*, Sc. Ct. of Sess. 4 F. 59; *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964.

17. 3. *No Way Where Other Access.* — *Charleston, etc., R. Co. v. Fleming*, 119 Ga. 995.

8. *How Necessity Created.* — *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964.

18. 3. *Necessity — Mere Convenience Insufficient.* — *Belser v. Moore*, 73 Ark. 296; *Gaines v. Lunsford*, 120 Ga. 370, 102 Am. St. Rep. 109; *Dudgeon v. Bronson*, 159 Ind. 562, 95 Am. St. Rep. 315; *Matter of Opening Robbins Ave.*, 83 N. Y. App. Div. 513.

19. 1. *Constitutionality of Statutes in General.* — See *Dickinson Tp. Road*, 23 Pa. Super. Ct. 34.

Establishment of Private Road Justified under Eminent Domain. — *Madera County v. Raymond Granite Co.*, 139 Cal. 128. *Contra*, *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964.

2. *Private Ways Laid Out under Statute Public Roads.* — *Madera County v. Raymond Granite Co.*, 139 Cal. 128; *Lesley v. Klamath County*, 44 Oregon 491.

6. *Private Way to Quarry Authorized.* — *Eldredge v. Norfolk County*, 185 Mass. 186.

7. *Statutory Private Ways — Terminus.* — *Lesley v. Klamath County*, 44 Oregon 491.

20. 3. *Necessity of Application.* — See *Madera County v. Raymond Granite Co.*, 139 Cal. 128; *Lesley v. Klamath County*, 44 Oregon 491.

4. *Application Should Be Written.* — See *Eldredge v. Norfolk County*, 185 Mass. 186.

6. *General Compliance with Statute Sufficient.* — See *Madera County v. Raymond Granite Co.*, 139 Cal. 128.

8. *General Description Sufficient.* — *Madera County v. Raymond Granite Co.*, 139 Cal. 128.

21. 1. *Necessity of Notice.* — See *Madera County v. Raymond Granite Co.*, 139 Cal. 128.

7. *Commissioners or Viewers to Determine Necessity.* — *Eldredge v. Norfolk County*, 185 Mass. 186; *Lesley v. Klamath County*, 44 Oregon 491. See also *Madera County v. Raymond Granite Co.*, 139 Cal. 128; *In re Rickards*, (Del. 1904) 58 Atl. Rep. 945.

22. 2. *Order for View in General.* — *Lesley v. Klamath County*, 44 Oregon 491.

5. *Necessity of Describing Width of Way.* — Under the *Delaware* statute providing that the width of a private way shall be twenty-five feet, the report need not fix the width of the road. *In re Rickards*, (Del. 1904) 58 Atl. Rep. 945.

7. *Who Liable for Damage.* — See *Madera County v. Raymond Granite Co.*, 139 Cal. 128, supporting the text paragraph generally.

8. *Objections — Exceptions.* — *Madera County v. Raymond Granite Co.*, 139 Cal. 128; *In re Rickards*, (Del. 1904) 58 Atl. Rep. 945.

Appeal. — *Mariposa County v. Knowles*, 146 Cal. 1; *Lesley v. Klamath County*, 44 Oregon 491.

14. *Certiorari.* — *Eldredge v. Norfolk County*, 185 Mass. 186.

23. 3. *Who Must Pay Damages.* — *Madera*

- 23. III. ESTABLISHMENT OF WAY** — In General. — See note 4.
Burden of Proof. — See note 6.
- 24. The Proof Necessary to Establish an Easement by Prescription.** — See note 2.
- IV. RIGHTS, DUTIES, AND LIABILITIES OF PARTIES** — 1. In General —
- a. WAY BY GRANT OR RESERVATION.* — See note 3.
- 25. Rights of Owner by Reservation.** — See note 1.
b. WAY BY PRESCRIPTION OR ADVERSE USE. — See note 2.
- 2. Owner of Way** — *a. EXTENT OF EASEMENT* — (1) *In General.* — See notes 4, 5.
Third Parties — Where the Way Is Appurtenant. — See note 9.
- 26. Common Owners of Way.** — See note 2.
(2) *Limitations upon Use* — (a) *Where Use Is Defined.* — See note 3.
- 27. (b) Where Use Is Not Defined.** — See note 2.
In Determining the Purposes for Which a Way May Be Used. — See note 3.
- 28. (c) Width of Way** — Where the Width Is Not Expressly Defined. — See note 3.
b. GATES AND FENCES — Duty of Wayowner to Replace Gates. — See note 5.
The Wayowner May Not Fence. — See note 6.
c. DUTY TO OPEN WAY. — See note 7.
- 29. Manner of Opening and Preparing Way.** — See note 1.
d. REPAIRS — The Right of Repair Is Incident to the Easement. — See note 5.
Duty of Wayowner to Repair. — See note 8.
- 30. 3. Owner of Land Subject to Way** — *a. IN GENERAL.* — See notes 1, 2.
- County *v.* Raymond Granite Co., 139 Cal. 128; Eldredge *v.* Norfolk County, 185 Mass. 186.
- 23. 4 Actions to Establish Right of Way.** — See generally Young *v.* Star Omnibus Co., 86 L. T. N. S. 41; Vanatta *v.* Waterhouse, 33 Ind. App. 516; Dickinson *v.* Crowell, 120 Iowa 254; Anderson *v.* Southworth, (Ky. 1903) 76 S. W. Rep. 391; Perth Amboy Terra Cotta Co. *v.* Ryan, 68 N. J. L. 474; Speer *v.* Erie R. Co., 64 N. J. Eq. 601; Hey *v.* Collman, 78 N. Y. App. Div. 584, affirmed 180 N. Y. 560.
- Plea of Justification in Action of Trespass. — Pennington *v.* Lewis, 4 Penn. (Del.) 447.
- 6. Claimant by Grant Must Produce Grant.** — See Speer *v.* Erie R. Co., 64 N. J. Eq. 601.
- 24. 2. Proof of Right by Prescription.** — Reid *v.* Garnett, 101 Va. 47. Compare O'Reagan *v.* Duggan, 117 Iowa 612.
- 3. Way by Grant or Reservation.** — Keplinger *v.* Woolsey, (Neb. 1903) 93 N. W. Rep. 1008; Hotchkiss *v.* Young, 42 Oregon 446; Bright *v.* Allan, 203 Pa. St. 386. See also Lott *v.* Payne, 82 Miss. 218, 100 Am. St. Rep. 632; Speer *v.* Erie R. Co., 64 N. J. Eq. 601.
- 25. 1. Rights of Owner by Reservation.** — Hotchkiss *v.* Young, 42 Oregon 446; Holman *v.* Patterson, 34 Tex. Civ. App. 344.
- 2. Ways by Prescription or Adverse Use.** — Reid *v.* Garnett, 101 Va. 47. Compare O'Reagan *v.* Duggan, 117 Iowa 612.
- 4. Wayowner Entitled to Passage Only.** — Weed *v.* McKeg, 79 N. Y. App. Div. 218; Gibbons *v.* Ebding, 70 Ohio St. 298, 101 Am. St. Rep. 900; Hotchkiss *v.* Young, 42 Oregon 446.
- 5. Wayowner Entitled to Rights Incidental to Passage.** — Weed *v.* McKeg, 79 N. Y. App. Div. 218; Gibbons *v.* Ebding, 70 Ohio St. 298, 101 Am. St. Rep. 900; Hotchkiss *v.* Young, 42 Oregon 446.
- 9. User by Third Parties.** — Baxendale *v.* North Lambeth Liberal, etc., Club, (1902) 2 Ch. 427, holding that the right extends to licenses, although the grantee, "his executors, administrators, and assigns, undertenants and servants," are the only persons specified in the grant.
- 26. 2. Use by Common Owners.** — See West *v.* Louisville, etc., R. Co., 137 Ala. 568.
- 3. Limitations upon Use — Where Defined.** — West *v.* Louisville, etc., R. Co., 137 Ala. 568. See also Hotchkiss *v.* Young, 42 Oregon 446.
- 27. 2. Where Use Is Not Defined.** — McCullough *v.* Broad Exch. Co., 101 N. Y. App. Div. 566.
- 3. Condition of Way at Acquisition to Be Considered.** — Hotchkiss *v.* Young, 42 Oregon 446.
- But Where There Is an Express Grant of a Private Way, to the unrestricted use of which the grantee is entitled, the grant is not to be restricted to access to the land for purposes for which access would be required at the time of the grant. Harris *v.* Flower, 90 L. T. N. S. 669.
- 28. 3. Wayowner Entitled to Convenient Width.** — Van De Vanter *v.* Flaherty, 37 Wash. 218.
- 5. Duty to Replace Gates or Fences Lawfully Erected.** — See Gibbons *v.* Ebding, 70 Ohio St. 298, 101 Am. St. Rep. 900.
- 6. Wayowner May Not Fence to Landowner's Detriment.** — See Gibbons *v.* Ebding, 70 Ohio St. 298, 101 Am. St. Rep. 900.
- 7. Duty to Open Way.** — See Hotchkiss *v.* Young, 42 Oregon 446. Compare Speer *v.* Erie R. Co., 64 N. J. Eq. 601.
- 29. 1. Manner of Opening and Preparing Way.** — Hotchkiss *v.* Young, 42 Oregon 446.
- 5. Right of Wayowner to Repair.** — Weed *v.* McKeg, 79 N. Y. App. Div. 218; Hotchkiss *v.* Young, 42 Oregon 446.
- 8. Duty of Wayowner to Repair.** — See Dudgeon *v.* Bronson, 159 Ind. 562, 95 Am. St. Rep. 315.
- 30. 1. Rights of Ownership of Land Subject to Way — In General.** — Gibbons *v.* Ebding, 70 Ohio St. 298, 101 Am. St. Rep. 900; Hotchkiss *v.* Young, 42 Oregon 446.

30. b. LOCATION OF PRIVATE WAYS—(1) *Ways by Necessity*—Right to Locate. — See note 8.

31. The Route Is to Be Determined Not by the Sole Interest of Either the Wayowner or the Landowner. — See note 6.

(2) *Expressly Granted or Reserved Ways*—Who May Locate. — See note 7.

32. Where Way Open and in Use. — See note 1.

Acquiescence in Use of Route. — See note 3.

(3) *Change of Location.* — See note 6.

33. (4) Right to Go Extra Viam. — See notes 5, 8.

34. c. GATES, BARS, AND FENCES—(1) *Gates and Bars*—Where There Is a General Grant of a Private Way. — See note 2.

35. d. BUILDINGS AND ERECTIONS—Where Building Is Obstruction. — See note 4.

4. Wrongful Use of Way. — See notes 6, 7.

36. What Constitutes Misuser. — See note 1.

5. Obstruction of Way—*a. WHAT CONSTITUTES OBSTRUCTION*—Question of Fact. — See note 2.

Determination of Question. — See note 3.

37. b. REMEDIES—(3) *Action for Damages.* — See note 4.

38. See note 3.

(4) *Injunction.* — See note 5.

30. 2. Wayowner Must Recognize Rights of Landowner.—*Gibbons v. Ebding*, 70 Ohio St. 298, 101 Am. St. Rep. 900; *Hotchkiss v. Young*, 42 Oregon 446.

8. Right to Locate. — *Thomas v. McCoy*, 30 Ind. App. 555; *Worthen v. Garno*, 182 Mass. 243; *Callan v. Hause*, 91 Minn. 270 (right of way reserved in deed).

31. 6. Determination of Route for Convenience of Both Parties—*By Act of Parties.* — See *Callan v. Hause*, 91 Minn. 270.

7. Expressly Granted or Reserved Ways—Who May Locate. — *Dickinson v. Crowell*, 120 Iowa 254.

Location Fixed by Exercise of Right to Locate Reserved in Deed. — *Speer v. Erie R. Co.*, 64 N. J. Eq. 601.

32. 1. Presumption Where Way Is in Use. — See *Dickinson v. Crowell*, 120 Iowa 254.

3. Acquiescence in Use of Route. — *Dickinson v. Crowell*, 120 Iowa 254.

6. Consent of Both Parties to Change Essential. — *Dudgeon v. Bronson*, 159 Ind. 562, 95 Am. St. Rep. 315; *Speer v. Erie R. Co.*, 64 N. J. Eq. 601.

33. 5. No Right to Deviate. — *Dudgeon v. Bronson*, 159 Ind. 562, 95 Am. St. Rep. 315.

8. No Distinction Between Way of Necessity and Other Ways. — *Dudgeon v. Bronson*, 159 Ind. 562, 95 Am. St. Rep. 315.

34. 2. Rule Where Grant Is General. — *Siple v. Blow*, 8 Ont. L. Rep. 547.

35. 4. Where Building Is Obstruction. — *Weed v. McKeg*, 79 N. Y. App. Div. 218.

6. Wrongful Use of Way—*Injunction.* — *McCullough v. Broad Exch. Co.*, 101 N. Y. App. Div. 566; *Hotchkiss v. Young*, 42 Oregon 446.

7. Recovery of Possession. — *Lott v. Payne*, 82 Miss. 218, 100 Am. St. Rep. 632. Compare *McCullough v. Broad Exch. Co.*, 101 N. Y. App. Div. 566.

36. 1. What Constitutes Misuser Question of Fact. — See *Hotchkiss v. Young*, 42 Oregon 446.

2. What Amounts to Obstruction Question of Fact. — See *Keplinger v. Woolsey*, (Neb. 1903) 93 N. W. Rep. 1008.

3. Determination of Question. — See *Weed v. McKeg*, 79 N. Y. App. Div. 218; *Bright v. Allan*, 203 Pa. St. 386.

37. 4. Action for Damages—England. — See *Young v. Star Omnibus Co.*, 86 L. T. N. S. 41.

Indiana. — *Cincinnati, etc., R. Co. v. Miller*, (Ind. App. 1904) 72 N. E. Rep. 827.

Kentucky. — *Louisville, etc., R. Co. v. Brooks*, (Ky. 1903) 77 S. W. Rep. 693; *Louisville, etc., R. Co. v. Carter*, (Ky. 1903) 77 S. W. Rep. 719; *Magruder v. Potter*, 77 S. W. Rep. 919, 25 Ky. L. Rep. 1336; *Zook v. Illinois Cent. R. Co.*, (Ky. 1904) 80 S. W. Rep. 211.

Maryland. — *Ross v. McGee*, 98 Md. 389. *Massachusetts.* — *Graves v. Broughton*, 185 Mass. 174.

New Jersey. — See *Perth Amboy Terra Cotta Co. v. Ryan*, 68 N. J. L. 474.

New York. — *Hey v. Collman*, 78 N. Y. App. Div. 584, affirmed 180 N. Y. 560.

Ohio. — *Gibbons v. Ebding*, 70 Ohio St. 298, 101 Am. St. Rep. 900.

Pennsylvania. — *Davis v. Wheeling, etc., R. Co.*, 26 Pa. Super. Ct. 364.

Vermont. — *Dee v. King*, 77 Vt. 230. Action Maintainable Against Administrator. — *Randall v. Brayton*, 26 R. I. 233.

38. 3. Trespass Will Not Lie. — *Vandegrift v. Burke*, 98 Md. 230; *Gibbons v. Ebding*, 70 Ohio St. 298, 101 Am. St. Rep. 900.

5. Injunction—In General—*England.* — *Young v. Star Omnibus Co.*, 86 L. T. N. S. 41. *Alabama.* — *Jackson v. Snodgrass*, 140 Ala. 369, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 38.

Delaware. — *Bubbenzer v. Philadelphia, etc., R. Co.*, (Del. Ch. 1904) 57 Atl. Rep. 242.

District of Columbia. — *Preston v. Siebert*, 21 App. Cas. (D. C.) 405.

39. Establishment of Complainant's Right at Law. — See note 2.

Mandatory Injunction. — See note 3.

40. (5) Action to Quiet Title. — See note 1.*c.* WHO MAY SUE — The Owner. — See note 3.

Lessees. — See note 4.

One of Several Entitled to Use a Way. — See note 6.

d. WHO MAY BE SUED. — See note 7.*e.* ACCRUAL OF RIGHT OF ACTION. — See note 8.*Georgia.* — See *Charleston, etc., R. Co. v. Fleming*, 118 Ga. 699.*Idaho.* — *Howes v. Barmon*, (Idaho 1905) 81 Pac. Rep. 48.*Iowa.* — *O'Reagan v. Duggan*, 117 Iowa 612.*Kentucky.* — *Anderson v. Southworth*, (Ky. 1903) 76 S. W. Rep. 391; *Evans v. Motley*, 78 S. W. Rep. 877, 25 Ky. L. Rep. 1825; *Damron v. Damron*, (Ky. 1905) 84 S. W. Rep. 748. See also *Golden v. Rupard*, (Ky. 1904) 80 S. W. Rep. 162.*Missouri.* — *St. Louis Safe Deposit, etc., Bank v. Kennett Estate*, 101 Mo. App. 370; *Anthony v. Kennard Bldg. Co.*, 188 Mo. 704.*Nebraska.* — *Keplinger v. Woolsey*, (Neb. 1903) 93 N. W. Rep. 1008.*New York.* — *Weed v. McKeg*, 79 N. Y. App. Div. 218; *Johnson v. Cox*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 301; *Andrus v. National Sugar Refining Co.*, 93 N. Y. App. Div. 377.*Pennsylvania.* — *Bright v. Allan*, 203 Pa. St. 386; *Richmond v. Bennett*, 205 Pa. St. 470; *Merishon v. Fidelity Ins., etc., Co.*, 208 Pa. St. 292.*Vermont.* — *Dee v. King*, 77 Vt. 230.Injunction Denied. — *Gibbons v. Ebbing*, 70 Ohio St. 298, 101 Am. St. Rep. 900.**39. 2. Establishment of Right at Law.** — See *Bubbenzer v. Philadelphia, etc., R. Co.*, (Del. Ch. 1904) 57 Atl. Rep. 242; *Howes v. Barmon*, (Idaho 1905) 81 Pac. Rep. 48; *Anderson v. Southworth*, (Ky. 1903) 76 S. W. Rep. 391; *St. Louis Safe Deposit, etc., Bank v. Kennett Estate*, 101 Mo. App. 370; *Dee v. King*, 77 Vt. 230.**3.** *Watkins v. Country Club*, 120 Ga. 45; *Anderson v. Southworth*, (Ky. 1903) 76 S. W. Rep. 391; *Louisville, etc., R. Co. v. Brooks*, (Ky. 1903) 77 S. W. Rep. 693; *Magruder v. Potter*, 77 S. W. Rep. 919, 25 Ky. L. Rep. 1336; *Chenault v. Gravitt*, 85 S. W. Rep. 184, 27 Ky. L. Rep. 403.**40. 1. Action to Quiet Title.** — *Thomas v. McCoy*, 30 Ind. App. 555.**3. Owner** — *England.* — *Young v. Star Omnibus Co.*, 86 L. T. N. S. 41.*Delaware.* — *Bubbenzer v. Philadelphia, etc., R. Co.*, (Del. Ch. 1904) 57 Atl. Rep. 242.*Iowa.* — *Dickinson v. Crowell*, 120 Iowa 254.*Kentucky.* — *Evans v. Motley*, 78 S. W. Rep. 877, 25 Ky. L. Rep. 1825; *Zook v. Illinois Cent. R. Co.*, (Ky. 1904) 80 S. W. Rep. 211; *Damron v. Damron*, (Ky. 1905) 84 S. W. Rep. 748; *Chenault v. Gravitt*, 85 S. W. Rep. 184, 27 Ky. L. Rep. 403.*Maryland.* — *Vandegrift v. Burke*, 98 Md. 230.*Massachusetts.* — *Graves v. Broughton*, 185 Mass. 174.*Missouri.* — *St. Louis Safe Deposit, etc.,**Bank v. Kennett Estate*, 101 Mo. App. 370; *Anthony v. Kennard Bldg. Co.*, 188 Mo. 704.*Nebraska.* — *Keplinger v. Woolsey*, (Neb. 1903) 93 N. W. Rep. 1008.*New Jersey.* — *Perth Amboy Terra Cotta Co. v. Ryan*, 68 N. J. L. 474; *Speer v. Erie R. Co.*, 64 N. J. Eq. 601.*New York.* — *Hey v. Collman*, 78 N. Y. App. Div. 584, affirmed 180 N. Y. 560; *Andrus v. National Sugar Refining Co.*, 93 N. Y. App. Div. 377.*Ohio.* — *Gibbons v. Ebbing*, 70 Ohio St. 298, 101 Am. St. Rep. 900.*Pennsylvania.* — *Richmond v. Bennett*, 205 Pa. St. 470.*Vermont.* — *Dee v. King*, 77 Vt. 230.**4. Lessees.** — *Watkins v. Country Club*, 120 Ga. 45; *Morrison v. Chicago, etc., R. Co.*, 117 Iowa 587.**6. Tenant May Enjoin Cotenant.** — *Merishon v. Fidelity Ins., etc., Co.*, 208 Pa. St. 292.**7. Any Person Who Assists in Obstructing May Be Sued** — *England.* — *Young v. Star Omnibus Co.*, 86 L. T. N. S. 41.*Delaware.* — *Bubbenzer v. Philadelphia, etc., R. Co.*, (Del. Ch. 1904) 57 Atl. Rep. 242.*Georgia.* — *Watkins v. Country Club*, 120 Ga. 45.*Iowa.* — *Dickinson v. Crowell*, 120 Iowa 254.*Kentucky.* — *Evans v. Motley*, 78 S. W. Rep. 877, 25 Ky. L. Rep. 1825; *Zook v. Illinois Cent. R. Co.*, (Ky. 1904) 80 S. W. Rep. 211; *Damron v. Damron*, (Ky. 1905) 84 S. W. Rep. 748; *Chenault v. Gravitt*, 85 S. W. Rep. 184, 27 Ky. L. Rep. 403.*Maryland.* — *Vandegrift v. Burke*, 98 Md. 230.*Massachusetts.* — *Graves v. Broughton*, 185 Mass. 174.*Missouri.* — *St. Louis Safe Deposit, etc., Bank v. Kennett Estate*, 101 Mo. App. 370.*Nebraska.* — *Keplinger v. Woolsey*, (Neb. 1903) 93 N. W. Rep. 1008.*New Jersey.* — *Perth Amboy Terra Cotta Co. v. Ryan*, 68 N. J. L. 474; *Speer v. Erie R. Co.*, 64 N. J. Eq. 601.*New York.* — *Hey v. Collman*, 78 N. Y. App. Div. 584, affirmed 180 N. Y. 560; *Andrus v. National Sugar Refining Co.*, 93 N. Y. App. Div. 377.*Ohio.* — *Gibbons v. Ebbing*, 70 Ohio St. 298, 101 Am. St. Rep. 900.*Pennsylvania.* — *Richmond v. Bennett*, 205 Pa. St. 470; *Merishon v. Fidelity Ins., etc., Co.*, 208 Pa. St. 292.*Rhode Island.* — *Randall v. Brayton*, 26 R. I. 233.*Vermont.* — *Dee v. King*, 77 Vt. 230.**8. When Action Accrues.** — See *Dickinson v. Crowell*, 120 Iowa 254; *Hey v. Collman*, 78 N. Y. App. Div. 584, affirmed 180 N. Y. 560,

40. *f.* ESSENTIALS TO RECOVERY. — See note 9.

41. *g.* DAMAGES. — See note 1.

V. EXTINGUISHMENT OF WAY — 1. In General — *a.* BY RELEASE OR ABANDONMENT — (2) *Release.* — See note 11.

42. (3) *Abandonment by Acts in Pais.* — See note 1.

Acts Relied On to Show Abandonment Must Be Unequivocal Acts. — See notes 3, 4.
Nonuser Accompanied by Acts Showing Intention to Abandon. — See note 5.

43. **User of the Way for Purposes Not Contemplated.** — See note 1.
Obstructions. — See notes 2, 4.

b. BY UNITY OF SEIZIN OR MERGER. — See note 5.

44. *f.* BY INCREASE OF BURDEN. — See note 2.

2. Ways by Necessity. — See notes 3, 4.

40. 9. Proof of Right of Way Essential. — See *Hey v. Collman*, 78 N. Y. App. Div. 584, affirmed 180 N. Y. 560.

41. 1. Damages in General. — See *Cincinnati, etc., R. Co. v. Miller*, (Ind. App. 1904) 72 N. E. Rep. 827; *Hey v. Collman*, 78 N. Y. App. Div. 584, affirmed 180 N. Y. 560; *Dee v. King*, 77 Vt. 230.

Diminution in Value of the Use of Land. — *Louisville, etc., R. Co. v. Carter*, (Ky. 1903) 77 S. W. Rep. 719.

11. A Parol Agreement to release a private right of way, in consideration of a substituted right of way, is held in *Utah* to be valid. *Thompson v. Madsen*, (Utah 1905) 81 Pac. Rep. 160.

42. 1. For Facts Held Not to Constitute Abandonment see *Mitchell v. Bourbon County*, 76 S. W. Rep. 16, 25 Ky. L. Rep. 512.

3. Nonuser. — *Perth Amboy Terra Cotta Co. v. Ryan*, 68 N. J. L. 474; *Brady v. Brady*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 411; *Weed v. McKeg*, 79 N. Y. App. Div. 218; *Andrus v. National Sugar Refining Co.*, 93 N. Y. App. Div. 377; *McCullough v. Broad Exch. Co.*, 101 N. Y. App. Div. 566; *Richmond v. Bennett*, 205 Pa. St. 470.

The Nonuser of a Way Acquired by Adverse User. — See *Brady v. Brady*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 411, 88 N. Y. App. Div. 427, affirmed (Supm. Ct. App. Div.) 84 N. Y. Supp. 1119.

4. Substitution of Way. — See *Speer v. Erie R. Co.*, 64 N. J. Eq. 601.

Way Not Extinguished by Acquisition of Additional Way. — *Perth Amboy Terra Cotta Co. v. Ryan*, 68 N. J. L. 474.

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5. Adverse User as Proof of Abandonment. — *Clay v. Kennedy*, (Ky. 1903) 72 S. W. Rep. 815; *Peden v. Crenshaw*, (Tex. Civ. App. 1904) 81 S. W. Rep. 369. See also *Brown v. Barton*, (Ky. 1904) 82 S. W. Rep. 405; *Brady v. Brady*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 411, 88 N. Y. App. Div. 427, affirmed (Supm. Ct. App. Div.) 84 N. Y. Supp. 1119; *Andrus v. National Sugar Refining Co.*, 93 N. Y. App. Div. 377; *McCullough v. Broad Exch. Co.*, 101 N. Y. App. Div. 566.

43. 1. User of Way for Purposes Not Contemplated. — *Matter of Opening East One Hundred and Forty-second St.*, 83 N. Y. App. Div. 430. See also *Harris v. Flower*, 90 L. T. N. S. 669; *McCullough v. Broad Exch. Co.*, 101 N. Y. App. Div. 566.

2. Permanent Obstructions. — *Compare Young v. Star Omnibus Co.*, 86 L. T. N. S. 41.

4. Temporary Obstructions. — See *McCullough v. Broad Exch. Co.*, 101 N. Y. App. Div. 566. *Compare Young v. Star Omnibus Co.*, 86 L. T. N. S. 41; *Harris v. Flower*, 90 L. T. N. S. 669.

5. Merger. — *Charleston, etc., R. Co. v. Fleming*, 118 Ga. 699; *Wettlauffer v. Ames*, 133 Mich. 201; *Bates v. Sherwood*, 24 Ohio Cir. Ct. 146. See also *Cavanaugh v. Wholey*, 143 Cal. 164.

44. 2. Speer v. Erie R. Co., 64 N. J. Eq. 601.

3. Lasts While Necessity Remains. — See *Perth Amboy Terra Cotta Co. v. Ryan*, 68 N. J. L. 474.

4. Ceases with Necessity. — *Holman v. Patterson*, 34 Tex. Civ. App. 344.

PRIVILEGED COMMUNICATIONS.

BY H. W. HOYE.

- 50. I. DEFINITION.** — See note 1.
- 51. II. POLITICAL MATTERS — STATE SECRETS — 1. Rule Stated.** — See note 1.
- 53. IV. PROFESSIONAL COMMUNICATIONS — 1. To Attorneys — a. GENERAL RULE — (1) Rule Stated.** — See note 6.
- 55.** See note 1.
- 56. (2) Reason of Rule.** — See note 1.
- (4) Communication Need Not Be in Reply to Inquiry.** — See note 4.
- 57. (7) Communications Between Attorneys for Same Party.** — See note 3.
- (8) Communication by Agent of Client.** — See note 5.
- 58. b. RELATION OF ATTORNEY AND CLIENT MUST EXIST — (1) Rule Stated.** — See note 4.
- 60. (2) Person Consulted Must Actually Be an Attorney.** — See note 2.
- (3) Attorney Must Be Consulted and Acting in Professional Capacity.** — See note 6.
- 61. Attorney Employed as Scrivener.** — See note 1.
- 62. (4) Communication Must Be on Account of Relation.** — See note 2.
- (5) Payment of Retainer or Fee.** — See note 5.

50. 1. Definition. — *People v. Pratt*, 133 Mich. 125, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 50.

51. 1. Political Matters — State Secrets. — *Kessler v. Best*, 121 Fed. Rep. 439.

Papers of Internal Revenue Department Privileged. — *In re Lamberton*, 124 Fed. Rep. 446.

53. 6. Communications to Attorney Privileged — Delaware. — *Jolls v. Keegan*, 4 Penn. (Del.) 21.

Indiana. — *George v. Hurst*, 31 Ind. App. 660.

Kansas. — *Sheehan v. Allen*, 67 Kan. 712.

Kentucky. — *Denunzio v. Scholtz*, 117 Ky. 182.

Louisiana. — *State v. Gosey*, 111 La. 616.

Massachusetts. — *Rooney v. Maryland Casualty Co.*, 184 Mass. 26.

Michigan. — *People v. Pratt*, 133 Mich. 125.

Missouri. — *State v. Faulkner*, 175 Mo. 546.

Nebraska. — *Jahnke v. State*, (Neb. 1903) 94 N. W. Rep. 158.

New York. — *Downey v. Owen*, 98 N. Y. App. Div. 411; *Kaufman v. Rosenshine*, 97 N. Y. App. Div. 514; *Pfeffer v. Kling*, 58 N. Y. App. Div. 179, affirmed 171 N. Y. 668; *Matter of Shawmut Min. Co.*, 94 N. Y. App. Div. 156; *Downey v. Owen*, 98 N. Y. App. Div. 411.

Pennsylvania. — *Shannon v. Castner*, 21 Pa. Super. Ct. 294.

Texas. — *Ft. Worth, etc., R. Co. v. Lock*, 30 Tex. Civ. App. 426; *Holden v. State*, 44 Tex. Crim. 382.

55. 1. Client Cannot Be Compelled to Disclose Communications to Attorney. — *George v. Hurst*, 31 Ind. App. 660.

56. 1. Reason of Rule. — *People v. Pratt*, 133 Mich. 125; *State v. Faulkner*, 175 Mo. 546; *Kaufman v. Rosenshine*, 97 N. Y. App. Div.

514; *King v. Ashley*, 96 N. Y. App. Div. 143, affirmed 179 N. Y. 281.

4. Communication Need Not Be in Reply to Inquiry. — *Mack v. Sharp*, (Mich. 1904) 101 N. W. Rep. 631.

57. 3. Harris v. Balfour Quarry Co., 137 N. Car. 204, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57.

5. Leyner v. Leyner, 123 Iowa 185.

58. 4. Relation of Attorney and Client Must Exist. — *Sheehan v. Allen*, 67 Kan. 712; *Grimshaw v. Kent*, 67 Kan. 463; *Union Pac. R. Co. v. Day*, 68 Kan. 726; *People v. Pratt*, 133 Mich. 125, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 58; *Eekhout v. Cole*, 135 N. Car. 583; *Cobb v. Simon*, 119 Wis. 597, 100 Am. St. Rep. 909.

60. 2. Communication to Judge. — Where a person accused of bribery, about to go before the grand jury, asked a judge for advice as to what he should do, and the judge gave advice, his communications were held to be privileged. *People v. Pratt*, 133 Mich. 125.

6. Attorney Must Be Consulted and Acting as Such. — *Union Pac. R. Co. v. Day*, 68 Kan. 726; *State v. Faulkner*, 175 Mo. 546; *Arbuthnot v. Brookfield Loan, etc., Assoc.*, 98 Mo. App. 382; *Eekhout v. Cole*, 135 N. Car. 583.

61. 1. Attorney Employed as Mere Scrivener. — *Grimshaw v. Kent*, 67 Kan. 463.

62. 2. Communication Must Be on Account of Relation. — *Union Pac. R. Co. v. Day*, 68 Kan. 726; *People v. Pratt*, 133 Mich. 125, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 62; *Elliott v. Elliott*, (Neb. 1902) 92 N. W. Rep. 1006.

5. Payment of Fees Not Necessary. — *Sheehan v. Allen*, 67 Kan. 712; *Union Pac. R. Co. v.*

63. (6) *Communications Before Employment* — (b) *Communications with View to Employment*. — See note 3.

(7) *Communications After Relation Has Ceased*. — See note 5.

64. (8) *Communications to Attorney of Adverse Party*. — See note 3.

c. *COMMUNICATIONS NEED NOT RELATE TO LITIGATION BEGUN OR CONTEMPLATED*. — See note 6.

65. d. *ATTORNEY ACTING FOR SEVERAL CLIENTS*. — See note 1.

67. f. *CONFIDENTIAL CHARACTER OF COMMUNICATION*. — See note 2.

g. *CLIENT NEED NOT BE A PARTY TO SUIT IN WHICH EVIDENCE OFFERED*. — See note 5.

69. j. *RULE AS TO DOCUMENTS* — (5) *Correspondence*. — See note 5.

70. k. *WHO MAY CLAIM PRIVILEGE* — (1) *Client — Personal Representative*. — See note 3.

(2) *Antagonist of Client*. — See note 4.

72. n. *LIMITATIONS OF RULE* — (1) *In General*. — See note 1.

73. (3) *Effect of Presence of Third Persons*. — See note 1.

Conversations and Transactions Between the Client and Other Persons. — See note 2.

(4) *Existence and Possession of Documents*. — See note 3.

74. (5) *Fact of Employment*. — See note 2.

(8) *Handwriting of Client*. — See note 10.

75. (11) *Communications Intended to Be Transmitted to Others or Made Public*. — See note 5.

(12) *Matters Disclosed on Trial*. — See note 6.

76. (16) *Handling of Client's Funds or Property*. — See note 12.

77. (18) *Testamentary Matters*. — See note 2.

78. (20) *Communications in Contemplation of Crime or Fraud — Crime*. — See note 1.

Day, 68 Kan. 726; *People v. Pratt*, 133 Mich. 125; *Mack v. Sharp*, (Mich. 1904) 101 N. W. Rep. 631; *Pfeffer v. Kling*, 58 N. Y. App. Div. 179, *affirmed* 171 N. Y. 668.

63. 3. *Communications with a View to Employment*. — *Helbig v. Citizen's Ins. Co.*, 108 Ill. App. 624.

5. *Communications After Relation Has Ceased*. — *Eekhout v. Cole*, 135 N. Car. 583.

64. 3. *Communications to Attorney of Adverse Party*. — *Jolls v. Keegan*, 4 Penn. (Del.) 21; *Andrews v. Scott*, 113 Ill. App. 581, *affirmed* 211 Ill. 612; *Gerhardt v. Tucker*, 187 Mo. 46.

6. *Need Not Relate to Litigation Begun or Contemplated*. — *Sheehan v. Allen*, 67 Kan. 712; *Kaufman v. Rosenshine*, 97 N. Y. App. Div. 514.

65. 1. *Attorney Acting for Several Clients*. — *Jahnke v. State*, (Neb. 1903) 94 N. W. Rep. 158.

67. 2. *Confidential Character*. — *Denunzio v. Scholtz*, 117 Ky. 182; *Bay v. Trusdell*, 92 Mo. App. 377; *Elliott v. Elliott*, (Neb. 1902) 92 N. W. Rep. 1006; *King v. Ashley*, 96 N. Y. App. Div. 143, *affirmed* 179 N. Y. 281; *Eekhout v. Cole*, 135 N. Car. 583; *In re Downing*, 118 Wis. 581.

5. *Client Need Not Be a Party*. — *Matter of Shawmut Min. Co.*, 94 N. Y. App. Div. 156.

69. 5. *Correspondence*. — *Harris v. Balfour Quarry Co.*, 137 N. Car. 204.

A *Letter in the Hands of a Third Person* is not privileged. *Platt v. Buck*, 4 Ont. L. Rep. 421.

70. 3. *Client or Personal Representative*. — See *Downey v. Owen*, 98 N. Y. App. Div. 411.

4. *Bay v. Trusdell*, 92 Mo. App. 377.

72. 1. *When Attorney Must Testify*. — *King v. Ashley*, 96 N. Y. App. Div. 143, *affirmed* 179 N. Y. 281; *Sargent v. Johns*, 206 Pa. St. 386.

73. 1. *Attorney May Testify*. — *Scott v. Aultman Co.*, 211 Ill. 612, *citing* 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 72, 73, *affirming* 113 Ill. App. 581; *Denunzio v. Scholtz*, 117 Ky. 182; *Elliott v. Elliott*, (Neb. 1902) 92 N. W. Rep. 1006.

2. *Conversation and Transactions Between Client and Others in Presence of Attorney*. — *Scott v. Aultman Co.*, 211 Ill. 612, *citing* 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 73.

3. *Existence of Documents*. — *King v. Ashley*, 96 N. Y. App. Div. 143, *affirmed* 179 N. Y. 281.

74. 2. *By Whom Employed*. — *Compare Matter of Shawmut Min. Co.*, 94 N. Y. App. Div. 156.

10. *Handwriting or Signature of Client*. — *Ex p. Gfeller*, 178 Mo. 248; *King v. Ashley*, 96 N. Y. App. Div. 143, *affirmed* 179 N. Y. 281.

75. 5. *Communications Intended to Be Transmitted to Others or Made Public*. — *List v. List*, (Ky. 1904) 82 S. W. Rep. 446.

6. *Matters Disclosed on Trial*. — *Becker v. Shaw*, 120 Ga. 1003; *Shelton v. Northern Texas Traction Co.*, 32 Tex. Civ. App. 507.

76. 12. *Phoebe v. Welster*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 528.

77. 2. *Rule of Privilege Not Applicable*. — *Sheehan v. Allen*, 67 Kan. 712; *Ex p. Gfeller*, 178 Mo. 248; *Elliott v. Elliott*, (Neb. 1902) 92 N. W. Rep. 1006; *King v. Ashley*, 96 N. Y. App. Div. 143, *affirmed* 179 N. Y. 281; *Matter of Cornell*, 89 N. Y. App. Div. 412; *In re Downing*, 118 Wis. 581.

78. 1. *Communications in Contemplation of Crime Not Privileged*. — *State v. Faulkner*, 175 Mo. 546.

- 79.** (25) *Disclosure for Protection of Attorney.* — See note 6.
- 82.** *a.* WAIVER AND LOSS OF PRIVILEGE — (3) *How Waived* —
- (a) *Whether Waiver May Be Implied.* — See note 5.
- 83.** (c) *Introduction of Testimony.* — See note 2.
- 2.** *To Physicians* — *a.* IN GENERAL. — See note 7, 9.
- 84.** *b.* RELATION OF PHYSICIAN AND PATIENT MUST EXIST — (1) *Rule Stated* — See note 1.
- 85.** (2) *Employment by Patient Not Necessary* — (a) *Rule Stated.* — See note 1.
- (b) *Physician Employed by Person Responsible for Injury to Another.* — See notes 2, 3.
- (c) *Physician Sent to Examine Prisoner.* — See note 4.
- (4) *Physician Must Be Acting Professionally.* — See note 7.
- 86.** *c.* WHAT MATTERS ARE PRIVILEGED — (1) *Rule Extends to All Information Acquired Professionally.* — See note 4.
- (2) *Ailments of Patient.* — See notes 5, 6.
- 87.** (4) *Whether Information Must Be Necessary for Treatment.* — See notes 1, 2.
- g.* BURDEN OF PROOF. — See note 9.

79. 6. *Disclosures for Protection of Attorney.* — *Arbuthnot v. Brookfield Loan, etc., Assoc.*, 98 Mo. App. 382; *Keck v. Bode*, 23 Ohio Cir. Ct. 413.

82. 5. *Waiver May Be Implied.* — *Denunzio v. Scholtz*, 117 Ky. 182.

83. 2. *Client Testifying as to Communications.* — *Becker v. Shaw*, 120 Ga. 1003; *Shelton v. Northern Texas Traction Co.*, 32 Tex. Civ. App. 507.

7. *Not Privileged at Common Law.* — *Towles v. McCurdy*, 163 Ind. 12, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 88 [83]; *Banigan v. Banigan*, 26 R. I. 454.

9. *Privileged by Statute* — *Indiana.* — *Aspy v. Botkins*, 160 Ind. 170; *Towles v. McCurdy*, 163 Ind. 12.

Iowa. — *Battis v. Chicago, etc., R. Co.*, 124 Iowa 623; *Nugent v. Cudahy Packing Co.*, 126 Iowa 517.

Michigan. — *Dick v. Supreme Body, etc.*, (Mich. 1904) 101 N. W. Rep. 564.

Minnesota. — *Price v. Standard L., etc., Ins. Co.*, 90 Minn. 264.

Missouri. — *State v. Kennedy*, 177 Mo. 98; *Holloway v. Kansas City*, 184 Mo. 19; *Ex p. Gfeller*, 178 Mo. 248; *Smart v. Kansas City*, 91 Mo. App. 586; *Lackland v. Lexington Coal Min. Co.*, 110 Mo. App. 634.

New York. — *Becker v. Metropolitan L. Ins. Co.*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 99, 99 N. Y. App. Div. 5; *Robinson v. Supreme Commandery, etc.*, 77 N. Y. App. Div. 215, affirmed 177 N. Y. 564; *Beil v. Supreme Lodge, etc.*, 80 N. Y. App. Div. 609; *Meyer v. Supreme Lodge, etc.*, 82 N. Y. App. Div. 359, affirmed 178 N. Y. 63; *Deutschmann v. Third Ave. R. Co.*, 87 N. Y. App. Div. 503.

Ohio. — *Metropolitan L. Ins. Co. v. Howle*, 68 Ohio St. 614.

Utah. — *Munz v. Salt Lake City R. Co.*, 25 Utah 220; *Matter of Van Alstine*, 26 Utah 193.

Washington. — *Dubcich v. Grand Lodge, etc.*, 33 Wash. 651.

Wisconsin. — *In re Hunt*, 122 Wis. 460.

84. 1. *Relation of Physician and Patient Must*

Exist. — *Seifert v. State*, 160 Ind. 464, 98 Am. St. Rep. 340; *Sutcliffe v. Iowa State Traveling Men's Assoc.*, 119 Iowa 220, 97 Am. St. Rep. 298; *State v. Height*, 117 Iowa 650, 94 Am. St. Rep. 323; *Patterson v. Cole*, 67 Kan. 441; *State v. Lyons*, 113 La. 959.

85. 1. *Employment by Patient Not Necessary.* — *Meyer v. Supreme Lodge, etc.*, 82 N. Y. App. Div. 359, affirmed 178 N. Y. 63; *Munz v. Salt Lake City R. Co.*, 25 Utah 220.

2. *Physician Employed by Person Responsible for Injury.* — *Battis v. Chicago, etc., R. Co.*, 124 Iowa 623; *Munz v. Salt Lake City R. Co.*, 25 Utah 220.

3. *Where Professional Treatment Not Intended.* — *James v. State*, 124 Wis. 130.

4. *Physician Sent to Examine Prisoner.* — *State v. Height*, 117 Iowa 650, 94 Am. St. Rep. 323.

7. *Physician Must Be Acting Professionally.* — *Hamilton v. Crowe*, 175 Mo. 634; *Jennings v. Supreme Council, etc.*, 81 N. Y. App. Div. 76; *Metropolitan L. Ins. Co. v. Howle*, 68 Ohio St. 614; *Dubcich v. Grand Lodge, etc.*, 33 Wash. 651.

86. 4. *Rule Extends to All Information Acquired Professionally.* — *Towles v. McCurdy*, 163 Ind. 12; *Battis v. Chicago, etc., R. Co.*, 124 Iowa 623; *Smart v. Kansas City*, 91 Mo. App. 586; *State v. Kennedy*, 177 Mo. 98; *Meyer v. Supreme Lodge, etc.*, 82 N. Y. App. Div. 359, affirmed 178 N. Y. 63; *Becker v. Metropolitan L. Ins. Co.*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 99, 99 N. Y. App. Div. 5; *Matter of Van Alstine*, 26 Utah 193; *Munz v. Salt Lake City R. Co.*, 25 Utah 220; *In re Hunt*, 122 Wis. 460.

5. *Ailments of Patient.* — *Price v. Standard L., etc., Ins. Co.*, 90 Minn. 264.

6. *Prescriptions.* — *Contra*, *Deutschmann v. Third Ave. R. Co.*, 87 N. Y. App. Div. 503.

87. 1. *Information Must Be Necessary for Treatment.* — *People v. Abrahams*, 96 N. Y. App. Div. 27.

2. *Liberal Construction.* — *State v. Kennedy*, 177 Mo. 98.

9. *Burden of Proof.* — *Jennings v. Supreme Council, etc.*, 81 N. Y. App. Div. 76.

- 88.** *h.* LIMITATIONS OF RULE — (2) *Testamentary Matters*. — See note 3.
In New York. — See note 4.
 (3) *Communications for Unlawful Purpose*. — See note 5.
 (4) *Inquisition in Lunacy*. — See note 7.
- 89.** (8) *Proofs of Death*. — See note 6.
 (9) *Hypothetical Questions*. — See note 7.
i. WAIVER AND LOSS — (1) *In General*. — See note 10.
- 90.** (2) *Who May Waive* — (a) *The Patient*. — See notes 3, 4.
 (d) *Personal Representatives of Patient*. — See note 9.
- 91.** (3) *How Waived* — (b) *Provision in Insurance Policy or Application — The Present New York Statute*. — See note 9.
 (c) *Introduction of Testimony*. — See notes 10, 11, 12, 13.
- 92.** (d) *Failure to Object Seasonably to Testimony*. — See note 1.
 (4) *Effect of Waiver at One Trial on Subsequent Trial*. — See note 3.
- 93.** *V. COMMUNICATIONS BETWEEN HUSBAND AND WIFE* — 1. *General Rule*
 — *a.* *RULE STATED*. — See note 4.
- 94.** *b.* *EFFECT OF STATUTES MAKING HUSBAND AND WIFE COMPETENT WITNESSES*. — See note 1.
c. *RULE DOES NOT AFFECT COMPETENCY AS WITNESSES*. — See note 3.
g. *DOCUMENTS AND LETTERS*. — See note 7.
- 95.** *h.* *RULE INCLUDES ALL KNOWLEDGE ACQUIRED BY VIRTUE OF RELATION*. — See note 1.
i. *CONFIDENTIAL NATURE*. — See note 2.
- 88.** 3. *Testamentary Causes*. — *Contra*, Towles v. McCurdy, 163 Ind. 12.
- 4.** *New York Rule*. Meyer v. Supreme Lodge, etc., 82 N. Y. App. Div. 359, affirmed 178 N. Y. 63.
5. *Communications for Unlawful Purpose*. — Seifert v. State, 160 Ind. 464, 98 Am. St. Rep. 340, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 88.
7. See Meyer v. Supreme Lodge, etc., 178 N. Y. 63.
- 89.** 6. Robinson v. Supreme Commandery, etc., 77 N. Y. App. Div. 215, affirmed 177 N. Y. 564.
7. *Hypothetical Questions*. — Crago v. Cedar Rapids, 123 Iowa 48.
10. *Privilege Continues until Waived by Patient*. — *In re* Hunt, 122 Wis. 460.
- 90.** 3. *Privilege Belongs to Patient*. — *In re* Hunt, 122 Wis. 460.
4. *Patient May Waive Privilege*. — Kemp v. Metropolitan St. R. Co., 94 N. Y. App. Div. 322.
9. *Personal Representatives May Waive Privilege*. — Beil v. Supreme Lodge, etc., 80 N. Y. App. Div. 609. But see *In re* Hunt, 122 Wis. 460.
- 91.** 9. *New York Rule*. — Meyer v. Supreme Lodge, etc., 82 N. Y. App. Div. 359, affirmed 178 N. Y. 63; Schlotterer v. Brooklyn, etc., Ferry Co., 89 N. Y. App. Div. 508.
10. *Testimony as to Privileged Matters*. — Highfill v. Missouri Pac. R. Co., 93 Mo. App. 219.
11. *Calling Physician as Witness*. — Ellis v. Baird, 31 Ind. App. 295; Deutschmann v. Third Ave. R. Co., 87 N. Y. App. Div. 503; Kemp v. Metropolitan St. R. Co., 94 N. Y. App. Div. 322; Schlotterer v. Brooklyn, etc., Ferry Co., 89 N. Y. App. Div. 508.
12. *General Testimony of Patient*. — Citizens St. R. Co. v. Shepherd, 30 Ind. App. 193; Nugent v. Cudahy Packing Co., 126 Iowa 517; Holloway v. Kansas City, 184 Mo. 19; Smart v. Kansas City, 91 Mo. App. 586.
13. *Testimony of Other Physicians*. — Citizens St. R. Co. v. Shepherd, 30 Ind. App. 193.
- 92.** 1. *Failure to Object in Time*. — Deutschmann v. Third Ave. R. Co., 87 N. Y. App. Div. 503.
3. Schlotterer v. Brooklyn, etc., Ferry Co., 89 N. Y. App. Div. 508.
- 93.** 4. *Communications Between Husband and Wife Privileged*. — Supreme Lodge, etc., v. Jones, 113 Ill. App. 241; German-American Ins. Co. v. Paul, (Indian Ter. 1904) 83 S. W. Rep. 60; Sutcliffe v. Iowa State Traveling Men's Assoc., 119 Iowa 220, 97 Am. St. Rep. 298; Clay v. Clay, (Ky. 1903) 72 S. W. Rep. 810; New York L. Ins. Co. v. Johnson, (Ky. 1903) 72 S. W. Rep. 763; Howard v. Com., (Ky. 1904) 80 S. W. Rep. 211; Multz v. Price, 82 N. Y. App. Div. 339; Davis v. State, 45 Tex. Crim. 292; Matter of Van Alstine, 26 Utah 193; Miller v. Stebbins, 77 Vt. 183.
- 94.** 1. *Statutes Making Husband and Wife Competent Witnesses*. — Gosselin v. Rex, 33 Can. Sup. Ct. 255.
3. *Competency as Witnesses Not Affected*. — State v. Lortz, 186 Mo. 122.
7. *Letters*. — Howard v. Com., (Ky. 1904) 80 S. W. Rep. 211.
- 95.** 1. *All Information Acquired by Virtue of Relation Excluded*. — See Gosselin v. Rex, 33 Can. Sup. Ct., 255.
2. *Only Confidential Communications Excluded*. — Eddy v. Bosley, 34 Tex. Civ. App. 116.

95. *j.* APPLICATION OF RULE IN CRIMINAL PROCEEDINGS. — See note 4.

96. 2. Limitations of Rule — *a.* EFFECT OF PRESENCE OF THIRD PERSONS. — See notes 5, 6, 8.

97. *d.* LETTERS IN HANDS OF THIRD PERSONS. — See note 2.

e. FACTS WITHIN PERSONAL KNOWLEDGE. — See note 4.

i. RULE IN CASES OF FRAUD. — See note 8.

98. *l.* DYING DECLARATIONS. — See note 3.

3. Waiver and Loss of Privilege — *d.* PRIVILEGE NOT LOST BY TERMINATION OF RELATION. — See note 13.

100. VII. BUSINESS COMMUNICATIONS — 1. General Rule. — See note 1.

101. PRIVY — PRIVIES — PRIVITY. — See note 2.

102. As to the Estate. — See note 2.

95. 4. Criminal Proceedings. — In *Kentucky* the competency of communications between husband and wife is governed in criminal prosecutions by the common law, the statute applying only to civil cases; hence, on a prosecution for homicide, it was held that the accused might testify that his wife had told him of threats made against his life by the deceased. *Shepherd v. Com.*, (Ky. 1905) 85 S. W. Rep. 191.

96. 5. Presence of Others. — *Hammons v. State*, 73 Ark. 495.

6. Husband or Wife May Testify. — *Reed v. Reed*, (Mo. App. 1902) 70 S. W. Rep. 505.

8. Communications in Presence of Spouse. — *Weston v. Weston*, 86 N. Y. App. Div. 159.

97. 2. Letters in Hands of Third Persons. — *Hammons v. State*, 73 Ark. 495; *Weston v. Weston*, 86 N. Y. App. Div. 159.

4. Facts Within Personal Knowledge. — *Hayes's Estate*, 23 Pa. Super. Ct. 570; *Gosselin v. Rex*, 33 Can. Sup. Ct. 255.

Gifts by Bankrupt. — A wife cannot refuse to testify regarding gifts presented to her by

her bankrupt husband. *Wiley v. McBride*, (Ark. 1905) 85 S. W. Rep. 84.

8. Fraud. — *Eddy v. Bosley*, 34 Tex. Civ. App. 116.

98. 3. Dying Declarations. — *Arnett v. Com.*, 114 Ky. 593.

13. Privilege Not Lost by Termination of Relation. — *German-American Ins. Co. v. Paul*, (Indian Ter. 1904) 83 S. W. Rep. 60; *Howard v. Com.*, (Ky. 1904) 80 S. W. Rep. 211; *Davis v. State*, 45 Tex. Crim. 292.

100. 1. Communications Between Principal and Agent. — *Urdaugen v. Doner*, 122 Iowa 533.

A Banker. — See *In re Davis*, 68 Kan. 791.

101. 2. Privy — Privity Defined. — *Allred v. Smith*, 135 N. Car. 443; *Harper v. Middle States Loan, etc., Co.*, 55 W. Va. 153, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 101.

102. 2. Lang *v. Metzger*, 206 Ill. 490, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 102; *Minnesota Debenture Co. v. Johnson*, 94 Minn. 150; *Hartford F. Ins. Co. v. King*, 31 Tex. Civ. App. 636.

PRIZE FIGHTS.

BY BASIL JONES.

104. I. DEFINITION. — See note 1.

105. II. NATURE AND ELEMENTS OF OFFENSE — 1. Nature of Offense — *b.* UNDER STATUTES. — See note 1.

2. Elements of Offense — *d.* PRIZE OR REWARD. — See note 8.

106. Division of Prize Immaterial. — See note 2.

e. METHOD IN WHICH FIGHT CONDUCTED IMMATERIAL. — See note 4.

Nor Are the Technical Rules. — See note 6.

107. IV. SPARRING OR BOXING MATCHES — 2. Under Statutes. — See note 4.

104. 1. Term Used in Its Common Signification. — *State v. Patton*, 159 Ind. 248. See also *People v. Finucan*, 80 N. Y. App. Div. 407.

105. 1. Under Statutes. — *State v. Patton*, 159 Ind. 248; *Com. v. McGovern*, 116 Ky. 212; *People v. Finucan*, 80 N. Y. App. Div. 407.

8. Prize Essential. — See *State v. Patton*, 159 Ind. 248.

106. 2. Division of Prize. — See *Com. v. McGovern*, 116 Ky. 212.

4. Use of Gloves. — *Com. v. McGovern*, 116 Ky. 212.

6. Rules Immaterial. — *People v. Finucan*, 80 N. Y. App. Div. 407.

107. 4. Question of Bona Fides Is for Jury. — *Com. v. Mack*, 187 Mass. 441.

- 107. V. REMEDIES IN CIVIL ACTIONS — 1. Injunction.** — See note 6.
VI. EVIDENCE — 2. Prize-fight a Question of Fact. — See note 11

- 108. PROBABLE.** — See note 1.

No Defense that Contest Was Conducted by Duly Chartered Club. — *Com. v. Mack*, 187 Mass. 441.

107. 6. Enjoining Fight. — *Com. v. McGovern*, 116 Ky. 212.

11. Sufficiency of Evidence. — See *People v. Finucan*, 80 N. Y. App. Div. 407.

108. 1. Probable. — *Gallamore v. Olympia*, 34 Wash. 379.

PROBATE AND LETTERS OF ADMINISTRATION.

By H. N. ELDRIDGE.

- 111. I. DEFINITIONS — 1. Probate.** — See note 1.
112. II. NATURE AND INCIDENTS OF PROBATE PROCEEDING — Not an Action. — See note 2.
 Proceeding in Rem. — See note 6.
114. III. JURISDICTION — 1. Probate Jurisdiction Generally — a. BY WHAT COURTS EXERCISED — (2) In United States — (b) Federal Courts. — See note 6.
116. b. JURISDICTIONAL FACTS — (3) Situs of Assets. — See note 9.
2. Nature and Extent of Probate Jurisdiction — In General. — See note 12.
117. See note 1.
 Construction of Will. — See note 3.
IV. NECESSITY OF PROBATE OR LETTERS OF ADMINISTRATION — The Probate of a Will. — See note 6.
119. V. WHAT PAPERS REQUIRE PROBATE — 1. Testamentary Papers in General — Will Containing Invalid Provisions. — See note 3.
120. 3. Paper Appointing Executor. — See note 8.
122. VI. WHO MAY PROPOUND WILL FOR PROBATE — 2. Rule in United States. — See notes 9, 10, 11.
123. VII. TIME FOR PROBATE — 2. After Death of Testator — b. DELAY IN PROOF OF WILL — (1) Rule at Common Law. — See note 8.
125. VIII. PROOF OF WILL — 2. Due Execution of Will — a. RULE STATED. — See notes 5, 7.

111. 1. Probate Defined. — *Tilghman v. France*, 99 Md. 614, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 111, and quoting the whole text paragraph.

112. 2. Probate Proceeding Not an Action. — *Lanning v. Gay*, 70 Kan. 353.

6. Proceeding in Rem. — *Sutton v. Hancock*, 118 Ga. 444, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 112; *Glover v. Coit*, 36 Tex. Civ. App. 104.

114. 6. Suits to Set Aside Probated Wills. — *Sawyer v. White*, (C. C. A.) 122 Fed. Rep. 223.

116. 9. Situs of Assets as Ground of Original Jurisdiction. — *Chicago Terminal Transfer R. Co. v. Winslow*, 216 Ill. 166, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 116.

12. Courts Possess Only Powers Conferred Expressly or by Necessary Implication. — *Delehanty v. Pitkin*, 76 Conn. 412.

117. 1. Probate Courts Are Courts of General Jurisdiction. — *Beer v. Plant*, (Neb. 1901) 96 N. W. Rep. 348.

3. Probate Courts Not Courts of Construction. — *Best v. Gralapp*, (Neb. 1904) 99 N. W. Rep. 837, affirming (Neb. 1903) 96 N. W. Rep. 641.

6. Necessity of Probate in General. — *Myar v. Mitchell*, 72 Ark. 381; *Montague v. Schieffelin*, (Oregon 1905) 80 Pac. Rep. 654.

119. 3. The Fact that the Sole Beneficiary under the Will Died in the Lifetime of the Testator does not prevent probate of the will. *Matter of Davis*, (Surrogate Ct.) 45 Misc. (N. Y.) 554, affirmed 105 N. Y. App. Div. 221.

120. 8. Paper Merely Appointing Executor. — *Matter of Davis*, (Surrogate Ct.) 45 Misc. (N. Y.) 306.

122. 9. Duty of Executor to Propound Will. — *Ward v. Brown*, 53 W. Va. 227.

10. Executor Subject to Penalties for Failure to Prove Will. — *Richardson v. Fletcher*, 74 Vt. 417; *Fletcher v. Fletcher*, 74 Vt. 430.

11. A Person Claiming Title by Deed from the Devisee Named in a Will has a right to apply for the probate of the will. *Hanley v. Kraftczyk*, 119 Wis. 352.

123. 8. Time of Probate Not Limited at Common Law. — *Hanley v. Kraftczyk*, 119 Wis. 352.

125. 5. When There Is No Attestation Clause the proponent must affirmatively prove all the statutory requisites, including that of publica-

126. *b. EVIDENCE — (1) Proof by Attesting Witnesses — (a) General Rule.* — See note 1.

(b) Number of Witnesses. — See note 2.

128. Death or Absence of Witnesses. — See note 1.

130. (3) *Presumption of Regularity.* — See note 11.

131. Effect of Attestation Clause. — See notes 5, 6.

(4) *Burden of Proof.* — See note 7.

132. IX. OPERATION AND EFFECT OF DECREE OR ORDER — 1. Admission to Probate — *a. CONCLUSIVENESS OF PROBATE — (1) Collateral Attack.* — See note 5.

133. See note 1.

(2) *Direct Attack.* — See note 4.

134. *c. MATTERS ADJUDICATED BY PROBATE.* — See notes 4, 7.

135. Force and Effect of Will. — See note 7.

137. X. REVOCATION OF PROBATE — 1. By Application to Probate Court — *a. POWER OF PROBATE COURT.* — See note 1.

b. GROUNDS OF REVOCATION. — See notes 5, 7.

138. 2. By Appeal from Probate Court. — See note 4.

3. By Suit in Equity or Action at Law — *a. SUIT IN EQUITY.* — See note 5.

tion. *Vernon v. Vernon*, (N. J. 1905) 61 Atl. Rep. 409.

125. 7. Knowledge of Contents. — *Barker v. Streuli*, (N. J. 1905) 61 Atl. Rep. 408.

126. 1. Proof by Attesting Witnesses. — See *Farleigh v. Kelley*, 28 Mont. 421; *Davenport v. Davenport*, 67 N. J. Eq. 320.

2. Proof by One Attesting Witness. — *Lorts v. Wash*, 175 Mo. 487.

128. 1. Death of All the Attesting Witnesses. — *More v. More*, 211 Ill. 268; *Farleigh v. Kelley*, 28 Mont. 421.

130. 11. Presumption of Regularity. — *In re Gillmor*, 117 Wis. 302.

131. 5. Presumption as to Facts Stated in Attestation Clause. — *In re Jones*, (Surrogate Ct.) 85 N. Y. Supp. 294.

An Attestation Clause Stating the Performance of Some of the Acts Required to make a valid testament, and omitting to state others, is *prima facie* evidence only of the facts stated. *In re Beggans*, (N. J. 1905) 59 Atl. Rep. 874.

6. Contradicting Attestation Clause. — *Matter of Berdan*, 65 N. J. Eq. 681; *Matter of Nash*, 76 N. Y. App. Div. 212, 12 N. Y. Annot. Cas. 41; *In re Gillmor*, 117 Wis. 302.

7. Burden of Proof. — *O'Brien v. Bonfield*, 213 Ill. 428; *Beebe v. McFaul*, 125 Iowa 514; *Matter of Burtis*, (Surrogate Ct.) 43 Misc. (N. Y.) 437, reversed on another ground 107 N. Y. App. Div. 51; *Holman's Will*, 42 Oregon 345; *Rathjens v. Merrill*, 38 Wash. 442. See also *Matter of Berdan*, 65 N. J. Eq. 681.

132. 5. Probate Conclusive Against Collateral Attack. — *Carraway v. Moore*, (Ark. 1905) 86 S. W. Rep. 993; *Kentucky Land, etc., Co. v. Crabtree*, 113 Ky. 922; *Tilghman v. France*, 99 Md. 614, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 132; *Stevens v. Larwill*, 110 Mo. App. 140; *Garvey v. U. S. Fidelity, etc., Co.*, 77 N. Y. App. Div. 391; *Ward v. Logan County*, 12 Okla. 267; *Teague v. Teague*, 2 Tenn. Ch. App. 376; *Laufer v. Powell*, 30 Tex. Civ. App. 604.

A Judgment Admitting a Foreign Will to pro-

bate cannot be collaterally attacked. *Morrison v. Fletcher*, (Ky. 1905) 84 S. W. Rep. 548.

133. 1. Probate in Common Form Not Subject to Collateral Attack. — *Tilghman v. France*, 99 Md. 614, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 132 [133].

4. Failure to Contest Within Time Limited. — *Andersen v. Andersen*, (Neb. 1903) 96 N. W. Rep. 276.

134. 4. Execution and Attestation. — *Heath v. Koch*, 74 N. Y. App. Div. 338, affirmed 173 N. Y. 629; *Iverson v. Iverson*, 80 N. Y. App. Div. 599; *Mock v. Garson*, 84 N. Y. App. Div. 65; *Amberson's Estate*, 204 Pa. St. 397; *Teague v. Teague*, 2 Tenn. Ch. App. 376.

7. Mental Capacity. — *Teague v. Teague*, 2 Tenn. Ch. App. 376.

135. 7. Validity and Effect of Will Not Adjudicated. — *Matter of Pforr*, 144 Cal. 121.

137. 1. A Register of Wills. — *McAndrew's Estate*, 206 Pa. St. 366.

5. Want of Jurisdiction. — *Davis v. Upson*, 209 Ill. 206.

7. Failure to Give Notice of Proceedings. — *Floto v. Floto*, 213 Ill. 438.

138. 4. Appeal from Probate Court. — *Delehanty v. Pitkin*, 76 Conn. 412; *In re Kohley*, 200 Ill. 189; *Moody v. Found*, 208 Ill. 78; *O'Brien v. Bonfield*, 213 Ill. 428; *In re Harvey*, (Iowa 1903) 94 N. W. Rep. 559; *Floore v. Green*, (Ky. 1904) 83 S. W. Rep. 133; *Matter of Rayner*, 93 N. Y. App. Div. 114.

Evidence Admissible. — *In Illinois*, on an appeal from an order admitting a will to probate, the parties are confined to the testimony of the subscribing witnesses; but where probate is refused, the proponent is entitled on appeal to introduce any evidence which would be competent to establish a will in chancery. *In re Arrowsmith*, 206 Ill. 352.

5. General Rule as to Equity Jurisdiction. — *Carrau v. O'Calligan*, (C. C. A.) 125 Fed. Rep. 657, reversing *O'Callaghan v. O'Brien*, 116 Fed. Rep. 934; *Davis v. Upson*, 209 Ill. 211, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 138.

- 139.** Statutory Jurisdiction in Equity. — See note 2.
- 141.** XII. FOREIGN WILLS — 1. Necessity of Probate — *a.* WILLS OF PERSONALTY. — See note 6.
b. WILLS OF REAL ESTATE. — See note 8.
- 144.** XIII. LOST, SUPPRESSED, OR DESTROYED WILLS — 1. General Principles — *b.* MATTERS REQUIRED TO BE PROVED. — See note 6.
- 145.** *d.* TIME OF LOSS OR DESTRUCTION — (2) *After Testator's Death.* — See note 2.
2. Jurisdiction — *a.* IN ENGLAND — (2) *Wills of Real Estate.* — See note 8.
- 146.** *b.* IN UNITED STATES. — See notes 1, 3.
- 148.** 4. Evidence — *b.* PROOF OF LOSS OR DESTRUCTION — (4) *Presumption of Revocation* — (a) Rule Stated. — See note 5.
 If Possession Is Not Traced to the Testator. — See note 7.
- 149.** (b) Nature of Presumption. — See note 2.
 (c) Rebutting Presumption — *aa.* EVIDENCE IN REBUTTAL GENERALLY. — See note 5.
 Opportunity on Part of Third Persons. — See note 7.
bb. BURDEN OF PROOF. — See note 9.
- 150.** *cc.* DECLARATIONS IN EVIDENCE — (*aa.*) *Declarations of Testator* — [Declarations of Revocation]. — See note 2*a.*
c. PROOF OF CONTENTS — (1) *Admissibility of Evidence* — (b) Copy of Will. — See note 9.
- 151.** (d) Declarations — *aa.* DECLARATIONS OF TESTATOR. — See note 6.
- 153.** (2) *Weight and Sufficiency of Evidence* — (b) Number of Witnesses — Proof by Two Witnesses Required by Statute. — See note 1.
- 139.** 2. Equity Jurisdiction Given by Statute. — *Baker v. Baker*, 202 Ill. 595; *Moody v. Found*, 208 Ill. 78; *Davis v. Upson*, 209 Ill. 206; *Kolowski v. Fausz*, 103 Ill. App. 528; *Henline v. Brady*, 110 Ill. App. 75.
- 141.** 6. Probate of Foreign Will Required by Statute. — *Jones v. Jones*, 107 Ill. App. 464.
8. Wills of Realty — Local Probate or Record Necessary. — *Fenderson v. Missouri Tie, etc.*, Co., 104 Mo. App. 290.
- 144.** 6. What Facts Must Be Proved. — *Nunn v. Lynch*, 73 Ark. 20.
- 145.** 2. Proof of Existence of Will at Testator's Death. — *Matter of Granacher*, 74 N. Y. App. Div. 567, *affirmed* 174 N. Y. 504.
8. Wills of Real Estate — Equity Jurisdiction. — See *Beatty v. Clegg*, 214 Ill. 34, *citing* 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 145.
- 146.** 1. Inherent Jurisdiction of Probate Courts over Lost Wills. — *Ewing v. McIntyre*, 133 Mich. 459.
3. Exclusive Jurisdiction of Probate Court. — *Beatty v. Clegg*, 214 Ill. 34.
- 148.** 5. Presumption of Revocation — Possession Traced to Testator. — *Spencer's Appeal*, 77 Conn. 638; *Stetson v. Stetson*, 200 Ill. 601; *Hamilton v. Crowe*, 175 Mo. 634; *Williams v. Miles*, (Neb. 1903) 94 N. W. Rep. 705, *rehearing denied* (Neb. 1903) 96 N. W. Rep. 151; *Gfeller v. Lappe*, 208 Pa. St. 48; *Lappe v. Gfeller*, 211 Pa. St. 462; *Gavitt v. Moulton*, 119 Wis. 35.
- Presumption When Effect Would Be to Revive Earlier Will. — See *Williams v. Miles*, (Neb. 1905) 102 N. W. Rep. 482.
7. Possession Not Traced to Testator. — *McElroy v. Phink*, (Tex. Civ. App. 1903) 74 S. W. Rep. 61, *reversed* on other grounds 97 Tex. 147.
- 149.** 2. Presumption of Fact. — *Williams v. Miles*, (Neb. 1903) 94 N. W. Rep. 705, *rehearing denied* (Neb. 1903) 96 N. W. Rep. 151.
5. Circumstantial Evidence to Rebut Presumption. — *Williams v. Miles*, (Neb. 1903) 94 N. W. Rep. 704, *rehearing denied* (Neb. 1903) 96 N. W. Rep. 151; *Spencer's Appeal*, 77 Conn. 638.
7. Opportunity of Third Persons to Destroy Will. — *Compare Williams v. Miles*, (Neb. 1905) 102 N. W. Rep. 482; *Gavitt v. Moulton*, 119 Wis. 35.
9. Burden of Proof. — *Hamilton v. Crowe*, 175 Mo. 634; *Davenport v. Davenport*, 67 N. J. Eq. 320.
- 150.** 2*a.* Declarations Proving Revocation. — In cases turning upon a claim that a will has been revoked by its intentional destruction by the testator, not only declarations accompanying the act of destruction may be received, but those preceding it, if not too remote in time. *Spencer's Appeal*, 77 Conn. 642. To the same effect see *Kimsey v. Allison*, 120 Ga. 413, holding further, however, that declarations of a testator that his will had been lost or stolen, and that it was no longer his will, these declarations not accompanying any act which could be construed as an act of revocation or attempted revocation, are inadmissible.
9. Copy of Will. — *Matter of Granacher*, 74 N. Y. App. Div. 567, *affirmed* 174 N. Y. 504.
- 151.** 6. Declarations of Testator Held Admissible. — *Davenport v. Davenport*, 67 N. J. Eq. 320.
- 153.** 1. Copy of Draft Equivalent to One

153. (c) Declarations of Testator. — See note 5.

154. XV. NUNCUPATIVE WILLS — In General. — See note 5.

155. PROCEEDING. — See notes 3, 4.

158. PROCEEDS. — See note 2.

159. See notes 1, 3.

160. PROCESS. — See notes 1, 3.

163. PROCHEIN AMI. — See note 6.

164. PRODUCE, PRODUCTS, ETC. — See note 4.

Witness. — Matter of Granacher, 74 N. Y. App. Div. 567, *affirmed* 174 N. Y. 504.

153. 5. Declaration of Testator Not Alone Sufficient to Prove Contents of Will. — Mann v. Balfour, 187 Mo. 290; Williams v. Miles, (Neb. 1903) 94 N. W. Rep. 705, rehearing denied (Neb. 1903) 96 N. W. Rep. 151.

154. 5. Strict Proof Required. — Godfrey v. Smith, (Neb. 1905) 103 N. W. Rep. 450.

155. 3. Proceeding. — State v. Perry, 117 Iowa 463.

"Proceedings" Includes Evidence. — The word *proceedings* as used in a case made which recites that it contains all the *proceedings* includes the evidence. John Deere Plow Co. v. Jones, (Kan. 1904) 75 Pac. Rep. 1039.

"Proceeding" Not Confined to Judicial Proceedings. — State v. Topeka, 68 Kan. 177.

4. Any Step Taken in Action. — Burns v. Superior Ct., 140 Cal. 5.

A Settlement of a Bill of Exceptions is a proceeding in an action. Morgan v. Oregon Short Line R. Co., 27 Utah 92.

Proceeding Used to Differentiate Criminal Proceeding from Criminal Action. — Greene Lake County v. Waupaca County, 113 Wis. 425.

158. 2. Proceeds Construed to Mean Net Proceeds. — Com. v. Alexander, 185 Mass. 551; Moss Point Lumber Co. v. Thompson, 83 Miss. 499.

Proceeds Construed to Imply a Sale and Conversion of Lands into Money. — McMurry v. Engelhardt, (Neb. 1904) 98 N. W. Rep. 40.

159. 1. The Word "Proceeds" Is One of Equivocal Import. — Wheeler, etc., Mfg. Co. v. Winnett, (Neb. 1902) 91 N. W. Rep. 514.

3. Money Not Necessarily Implied. — Montgomery County v. Cochran, (C. C. A.) 121 Fed. Rep. 17.

160. 1. Process. — Neal-Millard Co. v. Owens, 115 Ga. 959.

The Filing of a Petition in Bankruptcy Is "Judicial Process." — *In re Smith*, 132 Fed. Rep. 301.

"Process Issuing from the Court" does not include a notice which is prepared, signed, and served by an attorney. Leas v. Merriman, 132 Fed. Rep. 510.

3. An Appeal from Probate is held to be included in the term "*process* in civil actions." Campbell's Appeal, 76 Conn. 284.

Order of Sale in Foreclosure Proceedings is a *process*. National Black River Bank v. Wall, (Neb. 1902) 91 N. W. Rep. 525.

Includes Summons. — Section 11 of chapter 20 of the Compiled Statutes of 1901 of Nebraska, providing that "the rules of practice concerning pleadings and *processes* in the District Court shall be applicable so far as may be to pleadings in the County Court when the amount involved exceeds a justice's jurisdiction," is held to authorize a summons in the form allowable in the District Court in such cases. Farmers' Banking, etc., Co. v. Mauck, (Neb. 1903) 97 N. W. Rep. 835.

Broader than Summons. — See Franklin v. Taylor Hydraulic Air Compressing Co., 68 N. J. L. 113.

163. 6. Prochein Ami. — Vaile v. Sprague, 179 Mo. 393.

164. 4. "Produce of State" is held to embrace whatever is *produced* or grown in the state, or is the yield of the state, whether it be crops or timber or coal or iron or marble or wool, or any other article which may be treated as *produced* or grown within the state from or on the soil or found in the soil. Benedict v. Davidson County, 110 Tenn. 183.

PRODUCTION OF DOCUMENTS.

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169. II. PRIVATE DOCUMENTS — 1. In General — b. UNDER STATUTORY PROVISIONS. — See note 9.

170. See notes 1, 2.

Not Matter of Right. — See note 6.

171. 4. Actions Between Partners — a. IN GENERAL. — See note 3.

172. 6. Against Whom Allowed — a. IN GENERAL. — See note 7.

174. 7. Purposes for Which Allowed — a. TO AID IN FRAMING PLEADINGS. — See notes 4, 5.

b. TO AID IN PREPARATION FOR TRIAL — (1) In General. — See notes 9, 10.

175. (2) Under Federal Statute. — See note 4.

8. Prerequisites to Granting of Order — a. PENDENCY OF CAUSE. — See note 5.

b. POSSESSION OR CONTROL. — See notes 6, 7.

176. c. MATERIALITY AND NECESSITY — (1) In General. — See notes 4, 5.

177. (2) Materiality — (b) How Shown. — See note 7.

178. (3) Necessity — (b) How Shown. — See notes 2, 4, 6.

169. 9. Granting of Order Discretionary. — *Harris v. Richardson*, 92 Minn. 353; *Chamberlain v. Chamberlain Banking House*, (Neb. 1903) 93 N. W. Rep. 1021.

170. 1. Statutory Provisions. — *Harris v. Richardson*, 92 Minn. 353; *State v. District Ct.*, 30 Mont. 206; *Matter of Thompson*, 95 N. Y. App. Div. 542.

Mode Provided by Statute Exclusive. — *Romer v. Kensico Cemetery*, 79 N. Y. App. Div. 100.

2. Coextensive with Discovery in Equity. — *Wynn v. Taylor*, 109 Ill. App. 603.

6. Ashley v. Calhoun Circuit Judge, 138 Mich. 44.

171. 3. Actions Between Partners. — *Cohn v. Hessel*, 95 N. Y. App. Div. 548.

172. 7. Production by Third Person. — *Ridgely v. Richard*, 130 Fed. Rep. 387.

174. 4. To Frame Complaint. — *Ballenberg v. Wahn*, 103 N. Y. App. Div. 34; *Dannenberg v. Heller*, 88 N. Y. App. Div. 548; *Martin v. New Trinidad Lake Asphalt Co.*, 87 N. Y. App. Div. 472.

Inspection Granted to Aid in Preparing Amended Complaint. — *Harris v. Richardson*, 92 Minn. 353.

5. Answer. — *Seligsberg v. Schepp*, 79 N. Y. App. Div. 627.

9. To Prepare for Trial. — *Preston Nat. Bank v. Wayne Circuit Judge*, 137 Mich. 152; *Harris v. Richardson*, 92 Minn. 353; *Thomas v. Guy B. Waite Co.*, 113 N. Y. App. Div. 494; *Snyder v. De Forest Wireless Tel. Co.*, 113 N. Y. App. Div. 840; *Ferguson v. Bien*, (Supm. Ct. App. T.) 49 Misc. (N. Y.) 450.

10. To Prove Cause of Action. — *Home Ins. Co. v. Overturf*, 35 Ind. App. 361.

175. 4. Production Compelled. — *Cameron*

Lumber Co. v. Droney, 132 Fed. Rep. 304; *Gray v. Schneider*, 119 Fed. Rep. 474.

5. Pending Cause Essential. — *State v. District Ct.*, 29 Mont. 363.

6. Possession Necessary. — *Netter v. Stoeckle*, 4 Penn. (Del.) 345; *State v. District Ct.*, 30 Mont. 206; *Fidelity, etc., Co. v. Seagrist*, 80 N. Y. App. Div. 625.

7. Denying Possession. — *Henderson's Succession*, 113 La. 101.

176. 4. Materiality. — *In re Romine*, 138 Fed. Rep. 837; *Ridgely v. Richard*, 130 Fed. Rep. 387; *Swedish-American Telephone Co. v. Fidelity, etc., Co.*, 208 Ill. 562; *Wynn v. Taylor*, 109 Ill. App. 603; *State v. District Ct.*, 29 Mont. 363; *State v. District Ct.*, 27 Mont. 441; *Fidelity, etc., Co. v. Wendell, etc., Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 477; *Moore v. Encyclopædia Britannica Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 618.

5. Must Be Necessary. — *State v. District Ct.*, 30 Mont. 206; *State v. District Ct.*, 29 Mont. 363; *Thomas v. Guy B. Waite Co.*, 113 N. Y. App. Div. 494; *Seligsberg v. Schepp*, 79 N. Y. App. Div. 627; *Snyder v. De Forest Wireless Tel. Co.*, 113 N. Y. App. Div. 840; *Moore v. Encyclopædia Britannica Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 618; *Hallett v. American Law Book Co.*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 652.

177. 7. Entries Sought. — *Fidelity, etc., Co. v. Wendell, etc., Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 477.

178. 2. Illustrations. — *Dannenberg v. Heller*, 88 N. Y. App. Div. 548.

4. In re Romine, 138 Fed. Rep. 837; *Sutter v. New York*, 89 N. Y. App. Div. 494; *Dannenberg v. Heller*, 88 N. Y. App. Div. 548; *Fergu-*

- 178.** To State Amount of Damages. — See note 10.
 (4) *Demand*. — See note 11.
- 179.** 9. Grounds for Denial — *a*. FISHING EXAMINATION. — See notes 3, 4.
- 180.** *b*. WHERE PARTY HAS OTHER MEANS OF SECURING EVIDENCE. — See notes 2, 4.
- 181.** *c*. LACHES. — See note 2.
 10. Inspection. — See notes 11, 12.
- 182.** See notes 2, 5.
 11. Sealing Up Books. — See note 7.
 13. Production in Connection with Examination of Witness Before Trial. — See note 14.
- 183.** See note 1.
 14. Taking Copies. — See note 3.
 15. Modifying or Vacating Order. — See notes 6, 7.

son *v. Bien*, (Supm. Ct. App. T.) 49 Misc. (N. Y.) 450.

178. 6. *In re Romine*, 138 Fed. Rep. 837.

10. To State Damages. — *Martin v. New Trinidad Lake Asphalt Co.*, 87 N. Y. App. Div. 472. See also *Ballenberg v. Wahn*, 103 N. Y. App. Div. 34.

11. *Demand*. — See *Chamberlain v. Chamberlain Banking House*, (Neb. 1903) 93 N. W. Rep. 1021; *Thomas v. Guy B. Waite Co.*, 113 N. Y. App. Div. 494; *Moore v. Encyclopædia Britannica Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 618.

179. 3. Fishing Examination. — *In re Romine*, 138 Fed. Rep. 837; *District of Columbia v. Bakersmith*, 18 App. Cas. (D. C.) 574; *State v. District Ct.*, 30 Mont. 206; *Ferguson v. Bien*, (Supm. Ct. App. T.) 49 Misc. (N. Y.) 450.

4. To Discover Evidence. — *Seligsberg v. Schepp*, 79 N. Y. App. Div. 627; *Russell v. McSwegan*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 306.

180. 2. *Subpœna Duces Tecum*. — *Ashley v. Calhoun Circuit Judge*, 138 Mich. 44; *Preston Nat. Bank v. Wayne Circuit Judge*, 137 Mich. 152.

Rule Contra in Illinois. — *Swedish-American Telephone Co. v. Fidelity, etc., Co.*, 208 Ill. 562.

4. Other Testimony. — *In re Romine*, 138 Fed. Rep. 837. But see *State v. District Ct.*, 30 Mont. 206, holding that the application should be granted if it appears that the evidence relates to the cause of action or defense and is in possession of the adverse party, and that it is not essential to show that the evidence cannot be obtained from an examination of witnesses or from other sources.

181. 2. Laches. — See *Fidelity, etc., Co. v. Seagrist*, 79 N. Y. App. Div. 614.

Inspection Not Granted After Cause Has Actually Appeared on Day Calendar. — *Ferguson v. Bien*, (Supm. Ct. App. T.) 49 Misc. (N. Y.) 450.

11. Order Providing for Inspection at Defendant's Place of Business. — *Ballenberg v. Wahn*, 103 N. Y. App. Div. 34.

12. Compare *Cohn v. Hessel*, 95 N. Y. App. Div. 548.

182. 2. Order Providing for Inspection Dur-

ing Business Hours. — *Ballenberg v. Wahn*, 103 N. Y. App. Div. 34.

5. See *Cohn v. Hessel*, 95 N. Y. App. Div. 548.

7. Sealing Books. — *Swedish-American Telephone Co. v. Fidelity, etc., Co.*, 208 Ill. 562.

14. See *De Brunoff v. McClure-Tissot Co.*, 83 N. Y. App. Div. 640.

Statutory Provision Applicable to Corporations Only. — *Matter of Sands*, 98 N. Y. App. Div. 148; *Gee v. Pendas*, 87 N. Y. App. Div. 157.

Necessity of Presence of Books on Examination Must Be Shown. — *Wood v. J. L. Mott Iron Works*, 114 N. Y. App. Div. 108.

183. 1. *Matter of Sands*, 98 N. Y. App. Div. 148; *Bray v. C. A. Blanchard Co.*, 95 N. Y. App. Div. 423; *Matter of Thompson*, 95 N. Y. App. Div. 542; *Mauthey v. Wyoming County Co-operative F. Ins. Co.*, 76 N. Y. App. Div. 579; *Wagner v. Haight, etc., Co.*, (Supm. Ct. Spec. T.) 89 N. Y. Supp. 323; *Hart v. American Cotton Co.*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 436.

Refreshing Memory. — A corporation ought not to be required to produce its books upon the examination of one of its officers before trial, to enable him to refresh his memory therefrom while on the stand, unless he requires their assistance in order to testify concerning the matters in regard to which he is to be examined. *Bruen v. Whitman Co.*, 106 N. Y. App. Div. 248.

3. *District of Columbia v. Bakersmith*, 18 App. Cas. (D. C.) 574.

Applicant Allowed to Photograph Document. — *Beck v. Bohm*, 95 N. Y. App. Div. 273, holding, however, that the defendant should not be required to produce the document at a photographer's studio, but the order should be that the document be placed in the custody of the clerk with permission to the plaintiff to inspect it and, if he desires, to have it photographed.

6. *State v. District Ct.*, 30 Mont. 206; *Fidelity, etc., Co. v. Seagrist*, 80 N. Y. App. Div. 625, 79 N. Y. App. Div. 614; *Snyder v. De Forest Wireless Tel. Co.*, 113 N. Y. App. Div. 840.

7. *Vacating Order*. — *State v. District Ct.*, 27 Mont. 441.

185. PROFESSION — PROFESSIONAL. — See note 6.

185. 6. A Minister of the Gospel is following a *profession*. *Flanders v. Daley*, 120 Ga. 885.

A *Physician* is "attending a patient in a *pro-*

fessional capacity," although the patient is being treated against his will. *Meyer v. Supreme Lodge*, etc., 178 N. Y. 63.

PROFIT À PRENDRE.

186. I. DEFINITION. — See notes 2, 5.

187. See note 1.

II. DISTINGUISHED FROM EASEMENT. — See note 5.

188. See note 1.

III. APPURTENANT. — See note 2.

V. HOW ACQUIRED OR CREATED. — See notes 6, 7.

189. PROFITS. — See notes 1, 2.

190. See note 1.

191. See note 2.

186. 2. Hunting and Fishing. — *Albright v. Sussex County Lake*, etc., Commission, 71 N. J. L. 303; *Payne v. Sheets*, 75 Vt. 335.

5. Wood and Timber. — *Kennedy Stave*, etc., Co. v. *Sloss Sheffield Steel*, etc., Co., 137 Ala. 401.

187. 1. Examples — The Right to Take Ice. — *Walker Ice Co. v. American Steel*, etc., Co., 185 Mass. 463.

5. Right of Profit and Not Right of Convenience. — *Payne v. Sheets*, 75 Vt. 335.

188. 1. Dominant Estate Necessary for Easement. — *Payne v. Sheets*, 75 Vt. 335.

2. Easement Appurtenant to Another Estate. — *Kennedy Stave*, etc., Co. v. *Sloss Sheffield Steel*, etc., Co., 137 Ala. 401; *Walker Ice Co. v. American Steel*, etc., Co., 185 Mass. 463.

6. Grant or Prescription. — *Dawson v. McGrogan*, (1903) 1 Ir. 92; *Kennedy Stave*, etc., Co. v. *Sloss Sheffield Steel*, etc., Co., 137 Ala. 401.

7. Never Acquired by General Public Either by

Custom or by Dedication. — *Albright v. Sussex County Lake*, etc., Commission, 71 N. J. L. 303.

189. 1. Sale of Property. — *Cooke v. Cain*, 35 Wash. 353; *Rogers-Ruger Co. v. McCord*, 115 Wis. 261.

2. In Manufacture, Agriculture, and Ordinary Business the word *profit* ordinarily means the excess of returns over expenditures, and may or may not, according to circumstances, include in the returns any increase in value of the capital, and in the expenditures any depreciation of capital. In a more scientific sense, it relates to that excess which remains after deducting from the returns not only the operating expenses and depreciation of capital, but also interest on the capital employed. *Mayer v. Nethersole*, 71 N. Y. App. Div. 383.

190. 1. Net Profits. — *Mayer v. Nethersole*, 71 N. Y. App. Div. 383; *Cooke v. Cain*, 35 Wash. 353.

191. 2. Profits and Damages. — *Social Register Assoc. v. Murphy*, 129 Fed. Rep. 148; *Wooster v. Trowbridge*, 115 Fed. Rep. 728.

PROHIBITION.

By E. C. ELLSBREE.

195. I. DEFINITION AND SCOPE OF TITLE — Definition. — See note 1.

II. NATURE AND ORIGIN OF REMEDY — 1. A Common-law Writ. — See

note 3.

196. 5. As Counterpart of Mandamus. — See note 10.

197. III. PRINCIPLES GOVERNING ISSUANCE OF WRIT — 1. Something to Operate On. — See note 5.

195. 1. Prohibition Defined. — *Stein v. Morrison*, 9 Idaho 426; *Taylor v. Bliss*, 26 R. I. 16, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 195.

3. A Common-law Remedy. — *Stein v. Morrison*, 9 Idaho 426.

196. 10. Counterpart of Mandamus. — *State v. Superior Ct.*, 31 Wash. 96.

197. 5. Pendency of Cause. — *State v. Ryan*, 180 Mo. 32, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 197, and supporting the whole text paragraph.

197. 2. Nature of Acts Prohibited — a. WANT OF JURISDICTION — The Office of the Writ. — See note 6.

198. The General Rule. — See note 1.

199. Excess of Jurisdiction. — See note 3.

200. b. ERRORS IN EXERCISE OF JURISDICTION — Statement of Rule. — See note 5.

201. See note 1.

202. See notes 1, 2.

203. See note 2.

c. JUDICIAL, MINISTERIAL, OR LEGISLATIVE ACTION — Judicial Action. — See note 6.

204. Ministerial or Executive Action. — See note 3.

d. ACTS ALREADY PERFORMED. — See note 6.

205. See note 1.

3. Persons and Courts Subject to Writ — a. COURTS — Inferior Courts. — See note 6.

206. b. JUDICIAL AND QUASI-JUDICIAL OFFICERS. — See note 3.

c. MINISTERIAL, EXECUTIVE, AND LEGISLATIVE OFFICERS. — See note 4.

197. 6. Office and Purpose of Writ. — Ormond v. Ball, 120 Ga. 916, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 195 *et seq.*; State v. Bazille, 89 Minn. 440; Taylor v. Bliss, 26 R. I. 16; Moore v. Holt, 55 W. Va. 507.

198. 1. Want of Jurisdiction Ground for Writ. — People v. District Ct., 30 Colo. 488; Louisville Public Warehouse Co. v. Miller, (Ky. 1904) 81 S. W. Rep. 275; Com. v. Jones, (Ky. 1904) 82 S. W. Rep. 643; Jenkins v. Berry, (Ky. 1904) 83 S. W. Rep. 594; State v. Crosby, 92 Minn. 176; State v. Fort, 107 Mo. App. 328; People v. Tuthill, 79 N. Y. App. Div. 24; Doolittle v. Electrical Maintenance, etc., Co., 3 Ont. L. Rep. 460. See also Thomson v. Stone, 4 Ont. L. Rep. 333; *In re* Dundas St. Bridges, 8 Ont. L. Rep. 52; Barr v. McMillan, 7 Ont. L. Rep. 70. *affirmed* 7 Ont. L. Rep. 672.

199. 3. Excess but Not Total Absence of Jurisdiction — People v. District Ct., 30 Colo. 488; State v. Crosby, 92 Minn. 176; State v. Fort, 107 Mo. App. 328. See also Rochon v. Wellington, 5 Ont. L. Rep. 102.

200. 5. Writ Will Not Lie Where Court Has Jurisdiction. — State v. Bazille, 89 Minn. 440; State v. Third Judicial Dist. Ct., 27 Utah 336, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 200; State v. Superior Ct., 30 Wash. 156; State v. Kennan, 35 Wash. 52; State v. Superior Ct., 36 Wash. 566; Kay v. Storry, 8 Ont. L. Rep. 45.

201. 1. Error in Exercise of Jurisdiction Not Ground for Writ. — Finley v. Moose, (Ark. 1905) 85 S. W. Rep. 238; People v. District Ct., 30 Colo. 488; State v. Crosby, 92 Minn. 176; State v. Evans, 184 Mo. 632; State v. Third Judicial Dist. Ct., 27 Utah 336, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 201; State v. Superior Ct., 32 Wash. 408; Woods v. Cottrell, 55 W. Va. 476, 104 Am. St. Rep. 1004.

202. 1. State v. Third Judicial Dist. Ct., 27 Utah 336, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 202.

2. Only Jurisdictional Defects Considered. —

People v. District Ct., 30 Colo. 488; State v. Evans, 184 Mo. 632.

203. 2. Not a Process for Correction of Errors. — People's Home Sav. Bank v. Rickard, 139 Cal. 285; State v. District Ct., 30 Mont. 547.

6. Only Judicial Action Prohibited. — Lodge v. Fletcher, 184 Mass. 238; Board of Education v. Holt, 54 W. Va. 167; Hawk's Nest v. Fayette County Ct., 55 W. Va. 689.

204. 3. Ministerial or Executive Acts. — State v. Bradley, 134 Ala. 549; Valentine v. Police Ct., 141 Cal. 615; Miller v. Davenport, 8 Idaho 593; Board of Education v. Holt, 54 W. Va. 167; Hawk's Nest v. Fayette County Ct., 55 W. Va. 689; Williamson v. Mingo County Ct., 56 W. Va. 38. See also Reese v. Steel, 73 Ark. 66, *per* McCulloch, J., *dissenting*, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 204.

6. Writ Refused Where Act Fully Performed. — *Ex p.* Joins, 191 U. S. 93; Sanford v. District Ct., (Ariz. 1903) 71 Pac. Rep. 906; Valentine v. Police Ct., 141 Cal. 615; Klingelhoef v. Smith, 171 Mo. 455; Woods v. Cottrell, 55 W. Va. 476, 104 Am. St. Rep. 1004; Hawk's Nest v. Fayette County Ct., 55 W. Va. 689; Williamson v. Mingo County Ct., 56 W. Va. 38.

205. 1. See *In re* Dewar, 8 Ont. L. Rep. 141.

6. Inferior Courts. — Pennsylvania R. Co. v. Rogers, 52 W. Va. 450.

206. 3. Judicial Officers. — See Reese v. Steel, 73 Ark. 66, *per* McCulloch, J., *dissenting*, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 206.

The Writ Will Lie to a Single Judge. — *Contra*, Reese v. Steel, 73 Ark. 66.

4. Ministerial, Executive, and Legislative Officers. — Stein v. Morrison, 9 Idaho 426, *expressly overruling* Williams v. Lewis, 6 Idaho 184, 54 Pac. Rep. 619, stated as *contra* in the original note; Campbellsville Telephone Co. v. Patteson, 114 Ky. 52.

Does Not Lie Against Clerk of Court or Constable. — Woods v. Cottrell, 55 W. Va. 476, 104 Am. St. Rep. 1004.

206. *d.* PRIVATE PERSONS AND CORPORATIONS. — See note 5.

4. Threatened Exercise of Power. — See note 7.

207. See note 1.

5. Other Adequate Remedy — General Rule. — See note 3.

208. See notes 2, 3.

209. Appeal, Error, or Certiorari. — See notes 2, 3.

210. See notes 1, 3.

211. See notes 1, 3, 4.

212. Equitable Remedies. — See note 1.

6. Discretion of Court — *a.* STATEMENT OF RULE. — See notes 2, 3.

213. *b.* CONSIDERATIONS AFFECTING EXERCISE OF DISCRETION. — See note 2.

Necessity. — See notes 3, 5.

7. Preliminary Objection to Jurisdiction. — See note 9.

214. See note 1.

215. IV. JURISDICTION TO ISSUE WRIT — 2. In United States — *b.* STATE COURTS — (1) *Appellate Courts.* — See note 9.

206. 5. Private Persons and Corporations. — *Campbellsville Telephone Co. v. Patterson*, 114 Ky. 52; *Moore v. Holt*, 55 W. Va. 507.

7. Action Must Be Threatened. — *State v. Ryan*, 180 Mo. 32, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 206.

207. 1. Presumption. — See *Matter of Sullivan*, 36 Wash. 217.

3. Writ Lies Only in Absence of Other Adequate Remedy. — *Finley v. Moose*, (Ark. 1905) 85 S. W. Rep. 238; *Valentine v. Police Ct.*, 141 Cal. 615; *Kilty v. Railroad Com'rs*, 184 Mass. 310, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 207; *Chicago, etc., R. Co. v. Woodson*, 110 Mo. App. 208; *Holly Shelter R. Co. v. Newton*, 133 N. Car. 132, 136. See also *Woods v. Cottrell*, 55 W. Va. 476, 104 Am. St. Rep. 1004.

208. 2. Other Remedy Inadequate or Not Sufficiently Speedy. — *People v. District Ct.*, 32 Colo. 15.

3. Inconvenience, Delay, or Expense of Other Remedy. — *Lindley v. Superior Ct.*, 141 Cal. 220; *State v. Fort*, 107 Mo. App. 328, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 208; *State v. Superior Ct.*, 30 Wash. 700; *State v. Superior Ct.*, 36 Wash. 566.

209. 2. Not a Substitute for Other Revisory Proceedings. — *Cincinnati, etc., Packet Co. v. Bellville*, 55 W. Va. 560, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 209.

3. Remedy by Appeal. — *Sanford v. District Ct.*, (Ariz. 1903) 71 Pac. Rep. 906; *McAdoo v. Sayre*, 145 Cal. 344; *People v. District Ct.*, 32 Colo. 469; *State v. Leche*, 113 La. 1; *People v. Sherman*, 66 N. Y. App. Div. 231, affirming without opinion 171 N. Y. 684; *State v. Neal*, 30 Wash. 702; *State v. Superior Ct.*, 30 Wash. 700; *State v. Superior Ct.*, 31 Wash. 410; *State v. Superior Ct.*, 34 Wash. 643; *Knight v. Zahnhiser*, 53 W. Va. 370; *In re Gates*, 117 Wis. 445.

May Issue After Abandonment of Appeal. — *State v. Pettigrew*, 109 La. 132.

210. 1. Writ of Error. — *Aichele v. Johnson*, 30 Colo. 461; *People v. District Ct.*, 32 Colo. 469.

3. Erroneous Decision of Jurisdictional Question. — *State v. Third Judicial Dist. Ct.*, 27 Utah 336; *Cincinnati, etc., Packet Co. v. Bell-*

ville, 55 W. Va. 560, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 209, 210.

211. 1. Inferior Court. — *Cincinnati, etc., Packet Co. v. Bellville*, 55 W. Va. 560, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 209-211.

3. Where Appeal Not Adequate Remedy. — *Jenkins v. Berry*, (Ky. 1904) 83 S. W. Rep. 594; *State v. Fort*, 107 Mo. App. 328, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 211; *State v. Eby*, 170 Mo. 497.

4. Where Appeal Not Sufficiently Speedy. — *State v. Fort*, 107 Mo. App. 328, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 211.

212. 1. *Kilty v. Railroad Com'rs*, 184 Mass. 310.

2. Issuance of Writ Discretionary. — *Holly Shelter R. Co. v. Newton*, 133 N. Car. 132, 136, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 212; *State v. Third Judicial Dist. Ct.*, 27 Utah 336, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 212, and quoting the whole text paragraph; *Muirhead v. Spruce Creek Min. Co.*, 11 British Columbia 1.

3. When Discretionary and When Not. — *Kilty v. Railroad Com'rs*, 184 Mass. 310.

213. 2. Granted Only in Clear Cases. — *People v. District Ct.*, 32 Colo. 469.

3. Extreme Necessity. — *Holly Shelter R. Co. v. Newton*, 133 N. Car. 132, 136.

5. Where No Injury Can Result. — *Gibson v. Superior Ct.*, 139 Cal. 4.

9. Preliminary Objection Necessary. — *Reese v. Steel*, 73 Ark. 66; *Callbreath v. District Ct.*, 30 Colo. 486; *Knight v. Zahnhiser*, 53 W. Va. 370; *Jennings v. Judge*, 56 W. Va. 146; *State v. District Ct.*, 12 Wyo. 547; *Hogle v. Rockwell*, 20 Quebec Super. Ct. 309.

214. 1. Rule Not Jurisdictional. — *Hargis v. Parker*, (Ky. 1905) 85 S. W. Rep. 704; *State v. Eby*, 170 Mo. 497.

Where Excess of Jurisdiction Is Apparent of Record there is no necessity to suggest that fact to the trial court before applying for a prohibition from the Supreme Court. *State v. Dearing*, 184 Mo. 647.

215. 9. Jurisdiction of Supreme Court. — *State v. Ausherman*, 11 Wyo. 410.

In Missouri the Supreme Court may issue the

216. See note 1.

217. See note 2.

220. VI. PARTICULAR PERSONS AND ACTS PROHIBITED — 5. Appointment of Officers. — See note 9.

221. 11. Contempt Proceedings. — See note 10.

223. 22. Disqualification of Judge. — See note 3.

24. Elections. — See note 5.

224. 29. Executions. — See note 3.

225. 40. Jury Trial. — See note 8.

41. Licenses. — See note 9.

229. 62. Title to Office. — See note 6.

230. 66. Void or Repealed Statutes or Ordinances. — See note 9.

writ to an inferior court, whether it has or has not appellate jurisdiction in the cause. *State v. Eby*, 170 Mo. 497.

In Vacation. — A judge of the Supreme Court in *Missouri* has power during vacation to issue a preliminary rule in prohibition returnable to and triable by the court in term time. *State v. Dearing*, 184 Mo. 647.

216. 1. Supervisory Control of Superior Courts. — *Campbellsville Telephone Co. v. Patteson*, 114 Ky. 52; *Louisville Public Warehouse Co. v. Miller*, (Ky. 1904) 81 S. W. Rep. 275; *Com. v. Jones*, (Ky. 1904) 82 S. W. Rep. 643.

217. 2. In Aid of Appellate Jurisdiction. — See *State v. Superior Ct.*, 31 Wash. 96, refusing the writ where its effect would have been to obtain a review of the matter as to which the judgment of the inferior court was final and conclusive.

220. 9. Appointment of Arbitrators by Commissioner of Patents. — See *Faller v. Aylen*, 8 Ont. L. Rep. 70.

221. 10. Contempt Proceedings. — *State v. Superior Ct.*, 31 Wash. 481.

223. 3. Disqualification of Judge. — *Forest*

Coal Co. v. Doolittle, 54 W. Va. 210, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 223.

5. Preparation of Voters' Lists. — The High Court of Justice for *Ontario* has power to prohibit persons assuming to exercise judicial functions in the preparation of voters' lists for an election to the House of Commons for Canada, if these persons have no authority in law for the exercise of any judicial functions in respect of such lists. *Re West Algoma Voters' Lists*, 8 Ont. L. Rep. 533.

224. 3. Executions. — See *Mager v. Canadian Tin Plate Decorating Co.*, 7 Ont. L. Rep. 25.

225. 8. Refusal of Jury Trial. — *Compare Fraser v. Ham*, 7 Ont. L. Rep. 449.

9. Issuance of License. — Prohibition does not lie to prevent a County Court in *West Virginia* from granting a license to sell liquor, or to compel it to revoke a license granted without the consent of the town council. *Hawk's Nest v. Fayette County Ct.*, 55 W. Va. 689.

229. 6. Title to Office. — *Board of Education v. Holt*, 54 W. Va. 167; *Moore v. Holt*, 55 W. Va. 507.

230. 9. Void Statute or Ordinance. — *State v. Eby*, 170 Mo. 497.

PROMOTERS.

BY L. C. DARLINGTON.

232. I. DEFINITION AND NATURE. — See note 1.

233. See note 1.

II. WHEN PROMOTER BEGINS AND CEASES TO BE SUCH — Contemplation of Incorporation. — See note 4.

234. IV. RELATION OF PROMOTER TO COMPANY PROMOTED. — See note 5.

235. When the Relation Is Not Fiduciary. — See note 2.

V. DUTY OF PROMOTERS TO COMPANY PROMOTED — 2. Duty to Disclose Interest — Cannot Retain Secret Profits. — See note 4.

232. 1. Definitions. — *Goodwin v. Wilbur*, 104 Ill. App. 45; *Telegraph Co. v. Loetscher*, 127 Iowa 383.

233. 1. A Term of Business. — *Telegraph Co. v. Loetscher*, 127 Iowa 383.

4. Contemplation of Incorporation Not Enough. — *Highway Advertising Co. v. Ellis*, 7 Ont. L. Rep. 504.

234. 5. Relation of Promoter to Company Promoted. — *Goodwin v. Wilbur*, 104 Ill. App.

45; *Telegraph Co. v. Loetscher*, 127 Iowa 383; *Hayden v. Green*, 66 Kan. 204.

235. 2. When the Relation Is Not Fiduciary. — *Tompkins v. Sperry*, 96 Md. 560.

4. Cannot Retain Secret Profits. — *In re Leeds*, etc., Theaters, (1902) 2 Ch. 809, 87 L. T. N. S. 488, 72 L. J. Ch. 1; *In re Lady Forest Gold Mine*, (1901) 1 Ch. 582; *Telegraph Co. v. Loetscher*, 127 Iowa 383; *Hayden v. Green*, 66 Kan. 204; *Shawnee Commercial*, etc., Bank Co.

237. VI. LIABILITY OF PROMOTERS UPON THEIR PRE-CORPORATE CONTRACTS

— **As Agents.** — See note 7.

As Real Debtors. — See note 8.

As Partners. — See note 9.

241. VIII. RIGHTS AND LIABILITIES OF COMPANY UNDER CONTRACTS OF PROMOTERS — 1. Rule at Law. — See note 1.

2. Rule in Equity — Adopting Contract Cum Onere. — See note 3.

242. Limitations upon the Rule. — See note 1.

3. Adopting or Ratifying Promoters' Contract. — See note 7.

244. 5. Adoption Inferred from Corporate Acts — Express Promise Sometimes Required. — See note 5.

245. PROMOTION. — See note 3.

PROMPT. — See note 4.

PROOF. — See note 9.

246. See note 1.

v. Miller, 24 Ohio Cir. Ct. 198, wherein restitution of fraudulent profits was compelled.

237. 7. Promoters Not Intending to Bind Themselves, but only the corporation to be subsequently formed, are not personally liable. *Durbin v. Smith*, 133 Mich. 331.

8. **As Real Debtors.** — See *Seymour v. O. S. Richardson Fueling Co.*, 103 Ill. App. 625, reversed 205 Ill. 77.

9. **As Partners.** — *Ryland v. Hollinger*, (C. C. A.) 117 Fed. Rep. 216.

241. 1. Rights and Liabilities of Company under Contract of Promoters — Rule at Law. — *Merrick v. Consumers' Heat, etc., Co.*, 111 Ill. App. 153; *Holyoke Envelope Co. v. U. S. Envelope Co.*, 182 Mass. 171; *Forest Bank v. Orgill*, 82 Miss. 81; *Martin v. Remington-Martin Co.*, 95 N. Y. App. Div. 18; *Montgomery v. Whitbeck*, 12 N. Dak. 385.

3. **Adopting Contract Cum Onere.** — *Seacoast R. Co. v. Wood*, 65 N. J. Eq. 530.

242. 1. Limitations upon the Rule. — *Tryber v. Girard Creamery, etc., Co.*, 67 Kan. 489, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d

ed.) 242, and supporting the text paragraph generally.

7. *Holyoke Envelope Co. v. U. S. Envelope Co.*, 182 Mass. 171.

244. 5. Express Promise Sometimes Required. — See *Tryber v. Girard Creamery, etc., Co.*, 67 Kan. 489.

245. 3. Promotion Is an Advancement. — The term *promotion* is defined as an advancement or the act of exalting in rank or honor and as advancement to a higher position, grade, class, or rank; preferment in honor or dignity. See *People v. Partridge*, 89 N. Y. App. Div. 499.

4. **"To Be Shipped Prompt"** occurring in a contract was construed to mean by the usage of trade to be shipped within ten days. *Soper v. Tyler*, 77 Conn. 106.

9. **"Indubitable" Proof** is evidence that is not only found to be credible, but of such weight and directness as to make out the facts alleged beyond a reasonable doubt. *Highlands v. Philadelphia, etc., R. Co.*, 209 Pa. St. 286.

246. 1. Proof and Evidence. — *Oliveros v. State*, 120 Ga. 237.

PROOF OF OTHER CRIMES.

By H. N. ELDRIDGE.

247. I. GENERAL RULE EXCLUDING PROOF OF OTHER CRIMES. — See note 4.

247. 4. Evidence of Distinct Crimes Generally Excluded — *United States*. — *U. S. v. Breese*, 131 Fed. Rep. 915.

Alabama. — *Mitchell v. State*, 140 Ala. 118.

Arkansas. — *Ackers v. State*, 73 Ark. 262.

California. — *People v. Koller*, 142 Cal. 621.

Georgia. — *Stone v. State*, 118 Ga. 705, 98 Am. St. Rep. 145; *Cawthon v. State*, 119 Ga. 395.

Idaho. — *State v. Lancaster*, 10 Idaho 410.

Illinois. — *Henry v. People*, 198 Ill. 162; *Glover v. People*, 204 Ill. 170.

Iowa. — *State v. Vance*, 119 Iowa 685; *State v. Crofford*, 121 Iowa 395; *State v. Berger*, 121 Iowa 581; *State v. Snider*, 119 Iowa 15.

Kentucky. — *O'Brien v. Com.*, 115 Ky. 608; 4 Supp. E. of L.—33

Stith v. Com., (Ky. 1904) 82 S. W. Rep. 245; *Shepherd v. Com.*, (Ky. 1905) 85 S. W. Rep. 191.

Minnesota. — *State v. Fitchette*, 88 Minn. 145; *State v. Ames*, 90 Minn. 183.

Mississippi. — *Dabney v. State*, 82 Miss. 253.

Missouri. — *State v. Spray*, 174 Mo. 569; *State v. Rudolph*, 187 Mo. 67; *State v. Boatright*, 182 Mo. 33.

Nebraska. — *Goldsberry v. State*, 66 Neb. 312.

New Jersey. — *State v. Hendrick*, 70 N. J. L. 41.

New York. — *People v. Doody*, 172 N. Y. 165; *People v. Romano*, 84 N. Y. App. Div. 318. See also *People v. Doty*, 175 N. Y. 164.

248. II. EXCEPTIONS TO RULE — 1. In General — Principle on Which Exceptions Are Admitted. — See note 2.

249. Whether Principle or Precedent Determines Exceptions. — See note 3.

250. Mental State Generally. — See note 4.

2. To Prove Intent and Guilty Knowledge. — See notes 8, 9.

252. **3.** To Negative Accident, Mistake, or Good Faith. — See note 1.

253. **4.** To Prove Motive. — See note 4.

254. See note 1.

5. To Prove Identity of Criminal. — See note 3.

North Carolina. — State *v.* McCall, 131 N. Car. 798.

Oklahoma. — Harmon *v.* Territory, (Okla. 1905) 79 Pac. Rep. 765.

South Dakota. — State *v.* Halpin, 16 S. Dak. 170; State *v.* Stevens, 16 S. Dak. 309.

Texas. — Gibson *v.* State, (Tex. Crim. 1902) 68 S. W. Rep. 174; Kessinger *v.* State, (Tex. Crim. 1903) 71 S. W. Rep. 597; Walker *v.* State, (Tex. Crim. 1903) 72 S. W. Rep. 401; Allen *v.* State, (Tex. Crim. 1903) 73 S. W. Rep. 397; Smith *v.* State, (Tex. Crim. 1903) 73 S. W. Rep. 401; Lee *v.* State, 45 Tex. Crim. 51; Smith *v.* State, (Tex. Crim. 1903) 74 S. W. Rep. 556; Bright *v.* State, (Tex. Crim. 1903) 74 S. W. Rep. 912; Marks *v.* State, (Tex. Crim. 1904) 78 S. W. Rep. 512; Belt *v.* State, (Tex. Crim. 1904) 78 S. W. Rep. 933; Owens *v.* State, 46 Tex. Crim. 14; Clifton *v.* State, 46 Tex. Crim. 18; Dittfurth *v.* State, 46 Tex. Crim. 424; Wiggins *v.* State, (Tex. Crim. 1905) 84 S. W. Rep. 821; Simpson *v.* State, (Tex. Crim. 1905) 85 S. W. Rep. 16; Wesley *v.* State, (Tex. Crim. 1905) 85 S. W. Rep. 802; Driver *v.* State, (Tex. Crim. 1905) 85 S. W. Rep. 1056; Custer *v.* State, (Tex. Crim. 1905) 86 S. W. Rep. 757; Ball *v.* State, 44 Tex. Crim. 489; Walker *v.* State, 44 Tex. Crim. 546; Hill *v.* State, 44 Tex. Crim. 603.

Washington. — State *v.* Eder, 36 Wash. 482.

Wisconsin. — Paulson *v.* State, 118 Wis. 89; Baker *v.* State, 120 Wis. 135.

And see, besides the cross-references in the original note, the criminal titles generally, such as ADULTERY (AS A CRIME), **753.** 8; BURGLARY, **67.** 1; FORGERY, **1109.** 4, **1110.** 3; GAMING, **690.** 3; GAMING HOUSES, **726.** 7; RAPE, **881.** 9 *et seq.*

248. 2. Other Crime Establishing Offense or Element Thereof. — Stone *v.* State, 118 Ga. 705, 98 Am. St. Rep. 145; State *v.* Franklin, 69 Kan. 798; State *v.* Lewis, 181 Mo. 235; People *v.* Romano, 84 N. Y. App. Div. 318; Glenn *v.* State, (Tex. Crim. 1903) 76 S. W. Rep. 757; Barnett *v.* State, 44 Tex. Crim. 502, 100 Am. St. Rep. 873. See also State *v.* Lancaster, 10 Idaho 410, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 248; People *v.* Doty, 175 N. Y. 164.

249. 3. Further Exceptions Not to Be Added. — State *v.* Lancaster, 10 Idaho 410, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 249.

250. 4. Subsequent as Well as Prior Acts. — See State *v.* Marshall, 77 Vt. 262.

8. Counterfeiting. — See Bryan *v.* U. S., (C. C. A.) 133 Fed. Rep. 495; Stith *v.* Com., (Ky. 1904) 82 S. W. Rep. 245; People *v.* Doty, 175 N. Y. 164.

9. Arson. — Mitchell *v.* State, 140 Ala. 118.

Assault. — See People *v.* McGlade, 139 Cal. 66.

Bribery. — State *v.* Ames, 90 Minn. 183.

Burglary. — State *v.* Snider, 119 Iowa 15; Bright *v.* State, (Tex. Crim. 1903) 74 S. W. Rep. 912.

False Pretenses. — State *v.* Seligman, 127 Iowa 415; Com. *v.* Lubinsky, 182 Mass. 142.

Forgery. — Withaup *v.* U. S., (C. C. A.) 127 Fed. Rep. 530; Wooldridge *v.* State, (Fla. 1905) 38 So. Rep. 3. See also Wright *v.* State, 138 Ala. 69; People *v.* Carpenter, 136 Cal. 391; Goldsberry *v.* State, 66 Neb. 312; People *v.* Doty, 175 N. Y. 164; People *v.* Weaver, 177 N. Y. 434.

Gambling. — State *v.* Behan, 113 La. 701.

Keeping Intoxicating Liquors, Etc. — See Hollar *v.* State, (Tex. Crim. 1903) 73 S. W. Rep. 961.

Larceny. — People *v.* Nagle, 137 Mich. 88; Scott *v.* State, (Tex. Crim. 1902) 68 S. W. Rep. 680. See also People *v.* Putnam, 90 N. Y. App. Div. 125, affirmed 179 N. Y. 518.

Malicious Mischief. — State *v.* Roscum, 119 Iowa 330.

Murder. — Henry *v.* People, 198 Ill. 162.

Obtaining Money by Confidence Game. — Du Bois *v.* People, 200 Ill. 157, 93 Am. St. Rep. 183.

Receiving Deposit After Bank's Insolvency. — State *v.* Stevens, 16 S. Dak. 309.

Receiving Stolen Goods. — People *v.* Doty, 73 N. Y. App. Div. 78, affirmed 175 N. Y. 164. See also Goldsberry *v.* State, 66 Neb. 312.

Robbery. — State *v.* Ward, (Iowa 1902) 91 N. W. Rep. 898; State *v.* Spray, 174 Mo. 569.

252. 1. On Issue of Accident or Good Faith. — State *v.* Vance, 119 Iowa 685; State *v.* Spray, 174 Mo. 569; State *v.* Lewis, 181 Mo. 235. See also State *v.* Rudolph, 187 Mo. 67.

253. 4. Acts Flowing from Same Motive. — Cawthon *v.* State, 119 Ga. 395; State *v.* Vance, 119 Iowa 685; Whitney *v.* Com., (Ky. 1903) 74 S. W. Rep. 257; O'Brien *v.* Com., 115 Ky. 608; State *v.* Ames, 90 Minn. 183; State *v.* Spray, 174 Mo. 569; State *v.* Lewis, 181 Mo. 235; State *v.* Sargood, 77 Vt. 80.

254. 1. Prior Criminal Acts Which Form Motive of That on Trial. — Denham *v.* Com., (Ky. 1905) 84 S. W. Rep. 538; Goodman *v.* State, (Tex. Crim. 1904) 83 S. W. Rep. 106.

3. Identity. — See Mitchell *v.* State, 140 Ala. 118; Cawthon *v.* State, 119 Ga. 395; State *v.* Vance, 119 Iowa 685; Whitney *v.* Com., (Ky. 1903) 74 S. W. Rep. 257; State *v.* Ames, 90 Minn. 183; State *v.* Spray, 174 Mo. 569; State *v.* Lewis, 181 Mo. 235; State *v.* Rudolph, 187 Mo. 67; State *v.* Bates, 182 Mo. 70; Smith *v.* State, (Tex. Crim. 1903) 73 S. W. Rep. 401;

255. 6. To Prove Common Plan. — See notes 1, 2.

256. 8. Res Gestæ, Same Transaction. — See note 1.

III. EXTENT TO WHICH COLLATERAL CRIMES GONE INTO. — See note 4.

IV. INDICTMENT — ELECTION. — See note 5.

257. PROPER. — See note 1.

258. PROPERLY. — See note 1.

McAnally *v.* State, (Tex. Crim. 1903) 73 S. W. Rep. 404.

255. 1. Conspiracy. — State *v.* Soper, 118 Iowa 1.

2. Evidence of Separate Arsons Admissible Where in Pursuance of Same Scheme. — State *v.* Jones, 171 Mo. 401, 94 Am. St. Rep. 786.

Evidence of Separate Sales of Liquor Admissible to Show System. — See Peterson *v.* State, (Tex. Crim. 1902) 70 S. W. Rep. 978.

256. 1. Res Gestæ — Georgia. — Cawthon *v.* State, 119 Ga. 395.

Indiana. — Starr *v.* State, 160 Ind. 661.

Kentucky. — O'Brien *v.* Com., 115 Ky. 608; Havens *v.* Com., (Ky. 1904) 82 S. W. Rep. 369; Denham *v.* Com., (Ky. 1905) 84 S. W. Rep. 538.

Louisiana. — State *v.* Robinson, 112 La. 939.

New Jersey. — State *v.* Hendrick, 70 N. J. L. 41.

North Carolina. — State *v.* Register, 133 N. Car. 746.

South Dakota. — State *v.* Halpin, 16 S. Dak. 170.

Texas. — Scott *v.* State, (Tex. Crim. 1902) 68 S. W. Rep. 680; Allen *v.* State, (Tex. Crim. 1903) 73 S. W. Rep. 397; Smith *v.* State, (Tex. Crim. 1903) 73 S. W. Rep. 401; McAnally *v.* State, (Tex. Crim. 1903) 73 S. W. Rep. 404; Lee *v.* State, 45 Tex. Crim. 51; Bright *v.* State, (Tex. Crim. 1903) 74 S. W. Rep. 912; Glover *v.* State, (Tex. Crim. 1903) 76 S. W. Rep. 465; Glenn *v.* State, (Tex. Crim. 1903) 76 S. W. Rep. 757; Thompson *v.* State, (Tex.

Crim. 1904) 78 S. W. Rep. 941; Belt *v.* State, (Tex. Crim. 1904) 78 S. W. Rep. 933; White *v.* State, 45 Tex. Crim. 602; Leach *v.* State, 46 Tex. Crim. 507; Gray *v.* State, (Tex. Crim. 1905) 86 S. W. Rep. 764; Thomas *v.* State, 44 Tex. Crim. 344; Gray *v.* State, 44 Tex. Crim. 470; Barnett *v.* State, 44 Tex. Crim. 592, 100 Am. St. Rep. 873.

Washington. — State *v.* Burton, 27 Wash. 528.

4. Evidence Not to Be Considered as Make-weight Against Defendant. — See also State *v.* Scott, 172 Mo. 536.

5. Indictment for Single Offense — Election. — Bigcraft *v.* People, 30 Colo. 298; State *v.* King, 117 Iowa 484; Walker *v.* State, (Tex. Crim. 1903) 72 S. W. Rep. 401.

257. 1. "Proper Cash Items" in a cashier's accounts ordinarily include not only money on hand, but everything for which he has paid out the association's cash during a particular day or business period. U. S. *v.* Young, 128 Fed. Rep. 111.

258. 1. "Properly Secure" in a statute requiring mine owners to furnish and send down into the mine a sufficient supply of timber, so that the workmen at all times may be able *properly* to secure the workings from caving in, means such security as a reasonable and humane person, watchful of the almost constant peril to his workmen, would afford, commensurate with the impending or threatened danger. McDaniels *v.* Royle Min. Co., 110 Mo. App. 706.

PROPERTY.

BY H. N. ELDRIDGE.

259. I. GENERAL DEFINITION. — See note 1.

260. The Word "Property" Is Nomen Generalissimum. — See note 1.

259. 1. Right of User, Disposition, Etc. — Vann *v.* Edwards, 135 N. Car. 661; Callen *v.* Columbus Edison Electric Light Co., 66 Ohio St. 166.

Constitutional Law. — See also Callen *v.* Columbus Edison Electric Light Co., 66 Ohio St. 166.

260. 1. Nomen Generalissimum. — State *v.* Savage, 65 Neb. 714.

The Good Will of a Business Is "Property" transferable like any other property. Mapes *v.* Metcalf, 10 N. Dak. 601.

A Calling, Business, or Profession Chosen and Followed Is "Property." — State *v.* Chapman, 69 N. J. L. 464.

A Seat in the New York Stock Exchange is property. Matter of Glendinning, 68 N. Y. App. Div. 125, *affirmed* 171 N. Y. 684.

A Liquor License has been held not to be "property." Levee Com'rs *v.* Houston, 81 Miss. 619.

A Liquor Tax Certificate, if not property in the strict sense in which that word is used, constitutes a property right. Matter of Cullinan, 94 N. Y. App. Div. 445.

Public Securities of City and State Are Not "Property" within the meaning of a general law directing that all property shall be taxed. State *v.* Assessors, 111 La. 982.

A Public Office Is Not "Property" within the

- 260.** Everything That Is Subject of Ownership. — See note 2.
 Absolute and Qualified or Special Property. — See note 3.
- 261.** Applied to Rights of Owner or to Thing Itself. — See note 2.
- 262.** II. INCLUDES BOTH REAL AND PERSONAL PROPERTY. — See note 2.
- 263.** See note 1.
 As Applied to Real Property. — See note 3.
- 264.** See note 2.
 III. MONEY. — See note 3.
 IV. CHOSSES IN ACTION. — See note 5.
- 265.** See notes 1, 3, 5.
- 268.** PROSECUTE — PROSECUTION. — See note 8.
- 269.** See note 1.

meaning of a constitutional provision that "no person shall be deprived of life, liberty, or property without due process of law." *State v. Crumbaugh*, 26 Tex. Civ. App. 521.

The Incorporeal Interest of an Inventor in an Alleged Invention for Which No Patent Has Issued, though the application is pending, is not property, within the meaning of that section of the bankruptcy act which provides for the surrender to the trustee in bankruptcy of all the bankrupt's property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon or sold under judicial process against him. *In re Dann*, 129 Fed. Rep. 495.

Tangible or Intangible Property. — The word "property" as used in the *Nebraska* constitution is a generic term, and includes all property of whatever description, whether tangible or intangible. *State v. Savage*, 65 Neb. 714.

The Franchise Right of a Foreign Corporation to do business in the state of Montana has been held to be property, within the meaning of the provision of the state constitution relating to taxation of property. *Northwestern Mut. L. Ins. Co. v. Lewis and Clarke County*, 28 Mont. 484, 98 Am. St. Rep. 572.

260. 2. Everything Which Can Be Owned. — *Bailey v. People*, 190 Ill. 28, 83 Am. St. Rep. 116. See also *Miller v. Kern County*, 137 Cal. 518.

3. The Interest Which a Tenant Has in Land is property, within the meaning of a statute giving a right of action to owners of property along the line of a railroad against such railroad for failing to maintain a good and sufficient fence along its line, in consequence of which cattle or other domestic animals belonging to such owners of property stray on the track and are killed or maimed. *Walther v. Sierra R. Co.*, 141 Cal. 288.

261. 2. Thing Itself. — See also *Missouri*,

etc., *R. Co. v. Calkins*, (Tex. Civ. App. 1904) 79 S. W. Rep. 852.

262. 2. "Property" Includes Real Property. — *Kingsley v. Merrill*, 122 Wis. 185.

263. 1. "Property" Includes Personal Property. — *Howerton v. Iowa State Ins. Co.*, 105 Mo. App. 575; *Sherman v. Hayward*, 98 N. Y. App. Div. 254; *Kingsley v. Merrill*, 122 Wis. 185.

3. A Mortgage Is Property. — *Kingsley v. Merrill*, 122 Wis. 193.

264. 2. Incorporeal Hereditaments and Easements. — *Lawrence v. Hennessy*, 165 Mo. 659.

3. Property Includes Money. — *Matter of Daly*, 100 N. Y. App. Div. 373, affirmed 182 N. Y. 524.

Bankruptcy Act. — *Boyd v. Lemon, etc., Co.*, (C. C. A.) 114 Fed. Rep. 647; *Sherman v. Luckhardt*, 96 Mo. App. 320; *Landry v. Andrews*, 22 R. I. 597.

5. Choses in Action Included in Term "Property." — *Kingsley v. Merrill*, 122 Wis. 193, [quoting entire text paragraph 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 264, 265]; *In re Burnstine*, 131 Fed. Rep. 828; *Wentz's Appeal*, 76 Conn. 405.

265. 1. Solvent Credits. — *Savings, etc., Soc. v. San Francisco*, 131 Cal. 356; *Gallagher v. McGraw*, 132 Cal. 601; *Matter of Daly*, 100 N. Y. App. Div. 373, affirmed 182 N. Y. 524.

3. Promissory Notes. — *Manning v. Berdan*, 132 Fed. Rep. 382; *Crampton v. Newton*, 132 Mich. 149.

5. Bonds Held Not to Be Property. — *Matter of Preston*, 75 N. Y. App. Div. 250.

268. 8. The Word "Prosecution" May Refer to a Civil Proceeding. — *Fortune v. Wilburton*, 5 Indian Ter. 251.

269. 1. Criminal Proceeding. — *State v. Bowles*, 70 Kan. 827, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 268, 269.

"Prosecution Pending" construed to mean accusation pending. *State v. Jackson*, 111 La. 343.

PROSECUTING AND DISTRICT ATTORNEYS.

By F. G. BAMMAN.

- 272. I. NATURE OF OFFICE — SCOPE OF TITLE.** — See note 1.
II. MANNER OF FILLING OFFICE. — See note 7.
- 273. The Right of Appointment.** — See note 4.
III. APPOINTMENT OF ASSISTANT COUNSEL. — See notes 5, 6.
IV. ELIGIBILITY — Residence. — See notes 12, 14.
- 274. V. TENURE, REMOVAL, AND RESIGNATION — The Term of Office.** — See notes 9, 12.
Removal. — See note 16.
- 275. Where the Term Is Fixed by the Constitution.** — See note 2.
VI. POWERS AND DUTIES — 1. In General. — See note 8.
2. In Criminal Prosecutions. — See notes 9, 18, 19.
- 276. See note 7.**
Must Be Just and Impartial. — See notes 12, 13.
- 277. He Should Not Act in a Case.** — See note 1.
Certain Miscellaneous Matters. — See note 10.
3. In Civil Actions. — See notes 11, 13, 15, 18.
- 278. See note 7.**
4. Miscellaneous — Employing Assistants. — See notes 15, 16, 17.
- 272. 1. Statutory Office.** — *State v. Trehwhitt*, 113 Tenn. 561.
 7. *State v. Trehwhitt*, 113 Tenn. 561.
- 273. 4. See State v. Trehwhitt**, 113 Tenn. 561.
 5. **Appointment of Assistant Counsel.** — *Hinsdale County v. Crump*, 18 Colo. App. 59; *State v. Reid*, 113 La. 890.
 6. *U. S. v. Cobban*, 127 Fed. Rep. 713.
 12. **Residence.** — *Adams v. Roberts*, 83 S. W. Rep. 1035, 26 Ky. L. Rep. 1271.
 14. See *Adams v. Roberts*, 83 S. W. Rep. 1035, 26 Ky. L. Rep. 1271.
- 274. 9. Tenure.** — *Adams v. Roberts*, 83 S. W. Rep. 1035, 26 Ky. L. Rep. 1271.
 12. See *State v. Trehwhitt*, 113 Tenn. 561.
 16. **Removal.** — See *State v. Trinkle*, 70 Kan. 396.
- 275. 2. See Adams v. Roberts**, 83 S. W. Rep. 1035, 26 Ky. L. Rep. 1271.
The Legislature May Not Extend the Term of a county attorney, whose office was created by statute, in such a manner as to deprive the people of their constitutional right to fill by election any county office created by the legislature. *State v. Trehwhitt*, 113 Tenn. 561.
- 8. Powers and Duties.** — *Jones v. Sunflower County*, 84 Miss. 98.
9. In Criminal Prosecutions. — *Humiston v. Shaffer*, 145 Cal. 195; *Williams v. State*, 121 Ga. 195; *Independent Pub. Co. v. Lewis and Clarke County*, 30 Mont. 83.
- 18. Relations to Grand Jury.** — *U. S. v. Cobban*, 127 Fed. Rep. 713.
- 19. A Prosecuting Attorney May Be a Competent Witness for the State in a criminal action.** *State v. Wilmbusse*, 8 Idaho 608. See further the title WITNESSES, 932. 1, 941. 2 *et seq.*
- 276. 7. Prosecuting Violations of Liquor Laws.** — See *Goad v. State*, 73 Ark. 458.
- 12. Must Be Just and Impartial.** — *Burks v. State*, 72 Ark. 461; *People v. Sing Lee*, 145 Cal. 190; *State v. Irwin*, 9 Idaho 35; *Powers v. Com.*, (Ky. 1904) 83 S. W. Rep. 146; *Robbins v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 690; *Johnson v. State*, 46 Tex. Crim. 291. See also *State v. Price*, 186 Mo. 140.
- 13. State v. Williams**, 122 Iowa 115; *State v. Robinson*, 112 La. 939; *State v. Snyder*, 182 Mo. 462; *McDaniel v. State*, 46 Tex. Crim. 560; *Wallace v. State*, 46 Tex. Crim. 341; *Barnard v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 760; *Hanna v. State*, 46 Tex. Crim. 5. See also *People v. Mead*, 145 Cal. 500; *Brown v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 704.
- 277. 1. Appearance in Prior Civil Suit.** — See *U. S. v. Twining*, 132 Fed. Rep. 129; *State v. Reid*, 113 La. 890.
- 10. Signing of Bills.** — *Prince v. State*, 140 Ala. 158. See also *State v. Blands*, 101 Mo. App. 618; *Williams v. State*, 44 Tex. Crim. 235. And see the title INDICTMENTS, INFORMATION, AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 446, 447, and the Supplement thereto.
- 11. Duty to Appear in Civil Actions.** — *McMullin v. Montrose County*, 18 Colo. App. 117; *Board of Education v. Territory*, 12 Okla. 286; *State v. Seattle Gas, etc., Co.*, 28 Wash. 488.
- 13. Right to Appeal.** — *Boyd County v. Arthur*, (Ky. 1904) 82 S. W. Rep. 613.
- 15. Jefferson County v. Young, (Ky. 1905) 86 S. W. Rep. 985; *Boyd County v. Arthur*, (Ky. 1904) 82 S. W. Rep. 613.**
- 18. May Begin Quo Warranto Proceedings.** — *State v. Seattle Gas, etc., Co.*, 28 Wash. 488.
- 278. 7. Contra Costa County v. Soto**, 138 Cal. 57.
- 15. Employing Assistance.** — *Johnston v. Bernalillo County*, (N. Mex. 1904) 78 Pac.

- 279.** 5. Of Assistant Prosecuting Attorneys. — See notes 11, 13.
VII. COMPENSATION — 1. In General. — See note 14.
- 280.** 3. Fees — A Prosecuting Attorney Is Not Entitled to a Fee. — See notes 10, 13.
- 281.** See notes 1, 4.
- 282.** Conflicting Claims to Fees. — See note 3.
 4. Percentage Commissions. — See notes 5, 9.
 Lien for Commissions. — See note 17.
- 283.** 5. Extra Services. — See notes 1, 3.
 6. Expenses. — See note 5.
 7. Of Assistant Attorneys. — See notes 6, 7, 8, 9, 12.
 8. Liability of State or County. — See notes 13, 14.
- 284.** See note 1.
- 285.** 9. Of United States District Attorneys — *d.* EXTRA SERVICES. — See note 14.
- 286.** VIII. LIABILITY OF PROSECUTING ATTORNEYS. — See note 11.
- 290.** PROVIDE — PROVISION. — See note 1.
- 291.** PROVISIONS. — See note 3.
- 292.** PROVISO — PROVIDED. — See notes 1, 2, 3.

Rep. 43; State *v.* Tough, 12 N. Dak. 425; McCue *v.* Com., 103 Va. 870. See also State *v.* Reid, 113 La. 890; Krammer *v.* State, 117 Wis. 350.

278. 16. State *v.* Reid, 113 La. 890.

17. Assistant May Be Allowed to Conduct Prosecution Alone. — State *v.* Reid, 113 La. 890.

279. 11. Assistant Prosecuting Attorneys. — U. S. *v.* Cobban, 127 Fed. Rep. 713; State *v.* Crilly, 69 Kan. 802; Daniels *v.* State, (Tex. Crim. 1903) 77 S. W. Rep. 215.

13. State *v.* Tighe, 27 Mont. 327.

14. Change of District as Affecting Compensation. — The fact that a district attorney's compensation, arising from fines and forfeitures, may be affected does not deprive the legislature of the right to change the boundaries of districts or create new districts. Butler *v.* Stephens, (Ky. 1905) 84 S. W. Rep. 745.

280. 10. When Not Entitled to Fees. — McMullin *v.* Montrose County, 18 Colo. App. 117.

13. See Goad *v.* State, 73 Ark. 458.

281. 1. McMullin *v.* Montrose County, 18 Colo. App. 117.

4. McMullin *v.* Montrose County, 18 Colo. App. 117.

282. 3. Hager *v.* Franklin, 84 S. W. Rep. 541, 27 Ky. L. Rep. 189.

5. Percentage Commissions. — Hager *v.* Franklin, 81 S. W. Rep. 926, 26 Ky. L. Rep. 94, 84 S. W. Rep. 541, 27 Ky. L. Rep. 189; Spaulding *v.* Hill, 115 Ky. 1; Butler *v.* Stephens, (Ky. 1905) 84 S. W. Rep. 745.

9. See Hager *v.* Franklin, 81 S. W. Rep. 926, 26 Ky. L. Rep. 94.

17. Lien for Commissions. — Hager *v.* Franklin, 84 S. W. Rep. 541, 27 Ky. L. Rep. 189.

283. 1. When Contract for Extra Compensation Void. — Under a constitutional provision prohibiting county officers from being pecuniarily interested in county contracts, a contract between a county and its prosecuting attorney for extra compensation to the latter for unofficial services has been held to be void. Wilson *v.* Otoe County, (Neb. 1904) 98 N. W. Rep. 1050.

3. Humiston *v.* Shaffer, 145 Cal. 195; Wilson *v.* Otoe County, (Neb. 1904) 98 N. W. Rep. 1050.

5. Expenses. — See Gibboney *v.* Chosen Freeholders, (C. C. A.) 122 Fed. Rep. 46; Humiston *v.* Shaffer, 145 Cal. 195; Jones *v.* Sunflower County, 84 Miss. 98; Independent Pub. Co. *v.* Lewis and Clarke County, 30 Mont. 83.

6. Of Assistant Attorneys. — See Hinsdale County *v.* Crump, 18 Colo. App. 59.

7. Card *v.* Dawes County, (Neb. 1904) 99 N. W. Rep. 662.

8. Canada *v.* Territory, 12 Okla. 409.

9. See Goad *v.* State, 73 Ark. 458.

12. See Hinsdale County *v.* Crump, 18 Colo. App. 59.

13. Liability of State or County. — Territory *v.* Bernalillo County, (N. Mex. 1905) 79 Pac. Rep. 709.

14. Spaulding *v.* Hill, 115 Ky. 1.

284. 1. See Territory *v.* Bernalillo County, (N. Mex. 1905) 79 Pac. Rep. 709.

285. 14. Extra Services. — The Adula, 127 Fed. Rep. 853.

286. 11. See Shea *v.* Cloquet Lumber Co., 92 Minn. 348.

290. 1. Provide. — Cameron *v.* Dauphin, 14 Manitoba 575.

Provide means to take measures for counteracting or escaping something. Western Ranches *v.* Custer County, 28 Mont. 278.

291. 3. "Provisions" Includes Corn, Oats, and Bran. — Kansas City, etc., R. Co. *v.* Graham; 67 Kan. 791; Moise's Succession, 107 La. Ann. 717.

292. 1. "Provided" Is Generally Used in the Sense of "If." — Mohrstadt *v.* Mutual L. Ins. Co., (C. C. A.) 115 Fed. Rep. 81.

2. "Provided" Imports a Conditional Rather than an Absolute Estate. — Brennan *v.* Brennan, 185 Mass. 560.

3. Does Not Invariably Express Condition. — Jones *v.* Hoover, 144 Fed. Rep. 228, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 292; Shipley *v.* Jacob Tome Institute, 99 Md. 527, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 292.

PROXIES.

By A. A. WADSWORTH.

295. II. RIGHT TO VOTE BY PROXY — 1. At Common Law — a. GENERAL RULE. — See note 2.

297. IV. FORMAL REQUISITES — 1. No Particular Form Necessary. — See note 7.

298. V. RIGHTS AND POWERS OF PROXY — 2. When Authority Limited. — See note 10.

299. 4. Fundamental Changes in Organization. — See note 4.

6. Notice to Proxy Is Notice to Stockholder. — See note 7.

7. Waiver of Irregularities. — See note 8.

300. VI. COMPELLING EXECUTION OF PROXY — 2. To Pledgor — Laches. — See note 3.

VII. REVOCATION OF PROXY — 1. When About to Be Used for Improper Purpose. — See note 6.

302. PRUDENCE — PRUDENT. — See note 7.

306. PUBLIC AMUSEMENT, EXHIBITION, ETC. — See note 2.

295. 2. Must Be Authorized by Statute, Articles, or By-Laws. — *McKee v. Home Sav., etc., Co.*, 122 Iowa 731.

297. 7. Morgan v. Hartley Oil, etc., Co., 30 Pa. Co. Ct. 22, *quoting* 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 297.

298. 10. Limitation of Authority. — *McKee v. Home Sav., etc., Co.*, 122 Iowa 731, *citing* 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 298.

299. 4. McKee v. Home Sav., etc., Co., 122 Iowa 731.

7. Stockholder Charged with Notice to Proxy. — *Synnott v. Cumberland Bldg. Loan Assoc., (C. C. A.)* 117 Fed. Rep. 379.

8. Synnott v. Cumberland Bldg. Loan Assoc., (C. C. A.) 117 Fed. Rep. 379.

300. 3. Pledgor Required to Give Proxy to

Pledgor. — *Pennsylvania R. Co. v. Pennsylvania Ins. Co.*, 205 Pa. St. 219.

6. Fraudulent Use of Proxy. — *Warren v. Pim*, 65 N. J. Eq. 36; *Morgan v. Hartley Oil, etc., Co.*, 30 Pa. Co. Ct. 22.

302. 7. Good Judgment and Foresight in Practical Affairs. — *Houston, etc., R. Co. v. Everett*, (Tex. Civ. App. 1905) 86 S. W. Rep. 17.

The Term "Reasonable Prudence," as applied to the conduct and affairs of men, has a relative significance, and cannot be arbitrarily defined. *Hemingway v. Illinois Cent. R. Co., (C. C. A.)* 114 Fed. Rep. 843.

306. 2. A Public Sport, Game, Show, or Entertainment is one held out and given to the public. *People v. Poole*, (Supm. Ct.) 44 Misc. (N. Y.) 118.

PUBLICATION.

By H. N. ELDRIDGE.

308. III. MODE OF PUBLICATION — 1. In Newspapers. — See notes 5, 8.

2. By Posting. — See notes 10, 11.

308. 5. Designation of Particular Newspaper. — *Kansas City v. Overton*, 68 Kan. 560; *Moore v. Dick*, 187 Mass. 207.

Official Newspapers. — See *Democrat Pub. Co. v. Patterson*, (Ky. 1904) 78 S. W. Rep. 131.

Publication in Some Newspaper Published in County. — See *Kumpe v. Irwin*, 140 Ala. 460; *Vizard v. Moody*, 119 Ga. 918; *Foss v. Roseau County*, 93 Minn. 238.

Publication in Newspaper of General Circulation. — *Reagan v. Duddy*, (Ky. 1904) 78 S. W. Rep. 430.

Elections — Designation of Two Papers Authorized — Attempted Designation of Eight Void as to All. — *Matter of Ford*, 92 N. Y. App. Div. 119.

8. Newspaper Defined. — See *Kansas City v. Overton*, 68 Kan. 560; *Michigan Mut. L. Ins. Co. v. Klatt*, (Neb. 1904) 98 N. W. Rep. 436; *Puget Sound Pub. Co. v. Times Printing Co.*, 33 Wash. 551; *Hall v. Milwaukee*, 115 Wis. 470.

10. Posting Notices at Specified Place — Court-house Door. — *Dowling v. Hibernia Sav., etc., Soc.*, 143 Cal. 425.

309. IV. PROOF OF PUBLICATION.— See note 5.

If the Newspaper Is Not Specifically Designated. — See note 7.

V. PERIOD OF PUBLICATION.— See note 9.

308. 11. A Requirement of Posting at Three Public Places is not complied with by posting at three points so near together as to constitute practically one place. *National Loan, etc., Co. v. Dorenblaser*, 30 Tex. Civ. App. 148.

309. 5. Affidavit of Any Person Having Knowledge of Facts.— *Home Ins. Co. v. Clark*, (Neb. 1901) 95 N. W. Rep. 1056; *Loneragan v. South Omaha*, (Neb. 1904) 100 N. W. Rep. 407.

7. Proof of Character of Newspaper.— *Bourke v. Somers*, (Neb. 1902) 92 N. W. Rep. 990.

9. Period of Publication Prescribed.— *Kumpe v. Irwin*, 140 Ala. 460; *Denver v. Londoner*, 33 Colo. 104; *Vizard v. Moody*, 119 Ga. 918; *Tidd v. Grimes*, 66 Kan. 401; *Wilson v. Petzold*, 116 Ky. 873; *In re Lindner*, 113 La. 772; *Pierce v. Reed*, (Neb. 1903) 93 N. W. Rep. 154; *Cuyler v. Tate*, 67 Neb. 317; *Thomas v. Issenhuth*, (S. Dak. 1904) 100 N. W. Rep. 436; *Atkinson v. Washington and Jefferson College*, 54 W. Va. 32.

PUBLIC BUILDING OR PROPERTY.

310. I. DEFINITION.— See note 1.**311. PUBLIC CORPORATIONS.**— See note 3.**313. PUBLIC HOUSE.**— See note 1.

310. 1. Confined to Property Owned by State or Some Political Division Thereof.— See *Gate City Guard v. Atlanta*, 113 Ga. 883.

Building and Stock of Liquors Owned by Municipal Corporation and Operated by It as Dispensary.— *Walden v. Whigham*, 120 Ga. 646.

311. 3. Public Corporations.— *Arrison v. Company D*, 12 N. Dak. 554; *Carrick Academy v. Clark*, 112 Tenn. 483.

313. 1. A Jail House was held not to be a *public house* within the meaning of a gaming statute. *Lewis v. State*, 140 Ala. 126.

PUBLIC OFFICERS.

By C. T. GREEN.

- 322.** I. DEFINITIONS. — See notes 1, 3.
323. Criteria. — See notes 1, 2, 3, 4, 5, 6, 7, 8.
324. Distinction Between Office and Employment. — See notes 1, 2.
 In Applying These General Principles. — See note 3.

322. 1. Office and Officer Defined. — Goodrich *v. Mitchell*, 68 Kan. 765, 104 Am. St. Rep. 429; Mial *v. Ellington*, 134 N. Car. 131. See also Matter of Carter, 141 Cal. 316.

Other Definitions. — State *v. Gray*, 91 Mo. App. 438.

United States Officer Defined — Indian Agent. — Sharp *v. U. S.*, 13 Okla. 522.

Member of Congress Defined. — U. S. *v. Dietrich*, 126 Fed. Rep. 676.

Word "Officer" of Broader Meaning than "Public Officer." — *In re Harper*, 133 Fed. Rep. 970. **Statutory Construction of "Officers."** — See Hargis *v. Perry County*, (Ind. 1905) 73 N. E. Rep. 915.

3. Portion of Sovereignty Delegated. — Featherngill *v. State*, 33 Ind. App. 683; State *v. Harter*, 188 Mo. 516; People *v. McAdoo*, 98 N. Y. App. Div. 314, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 322; Barker *v. State*, 69 Ohio St. 68; Robertson *v. Ellis County*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1097.

323. 1. Oath. — U. S. *v. Dietrich*, 126 Fed. Rep. 676; Featherngill *v. State*, 33 Ind. App. 683; Hager *v. Lucas*, (Ky. 1905) 86 S. W. Rep. 552; State *v. Scott*, (Neb. 1904) 97 N. W. Rep. 1021; Rabbitt *v. Garand*, 89 N. Y. App. Div. 119; Taylor *v. Big Horn County*, 11 Wyo. 106.

Oath Not Determinative. — State *v. Gray*, 91 Mo. App. 438; Robertson *v. Ellis County*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1097; Stephenson *v. Salisbury*, 53 W. Va. 366.

2. Bond. — U. S. *v. Dietrich*, 126 Fed. Rep. 676; Hager *v. Lucas*, (Ky. 1905) 86 S. W. Rep. 552; State *v. Scott*, (Neb. 1904) 97 N. W. Rep. 1021; People *v. McAdoo*, 101 N. Y. App. Div. 183, affirmed 181 N. Y. 547.

3. Salary or Fees. — Featherngill *v. State*, 33 Ind. App. 683; Weesner *v. Central Nat. Bank*, 106 Mo. App. 668; State *v. Scott*, (Neb. 1904) 97 N. W. Rep. 1021; Barker *v. State*, 69 Ohio St. 68; White *v. Mears*, 44 Oregon 215.

Mere Appropriation Does Not Create Officer. — Grieb *v. Syracuse*, 94 N. Y. App. Div. 133.

4. Tenure. — Featherngill *v. State*, 33 Ind. App. 683; Weesner *v. Central Nat. Bank*, 106 Mo. App. 668. See also Wiggin *v. Manchester*, 72 N. H. 576.

5. Duration or Continuance. — Wall *v. Deaf, etc.*, Asylum, 145 Cal. 468. See also Barker *v. State*, 69 Ohio St. 68.

6. Requirement as to Creation. — Wall *v. Deaf, etc.*, Asylum, 145 Cal. 468.

Constitutional Provision, Statute, or Act of Body

with Delegated Power. — Eckerson *v. New York*, 80 N. Y. App. Div. 12, affirmed 176 N. Y. 609.

7. Not Determined by Official Designation. — Minnesota Sugar Co. *v. Iverson*, 91 Minn. 30.

Nature of Functions Determines. — See People *v. McAdoo*, 101 N. Y. App. Div. 183, affirmed 181 N. Y. 547.

Imposition of New Duties Does Not Create New Officers. — State *v. Scott*, (Neb. 1904) 97 N. W. Rep. 1021.

Inconsequential Nature of Position Not Determinative. — State *v. Gray*, 91 Mo. App. 438.

8. State v. Harter, 188 Mo. 516.

324. 1. Office and Employment Distinguished — United States. — U. S. *v. Schlierholz*, 133 Fed. Rep. 333.

California. — Wall *v. Deaf, etc.*, Asylum, 145 Cal. 468.

Indiana. — See Featherngill *v. State*, 33 Ind. App. 683.

Missouri. — Magner *v. St. Louis*, 179 Mo. 495; State *v. Gray*, 91 Mo. App. 438.

New Hampshire. — Wiggin *v. Manchester*, 72 N. H. 576.

New Jersey. — Dolan *v. Orange*, 70 N. J. L. 106.

New York. — Murphy *v. Board of Education*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 706, affirmed 76 N. Y. App. Div. 620; Eckerson *v. New York*, 80 N. Y. App. Div. 12, affirmed 176 N. Y. 609; Stenson *v. New York*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 533; Grieb *v. Syracuse*, 94 N. Y. App. Div. 133; People *v. Hamilton*, 98 N. Y. App. Div. 59; People *v. McAdoo*, 98 N. Y. App. Div. 312; Padden *v. New York*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 517. See also Downs *v. New York*, 75 N. Y. App. Div. 423, affirmed 173 N. Y. 651; Martin *v. New York*, 176 N. Y. 371.

Ohio. — Barker *v. State*, 69 Ohio St. 68.

Texas. — Robertson *v. Ellis County*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1097.

Officer and Clerk Distinguished. — U. S. *v. Cole*, 130 Fed. Rep. 614.

2. People v. McAdoo, 98 N. Y. App. Div. 314. See also State *v. Gray*, 91 Mo. App. 438.

3. Who Are Public Officers — Assessors. — Gannaway *v. McFall*, 109 Ill. App. 23; Springfield *v. Butterfield*, 98 Me. 156.

Auditor of Public Accounts. — Hager *v. Shuck*, (Ky. 1905) 87 S. W. Rep. 301.

City Chamberlain. — Matter of Haase, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 114, affirmed 88 N. Y. App. Div. 242.

Clerk in County Clerk's Office. — People *v.*

325. II. CLASSIFICATION — 1. With Reference to Duties. — See note a.**326. a. EXECUTIVE OFFICERS. — See note 1.**

Hamilton, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 577, *affirmed* 98 N. Y. App. Div. 59.

Clerks of Court. — See *State v. Scow*, 93 Minn. 11.

Commissioner of Public Works. — *Chicago v. McKechney*, 205 Ill. 372.

Commissioners to Organize Counties and Their Clerks. — *Taylor v. Big Horn County*, 11 Wyo. 106.

County Clerk. — *Horstman v. Adamson*, 101 Mo. App. 119.

County Surveyor. — *Watkins v. Havighorst*, 13 Okla. 128.

County Treasurer. — *Poole v. Burnet County*, 97 Tex. 77. See also *State v. Adams*, 101 Mo. App. 468.

Court Crier. — *Matter of Buhler*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 140.

Court Stenographer. — See *State v. Ledwidge*, 27 Mont. 197.

Deputy Constable. — *State v. Gray*, 91 Mo. App. 438.

Detective Sergeant. — *Grinnell v. Weston*, 95 N. Y. App. Div. 454.

Directors of Irrigation District. — *Hertle v. Ball*, 9 Idaho 193.

Dockmaster. — *Alsberge v. New York*, 75 N. Y. App. Div. 360; *Conlin v. Board of Education*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 125.

Excise Commissioners. — *Schwarz v. Dover*, 70 N. J. L. 502.

Judges. — *Com. v. Mathues*, 210 Pa. St. 383.

License Commissioners. — *Cook v. Springfield*, 184 Mass. 247; *Sargent v. Little*, 72 N. H. 555.

Member of Board of Education. — *State v. Loechner*, 65 Neb. 814.

Member of Committee Appointed to Examine Public Records. — *Chatham County v. Gaudry*, 120 Ga. 121.

Members of Canvassing Board. — *Holdermann v. Schane*, 56 W. Va. 11.

Notary Public. — *Midland Steel Co. v. Citizens Nat. Bank*, 34 Ind. App. 107; *People v. Wadhams*, 176 N. Y. 9.

Park Commissioners. — *Connor v. Manchester*, (N. H. 1905) 60 Atl. Div. Rep. 436.

Physician of State Asylum. — *Wall v. Deaf, etc.*, Asylum, 145 Cal. 468. See also *Marshall v. State Reformatory*, 201 Ill. 9.

Policeman. — *Conlin v. Board of Education*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 125; *People v. Foody*, (Ct. Gen. Sess.) 39 Misc. (N. Y.) 142.

Primary Election Inspectors. — *Rabbitt v. Garand*, 89 N. Y. App. Div. 119.

Principal Teacher in State Asylum. — *Wall v. Deaf, etc.*, Asylum, 145 Cal. 468.

Register of Deeds. — *State v. McClellan*, 113 Tenn. 616.

Revenue Agents. — *Hager v. Lucas*, (Ky. 1905) 86 S. W. Rep. 552.

Road Commissioner. — See *Bowden v. Derby*, 97 Me. 536, 94 Am. St. Rep. 516.

School Director. — *State v. Gray*, 91 Mo. App. 438.

School District Officers. — *State v. Loechner*, 65 Neb. 814; *State v. Waterhouse*, 71 N. H. 488.

School Trustee. — *Buchanan v. Graham*, 36 Tex. Civ. App. 468.

Street Commissioners. — *Connor v. Manchester*, (N. H. 1905) 60 Atl. Div. Rep. 436; *Bowden v. Derby*, 99 Me. 208.

Supervisors of Roads. — *Mial v. Ellington*, 134 N. Car. 131.

Tax Collector. — *Lake County v. Neilon*, 44 Oregon 14.

Teacher in Public School. — *Conlin v. Board of Education*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 125. But see *Murphy v. Board of Education*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 706, *affirmed* 76 N. Y. App. Div. 620.

Town Marshal. — See *Raley v. Warrenton*, 120 Ga. 365.

Treasurer of School District. — *State v. Harter*, 188 Mo. 516.

Treasurer of State Asylum. — *Wall v. Deaf, etc.*, Asylum, 145 Cal. 468.

Truant Officer. — *Featherngill v. State*, 33 Ind. App. 683.

Who Are Not Public Officers — *Attorney Appointed to Defend.* — *Hyatt v. Hamilton County*, 121 Iowa 292, 100 Am. St. Rep. 354.

Carpenter Employed by Board of Education. — *Conlin v. Board of Education*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 125.

Cashier of Mint. — *U. S. v. Cole*, 130 Fed. Rep. 614.

Clerk of Board of Aldermen. — *Martin v. New York*, 176 N. Y. 371.

Commissioner of Street Cleaning. — See *Normile v. Ballard*, 33 Wash. 369.

Complaint Clerk in Police Commissioner's Office. — *People v. McAdoo*, 98 N. Y. App. Div. 314.

County Officials. — *Hauser v. Seeley*, (S. Dak. 1904) 100 N. W. Rep. 437.

County Physician. — *People v. Shearer*, 143 Cal. 66.

Day Laborer. — *Eckerson v. New York*, 80 N. Y. App. Div. 12, *affirmed* 176 N. Y. 609.

Deputies. — *Stephenson v. Salisbury*, 53 W. Va. 366.

Engineer of City Hall. — *State v. Gray*, 91 Mo. App. 438.

Foremen and Engineers of Fire Department. — *State v. Gray*, 91 Mo. App. 438.

Jailer. — *Stephenson v. Salisbury*, 53 W. Va. 366.

Janitor of City Police Station. — *Dolan v. Orange*, 70 N. J. L. 106; *Wiggin v. Manchester*, 72 N. H. 576.

Night Watchman for Federal Building. — *State v. Gray*, 91 Mo. App. 438.

Officers of the World's Columbian Commission. — *Butt v. U. S.*, 122 Fed. Rep. 511.

Sergeant at Arms of Municipal Assembly. — *Padden v. New York*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 517.

Teachers in State Public Schools. — *State v. Gray*, 91 Mo. App. 438.

325. a. Classification. — *People v. Salisbury*, 134 Mich. 548, *citing* 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 325.

326. 1. Executive Officer Defined. — *State v. Loechner*, 65 Neb. 814.

326. *b.* LEGISLATIVE OFFICERS. — See note 2.

c. JUDICIAL OFFICERS. — See note 3.

d. MINISTERIAL OFFICERS. — See note 4.

327. 4. With Reference to Title — *a.* OFFICERS DE JURE. — See note 2.

c. USURPERS. — See note 8.

5. With Reference to Nature of Public Body — *a.* STATE OFFICERS.

— See note 11.

328. III. CREATION OF OFFICE. — See note 4.

IV. NATURE AND INCIDENTS OF PUBLIC OFFICES — LEGISLATIVE CONTROL — 2. In United States. — See note 7.

329. See note 1.

330. In North Carolina. — See note 1.

V. ELIGIBILITY — 2. Power of Legislature to Define. — See notes

2, 3, 4.

331. 5. Special Qualifications — *b.* RESIDENCE. — See note 10.

333. *c.* PROPERTY. — See notes 2, 3.

326. 2. Legislative Officer Defined. — State *v.* Loechner, 65 Neb. 814.

3. Judicial Officer Defined. — State *v.* Loechner, 65 Neb. 814.

4. Ministerial Officers. — State *v.* Loechner, 65 Neb. 814. See also Jewell Belting Co. *v.* Bertha, 91 Minn. 9.

327. 2. Officer de Jure Defined. — Stott *v.* Chicago, 205 Ill. 287, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 327.

8. State *v.* Craig, 69 Ohio St. 236.

11. Distinction Between State and Municipal Officers. — State *v.* Kohnke, 109 La. 838.

Judges of Chancery, Circuit, and Criminal Courts Are State Officers. — Colbert *v.* Bond, 110 Tenn. 370.

Presidential Electors Are State Officers. — Donegan *v.* Bird, (Ky. 1904) 80 S. W. Rep. 796.

Chief of Police Not a State Officer. — Peterson *v.* Culpepper, 72 Ark. 230.

Town Recorder Not State Officer. — State *v.* Townsend, 72 Ark. 180.

328. 4. Right of Legislature to Create. — *Ex p.* Gerino, 143 Cal. 412; Gilbert *v.* Craddock, 67 Kan. 362. See also State *v.* Porter, (Neb. 1903) 95 N. W. Rep. 769.

Creation of Municipal Officers. — Lowery *v.* Lexington, 116 Ky. 157.

Right Limited by Constitutional Provisions for Home Rule. — See Sugden *v.* Partridge, 174 N. Y. 87.

Question of Increasing Judiciary May Be Left to Legislative Discretion. — People *v.* Knopf, 198 Ill. 340.

Right of Municipality to Create Limited by Charter. — O'Connor *v.* Walsh, 83 N. Y. App. Div. 179.

Manifest Intention to Create Essential. — Grieb *v.* Syracuse, 94 N. Y. App. Div. 133.

Legislature May Be Constrained to Create Office to Be Filled by Election. — *Ex p.* Lewis, 45 Tex. Crim. 1, 107 Am. St. Rep. 970.

Office Cannot Be Created by Appropriation for Officers' Pay. — Moon *v.* Champaign, 214 Ill. 40.

7. Legislative Control. — Matter of Carter, 141 Cal. 316; Dallis *v.* Griffin, 117 Ga. 408; People *v.* Barrett, 203 Ill. 109, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 328; Tucker *v.* State, 163 Ind. 403; Goodrich *v.* Mitchell, 68 Kan. 765, 104 Am. St. Rep. 429; People *v.*

Coler, 173 N. Y. 103; Christy *v.* Kingfisher, 13 Okla. 585; Thomas *v.* State, 17 S. Dak. 579; Johnson *v.* Black, 103 Va. 477, 106 Am. St. Rep. 890; State *v.* Policemen's Pension Fund, 121 Wis. 49, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 328; Taylor *v.* Big Horn County, 11 Wyo. 106. Compare Territory *v.* Albright, (N. Mex. 1904) 78 Pac. Rep. 204, holding that removal from office "deprives the possessor of a valuable private right." See further *infra*, this title, **420**, 2.

Offices Not Hereditaments. — Mial *v.* Ellington, 134 N. Car. 131; Maxwell *v.* Fire Com'rs, 139 Cal. 229.

No Property Right in Office. — People *v.* Folks, 89 N. Y. App. Div. 171; People *v.* Howe, 177 N. Y. 499.

Word "Contract" Loosely Used. — See Keen *v.* Featherston, 29 Tex. Civ. App. 563.

Right Incorporal. — Nelson *v.* Sneed, 112 Tenn. 36.

329. 1. Effect of Constitutional Restrictions. — People *v.* Barrett, 203 Ill. 109, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 328 [329].

330. 1. North Carolina Doctrine. — In Mial *v.* Ellington, 134 N. Car. 131, the doctrine of Hoke *v.* Henderson, 4 Dev. L. (15 N. Car.) 1, 25 Am. Dec. 704, and of the cases following that decision was expressly overruled.

2. Power of Legislature to Define. — Sheehan *v.* Scott, 145 Cal. 684.

Qualifications May Be Implied from Office. — Fordyce *v.* State, 115 Wis. 608.

3. Fordyce *v.* State, 115 Wis. 608.

4. Constitutional Qualifications Binding upon Legislature. — Swincher *v.* Com., 72 S. W. Rep. 306, 24 Ky. L. Rep. 1897; State *v.* Acton, 31 Mont. 37. See also Sheehan *v.* Scott, 145 Cal. 684; Fordyce *v.* State, 115 Wis. 608.

331. 10. Residence. — Sheehan *v.* Scott, 145 Cal. 684; Matter of Buhler, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 140.

Residence Not Required as Qualification. — Territory *v.* Albright, (N. Mex. 1904) 78 Pac. Rep. 204.

333. 2. People *v.* Davis, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 397 (village officer).

3. Required to Be Resident Taxpayer. — State *v.* Fasse, 189 Mo. 532.

333. *f.* RIGHT TO VOTE. — See note 4.

6. Disqualifications — *b.* HOLDING INCOMPATIBLE OFFICES — (1) *In General.* — See note 8.

334. (4) *Incompatible State Offices.* — See notes 6, 21, 37.

335. (5) *Incompatible Federal and State Offices.* — See note 3.

336. (7) *Offices Not Incompatible* — (a) *State Offices.* — See note 29a.

(b) *Federal and State Offices.* — See note 31.

337. *d.* CONVICTION OF CRIME. — See notes 8, 9, 11.

Failure to Account for Public Money. — See note 16.

338. *h.* INTEREST. — See note 3.

7. Removal of Disqualifications. — See notes 12, 16.

8. Effect of Electing Ineligible Person. — See note 17.

339. 9. Evidence. — See note 4.

VI. METHODS OF CONFERRING OFFICE — 3. By Appointment —

a. DEFINITION — Distinguished from Election. — See note 13.

340. Change in Rank. — See note 5.

b. APPOINTING POWER — (1) *In General.* — See note 7.

(2) *Power of Legislature* — (a) *To Make Appointments.* — See note 10.

341. Constitutional Provision that Offices Be Filled as Directed by Law. — See note 3.

333. 4. Right to Vote. — *Ward v. Crowell*, 142 Cal. 587; *Sheehan v. Scott*, 145 Cal. 684.

Right to Vote and Right to Hold Office Not to Be Confused. — *Fordyce v. State*, 115 Wis. 608.

8. Constitutional Limitations on Right to Hold More than One Office. — *Goodrich v. Mitchell*, 68 Kan. 765, 104 Am. St. Rep. 429.

Statutory Provisions Against Holding Two Offices. — See *Com. v. Mathues*, 210 Pa. St. 383.

Separate Offices May Be Held When Not Incompatible. — *Allen v. Burrows*, 69 Kan. 821.

Municipal Officers Not Within Constitutional Prohibition. — *State v. Townsend*, 72 Ark. 180; *Peterson v. Culpepper*, 72 Ark. 230.

Acceptor of Incompatible Office Becomes Officer de Facto. — See the title DE FACTO OFFICERS, 789. 5.

Conferring New Powers Not Creation of New Office. — *Houston v. Stewart*, (Tex. 1905) 87 S. W. Rep. 663.

Offices Distinct Though Both Held by One Person. — *Mead v. State*, (Neb. 1905) 103 N. W. Rep. 433.

Consolidation of Offices. — See *State v. Woolfenden*, 26 Utah 167.

334. 6. See *Gilbert v. Craddock*, 67 Kan. 362 (mayor and city councilman).

21. Notary Public and Judge of Criminal Court. — *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101.

37. Assessor and County Treasurer. — *State v. Woolfenden*, 26 Utah 172.

335. 3. Incompatible Federal and State Offices. — *U. S. v. Dietrich*, 126 Fed. Rep. 676 (governor and United States senator).

336. 29a. Other State Offices Held Not to Be Incompatible are the following: attorney-general or secretary of state and member of special tribunal, *Allen v. Burrow*, 69 Kan. 821; governor and secretary of state, *State v. Grant*, 12 Wyo. 1; sheriff and chief of police, *Peterson v. Culpepper*, 72 Ark. 230; town recorder and probate judge, *State v. Townsend*, 72 Ark. 180.

State Officers May Also Be City Officers. — *State v. St. Louis*, 174 Mo. 125.

31. Retired Army Officer and Chief Clerk in

Executive Department. — *Geddes v. U. S.*, 38 Ct. Cl. 428.

337. 8. Conviction of Crime. — See *Sheridan v. St. Louis*, 183 Mo. 40.

9. Bribery. — *Gray v. Seitz*, 162 Ind. 1.

11. Duelling. — See *Goodrich v. Mitchell*, 68 Kan. 765, 104 Am. St. Rep. 429.

16. Failure to Account as Incumbent of Another Office. — *Springfield v. Butterfield*, 98 Me. 155.

338. 3. See *Potter v. Lainhart*, 44 Fla. 647.

12. Removal of Disqualification. — *Ward v. Crowell*, 142 Cal. 587.

Subsequent Removal of Disqualifications Not Sufficient. — *Sheehan v. Scott*, 145 Cal. 684.

16. *Gilbert v. Craddock*, 67 Kan. 362.

17. Effect of Electing Ineligible Person. — *Springfield v. Butterfield*, 98 Me. 156, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 338; *State v. Craig*, 69 Ohio St. 236.

339. 4. Legislative Bodies Made Judges of Qualifications of Their Members. — See *U. S. v. Dietrich*, 126 Fed. Rep. 676; *Massey v. People*, 201 Ill. 409; *People v. Fornes*, 79 N. Y. App. Div. 618, affirmed 175 N. Y. 114. See further the titles ELECTIONS, 818. 7; QUO WARRANTO, 609. 12 et seq.

13. Appointment and Election Distinguished. — *Bates v. Nome*, 1 Alaska 208. See also *Matter of Haase*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 114, affirmed 88 N. Y. App. Div. 242.

Appointment Treated as Election. — See *Vreeland v. Pierson*, 70 N. J. L. 508.

340. 5. Promotion Treated as New Appointment. — *State v. Hawes*, 177 Mo. 387.

7. United States — In People. — *Cox v. State*, 72 Ark. 94, 105 Am. St. Rep. 17.

Appointive Power Delegated Merely. — *Jones v. Sizemore*, 117 Ky. 810.

10. Legislature — Implied Power. — *Cox v. State*, 72 Ark. 94, 105 Am. St. Rep. 17, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 340; *Ex p. Lewis*, 45 Tex. Crim. 1, 107 Am. St. Rep. 970.

Power of Legislature to Appoint Investigating Committee. — See *Tipton v. Parker*, 71 Ark. 193; *Ex p. Conrades*, 185 Mo. 411.

341. 3. Offices to Be Filled as Directed by

311. Where the Constitution Has Expressly Provided that No Appointing Power Shall Be Exercised by the Legislature. — See note 7.

342. Court's Power to Review Legislative Appointments. — See note 3.

(b) To Provide Mode of Appointment. — See notes 6, 7, 11.

343. See notes 1, 3, 5.

(3) *Power of Executive.* — See note 6.

344. (4) *Power of Particular Officers or Boards.* — See note 1.

c. EXERCISE OF POWER — (1) *In General.* — See note 2.

(2) *Form of Appointment.* — See note 4.

Law. — *Matter of Allison*, 172 N. Y. 421. See also *Ex p. Gerino*, 143 Cal. 412.

311. 7. *Legislature Prohibited from Exercising Power.* — See *State v. Porter*, (Neb. 1903) 95 N. W. Rep. 769.

342. 3. *Motives Not Inquired Into.* — *Board of Education v. Territory*, 12 Okla. 286.

6. *Legislature Committing Appointment to Governor.* — *State v. Broatch*, (Neb. 1903) 94 N. W. Rep. 1016; *State v. Nolan*, (Neb. 1904) 98 N. W. Rep. 657; *Board of Education v. Territory*, 12 Okla. 286.

7. *Matter of Haase*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 114, *affirmed* 88 N. Y. App. Div. 242.

11. *Com. v. Paine*, 207 Pa. St. 45. Compare *Prince George's County v. Mitchell*, 97 Md. 330.

343. 1. *Court Appointing Judicial Officers or Officers of Court.* — *Sherman v. People*, 210 Ill. 552; *Ferguson v. Pottawattamie County*, 126 Iowa 108; *Prince George's County v. Mitchell*, 97 Md. 330; *Menella v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 5; *Robertson v. Ellis County*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1097. See also *U. S. v. McCabe*, (C. C. A.) 129 Fed. Rep. 708.

Power of Judge to Appoint Assistant Justice. — *State v. Chapelle*, 26 R. I. 375.

Power of Judge to Appoint Prosecuting Attorneys. — See *State v. Reid*, 113 La. 890.

Power to Appoint Special Commissioner. — *Louisville Public Warehouse Co. v. Miller*, (Ky. 1904) 81 S. W. Rep. 275.

Appointment by Court of Election Commissioners Ministerial Act. — *Williamson v. Mingo County Ct.*, 56 W. Va. 38.

Jurisdiction of Officers of Court Limited to That of Court. — *Choctaw Coal, etc., Co. v. Williams-Echols Dry Goods Co.*, (Ark. 1905) 87 S. W. Rep. 632.

3. *Ex p. Anderson*, 46 Tex. Crim. 372.

5. *Provisions for Local Self-government.* — *Jackson Square v. New Orleans*, 112 La. 957; *People v. Houghton*, 102 N. Y. App. Div. 209, *affirmed* 182 N. Y. 301; *Matter of Allison*, 172 N. Y. 421; *People v. Tax Com'rs*, 174 N. Y. 417; *Fay v. Partridge*, 174 N. Y. 526; *Ex p. Levine*, 46 Tex. Crim. 364; *Ex p. Lewis*, 45 Tex. Crim. 1, 107 Am. St. Rep. 970. See also *Lambert v. Norman*, 119 Ga. 351; *Sugden v. Partridge*, 174 N. Y. 87; *Brown v. Galveston*, 97 Tex. 1.

Right to Local Self-government Discretionary with Legislature. — *Adams v. Kuykendall*, 83 Miss. 571.

6. *Appointment Not Inherent Executive Function.* — *Cox v. State*, 72 Ark. 94, 105 Am. St. Rep. 17.

Constitutional Provisions Conferring Power of Appointment on Governor. — *Ross v. Chosen Freeholders*, 69 N. J. L. 143. See also *Traynor v. Beckham*, 116 Ky. 27.

Where the Constitution Provides for a gubernatorial Appointment to fill vacancies, such vacancies cannot be filled by elections. *Ferguson v. Hackett*, 74 S. W. Rep. 708, 25 Ky. L. Rep. 170.

344. 1. *Inferior Officers or Boards* — *Colorado.* — *Cutshaw v. Denver*, 19 Colo. App. 341. *Georgia.* — *Stapleton v. Perry*, 117 Ga. 561. *Illinois.* — *Stott v. Chicago*, 205 Ill. 287.

Kentucky. — *Daviess County v. Goodwin*, 116 Ky. 891; *Public Library v. Beitzer*, (Ky. 1904) 82 S. W. Rep. 421; *Shepherd v. Gambill*, 75 S. W. Rep. 223, 25 Ky. L. Rep. 333; *Erwin v. Benton*, (Ky. 1905) 87 S. W. Rep. 291.

Michigan. — *Willsie v. Ionia*, 137 Mich. 445. *Missouri.* — *State v. Badger*, 90 Mo. App. 183; *State v. Poucher*, 98 Mo. App. 109.

New Hampshire. — *Wiggin v. Manchester*, 72 N. H. 576.

New Jersey. — *Murray v. Pfeiffer*, 70 N. J. L. 768.

New York. — *In re Fitzgerald*, (County Ct.) 82 N. Y. Supp. 811; *Matter of Haase*, 88 N. Y. App. Div. 242; *People v. Scholer*, 94 N. Y. App. Div. 282, *affirmed* 179 N. Y. 602; *Canaseraga v. Green*, (County Ct.) 88 N. Y. Supp. 539.

Ohio. — *State v. Hall*, 25 Ohio Cir. Ct. 361. *Pennsylvania.* — *Com. v. Pedder*, 208 Pa. St. 28.

Rhode Island. — *Ney v. Whitley*, 26 R. I. 464.

Tennessee. — *Gotten v. Gowen*, 113 Tenn. 174; *Oak Cliff v. Eitheridge*, (Tex. Civ. App. 1903) 76 S. W. Rep. 602.

Utah. — *State v. Sheets*, 26 Utah 109.

Washington. — *Smith v. Sullivan*, 33 Wash. 30.

Power of Grand Jury to Appoint Committees to Examine Public Records. — *Chatham County v. Gaudry*, 120 Ga. 121.

Appointment and Confirmation Cannot Create Office. — *Moon v. Champaign*, 214 Ill. 40.

2. *Exercise Must Conform to Statute.* — *Arkadelphia Lumber Co. v. Asman*, 72 Ark. 320; *People v. Burch*, 79 N. Y. App. Div. 156; *Smith v. Sullivan*, 33 Wash. 30. See also *State v. Stroble*, 25 Ohio Cir. Ct. 762.

Must Be Intent to Appoint. — See *Murrey v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 349.

Acts under Invalid Appointment Void. — *Perry County v. Engle*, 116 Ky. 594.

4. *Writing Necessary.* — *Shepherd v. Common School Dist. No. 2*, 76 S. W. Rep. 1084, 25 Ky. L. Rep. 1072.

Certificates of Appointment Generally Issued. — *Matter of Brearton*, (Supm. Ct. Spec. T.) 44

- 345.** When Appointment Complete. — See note 2.
 No Particular Form of Writing Is Required. — See note 3.
 A Commission Is Not Conclusive. — See note 9.
 (3) *Appointments by Collective Bodies.* — See note 11.
- 346.** See notes 2, 4.
 (4) *Confirmation of Appointment.* — See notes 7, 8, 9, 10.
- 347.** (5) *Time of Appointment.* — See note 6.
- 348.** See note 1.
 (6) *Delegation of Appointing Power.* — See notes 2, 3
 (7) *Ratification of Unauthorized Appointments* — See note 4
 (8) *Rescinding Appointments.* — See note 6.
 d. WHO MAY BE APPOINTED TO OFFICE — Public Policy. — See note 8.
- e. FILLING VACANCIES — (1) *In General.* — See note 11.
- 349.** (2) *When Vacancy Exists* — (a) *In General.* — See notes 1, 2.
 New Office. — See note 3.
 Termination of Term. — See note 5.
 The Failure of an Elected Candidate to Qualify. — See note 7.
- Misc. (N. Y.) 247. See also *Rosen v. Voorhis*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 605.
 Oral Appointment May Create Officer de Facto. — *Canaseraga v. Green*, (County Ct.) 88 N. Y. Supp. 539.
- 345.** 2. Requirement that Appointments Be Filed Directory Merely. — *Orchard v. Peake*, 69 Kan. 510.
3. Implied Appointment. — See *State v. Hawes*, 177 Mo. 360.
 9. *State v. Badger*, 90 Mo. App. 183.
11. Selection by Majority. — *People v. Wright*, 30 Colo. 439.
- 346.** 2. *Com. v. Fleming*, 23 Pa. Super. Ct. 404.
4. Notice of Meeting. — *Saunders v. O'Bannon*, (Ky. 1905) 87 S. W. Rep. 1105.
 Notice of Adjourned Meeting Unnecessary. — *Com. v. Fleming*, 23 Pa. Super. Ct. 404.
7. Consent of Court. — See *Horstman v. Adanson*, 101 Mo. App. 119.
 Consent of Voters Present. — *Collins v. Masden*, 74 S. W. Rep. 720, 25 Ky. L. Rep. 81.
- Confirmation May Be Required for Original Appointments. — *Watkins v. Mooney*, 114 Ky. 646.
8. Consent of Senate, Etc. — *Thomas v. State*, 17 S. Dak. 579. See also *Murphy v. U. S.*, 38 Ct. Cl. 511; *In re Advisory Opinion to Governor*, 45 Fla. 154.
9. Consent of City Council. — *In re Fitzgerald*, (County Ct.) 82 N. Y. Supp. 811; *State v. Sheets*, 26 Utah 109.
10. *State v. Lyons*, 70 N. J. L. 114.
- Majority Vote of Council Required. — *State v. Sheets*, 26 Utah 109.
- 347.** 6. Appointment May Be Made in Anticipation of Vacancy. — See *Houston v. Mahoney*, 36 Tex. Civ. App. 45.
- 348.** 1. Provisions as to Time Directorv. — *Feathergill v. State*, 33 Ind. App. 683; *State v. Badger*, 90 Mo. App. 183. But see *Board of Education v. Territory*, 12 Okla. 286.
- Discretion in Appointment. — See *People v. Swanstrom*, 79 N. Y. App. Div. 94.
2. Power of Legislature to Delegate. — See *Ex p. Gerino*, 143 Cal. 412.
3. *Hayden v. U. S.*, 38 Ct. Cl. 39.
4. Ratification. — *Thomas v. State*, 17 S. Dak. 579. Compare *People v. Partridge*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 697.
6. Rescission. — *In re Fitzgerald*, (County Ct.) 82 N. Y. Supp. 811.
8. Appointment of Person Exercising Appointing Power. — See *State v. Craig*, 69 Ohio St. 236.
11. Power of Governor to Fill Vacancies. — *Ex p. Gerino*, 143 Cal. 412; *Territory v. Gutierrez*, (N. Mex. 1904) 78 Pac. Rep. 139.
- Power of Court to Fill Vacancies in Emergencies. — *State v. Givens*, (Fla. 1904) 37 So. Rep. 308.
- Power of County Board to Fill Vacancies. — *State v. Fulton*, 37 Wash. 271.
- Vacancy in Nominations. — *State v. Hays*, 31 Mont. 227.
- 349.** 1. When Office Vacant. — *Combs v. Eversole*, (Ky. 1905) 86 S. W. Rep. 560; *State v. Acton*, 31 Mont. 37; *State v. Grant*, 12 Wyo. 1.
- Ineligible Candidate Elected to Legislature — New Election Necessary. — *Sheridan v. St. Louis*, 183 Mo. 40.
- Appointment of Ineligible Person Creates Vacancy. — *State v. Craig*, 69 Ohio St. 236.
- Vacancy by Tie Vote in Election. — *Matter of Travis*, 87 N. Y. App. Div. 554.
- Vacancy Not Created by Mere Declaration to That Effect. — See *Atty.-Gen. v. Remick*, (N. H. 1904) 58 Atl. Rep. 871.
- Vacancy Not Created by Mere Qualification of Successor. — *Finley v. Combs*, 12 Okla. 497.
2. *Shepherd v. Gambill*, 75 S. W. Rep. 223, 25 Ky. L. Rep. 333; *State v. Acton*, 31 Mont. 37; *State v. McBride*, 29 Wash. 335.
3. Vacancy in New Office. — *State v. Burkhead*, 187 Mo. 14; *State v. Trewhitt*, 113 Tenn. 561.
5. Expiration of Term. — *People v. Wright*, 30 Colo. 439; *Terry v. Hargis*, 74 S. W. Rep. 271, 24 Ky. L. Rep. 2498; *Matter of Haase*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 114, *affirmed* 88 N. Y. App. Div. 242.
7. Failure to Qualify. — *Adams v. Doyle*, 139 Cal. 678; *Stewart v. Riverside Tp.*, 68 N. J. L. 571; *People v. Potter*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 485, *affirmed* 88 N. Y. App. Div. 239; *Gouhenour v. Anderson*, 35 Tex. Civ. App. 569.

350. Accepting Incompatible Office. — See note 4.

Resignation. — See notes 5, 7.

Statutory Provisions. — See notes 8, 11, 12, 13.

351. (c) Determination as to Existence of Vacancy. — See note 4.**VII. TITLE TO OFFICE — 1. In General** — Title Necessary to Support Action.

— See note 6.

2. Method of Determining Title. — See notes 8, 9, 10.**352. See notes 1, 2, 3.****3. Rights Pending Contest.** — See note 4.**No Vacancy Where Statutes Regarded as Directory.** — *Buchanan v. Graham*, 36 Tex. Civ. App. 468.**Vacancy from Failure to File New Bond.** — *Cochise County v. Rilter*, 3 Ariz. 208.**Provisions Declaring Vacancy.** — In *Jones v. Sizemore*, 117 Ky. 810, a statute providing that failure to qualify before the first day of the term should create a vacancy was held to have no application to appointments to fill vacancies.**350. 4. Accepting Incompatible Office.** — *Gilbert v. Craddock*, 67 Kan. 362; *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101.**5. Resignation.** — See *Combs v. Eversole*, (Ky. 1905) 86 S. W. Rep. 560.**7. See Keen v. Featherston, 29 Tex. Civ. App. 563.****8. Statutes Regulating Vacancies.** — *Stewart v. Riverside Tp.*, 68 N. J. L. 571; *Zeliff v. Whritenour*, 69 N. J. L. 224.**Vacancy by Abolition of District.** — *State v. Akin*, 112 Tenn. 603.**Sheriff's Office Vacated by Lynching of Prisoner.** — *State v. Dudley*, 161 Ind. 431.**11. Local Offices — Change of Residence.** — *Matter of Buhler*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 140. See also *Zeliff v. Whritenour*, 69 N. J. L. 224.**No Vacancy from Removal by Operation of Law.** — *Stewart v. Riverside Tp.*, 68 N. J. L. 571. See also *Territory v. Albright*, (N. Mex. 1904) 78 Pac. Rep. 204 (creation of new county).**12. Absconding.** — See *Wright v. Jacobs*, 12 Okla. 138.**13. Effect of Statutory Enumeration.** — *Compare Zeliff v. Whritenour*, 69 N. J. L. 224.**351. 4. Territory v. Albright, (N. Mex. 1904) 78 Pac. Rep. 204. See also *Shepherd v. Gambill*, 75 S. W. Rep. 223, 25 Ky. L. Rep. 333.****6. Plaintiff Must Recover on Strength of His Own Title.** — *Coghlan v. Alpers*, 140 Cal. 648; *State v. Wheatley*, 160 Ind. 183; *Watson v. McGrath*, 111 La. 1097. See also *State v. Tansey*, 161 Ind. 491.**Where State Is Plaintiff Defendant Must Justify.** — *People v. Stratton*, 33 Colo. 464; *Garms v. People*, 108 Ill. App. 631; *Stack v. Com.*, (Ky. 1904) 81 S. W. Rep. 917; *State v. Fasse*, 189 Mo. 532.**Public Interest Involved in Contest for Office.** — *Sweeny v. Adams*, 141 Cal. 558.**Right of Elector to Take Proceedings Against Wrongful Incumbent.** — *Maddux v. Walthall*, 141 Cal. 412.**8. In South Carolina**, the writ of quo warranto having been abolished, the proceedings are an action by summons and complaint. *State v. Rice*, 66 S. Car. 1.**Habeas Corpus Not Proper Remedy.** — *Ex p. Gerino*, 143 Cal. 412; *Smith v. Sullivan*, 33 Wash. 30. And see the titles ELECTIONS, 815. 11; HABEAS CORPUS, 155. 4.**Prohibition Not Proper Remedy.** — *Board of Education v. Holt*, 54 W. Va. 167; *Moore v. Holt*, 55 W. Va. 507. And see the titles ELECTIONS, 815. 6; PROHIBITION, 229. 6.**Certiorari Not Proper Remedy.** — *Anderson v. Morton*, 21 App. Cas. (D. C.) 444. *Compare Staples v. Brown*, 113 Tenn. 639.**9. In Cases arising under the Civil Service and Veteran Act**, in *New York*, it has been held that mandamus has taken the place of quo warranto. *Jones v. Willcox*, 80 N. Y. App. Div. 167.**10. Injunction Not Proper Remedy.** — *Little v. Bessemer*, 138 Ala. 127; *Deemar v. Boyne*, 103 Ill. App. 464; *Marshall v. State Reformatory*, 201 Ill. 9; *People v. Rose*, 211 Ill. 252; *Schmohl v. Williams*, 215 Ill. 63; *Landes v. Walls*, 160 Ind. 216; *Smith v. Doyle*, 76 S. W. Rep. 519, 25 Ky. L. Rep. 958; *People v. Howe*, 177 N. Y. 499; *Board of Education v. Territory*, 12 Okla. 286; *Howe v. Dunlap*, 12 Okla. 467; *State v. Rice*, 66 S. Car. 1. And see the title ELECTIONS, 816. 3 *et seq.***352. 1. Not Subject to Collateral Attack.** — *Williamson v. Lake County*, 17 S. Dak. 353; *Boesch v. Byron*, (Tex. Civ. App. 1904) 83 S. W. Rep. 18; *Standard Gold Min. Co. v. Byers*, 31 Wash. 100. See also *Greene v. Knox*, 175 N. Y. 432.**2. Proceeding to Recover Official Property Not Proper Method to Try Title.** — *In re Fitzgerald*, (County Ct.) 82 N. Y. Supp. 811; *Matter of Brearton*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 247.**3. Title Not Determined in Action for Fees.** — *State v. Moores*, (Neb. 1904) 99 N. W. Rep. 504; *Van Sant v. Atlantic City*, 68 N. J. L. 449.**Title Not Determined in Action by Taxpayer to Enjoin Payment of Salaries.** — *Greene v. Knox*, 175 N. Y. 432.**4. Rights Pending Determination of Lower Court.** — *Anderson v. Browning*, 140 Cal. 222; *Wilson v. Fisher*, 140 Cal. 188; *Bradley v. Georgetown*, (Ky. 1904) 82 S. W. Rep. 303; *Matter of Brearton*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 247; *Nelson v. Sneed*, 112 Tenn. 36; *State v. Kersten*, 118 Wis. 287. See also *Wilson v. Fisher*, 140 Cal. 188; *Rabbitt v. Garand*, 89 N. Y. App. Div. 119.**Effect of Nonissuance of Certificate of Election.** — See *Scales v. Faulkner*, 118 Ga. 152.**Mandatory Injunction to Compel Issuance of Certificate of Election.** — *Bennett v. Richards*, (Ky. 1904) 83 S. W. Rep. 154.

352. VIII. ACCEPTANCE AND QUALIFICATION — 1. Acceptance — *a.* NECESSITY OF ACCEPTANCE. — See note 6.

353. See note 2.

b. DUTY OF APPOINTEE OR OFFICER-ELECT TO ACCEPT. — See note 8.

354. 2. Qualification — *a.* DEFINITION. — See note 4.

b. NECESSITY OF QUALIFYING AND EFFECT OF OMISSION —

(1) *Qualification Condition Precedent to Holding Office.* — See note 5.

(2) *Presumption of Qualification.* — See note 8.

355. See note 2.

(3) *Effect of Failure to Qualify* — (a) *Official Acts of Officer as to Public and Third Persons.* — See notes 3, 4.

(b) *As to Rights of Officer.* — See note 5.

356. (c) *As to Tenure of Predecessor in Office.* — See note 2.

(4) *Time Within Which Officer Must Qualify.* — See note 3.

Effect of Contest. — See notes 5, 8, 9.

357. (5) *Effect of Failure to Qualify Within Prescribed Time.* — See notes 1, 2, 3, 4, 5.

Where Statute Declares Vacancy. — See note 6.

358. See note 1.

Statute Requiring Qualification Within Prescribed Time Mandatory. — See notes 5, 6.

352. 6. Acceptance Prerequisite to Holding of Office. — U. S. v. Dietrich, 126 Fed. Rep. 676.

353. 2. Acceptance May Be Implied. — U. S. v. Dietrich, 126 Fed. Rep. 676.

8. Compare U. S. v. Dietrich, 126 Fed. Rep. 676; State v. Porter, (Neb. 1903) 95 N. W. Rep. 769; State v. Dewey, (Neb. 1905) 102 N. W. Rep. 1015; State v. Frazier, 114 Tenn. 516.

354. 4. *In re Fitzgerald*, (County Ct.) 82 N. Y. Supp. 811.

5. Compliance with Statute Condition Precedent to Employment. — Featherngill v. State, 33 Ind. App. 683; State v. Wheatley, 160 Ind. 183; State v. Gray, 91 Mo. App. 438.

8. Presumption of Qualification. — Williams v. U. S., (Indian Ter. 1904) 88 S. W. Rep. 334; Montgomery v. Chelf, (Ky. 1904) 82 S. W. Rep. 388, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 354.

355. 2. See Stott v. Chicago, 205 Ill. 287.

3. Effect of Failure to Qualify. — U. S. v. Dietrich, 126 Fed. Rep. 676; Montgomery v. Chelf, (Ky. 1904) 82 S. W. Rep. 388, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 355; U. S. Fidelity, etc., Co. v. Board of Education, (Ky. 1905) 86 S. W. Rep. 1120, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 355; Powers v. State, 83 Miss. 691; Akers v. Kolkmeier, 97 Mo. App. 520; Mt. Vernon v. Kenlon, 97 N. Y. App. Div. 191; Williamson v. Lake County, 17 S. Dak. 353; Houston v. Estes, 35 Tex. Civ. App. 99. See also Springfield v. Butterfield, 98 Me. 156.

4. U. S. Fidelity, etc., Co. v. Board of Education, (Ky. 1905) 86 S. W. Rep. 1120, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 355.

5. Qualification Necessary to Recovery of Compensation. — Williamson v. Lake County, 17 S. Dak. 353.

356. 2. Failure to Qualify as Affecting Predecessor's Tenure. — See State v. Wheatley, 160 Ind. 183.

3. Time for Qualifying. — *In re Fitzgerald*, (County Ct.) 82 N. Y. Supp. 811. See also Gilbert v. Craddock, 67 Kan. 362.

Reasonable Time. — See Shepherd v. Gambill, 75 S. W. Rep. 223, 25 Ky. L. Rep. 333.

5. Contest Extends Time for Qualifying. — Gilbert v. Craddock, 67 Kan. 362; Murdoch v. Strange, 99 Md. 89.

8. See Gilbert v. Craddock, 67 Kan. 362; Murdoch v. Strange, 99 Md. 89.

9. Reasonable Time After Judicial Determination of Controversy. — Rich v. McLaurin, 83 Miss. 95.

357. 1. Oath. — Massey v. People, 201 Ill. 409; Matter of Drury, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 288; Buchanan v. Graham, 36 Tex. Civ. App. 468.

Oath Mailed but Not Filed by Clerk Does Not Create Vacancy. — Click v. Sample, 73 Ark. 194.

2. Bond. — Mt. Vernon v. Kenlon, 97 N. Y. App. Div. 191; Houston v. Estes, 35 Tex. Civ. App. 99.

3. Statutes Directory. — Buchanan v. Graham, 36 Tex. Civ. App. 468.

4. Compliance After Prescribed Time Sufficient. — Massey v. People, 201 Ill. 409; Matter of Drury, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 288.

No Oath or Bond Required until Certificate of Election Issued. — Gilbert v. Craddock, 67 Kan. 362.

5. Ground for Forfeiture. — Rosell v. Board of Education, 68 N. J. L. 498.

Omission Prima Facie Evidence of Refusal to Serve. — Matter of Drury, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 288.

Failure to Take Oath Criminal Offense. — Featherngill v. State, 33 Ind. App. 683.

6. Statutes Declaring Vacancy Held Directory. — Massey v. People, 201 Ill. 409.

358. 1. Matter of Drury, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 288.

5. Statute Prescribing Time Mandatory. — State v. Box, 34 Tex. Civ. App. 435.

359. *c.* OATH OF OFFICE — (1) *Power of Legislature to Prescribe Official Oaths* — Where Constitution Prescribes Form of Oath. — See note 6.

360. (4) *Duty to Administer.* — See notes 2, 3.

(5) *Form of Oath and Manner of Taking* — (c) *Necessity of Oath Being in Writing and Recorded.* — See note 8.

361. *d.* OFFICIAL BONDS — (1) *Power of Legislature to Require Bond.* — See notes 3, 4.

(2) *Necessity of Giving Bond.* — See note 5.

(3) *Form of Bond as Affecting Right to Office.* — See note 7.

(4) *Approval* — (a) *Necessity of Approval.* — See note 9.

363. (f) *Powers and Duties of Officer Charged with Approval.* — See note 2.

Compelling Officer to Act by Mandamus. — See note 5.

IX. AUTHORITY, POWERS, RIGHTS, AND DUTIES OF PUBLIC OFFICERS

— 1. *In General.* — See note 11.

364. 2. *Presumption as to Possession of Authority and Performance of Duty.* — See note 1.

365. 3. *Implied Powers.* — See note 1.

5. *When Performance of Duties Mandatory.* — See note 3.

358. 6. *Refusal to Qualify Deemed Forfeiture by Statute.* — *Gilbert v. Craddock*, 67 Kan. 362.

359. 6. *Requirement of Sworn Statement of Election Expenses Unconstitutional.* — *Stryker v. Churchill*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 578.

Requirement that Candidate Shall Declare His Purpose to Become Such Unconstitutional. — *Dapper v. Smith*, (Mich. 1904) 101 N. W. Rep. 60.

360. 2. *Duty to Administer Oath.* — *Low v. State*, 111 Tenn. 81.

3. *Huey v. Jones*, 140 Ala. 479.

8. See *Smartt v. State*, 112 Tenn. 539.

361. 3. *Bond Required to Be Joint and Several.* — *Barker v. Glendore*, (Neb. 1904) 99 N. W. Rep. 548.

Bond of State Treasurer's Clerk Not Official. — *Jackson v. Marton*, 136 N. Car. 196.

4. *Power to Require Additional Bonds.* — See *Baker County v. Huntington*, (Oregon 1905) 79 Pac. Rep. 187.

5. *Two Bonds Required in Order to Hold Two Positions.* — *German v. Highland Park School Dist.* No. 46, 117 Ky. 907.

7. *Statute Giving Effect to Bond in Accordance with Intent.* — See *U. S. Fidelity, etc., Co. v. Union Trust, etc., Co.*, (Ala. 1905) 38 So. Rep. 177.

May Be Valid as Common-law Bond. — *Buhrer v. Baldwin*, 137 Mich. 263.

Condition Held to Be Sufficient. — See *Smith v. Randlette*, 98 Me. 86.

9. *Bond of Municipal Officer Valid Without Approval by Mayor.* — See *Oakland v. Snow*, 145 Cal. 419.

Approval of Bond in Absence of Regular Officer. — See *Com. v. Ginn*, (Ky. 1905) 85 S. W. Rep. 688.

363. 2. *Duty to Approve Sufficient Bond.* — *Smith v. Randlette*, 98 Me. 86.

Neglect of Approving Body Cannot Affect Candidate Who Has Duly Qualified. — *In re Fitzgerald*, (County Ct.) 82 N. Y. Supp. 811.

5. *Mandamus Will Lie to Compel Approval.* — *Gouhenour v. Anderson*, 35 Tex. Civ. App. 569.

Mandamus Lies to Compel Court to Relieve from Bond. — *U. S. Fidelity, etc., Co. v. Peebles*, 100 Va. 585.

11. *Powers and Duties Prescribed by Law.* — *Railroad Tax Cases*, 136 Fed. Rep. 233; *McMurray v. Wright*, 19 Colo. App. 17; *Gardner v. Knox County*, 161 Ind. 149; *Moss v. Sugar Ridge Tp.*, 161 Ind. 417; *Patton v. Cass County*, 13 N. Dak. 351; *Poole v. Burnet County*, 97 Tex. 77.

Power of Legislature to Change Powers and Duties. — *Sayer v. Brown*, 119 Ga. 539; *Prince George's County v. Mitchell*, 97 Md. 330.

Act Imposing Additional Powers Void as Special Legislation. — *State v. Scott*, (Neb. 1904) 100 N. W. Rep. 812.

Officer Presumed to Know Nature and Duties of Office. — *Edwards v. McLean*, 23 Pa. Super. Ct. 43.

Right to Be Supplied with General Statutes of State. — *Marsh v. Stonebraker*, (Neb. 1904) 98 N. W. Rep. 699.

Same Officer or Body Cannot Act in Different Capacities with Respect to Same Subject-matter. — *Allen v. Burrow*, 69 Kan. 821.

Authorities and Duties of Municipal Officers. — *Draper v. Fall River*, 185 Mass. 142; *Matthews v. Cotton*, 83 Miss. 472; *Atty-Gen. v. Remick*, (N. H. 1904) 58 Atl. Rep. 871; *Galveston v. Hutches*, (Tex. Civ. App. 1903) 76 S. W. Rep. 214; *State v. Taylor*, 36 Wash. 607.

Powers and Duties of Secretary of State. — *Boyd v. Dunbar*, 44 Oregon 380.

Power of Investigating Committee of House of Delegates to Call Witnesses. — *Matter of Conrades*, 112 Mo. App. 21.

Duties of Corporation Counsel. — *Donahue v. Keshan*, 91 N. Y. App. Div. 602.

364. 1. *Presumption in Favor of Official Acts.* — *State v. Woolfenden*, 26 Utah 172, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 364.

365. 1. *Necessary Incidental Powers Implied.* — *Ormond v. Ball*, 120 Ga. 916; *Riggins v. Richards*, 97 Tex. 229. See also *State v. Carter*, 67 Ohio St. 422.

3. *"May" Construed "Must."* — *Pierson v. People*, 204 Ill. 456. See also *U. S. v. Saunders*, (C. C. A.) 124 Fed. Rep. 124; *Roth v. Ness County*, 69 Kan. 667; *Knowles's Petition*, (R. I. 1897) 57 Atl. Rep. 303; *Keen v. Featherston*, 29 Tex. Civ. App. 563.

- 365.** 6. Time and Manner of Performing Duties. — See note 4.
 7. Territorial Jurisdiction. — See note 5.
366. 8. Delegation of Authority. — See note 1.
 9. Exercise of Authority by Official Body — *a.* IN GENERAL. — See note 7.
b. MAJORITY ACTION. — See note 8.
367. See notes 1, 2, 3.
c. WHEN ONLY TWO PERSONS CONSTITUTE BODY. — See note 4.
368. *e.* DISTINCTION AS TO EXERCISE OF MINISTERIAL AND JUDICIAL AUTHORITY. — See note 1.

"Shall" Construed as Mandatory. — Matter of Smith, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 384.

"Shall" Not Necessarily Mandatory. — Thompson v. Alameda, 144 Cal. 281.

Duties of Officer Not Affected by Contracts with Third Persons. — State v. Ledwidge, 27 Mont. 197.

365. 4. Statutes Prescribing Time and Manner Directory. — Hendershot v. State, 162 Ind. 69; Brown v. Street Lighting Dist. No. 1, 70 N. J. L. 762.

5. Territorial Limits of Officer's Authority. — In re Jewett, 69 Kan. 830; Ex p. Sykes, 46 Tex. Crim. 51.

366. 1. What Powers May Be Delegated — United States. — Butfield v. Stranahan, 192 U. S. 470; Bishop v. U. S., 38 Ct. Cl. 473.

Arkansas. — Little Rock v. North Little Rock, 72 Ark. 195.

California. — Webster v. Board of Education, 140 Cal. 331.

District of Columbia. — See McGowan v. Moody, 22 App. Cas. (D. C.) 148.

Georgia. — Tietjen v. Merchants' Nat. Bank, 117 Ga. 501.

Illinois. — Carbondale v. Wade, 106 Ill. App. 654.

Kentucky. — Com. v. Genn, (Ky. 1905) 85 S. W. Rep. 688.

Minnesota. — Jewell Belting Co. v. Bertha, 91 Minn. 9; Townsend v. Underwood's Second Addition, 91 Minn. 242.

Missouri. — Heman Constr. Co. v. Loevy, 179 Mo. 455.

New Jersey. — Moreau v. Chosen Freeholders, 68 N. J. L. 480.

New York. — People v. Coler, 173 N. Y. 103.

North Carolina. — State v. Garland, 134 N. Car. 749.

Oklahoma. — Canada v. Territory, 12 Okla. 409.

Pennsylvania. — See Clothier v. Philadelphia, 22 Pa. Super. Ct. 608; Logan v. Rochester Tp., 21 Pa. Super. Ct. 113.

Texas. — Mahon v. State, 46 Tex. Crim. 234.

Official Signature. — New Iberia v. Moss Hotel Co., 112 La. 525. See also City St. Imp. Co. v. Rontet, 140 Cal. 55.

7. Independent Action Invalid. — Akerman v. Ford, 116 Ga. 473; Burge v. Rockwell City, 120 Iowa 495; Western Wheeled Scraper Co. v. Butler Tp., 24 Pa. Super. Ct. 477. See also Fayette County v. Krause, 31 Tex. Civ. App. 569.

8. Right of Majority to Act. — Burge v. Rockwell City, 120 Iowa 495; Murdoch v. Strange,

99 Md. 89; Boston v. Doyle, 184 Mass. 373; Blackwell v. Thayer, 101 Mo. App. 661; John v. Connell, (Neb. 1904) 98 N. W. Rep. 457; Wallace v. Jones, 83 N. Y. App. Div. 152; Western Wheeled Scraper Co. v. Butler Tp., 24 Pa. Super. Ct. 477; Riggins v. Richards, 97 Tex. 229; Cunningham v. Board of Education, 53 W. Va. 318; Kavanaugh v. Wausau, 120 Wis. 611.

Disqualification of One of Three Prevents Action. — Springfield v. Butterfield, 98 Me. 155; King's Lake Drainage, etc., Dist. v. Jamison, 176 Mo. 557.

Omission of Minority to Vote Immaterial. — Atty.-Gen. v. Remick, 71 N. H. 480; Com. v. Fleming, 23 Pa. Super. Ct. 404.

Participation of Whole Board Required. — State v. Frazier, 114 Tenn. 516.

367. 1. Notice to All Sufficient. — Burge v. Rockwell City, 120 Iowa 495; Decker v. School Dist. No. 2, 101 Mo. App. 115; Cunningham v. Board of Education, 53 W. Va. 318.

What Constitutes Notice. — See Click v. Sample, 73 Ark. 194; Shepherd v. Gambill, 75 S. W. Rep. 223, 25 Ky. L. Rep. 333; Saunders v. O'Bannon, (Ky. 1905) 87 S. W. Rep. 1105.

Failure to Give Notice Cured by Ratification. — Territory v. De Wolfe, 13 Okla. 454.

Failure to Give Notice Immaterial Where All Members Attend. — Moore v. Perry, 119 Iowa 423.

Acts Void if Less than Quorum Present. — Benwood v. Wheeling R. Co., 53 W. Va. 465.

2. Majority of Quorum May Act. — Thurston v. Huston, 123 Iowa 157; State v. Police Com'rs, 113 La. 424; Hanna v. Chalker, 136 Mich. 8; Dougherty v. Excelsior Springs, 110 Mo. App. 623; Matter of Brearton, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 247; Com. v. Fleming, 23 Pa. Super. Ct. 404.

3. Presumption of Presence. — State v. St. Louis, 174 Mo. 125.

Presumption of Regularity of Proceedings. — Markham v. Anamosa, 122 Iowa 689.

Majority Action Raises No Conclusive Presumption of Notice to Minority. — Kavanaugh v. Wausau, 120 Wis. 611.

4. One of Two Cannot Act. — Burge v. Rockwell City, 120 Iowa 495; Logan v. Rochester Tp., 21 Pa. Super. Ct. 113; Western Wheeled Scraper Co. v. Butler Tp., 24 Pa. Super. Ct. 477.

368. 1. Logan v. Rochester Tp., 21 Pa. Super. Ct. 113; F. C. Austin Mfg. Co. v. Ayr Tp., 24 Pa. Super. Ct. 91. See also Williams v. Broadwater County, 28 Mont. 360; Kavanaugh v. Wausau, 120 Wis. 611.

- 368.** 10. Official Good Faith. — See note 3.
 11. Right to Possession of Official Property. — See notes 4, 5.
369. 12. Exemption from Arrest and Service of Process. — See note 2.
 14. Invalidity of Statute Prescribing Duty — *a.* RIGHT TO QUESTION VALIDITY. — See note 4.
b. WHETHER OFFICER PROTECTED. — See note 7.
370. 15. Ratification — *b.* BY GOVERNMENT. — See notes 4, 5.
 16. Disqualification — *b.* MINISTERIAL OFFICERS. — See note 12.
371. 17. Expiration of Power. — See notes 2, 3.
 18. Power to Fix Successor with Liability. — See notes 4, 5.
 19. Control by Courts. — See note 8.

368. 3. Requirement of Good Faith — *Illinois.*
 — *Murr v. Naperville*, 210 Ill. 371.

Kansas. — *Sedgwick County v. State*, 66 Kan. 634.

Kentucky. — *Boyd County v. Arthur*, (Ky. 1904) 82 S. W. Rep. 613.

Louisiana. — *Young v. East Baton Rouge*, 112 La. 511. See also *Morgan City v. Dalton*, 112 La. 9.

Minnesota. — *Stone v. Bevans*, 88 Minn. 127, 97 Am. St. Rep. 506.

Mississippi. — See *Decell v. McRee*, 83 Miss. 423.

Missouri. — *Ward v. Hartley*, 178 Mo. 135.

Nebraska. — *Mockett v. State*, (Neb. 1903) 97 N. W. Rep. 588; *Wilson v. Otoe County*, (Neb. 1904) 98 N. W. Rep. 1050.

New Jersey. — *Drake v. Elizabeth*, 69 N. J. L. 190. See also *Hicks v. Long Branch Commission*, 69 N. J. L. 300.

New York. — *People v. Wadhams*, 176 N. Y. 9; *Matter of Opening Seventy-first St.*, 87 N. Y. App. Div. 52; *People v. Van De Carr*, 87 N. Y. App. Div. 386.

Oklahoma. — *Territory v. Logan County High School*, 13 Okla. 605.

Texas. — *Texas Anchor Fence Co. v. San Antonio*, 30 Tex. Civ. App. 561; *Keen v. Featherston*, 29 Tex. Civ. App. 563.

Wisconsin. — *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931.

Contracts in Violation of Rule Void. — *Hardy v. Gainesville*, 121 Ga. 327; *Nelson v. Harrison County*, 126 Iowa 436; *O'Neil v. Flannagan*, 98 Me. 426; *Harrison v. Elizabeth*, 70 N. J. L. 591; *Poling v. Board of Education*, 56 W. Va. 251. See also *Brown v. Street Lighting Dist. No. 1*, 71 N. J. L. 79.

Interest Within Rule Must Be Personal. — *Erie v. Grant*, 24 Pa. Super. Ct. 109.

4. Possession of Official Property. — *Lefingwell v. Miller*, (Colo. App. 1905) 79 Pac. Rep. 327; *Matter of Haase*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 114, *affirmed* 88 N. Y. App. Div. 242.

Mandamus to Compel Delivery. — *State v. Givens*, (Fla. 1904) 37 So. Rep. 308.

Preservation of Public Records. — See *Keen v. Featherston*, 29 Tex. Civ. App. 563; *Smithers v. Lowrance*, 35 Tex. Civ. App. 25.

5. Statutory Proceedings to Obtain Official Property. — *In re Fitzgerald*, (County Ct.) 82 N. Y. Supp. 811; *Matter of Gill*, 95 N. Y. App. Div. 174; *Matter of Bearton*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 247.

369. 2. Legislator Not Privileged from Service of Summons. — *Berlet v. Weary*, 67 Neb. 75.

4. Duty to Obey Statute. — *Payne v. Staunton*, 55 W. Va. 207. *Contra*, *Com. v. Mathues*, 210 Pa. St. 383.

7. View that Invalid Statute Does Not Protect. — *Swincher v. Com.*, 72 S. W. Rep. 306, 24 Ky. L. Rep. 1897; *Com. v. Mathues*, 210 Pa. St. 383, *citing* 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369; *Payne v. Staunton*, 55 W. Va. 207, *citing* 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 369.

370. 4. Legislative Ratification. — See *Mayo v. Dover*, etc., *Village Fire Co.*, 96 Me. 539.

5. Person or Body Without Power to Do Act Cannot Ratify. — *Murray v. Omaha*, 66 Neb. 279.

Void Act Cannot Be Ratified. — *Phillips v. Butler County*, 187 Mo. 698.

12. Incompetent to Act in His Own Behalf. — *Taylor v. Democratic Committee*, (Ky. 1905) 87 S. W. Rep. 786, *citing* 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 370.

371. 2. Power Ceases with Office. — *State v. Akin*, 112 Tenn. 603.

Mandamus Will Not Lie Against Officer After Term Expired. — *State v. Gibson*, 187 Mo. 536; *Holdermann v. Schane*, 56 W. Va. 11.

3. Exceptions to Rule. — *Allard v. Smith*, 120 Wis. 22.

4. Power to Bind Successor. — See *State v. Clinton County*, 162 Ind. 580; *Westminster Water Co. v. Westminster*, 98 Md. 551; *State v. Broatch*, (Neb. 1903) 94 N. W. Rep. 1016.

5. Power to Make Contract Extending Beyond Term of Office. — See *Snouffer v. Cedar Rapids*, etc., R. Co., 118 Iowa 287; *Schwan v. New York*, 173 N. Y. 32. And see the title MUNICIPAL CORPORATIONS, 1159. 4.

8. Courts Cannot Control Discretion — *United States.* — *De Cambra v. Rogers*, 189 U. S. 119; *Bates*, etc., *Co. v. Payne*, 194 U. S. 106; *Johnston v. U. S.*, 37 Ct. Cl. 309; *Dyer v. U. S.*, 37 Ct. Cl. 337; *Willits v. U. S.*, 38 Ct. Cl. 534.

Alabama. — *Inge v. Public Works*, 135 Ala. 187, 93 Am. St. Rep. 20.

Arkansas. — *Belding v. Rector*, 71 Ark. 463.

California. — *San Luis Obispo County v. Gage*, 139 Cal. 398; *Borchard v. Ventura County*, 144 Cal. 10.

District of Columbia. — *Payne v. Bates*, etc., *Co.*, 22 App. Cas. (D. C.) 250.

Illinois. — *Chicago v. People*, 114 Ill. App. 145; *Chicago*, etc., R. Co. *v. Carlinville*, 200 Ill. 314, 93 Am. St. Rep. 190; *Pierson v. People*, 204 Ill. 456.

Indiana. — *Boyce v. Tuhey*, 163 Ind. 202; *State v. Seely*, 163 Ind. 244.

Iowa. — *Snouffer v. Cedar Rapids*, etc., R.

372. See notes 1, 2, 3.

20. Review of Official Action. — See notes 4, 5, 6.

X. LIABILITIES OF PUBLIC OFFICERS — 1. Civil Liability — a. TO GOVERNMENT OR PUBLIC BODY — (2) Liability as to Public Money — (a) In General. — See note 9.

Co., 118 Iowa 287; *Downing v. Des Moines*, 124 Iowa 289.

Kansas. — *Shanks v. Pearson*, 66 Kan. 168; *Youmans v. Wyandotte County*, 68 Kan. 104; *Dever v. Humphrey*, 68 Kan. 759; *Allen v. Burrow*, 69 Kan. 821.

Kentucky. — *Traynor v. Beckham*, 116 Ky. 13; *Beasley v. Adams*, (Ky. 1904) 82 S. W. Rep. 249; *Taylor v. Democratic Committee*, (Ky. 1905) 87 S. W. Rep. 786. See also *Hopkins County v. St. Bernard Coal Co.*, 114 Ky. 153.

Louisiana. — *State v. Police Com'rs*, 109 La. 369.

Maryland. — *Henkel v. Millard*, 97 Md. 24.

Michigan. — *Kundinger v. Saginaw*, 132 Mich. 395.

Minnesota. — *Diamond v. Mankato*, 89 Minn. 48.

Mississippi. — *Ham v. Levee Com'rs*, 83 Miss. 534.

Missouri. — *State v. Hawes*, 177 Mo. 360; *Pelz v. Bollinger*, 180 Mo. 252; *State v. Allen*, 180 Mo. 27; *State v. Patton*, 108 Mo. App. 26; *State v. Birch*, 186 Mo. 205.

Montana. — *Beck v. Holland*, 29 Mont. 234.

Nebraska. — *State v. Savage*, 65 Neb. 714.

New Hampshire. — *Parker v. Concord*, 71 N. H. 468; *Sherburne v. Portsmouth*, 72 N. H. 539.

New Jersey. — *Hicks v. Long Branch Commission*, 69 N. J. L. 300; *Harrington v. Woodbridge Tp.*, 70 N. J. L. 28; *Carling v. Jersey City*, 71 N. J. L. 154.

New York. — *Harriman v. Yonkers*, 82 N. Y. App. Div. 408, *affirmed* 181 N. Y. 24; *Matter of Opening East One Hundred and Seventy-sixth St.*, 85 N. Y. App. Div. 347; *People v. Woodbury*, 88 N. Y. App. Div. 443, *affirmed* 179 N. Y. 525; *People v. Phillips*, 88 N. Y. App. Div. 560; *Donovan v. Oswego*, 90 N. Y. App. Div. 397; *People v. White Plains*, 93 N. Y. App. Div. 599; *People v. McCooey*, 100 N. Y. App. Div. 240; *People v. Miller*, 101 N. Y. App. Div. 291.

North Carolina. — *Fawcett v. Mt. Airy*, 134 N. Car. 125, 101 Am. St. Rep. 825.

Oklahoma. — See *Board of Education v. Territory*, 12 Okla. 286.

Pennsylvania. — *American Tel., etc., Co. v. Harborscreek Tp.*, 23 Pa. Super. Ct. 437.

Texas. — *Riggins v. Richards*, (Tex. Civ. App. 1904) 79 S. W. Rep. 84; *International, etc., R. Co. v. Railroad Commission*, (Tex. Civ. App. 1905) 86 S. W. Rep. 16.

Courts Cannot Compel Action Beyond Legal Right. — *Knopf v. Corcoran*, 112 Ill. App. 320; *Gile v. Stegner*, 92 Minn. 429.

Courts Cannot Invade Jurisdiction of Other Departments. — *People v. Barrett*, 203 Ill. 109.

Motives Not Inquired Into. — *Watkins v. Mooney*, 114 Ky. 646.

372. 1. Law Prescribing Authority Construed by Courts. — *Board of Education v. Territory*,

12 Okla. 286. See also *Moore v. Perry*, 119 Iowa 423.

Well-settled Construction by Officers Entitled to Weight. — *Hitchcock v. U. S.*, 22 App. Cas. (D. C.) 275.

2. When Mandamus Will Lie — Colorado. — *People v. Vanhorn*, (Colo. App. 1904) 77 Pac. Rep. 978.

District of Columbia. — *U. S. v. Root*, 22 App. Cas. (D. C.) 419.

Georgia. — See *Scales v. Faulkner*, 118 Ga. 152.

Illinois. — *People v. Knopf*, 198 Ill. 340.

Indiana. — *Brooks v. State*, 162 Ind. 568.

Kentucky. — *Traynor v. Beckham*, 116 Ky. 13.

Missouri. — *State v. Cook*, 174 Mo. 100; *State v. Fort*, 180 Mo. 97; *State v. Nerry*, 105 Mo. App. 458.

Montana. — *State v. District Ct.*, 30 Mont. 8.

Nebraska. — *Von Forel v. State*, (Neb. 1903) 96 N. W. Rep. 648.

New Jersey. — *Warmolts v. Keegan*, 69 N. J. L. 186.

New York. — *People v. Hanes*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 475. See also *Dental Soc. v. Jacobs*, 103 N. Y. App. Div. 86.

Ohio. — *State v. Smith*, 69 Ohio St. 196.

South Dakota. — *State v. Boyden*, (S. Dak. 1904) 100 N. W. Rep. 763.

Texas. — *Altgelt v. Campbell*, (Tex. Civ. App. 1904) 78 S. W. Rep. 967.

Wisconsin. — *Roberts v. Erickson*, 117 Wis. 324.

Mandamus Against United States Officers. — *Hitchcock v. U. S.*, 22 App. Cas. (D. C.) 275.

Mandamus Against Governor. — See *State v. Jelks*, 138 Ala. 115; *State v. Frazier*, 114 Tenn. 516.

Mandamus Against Secretary of State. — See *Rose v. Bennett*, 25 R. I. 405.

Mandamus Abated by Expiration of Term. — *State v. State Canvassers*, 32 Mont. 13.

3. When Injunction Will Lie. — *U. S. v. Root*, 22 App. Cas. (D. C.) 419; *Strickland v. Knight*, (Fla. 1904) 36 So. Rep. 363; *Burke v. Snively*, 208 Ill. 328; *State v. Scott*, (Neb. 1904) 97 N. W. Rep. 1021; *Sherburne v. Portsmouth*, 72 N. H. 539; *Hale v. Burns*, 101 N. Y. App. Div. 101; *Balch v. Beach*, 119 Wis. 77; *Tilly v. Mitchell, etc., Co.*, 121 Wis. 1, 105 Am. St. Rep. 1007. See also *Board of Education v. Territory*, 12 Okla. 286; *Tanner v. Nelson*, 25 Utah 226; *Johnson v. Black*, 103 Va. 477, 106 Am. St. Rep. 890; *Schneider v. Menasha*, 118 Wis. 298, 99 Am. St. Rep. 996.

4. Bureau of Inspection of Public Offices. — See *State v. Shumate*, 72 Ohio St. 487.

5. See *Allen v. Burrow*, 69 Kan. 821, *citing* 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 372.

6. Right of Officer to Review His Own Order. — *People v. Leonard*, 87 N. Y. App. Div. 269.

Power to Reconsider Action. — See *Matter of Weeks*, 97 N. Y. App. Div. 131.

9. Liability for Public Money — United States.

373. (b) Liability for Interest. — See notes 2, 3.

374. (c) Liability for Loss of Public Money. — See notes 2, 3.

375. b. TO PRIVATE PERSONS — (1) *Liability of Legislative Officers.* — See note 2.

(2) *Liability of Executive Officers.* — See note 3.

(3) *Liability of Judicial and Quasi-judicial Officers* — (a) In General. — See note 7.

376. See note 2.

377. (b) *Distinction Between Judicial and Ministerial Acts.* — See notes 1 2.

— *Laffan v. U. S.*, (C. C. A.) 122 Fed. Rep. 333. See also *U. S. v. Boyd*, 118 Fed. Rep. 89; *Montgomery County v. Cochran*, (C. C. A.) 126 Fed. Rep. 456.

California. — *Oakland v. Snow*, 145 Cal. 419.

Georgia. — *Graham v. Baxley*, 117 Ga. 42.

Indiana. — *Demarest v. Holdeman*, 34 Ind. App. 685; *Workman v. State*, (Ind. 1905) 73 N. E. Rep. 917. See also *Tucker v. State*, 163 Ind. 403.

Kansas. — *State v. Patterson*, 66 Kan. 447.

Maryland. — *Vansant v. State*, 96 Md. 110.

Michigan. — See *Montmorency County v. Putnam*, 135 Mich. 111.

Minnesota. — *Ramsey County v. Sullivan*, 94 Minn. 201.

Missouri. — *State v. Laughlin*, 180 Mo. 342.

New York. — *Walton v. Adair*, 96 N. Y. App. Div. 75.

Oklahoma. — *Board of Education v. Territory*, 12 Okla. 286.

Oregon. — *Baker v. Williams Banking Co.*, 42 Oregon 213; *State v. Neilon*, 43 Oregon 168.

Tennessee. — *State v. Ridley*, 114 Tenn. 508.

Texas. — *Tarrant County v. Butler*, 35 Tex. Civ. App. 421.

Wisconsin. — *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931.

Unauthorized Possession of Money No Defense. — *Kuntz v. Cedarville*, 109 Ill. App. 330; *Reed v. Chatsworth*, 109 Ill. App. 332; *Philipsburg v. Degenhart*, 30 Mont. 299; *State v. Neilon*, 43 Oregon 168; *Lake County v. Neilon*, 44 Oregon 14.

Custodian of Public Funds Analogous to Trustee. — *Vansant v. State*, 96 Md. 110.

"Public Money" Defined. — *Tarrant County v. Butler*, 35 Tex. Civ. App. 421.

Receipt under Color of Office Renders Officer Liable. — *Smith v. Patton*, 131 N. Car. 396, 92 Am. St. Rep. 783.

Good Faith Immaterial. — *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931.

Mandamus to Compel Report of Public Moneys. — See *Maurer v. State*, (Neb. 1904) 98 N. W. Rep. 426.

Right of Taxpayer to Recover Misappropriated Funds. — *State v. Holt*, (Ind. App. 1904) 70 N. E. Rep. 387.

Settlement Conclusive. — A full and complete settlement made with those authorized to make it is conclusive in the absence of fraud or mistake. *Wilcox v. Perkins County*, (Neb. 1903) 97 N. W. Rep. 236. See also *Lehigh County v. Gossler*, 24 Pa. Super. Ct. 406.

Commissions Earned Applied to Reduce Indebtedness. — *State v. Ridley*, 114 Tenn. 508.

373. 2. Liable for Interest on Money Improperly Retained. — *Goff v. U. S.*, 22 App. Cas. (D. C.) 512; *Vansant v. State*, 96 Md. 110.

3. Liable for Interest on Loan. — *Vansant v. State*, 96 Md. 110.

374. 2. Not Liable for Loss Without Negligence. — *Standard Wine Co. v. Chipman*, 135 Mich. 273, 106 Am. St. Rep. 394, 10 Detroit Leg. N. 726; *Ramsey County v. Elmund*, 94 Minn. 196. See also *Hunt v. Hopley*, 120 Iowa 701, adverting to the doctrine in states other than Iowa and citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 374.

Degree of Care Required — Such as Person Applies to His Own Affairs. — *Martin v. U. S.*, 37 Ct. Cl. 527.

Judge Not Insurer of Solvency of Sureties on Guardian's Bonds. — *Com. v. Lee*, (Ky. 1905) 86 S. W. Rep. 990.

3. Liable Though Not Negligent. — *Smythe v. U. S.*, (C. C. A.) 107 Fed. Rep. 376; *U. S. v. Fordyce*, 122 Fed. Rep. 962; *U. S. v. Cole*, 130 Fed. Rep. 614; *Smith v. Patton*, 131 N. Car. 396, 92 Am. St. Rep. 783; *Poole v. Burnet County*, 97 Tex. 77.

375. 2. Nonliability of Legislative Officers. — *Lough v. Estherville*, 122 Iowa 479; *Com. v. Kenneday*, (Ky. 1904) 82 S. W. Rep. 237.

3. Nonliability of Executive Officers in the United States. — Compare *Traynor v. Beckham*, 116 Ky. 13.

Military Governor of Cuba Liable for His Torts. — *O'Reilly de Camara v. Brooke*, 135 Fed. Rep. 384.

7. When Quasi-judicial Officers Not Liable. — *Gray v. Batesville*, (Ark. 1905) 86 S. W. Rep. 295; *Summers v. People*, 109 Ill. App. 430; *Lough v. Estherville*, 122 Iowa 479; *Schooler v. Arrington*, 106 Mo. App. 607; *Sargent v. Little*, 72 N. H. 555. See also *De Armas v. Bell*, 109 La. 181; *Lowe v. Conroy*, 120 Wis. 151, 102 Am. St. Rep. 983.

Liability for Acts Beyond Jurisdiction. — *Lowe v. Conroy*, 120 Wis. 151, 102 Am. St. Rep. 983.

376. 2. Liable for Malicious or Corrupt Acts. — *Reed v. Taylor*, (Ky. 1904) 78 S. W. Rep. 892; *Otoe County v. Dorman*, (Neb. 1904) 98 N. W. Rep. 1064; *Ahearn v. Connell*, 72 N. H. 238; *Black v. Linn*, 17 S. Dak. 335. See also *Schooler v. Arrington*, 106 Mo. App. 607.

Motives May Be Shown in Aggravation or Mitigation of Damages. — *Kossouf v. Knarr*, 206 Pa. St. 146.

377. 1. Judicial and Ministerial Acts Distinguished. — *State v. Jelks*, 138 Ala. 115; *Payne v. U. S.*, 20 App. Cas. (D. C.) 581; *Ormond v. Ball*, 120 Ga. 916; *State v. Cook*, 174 Mo. 100; *State v. Mansfield*, 99 Mo. App. 146; *Bair v.*

- 377.** (c) *Illustrations of Quasi-judicial Officers.* — See notes 5, 6, 9.
 (4) *Liability of Ministerial Officers* — (a) *In General.* — See note 11.
378. See notes 1, 2.
 (b) *Nature of Duty.* — See note 3.
379. See note 1.
 (a) *Contributory Negligence.* — See note 3.
 (f) *Extent of Protection Afforded by Process or Order.* — See note 5.
380. (g) *Special Duty and Injury to Individual Necessary.* — See note 1.

Struck, 29 Mont. 52; *State v. Loechner*, 65 Neb. 814; *Regan v. Jessup*, 34 Tex. Civ. App. 74; *U. S. Fidelity, etc., Co. v. Peebles*, 100 Va. 585.

Determining Quarantine of Animals Quasi-judicial Act. — *Bair v. Struck*, 29 Mont. 52.

Auditing Claims Fixed by Law Ministerial Act. — *Crouch v. Pyle*, (Neb. 1903) 96 N. W. Rep. 1049. See also *State v. District Ct.*, 90 Minn. 457.

Approving Sureties Ministerial Act. — *Williams v. Weeks*, 70 S. Car. 1.

Canvassing Votes Ministerial Act. — *Steadley v. Stuckey*, 113 Mo. App. 582.

Certifying Names of Persons Elected Ministerial Act. — *Allen v. Burrow*, 69 Kan. 821.

Entry of Judgment Ministerial Act. — *Cincinnati, etc., Packet Co. v. Bellville*, 55 W. Va. 560.

377. 2. *Bair v. Struck*, 29 Mont. 52, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 377. See *State v. Loechner*, 65 Neb. 814.

6. *School Officials.* — *Huebner v. Nims*, 132 Mich. 657, 10 Detroit Leg. N. 58; *Board of Education v. Volk*, 72 Ohio St. 469.

6. *Highway Commissioners.* — *Summers v. People*, 109 Ill. App. 430.

Bridge Commissioners. — *Schooler v. Arrington*, 106 Mo. App. 607.

9. *Members of Municipal Council.* — *Gray v. Batesville*, (Ark. 1905) 86 S. W. Rep. 295, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 376, 377.

11. *When Ministerial Officer Liable.* — *U. S. v. Bell*, 127 Fed. Rep. 1002; *U. S. v. Griswold*, (Ariz. 1904) 76 Pac. Rep. 596; *State v. Henderson*, 120 Ga. 780; *State v. Adams*, 101 Mo. App. 468; *Steadley v. Stuckey*, 113 Mo. App. 582; *Bair v. Struck*, 29 Mont. 52; *Otoe County v. Stroble*, (Neb. 1904) 98 N. W. Rep. 1065; *State v. McClellan*, 113 Tenn. 616. See also *Boyce v. St. Lawrence County*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 297.

Neither Wilfulness Nor Malice Need Be Shown. — *State v. McClellan*, 113 Tenn. 616.

Liability of Register of Deeds for Failure to Copy Deed Correctly. — *State v. McClellan*, 113 Tenn. 616.

Liability for Accepting Worthless Bonds. — *Williams v. Weeks*, 70 S. Car. 1.

County Officers Not Liable for Defects in Highways. — *Simons v. Gregory*, (Ky. 1905) 85 S. W. Rep. 751.

Liability of Members of Board for Conspiracy. — *Gage v. Springer*, 211 Ill. 200.

Not Liable Where Money Paid into Treasury. — *Craig v. Boone*, 146 Cal. 718.

What Are Acts Done in "Official Capacity." — *Felonicher v. Stingley*, 142 Cal. 630.

"Public Officers of Any Kind are liable per-

sonally in suits in tort to recover damages for illegal acts done in their official capacity." *O'Reilly de Camara v. Brooke*, 135 Fed. Rep. 384.

378. 1. *Mistake and Honest Intentions No Excuse.* — *Crawford v. Eidman*, 129 Fed. Rep. 992; *State v. Adams*, 101 Mo. App. 468; *Steadley v. Stuckey*, 113 Mo. App. 582; *State v. McClellan*, 113 Tenn. 616.

2. See *Payne v. Staunton*, 55 W. Va. 207.

3. *Absolute Duty.* — *Otoe County v. Stroble*, (Neb. 1904) 98 N. W. Rep. 1065; *Sargent v. Little*, 72 N. H. 555.

379. 1. *Personal Duty.* — *State v. McClellan*, 113 Tenn. 616. See also *Dowd v. Crow*, 205 Pa. St. 214.

3. *Contributory Negligence a Defense.* — *Beckham v. Kosminsky*, (Ark. 1905) 86 S. W. Rep. 292; *Parrott v. McDonald*, (Neb. 1904) 100 N. W. Rep. 132.

5. *Officer Protected by Process or Order.* — *Wilbur v. Stokes*, 117 Ga. 545; *State v. King*, 30 Ind. App. 389; *Gammage v. Mahaffey*, 110 La. 1008; *Stowell v. Public Works*, 184 Mass. 416; *State v. Stokes*, 99 Mo. App. 236; *State v. Miller*, 110 Mo. App. 542; *Western Seed, etc., Co. v. McDonald*, (Neb. 1904) 99 N. W. Rep. 517; *Smith v. Jones*, 16 S. Dak. 337; *Regan v. Jessup*, 34 Tex. Civ. App. 74; *Holz v. Rediske*, 116 Wis. 353. See also *Woodward v. McDonald*, 116 Ga. 748; *Connelly v. American Bonding, etc., Co.*, 113 Ky. 903; *State v. Rainey*, 99 Mo. App. 218.

Not Protected by Process Void on Face. — *Stephens v. Head*, 138 Ala. 455; *Adams v. Allen*, 99 Me. 249; *Verdon v. Bowman*, (Neb. 1903) 97 N. W. Rep. 229; *Goldberg v. Markowitz*, 94 N. Y. App. Div. 237, affirmed 182 N. Y. 540; *Jordan v. Henderson*, (Tex. Civ. App. 1905) 86 S. W. Rep. 961. See also *People v. McAdoo*, 98 N. Y. App. Div. 190.

Liability of Internal Revenue Collectors. — *Haymes v. Brown*, 132 Fed. Rep. 525.

Acting in Obedience to Void Injunction. — *State v. Carlson*, (Neb. 1904) 101 N. W. Rep. 1004.

Official Act Defined. — *Hall v. Tierney*, 89 Minn. 407.

380. 1. *When Individual May Sue.* — *People v. Harris*, 203 Ill. 272, 96 Am. St. Rep. 304; *Gage v. Springer*, 211 Ill. 200; *State v. Dudley*, 161 Ind. 431; *Lough v. Estherville*, 122 Iowa 479; *Com. v. Mathues*, 210 Pa. St. 383; *State v. McClellan*, 113 Tenn. 616, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 380; *Payne v. Staunton*, 55 W. Va. 207. See also *Amusement Syndicate Co. v. Topeka*, 68 Kan. 801; *State v. Harrison*, 99 Mo. App. 57.

No Liability for Breach of Public Duty. — *Miller v. Ouray Electric Light, etc., Co.*, 18

380. (h) Amount of Damages. — See note 2.

381. (5) Liability upon Official Contracts — (c) Effect of Want of Authority. — See note 4.

382. (6) Liability for Acts or Omissions of Subordinates. — See notes 1, 3, 4.

(7) Limitation of Actions Against Public Officers. — See note 6.

2. Criminal Liability — a. IN GENERAL. — See note 7.

Colo. App. 131; Webb v. Fisher, 109 Tenn. 701, 97 Am. St. Rep. 863; Simpson v. Whatcom, 33 Wash. 392, 99 Am. St. Rep. 951.

When Individual May Sue in Name of State. — Territory v. De Wolf, 13 Okla. 454.

When Individual May Sue on Bond Given to United States. — U. S. v. Bell, (C. C. A.) 135 Fed. Rep. 336. See also Goldstein v. Michelson, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 601.

Right of Taxpayer to Recover Public Money. — Kimble v. Franklin County, 32 Ind. App. 377; Zuelly v. Casper, 160 Ind. 455; State v. Holt, (Ind. App. 1904) 70 N. E. Rep. 387; Wallace v. Jones, 83 N. Y. App. Div. 152.

Right of Taxpayer to Enjoin Illegal Expenditure of Money. — Woodruff v. Welton, (Neb. 1904) 97 N. W. Rep. 1037.

Right of Taxpayer to Enjoin Payment of Salary. — Daviess County v. Goodwin, 116 Ky. 891.

Right Dependent on Refusal of Authorities to Act. — Etsell v. Knight, 117 Wis. 540.

Test of Public or Private Wrong. — Com. v. Mathues, 210 Pa. St. 383.

380. 2. Compensatory Damages. — Foley v. Martin, 142 Cal. 261, 100 Am. St. Rep. 123; State v. Adams, 101 Mo. App. 468; Ahearn v. Connell, 72 N. H. 238.

Exemplary Damages for Acting Maliciously. — Crawford v. Eidman, 129 Fed. Rep. 992; Giddings v. Freedley, (C. C. A.) 128 Fed. Rep. 355; Foley v. Martin, 142 Cal. 256, 100 Am. St. Rep. 123; Marshall v. Cleaver, 4 Penn. (Del.) 450. Compare Ostrom v. San Antonio, 33 Tex. Civ. App. 683.

Profits Not Recoverable. — Moravec v. Grill, 78 N. Y. App. Div. 146.

Attorney's Fees Not Recoverable. — Vaughn v. Justice, 78 S. W. Rep. 424, 25 Ky. L. Rep. 1666.

Right to Nominal Damages. — Kossouf v. Knarr, 206 Pa. St. 146.

More than Nominal Damages Must Be Shown in Suit on Bond. — U. S. v. Bell, 12 Fed. Rep. 1002; District of Columbia v. Ball, 22 App. Cas. (D. C.) 543. See also Beck, etc., Hardware Co. v. Knight, 121 Ga. 287.

Public Officers Liable for Costs. — Brown v. Macfarland, 22 App. Cas. (D. C.) 412; State v. Carlson, (Neb. 1904) 101 N. W. Rep. 1004. Compare O'Connor v. Walsh, 83 N. Y. App. Div. 179; Corscadden v. Haswell, 88 N. Y. App. Div. 158, reversed 177 N. Y. 499.

381. 4. Not Liable Because Authority Exceeded. — Schieber v. Von Arx, 87 Minn. 298; Hitch v. Edgecombe County, 132 N. Car. 573.

382. 1. Not Liable for Acts of Official Subordinates — Illinois. — Chicago v. Selz, 202 Ill. 545.

Iowa. — McFadden v. Jewell, 119 Iowa 321, 97 Am. St. Rep. 321.

Maine. — Bowden v. Derby, 97 Me. 536, 94 Am. St. Rep. 516.

Massachusetts. — Hunt v. Boston, 183 Mass. 303.

Minnesota. — Gaare v. Clay County, 90 Minn. 530.

Nebraska. — Murray v. Omaha, 66 Neb. 279.

New York. — Gunnison v. Board of Education, 176 N. Y. 11; People v. St. Lawrence County, 101 N. Y. App. Div. 327.

Rhode Island. — O'Donnell v. White, 24 R. I. 483.

Texas. — Clough v. Worsham, 32 Tex. Civ. App. 187; Oak Cliff v. Etheridge, (Tex. Civ. App. 1903) 76 S. W. Rep. 602; Blankenship v. Sherman, 33 Tex. Civ. App. 507.

Washington. — Normile v. Ballard, 33 Wash. 369.

Liability of County for Acts of Sheriff. — See Boyce v. St. Lawrence County, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 297.

County Bound by Judgment Rendered Against Its Officers. — Union Pac. R. Co. v. Saline County, 69 Kan. 278.

Municipal Officers Acting Judicially under State Authority Not City Agents. — Kidson v. Bangor, 99 Me. 139.

Statutory Liability of Superintendent of Mint. — Smythe v. U. S., (C. C. A.) 107 Fed. Rep. 376.

Liability of Municipality for Failure to Suppress Crime. — Dunstan v. New York, 91 N. Y. App. Div. 355.

3. Liable for Acts of Private Servants. — Com. v. Connor, 207 Pa. St. 263; Butler v. Milwaukee, 119 Wis. 526.

Responsibility Dependent on Power of Appointment and Removal. — De Armas v. Bell, 109 La. 181.

4. Responsible for Selection and Superintendence. — Bowden v. Derby, 99 Me. 208.

6. When Actions to Be Brought. — See Montgomery County v. Cochran, (C. C. A.) 126 Fed. Rep. 456; State v. Walters, 31 Ind. App. 77, 99 Am. St. Rep. 244; State v. Harter, 188 Mo. 516; State v. Davis, 42 Oregon 34; State v. McClellan, 113 Tenn. 616; Jennings v. Taylor, 102 Va. 191.

7. When Public Officer Liable. — U. S. v. Burton, 131 Fed. Rep. 552, reversed on other grounds 196 U. S. 283; Howard v. State, 72 Ark. 586; State v. Waterhouse, 71 N. H. 488; People v. Murray, 76 N. Y. App. Div. 118, affirmed 175 N. Y. 479; Barker v. State, 69 Ohio St. 68; State v. Jaques, 65 S. Car. 178. See also Tracy v. Com., (Ky. 1903) 76 S. W. Rep. 184; State v. McClellan, 113 Tenn. 616.

Failure to Take Oath No Defense. — U. S. v. Dietrich, 126 Fed. Rep. 676.

Ignorance of Law as Excuse for Misconduct in Office. — State v. Bair, 71 Ohio St. 410.

Corrupt Motive Essential. — Com. v. Wood, 116 Ky. 748.

383. *b.* STATUTORY LIABILITY. — See note 2.

384. 3. Liability to Penalty. — See note 7.

XI. LIABILITY OF PUBLIC FOR ACTS OF OFFICERS — 1. In General. — See note 8.

385. 2. Ascertainment of Authority by Third Persons. — See note 2.

XII. LIABILITY OF PRIVATE PERSONS FOR ACTS OF PUBLIC OFFICERS. — See note 3.

386. XIII. COMPENSATION — 2. Forms — *a.* SALARY. — See notes 1, 3.

387. *b.* FEES. — See notes 1, 2.

Officers Liable for Contempt of Court. — *Sherman v. People*, 210 Ill. 552.

383. 2. Criminal Liability under Statute — *United States*. — *Dimmick v. U. S.*, (C. C. A.) 121 Fed. Rep. 638; *McGregor v. U. S.*, (C. C. A.) 134 Fed. Rep. 187.

Indiana. — *Featherngill v. State*, 33 Ind. App. 683.

Maryland. — *Vansant v. State*, 96 Md. 110.

Michigan. — *People v. Salisbury*, 134 Mich. 548.

Missouri. — *State v. Kelly*, 103 Mo. App. 711; *State v. Laughlin*, 180 Mo. 342; *State v. Lehman*, 182 Mo. 424; *State v. Boyd*, 108 Mo. App. 518.

Nebraska. — *State v. Loechner*, 65 Neb. 814.

New Jersey. — *State v. Corrigan*, (N. J. 1905) 60 Atl. Rep. 515.

North Carolina. — *Turner v. McKee*, 137 N. Car. 251.

Texas. — *Butler v. State*, 46 Tex. Crim. 287.

No Federal Statute Creating Offense of Official Misconduct. — *Tyner v. U. S.*, 23 App. Cas. (D. C.) 324.

384. 7. Penalties for Acts or Omissions of Officers. — *Craig v. Smith*, (Ark. 1905) 85 S. W. Rep. 1124; *Mitchell v. Wheeler*, (Colo. App. 1904) 77 Pac. Rep. 361; *State v. Reeves*, 44 Fla. 179; *State v. Bagby*, 160 Ind. 669; *Adams v. Coker*, 85 Miss. 222; *Oppenheimer v. Regan*, 32 Mont. 110; *Wilson v. Barrett*, 24 Pa. Super. Ct. 68; *State v. Zillmann*, 121 Wis. 472; *Musback v. Schaefer*, 115 Wis. 357. See also *Keen v. Featherston*, 29 Tex. Civ. App. 563.

Penalties for Taking Illegal Fees. — *Wilson v. Barrett*, 24 Pa. Super. Ct. 68. See also *Newby v. Miller*, (Neb. 1904) 98 N. W. Rep. 1066; *Eccles v. U. S. Fidelity, etc., Co.*, (Neb. 1904) 101 N. W. Rep. 1023.

Good Faith in Charging Excessive Fees No Defense. — *Plyley v. Allison*, 113 Tenn. 500.

Misconception of Duty Does Not Protect Against Penalty. — *Bell v. Wycoff*, 131 N. Car. 245.

8. Not Liable for Unauthorized Acts. — *Langley v. Augusta*, 118 Ga. 590; *Chicago v. Cook County*, 106 Ill. App. 47; *Com. v. American Bonding, etc., Co.*, 205 Pa. St. 372, 54 Atl. Rep. 1034; *Wilson v. Mitchell*, 17 S. Dak. 515, 106 Am. St. Rep. 784; *Clough v. Worsham*, 32 Tex. Civ. App. 187. See also *Hyde v. U. S.*, 38 Ct. Cl. 649; *Houston Constr. Co. v. U. S.*, 38 Ct. Cl. 724.

Government Not Liable for Tortious Acts of Officers. — *Washington L. & T. Co. v. U. S.*, 39 Ct. Cl. 152.

Public Not Estopped by Violation of Duty by Officers. — *Wormstead v. Lynn*, 184 Mass. 425.

Officers Cannot Invoke Public Legal Machinery

in Defense of Personal Torts. — *Donahue v. Keeshan*, 91 N. Y. App. Div. 602.

385. 2. Presumption of Knowledge of Authority. — *Peck-Williamson Heating, etc., Co. v. Steen School Tp.*, 30 Ind. App. 637; *Moss v. Sugar Ridge Tp.*, 161 Ind. 417; *Silver, etc., Co. v. State Board of Education*, (Ind. App. 1904) 72 N. E. Rep. 829; *Bennett v. Mt. Vernon*, 124 Iowa 537; *Perry County v. Engle*, 116 Ky. 594; *Hager v. Shuck*, (Ky. 1905) 87 S. W. Rep. 301; *Jewell Belting Co. v. Bertha*, 91 Minn. 9; *Orange County v. Texas, etc., R. Co.*, 35 Tex. Civ. App. 361; *Schneider v. Menasha*, 118 Wis. 298, 99 Am. St. Rep. 996. See also *Sprague v. U. S.*, 37 Ct. Cl. 447.

3. Liability for Directing Officer to Do Illegal Act. — *McMorris v. Howell*, 89 N. Y. App. Div. 272.

Ratification Imposes Liability. — *Cooper v. Scyoc*, 104 Mo. App. 414.

386. 1. Definition. — *State v. Grant*, 12 Wyo. 1, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 386. See also *State v. Maynard*, 35 Wash. 168.

Compensation in Proportion to Population and Necessary Services. — See *Perry County v. Lindemann*, (Ind. 1905) 73 N. E. Rep. 912.

Percentage on Fines and Forfeitures Regarded as Salary. — *Butler v. Stephens*, (Ky. 1905) 84 S. W. Rep. 745.

When Compensation Covered by Salary. — *Timmony v. Salt Lake City*, 28 Utah 302.

Pay of Retired Officer Not Compensation. — *Geddes v. U. S.*, 38 Ct. Cl. 428.

Commutation Is Compensation. — *Odell v. U. S.*, 38 Ct. Cl. 194.

3. Salary Instead of Fees. — *State v. Foster*, 109 La. 587; *People v. Steuben County*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 590, affirmed 93 N. Y. App. Div. 604; *Schuylkill County v. Shoener*, 205 Pa. St. 592; *Philadelphia v. McMichael*, 208 Pa. St. 297; *Luzerne County v. Kirkendall*, 209 Pa. St. 116; *Verges v. Milwaukee County*, 116 Wis. 191; *Douglas County v. Sommer*, 120 Wis. 424; *State v. Erickson*, 120 Wis. 435. See also *Com. v. Mathues*, 210 Pa. St. 383.

387. 1. Fees Defined. — *Finley v. Territory*, 12 Okla. 621. See also *State v. Flynn*, 161 Ind. 554.

What Are Fees. — See *White v. Clarksville*, (Ark. 1905) 87 S. W. Rep. 630; *Tarrant County v. Butler*, 35 Tex. Civ. App. 421.

Fees Held to Include All Compensation. — *Maxey v. Tompkinsville*, 79 S. W. Rep. 214, 25 Ky. L. Rep. 1948; *Finley v. Territory*, 12 Okla. 621.

Per Diem Compensation Not Fees to Be Paid into Treasury. — *Seiler v. State*, 160 Ind. 605; *State v. Flynn*, 161 Ind. 554.

387. How Deficit Is Paid. — See note 4.

To Pay Fees into the Treasury. — See note 7.

c. PER DIEM. — See notes 8, 9.

d. APPROPRIATIONS. — See note 10.

388. No Payment Without an Appropriation. — See note 1.

e. COMMISSIONS. — See note 4.

389. *f.* EXPENSES. — See note 1.

Expenses in Defending Suits. — See note 5.

g. MILEAGE. — See note 7.

390. 3. Amount — *a.* WHERE NO REMUNERATION IS PROVIDED. —

See note 2.

Fees the Creature of Statute. — *State v. Allen*, 187 Mo. 560.

Right to Recover Fees in Advance. — *Williams v. Willock*, 123 Wis. 293.

Statute Providing for Fees Does Not Include Compensation for Ex Officio Services. — *Reese v. Cleburne County*, 139 Ala. 299.

387. 2. Fees Regarded as Salary. — *Holcombe v. Dawson County*, (Neb. 1901) 95 N. W. Rep. 835; *Smith v. Clay County*, (Neb. 1904) 99 N. W. Rep. 501; *Mitchell v. Clay County*, (Neb. 1904) 98 N. W. Rep. 662; *Finley v. Territory*, 12 Okla. 621.

4. How Deficit Is Paid. — *Perry County v. Lindemann*, (Ind. 1905) 73 N. E. Rep. 912; *Lyons v. Perry County*, (Ind. 1905) 73 N. E. Rep. 916.

7. To Pay Fees into Treasury. — *U. S. v. Mason*, (C. C. A.) 129 Fed. Rep. 742; *Oakland v. Snow*, 145 Cal. 419; *State v. Flynn*, 161 Ind. 554; *Perry County v. Lindemann*, (Ind. 1905) 73 N. E. Rep. 912; *Vansant v. State*, 96 Md. 110; *Holcombe v. Dawson County*, (Neb. 1901) 95 N. W. Rep. 835; *State v. Porter*, (Neb. 1903) 95 N. W. Rep. 769; *Dos Passos v. New York*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 394; *Finley v. Territory*, 12 Okla. 621; *Verges v. Milwaukee County*, 116 Wis. 191.

Constitutionality of Statute Limiting Fees and Requiring Excess to Be Paid into Treasury. — *Tarrant County v. Butler*, 35 Tex. Civ. App. 421.

No Fees to Officer for Making Out His Accounts. — *Hart v. U. S.*, 38 Ct. Cl. 571.

Not Required to Account for Moneys Received Outside of Official Capacity. — *State v. Holm*, (Neb. 1903) 97 N. W. Rep. 821.

8. Per Diem Compensation. — See generally *U. S. v. McCabe*, 122 Fed. Rep. 653, *affirmed* (C. C. A.) 129 Fed. Rep. 708 (court crier); *Comer v. Morgan County*, 32 Ind. App. 477 (clerk of court); *Ross v. Collins*, 106 Ill. App. 396; *Matter of Acquiring Title to East Two Hundred and Thirty-eighth St.*, 78 N. Y. App. Div. 87; *Connors v. Shelby County*, 113 Tenn. 177 (constable).

Per Diem Compensation Dependent upon Statute. — See *Robinson v. Smith County*, 33 Tex. Civ. App. 251.

9. For Actual Services. — *People v. Livingston County*, 89 N. Y. App. Div. 152; *Sayls v. Walla Walla County*, 30 Wash. 194. See also *U. S. v. Nix*, 189 U. S. 199; *U. S. v. Warren*, 12 Okla. 350; *Ferguson v. Pottawattamie County*, 126 Iowa 108.

10. Presumption Is Against Intention to Fix Salaries by Appropriation. — *State v. State Treasurer*, 68 S. Car. 411.

388. 1. No Payment Without Appropriation. — *Chicago v. People*, 210 Ill. 84; *Spencer v. New York*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 284; *Calbreath v. Dunbar*, (Oregon 1905) 81 Pac. Rep. 366.

Appropriation of Less than Necessary — Officer Held Entitled to Full Pay. — *Smith v. U. S.*, 37 Ct. Cl. 119.

Auditing Claim for Compensation Not Judgment. — *Tucker v. State*, 163 Ind. 403.

4. Commissions. — *Michigan Cent. R. Co. v. Harsha*, (C. C. A.) 134 Fed. Rep. 217; *Butte County v. Merrill*, 141 Cal. 396; *Adams v. Coker*, 85 Miss. 222.

Right to Commissions Dependent on Statute. — *Oakland v. Snow*, 145 Cal. 419.

389. 1. Expenses. — *Swift v. U. S.*, 128 Fed. Rep. 763; *U. S. v. Mason*, (C. C. A.) 129 Fed. Rep. 742; *U. S. v. Nix*, 189 U. S. 199; *Alexander v. Wilson*, 145 Cal. xviii, 79 Pac. Rep. 274; *Ludlow v. Richie*, 78 S. W. Rep. 199, 25 Ky. L. Rep. 1581; *Downing v. Hinds County*, 84 Miss. 29; *State v. Woodside*, 112 Mo. App. 451; *Dos Passos v. New York*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 394; *Russ v. Com.*, 210 Pa. St. 544, 105 Am. St. Rep. 825; *Stryker v. Lycoming County*, 20 Pa. Super. Ct. 345; *Douglas County v. Sommer*, 120 Wis. 424. See also *Independent Pub. Co. v. Lewis and Clarke County*, 30 Mont. 83; *Egan v. Finney*, 42 Oregon 599.

Necessity for Seasonable Filing of Bills. — *Allen v. Adams County*, 120 Iowa 63.

5. State v. St. Louis, 174 Mo. 125; *Anderson v. School Dist. No. 15*, 89 N. Y. App. Div. 231.

Right of Municipality to Defend Suits Against Its Officers. — See *Briggs v. Lahey*, 101 N. Y. App. Div. 136.

7. Mileage. — See *Lovering v. U. S.*, 117 Fed. Rep. 565; *U. S. v. Nix*, 189 U. S. 199; *Thomas v. U. S.*, 38 Ct. Cl. 70; *Chance v. U. S.*, 38 Ct. Cl. 75; *U. S. v. Hillyer*, 1 Alaska 47; *Ex p. Sykes*, 46 Tex. Crim. 51; *Henry v. Thurston County*, 31 Wash. 638.

390. 2. Only the Compensation Fixed by Law — *United States*. — *Hart v. U. S.*, 38 Ct. Cl. 571; *Thornton v. Insurance Cos.*, 125 Fed. Rep. 250. *Arkansas*. — *Hempstead County v. Harkness*, 73 Ark. 600.

Colorado. — *Cutshaw v. Denver*, 19 Colo. App. 341; *Mitchell v. Wheeler*, (Colo. App. 1904) 77 Pac. Rep. 361.

Illinois. — *Foote v. Lake County*, 206 Ill. 185; *Foreman v. People*, 209 Ill. 567.

Indiana. — *Zuelly v. Casper*, 160 Ind. 455; *Comer v. Morgan County*, 32 Ind. App. 477; *Tucker v. State*, 163 Ind. 403.

390. If a Public Office Is Created but No Compensation Is Fixed. — See notes 3, 7.

b. WHERE NO EXTRA REMUNERATION IS PROVIDED — In General.

— See note 9.

391. Subordinate Governmental Authority. — See note 4.

392. Unauthorized Appointment. — See note 2.

Increase of Duties. — See notes 3, 4.

Constructive Services. — See note 5.

Amount Not Fixed. — See note 7.

Special Enactments. — See note 8.

Offices Not Incompatible. — See note 9.

393. Two Entire Statutory Days' Work. — See note 2.

Kentucky. — Vaughn *v.* Hulett, (Ky. 1905) 84 S. W. Rep. 309.

Maryland. — Herbert *v.* Baltimore County, 97 Md. 639.

Minnesota. — Justus *v.* Ramsey County, 94 Minn. 72.

Missouri. — State *v.* Adams, 172 Mo. 1; State *v.* Police Com'rs, 108 Mo. App. 98.

Nebraska. — Red Willow County *v.* Smith, 67 Neb. 213; Wilson *v.* Otoe County, (Neb. 1904) 98 N. W. Rep. 1050.

Oregon. — Wallowa County *v.* Oakes, (Oregon 1904) 78 Pac. Rep. 892.

Pennsylvania. — Philadelphia *v.* McMichael, 208 Pa. St. 297.

Virginia. — Johnson *v.* Black, 103 Va. 477, 106 Am. St. Rep. 890.

Wisconsin. — Etsell *v.* Knight, 117 Wis. 540.

Presumed to Know Compensation Attached to Office. — Edwards *v.* McLean, 23 Pa. Super. Ct. 43.

390. 3. Where No Remuneration Is Provided. — Beckwith *v.* Farmington, 77 Conn. 318; State *v.* Adams, 172 Mo. 1; McGough *v.* New York, 83 N. Y. App. Div. 322; Munch *v.* New York, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 128; Johnson *v.* Black, 103 Va. 477, 106 Am. St. Rep. 890; Taylor *v.* Big Horn County, 11 Wyo. 106.

7. Comer *v.* Morgan County, 32 Ind. App. 477. See also State *v.* Holm, (Neb. 1903) 97 N. W. Rep. 821.

9. No Right to Extra Compensation — *United States.* — U. S. *v.* Moses, (C. C. A.) 126 Fed. Rep. 58; Stevens *v.* U. S., 38 Ct. Cl. 452; Hart *v.* U. S., 38 Ct. Cl. 571. See also Geddes *v.* U. S., 38 Ct. Cl. 428.

California. — Humiston *v.* Shaffer, 145 Cal. 195.

Illinois. — Sloan *v.* Peoria, 106 Ill. App. 151; Foote *v.* Lake County, 206 Ill. 185; Parker *v.* Richland County, 214 Ill. 165; Parker *v.* People, 214 Ill. 225.

Indiana. — Comer *v.* Morgan County, 32 Ind. App. 477.

Kentucky. — Daviess County *v.* Goodwin, 116 Ky. 891.

Minnesota. — Justus *v.* Ramsey County, 94 Minn. 72.

Nebraska. — Pawnee County *v.* Belding, (Neb. 1901) 95 N. W. Rep. 776; Wilson *v.* Otoe County, (Neb. 1904) 98 N. W. Rep. 1050; Otoe County *v.* Stroble, (Neb. 1904) 98 N. W. Rep. 1065; Red Willow County *v.* Smith, 67 Neb. 213.

New York. — See People *v.* Monroe County Ct., 105 N. Y. App. Div. 1.

Oklahoma. — Finley *v.* Territory, 12 Okla. 621.

Pennsylvania. — Philadelphia *v.* McMichael, 208 Pa. St. 297.

Virginia. — Johnson *v.* Black, 103 Va. 477, 106 Am. St. Rep. 890.

Extra Remuneration Forbidden After Services Rendered. — Edwards *v.* McLean, 23 Pa. Super. Ct. 43. But see Adams County *v.* Bowen, (Neb. 1903) 95 N. W. Rep. 869.

Additional Compensation Allowed. — Pulaski County *v.* Hayworth, 161 Ind. 503; Mankato *v.* Blue Earth County, 87 Minn. 425.

391. 4. Subordinate Governmental Authority No Power to Increase or Diminish. — Geddes *v.* U. S., 38 Ct. Cl. 428.

392. 2. Unauthorized Appointment Justifies Payment in Case of Necessity. — Clapp *v.* Titus, (Mich. 1904) 100 N. W. Rep. 1005.

3. Increase in Duties. — Garfield County *v.* Beardsley, 18 Colo. App. 55; Foote *v.* Lake County, 206 Ill. 185; Jefferson County *v.* Waters, 114 Ky. 48; Finley *v.* Territory, 12 Okla. 621.

4. Not Recoverable on Implied Contract. — Pass Christian *v.* Washington, 81 Miss. 470.

No Recovery for Services Rendered Voluntarily. — Hughes *v.* New York, 84 N. Y. App. Div. 347, affirmed 176 N. Y. 585.

5. No Fees by Implication. — Compare Chat-ham County *v.* Gaudry, 120 Ga. 121.

7. No Amount Fixed. — Clement *v.* Lewiston, 97 Me. 95; State *v.* Ridley, 114 Tenn. 508; Musback *v.* Schaefer, 115 Wis. 357. See also Taylor *v.* Adair County, (Ky. 1905) 84 S. W. Rep. 290.

Adequate Compensation Defined. — Com. *v.* Mathues, 210 Pa. St. 383.

8. Exceptions to Rule. — State *v.* Shutts, 161 Ind. 590. See also Hager *v.* Franklin, (Ky. 1904) 81 S. W. Rep. 926; Sena *v.* Bernalillo County, (N. Mex. 1904) 78 Pac. Rep. 46.

9. Pay for Two Distinct Offices. — Geddes *v.* U. S., 38 Ct. Cl. 428; Seiler *v.* State, 160 Ind. 605; State *v.* Grant, 12 Wyo. 1.

Dual Functions Not Justifying Double Compensation. — See Durden *v.* Sebastian County, 73 Ark. 305; Benjamin *v.* New York, 77 N. Y. App. Div. 62.

393. 2. Double Pay Denied. — Swift *v.* U. S., 128 Fed. Rep. 763 (performing duties of bailiff and deputy marshal); Daily *v.* Daviess County, (Ind. 1905) 74 N. E. Rep. 977 (county assessor sitting on board of review).

393. Services Outside Official Duties. — See note 4.

Must Show Right under the Statute. — See note 5.

394. Holding Over until Qualification of Successor. — See note 1.*c.* HOW ASCERTAINED. — See note 5.*4.* How and by Whom Fixed — *b.* THE CONSTITUTION. — See

note 8.

395. c. CONGRESS. — See note 3.*d.* STATE LEGISLATURES. — See notes 5, 7.

Imperative Statute. — See note 11.

e. COURTS. — See notes 12, 13, 14.*f.* BOARD OF SUPERVISORS. — See note 16.

393. 4. Services Outside of Scope of Employment. — The Adula, 127 Fed. Rep. 849; Congdon *v.* Nashua, 72 N. H. 468; People *v.* Monroe County Ct., 105 N. Y. App. Div. 1.

Recovery for Night Work. — Louis *v.* U. S., 37 Ct. Cl. 81.

5. Claimant Must Show His Right under Statute. — Fulford *v.* U. S., 38 Ct. Cl. 548; U. S. *v.* McCrory, (C. C. A.) 119 Fed. Rep. 861; Comer *v.* Morgan County, 32 Ind. App. 477.

394. 1. No Recovery Where Successor Chosen. — Beverly *v.* Hattiesburg, 83 Miss. 342.

5. The Following Cases Deal with the Amount of Compensation — Assessor. — Oak Cliff *v.* Etheridge, (Tex. Civ. App. 1903) 76 S. W. Rep. 602; Whitley County *v.* Garty, 161 Ind. 464.

City Attorney. — Atchison *v.* Owensboro, 114 Ky. 706.

City Electrician. — Alden *v.* Campbell, 30 Wash. 392.

Clerk of District Court. — U. S. *v.* Warren, 12 Okla. 350.

Constable. — State *v.* Stinebaker, 90 Mo. App. 280.

Coroner. — Jefferson County *v.* Abernathy, 139 Ala. 264.

County Surveyor. — Sayles *v.* Walla Walla County, 30 Wash. 194.

County Tax Collector. — State *v.* Hawkins, 169 Mo. 615.

County Treasurer. — Upham *v.* State, 174 N. Y. 336.

Election Officers. — Bennett *v.* Orange, 69 N. J. L. 176; Saves *v.* Trall, 71 N. J. L. 91.

Indian Inspector. — Smith *v.* U. S., 37 Ct. Cl. 119.

Justice of the Peace. — Herbert *v.* Baltimore County, 97 Md. 639.

Marshal. — Lovering *v.* U. S., 117 Fed. Rep. 565; Maxey *v.* Tompkinsville, (Ky. 1904) 79 S. W. Rep. 214.

Master in Chancery. — Fitchburg Steam Engine Co. *v.* Potter, 211 Ill. 138.

Members of Board of Charities and Corrections. — Thomas *v.* State, 17 S. Dak. 579.

Officers of World's Columbian Commission. — Butt *v.* U. S., 122 Fed. Rep. 511.

Police Justice. — Newport News *v.* Brown, 102 Va. 107.

Prize Commissioners. — The Adula, 127 Fed. Rep. 849.

Sheriff. — Parish Board of Directors *v.* Herbert, 112 La. 467.

State Attorneys. — Sims *v.* Com., 116 Ky. 1.

Superintendent of Schools. — Piercy *v.* Smith,

117 Ky. 990; Chase County *v.* Kelley, (Neb. 1903) 95 N. W. Rep. 865.

8. Constitutional Provision for Compensation "in Proportion to Duties." — Tucker *v.* Barnum, 144 Cal. 266.

395. 3. Congress. — U. S. *v.* Warren, 12 Okla. 350.

5. State Legislatures. — Martin *v.* Pima County, 3 Ariz. 59; Herbert *v.* Baltimore County, 97 Md. 639; Com. *v.* Mathues, 210 Pa. St. 383; Thomas *v.* State, 17 S. Dak. 579; State *v.* Policemen's Pension Fund, 121 Wis. 44. See also Ryan *v.* New York, 177 N. Y. 271.

Power of Legislature to Change Mode of Compensation. — McCauley *v.* Culbert, 144 Cal. 276; Sanchez *v.* Fordyce, 141 Cal. 427.

7. See Agard *v.* Shaffer, 141 Cal. 725; Colbert *v.* Bond, 110 Tenn. 370.

11. No Discretion. — Crouch *v.* Pyle, (Neb. 1903) 96 N. W. Rep. 1049. See also Von Forel *v.* State, (Neb. 1903) 96 N. W. Rep. 648; Chase County *v.* Kelley, (Neb. 1903) 95 N. W. Rep. 865; Otoe County *v.* Stroble, (Neb. 1904) 98 N. W. Rep. 1065.

12. Courts. — Fitchburg Steam Engine Co. *v.* Potter, 211 Ill. 138; Butler County *v.* James, 116 Ky. 575; Laurel County Ct. *v.* Pennington, (Ky. 1904) 80 S. W. Rep. 820; Gloucester Water Supply Co. *v.* Gloucester, 185 Mass. 535; State *v.* Stinebaker, 90 Mo. App. 280; Roberts *v.* Erickson, 117 Wis. 324.

Power to Grant Reasonable Compensation to Investigating Committees. — Chatham County *v.* Gaudry, 120 Ga. 121.

13. State *v.* Stinebaker, 90 Mo. App. 280.

14. Mandamus to Compel Fixing of Salary. — Cook *v.* Springfield, 184 Mass. 247.

16. Board of County Supervisors or Commissioners. — Foote *v.* Lake County, 109 Ill. App. 312, affirmed 206 Ill. 185; Roth *v.* Ness County, 69 Kan. 667; Polsgrove *v.* Walker, (Ky. 1904) 82 S. W. Rep. 979; Adams County *v.* Bowen, (Neb. 1903) 95 N. W. Rep. 869; People *v.* Steuben County, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 590, affirming 93 N. Y. App. Div. 604; State *v.* Erickson, 120 Wis. 435. Compare Butte County *v.* Merrill, 141 Cal. 396.

Power to Fix Salary at Adjourned Meeting. — Douglas County *v.* Sommer, 120 Wis. 424.

Board Acts Judicially in Fixing Salary of Clerk. — Mitchell *v.* Clay County, (Neb. 1904) 98 N. W. Rep. 662. Compare Mauer *v.* Gage County, (Neb. 1904) 100 N. W. Rep. 1026.

Necessity of Ratification by County Board. — See Card *v.* Dawes County, (Neb. 1904) 99 N. W. Rep. 662.

- 396.** *g.* CITY COUNCIL. — See note 7.
z. MISCELLANEOUS. — See notes 11, 14.
5. Right to Compensation — *a.* FOLLOWS TITLE TO THE OFFICE.
 — See note 15.
397. See notes 1, 4, 6.
c. IN DISPUTED CASES. — See notes 9, 11, 12.
d. RIGHT TO UNEARNED COMPENSATION. — See note 14.
398. *e.* RIGHT TO COMPENSATION ALREADY EARNED. — See notes 1, 2, 3, 5, 8.
f. WHEN OFFICE IS ABOLISHED. — See note 10.
399. *g.* DURING SUSPENSION. — See notes 1, 2, 3, 5.

396. 7. City Council. — Paducah *v.* Evitts, (Ky. 1905) 86 S. W. Rep. 1123; Cook *v.* Springfield, 184 Mass. 247; Alden *v.* Campbell, 30 Wash. 392.

11. Miscellaneous — Auditor. — Bosworth *v.* Shuck, (Ky. 1904) 81 S. W. Rep. 240.

Deputy Commissioner of Public Works. — Hartmann *v.* New York, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 272.

Police Commissioners. — Wiggin *v.* Manchester, 72 N. H. 576.

14. Sloan *v.* Peoria, 106 Ill. App. 151.

15. Right to Compensation — United States. — U. S. *v.* Dietrich, 126 Fed. Rep. 676.

California. — Adams *v.* Doyle, 139 Cal. 678. Iowa. — Brown *v.* Tama County, 122 Iowa 745, 101 Am. St. Rep. 296.

Kansas. — Ft. Scott *v.* Slater, 67 Kan. 133.

Kentucky. — Louisville *v.* Gorley, (Ky. 1904) 80 S. W. Rep. 203.

Massachusetts. — Cook *v.* Springfield, 184 Mass. 247.

Missouri. — Sheridan *v.* St. Louis, 183 Mo. 40, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 396; State *v.* Hawes, 177 Mo. 360.

Nebraska. — State *v.* Porter, (Neb. 1903) 95 N. W. Rep. 769.

New Jersey. — Bennett *v.* Orange, 69 N. J. L. 176.

New York. — Grieb *v.* Syracuse, 94 N. Y. App. Div. 133; Waters *v.* New York, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 154; People *v.* Hamilton, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 577, affirmed 98 N. Y. App. Div. 59; Greene *v.* Knox, 175 N. Y. 432; People *v.* McAdoo, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 517; Padden *v.* New York, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 517; Grant *v.* Rochester, 175 N. Y. 473, affirming 79 N. Y. App. Div. 460; Toole *v.* Ogden, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 581. Compare Driscoll *v.* New York, 78 N. Y. App. Div. 52.

Texas. — Houston *v.* Estes, 35 Tex. Civ. App. 99.

Right to Compensation Not Contractual. — People *v.* Coler, 173 N. Y. 103; Taylor *v.* Big Horn County, 11 Wyo. 106.

Right Not Dependent on Fact of Appropriation. — Geddes *v.* U. S., 38 Ct. Cl. 428.

Right Not Compromised by Failure to Fix Salary. — Butler County *v.* James, 116 Ky. 575. Compare Munch *v.* New York, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 128.

Statute Construed Strictly Against Officer. — Foreman *v.* People, 209 Ill. 567; State *v.* Adams, 172 Mo. 1.

Salary of Appointee to Fill Vacancy. — Foreman *v.* People, 209 Ill. 567.

Payment to De Facto Officer Discharges Municipality. — See Nall *v.* Coulter, 117 Ky. 747; State *v.* Babcock, 106 Mo. App. 72; People *v.* Grout, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 526; People *v.* Grout, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 505; Martin *v.* New York, 176 N. Y. 371; Stemmler *v.* New York, 179 N. Y. 473. And see the title DE FACTO OFFICERS, 814. 1.

Payment to Usurper After Notice of Adjudication No Defense. — Jones *v.* Buffalo, 178 N. Y. 45.

397. 1. Volunteer. — Sheridan *v.* St. Louis, 183 Mo. 40, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 396.

4. Payment to Possessor of Certificate of Election Valid. — Wilson *v.* Fisher, 140 Cal. 188; Bradley *v.* Georgetown, (Ky. 1904) 82 S. W. Rep. 303.

The Judgment of a Court Is Not a "Commission of Office" entitling the holder to the salary of the office. Bledsoe *v.* Colgan, 138 Cal. 34.

6. Moores *v.* State, 67 Neb. 535.

9. In Disputed Cases. — Van Sant *v.* Atlantic City, 68 N. J. L. 440.

11. Appeal. — Anderson *v.* Browning, 140 Cal. 222; Brown *v.* Tama County, 122 Iowa 745, 101 Am. St. Rep. 296; Jones *v.* Buffalo, 79 N. Y. App. Div. 328, affirmed 178 N. Y. 45. See also Bledsoe *v.* Colgan, 138 Cal. 34.

12. Hager *v.* Franklin, (Ky. 1905) 84 S. W. Rep. 541.

14. Right to Unearned Compensation. — See Greene *v.* Knox, 175 N. Y. 432.

398. 1. Compensation Already Earned. — Perry County *v.* Lindemann, (Ind. 1905) 73 N. E. Rep. 912.

2. Neglect of Duty. — See Cawthon *v.* Houston, 31 Tex. Civ. App. 1.

Performance of Services by Another. — Ft. Scott *v.* Slater, 67 Kan. 133.

3. Illness. — Cavanee *v.* Milan, 99 Mo. App. 672.

5. When Duties Are Abolished. — Ft. Scott *v.* Slater, 67 Kan. 133; Bennett *v.* Orange, 67 N. J. L. 176.

8. Fees Only for Actual Services Rendered — Threlkeld *v.* Livingston County Fiscal Ct., (Ky. 1904) 80 S. W. Rep. 1095. See also Stevens *v.* U. S., 38 Ct. Cl. 452.

10. When Office Is Abolished. — Cutshaw *v.* Denver, 19 Colo. App. 341; Raley *v.* Warren, 120 Ga. 365; Magner *v.* St. Louis, 170 Mo. 495. See also Greene *v.* Knox, 175 N. Y. 432.

399. 1. During Suspension. — Corcoran *v.*

399. i. AFTER DISMISSAL. — See note 10.

j. RETAINING SALARY FROM MONEY COLLECTED. — See note 11.

k. FRAUD. — See note 14.

6. When Compensation Becomes Due. — See note 15.

400. 7. Who Liable For. — See note 4.

8. From What Fund Payable. — See note 10.

9. Increasing and Decreasing Compensation — a. IN GENERAL. —

See note 11.

401. Such Change Unconstitutional. — See note 2.

But in the Absence of Such Constitutional Prohibition. — See notes 6, 7.

402. See notes 1, 3.

b. ESTOPPEL BY ACCEPTING LESS THAN AMOUNT DUE. — See notes 8, 9, 11.

U. S., 38 Ct. Cl. 341; *Louisville v. Gorley*, (Ky. 1904) 80 S. W. Rep. 203; *Alsberge v. New York*, 75 N. Y. App. Div. 360; *Padden v. New York*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 517; *Houston v. Estes*, 35 Tex. Civ. App. 99; *Houston v. Lubbock*, 35 Tex. Civ. App. 106. Compare *Hartwig v. Manistee*, 134 Mich. 615; *Blackwell v. Thayer*, 101 Mo. App. 661.

Cannot Recover Counsel Fees. — *Fallon v. Wright*, 82 N. Y. App. Div. 193.

399. 2. Lellmann v. U. S., 37 Ct. Cl. 128.

3. Houston v. Estes, 35 Tex. Civ. App. 99.

5. Brown v. Tama County, 122 Iowa 745, 101 Am. St. Rep. 296. See also *Conlin v. Board of Education*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 125; *Schuyler v. New York*, 95 N. Y. App. Div. 305.

10. After Dismissal. — *Houston v. Albers*, 32 Tex. Civ. App. 70.

After Successor Has Qualified. — See *Oklahoma City v. Dean*, (Okla. 1905) 79 Pac. Rep. 755.

11. County Treasure. Cannot Retain Commissions for Moneys Borrowed by County. — *Hall v. Greene County*, 119 Ga. 253.

14. Title Cannot Be Collaterally Attacked. — *Van Sant v. Atlantic City*, 68 N. J. L. 449.

15. When Compensation Becomes Due. — *Roberts v. Erickson*, 117 Wis. 324.

400. 4. The County. — *Staten Island Bank v. New York*, 68 N. Y. App. Div. 231, affirmed 174 N. Y. 519; *Colbert v. Bond*, 110 Tenn. 370.

10. See Hager v. Shuck, (Ky. 1905) 87 S. W. Rep. 300; *Bosworth v. Shuck*, (Ky. 1904) 81 S. W. Rep. 240.

11. Increasing and Decreasing Compensation. — *Foot v. Lake County*, 109 Ill. App. 312, affirmed 206 Ill. 185; *Jefferson County v. Waters*, 114 Ky. 48; *Board of Education v. Moore*, 114 Ky. 640; *Gilbert v. Paducah*, 115 Ky. 160; *Piercy v. Smith*, 117 Ky. 990; *Thomas v. State*, 17 S. Dak. 579; *State v. Erickson*, 120 Wis. 435.

Purpose of Provision. — See *Butler County v. James*, 116 Ky. 575; *Thomas v. Hager*, (Ky. 1905) 86 S. W. Rep. 969.

A Provision Against Change in Salary During "Continuance in Office" has been held to refer to the term, and not to the occupant. *Foreman v. People*, 209 Ill. 567.

Prohibition Not Applicable to Judiciary. — *Com. v. Mathues*, 210 Pa. St. 383; *Hauser v. Seeley*, (S. Dak. 1904) 100 N. W. Rep. 437. But see *Wolf v. Hope*, 210 Ill. 50.

Limitation Extends to Fees. — *Taylor v. Adair County*, (Ky. 1905) 84 S. W. Rep. 299.

Change from Fees to Salary Does Not Violate Provision. — *McCauley v. Culbert*, 144 Cal. 276.

Not Violated by Creating New Judicial District. — *Butler v. Stephens*, (Ky. 1905) 84 S. W. Rep. 745.

Violation by Taxation of Salaries. — *Matter of Taxation of Judges' Salaries*, 131 N. Car. 692.

No Increase by Compensatory Allowances. — *State v. Flynn*, 161 Ind. 554.

Reduction of Salaries Where Taxes Insufficient. — *Territory v. Beall*, (N. Mex. 1904) 75 Pac. Rep. 38.

Increase by Relieving from Payment of Deputy. — *Etsell v. Knight*, 117 Wis. 540.

Decrease by Reducing Appropriation. — *Grieb v. Syracuse*, 94 N. Y. App. Div. 133. See also *Butler County v. James*, 116 Ky. 575.

Excessive Appropriation Not Increase. — *James v. U. S.*, 38 Ct. Cl. 615.

401. 2. Such Change Unconstitutional. — *Butte County v. Merrill*, 141 Cal. 396; *Butler County v. James*, 116 Ky. 575; *Thomas v. Hager*, (Ky. 1905) 86 S. W. Rep. 969; *Thomas v. State*, 17 S. Dak. 579. See also *Bennett v. State*, 16 S. Dak. 417.

6. Power of Legislature to Change. — *Perry County v. Lindemann*, (Ind. 1905) 73 N. E. Rep. 912; *Dallis v. Griffin*, 117 Ga. 408; *Com. v. Mathues*, 210 Pa. St. 383; *Thomas v. State*, 17 S. Dak. 579.

Failure to Fix Before Qualification — Subsequent Determination Valid. — *Butler County v. James*, 116 Ky. 575.

7. Power Conferred upon Other Bodies. — *State v. Erickson*, 120 Wis. 435.

402. 1. Power to Fix Involves Power to Change. — *Com. v. Mathues*, 210 Pa. St. 383.

3. In Order to Deprive an Officer of His Statutory Compensation two things are essential: first, that the power so to do be lodged in some official hands; second, that it must be exercised actually and expressly, and not by implication. *Corcoran v. U. S.*, 38 Ct. Cl. 341.

8. Estoppel by Accepting Less than Amount Due. — *Grant v. Rochester*, 175 N. Y. 473, affirmed 79 N. Y. App. Div. 460.

9. Louisville v. Gorley, (Ky. 1904) 80 S. W. Rep. 203; *People v. Greene*, 95 N. Y. App. Div. 397. See also *Butler County v. James*, 116 Ky. 575.

11. Estoppel by Long Acquiescence. — *Hager v. Shuck*, (Ky. 1905) 87 S. W. Rep. 300; *Bannis-*

402. *c.* DISTINCTION BETWEEN RIGHT TO APPOINT AND TO FIX SALARY. — See note 12.

403. *d.* REDUCTION AMOUNTING TO ABOLITION OF OFFICE. — See note 1.

10. Recovery of Compensation. — See notes 4, 5, 9.

11. Recovering Back Money Illegally Paid. — See notes 11, 12.

404. See note 1.

Right to Set-off. — See note 3.

XIV. DURATION OF OFFICER'S AUTHORITY — 2. Duration of Authority in General — *b.* POWER TO FIX OR CHANGE DURATION — AUTHORITY OF LEGISLATURE — (1) *In General.* — See note 12.

405. See note 1.

(2) *Power to Abridge the Term of an Incumbent.* — See note 4.

(3) *Conclusiveness of Statutory Term.* — See note 8.

406. (4) *Constitutional Limitations* — (a) *Term Fixed by Constitution* — *aa.* RULE STATED. — See note 3.

bb. ABOLITION OF OFFICES IN CREATION OF NEW POLITICAL ORGANIZATIONS. — See note 4.

ter v. New York, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 408; *Ryan v. New York*, 177 N. Y. 271. See also *Healey v. Partridge*, 75 N. Y. App. Div. 511; *Knox v. New York*, 78 N. Y. App. Div. 368.

402. 12. *Distinction Between Appointing and Fixing Salary.* — *Andel v. People*, 106 Ill. App. 558.

Power of Appointment Held to Include Fixing of Compensation. — *Faulkner v. Sisson*, 183 Mass. 524.

403. 1. *Reduction Amounting to Abolition of Office.* — See *Com. v. Mathues*, 210 Pa. St. 383.

4. *Recovery by Mandamus Proceedings.* — See *Valley Bank v. Brodie*, (Ariz. 1904) 76 Pac. Rep. 617; *Chicago v. People*, 210 Ill. 84; *Fitzsimmons v. O'Neill*, 214 Ill. 494; *State v. Barrett*, 30 Mont. 203; *Moore v. State*, (Neb. 1903) 93 N. W. Rep. 986; *Gordon v. Omaha*, (Neb. 1904) 99 N. W. Rep. 242; *Hartmann v. New York*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 272; *People v. Grout*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 526; *People v. Hamilton*, (Supm. Ct. Spec. T.) 98 N. Y. App. Div. 59; *State v. State Treasurer*, 68 S. Car. 411.

5. *By Action at Law.* — See *Gregg v. Lake County*, 32 Colo. 357; *Foote v. Lake County*, 109 Ill. App. 312, *affirmed* 206 Ill. 185; *Wallowa County v. Oakes*, (Oregon 1904) 78 Pac. Rep. 892.

No Recovery on Quantum Meruit. — *Foreman v. People*, 209 Ill. 567.

Recovery by Reason of Statute. — *Cook v. Springfield*, 184 Mass. 247. See also *Jenkins v. Scranton*, 205 Pa. St. 598.

No Inquiry as to Reasonableness of Sum Where Compensation Fixed. — *Grenada v. Wood*, 81 Miss. 308.

9. *Recovery from Successor.* — Fees earned may be recovered from successor in office when collected by him. *Corbin v. Adair County*, 171 Mo. 385.

11. *Recovering Money Illegally Paid.* — *Zucly v. Casper*, 160 Ind. 455; *Comer v. Morgan County*, 32 Ind. App. 477; *Tucker v. State*, 163 Ind. 403; *Heath v. Allbrook*, 123 Iowa 550; *Mauer v. Gage County*, (Neb. 1901) 100 N. W. Rep. 1026; *Luzerne County v. Kirkendall*, 209

Pa. St. 116; *Tarrant County v. Butler*, 35 Tex. Civ. App. 421; *Etsell v. Knight*, 117 Wis. 540; *Douglas County v. Sommer*, 120 Wis. 424. *Compare Dickey County v. Hicks*, (N. Dak. 1905) 103 N. W. Rep. 423.

Overpayment Not Recoverable in Action on Bond. — *U. S. v. Boyd*, 118 Fed. Rep. 89.

Liability for Excess of Fees over Salary. — *Mitchell v. Clay County*, (Neb. 1904) 98 N. W. Rep. 662.

Laches No Defense. — *Johnson v. Black*, 103 Va. 477, 106 Am. St. Rep. 890.

12. *An Officer Cannot Recover Back from the County Moneys Voluntarily Paid*, but under a mistake of law. *Corbin v. Adair County*, 171 Mo. 385.

404. 1. *Judicial Determination Conclusive.* — *State v. Hawkins*, 169 Mo. 615.

3. *Right to Set-off.* — See *U. S. v. Warren*, 12 Okla. 350.

12. *Power of Legislature.* — *Dallis v. Griffin*, 117 Ga. 408; *Gilbert v. Craddock*, 67 Kan. 362; *People v. Kent*, 83 N. Y. App. Div. 554; *Matter of Lowman*, 95 N. Y. App. Div. 32, *affirmed* 179 N. Y. 600; *Thomas v. State*, 17 S. Dak. 570; *State v. Trewhitt*, 113 Tenn. 561; *State v. Howell*, 26 Utah 53; *State v. Policemen's Pension Fund*, 121 Wis. 44.

405. 1. *The Court Cannot Fix a Term* where the board upon which the duty is imposed refuse to act. See *State v. Hawes*, 177 Mo. 360.

4. *Power of Legislature to Abridge Incumbent's Term.* — *State v. Howell*, 26 Utah 53. See also *Thomas v. State*, 17 S. Dak. 570.

8. *Appointing Power Cannot Prolong Statutory Term by Delayed Reappointment.* — *Tansey v. Striger*, (Ky. 1903) 76 S. W. Rep. 537.

406. 3. *Legislature Cannot Alter Term Fixed by Constitution.* — *People v. Campbell*, 138 Cal. 11; *People v. Knopf*, 108 Ill. 340; *Gemmer v. State*, 163 Ind. 150; *Swincher v. Com.*, 72 S. W. Rep. 306, 24 Ky. L. Rep. 1897; *State v. Hall*, 67 Ohio St. 303; *Com. v. Mathues*, 210 Pa. St. 383.

4. *Creating New Political Organizations.* — *State v. Sawyer*, 139 Ala. 138; *Proulx v. Graves*, 143 Cal. 243; *People v. Oakley*, 93 N. Y. App. Div. 535; *Redistricting Cases*, 111 Tenn. 234.

407. (b) Term Limited by Constitution — *aa.* TERM LIMITED TO DEFINITE PERIOD OF TIME. — See note 1.

bb. TERM LIMITED TO PERIOD FOR WHICH OFFICER WAS ELECTED OR APPOINTED. — See notes 3, 4.

(c) Legislature Cannot Extend Term of Officer Elected under Constitution — *aa.* RULE STATED. — See note 7.

408. (e) Extent of Invalidity of Statutes Attempting to Alter Constitutional Term. — See notes 2, 3.

(f) Peculiar Provisions of Constitutional Limitations Construed. — See note 4.
c. INTERPRETATION OF LAWS FIXING OR REGULATING DURATION OF AUTHORITY — (1) *In General.* — See notes 7, 10.

409. See notes 1, 3.

410. *d.* DURATION OF AUTHORITY WHEN TENURE IS NOT FIXED. — See note 5.

3. When Authority Commences — *a.* WHEN DATE IS FIXED BY LAW. — See note 8.

411. See note 3.

b. WHEN NO DATE IS FIXED BY LAW — (1) *In General.* — See notes 7, 9.

Compare *Adams v. Roberts*, (Ky. 1904) 83 S. W. Rep. 1035.

Abolition of Offices by Redistricting of Counties. — *State v. Akin*, 112 Tenn. 603.

407. 1. Constitutional Limitation of Term to Definite Period of Time. — *Gilbert v. Craddock*, 67 Kan. 362; *Swincher v. Com.*, 72 S. W. Rep. 306, 24 Ky. L. Rep. 1897; *Matter of Lowman*, 95 N. Y. App. Div. 32, *affirmed* 179 N. Y. 600.
 3. See *State v. Witt*, 72 Ohio St. 584.

4. Statute Changing Time of Election. — Compare *People v. Knopf*, 198 Ill. 340.

7. Unconstitutionality of Statute Extending Term of Elective Officer. — *Gemmer v. State*, 163 Ind. 150; *Matter of Haase*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 114, *affirmed* 88 N. Y. App. Div. 242. See also *Lane v. Tilton*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 214; *People v. Kent*, 83 N. Y. App. Div. 554; *Matter of Haase*, 88 N. Y. App. Div. 242; *State v. Trehitt*, 113 Tenn. 561.

408. 2. Where Constitution Definitely Fixes Term. — *Hunt v. Buhner*, 133 Mich. 107, 10 Detroit Leg. N. 100. But see *People v. Knopf*, 198 Ill. 340.

3. Where Constitution Merely Limits Term. — See *Swincher v. Com.*, 72 S. W. Rep. 306, 24 Ky. L. Rep. 1897.

4. The Legislature Cannot Create an Interval between the official terms of persons elected under the constitution. *State v. Hall*, 67 Ohio St. 303.

7. Terms of a Certain Number of Years. — *Jones v. Sizemore*, 117 Ky. 810. See also *Houston v. Albers*, 32 Tex. Civ. App. 70.

Fixed Tenure Lost by Accepting Office Whose Tenure Is at Pleasure. — *State v. Hawes*, 177 Mo. 360.

10. Holding During Good Behavior Is Limited by a constitutional provision fixing at two years the terms of all officers not otherwise fixed. *Houston v. Estes*, 35 Tex. Civ. App. 99; *Houston v. Albers*, 32 Tex. Civ. App. 70; *Houston v. Mahoney*, 36 Tex. Civ. App. 45.

409. 1. Holding at Pleasure of Superior Officer or Official Body. — *Seebree v. Com.*, 115 Ky. 736;

MacLellan v. Marine, 98 Md. 53; *State v. Hawes*, 177 Mo. 360; *Atty.-Gen. v. Remick*, (N. H. 1904) 58 Atl. Rep. 871; *People v. Wells*, 178 N. Y. 135; *State v. Craig*, 69 Ohio St. 236; *White v. Mears*, 44 Oregon 215. See also *Vreeland v. Pierson*, 70 N. J. L. 508.

Right to Remove at Pleasure Distinct from Right to Remove for Cause. — *London v. Franklin*, (Ky. 1904) 80 S. W. Rep. 514.

Pleasure of Board Indicated by New Appointment. — *State v. Craig*, 69 Ohio St. 236.

3. Meaning of Holding "for the Occasion." — *Low v. State*, 111 Tenn. 81.

Meaning of "End of Year." — See *People v. Fitzgerald*, 96 N. Y. App. Div. 242, *affirmed* 180 N. Y. 269.

For the Construction of Peculiar Constitutional and Statutory Provision. — *Mannix v. Selbach*, 31 Colo. 502; *People v. Long*, 32 Colo. 486; *Fischer v. Moore*, 69 Kan. 191; *Atty.-Gen. v. Hutchinson*, 185 Mass. 85; *Hunt v. Buhner*, 133 Mich. 107, 10 Detroit Leg. N. 100; *Atty.-Gen. v. Shekell*, (Mich. 1904) 101 N. W. Rep. 525; *Ellis v. Greaves*, 82 Miss. 36; *Vreeland v. Pierson*, 70 N. J. L. 508; *White v. Mears*, 44 Oregon 215.

410. 5. Duration of Authority When Tenure Is Not Fixed. — *Farrell v. Police Com'rs*, (Cal. 1905) 81 Pac. Rep. 674; *Horstman v. Adamson*, 101 Mo. App. 119; *People v. Wells*, 176 N. Y. 462.

The Tenure of Ministerial Officers. — *Carling v. Jersey City*, 71 N. J. L. 154. See also *Horstman v. Adamson*, 101 Mo. App. 119.

8. Date Fixed by Law. — *People v. Fitzgerald*, 96 N. Y. App. Div. 242, *affirmed* 180 N. Y. 269.

When the Date Is Fixed by Law a Prior Qualification Is Unavailable, even in the absence of an incumbent in the office. *Finley v. Combs*, 12 Okla. 497.

411. 3. People v. Knopf, 198 Ill. 340.

7. Term to Begin from Election and Qualification. — See *Jones v. Sizemore*, 117 Ky. 810.

9. Term Beginning from Election Notwithstanding Want of Qualification. — See *Jones v. Sizemore*, 117 Ky. 810.

412. 4. When Authority Ends — a. WHEN TERM IS DEFINITELY FIXED OR LIMITED BY LAW — (1) General Rule. — See note 3.

(2) *Right to Hold Over* — (a) *In Absence of Any Express Provision* — *aa. IN GENERAL.* — See note 6.

413. See note 1.

(b) *Under Constitutional and Statutory Provisions* — *aa. IN GENERAL.* — See note 8.

414. Where a Successor Cannot Be Elected or Appointed. — See note 2.

415. The Policy of Provisions of This Character. — See note 1.

The Holding Over Is Not a New Term. — See note 2.

The Word "Elected." — See note 4.

Some of the Peculiar Provisions. — See note 6.

bb. AUTHORITY OF LEGISLATURE — CONSTITUTIONAL LIMITATIONS. — See note 8.

416. *dd. EFFECT OF JUDGMENT DECLARING OFFICE FORFEITED.* — See note 3.

ff. PRECLUSION OF VACANCY BY A HOLDING OVER. — See note 8.

418. b. WHEN TENURE IS AT PLEASURE OF SUPERIOR OFFICER OR OFFICIAL BODY. — See note 3.

c. TENURE OF PERSONS ELECTED OR APPOINTED TO FILL VACANCIES — (1) In Absence of Express Provision — (b) Where Term Is Fixed but Not Its Commencement or Termination. — See note 9.

419. (2) Under Express Constitutional and Statutory Provisions — (b) Power of Legislature — bb. WHEN TERM OF ELECTIVE OFFICE IS FIXED BY CONSTITUTION. — See note 2.

412. 3. Termination of Authority Where Term Fixed by Law. — *State v. Hawes*, 177 Mo. 360.

Expiration of Term Does Not Relieve from Duty to Account. — *Finley v. Territory*, 12 Okla. 621.

"Until" Construed as Inclusive. — *People v. Fitzgerald*, 96 N. Y. App. Div. 242, affirmed 180 N. Y. 269.

6. Incumbent Cannot Hold Over. — See *People v. Campbell*, 138 Cal. 11.

413. 1. Officers Entitled to Hold Over in Absence of Restrictive Words. — *Feathergill v. State*, 33 Ind. App. 683; *State v. Hawes*, 177 Mo. 360.

8. Holding Over under Express Provisions of Law — Colorado. — *People v. Herring*, 30 Colo. 445.

Georgia. — *Scales v. Faulkner*, 118 Ga. 152.

Illinois. — *People v. Knopf*, 198 Ill. 340.

Kansas. — *Griffith v. Manning*, 67 Kan. 559; *Goodrich v. Mitchell*, 68 Kan. 765, 104 Am. St. Rep. 429.

Missouri. — *State v. Dabbs*, 182 Mo. 359.

Montana. — *State v. Acton*, 31 Mont. 37.

New York. — *Matter of Travis*, 87 N. Y. App. Div. 554; *Langto v. Raymond*, 90 N. Y. App. Div. 614; *Hammondsport Law, etc., Assoc. v. Kinzell*, (County Ct.) 43 Misc. (N. Y.) 505.

Ohio. — *State v. Hall*, 67 Ohio St. 303.

South Carolina. — *Rushton v. Woodham*, 68 S. Car. 110.

Texas. — *Keen v. Featherston*, 29 Tex. Civ. App. 563.

Constitutional Limitations on Right to Hold Over. — *Donelan v. Bird*, (Ky. 1904) 80 S. W. Rep. 796.

Constitutional Provision to Holding Over Mandatory. — *Keen v. Featherston*, 29 Tex. Civ. App. 563.

414. 2. Where Office Has Been Abolished. — *People v. Adams*, 31 Colo. 476. Compare *Kee-ling v. Pittsburg, etc., R. Co.*, 205 Pa. St. 31.

416. 1. Policy of Provisions. — *Gemmer v.*

State, 163 Ind. 150; *State v. Trehwhitt*, 113 Tenn. 561; *State v. Grace*, 113 Tenn. 9; *Keen v. Featherston*, 29 Tex. Civ. App. 563; *Houston v. Mahoney*, 36 Tex. Civ. App. 45. See also *People v. Knopf*, 198 Ill. 340.

2. Holding Over a Prolongation of Old Term. — *Tansey v. Striger*, (Ky. 1903) 76 S. W. Rep. 537; *State v. Dabbs*, 182 Mo. 359.

4. "General Election" Defined. — See *Mannix v. Selbach*, 31 Colo. 502.

Cannot Postpone Election by Failure to Qualify. — *State v. Dabbs*, 182 Mo. 359.

6. Authority to Hold until Next General Election. — See *Mannix v. Selbach*, 31 Colo. 502.

Rights of Officers of Cities Transferred from One Class to Another to Hold Over. — *Gilbert v. Paducah*, 115 Ky. 160.

8. Where an Office Was Abolished at the end of a term, and the election of a successor was prohibited, it was held that the incumbent could not continue to hold the office. *State v. Howell*, 26 Utah 53.

Cannot Extend Term by Postponing Election. — *Gemmer v. State*, 163 Ind. 150.

416. 3. Hold-over Provision Not Applicable Where Office Has Been Forfeited. — *Shepherd v. Gambill*, 75 S. W. Rep. 223, 25 Ky. L. Rep. 333.

8. Authority to Fill Vacancy Does Not Authorize Election or Appointment During Holding Over. — *State v. Acton*, 31 Mont. 37. See also *Terry v. Hargis*, 74 S. W. Rep. 271, 24 Ky. L. Rep. 2498. But see *Kline v. McKelvey*, 57 W. Va. 29.

418. 3. Power to Abolish Office Does Not Give Power to Abolish Tenure. — *Adams v. Roberts*, (Ky. 1904) 83 S. W. Rep. 1035.

9. Appointee Held Entitled Only to Predecessor's Unexpired Term. — *Nicks v. Curl*, (Tex. Civ. App. 1905) 86 S. W. Rep. 368.

Appointee to Fill Unexpired Term Has No Power to Hold Over — *Terry v. Hargis*, 74 S. W. Rep. 271, 24 Ky. L. Rep. 2498.

419. 2. Failure to Hold Election at Time

419. (c) Construction of Provisions. — See note 5.

420. XV. TERMINATION OF AUTHORITY—1. Abolition of Office. — See notes 2, 3.

421. See notes 3, 4.

2. Resignation and Surrender — *a.* RIGHT TO RESIGN. — See note 7.

422. *b.* FORM AND REQUISITES OF RESIGNATION. — See note 4.

423. *d.* ACCEPTANCE — Necessity. — See note 2.

424. *f.* WITHDRAWAL OF RESIGNATION. — See notes 2, 6.

425. 3. Abandonment and Forfeiture — *a.* FAILURE TO QUALIFY OR TO MAINTAIN QUALIFICATIONS. — See notes 3, 4.

427. *d.* ACCEPTANCE OF INCOMPATIBLE OFFICE. — See notes 4, 5, 6.

e. COMMISSION OF CRIMINAL ACTS. — See note 9.

428. 5. Removal, Suspension, and Reinstatement — *a.* CONSTITUTIONAL PHASES OF POWER OF REMOVAL — (1) *Nature of Power as Executive, Legislative, or Judicial.* — See note 7.

429. See note 1.

Prescribed Cannot Affect Tenure of Office. — *Hendershot v. State*, 162 Ind. 69.

419. 5. Authority to Hold for Residue of Unexpired Term. — *Matter of Lowman*, 95 N. Y. App. Div. 32, *affirmed* 179 N. Y. 600.

Until the Next General Election. — *Mannix v. Seibach*, 31 Colo. 502; *State v. Burkhead*, 187 Mo. 14; *People v. Goodrich*, 92 N. Y. App. Div. 445, *affirmed* 180 N. Y. 522. See also *State v. Challerton*, 12 Wyo. 168.

Holding Over under Express Provision until Successors Chosen and Qualified. — *People v. Houghton*, 102 N. Y. App. Div. 209, *affirmed* 182 N. Y. 301; *Oklahoma City v. Dean*, (Okla. 1905) 79 Pac. Rep. 755; *State v. Trewitt*, 113 Tenn. 561.

When Election to Fill Vacancy Should Be Held. — *Donelan v. Bird*, (Ky. 1904) 80 S. W. Rep. 796.

Failure to Elect Successor. — *Click v. Sample*, 73 Ark. 194.

Provisions to Secure Uniformity in Tenure. — *State v. Burkhead*, 187 Mo. 14.

420. 2. Legislature May Not Abolish Constitutional Offices. — *Morris v. Glover*, 121 Ga. 751; *Adams v. Roberts*, (Ky. 1904) 83 S. W. Rep. 1035. See also *Matter of Allison*, 172 N. Y. 421.

Consolidation of Offices Unconstitutional Abolition. — *Morris v. Glover*, 121 Ga. 751.

3. Right to Abolish Office Created by Legislature. — *Gilbert v. Paducah*, 115 Ky. 160; *Matter of Allison*, 172 N. Y. 421; *Matter of Lowman*, 95 N. Y. App. Div. 32, *affirmed* 179 N. Y. 600; *Friel v. McAdoo*, 101 N. Y. App. Div. 155, *affirmed* 181 N. Y. 558; *People v. Tax Com'rs*, 174 N. Y. 417; *State v. Trewitt*, 113 Tenn. 561; *State v. Howell*, 26 Utah 53. See also *Morris v. Glover*, 121 Ga. 751. And see further *supra*, this title, **328**, 7.

Abolition by Adopting New Charter. — *Atty.-Gen. v. Shekell*, (Mich. 1904) 101 N. W. Rep. 525.

Intention of Legislature to Abolish Must Be Clear. — *Ft. Scott v. Slater*, 67 Kan. 133.

Good Faith Essential. — *Jones v. Willcox*, 80 N. Y. App. Div. 167 (abolition as subterfuge to evade preference to veterans); *People v. Coleman*, 99 N. Y. App. Div. 88.

421. 3. Abolition of Municipal Office. —

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Raley v. Warrenton, 120 Ga. 365; *Chicago v. People*, 114 Ill. App. 145; *Downey v. State*, 160 Ind. 578; *Wagner v. St. Louis*, 179 Mo. 495; *Stivers v. Jersey City*, 70 N. J. L. 606; *Jones v. Willcox*, 80 N. Y. App. Div. 167.

Courts Will Not Inquire into Motives for Abolishing Office. — *Downey v. State*, 160 Ind. 578.

Abolition by Turning Duties over to Another Official. — *Fitzsimmons v. O'Neil*, 214 Ill. 494.

4. Abolition by Depriving of Emoluments. — See *Morris v. Glover*, 121 Ga. 751.

7. Right of Retirement for Disability. — *State v. Policemen's Pension Fund*, 119 Wis. 436.

422. 4. Unexplained Absence Deemed Resignation. — *People v. Sturgis*, 77 N. Y. App. Div. 151.

423. 2. See *Gilbert v. Craddock*, 67 Kan. 362.

424. 2. See *State v. Grace*, 113 Tenn. 9.

6. See *Saunders v. O'Bannon*, (Ky. 1905) 87 S. W. Rep. 1105, *quoting* 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 424, and supporting the text paragraph generally.

425. 3. Failure to Qualify Per Se Forfeiture of Office. — See *State v. Box*, 34 Tex. Civ. App. 435; *Gouhenour v. Anderson*, 35 Tex. Civ. App. 569.

4. Omission Not Due to Officer's Fault. — See *State v. Box*, 34 Tex. Civ. App. 435.

427. 4. Accepting Incompatible Office. — *Gilbert v. Craddock*, 67 Kan. 362, *citing* 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 427; *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101. See also *Padden v. New York*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 517.

Officer Cannot Be Removed by Electing Him to Incompatible Office. — *U. S. v. Dietrich*, 126 Fed. Rep. 676.

Policeman Wrongfully Ousted — No Abandonment by Accepting Appointment as Special Policeman. — *Houston v. Estes*, 35 Tex. Civ. App. 99.

5. *State v. Hawes*, 177 Mo. 360.

6. *State v. Craig*, 69 Ohio St. 236.

9. Felony. — See *Lynch v. Com.*, 115 Ky. 309.

Conviction of Misdemeanor. — See *State v. Thompson*, 91 Minn. 279.

428. 7. Powers of Municipal Bodies to Remove. — *Riggins v. Richards*, 97 Tex. 229. See also *Matter of Carter*, 141 Cal. 316.

429. 1. Power of Removal for Cause Con-

- 429.** For Purpose of Review. — See notes 2, 3, 6, 9.
430. See notes 1, 5, 6.
431. See note 2.
 (2) *Departure from Constitutional and Statutory Requirements.* — See notes 6, 9.
432. b. WHAT IS REMOVAL — (1) *Requisites of Act of Removal.* — See note 9.
433. See notes 4, 5, 6.
 (2) *Appointment of Successor.* — See note 9.
 (3) *Revocation of Appointment.* — See note 11.
434. c. PERSONS AND BOARDS VESTED WITH POWER OF REMOVAL —
 (1) *General Principles.* — See notes 6, 8, 10, 11.
435. (2) *Power of President.* — See note 6.
 (3) *Power of Removal as Incident to Power of Appointment.* — See note 10.

sidered Judicial. — See *Van Sant v. Atlantic City*, 68 N. J. L. 449; *People v. Coler*, 173 N. Y. 103; *Christy v. Kingfisher*, 13 Okla. 585.

429. 2. Right of Review. — *Gill v. Brunswick*, 118 Ga. 85; *Akerman v. School Com'rs*, 118 Ga. 334; *Van Sant v. Atlantic City*, 68 N. J. L. 449; *People v. Greene*, 179 N. Y. 253.

Right to Inquire into Jurisdictional Facts. — *Cripple Creek v. Hanley*, 19 Colo. App. 390.

3. Existence of Cause. — *Ewin v. Independent School Dist. No. 8*, 10 Idaho 102.

6. Power to Remove at Pleasure. — *Horstman v. Adamson*, 101 Mo. App. 119. See also *Ewin v. Independent School Dist. No. 8*, 10 Idaho 102.

Right of Summary Removal Closely Scrutinized. — *Christy v. Kingfisher*, 13 Okla. 585.

9. Cannot Review Questions of Fact. — *Hogan v. Collins*, 183 Mass. 43; *Campbell v. Police Com'rs*, 71 N. J. L. 98; *People v. Partridge*, 88 N. Y. App. Div. 60. See also *Quinn v. Police Com'rs*, 69 N. J. L. 571; *Chicago v. People*, 210 Ill. 84.

Courts Will Not Review Punishment. — *People v. Greene*, 96 N. Y. App. Div. 1, affirmed 181 N. Y. 550.

Failure to Postpone Trial Reviewable. — *People v. Webster*, 98 N. Y. App. Div. 581.

430. 1. Discretion Not Subject to Control. — *State v. Kennelly*, 75 Conn. 704; *State v. Police Com'rs*, 184 Mo. 109; *Donahue v. Cumberland*, 25 R. I. 70; *Riggins v. Richards*, (Tex. Civ. App. 1904) 79 S. W. Rep. 84.

Motives Actuating Removals Not Ordinarily Reviewable. — *State v. Kennelly*, 75 Conn. 704; *Horstman v. Adamson*, 101 Mo. App. 119.

Removal Must Be in Good Faith. — *People v. Monroe*, 97 N. Y. App. Div. 283.

5. Review of Removal of Member of Legislative Body. — See *Cripple Creek v. Hanley*, 19 Colo. App. 390.

6. Action of Executive Conclusive. — See *State v. Kennelly*, 75 Conn. 704.

431. 2. See *Jones v. Willcox*, 80 N. Y. App. Div. 167.

6. Removing Power Limited by Statute. — *State v. Thompson*, 91 Minn. 279.

9. See *London v. Franklin*, (Ky. 1904) 80 S. W. Rep. 514.

432. 9. Removal by Concurrence of City Council in Mayor's Recommendation. — *State v. Byrne*, 31 Wash. 213.

Removal by Reduction of Salary. — *Shepard v. Oakley*, 181 N. Y. 339.

Removal by Declaring Office Vacant. — *Atty.-Gen. v. Remick*, (N. H. 1904) 58 Atl. Rep. 871.

Relieving Officer of His Command Not Removal. — *State v. Jelks*, 138 Ala. 115.

433. 4. Intent to Remove Necessary. — *Atty.-Gen. v. Remick*, (N. H. 1904) 58 Atl. Rep. 871.

5. Abolishing Board and Creating New One Held to Operate as Removal. — *Thomas v. State*, 17 S. Dak. 579.

6. When Transfer Is Removal. — *Waters v. New York*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 154; *People v. Board of Education*, 174 N. Y. 169.

9. Removal by Appointment of Another. — *Shepherd v. Gambill*, 75 S. W. Rep. 223, 25 Ky. L. Rep. 333; *Watson v. McGrath*, 111 La. 1097; *Atty.-Gen. v. Remick*, 71 N. H. 480; *State v. Craig*, 69 Ohio St. 236. Compare *Skinner v. Manchester*, 72 N. H. 299. *Contra*, where the appointing power is exhausted. *Board of Education v. Territory*, 12 Okla. 286.

11. No Revocation of Appointment for Fixed Term. — *Horstman v. Adamson*, 101 Mo. App. 119.

434. 6. Police Commissioner Sole Officer with Power to Dismiss Policeman. — *People v. Partridge*, 99 N. Y. App. Div. 410, affirmed 180 N. Y. 542.

8. Power of Appointment and of Removal Separated. — *People v. Adams*, 31 Colo. 476.

Power to Remove Appointees of Predecessor. — *MacLellan v. Marine*, 98 Md. 53.

10. Power of Governor to Remove. — See *State v. Jelks*, 138 Ala. 115; *People v. Adams*, 31 Colo. 476.

11. Authority of City Council to Remove. — *Rogers v. Congleton*, (Ky. 1905) 84 S. W. Rep. 521.

Power of Heads of Departments to Remove. — *People v. Scholer*, 94 N. Y. App. Div. 282, affirmed 179 N. Y. 602.

Power of Removal in Chief of Police Not Affected by Pension Fund Provisions. — *State v. Policemen's Pension Fund*, 123 Wis. 245.

435. 6. Power of President. — *Shurtleff v. U. S.*, 189 U. S. 311.

10. General Rule as to Power of Removal. — *State v. Kennelly*, 75 Conn. 704; *State v.*

436. See note 1.

d. PERSONS SUBJECT TO REMOVAL, INCLUDING RIGHT TO NOTICE — (1) *In General.* — See note 3.

437. Distinction Between State and Other Officers. — See note 1.

Distinction Between Officers and Employees. — See note 3.

(3) *As Affected by Mode of Appointment and Tenure of Office.* — See notes 7, 8.

438. Right to Notice. — See notes 1, 2.**439.** See notes 1, 2.

(4) *Persons Entitled to Protection under Civil Service and Veteran Acts* — (a) *In General.* — See note 4. See also generally the title CIVIL SERVICE.

440. See notes 1, 2.

Holding Position. — See note 3.

441. Temporary and Probationary Appointments. — See note 1.

Thompson, 91 Minn. 279; Horstman v. Adamson, 101 Mo. App. 119; Mack v. New York, 82 N. Y. App. Div. 637, *affirming* (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 371; Board of Education v. Territory, 12 Okla. 286, 70 Pac. Rep. 792; Christy v. Kingfisher, 13 Okla. 585; State v. Sheets, 26 Utah 109, *quoting* 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 435.

Power to Appoint Does Not Necessarily Include Power to Remove. — People v. Adams, 31 Colo. 476.

Power of Removal Not Incident to Mere Power to Investigate Charges. — Eason v. Seattle, 32 Wash. 405.

Power to Remove Includes Power to Suspend. — See Blackwell v. Thayer, 101 Mo. App. 661.

436. 1. Power of Municipal Corporations. — State v. Thompson, 91 Minn. 279.

3. Distinction Between Elective and Appointive Officers. — State v. Thompson, 91 Minn. 279.

Removal of Magistrates. — Matter of Baker, 94 N. Y. App. Div. 278; Matter of Tighe, 97 N. Y. App. Div. 28.

437. 1. Necessity of Determining to What Political Division Officer Attached. — Magner v. St. Louis, 179 Mo. 495; People v. Scholer, 94 N. Y. App. Div. 282, *affirmed* 179 N. Y. 602.

3. Who Are Employees. — Magner v. St. Louis, 179 Mo. 495; State v. Craig, 69 Ohio St. 236. See also *supra*, this title, **323**, 1 *et seq.*

"Regular Clerk" — People v. McDoo, 101 N. Y. App. Div. 183, *affirmed* 181 N. Y. 547.

7. During Good Behavior. — Street Com'rs v. Williams, 96 Md. 232; People v. Board of Education, 174 N. Y. 169. See also Houston v. Albers, 32 Tex. Civ. App. 70.

8. Fixed Period. — Morrilton Waterworks Imp. Dist. v. Earl, 71 Ark. 4; Raley v. Warrenton, 120 Ga. 365; Hager v. Lucas, (Ky. 1905) 86 S. W. Rep. 552.

438. 1. Entitled to Notice of Charges. — Shurtleff v. U. S., 189 U. S. 311; State v. Kennelly, 75 Conn. 704; Street Com'rs v. Williams, 96 Md. 232; State v. Hawes, 177 Mo. 387; People v. Sturgis, 91 N. Y. App. Div. 286; Martin v. New York, 176 N. Y. 371; Christy v. Kingfisher, 13 Okla. 585; Riggins v. Richards, 97 Tex. 229. See also Ewin v. Independent School Dist. No. 8, 10 Idaho 102.

Officer Illegally Appointed Not Entitled. — People v. McDoo, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 517.

2. Express Provision for Notice Unnecessary. — Christy v. Kingfisher, 13 Okla. 585.

439. 1. Specific Charges. — Campbell v. Police Com'rs, 71 N. J. L. 98; Jones v. Buffalo, 79 N. Y. App. Div. 328, *affirmed* 178 N. Y. 45; People v. Sturgis, 91 N. Y. App. Div. 286; Riggins v. Richards, 97 Tex. 229.

2. No Notice When Tenure at Pleasure. — Farrell v. Police Com'rs, (Colo. 1905) 81 Pac. Rep. 674; MacLellen v. Marine, 98 Md. 53; Horstman v. Adamson, 101 Mo. App. 119; State v. Hawes, 177 Mo. 360; Magner v. St. Louis, 179 Mo. 495.

Where Statute Makes Removing Officer Sole Judge. — Christy v. Kingfisher, 13 Okla. 585.

4. Constitutionality of Veteran Acts Upheld. — Goodrich v. Mitchell, 68 Kan. 765, 104 Am. St. Rep. 429.

Power of Commission to Adopt and Change Rules. — People v. Hamilton, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 577, *affirmed* 98 N. Y. App. Div. 59; Houston v. Smith, 36 Tex. Civ. App. 43.

"Classified List" Construed. — State v. Wyman, 71 Ohio St. 1.

440. 1. Person Must Bring Himself Within Provisions of Act. — Stott v. Chicago, 205 Ill. 287.

What Members of Fire Department Protected. — People v. Folks, 89 N. Y. App. Div. 171.

Fire Marshal Protected. — People v. Sturgis, 87 N. Y. App. Div. 413.

Honorably Discharged Soldier of Civil or Spanish War. — People v. Hynes, 101 N. Y. App. Div. 453.

Waiver of Rights by Refusing Reinstatement. — Fish v. McGann, 205 Ill. 179.

2. Not to Deputies. — People v. Wells, 176 N. Y. 462; People v. Dalton, 85 N. Y. App. Div. 110.

Not to Persons Holding Confidential Positions. — People v. McFadden, 75 N. Y. App. Div. 264; People v. Wells, 85 N. Y. App. Div. 378, *reversed* 178 N. Y. 411. See also Shaughnessy v. Fornes, 172 N. Y. 323.

Not to Officers and Attendants of Legislative Bodies. — Shaughnessy v. Fornes, 172 N. Y. 323.

3. Meaning of "Holding a Position." — People v. Redfield, 86 N. Y. App. Div. 367.

441. 1. Clerks on Probation Not Protected. — Fish v. McGann, 205 Ill. 179.

- 441.** De Facto Officers and Employees. — See note 5.
 Military Officers. — See note 8.
 (b) Dismissal on Grounds of Economy. — See note 9.
- 442.** e. CAUSES FOR REMOVAL — (1) *Definitions* — *Nonfeasance*. — See note 5.
Misfeasance. — See note 6.
Malfeasance. — See note 7.
 By Official Misconduct. — See note 8.
- 443.** (3) *Intent and Motive as Affecting Nature of Act*. — See note 6.
- 444.** (4) *Necessity of Prior Conviction*. — See note 2.
 (5) *Unofficial Acts in General*. — See note 8.
- 445.** (6) *Acts Before Appointment, in Other Offices, and in Prior Terms of Same Office*. — See note 1.
- 446.** (7) *Acts Touching Qualification and Competency* — (c) *Nonresidence*. — See note 4.
 (8) *Acts Affecting Conduct of Office* — (b) *Refusal to Perform Official Duties*. — See note 11.
- 447.** (d) *Nonattendance*. — See note 1.
 (e) *Disobedience and Contumacy*. — See notes 3, 4.
- 448.** (9) *Indictment, Conviction of Crime, and Imprisonment*. — See note 8.
- 449.** (11) *Intoxication*. — See note 2.
 (12) *Acts Peculiarly Affecting Police Officers*. — See notes 5, 7, 8, 11, 12.

441. 5. De Facto Appointees Protected. — See State v. Strobble, 25 Ohio Cir. Ct. 762.

8. New York Statute. — People v. Hynes, 101 N. Y. App. Div. 453.

9. May Remove Without Notice for Economy. — Chicago v. People, 114 Ill. App. 145; Fitzsimmons v. O'Neil, 214 Ill. 494; Seide v. Eustis, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 663; Lazenby v. Board of Police, 76 N. Y. App. Div. 171; People v. Wells, 78 N. Y. App. Div. 373; People v. Health Dept., 86 N. Y. App. Div. 521, affirmed 176 N. Y. 602; People v. Lindenthal, 173 N. Y. 524. See also Jones v. Willcox, 80 N. Y. App. Div. 167; Cusack v. Board of Education, 174 N. Y. 136.

Reinstatement When Office Colorably Abolished. — People v. Coleman, 99 N. Y. App. Div. 88.

May Abolish Office in Good Faith. — See Stivers v. Jersey City, 70 N. J. L. 606.

Good Faith Essential. — People v. Hogan, 101 N. Y. App. Div. 216.

Reduction of Force May Be Accomplished Without Notice. — State v. Police Com'rs, 184 Mo. 109.

Reduction of Salary Is Within Purview of Statute. — Waters v. New York, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 154.

442. 5. Nonfeasance Defined. — State v. McClellan, 113 Tenn. 616.

6. Misfeasance Defined. — State v. McClellan, 113 Tenn. 616.

7. Malfeasance Defined. — State v. McClellan, 113 Tenn. 616.

8. Accepting Free Transportation. — See People v. Wadhams, 176 N. Y. 9.

443. 6. Materiality of Intent. — See State v. Trinkle, 76 Kan. 306.

444. 2. Howard v. State, 72 Ark. 600.

8. Removal for Participation in Politics. — See Brownell v. Russell, 76 Vt. 326.

445. 1. Not Removable for Acts Done Before

Taking Office. — Campbell v. Police Com'rs, 71 N. J. L. 98.

446. 4. Effect of Permanent Removal. — See Matter of Bolte, 97 N. Y. App. Div. 551.

11. Wilful Refusal to Perform Duties — When Ground for Removal. — State v. Trinkle, 70 Kan. 396; Matter of Bolte, 97 N. Y. App. Div. 551; Riggins v. Richards, (Tex. Civ. App. 1904) 79 S. W. Rep. 84.

Permitting Subordinate to Abscond Ground for Removal. — People v. Coler, 78 N. Y. App. Div. 248, affirmed 175 N. Y. 510.

447. 1. Removal for Nonattendance. — See People v. Sturgis, 77 N. Y. App. Div. 636; Leach v. Woodbury, 75 N. Y. App. Div. 503; Matter of Bolte, 97 N. Y. App. Div. 551.

3. Refusal to Give Explanation Ground for Removal. — People v. Coler, 78 N. Y. App. Div. 593, affirmed 179 N. Y. 525.

4. Scandalous Language from Bench. — Matter of Bolte, 97 N. Y. App. Div. 551.

448. 8. Removal on Conviction of Criminal Act. — See Howard v. State, 72 Ark. 586.

449. 2. Intoxication. — Hogan v. Collins, 183 Mass. 43.

5. Technical Violation of Rule Not Necessitating Removal. — See People v. Greene, 89 N. Y. App. Div. 296.

7. Accusing Fellow Officer of Extortion. — People v. Partridge, 87 N. Y. App. Div. 573.

8. Maltreatment of Prisoners. — People v. Partridge, 88 N. Y. App. Div. 60.

11. Neglect of Duty. — People v. Partridge, 83 N. Y. App. Div. 262.

Neglecting to Arrest and Report. — People v. Glennon, 175 N. Y. 45; People v. Diamond, 175 N. Y. 517, affirming 72 N. Y. App. Div. 281.

Absence Without Leave. — People v. York, 173 N. Y. 610, 73 N. Y. App. Div. 445.

Failure to Suppress Disorderly Houses. — People v. Greene, 179 N. Y. 195.

450. *f.* NATURE OF PROCEEDING AS AFFECTING SUBSTANTIAL RIGHTS. — See note 6.

451. *h.* EVIDENCE. — See notes 1, 2.

452. *i.* SUSPENSION. — See note 1.

j. NOTICE OF SUSPENSION OR REMOVAL. — See note 3.

k. EFFECT AND INCIDENTS OF REMOVAL — (1) *In General.* —

See note 6.

453. *l.* REINSTATEMENT — (1) *In General.* — See notes 3, 6.

(3) *Laches.* — See note 10.

454. PUBLIC PLACE. — See notes 3, 5.

456. PUBLIC POLICY. — See note 2.

457. See note 1.

[PUBLIC PROPERTY. — See note 2*a*.]

PUBLIC PURPOSE. — See note 4.

449. 12. Criminal Offenses. — See Oesterreich *v.* Fowle, 132 Mich. 9, 9 Detroit Leg. N. 496; *People v.* Greene, 101 N. Y. App. Div. 33.

450. 6. Does Not Preclude Subsequent Prosecution. — *State v.* Kelly, 103 Mo. App. 711.

451. 1. Rule as to Quantum of Evidence. — *Matter of Koch*, 91 N. Y. App. Div. 194.

Fair Preponderance of Evidence. — *People v.* Sturgis, 91 N. Y. App. Div. 286; *People v.* Greene, 92 N. Y. App. Div. 243.

Admissibility of Evidence. — *People v.* Greene, 96 N. Y. App. Div. 249; *People v.* Greene, 179 N. Y. 195; *People v.* Greene, 179 N. Y. 253; *People v.* Sturgis, 91 N. Y. App. Div. 286.

2. Neglect and Negligence. — *People v.* Partridge, 86 N. Y. App. Div. 310; *Matter of Koch*, 91 N. Y. App. Div. 194; *People v.* Greene, 94 N. Y. App. Div. 287, reversed 179 N. Y. 253; *People v.* Greene, 96 N. Y. App. Div. 249.

Intoxication. — *Hogan v.* Collins, 183 Mass. 43.

Maltreatment of Prisoners. *People v.* Partridge, 88 N. Y. App. Div. 60.

Absence from Post. — *People v.* Partridge, 99 N. Y. App. Div. 410, affirmed 180 N. Y. 542.

Bribery. — *People v.* Partridge, 95 N. Y. App. Div. 323.

Conduct Unbecoming Officer. — *People v.* Partridge, 91 N. Y. App. Div. 557, affirmed 179 N. Y. 531; *People v.* Greene, 97 N. Y. App. Div. 404.

Failure to Enforce Liquor Laws. — *People v.* Partridge, 99 N. Y. App. Div. 410, affirmed 180 N. Y. 542.

Failure to Suppress Disorderly Houses. — *People v.* Greene, 92 N. Y. App. Div. 243; *People v.* Greene, 98 N. Y. App. Div. 620; *People v.* Greene, 104 N. Y. App. Div. 496.

False Accusations. — *People v.* Partridge, 87 N. Y. App. Div. 573.

Insubordination. — *People v.* Greene, 96 N. Y. App. Div. 249.

Use of Profane Language. — *Lamb v.* Brunswick, 121 Ga. 345.

Disobedience of Rules. — *People v.* Sturgis, 96 N. Y. App. Div. 620; *People v.* Greene, 91 N. Y. App. Div. 58, affirmed 178 N. Y. 617.

452. 1. Police Officer — Suspension Preventing Right to Retire. — *People v.* Greene, 87 N. Y. App. Div. 589.

3. Necessity of Notice. — *Matter of Carter*, 141 Cal. 316.

Sufficiency of Notice. — *Jenkins v.* Scranton, 205 Pa. St. 598.

6. Authority Terminated. — See *State v.* Byrne, 31 Wash. 213.

453. 3. Necessity of Demand for Reinstatement. — See *People v.* Grout, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 47; *People v.* Lantry, 88 N. Y. App. Div. 583.

6. Need for Services. — See *People v.* Grout, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 47.

10. Right Lost by Laches. — *Jones v.* Police Com'rs, 141 Cal. 96; *Glori v.* Police Com'rs, (N. J. 1905) 60 Atl. Rep. 47; *People v.* Police Com'rs, 174 N. Y. 450, 95 Am. St. Rep. 596; *People v.* Greene, 87 N. Y. App. Div. 346; *People v.* Maxwell, 87 N. Y. App. Div. 391. Compare *Houston v.* Estes, 35 Tex. Civ App. 99.

Facts Held Not to Constitute Laches. — See *People v.* Greene, 95 N. Y. App. Div. 397.

454. 3. Public Place. — *Myrick v.* Kahle, 120 Wis. 57.

A "Public Place" Is a Place Put into Practical Use by the Public. — *Gray v.* St. Paul City R. Co., 87 Minn. 280.

5. A Workhouse has been held to be a public place. *Mill End Guardians v.* Hoare, (1903) 2 K. B. 483.

A Yard of a Private House forty feet away and open to observation from a public highway is a public place. *Lee v.* State, 136 Ala. 31.

456. 2. Vagueness of Term. — *Lipscomb v.* Adams, 193 Mo. 542, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 456.

457. 1. The Public Policy of a State Cannot Have Extraterritorial Effect. — *Cleveland, etc., R. Co. v.* Druen, 118 Ky. 237.

A Contract Binding Maker to Do Something Against Public Policy is void, however solemnly made. *Hard v.* Harris, 24 Ohio Cir. Ct. 715, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 455 [457].

2*a.* Public Property. — A building and a stock of liquors owned by a municipal corporation and operated by it as a dispensary are public property. *Walden v.* Whigham, 120 Ga. 646.

Property owned by a city necessary to the exercise of those duties which are strictly governmental is public property. *Frankfort v.* Com., (Ky. 1904) 82 S. W. Rep. 1008.

4. The Words "For Public Purposes" mean the same as the words "for governmental pur-

- 458. PUBLIC RECORDS.** — See note 1.
PUBLIC ROADS. — See note 3.
PUBLIC USE. — See note 5.
459. PUBLIC WAYS. — See note 1.
PUBLIC WORKS. — See note 2.
461. PUNITIVE DAMAGES. — See note 5.
462. PURCHASE — PURCHASER. — See note 1.
463. See note 1.
464. Methods of Acquiring Title by Purchase. — See note 1.
465. PURCHASE MONEY. — See notes 2, 3.

poses." *Frankfort v. Com.*, (Ky. 1904) 82 S. W. Rep. 1008.

458. 1. Public Records. — See *Kemp v. Metropolitan St. R. Co.*, 94 N. Y. App. Div. 322.

3. Public Roads. — *Heninger v. Perry*, 102 Va. 896.

5. Public Use. — *Sisson v. Buena Vista County*, 128 Iowa 442; *Borden v. Trespalacios Rice*, etc., Co., (Tex. Civ. App. 1904) 82 S. W. Rep. 461; *Nash v. Clark*, 27 Utah 158; *Healy Lumber Co. v. Morris*, 33 Wash. 490. See also *Hildreth v. Montecito Creek Water Co.*, (Cal. 1902) 70 Pac. Rep. 672.

In *Albright v. Sussex County Lake*, etc., Commission, 71 N. J. L. 303, the court said: "In order that a use may be public, it is not essential that the whole community should be able directly to participate in it. Thus, a free school for children is for a *public use*, although only a fraction of the community can attend it. But it is essential that the utility should in a substantial measure concern the public, as, for example, the education of the young concerns the community."

Public Interest and Public Use Not Synonymous. — *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662.

459. 1. Public Ways. — *Jones v. Venable*, 120 Ga. 1; *Railroad Commission v. St. Louis Southwestern R. Co.*, 35 Tex. Civ. App. 52.

2. "Public Works" Not Limited to Fixed Works, However. — *U. S. v. Perth Amboy Shipbuilding, etc., Co.*, 137 Fed. Rep. 689, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 459; *U. S. v. Ætna Indemnity Co.*, 40 Wash. 87.

The Reduction of the Garbage of a City Is a "Public Work." — *State v. Butler*, 178 Mo. 272.

461. 5. Punitive Damages. — *Beaudrot v. Southern R. Co.*, 69 S. Car. 160.

462. 1. Purchase May Include a Complete or Incomplete Transaction. — *State v. Ware*, 71 N. J. L. 53.

A Mortgagee may be a purchaser. *Allison v. Manzke*, 118 Wis. 11.

463. 1. Technical Sense. — *Frick Coke Co. v. Laughead*, 203 Pa. St. 168.

464. 1. Devise. — *Clark v. Strong*, 105 N. Y. App. Div. 183, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 464.

465. 2. Purchase Money. — *Rex v. Whitehorn*, (1904) 1 K. B. 827.

3. Property or Labor. — *Daily v. Minnick*, 117 Iowa 563.

PURCHASE-MONEY MORTGAGES.

By A. A. WADSWORTH.

467. I. DEFINITION AND SCOPE OF TITLE — Mortgage Substituted for Purchase-money Mortgage. — See note 4.

468. II. PRIORITY OVER OTHER LIENS — 2. Over Other Mortgages — Mortgage to Cover After-acquired Property. — See note 3.

469. 4. Over Mechanics' Liens. — See note 5.

7. Priority by Agreement — If Two Purchase-money Mortgages Be Taken. — See note 9.

A New Mortgage May, by Mutual Agreement, Be Substituted. — See note 10.

467. 4. See *Nicholson v. Aney*, 127 Iowa 278, holding that a mortgage executed for money to take up a mortgage for the purchase of chattels and to buy additional material to run the business is not a purchase-money mortgage.

468. 3. Farmers' L. & T. Co. v. Denver, etc., R. Co., (C. C. A.) 126 Fed. Rep. 46.

469. 5. Over Mechanics' Liens. — *Wilson v. Lubke*, 176 Mo. 210, 98 Am. St. Rep. 503.

9. Waiver of Priority by Agreement. — A vendor holding a purchase-money mortgage may

waive his priority in favor of a junior mortgagee by an instrument in writing reciting that such waiver is made in order to enable the vendee to secure a loan with which to build a house upon the mortgaged premises, but the junior mortgagee is entitled to priority only to the extent of the amount of money so applied. *Claypool v. German F. Ins. Co.*, 32 Ind. App. 540. See also to the same effect *Jorammon v. McPhee*, 31 Colo. 26.

10. Substitute of New Mortgage. — *Maas v. Tacquard*, 33 Tex. Civ. App. 40.

PURCHASERS FOR VALUE AND WITHOUT NOTICE.

By E. C. ELLSBREE.

476. III. DEFINITION AND GENERAL CONSIDERATION — 1. Definition. — See note 3.

2. Persons Entitled to Protection — *b.* MORTGAGEE. — See note 4.
c. ASSIGNEE OF MORTGAGE. — See note 5.

477. *d.* TRUSTEE AND CESTUI QUE TRUST IN TRUST DEED. — See note 1.

h. PURCHASER WITH NOTICE FROM BONA FIDE PURCHASER — (1) *General Rule.* — See note 5.

478. (2) *Exceptions and Limitations* — Purchase by Former Owner. — See note 1.

i. BONA FIDE PURCHASER FROM PURCHASER WITH NOTICE. — See note 5.

479. IV. ESSENTIAL ELEMENTS OF BONA FIDE PURCHASE — 1. General Principle. — See note 3.

3. Acquisition of Legal Title — *a.* GENERAL RULE. — See note 6.

480. *b.* APPLICATIONS OF RULE — (1) *Conflicting Rights or Titles Both Equitable* — (a) General Rule. — See note 2.

481. (c) Purchase of Legal Estate by Subsequent Party. — See notes 3, 4.

483. (2) *Prior Legal Estate* — (b) Title Not in Vendor — *bb.* DEED TO VENDOR NOT DELIVERED. — See note 2.

484. (c) Want of Capacity in Vendor — *cc.* INSANITY — Deed Voidable. — See note 8.

487. 4. Consideration or Value — *a.* IN GENERAL. — See note 5.

476. 3. Term Defined. — Cahill *v.* Seitz, 93 N. Y. App. Div. 105; Derrett *v.* Britton, 35 Tex. Civ. App. 485; Lyster *v.* Leighton, 36 Tex. Civ. App. 62; Rhea *v.* Shields, 103 Va. 305.

4. Mortgagee as a Purchaser. — Atlanta Nat. Bldg., etc., Assoc. *v.* Gilmer, 128 Fed. Rep. 293, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 476; Crooks *v.* Jenkins, 124 Iowa 317, 104 Am. St. Rep. 326; Allison *v.* Manzke, 118 Wis. 11.

5. Assignee of Mortgage as a Purchaser. — Boyer *v.* Webber, 22 Pa. Super. Ct. 35.

477. 1. Trustee and Creditors under Deed of Trust. — Gilbert *v.* Lawrence, 56 W. Va. 281.

The Bona Fide Assignee of a Note Secured by a Deed of Trust is the owner of the trust deed free from equities of which he had no notice. Kittler *v.* Studabaker, 113 Ill. App. 342, 352.

5. Bona Fide Purchaser May Convey Perfect Title to Grantee with Notice. — Livingstone *v.* Murphy, 187 Mass. 315, 105 Am. St. Rep. 400; Long *v.* Fields, 31 Tex. Civ. App. 241; Garner *v.* Boyle, 34 Tex. Civ. App. 42.

478. 1. Purchase by Prior Grantor. — Bourquin *v.* Bourquin, 120 Ga. 115.

5. Notice in Grantor Inoperative. — West *v.* Wright, 121 Ga. 470; Richards *v.* Carter, 201 Ill. 165; Thompson *v.* Stark, (Ky. 1904) 79 S. W. Rep. 202.

479. 3. U. S. *v.* Detroit Timber, etc., Co., (C. C. A.) 131 Fed. Rep. 668. See also Derrett *v.* Britton, 35 Tex. Civ. App. 485.

6. Purchaser Must Have Acquired Legal Title. — Shook *v.* Southern Bldg., etc., Assoc., 140 Ala. 575, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 479 *et seq.*

480. 2. Qui Prior in Tempore Potior Est in Jure. — Slaughter *v.* Coke County, 34 Tex. Civ. App. 598; Lowther Oil Co. *v.* Miller-Sibley Oil Co., 53 W. Va. 501, 97 Am. St. Rep. 1027; Martin *v.* Thomas, 56 W. Va. 220.

481. 3. Subsequent Incumbrancer May Gain Protection of Legal Estate. — U. S. *v.* Detroit Timber, etc., Co., (C. C. A.) 131 Fed. Rep. 668; Martin *v.* Thomas, 56 W. Va. 220.

4. U. S. *v.* Detroit Timber, etc., Co., (C. C. A.) 131 Fed. Rep. 668; Martin *v.* Thomas, 56 W. Va. 220.

483. 2. Necessity for Delivery of Deed. — Houston Land, etc., Co. *v.* Hubbard, (Tex. Civ. App. 1905) 85 S. W. Rep. 474.

Estoppel of Original Grantor. — Houston Land, etc., Co. *v.* Hubbard, (Tex. Civ. App. 1905) 85 S. W. Rep. 474.

484. 8 Deed Voidable — Purchaser Protected. — Logan *v.* Vanarsdall, (Ky. 1905) 86 S. W. Rep. 081.

487. 5. Necessity for Consideration. — Kringle *v.* Rhomberg, 120 Iowa 472.

487. *b. NATURE AND ADEQUACY OF CONSIDERATION — (1) Sufficiency in General — Value Must Be Given. — See note 8.*

488. *Merely Nominal Consideration. — See note 1.*

Consideration Need Not Be Full Value of Property. — See note 2.

490. *(9) Antecedent Debt — (b) Rule that Grantee Is Not Protected. — See note 4.*

491. *(f) Conveyance or Mortgage as Security for Antecedent Debt. — See note 7.*

493. *(h) Extending Time of Payment of Antecedent Debt. — See note 2.*

495. *V. NOTICE — ITS SUFFICIENCY AND EFFECT — 2. Nature and Sufficiency of Notice — a. CONSTRUCTIVE NOTICE — (1) General Rule. — See note 2.*

496. *(2) Qualifications of Rule. — See note 3.*

497. *See note 1.*

498. *(3) By Possession of Property — (a) In General. — See note 4.*

487. *8. Consideration Must Be Valuable. — Mackay v. Gabel, 117 Fed. Rep. 873; Collins v. Davis, 132 N. Car. 106, holding that "valuable consideration," in this connection, means "a fair and reasonable price according to the common mode of dealing between buyers and sellers."*

488. *1. Nominal Consideration Insufficient. — Mackay v. Gabel, 117 Fed. Rep. 873; Crossly v. Campion Min. Co., 1 Alaska 391.*

2. Payment of Less than Real Value Sufficient. — Koch v. West, 118 Iowa 468, 96 Am. St. Rep. 394, holding that inadequacy has no force at all where the purchase was made at a judicial sale.

490. *4. Discharge of Antecedent Debt Not a Valuable Consideration. — Birket v. Elward, 68 Kan. 295, 104 Am. St. Rep. 405, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 490; Catrett v. J. S. Brown Hardware Co., (Tex. Civ. App. 1905) 86 S. W. Rep. 1045.*

491. *7. Conveyance or Mortgage Securing Antecedent Debt. — O'Brien v. Fleckenstein, 86 N. Y. App. Div. 140, affirmed 180 N. Y. 350; Adamson v. Souder, 205 Pa. St. 498.*

493. *2. Extending Payment of Antecedent Debt a Sufficient Consideration. — O'Brien v. Fleckenstein, 180 N. Y. 350, affirming 86 N. Y. App. Div. 140.*

495. *2. Putting Purchaser on Inquiry, Sufficient Notice — United States. — Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co., (C. C. A.) 121 Fed. Rep. 524.*

Alabama. — Rankin Mfg. Co. v. Bishop, 137 Ala. 271.

California. — Kenniff v. Caulfield, 140 Cal. 34, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 494.

Colorado. — Allen v. Moore, 30 Colo. 307.

Georgia. — Walker v. Neil, 117 Ga. 733.

Indiana. — Blair v. Whittaker, 31 Ind. App. 664; Webb v. John Hancock Mut. L. Ins. Co., 162 Ind. 616.

Iowa. — Beeman v. Kitzman, 124 Iowa 86.

Kentucky. — Dalmazzo v. Simmons, (Ky. 1904) 78 S. W. Rep. 179.

New Jersey. — Atlantic City v. New Auditorium Pier Co., 63 N. J. Eq. 644.

New York. — Sweet v. Henry, 175 N. Y. 268; Matter of Hollister, 96 N. Y. App. Div. 501, affirmed 180 N. Y. 518.

North Carolina. — Collins v. Davis, 132 N. Car. 106; Patton v. Cooper, 132 N. Car. 701.

Texas. — O'Mahoney v. Flanagan, 34 Tex. Civ. App. 244; King v. Summerville, (Tex. Civ.

App. 1904) 80 S. W. Rep. 1050; Masterson v. Harris, (Tex. Civ. App. 1904) 83 S. W. Rep. 428.

Virginia. — Fulkerson v. Taylor, 102 Va. 314.

Washington. — Bigelow v. Brewer, 29 Wash. 670.

West Virginia. — Clark v. Sayers, 55 W. Va. 512.

Wisconsin. — Beebe v. Wisconsin Mortg. Loan Co., 117 Wis. 328; Ward v. Russell, 121 Wis. 77.

496. *3. Duty to Make Inquiry Is Essential. — Cahill v. Seitz, 93 N. Y. App. Div. 105; Clark v. Sayers, 55 W. Va. 512.*

"What Makes Inquiry a Duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell." U. S. v. Detroit Timber, etc., Co., (C. C. A.) 131 Fed. Rep. 668.

497. *1. Path of Inquiry Must Lead to Knowledge. — Clark v. Sayers, 55 W. Va. 512.*

498. *4. Possession of Property Is Constructive Notice — United States. — Rankin Mfg. Co. v. Bishop, 137 Ala. 271.*

Colorado. — Allen v. Moore, 30 Colo. 307.

Georgia. — Baldwin v. Sherwood, 117 Ga. 827.

Illinois. — Hepp v. Szczepanski, 209 Ill. 88, 101 Am. St. Rep. 221; Helm v. Kaddatz, 107 Ill. App. 413; Santee v. Day, 111 Ill. App. 495.

Indiana. — Kirkham v. Moore, 30 Ind. App. 549; Blair v. Whittaker, 31 Ind. App. 664; Elsbury v. Shull, 32 Ind. App. 556; Rothschild v. Leonhard, 33 Ind. App. 452.

Iowa. — Truth Lodge No. 213 v. Barton, 119 Iowa 230, 97 Am. St. Rep. 303; Crooks v. Jenkins, 124 Iowa 317, 104 Am. St. Rep. 326.

Kansas. — Gray v. Zellmer, 66 Kan. 514, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 498.

Kentucky. — Bryant v. Main, (Ky. 1903) 77 S. W. Rep. 680.

Minnesota. — Thompson v. Borg, 90 Minn. 209.

Nebraska. — Oberlender v. Butcher, 67 Neb. 410.

New Jersey. — English v. Rainear, (N. J. 1903) 55 Atl. Rep. 41; Gilson v. Thomas, 180 N. Y. 483.

Oregon. — Randall v. Lingwall, 43 Oregon 383.

Texas. — Jinks v. Moppin, (Tex. Civ. App. 1904) 80 S. W. Rep. 390; Kuteman v. Carroll, (Tex. Civ. App. 1904) 80 S. W. Rep. 842.

Washington. — Peterson v. Philadelphia

501. (b) Applications of Principle — *aa.* POSSESSION BY TENANT OR LESSEE — (*aa*) *In General* — Possession by Tenant Notice of Rights Beyond Tenancy. — See note 1.

(*bb*) Notice of Landlord's Title — Rule in United States. — See note 6.

503. *bb.* POSSESSION BY PRIOR GRANTOR AFTER CONVEYANCE. — See note 1.

cc. POSSESSION BY JOINT TENANT OR TENANT IN COMMON. — See note 4.

504. See note 1.

dd. POSSESSION BY HUSBAND AND WIFE — In Georgia. — See note 8.

505. (e) Requisites and Sufficiency of Possession — *aa.* IN GENERAL. — See note 1.

506. See note 1.

dd. MUST BE INCONSISTENT WITH APPARENT TITLE OF GRANTOR — (*aa*) Principle Stated. — See note 6.

507. (*bb*) Necessity for Change of Possession at Prior Sale. — See note 1.

Vendor in Possession by Tenant — Attornment to Vendee Not Sufficient. — See note 3.

508. (4) By Instruments Relating to Title — *aa.* GENERAL RULE. — See note 3.

509. Purchaser Not Entitled to Rely on Representations of Vendor. — See note 1.

510. *bb.* QUALIFICATIONS OF RULE — (*bb*) Instrument Must Relate to Chain of Title. — See note 5.

cc. BY QUITCLAIM DEED — (*aa*) Majority Rule. — See note 6.

511. (*bb*) Qualifications of Rule — Deed Purporting to Convey Absolute Title. — See note 1.

Mortg., etc., Co., 33 Wash. 464, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 498-501.

West Virginia. — Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 97 Am. St. Rep. 1027.

Wisconsin. — Roberts v. Decker, 120 Wis. 102.

501. 1. Possession of Tenant Notice of Rights Collateral to Tenancy. — Crooks v. Jenkins, 124 Iowa 317, 104 Am. St. Rep. 326, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 500.

6. Tenant's Possession Notice of Landlord's Title. — Storthz v. Chapline, 71 Ark. 31; Thompson v. Borg, 90 Minn. 209; Randall v. Lingwall, 43 Oregon 383; Callum v. Sanger, 98 Tex. 162.

503. 1. Vendor's Possession Not Notice. — Malette v. Wright, 120 Ga. 735; Crooks v. Jenkins, 124 Iowa 317, 104 Am. St. Rep. 326; Hockman v. Thuma, 68 Kan. 519; Randall v. Lingwall, 43 Oregon 383.

4. Possession by Cotenant. — The mere sole possession of one coparcener or tenant in common is not notice to subsequent purchasers of shares of other coparceners or tenants in common of the right of such occupant to those shares under a prior unrecorded purchase of them by such occupant. Martin v. Thomas, 56 W. Va. 220.

501. 1. Collum v. Sanger, 98 Tex. 162.

8. Georgia Rule. — Compare Walker v. Neil, 117 Ga. 733.

505. 1. General Requisites of Possession. — Atlanta Nat. Bldg., etc., Assoc. v. Gilmer, 128 Fed. Rep. 293, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 509 [505]; Roderick v. McMeekin, 204 Ill. 625; Gray v. Lamb, 207 Ill. 258; Sheldon v. Powell, 31 Mont. 249. See also Rankin Mfg. Co. v. Bishop, 137 Ala. 271.

Sufficiency of Possession Question of Fact. — Helm v. Kaddatz, 107 Ill. App. 413.

The Joint Occupation of the Claimant of an Equity with the Holder of the Legal Title is not notice of the claim of the former. Atlantic Nat. Bldg., etc., Assoc. v. Gilmer, 128 Fed. Rep. 293.

506. 1. Inclosing Land with Fence Sufficient Notice. — Millard v. Wegner, (Neb. 1903) 94 N. W. Rep. 802.

6. Possession Consistent with Apparent Title in Grantor Not Notice. — Aden v. Vallejo, 139 Cal. 165.; Crooks v. Jenkins, 124 Iowa 317, 104 Am. St. Rep. 326; Gibson v. Thomas, 85 N. Y. App. Div. 243, affirmed 180 N. Y. 483; Derrett v. Britton, 35 Tex. Civ. App. 485; Eastham v. Hunter, 98 Tex. 560; Martin v. Thomas, 56 W. Va. 220, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 506. Compare Collum v. Sanger, 98 Tex. 162.

507. 1. Vendor and Vendee Remaining in Possession. — See Rankin Mfg. Co. v. Bishop, 137 Ala. 271.

3. Attornment of Vendor's Tenant to Vendee Not Sufficient Change of Possession. — Stockton v. National Bank, 45 Fla. 590.

508. 3. General Rule as to Instruments Relating to Title. — Lombard v. La Dow, (C. C. A.) 126 Fed. Rep. 119; Mitchell v. D'Olier, 68 N. J. L. 375; Condit v. Bigalow, 64 N. J. Eq. 504; Sweet v. Henry, 175 N. Y. 268; Hetzel v. Easterly, 96 N. Y. App. Div. 517; Waggoner v. Dodson, 96 Tex. 415; O'Mahoney v. Flanagan, 34 Tex. Civ. App. 244; King v. Summerville, (Tex. Civ. App. 1904) 80 S. W. Rep. 1050; Waldron v. Harvey, 54 W. Va. 608, 102 Am. St. Rep. 959, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508.

509. 1. Purchaser Relying on Statement of Vendor. — Compare U. S. v. Detroit Timber, etc., Co., (C. C. A.) 131 Fed. Rep. 668.

510. 5. Purchaser Not Chargeable with Notice of Instruments Beyond Chain of Title. — Booker v. Booker, 208 Ill. 529, 100 Am. St. Rep. 250; Hart v. Gardner, 81 Miss. 650.

6. Grantee in Quitclaim Deed Purchaser with Notice. — Fowler v. Will, (S. Dak. 1905) 102 N. W. Rep. 508; Clark v. Sayers, 55 W. Va. 512.

511. 1. Deed Purporting to Convey Land as Distinct from Mere Chance of Title. — Babcock v. Wells, 25 R. I. 23, 105 Am. St. Rep. 848;

- 512.** Purchaser Under Warranty Deed from Grantee in Quitclaim Deed. — See note 6.
(cc) *Rule as Affected by Statutes — Recording Acts.* — See note 8.
- 513.** (dd) *Minority Rule.* — See note 2.
(5) *By Inadequacy of Consideration.* — See notes 3, 4.
- 516.** d. NOTICE TO PURCHASERS TAKING PROPERTY IN COMMON. — See note 4.
- 3.** Effect of Notice — a. IN GENERAL. — See note 11.
- 518.** b. NOTICE BEFORE COMPLETION OF PURCHASE — (1) *General Rule.* — See note 1.
(2). *Applications of Rule* — (b) *Notice Before Conveyance.* — See note 3.
- 520.** (e) *Notice After Conveyance and Before Payment.* — See note 2.
- 522.** VI. EVIDENCE AND BURDEN OF PROOF — 2. Burden of Proof — Rule that Burden of Proof Rests upon Purchaser. — See notes 4, 5.
- 523.** As to Payment of Consideration. — See note 1.
As to Notice. — See notes 3, 4.
- 524.** 3. Recital in Deed as Evidence of Payment. — See notes 1, 2.
- 526.** PURE — PURELY. — See note 7.
- 528.** PURPOSE — PURPOSELY. — See note 2.
PURPRESTURE. — See note 3.

Thompson v. Rust, 32 Tex. Civ. App. 441. See also Clark v. Sayers, 55 W. Va. 512.

512. 6. Quitclaim Deed Among Mesne Conveyances to Grantor. — See Boynton v. Haggart, (C. C. A.) 120 Fed. Rep. 819.

8. Effect of Recording Acts. — Boynton v. Haggart, (C. C. A.) 120 Fed. Rep. 819.

513. 2. Grantee in Quitclaim Deed Purchaser Without Notice. — Livingston v. Murphy, 187 Mass. 315, 105 Am. St. Rep. 400.

3. Gross Inadequacy of Price Puts Purchaser on Inquiry. — Barstow v. Beckett, 122 Fed. Rep. 140; Webb v. John Hancock Mut. L. Ins. Co., 162 Ind. 616, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 513; Green v. Robertson, 30 Tex. Civ. App. 236.

Rule Does Not Apply to Purchase at Execution Sale. — Hart v. Gardner, 81 Miss. 650.

4. Booker v. Booker, 208 Ill. 509, 100 Am. St. Rep. 250.

516. 4. Notice to One Joint Purchaser Not Notice to Another. — Babcock v. Wells, 25 R. I. 23, 105 Am. St. Rep. 848.

11. General Rule as to Effect of Notice. — Myers v. Schuchmann, 182 Mo. 159; Michigan Trust Co. v. Red Cloud, (Neb. 1902) 92 N. W. Rep. 900; Griffin v. Stone River Nat. Bank, (Tex. Civ. App. 1904) 80 S. W. Rep. 254; Hunter v. Eastham, (Tex. Civ. App. 1904) 81 S. W. Rep. 336; Fond du Lac Land Co. v. Meiklejohn, 118 Wis. 340.

518. 1. General Rule as to Completion of Purchase Before Notice. — Cooper v. Ryan, 73 Ark. 37; Tibbs v. Zirkle, 55 W. Va. 49, 104 Am. St. Rep. 977.

3. Title Must Have Been Acquired by Deed. — Clark v. Sayers, 55 W. Va. 512.

520. 2. Conveyance Without Payment Before Notice. — Trice v. Comstock, (C. C. A.) 121 Fed. Rep. 620; Barstow v. Beckett, 122 Fed. Rep. 140; Kenniff v. Caulfield, 140 Cal. 34; Halloran v. Holmes, 13 N. Dak. 411.

522. 4. Purchaser Has Burden of Proof. — Mercantile Trust Co. v. Chicago, etc., R. Co., (C. C. A.) 123 Fed. Rep. 393; Kenniff v. Caul-

field, 140 Cal. 34; Bell v. Pleasant, 145 Cal. 410, 104 Am. St. Rep. 61; Lloyd v. Simons, 90 Minn. 237; Condit v. Bigalow, 64 N. J. Eq. 504; Moody v. Ogden, 31 Tex. Civ. App. 395.

5. Grantee Presumed to Be Bona Fide Purchaser. — Catrett v. J. S. Brown Hardware Co., (Tex. Civ. App. 1905) 86 S. W. Rep. 1045.

523. 1. Purchaser Must Prove Payment. — Kenniff v. Caulfield, 140 Cal. 34; Bell v. Pleasant, 145 Cal. 410, 104 Am. St. Rep. 61; Kringle v. Rhomberg, 120 Iowa 472; Lloyd v. Simons, 90 Minn. 237; Green v. Robertson, 30 Tex. Civ. App. 236.

3. Prior Claimant Must Prove Notice. — Livingstone v. Murphy, 187 Mass. 315, 105 Am. St. Rep. 400; Sheldon v. Powell, 31 Mont. 249; Atlantic City v. New Auditorium Pier Co., 67 N. J. Eq. 610; Lane v. De Bode, 29 Tex. Civ. App. 602.

4. Purchaser Must Prove Lack of Notice. — Kenniff v. Caulfield, 140 Cal. 34; Bell v. Pleasant, 145 Cal. 410, 104 Am. St. Rep. 61; Kringle v. Rhomberg, 120 Iowa 472; McLeod v. Lloyd, 43 Oregon 260; Green v. Robertson, 30 Tex. Civ. App. 236.

524. 1. General Rule — Recital Not Evidence. — Condit v. Bigalow, 64 N. J. Eq. 504; Moody v. Ogden, 31 Tex. Civ. App. 395.

2. Recital Prima Facie Evidence. — Weideman v. Zielinska, 102 N. Y. App. Div. 163.

526. 7. Pure Water. — Meridian Waterworks Co. v. Meridian, 85 Miss. 515.

The Word "Pure" Means Not Only Free from All Foreign Substance, but in its original sense *pure* means "free from any defiling or objectionable mixture." People v. Henry J. Heinz Co., 90 N. Y. App. Div. 408.

Pure Accident. — Nelson v. Narragansett Electric Lighting Co., 26 R. I. 258.

528. 2. Purposely. — Eaton v. State, 162 Ind. 554; State v. Lindgrind, 33 Wash. 440.

3. Every Building or Wharf Erected upon Land Below Low-water Mark is a *purpresture*. San Francisco Sav. Union v. R. G. R. Petroleum, etc., Co., 144 Cal. 134.

529. PUT. — See note 4.

531. QUALIFICATION — QUALIFY — QUALIFIED. — See note 1.

529. 4. Put. — DeMary *v.* Burtenshaw, 131 Mich. 326; Lane *v.* Logan Grain Co., 105 Mo. App. 215.

531. 1. To Qualify Means Ordinarily to Take the Oath of Office. — Matter of Fitzgerald, 88 N. Y. App. Div. 442.

QUARANTINE.

535. II. WHO MAY MAKE REGULATIONS. — See note 2.

539. VI. CARRIERS — WHARFINGERS. — See note 1.

VII. ANIMALS. — See note 2.

541. QUASI CORPORATIONS — QUASI-MUNICIPAL CORPORATIONS — QUASI-PUBLIC CORPORATIONS. — See note 1.

542. [QUASI IN REM. — See note 3*a*.]

535. 2. Constitutionality of State Laws. — See State *v.* Kirby, 120 Iowa 26.

539. 1. Liability of Carrier for Communicating Disease to Plaintiff by Breaking Quarantine. — See Mason *v.* Illinois Cent. R. Co., (Ky. 1903) 77 S. W. Rep. 375.

2. Constitutional Law — Live Stock. — Smith *v.* Lowe, (C. C. A.) 121 Fed. Rep. 753, following Hannibal, etc., R. Co. *v.* Husen, 95 U. S. 465, cited in the original note.

The Establishment of Quarantine Lines Not in Conformity with the Statutes under which they are authorized is *ultra vires*. Trent *v.* State, (Tex. Crim. 1903) 75 S. W. Rep. 857.

541. 1. A Waterworks Company Is a Quasi-

public Corporation. — Wiemer *v.* Louisville Water Co., 130 Fed. Rep. 251.

A Telephone Company maintaining a public telephone system and having the right of eminent domain is a *quasi-public corporation*. Cumberland Telephone, etc., Co. *v.* Evansville, 127 Fed. Rep. 187.

A Road District Is Not a Quasi Corporation. — Custer County Bank *v.* Custer County, 18 S. Dak. 274.

Counties Held to Be Quasi Corporations. — State *v.* Gunn, 92 Minn. 436.

542. 3*a*. A Suit Quasi in Rem is where the suit is against the person in respect of the *res*. Hill *v.* Henry, 66 N. J. Eq. 150.

QUESTIONS OF LAW AND FACT.

By JOHN SIMPSON.

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545. 4. Questions of Law Are for the Court in Civil Cases — *Alabama.* — Mann v. State, 134 Ala. 1.

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546. 1. Error in Submitting Question of Law to Jury. — People v. Alton, 193 Ill. 309; Whitehouse Cannel Coal Co. v. Wells, (Ky. 1903) 74 S. W. Rep. 736; Ward v. Poor, 94 Md. 133; Gallick v. Bordeaux, 31 Mont. 328.

3. Questions of Law Are for the Court in Criminal Cases. — Sherrill v. State, 138 Ala. 3; State v. Cook, 75 Conn. 267; Jackson v. State, 118 Ga. 780; State v. Woods, 112 La. 617; State v. Hansbrough, 181 Mo. 348; State v. De Wolfe, 29 Mont. 415; State v. Barry, 11 N. Dak. 428;

Carroll v. State, (Tex. Crim. 1904) 81 S. W. Rep. 294; Swan v. State, (Tex. Crim. 1903) 76 S. W. Rep. 464; State v. Mitchell, 32 Wash. 64.

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548. 1. Authority of Juries to Find General Verdicts. — Chicago, etc., R. Co. v. Sporer, (Neb. 1903) 94 N. W. Rep. 991.

2. Submitting Legal Questions to Jury. — Whitehouse Cannel Coal Co. v. Wells, (Ky. 1903) 74 S. W. Rep. 736; Hinman v. F. C. Austin Mfg. Co., 65 Neb. 187.

549. 3. Connecticut Statute — Construction. — Under the Connecticut statute it is the duty of the jury to accept the law of the case as stated by the court; and State v. Buckley, 40 Conn. 246, and State v. Thomas, 47 Conn. 546, are overruled in so far as they can be regarded as assuming that the jury can disregard the law as so stated to it. State v. Gannon, 75 Conn. 206.

550. 1. Province of Court to Find Facts in Trials Without Jury. — Johnson v. State, 120 Ga. 483; Rosenbaum v. Gilliam, 101 Mo. App. 126; Morrow v. Pullman Palace Car Co., 98 Mo. App. 351; Vail v. Goodman, (N. J. 1902) 53 Atl. Rep. 692.

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551. 2. When Submission of Question of Fact to Jury Is Unnecessary and Improper. — Wolf Co. v. Western Union Tel. Co., 24 Pa. Super. Ct. 129; Hollings v. Bankers Union of the World, 63 S. Car. 192.

5. What Constitutes Probable Cause in Action

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IV. ENUMERATION OF QUESTIONS OF LAW — 3. Questions of Statutory Law. — See note 4.

4. Questions Arising upon Pleadings. — See note 5.

553. 6. Questions Arising upon Construction of Documents, Records, and Other Writings — a. IN GENERAL. — See note 2.

554. Intent. — See note 1.

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for Malicious Prosecution. — *Maynard v. Sigman*, 65 Neb. 590; *Miller Bank v. Richmon*, 64 Neb. 111; *Toth v. Greisen*, (N. J. 1902) 51 Atl. Rep. 927; *Bell v. Atlantic City R. Co.*, 202 Pa. St. 178; *Scott v. Dewey*, 23 Pa. Super. Ct. 396. And see the title MALICIOUS PROSECUTION, **669. 4.**

552. 1. Question as to Who Are Fellow Servants. — *Gayle v. Missouri Car, etc., Co.*, 177 Mo. 427. And see the title FELLOW SERVANTS, **1019. 7.**

4. The Question What Is the Law of a Foreign Country or State is held to be one of fact for the jury. *Cook v. Bartlett*, 179 Mass. 576; *Bank of China, etc., v. Morse*, 168 N. Y. 458, 85 Am. St. Rep. 676; *Morrisette v. Canadian Pac. R. Co.*, 74 Vt. 232.

• **But the Construction of a Foreign Law** is for the court. *Bank of China, etc., v. Morse*, 168 N. Y. 458, 85 Am. St. Rep. 676; *Cook v. Bartlett*, 179 Mass. 576. See further the title FOREIGN LAWS, **1071. 7, 8.**

5. Question of Law as to What Issues Are Raised by Pleadings. — *Stevens v. Maxwell*, 65 Kan. 835.

Construction of Pleadings — Question of Law for Court. — *Bering Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36.

Question of Law for Court as to Sufficiency of Indictment. — *State v. Woods*, 112 La. 617.

Question of Fact Arising from Pleadings. — The question whether part of a complaint introduced by the defendant as an admission by the plaintiff is explained or modified by the rest of the complaint has been held to be for the jury. *McCord v. Southern R. Co.*, 130 N. Car. 491.

553. 2. Construction of Writings Is for the Court in Civil Cases — *United States*. — *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242; *Kessler v. Perilloux*, (C. C. A.) 132 Fed. Rep. 903; *Dunn v. Mayo Mills*, (C. C. A.) 134 Fed. Rep. 804.

Alabama. — *Bullock-McCall-McDonnell Electric Co. v. Coleman*, 136 Ala. 610.

California. — *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182.

Delaware. — *Schilansky v. Merchants', etc., F. Ins. Co.*, 4 Penn. (Del.) 293.

Georgia. — *McCullough v. Armstrong*, 118 Ga. 424.

Illinois. — *Dunn v. Crichfield*, 214 Ill. 292; *Foster v. Chicago*, 197 Ill. 264; *Central Union Bldg. Co. v. Kolander*, 212 Ill. 27; *Traders' Mut. L. Ins. Co. v. Humphrey*, 207 Ill. 540, affirming 109 Ill. App. 246; *Telluride Power Transmission Co. v. Crane Co.*, 208 Ill. 218; *Recke v. Sayers*, 106 Ill. App. 283.

Iowa. — *Grasmier v. Wolf*, (Iowa 1902) 90 N. W. Rep. 813,

Kansas. — *Brown v. St. John Trust Co.*, (Kan. 1905) 80 Pac. Rep. 37.

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Nebraska. — *McCormick Harvesting Mach. Co. v. Carpenter*, (Neb. 1901) 95 N. W. Rep. 617; *Hinman v. F. C. Austin Mfg. Co.*, 65 Neb. 187.

New Jersey. — *Boulevard Globe, etc., Co. v. Kern Incandescent Gaslight Co.*, 67 N. J. L. 279.

New York. — *Rochester, etc., Coal, etc., Co. v. Flint*, (Supm. Ct. App. T.) 84 N. Y. Supp. 269; *Russell v. McSwegan*, (Supm. Ct. App. T.) 84 N. Y. Supp. 614; *Stokes v. Foote*, 172 N. Y. 327.

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South Dakota. — *Hughes v. Rudy*, 15 S. Dak. 460.

Texas. — *Eddy v. Bosley*, 34 Tex. Civ. App. 116; *Tinsley v. McIlhenny*, 30 Tex. Civ. App. 352; *Pope v. Anthony*, 29 Tex. Civ. App. 298; *McLane v. Maurer*, 28 Tex. Civ. App. 75.

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West Virginia. — *Snooks v. Wingfield*, 52 W. Va. 441.

Wisconsin. — *Milwaukee Carnival Assoc. v. King, etc., Co.*, 112 Wis. 647.

554. 1. Question of Intent Is for the Court. — *Fenderson v. Missouri Tie, etc., Co.*, 104 Mo. App. 290.

3. Where Written Instrument Has Been Lost. — *Thompson v. Flint, etc., R. Co.*, 131 Mich. 95.

4. Where Instrument Consists of Written Correspondence. — *Danziger v. Pittsfield Shoe Co.*, 204 Ill. 145; *Dobbs v. Campbell*, 66 Kan. 805; *Slater v. U. S. Health, etc., Ins. Co.*, 133 Mich. 347; *Hesser-Milton-Renahan Coal Co. v. La Crosse Fuel Co.*, 114 Wis. 654,

555. Question of Fact as to What Construction Has Been Placed upon Writings by Parties. — See note 1.

Distinction Depending upon Whether Words Are Used in Ordinary Sense or Not. — See notes 3, 4.

c. WHERE PAROL EVIDENCE IS INTRODUCED TO EXPLAIN WRITINGS. — See note 7.

556. 7. Questions Arising upon the Evidence — *a.* ADMISSIBILITY OF EVIDENCE — In General. — See note 2.

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557. *b.* COMPETENCY OF WITNESSES. — See note 2.

c. SUFFICIENCY OF EVIDENCE TO GO TO JURY OR SUSTAIN VERDICT — (1) *In Civil Cases* — (a) In General. — See note 3.

558. (c) Withdrawal of Case from Jury — When Case May Be Withdrawn from Jury. — See note 1.

555. 1. Question of Fact as to What Construction Has Been Placed upon Writings by Parties. — *Summerour v. Pappa*, 119 Ga. 1; *Southern R. Co. v. Horner*, 115 Ga. 381; *Reedy Elevator, etc., Co. v. Mertz*, 107 Mo. App. 28; *Missouri, etc., R. Co. v. Anderson*, 36 Tex. Civ. App. 121.

3. Question for Court as to Meaning of Words Used in Ordinary Sense. — *Drainage Commission v. National Contracting Co.*, 136 Fed. Rep. 780, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 555; *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, (C. C. A.) 121 Fed. Rep. 524.

4. Question for Jury as to Meaning of Words Used in Extraordinary Sense. — *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, (C. C. A.) 121 Fed. Rep. 524.

7. Province of Jury Where Parol Evidence Is Admitted. — *Danziger v. Pittsfield Shoe Co.*, 204 Ill. 145; *Davenport First Nat. Bank v. Rothschild*, 107 Ill. App. 133; *Joseph Joseph, etc., Co. v. Schonthal Iron, etc., Co.*, 99 Md. 382; *Cook v. Littlefield*, 98 Me. 299; *Rochester, etc., Coal, etc., Co. v. Flint*, (Supm. Ct. App. T.) 84 N. Y. Supp. 269; *Ward v. Gay*, 137 N. Car. 397; *Glover v. Gasque*, 67 S. Car. 18; *Thompson v. Family Protective Union*, 66 S. Car. 459; *Durand v. Heney*, 33 Wash. 38; *Snooks v. Wingfield*, 52 W. Va. 441. See also *Rankin v. Fidelity Ins., etc., Co.*, 189 U. S. 242; *Hugumin v. Hinds*, 97 Mo. App. 346.

556. 2. Question of Law for Court as to Admissibility of Evidence. — *State v. Cook*, 75 Conn. 267; *Nickey v. Zonker*, 31 Ind. App. 88; *People v. Goodrode*, 132 Mich. 542; *State v. Coats*, 174 Mo. 396; *Kendall v. Flanders*, 72 N. H. 11; *State v. Lindsey*, 68 S. Car. 276; *Richardson v. Dybedahl*, 17 S. Dak. 629; *Snooks v. Wingfield*, 52 W. Va. 441; *Kavanaugh v. Wausau*, 120 Wis. 611.

3. Preliminary Questions of Fact Involved in Determining Admissibility of Evidence. — *Collins v. State*, 138 Ala. 57.

Question for Court as to *Prima Facie* Existence of Conspiracy. — *State v. Crofford*, 121 Iowa 395.

Questions of Fact Arising Where Dying Declarations Are Offered. — *Weightnovel v. State*, (Fla. 1903) 35 So. Rep. 856.

Identification Preliminary to Admissibility of Photographs. — *Hupfer v. National Distilling Co.*, 119 Wis. 417.

Admissibility of Plat and Part of Deed. — *Snooks v. Wingfield*, 52 W. Va. 441.

557. 2. Questions of Law and Fact as to Qualifications of Expert Witnesses. — *Gustafson v. Seattle Traction Co.*, 28 Wash. 227. See also *Johnson v. Kahn*, 97 Mo. App. 628.

3. Question of Law as to Sufficiency of Evidence to Go to Jury or Sustain Verdict — *United States*. — *New York Cent., etc., R. Co. v. Difendaffer*, (C. C. A.) 125 Fed. Rep. 893; *Cole v. German Sav., etc., Soc.*, (C. C. A.) 124 Fed. Rep. 113; *Carstairs v. American Bonding, etc., Co.*, (C. C. A.) 116 Fed. Rep. 449.

Illinois. — *Woodman v. Illinois Trust, etc., Bank*, 211 Ill. 578; *Libby v. Banks*, 209 Ill. 109; *Illinois Cent. R. Co. v. Satkowski*, 107 Ill. App. 524.

Iowa. — *Gillespie v. Ashford*, 125 Iowa 729. *Kansas*. — *State v. Ryno*, 68 Kan. 348.

Maryland. — *Schwanteck v. Berner*, 96 Md. 138.

New Mexico. — *Robinson v. Palatine Ins. Co.*, 11 N. Mex. 162.

New York. — *Philips v. Philips*, 77 N. Y. App. Div. 113, affirmed 179 N. Y. 585.

Oklahoma. — See *Turner v. Territory*, 11 Okla. 660.

Oregon. — *Huber v. Miller*, 41 Oregon 103.

South Dakota. — See *Bohl v. Dell Rapids*, 15 S. Dak. 619.

Washington. — *State v. Riddell*, 33 Wash. 324.

Wisconsin. — *Devoy v. State*, 122 Wis. 148.

558. 1. When Case May Be Withdrawn from Jury — *United States*. — *Kalamazoo Corset Co. v. Simon*, 129 Fed. Rep. 144, affirmed (C. C. A.) 129 Fed. Rep. 1005; *U. S. v. Dietrich*, 126 Fed. Rep. 676.

Alabama. — *Southern Bell Telephone, etc., Co. v. Mayo*, 134 Ala. 641.

Colorado. — *Denver v. Murray*, 18 Colo. App. 142.

District of Columbia. — *Green v. Stewart*, 23 App. Cas. (D. C.) 570.

Georgia. — *Whitley v. Clegg*, 120 Ga. 1038; *Tilley v. Cox*, 119 Ga. 867; *Midville, etc., R. Co. v. Bruhl*, 117 Ga. 329; *McWaters v. Equitable Mortg. Co.*, 115 Ga. 723; *Wall v. Brewer*, 115 Ga. 1021; *Clarke v. Havard*, 115 Ga. 882; *O'Dell v. Meacham*, 114 Ga. 910; *Whisenant v. Sappington*, 115 Ga. 14.

Indiana. — *Burns v. Smith*, 29 Ind. App. 181,

560. Evidence of Opposite Party Must Be Assumed to Be True. — See note 2.

561. The "Scintilla Doctrine." — See note 2.

Where Verdict Would Be Set Aside. — See note 3.

94 Am. St. Rep. 268; *Dunnington v. Syfers*, 157 Ind. 458.

Indian Territory. — *Bryson v. Wallace*, 4 Indian Ter. 101.

Maine. — *Blumenthal v. Boston*, etc., R. Co., 97 Me. 255.

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Missouri. — *Badger Lumber Co. v. Muehlebach*, 109 Mo. App. 646; *Hendley v. Globe Refinery Co.*, 106 Mo. App. 20; *Holmes v. Leadbetter*, 95 Mo. App. 419.

Montana. — *Tague v. John Caplice Co.*, 28 Mont. 51.

Nebraska. — *Agnew v. Montgomery*, (Neb. 1904) 99 N. W. Rep. 820; *Weed v. Chicago*, etc., R. Co., (Neb. 1904) 99 N. W. Rep. 827; *Sattler v. Chicago*, etc., R. Co., (Neb. 1904) 98 N. W. Rep. 663; *Kielbeck v. Chicago*, etc., R. Co., (Neb. 1903) 97 N. W. Rep. 750; *Jessen v. Donahue*, (Neb. 1903) 96 N. W. Rep. 639; *Winterringer v. Warder*, etc., Co., (Neb. 1902) 95 N. W. Rep. 619; *Parker v. Wells*, (Neb. 1903) 94 N. W. Rep. 717; *McClenneghan v. Norton*, (Neb. 1903) 93 N. W. Rep. 695; *Morgan v. Stone*, (Neb. 1903) 93 N. W. Rep. 743; *Palmer v. Fidelity Mut. F. Ins. Co.*, (Neb. 1902) 92 N. W. Rep. 575; *Fremont Brewing Co. v. Hansen*, 65 Neb. 456; *Dodd v. Skelton*, 65 Neb. 585; *McDonald v. Tootle-Weakley Millinery Co.*, 64 Neb. 577. See also *Chicago*, etc., R. Co. v. *Sporer*, (Neb. 1903) 94 N. W. Rep. 991.

New Hampshire. — *Boston*, etc., R. Co. v. *Sargent*, 72 N. H. 455.

New Jersey. — *Sommers v. Myers*, 69 N. J. L. 24.

New York. — *McCormick v. Gulner*, (Supm. Ct. App. T.) 90 N. Y. Supp. 1073; *Walters v. Syracuse Rapid Transit R. Co.*, 84 N. Y. App. Div. 64, reversed on another ground 178 N. Y. 50.

North Carolina. — *Hinson v. Postal Tel. Cable Co.*, 132 N. Car. 460.

Oklahoma. — *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356; *Yingling v. Redwine*, 12 Okla. 64.

Pennsylvania. — *Gudfelder v. Pittsburg*, etc., R. Co., 207 Pa. St. 629; *Bube v. Weatherly*, 25 Pa. Super. Ct. 88.

South Carolina. — *Reid v. Courtenay Mfg. Co.*, 68 S. Car. 466; *Rice v. Bamberg*, 68 S. Car. 184.

South Dakota. — *Bohl v. Dell Rapids*, 15 S. Dak. 619.

Texas. — *Phelps v. Miller*, (Tex. Civ. App. 1904) 83 S. W. Rep. 218; *Gilbreath v. State*, (Tex. Civ. App. 1904) 82 S. W. Rep. 807; *Richards v. Bemis*, (Tex. Civ. App. 1903) 78 S. W. Rep. 239; *Brockenbrow v. Stafford*, (Tex. Civ. App. 1903) 76 S. W. Rep. 576; *El Paso*, etc., R. Co. v. *McComas*, (Tex. Civ. App. 1903) 72 S. W. Rep. 629; *Flores v. Atchison*, etc., R. Co., 24 Tex. Civ. App. 328.

Utah. — *State v. Gordon*, 28 Utah 15.

Washington. — *Pacific Nat. Bank v. Aetna In-*

demnity Co., 33 Wash. 428; *West Seattle Land*, etc., Co. v. *Novelty Mill Co.*, 31 Wash. 435; *Norman v. Western Union Tel. Co.*, 31 Wash. 577.

West Virginia. — *White v. L. Hoster Brewing Co.*, 51 W. Va. 259; *Williams v. Belmont Coal*, etc., Co., 55 W. Va. 84.

Wisconsin. — *Batavian Bank v. North*, 114 Wis. 637.

Canada. — *Nightingale v. Union Colliery Co.*, 8 British Columbia 134, 9 British Columbia 453, affirmed 35 Can. Sup. Ct. 65.

560. 2. Evidence of Opposite Party Must Be Assumed to Be True — *United States.* — *Des Moines L. Assoc. v. Crim*, (C. C. A.) 134 Fed. Rep. 348; *Milwaukee Mechanics' Ins. Co. v. Rhea*, (C. C. A.) 123 Fed. Rep. 9; *New York Dry Goods Store v. Pabst Brewing Co.*, (C. C. A.) 112 Fed. Rep. 381; *Wallace v. Central of Georgia R. Co.*, 116 Ga. 230.

Illinois. — *Delaware*, etc., Canal Co. v. *Mitchell*, 211 Ill. 379; *Veach v. Champaign*, 113 Ill. App. 151; *Illinois Cent. R. Co. v. Burke*, 112 Ill. App. 415; *Martin v. Chicago*, etc., R. Co., 194 Ill. 138; *Nolan v. Morris*, 108 Ill. App. 261; *Hober v. W. P. Nelson Co.*, 101 Ill. App. 336; *Kane v. Cicero*, etc., Electric R. Co., 100 Ill. App. 181.

Kansas. — *Buoy v. Clyde Milling*, etc., Co., 68 Kan. 436.

Kentucky. — *Board v. Chesapeake*, etc., R. Co., (Ky. 1902) 70 S. W. Rep. 625.

Maryland. — *Newbold v. Hayward*, 96 Md. 247.

Missouri. — *Dietring v. St. Louis Transit Co.*, 109 Mo. App. 524; *Morrow v. Pullman Palace Car Co.*, 98 Mo. App. 351; *Creighton v. Modern Woodmen of America*, 90 Mo. App. 378.

Montana. — *Cummings v. Helena*, etc., Smelting, etc., Co., 26 Mont. 434.

New York. — *Levin v. Habicht*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 381; *Robinson v. New York City R. Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 368; *Hirsch v. American Dist. Tel. Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 464; *Fay v. Brooklyn Heights R. Co.*, 69 N. Y. App. Div. 563.

North Carolina. — *Craft v. Norfolk*, etc., R. Co., 136 N. Car. 49; *Daniel v. Atlantic Coast Line R. Co.*, 136 N. Car. 517.

Oklahoma. — *Kentucky Refining Co. v. Purcell Cotton Seed Oil Mills*, 13 Okla. 220; *Edmission v. Drumm-Flato Commission Co.*, 13 Okla. 440.

Pennsylvania. — *French v. Spencer*, 23 Pa. Super. Ct. 428.

South Dakota. — *Bohl v. Dell Rapids*, 15 S. Dak. 619.

West Virginia. — *Cobb v. Glen Boom*, etc., Co., 57 W. Va. 49.

561. 2. The "Scintilla Doctrine." — *McFarland v. Harbison*, etc., Co., (Ky. 1904) 82 S. W. Rep. 430. See also *Davis v. Cox*, (Ky. 1902) 67 S. W. Rep. 261. And see *Walters v. Syracuse Rapid Transit R. Co.*, 178 N. Y. 50, reversing 84 N. Y. App. Div. 64.

3. Where Verdict Would Be Set Aside — *United*

561. Power and Duty of Court to Weigh Evidence. — See note 4.

562. Withdrawing Case from Jury at Instance of Plaintiff. — See note 2.

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States. — *Riley v. Louisville, etc., R. Co., (C. C. A.)* 133 Fed. Rep. 904; *Patillo v. Allen-West Commission Co., (C. C. A.)* 131 Fed. Rep. 680; *Gentry v. Singleton, (C. C. A.)* 128 Fed. Rep. 679; *Shoup v. Marks, (C. C. A.)* 128 Fed. Rep. 32; *Marquardt v. Ball Engine Co., (C. C. A.)* 122 Fed. Rep. 374.

California. — *Wilson v. Alcatraz Asphalt Co.,* 142 Cal. 182.

District of Columbia. — *Guenther v. Metropolitan R. Co.,* 23 App. Cas. (D. C.) 493.

Georgia. — *McCall v. Herrin,* 118 Ga. 522.

Illinois. — *Nolan v. Morris,* 108 Ill. App. 261.

Indian Territory. — See *Truskett v. Bronaugh,* 4 Indian Ter. 731.

Maine. — *Coleman v. Lord,* 96 Me. 192.

Montana. — *Cummings v. Helena, etc., Smelting, etc., Co.,* 26 Mont. 434.

Nebraska. — *Chaffee v. Park Falls Lumber Co., (Neb. 1901)* 96 N. W. Rep. 495; *Lynch v. Englehardt-Winning-Davison Mercantile Co., (Neb. 1901)* 96 N. W. Rep. 524; *Wagoner v. Landon, (Neb. 1901)* 95 N. W. Rep. 496; *Ellsworth v. Newby, (Neb. 1902)* 91 N. W. Rep. 517; *Zimmerman v. Kearney County Bank, (Neb. 1902)* 91 N. W. Rep. 497.

New Mexico. — *Armstrong v. Aragon, (N. Mex. 1905)* 79 Pac. Rep. 291; *Heisch v. Bell,* 11 N. Mex. 523.

Oklahoma. — *Neeley v. Southwestern Cotton Seed Oil Co.,* 13 Okla. 356; *Kentucky Refining Co. v. Purcell Cotton Seed Oil Mills,* 13 Okla. 220.

Contra. — The rule in *New York* now is that where there is any conflict whatever in the evidence a verdict cannot be directed, even though a verdict against the party moving for a direction in his favor would be properly set aside. *Padbury v. Metropolitan St. R. Co.,* 71 N. Y. App. Div. 616; *Howell v. New York Cent., etc., R. Co.,* 68 N. Y. App. Div. 409; *Gansburg v. Sagemohl,* 67 N. Y. App. Div. 554; *Smith v. Metropolitan St. R. Co.,* 66 N. Y. App. Div. 600; *Wagner v. Einhorn, (Supm. Ct. App. T.)* 88 N. Y. Supp. 370.

561. 4. Power and Duty of Court to Weigh Evidence. — *Chicago City R. Co. v. Martensen,* 198 Ill. 511.

562. 2. Withdrawing Case from Jury at Instance of Plaintiff. — *Board v. Chesapeake, etc., R. Co., (Ky. 1902)* 70 S. W. Rep. 625.

3. When Case Should Not Be Withdrawn from Jury. — *United States.* — *Chicago, etc., R. Co. v. De Clow, (C. C. A.)* 124 Fed. Rep. 142; *Standard L., etc., Ins. Co. v. Sale, (C. C. A.)* 121 Fed. Rep. 664.

Alabama. — *Mobile, etc., R. Co. v. Bromberg,* 141 Ala. 258; *Southern R. Co. v. Bunnell,* 138 Ala. 247; *Carter v. Fulgham,* 134 Ala. 238; *Alabama Midland R. Co. v. Thompson,* 134 Ala. 232; *Cook v. State,* 134 Ala. 137.

Arkansas. — *Seabrook v. Orto,* 70 Ark. 503; *Neal v. St. Louis, etc., R. Co.,* 71 Ark. 445.

Colorado. — *Posten v. Denver Consol. Tramway Co., (Colo. App. 1904)* 78 Pac. Rep. 1067.

District of Columbia. — *Kohner v. Capital Traction Co.,* 22 App. Cas. (D. C.) 181.

Georgia. — *Jackson v. Georgia R., etc., Co.,* 120 Ga. 1009; *Ford v. Fargason,* 120 Ga. 606; *Cunningham v. Central of Georgia R. Co.,* 118 Ga. 276; *Pritchett v. Moore,* 116 Ga. 757; *Matheson v. Tennille,* 115 Ga. 999; *Jones v. Dannenberg Co.,* 115 Ga. 769; *Dover, etc., R. Co. v. Deal,* 115 Ga. 42.

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Indian Territory. — *Doherty v. Arkansas, etc., R. Co., (Indian Ter. 1904)* 82 S. W. Rep. 899.

Iowa. — *Campbell v. Park, (Iowa 1904)* 101 N. W. Rep. 861.

Kansas. — *Burnett v. Hinshaw,* 64 Kan. 886.

Kentucky. — *Gladstone Baptist Church v. Scott, (Ky. 1903)* 74 S. W. Rep. 1075; *Chesapeake, etc., R. Co. v. Ogles, (Ky. 1903)* 73 S. W. Rep. 751; *Middleton v. Kentucky Lumber Co., (Ky. 1902)* 66 S. W. Rep. 42.

Michigan. — *Ball-Barnhart-Putman Co. v. Lane,* 135 Mich. 275; *Wilson v. Parker,* 130 Mich. 638.

Missouri. — *Poindexter v. McDowell,* 110 Mo. App. 233; *Carr v. Ubsdell,* 97 Mo. App. 326; *Morrow v. Pullman Palace Car Co.,* 98 Mo. App. 351; *Joplin Waterworks Co. v. Joplin,* 177 Mo. 496.

Montana. — *McCabe v. Montana Cent. R. Co.,* 30 Mont. 323; *Michener v. Fransham,* 29 Mont. 240; *Ball v. Gussenhoven,* 29 Mont. 321; *Cain v. Gold Mountain Min. Co.,* 27 Mont. 520.

Nebraska. — *Chicago, etc., R. Co. v. Sporer, (Neb. 1903)* 94 N. W. Rep. 991; *Allen v. Cerny, (Neb. 1903)* 94 N. W. Rep. 151; *Pope v. Whitcomb, (Neb. 1903)* 93 N. W. Rep. 947; *Goldsberry v. State,* 66 Neb. 312; *Morrill v. McNeill, (Neb. 1902)* 91 N. W. Rep. 602; *Dempster Mill Mfg. Co. v. Lofquist, (Neb. 1902)* 91 N. W. Rep. 524; *Nelson v. Metz Bros. Brewing Co., (Neb. 1902)* 90 N. W. Rep. 766.

New Hampshire. — *Lamkin v. Johnson,* 72 N. H. 344.

New Jersey. — *Metting v. North Jersey St. R. Co.,* 69 N. J. L. 605; *Gwynn v. Hitchner,* 67 N. J. L. 654; *Maurer v. Gould, (N. J. 1904)* 59 Atl. Rep. 28; *Baumann v. Hamburg-American Packet Co.,* 67 N. J. L. 250.

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563. (c) Setting Aside Verdict — When Verdict May Be Set Aside. — See note 1.

564. Verdict of Jury When Issue at Law Has Been Directed by Chancellor. — See note 1.
When Verdict Should Not Be Set Aside. — See note 2.

(2) *In Criminal Cases* — (a) Withdrawal of Case from Jury — At Instance of Defendant. — See note 3.

Peremptory Instruction to Find Defendant Guilty. — See note 4.

565. (b) Setting Aside Verdict — At Instance of Defendant. — See note 1.

V. ENUMERATION OF QUESTIONS OF FACT AND OF MIXED QUESTIONS OF LAW AND FACT — 2. Questions Arising upon Evidence Which Is Not Conflicting.
— See note 3.

566. 3. Questions Arising upon Conflicting Evidence. — See note 1.

67 N. Y. App. Div. 554; *Padbury v. Metropolitan St. R. Co.*, 71 N. Y. App. Div. 616.

North Carolina. — *Coble v. Huffines*, 133 N. Car. 422.

Oklahoma. — *Kentucky Refining Co. v. Purcell Cotton Seed Oil Mills*, 13 Okla. 220; *Farmers' State Bank v. Spencer*, 12 Okla. 597; *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okla. 356.

Oregon. — *Stager v. Troy Laundry Co.*, 41 Oregon 141; *In re Morgan*, (Oregon 1905) 78 Pac. Rep. 1029; *Huber v. Miller*, 41 Oregon 103.

Pennsylvania. — *Charles D. Kaier Co. v. O'Brien*, 202 Pa. St. 153; *Heh v. Consolidated Gas Co.*, 201 Pa. St. 443, 88 Am. St. Rep. 819.

South Carolina. — *Hughes v. School Dist. No. 37*, 66 S. Car. 259; *Koon v. Southern R. Co.*, 69 S. Car. 101; *Earle v. Poat*, 63 S. Car. 439.

South Dakota. — *Weller v. Hilderbrandt*, (S. Dak. 1904) 101 N. W. Rep. 1108; *Spearfish Bank v. Graham*, 16 S. Dak. 49; *Wilson v. Commercial Union Ins. Co.*, 15 S. Dak. 322.

Texas. — *Bonn v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 808; *Chicago, etc., R. Co. v. Harton*, 36 Tex. Civ. App. 475; *St. Louis Southwestern R. Co. v. Gentry*, (Tex. Civ. App. 1903) 74 S. W. Rep. 607; *Angel v. State*, 45 Tex. Crim. 135; *Daggett v. Webb*, 30 Tex. Civ. App. 415; *Ney v. Ladd*, (Tex. Civ. App. 1902) 68 S. W. Rep. 1014.

Vermont. — *In re Claffin*, 73 Vt. 129, 87 Am. St. Rep. 693.

West Virginia. — *Harman v. Maddy*, 57 W. Va. 66; *White v. L. Hoster Brewing Co.*, 51 W. Va. 259.

Wisconsin. — *Morton v. Smiley*, 119 Wis. 156.

563. 1. When Verdict May Be Set Aside in Civil Cases. — *Sovereign Camp, etc., v. Henby*, (Neb. 1903) 96 N. W. Rep. 998; *Jackson v. Grand Trunk R. Co.*, 32 Can. Sup. Ct. 245.

564. 1. *Webb v. Hicks*, 117 Ga. 335.

2. When Verdict Should Not Be Disturbed in Civil Cases. — *Standard L., etc., Ins. Co. v. Sale*, (C. C. A.) 121 Fed. Rep. 664; *Gladstone Baptist Church v. Scott*, (Ky. 1903) 74 S. W. Rep. 1075; *Gribble v. Everett*, 98 Mo. App. 32; *Houston, etc., R. Co. v. Bell*, (Tex. Civ. App. 1903) 73 S. W. Rep. 56; *McLeod v. Montreal St. R. Co.*, 20 Quebec Super. Ct. 8. See also *Martin v. Dowd*, 8 Idaho 453.

3. When Criminal Case Should Not Be Withdrawn from Jury. — *McCray v. State*, 45 Fla. 80.

4. Court Has No Authority to Give Peremptory Instruction to Find Defendant Guilty. — *Potts v. State*, 45 Tex. Crim. 45.

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565. 1. When Verdict Should Not Be Disturbed in Criminal Cases. — *Everson v. State*, (Neb. 1903) 93 N. W. Rep. 394.

3. Questions Arising upon Evidence Which Is Not Conflicting. — *Van Gaasbeek v. Staples*, 85 N. Y. App. Div. 271, affirmed 177 N. Y. 524; *Speck v. Berliner*, (Supm. Ct. App. T.) 85 N. Y. Supp. 370; *Hagan v. Sone*, 174 N. Y. 317; *State v. Barry*, 11 N. Dak. 428; *Barnett v. Becker*, 25 Pa. Super. Ct. 22; *Tracy v. Grand Trunk R. Co.*, 76 Vt. 313; *Morrisette v. Canadian Pac. R. Co.*, 74 Vt. 232.

566. 1. Question of Fact for Jury on Conflicting Evidence in Civil Cases — *United States*. — *Chicago G. W. R. Co. v. Roddy*, (C. C. A.) 131 Fed. Rep. 712; *Jordan v. Philadelphia*, 125 Fed. Rep. 825; *American Bonding, etc., Co. v. Baltimore, etc., R. Co.*, (C. C. A.) 124 Fed. Rep. 866; *Hocking v. Hamilton*, (C. C. A.) 122 Fed. Rep. 417; *Robb v. Security Trust Co.*, (C. C. A.) 121 Fed. Rep. 460; *Union Cent. L. Ins. Co. v. Skipper*, (C. C. A.) 115 Fed. Rep. 69; *Goldsmith v. Thuringia Ins. Co.*, (C. C. A.) 114 Fed. Rep. 914; *Ambs v. Atchison, etc., R. Co.*, 114 Fed. Rep. 317.

Alabama. — *Louisville, etc., R. Co. v. Sullivan Timber Co.*, 138 Ala. 379; *Southern R. Co. v. Bunnell*, 138 Ala. 247; *Bessemer Liquor Co. v. Tillman*, 139 Ala. 462; *Montgomery St. R. Co. v. Shanks*, 139 Ala. 489; *Sledge v. Singley*, 139 Ala. 346; *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258; *McWhorter v. Bluthenthal*, 136 Ala. 568, 96 Am. St. Rep. 43; *Birmingham R., etc., Co. v. Hinton*, 141 Ala. 606.

California. — *Di Nola v. Allison*, 143 Cal. 106, 101 Am. St. Rep. 84.

Colorado. — *Posten v. Denver Consol. Tramway Co.*, (Colo. App. 1904) 78 Pac. Rep. 1067.

Delaware. — *Mauck v. Merchants, etc., F. Ins. Co.*, 4 Penn. (Del.) 325.

Florida. — *Smith v. Klay*, (Fla. 1904) 36 So. Rep. 54.

Georgia. — *Wallace v. Central of Georgia R. Co.*, 116 Ga. 230; *Matheson v. Tennille*, 115 Ga. 999; *Pritchett v. Moore*, 116 Ga. 757; *Wilson v. Huguenin*, 117 Ga. 546; *Cunningham v. Central of Georgia R. Co.*, 118 Ga. 276; *Palmour v. Roper*, 119 Ga. 10; *Summerour v. Pappa*, 119 Ga. 1; *Heard v. Tappan*, 116 Ga. 930; *Augusta Southern R. Co. v. Snider*, 118 Ga. 146; *Telfair County v. Webb*, 119 Ga. 916; *Ford v. Fargason*, 120 Ga. 606.

Idaho. — *York v. Pacific, etc., R. Co.*, 8 Idaho 574.

Illinois. — *Chicago Union Traction Co. v. Browdy*, 206 Ill. App. 615; *Shickle-Harrison*,

etc., *Iron Co. v. Beck*, 112 Ill. App. 444, *affirmed* 212 Ill. 268; *Corkings v. Meier*, 112 Ill. App. 655; *Chicago, etc., R. Co. v. Stratton*, 111 Ill. App. 142; *Venice v. Griffin*, 109 Ill. App. 410; *Chippis v. Buxton*, 109 Ill. App. 88; *Gruenendahl v. Consolidated Coal Co.*, 108 Ill. App. 644; *Chicago City R. Co. v. Iverson*, 108 Ill. App. 433; *Chicago City R. Co. v. Bohnow*, 108 Ill. App. 346; *Chicago Union Traction Co. v. Ludlow*, 108 Ill. App. 357; *Harlev v. Sanitary Dist.*, 107 Ill. App. 546; *Crabtree v. Potts*, 108 Ill. App. 627; *Dick v. Zimmerman*, 105 Ill. App. 615, *affirmed* 207 Ill. 636; *Chicago, etc., R. Co. v. Huff*, 104 Ill. App. 594; *Central R. Co. v. Mehlenbeck*, 103 Ill. App. 17; *Colwell v. Brown*, 103 Ill. App. 22; *Hartung v. North Chicago St. R. Co.*, 102 Ill. App. 470; *Anthony Ittner Brick Co. v. Ashby*, 100 Ill. App. 604, *affirmed* 198 Ill. 562; *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1; *Kehl v. Abram*, 210 Ill. 218, 102 Am. St. Rep. 158; *Illinois Cent. R. Co. v. Prickett*, 210 Ill. 140; *Libby v. Banks*, 209 Ill. 109; *Rabbermann v. Carroll*, 207 Ill. 253; *Chicago Junction R. Co. v. McGrath*, 203 Ill. 511; *Nelson v. Fehd*, 203 Ill. 120; *Hart- rich v. Hawes*, 202 Ill. 334; *Orient Ins. Co. v. McKnight*, 197 Ill. 190; *Chicago City R. Co. v. Tuohy*, 196 Ill. 410; *Martin v. Chicago, etc., R. Co.*, 194 Ill. 138; *Landgraf v. Kuh*, 188 Ill. 484.

Indiana.—*Jacobs v. Jolly*, 29 Ind. App. 25; *Howard v. Indianapolis St. R. Co.*, 29 Ind. App. 514; *Dill v. Marmon*, (Ind. App. 1904) 71 N. E. Rep. 669; *Winklebleck v. Winklebleck*, 160 Ind. 570; *Haughton v. Aetna L. Ins. Co.*, (Ind. 1905) 73 N. E. Rep. 592.

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Iowa.—*Wilkins v. Missouri Valley*, (Iowa 1903) 96 N. W. Rep. 868; *Oliver v. Iowa Cent. R. Co.*, 122 Iowa 217; *Selensky v. Chicago G. W. R. Co.*, 120 Iowa 113; *Kirsher v. Kirsher*, 120 Iowa 337; *Bauer v. Dubuque*, 122 Iowa 500; *Warfield v. Clark*, 118 Iowa 69; *Kinyon v. Chicago, etc., R. Co.*, 118 Iowa 349, 96 Am. St. Rep. 382; *Matter of Hull*, 117 Iowa 738; *Frick v. Kabaker*, 116 Iowa 494.

Kansas.—*Chicago, etc., R. Co. v. Wood*, 66 Kan. 613; *Young v. Irwin*, 70 Kan. 796.

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Maryland.—*New York, etc., R. Co. v. Jones*, 94 Md. 24; *Newbold v. Hayward*, 96 Md. 247.

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Mich. 291; *Wager v. Lamont*, 135 Mich. 521; *Ball-Barnhart-Putman Co. v. Lane*, 135 Mich. 275; *Newman v. Meddaugh*, 131 Mich. 595; *McMillan v. Reaume*, 137 Mich. 1.

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Missouri.—*Holden v. Missouri R. Co.*, 108 Mo. App. 665; *Houts v. St. Louis Transit Co.*, 108 Mo. App. 686; *Bissel v. York*, 108 Mo. App. 272; *Wacher v. St. Louis Transit Co.*, 108 Mo. App. 645; *Freeman v. Metropolitan St. R. Co.*, 95 Mo. App. 94; *Huguinin v. Hinds*, 97 Mo. App. 346; *Johnson v. Kahn*, 97 Mo. App. 628; *Morrow v. Pullman Palace Car Co.*, 98 Mo. App. 351; *Dodd v. Guiseff*, 100 Mo. App. 311; *Glasscock v. Swofford Bros. Dry Goods Co.*, (Mo. App. 1903) 74 S. W. Rep. 1039; *Haggerty v. St. Louis, etc., R. Co.*, 100 Mo. App. 424; *Chinn v. Chicago, etc., R. Co.*, 100 Mo. App. 576; *Henderson v. Kansas City*, 177 Mo. 477; *Parks v. St. Louis, etc., R. Co.*, 178 Mo. 108, 101 Am. St. Rep. 425; *Koerper v. Royal Invest. Co.*, 102 Mo. App. 543; *Campbell v. Stanberry*, 105 Mo. App. 56; *Carp v. Queens Ins. Co.*, 104 Mo. App. 502; *Gage v. Mears*, 107 Mo. App. 140; *Laclede Constr. Co. v. T. J. Moss Tie Co.*, 185 Mo. 25.

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New York.—*Fay v. Brooklyn Heights R. Co.*, 69 N. Y. App. Div. 563; *Cullinan v. Furth- mann*, 70 N. Y. App. Div. 110; *Padbury v. Met- ropolitan St. R. Co.*, 71 N. Y. App. Div. 616; *Lennan v. Hamburg-American Steamship Co.*, 73 N. Y. App. Div. 357; *Van Pub. Co. v. West- inghouse*, 72 N. Y. App. Div. 121; *Jones v. Daly*, 73 N. Y. App. Div. 220, *affirmed* 175 N. Y. 520; *Kochmann v. Baumeister*, 73 N. Y. App. Div. 309; *Heillbronn v. Herzog*, 73 N. Y. App. Div. 188; *Morel v. Stearns*, (Supm. Ct. App. T.) 84 N. Y. Supp. 521; *Becker v. New York*, 170 N. Y. 219; *Walters v. Syracuse Rapid Transit R. Co.*, 84 N. Y. App. Div. 64, *reversed* on other grounds 178 N. Y. 50; *Rosenstock v. Dessar*, 85 N. Y. App. Div. 501; *Van Gaasbeek v. Staples*, 85 N. Y. App. Div. 271, *affirmed* 177 N. Y. 524; *Rosenkranz v. Saberski*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 650; *Haggerty v. New York City R. Co.*, (Supm. Ct. App. T.)

572. 4. Questions Arising upon Credibility of Witnesses. — See note 2.

90 N. Y. Supp. 336; *Sternaman v. Metropolitan L. Ins. Co.*, 94 N. Y. App. Div. 610, *affirmed* 181 N. Y. 514; *Blumberg v. Marks*, (Supm. Ct. App. T.) 87 N. Y. Supp. 512; *Tanenbaum v. Josephi*, 93 N. Y. App. Div. 341; *Bell v. Mills*, 78 N. Y. App. Div. 42; *New York Hydraulic Press Brick Co. v. Gunn*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 330; *Sundheimer v. New York*, 176 N. Y. 495; *Forgotson v. Raubitschek*, (Supm. Ct. App. T.) 87 N. Y. Supp. 503.

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Oregon. — *North Pac. Lumber Co. v. Spore*, 44 Oregon 462; *Huber v. Miller*, 41 Oregon 103; *Stager v. Troy Laundry Co.*, 41 Oregon 141.

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Rhode Island. — *Lebeau v. Dyerville Mfg. Co.*, 26 R. I. 34.

South Carolina. — *Davis v. Atlanta, etc.*, Air Line R. Co., 63 S. Car. 370; *Morrow v. Gaffney Mfg. Co.*, 70 S. Car. 242; *Hughes v. School Dist. No. 37*, 66 S. Car. 259; *Griffin v. Southern R. Co.*, 66 S. Car. 77; *Wood v. Victor Mfg. Co.*, 66 S. Car. 482; *Austin v. Piedmont Mfg. Co.*, 67 S. Car. 122; *Glover v. Gasque*, 67 S. Car. 18.

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Texas. — *Alexander v. Von Koehring*, (Tex. Civ. App. 1903) 77 S. W. Rep. 629; *Taylor v. Lewis*, 36 Tex. Civ. App. 305; *Galveston, etc.*, R. Co. v. *McAdams*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1076; *Daggett v. Webb*, 30 Tex. Civ. App. 415; *St. Louis Southwestern R. Co. v. Gentry*, (Tex. Civ. App. 1903) 74 S. W. Rep. 607; *Gulf, etc.*, R. Co. v. *Phillips*, 32 Tex. Civ. App. 238; *Harweil v. Southern Furniture Co.*, (Tex. Civ. App. 1903) 75 S. W. Rep. 52; *International, etc.*, R. Co. v. *Ives*, 34 Tex. Civ. App. 49; *Missouri, etc.*, R. Co. v. *Hoskins*, 34 Tex. Civ. App. 627; *Northern Texas Traction Co. v. Peterman*, (Tex. Civ. App. 1904) 80 S. W. Rep. 535; *Texas, etc.*, R. Co. v. *Kelly*, 34 Tex. Civ. App. 21; *Wofford v. Buchel Power, etc.*, Co., 35 Tex. Civ. App. 531; *Northern Texas*

Traction Co. v. Hooper, (Tex. Civ. App. 1904) 80 S. W. Rep. 113.

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Vermont. — *Bass v. Rublee*, 76 Vt. 395; *Morrisette v. Canadian Pac. R. Co.*, 74 Vt. 232; *In re Claflin*, 73 Vt. 129, 87 Am. St. Rep. 693.

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West Virginia. — *Snooks v. Wingfield*, 52 W. Va. 441; *Vance v. Ravenswood, etc.*, R. Co., 53 W. Va. 338.

Wisconsin. — *Teesdale v. Bennett*, 123 Wis. 355; *Kamp v. Coxe*, 122 Wis. 206; *Kavanaugh v. Wausau*, 120 Wis. 611; *Strasser v. Goldberg*, 120 Wis. 621; *Morton v. Smiley*, 119 Wis. 156; *Baushka v. McKey*, 118 Wis. 359; *Allen v. Voje*, 114 Wis. 1.

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California. — *People v. Morgan*, 144 Cal. 48.

Connecticut. — *State v. Gannon*, 75 Conn. 206.

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Kentucky. — *Powers v. Com.*, 114 Ky. 237.

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Maine. — *State v. Lambert*, 97 Me. 51.

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Wyoming. — *Curran v. State*, 12 Wyo. 553.

572. 2. Question of Fact as to Credibility of Witnesses in Civil Actions — *Alabama*. — *Moore v. Nashville, etc.*, R. Co., 137 Ala. 495; *Brown v. State*, (Ala. 1904) 38 So. Rep. 268; *Townsend v. State*, 137 Ala. 91.

Connecticut. — *Bradley v. Gorham*, 77 Conn. 211.

Delaware. — *State v. Brinte*, 4 Penn. (Del.) 551.

District of Columbia. — *Lyles v. U. S.*, 20 App. Cas. (D. C.) 559.

Idaho. — *Kroetch v. Empire Mill Co.*, 9 Idaho 277.

Illinois. — *Cleveland, etc.*, R. Co. v. *Alfred*, 113 Ill. App. 236; *Chicago City R. Co. v. Mathieson*, 113 Ill. App. 246, *affirmed* 212 Ill. 292;

- Mayer v. Schneider*, 112 Ill. App. 628, *affirmed* 212 Ill. 286; *Junction Min. Co. v. Ench*, 111 Ill. App. 346; *W. H. Stubbings Co. v. World's Columbian Exposition Co.*, 110 Ill. App. 210; *Chicago Union Traction Co. v. Shedd*, 110 Ill. App. 400; *Sullivan v. People*, 108 Ill. App. 328; *Evergreen Park v. Bailey*, 107 Ill. App. 420; *Peterson v. Fullerton*, 106 Ill. App. 237; *Dick v. Zimmerman*, 105 Ill. App. 615, *affirmed* 207 Ill. App. 267, *affirmed* 206 Ill. 124; *Hale Elevator Co. v. Hale*, 201 Ill. 131; *Henry v. People*, 198 Ill. 162; *Starkweather v. Maginnis*, 196 Ill. 274; *Chicago City R. Co. v. Tuohy*, 196 Ill. 410.
- Indiana*.—*Winklebleck v. Winklebleck*, 160 Ind. 570; *Nickey v. Zonker*, 31 Ind. App. 88; *Aspy v. Botkins*, 160 Ind. 170; *Jacobs v. Jolley*, 29 Ind. App. 25.
- Indian Territory*.—*Truskett v. Bronaugh*, 4 Indian Ter. 731.
- Iowa*.—*In re Knox*, 123 Iowa 24.
- Kansas*.—*Jevons v. Union Pac. R. Co.*, 70 Kan. 491.
- Kentucky*.—*Caudle v. Ford*, (Ky. 1903) 72 S. W. Rep. 270; *Illinois Cent. R. Co. v. Eblin*, 114 Ky. 817.
- Maine*.—*State v. Lambert*, 97 Me. 51.
- Massachusetts*.—*Root v. Boston El. R. Co.*, 183 Mass. 418.
- Michigan*.—*Piehl v. Piehl*, (Mich. 1904) 101 N. W. Rep. 628; *Payne v. Union Life Guards*, 136 Mich. 416.
- Minnesota*.—*White v. Collins*, 90 Minn. 165.
- Mississippi*.—*Miller v. State*, (Miss. 1904) 35 So. Rep. 690.
- Missouri*.—*Woodard v. Cooney*, 111 Mo. App. 152; *Bond v. Chicago, etc., R. Co.*, 110 Mo. App. 131; *Bissell v. York*, 108 Mo. App. 307; *Hugumin v. Hinds*, 97 Mo. App. 246; *Dalton v. Poplar Bluff*, 173 Mo. 39; *Glasscock v. Swofford Bros. Dry Goods Co.*, (Mo. App. 1903) 74 S. W. Rep. 1039, 106 Mo. App. 657; *Chinn v. Chicago, etc., R. Co.*, 100 Mo. App. 576; *Poplar Bluff v. Hill*, 92 Mo. App. 17; *Caris v. Nimmons*, 92 Mo. App. 66.
- Nebraska*.—*Oelke v. Theis*, (Neb. 1903) 97 N. W. Rep. 588; *Bankers' Union of the World v. Schwerin*, 67 Neb. 303; *Skow v. Locks*, (Neb. 1902) 91 N. W. Rep. 204.
- New Jersey*.—*Baumann v. Hamburg-American Packet Co.*, 67 N. J. L. 250; *McLean v. Erie R. Co.*, 69 N. J. L. 57; *Acolia v. Elizabeth, etc., R. Co.*, (N. J. 1904) 57 Atl. Rep. 257.
- New York*.—*Durst v. Ernst*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 627; *Hunt v. Dexter Sulphite Pulp, etc., Co.*, 100 N. Y. App. Div. 119; *Sternman v. Metropolitan L. Ins. Co.*, 94 N. Y. App. Div. 610, *affirmed* 181 N. Y. 514; *Bell v. Mills*, 78 N. Y. App. Div. 42; *Cullinan v. Furthmann*, 70 N. Y. App. Div. 110; *Fisher v. Union R. Co.*, 86 N. Y. App. Div. 365; *Littlefield v. Lawrence*, 83 N. Y. App. Div. 327; *Bjerrum v. Springfield Breweries Co.*, 83 N. Y. App. Div. 172.
- North Carolina*.—*Craft v. Norfolk, etc., R. Co.*, 136 N. Car. 49; *Hinson v. Postal Tel. Cable Co.*, 132 N. Car. 460; *Hancock v. Western Union Tel. Co.*, 137 N. Car. 497.
- Oklahoma*.—*Strickler v. Gitchel*, 14 Okla. 523.
- Oregon*.—*In re Morgan*, (Oregon 1905) 78 Pac. Rep. 1029.
- Pennsylvania*.—*Smith v. Jackson Tp.*, 26 Pa. Super. Ct. 234; *Dinan v. Supreme Council, etc., Assoc.*, 210 Pa. St. 456; *Enright v. Pittsburg Junction R. Co.*, 204 Pa. St. 543; *Cobb v. Metropolitan L. Ins. Co.*, 19 Pa. Super. Ct. 228; *Thomas v. Law*, 25 Pa. Super. Ct. 19.
- South Dakota*.—*Weller v. Hilderbrandt*, (S. Dak. 1904) 101 N. W. Rep. 1108.
- Texas*.—*Galveston, etc., R. Co. v. Butshek*, 34 Tex. Civ. App. 194; *Dina v. State*, 46 Tex. Crim. 402.
- Utah*.—*Meyers v. Highland Boy Gold Min. Co.*, 28 Utah 96.
- Virginia*.—*Farley v. Thalhimer*, 103 Va. 504.
- Washington*.—*Smith v. Seattle*, 33 Wash. 481.
- West Virginia*.—*Snooks v. Wingfield*, 52 W. Va. 441.
- Wisconsin*.—*Baushka v. McKey*, 118 Wis. 359.
- Question for Jury as to Credibility of Expert Witnesses.**—*Johnson v. Kahn*, 97 Mo. App. 628; *Kingsbury v. Joseph*, 94 Mo. App. 298; *Gustafson v. Seattle Traction Co.*, 28 Wash. 227. See also *Cosgrove v. Burton*, 104 Mo. App. 698, as to the authority of the court to lay down some rule for the guidance of the jury.
- Question of Fact as to Credibility of Witnesses in Criminal Prosecutions.**—*Alabama*.—*Jackson v. State*, 136 Ala. 22; *Stevens v. State*, 138 Ala. 71; *Hainsworth v. State*, 136 Ala. 13; *Townsend v. State*, 137 Ala. 91; *Hall v. State*, 134 Ala. 90.
- Delaware*.—*State v. Brinte*, 4 Penn. (Del.) 551; *State v. Walls*, 4 Penn. (Del.) 408.
- Florida*.—*Sumpter v. State*, 45 Fla. 106.
- Georgia*.—*Ector v. State*, 120 Ga. 543; *Minor v. State*, 120 Ga. 490; *Cowart v. State*, 120 Ga. 510; *Powell v. State*, 120 Ga. 181.
- Illinois*.—*Hauser v. People*, 210 Ill. 253; *Carle v. People*, 200 Ill. 494, 93 Am. St. Rep. 208.
- Iowa*.—*State v. Carpenter*, 124 Iowa 5; *State v. Smith*, 124 Iowa 334.
- Kentucky*.—*Powers v. Com.*, 114 Ky. 237; *McKinney v. Com.*, (Ky. 1904) 82 S. W. Rep. 263; *Peacock Distillery Co. v. Com.*, (Ky. 1904) 78 S. W. Rep. 893.
- Louisiana*.—*State v. Lyons*, 113 La. 959; *State v. Williams*, 111 La. 179.
- Maine*.—*State v. Lambert*, 97 Me. 51.
- Michigan*.—*People v. Goodrode*, 132 Mich. 542.
- Mississippi*.—*Miller v. State*, (Miss. 1904) 35 So. Rep. 690.
- Missouri*.—*State v. Sharp*, 183 Mo. 715; *State v. Coats*, 174 Mo. 396; *State v. Pyscher*, 179 Mo. 140.
- Nebraska*.—*Parker v. State*, 67 Neb. 555; *Everson v. State*, (Neb. 1903) 93 N. W. Rep. 394; *Fidelity Mut. F. Ins. Co. v. Lowe*, (Neb. 1903) 93 N. W. Rep. 749.
- North Carolina*.—*State v. Wilcox*, 132 N. Car. 1120; *State v. Hall*, 132 N. Car. 1094; *State v. Davis*, 134 N. Car. 633.
- Ohio*.—*State v. Tuttle*, 67 Ohio St. 440, 93 Am. St. Rep. 689.
- Oklahoma*.—*Hill v. Territory*, (Okla. 1905) 79 Pac. Rep. 757.
- Oregon*.—*State v. Leasia*, 45 Oregon 410.
- Rhode Island*.—*Shibley v. Gendron*, 25 R. I. 519.

573. Sufficiency of Corroborating Evidence. — See note 1.

574. 7. Physical Capacity, Condition, and Age of Persons. — See note 1.

8. Mental Qualities and Conditions, and Operations of the Mind — *a.*

MENTAL QUALITIES AND CAPACITY. — See note 2.

b. INFLUENCES OPERATING UPON THE MIND. — See note 3.

575. *c.* KNOWLEDGE OR NOTICE. — See note 1.

d. BELIEF. — See note 2.

e. INTENT — (1) *In Civil Actions.* — See note 3.

576. (2) *In Criminal Cases.* — See note 1.

f. MOTIVE. — See note 2.

g. MALICE. — See note 3.

577. 9. Relations of Persons. — See note 1.

South Dakota. — *State v. Coleman*, 17 S. Dak. 594.

Texas. — *Hart v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 652; *Washington v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 653.

Washington. — *State v. Johnson*, 36 Wash. 294; *State v. Fenton*, 30 Wash. 325.

Question for Jury as to Credibility of Accomplice. — *People v. Wardrip*, 141 Cal. 229; *State v. Faulkner*, 185 Mo. 673; *People v. O'Farrell*, 175 N. Y. 323.

Credibility of Accused. — The fact that the accused is the wife of the deceased does not, in a homicide case, alter the rule. *State v. Hosack*, 116 Iowa 194.

Where There Is No Conflict in the Evidence, no contradictory statement, or effort at impeachment, an instruction that the jurors are the sole judges of the credibility of the witness is properly refused. *Brazis v. St. Louis Transit Co.*, 102 Mo. App. 224.

Where Evidence Indubitably False. — Where the undisputed circumstances show that the witness's evidence cannot possibly be true it does not raise an issue of fact which should be submitted to the jury. *Blumenthal v. Boston*, etc., R. Co., 97 Me. 255.

573. 1. Sufficiency of Corroborating Evidence. — See *State v. Keerl*, 29 Mont. 508, 101 Am. St. Rep. 579.

574. 1. Whether Person Could See Train. — *Selesky v. Chicago G. W. R. Co.*, 120 Iowa 113.

Age of Person. — *Hancock v. Supreme Council*, etc., 69 N. J. L. 308.

Ability to See Train Lights. — *Vance v. Ravenswood*, etc., R. Co., 53 W. Va. 338.

Ability to Strike Fatal Blow. — *State v. Johnson*, 66 S. Car. 23.

Hearing Bell or Whistle. — *McLean v. Erie R. Co.*, 69 N. J. L. 57.

2. Question of Fact as to Mental Qualities and Capacity in Civil Actions. — *Henning v. Stevenson*, (Ky. 1904) 80 S. W. Rep. 1135; *Dunaway v. Smoot*, (Ky. 1902) 67 S. W. Rep. 62; *Matter of Stapleton*, 71 N. Y. App. Div. 1; *Matter of Miller*, 72 N. Y. App. Div. 615.

Question of Fact as to Mental Qualities and Capacity in Criminal Prosecutions. — *Porter v. State*, 135 Ala. 51; *State v. Keerl*, 29 Mont. 508, 101 Am. St. Rep. 579; *Turner v. Territory*, 11 Okla. 660; *Angel v. State*, 45 Tex. Crim. 135; *State v. Haworth*, 24 Utah 398.

3. Influences Operating upon the Mind. — *Wilson v. Parker*, 130 Mich. 638; *Matter of Staple-*

ton, 71 N. Y. App. Div. 1; *Matter of Miller*, 72 N. Y. App. Div. 615, 76 N. Y. Supp. 351.

575. 1. Knowledge or Notice. — *Parker v. Moore*, (C. C. A.) 115 Fed. Rep. 799; *El Paso*, etc., R. Co. v. *McComus*, 36 Tex. Civ. App. 170.

2. Question of Fact as to Belief. — *Warfield v. Clark*, 118 Iowa 69.

3. Question of Fact as to Intent in Civil Cases — *United States*. — *Drainage Commission v. National Contracting Co.*, 136 Fed. Rep. 780; *U. S. Consolidated Seeded Raisin Co. v. Griffin*, etc., Co., (C. C. A.) 126 Fed. Rep. 364; *Butte*, etc., *Consol. Min. Co. v. Montana Ore Purchasing Co.*, (C. C. A.) 121 Fed. Rep. 524.

Alabama. — *Fitzpatrick v. Brigman*, 133 Ala. 242.

Georgia. — *Summerour v. Pappa*, 119 Ga. 1; *Leverett v. Bullard*, 121 Ga. 534; *Southern R. Co. v. Horner*, 115 Ga. 381.

Iowa. — *Stroup v. Bridger*, 124 Iowa 401; *Clark v. Shannon*, etc., Co., 117 Iowa 645.

Kentucky. — *Lytle v. Newell*, (Ky. 1902) 68 S. W. Rep. 118; *Locke v. Lyon Medicine Co.*, (Ky. 1905) 84 S. W. Rep. 307.

Missouri. — *Cochran v. Missouri*, etc., R. Co., 94 Mo. App. 469.

Nebraska. — *Goldsberry v. State*, 66 Neb. 312.

New Jersey. — *Boulevard Globe*, etc., Co. v. *Kern Incandescent Gaslight Co.*, 67 N. J. L. 279.

New York. — *Gansberg v. Sagemohl*, 67 N. Y. App. Div. 554.

North Carolina. — *Vann v. Edwards*, 135 N. Car. 661.

Oregon. — *Oliver v. Oregon Sugar Co.*, 45 Oregon 77.

Texas. — *Nabours v. McCord*, 36 Tex. Civ. App. 504.

Washington. — *Durand v. Heney*, 33 Wash. 38.

576. 1. Question of Fact as to Intent in Criminal Cases. — *Hainsworth v. State*, 136 Ala. 13; *Tipton v. State*, 119 Ga. 304; *State v. Howard*, 30 Mont. 518; *Angel v. State*, 45 Tex. Crim. 135; *State v. Beatty*, 51 W. Va. 232.

2. Question of Fact as to Motive. — See *State v. Gates*, 28 Wash. 689 (weight of evidence of threats by accused).

3. Question of Fact as to Malice. — *Stubbs v. Mulholland*, 168 Mo. 47; *Coble v. Huffins*, 133 N. Car. 422.

577. 1. Relations of Persons. — *Wilson v. Huguenin*, 117 Ga. 546; *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145; *Davis v. Atlanta*, etc., *Air Line R. Co.*, 63 S. Car. 370.

577. 10. Nature, Quality, and Condition of Things — *a.* QUESTIONS OF FACT. — See note 2.

578. 11. Ownership and Possession of Property — *a.* OWNERSHIP. — See note 2.

b. POSSESSION — (2) *Nature of Possession.* — See note 4.

579. 12. Performance or Accomplishment of Acts and Nature of Acts — *a.* IN GENERAL. — See note 1.

580. Abandonment. — See note 1.

Acceptance. — See note 2.

Acquiescence, Ratification, and Waiver. — See note 3.

Delivery. — See note 4.

Performance of Contract. — See note 5.

581. *d.* NATURE OF ACTS AND METHODS OF ACCOMPLISHING THEM. — See note 4.

582. 13. Time — *a.* PARTICULAR TIME AT WHICH ACT WAS DONE OR EVENT HAPPENED. — See note 1.

b. DURATION. — See note 2.

17. Place or Location. — See note 7.

As to Who Are Accomplishes. — Lightfoot v. State, (Tex. Crim. 1904) 78 S. W. Rep. 1075. And see the title ACCOMPLICES, **393.** 2.

As to Who Are Fellow Servants. — Gayle v. Missouri Car, etc., Co., 177 Mo. 427. And see the title FELLOW SERVANTS, **1019.** 7 *et seq.*

Agency. — Cheesman v. Nicholl, 18 Colo. App. 174. And see the title AGENCY, **967.** 3, 4 *et passim.*

577. 2. Question of Fact under What Circumstances Conception May Occur. — State v. Carpenter, 124 Iowa 5.

578. 2. Mixed Question of Law and Fact as to What Constitutes Ownership. — State v. Knowles, 185 Mo. 173, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 578.

4. Mixed Question of Law and Fact as to Nature of Possession. — Georgia Iron, etc., Co. v. Allison, 121 Ga. 483; Rabbermann v. Carroll, 207 Ill. 253; Holliday-Koltz Land, etc., Co. v. Markham, 96 Mo. App. 51; Hopkins v. Deering, 71 N. H. 353; Earle v. Poat, 63 S. Car. 439; Johnson v. Brown, 33 Wash. 588.

579. 1. Question of Fact for Jury as to Physical Acts. — White v. Harris, 69 S. Car. 65, 104 Am. St. Rep. 791; State v. Johnson, 66 S. Car. 23.

Illustrations of Questions of Fact as to Physical Acts — Question as to Whether Signals Were Given. — Corcoran v. Pennsylvania R. Co., 203 Pa. St. 380.

Question as to Whether Notice Was Given. — Illinois Cent. R. Co. v. Byrne, 205 Ill. 9.

Whether Instrument Altered. — Heard v. Tappan, 116 Ga. 930.

Whether Conversation Took Place as Alleged. — McCarthy v. Peach, 186 Mass. 67.

Whether Certificate of Deposit Has Been Paid. — Rosenstock v. Dessar, 85 N. Y. App. Div. 501.

580. 1. Question of Mixed Law and Fact as to Abandonment. — Koerper v. Royal Invest. Co., 102 Mo. App. 543.

2. Acceptance. — Swafford v. Spratt, 93 Mo. App. 631; Grabfelder v. Vosburgh, 90 N. Y. App. Div. 307; Van Pub. Co. v. Westinghouse, 72 N. Y. App. Div. 121.

3. Mixed Question of Law and Fact as to Ratification. — Wilson v. Huguenin, 117 Ga. 546.

Mixed Question of Law and Fact as to Waiver — Grant v. Pratt, 87 N. Y. App. Div. 490; Jones v. Daly, 73 N. Y. App. Div. 220, affirmed 175 N. Y. 520; Bell v. Mills, 78 N. Y. App. Div. 42.

4. Mixed Question of Law and Fact as to Delivery. — Swafford v. Spratt, 93 Mo. App. 631; Gross v. Smith, 132 N. Car. 604.

Delivery of Deed. — Burnett v. Hinshaw, 64 Kan. 886, 67 Pac. Rep. 1101.

5. Mixed Question of Law and Fact as to Performance of Contract. — George A. Fuller Co. v. B. P. Young Co., (C. C. A.) 126 Fed. Rep. 343; Pitcairn v. Philip Hiss Co., (C. C. A.) 113 Fed. Rep. 492; Gunther v. Gunther, 181 Mass. 217; Sullivan v. Moffatt, 70 N. J. L. 4; Manda v. Etienne, 93 N. Y. App. Div. 609; New York Hydraulic Press Brick Co. v. Gunn, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 330; Kochmann v. Baumeister, 73 N. Y. App. Div. 309; Van Pub. Co. v. Westinghouse, 72 N. Y. App. Div. 121; Shultz v. Seibel, 209 Pa. St. 27; Drew v. Goodhue, 74 Vt. 436.

581. 4. Mixed Questions of Law and Fact as to Nature of Acts and Methods of Accomplishing Them. — *The Existence of Fraud in a Transaction* is usually a question of fact for the jury. Whitehouse v. Bolster, 95 Me. 458; Hidden v. Exeter, etc., R. Co., 72 N. H. 422; Griffin v. Southern R. Co., 66 S. Car. 77; Spearfish Bank v. Graham, 16 S. Dak. 49; Ney v. Ladd, (Tex. Civ. App. 1902) 68 S. W. Rep. 1014; Bjorklund v. Seattle Electric Co., 35 Wash. 439.

582. 1. Question of Fact as to Time When Act Was Done or Event Happened. — Dawson v. Thigpen, 137 N. Car. 462; State v. Warren, 41 Oregon 348; Holliday v. Lambright, 29 Tex. Civ. App. 226; State v. Eubank, 33 Wash. 203.

2. Question of Fact as to Duration. — Newman v. Meddaugh, 131 Mich. 595.

7. Question of Fact as to Alibi. — Bohlman v. State, 135 Ala. 45.

Location of Collision at Sea. — Lennan v. Hamburg-American Steamship Co., 73 N. Y. App. Div. 357.

Residence of Corporation. — Nester v. Baraga Tp., 133 Mich. 640.

Residence as Affecting Jurisdiction. — Louis-

583. Question of Boundaries. — See note 1.18. Identity — *a.* IN GENERAL. — See note 2.*b.* OF PERSONS. — See note 3.*c.* OF PROPERTY. — See note 4.**584. 20. Reasonableness** — *a.* IN GENERAL. — See note 1.*b.* OF ACTS, METHODS, AND INSTRUMENTALITIES — **Necessity for Acts.**

— See note 5.

585. c. OF TIME — (1) *In General.* — See note 2.**586. VI. INVASION OF JURY'S PROVINCE BY COURT** — **Doctrine Stated.** — See note 2.ville, etc., *R. Co. v. Munford*, (Ky. 1902) 68 S. W. Rep. 635.**583. 1. Respective Provinces of Court and Jury in Determining Boundaries.** — *Snooks v. Wingfield*, 52 W. Va. 441.**2. Question of Fact as to Identity.** — *State v. Hyatt*, 179 Mo. 344.**Idem Sonans** — **Question for Court.** — *New York, etc., Land Co. v. Dooley*, 33 Tex. Civ. App. 636. And see the title **NAME**, **317.** 3, 4.**3. Question of Fact as to Identity of Persons.** — *Duffy v. Duffy*, 20 Pa. Super. Ct. 25.**4. Question of Fact as to Identity of Property.** — *Johnson v. McKay*, 121 Ga. 763; *Livingston v. Stevens*, 122 Iowa 62; *Ward v. Gay*, 137 N. Car. 397.**584. 1. Question of Fact as to Reasonableness.** — *Cousins v. Bowling*, 100 Mo. App. 452.**5. Mixed Question of Law and Fact as to Self-defense.** — *Sherrill v. State*, 138 Ala. 3; *Richardson v. State*, 133 Ala. 78; *Ringer v. State*, (Ark. 1905) 85 S. W. Rep. 410; *Newman v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 519.**585. 2. Mixed Question of Law and Fact as to Reasonableness of Time.** — *Daytona Bridge Co. v. Bond*, (Fla. 1904) 36 So. Rep. 445; *Lewis v. Worrell*, 185 Mass. 572; *Harrison Granite Co. v. Lambie*, (Supm. Ct. App. T.) 88 N. Y. Supp. 862.**Reasonableness of Time of Retention of Goods for Examination** — **Question for Jury.** — *Grabfelder v. Vosburgh*, 90 N. Y. App. Div. 307.**586. 2. Invading Province of Jury in Civil Cases** — *Alabama.* — *Montgomery St. R. Co. v. Shanks*, 139 Ala. 489; *Clewis v. Malone*, 131 Ala. 465; *Birmingham R., etc., Co. v. Mullen*, 138 Ala. 614; *Gaynor v. Louisville, etc., R. Co.*, 136 Ala. 244; *Moore v. Nashville, etc., R. Co.*, 137 Ala. 495.*California.* — *People v. Glaze*, 139 Cal. 154; *Kahn v. Triest-Rosenberg Cap Co.*, 139 Cal. 340.*Delaware.* — *State v. Snow*, 3 Penn. (Del.) 259.*Florida.* — *Southern Pine Co. v. Powell*, (Fla. 1904) 37 So. Rep. 570.*Georgia.* — *Acme Brewing Co. v. Central R., etc., Co.*, 115 Ga. 494.*Idaho.* — *State v. Shuff*, 9 Idaho 115.*Illinois.* — *O'Flaherty v. Mann*, 196 Ill. 304; *Chicago, etc., R. Co. v. O'Leary*, 102 Ill. App. 665; *Adams v. Neu*, 108 Ill. App. 50; *Chippis v. Buxton*, 109 Ill. App. 88; *People v. Peden*, 109 Ill. App. 560.*Iowa.* — *Warfield v. Clark*, 118 Iowa 69.*Missouri.* — *Brock v. St. Louis Transit Co.*, 107 Mo. App. 109; *Gage v. Mears*, 107 Mo. App. 140; *Pace v. Roberts, etc., Shoe Co.*, 103Mo. App. 662; *Smith v. Sovereign Camp, etc.*, 179 Mo. 119; *Chinn v. Chicago, etc., R. Co.*, 100 Mo. App. 576; *Dodd v. Guiseffi*, 100 Mo. App. 311; *Dalton v. Poplar Bluff*, 173 Mo. 39; *O'Neill v. Blase*, 94 Mo. App. 648; *Winter v. Supreme Lodge, etc.*, 96 Mo. App. 1; *Pim v. St. Louis Transit Co.*, 108 Mo. App. 713.*Montana.* — *Lawrence v. Westlake*, 28 Mont. 503.*Nebraska.* — *South Omaha v. Wrzesinski*, 66 Neb. 790; *Skow v. Locks*, (Neb. 1902) 91 N. W. Rep. 204.*North Carolina.* — *Bumgardner v. Southern R. Co.*, 132 N. Car. 438; *Meadows v. Western Union Tel. Co.*, 131 N. Car. 73; *Faulkner v. King*, 130 N. Car. 494.*Texas.* — *Perez v. San Antonio, etc., R. Co.*, 28 Tex. Civ. App. 255; *St. Louis Southwestern R. Co. v. Sibby*, 29 Tex. Civ. App. 396; *Galveston, etc., R. Co. v. Karrer*, (Tex. Crim. App. 1902) 70 S. W. Rep. 328; *White v. Epperson*, 32 Tex. Civ. App. 162; *St. Louis Southwestern R. Co. v. Gentry*, (Tex. Civ. App. 1903) 74 S. W. Rep. 607; *Gulf, etc., R. Co. v. Phillips*, 35 Tex. Civ. App. 337.*Washington.* — *Gilmore v. Seattle, etc., R. Co.*, 29 Wash. 150.**Invading Province of Jury in Criminal Cases** — *United States.* — *Dolan v. U. S.*, (C. C. A.) 123 Fed. Rep. 52.*Alabama.* — *Watkins v. State*, 133 Ala. 88; *Thomas v. State*, 133 Ala. 139; *Rambo v. State*, 134 Ala. 71; *Crittenden v. State*, 134 Ala. 145; *Porter v. State*, 135 Ala. 51; *Bohlman v. State*, 135 Ala. 45; *Stevens v. State*, 138 Ala. 71; *Rollings v. State*, 136 Ala. 126; *Deal v. State*, 136 Ala. 52; *Collins v. State*, 138 Ala. 57.*Florida.* — *Cook v. State*, (Fla. 1903) 35 So. Rep. 665.*Georgia.* — *Crawford v. State*, 117 Ga. 247; *Hodge v. State*, 116 Ga. 929. See also *Turner v. State*, 118 Ga. 756; *Stephens v. State*, 118 Ga. 762.*Idaho.* — *State v. Shuff*, 9 Idaho 115.*Iowa.* — *State v. Crofford*, 121 Iowa 395.*Kentucky.* — *Tines v. Com.*, (Ky. 1903) 77 S. W. Rep. 363.*Maine.* — See *State v. Means*, 95 Me. 364, 85 Am. St. Rep. 421.*Missouri.* — *State v. Bonner*, 178 Mo. 424.*North Dakota.* — *State v. Barry*, 11 N. Dak. 428.*Texas.* — *Ballow v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 513; *Leach v. State*, 46 Tex. Crim. 507; *Arnold v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 205; *Morton v. State*, 43 Tex. Crim. 533; *Nelson v. State*, 43 Tex. Crim. 553; *Moore v. State*, 44 Tex. Crim. 45; *Reese v.*

587. Extent to Which Federal Courts May Express Opinion as to Weight of Evidence. — See note 1.

[QUIRT. — See note 5a.]

State, (Tex. Crim. 1902) 70 S. W. Rep. 424; Jones v. State, 44 Tex. Crim. 557; Hollar v. State, (Tex. Crim. 1903) 73 S. W. Rep. 961; Cortez v. State, (Tex. Crim. 1903) 74 S. W. Rep. 907; Angel v. State, 45 Tex. Crim. 135; Potts v. State, 45 Tex. Crim. 45; Glover v. State, (Tex. Crim. 1903) 76 S. W. Rep. 465; Bean v. State, (Tex. Crim. 1903) 76 S. W. Rep. 759. See also Perrin v. State, 45 Tex. Crim. 560.

South Carolina. — Ballentine v. Hammond, 68 S. Car. 153; Griffin v. Southern R. Co., 66 S. Car. 77.

Washington. — State v. Vance, 29 Wash. 435. See also State v. Mitchell, 32 Wash. 64.

Washington Constitution. — State v. Thield, 36 Wash. 365.

Stating Recollection of Testimony Not Expression of Opinion. — Coombs v. Mason, 97 Me. 270.

In Connecticut it appears that it is within the discretion of the court to let the jury know its opinion of the weight of evidence offered in a criminal case. State v. Main, 75 Conn. 55. See further *supra*, this title, 549. 3.

587. 1. Nome Beach Lighterage, etc., Co. v. Munich Assur. Co., 123 Fed. Rep. 820; Ching v. U. S., (C. C. A.) 118 Fed. Rep. 538; Freese v. Kemplay, (C. C. A.) 118 Fed. Rep. 428; Kerr v. Modern Woodmen of America, (C. C. A.) 117 Fed. Rep. 593; Lesser Cotton Co. v. St. Louis, etc., R. Co., (C. C. A.) 114 Fed. Rep. 133.

5a. A *quirt* is a rawhide whip plaited with two thongs of buffalo hide. Miller v. Meche, 111 La. 143.

QUORUM.

589. II. LEGISLATIVE AND CORPORATE BODIES. — See note 2.

591. VI. MAJORITY OF QUORUM MAY ACT. — See note 4.

592. See notes 3, 4.

Members Present and Refusing to Vote. — See note 5.

589. 2. Provision of City Charter Fixing Quorum of Council Controls. — Benwood v. Wheeling R. Co., 53 W. Va. 465.

By-law Fixing Different Quorum from That Provided by Statute Void. — Darrin v. Hoff, 99 Md. 491.

591. 4. When a Quorum Has Met, the Majority of Such Quorum May Act. — Thurston v. Huston, 123 Iowa 157; Matter of Brearton, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 247, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 591; Com. v. Fleming, 23 Pa. Super. Ct. 404.

592. 3. Presence of Quorum Necessary. — Pennsylvania Co. v. Cole, 132 Fed. Rep. 668.

4. Adjournment. — *Contra*, Pennsylvania Co. v. Cole, 132 Fed. Rep. 668, holding that less than a quorum may adjourn only in pursuance of authority expressly conferred by the by-laws, etc.

5. Silence Presumed to Be Acquiescence. — Atty.-Gen. v. Remick, 71 N. H. 480; Matter of Brearton, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 247, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 592; Com. v. Fleming, 23 Pa. Super. Ct. 404.

QUO WARRANTO.

BY P. B. MCKENZIE.

596. II. NATURE AND ORIGIN OF REMEDY — 1. Ancient Writ of Quo Warranto. — See note 3.

597. 2. Information in Nature of Quo Warranto. — See notes 1, 2.

3. Modern Statutory Regulations and Substitutes. — See note 8.

598. See note 3.

596. 3. Ancient Writ Defined. — State v. Scott, (Neb. 1904) 97 N. W. Rep. 1021; Meehan v. Bachelder, (N. H. 1904) 59 Atl. Rep. 620.

597. 1. Meehan v. Bachelder, (N. H. 1904) 59 Atl. Rep. 620.

2. Information Now Exclusive Remedy. —

Meehan v. Bachelder, (N. H. 1904) 59 Atl. Rep. 620.

8. Civil Action. — State v. McLean County, 11 N. Dak. 356.

598. 3. Remedy Substantially Unchanged. — Meehan v. Bachelder, (N. H. 1904) 59 Atl. Rep. 620.

599. 4. Extraordinary Prerogative Character — The Statute of Anne. — See note 3.

5. Civil or Criminal Character — The Writ of Quo Warranto. — See note 4. The Information in the Nature of Quo Warranto. — See note 6.

600. See note 3.

7. Legal or Equitable Character. — See note 7.

601. III. PRINCIPLES GOVERNING USE OF REMEDY — 1. General Rule. — See note 1.

2. Possession and User. — See notes 3, 8.

602. 4. Leave of Court — *b*. INFORMATIONS IN NATURE OF QUO WARRANTO. — See notes 4, 5, 6.

603. 5. Discretion of Court — *a*. STATEMENT OF RULE. — See note 6.

604. *b*. CONSIDERATIONS AFFECTING EXERCISE OF DISCRETION. — See notes 3, 4, 5, 11, 12.

605. See note 5.

c. EXHAUSTION OF DISCRETION. — See notes 9, 10.

6. Discretion of Prosecuting Officer. — See note 12.

606. See notes 1, 4, 6.

607. 7. Limitation and Laches. — See notes 2, 3.

8. Acquiescence and Estoppel. — See notes 5, 6, 7.

599. 3. Albright *v.* Territory, (N. Mex. 1905) 79 Pac. Rep. 719.

4. Writ a Civil Remedy. — Meehan *v.* Bachelder, (N. H. 1904) 59 Atl. Rep. 620.

6. Information Now a Civil Remedy. — Meehan *v.* Bachelder, (N. H. 1904) 59 Atl. Rep. 620; Fordyce *v.* State, 115 Wis. 608; State *v.* Leisauke, 117 Wis. 475.

600. 3. Civil Action Substituted. — State *v.* McLean County, 11 N. Dak. 356.

7. Legal Proceeding. — Atty.-Gen. *v.* Preferred Mercantile Co., 187 Mass. 516.

601. 1. Lies for Usurpation of Office or Franchise. — Hathcock *v.* McGouirk, 119 Ga. 973; State *v.* Milwaukee, etc., R. Co., 116 Wis. 142.

3. Possession and User Necessary. — State *v.* Milwaukee, etc., R. Co., 116 Wis. 142.

8. What Constitutes Possession and User. — State *v.* Milwaukee, etc., R. Co., 116 Wis. 142.

602. 4. Ex Officio Informations Without Leave. — State *v.* Mansfield, 99 Mo. App. 146; State *v.* Atchison, etc., R. Co., 176 Mo. 687; State *v.* Chicago, etc., R. Co., 176 Mo. 721; Meehan *v.* Bachelder, (N. H. 1904) 59 Atl. Rep. 620. See also Bishop *v.* People, 200 Ill. 33.

5. Leave Necessary under Statute of Anne. — State *v.* Kohnke, 109 La. 838.

6. Meehan *v.* Bachelder, (N. H. 1904) 59 Atl. Rep. 620; State *v.* McLean County, 11 N. Dak. 356.

603. 6. Granting of Leave Discretionary with Court. — People *v.* People's Gas Light, etc., Co., 205 Ill. 482, 98 Am. St. Rep. 244; Tillyer *v.* Mindermann, 70 N. J. L. 512; State *v.* Wilcox, 11 N. Dak. 329; State *v.* McLean County, 11 N. Dak. 356; Ohio Turnpike Co. *v.* Waechter, 25 Ohio Cir. Ct. 605; Guay *v.* Fortin, 24 Quebec Super. Ct. 210.

604. 3. Discretion Governed by Circumstances of Case. — Ohio Turnpike Co. *v.* Waechter, 25 Ohio Cir. Ct. 605.

4. Affirmative Showing Necessary. — People *v.* People's Gas Light, etc., Co., 205 Ill. 482, 98 Am. St. Rep. 244.

5. Counter-affidavits. — People *v.* People's Gas

Light, etc., Co., 205 Ill. 482, 98 Am. St. Rep. 244.

11. Question of Law Decisive. — Vreeland *v.* Pierson, 70 N. J. L. 508; Clark *v.* Searing, 70 N. J. L. 517. See also Scales *v.* Faulkner, 118 Ga. 152.

12. Interest of Public and Third Persons. — People *v.* People's Gas Light, etc., Co., 205 Ill. 482, 98 Am. St. Rep. 244; Tillyer *v.* Mindermann, 70 N. J. L. 512; State *v.* McLean County, 11 N. Dak. 356.

605. 5. Relator Without Interest. — State *v.* McLean County, 11 N. Dak. 356.

9. Leave Improvidently Granted. — See State *v.* Mansfield, 99 Mo. App. 146, refusing ouster where no sufficient benefit would have accrued therefrom.

10. Discretion Exhausted by Granting Leave. — State *v.* McLean County, 11 N. Dak. 356.

12. Discretion of Prosecuting Officer. — Meehan *v.* Bachelder, (N. H. 1904) 59 Atl. Rep. 620.

606. 1. Abuse of Discretion. — Meehan *v.* Bachelder, (N. H. 1904) 59 Atl. Rep. 620, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 606.

4. Right of Private Relator to Use Prosecuting Officer's Name. — See State *v.* Wilcox, 11 N. Dak. 329, holding that the disapproval of the application by the attorney-general would not bind the court.

6. State *v.* Wilcox, 11 N. Dak. 329.

607. 2. Laches and Delay Ground for Refusing Leave. — State *v.* Birch, 186 Mo. 205; State *v.* McLean County, 11 N. Dak. 356.

Delay of Six Months Not Laches. — Atty.-Gen. *v.* Lowrey, 131 Mich. 639, 9 Detroit Leg. N. 470.

3. Application Against State. — Soule *v.* People, 205 Ill. 618; State *v.* Mansfield, 99 Mo. App. 146; State *v.* Huff, 105 Mo. App. 354; State *v.* McLean County, 11 N. Dak. 356.

5. Relator Estopped by His Own Conduct. — People *v.* Long, 32 Colo. 486; Lincoln Park Chapter No. 177, etc., *v.* Swatek, 204 Ill. 228.

6. Estoppel of State. — People *v.* Burns, 212

607. 9. Other Adequate Remedy — *a.* GENERAL RULE. — See note 8.

608. See note 2.

b. CONCURRENT AND EXCLUSIVE REMEDIES — (1) *Constitutional and Statutory Remedies.* — See note 7.

609. (2) *Election Contest.* — See note 5.

610. (3) *Bodies Deciding Qualifications of Their Own Members.* — See notes 1, 4.

10. Public or Private Rights. — See note 6.

611. IV. JURISDICTION — 1. In General. — See note 1.

2. Appellate Courts. — See note 4.

612. See notes 1, 2.

613. 4. State or Federal Courts. — See note 5.

6. Distinction Between Writ and Information in Grant of Jurisdiction.

— See note 7.

614. See note 1.

V. PARTIES — 1. Who May Maintain Proceedings — *a.* STATE OR SOVEREIGN. — See note 8.

615. *b.* PRIVATE INDIVIDUALS — RELATORS — (1) *General Rules.* — See notes 4, 5, 7, 8.

616. See notes 2, 4.

(2) *Interest of Relator.* — See notes 5, 6.

Ill. 227. *Compare* Fordyce v. State, 115 Wis. 608, holding that a judgment of an inferior court declaring unconstitutional a statute prescribing qualifications of a candidate for a certain office, did not estop the state from proceeding by quo warranto to oust from such office an ineligible person elected thereto; State v. Broatch, (Neb. 1903) 94 N. W. Rep. 1016.

607. 7. Recognition of Corporation by State. — Soule v. People, 205 Ill. 618; State v. McLean County, 11 N. Dak. 356.

8. General Rule. — People v. Waite, 213 Ill. 421; State v. Scott, (Neb. 1904) 97 N. W. Rep. 1021.

608. 2. Other Remedy Not Adequate. — The state is not ousted of the remedy by quo warranto by reason of a remedy existing in favor of a municipality. State v. Toledo R., etc., Co., 23 Ohio Cir. Ct. 603.

7. Exclusive Statutory Remedies. — State v. Atchison, etc., R. Co., 176 Mo. 687; State v. Missouri Pac. R. Co., 176 Mo. 718; State v. Chicago, etc., R. Co., 176 Mo. 721.

609. 5. Contest Exclusive on Some Questions and Not on Others. — Hathcock v. McGouirk, 119 Ga. 973.

610. 1. Garms v. People, 108 Ill. App. 631.

4. State Legislature. — See the title STATUTES, 535. 4, 5.

6. Not Available as a Purely Private Remedy. — People v. People's Gas Light, etc., Co., 205 Ill. 482, 98 Am. St. Rep. 244; State v. Atchison, etc., R. Co., 176 Mo. 687; State v. Missouri Pac. R. Co., 176 Mo. 718; State v. Chicago, etc., R. Co., 176 Mo. 721.

611. 1. Statutory and Constitutional Provisions. — Meehan v. Bachelder, (N. H. 1904) 59 Atl. Rep. 620; State v. McLean County, 11 N. Dak. 356.

4. Original Jurisdiction of Supreme or Appellate Courts. — State v. McLean County, 11 N. Dak. 356.

612. 1. Concurrent Jurisdiction of Appellate and Inferior Court. — People v. American Smelt-

ing, etc., Co., 30 Colo. 275; State v. McLean County, 11 N. Dak. 356.

2. Where Merely Private Rights Are Involved. — Duluth Elevator Co. v. White, 11 N. Dak. 534; State v. Wilcox, 11 N. Dak. 329; State v. McLean County, 11 N. Dak. 356.

613. 5. Interstate Commerce Affected. — Compare State v. Atchison, etc., R. Co., 176 Mo. 687; State v. Missouri Pac. R. Co., 176 Mo. 718; State v. Chicago, etc., R. Co., 176 Mo. 721.

7. Writ and Information Used Synonymously. — Meehan v. Bachelder, (N. H. 1904) 59 Atl. Rep. 620; State v. McLean County, 11 N. Dak. 356.

614. 1. Meehan v. Bachelder, (N. H. 1904) 59 Atl. Rep. 620.

8. Modern Rule in Cases Affecting Only Public Rights. — State v. Reardon, 161 Ind. 249; Clarke v. Interstate Independent Telephone Co., (Neb. 1904) 101 N. W. Rep. 977; Holloway v. Dickinson, 7 N. J. L. 72; State v. Seymour, 69 N. J. L. 606.

615. 4. In Absence of Statute. — Meehan v. Bachelder, (N. H. 1904) 59 Atl. Rep. 620.

5. Statute of Anne. — State v. Kohnke, 109 La. 838.

7. Modern Statutes. — State v. Kohnke, 109 La. 838.

8. Proceeding Still in Name of State. — Fordyce v. State, 115 Wis. 608; State v. Leischer, 117 Wis. 475.

616. 2. Private Action to Determine Right to Office. — Tillyer v. Mindermann, 70 N. J. L. 512.

4. Joinder of Relator with State. — West End v. State, 138 Ala. 295 (joinder necessary).

5. Special Interest Necessary. — State v. Wheatley, 160 Ind. 183; State v. Reardon, 161 Ind. 249; State v. Dudley, 161 Ind. 431; State v. Wilcox, 11 N. Dak. 329; State v. McLean County, 11 N. Dak. 356; Ney v. Whitley, 26 R. I. 464; State v. Leischer, 117 Wis. 475.

6. Effect of Statutory Provisions. — Holloway

617. *c.* APPLICATION OF RULES TO PARTICULAR CASES — (1) *Public Offices* — The State or Sovereign. — See note 2.

618. A Claimant of a Public Office. — See notes 3, 4.

A Defeated Candidate. — See note 5.

A Private Individual. — See notes 6, 8, 9.

Any Citizen and Taxpayer of a Municipal Corporation. — See note 10.

***620.** (3) *Private Corporations*. — See note 3.

621. See note 2.

(5) *Franchises*. — See note 9.

622. 2. Against Whom Maintainable — *a.* GENERAL RULE AS TO DEFENDANTS. — See note 1.

b. PUBLIC OR MUNICIPAL CORPORATIONS. — See note 7.

624. VI. PROPER OFFICER TO PROSECUTE — 2. Particular Officers. — See note 7.

625. See notes 1, 3.

VII. BURDEN OF PROOF. — See note 5.

626. See notes 2, 4, 6.

IX. JURY TRIAL. — See note 8.

627. See note 2.

X. JUDGMENT — 1. Ouster. — See note 5.

628. 2. Fine. — In the United States. — See note 3.

629. 5. Res Judicata and Collateral Attack. — See note 6.

v. Dickinson, 69 N. J. L. 72; *State v. Seymour*, 69 N. J. L. 606.

617. 2. State or Sovereign. — *State v. Dudley*, 161 Ind. 431; *Holloway v. Dickinson*, 69 N. J. L. 72; *State v. Seymour*, 69 N. J. L. 606; *Ney v. Whitley*, 26 R. I. 464.

A Municipality is a proper relator in proceedings to oust a policeman. *Beverly v. Hattiesburg*, 83 Miss. 621.

618. 3. Title of Plaintiff Defective. — *Scales v. Faulkner*, 118 Ga. 152.

4. Qualification of Claimant. — *Gilbert v. Craddock*, 67 Kan. 346. See also *People v. Campbell*, 138 Cal. 11. *Contra*, *State v. Wheatley*, 160 Ind. 183.

5. Defeated Candidate. — *Hathcock v. McGouirk*, 119 Ga. 973.

6. Private Individuals. — *Ney v. Whitley*, 26 R. I. 464.

8. *State v. Reardon*, 161 Ind. 249; *State v. Dudley*, 161 Ind. 431.

9. Refusal of Prosecuting Officer to Proceed. — *Ney v. Whitley*, 26 R. I. 464; *State v. Milwaukee*, etc., R. Co., 116 Wis. 142; *State v. Leischer*, 117 Wis. 475.

10. Citizens and Taxpayers of Municipal Corporations. — *Whitehurst v. Jones*, 117 Ga. 803; *Hathcock v. McGouirk*, 119 Ga. 973; *State v. Kohnke*, 109 La. 838; *Fordyce v. State*, 115 Wis. 608; *State v. Leischer*, 117 Wis. 475.

620. 3. State or Sovereign. — *Lincoln Park Chapter No. 177*, etc., *v. Swatek*, 204 Ill. 228.

621. 2. Private Relators. — *State v. U. S. Endowment*, etc., Co., 140 Ala. 610.

9. State. — *State v. Toledo R.*, etc., Co., 23 Ohio Cir. Ct. 603.

622. 1. Defendants. — *State v. Kohnke*, 109 La. 838; *State v. Leischer*, 117 Wis. 475.

7. When Against Individuals and When Against Corporation. — *West End v. State*, 138 Ala. 295; *State v. Huff*, 105 Mo. App. 354; *State v. South Park*, 34 Wash. 162; *State v. Leischer*, 117 Wis. 475.

624. 7. Attorney-General. — *State v. Milwaukee*, etc., R. Co., 116 Wis. 142; *State v. Leischer*, 117 Wis. 475.

625. 1. Attorney-General in Supreme Court. — *Duluth Elevator Co. v. White*, 11 N. Dak. 534; *State v. Wilcox*, 11 N. Dak. 329; *State v. McLean County*, 11 N. Dak. 356.

3. District or County Attorney. — *State v. Seattle Gas*, etc., Co., 28 Wash. 488.

5. Burden on Respondent. — *Garms v. People*, 108 Ill. App. 631.

626. 2. Burden of Showing Forfeiture. — *State v. Trinkle*, 70 Kan. 396.

4. Burden on Relator to Show His Own Title. — *State v. Rosenthal*, 123 Wis. 442.

Where Ineligibility Is the Ground of Complaint the burden is on the relator. *State v. Duncan*, 1 Tenn. Ch. App. 334.

6. Burden on Each to Establish His Own Title. — *State v. Rosenthal*, 123 Wis. 442.

8. Facts Usually Submitted to Jury. — *Ohio Turnpike Co. v. Waechter*, 25 Ohio Cir. Ct. 605, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 626.

627. 2. No Constitutional Right to Jury Trial. — *Wheeler v. Caldwell*, 68 Kan. 776.

5. Ouster. — Where the proceedings may be instituted by the attorney-general or other public officer without leave, the court will exercise a discretion in the granting of judgment of ouster, and refuse it where no public benefit will result therefrom. *State v. Mansfield*, 99 Mo. App. 146.

628. 3. Fine in Absence of Statute. — *Contra*, *Albright v. Territory*, (N. Mex. 1905) 79 Pac. Rep. 719.

629. 6. As Res Judicata. — A judgment determining the rights of claimants to a certain office is not *res judicata* as between those claiming the office for a subsequent term, though the grounds of controversy are identical. *State v. Broatch*, (Neb. 1903) 94 N. W. Rep. 1016.

629. XI. COSTS. — See note 10.

630. XII. USE OF REMEDY IN PARTICULAR CASES — 1. Public Officers —
a. APPROPRIATENESS AND EXCLUSIVENESS OF REMEDY — (1) In General —
At Common Law. — See note 3.

632. Constitutionality of Statute under Which Office Exercised. — See note 1.

(3) *Official Misconduct or Illegal Action.* — See note 8.

633. (5) *Expiration of Term.* — See notes 4, 6.

634. b. WHO ARE PUBLIC OFFICERS SUBJECT TO WRIT — (1) In General. — See note 2.

635. (2) *Particular Officers.* — See note 2.

636. See note 1.

c. TRIAL OF RELATOR'S TITLE TO OFFICE. — See notes 2, 5.

637. See note 4.

2. Public or Municipal Corporations — a. CORPORATE EXISTENCE. —
 See note 5.

638. See note 2.

b. TERRITORIAL JURISDICTION. — See note 5.

639. 3. Private Corporations — a. CORPORATE EXISTENCE. — See note 6.

629. 10. Security for Costs. — *State v. U. S. Endowment, etc., Co.*, 140 Ala. 610; *Hull v. Eby*, 123 Iowa 257.

630. 3. General Rule — Alabama. — *Little v. Bessemer*, 138 Ala. 127.

California. — *People v. Campbell*, 138 Cal. 11.
Georgia. — *Hathcock v. McGouirk*, 119 Ga. 973.

Illinois. — *Marshall v. Illinois State Reformatory*, 103 Ill. App. 65, affirmed 201 Ill. 9; *Deemar v. Boyne*, 103 Ill. App. 464.

Iowa. — *Daniels v. Newbold*, 125 Iowa 193.
Michigan. — *Hartwig v. Manistee*, 134 Mich. 615, 10 Detroit Leg. N. 637.

Mississippi. — *Beverly v. Hattiesburg*, 83 Miss. 621.

Nebraska. — *State v. Broatch*, (Neb. 1903) 94 N. W. Rep. 1016; *State v. Moores*, (Neb. 1904) 99 N. W. Rep. 504.

New Jersey. — *Vreeland v. Pierson*, 70 N. J. L. 508.

New Hampshire. — *Meehan v. Bachelder*, (N. H. 1904) 59 Atl. Rep. 620.

New York. — *Greene v. Knox*, 175 N. Y. 432; *People v. Howe*, 177 N. Y. 499; *People v. Police Com'rs*, 174 N. Y. 450, 95 Am. St. Rep. 596; *People v. Ogden*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 246, affirmed 87 N. Y. App. Div. 631; *People v. Hinsdale*, (Supm. St. Spec. T.) 43 Misc. (N. Y.) 182. See also *People v. Greene*, 95 N. Y. App. Div. 397.

Ohio. — *State v. Conser*, 24 Ohio Cir. Ct. 270.

Texas. — *Ex p. Lewis*, 45 Tex. Crim. 1, 107 Am. St. Rep. 970.

West Virginia. — *Board of Education v. Holt*, 54 W. Va. 167; *Moore v. Holt*, 55 W. Va. 507.

632. 1. Determination of Constitutional Questions. — *People v. People's Gas Light, etc., Co.*, 205 Ill. 482, 98 Am. St. Rep. 244. See also *State v. Kohnke*, 109 La. 838.

8. Not a Remedy for Misconduct or Illegal Action. — *People v. McDonald*, 208 Ill. 638, 214 Ill. 83; *State v. Scott*, (Neb. 1904) 97 N. W. Rep. 1021; *State v. Nolan*, (Neb. 1904) 98 N. W. Rep. 657.

633. 4. Tillyer v. Mindermann, 70 N. J. L. 512.

6. Ouster Not Sole Object of Proceeding. — *Albright v. Territory*, (N. Mex. 1905) 79 Pac. Rep. 719.

634. 2. Permanent Substantive Office. — *State v. Gray*, 91 Mo. App. 438; *State v. Duncan*, 1 Tenn. Ch. App. 334.

635. 2. Borough Councillor. — See *Rex v. Beer*, (1903) 2 K. B. 693.

Member of City Council. — *Roy v. Martineau*, 22 Quebec Super. Ct. 1.

Secretary of State Board of Agriculture. — *Meehan v. Bachelder*, (N. H. 1904) 59 Atl. Rep. 620.

School Officers. — *Ellis v. Greaves*, 82 Miss. 36.

636. 1. Engineer of City Hall. — *State v. Gray*, 91 Mo. App. 438.

Employee of Quasi-public Corporation. — *State v. Duncan*, 1 Tenn. Ch. App. 334.

2. Respondent's Title the Sole Issue. — *People v. Campbell*, 138 Cal. 11; *Albright v. Territory*, (N. Mex. 1905) 79 Pac. Rep. 719.

5. Statutory Extension of Remedy. — *State v. Wheatley*, 160 Ind. 183; *Otis v. Lane*, (N. J. 1903) 54 Atl. Rep. 442.

637. 4. Good Title in Relator Necessary. — *State v. Wheatley*, 160 Ind. 183.

5. Quo Warranto Lies to Try Corporate Existence. — *West End v. State*, 138 Ala. 295; *Velasquez v. Zimmerman*, 30 Colo. 355; *State v. Kohnke*, 109 La. 838; *School Dist. No. 4 v. Smith*, 90 Mo. App. 215.

638. 2. Collateral Attack on Corporate Existence. — *Velasquez v. Zimmerman*, 30 Colo. 355.

5. Quo Warranto Lies to Try Territorial Jurisdiction. — *People v. McDonald*, 208 Ill. 638; *State v. Birch*, 186 Mo. 205; *State v. McLean County*, 11 N. Dak. 356.

639. 6. Appropriate and Exclusive Remedy to Try Corporate Existence. — *Atty.-Gen. v. Preferred Mercantile Co.*, 187 Mass. 516; *State v. Atchison, etc.*, R. Co., 176 Mo. 687; *State v. Missouri Pac. R. Co.*, 176 Mo. 718; *State v. Chicago, etc.*, R. Co., 176 Mo. 721; *Clark v.*

640. *c.* POWERS AND FRANCHISES NOT CONFERRED BY LAW. — See note 4.

641. See note 2.

642. 4. Officers of Private Corporations — *b.* DISTINCTION BETWEEN OFFICE AND EMPLOYMENT. — See note 4.

d. OFFICIAL MISCONDUCT. — See note 9.

643. 5. Franchises — *b.* APPLICATION OF RULES — (5) *Licenses*. — See note 10.

644. (6) *Use of Streets and Highways*. — See note 1.

645. RADIUS. — See note 3.

RAGS. — See note 6.

646. RAILROAD — RAILWAY. — See notes 1, 3.

648. Railroad and Street Railroad. — See notes 4, 5, 6.

649. Railroad Company. — See note 7.

Interstate Independent Telephone Co., (Neb. 1904) 101 N. W. Rep. 977; *State v. Toledo R., etc., Co.*, 23 Ohio Cir. Ct. 603.

649. 4. Ouster from Particular Powers and Franchises. — *State v. Atchison, etc., R. Co.*, 176 Mo. 687; *State v. Missouri Pac. R. Co.*, 176 Mo. 718; *State v. Chicago, etc., R. Co.*, 176 Mo. 721; *State v. Toledo R., etc., Co.*, 23 Ohio Cir. Ct. 603; *State v. Milwaukee, etc., R. Co.*, 116 Wis. 142.

641. 2. Acts Not Amounting to Exercise of Franchise. — *State v. Toledo*, 23 Ohio Cir. Ct. 327.

642. 4. Will Not Lie Against Mere Employees or Agents. — *State v. Gray*, 91 Mo. App. 438.

9. Official Misconduct. — *State v. Toledo*, 23 Ohio Cir. Ct. 327.

643. 10. *Hargett v. Bell*, 134 N. Car. 394.

644. 1. *State v. Milwaukee, etc., R. Co.*, 116 Wis. 142.

645. 3. "Radius of One-half Mile" from Telegraph Office as used in a rule of a telegraph company granting free delivery of messages within that distance has reference to a straight line from the office and not to a line by the nearest traveled route by road. *Western Union Tel. Co. v. Jennings*, 98 Tex. 465.

6. Portions of Woolen Material Clipped from the Piece in the Course of Making Up Garments are *rags*. *U. S. v. Pearson*, 131 Fed. Rep. 571.

646. 1. "Railroad" Synonymous with "Rail-

way." — *Black v. St. Louis, etc., R. Co.*, 110 Mo. App. 198.

3. Broad Sense of Term. — A *railroad* may comprehend not only the equipment and roadway, but the sites of depots, warehouses, and other real estate incidentally connected with the business. *State v. Canadian Pac. R. Co.*, 100 Me. 202.

A Railroad Includes Its Appurtenances. — *St. Louis Southwestern R. Co. v. Grayson*, 72 Ark. 119.

Tramway Laid Along a Public Road held to be a *railroad*. *Fletcher v. London United Tramways*, (1902) 2 K. B. 269.

648. 4. Railroad Includes Street Railroad. — *Evans v. Utica, etc., R. Co.*, (County Ct.) 44 Misc. (N. Y.) 345.

"Trunk Railway" Held to Include Street Railway. — *Diebold v. Kentucky Traction Co.*, 117 Ky. 146.

5. Meaning Depends on Context. — *Georgia R., etc., Co. v. Joiner*, 120 Ga. 905.

The Word "Railroad" May or May Not Include Street Railroads, According to the Circumstances. — *San Francisco, etc., Electric R. Co. v. Scott*, 142 Cal. 222.

6. In a Technical Sense a Street Railway Is Not a Railroad. — *State v. Cain*, 69 Kan. 186.

649. 7. Dock Company having within its docks lines of rails and sidings held not to be a *railway company* with respect to such lines and sidings. *London, etc., Docks Co. v. Great Eastern R. Co.*, (1902) 1 K. B. 568.

RAILROAD COMMISSIONERS.

By A. W. VARIAN.

651. I. POWER TO CREATE COMMISSIONS. — See notes 1, 2.

II. EXTENT OF REGULATION THROUGH AGENCY OF COMMISSIONERS —

1. In General. — See note 4.

652. VI. POWERS AND DUTIES — 1. In England. — See note 8.

653. 2. In United States — *a.* IN GENERAL — Matters Submitted to Regulation of Commissions. — See note 5.

655. Effect Given in Judicial Proceedings to Findings and Orders of Commissioners. — See note 1.

660. c. POWERS IN REGARD TO STATIONS AND STATION HOUSES. — See note 2.

662. c. POWER TO REQUIRE INTERSECTING ROADS TO INTERCHANGE CARS. — See note 1.

VII. ENFORCEMENT OF ORDERS — In United States. — See note 4.

VIII. LIABILITY FOR VIOLATION OF COMMISSIONERS' REGULATIONS —

1. Penal Liability. — See note 8.

651. 1. Police Power. — Railroad Com'rs *v.* Atlantic Coast Line R. Co., 71 S. Car. 130.

2. Regulation by Commission. — Morgan's Louisiana, etc., R., etc., Co. *v.* Railroad Commission, 109 La. 247; Railroad Commission *v.* Kansas City Southern R. Co., 111 La. 133; Railroad Com'rs *v.* Atlantic Coast Line R. Co., 71 S. Car. 130.

4. Morgan's Louisiana, etc., R., etc., Co. *v.* Railroad Commission, 109 La. 247.

652. 8. Powers of English Railway Commission. — Vickers *v.* Midland R. Co., 87 L. T. N. S. 665; Furness R. Co. *v.* Vickers, 20 Times L. Rep. 326; Lanarkshire Steel Co. *v.* Caledonian R. Co., Sc. Ct. of Sess. 6 F. 47; Williams *v.* Grand Trunk R. Co., 36 Can. Sup. Ct. 321; *Re* Canadian Freight Assoc., etc., 3 Can. R. Cas. 427; Duthie *v.* Grand Trunk R. Co., 4 Can. R. Cas. 304.

653. 5. As to the Powers of Railroad Commissioners. — Nashville, etc., R. Co. *v.* State, 137 Ala. 439; Railroad Commission *v.* Kansas City Southern R. Co., 111 La. 133; Morgan's Louisiana, etc., R., etc., Co. *v.* Railroad Commission, 109 La. 247; Railroad Com'rs *v.* Atlantic Coast Line R. Co., 11 S. Car. 130; State *v.* Chicago, etc., R. Co., 16 S. Dak. 517.

655. 1. Effect Given in Judicial Proceedings to Findings and Orders of Commissioners. — Morgan's Louisiana, etc., R., etc., Co. *v.* Railroad Commission, 109 La. 247; Railroad Com'rs *v.* Atlantic Coast Line R. Co., 71 S. Car. 130.

660. 2. Erection, Location, or Change of Station or Station House. — Morgan's Louisiana, etc., R., etc., Co. *v.* Railroad Commission, 109 La. 247.

The *Alabama* statute does not authorize railroad commissioners to order the establishment of stations. Nashville, etc., R. Co. *v.* State, 137 Ala. 439.

Commissioners Have Power to Regulate Train Service. — Railroad Com'rs *v.* Atlantic Coast Line R. Co., 71 S. Car. 130.

662. 1. Interchange of Cars by Intersecting Roads. — State *v.* Chicago, etc., R. Co., 16 S. Dak. 517.

4. *Mandamus.* — Railroad Com'rs *v.* Missouri Pac. R. Co., (Kan. 1905) 80 Pac. Rep. 53; Railroad Com'rs *v.* Atlantic Coast Line R. Co., 71 S. Car. 130.

8. **Commission Has Power to Impose Fine for Noncompliance with Its Order.** — Railroad Commission *v.* Kansas City Southern R. Co., 111 La. 133.

RAILROAD POOLS.

664. I. DEFINITION. — See note 1.

664. 1. Railroad Pools Defined. — *In re* Pooling Freights, 115 Fed. Rep. 588.

RAILROADS.

By A. W. VARIAN.

674. III. LEGAL STATUS OF RAILROADS AND RAILROAD CORPORATIONS —

1. Railroads Quasi-public Highways. — See notes 7, 8, 9.

675. See note 2.

2. Railroad Companies Quasi-public Corporations. — See note 7.

676. 3. Railroad Companies Common Carriers. — See note 1.

7. Railroads as Subjects of State and Federal Control. — See note 8.

677. IV. RAILROAD CORPORATIONS — 2. Creation and Organization — *a.* IN GENERAL. — See note 6.

b. MODE OF CREATION — (3) *Designation of Route and Termini.* —

See note 9.

678. Circular Road. — See note 3.

c. ACCEPTANCE OF CHARTER. — See note 5.

679. *e.* AMENDMENT AND REPEAL — (3) *Where Right to Amend or Repeal Has Been Reserved.* — See note 2.

3. Domicil, Citizenship, and Residence — The Residence of the Corporation. —

See notes 19, 20.

680. For Purposes of Jurisdiction. — See note 1.

4. Powers — *a.* IN GENERAL. — See note 4.

b. CONSTRUCTION OF CHARTER. — See note 6.

682. 5. Exclusiveness of Franchises — *b.* GRANTS STRICTLY CONSTRUED. — See note 4.

674. 7. Railroads Declared Public Highways by Constitution or Statute. — *McClanahan v. Vicksburg, etc., R. Co., 111 La. 781.*

8. Railroads Not Highways in Ordinary Sense of Term. — *McLucas v. St. Joseph, etc., R. Co., 67 Neb. 603.*

9. Railroads Quasi-public Highways. — *Southern California R. Co. v. Slauson, 138 Cal. 342, 94 Am. St. Rep. 58; Ulmer v. Lime Rock R. Co., 98 Me. 579; McLucas v. St. Joseph, etc., R. Co., 67 Neb. 603.*

675. 2. Not Highways for Pedestrians. — *Compare McClanahan v. Vicksburg, etc., R. Co., 111 La. 781.*

7. Railroads Quasi-public Corporations. — *Atchison, etc., R. Co. v. Spaulding, 69 Kan. 431, 105 Am. St. Rep. 175; Ulmer v. Lime Rock R. Co., 98 Me. 579.*

676. 1. Railroad Companies Common Carriers. — See *McLucas v. St. Joseph, etc., R. Co., 67 Neb. 603.*

8. Railroad Companies Proper Subjects of Legislative Control. — *Atchison, etc., R. Co. v. Spaulding, 69 Kan. 431, 105 Am. St. Rep. 175.*

677. 6. Special or General Laws. — *Collier v. Union R. Co., 113 Tenn. 96.*

9. Designation of Termini. — *Collier v. Union R. Co., 113 Tenn. 96.*

678. 3. Circular Road. — See *Collier v. Union R. Co., 113 Tenn. 96, following State v. Martin, 51 Kan. 462, cited in the original note.*

5. Acceptance Must Be in Toto. — *Brooklyn, etc., R. Co. v. Long Island R. Co., 72 N. Y. App. Div. 496.*

679. 2. See *Union Pac. R. Co. v. Mason*

City, etc., R. Co., (C. C. A.) 128 Fed. Rep. 230, upholding the right to compel a railroad to permit another railroad to use a bridge and right of way.

19. Resident of Incorporating State. — *Railroad Com'rs v. Atlantic Coast Line R. Co., 71 S. Car. 130.*

20. *Davis v. Chesapeake, etc., R. Co., 116 Ky. 144.*

680. 1. Residence for Purposes of Jurisdiction. — *Poland v. United Traction Co., 88 N. Y. App. Div. 281 (affirmed 177 N. Y. 557), citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 680. As to other counties see Atchison, etc., R. Co. v. Forbis, 35 Tex. Civ. App. 255.*

4. Business Incidental to Principal Business. — *Canton v. Canton Cotton Warehouse Co., 84 Miss. 268 (power to lay pipes for conveying water).*

Powers as to Running Steamboats. — *Graham v. Macon, etc., R. Co., 120 Ga. 757.*

Power to Operate Ferry. — *Brooker v. Maysville, etc., R. Co., (Ky. 1904) 83 S. W. Rep. 117.*

Power to Erect and Maintain Telegraph Line. — *Canton v. Canton Cotton Warehouse Co., 84 Miss. 268.*

May Conduct "Relief Fund" for Employees. — *State v. Pittsburg, etc., R. Co., 68 Ohio St. 9, 96 Am. St. Rep. 635.*

Power to Maintain Hotel and Restaurant. — *Abraham v. Oregon, etc., R. Co., 41 Oregon 550.*

6. Chicago Terminal Transfer R. Co. v. Chicago, 203 Ill. 576.

682. 4. Grant of Exclusive Franchise Con-

- 682.** *d.* SUBJECT TO BE TAKEN BY EMINENT DOMAIN. — See note 6.
- 8.** Foreign Corporations. — See note 9.
- 683.** *9.* Dissolution — *c.* GROUNDS OF FORFEITURE — (3) *Failure to Complete Within Specified Time.* — See note 6.
- 684.** *V.* LOCATION OF ROAD — *1.* In General — *a.* MEANING OF TERM. — See note 14.
- 685.** *b.* HOW ADOPTED. — See note 1.
- c.* DISCRETION OF COMPANY AS TO ROUTE AND TERMINI — (1) *In General.* — See note 3.
- 686.** (2) *Conformity to Prescribed Route.* — See note 2.
- (3) *Construction of Charter Provisions.* — See note 6.
- 687.** *d.* DESCRIPTION OF LOCATION — MAPS, PLANS, AND SURVEYS — (1) *Necessity to File.* — See notes 7, 8, 9.
- 688.** (2) *Requisites and Sufficiency.* — See note 2.
- (4) *Where Location of Road Is Changed.* — See note 6.
- (7) *Notice to Landowners.* — See note 9.
- 689.** *4.* Extensions — Power to Build. — See note 10.
- 690.** See note 1.
- 5.* Changes of Location — *a.* POWER TO CHANGE — In General. — See notes 6, 7, 8.

strued Strictly. — Brooklyn, etc., R. Co. v. Long Island R. Co., 72 N. Y. App. Div. 496.

682. *6.* May Be Acquired for Streets. — Southern Kansas R. Co. v. Oklahoma City, 12 Okla. 82.

9. Powers of Foreign Railroad Corporations. — See Illinois State Trust Co. v. St. Louis, etc., R. Co., 208 Ill. 419.

683. *6.* Provision Held Self-executing. — See Brooklyn, etc., R. Co. v. Long Island R. Co., 72 N. Y. App. Div. 496.

Presumption of Compliance. — Chesapeake Beach R. Co. v. Washington, etc., R. Co., 23 App. Cas. (D. C.) 589.

684. *14.* Meaning of Term "Location." — Chesapeake, etc., R. Co. v. Deepwater R. Co., 57 W. Va. 641.

Preliminary Surveys Do Not Constitute Location. — Kaufman v. Pittsburgh, etc., R. Co., 210 Pa. St. 440.

685. *1.* Line Adopted by Railroad Company Through Board of Directors. — Kaufman v. Pittsburgh, etc., R. Co., 210 Pa. St. 440; Chesapeake, etc., R. Co. v. Deepwater R. Co., 57 W. Va. 641.

3. Route and Termini in Discretion of Company. — Tennessee Cent. R. Co. v. Campbell, 109 Tenn. 655. See also Erie R. Co. v. Steward, 170 N. Y. 172; Price v. Pennsylvania R. Co., 209 Pa. St. 81.

686. *2.* Exercise of Discretion Not Reviewed Unless Abused. — Price v. Pennsylvania R. Co., 209 Pa. St. 81.

6. Construction to Be Favorably to Public. — Brooklyn, etc., R. Co. v. Long Island R. Co., 72 N. Y. App. Div. 496.

Liberal Construction. — Deepwater R. Co. v. Lambert, 54 W. Va. 387.

Reference to Particular Townships. — In Ohio the statutes do not require that the townships through which the railroad is to be run shall be set forth in the articles of incorporation, and the fact that certain townships are mentioned in such articles does not preclude the railroad from extending through other town-

ships within the proper counties. Hayes v. Toledo R., etc., Co., 26 Ohio Cir. Ct. 395.

687. *7.* Filing of Location, Maps, Plans, and Surveys. — Stephens v. New York, etc., R. Co., 175 N. Y. 72; Greenwich, etc., R. Co. v. Greenwich, etc., Electric R. Co., 75 N. Y. App. Div. 220, affirmed 172 N. Y. 462; Chesapeake, etc., R. Co. v. Deepwater R. Co., 57 W. Va. 641.

8. Condition Precedent to Condemnation Proceedings. — See Stephens v. New York, etc., R. Co., 175 N. Y. 72; Greenwich, etc., R. Co. v. Greenwich, etc., Electric R. Co., 75 N. Y. App. Div. 220, affirmed 172 N. Y. 462.

9. Not a Condition Precedent to Condemnation Proceedings. — Chesapeake, etc., R. Co. v. Deepwater R. Co., 57 W. Va. 641.

688. *2.* Requisites and Sufficiency of Papers Filed. — Stephens v. New York, etc., R. Co., 175 N. Y. 72; Mercer County Traction Co. v. United New Jersey R., etc., Co., 65 N. J. Eq. 574.

6. Where Location of Road Is Changed. — See Greenwich, etc., R. Co. v. Greenwich, etc., Electric R. Co., 75 N. Y. App. Div. 220, affirmed 172 N. Y. 462.

9. Notice to Landowners. — Greenwich, etc., R. Co. v. Greenwich, etc., Electric R. Co., 75 N. Y. App. Div. 220, affirmed 172 N. Y. 462.

689. *10.* No Power to Extend in Absence of Statute. — Greenwich, etc., R. Co. v. Greenwich, etc., Electric R. Co., 172 N. Y. 462, affirming 75 N. Y. App. Div. 220; Erie R. Co. v. Steward, 170 N. Y. 172.

690. *1.* Power to Build Branches Construed as Power to Extend Road. — See Price v. Pennsylvania R. Co., 209 Pa. St. 81.

6. Discretion as to Location Exhausted by Exercise. — Brooklyn, etc., R. Co. v. Long Island R. Co., 72 N. Y. App. Div. 496.

7. No Power to Change in Absence of Statute. — State v. Mobile, etc., R. Co., 86 Miss. 172; Greenwich, etc., R. Co. v. Greenwich, etc., Electric R. Co., 172 N. Y. 462; Erie R. Co. v. Steward, 170 N. Y. 172.

8. Increased Business Not Ground for Change. — Erie R. Co. v. Steward, 170 N. Y. 172.

- 691.** In New York. — See notes 6, 7.
692. *b.* STATUTES AUTHORIZING CHANGE STRICTLY CONSTRUED. — See note 2.
a. CHANGE OF TRACK WITHIN LIMITS OF RIGHT OF WAY. — See note 12.
693. 6. Conflicting Locations. — See note 1.
696. VI. RIGHT OF WAY — 2. Methods of Acquisition in General — With Consent of Owner or by Condemnation. — See note 1.
697. 4. Acquisition by Purchase — *a.* IN GENERAL — Construction of Grants. — See note 6.
698. *c.* RESERVATIONS IN GRANTS. — See note 4.
d. CONDITIONS AND COVENANTS IN GRANTS. — See notes 5, 6, 7, 8.
699. See notes 1, 2, 3, 4, 5, 6.
700. 5. Acquisition by License. — See notes 1, 3.
 6. Acquisition by Implied Grant. — See notes 5, 6.
701. See note 2.
 7. Width and Location of Right of Way. — See note 3.

691. 6. As to the Procedure on a Petition under the Statute. — *Greenwich, etc., R. Co. v. Greenwich, etc., Electric R. Co., 75 N. Y. App. Div. 220, affirmed 172 N. Y. 462.*

7. Extension Creating New Line Not Permitted. — *Greenwich, etc., R. Co. v. Greenwich, etc., Electric R. Co., 172 N. Y. 462.*

692. 2. *Erie R. Co. v. Steward, 170 N. Y. 172.* See also *Greenwich, etc., R. Co. v. Greenwich, etc., Electric R. Co., 172 N. Y. 462*; *Brooklyn, etc., R. Co. v. Long Island R. Co., 72 N. Y. App. Div. 496.*

12. Change of Track Within Limits of Right of Way. — *Erie R. Co. v. Steward, 170 N. Y. 172.*

693. 1. Priority of Location Gives Priority of Right. — *Chesapeake, etc., R. Co. v. Deep-water R. Co., 57 W. Va. 641.*

696. 1. Acquirement by Prescription or Adverse Possession. — *Louisville, etc., R. Co. v. Smith, (C. C. A.) 128 Fed. Rep. 1.*

Only Land in Actual Possession Acquired by Prescription. — *Floyd v. Louisville, etc., R. Co., (Ky. 1904) 80 S. W. Rep. 204.*

697. 6. Conveyance Constructed Reasonably. — *Krueger v. St. Louis, etc., R. Co., 185 Mo. 227*; *Missouri, etc., R. Co. v. Anderson, 36 Tex. Civ. App. 121, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 697.*

Interpretation by Acts of Parties May Be Regarded. — *Walker v. Illinois Cent. R. Co., 215 Ill. 610.*

698. 4. Construction and Effect of Reservations in Conveyances to Railroads. — *Gill v. Chicago, etc., R. Co., 117 Iowa 278.*

5. Grant May Be on Condition Precedent or Subsequent. — *Griswold v. Minneapolis, etc., R. Co., 12 N. Dak. 435, 102 Am. St. Rep. 572.*

6. Covenants to Construct and Maintain Crossings. — *Pittsburgh, etc., R. Co. v. Wilson, 34 Ind. App. 324.*

7. Covenants to Erect and Maintain Depots. — *Griswold v. Minneapolis, etc., R. Co., 12 N. Dak. 435, 102 Am. St. Rep. 572*; *Monnett v. Columbus, etc., R. Co., 26 Ohio Cir. Ct. 469.*

8. Conditions Binding upon Railroad Company. — *Pittsburgh, etc., R. Co. v. Wilson, 34 Ind. App. 324.*

Ejectment Does Not Lie for Breach of Condition. — *Fresno, etc., R. Co. v. Southern Pac. R. Co.,*

135 Cal. 202; *Southern California R. Co. v. Slauson, 138 Cal. 342, 94 Am. St. Rep. 58.* *Contra, Griswold v. Minneapolis, etc., R. Co., 12 N. Dak. 435, 102 Am. St. Rep. 572.*

699. 1. Successors of Railroad Company Bound by Covenants. — *Scowden v. Erie R. Co., 26 Pa. Super. Ct. 15.*

2. As to What Covenants Do or Do Not Run with the Land. — *Pittsburgh, etc., R. Co. v. Wilson, 34 Ind. App. 324*; *Monnett v. Columbus, etc., R. Co., 26 Ohio Cir. Ct. 469.*

3. Grant Defeated by Breach of Condition Subsequent. — *Griswold v. Minneapolis, etc., R. Co., 12 N. Dak. 435, 102 Am. St. Rep. 572*; *Monnett v. Columbus, etc., R. Co., 26 Ohio Cir. Ct. 469.*

4. No Forfeiture for Breach of Covenant. — *Southern California R. Co. v. Slauson, 138 Cal. 342, 94 Am. St. Rep. 58*; *Monnett v. Columbus, etc., R. Co., 26 Ohio Cir. Ct. 469.* See also *Krueger v. St. Louis, etc., R. Co., 185 Mo. 227.*

5. Breach of Covenant Remediable by Action for Damages. — *Southern California R. Co. v. Slauson, 138 Cal. 342, 94 Am. St. Rep. 58*; *Monnett v. Columbus, etc., R. Co., 26 Ohio Cir. Ct. 469.*

6. Covenants May Be Specifically Enforced in Equity. — *Monnett v. Columbus, etc., R. Co., 26 Ohio Cir. Ct. 469.*

700. 1. License Revocable When Not Coupled with Interest. — *Stephens v. New York, etc., R. Co., 175 N. Y. 72.*

3. License Enforced Where Revocation Would Operate as a Fraud. — *Stephens v. New York, etc., R. Co., 175 N. Y. 72.*

5. Landowner Entitled to Damages or Value of Land. — *Stephens v. New York, etc., R. Co., 175 N. Y. 72.*

6. Ejectment or Other Possessory Action Lies. — *Griswold v. Minneapolis, etc., R. Co., 12 N. Dak. 435, 102 Am. St. Rep. 572.*

701. 2. Estoppel to Maintain Ejectment or Enjoin Use of Land. — *Consumers' Gas Trust Co. v. American Plate Glass Co., 162 Ind. 393.*

When Rule as to Estoppel Does Not Operate. — *Griswold v. Minneapolis, etc., R. Co., 12 N. Dak. 435, 102 Am. St. Rep. 572.*

3. Decision of Company Prima Facie Evidence of Necessity for Taking Full Width. — *Roberts*

- 702.** Where the Land Is Acquired by Adverse Possession. — See note 3.
 Location of Right of Way. — See notes 5, 8.
 8. Estate or Interest Acquired — *b.* BY PURCHASE OR AGREEMENT.
 — See note 10.
- 703.** See notes 1, 2, 3, 4.
 Easement a Perpetual One. — See note 7.
 Right Exclusive as to Possession and Use. — See notes 8, 9, 10.
- 704.** Purposes for Which Right of Way May Be Used. — See notes 2, 3.
 Land Acquired Subject to Inchoate Interests and Liens. — See note 5.
c. BY PRESCRIPTION. — See note 6.
 9. Alienation by Company. — See note 9.
- 705.** 10. Abandonment or Forfeiture — In General. — See notes 1, 3.
 A Transfer of the Rights of the Original Railroad Company. — See note 5.
 Permissive Occupancy of Land by Original Owner. — See note 6.
- v.* Sioux City, etc., R. Co., (Neb. 1905) 102 N. W. Rep. 60.
- 702.** 3. Width of Way Acquired by Adverse Possession. — *Jones v. Nashville, etc., R. Co.*, 141 Ala. 388; *Louisville, etc., R. Co. v. Smith*, 141 Ala. 335.
5. Occupancy of a Particular Route with the consent of the grantor or without objection by him will serve to locate the route. *Gaston v. Gainesville, etc., Electric R. Co.*, 120 Ga. 516.
8. See *Ohio River R. Co. v. Johnson*, 50 W. Va. 499.
10. Generally an Easement Where Acquired by Purchase. — *Walker v. Illinois Cent. R. Co.*, 215 Ill. 610; *Cincinnati, etc., R. Co. v. Wachter*, 70 Ohio St. 113; *McLemore v. Memphis, etc., R. Co.*, (Tenn. 1902) 69 S. W. Rep. 338; *Missouri, etc., R. Co. v. Anderson*, 36 Tex. Civ. App. 121; *Uhl v. Ohio River R. Co.*, 51 W. Va. 106.
- 703.** 1. May Acquire Fee. — *Watkins v. Iowa Cent. R. Co.*, 123 Iowa 390.
2. See *Watkins v. Iowa Cent. R. Co.*, 123 Iowa 390.
3. Deed Conveying "Right of Way" Passes Easement. — *Cincinnati, etc., R. Co. v. Wachter*, 70 Ohio St. 113; *McLemore v. Memphis, etc., R. Co.*, (Tenn. 1902) 69 S. W. Rep. 338; *Uhl v. Ohio River R. Co.*, 51 W. Va. 106.
4. Deed for Railway Purposes Only Conveys Easement. — *Gaston v. Gainesville, etc., Electric R. Co.*, 120 Ga. 516; *Walker v. Illinois Cent. R. Co.*, 215 Ill. 610.
7. Easement Perpetual. — *Walker v. Illinois Cent. R. Co.*, 215 Ill. 610; *Boyce v. Missouri Pac. R. Co.*, 168 Mo. 583.
8. Company Entitled to Exclusive Possession and Use. — *Walker v. Illinois Cent. R. Co.*, 215 Ill. 610; *Atchison, etc., R. Co. v. Spaulding*, 69 Kan. 431, 105 Am. St. Rep. 175; *Kansas, etc., R. Co. v. Burns*, 70 Kan. 627; *Southern Kansas R. Co. v. Oklahoma City*, 12 Okla. 82. See also *Hull v. Kansas City, etc., R. Co.*, (Neb. 1904) 98 N. W. Rep. 47.
9. Acts Hindering Use Enjoined. — *Atchison, etc., R. Co. v. Spaulding*, 69 Kan. 431, 105 Am. St. Rep. 175.
10. Landowner May Maintain Private Crossing. — *Cincinnati, etc., R. Co. v. Wachter*, 70 Ohio St. 113. And see the title CROSSINGS, 427. 4 *et seq.*
- 704.** 2. Any Use Essential to Proper Operation of Road. — *Canton v. Canton Cotton Warehouse Co.*, 84 Miss. 268. See also *Walker v. Illinois Cent. R. Co.*, 215 Ill. 610.
- Right to Use Materials Along Right of Way. — The railroad company cannot take sand or other material from the right of way and use it elsewhere, but can take such materials for necessary use upon its right of way in the construction of its road upon the lands from which it is taken. *Hendler v. Lehigh Valley R. Co.*, 209 Pa. St. 256.
3. No Right to Use for Other than Railway Purposes. — *Hodges v. Western Union Tel. Co.*, 133 N. Car. 225.
- Cannot Be Used for Railroad Purposes Not Contemplated. — *Missouri, etc., R. Co. v. Anderson*, 36 Tex. Civ. App. 121.
- Cannot Maintain Nuisance. — *Missouri, etc., R. Co. v. Mott*, 98 Tex. 91.
5. Acquired Subject to Inchoate Interests and Liens. — *Floyd v. Louisville, etc., R. Co.*, (Ky. 1904) 80 S. W. Rep. 204.
6. Easement Only When Acquired by Prescription. — *Consumers' Gas Trust Co. v. American Plate Glass Co.*, 162 Ind. 393, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 704.
9. Conveyance to Another Company Valid. — *Coyne v. Warrior Southern R. Co.*, 137 Ala. 553; *Gaston v. Gainesville, etc., Electric R. Co.*, 120 Ga. 516.
- 705.** 1. Abandonment a Question of Intent — Nonuser Alone Not Sufficient. — *Gaston v. Gainesville, etc., Electric R. Co.*, 120 Ga. 516; *Chicago, etc., R. Co. v. Wood*, 30 Ind. App. 650; *Watkins v. Iowa Cent. R. Co.*, 123 Iowa 390; *Missouri Pac. R. Co. v. Bradbury*, 106 Mo. App. 450; *Garlich v. Pittsburgh, etc., R. Co.*, 67 Ohio St. 223.
- Facts Held Insufficient to Show Abandonment. — See *Roberts v. Sioux City, etc., R. Co.*, (Neb. 1905) 102 N. W. Rep. 60.
- Title Divested by Adverse Possession. — *McLucas v. St. Joseph, etc., R. Co.*, 67 Neb. 603.
- Use for Other than Legitimate Railway Purposes Abandonment. — *Gill v. Chicago, etc., R. Co.*, 117 Iowa 278.
3. Question of Abandonment for the Jury. — *Gaston v. Gainesville, etc., Electric R. Co.*, 120 Ga. 516.
5. Transfer of Rights to Another Company Not Abandonment. — See *Durham v. Southern R. Co.*, 121 Fed. Rep. 894.
6. Effect of Permissive Occupancy by Original Owner — *Chicago, etc., R. Co. v. Wood*, 30 Ind.

706. Statutory Provisions. — See note 1.

Effect of Abandonment. — See notes 3, 5.

707. 11. Use of Highways and Streets — *a.* RURAL HIGHWAYS — Manner of Use. — See notes 3, 4.

Restoration to Former State of Usefulness. — See note 5.

710. VII. CONSTRUCTION, EQUIPMENT, AND MAINTENANCE — 1. Construction — *a.* AUTHORITY AND DUTY TO CONSTRUCT — Duty to Construct. — See note 9.

711. *c.* GENERAL PLAN OF CONSTRUCTION — Location of Track on Right of Way. — See note 7.

714. *e.* INJURIES FROM CONSTRUCTION OF ROAD — General Rule. — See note 6.

715. Embankments, Cuts, Culverts, Bridges, Etc. — See note 9.

716. See note 1.

718. *f.* CONSTRUCTION LIENS — (1) *In General.* — See note 4. See also the title MECHANICS' LIENS, **289.** 4 *et seq.*, **297.** 1.

719. Statutes. — See notes 1, 3, 4, 6, 7.

720. See note 1.

App. 650; *Roberts v. Sioux City, etc., R. Co.*, (Neb. 1905) 102 N. W. Rep. 60. See also *Gaston v. Gainesville, etc., Electric R. Co.*, 120 Ga. 516.

706. 1. Statutory Provisions as to Abandonment or Forfeiture. — *Gill v. Chicago, etc., R. Co.*, 117 Iowa 278.

3. Land Reverts to Original Owner. — *Missouri Pac. R. Co. v. Bradbury*, 106 Mo. App. 450; *Boyce v. Missouri Pac. R. Co.*, 168 Mo. 583.

Inures to Benefit of Present Owners. — *McLemore v. Memphis, etc., R. Co.*, (Tenn. 1902) 69 S. W. Rep. 338.

5. Rails Not Removed Pass on Abandonment to Landowner. — *Missouri Pac. R. Co. v. Bradbury*, 106 Mo. App. 450.

707. 3. Must Not Obstruct Highway Unnecessarily. — *Atlantic, etc., R. Co. v. Montezuma*, 122 Ga. 1.

4. Right Generally Limited to Passing and Re-passing with Trains. — *Atlantic, etc., R. Co. v. Montezuma*, 122 Ga. 1.

5. Must Restore Highway to Former State of Usefulness. — *Atchison, etc., R. Co. v. Townsend*, (Kan. 1905) 81 Pac. Rep. 205; *Atchison, etc., R. Co. v. Schwindt*, 67 Kan. 8; *People v. Delaware, etc., R. Co.*, 177 N. Y. 337; *International, etc., R. Co. v. Haddox*, 36 Tex. Civ. App. 385; *International, etc., R. Co. v. Butcher*, (Tex. Civ. App. 1904) 81 S. W. Rep. 819.

710. 9. See *Brooklyn, etc., R. Co. v. Long Island R. Co.*, 72 N. Y. App. Div. 496.

711. 7. *Ohio River R. Co. v. Johnson*, 50 W. Va. 499.

714. 6. Injuries from Construction. — *Compare Davenport, etc., R. Co. v. Sinnet*, 111 Ill. App. 75.

715. 9. Bridges and Culverts. — *Illinois Cent. R. Co. v. Ferrell*, 108 Ill. App. 659; *Gulf, etc., R. Co. v. Steele*, 29 Tex. Civ. App. 328; *Denison, etc., R. Co. v. Barry*, (Tex. Civ. App. 1904) 80 S. W. Rep. 634; *International, etc., R. Co. v. Glover*, (Tex. Civ. App. 1904) 84 S. W. Rep. 604; *Richards v. Ohio River R. Co.*, 56 W. Va. 592. See also *Gulf, etc., R. Co. v. Moore*, (Tex. Civ. App. 1904) 81 S. W. Rep. 569. And see the title WATERS AND WATERCOURSES, **375.** 4.

716. 1. Surface Waters. — *Chorman v. Queen Anne's R. Co.*, 3 Penn. (Del.) 407; *Davenport, etc., R. Co. v. Sinnet*, 111 Ill. App. 75; *Atchison, etc., R. Co. v. Jones*, 110 Ill. App. 626; *Kelly v. Pittsburgh, etc., R. Co.*, 28 Ind. App. 457, 91 Am. St. Rep. 134; *Earhart v. Cowles*, 122 Iowa 194; *Houghtaling v. Chicago G. W. R. Co.*, 117 Iowa 540; *Childers v. Louisville, etc., R. Co.*, (Ky. 1903) 74 S. W. Rep. 241; *Cox v. Hannibal, etc., R. Co.*, 174 Mo. 588; *Denison, etc., R. Co. v. Barry*, (Tex. Civ. App. 1904) 80 S. W. Rep. 634; *Gulf, etc., R. Co. v. Roberts*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1052; *Missouri, etc., R. Co. v. McGregor*, (Tex. Civ. App. 1902) 68 S. W. Rep. 711; *Richards v. Ohio River R. Co.*, 56 W. Va. 592.

718. 4. Liens at Common Law. — *Cincinnati, etc., R. Co. v. Shera*, (Ind. App. 1905) 73 N. E. Rep. 293; *Pere Marquette R. Co. v. Smith*, (Ind. App. 1905) 74 N. E. Rep. 545; *Pere Marquette R. Co. v. Baertz*, (Ind. App. 1905) 74 N. E. Rep. 51.

719. 1. Express Provisions for Liens Against Railroads. — *St. Louis, etc., R. Co. v. Love*, (Ark. 1905) 86 S. W. Rep. 395; *Pere Marquette R. Co. v. Baertz*, (Ind. App. 1905) 74 N. E. Rep. 51; *Cincinnati, etc., R. Co. v. Shera*, (Ind. App. 1905) 73 N. E. Rep. 293; *Westinghouse Air Brake Co. v. Kansas City Southern R. Co.*, (C. C. A.) 137 Fed. Rep. 26; *Bagnell Timber Co. v. Missouri, etc., R. Co.*, 180 Mo. 420; *Hercules Powder Co. v. Knoxville, etc., R. Co.*, 113 Tenn. 382, 106 Am. St. Rep. 836.

3. Contractors. — *St. Louis, etc., R. Co. v. Love*, (Ark. 1905) 86 S. W. Rep. 395; *Noll v. Cumberland Plateau R. Co.*, 112 Tenn. 140.

4. Subcontractors. — *Hercules Powder Co. v. Knoxville, etc., R. Co.*, 113 Tenn. 382, 106 Am. St. Rep. 836.

6. Labor for Contractors. — *St. Louis, etc., R. Co. v. Love*, (Ark. 1905) 86 S. W. Rep. 395.

7. Labor for Subcontractor. — *St. Louis, etc., R. Co. v. Rogers*, 72 Ark. 270; *Pere Marquette R. Co. v. Baertz*, (Ind. App. 1905) 74 N. E. Rep. 51; *Eastern Texas R. Co. v. Davis*, (Tex. Civ. App. 1904) 83 S. W. Rep. 883. See also *Choctaw, etc., R. Co. v. Speer Hardware Co.*, 71 Ark. 126.

720. 1. Materials. — *Westinghouse Air*

720. "Construction." — See notes 4, 5, 6, 7.

(2) *Property Subject to Lien.* — See note 8.

721. (3) *Perfection of Right to Lien.* — See note 4.

722. See note 1.

723. *g. LIABILITY OF RAILROAD COMPANY FOR CONSTRUCTION CLAIMS — Territorial Operation.* — See note 3.

725. 2. *Equipment and Maintenance — c. NATURE OF EQUIPMENT AS PROPERTY — WHETHER REAL OR PERSONAL.* — See note 4.

729. VIII. *OPERATION OF ROAD — 2. Rights and Liabilities — d. NEGLIGENCE IN OPERATING — POLICE POWER.* — See note 3.

730. 3. *Corporations and Persons Liable for Injuries — b. CORPORATIONS MAKING COMMON USE OF TRACKS AND SERVICES OF EMPLOYEES.* — See note 3.

731. See note 1.

c. USE BY ONE CORPORATION OF ROLLING STOCK OWNED BY ANOTHER. — See note 2.

732. *f. NEGLIGENCE OF POSTAL CLERKS AND NEWS AGENTS.* — See note 2.

4. *Injuries to Persons On or Near Tracks — b. OBLIGATION OF RAILROAD IN RESPECT TO ROADBED, YARDS, AND TRACKS — (1) In General.* — See notes 6, 7.

733. See notes 1, 3.

(2) *Duty to Block Frogs and Guard Rails.* — See note 4.

Brake Co. v. Kansas City Southern R. Co., (C. C. A.) 137 Fed. Rep. 26; *St. Louis, etc., R. Co. v. Love*, (Ark. 1905) 86 S. W. Rep. 395; *Ozark, etc., R. Co. v. Morgan Bolt, etc., Mfg. Co.*, (Ark. 1905) 86 S. W. Rep. 848; *Cincinnati, etc., R. Co. v. Shera*, (Ind. App. 1905) 73 N. E. Rep. 293.

720. 4. *Coal to Run Engine Operating Derrick Not Used in Construction.* — *Cincinnati, etc., R. Co. v. Shera*, (Ind. App. 1905) 73 N. E. Rep. 293.

5. *Money, Teams, and Supplies Not Included.* — *St. Louis, etc., R. Co. v. Love*, (Ark. 1905) 86 S. W. Rep. 395; *St. Louis, etc., R. Co. v. Henry*, (Ark. 1905) 86 S. W. Rep. 841.

Civil Engineer Not Entitled to Lien. — *Gulf, etc., R. Co. v. Berry*, 31 Tex. Civ. App. 408. *Contra*, *Van Frank v. St. Louis, etc., R. Co.*, 93 Mo. App. 412.

6. See *St. Louis, etc., R. Co. v. Rogers*, 72 Ark. 270.

7. *Hercules Powder Co. v. Knoxville, etc., R. Co.*, 113 Tenn. 382, 106 Am. St. Rep. 836.

8. *General Rule — Property Subject to Lien.* — *Bagnell Timber Co. v. Missouri, etc., R. Co.*, 180 Mo. 420, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 720.

721. 4. *Notice to Company.* — *Dalton v. St. Louis, etc., R. Co.*, 113 Mo. App. 71; *Williams v. Dittenhoefer, etc., R. Co.*, 188 Mo. 134.

Serving Notice — On Whom Served. — *Williams v. Dittenhoefer, etc., R. Co.*, 188 Mo. 134.

Manner of Serving Notice. — *Dalton v. St. Louis, etc., R. Co.*, 113 Mo. App. 71.

722. 1. *St. Louis, etc., R. Co. v. Love*, (Ark. 1905) 86 S. W. Rep. 395.

723. 3. *Bagnell Timber Co. v. Missouri, etc., R. Co.*, 180 Mo. 420, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 723.

725. 4. *Roadbed.* — *Compare Omaha, etc.,*

R. Co. v. Whitney, (Neb. 1904) 99 N. W. Rep. 525.

729. 3. *Police Power Generally.* — *Harri-man v. Southern R. Co.*, (Tenn. 1904) 82 S. W. Rep. 213.

730. 3. *Injuries to Employees of Other Railroad Companies.* — *Keck v. Philadelphia, etc., R. Co.*, 206 Pa. St. 501.

No Liability for Negligence of Other Company. — *Jolly v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 837.

731. 1. *Liability of Corporation Owning Road.* — *McFarland v. Missouri, etc., R. Co.*, 94 Mo. App. 336.

Owner of Road Presumed to Be Operating It. — *Gulf, etc., R. Co. v. Miller*, 98 Tex. 270.

2. *Use by One Corporation of Rolling Stock Owned by Another.* — *Compare Brady v. Jay*, 111 La. 1071.

732. 2. *Ejection of Mail Sacks or Packages from Moving Trains.* — *Carver v. Minneapolis, etc., R. Co.*, 120 Iowa 346.

6. *Obligation in Respect to Roadbeds, Yards, and Tracks — To Trespassers.* — *McConkey v. Oregon R., etc., Co.*, 35 Wash. 55.

7. *To Bare Licensees.* — *De la Pena v. International, etc., R. Co.*, 32 Tex. Civ. App. 241 (falling in open drain); *San Antonio, etc., R. Co. v. Montgomery*, 31 Tex. Civ. App. 491 (stumbling against protruding spike); *McConkey v. Oregon R., etc., Co.*, 35 Wash. 55 (falling through trestle after removal of ties).

733. 1. *McConkey v. Oregon R., etc., Co.*, 35 Wash. 55.

3. *Implied Invitation.* — *Matthews v. Seaboard Air Line R. Co.*, 67 S. Car. 499, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 732 [733].

4. *No Liability to Licensee for Failure to Block Frog.* — *Archer v. Union Pac. R. Co.*, 110 Mo. App. 349.

733. (3) *Duty to Fence In Tracks* — In the Absence of Statutory Requirement. — See note 6.

734. Under Statutes Requiring Erection of Fences. — See notes 1, 4, 5, 6, 8.

c. OBLIGATION IN RESPECT TO DANGEROUS INSTRUMENTALITIES.

— See notes 10, 11.

735. d. OBLIGATION IN RESPECT TO MOVEMENT OF TRAINS — (1) *Obligation to Trespassers*. — See notes 1, 2, 3.

733. 6. *Failure to Fence In Tracks* — At Common Law. — *Growney v. Wabash R. Co.*, 102 Mo. App. 442.

734. 1. Under Statutes. — *Byrnes v. Boston, etc.*, R. Co., 181 Mass. 322.

4. *Byrnes v. Boston, etc.*, R. Co., 181 Mass. 322; *Schreiner v. Great Northern R. Co.*, 86 Minn. 245; *Lake Shore, etc.*, R. Co. v. *Liidtke*, 69 Ohio St. 384. See also *Growney v. Wabash R. Co.*, 102 Mo. App. 442.

5. See *Innes v. Fife Coal Co.*, Sc. Ct. of Sess. 3 F. 335; *Potvin v. Canadian Pac. R. Co.*, 3 Can. R. Cas. 8.

6. *Mattes v. Great Northern R. Co.*, (Minn. 1905) 104 N. W. Rep. 234.

8. *Failure to Fence Must Be Proximate Cause of Injury*. — See *Lake Shore, etc.*, R. Co. v. *Liidtke*, 69 Ohio St. 384; *Corbett v. Oregon Short Line R. Co.*, 25 Utah 449.

10. *Explosion of Tank of Sulphuric Acid* — Not Liable for Injury to Licensee. — *Means v. Southern California R. Co.*, 144 Cal. 473.

11. *When Placed Where It Will Attract Attention of Children*. — See *Euting v. Chicago, etc.*, R. Co., 116 Wis. 13, 96 Am. St. Rep. 936.

735. 1. *Liability of Railroad Company to Trespassers on Its Tracks*. — *United States*. — *Louisville, etc.*, R. Co. v. *McClish*, (C. C. A.) 115 Fed. Rep. 268.

Alabama. — *Nashville, etc.*, R. Co. v. *Harris*, (Ala. 1904) 37 So. Rep. 794; *Alabama G. S. R. Co. v. Guest*, 136 Ala. 348; *Louisville, etc.*, R. Co. v. *Mitchell*, 134 Ala. 261.

Arizona. — See *Arizona, etc.*, R. Co. v. *Nevitt*, (Ariz. 1902) 68 Pac. Rep. 550.

Georgia. — *Nashville, etc.*, R. Co. v. *Priest*, 117 Ga. 767; *Seaboard Air-Line R. Co. v. Shigg*, 117 Ga. 454; *Kendrick v. Seaboard Air-Line R. Co.*, 121 Ga. 775; *Ashworth v. Southern R. Co.*, 116 Ga. 635; *Southern R. Co. v. Eubanks*, 117 Ga. 217; *Hall v. Western, etc.*, R. Co., 123 Ga. 213.

Illinois. — *McLaughlin v. Chicago, etc.*, R. Co., 115 Ill. App. 262; *Belt R. Co. v. Banicke*, 102 Ill. App. 642; *James v. Illinois Cent. R. Co.*, 195 Ill. 327; *Cleveland, etc.*, R. Co. v. *Cline*, 111 Ill. App. 416; *Chicago, etc.*, R. Co. v. *Urbaniac*, 106 Ill. App. 325; *Cleveland, etc.*, R. Co. v. *Largent*, 108 Ill. App. 650.

Indiana. — *Manlove v. Cleveland, etc.*, R. Co., 29 Ind. App. 694.

Kansas. — *Wilson v. Atchison, etc.*, R. Co., 66 Kan. 183.

Kentucky. — *Dilas v. Chesapeake, etc.*, R. Co., (Ky. 1903) 71 S. W. Rep. 492; *Hulsey v. Louisville, etc.*, R. Co., (Ky. 1905) 87 S. W. Rep. 302; *Davis v. Chesapeake, etc.*, R. Co., 116 Ky. 144; *Louisville, etc.*, R. Co. v. *Logsdon*, (Ky. 1904) 81 S. W. Rep. 657; *Maysville, etc.*, R. Co. v. *McCabe*, (Ky. 1904) 82 S. W. Rep. 233; *Illinois Cent. R. Co. v. Broughton*, (Ky.

1904) 78 S. W. Rep. 876; *Chesapeake, etc.*, R. Co. v. *See*, (Ky. 1904) 79 S. W. Rep. 252; *Kendall v. Louisville, etc.*, R. Co., (Ky. 1903) 76 S. W. Rep. 376; *Chinn v. Chesapeake, etc.*, R. Co., (Ky. 1903) 74 S. W. Rep. 215; *Goodman v. Louisville, etc.*, R. Co., 116 Ky. 900.

Louisiana. — See *Gilliam v. Texas, etc.*, R. Co., 114 La. 272.

Maryland. — *West Virginia Cent., etc.*, R. Co. v. *State*, 96 Md. 652.

Minnesota. — *Klugherz v. Chicago, etc.*, R. Co., 90 Minn. 17, 101 Am. St. Rep. 384.

Missouri. — *Koegel v. Missouri Pac. R. Co.*, 181 Mo. 379; *Carrier v. Missouri Pac. R. Co.*, 175 Mo. 470; *Murrell v. Missouri Pac. R. Co.*, 105 Mo. App. 88.

New York. — *Johnson v. New York Cent., etc.*, R. Co., 173 N. Y. 79; *Gunther v. New York Cent., etc.*, R. Co., 81 N. Y. App. Div. 606; *Riordan v. New York Cent., etc.*, R. Co., (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 399.

Ohio. — *Cleveland, etc.*, R. Co. v. *Stein*, 24 Ohio Cir. Ct. 643.

South Carolina. — *Haltiwanger v. Columbia, etc.*, R. Co., 64 S. Car. 7; *McKeown v. South Carolina, etc.*, Extension R. Co., 68 S. Car. 483; *Elkins v. South Carolina, etc.*, R. Co., 64 S. Car. 553.

Tennessee. — *White v. Nashville, etc.*, R. Co., 108 Tenn. 739.

Texas. — *Over v. Missouri, etc.*, R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 535; *McCowan v. Gulf, etc.*, R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 46; *Smith v. International, etc.*, R. Co., 34 Tex. Civ. App. 209.

Utah. — *Morgan v. Oregon Short Line R. Co.*, 27 Utah 92.

Virginia. — *Seaboard, etc.*, R. Co. v. *Vaughan*, (Va. 1905) 51 S. E. Rep. 452; *Hortenstein v. Virginia-Carolina R. Co.*, 102 Va. 914.

Washington. — *Dotta v. Northern Pac. R. Co.*, 36 Wash. 506.

West Virginia. — *Compare Ray v. Chesapeake, etc.*, R. Co., 57 W. Va. 333.

Failure to Observe Statute or Ordinance. — *Cleveland, etc.*, R. Co. v. *Cline*, 111 Ill. App. 416.

2. *Railroad Track Itself a Warning of Danger*. — *Garlich v. Northern Pac. R. Co.*, (C. C. A.) 131 Fed. Rep. 837; *Illinois Terminal R. Co. v. Mitchell*, 214 Ill. 151; *Zirkle v. Missouri Pac. R. Co.*, 67 Kan. 77; *Seaboard, etc.*, R. Co. v. *Vaughan*, (Va. 1905) 51 S. E. Rep. 452.

3. *Trespasser Assumes Risk*. — *Kinnare v. Chicago, etc.*, R. Co., 114 Ill. App. 230; *Illinois Cent. R. Co. v. Eicher*, 202 Ill. 556, *reversing* 100 Ill. App. 599; *Atchison, etc.*, R. Co. v. *Potter*, 64 Kan. 13. See also *Dugan v. Chesapeake, etc.*, R. Co., (Ky. 1903) 72 S. W. Rep. 291.

736. Infant Trespassers. — See note 1.(2) *Obligation to Bare Licensees.* — See note 4.(3) *Obligation to Persons on Premises by Invitation.* — See note 5(4) *Obligation to Persons on Public Streets.* — See note 6.**737.** See notes 4, 5, 6.(5) *Who Are Trespassers, Licensees, or Persons Present by Invitation*— (a) *Employees of Railroad Company.* — See note 7.(b) *Employees of Associated Corporations or Independent Contractors — Employees of Associated Corporations.* — See note 11.**738. Employees of Independent Contractor.** — See note 3.(a) *Persons Transacting Business at Stations* — *aa. IN GENERAL.* — See note 10.**739. bb. PERSONS RECEIVING OR DELIVERING GOODS.** — See notes 2, 3, 4.*cc. PERSONS LOADING OR UNLOADING CARS.* — See note 5.

736. 1. Infant Trespassers. — Nashville, etc., R. Co. v. Harris, (Ala. 1904) 37 So. Rep. 794; Gadsden, etc., R. Co. v. Julian, 133 Ala. 371; Ashworth v. Southern R. Co., 116 Ga. 635; Nashville, etc., R. Co. v. Priest, 117 Ga. 767; Goodman v. Louisville, etc., R. Co., 116 Ky. 900; Louisville, etc., R. Co. v. Logsdon, (Ky. 1904) 81 S. W. Rep. 657.

4. Duty to Bare Licensee — *Arizona.* — See Arizona, etc., R. Co. v. Nevitt, (Ariz. 1902) 68 Pac. Rep. 550.

California. — Means v. Southern California R. Co., 144 Cal. 473.

Illinois. — Illinois Central R. Co. v. Hopkins, 200 Ill. 122; Illinois Cent. R. Co. v. Eicher, 202 Ill. 556; McLaughlin v. Chicago, etc., R. Co., 115 Ill. App. 262; Illinois Cent. R. Co. v. Schmitt, 100 Ill. App. 490; Kinnare v. Chicago, etc., R. Co., 114 Ill. App. 230. *Compare* Illinois Cent. R. Co. v. Parkhurst, 106 Ill. App. 467; Illinois Cent. R. Co. v. Eicher, 202 Ill. 556, *reversing* 100 Ill. App. 599.

Indiana. — Chicago, etc., R. Co. v. Martin, 31 Ind. App. 308; Manlove v. Cleveland, etc., R. Co., 29 Ind. App. 694.

Kentucky. — See Gregory v. Louisville, etc., R. Co., (Ky. 1904) 79 S. W. Rep. 238.

Minnesota. — Klugherz v. Chicago, etc., R. Co., 90 Minn. 17, 101 Am. St. Rep. 384.

New Hampshire. — Batchelder v. Boston, etc., R. Co., 72 N. H. 528.

New York. — Winn v. New York Cent., etc., R. Co., 65 N. Y. App. Div. 572.

Ohio. — Cleveland, etc., R. Co. v. Stein, 24 Ohio Cir. Ct. 643; Cleveland, etc., R. Co. v. Workman, 66 Ohio St. 509, 90 Am. St. Rep. 602.

South Carolina. — Compare Boggero v. Southern R. Co., 64 S. Car. 104.

Texas. — Lovett v. Gulf, etc., R. Co., 97 Tex. 436. But see Texas, etc., R. Co. v. Ball, (Tex. Civ. App. 1903) 73 S. W. Rep. 420.

Virginia. — Williamson v. Southern R. Co., (Va. 1905) 51 S. E. Rep. 195.

Washington. — McConkey v. Oregon R., etc., Co., 35 Wash. 55.

5. Obligation to Persons on Premises by Invitation. — Fraser v. Caledonian R. Co., Sc. Ct. of Sess. 5 F. 41; Illinois Cent. R. Co. v. Hopkins, 200 Ill. 122; Southern R. Co. v. Drake, 107 Ill. App. 12; Cincinnati, etc., R. Co. v. Vaught, (Ky. 1904) 78 S. W. Rep. 859; Klugherz v. Chicago, etc., R. Co., 90 Minn. 17, 101 Am. St. Rep. 384; Cleveland, etc., R. Co. v. Stein, 24

Ohio Cir. Ct. 643; Ray v. Chesapeake, etc., R. Co., 57 W. Va. 333. See also McKeown v. South Carolina, etc., Extension R. Co., 68 S. Car. 483.

6. Persons on Tracks Laid Through Public Streets Not Trespassers. — Southern R. Co. v. Crenshaw, 136 Ala. 573; St. Louis Southwestern R. Co. v. Underwood, (Ark. 1905) 86 S. W. Rep. 804; Illinois Terminal R. Co. v. Mitchell, 214 Ill. 151; International, etc., R. Co. v. Hall, 35 Tex. Civ. App. 545; Rio Grande, etc., R. Co. v. Martinez, (Tex. Civ. App. 1905) 87 S. W. Rep. 853.

737. 4. Contra, holding that the public has equal rights with the railroad, Southern R. Co. v. Crenshaw, 136 Ala. 573; International, etc., R. Co. v. Hall, 35 Tex. Civ. App. 545.

5. St. Louis Southwestern R. Co. v. Underwood, (Ark. 1905) 86 S. W. Rep. 804; Toledo, etc., R. Co. v. Hammett, 115 Ill. App. 268; Rio Grande, etc., R. Co. v. Martinez, (Tex. Civ. App. 1905) 87 S. W. Rep. 853.

6. A Person in Walking upon Tracks Laid Through a Public Street. — Illinois Terminal R. Co. v. Mitchell, 214 Ill. 151; Toledo, etc., R. Co. v. Hammett, 115 Ill. App. 268; Rio Grande, etc., R. Co. v. Martinez, (Tex. Civ. App. 1905) 87 S. W. Rep. 853.

7. Employees Going to or Returning from Work. — Gregory v. Louisville, etc., R. Co., (Ky. 1904) 79 S. W. Rep. 238. See also Louisville, etc., R. Co. v. Wade, (Fla. 1903) 35 So. Rep. 863; Cleveland, etc., R. Co. v. Workman, 66 Ohio St. 509, 90 Am. St. Rep. 602.

11. Employees of Operating Company — Duty from Holding Company. — See Chicago Terminal Transfer R. Co. v. Vandenberg, 164 Ind. 470.

738. 3. Employees of Contractor Repairing Right of Way. — Southern R. Co. v. Drake, 107 Ill. App. 12; Gulf, etc., R. Co. v. Lovett, (Tex. Civ. App. 1903) 74 S. W. Rep. 570.

10. Atchison, etc., R. Co. v. Keller, 33 Tex. Civ. App. 358.

739. 2. Ryan v. New York, etc., R. Co., 115 Fed. Rep. 197; State v. Western Maryland R. Co., 98 Md. 125.

3. Chicago, etc., R. Co. v. Shaw, (C. C. A.) 116 Fed. Rep. 621.

4. Hathaway v. New York, etc., R. Co., 182 Mass. 286.

5. Persons Loading or Unloading Cars. — State v. Western Maryland R. Co., 98 Md. 125; Smith v. Southern R. Co., 120 N. Car. 374; Texas, etc., R. Co. v. McDonald, (Tex. Civ.

739. (e) *Persons Crossing Tracks.* — See notes 8, 9.

740. See note 1.

(f) *Persons Walking on Right of Way.* — See note 3.

741. See notes 1, 2, 3.

App. 1905) 85 S. W. Rep. 493. See also Chicago, etc., R. Co. v. Martin, 31 Ind. App. 308. And see the title STATIONS (RAILROAD), 514.4.

739. 8. *Persons Crossing Tracks.* — James v. Illinois Cent. R. Co., 195 Ill. 327; Cleveland, etc., R. Co. v. Cline, 111 Ill. App. 416; Illinois Cent. R. Co. v. Broughton, (Ky. 1904) 78 S. W. Rep. 876; Davis v. Chesapeake, etc., R. Co., 116 Ky. 144; Le Duc v. New York Cent., etc., R. Co., 92 N. Y. App. Div. 107; Riordan v. New York Cent., etc., R. Co., (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 399.

When Public Crossing Is Blocked. — Cleveland, etc., R. Co. v. Cline, 111 Ill. App. 416.

Crossing Blocked for Unreasonable Time — Entry on Company's Ground Not Trespass. — Chicago, etc., R. Co. v. Mayer 112 Ill. App. 149; Chicago Junction R. Co. v. McGrath, 107 Ill. App. 100, affirmed 203 Ill. 511.

9. *Crossing by Mere Sufferance.* — Atchison, etc., R. Co. v. Potter, 64 Kan. 13; Wilmurth v. Illinois Cent. R. Co., (Ky. 1903) 76 S. W. Rep. 193.

The Fact that the Railroad Maintains a Station Adjacent to the Track does not give the right to cross except at the established crossing. James v. Illinois Cent. R. Co., 195 Ill. 327.

740. 1. *Use of Customary Crossing.* — Booth v. Union Terminal R. Co., 126 Iowa 8; Thomas v. Chicago, etc., R. Co., 103 Iowa 649; Scott v. St. Louis, etc., R. Co., 112 Iowa 54; McCarty v. New York Cent., etc., R. Co., 73 N. Y. App. Div. 34; Keller v. Erie R. Co., 98 N. Y. App. Div. 550; Gunther v. New York Cent., etc., R. Co., 81 N. Y. App. Div. 606; Jones v. Charleston, etc., R. Co., 65 S. Car. 410; Over v. Missouri, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 535; Texas, etc., R. Co. v. Ball, (Tex. Civ. App. 1903) 71 S. W. Rep. 420.

3. *Persons Walking on the Right of Way* — United States. — Louisville, etc., R. Co. v. McClish, (C. C. A.) 115 Fed. Rep. 268.

Alabama. — Nashville, etc., R. Co. v. Harris, (Ala. 1904) 37 So. Rep. 794; Alabama G. S. R. Co. v. Guest, 136 Ala. 348.

Arizona. — Compare Arizona, etc., R. Co. v. Nevitt, (Ariz. 1902) 68 Pac. Rep. 550.

Georgia. — Seaboard Air-Line R. Co. v. Shigg, 117 Ga. 454; Hall v. Western, etc., R. Co., 123 Ga. 213; Southern R. Co. v. Eubanks, 117 Ga. 217; Kendrick v. Seaboard Air-Line R. Co., 121 Ga. 775.

Illinois. — McLaughlin v. Chicago, etc., R. Co., 115 Ill. App. 262; Belt R. Co. v. Banicki, 102 Ill. App. 642; Kinnare v. Chicago, etc., R. Co., 114 Ill. App. 230; Chicago, etc., R. Co. v. Urbanic, 106 Ill. App. 325; Cleveland, etc., R. Co. v. Largent, 108 Ill. App. 650; Illinois Cent. R. Co. v. Eicher, 202 Ill. 556.

Indiana. — Manlove v. Cleveland, etc., R. Co., 29 Ind. App. 694.

Kansas. — Atchison, etc., R. Co. v. Potter, 64 Kan. 13.

Kentucky. — Maysville, etc., R. Co. v. Mc-

Cabe, (Ky. 1904) 82 S. W. Rep. 233; Louisville, etc., R. Co. v. Logsdon, (Ky. 1904) 81 S. W. Rep. 657; Dilas v. Chesapeake, etc., R. Co., (Ky. 1903) 71 S. W. Rep. 492; Goodman v. Louisville, etc., R. Co., 116 Ky. 900; Chesapeake, etc., R. Co. v. See, (Ky. 1904) 79 S. W. Rep. 252; Manning v. Illinois Cent. R. Co., (Ky. 1905) 84 S. W. Rep. 565; Dorsey v. Louisville, etc., R. Co., (Ky. 1904) 80 S. W. Rep. 1131; Hulsey v. Louisville, etc., R. Co., (Ky. 1905) 87 S. W. Rep. 302.

Louisiana. — White v. Illinois Cent. R. Co., 114 La. 825. Compare McClanahan v. Vicksburg, etc., R. Co., 111 La. 781.

Minnesota. — See Schreiner v. Great Northern R. Co., 86 Minn. 245.

Missouri. — Koegel v. Missouri Pac. R. Co., 181 Mo. 379; Carrier v. Missouri Pac. R. Co., 175 Mo. 470.

New York. — Gunther v. New York Cent., etc., R. Co., 81 N. Y. App. Div. 606.

Ohio. — Cleveland, etc., R. Co. v. Stein, 24 Ohio Cir. Ct. 643.

South Carolina. — McKeown v. South Carolina, etc., Extension R. Co., 68 S. Car. 483; Haltiwanger v. Columbia, etc., R. Co., 64 S. Car. 7.

Texas. — Smith v. International, etc., R. Co., 34 Tex. Civ. App. 209.

Washington. — Hamlin v. Columbia, etc., R. Co., 37 Wash. 448; Dotta v. Northern Pac. R. Co., 36 Wash. 506.

741. 1. *Implied License to Use Roadbed as a Footpath* — Georgia. — See Southern R. Co. v. Eubanks, 117 Ga. 217.

Illinois. — Illinois Cent. R. Co. v. Eicher, 100 Ill. App. 599, reversed on another point 202 Ill. 556. See also Illinois Cent. R. Co. v. Schmitt, 100 Ill. App. 490.

Indiana. — Compare Manlove v. Cleveland, etc., R. Co., 29 Ind. App. 694.

Iowa. — Booth v. Union Terminal R. Co., 126 Iowa 8.

Minnesota. — Compare Schreiner v. Great Northern R. Co., 86 Minn. 245.

Mississippi. — Yazoo, etc., R. Co. v. Metcalf, 84 Miss. 242.

Missouri. — Murrell v. Missouri Pac. R. Co., 105 Mo. App. 88.

New York. — Keller v. Erie R. Co., 98 N. Y. App. Div. 550. See also Winn v. New York Cent., etc., R. Co., 65 N. Y. App. Div. 572; Meinrenken v. New York Cent., etc., R. Co., 81 N. Y. App. Div. 132.

South Carolina. — Jones v. Charleston, etc., R. Co., 65 S. Car. 410; Sentell v. Southern R. Co., 70 S. Car. 183; Boggero v. Southern R. Co., 64 S. Car. 104; McKeown v. South Carolina, etc., Extension R. Co., 68 S. Car. 483; Matthews v. Seaboard Air-Line R. Co., 67 S. Car. 499.

Texas. — Gulf, etc., R. Co. v. Matthews, (Tex. 1905) 88 S. W. Rep. 192; St. Louis Southwestern R. Co. v. Bolton, 36 Tex. Civ. App. 87; Kroeger v. Texas, etc., R. Co., 30 Tex. Civ.

742. See notes 1, 2.

(g) *Persons Crossing Bridges and Trestles.* — See notes 3, 4.

(6) *Application of Principles to Injuries from Particular Causes* —

(a) *Injuries from Things Thrown from Trains.* — See notes 5, 6.

743. (b) *Injuries from Things Projecting from Cars.* — See note 2.

(c) *Injuries from Derailment of Cars.* — See note 6.

(d) *Injuries from Horses Taking Fright* — *aa.* AT STANDING CARS. — See note 9.

bb. AT MOVING TRAINS. — See note 10.

App. 87; *Ollis v. Houston East, etc., R. Co.*, 31 Tex. Civ. App. 601.

Virginia. — *Norfolk, etc., R. Co. v. Johnson*, 103 Va. 787; *Williamson v. Southern R. Co.*, (Va. 1905) 51 S. E. Rep. 195.

West Virginia. — *Ray v. Chesapeake, etc., R. Co.*, 57 W. Va. 333.

Washington. — *Dotta v. Northern Pac. R. Co.*, 36 Wash. 506.

Sleeping or Sitting on Track. — Acquiescence in a habit of walking along the right of way does not authorize persons to use the track for sitting or sleeping purposes. *Smith v. International etc., R. Co.*, 34 Tex. Civ. App. 209.

741. 2. Acquiescence a Question of Fact. — *Cleveland, etc., R. Co. v. Stein*, 24 Ohio Cir. Ct. 643; *Matthews v. Seaboard Air-Line R. Co.*, 67 S. Car. 499; *McKeown v. South Carolina, etc., Extension R. Co.*, 68 S. Car. 483. See also *Gulf, etc., R. Co. v. Matthews*, (Tex. 1905) 88 S. W. Rep. 192.

3. Mere Sufferance Does Not Constitute an Invitation. — *Kendrick v. Seaboard Air-Line R. Co.*, 121 Ga. 775; *Southern R. Co. v. Eubanks*, 117 Ga. 217.

Illinois. — *Illinois Cent. R. Co. v. Eicher*, 202 Ill. 556.

Indiana. — *Manlove v. Cleveland, etc., R. Co.*, 29 Ind. App. 694.

Iowa. — *Wagner v. Chicago, etc., R. Co.*, 122 Iowa 360.

Kansas. — *Atchison, etc., R. Co. v. Potter*, 64 Kan. 13.

Kentucky. — *Dilas v. Chesapeake, etc., R. Co.*, (Ky. 1903) 71 S. W. Rep. 492; *Goodman v. Louisville, etc., R. Co.*, 116 Ky. 900; *Chesapeake, etc., R. Co. v. See*, (Ky. 1904) 79 S. W. Rep. 252.

Minnesota. — See *Schreiner v. Great Northern R. Co.*, 86 Minn. 245.

New York. — *Gunther v. New York Cent., etc., R. Co.*, 81 N. Y. App. Div. 606.

Ohio. — See *Cleveland, etc., R. Co. v. Workman*, 66 Ohio St. 509, 90 Am. St. Rep. 602.

South Carolina. — *Haltiwanger v. Columbia, etc., R. Co.*, 64 S. Car. 7.

Texas. — *St. Louis Southwestern R. Co. v. Shiflet*, 98 Tex. 326; *Reichert v. International, etc., R. Co.*, (Tex. Civ. App. 1903) 72 S. W. Rep. 1031.

Washington. — *Dotta v. Northern Pac. R. Co.*, 36 Wash. 506; *Hamlin v. Columbia, etc., R. Co.*, 37 Wash. 448.

Effect of Objection by Railroad. — See *Denver, etc., R. Co. v. Buffehr*, 30 Colo. 27.

742. 1. See *Dotta v. Northern Pac. R. Co.*, 36 Wash. 506.

Knowledge Necessary. — *Reichert v. Interna-*

tional, etc., R. Co., (Tex. Civ. App. 1903) 72 S. W. Rep. 1031.

2. Erection of Facilities by Company. — See *Ray v. Chesapeake, etc., R. Co.*, 57 W. Va. 333.

3. Trespasses upon Railroad Bridges and Trestles. — *Seaboard Air-Line R. Co. v. Shigg*, 117 Ga. 454; *Cleveland, etc., R. Co. v. Largent*, 108 Ill. App. 650; *Dugan v. Chesapeake, etc., R. Co.*, (Ky. 1903) 72 S. W. Rep. 291; *Weeks v. Wilmington, etc., R. Co.*, 131 N. Car. 78; *Dotta v. Northern Pac. R. Co.*, 36 Wash. 506.

Duty After Discovery of Person on Trestle. — See *Wright v. Southern R. Co.*, 132 N. Car. 327.

4. Customary Use of Railroad Bridge. — See *St. Louis Southwestern R. Co. v. Bolton*, 36 Tex. Civ. App. 87.

5. Liability for Wanton Injury. — *Polatty v. Charleston, etc., R. Co.*, 67 S. Car. 391, 100 Am. St. Rep. 750.

6. Persons Rightfully Beside Track. — *Willis v. Maysville, etc., R. Co.*, (Ky. 1905) 85 S. W. Rep. 716.

Mail Bags and Bundles. — *Carver v. Minneapolis, etc., R. Co.*, 120 Iowa 346.

743. 2. When Person Injured Is Standing Where Public Is Permitted to Go. — *Yazoo, etc., R. Co. v. Metcalf*, 84 Miss. 242 (bar protruding from engine); *Reichert v. International, etc., R. Co.*, (Tex. Civ. App. 1903) 72 S. W. Rep. 1031 (timber projecting from train).

Trespasser on Property of Third Party — Railroad Company Liable. — *Missouri, etc., R. Co. v. Scarborough*, 29 Tex. Civ. App. 194.

6. Illinois Cent. R. Co. v. Watson, 117 Ky. 374.

On Property of Third Party — Railroad Company Liable. — *West Virginia Cent., etc., R. Co. v. State*, 96 Md. 652.

9. Car Standing Near Highway. — *Compare Atchison, etc., R. Co. v. Morris*, 64 Kan. 411; *Butler v. Easton, etc., R. Co.*, (N. J. 1905) 60 Atl. Rep. 218.

10. Horse Taking Fright at Moving Train. — *Chicago, etc., R. Co. v. Vremeister*, 112 Ill. App. 346; *Louisville, etc., R. Co. v. Howerton*, 115 Ky. 89; *Chicago, etc., R. Co. v. Roberts*, (Neb. 1902) 91 N. W. Rep. 707; *Hendricks v. Fremont, etc., R. Co.*, 67 Neb. 120; *Cooper v. Charleston, etc., R. Co.*, 65 S. Car. 214; *Fares v. Rio Grande Western R. Co.*, 28 Utah 132; *Crowley v. Chicago, etc., R. Co.*, 122 Wis. 287.

Failure to Give Signal. — A railroad company is liable for injuries sustained by reason of a horse taking fright at a moving train, where the horse came into close proximity to the train solely by failure of the crew to give notice of its approach. *St. Louis, etc., R. Co. v. Boback*, 71 Ark. 427. See generally *infra*, this title, **754. 7 et seq.**

744. See note 1.

cc. AT STARTLING AND UNUSUAL NOISES. — See notes 4, 5, 7, 8, 9.

dd. FAILURE TO STOP TRAIN OR CEASE NOISE. — See note 10.

745. See note 1.

(e) Putting Detached Cars in Motion. — See notes 3, 5, 6, 8, 10.

(f) Running Trains or Engines Backwards. — See note 12.

746. (g) Coupling Up to Cars Which Are Being Loaded or Unloaded. — See note 2.

(h) Ordinary Operation of Trains — aa. GENERAL STATEMENT. — See note 4.

747. bb. CARE BEFORE DISCOVERY OF PERSON ON TRACK — (aa) *In General*. — See notes 1, 2.**744.** 1. *Fares v. Rio Grande Western R. Co.*, 28 Utah 132.4. *Horse Frightened by Locomotive Whistle*. — *Lake Erie, etc., R. Co. v. Fike*, (Ind. App. 1905) 74 N. E. Rep. 636; *Atchison, etc., R. Co. v. Walkenshaw*, (Kan. 1905) 81 Pac. Rep. 463; *Webb v. Philadelphia, etc., R. Co.*, 202 Pa. St. 511; *McGrew v. St. Louis, etc., R. Co.*, 32 Tex. Civ. App. 265; *St. John v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 603; *Gulf, etc., R. Co. v. Hord*, (Tex. Civ. App. 1905) 87 S. W. Rep. 848; *Fares v. Rio Grande Western R. Co.*, 28 Utah 132.*Sounding Whistle under Highway Bridge Negligence*. — *Cleveland, etc., R. Co. v. David*, 105 Ill. App. 69.5. *Coleman v. Wrightsville, etc., R. Co.*, 114 Ga. 386; *Chalkley v. Central of Georgia R. Co.*, 120 Ga. 683; *Louisville, etc., R. Co. v. Howerton*, 115 Ky. 89; *Webb v. Philadelphia, etc., R. Co.*, 202 Pa. St. 511; *Crowley v. Chicago, etc., R. Co.*, 122 Wis. 287.7. *Negligently Sounding Whistle*. — *Gulf, etc., R. Co. v. Hord*, (Tex. Civ. App. 1905) 87 S. W. Rep. 848.*Negligently Emitting Steam from Engine*. — *Chicago, etc., R. Co. v. Jones*, (Tex. Civ. App. 1905) 88 S. W. Rep. 445.8. *Unnecessary Sounding of Whistle*. — *Chalkley v. Central of Georgia R. Co.*, 120 Ga. 683; *Chicago G. W. R. Co. v. Bailey*, 66 Kan. 115; *Webb v. Philadelphia, etc., R. Co.*, 202 Pa. St. 511; *Texas, etc., R. Co. v. Kennedy*, 29 Tex. Civ. App. 94; *McGrew v. St. Louis, etc., R. Co.*, 32 Tex. Civ. App. 265; *Ft. Worth, etc., R. Co. v. Partin*, 33 Tex. Civ. App. 173.9. *Necessity a Question of Fact*. — *Compare Webb v. Philadelphia, etc., R. Co.*, 202 Pa. St. 511.10. *No Obligation to Observe Conduct of Teams on Adjacent Highway*. — *Atchison, etc., R. Co. v. Walkenshaw*, (Kan. 1905) 81 Pac. Rep. 463; *Gulf, etc., R. Co. v. Hord*, (Tex. Civ. App. 1905) 87 S. W. Rep. 848; *Fares v. Rio Grande Western R. Co.*, 28 Utah 132. But see *McGrew v. St. Louis, etc., R. Co.*, 32 Tex. Civ. App. 265.**745.** 1. *Duty to Cease Sounding Whistle*. — *Kentucky, etc., Bridge Co. v. Montgomery*, (Ky. 1902) 67 S. W. Rep. 1008; *St. Louis Southwestern R. Co. v. Kilman*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1050; *Texas, etc., R. Co. v. Kennedy*, 29 Tex. Civ. App. 94. See also *Gulf, etc., R. Co. v. Hord*, (Tex. Civ. App. 1905) 87 S. W. Rep. 848.*Duty to Shut Off Steam*. — *St. Louis, etc., R. Co. v. Boback*, 71 Ark. 427.3. *Setting Detached Cars in Motion Unattended*. — *Chicago Junction R. Co. v. McGrath*, 107 Ill.App. 100, *affirmed* 203 Ill. 511; *St. Louis Southwestern R. Co. v. Bowles*, 32 Tex. Civ. App. 118. See also *McCarty v. New York Cent., etc., R. Co.*, 73 N. Y. App. Div. 34.It is the duty of a railroad company to give signals when a detached car is started, even in its own yards, if by custom and acquiescence the public have made a pathway across the yards. Over *v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 535.5. *On Tracks Along Public Streets*. — *Van Bach v. Missouri Pac. R. Co.*, 171 Mo. 338.6. *Through Freight Yard*. — *Kansas City Southern R. Co. v. Moles*, (C. C. A.) 121 Fed. Rep. 351.8. *On Tracks Crossing Public Streets*. — *St. Louis Southwestern R. Co. v. Bowles*, 32 Tex. Civ. App. 118.10. *On Tracks Used by Public as Footpath*. — See *Arizona, etc., R. Co. v. Neavitt*, (Ariz. 1902) 68 Pac. Rep. 550.12. *Statute Making Railroad Company Liable*. — *Yazoo, etc., R. Co. v. Metcalf*, 84 Miss. 242.**746.** 2. *Moving Cars Which Are Being Loaded or Unloaded*. — *Galveston, etc., R. Co. v. Levy*, 35 Tex. Civ. App. 107.4. *General Statement of Liability for Injury from Ordinary Movement of Trains — Alabama*. — *Louisville, etc., R. Co. v. Mitchell*, 134 Ala. 261; *Nashville, etc., R. Co. v. Harris*, (Ala. 1904) 37 So. Rep. 794.*Georgia*. — *Ashworth v. Southern R. Co.*, 116 Ga. 635.*Illinois*. — *Illinois Cent. R. Co. v. Eicher*, 202 Ill. 556; *Kinnare v. Chicago, etc., R. Co.*, 114 Ill. App. 230; *Cleveland, etc., R. Co. v. Cline*, 111 Ill. App. 416.*Indiana*. — *Manlove v. Cleveland, etc., R. Co.*, 29 Ind. App. 694.*Kentucky*. — *Louisville, etc., R. Co. v. Logsdon*, (Ky. 1904) 81 S. W. Rep. 657; *Goodman v. Louisville, etc., R. Co.*, 116 Ky. 900.*Louisiana*. — *Compare McClanahan v. Vicksburg, etc., R. Co.*, 111 La. 781.*Ohio*. — *Cleveland, etc., R. Co. v. Workman*, 66 Ohio St. 509, 90 Am. St. Rep. 602; *Cleveland, etc., R. Co. v. Stein*, 24 Ohio Cir. Ct. 643.*South Carolina*. — *Boggero v. Southern R. Co.*, 64 S. Car. 104; *Haltiwanger v. Columbia, etc., R. Co.*, 64 S. Car. 7.*Tennessee*. — *White v. Nashville, etc., R. Co.*, 108 Tenn. 739.*Texas*. — *Smith v. International, etc., R. Co.*, 34 Tex. Civ. App. 209.**747.** 1. *Care Before Discovery of Person on Track — Alabama*. — *Louisville, etc., R. Co. v. Mitchell*, 134 Ala. 261; *Alabama G. S. R. Co. v.*

747. (bb) *Application of Rule to Children.* — See note 3.

748. (cc) *Effect of Reasonable Apprehension of Presence on Track.* — See notes 2, 3.
cc. CARE AFTER DISCOVERY OF PERSON. — See note 4.

749. dd. CARE REQUIRED IN TOWNS AND CITIES. — See note 1.

Guest, 136 Ala. 348; Mizzell v. Southern R. Co., 132 Ala. 504.

Georgia. — Southern R. Co. v. Eubanks, 117 Ga. 217; Hall v. Western, etc., R. Co., 123 Ga. 213.

Illinois. — Chicago, etc., R. Co. v. Urbaniac, 106 Ill. App. 325; Illinois Cent. R. Co. v. Eicher, 202 Ill. 556; James v. Illinois Cent. R. Co., 195 Ill. 327.

Indiana. — Manlove v. Cleveland, etc., R. Co., 29 Ind. App. 694.

Iowa. — Gregory v. Wabash R. Co., 126 Iowa 230.

Kentucky. — Dugan v. Chesapeake, etc., R. Co., (Ky. 1903) 72 S. W. Rep. 291; Dilas v. Chesapeake, etc., R. Co., (Ky. 1903) 71 S. W. Rep. 492; Manning v. Illinois Cent. R. Co., (Ky. 1905) 84 S. W. Rep. 565; Louisville, etc., R. Co. v. Logsdon, (Ky. 1904) 81 S. W. Rep. 657; Hulsey v. Louisville, etc., R. Co., (Ky. 1905) 87 S. W. Rep. 302; Dorsey v. Louisville, etc., R. Co., (Ky. 1904) 80 S. W. Rep. 1131; Kendall v. Louisville, etc., R. Co., (Ky. 1903) 76 S. W. Rep. 376; Chesapeake, etc., R. Co. v. See, (Ky. 1904) 79 S. W. Rep. 252.

Missouri. — Carrier v. Missouri Pac. R. Co., 175 Mo. 470; Murrell v. Missouri Pac. R. Co., 105 Mo. App. 88; Koegel v. Missouri Pac. R. Co., 181 Mo. 379.

Ohio. — Cleveland, etc., R. Co. v. Workman, 66 Ohio St. 509, 90 Am. St. Rep. 602; Cleveland, etc., R. Co. v. Stein, 24 Ohio Cir. Ct. 643.

747. 2. Nashville, etc., R. Co. v. Harris, (Ala. 1904) 37 So. Rep. 794; Southern R. Co. v. Eubanks, 117 Ga. 217; Carrier v. Missouri Pac. R. Co., 175 Mo. 470.

3. Rule Making No Distinction in Favor of Children. — Nashville, etc., R. Co. v. Harris, (Ala. 1904) 37 So. Rep. 794; Gadsden, etc., R. Co. v. Julian, 133 Ala. 371; Gregory v. Wabash R. Co., 126 Iowa 230; Louisville, etc., R. Co. v. Logsdon, (Ky. 1904) 81 S. W. Rep. 657; Goodman v. Louisville, etc., R. Co., 116 Ky. 900. See also Kinnare v. Chicago, etc., R. Co., 114 Ill. App. 230.

748. 2. *Effect of Reasonable Apprehension of Presence of Person on Track.* — Arizona, etc., R. Co. v. Nevitt, (Ariz. 1902) 68 Pac. Rep. 550; Bullard v. Southern R. Co., 116 Ga. 644; Ashworth v. Southern R. Co., 116 Ga. 635; Murrell v. Missouri Pac. R. Co., 105 Mo. App. 88; Batchelder v. Boston, etc., R. Co., 72 N. H. 528; McCarty v. New York Cent., etc., R. Co., 73 N. Y. App. Div. 34; Sentell v. Southern R. Co., 70 S. Car. 183; St. Louis Southwestern R. Co. v. Abernathy, 28 Tex. Civ. App. 613; Texas, etc., R. Co. v. Ball, (Tex. Civ. App. 1903) 73 S. W. Rep. 420; Corbett v. Oregon Short Line R. Co., 25 Utah 449; Williamson v. Southern R. Co., (Va. 1905) 51 S. E. Rep. 105. See also Illinois Cent. R. Co. v. Watson, 117 Ky. 374.

Rule Not Applicable to Trespassers. — Dugan v. Chesapeake, etc., R. Co., (Ky. 1903) 72 S. W. Rep. 291.

Where Children Are Likely to Be on Track. —

Ollis v. Houston East, etc., R. Co., 31 Tex. Civ. App. 601.

3. Manlove v. Cleveland, etc., R. Co., 29 Ind. App. 694; Chesapeake, etc., R. Co. v. See, (Ky. 1904) 79 S. W. Rep. 252. See also Williamson v. Southern R. Co., (Va. 1905) 51 S. E. Rep. 195.

4. Care Required After Discovery of Person's Peril — Alabama. — Alabama G. S. R. Co. v. Hamilton, 135 Ala. 343.

Arkansas. — St. Louis, etc., R. Co. v. Hill, (Ark. 1905) 86 S. W. Rep. 303; St. Louis, etc., R. Co. v. Evans, (Ark. 1905) 86 S. W. Rep. 427.

Colorado. — Denver, etc., R. Co. v. Buffehr, 30 Colo. 27.

Georgia. — Kendrick v. Seaboard Air-Line R. Co., 121 Ga. 775.

Illinois. — James v. Illinois Cent. R. Co., 195 Ill. 327.

Iowa. — Gregory v. Wabash R. Co., 126 Iowa 230.

Kentucky. — Wilmurth v. Illinois Cent. R. Co., (Ky. 1903) 76 S. W. Rep. 193; Dugan v. Chesapeake, etc., R. Co., (Ky. 1903) 72 S. W. Rep. 291.

Louisiana. — McClanahan v. Vicksburg, etc., R. Co., 111 La. 781.

Michigan. — Labarge v. Pere Marquette R. Co., 134 Mich. 139.

Missouri. — Scullin v. Wabash R. Co., 184 Mo. 695; Reyburn v. Missouri Pac. R. Co., 187 Mo. 565; Woods v. Wabash R. Co., 188 Mo. 229.

New Hampshire. — Batchelder v. Boston, etc., R. Co., 72 N. H. 528.

New York. — Fitzgibbons v. Manhattan R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 341; Greene v. New York, etc., R. Co., 102 N. Y. App. Div. 322.

North Carolina. — See Wright v. Southern R. Co., 132 N. Car. 327.

Ohio. — Cleveland, etc., R. Co. v. Stein, 24 Ohio Cir. Ct. 643; Cleveland, etc., R. Co. v. Workman, 66 Ohio St. 509, 90 Am. St. Rep. 602; Lake Shore, etc., R. Co. v. Callahan, 25 Ohio Cir. Ct. 115.

Texas. — St. Louis Southwestern R. Co. v. Allen, 35 Tex. Civ. App. 355; Central Texas, etc., R. Co. v. Gibson, 35 Tex. Civ. App. 66; Missouri, etc., R. Co. v. Eyer, 96 Tex. 72; Texas, etc., R. Co. v. Ball, (Tex. Civ. App. 1903) 73 S. W. Rep. 420; Kroeger v. Texas, etc., R. Co., 30 Tex. Civ. App. 87; Missouri, etc., R. Co. v. Hammer, 34 Tex. Civ. App. 354.

Virginia. — Green v. Southern R. Co., 102 Va. 701; Chesapeake, etc., R. Co. v. Rodgers, 100 Va. 324.

Washington. — Dotta v. Northern Pac. R. Co., 36 Wash. 506.

Duty to Drunken Trespasser in Yards. — Cincinnati, etc., R. Co. v. Marrs, (Ky. 1905) 85 S. W. Rep. 188.

749. 1. *Care Required in Towns and Cities.* — Bullard v. Southern R. Co., 116 Ga. 644; Louis-

749. *ff.* PRESUMPTION THAT PERSON ON OR NEAR TRACK WILL AVOID COLLISION. — See note 4.

750. See notes 1, 2.

751. See note 1.

gg. LOOKOUT — (*aa*) *In General* — Jurisdictions Requiring Lookout. — See note 2.

752. Duty under Statute. — See note 3.

753. Jurisdictions Holding Lookout Unnecessary. — See note 1.

ville, etc., R. Co. *v.* Logsdon, (Ky. 1904) 81 S. W. Rep. 657; Chesapeake, etc., R. Co. *v.* See, (Ky. 1904) 79 S. W. Rep. 252; Gillian *v.* Texas, etc., R. Co., 114 La. 272. Compare Louisville, etc., R. Co. *v.* Mitchell, 134 Ala. 261.

749. 4. Presumption that Person on Track Will Avoid Collision — *Alabama*. — Louisville, etc., R. Co. *v.* Lewis, 141 Ala. 466.

Arkansas. — St. Louis, etc., R. Co. *v.* Evans, (Ark. 1905) 86 S. W. Rep. 427.

Colorado. — Denver, etc., R. Co. *v.* Buffehr, 30 Colo. 27.

Indiana. — Manlove *v.* Cleveland, etc., R. Co., 29 Ind. App. 694.

Missouri. — Carrier *v.* Missouri Pac. R. Co., 175 Mo. 470.

Nebraska. — Missouri Pac. R. Co. *v.* Hansen, 48 Neb. 232; Chicago, etc., R. Co. *v.* Lilley, (Neb. 1903) 93 N. W. Rep. 1012.

North Carolina. — Weeks *v.* Wilmington, etc., R. Co., 131 N. Car. 78; Glenn *v.* Norfolk, etc., R. Co., 128 N. Car. 184; Wright *v.* Southern R. Co., 132 N. Car. 327; Stewart *v.* North Carolina R. Co., 136 N. Car. 385; Bessent *v.* Southern R. Co., 132 N. Car. 934; Marks *v.* Atlantic Coast Line R. Co., 133 N. Car. 89; Clegg *v.* Southern R. Co., 132 N. Car. 292, rehearing denied 133 N. Car. 303; Pharr *v.* Southern R. Co., 133 N. Car. 610; Smith *v.* Atlanta, etc., R. Co., 130 N. Car. 344.

Ohio. — New York, etc., R. Co. *v.* Kistler, 66 Ohio St. 326.

Virginia. — Savage *v.* Southern R. Co., 103 Va. 422.

Person on Footpath Parallel with Road. — Pharr *v.* Southern R. Co., 133 N. Car. 610.

Presumption that Person in Place of Safety Will Not Walk into Danger. — Koegel *v.* Missouri Pac. R. Co., 181 Mo. 379.

750. 1. Clegg *v.* Southern R. Co., 132 N. Car. 292, rehearing denied 133 N. Car. 303.

2. Driver of Hand Car Not Held to Same Diligence as Locomotive Engineer. — Wright *v.* Southern R. Co., 132 N. Car. 327.

751. 1. Circumstances Indicating that Person Will Not Avoid Collision. — Stewart *v.* North Carolina R. Co., 136 N. Car. 385; McArver *v.* Southern R. Co., 129 N. Car. 380; Missouri, etc., R. Co. *v.* Hammer, 34 Tex. Civ. App. 354. See also Louisville, etc., R. Co. *v.* Vanarsdell, (Ky. 1904) 77 S. W. Rep. 1103.

Child of Tender Age. — St. Louis Southwestern R. Co. *v.* Allen, 35 Tex. Civ. App. 355.

2. Jurisdictions Requiring Lookout. — McClanahan *v.* Vicksburg, etc., R. Co., 111 La. 781; Wright *v.* Southern R. Co., 132 N. Car. 327; McArver *v.* Southern R. Co., 129 N. Car. 380; Cooper *v.* Charleston, etc., R. Co., 65 S. Car. 214; Houston, etc., R. Co. *v.* Ramsey, 36 Tex. Civ. App. 285; Missouri, etc., R. Co. *v.*

Owens, (Tex. Civ. App. 1903) 75 S. W. Rep. 581; Rio Grande, etc., R. Co. *v.* Martinez, (Tex. Civ. App. 1905) 87 S. W. Rep. 853; Central Texas, etc., R. Co. *v.* Gibson, 35 Tex. Civ. App. 66; St. Louis Southwestern R. Co. *v.* Bolton, 36 Tex. Civ. App. 87; Missouri, etc., R. Co. *v.* Hammer, 34 Tex. Civ. App. 354. See also Atchison, etc., R. Co. *v.* Walkenshaw, (Kan. 1905) 81 Pac. Rep. 463. Compare Sentell *v.* Southern R. Co., 70 S. Car. 183; St. Louis Southwestern R. Co. *v.* Shiflet, 98 Tex. 326.

Person on Trestle. — *Contra*, McCowen *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 46.

Contributory Negligence as Defense. — Houston, etc., R. Co. *v.* Ramsey, 36 Tex. Civ. App. 285.

Drunken Person Lying Asleep on Track Held to Be Guilty of Contributory Negligence. — Dorsey *v.* Louisville, etc., R. Co., (Ky. 1904) 80 S. W. Rep. 1131.

752. 3. In Tennessee. — Cincinnati, etc., R. Co. *v.* Davis, (C. C. A.) 127 Fed. Rep. 933.

When Object Appears on Road. — Rogers *v.* Cincinnati, etc., R. Co., (C. C. A.) 136 Fed. Rep. 573.

Contributory Negligence is no defense under the Tennessee statute, but goes only in mitigation of damages. Rogers *v.* Cincinnati, etc., R. Co., (C. C. A.) 136 Fed. Rep. 573.

Arkansas Statute — Contributory Negligence as Defense. — St. Louis, etc., R. Co. *v.* Evans, (Ark. 1905) 86 S. W. Rep. 427.

753. 1. Jurisdictions Not Requiring a Lookout — *Georgia*. — Hall *v.* Western, etc., R. Co., 123 Ga. 213.

Illinois. — Chicago, etc., R. Co. *v.* Urbanic, 106 Ill. App. 325; Kinnare *v.* Chicago, etc., R. Co., 114 Ill. App. 230; Cleveland, etc., R. Co. *v.* Cline, 111 Ill. App. 416; Cleveland, etc., R. Co. *v.* Largent, 108 Ill. App. 650.

Iowa. — Wagner *v.* Chicago, etc., R. Co., 122 Iowa 360, 124 Iowa 462; Gregory *v.* Wabash R. Co., 126 Iowa 230.

Kentucky. — Wilmurth *v.* Illinois Cent. R. Co., (Ky. 1903) 76 S. W. Rep. 193; Chesapeake, etc., R. Co. *v.* See, (Ky. 1904) 79 S. W. Rep. 252; Louisville, etc., R. Co. *v.* Logsdon, (Ky. 1904) 81 S. W. Rep. 657; Manning *v.* Illinois Cent. R. Co., (Ky. 1905) 84 S. W. Rep. 565; Louisville, etc., R. Co. *v.* Dick, (Ky. 1904) 78 S. W. Rep. 914. Compare Louisville, etc., R. Co. *v.* Logsdon, (Ky. 1904) 78 S. W. Rep. 409.

Missouri. — Carrier *v.* Missouri Pac. R. Co., 175 Mo. 470.

Ohio. — Cleveland, etc., R. Co. *v.* Stein, 24 Ohio Cir. Ct. 643; Cleveland, etc., R. Co. *v.* Workman, 66 Ohio St. 509, 90 Am. St. Rep. 602.

Washington. — McConkey *v.* Oregon, etc., R. Co., 35 Wash. 55; Dotta *v.* Northern Pac. R. Co., 36 Wash. 506.

754. (bb) *For Children.* — See notes 1, 2.

(cc) *Place of Apprehended Danger.* — See notes 3, 4, 5.

hh. SIGNALS AND WARNINGS — (aa) *In General.* — See note 7.

755. See notes 1, 2.

Failure to Give Signal Must Be Proximate Cause of Injury. — See notes 3, 4.

756. (bb) *Place of Apprehended Danger.* — See note 1.

Backing Train. — See note 3.

(cc) *Crossing Signals.* — See note 5.

757. See note 2.

(dd) *Violation of Statute or Municipal Ordinance.* — See notes 4, 5, 6.

754. 1. Lookout Required for Children. — *Olivares v. San Antonio, etc., R. Co.,* (Tex. Civ. App. 1904) 84 S. W. Rep. 248; *Missouri, etc., R. Co. v. Hammer,* 34 Tex. Civ. App. 354. See also *St. Louis Southwestern R. Co. v. Bolton,* 36 Tex. Civ. App. 87.

2. Jurisdictions Holding Lookout for Children Unnecessary. — *Cleveland, etc., R. Co. v. Largent,* 108 Ill. App. 650; *Wagner v. Chicago, etc., R. Co.,* 124 Iowa 462, 122 Iowa 360; *Gregory v. Wabash R. Co.,* 126 Iowa 230; *Louisville, etc., R. Co. v. Logsdon,* (Ky. 1904) 81 S. W. Rep. 657. See also *Southern R. Co. v. Eubanks,* 117 Ga. 217.

3. Lookout Required Where Reason to Apprehend Danger. — *Alabama G. S. R. Co. v. Guest,* 136 Ala. 348; *Bullard v. Southern R. Co.,* 116 Ga. 644; *Ashworth v. Southern R. Co.,* 116 Ga. 635; *Kentucky, etc., Bridge, etc., Co. v. Sydor,* (Ky. 1904) 82 S. W. Rep. 989; *Ayers v. Wabash R. Co.,* 190 Mo. 228; *Murrell v. Missouri Pac. R. Co.,* 105 Mo. App. 88; *Sentell v. Southern R. Co.,* 70 S. Car. 183; *Central Texas, etc., R. Co. v. Gibson,* 35 Tex. Civ. App. 66; *Williamson v. Southern R. Co.,* (Va. 1905) 51 S. E. Rep. 195; *McConkey v. Oregon R., etc., Co.,* 35 Wash. 55. See also *Van Bach v. Missouri Pac. R. Co.,* 171 Mo. 338.

No Liability Where Failure to Keep Lookout Is Not Proximate Cause of Injury. — *Missouri Pac. R. Co. v. Jaffi,* 67 Kan. 81.

The Degree of Care Varies as the known probabilities of danger vary along different portions of the road. *Missouri, etc., R. Co. v. Hammer,* 34 Tex. Civ. App. 354.

4. Corbett v. Oregon Short Line R. Co., 25 Utah 449. See also *Louisville, etc., R. Co. v. Logsdon,* (Ky. 1904) 81 S. W. Rep. 657.

5. Murrell v. Missouri Pac. R. Co., 105 Mo. App. 88; *Ayers v. Wabash R. Co.,* 190 Mo. 228; *Sentell v. Southern R. Co.,* 70 S. Car. 183; *McKeown v. South Carolina, etc., Extension R. Co.,* 68 S. Car. 483; *Williamson v. Southern R. Co.,* (Va. 1905) 51 S. E. Rep. 195.

7. No Duty to Give Warning in General. — *Kinnare v. Chicago, etc., R. Co.,* 114 Ill. App. 230; *James v. Illinois Cent. R. Co.,* 195 Ill. 327; *Cleveland, etc., R. Co. v. Cline,* 111 Ill. App. 416; *Chesapeake, etc., R. Co. v. See,* (Ky. 1904) 79 S. W. Rep. 252; *Dorsey v. Louisville, etc., R. Co.,* (Ky. 1904) 80 S. W. Rep. 1131; *Carrier v. Missouri Pac. R. Co.,* 175 Mo. 470; *Le Duc v. New York Cent., etc., R. Co.,* 92 N. Y. App. Div. 107; *Pharr v. Southern R. Co.,* 133 N. Car. 610; *Cleveland, etc., R. Co. v. Stein,* 24 Ohio Cir. Ct. 643; *Hortenstein v. Virginia-Carolina R. Co.,* 102 Va. 914. See

also *Wilmurth v. Illinois Cent. R. Co.,* (Ky. 1903) 76 S. W. Rep. 193.

No Duty to Give Signals at Private Crossings. — *Ayers v. Wabash R. Co.,* 190 Mo. 228.

Duty to Driver of Teams Near Right of Way. — *St. Louis Southwestern R. Co. v. Kilman,* (Tex. Civ. App. 1905) 86 S. W. Rep. 1050.

No Duty to Give Warning to Licensee. — *Illinois Cent. R. Co. v. Schmitt,* 100 Ill. App. 490.

755. 1. Dilas v. Chesapeake, etc., R. Co., (Ky. 1903) 71 S. W. Rep. 492.

2. Timely Warning Necessary Where Person Is Seen. — *St. Louis, etc., R. Co. v. Evans,* (Ark. 1905) 86 S. W. Rep. 427; *Gregory v. Wabash R. Co.,* 126 Iowa 230; *Wilmurth v. Illinois Cent. R. Co.,* (Ky. 1903) 76 S. W. Rep. 193; *Reyburn v. Missouri Pac. R. Co.,* 187 Mo. 565; *Greene v. New York, etc., R. Co.,* 102 N. Y. App. Div. 322; *St. Louis Southwestern R. Co. v. Allen,* 35 Tex. Civ. App. 355.

3. No Liability Where Failure to Give Signal Is Not Proximate Cause of Injury. — *Nashville, etc., R. Co. v. Harris,* (Ala. 1904) 37 So. Rep. 794; *Missouri Pac. R. Co. v. Jaffi,* 67 Kan. 81.

4. Where Person Had Notice of Approach of Train. — *Carpenter v. Chicago, etc., R. Co.,* 126 Iowa 94. See also *Chicago, etc., R. Co. v. Vremeister,* 112 Ill. App. 346.

756. 1. Signals Required at Place of Apprehended Danger. — *Southern R. Co. v. Crenshaw,* 136 Ala. 573; *Alabama G. S. R. Co. v. Guest,* 136 Ala. 348; *Bullard v. Southern R. Co.,* 116 Ga. 644; *Keller v. Erie R. Co.,* 98 N. Y. App. Div. 550; *Cooper v. Charleston, etc., R. Co.,* 65 S. Car. 214; *Ray v. Chesapeake, etc., R. Co.,* 57 W. Va. 333. See also *McKeown v. South Carolina, etc., Extension R. Co.,* 68 S. Car. 483.

Starting Cars in Yard. — See *supra*, this title, **745. 3.**

3. See Cleveland, etc., R. Co. v. Cline, 111 Ill. App. 416.

5. Crossing Signals Held Not Intended for Trespassers. — *Dilas v. Chesapeake, etc., R. Co.,* (Ky. 1903) 71 S. W. Rep. 492. See also *Texas, etc., R. Co. v. Shoemaker,* 98 Tex. 451. And see the title **CROSSINGS, 410. 1. 2.**

757. 2. Failure to Give Signal a Fact Tending to Show Negligence. — See *Ray v. Chesapeake, etc., R. Co.,* 57 W. Va. 333.

4. Violation of Statute Negligence. — *Cincinnati, etc., R. Co. v. Davis,* (C. C. A.) 127 Fed. Rep. 933; *Peters v. Southern R. Co.,* 135 Ala. 533; *Mitchell v. Union Terminal R. Co.,* 122 Iowa 237; *Stevens v. Yazoo, etc., R. Co.,* 81 Miss. 195; *Davis v. Atlanta, etc., Air Line R. Co.,* 63 S. Car. 370; *Missouri, etc., R. Co. v. Taff,* 31 Tex. Civ. App. 657. See also *Royle v.*

757. (cc) *Running Train Without Headlight.* — See note 7.

758. See note 1.

(gg) *Duty to Heed Signal of Stranger.* — See note 4.

ii. RATE OF SPEED — (aa) *In General.* — See note 6.

759. See note 1.

In Towns and Cities. — See note 2.

Passing Station When Train Is Receiving or Discharging Passengers. — See note 3.

(bb) *Violation of Statute or Ordinance Regulating Speed.* — See note 5.

760. See notes 1, 2.

Contributory Negligence as Defense. — See notes 4, 5.

761. kk. *DUTY TO STOP TRAIN.* — See note 4.

763. (7) *Contributory Negligence* — (a) *Voluntarily Occupying Place of Danger* — aa. *IN GENERAL.* — See note 4.

764. bb. *SLEEPING ON TRACK.* — See notes 1, 2.

Canadian Northern R. Co., 14 Manitoba 275. *Contra*, Batchelder v. Boston, etc., R. Co., 72 N. H. 528.

757. 5. *Violation of Ordinance.* — Pittsburgh, etc., R. Co. v. Lighthouse, 163 Ind. 247; Galveston, etc., R. Co. v. Levy, 35 Tex. Civ. App. 107.

Injury to Employee of Contractor. — Southern R. Co. v. Drake, 107 Ill. App. 12.

6. Kinnare v. Chicago, etc., R. Co., 114 Ill. App. 230; Illinois Cent. R. Co. v. Schmitt, 100 Ill. App. 490; Cleveland, etc., R. Co. v. Cline, 111 Ill. App. 416; Pittsburgh, etc., R. Co. v. Kinnare, 203 Ill. 388. See also Chesapeake, etc., R. Co. v. See, (Ky. 1904) 79 S. W. Rep. 252; Cleveland, etc., R. Co. v. Workman, 66 Ohio St. 509, 90 Am. St. Rep. 602.

7. *Running Engine Without Headlight.* — Compare Illinois Cent. R. Co. v. Schmitt, 100 Ill. App. 490.

758. 1. *Trespasser.* — Chesapeake, etc., R. Co. v. See, (Ky. 1904) 79 S. W. Rep. 252; Gilliam v. Texas, etc., R. Co., 114 La. 272.

Licensee. — Williamson v. Southern R. Co., (Va. 1905) 51 S. E. Rep. 195.

4. See Fitzgibbons v. Manhattan R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 341.

6. *High Rate of Speed Not Negligence Per Se.* — McLaughlin v. Chicago, etc., R. Co., 115 Ill. App. 262; Boyd v. Chicago, etc., R. Co., 103 Ill. App. 199; Illinois Cent. R. Co. v. Schmitt, 100 Ill. App. 490; Gregory v. Louisville, etc., R. Co., (Ky. 1904) 79 S. W. Rep. 238; Custer v. Baltimore, etc., R. Co., 206 Pa. St. 529.

759. 1. Boyd v. Chicago, etc., R. Co., 103 Ill. App. 199.

2. *High Speed in Towns and Cities.* — Southern R. Co. v. Crenshaw, 136 Ala. 573; Alabama G. S. R. Co. v. Guest, 136 Ala. 348; Bullard v. Southern R. Co., 116 Ga. 644; Custer v. Baltimore, etc., R. Co., 206 Pa. St. 529; Texas, etc., R. Co. v. Ball, (Tex. Civ. App. 1903) 73 S. W. Rep. 420.

3. Chicago, etc., R. Co. v. Jennings, 190 Ill. 478; Chicago, etc., R. Co. v. Taylor, 102 Ill. App. 445.

5. *Violation of Statute or Ordinance Regulating Speed as Negligence Per Se.* — Stevens v. Yazoo, etc., R. Co., 81 Miss. 195; Murrell v. Missouri Pac. R. Co., 105 Mo. App. 88; Missouri, etc., R. Co. v. Owens, (Tex. Civ. App. 1903) 75 S. W. Rep. 581; International, etc., R. Co. v. Hall,

35 Tex. Civ. App. 545; Missouri, etc., R. Co. v. Owens, (Tex. Civ. App. 1903) 75 S. W. Rep. 581; Grand Trunk R. Co. v. Hainer, 36 Can. Sup. Ct. 180. See also Colorado Midland R. Co. v. Robbins, 30 Colo. 449. But see Andreas v. C. P. R. Co., 2 West L. Rep. 249.

Negligence as to Employee. — Missouri, etc., R. Co. v. Penny, (Tex. Civ. App. 1905) 87 S. W. Rep. 718.

Statute Not for Protection of Employee. — Erie R. Co. v. McCormick, 69 Ohio St. 45.

760. 1. *Presumption of Negligence under Illinois Statute.* — Illinois Cent. R. Co. v. Eicher, 100 Ill. App. 599, affirmed 202 Ill. 556; Southern R. Co. v. Drake, 107 Ill. App. 12; Chicago, etc., R. Co. v. Crose, 214 Ill. 602, 105 Am. St. Rep. 135.

2. *A Circumstance Showing Negligence.* — Colorado Midland R. Co. v. Robbins, 30 Colo. 449. See also Boggero v. Southern R. Co., 64 S. Car. 104.

4. *Contributory Negligence as Defense.* — Illinois Cent. R. Co. v. Eicher, 202 Ill. 556; International, etc., R. Co. v. Hall, 35 Tex. Civ. App. 545; Kroeger v. Texas, etc., R. Co., 30 Tex. Civ. App. 87. See also Garlich v. Northern Pac. R. Co., (C. C. A.) 131 Fed. Rep. 837; Pharr v. Southern R. Co., 133 N. Car. 610.

5. See Kinnare v. Chicago, etc., R. Co., 114 Ill. App. 230.

761. 4. *Duty to Stop Train.* — Carrier v. Missouri Pac. R. Co., 175 Mo. 470; Woods v. Wabash R. Co., 188 Mo. 229; Chicago, etc., R. Co. v. Lilley, (Neb. 1903) 93 N. W. Rep. 1012; Missouri Pac. R. Co. v. Hansen, 48 Neb. 232; Fitzgibbons v. Manhattan R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 341; McCall v. Southern R. Co. 129 N. Car. 298; Glenn v. Norfolk, etc., R. Co., 128 N. Car. 184; Savage v. Southern R. Co., 103 Va. 422. See also St. Louis Southern R. Co. v. Allen, 35 Tex. Civ. App. 355.

763. 4. *Voluntarily Occupying Place of Danger.* — Atchison, etc., R. Co. v. Withers, 69 Kan. 620 (standing near track in yard); Zumault v. Kansas City Suburban Belt R. Co., 175 Mo. 288 (sitting on platform too close to track).

764. 1. *Sleeping on Railroad Track.* — Dugan v. Chesapeake, etc., R. Co., (Ky. 1903) 72 S. W. Rep. 291; Clegg v. Southern R. Co., 132 N. Car. 292, rehearing denied 133 N. Car.

761. *cc.* GOING UNDER OR BETWEEN CARS. — See note 4.

dd. PERSONS OF DEFECTIVE SENSES WALKING ON TRACK. — See note 7.

ee. CROSSING RAILROAD BRIDGE OR TRESTLE. — See note 9.

765. (b) Failure to Look and Listen for Approaching Trains — *aa.* IN GENERAL. — See notes 3, 4.

766. See notes 1, 2.

303; *Upton v. South Carolina, etc.*, Extension R. Co., 128 N. Car. 173; *Smith v. International, etc.*, R. Co., 34 Tex. Civ. App. 209.

764. 2. While Intoxicated. — *Ayers v. Wabash R. Co.*, 190 Mo. 228; *Stewart v. North Carolina R. Co.*, 136 N. Car. 385; *Gulf, etc.*, R. Co. *v.* *Matthews*, 32 Tex. Civ. App. 137.

4. Passing Between Cars of Train. — *Illinois Cent. R. Co. v. Broughton*, (Ky. 1904) 78 S. W. Rep. 876; *Nichols v. Gulf, etc.*, R. Co., 82 Miss. 126; *Furey v. New York Cent., etc.*, R. Co., 67 N. J. L. 270.

Circumstances Making Negligence of Act Question of Fact. — *Copley v. Union Pac. R. Co.*, 26 Utah 361.

7. Contributory Negligence for Deaf Person to Walk on Track. — *Carrier v. Missouri Pac. R. Co.*, 175 Mo. 470; *Roach v. Atlanta, etc.*, R. Co., 119 Ga. 98.

Contributory Negligence for Epileptic to Walk on Track. — *Marks v. Atlantic Coast Line R. Co.*, 133 N. Car. 89.

9. Attempt to Cross Railroad Bridge or Trestle. — *Seaboard Air-Line R. Co. v. Shigg*, 117 Ga. 454; *Weeks v. Wilmington, etc.*, R. Co., 131 N. Car. 78; *International, etc.*, R. Co. *v.* *De Ollos*, (Tex. Civ. App. 1903) 76 S. W. Rep. 222; *McCowen v. Gulf, etc.*, R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 46; *McConkey v. Oregon R., etc.*, Co., 35 Wash. 55.

Not Negligence Per Se. — *Harris v. Atlantic Coast Line R. Co.*, 132 N. Car. 160.

765. 3. The Fact that a Person Is upon the Track by Right. — *Denver, etc.*, R. Co. *v.* *Buffehr*, 30 Colo. 27; *Zirkle v. Missouri Pac. R. Co.*, 67 Kan. 77; *Atchison, etc.*, R. Co. *v.* *Withers*, 69 Kan. 620; *St. Louis Southwestern R. Co. v. Branom*, (Tex. Civ. App. 1903) 73 S. W. Rep. 1064; *Gulf, etc.*, R. Co. *v.* *Miller*, 30 Tex. Civ. App. 122; *French v. Grand Trunk R. Co.*, 76 Vt. 441.

Rule Not Absolute. — See *Grand Trunk R. Co. v. Hainer*, 36 Can. Sup. Ct. 180.

4. Stepping upon Railroad Track Without Looking or Listening. — *United States. — Garlich v. Northern Pac. R. Co.*, (C. C. A.) 131 Fed. Rep. 837.

Alabama. — Louisville, etc., R. Co. *v.* *Mitchell*, 134 Ala. 261; *Peters v. Southern R. Co.*, 135 Ala. 533.

Arkansas. — St. Louis, etc., R. Co. *v.* *Evans*, (Ark. 1905) 86 S. W. Rep. 427; *Burns v. St. Louis Southwestern R. Co.*, (Ark. 1905) 88 S. W. Rep. 824.

Colorado. — Denver, etc., R. Co. *v.* *Buffehr*, 30 Colo. 27.

Indiana. — Chicago, etc., R. Co. *v.* *Reed*, 29 Ind. App. 94; *Malo't v. Hawkins* 159 Ind. 127.

Kansas. — St. Louis, etc., R. Co. *v.* *Brock*, 64 Kan. 90.

Maine. — Day v. Boston, etc., R. Co., 96 Me. 207, 90 Am. St. Rep. 335.

Maryland. — Baltimore, etc., R. Co. *v.* *State*, 96 Md. 67.

Massachusetts. — Raymond v. New York, etc., R. Co., 182 Mass. 337.

Mississippi. — Hackney v. Illinois Cent. R. Co., (Miss. 1903) 33 So. Rep. 723.

Missouri. — Engleking v. Kansas City, etc., R. Co., 187 Mo. 158.

New York. — Le Duc v. New York Cent., etc., R. Co., 92 N. Y. App. Div. 107; *Cox v. New York Cent., etc.*, R. Co., 69 N. Y. App. Div. 451.

North Carolina. — Pharr v. Southern R. Co., 133 N. Car. 610.

Ohio. — Lake Shore, etc., R. Co. *v.* *Callahan*, 25 Ohio Cir. Ct. 115; *Cleveland, etc.*, R. Co. *v.* *Stein*, 24 Ohio Cir. Ct. 643.

South Carolina. — Edwards v. Southern R. Co., 63 S. Car. 271.

Tennessee. — Louisville, etc., R. Co. *v.* *Satterwhite*, 112 Tenn. 185.

Texas. — International, etc., R. Co. *v.* *De Ollos*, (Tex. Civ. App. 1903) 76 S. W. Rep. 222; *Lumsden v. Chicago, etc.*, R. Co., 31 Tex. Civ. App. 604; *St. Louis Southwestern R. Co. v. Branom*, (Tex. Civ. App. 1903) 73 S. W. Rep. 1064.

Vermont. — French v. Grand Trunk R. Co., 76 Vt. 441.

Virginia. — Savage v. Southern R. Co., 103 Va. 422.

Wisconsin. — Steber v. Chicago, etc., R. Co., 115 Wis. 200.

Canada. — Champaigne v. Grand Trunk R. Co., 9 Ont. L. Rep. 589; *Sims v. Grand Trunk R. Co.*, 10 Ont. L. Rep. 330; *Moyer v. Grand Trunk R. Co.*, 3 Can. R. Cas. 1; *Wright v. Grand Trunk R. Co.*, 4 Can. R. Cas. 202.

766. 1. Standing On or Beside Railroad Track. — *Wilson v. Illinois Cent. R. Co.*, 210 Ill. 603; *Zirkle v. Missouri Pac. R. Co.*, 67 Kan. 77; *Atchison, etc.*, R. Co. *v.* *Withers*, 69 Kan. 620; *Meinrenken v. New York Cent., etc.*, R. Co., 81 N. Y. App. Div. 132.

Sitting on Track. — Texas, etc., R. Co. *v.* *McDonald*, (Tex. 1905) 88 S. W. Rep. 201; *Hughes v. Louisville, etc.*, R. Co., (Ky. 1902) 67 S. W. Rep. 984.

Lying on Track. — Gilliam v. Texas, etc., R. Co., 114 La. 272.

2. Walking On or Beside Track — *United States. — Louisville, etc.*, R. Co. *v.* *McClish*, (C. C. A.) 115 Fed. Rep. 268; *Garlich v. Northern Pac. R. Co.*, (C. C. A.) 131 Fed. Rep. 837.

Arkansas. — Burns v. St. Louis Southwestern R. Co., (Ark. 1905) 88 S. W. Rep. 824.

Colorado. — Denver, etc., R. Co. *v.* *Buffehr*, 30 Colo. 27.

Kansas. — Atchison, etc., R. Co. *v.* *Schwindt*, 67 Kan. 8.

Louisiana. — White v. Illinois Cent. R. Co., 114 La. 825.

767. See notes 1, 2, 4, 5, 6, 7.

768. *bb. CROSSING TRACKS AT STATIONS.* — See note 2.

(c) *Attempting to Cross Track in Front of Approaching Train.* — See note 5.

769. (d) *Remaining on Track with Knowledge of Approaching Train.* — See note 4.

(e) *Mismanagement of Horses Frightened by Train.* — See note 7.

(f) *Acts Done or Omitted in Emergencies.* — See note 11.

770. (8) *Presumption of Negligence.* — See notes 2, 3.

772. IX. SALES, LEASES, AND CONSOLIDATION — 2. Sales — a. POWER TO BUY OR SELL IN GENERAL — (1) Rule Stated — (b) Power to Buy — Parallel or Competing Lines. — See note 1.

b. STATUTORY AUTHORITY TO SELL — (1) In General. — See note 5.

774. (2) *Rights and Liabilities of Purchasers — (b) Liabilities of Purchasers — aa. LIABILITIES TO PUBLIC.* — See note 4.

bb. LIABILITIES TO INDIVIDUALS — (aa) Contracts of Vendor in General. — See note 8.

Mississippi. — Illinois Cent. R. Co. v. Jones, (Miss. 1903) 35 So. Rep. 193.

Missouri. — Engleking v. Kansas City, etc., R. Co., 187 Mo. 158.

New Hampshire. — Batchelder v. Boston, etc., R. Co., 72 N. H. 528.

North Carolina. — Bessent v. Southern R. Co., 132 N. Car. 934; Clegg v. Southern R. Co., 132 N. Car. 292, rehearing denied 133 N. Car. 303; Carter v. Southern R. Co., 135 N. Car. 498.

Ohio. — Lake Shore, etc., R. Co. v. Callahan, 25 Ohio Cir. Ct. 115.

Texas. — International, etc., R. Co. v. De Ollos, (Tex. Civ. App. 1903) 76 S. W. Rep. 222; Gulf, etc., R. Co. v. Miller, 30 Tex. Civ. App. 122.

Virginia. — Savage v. Southern R. Co., 103 Va. 422.

Washington. — Hamlin v. Columbia, etc., R. Co., 37 Wash. 448.

Knowledge that Train Is Behind Him. — Meinrenken v. New York Cent., etc., R. Co., 81 N. Y. App. Div. 132.

767. 1. *Intoxication of Person Injured.* — Gilliam v. Texas, etc., R. Co., 114 La. 272. Compare McClanahan v. Vicksburg, etc., R. Co., 111 La. 781.

2. *Zirkle v. Missouri Pac. R. Co.*, 67 Kan. 77.

4. *Van Bach v. Missouri Pac. R. Co.*, 171 Mo. 338; *St. Louis Southwestern R. Co. v. Branom*, (Tex. Civ. App. 1903) 73 S. W. Rep. 1064.

5. *Bessent v. Southern R. Co.*, 132 N. Car. 934.

6. *Track Obscured by Smoke.* — Keller v. Erie R. Co., 98 N. Y. App. Div. 550.

7. *Sound of Approaching Train Drowned by Nearer Noise.* — Garlich v. Northern Pac. R. Co., (C. C. A.) 131 Fed. Rep. 837; *Meinrenken v. New York Cent., etc., R. Co.*, 81 N. Y. App. Div. 132; *Keller v. Erie R. Co.*, 98 N. Y. App. Div. 550.

768. 2. *Crossing Tracks at Stations.* — Compare Steber v. Chicago, etc., R. Co., 115 Wis. 200.

Person Must Look and Listen for Expected Train. — Louisville, etc., R. Co. v. Satterwhite, 112 Tenn. 185.

5. *Attempting to Cross Track in Front of Approaching Train.* — Van Bach v. Missouri Pac.

R. Co., 171 Mo. 338; *Keller v. Erie R. Co.*, 98 N. Y. App. Div. 550.

769. 4. *Remaining on Track with Knowledge of Approaching Train.* — Gallagher v. Northern Pac. R. Co., 94 Minn. 64; *Bessent v. Southern R. Co.*, 132 N. Car. 934, holding further that failure of the engineer to give signals will not excuse the plaintiff's negligence; *Lake Shore, etc., R. Co. v. Callahan*, 25 Ohio Cir. Ct. 115.

7. *Jumping from Vehicle Not Negligence.* — Where a horse has been frightened through the negligence of a railroad it is not negligence for the driver to jump from the vehicle to escape more imminent danger, *Chesapeake, etc., R. Co. v. Ogles*, (Ky. 1903) 73 S. W. Rep. 751; or for the purpose of holding the horse, especially where a child is in the vehicle, *St. Louis, etc., R. Co. v. Boback*, 71 Ark. 427.

11. *Acts Done or Omitted in Emergencies.* — Atlanta, etc., R. Co. v. Roberts, 116 Ga. 505; *Chesapeake, etc., R. Co. v. Ogles*, (Ky. 1903) 73 S. W. Rep. 751; *Weeks v. Wilmington, etc., R. Co.*, 131 N. Car. 78; *St. Louis Southwestern R. Co. v. Bolton*, 36 Tex. Civ. App. 87; *Texas, etc., R. Co. v. Berry*, 32 Tex. Civ. App. 259.

770. 2. *Proof of Injury Does Not Raise Presumption of Negligence.* — Upton v. South Carolina, etc., Extension R. Co., 128 N. Car. 173; *Stewart v. North Carolina R. Co.*, 136 N. Car. 385; *Clegg v. Southern R. Co.*, 132 N. Car. 292, rehearing denied 133 N. Car. 303; *Southern R. Co. v. Back*, 103 Va. 778; *Southern R. Co. v. Hall*, 102 Va. 135.

3. *Finding Dead Body Beside Track No Evidence of Negligence.* — Texas, etc., R. Co. v. Shoemaker, 98 Tex. 451.

772. 1. *Purchase of Parallel or Competing Lines Expressly Prohibited.* — Yazoo, etc., R. Co. v. Southern R. Co., 83 Miss. 746, discussing also the question what are competing lines.

5. *Authority to Sell Conferred by Statute.* — Louisville, etc., R. Co. v. Jarvis, (Ky. 1905) 87 S. W. Rep. 759.

774. 4. *Duty to Public.* — Hawkins v. Central of Georgia R. Co., 119 Ga. 159.

8. *Purchaser Not Bound by Vendor's Contracts.* — Seaboard Air-Line R. Co. v. Leader, 115 Ga. 702; *Hawkins v. Central of Georgia R. Co.*, 119 Ga. 159; *Hukle v. Atchison, etc., R. Co.*, (Kan. 1905) 80 Pac. Rep. 603.

775. See notes 2, 3.

(bb) *Torts of Vendor in General.* — See notes 4, 6.

777. 3. Leases — a. POWER TO MAKE OR TAKE LEASES — (1) *No Power unless Given by Statute.* — See note 1.

Effect of Unauthorized Lease. — See note 4.

778. Liability for Acts of Lessee. — See note 2.

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(2) *Lease Authorized by Statute* — (a) *In General.* — See note 6.

779. (c) Limitations and Restrictions — aa. CONTINUOUS OR CONNECTING LINES. — See note 3.

780. "Continuous" Lines. — See note 1.

"Connected" Lines. — See note 2.

bb. PARALLEL AND COMPETING LINES. — See note 4.

Effect of Prohibited Lease. — See note 6.

cc. RULE AS TO FOREIGN RAILROAD COMPANIES. — See note 8.

Lease to Foreign Companies Expressly Forbidden. — See note 10.

781. b. REQUISITES AND VALIDITY OF LEASES — (2) *Term of Lease.* — See note 11.

782. (3) *Consent of Stockholders* — (a) Requirements in General. — See note 5.

(b) Proportion of Consenting Stockholders. — See note 9.

783. (a) Effect of Failure to Obtain Consent. — See note 1.

784. c. OPERATION AND EFFECT OF LEASES — (1) *As to Lessor* — (b) Liabilities of Lessor — aa. IN GENERAL. — See note 3.

775. 2. Assumption of Liability by Purchaser. — Seaboard Air-Line R. Co. v. Leader, 115 Ga. 702.

3. Liability Imposed by Statute. — Seaboard Air-Line R. Co. v. Leader, 115 Ga. 702; Missouri, etc., R. Co. v. Carter, 95 Tex. 461.

4. Purchaser Not Liable for Torts of Vendor. — Julian v. Central Trust Co., 193 U. S. 93; Hawkins v. Central of Georgia R. Co., 119 Ga. 159; Seaboard Air-Line R. Co. v. Leader, 115 Ga. 702; Burge v. St. Louis, etc., R. Co., 100 Mo. App. 460.

6. Liability Imposed by Statute Authorizing Sale. — Missouri, etc., R. Co. v. Warner, 30 Tex. Civ. App. 280.

777. 1. No General Power to Make Leases. — Louisiana, etc., R. Co. v. State, (Ark. 1905) 88 S. W. Rep. 559; Chicago, etc., R. Co. v. Hart, 209 Ill. 414, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 777.

Lease Void for Failure of Lessor to Comply with Charter. — Brooklyn, etc., R. Co. v. Long Island R. Co., 72 N. Y. App. Div. 496.

4. Unauthorized Lease Held Void. — Louisiana, etc., R. Co. v. State, (Ark. 1905) 88 S. W. Rep. 559; Georgia R., etc., Co. v. Maddox, 116 Ga. 64; Chicago, etc., R. Co. v. Hart, 209 Ill. 414, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 777; Yazoo, etc., R. Co. v. Southern R. Co., 83 Miss. 746.

778. 2. Lessor Liable for Lessee's Act. — Chicago, etc., R. Co. v. Hart, 209 Ill. 414, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 778.

5. Unauthorized Lease as Ground of Forfeiture of Lessee's Charter. — See Louisiana, etc., R. Co. v. State, (Ark. 1905) 88 S. W. Rep. 559.

6. Leases Authorized by Statute. — Georgia R., etc., Co. v. Maddox, 116 Ga. 64; Markey v. Louisiana, etc., R. Co., 185 Mo. 348; Worm-

ser v. Metropolitan St. R. Co., 98 N. Y. App. Div. 29.

779. 3. Authority to Lease Connecting or Continuous Line. — Georgia R., etc., Co. v. Maddox, 116 Ga. 64. See also Hughes v. Louisville, etc., R. Co., (Ky. 1902) 67 S. W. Rep. 984.

780. 1. Point of Connection. — See Missouri, etc., R. Co. v. Jolly, 31 Tex. Civ. App. 512.

2. Connected Line Defined. — Georgia R., etc., Co. v. Maddox, 116 Ga. 64.

4. Leases of Parallel and Competing Lines Expressly Prohibited. — Yazoo, etc., R. Co. v. Southern R. Co., 83 Miss. 746.

6. Lease Void Ab Initio. — Yazoo, etc., R. Co. v. Southern R. Co., 83 Miss. 746.

Rent Due on Void Lease Not Recoverable. — Cox v. Terre Haute, etc., R. Co., 123 Fed. Rep. 439, affirmed (C. C. A.) 133 Fed. Rep. 371.

8. Leases to Foreign Companies Expressly Authorized. — Markey v. Louisiana, etc., R. Co., 185 Mo. 348.

10. Leases to Foreign Companies Expressly Prohibited — Louisiana, etc., R. Co. v. State, (Ark. 1905) 88 S. W. Rep. 559.

781. 11. Term of Lease Limited by Statute. — Wormser v. Metropolitan St. R. Co., 98 N. Y. App. Div. 29.

782. 5. Consent of Stockholders Required. — Louisiana, etc., R. Co. v. State, (Ark. 1905) 88 S. W. Rep. 559.

9. Consent of More than Majority — Two-thirds. — Louisiana, etc., R. Co. v. State, (Ark. 1905) 88 S. W. Rep. 559.

783. 1. Consent Waived by Stockholders. — Louisiana, etc., R. Co. v. State, (Ark. 1905) 88 S. W. Rep. 559.

784. 3 Duties and Liabilities of Lessor Not Affected by Lease. — Hawkins v. Central of Georgia R. Co., 119 Ga. 159; Chicago, etc., R.

784. Construction and Maintenance of Road. — See note 4.

785. *bb.* NEGLIGENT OPERATION BY LESSEE — (*aa*) Rule Holding Lessor Liable. — See notes 1, 2.

Injuries to Lessee's Servants. — See note 5.

(*bb*) Rule Denying Liability of Lessor. — See note 7.

786. Possession Retained by Lessor. — See note 1.

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788. (2) Rights and Liabilities of Lessee — (b) Construction, Maintenance, and Operation of Road — Negligence in Operation of Road. — See notes 2, 4, 5.

792. X. CRIMES AND OFFENSES — 2. Against Railroads — *a.* SHOOTING OR THROWING AT TRAIN. — See note 4.

b. OBSTRUCTING RAILROADS — (1) *In General.* — See note 7.

(2) *To What Railroads Applicable.* — See note 9.

793. (3) *Nature of Obstruction* — (a) *In General.* — See note 1.

Co. v. Hart, 209 Ill. 414, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 784; Southern R. Co. v. Sittasen, (Ind. App. 1905) 74 N. E. Rep. 898, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 784; Muntz v. Algiers, etc., R. Co., 111 La. 403, 100 Am. St. Rep. 495; State v. Mobile, etc., R. Co. 86 Miss. 172.

784. 4. Liability of Lessor as to Construction and Maintenance of Road. — Southern R. Co. v. Sittasen, (Ind. App. 1905) 74 N. E. Rep. 898, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 784; Chicago Terminal Transfer R. Co. v. Vandenberg, 164 Ind. 470.

785. 1. Lessor Held Liable for Lessee's Negligence — *Illinois.* — Chicago, etc., R. Co. v. Hart, 209 Ill. 414; Chicago Union Traction Co. v. Stanford, 104 Ill. App. 99; Chicago, etc., R. Co. v. Donworth, 105 Ill. App. 400, reversed on another point 203 Ill. 192; Chicago, etc., R. Co. v. Hart, 104 Ill. App. 57, affirmed 209 Ill. 414; Chicago, etc., R. Co. v. Schmitz, 211 Ill. 446; Chicago, etc., R. Co. v. Newell, 113 Ill. App. 263, affirmed 212 Ill. 332; West Chicago St. R. Co. v. Anderson, 102 Ill. App. 310, affirmed 200 Ill. 329.

Indiana. — Southern R. Co. v. Sittasen, (Ind. App. 1905) 74 N. E. Rep. 898, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 785.

Louisiana. — Muntz v. Algiers, etc., R. Co., 111 La. 423, 100 Am. St. Rep. 495, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 785.

North Carolina. — Julian v. Central Trust Co., 193 U. S. 93; Perry v. Western North Carolina R. Co., 129 N. Car. 333; Smith v. Atlanta, etc., R. Co., 130 N. Car. 344; Brown v. Atlanta, etc., Air Line R. Co., 131 N. Car. 455; Raleigh v. North Carolina R. Co., 129 N. Car. 265; Harden v. North Carolina R. Co., 129 N. Car. 354, 85 Am. St. Rep. 747.

South Carolina. — Davis v. Atlanta, etc., Air Line R. Co., 63 S. Car. 370.

Texas. — Missouri, etc., R. Co. v. Owens, (Tex. Civ. App. 1903) 75 S. W. Rep. 581.

2. Rule Founded on Public Policy. — Julian v. Central Trust Co., 193 U. S. 93; West Chicago St. R. Co. v. Anderson, 102 Ill. App. 310, affirmed 200 Ill. 329; Suburban R. Co. v. Balkwill, 195 Ill. 535; Harden v. North Carolina R. Co., 129 N. Car. 354, 85 Am. St. Rep. 747; Davis v. Atlanta, etc., Air Line R. Co., 63 S.

Car. 370. See also Brooker v. Maysville, etc., R. Co., (Ky. 1904) 83 S. W. Rep. 117.

5. Injuries to Lessee's Servants. — Williard v. Spartanburg, etc., R. Co., 124 Fed. Rep. 796; Beltz v. Baltimore, etc., R. Co., 137 Fed. Rep. 1016; Axline v. Toledo, etc., R. Co., 138 Fed. Rep. 169; Lewis v. Maysville, etc., R. Co., (Ky. 1903) 76 S. W. Rep. 526; Swice v. Maysville, etc., R. Co., 116 Ky. 253. *Contra*, Chicago, etc., R. Co. v. Hart, 104 Ill. App. 57, affirmed 209 Ill. 414; Southern R. Co. v. Sittasen, (Ind. App. 1905) 74 N. E. Rep. 898; Markey v. Louisiana, etc., R. Co., 185 Mo. 348 (by statute).

7. Lessor Held Not Liable for Negligence of Lessee. — *Compare* Gulf, etc., R. Co. v. Miller, 35 Tex. Civ. App. 116.

786. 1. Lessor Retaining Possession and Control of Road. — *Compare* Missouri, etc., R. Co. v. Jolly, 31 Tex. Civ. App. 512.

2. Lessor Declared Liable by Statute. — Keller v. Kansas City, etc., R. Co., 135 Fed. Rep. 202.

788. 2. Lessee Liable for Negligence in Operating Road. — Chicago, etc., R. Co. v. Schmitz, 211 Ill. 446; West Chicago St. R. Co. v. Anderson, 102 Ill. App. 310, affirmed 200 Ill. 329; Suburban R. Co. v. Balkwill, 195 Ill. 535; Simpson v. Enfield Lumber Co., 133 N. Car. 95.

4. Joint Liability of Lessor and Lessee. — West Chicago St. R. Co. v. Anderson, 102 Ill. App. 310, affirmed 200 Ill. 329; Chicago, etc., R. Co. v. Schmitz, 211 Ill. 446. See also Suburban R. Co. v. Balkwill, 195 Ill. 535.

5. Liability to Employee for Failure to Furnish Safe Place to Work. — See Illinois Terminal R. Co. v. Thompson, 210 Ill. 226; Illinois Terminal R. Co. v. Thompson, 112 Ill. App. 463, affirmed 210 Ill. 226.

792. 4. Ownership by Chartered Company Not Essential. — See Allen v. State, 123 Ga. 499.

Need Not Be Passenger Coach if Car Contains Passengers. — Burkhardt v. Com., (Ky. 1904) 83 S. W. Rep. 633.

7. Statutory Provisions. — State v. Bisping, 123 Wis. 267.

9. Corporations De Facto. — *Compare* Sanders v. State, 118 Ga. 788.

793. 1. Obstruction on Track. — Sanders v. State, 118 Ga. 329.

Obstruction Need Not Endanger Human Life Nor Prevent Safe Running of Trains. — State v. Bisping, 123 Wis. 267.

RAILROAD SECURITIES.

BY BRISCOE B. CLARK.

798. 1. MORTGAGES — 1. Power to Mortgage — b. STATUTORY AUTHORITY TO MORTGAGE — (1) *In General* — Restrictions upon Power. — See note 3.

801. 2. Requisites and Validity of Mortgage — c. STATUTORY REQUIREMENTS AND RESTRICTIONS — (2) *Registration* — Unrecorded Mortgages. — See note 3.

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803. 3. General Construction of Provisions in Railway Mortgages and Bonds — b. PROVISION FOR APPLICATION OF PROCEEDS OF BONDS SECURED BY MORTGAGE. — See note 1.

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801. 3. Unrecorded Mortgages — Validity. — *State Trust Co. v. Kansas City, etc.*, R. Co., 120 Fed. Rep. 398.

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803. 1. Lease and Mortgage to Complete Road Construed Together — Recovery Allowed Against Lessee. — *Louisville, etc.*, R. Co. v. Schmidt, 112 Ky. 717.

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805. 14. "Appurtenances" or "Property Appertaining." — *Chicago, etc.*, R. Co. v. McGuire, 31 Ind. App. 110, 99 Am. St. Rep. 249.

Another Railroad Subsequently Purchased by the Mortgagor, but at the time of the purchase in no way connected with the original road mortgaged, does not pass under the mortgage as future-acquired property "connected with or issuing from or relating to the said railroad, or the construction, maintenance, and use and enjoyment of the same." *Murray v. Farmville, etc.*, R. Co., 101 Va. 262.

Leasehold Rights Held to Be Covered by Mortgage. — *Guaranty Trust Co. v. Atlantic Coast Electric R. Co.*, 132 Fed. Rep. 68.

15. Lands Purchased for Resale. — *Pardee v. Aldridge*, 189 U. S. 429, affirming 24 Tex. Civ. App. 254.

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806. 6. Land Grants in Aid of Railway Held Not to Pass. — *Everett v. Galveston, etc.*, R. Co., 28 Tex. Civ. App. 528.

808. 1. Rents, Income, and Earnings. — *Rumsey v. People's R. Co.*, 91 Mo. App. 202.

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8. Mortgage of Future Interests. — *Central Trust Co. v. Washington County R. Co.*, 124 Fed. Rep. 813; *Guaranty Trust Co. v. Atlantic Coast Electric R. Co.*, 132 Fed. Rep. 68; *Pere Marquette R. Co. v. Graham*, 136 Mich. 444; *St. Joseph, etc.*, R. Co. v. Smith, 170 Mo. 327; *Flanagan Bank v. Graham*, 42 Oregon 403; *Murray v. Farmville, etc.*, R. Co., 101 Va. 262.

809. 4. Bonds for Purposes Not Within Mortgage. — Where the mortgage securing railway bonds provides that the bonds shall not be issued except for the purpose of constructing the railroad, bonds issued for other purposes are not secured by the mortgage as against holders having knowledge of their improper issuance. *Central Trust Co. v. California, etc.*, R. Co., 110 Fed. Rep. 70, affirmed (C. C. A.) 128 Fed. Rep. 882.

810. 1. Priorities — Creditors. — *Central Trust Co. v. California, etc.*, R. Co., 110 Fed. Rep. 70, affirmed (C. C. A.) 128 Fed. Rep. 882.

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811. *c.* PRIORITY BETWEEN SAME CLASSES OF BONDHOLDERS. — See note 2.

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l. EQUITIES IN CASE OF APPOINTMENT OF RECEIVER — (1) *Claims Arising Prior to Receivership* — (a) *In General* — General Creditors. — See note 6.

816. Operating Expenses. — See notes 1, 2, 3.

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(b) What Constitute Operating Expenses. — See notes 2, 5, 7, 8, 10.

Trust Co. *v.* Kansas City, etc., R. Co., 120 Fed. Rep. 398.

810. 2. Roberts *v.* Central Trust Co., 128 Fed. Rep. 882, 63 C. C. A. 220, *affirming* 110 Fed. Rep. 70; Grand Junction First Nat. Bank *v.* Wyman, 16 Colo. App. 468.

811. 2. Bondholders of Same Class. — Central Trust Co. *v.* California, etc., R. Co., 110 Fed. Rep. 70, *affirmed* (C. C. A.) 128 Fed. Rep. 882; Murray *v.* Farmville, etc., R. Co., 101 Va. 262.

813. 7. Claims for Injuries in the Construction of a Railroad, which result from causes which are temporary in their nature, and which may be remedied without interference with the prudent operation of the road, do not constitute a lien so as to be entitled to priority over a prior mortgage. Tolle *v.* Owensboro, etc., R. Co., 111 Ky. 623.

814. 1. Van Frank *v.* St. Louis, etc., R. Co., 89 Mo. App. 573, 93 Mo. App. 412. See generally the titles MECHANICS' LIENS, **289**, 4 *et seq.*; RAILROADS, **718**, 4 *et seq.*

2. Operating Expenses. — See Bell *v.* St. Johnsbury, etc., R. Co., 76 Vt. 42, construing the statute.

5. Hampton *v.* Norfolk, etc., R. Co., (C. C. A.) 127 Fed. Rep. 662, *affirming* 114 Fed. Rep. 389.

815. 3. King *v.* Thompson, 110 Fed. Rep. 319, 49 C. C. A. 59 (Ohio statute); Kansas City Southern R. Co. *v.* King, (Ark. 1905) 85 S. W. Rep. 1131.

4. Constitutionality. — King *v.* Thompson, 110 Fed. Rep. 319, 49 C. C. A. 59 (Ohio statute); State Trust Co. *v.* Kansas City, etc., R. Co., 115 Fed. Rep. 367 (Arkansas statute).

No Extraterritorial Effect. — Fidelity Ins., etc., Co. *v.* Norfolk, etc., R. Co., 114 Fed. Rep. 389, *affirmed* (C. C. A.) 127 Fed. Rep. 662 (arising under the North Carolina statute).

6. General Claims Prior to Receivership. — Southern R. Co. *v.* Chapman Jack Co., 117 Fed. Rep. 424, 54 C. C. A. 598; Gregg *v.* Metropolitan Trust Co., (C. C. A.) 124 Fed. Rep. 721.

816. 1. Operating Expenses Prior to Receivership. — Fidelity Ins., etc., Co. *v.* Norfolk, etc., R. Co., 114 Fed. Rep. 389, *affirmed* (C. C. A.) 127 Fed. Rep. 662; Southern R. Co. *v.* Chapman Jack Co., 117 Fed. Rep. 424, 54 C. C. A. 598; Grand Junction First Nat. Bank *v.* Wyman, 16 Colo. App. 468; Van Frank *v.* St. Louis, etc., R. Co. 89 Mo. App. 460, 489; Security

Trust Co. *v.* Goble R. Co., 44 Oregon 379, *modifying* 44 Oregon 370. See also Southern R. Co. *v.* Ensign Mfg. Co., (C. C. A.) 117 Fed. Rep. 417, discussing the requisites of a preferential claim. See, however, Van Frank *v.* St. Louis, etc., R. Co., 93 Mo. App. 412.

Rule Not Applicable to Private Railroad. — Grand Junction First Nat Bank *v.* Wyman, 16 Colo. App. 468.

What Constitutes Current Income. — See Gregg *v.* Metropolitan Trust Co., 124 Fed. Rep. 721, 59 C. C. A. 637.

2. Payment from Corpus of Mortgaged Property. — Fidelity Ins., etc., Co. *v.* Norfolk, etc., R. Co., 114 Fed. Rep. 389, *affirmed* (C. C. A.) 127 Fed. Rep. 662; Southern R. Co. *v.* Ensign Mfg. Co., 117 Fed. Rep. 417, 54 C. C. A. 591; Van Frank *v.* St. Louis, etc., R. Co., 89 Mo. App. 489.

3. Van Frank *v.* St. Louis, etc., R. Co., 89 Mo. App. 460; Security Trust Co. *v.* Goble R. Co., 44 Oregon 370.

5. Westinghouse Air Brake Co. *v.* Kansas City Southern R. Co., (C. C. A.) 137 Fed. Rep. 41, *reversing* 128 Fed. Rep. 129, 129 Fed. Rep. 455, *citing* 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 816; Southern R. Co. *v.* Chapman Jack Co., 117 Fed. Rep. 424, 54 C. C. A. 598.

817. 1. State Trust Co. *v.* Kansas City, etc., R. Co., 129 Fed. Rep. 455; Van Frank *v.* St. Louis, etc., R. Co., 89 Mo. App. 460.

2. What Constitute Operating Expenses. — Southern R. Co. *v.* Chapman Jack Co., 117 Fed. Rep. 424, 54 C. C. A. 598; Westinghouse Air Brake Co. *v.* Kansas City Southern R. Co., (C. C. A.) 137 Fed. Rep. 26; Van Frank *v.* St. Louis, etc., R. Co., 89 Mo. App. 460; Security Trust Co. *v.* Goble R. Co. 44 Oregon 370.

Claim for Printing and Stationery Not Entitled to Preference. — Van Frank *v.* St. Louis, etc., R. Co., 89 Mo. App. 489.

5. Attorneys' Fees. — Compare Bell *v.* St. Johnsbury, etc., R. Co., 76 Vt. 42.

7. Money Loaned. — Grand Junction First Nat. Bank *v.* Wyman, 16 Colo. App. 468.

8. Labor and Materials for Original Construction. — Niles Tool Works Co. *v.* Louisville, etc., R. Co., 112 Fed. Rep. 561, 50 C. C. A. 390; Van Frank *v.* St. Louis, etc., R. Co., 89 Mo. App. 573.

10. Instalments on Rolling Stock. — Southern R. Co. *v.* Ensign Mfg. Co., 117 Fed. Rep. 417, 54 C. C. A. 591.

818. See note 2.

(c) *Diversion of Income.* — See note 4.

(2) *Claims Arising under Receivership* — General Rule. — See note 5.

819. Where Income Insufficient. — See note 1.

m. *WAIVER AND POSTPONEMENT OF MORTGAGE LIEN BY AGREEMENT.* — See note 3.

7. Foreclosure — *a.* *SALES UNDER POWER.* — See note 6.

820. *b.* *FORECLOSURE BY BILL IN EQUITY* — (1) *When Right to Foreclose Accrues.* — See note 1.

821. (2) *Who May Sue for Foreclosure* — (a) *Right of Trustee to Foreclose.* — See note 1.

823. (3) *Intervention* — By Bondholders. — See note 9.

824. See note 1.

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825. (5) *Defenses.* — See note 7.

826. (6) *Foreclosure Sale* — (b) *Time of Sale and Adjournments.* — See note 9.

828. (e) *Terms of Sale* — *Upset Price.* — See note 1.

(g) *Who May Purchase at Sale.* — See notes 6, 8.

829. (k) *Vacating Sale* — *Inadequacy of Price.* — See note 9.

830. (m) *General Rights and Liabilities of Purchaser* — *aa.* *TITLE ACQUIRED.* — See note 7.

818. 2. Claims for Torts. — Fidelity Insurance, etc., *Co. v. Norfolk, etc.*, R. Co., 114 Fed. Rep. 389, *affirmed* (C. C. A.) 127 Fed. Rep. 662; *Hampton v. Norfolk, etc.*, R. Co., (C. C. A.) 127 Fed. Rep. 62, *affirming* 114 Fed. Rep. 389.

4. Diversion of Income. — Fidelity Insurance, etc., *Co. v. Norfolk, etc.*, R. Co., 114 Fed. Rep. 389, *affirmed* (C. C. A.) 127 Fed. Rep. 662; *Southern R. Co. v. Ensign Mfg. Co.*, 117 Fed. Rep. 417, 54 C. C. A. 591; *Grand Junction First Nat. Bank v. Wyman*, 16 Colo. App. 468; *Van Frank v. Missouri Pac. R. Co.*, 89 Mo. App. 460; *Van Frank v. St. Louis, etc.*, R. Co., 89 Mo. App. 489.

5. Claims Arising under Receivership. — Fidelity Ins., etc., *Co. v. Norfolk, etc.*, R. Co., 114 Fed. Rep. 389, *affirmed* (C. C. A.) 127 Fed. Rep. 662; *Grand Junction First Nat. Bank v. Wyman*, 16 Colo. App. 468.

819. 1. Where Income Insufficient. — Fidelity Ins., etc., *Co. v. Norfolk, etc.*, R. Co., 114 Fed. Rep. 389, *affirmed* (C. C. A.) 127 Fed. Rep. 662; *Bank of Commerce v. Central Coal, etc., Co.*, (C. C. A.) 115 Fed. Rep. 878; *Van Frank v. St. Louis, etc.*, R. Co., 89 Mo. App. 489; *Townsend v. Oneonta, etc.*, R. Co., 88 N. Y. App. Div. 208.

3. One Bondholder Has No Authority to Bind Other Bondholders by an agreement postponing priority of the mortgage security. *Grand Junction First Nat. Bank v. Wyman*, 16 Colo. App. 468.

6. Laches Barring Right to Attack Sale. — See *Raphael v. Rio Grande Western R. Co.*, 132 Fed. Rep. 12, 65 C. C. A. 632.

820. 1. Accrual of Right to Foreclose. — Central Trust Co. v. Western North Carolina R. Co., 112 Fed. Rep. 471; *State Trust Co. v. Kansas City, etc.*, R. Co., 120 Fed. Rep. 398.

821. 1. Right of Trustee to Foreclose. — *Weed v. Gainesville, etc.*, R. Co., 119 Ga. 576.

823. 9. Bowling Green Trust Co. v. Virginia Pass., etc., Co., 132 Fed. Rep. 921.

Intervention Proper Where Validity of Bonds in Controversy. — Central Trust Co. v. California,

etc., R. Co., 110 Fed. Rep. 70, *affirmed* (C. C. A.) 128 Fed. Rep. 882.

Right of Bondholders to Intervene. — See Central Trust Co. v. Unadilla Valley R. Co., (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 604.

824. 1. Bad Faith — Hostile Interests of Trustee. — Central Trust Co. v. Washington County R. Co., 124 Fed. Rep. 813.

5. Central Trust Co. v. Washington County R. Co., 124 Fed. Rep. 813.

825. 7. Laches Barring Foreclosure. — See *Gunnison v. Chicago, etc.*, R. Co., 117 Fed. Rep. 629, *affirmed* (C. C. A.) 130 Fed. Rep. 259.

826. 9. Time of Sale — Court's Discretion. — The sale need not be postponed until the validity of some of the bonds secured by the mortgage is determined. *Guaranty Trust Co. v. Atlantic Coast Electric R. Co.*, 132 Fed. Rep. 68.

828. 1. Upset Price. — Central Trust Co. v. Washington County R. Co., 124 Fed. Rep. 813.

6. Foreign Railroad as Purchaser. — *Rothchild v. Memphis, etc.*, R. Co., 113 Fed. Rep. 476, 51 C. C. A. 310; *Julian v. Central Trust Co.*, 193 U. S. 93, *affirming* (C. C. A.) 115 Fed. Rep. 956.

8. Right of Bondholders to Join in Pool Among Other Bondholders to Purchase Road Upheld. — *Reed v. Schmidt*, 115 Ky. 67.

Right of Stockholders to Purchase. — Where, in ordinary course, foreclosure is instituted and carried out for the honest purpose only of enforcing against the property the mortgage obligation, the mere fact that the shareholders of the old company may, under a purchasing arrangement, become interested in the securities of the new will not make the foreclosure *per se* fraudulent, though such fact may be indicative of fraud. *Wenger v. Chicago, etc.*, R. Co., (C. C. A.) 114 Fed. Rep. 34.

829. 9. Inadequacy of Price. — *Blanks v. Farmers' L. & T. Co.*, (C. C. A.) 122 Fed. Rep. 849.

830. 7. Title of Purchaser. — *Kansas City Northwestern R. Co. v. Frohwerk*, 68 Kan. 292.

831. *cc.* LIABILITY OF PURCHASER FOR OBLIGATIONS OF RAILWAY COMPANY. — See note 4.

833. *cc.* WHAT RIGHTS AND INTERESTS PASS TO PURCHASER. — See note 4.
Franchises. — See notes 6, 8, 10.

834. 8. Trustee — *b.* LIABILITY TO BONDHOLDERS FOR NEGLIGENCE. — See note 6.

835. *e.* REMOVAL OF TRUSTEE AND FILLING VACANCY — Filling Vacancies. — See note 11.

II. BONDS — 2. Power to Issue Bonds. — See note 14.

838. 3. Transfer of Bonds and Rights of Bona Fide Holders — *b.* PROTECTION AFFORDED TO BONA FIDE HOLDERS. — See note 1.

A Purchaser of Overdue Bonds. — See note 7.

840. 5. General Rights of Bondholders. — See note 2.

Action on Bonds. — See note 4.

841. IV. GUARANTY AND SURETYSHIP — The General Rule. — See note 9.

843. RANGE. — See note 5.

831. 4. No Liability on Obligations of Railway Company. — Central Trust Co. *v.* Western North Carolina R. Co., 112 Fed. Rep. 471; Sawyer *v.* Atchison, etc., R. Co., 129 Fed. Rep. 100, 63 C. C. A. 602, affirming 119 Fed. Rep. 252; Julian *v.* Central Trust Co., 193 U. S. 93, affirming (C. C. A.) 115 Fed. Rep. 956; Kansas City Southern R. Co. *v.* King, (Ark. 1905) 85 S. W. Rep. 1131.

833. 4. What Rights and Interests Pass to Purchaser. — Connor *v.* Tennessee Cent. R. Co., 109 Fed. Rep. 931, 48 C. C. A. 730; Barker *v.* Southern R. Co., 137 N. Car. 214.

6. Franchises — Tolls Chargeable. — Railroad Com'r *v.* Grand Rapids, etc., R. Co., 130 Mich. 248.

8. Franchise of Corporate Existence. — Julian *v.* Central Trust Co., 193 U. S. 93, affirming (C. C. A.) 115 Fed. Rep. 956.

10. Franchise to Operate. — Central Trust Co. *v.* Western North Carolina R. Co., 112 Fed. Rep. 471; Julian *v.* Central Trust Co., 193 U. S. 93, affirming (C. C. A.) 115 Fed. Rep. 956.

Right of Way on Street Passes to Purchaser. — Denison, etc., R. Co. *v.* St. Louis Southwestern R. Co., 96 Tex. 233, affirming 30 Tex. Civ. App. 474.

834. 6. Liability of Trustee to Bondholders for Failure to See to Proper Applications of Proceeds of Bonds. — Rhinelander *v.* Farmers' L. & T. Co., 172 N. Y. 519.

835. 11. Filling Vacancies. — Bowling Green Trust Co. *v.* Virginia Pass., etc., Co., 132 Fed. Rep. 921.

14. Consent of Railroad Commission to Issuance

of Bonds. — See Denison, etc., R. Co. *v.* Railroad Commission, 95 Tex. 671.

838. 1. Protection Afforded Bona Fide Holders. — Central Trust Co. *v.* California, etc., R. Co., 110 Fed. Rep. 70, affirmed (C. C. A.) 128 Fed. Rep. 882; Central R., etc., Co. *v.* Farmers' L. & T. Co., 116 Fed. Rep. 700; Kissel *v.* Chicago, etc., R. Co., (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 156.

7. Central R., etc., Co. *v.* Farmers' L. & T. Co., 116 Fed. Rep. 700.

840. 2. Bondholders Entitled under Mortgage to Inspect Statement Filed with Trustee. — Pronick *v.* Metropolitan Trust Co., 67 N. Y. App. Div. 616.

4. Recovery by Trustee Conclusive on Bondholders with Notice. — Grant *v.* Winona, etc., R. Co., 85 Minn. 422.

841. 9. When Power to Guarantee Immaterial. — Where bonds are issued by one railroad on a guaranty by another, and the former pays into the hands of the latter a sinking fund for the payment of such bonds, the question whether the latter company had power to enter into the guaranty is immaterial in an action by bondholders to compel payment by the guarantor from such sinking fund. Central R., etc., Co. *v.* Farmers' L. & T. Co., 116 Fed. Rep. 700.

843. 5. The Word "Range" as Used by Ranchmen signifies sparsely populated and uninclosed prairie over which stock growers have been allowed to let cattle, horses, and other animals owned by them or in their charge, roam and feed without restraint. Miller *v.* Lewis, 17 S. Dak. 448.

RAPE.

By B. B. CLARK.

- 847.** I. DEFINITION. — See note 1.
848. III. WHO MAY COMMIT RAPE — 1. In General. — See note 5.
 Age. — See note 7.
 2. Impotent Persons. — See note 9.
849. 4. Husband. — See note 6.
 5. Accomplices and Accessories. — See note 8.
850. IV. UPON WHOM RAPE MAY BE COMMITTED — 1. In General —
 Daughter or Sister. — See note 6.
 2. Age of Victim. — See notes 7, 8.
 3. Chastity of Victim. — See note 10.
851. Statutory Requirement of Chastity. — See note 2.
 V. CARNAL KNOWLEDGE — 1. In General. — See note 4.
 2. Penetration. — See note 6.
852. Proof of Penetration. — See notes 3, 4, 6.
853. 3. Emission — United States Doctrine. — See notes 1, 2.
 VI. FORCE. — See note 3.

847. 1. Definition. — *Gore v. State*, 119 Ga. 418, 100 Am. St. Rep. 182; *Francy v. People*, 210 Ill. 206.

848. 5. Female as Accessory or Accomplice. — *Trimble v. Territory*, (Ariz. 1903) 71 Pac. Rep. 934.

7. Presumption as to Male Over Fourteen. — *People v. Row*, 135 Mich. 505.

Prosecution Not Required to Show that Defendant Was Over Fourteen Years of Age. — *Peckham v. People*, 32 Colo. 140.

Testimony as to Age of Defendant Admissible as Relating to Physical Capacity. — *State v. Armstrong*, 167 Mo. 257.

9. Impotency Question for Jury. — *State v. Bailey*, 31 Wash. 89.

849. 6. Husband. — *Plunkett v. State*, 72 Ark. 439; *Garner v. State*, 73 Ark. 487; *Frazier v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 754, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 849.

8. Aiders and Abettors and Accessories. — *Clymer v. Com.*, (Ky. 1901) 64 S. W. Rep. 409; *Harmon v. Territory*, (Okla. 1905) 79 Pac. Rep. 765.

850. 6. Same Act Rape and Incest. — *Edwards v. State*, (Neb. 1903) 95 N. W. Rep. 1038.

7. Age of Female Immaterial. — *Castleberry v. State*, 135 Ala. 24.

8. Children under Statutory Age of Consent. — *Oakley v. State*, 135 Ala. 29.

10. Chastity of Female Immaterial. — *Black v. State*, 119 Ga. 746; *Johnson v. People*, 197 Ill. 48.

851. 2. Carnal Knowledge of Children — Chastity Essential by Statute. — *State v. De Witt*, 186 Mo. 61.

Proof of Unchastity. — Evidence of the general bad reputation of the prosecutrix for chastity, or of the general reputation of one of her

associates, has been held not to be admissible to prove that she was unchaste. *Woodruff v. State*, (Neb. 1904) 101 N. W. Rep. 1114.

Sufficiency of Evidence to Prove Chastity. — *State v. McCullough*, 171 Mo. 571.

4. Actual Carnal Knowledge Required. — *Trimble v. Territory*, (Ariz. 1903) 71 Pac. Rep. 934.

6. Penetration Required. — *People v. Howard*, 143 Cal. 316; *State v. Newman*, 93 Minn. 393; *People v. Scouten*, 130 Mich. 620; *Price v. State*, 44 Tex. Crim. 304.

Rupture of Hymen Unnecessary. — *Kenney v. State*, (Tex. Crim. 1903) 79 S. W. Rep. 817.

"Abuse" of Child Limited in Meaning to Injuries to Sexual Organs. — *Castleberry v. State*, 135 Ala. 24, citing *Dawkins v. State*, 58 Ala. 376.

852. 3. Proof of Penetration — Circumstantial Evidence. — *People v. Scouten*, 130 Mich. 620; *State v. Newman*, 93 Minn. 393; *State v. Welch*, 41 Oregon 35.

Proof of Penetration Held to Be Sufficient. — *State v. Armstrong*, 167 Mo. 257; *Proctor v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 368.

Medical Examination of Prosecutrix Not Indispensable. — *Harmon v. Territory*, (Okla. 1905) 79 Pac. Rep. 765.

4. No Particular Form of Words Necessary. — *Bradburn v. State*, 162 Ind. 689; *People v. Scouten*, 130 Mich. 620.

6. Quantum of Proof. — *Hill v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 808.

853. 1. United States — Emission Generally Not Essential. — *State v. Monds*, 130 N. Car. 697.

2. *Bradburn v. State*, 162 Ind. 689.

3. Force. — *State v. Marsh*, 132 N. Car. 1000; *Munoz v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 11.

853. As to What Amounts to Force. — See notes 4, 5.

854. Carnally Knowing Children under Statutory Age — Whether Force Essential. — See note 5.

VII. CONSENT — 1. In General. — See note 7.

855. 2. Consent Before Rape Completed. — See note 1.

4. Withdrawal of Consent. — See note 5.

6. Unconscious, Drunken, or Drugged Woman. — See note 7.

856. 7. Weak-minded, Insane, or Idiotic Woman. — See notes 1, 2.

857. 8. Fraud — Personating Husband. — See note 2.

Mock Marriage. — See note 4.

858. 9. Consent of Infants — *b.* STATUTORY AGE OF CONSENT — (1) In General. — See notes 4, 5.

859. (2) Ignorance of Age. — See note 3.

(3) Proof of Age — Admissibility of Evidence. — See note 4.

853. 4. Where the Woman Is Insensible. — Harlan v. People, 32 Colo. 397.

5. Force May Exist Without Violence. — Shepherd v. State, 135 Ala. 9; Clymer v. Com., (Ky. 1901) 64 S. W. Rep. 409; Smith v. Com., (Ky. 1904) 83 S. W. Rep. 647.

854. 5. Intercourse with Children under Statutory Age. — People v. Totman, 135 Cal. 133; People v. Bailey, 142 Cal. 434; State v. Bebb, (Iowa 1903) 96 N. W. Rep. 714; State v. Scroggs, 123 Iowa 649; State v. Anderson, 125 Iowa 501; State v. Sheets, 127 Iowa 73; State v. Russell, 64 Kan. 798; State v. Hamey, 168 Mo. 167; State v. McCullough, 171 Mo. 571; State v. Roller, 30 Wash. 692; State v. Fetterly, 33 Wash. 599.

7. Want of Consent. — Bigcraft v. People, 30 Colo. 298; Alfred v. State, (Miss. 1902) 32 So. Rep. 54; Anderson v. State, 82 Miss. 784; State v. Marsh, 132 N. Car. 1000; Huffman v. State, 46 Tex. Crim. 428; Simpson v. State, 46 Tex. Crim. 551; Munoz v. State, (Tex. Crim. 1905) 85 S. W. Rep. 11; Devoy v. State, 122 Wis. 148.

855. 1. Consent Before Rape Completed. — Devoy v. State, 122 Wis. 148.

5. Withdrawal of Consent. — See Johnson v. People, 197 Ill. 48, applying the principle to an assault with intent to rape.

7. Unconscious Woman. — Com. v. Lowe, 116 Ky. 335; State v. Armstrong, 167 Mo. 257.

Chloroform Administered to Victim. — Harlan v. People, 32 Colo. 397.

Administering Drug to Excite Sexual Passion of Prosecutrix. — Baldrige v. State, 45 Tex. Crim. 193.

856. 1. Weak-minded, Insane, or Idiotic Woman. — Gore v. State, 119 Ga. 418, 100 Am. St. Rep. 182, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 856; Fredrick v. State, 44 Tex. Crim. 288.

Statutes Declaring Such Connection to Be Rape. — State v. Trusty, 122 Iowa 82.

Evidence Held to Be Insufficient to Show Incapacity to Consent. — Lee v. State, 43 Tex. Crim. 285.

2. Weak-minded Female Animated by Animal Passion. — See Gore v. State, 119 Ga. 418, 100 Am. St. Rep. 182, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 856.

857. 2. Personating Husband. — See Huffman v. State, 46 Tex. Crim. 428, wherein, however, the evidence was held to be insufficient to show personation.

4. Mock Marriage. — Lee v. State, 44 Tex. Crim. 354.

858. 4. Statutory Age of Consent — England. — Rex v. Gray, 68 J. P. 327.

Arkansas. — Plunkett v. State, 72 Ark. 409; Corothers v. State, (Ark. 1905) 88 S. W. Rep. 585.

California. — People v. Bailey, 142 Cal. 434. Delaware. — State v. Barrett, (Del. 1904) 59 Atl. Rep. 45. See also State v. Pucca, 4 Penn. (Del.) 71.

Florida. — Schang v. State, 43 Fla. 561.

Illinois. — Johnson v. People, 202 Ill. 53.

Iowa. — State v. Bebb, (Iowa 1903) 96 N. W. Rep. 714.

Missouri. — State v. Allen, 174 Mo. 689; State v. Day, 188 Mo. 359.

Montana. — State v. Jones, 32 Mont. 442.

Nebraska. — Reinoehl v. State, 62 Neb. 619.

New York. — People v. Robertson, 88 N. Y. App. Div. 198.

Ohio. — State v. Carl, 71 Ohio St. 259.

Rhode Island. — State v. Tourjee, 26 R. I. 234.

Texas. — Bryant v. State, 46 Tex. Crim. 126.

Washington. — State v. Priest, 32 Wash. 74; State v. Fetterly, 33 Wash. 599.

Wisconsin. — Loose v. State, 120 Wis. 115.

The Fact that the Female Is Married has been held not to render her capable of giving consent where she is below the statutory age. Smith v. State, (Tex. Crim. 1903) 74 S. W. Rep. 556.

5. Constitutionality of Statutes. — See State v. Hunter, 171 Mo. 435.

859. 3. Ignorance of Age of Child No Defense. — State v. Scroggs, 123 Iowa 649; Manning v. State, 43 Tex. Crim. 302, 96 Am. St. Rep. 873; Smith v. State, (Tex. Crim. 1903) 73 S. W. Rep. 401.

4. Extract Copy from Register of Births. — Loose v. State, 120 Wis. 115.

Record of Physician as to Confinement of Mother. — Smith v. State, (Tex. Crim. 1903) 73 S. W. Rep. 401.

Family Bible. — Simpson v. State, 45 Tex. Crim. 320. But entries made by the father in the family Bible are not admissible in proof of the age of the child if the father is living. State v. Miller, (Kan. 1905) 80 Pac. Rep. 51.

Memorandum Inadmissible Where Writer's Testimony Procurable. — Stone v. State, 45 Tex. Crim. 91.

859. Testimony of Child or Members of Family. — See notes 6, 7, 9.

The Appearance of the Child. — See note 10.

The Opinion of Medical Experts. — See note 11.

The Burden of Proving. — See note 12.

Sufficiency. — See note 13.

860. 10. Submission Distinguished from Consent — Fear Induced by Threats Equivalent to Force. — See note 4.

11. Resistance — *a.* IN GENERAL. — See note 7.

Extent of Resistance. — See note 8.

861. See note 3.

862. *b.* CONSIDERATIONS AFFECTING DEGREE OF RESISTANCE — (2) *Outcry.* — See notes 5, 6, 7.

12. Particular Considerations Showing Consent — *a.* FAILURE TO MAKE COMPLAINT. — See note 11.

863. See notes 1, 2.

b. CONTINUED FRIENDLY RELATIONS. — See note 5.

d. IMPREGNATION. — See note 7.

13. Burden of Proof. — See note 9.

VIII. ASSAULT WITH INTENT TO RAPE. — See note 10.

864. See notes 1, 3.

The Assault. — See notes 4, 5.

Register of School Teacher Inadmissible. — Simpson *v.* State, 46 Tex. Crim. 551.

859. 6. Child's Testimony as to Her Age. — State *v.* Scroggs, 123 Iowa 649; State *v.* Miller, (Kan. 1905) 80 Pac. Rep. 51; Knowles *v.* State, 44 Tex. Crim. 322; Loose *v.* State, 120 Wis. 115.

7. Parents. — Loose *v.* State, 120 Wis. 115.

9. Declarations to Third Parties. — Knowles *v.* State, 44 Tex. Crim. 322. See, however, People *v.* Elco, 131 Mich. 519.

Declaration of Living Relatives Held to Be Inadmissible. — State *v.* Trusty, 122 Iowa 82; Donley *v.* State, 44 Tex. Crim. 428.

10. Appearance of Child. — People *v.* Elco, 131 Mich. 519; Donley *v.* State, 44 Tex. Crim. 428.

11. Opinion of Witness Admissible. — Donley *v.* State, 44 Tex. Crim. 428; Simpson *v.* State, 45 Tex. Crim. 320.

12. Burden of Proof. — Simpson *v.* State, 46 Tex. Crim. 551.

13. Age Question for Jury. — People *v.* Elco, 131 Mich. 519.

860. 4. Submission Secured by Threats. — Shepherd *v.* State, 135 Ala. 9; Smith *v.* Com., (Ky. 1904) 83 S. W. Rep. 647; Clymer *v.* Com., (Ky. 1901) 64 S. W. Rep. 409; Caddell *v.* State, 44 Tex. Crim. 213.

7. Necessity for Resistance. — Bigcraft *v.* People, 30 Colo. 298; Anderson *v.* State, 82 Miss. 784; Tyler *v.* State, 46 Tex. Crim. 10; Rushing *v.* State, (Tex. Crim. 1904) 80 S. W. Rep. 527; Perez *v.* State, (Tex. Crim. 1905) 87 S. W. Rep. 350; Devoy *v.* State, 122 Wis. 148.

8. "To the Utmost" or "Utmost Resistance." — Devoy *v.* State, 122 Wis. 148. See, however, State *v.* Colestock, 41 Oregon 9.

861. 3. Nonresistance Because of Fear of Great Bodily Harm. — Bigcraft *v.* People, 30 Colo. 298.

862. 5. Failure to Make Outcry. — Thomas *v.* State, (Tex. Crim. 1902) 70 S. W. Rep. 93; Devoy *v.* State, 122 Wis. 148.

6. Darrell *v.* Com., (Ky. 1904) 82 S. W. Rep. 289.

7. Oakley *v.* State, 135 Ala. 15.

11. Failure to Make Complaint. — State *v.* Wolf, 118 Iowa 564; State *v.* Bebb, (Iowa 1903) 96 N. W. Rep. 714; Baker *v.* State, 82 Miss. 84.

Child under Age of Consent — Failure to Complain Immaterial. — State *v.* Peres, 27 Mont. 358; Loose *v.* State, 120 Wis. 115.

863. 1. Explaining Delay. — State *v.* Bebb, (Iowa 1903) 96 N. W. Rep. 714.

2. People *v.* Keith, 141 Cal. 686; State *v.* Icenbice, 126 Iowa 16; Darrell *v.* Com., (Ky. 1904) 82 S. W. Rep. 289; People *v.* Estell, 106 N. Y. App. Div. 516.

5. Continued Friendly Relations. — State *v.* Shouse, 188 Mo. 473.

7. Pregnancy. — Lyles *v.* U. S., 20 App. Cas. (D. C.) 559; State *v.* Carpenter, 124 Iowa 5.

9. Sufficiency of Evidence. — See Darrell *v.* Com., (Ky. 1904) 82 S. W. Rep. 289.

10. Assault with Intent to Rape. — Robinson *v.* State, 118 Ga. 32; State *v.* Peak, 130 N. Car. 711.

864. 1. Franey *v.* People, 210 Ill. 206, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 864; Lee *v.* State, (Tex. Crim. 1905) 85 S. W. Rep. 798; Bannen *v.* State, 115 Wis. 317.

3. Franey *v.* People, 210 Ill. 206.

4. Kearse *v.* State, (Tex. Crim. 1905) 88 S. W. Rep. 363.

Hands Need Not Actually Be Laid on Woman. — State *v.* Garner, 129 N. Car. 536.

Solicitation to Intercourse Insufficient — Children under Age of Consent. — People *v.* Dowell, 136 Mich. 306 (though person of child touched); State *v.* Riseling, 186 Mo. 521; Ross *v.* State, (Tex. Crim. 1904) 78 S. W. Rep. 503 (though defendant held prosecutrix's hand and threatened injury).

5. Consent of Female. — Jackson *v.* State, 114 Ga. 861; Donovan *v.* People, 215 Ill. 520; State *v.* Huff, 136 N. Car. 679.

Consent of Infants — General Rule in United States. — Schang *v.* State, 43 Fla. 561; Lieb-scher *v.* State, (Neb. 1903) 95 N. W. Rep. 870;

865. The Intent. — See notes 1, 2, 3, 4, 5.

866. See note 1.

867. Abandonment of Purpose. — See note 1.
Merger. — See note 3.

IX. ATTEMPT TO RAPE. — See note 6.

868. Attempt Distinguished from Assault with Intent to Commit. — See note 7.
Overt Act. — See note 8.

869. X. COMPULSORY DEFILEMENT. — See note 2.

XI. TAKING OR DETENTION FOR SEXUAL INTERCOURSE. — See note 4.

XII. EVIDENCE — 1. Admissibility — *a.* IN GENERAL. — See note 5.

870. *b.* ADMISSIONS BY DEFENDANT. — See note 1.

State v. Clark, 77 Vt. 10; *Bannen v. State*, 115 Wis. 317; *Loose v. State*, 120 Wis. 115.

865. 1. Intent to Rape Essential. — *People v. Barker*, 137 Cal. 557; *Sutton v. State*, 123 Ga. 125; *Addison v. People*, 193 Ill. 405; *Franey v. People*, 210 Ill. 206; *State v. Neal*, 178 Mo. 63; *State v. Smith*, 136 N. Car. 684; *Caddell v. State*, 44 Tex. Crim. 213; *Coffee v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 761; *Dina v. State*, 46 Tex. Crim. 402; *Suggs v. State*, 46 Tex. Crim. 151. See, however, *Jacobi v. State*, 133 Ala. 1, appeal dismissed 187 U. S. 133.

Child under Age of Consent. — *Carter v. State*, 44 Tex. Crim. 312.

2. Proof of Intent — Accompanying Circumstances. — *Lathrop v. People*, 197 Ill. 169.

3. Implication from Conduct. — *State v. Clark*, 77 Vt. 10.

4. Proof of Intent Beyond Reasonable Doubt. — *People v. Barker*, 137 Cal. 557; *Caddell v. State*, 44 Tex. Crim. 213.

Question for Jury. — *Amunsden v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 418.

5. Proof of Intent Held to Be Sufficient — *Colorado*. — *Harlan v. People*, 32 Colo. 397.

Georgia. — *Bryant v. State*, 114 Ga. 861.

Iowa. — *State v. Johnson*, 114 Iowa 430; *State v. Snider*, 119 Iowa 15; *State v. Miller*, 124 Iowa 429; *State v. Sheets*, 127 Iowa 73.

Michigan. — *People v. Toutant*, 133 Mich. 520.

Missouri. — *State v. Huff*, 164 Mo. 480; *State v. Neal*, 178 Mo. 63.

Nebraska. — *Strong v. State*, 63 Neb. 440.

North Carolina. — *State v. Finger*, 131 N. Car. 781; *State v. Mehaffey*, 132 N. Car. 1062.

Texas. — *Berry v. State*, 44 Tex. Crim. 395; *Wilson v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 16; *Riddling v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 805; *Perkins v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 619.

Wisconsin. — *Bannen v. State*, 115 Wis. 317.

866. 1. Proof of Intent Insufficient. — *Quinn v. State*, (Ark. 1905) 84 S. W. Rep. 505; *Jackson v. State*, 114 Ga. 861; *Franey v. People*, 210 Ill. 206; *State v. Hahn*, 189 Mo. 241; *State v. Smith*, 136 N. Car. 684; *Caddell v. State*, 44 Tex. Crim. 213; *Sirmons v. State*, 44 Tex. Crim. 488; *Dina v. State*, 46 Tex. Crim. 402; *Ross v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 503.

Burglary with Intent to Rape. — *Mason v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 689.

Putting Arm Around Woman on Street and Attempting to Pull Up Dress. — *Coffee v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 761.

867. 1. Abandonment of Purpose. — *Franey v. People*, 210 Ill. 206; *State v. Mehaffey*, 132 N. Car. 1062; *Caddell v. State*, 44 Tex. Crim. 213.

3. Conviction of Assault with Intent on Indictment for Rape. — *Oakley v. State*, 135 Ala. 29; *Schang v. State*, 43 Fla. 561; *State v. Love*, 106 La. 452; *People v. Dowell*, 136 Mich. 306; *Horton v. State*, 84 Miss. 473; *State v. Scott*, 172 Mo. 536.

6. Statutes. — *Bevens v. State*, 72 Ark. 129; *People v. Mosier*, 73 N. Y. App. Div. 5.

868. 7. *Taylor v. State*, 44 Tex. Crim. 153.

8. Necessity for Overt Act. — *State v. Sunnafrank*, 64 Kan. 886, 67 Pac. Rep. 1103; *State v. Russell*, 64 Kan. 798.

869. 2. Defilement of Ward or Employee under Eighteen Years of Age. — *State v. Pollard*, 174 Mo. 607; *State v. Hesterly*, 178 Mo. 43.

4. Evidence of Complaint by Prosecutrix Not Admissible. — *Douglas v. Com.*, (Ky. 1902) 68 S. W. Rep. 1107.

5. *Knowles v. State*, 44 Tex. Crim. 322.

Relevancy. — *Baker v. State*, 82 Miss. 84.

Materiality. — *Clymer v. Com.*, (Ky. 1901) 64 S. W. Rep. 409.

Hearsay. — *State v. Pollard*, 174 Mo. 607; *Wells v. State*, 43 Tex. Crim. 451.

Declaration of Child Inadmissible. — *People v. Beech*, 129 Mich. 622.

Weight and Condition of Health of Prosecutrix. — *State v. Carpenter*, 124 Iowa 5.

Evidence that Defendant Is Married Inadmissible. — *Smith v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 556. *Contra*, where the prosecutrix was under the age of consent, *Woodruff v. State*, (Neb. 1904) 101 N. W. Rep. 1114; *Simpson v. State*, 45 Tex. Crim. 320.

Condition of Ground at Scene of Offense. — *Tyler v. State*, 46 Tex. Crim. 10.

Condition of Defendant at Time of Offense Admissible as Res Gestæ. — *People v. Hosmer*, 66 N. Y. App. Div. 616.

Examination of Accused by Physician for Discovery of Venereal Disease. — *State v. McCoy*, 109 La. 682.

Exhibit of Defendant's Hat Worn on Occasion of Crime Admissible. — *State v. Neal*, 178 Mo. 63.

Explanation of Mistake in Identification of Defendant by Prosecutrix. — *Shular v. State*, 160 Ind. 300.

870. 1. Admissions by Accused. — *Oakley v. State*, 135 Ala. 15; *Meisenheimer v. State*, 73 Ark. 407; *People v. Howard*, 143 Cal. 316; *People v. Rich*, 133 Mich. 14; *State v. De Witt*, 186 Mo. 61; *Woodruff v. State*, (Neb. 1904)

- 870.** *c.* ADMISSIONS BY PROSECUTRIX. — See note 3.
d. CHARACTER OF DEFENDANT. — See note 4.
e. CHASTITY OF PROSECUTRIX — (1) *Evidence for Defense* — (a) In General — Reputation. — See note 6.
871. Attempts — Assault with Intent to Rape. — See note 2.
 (b) Particular Acts of Unchastity — With Third Persons. — See note 3.
872. With Defendant. — See note 1.
 (c) Carnal Knowledge of Children under Age of Consent. — See notes 3, 4.
873. (d) Admissibility to Rebut Other Evidence. — See notes 1, 3.
 (f) Purpose and Effect of Evidence of Unchastity. — See note 7.
 (2) *Evidence for Prosecution*. — See notes 8, 9.
f. COMPLAINT BY PROSECUTRIX — (1) *In General*. — See note 10.
874. See notes 1, 2, 4.

101 N. W. Rep. 1114; *Ricks v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 345; *James v. State*, 124 Wis. 130.

Payment of Money to Witness to Induce Silence. — *State v. Pollard*, 174 Mo. 607.

870. 3. *State v. Brady*, 71 N. J. L. 360.

4. Accused May Show His Character Good for Chastity. — *State v. Brady*, 71 N. J. L. 360.

When Defendant Becomes Witness His Character Is in Issue. — See *State v. McCoy*, 109 La. 682; *State v. Pollard*, 174 Mo. 607.

Accused May Show His Character Good or Bad as Peaceable Man. — *Horton v. State*, 84 Miss. 473.

Effect of Evidence of Good Character. — See *State v. Pucca*, 4 Penn. (Del.) 71; *State v. Jones*, 32 Mont. 442.

6. Chastity of Prosecutrix as Bearing on Consent. — *Seals v. State*, 114 Ga. 518, 88 Am. St. Rep. 33; *Black v. State*, 119 Ga. 746.

Evidence of Reputation of House in Which Prosecutrix Lived Excluded. — *James v. State*, 124 Wis. 130.

Evidence that Family of Prosecutrix Associated with Negroes Excluded. — *State v. Finger*, 131 N. Car. 781.

871. 2. Rule in Cases of Assault with Intent and Attempt. — *Bannen v. State*, 115 Wis. 317.

3. Specific Acts with Third Persons Incompetent. — *Black v. State*, 119 Ga. 746, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 871; *State v. Smith*, (S. Dak. 1904) 100 N. W. Rep. 740.

872. 1. Specific Acts of Unchastity with Defendant. — *Black v. State*, 119 Ga. 746.

3. Carnal Knowledge of Infants. — *People v. Wilmot*, 139 Cal. 103; *State v. Smith*, (S. Dak. 1904) 100 N. W. Rep. 740; *Price v. State*, 44 Tex. Crim. 304.

Character of Prosecutrix's Mother Inadmissible. — *Smith v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 401; *Manning v. State*, 43 Tex. Crim. 302, 96 Am. St. Rep. 873.

4. Evidence as to Specific Acts Irrelevant. — *Plunkett v. State*, 72 Ark. 409; *State v. Bebb*, 125 Iowa 494. See, however, *Knowles v. State*, 44 Tex. Crim. 322.

873. 1. *State v. Height*, 117 Iowa 650, 94 Am. St. Rep. 323.

3. *State v. Bebb*, 125 Iowa 494; *Knowles v. State*, 44 Tex. Crim. 322, following *Bice v. State*, 37 Tex. Crim. 38.

7. Effect of Evidence of Unchastity. — *State v. Tuttle*, 67 Ohio St. 440, 93 Am. St. Rep. 689.

8. Evidence for Prosecution. — *Tyler v. State*, 46 Tex. Crim. 10.

9. *Baker v. State*, 82 Miss. 84.

10. Complaint by Prosecutrix — *Alabama*. — *Bray v. State*, 131 Ala. 46; *Oakley v. State*, 135 Ala. 15.

Arizona. — *Trimble v. Territory*, (Ariz. 1903) 71 Pac. Rep. 932.

California. — *People v. Figueroa*, 134 Cal. 159; *People v. Totman*, 135 Cal. 133; *People v. Keith*, 141 Cal. 686; *People v. Scalamiro*, 143 Cal. 343.

District of Columbia. — *Lyles v. U. S.*, 20 App. Cas. (D. C.) 559.

Illinois. — *Cunningham v. People*, 210 Ill. 410.

Indiana. — *Shular v. State*, 160 Ind. 300.

Iowa. — *State v. Snider*, 119 Iowa 15; *State v. Carpenter*, 124 Iowa 5; *State v. Bebb*, 125 Iowa 494.

Louisiana. — *State v. McCoy*, 109 La. 682.

Michigan. — *People v. Rich*, 133 Mich. 14; *People v. Row*, 135 Mich. 505.

Mississippi. — *Ashford v. State*, 81 Miss. 414.

Montana. — *State v. Peres*, 27 Mont. 358.

New York. — *People v. Garner*, 169 N. Y. 585, affirming 64 N. Y. App. Div. 410.

North Carolina. — *State v. Stines*, 138 N. Car. 686.

Canada. — *Rex v. Riendeau*, 10 Quebec K. B. 584, 4 Can. Crim. Cas. 421.

Child under Age of Consent. — The fact that complaint was made may be shown where the prosecutrix was under the age of consent, though she made no resistance. *People v. Wilmot*, 139 Cal. 103. But see *Rex v. Kingham*, 66 J. P. 393, distinguishing *Reg. v. Lillyman*, (1896) 2 Q. B. 167, and holding that in a prosecution for indecent assault upon a child seven years of age, evidence of complaint by the child was inadmissible, as the consent of the child was immaterial.

Answers of Prosecutrix to Interrogatories Not Admissible as Complaint. — *Reg. v. Merry*, 19 Cox C. C. 442; *Cunningham v. People*, 210 Ill. 410; *State v. Bebb*, 125 Iowa 494.

Mere Statements of Prosecutrix in Casual Conversation Not Admissible. — *People v. Wilmot*, 139 Cal. 103.

Weight of Testimony. — Evidence of complaint by the prosecutrix is not regarded, unless forming part of the *res gestæ*, as original or important evidence. *State v. Wheeler*, 116 Iowa 212, 93 Am. St. Rep. 236.

874. 1. *Trimble v. Territory*, (Ariz. 1903)

874. (2) *Particulars of Complaint*—(a) *Doctrine in United States*—General Rule.—See note 6.

875. See notes 1, 2.

876. (b) *Doctrine in England and Canada*.—See note 2.

(c) *What Are Particulars*.—See notes 6, 9.

877. *Matters Held Not to Be Particulars*.—See note 4.

(3) *Lapse of Time or Delay in Making Complaint*.—See notes 7, 9.

(4) *Prosecutrix Not Witness*.—See note 11.

878. (5) *Res Gestæ*.—See notes 1, 2.

g. CONDITION OF CLOTHING, PERSON, AND MIND OF PROSECUTRIX—*Clothing*.—See note 5.

Physical Conditions.—See note 12.

879. See notes 2, 5.

Mental Condition.—See note 9.

h. CONDUCT OF MEMBERS OF PROSECUTRIX'S FAMILY.—See notes 11, 13.

880. *j. EXPERT MEDICAL TESTIMONY*.—See note 5.

71 Pac. Rep. 932; *People v. Wilmot*, 139 Cal. 103; *People v. Scalamiero*, 143 Cal. 343.

874. 2. *People v. Wilmot*, 139 Cal. 103; *People v. Scalamiero*, 143 Cal. 343.

4. Complaint to Several—Husband Alone Called.—*Bray v. State*, 131 Ala. 46.

6. Particulars of Complaint—General Rule in United States.—*Oakley v. State*, 135 Ala. 15; *People v. Wilmot*, 139 Cal. 103; *People v. Scalamiero*, 143 Cal. 343; *State v. Harness*, 10 Idaho 18; *People v. Row*, 135 Mich. 505, following *People v. Duncan*, 104 Mich. 464; *Ashford v. State*, 81 Miss. 414; *Anderson v. State*, 82 Miss. 784; *Carter v. State*, 44 Tex. Crim. 312; *Kearse v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 363.

Waiver by Accused of Testimony as to Particulars of Complaint.—*Donaldson v. People*, 33 Colo. 333.

Defense May on Cross-examination Bring Out Details of Complaint.—*State v. McCoy*, 109 La. 682.

875. 1. *After Impeachment of Prosecutrix*.—*Bray v. State*, 131 Ala. 46; *Oakley v. State*, 135 Ala. 15; *State v. Parker*, 134 N. Car. 209.

Particulars to Be Considered Only for Purpose of Corroborating Prosecutrix.—*State v. Parker*, 134 N. Car. 209.

2. *Bray v. State*, 131 Ala. 46; *Oakley v. State*, 135 Ala. 15.

876. 2. *Later English Doctrine*.—*Rex v. Riendeau*, 10 Quebec K. B. 584, 4 Can. Crim. Cas. 421.

6. Name and Description of Assailant.—*Bray v. State*, 131 Ala. 46; *Oakley v. State*, 135 Ala. 15; *People v. Wilmot*, 139 Cal. 103; *State v. Egbert*, 125 Iowa 443; *Ashford v. State*, 81 Miss. 414; *Anderson v. State*, 82 Miss. 784.

Declarations as to Time of the Offense are particulars of the complaint and are inadmissible. *Anderson v. State*, 82 Miss. 784.

9. Particulars as to Locus of Offense.—*Anderson v. State*, 82 Miss. 784.

877. 4. *Bannen v. State*, 115 Wis. 317.

Complaint of Being "Assaulted".—*Shular v. State*, 160 Ind. 300.

7. Delay in Making Complaint.—*Trimble v. Territory*, (Ariz. 1903) 71 Pac. Rep. 932; *State v. Bebb*, (Iowa 1903) 96 N. W. Rep. 714, 125

Iowa 494; *Cunningham v. People*, 210 Ill. 410; *State v. McCoy*, 109 La. 682; *State v. Snider*, 119 Iowa 15; *State v. Peres*, 27 Mont. 358; *Bannen v. State*, 115 Wis. 317; *Rex v. Riendeau*, 10 Quebec K. B. 584, 4 Can. Crim. Cas. 421.

9. Bigcraft v. People, 30 Colo. 298; *Lyles v. U. S.*, 20 App. Cas. (D. C.) 559.

11. Prosecutrix Not Witness.—*State v. Wheeler*, 116 Iowa 212, 93 Am. St. Rep. 236; *Rex v. South*, 39 Can. L. J. 639.

878. 1. *Res Gestæ*.—*State v. Pollard*, 174 Mo. 607; *Carter v. State*, 44 Tex. Crim. 312. See, however, *Berry v. State*, 44 Tex. Crim. 395; *Kenney v. State*, (Tex. Crim. 1903) 79 S. W. Rep. 817.

2. Immediate Complaint in Presence of Accused.—*Wells v. State*, 43 Tex. Crim. 451; *Thomas v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 823.

Prosecutrix Not a Witness.—Where the complaint of the prosecutrix forms a part of the *res gestæ* it is admissible though on account of her age she is not a witness. *Kenney v. State*, (Tex. Crim. 1903) 79 S. W. Rep. 817.

5. Condition of Prosecutrix's Clothing.—*People v. Figueroa*, 134 Cal. 159; *Anderson v. State*, 82 Miss. 784.

12. Marks of Violence.—*People v. Figueroa*, 134 Cal. 159; *People v. Keith*, 141 Cal. 686; *State v. Snider*, 119 Iowa 15; *Anderson v. State*, 82 Miss. 784.

Sickness of Prosecutrix.—*State v. Steffens*, 116 Iowa 227.

879. 2. *Conditions of Pudenda*.—*State v. King*, 117 Iowa 484; *State v. Scott*, 172 Mo. 536.

5. Lapse of Time Before Examination.—*Lyles v. U. S.*, 20 App. Cas. (D. C.) 559; *State v. King*, 117 Iowa 484 (six weeks after offense); *State v. Scott*, 172 Mo. 536; *Bannen v. State*, 115 Wis. 317.

9. Mental Condition.—*Kearse v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 363.

11. That the Father of the Prosecutrix Was Opposed to the Prosecution cannot be shown by the defense. *Welborn v. State*, 116 Ga. 522.

13. *Wells v. State*, 43 Tex. Crim. 451.

880. 5. *Expert Testimony as to Potency of Defendant Admissible*.—*State v. Walke*, 69 Kan. 183.

880. *k.* INFANT PROSECUTRIX AS WITNESS. — See note 7.

l. MOTIVE OF PROSECUTRIX. — See note 8.

881. See note 1.

m. PRIOR SOLICITATION, THREATS, ETC. — See notes 2, 3.

n. PHYSICAL EXAMINATION OF PROSECUTRIX. — See note 5.

o. PREGNANCY OF PROSECUTRIX AND OFFSPRING OF INTERCOURSE. — See note 7.

p. PROOF OF OTHER CRIMES. — See note 9.

882. See note 1.

Carnal Knowledge of Children. — See notes 2, 3, 4, 5.

Explanation by Physician of Technical Terms in Medical Book. — *Oakley v. State*, 135 Ala. 29.

880. 7. Infants Considered to Be Competent. — *Castlebury v. State*, 135 Ala. 24 (eight years of age); *State v. Neal*, 178 Mo. 63 (eight years of age); *Reyna v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 25 (seven years of age).

Infants Considered to Be Incompetent. — *People v. Beech*, 129 Mich. 622 (six years of age). Capacity Question for Trial Court. — *State v. Finger*, 131 N. Car. 781; *State v. Bailey*, 31 Wash. 89.

Imbecile Prosecutrix Not Competent. — *Lee v. State*, 43 Tex. Crim. 285.

8. Friendliness and Reluctance to Prosecute may be shown. *Denton v. State*, 46 Tex. Crim. 193, wherein the prosecutrix was under the age of consent.

Evidence that the Father of the Prosecutrix Caused Her to Bring the Charge is inadmissible. *State v. Barrett*, (Del. 1904) 59 Atl. Rep. 45.

881. 1. *Rex v. Riendeau*, 10 Quebec K. B. 584, 4 Can. Crim. Cas. 421.

2. Prior Solicitations. — *Reinoehl v. State*, 62 Neb. 619; *Woodruff v. State*, (Neb. 1904) 101 N. W. Rep. 1114; *Manning v. State*, 43 Tex. Crim. 302, 96 Am. St. Rep. 873.

3. Prior Threats. — *State v. Sheets*, 127 Iowa 73.

5. Physical Examination. — *Harmon v. Territory*, (Okla. 1905) 79 Pac. Rep. 765.

The Court May Direct that the Infant Prosecutrix Be Examined by a physician to see whether she has had sexual intercourse. *State v. Pucca*, 4 Penn. (Del.) 71.

7. Pregnancy and Birth of Child Admissible. — *Peckham v. People*, 32 Colo. 140; *State v. Miller*, (Kan. 1905) 80 Pac. Rep. 51; *Woodruff v. State*, (Neb. 1904) 101 N. W. Rep. 1114; *State v. Danforth*, (N. H. 1905) 60 Atl. Rep. 839; *People v. Robertson*, 88 N. Y. App. Div. 198. See also *State v. Carpenter*, 124 Iowa 5.

Exhibiting a Child to the Jury, the Result of the Intercourse Charged, is not error, nor is it error for the attorney for the prosecutrix to comment on the likeness of the child to the defendant. *State v. Danforth*, (N. H. 1905) 60 Atl. Rep. 839. *Contra* in a prosecution for rape of a girl under the age of consent, *Gray v. State*, 43 Tex. Crim. 300.

Permitting the Prosecutrix to Have Her Child in Court with her is not error. *Plunkett v. State*, 72 Ark. 409; *Sykes v. State*, 112 Tenn. 572, 105 Am. St. Rep. 972.

9. Proof of Other Crimes Generally Inadmissible. — *Bigcraft v. People*, 30 Colo. 298; *Addison v. People*, 193 Ill. 405; *Johnson v. People*,

202 Ill. 53; *McAllister v. State*, 112 Wis. 496; *Rex v. South*, 39 Can. L. J. 639.

A Direction to the Jury to Disregard Such Evidence where objections to the evidence were sustained renders harmless improper conduct of the prosecuting attorney in attempting to introduce the evidence. *Lathrop v. People*, 197 Ill. 169. See generally the title INSTRUCTIONS, 11 ENCYC. OF PL. AND PR. 307. 1 *et seq.*, and the Supplement thereto.

882. 1. See *State v. Carpenter*, 124 Iowa 5.

The Facts of a Previous Rape Have Been Held Admissible to Explain the Prosecutrix's Submission. — *State v. Lewis*, 112 La. 872, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 882.

Evidence of Prior Attempts Held Admissible. — *State v. Scott*, 172 Mo. 536.

Attempt to Produce Abortion on Prosecutrix. — See *Darrell v. Com.*, (Ky. 1904) 82 S. W. Rep. 289; *Woodruff v. State*, (Neb. 1904) 101 N. W. Rep. 1114.

Res Gestæ. — See *Oakley v. State*, 135 Ala. 15 (attack on mother of prosecutrix); *State v. Sheets*, 127 Iowa 73 (evidence of rape on another); *State v. Bebb*, 125 Iowa 494 (statements of intercourse with others); *Woodruff v. State*, (Neb. 1904) 101 N. W. Rep. 1114 (evidence of conditional promise of marriage); *Harmon v. Territory*, (Okla. 1905) 79 Pac. Rep. 765 (assault on another person).

2. Carnal Knowledge of Children — General Rule. — *People v. Mathews*, 139 Cal. 527; *State v. King*, 117 Iowa 484; *State v. Trusty*, 122 Iowa 82; *State v. Borchert*, 68 Kan. 360; *State v. Peres*, 27 Mont. 358; *Reinoehl v. State*, 62 Neb. 619; *State v. Cannon*, (N. J. 1905) 60 Atl. Rep. 177, following *State v. Snover*, 65 N. J. L. 289; *Sykes v. State*, 112 Tenn. 572, 105 Am. St. Rep. 972; *State v. Fetterly*, 33 Wash. 599; *Lamphere v. State*, 114 Wis. 193.

Waiver by Defendant. — *People v. Estell*, 106 N. Y. App. Div. 516.

3. See *State v. Cook*, 4 Penn. (Del.) 31; *Henard v. State*, 46 Tex. Crim. 90, second appeal (Tex. Crim. 1904) 82 S. W. Rep. 655.

4. Prior and Subsequent Acts Distinguished. — *Compare Smith v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 556.

5. *People v. Robertson*, 88 N. Y. App. Div. 198; *Smith v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 401, overruling *Hamilton v. State*, 36 Tex. Crim. 372; *Callison v. State*, 37 Tex. Crim. 216; *Hanks v. State*, (Tex. Crim. 1896) 38 S. W. Rep. 173, and *Cooksey v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 103, in so far as they announce a contrary rule; *Simpson v. State*, 46 Tex. Crim. 551.

882. Election. — See note 6.

883. *q.* RELATIONSHIP OR FRIENDSHIP BETWEEN PROSECUTRIX AND DEFENDANT — The Relationship. — See note 5.

Prior Friendly Relations. — See notes 6, 7, 8.

2. Sufficiency — *a.* IN GENERAL. — See note 10.

884. *b.* CORROBORATION OF PROSECUTRIX — (1) *Common-law Rule.* — See notes 1, 3.

Rule Where Defendant Testifies in His Own Behalf. — See note 5.

885. Instructions. — See notes 1, 2.

(2) *Statutory Requirement.* — See note 3.

Sufficiency of Corroboration. — See note 6.

882. 6. Election. — State *v.* King, 117 Iowa 484; State *v.* Norris, 122 Iowa 154; Price *v.* State, 44 Tex. Crim. 304; Stone *v.* State, 45 Tex. Crim. 91.

883. 5. Evidence of Relationship Admissible. — Shepherd *v.* State, 135 Ala. 9; Oakley *v.* State, 135 Ala. 15.

6. Bannen *v.* State, 115 Wis. 317.

7. People *v.* Elco, 131 Mich. 519; Henard *v.* State, (Tex. Crim. 1904) 82 S. W. Rep. 655.

Prior Improper Familiarity. — In a prosecution for statutory rape frequent acts of improper familiarity between the parties may be received in evidence to show their adulterous disposition towards each other. Blair *v.* State, (Neb. 1904) 101 N. W. Rep. 17.

8. Evidence of Previous Ill Treatment. — Baker *v.* State, 82 Miss. 84.

10. Caution of Sir Matthew Hale Approved. — State *v.* Pucca, 4 Penn. (Del.) 71. See also Black *v.* State, 119 Ga. 746.

For Evidence Held to Be Sufficient to support a conviction see the following cases:

Colorado. — Peckham *v.* People, 32 Colo. 140.

Georgia. — Black *v.* State, 119 Ga. 746.

Iowa. — State *v.* Carpenter, 124 Iowa 5.

Kentucky. — Smith *v.* Com., (Ky. 1904) 83 S. W. Rep. 647.

Missouri. — State *v.* Hunter, 171 Mo. 435; State *v.* Allen, 174 Mo. 689; State *v.* DeWitt, 186 Mo. 61.

Nebraska. — Richards *v.* State, 65 Neb. 808; Blair *v.* State, (Neb. 1904) 101 N. W. Rep. 17.

New York. — People *v.* Hosmer, 66 N. Y. App. Div. 616.

Oklahoma. — Harmon *v.* Territory, (Okla. 1905) 79 Pac. Rep. 765.

South Dakota. — State *v.* Callahan, (S. Dak. 1904) 99 N. W. Rep. 1100.

Texas. — Kee *v.* State, (Tex. Crim. 1901) 65 S. W. Rep. 517; Price *v.* State, 44 Tex. Crim. 304; Rodgers *v.* State, (Tex. Crim. 1904) 82 S. W. Rep. 1041; Henard *v.* State, (Tex. Crim. 1904) 82 S. W. Rep. 655; Ricks *v.* State, (Tex. Crim. 1905) 87 S. W. Rep. 345.

Washington. — State *v.* Bailey, 31 Wash. 89; State *v.* Roller, 30 Wash. 692.

Wisconsin. — Roszczyńska *v.* State, 125 Wis. 414.

For Evidence Held to Be Insufficient see Keller *v.* People, 204 Ill. 604; Franey *v.* People, 210 Ill. 206; Cunningham *v.* People, 210 Ill. 410; Ashford *v.* State, (Miss. 1904) 35 So. Rep. 569; State *v.* Hamey, (Mo. 1901) 65 S. W. Rep. 946; Champagne *v.* Hamey, 189 Mo. 709; People *v.* Feldman, 77 N. Y. App. Div. 639;

Adkins *v.* State, (Tex. Crim. 1901) 65 S. W. Rep. 924; Dina *v.* State, 46 Tex. Crim. 402; Donoghue *v.* State, (Tex. Crim. 1904) 79 S. W. Rep. 309; Rushing *v.* State, (Tex. Crim. 1904) 80 S. W. Rep. 527; Harvey *v.* Com., 103 Va. 850; Devoy *v.* State, 122 Wis. 148.

Circumstantial Evidence Sufficient. — Oakley *v.* State, 135 Ala. 29.

Testimony of Prosecutrix that Defendant "Raped" or "Ravished" Her Sufficient. — Lowry *v.* Com., (Ky. 1901) 65 S. W. Rep. 434.

884. 1. Corroboration of Prosecutrix Unnecessary. — Arizona. — Trimble *v.* Territory, (Ariz. 1903) 71 Pac. Rep. 932.

California. — People *v.* Keith, 141 Cal. 686.

Colorado. — Peckham *v.* People, 32 Colo. 140.

Illinois. — Johnson *v.* People, 197 Ill. 48 (assault with intent to rape); Crocker *v.* People, 213 Ill. 287.

Indiana. — Shular *v.* State, 160 Ind. 300.

Michigan. — People *v.* Randall, 133 Mich. 516.

Missouri. — State *v.* Day, 188 Mo. 359; Champagne *v.* Hamey, 189 Mo. 709.

Montana. — State *v.* Peres, 27 Mont. 358; State *v.* Jones, 32 Mont. 442.

Washington. — State *v.* Roller, 30 Wash. 692; State *v.* Fetterly, 33 Wash. 599.

3. Uncorroborated Testimony of Infant Prosecutrix. — Hill *v.* State, (Tex. Crim. 1903) 77 S. W. Rep. 808; Lamphere *v.* State, 114 Wis. 193; State *v.* Patchen, 37 Wash. 24.

That a Child under Age Consents Does Not Render Her an Accomplice so as to require corroboration. State *v.* Tuttle, 67 Ohio St. 440, 93 Am. St. Rep. 689; Donley *v.* State, 44 Tex. Crim. 428; Smith *v.* State, (Tex. Crim. 1903) 73 S. W. Rep. 401.

5. Uncorroborated Testimony Sufficient Even Though Defendant Denies Guilt. — Trimble *v.* Territory, (Ariz. 1903) 71 Pac. Rep. 932; Brenton *v.* Territory, (Okla. 1904) 78 Pac. Rep. 83, and Harmon *v.* Territory, (Okla. 1905) 79 Pac. Rep. 765, *overruling* Sowers *v.* Territory, 6 Okla. 436.

885. 1. Compare State *v.* Trusty, 122 Iowa 82.

2. Edwards *v.* State, (Neb. 1903) 95 N. W. Rep. 1038.

3. Statutory Requirement. — Rex *v.* Gray, 68 J. P. 327; State *v.* Wheeler, 116 Iowa 212, 93 Am. St. Rep. 236; People *v.* Haischer, 81 N. Y. App. Div. 559.

6. What Is Sufficient Corroboration. — State *v.* Snider, 119 Iowa 15; State *v.* Norris, 122 Iowa 154; State *v.* Carpenter, 124 Iowa 5.

That Opportunity Existed to Commit Offense Is

- 885.** *c.* CONFESSION. — See note 8.
886. XIII. PUNISHMENT. — See note 1.
 Discretion. — See note 2.
887. XVI. STATUTE OF LIMITATIONS. — See note 3.
 XVII. CIVIL ACTION. — See notes 4, 5, 6.
888. RATE. — See note 6.
889. RATIFY — RATIFICATION. — See notes 1, 2.
890. Relation. — See note 2.
891. RAZOR. — See note 2.
 READ. — See note 3.
892. READY MONEY. — See note 1.
893. REAL ESTATE. — See notes 3, 5.

Not Sufficient Corroboration. — State *v.* Egbert, 125 Iowa 443, discussing also the effect of evidence of complaint by the prosecutrix.

Other Cases Wherein Corroboration Was Held to Be Sufficient. — Peckham *v.* People, 32 Colo. 140; People *v.* Adams, 72 N. Y. App. Div. 166.

Cases Wherein Corroboration Was Insufficient. — People *v.* Haischer, 81 N. Y. App. Div. 559; People *v.* Robertson, 88 N. Y. App. Div. 198; People *v.* Green, 103 N. Y. App. Div. 79.

885. 8. Meisenheimer *v.* State, 73 Ark. 407; Fredrickson *v.* State, 44 Tex. Crim. 288.

Where the Prosecutrix Fails to Identify the Accused, his confessions are sufficient proof of his identity to warrant a conviction. State *v.* Icenbice, 126 Iowa 16.

886. 1. Punishment Now Universally Fixed by Statute — Rape. — Oakley *v.* State, 135 Ala. 15; Schang *v.* State, 43 Fla. 561; People *v.* Murphy, 202 Ill. 493.

Age of Defendant Determines Penalty — Texas Statute. — Thompson *v.* State, 45 Tex. Crim. 190.

2. Instances of Punishment Held Excessive on Appeal. — See State *v.* Miller, 124 Iowa 429 (assault with intent to rape).

Death Penalty Upheld. — Reyna *v.* State, (Tex. Crim. 1903) 75 S. W. Rep. 25.

Life Sentence Reduced to Imprisonment for Fifteen Years. — State *v.* Steffens, 116 Iowa 227.

Mitigation. — The fact that the defendant intended to get a divorce and marry the prosecutrix is immaterial in mitigation of the offense of carnal knowledge of a child. Smith *v.* State, (Tex. Crim. 1903) 73 S. W. Rep. 401.

So the reputation and station in life of the defendant and the prosecutrix are not to be taken into consideration in mitigation of punishment. Thomas *v.* State, (Tex. Crim. 1902) 70 S. W. Rep. 93.

887. 3. Statute of Limitations. — State *v.* Kunhi, 119 Iowa 461.

4. Civil Action by Female. — Champagne *v.* Hamey, 189 Mo. 709.

A Father may maintain a civil action for damages for the carnal abuse of his minor child; but evidence of the general character of the minor is not admissible. Nyman *v.* Lynde, 93 Minn. 257.

Corroboration of the Woman's Testimony is not necessary to enable her to recover. Starnes *v.* Stevenson, (Iowa 1904) 98 N. W. Rep. 312.

5. Champagne *v.* Hamey, 189 Mo. 709.

6. Failure to Complain. — Champagne *v.* Hamey, 189 Mo. 709.

Weight of Failure to Complain Is for Jury. — Starnes *v.* Stevenson, (Iowa 1904) 98 N. W. Rep. 312.

888. 6. Tax. — Ankeny *v.* Blakely, 44 Oregon 78.

889. 1. The Gist of a Ratification is the deliberate admission by the proper authority of a liability to pay for that for which it may lawfully contract. East Newark *v.* New York, etc., Water Supply Co., 67 N. J. Eq. 295.

2. Ratification. — Russell *v.* Erie R. Co., 70 N. J. L. 816, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 889.

890. 2. Relation. — Eau Claire Canning Co. *v.* Western Brokerage Co., 213 Ill. 590, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 890.

891. 2. Razor. — State *v.* Nelson, 38 La. Ann. 942; State *v.* Page, 15 S. Dak. 613.

3. "Papers Read in Evidence" include photographs or skiographs. Chicago, etc., Electric R. Co. *v.* Spence, 213 Ill. 220.

892. 1. Money on Deposit at a Bank Withdrawable at Fourteen Days' Notice is not *ready money*. In re Wheeler, (1904) 2 Ch. 66.

Nor is money on deposit at a bank subject to more than twenty-four hours' notice of withdrawal *ready money*. In re Price, (1905) 2 Ch. 55.

893. 3. Lands, Tenements, and Hereditaments. — Murphy *v.* Superior Ct., 138 Cal. 69; Morgan *v.* Joslyn, 91 Minn. 60.

5. Bridge held not to be *real estate* within meaning of statutes relating to the taxation of *real estate*. Middletown, etc., Bridge Co. *v.* Middletown, 77 Conn. 314.

Buildings. — In Idaho by statute *real estate* includes that which is affixed to the land, as a hotel building. Beeler *v.* C. C. Mercantile Co., 8 Idaho 644.

Estates for Life of Debtor of Another Person and Estates for Years held to be *real estate* within meaning of statute. Morrison *v.* Schorr, 197 Ill. 554.

Lease. — Wells *v.* Becker, 24 Pa. Super. Ct. 174.

Rents are not *real estate*, but when they have accrued they are personal property. Thomas *v.* Hamill, 106 Ill. App. 524.

REAL-ESTATE BROKERS.

BY H. W. HOYE.

898. I. DEFINITION. — See note 1.

899. IV. EMPLOYMENT — 1. Who May Employ Broker — a. AGENT OF OWNER. — See note 2.

900. 3. Whether Writing Necessary. — See note 4. See also the title AGENCY, **955. 10, 956. 1.**

V. AUTHORITY, POWERS, AND DUTIES — 1. General Rule — a. RULE STATED. — See note 5.

b. RATIFICATION OF UNAUTHORIZED ACTS. — See notes 8, 9.

2. Must Act in Good Faith and in Interest of Employer. — See note 10.

901. 3. Power to Sell. — See note 2.

4. Power to Make Contract of Sale — a. GENERAL RULE. — See note 4.

b. WHETHER AUTHORITY MUST BE IN WRITING. — See notes 7, 8.

c. EFFECT OF GRANT OF POWER "TO SELL." — See note 10.

902. f. RATIFICATION OF UNAUTHORIZED CONTRACT. — See note 5.

898. 1. Definition. — *Ober v. Stephens*, 54 W. Va. 354.

899. 2. Agent May Employ Broker. — *Bell v. Rokeby*, 15 Manitoba 327.

900. 4. Writing Necessary — Arizona. — *Wulff v. Lindsay*, (Ariz. 1903) 71 Pac. Rep. 963.

California. — *Jamison v. Hyde*, 141 Cal. 109.

Indiana. — *Beahler v. Clark*, 32 Ind. App. 222.

Nebraska. — *Rank v. Garvey*, 66 Neb. 767; *Covey v. Henry*, (Neb. 1904) 98 N. W. Rep. 434; *Danielson v. Goebel*, (Neb. 1904) 98 N. W. Rep. 819; *Blair v. Austin*, (Neb. 1904) 98 N. W. Rep. 1040.

New Jersey. — *Longstreth v. Korb*, 64 N. J. L. 112; *Somers v. Westcoat*, 66 N. J. L. 551; *Kent v. Phenix Art Metal Co.*, 69 N. J. L. 532; *Stout v. Humphrey*, 69 N. J. L. 436; *S. E. Crowley Co. v. Myers*, 69 N. J. L. 245; *Leimbach v. Regner*, 70 N. J. L. 608.

New York. — *Whiteley v. Terry*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 93, *affirmed* 83 N. Y. App. Div. 197; *Goldstein v. Scott*, 76 N. Y. App. Div. 78; *Peck v. Antes*, (Supm. Ct. App. T.) 84 N. Y. Supp. 252; *Adler v. Schaumberger*, (Supm. Ct. App. T.) 84 N. Y. Supp. 235; *Charles v. Arthur*, (Supm. Ct. App. T.) 84 N. Y. Supp. 284; *Davis v. Kidansky*, (Supm. Ct. App. T.) 86 N. Y. Supp. 6; *Kronenberger v. Quinn*, (Supm. Ct. App. T.) 86 N. Y. Supp. 139; *Cohen v. Boccuzzi*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 544; *Borgio v. Gange*, (Supm. Ct. App. T.) 87 N. Y. Supp. 538.

Sufficiency of Writing. — *Bradley v. Bower*, (Neb. 1904) 99 N. W. Rep. 490, holding signed letters to be sufficient.

Writing Not Necessary. — *Rathbun v. McLay*, 76 Conn. 308; *Fox v. Starr*, 106 Ill. App. 273; *Hancock v. Dodge*, 85 Miss. 228; *Gwinnup v. Sibert*, 106 Mo. App. 709; *Abbott v. Hunt*, 129 N. Car. 403; *Lamb v. Baxter*, 130 N. Car. 67;

Wilson v. Clark, 35 Tex. Civ. App. 92. See also *Cody v. Dempsey*, 86 N. Y. App. Div. 335.

5. General Rule. — *Ropes v. Rosenfeld*, 145 Cal. 671; *Gilmour v. Simon*, 15 Manitoba 205.

8. May Be Ratified. — *Butman v. Butman*, 213 Ill. 104; *Hurt v. Jones*, 105 Mo. App. 106.

9. Facts Must Be Known. — *Edwards v. Davidson*, (Tex. Civ. App. 1904) 79 S. W. Rep. 48.

10. Interest of Empolyer. — *Jeffries v. Robins*, 66 Kan. 427; *Holmes v. Cathcart*, 88 Minn. 213, 97 Am. St. Rep. 513; *Roome v. Robinson*, 99 N. Y. App. Div. 143; *Humphrey-Gibson Co. v. Robinson*, 134 N. Car. 432.

901. 2. Power to Collect Rents Does Not Include Power to Sell. — *Hunn v. Ashton*, 121 Iowa. 265.

4. Broker Cannot Make Contract of Sale. — *Brandrup v. Britten*, 11 N. Dak. 376; *Ward v. McQueen*, 13 N. Dak. 153; *Halsell v. Renfrow*, 14 Okla. 674; *York v. Nash*, 42 Oregon 321; *Smith v. McCann*, 205 Pa. St. 57; *Gilmour v. Simon*, 15 Manitoba 205.

7. Verbal Authority Sufficient. — *Fox v. Starr*, 106 Ill. App. 273; *Veeder v. Seaton*, 85 N. Y. App. Div. 196; *Gilmour v. Simon*, 15 Manitoba 205. But see *Kesner v. Miesch*, 204 Ill. 320. See further the title AGENCY, **955. 10.**

8. Written Authority Indispensable to Bind Owner. — *Brandrup v. Britten*, 11 N. Dak. 376; *Halsell v. Renfrow*, 14 Okla. 674; *Mainwaring v. Crane*, 22 Quebec Super. Ct. 67. See also the title AGENCY, **956. 1.**

10. Employment "to Sell" Does Not Give Power to Make Contract of Sale. — *Boyle v. Grassick*, 2 West. L. Rep. 284, *reversing* 2 West. L. Rep. 99.

Power to Sell Does Not Include Power to Give Option. — *Tibbs v. Zinkle*, 55 W. Va. 49, 104 Am. St. Rep. 977.

902. 5. Ratification. — *Charles v. Cook*, 88 N. Y. App. Div. 81.

902. 5. Right to Collect Proceeds of Sale. — See note 6.

7. Terms of Sale — *a.* BROKER MUST ADHERE TO TERMS FIXED BY EMPLOYER. — See note 9.

903. *b.* WHEN TERMS OF SALE NOT EXPRESSED. — See note 2.

d. RATIFICATION OF SALE ON UNAUTHORIZED TERMS. — See note 6.

VI. TIME ALLOWED TO FIND PURCHASER, LENDER, ETC. — 1. Where Time Fixed by Contract. — See note 9.

Where a Sale Is Made After the Time Limited. — See note 10.

904. 2. Where No Time Fixed by Contract. — See note 3.

3. Abandonment by Broker of Efforts to Sell. — See note 4.

905. VIII. LIABILITIES OF BROKER — 1. To Employer — *h.* DECEPTION AS TO AMOUNT FOR WHICH PROPERTY SOLD. — See note 8.

906. *i.* PURCHASE FOR HIMSELF AND RESALE AT PROFIT. — See note 2.

907. IX. RULE AGAINST ACTING FOR BOTH PARTIES — 1. Rule Stated. — See note 2.

2. Limitations of the Rule. — See note 4.

908. X. RULES AGAINST BROKER ACTING FOR HIMSELF. — See note 3.

909. XI. COMPENSATION — 1. Right To — *a.* GENERAL RULE. — See notes 1, 2.

902. 6. See *Halsell v. Renfrow*, 14 Okla. 674.

9. Terms and Conditions Fixed Must Be Adhered To — *Colorado.* — *Brown v. Keegan*, 32 Colo. 463.

Indiana. — *Strong v. Ross*, 33 Ind. App. 586; *Engle v. Johnson*, 34 Ind. App. 593.

Iowa. — *Flynn v. Jordal*, 124 Iowa 457, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 902 *et seq.*; *Staten v. Hammer*, 121 Iowa 499; *Park v. Hogle*, 124 Iowa 98; *Robertson v. Vasey*, 125 Iowa 526.

Texas. — *Edwards v. Davidson*, (Tex. Civ. App. 1904) 79 S. W. Rep. 48.

Canada. — *Gilmour v. Simon*, 15 Manitoba 205.

903. 2. See *Rake v. Townsend*, (Iowa 1905) 102 N. W. Rep. 499.

6. *Ullmann v. Land*, (Tex. Civ. App. 1904) 84 S. W. Rep. 294.

9. Limit of Time. — *Ropes v. Rosenfeld*, 145 Cal. 671; *La Force v. Washington University*, 106 Mo. App. 517; *Satterthwaite v. Goodyear*, 137 N. Car. 302; *Smith v. McCann*, 205 Pa. St. 57.

10. Sale After Time Limited. — *S. E. Crowley Co. v. Myers*, 69 N. J. L. 245.

904. 3. Reasonable Time. — *Moore v. Boehm*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 622.

4. Abandonment. — *Trickey v. Crowe*, (Ariz. 1903) 71 Pac. Rep. 965; *Leonard v. Eldridge*, 184 Mass. 594; *McCormack v. Henderson*, 100 Mo. App. 647; *Tooker v. Duckworth*, 107 Mo. App. 231; *Phinney v. Chesebro*, 87 N. Y. App. Div. 409; *Von Tobel v. Stetson, etc.*, Mill Co., 32 Wash. 683.

905. 8. Recovery of Purchase Money Retained. — *Ballinger v. Wilson*, (N. J. 1902) 53 Atl. Rep. 488.

906. 2. Broker Liable to Employer for Profit. — *Ballinger v. Wilson*, (N. J. 1902) 53 Atl. Rep. 488.

907. 2. Rule Against Acting for Both Parties. — *Green v. Southern States Lumber Co.*, 141

Ala. 686, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 907; *Bunn v. Keach*, 214 Ill. 259; *Humphrey-Gibson Co. v. Robinson*, 134 N. Car. 432; *Linderman v. McKenna*, 20 Pa. Super. Ct. 409.

The Vendor May Recover Commissions Paid by him where the broker is acting under a secret commission from the purchaser, and this, too, although he has compelled the broker to give him the commission received from the purchaser. *Andrews v. Ramsay*, (1903) 2 K. B. 635, 72 L. J. K. B. 865, 89 L. T. N. S. 450, 52 W. R. 126.

The Burden of Proof is upon the party asserting that the broker was acting for both parties. *Red Cypress Lumber Co. v. Perry*, 118 Ga. 876.

4. Consent of Both Parties. — *Lincoln v. Levi Cotton Mills Co.*, (C. C. A.) 128 Fed. Rep. 865; *Red Cypress Lumber Co. v. Perry*, 118 Ga. 876; *Stripling v. Maguire*, 108 Mo. App. 594; *Lamb v. Baxter*, 130 N. Car. 67.

Ratification Equivalent to Prior Knowledge. — *Casady v. Carraher*, 119 Iowa 500.

908. 3. The Purchase by the Agent Is Not Absolutely Void. — *Teal v. McKnight*, 110 La. 256.

Limitations of Rule. — The rule does not prevent the agent from advancing the money to the purchaser, nor does it make the broker the agent of the purchaser, even though the deed which the owner is asked to sign is made out to the broker. *Goodson v. Embleton*, 106 Mo. App. 77.

909. 1. Broker Must Have Been the Procuring Cause. — *Marlatt v. Elliott*, 69 Kan. 477; *Hollyday v. Southern Farm Agency*, 100 Md. 294; *Decker v. Widdicomb*, 137 Mich. 331; *Jaeger v. Glover*, 80 Minn. 490; *Studer v. Byson*, 92 Minn. 388; *Henkle v. Dunn*, 97 Mo. App. 671; *Walton v. McMorrow*, 63 N. Y. App. Div. 147, affirmed 175 N. Y. 493; *Land Mortg. Bank v. Hargis*, (Tex. Civ. App. 1902) 70 S. W. Rep. 352; *McCleary v. Willis*, 35 Wash. 676.

2. Broker Who Is Procuring Cause Entitled to Commissions. — *New Kanawha Coal, etc., Co. v.*

910. See note 1.

The Broker Is the Procuring Cause. — See notes 2, 4.

911. See note 1.

The Burden of Proof. — See note 2.

A Question for the Jury. — See note 3.

Special Contract. — See note 4.

b. NECESSITY FOR EMPLOYMENT — (1) *Rule Stated.* — See notes

5, 6.

912. (2) *Burden of Proof.* — See note 2.

(3) *Question for Jury.* — See note 3.

c. NECESSITY FOR LICENSE. — See notes 4, 5.

d. NECESSITY FOR AGREEMENT TO PAY COMMISSIONS. — See notes 7, 8.

913. *e. COMPENSATION DEPENDENT UPON SUCCESS.* — See note 2.

Wright, 163 Ind. 529; Kiernan v. Bloom, 91 N. Y. App. Div. 429; McCaffrey v. Page, 20 Pa. Super. Ct. 400.

910. 1. Sale by Owner. — Dean v. Archer, 103 Ill. App. 455; Gouge v. Hoyt, 127 Iowa 340; Marlatt v. Elliott, 69 Kan. 477; Jaeger v. Glover, 89 Minn. 90; Cunliff v. Hausman, 97 Mo. App. 467; McCormack v. Henderson, 100 Mo. App. 647.

2. Exertions of Broker. — Gibson v. Hunt, (Iowa 1903) 94 N. W. Rep. 277; Marlatt v. Elliott, 69 Kan. 477; Hurt v. Jones, 105 Mo. App. 106.

4. Introduction. — Wineteer v. Jones, 113 Ill. App. 129; Gouge v. Hoyt, 127 Iowa 340; Smith v. Truitt, 107 Mo. App. 1; Somers v. Wescoat, 66 N. J. L. 551.

Sale Resulting from Efforts of Another. — Where a broker merely brought the parties together and did nothing more, and subsequently a sale was made through the efforts of another broker, the first broker was held not to be entitled to a commission. De Zavala v. Royaliner, (Supm. Ct. App. T.) 84 N. Y. Supp. 969, affirmed (Supm. Ct. App. T.) 45 Misc. (N. Y.) 430.

911. 1. Wineteer v. Jones, 113 Ill. App. 129.

2. Burden of Proof. — Halterman v. Leining, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 397.

3. Question of Fact. — Jaeger v. Glover, 89 Minn. 490; Donovan v. Weed, 86 N. Y. App. Div. 630, reversed on the facts 182 N. Y. 43; Lewis's Estate, 21 Pa. Super. Ct. 393; McCaffrey v. Page, 20 Pa. Super. Ct. 400.

4. Reichard v. Wallach, (Supm. Ct. App. T.) 91 N. Y. Supp. 347; Murray v. Rickard, 103 Va. 132.

5. Necessity for Employment. — Moses v. Beverly, 137 Ala. 473; Hunn v. Ashton, 121 Iowa 265; Barton v. Powers, 182 Mass. 467; Downing v. Buck, 135 Mich. 636; McDonnell v. Stevinson, 104 Mo. App. 191; Borgio v. Gange, (Supm. Ct. App. T.) 87 N. Y. Supp. 538; Marks v. Elliot, (Supm. Ct. App. T.) 90 N. Y. Supp. 331; Cody v. Dempsey, 86 N. Y. App. Div. 335; Brady v. American Mach., etc., Co., 86 N. Y. App. Div. 267; Johnson v. Whalen, 13 Okla. 320; Samuels v. Luckenbach, 205 Pa. St. 428; Mainwaring v. Crane, 22 Quebec Super. Ct. 67. See also Wilkes v. Maxwell, 14 Manitoba 599.

Facts or Evidence Sufficient to Show Employment. — Sandefur v. Hines, 69 Kan. 168; Hart

v. Maloney, 80 N. Y. App. Div. 265; West v. Mills, 83 N. Y. App. Div. 629; Raeder v. Butler, 19 Pa. Super. Ct. 604; Eastland v. Maney, 36 Tex. Civ. App. 147.

Facts Not Showing Employment. — Haynes v. Fraser, 76 N. Y. App. Div. 627; Brady v. American Mach., etc., Co., 86 N. Y. App. Div. 267; Johnson v. Whalen, 13 Okla. 320. And see La Force v. Washington University, 106 Mo. App. 517.

An Employment to Secure an Option does not entitle the broker to a fee in case the property is actually sold. Boardman v. Hanks, 185 Mass. 555.

6. Acceptance and Ratification. — Suydam v. Vogel, (Supm. Ct. App. T.) 84 N. Y. Supp. 915.

912. 2. Burden of Proof. — Green v. Southern States Lumber Co., 141 Ala. 680; Moses v. Beverly, 137 Ala. 473; Ryan v. Page, 123 Iowa 246; Taylor v. Martin, 109 La. 137; Roome v. Robinson, 99 N. Y. App. Div. 143; Peck v. Antes, (Supm. Ct. App. T.) 84 N. Y. Supp. 252.

3. Longstreth v. Korb, 64 N. J. L. 112; Cohn v. James McCreery Realty Corp., 102 N. Y. App. Div. 611; Deitch v. Feder, (Supm. Ct. App. T.) 86 N. Y. Supp. 802; Cody v. Dempsey, 86 N. Y. App. Div. 335; Raeder v. Butler, 19 Pa. Super. Ct. 604.

4. Necessity for License. — See Wicks v. Carlisle, 12 Okla. 337, holding, however, that the rule does not operate to the broker's prejudice where his failure to obtain a license was due to the wrongful refusal of the proper officer to receive the fee.

5. License Not Necessary. — Tooker v. Duckworth, 107 Mo. App. 231; Black v. Snook, 204 Pa. St. 119; Raeder v. Butler, 19 Pa. Super. Ct. 604.

7. Calloway v. Stobart, 14 Manitoba 650.

8. Implied Agreement to Pay. — Kinder v. Pope, 106 Mo. App. 536; Hart v. Maloney, 80 N. Y. App. Div. 265; Aikins v. Allan, 14 Manitoba 549.

913. 2. Compensation Dependent upon Success. — Trickey v. Crowe, (Ariz. 1903) 71 Pac. Rep. 965; Demarest v. Spiral Riveted Tube Co., 71 N. J. L. 14; Phinney v. Chesebro, 87 N. Y. App. Div. 409; De Zavala v. Royaliner, (Supm. Ct. App. T.) 84 N. Y. Supp. 969. Compare Donald v. Lawson, (Supm. Ct. App. T.) 87 N. Y. Supp. 485.

913. In Pennsylvania. — See note 3.

g. KNOWLEDGE OF OWNER THAT CUSTOMER SENT BY BROKER.

— See note 5.

h. SALE THROUGH EFFORTS OF BROKER'S SUBAGENT OR EMPLOYEE. — See note 6.

914. i. SALE DIRECTLY BY OWNER — (1) *General Rule*. — See notes 1, 2.

(2) *Contracts Varying the Rule*. — See note 4.

915. j. FULL DUTY MUST BE PERFORMED — (1) *General Rule Stated*.

— See notes 1, 2.

916. See note 1.

(2) *Minds of Parties Must Meet*. — See note 2.

917. (3) *Broker Entitled to Commissions Where Binding Contract of Sale Made*. — See note 1.

913. 3. *Raeder v. Butler*, 19 Pa. Super. Ct. 604.

5. *Knowledge of Owner Not Necessary*. — *Kiernan v. Bloom*, 91 N. Y. App. Div. 429; *McCleary v. Willis*, 35 Wash. 676. See also *Henninger v. Burch*, 90 Minn. 43.

6. *Sale through Subagent or Employee*. — *Henninger v. Burch*, 90 Minn. 43; *Bray v. Riggs*, 110 Mo. App. 630.

914. 1. *Sale by Owner*. — *Iowa Land Co. v. Schoenewe*, (Iowa 1905) 102 N. W. Rep. 817; *White v. Benton*, 121 Iowa 354; *Tracy v. Abney*, 122 Iowa 306; *Johnson v. Wright*, 124 Iowa 61; *Mott v. Ferguson*, 92 Minn. 201; *Weaver v. Snively*, (Neb. 1905) 102 N. W. Rep. 77; *York v. Nash*, 42 Oregon 321.

2. *Sale to or Exchange with Broker's Customer*. — *Baker v. Murphy*, 105 Ill. App. 151; *Gibson v. Hunt*, (Iowa 1903) 94 N. W. Rep. 277; *Hollyday v. Southern Farm Agency*, 100 Md. 294; *Delta, etc., Co. v. Wallace*, 83 Miss. 656; *Aikins v. Allan*, 14 Manitoba 549.

Where the Broker Has Been Unsuccessful. — *Tooker v. Duckworth*, 107 Mo. App. 231; *Von Tobel v. Stetson, etc., Mill Co.*, 32 Wash. 683.

4. *Exclusive Authority to Sell*. — *Black v. Snook*, 204 Pa. St. 119; *Sylvester v. Johnson*, 110 Tenn. 392. But see *Ingold v. Symonds*, 125 Iowa 82.

Contract Not Giving Exclusive Right. — The words, "I will myself help to find a buyer and sell same to the first person offering me the above price," do not give to the agent an exclusive power of sale and prevent the owner from making a sale. *Kidman v. Howard*, (S. Dak. 1904) 99 N. W. Rep. 1104.

915. 1. *Full Duty Must Be Performed*. — *Ivy Coal, etc., Co. v. Long*, 139 Ala. 535; *Smith v. Lawrence*, 98 Me. 92; *Weibler v. Cook*, 77 N. Y. App. Div. 637; *Owen v. Kuhn*, (Tex. Civ. App. 1903) 72 S. W. Rep. 432; *Shinn v. Boyd*, 34 Tex. Civ. App. 151.

2. *What Constitutes Duty of Broker* — *Arizona*. — *Czarnowski v. Holland*, 5 Ariz. 119; *Trickey v. Crowe*, (Ariz. 1903) 71 Pac. Rep. 965.

Colorado. — *Brown v. Keegan*, 32 Colo. 463.

Connecticut. — *Wendle v. Palmer*, 77 Conn. 12.

Illinois. — *Hanrahan v. Ulrich*, 107 Ill. App. 626; *Faber v. Vaughan*, 108 Ill. App. 553; *Phillips v. Dowhower*, 103 Ill. App. 50; *Gilmore v. Bailey*, 103 Ill. App. 245.

Iowa. — *Ryan v. Page*, 123 Iowa 246; *Park v. Hogle*, 124 Iowa 98; *Johnson v. Wright*, 124

Iowa 61; *Flynn v. Jordal*, 124 Iowa 457; *Snyder v. Fidler*, 125 Iowa 378; *McGinn v. Garber*, 125 Iowa 533; *Rake v. Townsend*, (Iowa 1905) 102 N. W. Rep. 499.

Kansas. — *Sandefur v. Hines*, 69 Kan. 168.

Louisiana. — *Taylor v. Martin*, 109 La. 137.

Maryland. — *Hollyday v. Southern Farm Agency*, 100 Md. 294.

Minnesota. — *Studer v. Byson*, 92 Minn. 388; *Sherburne Land Co. v. Ellis*, 92 Minn. 114; *Rutherford v. Selover*, 87 Minn. 495.

Missouri. — *Harmon v. Enright*, 107 Mo. App. 560.

New York. — *Sampson v. Ottinger*, 93 N. Y. App. Div. 226; *Scherer v. Colwell*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 390.

North Dakota. — *Ward v. McQueen*, 13 N. Dak. 153.

Oregon. — *York v. Nash*, 42 Oregon 321.

Pennsylvania. — *McCaffrey v. Page*, 20 Pa. Super. Ct. 400.

South Dakota. — *Ball v. Dolan*, (S. Dak. 1904) 101 N. W. Rep. 719.

Texas. — *Smye v. Groesbeck*, (Tex. Civ. App. 1902) 73 S. W. Rep. 972.

Virginia. — *Murray v. Rickard*, 103 Va. 132.

Canada. — *Calloway v. Stobart*, 35 Can. Sup. Ct. 301.

Procuring of Option Contract Not Sufficient. — A broker whose only authority is to sell is not entitled to commission on the amount paid to secure an option. *Blakely v. Purssell*, (Supm. Ct. App. T.) 90 N. Y. Supp. 337.

916. 1. *Hersher v. Wells*, 103 Ill. App. 418; *Kilpatrick v. McLaughlin*, 108 Ill. App. 463; *Jeffries v. Loving*, 106 Ill. App. 380; *Collins v. Padden*, 120 Iowa 381; *Teal v. McKnight*, 110 La. 256; *Reishus-Remer Land Co. v. Benner*, 91 Minn. 401; *Hancock v. Dodge*, 85 Miss. 228; *S. E. Crowley Co. v. Myers*, 69 N. J. L. 245; *Martin v. Fegan*, 95 N. Y. App. Div. 154; *Veeder v. Seaton*, 85 N. Y. App. Div. 196.

2. *Minds of Parties Must Meet*. — *Drake v. Biddinger*, 30 Ind. App. 357; *Ormsby v. Graham*, 123 Iowa 202.

917. 1. *Broker Entitled to Commissions Where Binding Contract of Sale Made*. — *Merriman v. Wickersham*, 141 Cal. 567; *Kaestnet v. Oldham*, 102 Ill. App. 372; *Brailow v. Oziemkowski*, 112 Ill. App. 165; *Boardman v. Hanks*, 185 Mass. 555; *Perrin v. Kimberlin*, 110 Mo. App. 661; *Charles v. Cook*, 88 N. Y. App. Div. 81; *Seabury v. Fidelity Ins., etc., Co.*, 205 Pa. St. 234.

918. (4) *Burden of Proof.* — See note 3.

k. CONSUMMATION OF SALE. — See note 5.

l. VARIATION OF TERMS OR PRICE — (1) *Rule Stated.* — See note 7.

919. See notes 1, 2.

(2) *Special Contracts.* — See notes 3, 4.

m. WHERE SALE DEFEATED BY ACT OF OWNER — (1) *General Rule Stated.* — See note 5.

921. (2) *Where Reason for Refusal Sufficient if True.* — See note 1.

(3) *Where Name of Purchaser Not Disclosed.* — See note 3.

n. RIGHT TO COMPENSATION A QUESTION FOR THE JURY. — See note 6.

o. LOSS OF RIGHT TO COMMISSIONS — (1) *Fraud or Bad Faith.* — See note 7.

Option Contract Not Sufficient. — Lawrence v. Pederson, 34 Wash. 1.

918. 3. Burden of Proof. — Lassen v. Bayliss, 60 C. C. A. 512, 125 Fed. Rep. 744; Russell v. Hurd, 113 Ill. App. 63; Donley v. Porter, 119 Iowa 542; Parker v. National Mut. Bldg., etc., Assoc., 55 W. Va. 134.

5. Chapman v. Winson, 91 L. T. N. S. 17; Ormsby v. Graham, 123 Iowa 202; Fittichauer v. Van Wyck, (Supm. Ct. App. T.) 92 N. Y. Supp. 241; Hess v. Eggers, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 845, affirmed (Supm. Ct. App. T.) 38 Misc. (N. Y.) 726; Owen v. Kuhn, (Tex. Civ. App. 1903) 72 S. W. Rep. 432. See also Calloway v. Stobart, 14 Manitoba 650.

7. **Change of Terms.** — S. E. Crowley Co. v. Myers, 69 N. J. L. 245; Ullmann v. Land, (Tex. Civ. App. 1904) 84 S. W. Rep. 294.

919. 1. Change of Price. — Boland v. Ashurst Oil, etc., Co., 145 Cal. 405; Martin v. Fegan, 95 N. Y. App. Div. 154; Showaker v. Kelly, 21 Pa. Super. Ct. 390.

2. Hollyday v. Southern Farm Agency, 100 Md. 294. But see Wulff v. Lindsay, (Ariz. 1903) 71 Pac. Rep. 963.

3. See Rice v. Omberg, (Ky. 1903) 76 S. W. Rep. 15.

4. Ball v. Dolan, (S. Dak. 1904) 101 N. W. Rep. 719.

5. **Refusal of Employer to Complete Transaction** — *California.* — Merriman v. Wickersham, 141 Cal. 567.

Colorado. — Ross v. Smiley, 18 Colo. App. 204.

Iowa. — Flynn v. Jordal, 124 Iowa 457; Heaton v. Clarke, 122 Iowa 716; Lewis v. Simpson, 122 Iowa 663; Collins v. Padden, 120 Iowa 381; Donley v. Porter, 119 Iowa 542; McDermott v. Mahoney, 119 Iowa 470.

Kentucky. — Guthrie v. Bright, (Ky. 1904) 82 S. W. Rep. 985.

Minnesota. — Marlin v. Sipprell, 93 Minn. 271.

Missouri. — Goodson v. Embleton, 106 Mo. App. 77; Gwinnup v. Sibert, 106 Mo. App. 709; Perrin v. Kimberlin, 110 Mo. App. 661; Bruce v. Wolfe, 102 Mo. App. 384.

New York. — Marks v. Elliot, (Supm. Ct. App. T.) 90 N. Y. Supp. 331; Dorlon v. Forrest, 101 N. Y. App. Div. 32; Suydam v. Healy, 93 N. Y. App. Div. 396.

North Dakota. — Canfield v. Orange, 13 N. Dak. 622; Ward v. McQueen, 13 N. Dak. 153.

Pennsylvania. — Showaker v. Kelly, 21 Pa. Super. Ct. 390.

South Dakota. — Huntmer v. Arent, 16 S. Dak. 465.

Texas. — Smye v. Groesbeck, (Tex. Civ. App. 1902) 73 S. W. Rep. 972.

West Virginia. — Parker v. National Mut. Bldg., etc., Assoc., 55 W. Va. 134.

Where the Owner Insisted on Unreasonable Conditions as to the payment of a mortgage, after the sale had been practically completed except for the arrangement of slight details, in consequence of which the deal fell through, it was held that the broker was entitled to his commissions. Wendle v. Palmer, 77 Conn. 12.

Defect in Vendor's Title. — When a sale has been arranged through the exertions of an agent employed to find a purchaser, but afterwards goes off upon a defect in the vendor's title or some other defect for which the agent is not responsible, the agent is entitled to his commissions. Brydges v. Clement, 14 Manitoba 588.

921. 1. Reasons Sufficient to Justify Refusal. — Hardloper v. Weaver Coal, etc., Co., (Supm. Ct. App. T.) 45 Misc. (N. Y.) 610.

3. **Where the Owner Never Asks the Name of the Purchaser** he will not be allowed to refuse to convey on the ground that the purchaser's name was not disclosed. Rank v. Garvey, 66 Neb. 767.

6. Kinder v. Pope, 106 Mo. App. 536; Parker v. National Mut. Bldg., etc., Assoc., 55 W. Va. 134.

7. **Fraud or Bad Faith.** — Bunn v. Keach, 214 Ill. 259; Jeffries v. Robbins, 66 Kan. 427; Whaples v. Fahys, 87 N. Y. App. Div. 518; Lichtenstein v. Case, 99 N. Y. App. Div. 570 (sale of property for \$105,000 where \$110,000 could have been procured); De Armit v. Milnor, 20 Pa. Super. Ct. 369.

Circumstances Not Showing Fraud or Bad Faith. — See Davidson v. Manitoba, etc., Land Corp., 14 Manitoba 232, reversed 34 Can. Sup. Ct. 255.

A Broker's Agreement to Advance the Purchase Money and take back a mortgage on the property sold has been held not to deprive him of his right to commissions. Canfield v. Orange, 13 N. Dak. 622.

922. See note 1.

(2) *Failure or Refusal of Broker's Customer to Perform* — (a) **General Rule.** — See note 3.

(b) **Limitations of the Rule** — *aa. REFUSAL DUE TO DEFECTS IN TITLE.* — See notes 4, 5.

923. **When the Broker Knows the State of His Employer's Title.** — See note 1.

Commission Dependent upon Obtaining a Certain Price. — See note 2.

bb. REFUSAL DUE TO VENDOR'S INABILITY TO GIVE POSSESSION. — See note 3.

cc. REFUSAL DUE TO PROPERTY NOT BEING AS REPRESENTED. — See note 5.

924. (5) *Effect of Failure to Disclose Name of Purchaser.* — See note 2.

925. **3. Amount of Compensation** — *a. AMOUNT FIXED BY CONTRACT.* — See note 6.

b. REASONABLE VALUE OF SERVICES. — See note 8.

926. *c. PERCENTAGE OF PRICE OBTAINED* — (1) *In General.* — See note 1.

927. *d. CONTRACT TO ALLOW BROKER ALL OVER A CERTAIN AMOUNT.* — See notes 1, 2.

4. Time for Payment of Commissions. — See notes 4, 5.

928. **5. Employment of Several Brokers** — *a. RIGHT OF OWNER.* — See note 3.

b. WHO ENTITLED TO COMMISSIONS. — See notes 4, 5, 6.

929. **Merely Calling the Purchaser's Attention to the Property.** — See note 1.

9. Reimbursement for Expenses. — See note 11.

930. **XII. AGREEMENT BETWEEN BROKERS TO SHARE COMMISSIONS** — **3. Rights Arising Out of Agreement** — *Rights as Against Employer.* — See note 7.

922. 1. *Humphrey-Gibson Co. v. Robinson*, 134 N. Car. 432.

3. **Failure or Refusal of Purchaser to Perform.** — *Chapman v. Winson*, 91 L. T. N. S. 17; *Harmon v. Enright*, 107 Mo. App. 560; *Sheinhouse v. Khueppel*, 80 N. Y. App. Div. 445; *Ashfield v. Case*, 93 N. Y. App. Div. 452; *Chambers v. Ackley*, (Supm. Ct. Tr. T.) 91 N. Y. Supp. 78; *Smye v. Groesbeck*, (Tex. Civ. App. 1902) 73 S. W. Rep. 972.

4. **Groundless Objections to Title.** — *Marmaduke v. Martin*, 90 Mo. App. 629; *Scott v. Gage*, 16 S. Dak. 285.

5. **Refusal Due to Actual Defect of Title.** — *Fullerton v. Carpenter*, 97 Mo. App. 197; *Bruce v. Wolfe*, 102 Mo. App. 384; *Cusack v. Aikman*, 93 N. Y. App. Div. 579; *Finck v. Bauer*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 218; *Huntemer v. Arent*, 16 S. Dak. 465; *Scottish-American Mortg. Co. v. Davis*, (Tex. Civ. App. 1902) 72 S. W. Rep. 217; *Wilson v. Clark*, 35 Tex. Civ. App. 92.

923. 1. **Knowledge of Broker.** — *Shropshire v. Frankel*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 616.

2. *Locke v. Griswold*, 96 Mo. App. 527.

3. *Putter v. Berger*, 95 N. Y. App. Div. 62.

5. See *Hausman v. Herdtfelder*, 81 N. Y. App. Div. 46.

924. 2. *Compare Roome v. Robinson*, 99 N. Y. App. Div. 143.

925. 6. **Contract Governs Irrespective of Value of Services.** — See *Tyler v. Justice*, 120 Ga. 879; *King v. Hammond*, (Supm. Ct. App. T.) 84 N. Y. Supp. 121.

8. **Reasonable Value of Services** — *Customary Charges.* — *New Kanawha Coal, etc., Co. v. Wright*, 163 Ind. 529; *Hurt v. Jones*, 105 Mo.

App. 106; *Boyd v. Vale*, 84 N. Y. App. Div. 414.

926. 1. **Construction of Contract.** — Where a broker was to receive ten per cent. of the price, and secured a purchaser who agreed to pay sixteen hundred dollars, but after paying eight hundred dollars refused to pay any more, and the owner of the property accepted the sum paid as in full, the broker was held to be entitled only to his percentage upon the amount actually paid. *Blakely v. Purssell*, (Supm. Ct. App. T.) 90 N. Y. Supp. 337.

927. 1. **Contract Governs.** — See *Canfield v. Orange*, 13 N. Dak. 622.

2. *Seabury v. Fidelity Ins., etc., Co.*, 205 Pa. St. 234; *Evans v. Gay*, (Tex. Civ. App. 1903) 74 S. W. Rep. 575.

4. *Finch v. Guardian Trust Co.*, 92 Mo. App. 263.

5. **Contract Governs.** — *Frank v. Bonnevie*, (Colo. App. 1904) 77 Pac. Rep. 363; *Hart v. L. D. Garrett Co.*, 93 N. Y. App. Div. 145.

928. 3. *Adams v. Dieren*, 92 Mo. App. 129.

4. **Broker Who Procured Sale Entitled to Commission.** — *Gamble v. Grether*, 108 Mo. App. 340.

5. **Sale Through Another Broker.** — *Smith v. Truitt*, 107 Mo. App. 1; *Cunliff v. Hausman*, 97 Mo. App. 467; *Sylvester v. Johnson*, 110 Tenn. 392.

6. *Bell v. Rokeby*, 15 Manitoba 327.

929. 1. See *Johnson v. Appleton*, 11 British Columbia 128.

11. **Reimbursement for Expenses.** — *Park v. Hogle*, 124 Iowa 98; *Smith v. Lawrence*, 98 Me. 92.

930. 7. See *Theobald v. Hopkins*, 93 Minn. 253.

930. XIII. REVOCATION OF AUTHORITY — 1. Right to Revoke — a. GENERAL RULE. — See note 9.

931. See note 1.

932. REAL PARTY IN INTEREST. — See note 2.

930. 9. Right to Revoke Authority. — Trickey *v. Crowe*, (Ariz. 1903) 71 Pac. Rep. 965; Milligan *v. Owen*, 123 Iowa 285; Taylor *v. Martin*, 109 La. 137; Cadigan *v. Crabtree*, 186 Mass. 7, 104 Am. St. 543; Leonard *v. Eldridge*, 184 Mass. 594; George B. Loving Co. *v. Hesperian Cattle Co.*, 176 Mo. 330; La Force *v. Washington University*, 106 Mo. App. 517; Macfarren *v. Gallinger*, 210 Pa. St. 74; Evans *v. Gáy*, (Tex. Civ. App. 1903) 74 S. W. Rep. 575; Rowan *v. Hull*, 55 W. Va. 335, 104 Am. St. Rep. 998.

Circumstances Amounting to Revocation. — Freeland *v. Hughes*, 109 Ill. App. 73; Wallace *v. Figone*, 107 Mo. App. 362.

931. 1. Lewis *v. Simpson*, 122 Iowa 663; Sylvester *v. Johnson*, 110 Tenn. 392.

932. 2. Real Party in Interest. — Gross *v. Heckert*, 120 Wis. 314. See also Lake County *v. Schradsky*, 31 Colo. 178; Hartford F. Ins. Co. *v. King*, 31 Tex. Civ. App. 636.

REAL PROPERTY.

944. IV. TITLE, AND THE MODE OF ACQUIRING AND LOSING IT — 2. Mode of Acquiring and Losing — c. TITLE BY PURCHASE — (12) Alienation — (b) Modes of Assurance — dd. SURRENDER OR DESTRUCTION OF TITLE DEED. — See note 7.

946. REASONABLE — REASONABLY. — See note 1.

947. See note 1.

944. 7. Surrender or Destruction of Title Deed. — Holder *v. Scarborough*, 119 Ga. 256; Clark *v. Harper*, 215 Ill. 24; Tabor *v. Tabor*, 136 Mich. 255. See also Voiers *v. Atkins*, 113 La. 303. And see the title DEEDS, 164. 1 *et seq.*

946. 1. Reasonable Is a Relative Term. — Brunswick, etc., Water Dist. *v. Maine Water Co.*, 99 Me. 371.

"Reasonable" Synonymous with "Just." — Gustie *v. State*, 44 Tex. Crim. 272.

947. 1. Tompkins v. Com., 117 Ky. 138.

"Reasonably Without Fault" is not sufficient to hypothesize freedom from fault. Watkins *v. State*, 133 Ala. 88.

"Reasonably Apparent" construed as equivalent to *reasonably* certain in charge of trial jury concerning a recovery for future pain and suffering. Harrison *v. Ayrshire*, 123 Iowa 528.

REASONABLE DOUBT.

BY JOHN SIMPSON.

948. I. PROOF BEYOND REASONABLE DOUBT NECESSARY IN CRIMINAL CASES — 1. General Doctrine. — See note 1.

948. 1. Proof Beyond Reasonable Doubt Necessary — *United States*. — U. S. *v. Breese*, 131 Fed. Rep. 915.

Alabama. — Pitts *v. State*, 140 Ala. 70; Smith *v. State*, 133 Ala. 145, 91 Am. St. Rep. 21.

Arkansas. — Bruce *v. State*, 71 Ark. 475.
Delaware. — State *v. Brinte*, 4 Penn. (Del.) 551; State *v. Fahey*, 3 Penn. (Del.) 594; State *v. Magnell*, 3 Penn. (Del.) 307; State *v. Pratt*, 3 Penn. (Del.) 264; State *v. Emory*, (Del. 1904) 58 Atl. Rep. 1036.

Florida. — See Cook *v. State*, (Fla. 1903) 35 So. Rep. 665.

Georgia. — Williams *v. State*, 116 Ga. 525.

Illinois. — Stanley *v. People*, 104 Ill. App. 294.

Indiana. — Clark *v. State*, 159 Ind. 60.

Missouri. — State *v. Faulkner*, 175 Mo. 546.

Montana. — State *v. Felker*, 27 Mont. 451.

Nebraska. — Lamb *v. State*, (Neb. 1903) 95 N. W. Rep. 1050; Keeler *v. State*, (Neb. 1905) 103 N. W. Rep. 64.

New York. — People *v. Lagroppo*, 90 N. Y. App. Div. 219, affirmed 179 N. Y. 126.

Texas. — Adams *v. State*, (Tex. Crim. 1904) 84 S. W. Rep. 231; Vann *v. State*, 45 Tex. Crim. 434, 107 Am. St. Rep. 997; Angel *v. State*, 45 Tex. Crim. 135.

Virginia. — Goldman *v. Com.*, 100 Va. 865.

950. See note 1.

Matters of Defense. — See note 3.

951. 2. Circumstantial Evidence. — See notes 1, 2.**952.** See notes 1, 2.

3. Degree of Crime. — See note 3.

953. 4. Elements of Offense and Each Fact in Case. — See notes 1, 2, 3.

Circumstantial Evidence — Links in Chain. — See note 4.

954. See note 1.*West Virginia.* — *State v. Kellison*, 56 W. Va. 690.Evidence Raising a Mere Suspicion of Guilt is insufficient to convict. *Branch v. Com.*, 100 Va. 837.**950.** 1. Failure or Refusal to Charge. — *Bruce v. State*, 71 Ark. 475; *Butler v. State*, 83 Miss. 437.3. Affirmative Defenses. — *Bohlman v. State*, 135 Ala. 45; *Tanks v. State*, 71 Ark. 459; *Clark v. State*, 159 Ind. 60; *State v. Davis*, 186 Mo. 533; *State v. Felker*, 27 Mont. 451; *State v. McQueen*, 69 N. J. L. 522; *State v. Gadsden*, 70 S. Car. 430; *Perrin v. State*, 45 Tex. Crim. 560; *Winfield v. State*, 44 Tex. Crim. 475. See also *State v. Pray*, 126 Iowa 249.Failure to Prove an Alibi set up by the prisoner does not relieve the prosecution from the necessity of proving the commission of the crime beyond a reasonable doubt. *Com. v. Gutshall*, 22 Pa. Super. Ct. 269.**951.** 1. Circumstantial Evidence Sufficient. — *State v. Magnell*, 3 Penn. (Del.) 307; *State v. Coleman*, 17 S. Dak. 594; *Kelley v. State*, 44 Tex. Crim. 187; *Curran v. State*, 12 Wyo. 553.2. Circumstantial Evidence Must Exclude Every Other Reasonable Hypothesis — *Alabama.* — *Gregory v. State*, 140 Ala. 16.*Georgia.* — *Sikes v. State*, 120 Ga. 494; *Andrews v. State*, 116 Ga. 83; *Shigg v. State*, 115 Ga. 212.*Idaho.* — *State v. Levy*, 9 Idaho 483.*Maine.* — *State v. Terrio*, 98 Me. 17.*Missouri.* — *State v. Pyscher*, 179 Mo. 140.*Nebraska.* — *Lamb v. State*, (Neb. 1903) 95 N. W. Rep. 1050; *Lillie v. State*, (Neb. 1904) 100 N. W. Rep. 316.*North Carolina.* — *State v. Wilcox*, 132 N. Car. 1120.*South Dakota.* — *State v. Coleman*, 17 S. Dak. 594.*Texas.* — *Lowe v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 220.*Virginia.* — *Goldman v. Com.*, 100 Va. 865.**952.** 1. Hypothesis Must Be Reasonable. — *Bowen v. State*, 140 Ala. 65; *Jones v. State*, 141 Ala. 55; *Jarvis v. State*, 138 Ala. 17; *Walker v. State*, 134 Ala. 86; *Smith v. State*, 133 Ala. 145, 91 Am. St. Rep. 21.2. Commission of Crime by Another. — *Bowen v. State*, 140 Ala. 65.3. Degree of Crime. — *Galloway v. State*, (Fla. 1904) 36 So. Rep. 168, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 952; *People v. Boggianno*, 179 N. Y. 267.A Failure to Charge on Reasonable Doubt as Between Degrees is not error where the court charges on reasonable doubt as applied to the whole case. *Smith v. State*, (Tex. Crim. 1904) 78 S. W. Rep. 517.**953.** 1. Elements. — *State v. Gallivan*, 75 Conn. 326, 96 Am. St. Rep. 203; *State v. Magnell*, 3 Penn. (Del.) 307; *State v. Pratt*, 3 Penn. (Del.) 264; *State v. Felker*, 27 Mont. 451; *Lamb v. State*, (Neb. 1903) 95 N. W. Rep. 1050; *Vann v. State*, 45 Tex. Crim. 434, 107 Am. St. Rep. 997. See also *Jarvis v. State*, 138 Ala. 17; *State v. Crabtree*, 170 Mo. 642.Intent. — *State v. Pratt*, 3 Penn. (Del.) 264; *Goldsberry v. State*, 66 Neb. 312; *State v. McBarron*, 66 N. J. L. 680.Every Material Allegation in the Indictment must be proved beyond a reasonable doubt. *Stanley v. People*, 104 Ill. App. 294.2. Doubt upon Any Fact. — *Glover v. State*, 114 Ga. 828 (identification of the defendant as the perpetrator of the crime). See also *Jarvis v. State*, 138 Ala. 17.3. Materiality. — *Jarvis v. State*, 138 Ala. 17; *State v. Gallivan*, 75 Conn. 326, 96 Am. St. Rep. 203. See also *People v. Rich*, 133 Mich. 14.*Alabama.* — To the same effect as *Dent v. State*, 105 Ala. 14, stated in the original note, see *Pitts v. State*, 140 Ala. 70.A reasonable doubt of material facts, without regard to whether they were facts essential to the establishment of the defendant's guilt, does not require an acquittal. *Burton v. State*, 141 Ala. 32.Charge on Reasonable Doubt Must Be of Crime Charged in Indictment. — *Stewart v. State*, 133 Ala. 105.Phases of Case. — In *Mitchell v. State*, 73 Ark. 291, it was held not to be necessary that the court should add to an instruction stating that reasonable doubt applies to the whole case the words "and also to each and every phase of the case."4. Each Link in Chain of Circumstances. — *State v. Wilcox*, 132 N. Car. 1120.Where the Evidence Was in Part Circumstantial and in Part Direct, an instruction that it was circumstantial and that the defendant's innocence should be presumed by the jury until his guilt was established in all the material aspects of the case beyond a reasonable doubt and to a moral certainty was held to have been properly refused. *Cowan v. State*, 136 Ala. 101. See also *Stockbridge v. Territory*, (Okla. 1905) 79 Pac. Rep. 753; *Horn v. State*, 12 Wyo. 80.**954.** 1. Jury Need Not Be Satisfied as to Each Link. — *State v. Gallivan*, 75 Conn. 326, 96 Am. St. Rep. 203; *Henry v. People*, 198 Ill. 162; *State v. Hossack*, 116 Iowa 194; *Hodge v. Territory*, 12 Okla. 108.Where the Circumstantial Evidence Is Only Corroborative it is not necessary that every link in the chain should be proved beyond a reasonable doubt. *People v. Rich*, 133 Mich. 14.

954. Right to Instruction. — See note 2.

955. 5. Doubt Entertained by One Juror. — See notes 2, 3.

II. DEFINITION AND INSTRUCTIONS — 1. Necessity of Defining Term.

— See note 6.

956. See note 1.

2. General Definitions and Particular Terms Considered. — See note 3.

957. See note 1.

959. The Courts Have Employed a Number of Words and Phrases in Defining the Term.

— See notes 2, 5, 8, 9.

By Proof Beyond Reasonable Doubt Is Not Meant that the Evidence Must Exclude

All Doubt. — See note 10.

960. Substantial Doubt. — See note 1.

Doubt for Which Reason May Be Given — Founded on Reason. — See notes 2, 3, 4.

954. 2. Instruction Not Necessary. — Deal v. State, 136 Ala. 52; Smith v. State, 137 Ala. 22; State v. Gallivan, 75 Conn. 326, 96 Am. St. Rep. 203; Henry v. People, 198 Ill. 162; State v. Pyscher, 179 Mo. 140.

955. 2. Instruction Held Not to Be Necessary. — Jimmerson v. State, 133 Ala. 18; State v. Coleman, 17 S. Dak. 594; Snelling v. State, (Fla. 1905) 37 So. Rep. 917; Price v. State, 114 Ga. 855.

Special Instruction as to Every Branch of Case Not Necessary. — State v. Ryno, 68 Kan. 348.

Instruction to Make Mistrial Properly Refused. — Oakley v. State, 135 Ala. 29.

3. Acquittal. — Jimmerson v. State, 133 Ala. 18; Davis v. State, 131 Ala. 10; Andrews v. State, 134 Ala. 47.

6. For Cases Remarking upon Impracticability and Inexpediency of Attempts to Define and Explain Term "Reasonable Doubt." — State v. Mahoney, 122 Iowa 168; State v. Patton, 66 Kan. 486; State v. Newman, 93 Minn. 393; Junod v. State, (Neb. 1905) 102 N. W. Rep. 462; Mays v. State, (Neb. 1904) 101 N. W. Rep. 979; Lillie v. State, (Neb. 1904) 100 N. W. Rep. 316; State v. Wilcox, 132 N. Car. 1120; State v. Allen, 68 Ohio St. 516; Wilson v. State, 109 Tenn. 167; State v. Blay, 77 Vt. 56, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 794; State v. Kellison, 56 W. Va. 690.

956. 1. Definition of Reasonable Doubt Necessary. — In Florida, where the court has not in its charge given or attempted to give a definition of reasonable doubt, it is error to refuse a request for an instruction defining the term. Davis v. State, (Fla. 1903) 35 So. Rep. 76.

3. Chief Justice Shaw's Definition in Webster Case Approved. — People v. Lewandowski, 143 Cal. 574; People v. Murphy, 146 Cal. 502; State v. Patton, 66 Kan. 486.

957. 1. Definitions Approved and Disapproved — United States — Approved. — "A doubt which is reasonable in view of all of the evidence, and such as arises upon an impartial comparison and consideration of all of it, and prevents the jury from being able candidly and truthfully to say that they have an abiding conviction of the defendant's guilt." Owens v. U. S., (C. C. A.) 130 Fed. Rep. 279.

Alabama — Approved. — Bohlman v. State, 135 Ala. 45.

Disapproved. — Jimmerson v. State, 133 Ala. 18; Thompson v. State, 131 Ala. 18; Bell v. State, 140 Ala. 57; Thayer v. State, 138 Ala. 39.

Delaware — Approved. — State v. Carr, 4 Penn. (Del.) 523; State v. Walls, 4 Penn. (Del.) 408.

Florida — Disapproved. — Gass v. State, 44 Fla. 70.

Georgia — Approved. — Barnard v. State, 119 Ga. 436.

Disapproved. — Williams v. State, 116 Ga. 525.

Mississippi — Approved. — West v. State, 80 Miss. 710.

Missouri — Approved. — State v. Taylor, 171 Mo. 465.

Nebraska — Disapproved. — In Mays v. State, (Neb. 1904) 101 N. W. Rep. 979, and Junod v. State, (Neb. 1905) 102 N. W. Rep. 462, the court declined to approve of definitions such as had been formerly approved, but would not reverse the case solely because the instructions had been given. See also Keeler v. State, (Neb. 1905) 103 N. W. Rep. 64.

Pennsylvania — Approved. — Com. v. Conroy, 207 Pa. St. 212.

Texas — Approved. — Winfield v. State, 44 Tex. Crim. 475.

Wisconsin — Approved. — Secor v. State, 118 Wis. 621.

959. 2. A Reasonable Doubt Must Be Actual. — Gregory v. State, 140 Ala. 16; Pitts v. State, 140 Ala. 70.

5. Fair. — State v. Levy, 9 Idaho 483.

8. Reasonable Doubt Must Be Real Doubt. — State v. Magnell, 3 Penn. (Del.) 307.

9. Well-founded. — Hunt v. State, 135 Ala. 1. See also State v. Mahoney, 122 Iowa 168, holding that the expression "well-founded" is a loose one and not to be commended. And see Willis v. State, 134 Ala. 429.

10. Doubt Must Be Reasonable. — Alexis v. U. S., (C. C. A.) 129 Fed. Rep. 60; Jarvis v. State, 138 Ala. 17; State v. May, 172 Mo. 630; People v. Boggiano, 179 N. Y. 267. See also Ragsdale v. State, 134 Ala. 24.

960. 1. Doubt Must Be Substantial. — U. S. v. Breese, 131 Fed. Rep. 915; Gregory v. State, 140 Ala. 16; Jimmerson v. State, 133 Ala. 18; Jackson v. State, 136 Ala. 22; Pitts v. State, 140 Ala. 70; State v. Magnell, 3 Penn. (Del.) 307; State v. Di Guglielmo, 4 Penn. (Del.) 336; State v. Emory, (Del. 1904) 58 Atl. Rep. 1036; State v. Mahoney, 122 Iowa 168.

2. Reason, Based on Reason, Etc. — People v. Lagroppo, 90 N. Y. App. Div. 219, affirmed 179 N. Y. 126.

- 961.** Satisfaction. — See note 1.
 Honest Misgiving. — See note 3.
 A Vague Doubt. — See note 7.
 Whim. — See note 8.
 Speculative. — See note 9.
 Probability. — See notes 10, 11.
- 962.** Abiding Conviction — Moral Certainty. — See notes 1, 2, 3.
- 963.** Absolute Certainty. — See note 1.
 Possibility. — See note 2.
- 964.** Mathematical Certainty. — See note 1.
 Chimerical, Conjectural, or Fanciful Doubts. — See note 4.
 Imaginary Doubt. — See note 5.
 Caprice — Captious. — See note 6.
 Sympathy. — See note 7.
- 965.** Good Character. — See note 1.

Having Basis in Reason. — In *State v. Mahoney*, 122 Iowa 168, a reasonable doubt was defined as one "having some basis in reason, although it need not be such an one as the jurors may be able to give a reason for."

960. 3. Error. — See *Owens v. U. S.*, (C. C. A.) 130 Fed. Rep. 279; *Darden v. State*, 73 Ark. 315.

4. Not Reversible Error. — See *State v. Patton*, 66 Kan. 486; *State v. Newman*, 93 Minn. 393.

Neither Giving Nor Refusing Such Instruction Is Reversible Error. — *Mitchell v. State*, 140 Ala. 118; *Caddell v. State*, 136 Ala. 9; *Jimmerson v. State*, 133 Ala. 18; *Bell v. State*, 140 Ala. 57; *Cawley v. State*, 133 Ala. 128; *Thompson v. State*, 131 Ala. 18.

961. 1. The Phrases "Entirely Satisfied," "Wholly Satisfied," and "Satisfied to a Moral Certainty" in a charge exact too high a degree of proof. *Thayer v. State*, 138 Ala. 39.

"Full Satisfaction" of the minds and consciences of the jurors of the guilt of a defendant is no compliance with the rule. *Jones v. State*, 84 Miss. 194.

3. Honest Misgiving. — See *Wilson v. State*, 109 Tenn. 167.

7. Vague Doubt. — *State v. Brinte*, 4 Penn. (Del.) 551; *State v. Newman*, 93 Minn. 393; *State v. Kellison*, 56 W. Va. 690.

8. Whim. — *State v. Brinte*, 4 Penn. (Del.) 551; *State v. Di Guglielmo*, 4 Penn. (Del.) 336; *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036; *State v. Magnell*, 3 Penn. (Del.) 307.

9. Speculative Doubt Not Sufficient. — *Jimmerson v. State*, 133 Ala. 18; *Bowen v. State*, 140 Ala. 65; *Pitts v. State*, 140 Ala. 70; *State v. Brinte*, 4 Penn. (Del.) 551; *Bannen v. State*, 115 Wis. 317.

10. Probability of Guilt. — *State v. Allen*, 68 Ohio St. 516.

11. Probability of Defendant's Innocence. — *Mims v. State*, 141 Ala. 93; *Gainey v. State*, 141 Ala. 72.

962. 1. Abiding Conviction to Moral Certainty. — *State v. Fahey*, 3 Penn. (Del.) 594.

Reasonable Certainty. — *State v. Allen*, 68 Ohio St. 516.

2. Beyond Reasonable Doubt Equivalent to Moral Certainty. — *Bailey v. State*, 133 Ala. 155; *Hodge v. State*, 116 Ga. 852; *Lamb v. State*, (Neb. 1903) 95 N. W. Rep. 1050.

Phrases Distinguished. — See *Oakley v. State*, 135 Ala. 29.

Moral and Reasonable Certainty. — *Jackson v. State*, 118 Ga. 780.

Phrase "Moral Certainty" Not Necessary in Instruction. — *State v. Gallivan*, 75 Conn. 326, 96 Am. St. Rep. 203.

3. Abiding Conviction of Truth of Charge Equivalent to Proof Beyond Reasonable Doubt. — See *Mays v. State*, (Neb. 1904) 101 N. W. Rep. 979.

Fixed Conviction of the truth of the charge is held to be equivalent to satisfaction beyond a reasonable doubt. *Brown v. State*, (Ala. 1904) 38 So. Rep. 268; *Jackson v. State*, 136 Ala. 22; *Bohlman v. State*, 135 Ala. 45.

963. 1. Absolute. — *Jones v. State*, 141 Ala. 55.

2. Possibility — *United States*. — *Alexis v. U. S.*, (C. C. A.) 129 Fed. Rep. 60.

Alabama. — *Gregory v. State*, 140 Ala. 16; *Jimmerson v. State*, 133 Ala. 18; *Jackson v. State*, 136 Ala. 22; *Bohlman v. State*, 135 Ala. 45; *White v. State*, 133 Ala. 122.

Delaware. — *State v. Di Guglielmo*, 4 Penn. (Del.) 336; *State v. Fahey*, 3 Penn. (Del.) 594; *State v. Magnell*, 3 Penn. (Del.) 307; *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036.

Idaho. — *State v. Levy*, 9 Idaho 483.

Iowa. — *State v. Mahoney*, 122 Iowa 168.

Wyoming. — *Horn v. State*, 12 Wyo. 80.

964. 1. Mathematical Certainty. — *State v. Brinte*, 4 Penn. (Del.) 551; *Owen v. State*, 119 Ga. 304; *Jackson v. State*, 118 Ga. 780; *Hodge v. State*, 116 Ga. 852.

4. Conjectural Doubt Not Sufficient. — *Bohlman v. State*, 135 Ala. 45.

5. Reasonable Doubt Not Imaginary Doubt. — *Bohlman v. State*, 135 Ala. 45; *State v. Magnell*, 3 Penn. (Del.) 307; *State v. Di Guglielmo*, 4 Penn. (Del.) 336; *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036; *State v. Levy*, 9 Idaho 483; *State v. Mahoney*, 122 Iowa 168; *State v. Newman*, 93 Minn. 393.

6. Caprice — Captious. — *State v. Levy*, 9 Idaho 483; *State v. Mahoney*, 122 Iowa 168.

7. Sympathy. — *U. S. v. Breeze*, 131 Fed. Rep. 915. See also *Alexis v. U. S.*, (C. C. A.) 129 Fed. Rep. 60; *Mays v. State*, (Neb. 1904) 101 N. W. Rep. 979.

965. 1. Good Character. — Compare *Jarvis v. State*, 138 Ala. 17; *Bohlman v. State*, 135 Ala. 45; *Barnes v. State*, 134 Ala. 36.

965. Conscience — Conscientious. — See note 2.

Belief as Juror and Belief as Man. — See notes 5, 7.

"Reasonable Man" Standard — Proof that Jury Would Act upon in Own Affairs.

— See notes 9, 10.

966. See notes 1, 3.

Doubt Must Be Based on Evidence or Want of Evidence. — See notes 4, 5.

967. See note 1.

4. Instructions Clear upon the Whole. — See note 4.

968. 5. Charge of Court Fully Covering Instruction Asked by Counsel. — See note 1.

III. CIVIL ACTIONS — 1. General Rule. — See note 3.

970. 3. Bastardy. — See note 2.

971. REASONABLE TIME. — See note 1.

972. REBELLION. — See note 3.

965. 2. Conscience. — See *Miller v. State*, (Miss. 1904) 35 So. Rep. 690.

5. Belief as Jurors and Belief as Men. — *State v. Kellison*, 56 W. Va. 690. See also *Mays v. State*, (Neb. 1904) 101 N. W. Rep. 979.

7. Instruction Disapproved but Held Not to Be Reversible Error. — *Lillie v. State*, (Neb. 1904) 100 N. W. Rep. 316.

9. "Reasonable Man" Standard. — *State v. Pratt*, 3 Penn. (Del.) 264.

10. Prudent Men — Important Affairs. — *State v. Brinte*, 4 Penn. (Del.) 551; *State v. Newman*, 93 Minn. 393.

966. 1. Highest Importance. — *People v. Albers*, 137 Mich. 678.

Ordinary Affairs — Not Sufficient. — *People v. Albers*, 137 Mich. 678.

3. Instruction Disapproved. — *Gregory v. State*, 140 Ala. 16; *Spraggins v. State*, 139 Ala. 93; *Walker v. State*, 139 Ala. 56; *Goodlett v. State*, 136 Ala. 39; *Hunt v. State*, 135 Ala. 1; *Willis v. State*, 134 Ala. 429; *Allen v. State*, 134 Ala. 159; *Sanders v. State*, 134 Ala. 74; *Mann v. State*, 134 Ala. 1; *Thompson v. State*, 131 Ala. 18.

4. Doubt Must Be Founded on Evidence. — *Walker v. State*, 139 Ala. 56; *Bohlman v. State*, 135 Ala. 45; *State v. Magnell*, 3 Penn. (Del.) 307; *State v. Pratt*, 3 Penn. (Del.) 264; *State v. Levy*, 9 Idaho 483. See also *Matthis v. State*, 80 Miss. 491.

Abstract Instruction. — An instruction as to reasonable doubt founded on the evidence cannot be called abstract. *Hunt v. State*, 135 Ala. 1.

Charge Need Not State that Doubt Must Arise from Evidence. — *Mikel v. State*, 43 Tex. Crim. 615. See also *Henry v. People*, 198 Ill. 162; *Benge v. Com.*, (Ky. 1903) 71 S. W. Rep. 648.

5. Doubt Must Arise from Evidence or Want of Evidence. — *U. S. v. Breese*, 131 Fed. Rep. 915; *O'Dell v. State*, 120 Ga. 152; *State v. Mahoney*, 122 Iowa 168. See *State v. Terrio*, 98 Me. 17.

Lack of Evidence. — *Nix v. State*, (Tex. Crim. 1903) 74 S. W. Rep. 764.

In *Baker v. State*, 120 Wis. 135, it was said to be well to inform the jury that the doubt should arise from a consideration of all the evidence "or want of evidence," though the court was not prepared to hold that the absence of the words quoted is necessarily reversible error.

967. 1. Must Arise from Evidence Considered as Whole. — *Winter v. State*, 132 Ala. 32; *Gor-*

don v. State, 140 Ala. 29; *Holmes v. State*, 136 Ala. 80; *Jarvis v. State*, 138 Ala. 17; *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036; *Gorgo v. People*, 100 Ill. App. 130; *Delahoyde v. People*, 212 Ill. 554; *Landreth v. State*, 44 Tex. Crim. 239; *Baker v. State*, 120 Wis. 135.

"The evidence in the case must be so conclusive that, taking it all together, it cannot be reasonably reconciled with the theory of the defendant's innocence." *U. S. v. Breese*, 131 Fed. Rep. 915.

May Grow Out of Evidence of Prosecution or of Defendant. — *Wilson v. State*, 140 Ala. 43; *Sanders v. State*, 134 Ala. 74.

Doubt Arising from Consideration of Part of Evidence Only. — See *Deal v. State*, 136 Ala. 52.

4. Instruction Clear upon the Whole. — *People v. Murphy*, 146 Cal. 502; *Martin v. State*, 67 Neb. 36; *Winfield v. State*, 44 Tex. Crim. 475; *Ussleton v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 21. See also *State v. Pray*, 126 Iowa 249.

The Definition May Be Given in Different Instructions, instead of embodying them in one, where the party objecting is not prejudiced thereby. *Johnson v. People*, 202 Ill. 53.

968. 1. Charge of Court Fully Covering Instruction Asked by Counsel. — *Willis v. State*, 134 Ala. 429; *Winter v. State*, 133 Ala. 176; *Snelling v. State*, (Fla. 1905) 37 So. Rep. 917; *State v. Coleman*, 186 Mo. 151; *Lamb v. State*, (Neb. 1903) 95 N. W. Rep. 1050; *People v. Bogiano*, 179 N. Y. 267; *Loose v. State*, 120 Wis. 115.

Illustration. — Having charged as to the weight which may be given to the prisoner's statement, it is not necessary, in defining reasonable doubt, for the judge further to say that it may arise from the defendant's statement. *Walker v. State*, 118 Ga. 34.

3. Proof Beyond Reasonable Doubt Not Required. — *Blackmore v. Ellis*, 70 N. J. L. 264.

970. 2. Bastardy — Preponderance of Evidence Sufficient. — *Priel v. Adams*, (Neb. 1902) 91 N. W. Rep. 536. See title BASTARDY, 874. 1.

971. 1. Reasonable Time Dependent upon Circumstances. — *Henderson v. McFadden*, (C. C. A.) 112 Fed. Rep. 389; *Hogan v. Tucker*, 116 Ky. 918; *Neilsen v. Mayer*, (Supm. Ct. App. T.) 85 N. Y. Supp. 1069; *Bowen v. Young*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 547; *Goltra v. Penland*, 45 Oregon 254.

972. 3. Rebellion. — See also *Crashley v. Press Pub. Co.*, 74 N. Y. App. Div. 118.

RECAPTION.

976. II. EXERCISE OF RIGHT — 2. Real Property. — See note 3.

976. 3. Real Property. — *State v. Wester*, 67 Kan. 810.

RECEIPTS.

BY J. H. SMITH.

978. II. DEFINITION AND NATURE — Is Not Contract. — See note 3.

979. Effect of Receipt and Release Distinguished. — See note 4.

980. IV. RECEIPTS AS EVIDENCE — 1. Admissibility — a. IN GENERAL —
Alteration of Receipt. — See note 5.

983. 3. Effect of Receipts as Evidence — a. CONCLUSIVENESS OF RECEIPTS — (1) *Prima Facie* Evidence but Not Conclusive — In General. — See note 4.

984. See notes 1, 2, 3.

985. Fraud, Mistake, Undue Influence, Etc. — See notes 2, 5.

986. When Unexplained. — See note 1.

Necessity for Convincing Evidence in Contradiction or Explanation. — See note 4.
Rule Where Evidence of Equal Weight. — See note 6.

988. b. RECEIPTS IN FULL — *Prima Facie* Defense. — See notes 1, 2.

989. See note 1.

Receipt in Full as Evidence of Accord and Satisfaction. — See note 4.

978. 3. Conclusiveness of Receipt as Evidence of Contract. — *Vacheron v. Hildebrant*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 61. See also *Seeger v. Manitowoc Steam Boiler Works*, 120 Wis. 11.

979. 4. Distinction Between Release and Receipt. — Where on an inspection of an instrument it appears that it extinguishes a pre-existing debt, it is not only a receipt, but a release. *Cammarata v. Pennsylvania Coal Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 787.

980. 5. Fraudulent Alteration of Receipt. — *Rambousek v. Supreme Council, etc.*, 119 Iowa 263.

983. 4. Receipt Merely *Prima Facie* Evidence. — *Rarden v. Cunningham*, 136 Ala. 263; *Butler v. State*, 81 Miss. 734; *Mutual Ben. L. Ins. Co. v. Daniels*, 67 Neb. 91; *Komp v. Raymond*, 175 N. Y. 102; *Guhl v. Frank*, 22 Pa. Super. Ct. 531; *Anderson v. Davis*, 55 W. Va. 434.

984. 1. Open to Explanation or Contradiction. — *Rork v. Minor*, 109 Ill. App. 12; *Hennessy v. Kennedy Furniture Co.*, 30 Mont. 264; *H. F. Cady Lumber Co. v. Greater America Exposition Co.*, (Neb. 1903) 93 N. W. Rep. 961; *Guhl v. Frank*, 22 Pa. Super. Ct. 531.

2. Parol Evidence. — *Lynn v. Bean*, 141 Ala. 236; *Rarden v. Cunningham*, 136 Ala. 263; *Lacrabere v. Wise*, (Cal. 1903) 71 Pac. Rep. 175; *Hudson v. Baker*, 185 Mass. 122; *Tru-*

worthy v. French, 97 Me. 143; *Butler v. State*, 81 Miss. 734; *Komp v. Raymond*, 175 N. Y. 102; *Vacheron v. Hildebrant*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 61.

3. See *Rork v. Minor*, 109 Ill. App. 12.

985. 2. Mistake as to Facts. — *Butler v. State*, 81 Miss. 734; *Guhl v. Frank*, 22 Pa. Super. Ct. 531.

5. Fraud. — *Butler v. State*, 81 Miss. 734; *Guhl v. Frank*, 22 Pa. Super. Ct. 531.

986. 1. Receipt Unexplained Is Conclusive. — See *Cummings v. Lynn*, 121 Iowa 344.

4. *Anderson v. Davis*, 55 W. Va. 434, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 986.

6. Receipt Must Stand Where Evidence of Equal Weight. — *Guhl v. Frank*, 22 Pa. Super. Ct. 531.

988. 1. Burden of Proof on Opposite Party. — See *Guhl v. Frank*, 22 Pa. Super. Ct. 531.

2. Not Conclusive. — *Rork v. Minor*, 109 Ill. App. 12; *Komp v. Raymond*, 175 N. Y. 102; *Guhl v. Frank*, 22 Pa. Super. Ct. 531; *Anderson v. Davis*, 55 W. Va. 434, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 988; *Seeger v. Manitowoc Steam Boiler Works*, 120 Wis. 11.

989. 1. Compromise. — *Vacheron v. Hildebrant*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 61.

4. Receipt Evidence of Accord and Satisfaction. — *Vacheron v. Hildebrant*, (Supm. Ct. Tr. T.) 39 Misc. (N. Y.) 61.

RECEIVERS.

By J. E. BRADY.

1001. I. DEFINITION — 1. In General. — See note 1.

II. NATURE OF RECEIVERSHIPS — 2. Receivership Provisional and Ancillary Remedy. — See note 5.

3. Appointment of Receiver as Equitable Execution. — See note 7.

1002. 4. Appointment as Equitable Assignment. — See note 2.

III. OBJECT AND PURPOSE OF APPOINTMENT. — See note 3.

IV. JURISDICTION TO APPOINT RECEIVERS — 1. General Equity Jurisdiction — a. IN GENERAL. — See note 6.

1003. b. EXHAUSTION OF LEGAL REMEDIES — (1) General Rule. — See notes 1, 3.

1004. (3) Legal Remedy Must Be "Complete, Prompt, and Efficient." — See note 3.

c. RECEIVERS OF CORPORATIONS. — See notes 4, 6.

1005. See note 1.

2. Jurisdiction of Courts of Law. — See note 2.

3. Statutory Jurisdiction. — See note 4.

1001. 1. For Other Definitions. — McGarrah v. Southwestern Georgia Bank, 117 Ga. 556; Cogan v. Conover Mfg. Co., (N. J. 1905) 60 Atl. Rep. 408; Egan v. North American Sav., etc., Co., 45 Oregon 131.

5. A Provisional Remedy. — St. Louis, etc., R. Co. v. Vandalia, 103 Ill. App. 363; Ruprecht v. Henrici, 113 Ill. App. 398, 116 Ill. App. 583; Saxon v. Southwestern Brick, etc., Mfg. Co., 113 La. 637; Vila v. Grand Island Electric Light, etc., Co., (Neb. 1903) 97 N. W. Rep. 613, 94 N. W. Rep. 136; Smiley v. Sioux Beet Syrup Co., (Neb. 1904) 101 N. W. Rep. 253. See also Winona, etc., Traction Co. v. Collins, 162 Ind. 693.

Where There Is No Action Pending to which the application for a receiver is ancillary a receiver will not be appointed. Winona, etc., Traction Co. v. Collins, 162 Ind. 693; Vila v. Grand Island Electric Light, etc., Co., (Neb. 1903) 94 N. W. Rep. 136; Popp v. Daisy Gold Min. Co., 27 Utah 83.

7. Commonwealth Roofing Co. v. North American Trust Co., (C. C. A.) 135 Fed. Rep. 989; Vila v. Grand Island Electric Light, etc., Co., (Neb. 1903) 97 N. W. Rep. 613. See also Thompson v. Gill, (1903) 1 K. B. 760; Burns v. Munn, 2 West. L. Rep. (Can.) 128; Sanford v. Anderson, (Neb. 1903) 95 N. W. Rep. 632.

1002. 2. Receiver Is Statutory Assignee. — See Fish v. Olin, 76 Vt. 120.

Receiver Not Assignee. — Dayton Hydraulic Co. v. Felsenthal, (C. C. A.) 116 Fed. Rep. 961.

3. Purpose of Receivership. — Home Sav., etc., Co. v. District Ct., 121 Iowa 1; City Item Co-operative Printing Co. v. Phoenix Furniture Concern, 108 La. 258; Larsen v. U. S. Mortgage, etc., Co., 104 N. Y. App. Div. 76; Troughber v. Akin, 109 Tenn. 451; Fernald v. Spokane, etc., Telephone, etc., Co., 31 Wash. 219; Belding v. Washington Cornice Co., 36 Wash. 549.

6. Inherent Power of Chancery. — Gibbs v. Morgan, 9 Idaho 100.

1003. 1. Exhaustion of Legal Remedies. — Jones v. Mutual Fidelity Co., 123 Fed. Rep. 506; Booth v. Mohr, 122 Ga. 333; Barnesville Mfg. Co. v. Schofield's Sons Co., 118 Ga. 664; Davidge v. Kirby, 10 British Columbia 231. See also Hardy v. Abbott, 32 Tex. Civ. App. 66.

3. Where Action at Law Lies. — Hallenborg v. Cobre Grande Copper Co., (Ariz. 1904) 74 Pac. Rep. 1052.

1004. 3. Columbia National Sand Dredging Co. v. Washed Bar Sand Dredging Co., 136 Fed. Rep. 710.

4. Receiver for Corporation. — People v. District Ct., 33 Colo. 293; State v. Ellis, 108 La. 521; Vila v. Grand Island Electric Light, etc., Co., (Neb. 1903) 97 N. W. Rep. 613.

The Consent of a Corporation to the appointment of a receiver cannot of itself confer jurisdiction to appoint. Vila v. Grand Island Electric Light, etc., Co., (Neb. 1903) 94 N. W. Rep. 136.

6. Statutes. — U. S. Shipbuilding Co. v. Conklin, (C. C. A.) 126 Fed. Rep. 132; Jones v. Mutual Fidelity Co., 123 Fed. Rep. 506; Gibbs v. Morgan, 9 Idaho 100; Bartlett v. Fourton, (La. 1905) 38 So. Rep. 882; Saxon v. Southwestern Brick, etc., Mfg. Co., 113 La. 637; Jacobus v. Diamond Soda Water Mfg. Co., 94 N. Y. App. Div. 366; Kieley v. Barron, etc., Heating, etc., Co., 87 N. Y. App. Div. 317.

1005. 1. Strict Construction. — State v. Ellis, 108 La. 521; Hutchinson v. Rice, 109 La. 29; Saxon v. Southwestern Brick, etc., Mfg. Co., 113 La. 637; Bartlett v. Fourton, (La. 1905) 38 So. Rep. 882.

2. Probate Court cannot appoint receiver. Garrett v. London, etc., F. Ins. Co., (Okla. 1905) 81 Pac. Rep. 421.

4. Statutory Provisions — Colorado. — People v. District Ct., 33 Colo. 293.

1005. 4. Jurisdiction as Dependent on Situs of Property — *a.* IN GENERAL. — See note 5.

1006. *b.* FOREIGN CORPORATIONS. — See notes 1, 2, 3.

5. Jurisdiction of Person of Owner. — See note 5.

1007. V. GROUNDS FOR APPOINTMENT OF RECEIVER — 1. In General. — See note 2.

Where Requisite Danger of Loss Not Shown. — See note 3.

1009. 4. Under Canadian Judicature Act. — See note 1.

5. Where Title to Property in Dispute. — See notes 3, 4.

7. Fraud. — See note 7.

1010. 8. Insolvency — *a.* IN GENERAL. — See note 3.

b. INSOLVENCY AS SOLE GROUND. — See note 6.

1011. *c.* INSOLVENCY COUPLED WITH DANGER OF LOSS. — See note 3.

1013. 10. Where Trustee Neglects, Abuses, or Mismanages Trust — *c.* WHEN RECEIVER WILL BE APPOINTED — (3) *Disputes and Dissensions Among Cotrustees.* — See note 5.

1014. (7) *Testamentary Trusts.* — See note 7.

Idaho. — Gibbs *v.* Morgan, 9 Idaho 100.

Indiana. — Levin *v.* Florsheim, 161 Ind. 457; Huntington County Loan, etc., Assoc. *v.* Fulk, 158 Ind. 113.

Kentucky. — Dupoyster *v.* Ft. Jefferson Imp. Co., (Ky. 1903) 72 S. W. Rep. 268; Thompson *v.* Page, (Ky. 1903) 76 S. W. Rep. 128.

Louisiana. — Matter of John Lange Land, etc., Co., 106 La. 466.

Massachusetts. — George *v.* Clark, 186 Mass. 426.

New York. — Mack *v.* Stanley, 74 N. Y. App. Div. 145; Zeltner *v.* Henry Zeltner Brewing Co., 79 N. Y. App. Div. 136, affirmed 174 N. Y. 247, 95 Am. St. Rep. 574; Jacobus *v.* Diamond Soda Water Mfg. Co., 94 N. Y. App. Div. 366.

Ohio. — Norwood First Nat. Bank *v.* Clauss, 26 Ohio Cir. Ct. 107.

South Dakota. — Kelly *v.* Fargo Mercantile Co., 16 S. Dak. 73; Crouch *v.* Dakota, etc., Co., (S. Dak. 1904) 101 N. W. Rep. 722; Juckett *v.* Fargo Mercantile Co., (S. Dak. 1905) 102 N. W. Rep. 604.

Washington. — Euphrat *v.* Morrison, (Wash. 1905) 81 Pac. Rep. 695.

1005. 5. Rule by Statute. — The Pennsylvania Court of Common Pleas, under the Insolvency Act of June 4, 1901, § 7, P. L. 404, is without jurisdiction to appoint a receiver for an insolvent not residing within the county and having no place of business therein. Dolhenty's Estate, 11 Pa. Dist. 187.

1006. 1. Foreign Corporations. — Acken *v.* Coughlin, 103 N. Y. App. Div. 1.

2. Bradbury *v.* Waukegan, etc., Min., etc., Co., 113 Ill. App. 601. See also Schmitz *v.* Metallic Condense Co., 11 Pa. Dist. 442.

3. American Tribune New Colony Co. *v.* Schuler, 34 Tex. Civ. App. 560.

5. Jurisdiction of Person of Owner. — Schmitz *v.* Metallic Condense Co., 11 Pa. Dist. 442.

1007. 2. Danger of Loss of or Injury to Property. — Dubois *v.* Bowles, 30 Colo. 44; Kelly *v.* Steele, 9 Idaho 141; Ruprecht *v.* Henrich, 113 Ill. App. 398; Levin *v.* Florsheim, 161 Ind. 457; Kentucky Racing, etc., Assoc. *v.* Gal-

breath, 117 Ky. 66; Johnston *v.* Lippert, 96 Md. 584; Benepe-Owenhouse Co. *v.* Scheidegger, 32 Mont. 424; Schmitz *v.* Metallic Condense Co., 11 Pa. Dist. 444; Crouch *v.* Dakota, etc., R. Co., (S. Dak. 1904) 101 N. W. Rep. 722; Fernald *v.* Spokane, etc., Telephone, etc., Co., 31 Wash. 672.

3. Belding *v.* Washington Cornice Co., 36 Wash. 549. See also Johnston *v.* Lippert, 96 Md. 584.

1009. 1. The Purpose of the Ontario Enactment was expressly to confer upon all the courts that jurisdiction which, under the designation of equitable execution, had, before the fusion of law and equity, been exercised by the Court of Chancery alone. Asselin *v.* Cleghorn, 6 Ont. L. Rep. 170.

3. Title in Dispute — Freer *v.* Davis, 52 W. Va. 35, 94 Am. St. Rep. 910.

4. See Kelly *v.* Steele, 9 Idaho 141; Levin *v.* Florsheim, 161 Ind. 457.

7. Fraudulent Transfers. — National Bank of Republic *v.* Hobbs, 118 Fed. Rep. 626.

Fraud on Person Lacking Testamentary Capacity. — In order to justify the appointment of a receiver at the suit of heirs over property conveyed shortly before the grantor's death under alleged undue influence upon the grantor, facts must appear showing the absence of testamentary capacity. Johnston *v.* Lippert, 96 Md. 584.

1010. 3. Insolvency. — Kelly *v.* Steele, 9 Idaho 141; Johnston *v.* Lippert, 96 Md. 584; Miller *v.* Kitchen, (Neb. 1905) 103 N. W. Rep. 297; Kelly *v.* Fargo Mercantile Co., 16 S. Dak. 73; Freer *v.* Davis, 52 W. Va. 35, 94 Am. St. Rep. 910.

6. Worth Mfg. Co. *v.* Bingham, (C. C. A.) 116 Fed. Rep. 785; Lemker *v.* Kalberlah, 105 Ill. App. 451; Bettle *v.* Republic Sav., etc., Assoc., 63 N. J. Eq. 578.

1011. 3. Bettle *v.* Republic Sav., etc., Assoc., 63 N. J. Eq. 578.

1013. 5. Donaldson *v.* Allen, 182 Mo. 626.

1014. 7. Upon the Termination of a Trust under a Will, where disputes arise between the trustees, a receiver may be appointed. Donaldson *v.* Allen, 182 Mo. 626.

1015. 11. Where No Person Competent to Hold Property — *b.* ESTATES OF DECEDENTS. — See note 10.

1016. 12. To Carry Judgment or Decree into Effect. — See note 9.

1017. 13. Where No Property — *a.* IN GENERAL. — See note 1.

15. Consent of Parties. — See note 9.

1018. 16. Receivers of Partnerships — *b.* IN ACTIONS FOR DISSOLUTION. — See note 3.

1019. After the Dissolution of a Partnership. — See note 4.

c. RECEIVER NOT APPOINTED TO CONTINUE BUSINESS. — See note 6.

d. EXCLUSION FROM PARTNERSHIP RIGHTS. — See note 8.

1020. *f.* MISCONDUCT OF PARTNER. — See notes 6, 7.

1021. See note 3.

g. NECESSITY FOR PARTNERSHIP. — See notes 4, 5.

h. DOUBT AS TO EXISTENCE OF PARTNERSHIP. — See note 8.

17. Receivers of Corporations — *a.* GENERAL RULE. — See note 10.

1022. Danger of Loss. — See note 2.

Power to Consent to Appointment. — See note 3.

c. FAILURE TO PURSUE OBJECTS OF CREATION. — See note 5.

1023. *e.* MISCONDUCT OF OFFICERS OR DIRECTORS — (1) *In General.* — See notes 3, 4.

1015. 10. Decedents' Estates. — Thompson v. Page, (Ky. 1903) 76 S. W. Rep. 128. See also Le Brantz v. Conklin, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 715.

Where the Personal Representative Refuses to Act a receiver may be appointed. Bushkirk v. Peck, 57 W. Va. 360. And as to the right to renounce executorship and the effect of renunciation see generally the title EXECUTORS AND ADMINISTRATORS, 754. 5 *et seq.*; 1328. 1 *et seq.*

1016. 9. See Asselin v. Cleghorn, 6 Ont. L. Rep. 170, wherein, however, the court refused to appoint a receiver of all a debtor's property and earnings in order to enable a judgment creditor to collect his judgment.

1017. 1. When There Is No Property. — Lowther v. Lowther, 105 N. Y. App. Div. 638. See also Kelsey v. Webb, 94 N. Y. App. Div. 571.

Where No Property Applicable to Judgment. — Matter of Stafford, 105 N. Y. App. Div. 46.

Absentee. — A statute providing for the appointment of a receiver for the property of one whose whereabouts are unknown does not apply to a case where a legatee under a will had disappeared more than seven years before the death of the testator, there being a presumption of the legatee's death, and the property, therefore, never belonging to him. George v. Clark, 186 Mass. 426.

9. Vila v. Grand Island Electric Light, etc., Co., (Neb. 1903) 94 N. W. Rep. 136.

1018. 3. Dissolution of Partnership. — Gillett v. Higgins, (Ala. 1905) 38 So. Rep. 664.

1019. 4. Fink v. Montgomery, 162 Ind. 424.

6. Continuance of Business. — Laramie First Nat. Bank v. Cook, 12 Wyo. 492.

8. Where Partner Excluded from Participation. — Gillett v. Higgins, (Ala. 1905) 38 So. Rep. 664; Redding v. Anderson, 37 Wash. 209.

1020. 6. See Joselove v. Bohrmann, 119 Ga. 204.

7. Fink v. Montgomery, 162 Ind. 424.

1021. 3. Appropriation of Firm Assets by

Partner After Dissolution. — Fink v. Montgomery, 162 Ind. 424.

4. Necessity for Existing Partnership. — Smith v. Dunn, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 288, holding that mere evidence of a joint enterprise is not sufficient.

5. Where One Partner Had Sold His Interest to the Other, but the business was being continued in the firm name, and the purchasing partner contracted debts in the firm name though insolvent, it was held that a receiver was properly appointed, the selling partner being still a partner in liability though not in interest. Jose-love v. Bohrmann, 119 Ga. 204.

8. Rowland v. Auto Car Co., 133 Fed. Rep. 835.

10. Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co., 136 Fed. Rep. 710; Posner v. Southern Exhaust, etc., Pipe Co., 109 La. 658; Vila v. Grand Island Electric Light, etc., Co., (Neb. 1903) 94 N. W. Rep. 136; Miller v. Kitchen, (Neb. 1905) 103 N. W. Rep. 297.

Receiverships Denied under Particular Circumstances. — Donald v. Manufacturers' Export Co., (Ala. 1905) 38 So. Rep. 841; Chemung Min. Co. v. Hanley, (Idaho 1905) 81 Pac. Rep. 619; Bartlett v. Fourton, (La. 1905) 38 So. Rep. 882; Stokes v. Knickerbocker Invest. Co., (N. J. 1905) 61 Atl. Rep. 736; Bacon v. Hoover Wagon Co., 13 Pa. Dist. 16.

Appointment under Particular Circumstances. — Boston Mercantile Co. v. Ould-Carter Co., 123 Ga. 458.

1022. 2. Management and Danger of Loss — Receiver Appointed. — Kentucky Racing, etc., Assoc. v. Galbreath, 117 Ky. 66.

Receiver Not Appointed Where No Danger of Loss. — Kelly v. Steele, 9 Idaho 141.

3. Saxon v. Southwestern Brick, etc., Mfg. Co., 113 La. 637, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1022.

5. Treat v. Pennsylvania Mut. L. Ins. Co., 203 Pa. St. 21.

1023. 3. Gross Mismanagement Sufficient

1023. Nor Are Mere Irregularities. — See note 5.

1024. A Receiver of a Corporation May, However, Be Appointed. — See note 2.
Where Corporation Is Solvent. — See note 3.

f. INSOLVENCY — (1) *In General*. — See notes 6, 7.

1025. See notes 1, 2.

(2) *When Corporation Is Insolvent* — (b) *Return of Unsatisfied Execution*.

— See note 7.

g. DISSOLUTION OF CORPORATION. — See note 8.

1026. *h.* WHERE ADEQUATE REMEDY AT LAW. — See note 2.

18. Receivers of Mortgaged Property — a. IN GENERAL. — See notes 3, 4.

1027. *e.* INADEQUACY OF SECURITY — INSOLVENCY OF MORTGAGOR.
— See note 5.

1028. See notes 1, 3.

Ground. — *Posner v. Southern Exhaust, etc., Pipe Co.*, 109 La. 658.

1023. 4. Mere Misconduct. — *New Albany Waterworks v. Louisville Banking Co.*, (C. C. A.) 122 Fed. Rep. 776; *Miller v. Kitchen*, (Neb. 1905) 103 N. W. Rep. 297; *Richardson v. Clinton Wall Trunk Mfg. Co.*, 181 Mass. 580. See also *Alabama Coal, etc., Co. v. Shackelford*, 137 Ala. 224; *Bartlett v. Fourton*, (La. 1905) 38 So. Rep. 882.

An Attempt to Make an Ultra Vires Lease on the part of a corporate board is not a sufficient ground to justify the appointment of a receiver. *New Albany Waterworks v. Louisville Banking Co.*, (C. C. A.) 122 Fed. Rep. 776.

Misconduct of Officers of a Foreign Corporation is not a ground for the appointment of a receiver. *Phillips v. Sonora Copper Co.*, 90 N. Y. App. Div. 140.

5. Mere Irregularities. — *Callaway v. Powhatan Imp. Co.*, 95 Md. 177.

1024. 2. Where Rights of Stockholders or Creditors Jeopardized. — *Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co.*, 136 Fed. Rep. 710; *The Anvil v. Savery*, 116 Ga. 321; *Davies v. Monroe Water Works, etc., Co.*, 107 La. 145; *Treat v. Pennsylvania Mut. L. Ins. Co.*, 203 Pa. St. 21.

3. Contra, where the corporate officers, by mismanagement and fraud, are jeopardizing the property. *Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co.*, 136 Fed. Rep. 710. Compare *Treat v. Pennsylvania Mut. L. Ins. Co.*, 203 Pa. St. 21.

Only in a Strong Case can the appointment of a receiver for a solvent corporation be justified. *Bacon v. Hoover Wagon Co.*, 13 Pa. Dist. 16.

6. Insolvency. — *The Anvil v. Savery*, 116 Ga. 321. See also *Kentucky Racing, etc., Assoc. v. Galbreath*, 117 Ky. 66.

7. Worth Mfg. Co. v. Bingham, (C. C. A.) 116 Fed. Rep. 785.

Refusal to Pay Debts Insufficient. — *Brenton v. Peck*, (Tex. Civ. App. 1905) 87 S. W. Rep. 898.

1025. 1. See *U. S. Shipbuilding Co. v. Conklin*, (C. C. A.) 126 Fed. Rep. 132.

2. *U. S. Shipbuilding Co. v. Conklin*, (C. C. A.) 126 Fed. Rep. 132; *The Anvil v. Savery*, 116 Ga. 321. See also *Worth Mfg. Co. v. Bingham*, (C. C. A.) 116 Fed. Rep. 785.

Where a corporation is insolvent, and its in-

vestments are reckless and its expenses large, the appointment of a receiver is authorized. *Bettle v. Republic Sav., etc., Assoc.*, 63 N. J. Eq. 578.

7. See *Consolidated Barb Wire Co. v. Stevenson*, (Kan. 1905) 79 Pac. Rep. 1085.

8. Where Corporation Dissolved. — See *Matter of John Lange Land, etc., Co.*, 106 La. 466.

1026. 2. *Hallenborg v. Cobre Grande Copper Co.*, (Ariz. 1904) 74 Pac. Rep. 1052.

Appointment Made Only Where Ordinary Remedies Inadequate. — *Belding v. Washington Cornice Co.*, 36 Wash. 549.

Other Equitable Relief. — *Miller v. Kitchen*, (Neb. 1905) 103 N. W. Rep. 297.

3. Property Not Covered by a Mortgage will not be placed in the hands of a receiver at the instance of the mortgagee. *Vila v. Grand Island Electric Light, etc., Co.*, (Neb. 1903) 94 N. W. Rep. 136.

4. Must Be Clear Case for Exercise of Equitable Powers. — *New York Bldg. Loan Banking Co. v. Begly*, 75 N. Y. App. Div. 308. See also *Welche v. Schoenberg*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 126.

1027. 5. Inadequacy of Security — Insolvency of Mortgagor. — *Ortengren v. Rice*, 104 Ill. App. 428; *Alexander v. Houston*, (Miss. 1902) 31 So. Rep. 211; *Euphrat v. Morrison*, (Wash. 1905) 81 Pac. Rep. 695, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1027. See also *Chicago Real Estate L. & T. Co. v. People*, 104 Ill. App. 290; *McKenzie v. Beaumont*, (Neb. 1903) 97 N. W. Rep. 225.

Dispute as to Adequacy of Security and Solvency. — It has been held that a mortgagor is entitled to the appointment of a receiver where the mortgagor is in wrongful possession and the amount of the mortgage debt, the value of the property, and the solvency of the defendant are in dispute. *H. B. Claffin Co. v. Furtick*, 119 Fed. Rep. 429.

1028. 1. No Express Lien on the Income. — *Ruprecht v. Henrici*, 116 Ill. App. 583.

3. Waste — Danger of Loss or Injury, Etc. — *Alexander v. Houston*, (Miss. 1902) 31 So. Rep. 211; *Thomas v. Davis*, 90 N. Y. App. Div. 1.

Property Sold for Taxes Pending Foreclosure. — The *Nebraska* statute has been held not to authorize the appointment, at the instance of the holder of a tax-sale certificate, of a receiver of rents and profits of property sold for taxes pending a mortgage-foreclosure proceeding.

- 1028.** *f.* ADEQUACY OF SECURITY. — See note 4.
g. SOLVENCY OF MORTGAGOR. — See note 5.
1029. *h.* MERE FACT THAT SECURITY INSUFFICIENT. — See note 1.
1030. *j.* EXPRESS PROVISION AS TO RENTS. — See notes 2, 3.
k. EXPRESS PROVISION AS TO RECEIVER. — See notes 5, 6, 7.
1031. *l.* EFFECT OF APPOINTMENT — (1) *In General.* — See note 1.
(2) Lien upon Unpaid Rents. — See note 2.
1032. *(7) Tenants Attorning to Receiver.* — See note 4.
VI. WHO MAY BE APPOINTED RECEIVER — 1. Impartial, Independent, and Disinterested Person. — See note 7.
1033. *2. Discretion of Court as to Receiver.* — See note 1.
3. Relationship with Parties. — See note 5.
6. Agreement or Recommendation of Parties. — See note 9.
1034. *Secured Creditors, However, Cannot Dictate.* — See note 1.
7. Nonresidence of Receiver. — See note 3.
10. Creditors. — See note 6.
11. Master or Clerk of Court. — See note 8.
1035. *14. Counsel or Solicitors of Parties.* — See note 2.
1036. *17. Receivers of Corporations — a. OFFICERS AND STOCKHOLDERS.* — See note 1.

Walker v. Fitzgerald, (Neb. 1903) 95 N. W. Rep. 32.

1028. *4. Where Security Adequate.* — Greenwood Loan, etc., Assoc. v. Childs, 67 S. Car. 251; Chicago Real Estate L. & T. Co. v. People, 104 Ill. App. 290. See also New York Bldg. Loan Banking Co. v. Begly, 75 N. Y. App. Div. 308.

5. When Mortgagor Solvent. — Chicago Real Estate L. & T. Co. v. People, 104 Ill. App. 290. See also Greenwood Loan, etc., Assoc. v. Childs, 67 S. Car. 251. *Contra* where the mortgaged property "is in danger of being lost, removed, injured, or is probably insufficient to discharge the mortgage debt," Johnson v. Young, (Neb. 1901) 95 N. W. Rep. 497.

1029. *1. Inadequacy of Security Alone.* — See Ball v. Marske, 202 Ill. 31.

Inadequacy of Security Alone Insufficient. — Dubois v. Bowles, 30 Colo. 44.

1030. *2. West v. Adams,* 106 Ill. App. 114, holding further that where the rents and profits are specifically pledged a receiver may be appointed regardless of the mortgagor's solvency. *Compare* McLester v. Rose, 104 Ill. App. 433.

3. See Ortengren v. Rice, 104 Ill. App. 428; McLester v. Rose, 104 Ill. App. 433.

5. Express Provision as to Receiver. — Derby v. Brandt, 99 N. Y. App. Div. 257.

6. Provision as to Receiver Not Controlling. — Thomas v. Davis, 90 N. Y. App. Div. 1. See also New York Bldg. Loan Banking Co. v. Begly, 75 N. Y. App. Div. 308.

7. Compare Pringle v. James, 109 Ill. App. 100, holding that where the mortgage provides for the appointment of a receiver the appointment may be made though the mortgagor is solvent.

1031. *1. The Object of Appointing a Receiver* is to divest the rents and profits from the mortgagor and invest them in the mortgagee. Ortengren v. Rice, 104 Ill. App. 428.

The Practical Effect of a Receivership is the dispossession of the defendant. Sanford v. Anderson, (Neb. 1903) 95 N. W. Rep. 632.

2. Unpaid Rents. — Ortengren v. Rice, 104 Ill. App. 428.

1032. *4. A Tenant Is Not Guilty of Contempt* for refusing to attorn to a receiver appointed in foreclosure proceedings where he was not a party to the suit and his right of possession was prior to the execution of the mortgage. American Mortg. Co. v. Sire, 103 N. Y. App. Div. 396.

7. Appointee Should Be Disinterested. — Cook v. Martin, (Ark. 1905) 87 S. W. Rep. 625, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1032; Fisher v. Southern L. & T. Co., 138 N. Car. 90.

A Nonresident Who Has an Interest in the Property may be appointed where a resident is appointed as coreceiver. Burwell v. Farmers, etc., Bank, 119 Ga. 633.

1033. *1. Discretion of Court.* — Burwell v. Farmers, etc., Bank, 119 Ga. 633; Polk v. Johnson, 160 Ind. 292, 98 Am. St. Rep. 274; *In re* Eckhardt Mfg. Co., 114 La. 119; Fisher v. Southern L. & T. Co., 138 N. Car. 90.

5. Relationship. — Bowling Green Trust Co. v. Virginia Pass., etc., Co., 133 Fed. Rep. 186.

9. Agreement of Parties. — See Polk v. Johnson, 160 Ind. 292, 98 Am. St. Rep. 274.

1034. *1. See* Polk v. Johnson, 160 Ind. 292, 98 Am. St. Rep. 274.

3. See Burwell v. Farmers, etc., Bank, 119 Ga. 633.

6. Creditors. — *In re* Anglesey, (1903) 2 Ch. 727; *In re* Eckhardt Mfg. Co., 114 La. 119. See also Polk v. Johnson, 160 Ind. 292, 98 Am. St. Rep. 274, (Ind. App. 1902) 65 N. E. Rep. 536.

8. Clerk of Court. — White v. Britton, (S. Car. 1905) 51 S. E. Rep. 547.

1035. *2. Counsel of Party to Cause.* — Cook v. Martin, (Ark. 1905) 87 S. W. Rep. 625.

Counsel of Party May Be Appointed. — Fisher v. Southern L. & T. Co., 138 N. Car. 90.

1036. *1. Corporate Officers and Stockholders.* — *In re* Eckhardt Mfg. Co., 114 La. 119; Townsend v. Oneonta, etc., R. Co., 86 N. Y. App. Div. 604.

1037. VII. APPOINTMENT OF RECEIVER — 1. Requisite Showing to Obtain. — See note 1.

3. Effect of Delay in Objecting to Appointment. — See note 4.

1038. 5. Reluctance of Courts to Appoint Receivers. — See notes 3, 4, 6, 7.

6. Fact that Appointment Will Do No Harm. — See note 10.

1039. 7. Interference with Legal Title. — See note 2.

8. Where Other Remedies Exist. — See note 5.

In the Case of Corporations. — See note 7.

9. Discretion of Court as to Appointment — a. GENERAL RULE. —

See note 8.

1040. See note 1.

10. Irregular and Collusive Appointments. — See note 5.

1041. 12. Constitutional Provisions. — See note 3.

1037. 1. Kelly v. Steele, 9 Idaho 141; *Semker v. Kalberlah*, 105 Ill. App. 445; *Johnston v. Lippert*, 96 Md. 584; *Platt v. Elias*, 101 N. Y. App. Div. 518; *Kelly v. Fargo Mercantile Co.*, 16 S. Dak. 73; *Brenton v. Peck*, (Tex. Civ. App. 1905) 87 S. W. Rep. 898; *Union Boom Co. v. Samish Boom Co.*, 33 Wash. 144. See also *Ruprecht v. Henrici*, 113 Ill. App. 398; *Belding v. Washington Cornice Co.*, 36 Wash. 549.

4. Delay in Objecting. — *Pagett v. Brooks*, 140 Ala. 257, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1037.

1038. 3. Courts Reluctant to Appoint Receivers. — *American Tribune New Colony Co. v. Schuler*, 34 Tex. Civ. App. 560; *Freer v. Davis*, 52 W. Va. 35, 94 Am. St. Rep. 910.

4. Cabaniss v. Reco Min. Co., (C. C. A.) 116 Fed. Rep. 318; *Miller v. Kitchen*, (Neb. 1905) 103 N. W. Rep. 297. See also *Johnston v. Lippert*, 96 Md. 584.

Receivers Should Not Be Appointed Without Notice except in cases of "imperious necessity." *Joseph Dry Goods Co. v. Hecht*, (C. C. A.) 120 Fed. Rep. 760.

6. The Power to Be Exercised with Caution. — *Cabaniss v. Reco Min. Co.*, (C. C. A.) 116 Fed. Rep. 318; *Barnesville Mfg. Co. v. Schofield's Sons Co.*, 118 Ga. 664; *Ruprecht v. Henrici*, 113 Ill. App. 398; *Johnston v. Lippert*, 96 Md. 584; *Benepe-Owenhouse Co. v. Scheidegger*, 32 Mont. 424; *Vila v. Grand Island Electric Light, etc., Co.*, (Neb. 1903) 97 N. W. Rep. 613; *Belding v. Washington Cornice Co.*, 36 Wash. 549. See also *Acken v. Coughlin*, 103 N. Y. App. Div. 1; *Bacon v. Hoover Wagon Co.*, 13 Pa. Dist. 16.

7. A Clear Case Necessary. — *Ford v. Taylor*, 137 Fed. Rep. 149; *Kelly v. Steele*, 9 Idaho 141; *Lemker v. Kalberlah*, 105 Ill. App. 445; *Sheehan v. O'Rourke Ironworks*, 112 La. 461; *New York Bldg. Loan Banking Co. v. Begly*, 75 N. Y. App. Div. 308; *Union Boom Co. v. Samish Boom Co.*, 33 Wash. 144; *Freer v. Davis*, 52 W. Va. 35, 94 Am. St. Rep. 910.

10. See Johnston v. Lippert, 96 Md. 584.

Where Appointment Unnecessary. — *Weiher v. Simon*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 202.

1039. 2. Interference with Legal Title. — *Lemker v. Kalberlah*, 105 Ill. App. 445; *Trougher v. Akin*, 109 Tenn. 451.

5. Miller v. Kitchen, (Neb. 1905) 103 N. W. Rep. 297.

7. When Injunction Adequate. — See *Acken v. Coughlin*, 103 N. Y. App. Div. 1.

8. General Rule — A Matter of Discretion — United States. — *H. B. Claflin Co. v. Furtick*, 119 Fed. Rep. 429; *Briggs v. Neal*, (C. C. A.) 120 Fed. Rep. 224; *Heinze v. Butte, etc., Consol. Min. Co.*, (C. C. A.) 126 Fed. Rep. 1; *U. S. Shipbuilding Co. v. Conklin*, (C. C. A.) 126 Fed. Rep. 132; *Blue Mountain Iron, etc., Co. v. Portner*, (C. C. A.) 131 Fed. Rep. 57; *Cuyler v. Atlantic, etc., R. Co.*, 132 Fed. Rep. 568; *Rowland v. Auto Car Co.*, 133 Fed. Rep. 835; *Edinburg Coal Co. v. Humphreys*, (C. C. A.) 134 Fed. Rep. 839; *Ford v. Taylor*, 137 Fed. Rep. 149.

California. — *Silveira v. Reese*, 138 Cal. xix, 71 Pac. Rep. 515.

Georgia. — *McGarrah v. Southwestern Georgia Bank*, 117 Ga. 556; *The Anvil v. Savery*, 116 Ga. 321.

Illinois. — *St. Louis, etc., R. Co. v. Vandalia*, 103 Ill. App. 368; *Lemker v. Kalberlah*, 105 Ill. App. 445; *Garrett v. Simpson*, 115 Ill. App. 62; *Ruprecht v. Henrici*, 113 Ill. App. 398.

Louisiana. — *Davies v. Monroe Water Works, etc., Co.*, 107 La. 145.

Nebraska. — *McKenzie v. Beaumont*, (Neb. 1903) 97 N. W. Rep. 225.

New York. — *New York Bldg. Loan Banking Co. v. Begly*, 75 N. Y. App. Div. 308; *Matter of Stafford*, 105 N. Y. App. Div. 46.

Washington. — *Belding v. Washington Cornice Co.*, 36 Wash. 549; *Union Boom Co. v. Samish Boom Co.*, 33 Wash. 144.

1040. 1. Lemker v. Kalberlah, 105 Ill. App. 445; *Union Boom Co. v. Samish Boom Co.*, 33 Wash. 144.

Appointment Held to Be Abuse of Discretion. — *Goff v. Goff*, 54 W. Va. 364.

Appointment Held Not to Be Abuse of Discretion. — *U. S. Shipbuilding Co. v. Conklin*, (C. C. A.) 126 Fed. Rep. 132; *Heinze v. Butte, etc., Consol. Min. Co.*, (C. C. A.) 126 Fed. Rep. 1; *St. Louis, etc., R. Co. v. Vandalia*, 103 Ill. App. 363; *Garrett v. Simpson*, 115 Ill. App. 62. See also *Briggs v. Neal*, (C. C. A.) 120 Fed. Rep. 224.

5. Harrigan v. Gilchrist, 121 Wis. 292, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1040.

1041. 3. Barrera v. Frost, 33 Tex. Civ. App. 580. See also *Ross-Meehan Foundry Co. v. Southern Car, etc., Co.*, 124 Fed. Rep. 403.

1041. 13. Evidence of Appointment. — See note 4.

14. Injunction and Receiver. — See note 9.

VIII. EFFECT OF APPOINTMENT OF RECEIVER — 1. Determines No Right. — See note 11.

1042. 2. Title to Property. — See notes 4, 5, 6.

3. Property in Custodia Legis. — See note 7.

1043. 5. Receiver's Possession Not Adverse. — See note 4.

6. Relieves Previous Holder from Further Responsibility. — See note 5.

7. Appointment Creates No Lien. — See note 6.

1044. 11. Pending Suits. — See note 3.

12. Corporations — *a.* CORPORATION NOT DISSOLVED. — See note 6.

1045. See note 2.

b. CORPORATE FUNCTIONS AND POWERS — (1) *In General.* — See note 3.

c. CORPORATE PROPERTY — (1) *In General.* — See note 7.

1041. 4. Blue Mountain Iron, etc., Co. v. Portner, (C. C. A.) 131 Fed. Rep. 57.

9. Freer v. Davis, 52 W. Va. 35, 94 Am. St. Rep. 910. See also Richardson v. Clinton Wall Trunk Mfg. Co., 181 Mass. 580.

11. Effect of Appointment. — H. B. Claflin Co. v. Furtick, 119 Fed. Rep. 429; Home Sav., etc., Co. v. District Ct., 121 Iowa 1; McCarty v. Patterson, 186 Mass. 1; Troughber v. Akin, 109 Tenn. 451. See also Vila v. Grand Island Electric Light, etc., Co., (Neb. 1903) 97 N. W. Rep. 613.

1042. 4. No Change in Title to Property. — Dayton Hydraulic Co. v. Felsenthal, (C. C. A.) 116 Fed. Rep. 961; Lewis v. American Naval Stores Co., 119 Fed. Rep. 391; Johnson v. Lehigh Valley Traction Co., 130 Fed. Rep. 932; Com. v. Overholt, 23 Pa. Super. Ct. 199. See also H. B. Claflin Co. v. Furtick, 119 Fed. Rep. 429.

5. Harrison v. J. J. Warren Co., 183 Mass. 123; Hillyer v. Le Roy, 179 N. Y. 369; Dow v. Nealis, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 153. Compare Brynjolfson v. Osthus, 12 N. Dak. 42; Fish v. Olin, 76 Vt. 120.

6. See Dow v. Nealis, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 153.

7. *In Custodia Legis* — *United States.* — Commonwealth Roofing Co. v. North American Trust Co., (C. C. A.) 135 Fed. Rep. 984; Hitz v. Jenks, 185 U. S. 155; Ridge v. Manker, (C. C. A.) 132 Fed. Rep. 599; The Jonas H. French, 119 Fed. Rep. 462; H. B. Claflin Co. v. Furtick, 119 Fed. Rep. 429; Clark v. Brown, (C. C. A.) 119 Fed. Rep. 130; Dayton Hydraulic Co. v. Felsenthal, (C. C. A.) 116 Fed. Rep. 961.

Illinois. — Ruprecht v. Henrici, 113 Ill. App. 398; Gunning v. Sorg, 113 Ill. App. 332, affirmed 214 Ill. 616.

Iowa. — State Cent. Sav. Bank v. Fanning Ball Bearing Chain Co., 118 Iowa 698; Manker v. Phoenix Loan Assoc., (Iowa 1903) 96 N. W. Rep. 982; Home Sav., etc., Co. v. District Ct., 121 Iowa 1.

Louisiana. — *In re* New Iberia Cotton Mill Co., 109 La. 875.

Massachusetts. — Harrison v. J. J. Warren Co., 183 Mass. 123.

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New York. — Larsen v. U. S. Mortgage, etc., Co., 104 N. Y. App. Div. 76; Beardslee v. Ingraham, 106 N. Y. App. Div. 506. See also Matter of Malcolm Brewing Co., 78 N. Y. App. Div. 592.

North Dakota. — Woodhull v. Farmers' Trust Co., 11 N. Dak. 157, 95 Am. St. Rep. 712.

Oklahoma. — Foster v. Field, 13 Okla. 230.

Oregon. — Egan v. North American Sav., etc., Co., 45 Oregon 131.

1043. 4. Compare McDermott v. Crook, 20 App. Cas. (D. C.) 465, holding that the possession of a receiver of a corporation is adverse and antagonistic to that of the corporation.

5. Sigua Iron Co. v. Brown, 171 N. Y. 488.

6. *No Lien Created.* — Home Sav., etc., Co. v. District Ct., 121 Iowa 1.

1044. 3. Effect of Pending Suits. — Cooper v. Philadelphia Worsted Co., (N. J. 1904) 57 Atl. Rep. 733; Rooney v. Southern Bldg., etc., Assoc., 119 Ga. 941.

6. *Corporation Not Dissolved by Appointment.* — Atlas R. Supply Co. v. Lake, etc., R. Co., 134 Fed. Rep. 503; Detroit, etc., R. Co. v. Campbell, (Mich. 1905) 103 N. W. Rep. 856; Pinchback v. Bessemer Min., etc. Co., 137 N. Car. 171; Monnett v. Columbus, etc., R. Co., 26 Ohio Cir. Ct. 469. See also Fish v. Olin, 76 Vt. 120. But see Treat v. Pennsylvania Mut. L. Ins. Co., 203 Pa. St. 21.

1045. 2. Recovery of Calls Permitted. — Sigua Iron Co. v. Brown, 171 N. Y. 488.

Exercise of Corporate Functions Suspended by Appointment of Receiver. — Brynjolfson v. Osthus, 12 N. Dak. 42.

Building and Loan Association. — "Upon the appointment of a receiver of an insolvent building and loan association, the business of the association ceases, and nothing remains but liquidation." Monier v. Clarke, (N. Mex. 1904) 75 Pac. Rep. 35.

3. *Suspends Functions.* — The appointment of a receiver suspends the legal functions of a corporation and its authority over its property and effects. Bacon v. Hoover Wagon Co., 13 Pa. Dist. 16.

7. Harrigan v. Gilchrist, 121 Wis. 236.

- 1046.** (2) *Trust Fund Doctrine*. — See note 2.
1047. *f. TORTS OF RECEIVER*. — See note 1.
1048. IX. FOR WHAT PROPERTY RECEIVER APPOINTED — 2. Portion Only of Defendant's Property. — See note 6.
 3. Equitable Property. — See note 8.
1049. 7. Incomes and Annuities. — See note 5.
 9. Rents and Profits — *a. IN GENERAL*. — See note 11.
1051. 11. Real Property — *a. IN GENERAL*. — See note 6.
1052. *b. REQUISITES TO APPOINTMENT*. — See note 1.
 f. DISTURBANCE OF LEGAL TITLE OR POSSESSION — (1) *General Rule*. — See note 5.
1053. (2) *In Aid of Ejectments*. — See note 1.
 12. Mines. — See note 5.
1055. 14. Joint Property — *b. EXCLUSION FROM PARTICIPATION*. — See note 1.
 c. PENDING ACTION FOR PARTITION. — See note 3.
 15. Miscellaneous Property. — See note 6.
1056. X. RELATION OF RECEIVER TO COURT — 1. General Rule. — See notes 1, 2, 3.

1046. 2. *Harrigan v. Gilchrist*, 121 Wis. 236. See also *Mitchell v. Jordan*, 36 Wash. 645.

1047. -1. *Torts*. — *Tobin v. Central Vermont R. Co.*, 185 Mass. 337.

Corporation Not Liable for Injuries to Employee of Receiver. — *St. Louis, etc., R. Co. v. Bricker*, 65 Kan. 321.

1048. 6. *Sanford v. Anderson*, (Neb. 1903) 95 N. W. Rep. 632.

8. *Equitable Assets*. — *In re Anglesey*, (1903) 2 Ch. 727.

1049. 5. *Incomes and Annuities*. — See *McCreery v. Bennett*, (1904) 2 Ir. R. 69.

11. *General Rule as to Rents and Profits*. — *Vizard v. Moody*, 117 Ga. 67; *Whyte v. Spransy*, 19 App. Cas. (D. C.) 450; *McLester v. Rose*, 104 Ill. App. 433. See also *Ridout v. Fowler*, (1904) 2 Ch. 93. And see generally *supra*, this title, **1026**. 3 *et seq.*

Appointment of Receiver of Rents and Profits to Enforce Payment of Annuity. — *Gee v. Gee*, 107 Ill. App. 312, *affirmed* 204 Ill. 588.

1051. 6. *Pending Foreclosure of Homestead — Receiver Not Appointed*. — *Sanford v. Anderson*, (Neb. 1902) 92 N. W. Rep. 152.

1052. 1. *Essentials*. — *Kelly v. Steele*, 9 Idaho 141; *Lemker v. Kalberlah*, 105 Ill. App. 445; *Union Boom Co. v. Samish Boom Co.*, 33 Wash. 144.

5. *Rights of Claimant of Realty Out of Possession*. — *Lemker v. Kalberlah*, 105 Ill. App. 445.

1053. 1. *Pending Action of Ejectment*. — *Hereford v. Hereford*, 134 Ala. 321; *Vizard v. Moody*, 117 Ga. 67; *Whyte v. Spransy*, 19 App. Cas. (D. C.) 450.

5. *Mining Property*. — See *Heinze v. Butte, etc., Consol. Min. Co.*, (C. C. A.) 126 Fed. Rep. 1, holding that a receiver with authority to operate mining property is appointed only in rare cases.

1055. 1. *Heinze v. Butte, etc., Consol. Min. Co.*, 126 Fed. Rep. 1 (mining property).

3. *Partition Suits*. — *Heinze v. Butte, etc., Consol. Min. Co.*, 126 Fed. Rep. 1; *Mesnager v. De Leonis*, 140 Cal. 402. See also *McCarty v. Patterson*, 186 Mass. 1.

6. *Seat in Exchange*. — *Leggett v. Waller*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 408.

Receiver Not Appointed for Homestead Property Occupied as Such. — *Johnson v. Young*, (Neb. 1901) 95 N. W. Rep. 497; *Sanford v. Anderson*, (Neb. 1902) 92 N. W. Rep. 152. See also *Sanford v. Anderson*, (Neb. 1903) 95 N. W. Rep. 632.

Receiver Not Appointed for Lottery Fund. — *Stevens v. Cincinnati Times-Star Co.*, 72 Ohio St. 112.

1056. 1. *Receiver Officer of Court — United States*. — *Ridge v. Manker*, (C. C. A.) 132 Fed. Rep. 599; *Hubert v. New Orleans*, (C. C. A.) 130 Fed. Rep. 21; *Hilliker v. Hale*, (C. C. A.) 117 Fed. Rep. 220.

Arkansas. — *Choctaw Coal, etc., Co. v. Williams Echols Dry Goods Co.*, (Ark. 1905) 87 S. W. Rep. 632; *Robinson v. Arkansas L. & T. Co.*, (Ark. 19 5) 85 S. W. Rep. 413.

Georgia. — *McGarrah v. Southwestern Georgia Bank*, 117 Ga. 556.

Illinois. — *Ruprecht v. Henrici*, 113 Ill. App. 398; *Chicago City R. Co. v. People*, 116 Ill. App. 633; *Carroll v. Haigh*, 108 Ill. App. 264, *affirmed* 209 Ill. 576; *Ross v. Saylor*, 104 Ill. App. 19.

Indiana. — *Chicago, etc., R. Co. v. Kenney*, 29 Ind. App. 506.

Iowa. — *State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co.*, 118 Iowa 698; *Manker v. Phoenix Loan Assoc.*, (Iowa 1903) 96 N. W. Rep. 982; *Williams v. Des Moines L. & T. Co.*, 126 Iowa 22.

Kansas. — *St. Louis, etc., R. Co. v. Bricker*, 65 Kan. 321.

Louisiana. — *In re New Iberia Cotton Mill Co.*, 109 La. 875.

Maryland. — *Horn v. Bohn*, 96 Md. 8.

Massachusetts. — *Harrison v. J. J. Warren Co.*, 183 Mass. 123.

Michigan. — *In re Angell*, 131 Mich. 345.

Nebraska. — *State v. German Sav. Bank*, 65 Neb. 416.

Nevada. — *McKenzie v. Coslett*, (Nev. 1905) 80 Pac. Rep. 1070.

1057. 2. Judicial Control of Receiver. — See note 1.

3. Protection of Receiver — *a.* IN GENERAL. — See note 3.

1058. *b.* LEAVE TO CLAIMANT TO ASSERT RIGHT. — See note 5.

c. INJUNCTION TO PROTECT RECEIVER'S POSSESSION. — See note 6.

1059. 5. Interference with Receiver as Contempt of Court — *a.* GENERAL RULE. — See note 4.

Refusal to Surrender Property. — See note 5.

1060. *d.* NOTICE OF APPOINTMENT. — See note 6.

1061. 6. Advice and Instructions of Court. — See note 2.

7. Responsibility of Receiver to Court. — See notes 3, 4.

8. Accounting by Receiver — *a.* IN GENERAL. — See note 7.

1062. 9. When Jurisdiction of Court Ends. — See note 6.

XI. FUNCTIONS, POWERS, AND DUTIES — 1. General Rule. — See notes 7, 8.

Must Act Impartially. — See note 10.

1063. Receiver to Wind Up Business. — See notes 1, 2.

2. Authority Derived from Court. — See note 4.

New York. — *Larsen v. U. S. Mortgage, etc., Co.*, 104 N. Y. App. Div. 76.

Ohio. — *Rodgers v. Forbes*, 23 Ohio Cir. Ct. 438.

Oklahoma. — *Foster v. Field*, 13 Okla. 230.

Wisconsin. — *Harrigan v. Gilchrist*, 121 Wis. 251.

1056. 2. *Foster v. Field*, 13 Okla. 230.

3. *Carroll v. Haigh*, 108 Ill. App. 264, affirmed 209 Ill. 576.

1057. 1. Subject to Court's Control. — *Atlantic Trust Co. v. Dana*, (C. C. A.) 128 Fed. Rep. 224; *Ridge v. Manker*, (C. C. A.) 132 Fed. Rep. 599.

3. General Rule as to Protection of Receiver. — *Vestel v. Tasker*, 123 Ga. 213.

1058. 5. Application to Court to Assert Right Against Receiver. — *Colburn v. Yantis*, 176 Mo. 670.

6. Injunction. — *Vestel v. Tasker*, 123 Ga. 213.

1059. 4. Interference with Receiver Is Contempt. — *Hitz v. Jenks*, 185 U. S. 155; *Vestel v. Tasker*, 123 Ga. 213; *Gunning v. Sorg*, 113 Ill. App. 332, affirmed 214 Ill. 616; *Beardslee v. Ingraham*, 106 N. Y. App. Div. 506; *Schultz v. Luft*, 74 N. Y. App. Div. 628. See also *Wheaton v. Daily Tel. Co.*, (C. C. A.) 124 Fed. Rep. 61, and see the title CONTEMPT, 52. 6 *et seq.*

A Tenant Who Is Not Made a Party to a Foreclosure Proceeding, and who claims under a contract made prior to the mortgage in suit, is not punishable for contempt for interfering with the possession of a receiver appointed in the foreclosure suit. *American Mortg. Co. v. Sire*, 103 N. Y. App. Div. 396.

5. *In re Wilson*, 116 Fed. Rep. 419. But see *Norwood First Nat. Bank v. Clauss*, 26 Ohio Cir. Ct. 107.

Partnership Property. — See *Lawson v. Tyler*, 98 N. Y. App. Div. 10.

1060. 6. In the Absence of a Showing. — *Schultz v. Luft*, 74 N. Y. App. Div. 628.

1061. 2. Advice of the Court. — See *In re Angell*, 131 Mich. 345.

3. *Harrigan v. Gilchrist*, 121 Wis. 254, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1061.

4. Where a Receiver Acts in Good Faith in failing to surrender possession of the property after his power has been suspended, his offense is merely technical and his punishment should be light. *Rumney v. Donovan*, 28 Mont. 69.

7. Accounting. — *Harrigan v. Gilchrist*, 121 Wis. 254, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1061.

1062. 6. Jurisdiction Ends Only When All Matters Are Adjusted. — *La Junta, etc., Canal Co. v. Hess*, 31 Cold. 1.

7. Receiver a Ministerial Officer. — *Vila v. Grand Island Electric Light, etc., Co.*, (Neb. 1903) 97 N. W. Rep. 613.

8. Receiver Must Not Speculate with Property. — *Harrigan v. Gilchrist*, 121 Wis. 127.

10. Must Act Impartially. — See *Home Sav., etc., Co. v. District Ct.*, 121 Iowa 1.

1063. 1. Winding Up of Business. — See *Fleming v. Fleming Hotel Co.*, (N. J. 1905) 61 Atl. Rep. 739.

2. See *Dalliba v. Riggs*, (Idaho 1905) 82 Pac. Rep. 107, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1068 [1063] and holding that "a court of equity has no authority to place its receiver in charge of * * * property and operate the same, carrying on a general mining business, and when it turns out to be at a loss, as is likely to be the result in such cases, charge the same up as a preferred claim and lien against the property, to the prejudice and loss of the holders of prior recorded liens." See also *State Central Sav. Bank v. Fanning Ball-Bearing Chain Co.*, 118 Iowa 698.

4. Authority Derived Solely from Court — General Rule. — *Johnson v. Lehigh Valley Traction Co.*, 130 Fed. Rep. 932; *State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co.*, 118 Iowa 698; *Manker v. Phoenix Loan Assoc.*, (Iowa 1903) 96 N. W. Rep. 982; *Detroit, etc., R. Co. v. Campbell*, (Mich. 1905) 103 N. W. Rep. 856; *Larsen v. U. S. Mortgage, etc., Co.*, 104 N. Y. App. Div. 76; *Weiher v. Simon*, (Suppl. Ct. Spec. T.) 41 Misc. (N. Y.) 202. See also *Laramie First Nat. Bank v. Cook*, 12 Wyo. 492.

1064. See note 1.

Where an Unusual or Extraordinary Power. — See note 3.

3. Ratification of Receiver's Acts by Court. — See note 5.

5. Discretionary Power. — See notes 8, 9.

1065. Application of Funds. — See note 1.

6. Whom Receiver Represents — *a.* IN GENERAL. — See note 2.

1066. *b.* NO ADVANTAGE TO PARTY APPLYING FOR APPOINTMENT. — See note 2.

1067. **7.** Power to Contract — *b.* TO CARRY OUT EXISTING CONTRACTS — See note 1.

8. To Employ Counsel — *a.* GENERAL RULE. — See notes 5, 6.

1068. *b.* WHEN EMPLOYMENT PROPER AND WHEN NOT — (1) *In General.* — See note 1.

A Fortiori. — See note 2.

1069. (6) *Amount of Allowance for Fees.* — See note 9.

1070. See notes 2, 3, 4.

1071. **11.** Expenditures — *a.* GENERAL RULE. — See notes 2, 3.

1072. *d.* REPAIRS. — See notes 6, 8.

1064. **1.** *Dow v. Nealis*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 153.

3. In the Absence of Proof it is not to be presumed that the order appointing a receiver gave to him greater powers than are ordinarily granted. *Dow v. Nealis*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 153.

5. Ratification by Court. — *Rochat v. Gee*, 137 Cal. 497.

8. Receiver's Discretion. — *State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co.*, 118 Iowa 698.

9. See *State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co.*, 118 Iowa 698.

1065. **1.** See *State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co.*, 118 Iowa 698.

2. Receiver Representative of Court. — *Ridge v. Manker*, (C. C. A.) 132 Fed. Rep. 599; *King v. Pomeroy*, (C. C. A.) 121 Fed. Rep. 287; *McGarrah v. Southwestern Georgia Bank*, 117 Ga. 556; *Chicago City R. Co. v. People*, 116 Ill. App. 633; *Ross v. Sayler*, 104 Ill. App. 19; *Polk v. Johnson*, (Ind. App. 1902) 65 N. E. Rep. 536; *Tobin v. Central Vermont R. Co.*, 185 Mass. 337; *Harrigan v. Gilchrist*, 121 Wis. 250, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1065.

Representative of All Parties in Interest. — *Home Sav., etc., Co. v. District Ct.*, 121 Iowa 1.

Represents Corporation as to Property in His Possession. — *Ratcliff v. Adler*, 71 Ark. 269.

Receiver Acts in Creditors' Interest. — *Kirkpatrick v. American Alkali Co.*, 135 Fed. Rep. 230.

Represents Creditors and Stockholders. — *Raymond v. Security Trust, etc., Co.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 31, affirmed 101 N. Y. App. Div. 546.

"Duly Authorized" Agent of Creditors. — *Dight v. Chapman*, 44 Oregon 265.

Receiver Not Representative of Corporation. — *Chicago City R. Co. v. People*, 116 Ill. App. 633.

Receiver Not Agent of Corporation. — *St. Louis, etc., R. Co. v. Bricker*, 65 Kan. 321.

1066. **2.** *Home Sav., etc., Co. v. District Ct.*, 121 Iowa 1. See also *supra*, this title, 1043. 8.

1067. **1.** Existing Contracts. — *Rochat v.*

Gee, 137 Cal. 497, holding further that a receiver may pay a debt in order to facilitate the carrying out of a contract made prior to the receivership; *Harrigan v. Gilchrist*, 121 Wis. 352.

5. Power and Duty to Employ Counsel. — *Hickey v. Parrot Silver, etc., Co.*, 32 Mont. 143, 107 Am. St. Rep. 362.

6. Reasonable Counsel Fees. — See *Graham v. Carr*, 133 N. Car. 449.

Allowance Made to Receiver, Not to Counsel. — *Portland First Nat. Bank v. Oregon Paper Co.*, 42 Oregon 398.

Attorney's Fees Paid by Receiver May Be Taxed as Costs. — *Adams v. Elwood*, 104 N. Y. App. Div. 138.

1068. **1.** General Rule as to Propriety of Employment of Counsel. — *Dalliba v. Riggs*, (Idaho 1905) 82 Pac. Rep. 107.

2. Counsel Fees for Prosecuting Claims for Compensation should not be allowed. *Dalliba v. Riggs*, (Idaho 1905) 82 Pac. Rep. 107.

Fees for Counsel to a Superintendent of the Insolvent Corporation will not be allowed to the receiver. *Forrester v. Boston, etc., Consol. Copper, etc., Min. Co.*, 30 Mont. 181.

1069. **9.** Amount — Discretion of Court. — *Granville v. Arnott*, (Conn. 1904) 59 Atl. Rep. 405; *Silvers v. Merchants', etc., Assoc.*, (N. J. 1903) 56 Atl. Rep. 294; *Lembeck v. Jarvis Terminal Cold Storage Co.*, (N. J. 1904) 59 Atl. Rep. 565; *Harrigan v. Gilchrist*, 121 Wis. 127.

1070. **2.** See *Lembeck v. Jarvis Terminal Cold Storage Co.*, (N. J. 1904) 59 Atl. Rep. 565.

3. *Silvers v. Merchants', etc., Assoc.*, (N. J. 1903) 56 Atl. Rep. 294.

4. *Harrigan v. Gilchrist*, 121 Wis. 127. See also *Lembeck v. Jarvis Terminal Cold Storage Co.*, (N. J. 1904) 59 Atl. Rep. 565.

1071. **2.** See *Schwartz v. Rosetta Gravel Paving, etc., Co.*, 110 La. 610.

3. Expenditure Must Be Essential to Preservation of Property — Ratification. — *Schwartz v. Rosetta Gravel Paving, etc., Co.*, 110 La. 610.

1072. **6.** Reasonable Sums Expended in Taking Care of the Property should be made good to the receiver. *Pullis v. Pullis Bros. Iron Co.*, 90 Mo. App. 244.

1072. *e.* TAXES — (1) *In General.* — See note 10.

1073. 12. Power to Sue — *a.* IN GENERAL. — See note 4.

1074. A Receiver of a Corporation. — See notes 3, 4.

b. DEFENSES TO RECEIVERS' SUITS. — See note 7.

1075. *c.* SUITS AGAINST OFFICERS AND DIRECTORS OF CORPORATIONS. — See note 1.

d. STATUTORY LIABILITY OF STOCKHOLDERS — (1) *In General.* — See notes 4, 6.

1076. *e.* UNPAID SUBSCRIPTIONS TO STOCK — (1) *General Rule.* — See note 3.

1077. See note 2.

(2) *Necessity for Call or Assessment.* — See note 4.

f. DIVIDENDS ILLEGALLY DECLARED. — See note 6.

1078. 13. Impeachment of Fraudulent Transactions or Conveyances — *a.* IN GENERAL. — See notes 1, 2.

1080. 14. Power to Compromise Claims or Suits. — See note 3.

15. Receivers' Sales — *a.* GENERAL RULE. — See note 7.

1081. *c.* CONFORMITY OF SALE TO TERMS OF ORDER. — See note 3.

1082. *d.* PURCHASERS — (5) *Rule of Caveat Emptor.* — See note 2.

1072. 8. See *Dow v. Nealis*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 153.

10. Payment of Taxes. — *Los Angeles v. Los Angeles City Water Co.*, 137 Cal. 699.

1073. 4. General Power to Sue. — *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257; *Ironwood v. Wickes*, 93 N. Y. App. Div. 164; *Harrigan v. Gilchrist*, 121 Wis. 236.

Receiver May Enforce Rights of Creditors as Well as Those of Debtor. — *King v. Pomeroy*, (C. C. A.) 121 Fed. Rep. 287.

1074. 3. See *Hayes v. Pierson*, 65 N. J. Eq. 353.

4. Compare *Hayes v. Pierson*, 65 N. J. Eq. 353.

7. Defenses Against Receiver. — *Nix v. Ellis*, 118 Ga. 345.

Laches. — *Ex p. Baker*, 67 S. Car. 74.

A Tenant Whose Lease Is Subsequent to a Mortgage containing a provision for the appointment may not set up a defense against an action by the receiver for rent, though it would have been good as against the original landlord. *Derby v. Brandt*, 99 N. Y. App. Div. 257.

1075. 1. Suits Against Corporate Officers. — *New Haven Trust Co. v. Doherty*, 75 Conn. 555, 96 Am. St. Rep. 239; *Jessup v. Thomason*, (N. J. 1904) 59 Atl. Rep. 226; *Hayes v. Pierson*, 65 N. J. Eq. 353; *Mabon v. Miller*, 81 N. Y. App. Div. 10. See also *New Haven Trust Co. v. Doherty*, 75 Conn. 555, 96 Am. St. Rep. 239.

The Statutory Right of Action against the directors upon the corporate debts passes to the receiver. *Boynton v. Sprague*, 100 N. Y. App. Div. 443.

Unlawful Preferences. — A receiver may sue the corporation and a creditor whom it has wrongfully preferred. *Industrial Mut. Deposit Co. v. Taylor*, (Ky. 1904) 82 S. W. Rep. 574.

4. Enforcing Statutory Liability of Stockholders. — *Smathers v. Western Carolina Bank*, 135 N. Car. 410; *Bennett v. Thorne*, 36 Wash. 253. See also *Hunt v. Roosen*, 87 Minn. 68.

6. *Hale v. Allinson*, 188 U. S. 56; *Evans v. Nellis*, 187 U. S. 271.

1076. 3. Unpaid Stock Subscriptions. — *King v. Pomeroy*, (C. C. A.) 121 Fed. Rep. 287; *City Item Co-operative Printing Co. v. Phoenix Furniture Concern*, 108 La. 258; *Campbell v. Chapman*, (Miss. 1902) 31 So. Rep. 101; *Cumberland Lumber Co. v. Clinton Hill Lumber, etc., Co.*, 64 N. J. Eq. 517; *Smathers v. Western Carolina Bank*, 135 N. Car. 410.

Other Visible Assets Must Be Liquidated before a suit for unpaid subscriptions may be maintained by a receiver. *Land Title, etc., Co. v. Asphalt Co.*, 121 Fed. Rep. 587. See also *Tichenor v. Williams Block Pavement Co.*, 116 Ga. 303.

1077. 2. As to Defenses Held to Be Invalid, see *Cumberland Lumber Co. v. Clinton Hill Lumber, etc., Co.*, 64 N. J. Eq. 517.

4. Power to Issue Calls. — *Cumberland Lumber Co. v. Clinton Hill Lumber, etc., Co.*, 64 N. J. Eq. 517.

6. Recovery Back of Illegal Dividends. — *Corn v. Skillern*, (Ark. 1905) 87 S. W. Rep. 142.

1078. 1. May Sue to Set Aside Fraudulent Transfers. — *Holmes v. Sheridan*, 65 N. J. Eq. 765, 56 Atl. Rep. 308; *Richardson v. Gerli*, (N. J. 1903) 54 Atl. Rep. 438; *Raymond v. Security Trust, etc., Co.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 31, affirmed 101 N. Y. App. Div. 546.

2. *Sayle v. Guarantee Sav., etc., Co.*, 25 Ohio Cir. Ct. 503.

Suit Against Stockholders for Misappropriated Assets. — *Mitchell v. Jordan*, 36 Wash. 645.

1080. 3. Compromise — Statutory Authority. — *State v. German Sav. Bank*, 65 Neb. 416.

7. Sales by Receivers. — *Mercantile Realty Co. v. Stetson*, 120 Iowa 324; *Ex p. O'Bannon*, 65 S. Car. 487. See also *Matter of Coleman*, 174 N. Y. 373.

Court May Revoke Order. — *Fitzner v. Noullet*, 114 La. 400.

1081. 3. *Morrison v. Lincoln Sav. Bank, etc., Co.*, (Neb. 1901) 96 N. W. Rep. 230.

Sale Must Conform to Advertisement. — *Patterson v. Patterson*, 207 Pa. St. 252.

1082. 2. Caveat Emptor. — *Matter of Coleman*, 174 N. Y. 373.

- 1082.** (6) *Compelling Purchaser to Complete Contract.* — See note 5.
1083. *f.* CONFIRMATION OF SALE BY COURT. — See notes 4, 7, 8.
1084. *h.* CLAIMS ARISING OUT OF RECEIVERSHIP. — See notes 5, 6, 7.
1085. 16. Profits in Transactions with Receivership Property. — See notes 1, 4, 6.
 17. Inventories and Accounts. — See note 8.
1086. See note 1.
 XII. JURISDICTION AND CONTROL OVER PROPERTY AND FUNDS —
 1. In General. — See notes 2, 4.
1087. 7. Receiver's Title — *a.* AT COMMON LAW. — See notes 7, 8.
1088. See note 1.
b. RULE BY STATUTE — (1) *In General.* — See note 2.
d. PATENTS. — See note 5.
1090. 8. Liability of Receivership Property to Judicial Process — *a.* IN GENERAL. — See notes 7, 8.
1091. *b.* SALE UNDER EXECUTION. — See note 2.
 9. Receiver's Rights Subject to Existing Liens — *a.* GENERAL RULE. — See note 11.

Judgment Lien Not Divested by Sale. — Denny *v.* Broadway Nat. Bank, 118 Ga. 221.

1082. 5. *Compelling Completion of Contract.* — Files *v.* Brown, (C. C. A.) 124 Fed. Rep. 133; Ohio Coal Co. *v.* Whitcomb, (C. C. A.) 123 Fed. Rep. 359.

1083. 4. Files *v.* Brown, (C. C. A.) 124 Fed. Rep. 133.

7. See Fleming *v.* Fleming Hotel Co., (N. J. 1905) 61 Atl. Rep. 739, wherein a sale was confirmed although a person was produced who offered to bid twenty-five per cent. more than the amount received on the sale.

Inadequacy of Price, to justly setting aside a receiver's sale, must be such as to shock the conscience. Files *v.* Brown, (C. C. A.) 124 Fed. Rep. 133. But gross inadequacy is a sufficient objection to confirmation. Porch *v.* Agnew Co., 66 N. J. Eq. 232.

8. *Material Errors.* — Strickland *v.* National Salt Co., (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 172, affirmed 105 N. Y. App. Div. 640, 94 N. Y. Supp. 936; Rawolle *v.* Kalbfleisch, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 364.

1084. 5. *Sale to Pay Receivership Debts.* — Ohio Coal Co. *v.* Whitcomb, (C. C. A.) 123 Fed. Rep. 359.

Subject to Mortgages. — The court has power to order the sale of the receivership property subject to mortgages. Mercantile Realty Co. *v.* Stetson, 120 Iowa 324.

6. Ohio Coal Co. *v.* Whitcomb, (C. C. A.) 123 Fed. Rep. 359.

7. See Scott *v.* Farmers', etc., Nat. Bank, 97 Tex. 31, 104 Am. St. Rep. 835.

1085. 1. *Receiver May Not Act for His Own Profit.* — Harrigan *v.* Gilchrist, 121 Wis. 127.

4. *Purchase by Receiver.* — Pangburn *v.* American Vault, etc., Co., 205 Pa. St. 93.

6. *Purchase by Receiver Irregular and Voidable, but Not Void.* — Groeltz *v.* Cole, (Iowa 1905) 103 N. W. Rep. 977.

8. *Inventory.* — *In re* New Iberia Cotton Mill Co., 109 La. 875.

1086. 1. *Accounts.* — Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 107 Am. St. Rep. 362; Strauss *v.* Casey Mach., etc., Co., (N. J. 1905) 60 Atl. Rep. 402.

2. *Rule as to Control over Property.* — Atlantic Trust Co. *v.* Dana, (C. C. A.) 128 Fed. Rep. 223; Commonwealth Roofing Co. *v.* North American Trust Co., (C. C. A.) 135 Fed. Rep. 984; Chicago, etc., R. Co. *v.* Kenney, 29 Ind. App. 506. See also Wyman *v.* Bowman, (C. C. A.) 127 Fed. Rep. 257.

An Award for Land taken for public use may properly be paid to the receiver. Van Loan *v.* New York, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 482, affirmed 105 N. Y. App. Div. 572.

4. *It Is the Receiver's Duty* to reduce to possession enough of the property to settle the plaintiff's claim. Adams *v.* Elwood, 104 N. Y. App. Div. 138.

1087. 7. *Common-law Rule as to Receiver's Title.* — Harrison *v.* J. J. Warren Co., 183 Mass. 123; Hillyer *v.* Le Roy, 179 N. Y. 369.

Receiver of National Bank Takes Legal Title. — Fish *v.* Olin, 76 Vt. 120.

8. Brynjolfson *v.* Osthus, 12 N. Dak. 42.

1088. 1. *Real Property.* — Chadeayne *v.* Gwyer, 83 N. Y. App. Div. 403.

2. *Statutory Rule.* — See Van Loan *v.* New York, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 482, affirmed 105 N. Y. App. Div. 572.

5. *A Patent Which Has Been Assigned to a Corporation* becomes part of the property in the hands of a receiver of the corporation upon his appointment. Douglass *v.* Campbell, 24 Ohio Cir. Ct. 241.

1090. 7. *Exemption from Judicial Process Generally.* — The Jonas H. French, 119 Fed. Rep. 462; Campau *v.* Detroit Driving Club, 135 Mich. 575; Woodhull *v.* Farmers' Trust Co., 11 N. Dak. 157, 95 Am. St. Rep. 712.

8. See Worden *v.* Pruter, (Tex. Civ. App. 1905) 88 S. W. Rep. 434.

1091. 2. *Execution Sale.* — McAnally *v.* Glidden, 30 Ind. App. 22. And see the title EXECUTIONS, 641. 4. 642. 1.

11. *Effect upon Existing Liens.* — Commonwealth Roofing Co. *v.* North American Trust Co., (C. C. A.) 135 Fed. Rep. 984; Nix *v.* Ellis, 118 Ga. 345; North Side Bank *v.* John Good Cordage, etc., Co., 97 N. Y. App. Div. 70; Leggett *v.* Waller, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 408; People's Nat. Bank *v.* Virginia

1093. See note 1.

1094. *c.* WHERE PROPERTY IN POSSESSION OF LIENOR. — See note 2.
g. SET-OFF AGAINST RECEIVER. — See note 5.

1095. 10. When Receiver's Title Vests — *a.* IN GENERAL. — See note 2.

1096. XIII. LIABILITIES OF RECEIVER — 1. General Rule. — See notes 7, 8.

2. Negligence or Misconduct — *a.* GENERAL RULE. — See note 9.

1097. *c.* WRONGFUL SEIZURE OF PROPERTY. — See note 5.

1098. 3. Torts of Employees — *a.* GENERAL RULE. — See notes 3, 7.

4. Contracts — *a.* IN GENERAL. — See notes 10, 11.

1099. See note 2.

c. CONTRACTS PRIOR TO RECEIVERSHIP — (1) *In General.* —

See notes 10, 11.

1100. (2) *Reasonable Time for Election.* — See note 3.

5. Interest. — See note 7.

1101. See note 2.

8. When Liability Ends. — See notes 5, 8.

1102. XIV. COMPENSATION OF RECEIVERS — 1. In General. — See note 2.

Textile Co., (Va. 1905) 51 S. E. Rep. 155;
 Laramie First Nat. Bank *v.* Cook, 12 Wyo.
 492.

An Unrecorded Chattel Mortgage does not,
 under the Massachusetts statute, take priority
 over a receiver's claim. Harrison *v.* J. J. War-
 ren Co., 183 Mass. 123.

1093. 1. Receiver's Title Subject to Equities.
 — Leggett *v.* Waller, (Supm. Ct. Spec. T.) 39
 Misc. (N. Y.) 408; Matter of Coleman, 174 N.
 Y. 373; Laramie First Nat. Bank *v.* Cook, 12
 Wyo. 492.

1094. 2. Property in Possession of Lienor. —
 Wheaton *v.* Daily Tel. Co., (C. C. A.) 124 Fed.
 Rep. 61.

5. Set-off. — Nix *v.* Ellis, 118 Ga. 345.

1095. 2. Date of Filing of Order of Appoint-
 ment. — Pickert *v.* Eaton, 81 N. Y. App. Div.
 423.

1096. 7. Rule as to Receiver's Liability. —
 American Bonding, etc., Co. *v.* Baltimore, etc.,
 R. Co., (C. C. A.) 124 Fed. Rep. 866; Malott
v. Woods, 109 Ill. App. 513.

8. Malott *v.* Howell, 111 Ill. App. 233; Malott
v. Woods, 109 Ill. App. 512.

Error to Award Execution Against Receiver. —
 Malott *v.* Mapes, 111 Ill. App. 340.

9. Rule as to Negligence or Misconduct. —
 Robinson *v.* Arkansas L. & T. Co., (Ark. 1905)
 85 S. W. Rep. 413, citing 23 AM. AND ENG.
 ENCYC. OF LAW (2d ed.) 1096; State Cent. Sav.
 Bank *v.* Fanning Ball-Bearing Chain Co., 118
 Iowa 698; Pangburn *v.* American Vault, etc.,
 Co., 205 Pa. St. 93.

Carelessness in Collecting Claims. — *In re* An-
 gell, 131 Mich. 345.

1097. 5. Where a Receiver Continues in Pos-
 session of Land Wrongfully Seized by the corpora-
 tion previous to his appointment, an action for
 damages may be brought against him. Ratcliff *v.*
 Adler, 71 Ark. 269.

1098. 3. Torts of Employees. — See Ameri-
 can Bonding, etc., Co. *v.* Baltimore, etc., R. Co.,
 (C. C. A.) 124 Fed. Rep. 877.

A Receiver Is Personally Liable for the tort of
 an employee committed during the receiver's
 possession but after the termination of his
 powers. Larsen *v.* U. S. Mortgage, etc., Co.,
 104 N. Y. App. Div. 76.

7. McDermott *v.* Crook, 20 App. Cas. (D. C.)
 465.

10. Contracts. — See Shirk *v.* Brookfield, 77
 N. Y. App. Div. 295, holding that a contract
 made by an agent of the receiver is binding on
 him.

11. Official, Not Personal, Liability. — Olpherts
v. Smith, 173 N. Y. 593.

1099. 2. State Cent. Sav. Bank *v.* Fanning
 Ball-Bearing Chain Co., 118 Iowa 698 (employ-
 ment of attorney).

10. Executory Contracts Prior to Appointment.
 — Dayton Hydraulic Co. *v.* Felsenthall, (C. C.
 A.) 116 Fed. Rep. 961; Rochat *v.* Gee, 137 Cal.
 497; Wells *v.* Hartford Manilla Co., 76 Conn.
 27; Harrigan *v.* Gilchrist, 121 Wis. 352.

In the Absence of Authorization by the Court,
 a receiver has no power to adopt a contract
 made prior to his appointment. Dow *v.* Nealis,
 (Supm. Ct. App. T.) 47 Misc. (N. Y.) 153.

11. Wells *v.* Hartford Manilla Co., 76 Conn.
 27; Dow *v.* Nealis, (Supm. Ct. App. T.) 47
 Misc. (N. Y.) 153.

1100. 3. Dayton Hydraulic Co. *v.* Felsen-
 thall, (C. C. A.) 116 Fed. Rep. 961; Johnson
v. Lehigh Valley Traction Co., 130 Fed. Rep.
 932.

7. Interest — General Rule. — Clark *v.* Brown,
 (C. C. A.) 119 Fed. Rep. 130.

1101. 2. Failure to Account at Proper Time.
 — Rosenthal *v.* McGraw, (C. C. A.) 138 Fed.
 Rep. 721.

5. Termination of Liability. — Ansley *v.* Mc-
 Loud, (Indian Ter. 1904) 82 S. W. Rep. 908;
 Tobin *v.* Central Vermont R. Co., 185 Mass.
 337. See also Western New York, etc., R. Co.
v. Penn Refining Co., (C. C. A.) 137 Fed. Rep.
 343.

8. McGhee *v.* Willis, 134 Ala. 281.

1102. 2. Receiver's Compensation. — *In re*
 Richards, 127 Fed. Rep. 772; Joplin Supply Co.
v. Brennerman, 99 Mo. App. 657; Forrester *v.*
 Boston, etc., Consol. Copper, etc., Min. Co., 32
 Mont. 240; Hickey *v.* Parrot Silver, etc., Co., 32
 Mont. 143, 107 Am. St. Rep. 362; Lembeck *v.*
 Jarvis Terminal Cold Storage Co., (N. J. 1904)
 59 Atl. Rep. 565; Silvers *v.* Merchants', etc.,
 Assoc., (N. J. 1903) 56 Atl. Rep. 294; Rogers
v. Forbes, 23 Ohio Cir. Ct. 438.

1102. 2. Amount or Rate of Compensation — *a.* WHERE REGULATED BY STATUTE. — See notes 3, 5.

1103. See note 1.

b. IN ABSENCE OF STATUTE — (1) *Rule as to Discretion of Court.* — See notes 2, 3.

(2) *Consideration of Particular Circumstances.* — See note 4.

1105. 5. Additional Compensation. — See note 2.

6. Agreement to Serve Without Compensation. — See note 5.

8. Effect of Receiver's Negligence or Misconduct. — See note 7.

1106. 10. Where Order of Appointment Reversed. — See note 4.

1107. 15. Liability of Receivership Property. — See notes 1, 2.

16. Liability of Parties. — See note 5.

XV. FOREIGN RECEIVERS — 1. Rule as to Extraterritorial Jurisdiction. — See note 7.

Termination of Rights of Compensation. — A receiver is not entitled to compensation after the time when in justice he should have been discharged. *Forrester v. Boston, etc., Consol. Copper, etc., Min. Co.,* 30 Mont. 181.

1102. 3. Statutory Regulation. — See *In re Cambridge Lumber Co.,* 136 Fed. Rep. 983; *Spears v. Thomas, (Ky. 1902)* 70 S. W. Rep. 1060; *Fidelity Nat. Bank v. Youtsey, (Ky. 1904)* 81 S. W. Rep. 263; *In re Angell, 131 Mich. 345; State v. Active Bldg., etc., Assoc. No. 2, 102 Mo. App. 675; Adams v. Elwood, 104 N. Y. App. Div. 138; Graham v. Carr, 133 N. Car. 449; Portland First Nat. Bank v. Oregon Paper Co., 42 Oregon 398.*

5. Compensation Is to Be Calculated on the Entire Amount of property acquired by the receiver in good faith although it proved to be more than was required. *Adams v. Elwood, 104 N. Y. App. Div. 138.*

1103. 1. See *Slater v. Slater, 78 N. Y. App. Div. 449, modified 175 N. Y. 143.*

2. Discretion of Court. — *Drey v. Watson, (C. C. A.) 138 Fed. Rep. 792; Spears v. Thomas, (Ky. 1902)* 70 S. W. Rep. 1060; *Ellis v. Warschauer, 92 Minn. 444; Hickey v. Parrot Silver, etc., Co., 32 Mont. 143, 107 Am. St. Rep. 362; McKenzie v. Coslett, (Nev. 1905)* 80 Pac. Rep. 1070; *Silvers v. Merchants', etc., Assoc., (N. J. 1903)* 56 Atl. Rep. 294; *Pangburn v. American Vault, etc., Co., 205 Pa. St. 93.* See also *Portland First Nat. Bank v. Oregon Paper Co., 42 Oregon 398.*

Court May Revoke Allowance Made Without Knowledge of Facts. — *In re Angell, 131 Mich. 345.*

3. Discretion Not Interfered with unless Abused. — *Culver v. H. R. Allen, Sr., Medical, etc., Assoc., 206 Ill. 40, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1103, affirming 108 Ill. App. 394; Forrester v. Boston, etc., Consol. Copper, etc., Min. Co., 30 Mont. 181.*

4. Particular Circumstances to Be Considered. — *Culver v. H. R. Allen, Sr., Medical, etc., Assoc., 206 Ill. 40, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1103; Stearns Paint Mfg. Co. v. Comstock, 121 Iowa 430; Spears v. Thomas, (Ky. 1902)* 70 S. W. Rep. 1060; *Hickey v. Parrot Silver, etc., Co., 32 Mont. 143, 107 Am. St. Rep. 362; Lembeck v. Jarvis Terminal Cold Storage Co., (N. J. 1904)* 59 Atl. Rep. 565; *Harrigan v. Gilchrist, 121 Wis. 127.* See also *Drey v. Watson, (C. C. A.) 138 Fed. Rep. 792.*

1105. 2. *Spears v. Thomas, (Ky. 1902)* 70 S. W. Rep. 1060; *In re Angell, 131 Mich. 345; Hickey v. Parrot Silver, etc., Co., 32 Mont. 143, 107 Am. St. Rep. 362.*

5. Where Receiver Consents to Serve Graciously. — *Polk v. Johnson, (Ind. App. 1902)* 65 N. E. Rep. 536, 160 Ind. 292, 98 Am. St. Rep. 274.

Agreement to Be Compensated Out of Income of Property. — See *Ephraim v. Pacific Bank, 136 Cal. 646.*

Under a Contract Not to Enforce a Claim for Compensation to the Detriment of the Debtor, the debtor cannot claim against an allowance made to the receiver out of funds which would otherwise not have been applied to his debt. *Bloomfield v. Roy, (C. C. A.) 120 Fed. Rep. 502.*

7. Negligence or Misconduct. — *Dalliba v. Riggs, (Idaho 1905)* 82 Pac. Rep. 107; *Pangburn v. American Vault, etc., Co., 205 Pa. St. 93.*

1106. 4. Order of Appointment Reversed. — *Clark v. Brown, (C. C. A.) 119 Fed. Rep. 130; Hickey v. Parrot Silver, etc., Co., 32 Mont. 143, 107 Am. St. Rep. 362.*

Appointment by Court Lacking Jurisdiction. — See *Ford v. Gilbert, 42 Oregon 528.*

1107. 1. Charge on Receivership Property. — *Clark v. Brown, (C. C. A.) 119 Fed. Rep. 130; Frick v. Fritz, 124 Iowa 529; Hickey v. Parrot Silver, etc., Co., 32 Mont. 143, 107 Am. St. Rep. 362; Lembeck v. Jarvis Terminal Cold Storage Co., (N. J. 1904)* 59 Atl. Rep. 565.

2. *Laramie First Nat. Bank v. Cook, 12 Wyo. 492.*

5. Liability of Party Improperly Procuring Appointment of Receiver. — *Carroll v. Haigh, 108 Ill. App. 264, affirmed 209 Ill. 576; Link Belt Machinery Co. v. Hughes, 195 Ill. 413; Hickey v. Parrot Silver, etc., Co., 32 Mont. 143, 107 Am. St. Rep. 362.* See also *Wills Valley Min., etc., Co. v. Galloway, 139 Ala. 276; Ford v. Gilbert, 42 Oregon 528.*

7. No Extraterritorial Jurisdiction. — *Hilliker v. Hale, (C. C. A.) 117 Fed. Rep. 220; Lewis v. American Naval Stores Co., 119 Fed. Rep. 391; Great Western Min., etc., Co. v. Harris, (C. C. A.) 128 Fed. Rep. 321; Lewis v. Clark, (C. C. A.) 129 Fed. Rep. 570; Hale v. Allinson, 188 U. S. 56; Great Western Min., etc., Co. v. Harris, 198 U. S. 561; Choctaw Coal, etc., Co. v. Williams-Echols Dry Goods Co., (Ark. 1905)*

- 1108.** See note 1.
4. Recognition and Rights by Comity — Rule Stated. — See note 6.
- 1109.** Removal of Funds — Prejudice of Domestic Creditors. — See note 2.
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2. Powers and Duties. — See note 7.
- 1111.** **3. Relation to General or Principal Receiver.** — See note 2.
XVII. CONFLICTING RECEIVERSHIPS — 1. General Rule. — See note 4.
- 1112.** See note 2.
2. Priority of Appointment — *a.* GENERAL RULE. — See notes 3, 5, 6.
- 1113.** **4. Conflict of Jurisdiction as Between State and Federal Courts.** — See notes 4, 5.
- 1114.** See note 1.
- 1115.** XVIII. RECEIVER'S BONDS — 1. General Rule. — See note 1.
3. Formal Requisites — *a.* IN GENERAL. — See note 7.
4. Liability on Bond — *a.* IN GENERAL. — See note 14.
- 1117.** 11. When Security Not Required. — See note 9.
- 1118.** XIX. FILING AND ALLOWANCE OF CLAIMS — 2. Period for Filing Claims. — See note 3.
3. Interest. — See note 6.

87 S. W. Rep. 632; *Lackmann v. Supreme Council, etc.*, 142 Cal. 22; *Woodhull v. Farmers' Trust Co.*, 11 N. Dak. 157, 95 Am. St. Rep. 712; *Frowert v. Blank*, 205 Pa. St. 299; *American Tribune New Colony Co. v. Schuler*, 34 Tex. Civ. App. 560. See also *The Jonas H. French*, 119 Fed. Rep. 462; *Acken v. Coughlin*, 103 N. Y. App. Div. 1.

1108. 1. See *Great Western Min., etc., Co. v. Harris*, 198 U. S. 561.

6. Rule of Comity. — *Lewis v. Clark*, (C. C. A.) 129 Fed. Rep. 570; *Lewis v. American Naval Stores Co.*, 119 Fed. Rep. 391; *Choctaw Coal, etc., Co. v. Williams-Echols Dry Goods Co.*, (Ark. 1905) 87 S. W. Rep. 632; *Pruyn v. McCreary*, 105 N. Y. App. Div. 302; *Woodhull v. Farmers' Trust Co.*, 11 N. Dak. 157, 95 Am. St. Rep. 712; *Egan v. North American Sav., etc., Co.*, 45 Oregon 131, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1108. See also *Hilliker v. Hale*, (C. C. A.) 117 Fed. Rep. 220; *Hallam v. Ashford*, (Ky. 1902) 70 S. W. Rep. 197.

The Rights of a Domestic Attaching Creditor, claiming a fund within the state, will not be set aside in favor of a foreign receiver acting under the laws of another state. *Lackmann v. Supreme Council, etc.*, 142 Cal. 22.

1109. 2. *Lackmann v. Supreme Council, etc.*, 142 Cal. 22. Compare *National Park Bank v. Clark*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 558, reversed 92 N. Y. App. Div. 262; *Tobin v. Central Vermont R. Co.*, 185 Mass. 337.

1110. 4. *Ancillary Receiver.* — *Lewis v. American Naval Stores Co.*, 119 Fed. Rep. 391. See also *Egan v. North American Sav., etc., Co.*, 45 Oregon 131.

Federal Court May Appoint. — *Scaife v. Scammon Invest., etc., Assoc.*, (Kan. 1905) 80 Pac. Rep. 957.

7. Custodian of Property Within State. — *Frowert v. Blank*, 205 Pa. St. 299.

1111. 2. *Relation of Ancillary to Principal Receiver.* — *Southern Bldg., etc., Assoc v. Miller*, (C. C. A.) 118 Fed. Rep. 369.

4. Extending Original Receivership. — *Fernold v. Spokane, etc., Telephone, etc., Co.*, 31 Wash. 219, holding that the same receiver should not be reappointed by another court.

1112. 2.⁴ See *Fernald v. Spokane, etc., Co.*, 31 Wash. 219.

3. General Rule as to Priority of Appointment — *Lewis v. American Naval Stores Co.*, 119 Fed. Rep. 391; *McKay v. Van Kleeck*, 133 Mich. 27; *Fernald v. Spokane, etc., Telephone, etc., Co.*, 31 Wash. 219.

5. Interference by Subsequently Appointed Receiver Not Allowed. — *Lewis v. American Naval Stores Co.*, 119 Fed. Rep. 391; *Fernald v. Spokane, etc., Telephone, etc., Co.*, 31 Wash. 219.

6. *McKay v. Van Kleeck*, 133 Mich. 27.

1113. 4. *Federal and State Courts.* — See *Lewis v. American Naval Stores Co.*, 119 Fed. Rep. 391.

5. Federal Court Will Not Interfere with Receiver of State Court. — *McKay v. Van Kleeck*, 133 Mich. 27.

1114. 1. See *McKay v. Van Kleeck*, 133 Mich. 27.

1115. 1. *Receiver's Bonds.* — *Beach v. Macon Grocery Co.*, (C. C. A.) 116 Fed. Rep. 143; *Matter of Spies*, 92 N. Y. App. Div. 175.

7. See *Stratton v. City Trust, etc., Co.*, 86 N. Y. App. Div. 551.

14. When Surety Not Liable. — Under Code Civ. Pro. N. Y., § 715, requiring notice of an accounting to the surety, failure to give such notice exonerates the surety from liability on the bond. *Stratton v. City Trust, etc., Co.*, 86 N. Y. App. Div. 551.

1117. 9. *Bond Not Required of Trust Company.* — *Goff v. Goff*, 54 W. Va. 364.

1118. 3. *Court May Allow Filing After Expiration of Time.* — *Straw, etc., Mfg. Co. v. Kilbourne Boot, etc., Co.*, 92 Minn. 399.

6. Interest Not Allowed After Appointment of Receiver. — *Solomons v. American Bldg., etc., Assoc.*, 116 Fed. Rep. 676, affirmed (C. C. A.) 120 Fed. Rep. 1018. See also *People v. American L. & T. Co.*, 172 N. Y. 371.

1119. 4. Collateral Security. — See note 1.

XX. PREFERENCES AND PRIORITIES — 3. Liens, Mortgages, Etc. —

a. IN GENERAL. — See note 5.

1120. *b.* OPERATING EXPENSES. — See notes 1, 2.

d. CLAIMS PRIOR TO RECEIVERSHIP. — See note 6.

e. WAGES DUE LABORERS OR EMPLOYEES. — See note 8.

1121. 5. Unlawful Preferences. — See note 2.

XXI. RECEIVER'S CERTIFICATES — 2. Power to Authorize. — See notes 7, 8, 9.

4. Priority and Lien. — See note 12.

1122. **XXII. SUITS BY AND AGAINST RECEIVERS — 1. Leave to Receiver to Sue or Defend —** *a.* IN GENERAL. — See note 5.

1123. See notes 1, 2.

d. SUITS IN FOREIGN JURISDICTIONS. — See note 7.

2. Leave to Sue Receiver — *a.* GENERAL RULE. — See note 8.

1119. 1. Collateral Security. — Compare *State Nat. Bank v. Esterly*, 69 Ohio St. 24.

5. A Simple Contract Claim, Owned by the State, is not entitled to preference. *State v. Williams*, 101 Md. 529.

Priority Between Creditors. — Where the assets of a bank in the hands of a receiver were turned over to the bank, on the application of certain creditors, for the purpose of reorganizing for the benefit of all creditors, the creditors who were not parties to the application were held to be entitled to priority over those who were parties on the failure of the scheme of reorganization and the appointment of a second receiver. *Rumble v. Tyus*, 123 Ga. 295.

1120. 1. Receiver Appointed to Operate Property May Give Expenses a First Lien. — *People's Nat. Bank v. Virginia Textile Co.*, (Va. 1905) 51 S. E. Rep. 155.

Damages for Injuries to Employee a First Lien. — *Robinson v. New York, etc., Electric Co.*, 99 N. Y. App. Div. 509.

Expense of Permanent Improvements Not Preferred. — *Atlantic Trust Co. v. Dana*, (C. C. A.) 128 Fed. Rep. 209.

2. Preference for Expenses Before Receivership Authorized. — *Le Hote v. Boyet*, 85 Miss. 636; *Walter v. West Branch Table, etc., Co.*, 12 Pa. Dist. 529.

6. Existing Claims Have Priority over Those Accruing After Receivership. — *Wells v. Hartford Manilla Co.*, 76 Conn. 27.

A Receiver Should Not Pay a Claim of His Own against the insolvent ahead of other claims. *State Cent. Sav. Bank v. Fanning Ball-Bearing Chain Co.*, 118 Iowa 698.

A Judgment, obtained after the institution of proceedings for the appointment of a receiver, is not entitled to priority over other claims. *Clark v. Bacorn*, (C. C. A.) 116 Fed. Rep. 617.

8. Wages a Preferred Claim. — *Cunningham v. Elm Grove Zinc, etc., Min. Co.*, 103 Mo. App. 398; *Security Sav., etc., Co. v. Goble, etc., R. Co.*, 44 Oregon 379.

The Assignee of a Claim for Wages, assigned before insolvency, is not entitled to priority. *Cogan v. Conover Mfg. Co.*, (N. J. 1805) 60 Atl. Rep. 408.

1121. 2. Unlawful Preferences. — See *Schlesinger v. Goldberg*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 149.

7. Discretion of Court. — See *Vandalia v. St. Louis, etc., R. Co.*, 209 Ill. 73.

8. Generally Confined to Purposes Essential to Preservation of Property. — *Porch v. Agnew Co.*, (N. J. 1904) 57 Atl. Rep. 546.

9. Only in the Case of a Corporation Engaged in Public Service, where the service cannot be interrupted without injury to the community, will receivers' certificates be authorized. *Wiggins v. Neversink Light, etc., Co.*, (Supm. Ct. Spec. T.) 47 Misc. (N. Y.) 315.

12. Receivers' Certificates Generally Have First Lien. — *Royal Trust Co. v. Washburn, etc., R. Co.*, (C. C. A.) 120 Fed. Rep. 11.

1122. 5. Leave to Sue or Defend Necessary. — *Hubert v. New Orleans*, (C. C. A.) 130 Fed. Rep. 21; *St. Louis, etc., R. Co. v. Vandalia*, 103 Ill. App. 363; *Manker v. Phoenix Loan Assoc.*, (Iowa 1903) 96 N. W. Rep. 982; *De La Fleur v. Barney*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 515.

A Receiver May Bring a Petition for an Injunction in the court appointing him without obtaining formal leave. *Vestel v. Tasker*, 123 Ga. 213.

1123. 1. Order of Appointment Conferring General Authority. — See *Hubert v. New Orleans*, (C. C. A.) 130 Fed. Rep. 21.

2. See *Hubert v. New Orleans*, (C. C. A.) 130 Fed. Rep. 21.

Subsequent Order Approving Suit. — *De La Fleur v. Barney*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 515.

7. No Power to Institute Suits Beyond Jurisdiction. — *Hilliker v. Hale*, (C. C. A.) 117 Fed. Rep. 220; *Great Western Min., etc., Co. v. Harris*, (C. C. A.) 128 Fed. Rep. 321; *Lewis v. American Naval Stores Co.*, 119 Fed. Rep. 391; *Lewis v. Clark*, (C. C. A.) 129 Fed. Rep. 570; *Hale v. Allinson*, 188 U. S. 56; *Great Western Min., etc., Co. v. Harris*, 198 U. S. 561; *Frowert v. Blank*, 205 Pa. St. 299. See also *Choctaw Coal, etc., Co. v. Williams-Echols Dry Goods Co.*, (Ark. 1905) 87 S. W. Rep. 632.

In Kentucky a foreign receiver may sue to recover a debt due from a resident of Kentucky to his corporation. *Hallam v. Ashford*, 70 S. W. Rep. 197, 24 Ky. L. Rep. 870.

8. Leave to Sue Receiver Necessary. — *James Freeman Brown Co. v. Harris*, (C. C. A.) 139 Fed. Rep. 105; *Commonwealth Roofing Co. v.*

1124. See notes 2, 6.

Personal Judgment Against Receiver. — See note 7.

1125. *b.* DISCRETION OF COURT AS TO LEAVE. — See note 1.

c. EFFECT OF FAILURE TO OBTAIN LEAVE. — See notes 3, 4, 6

d. RULE BY STATUTE. — See note 8.

1126. See note 1.

XXIII. COLLATERAL ATTACK — 1. Appointment of Receiver. — See

note 7.

1127. See note 2.

But the Jurisdiction of the Appointing Court. — See note 3.

2. Receiver's Title and Authority. — See note 6.

4. Orders Entered in Receivership Proceeding. — See note 8.

1128. **XXIV. SUSPENSION OF RECEIVER'S FUNCTIONS.** — See note 1.

XXV. TERMINATION OF RECEIVER'S FUNCTIONS — 4. Removal and

Discharge — *a.* IN GENERAL. — See note 8.

b. DISCRETION OF COURT. — See note 11.

North American Trust Co., (C. C. A.) 135 Fed. Rep. 989; Ridge *v.* Manker, (C. C. A.) 132 Fed. Rep. 599; Baker *v.* Carraway, 133 Ala. 502; Fox River Paper Co. *v.* Western Envelope Co., 109 Ill. App. 393; Malott *v.* State, 158 Ind. 678; Manker *v.* Phoenix Loan Assoc., (Iowa 1903) 96 N. W. Rep. 982; Cooper *v.* Philadelphia Worsted Co., (N. J. 1904) 57 Atl. Rep. 733; Pruyn *v.* McCreary, 105 N. Y. App. Div. 302; Case *v.* Duffy, (Supm. Ct. App. T.) 86 N. Y. Supp. 778; Egan *v.* North American Sav., etc., Co., 45 Oregon 131. See also Manker *v.* Phoenix Loan Assoc., 124 Iowa 341; Kidder *v.* Beavers, 33 Wash. 635.

The Court May Revoke Authority to Sue, or in granting such authority may stipulate in what court suit is to be brought. Buckhannon, etc., R. Co. *v.* Davis, (C. C. A.) 135 Fed. Rep. 707.

1124. 2. Suit Without Leave — Contempt. — See Gunning *v.* Sorg, 113 Ill. App. 332, affirmed 214 Ill. 616.

6. See Kidder *v.* Beavers, 33 Wash. 635.

A Suit to Cancel an Unsatisfied Mortgage, given as security, may be brought without leave of court. Egan *v.* North American Sav., etc., Co., 45 Oregon 131.

7. Personal Judgment. — Malott *v.* Woods, 109 Ill. App. 512; Malott *v.* Howell, 111 Ill. App. 233; Malott *v.* Mapes, 111 Ill. App. 340.

1125. 1. Gunning *v.* Sorg, 113 Ill. App. 332, affirmed 214 Ill. 616. See also Fox River Paper Co. *v.* Western Envelope Co., 109 Ill. App. 393.

3. Effect of Failure to Obtain Leave. — Manker *v.* Phoenix Loan Assoc., 124 Iowa 341, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1125; Pruyn *v.* McCreary, 105 N. Y. App. Div. 302; Payson *v.* Jacobs, 38 Wash. 209, citing 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1125.

A Decree Is Not Subject to Collateral Attack on the ground that the record fails to show leave to sue. Ridge *v.* Manker, (C. C. A.) 132 Fed. Rep. 599.

4. Proceeding May Be Arrested. — Pruyn *v.* McCreary, 105 N. Y. App. Div. 302.

6. A Contempt Which May Be Cured or Waived. — Payson *v.* Jacobs, 38 Wash. 203.

8. Federal Statute. — Buckhannon, etc., R. Co. *v.* Davis, (C. C. A.) 135 Fed. Rep. 707; Coster

v. Parkersburg Branch R. Co., 131 Fed. Rep. 115; Malott *v.* State, 158 Ind. 678; Malott *v.* Hawkins, 159 Ind. 127.

1126. 1. Statute Construed. — Malott *v.* Hawkins, 159 Ind. 127. Compare Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 118 Fed. Rep. 204, holding that an action in a state court against the receiver of a federal court, on a claim arising prior to the receivership, cannot be maintained without leave.

The Federal Statute Applies only to transactions of the receiver connected with property in his hands. Coster *v.* Parkersburg Branch R. Co., 131 Fed. Rep. 115.

7. Appointment Not to Be Collaterally Attacked. — Blue Mountain Iron, etc., Co. *v.* Portner, (C. C. A.) 131 Fed. Rep. 57; Gunby *v.* Armstrong, (C. C. A.) 133 Fed. Rep. 417; Powell *v.* National Bank of Commerce, 19 Colo. App. 57; McKay *v.* Van Kleeck, 133 Mich. 27; Murphy *v.* Fidelity Mut. F. Ins. Co., (Neb. 1903) 95 N. W. Rep. 1022; Boynton *v.* Sprague, 100 N. Y. App. Div. 443; Platt *v.* New York, etc., R. Co., 170 N. Y. 451; Brynjolfson *v.* Osthus, 12 N. Dak. 42; Juckett *v.* Fargo Mercantile Co., (S. Dak. 1905) 102 N. W. Rep. 604.

Appointment Not Reviewable by Mandamus. — Edinburg Coal Co. *v.* Humphreys, (C. C. A.) 134 Fed. Rep. 839.

1127. 2. Murphy *v.* Fidelity Mut. F. Ins. Co., (Neb. 1903) 95 N. W. Rep. 1022.

3. Where Title Involved Appointment May Be Questioned. — Compare Blue Mountain Iron, etc., Co. *v.* Portner, (C. C. A.) 131 Fed. Rep. 57.

6. No Collateral Attack on Title and Authority. — Miller *v.* Brown, (Neb. 1901) 95 N. W. Rep. 797; Juckett *v.* Fargo Mercantile Co., (S. Dak. 1905) 102 N. W. Rep. 604.

8. See Snader *v.* Bomberger, 21 Pa. Super. Ct. 629; Juckett *v.* Fargo Mercantile Co., (S. Dak. 1905) 102 N. W. Rep. 604.

1128. 1. Suspension of Receiver. — Rumney *v.* Donovan, 28 Mont. 69, quoting 23 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1127.

8. Removal of Receiver. — *In re* Angell, 131 Mich. 345.

11. Removal in Discretion of Court. — *In re* Angell, 131 Mich. 345.

Receiver Cannot Question His Removal. — State *v.* Inter State Fisheries Co., 36 Wash. 80.

1129. 5. Causes for Removal—*a. WHERE IMPROPER PERSON APPOINTED.*— See note 3.

c. MISCONDUCT OR DERELICTION OF DUTY.— See note 6.

1131. 6. When Receiver Will Be Discharged—*a. NO FURTHER NECESSITY FOR RECEIVER.*— See note 1.

1132. 7. Effect of Change of Receiver.— See note 5.

1129. 3. A Mere Possibility that the receiver may prove to be an improper person for the duties will not require his removal. *Land Title, etc., Co. v. Asphalt Co.*, 120 Fed. Rep. 996.

6. Misconduct.— See *In re Angell*, 131 Mich. 345.

1131. 1. Where No Further Necessity for Receivership.— *Harris v. Root*, 28 Mont. 159; *State v. Superior Ct.*, 31 Wash. 481.

Where Receiver Turns Assets Over to Receiver in Bankruptcy.— *Bloch v. Bloch*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 278.

Accounting Condition Precedent to Discharge.—

"A receiver ought not to be discharged until he discloses whether there are debts of the insolvent corporation remaining unpaid." *Strauss v. Casey Mach., etc., Co.*, (N. J. 1905) 60 Atl. Rep. 402.

1132. 5. Change of Receiver.— *Knickerbocker v. Benes*, 195 Ill. 434.

Change Does Not Work Assignment.— *Paige v. Rochester*, 137 Fed. Rep. 663.

RECEIVERS OF RAILROADS.

By J. E. BRADY.

- 4. III. OBJECT OF APPOINTMENT.** — See notes 5, 6.
- 5. IV. GROUNDS FOR APPOINTMENT — 3. Insolvency.** — See note 1.
- 8. V. JURISDICTION TO APPOINT — 4. Rule as to Discretion of Court.** — See note 5.
- VI. WHO MAY BE APPOINTED RECEIVER — 1. General Rule.** — See note 9.
- 9. 3. Officers and Directors.** — See note 4.
- VII. EFFECT OF APPOINTMENT — 1. In General.** — See note 9.
- 10. 2. Does Not Dissolve Corporation — a. GENERAL RULE.** — See note 1.
- b. SUBSEQUENT EXERCISE OF CORPORATE FUNCTIONS.** — See notes 4, 6.
- 4. Liability of Corporation for Receiver's Torts — a. GENERAL RULE.** — See note 10.
- 13. VIII. JUDICIAL CONTROL OF RECEIVER — RECEIVER'S RELATION TO COURT — 3. Receiver of Railroad as Agent or Arm of Court.** — See note 6.
- 14. IX. FUNCTIONS, POWERS, DUTIES — 1. In General.** — See note 1.
- 15. 4. Power to Manage and Operate Road — a. IN GENERAL.** — See note 1.
- b. EMPLOYMENT AND DISMISSAL OF SERVANTS AND AGENTS.** — See note 2.
- d. ENLARGEMENT OR EXTENSION OF OPERATIONS.** — See note 5.
- 16. 5. Power to Contract — a. IN GENERAL.** — See notes 1, 4.
- c. ADOPTION OF EXISTING CONTRACTS.** — See note 8.
- 18. 8. Expenditures — d. PAYMENT OF DEBTS OF CORPORATION.** — See note 3.

4. 5. Larsen v. U. S. Mortgage, etc., Co., 104 N. Y. App. Div. 76.

6. Johnson v. Lehigh Valley Traction Co., 130 Fed. Rep. 932.

5. 1. See St. Augustine First Nat. Bank v. Kirkby, 43 Fla. 376.

8. 5. Judicial Discretion. — Cuyler v. Atlantic, etc., R. Co., 132 Fed. Rep. 568; St. Louis, etc., R. Co. v. Vandalia, 103 Ill. App. 363.

9. Relative of Stockholders Not Ineligible. — Bowling Green Trust Co. v. Virginia Pass, etc., Co., 133 Fed. Rep. 186.

9. 4. One Who Had Been a Treasurer and Director of a railroad corporation may be appointed its receiver. Townsend v. Oneonta, etc., R. Co., 86 N. Y. App. Div. 604.

9. Effect of Appointment. — Johnson v. Lehigh Valley Traction Co., 130 Fed. Rep. 932.

10. 1. Does Not Operate as Dissolution. — Atlas R. Supply Co. v. Lake, etc., R. Co., 134 Fed. Rep. 503; Detroit, etc., R. Co. v. Campbell, (Mich. 1905) 103 N. W. Rep. 856; Monnett v. Columbus, etc., R. Co., 26 Ohio Cir. Ct. 469.

4. Atlas R. Supply Co. v. Lake, etc., R. Co., 134 Fed. Rep. 503 (corporation may incur indebtedness); Detroit, etc., R. Co. v. Campbell, (Mich. 1905) 103 N. W. Rep. 856.

6. Suits By and Against Corporation. — Monnett v. Columbus, etc., R. Co., 26 Ohio Cir. Ct. 469.

10. Torts by Receiver — Liability of Company. — Tobin v. Central Vermont R. Co., 185 Mass. 337.

13. 6. Johnson v. Lehigh Valley Traction Co., 130 Fed. Rep. 932.

14. 1. Powers. — A receiver has substantially the same powers as were possessed by the corporation previous to the appointment. Farmers' L. & T. Co. v. Northern Pac. R. Co., (C. C. A.) 120 Fed. Rep. 873, affirmed 195 U. S. 439.

15. 1. Johnson v. Lehigh Valley Traction Co., 130 Fed. Rep. 932.

2. Power to Appoint General Agents. — See Northern Pac. R. Co. v. American Trading Co., 195 U. S. 439.

5. Pueblo Traction, etc., Co. v. Allison, 30 Colo. 337.

16. 1. Receiver's Power to Contract. — Farmers' L. & T. Co. v. Northern Pac. R. Co., (C. C. A.) 120 Fed. Rep. 873, affirmed 195 U. S. 439.

4. Farmers' L. & T. Co. v. Northern Pac. R. Co., (C. C. A.) 120 Fed. Rep. 873, affirmed 195 U. S. 439.

8. See Platt v. Philadelphia, etc., R. Co., 115 Fed. Rep. 842.

18. 3. A Receiver Cannot Incur an Obligation to Discharge a Liability incurred previous to his appointment. Platt v. Philadelphia, etc., R. Co., 115 Fed. Rep. 842.

- 20. XI. SUITS BY AND AGAINST RECEIVERS — 1. In General.** — See note 5.
2. Rule by Statute. — See note 9.
XII. LIABILITIES — 1. Liability for Tort — a. IN GENERAL. — See note 11.
21. b. NEGLIGENCE OF EMPLOYEES. — See note 5.
22. 2. Liability on Contracts — a. IN GENERAL. — See note 2.
23. c. ADOPTION OF ADVANTAGEOUS CONTRACTS — (1) In General. — See note 4.
(2) What Constitutes Adoption — Leases. — See note 6.
25. 5. When Liability Ends. — See note 1.
26. XIV. WHOM RECEIVER REPRESENTS. — See note 4.
31. XVIII. CLAIMS — PRIORITIES — 3. Nature of Claims to Which Priority Is Given — g. CLAIMS FOR DAMAGES — Torts During Receivership. — See note 4
Torts Prior to Receivership. — See note 6.
32. h. OPERATING EXPENSES — (1) In General. — See note 2.
34. (3) Wages — Rule by Statute. — See note 1.
k. BACK DEBTS — (1) In General. — See note 6.
38. m. PRIORITIES AMONG PREFERENTIAL DEBTS. — See note 3.
XIX. RECEIVERS' CERTIFICATES — 1. In General. — See note 6.
39. 2. Power to Authorize Issuance — See notes 2, 3.
- 20. 5. Leave to Sue Necessary.** — *Malott v. State*, 158 Ind. 678.
9. See *Malott v. Hawkins*, 159 Ind. 127.
The Act Does Not Apply to a Suit to Condemn a Railway Crossing over property in the receiver's hands. *Buckhannon, etc., R. Co. v. Davis*, (C. C. A.) 135 Fed. Rep. 707.
11. Liability for Torts — General Rule. — See *St. Louis, etc., R. Co. v. Bricker*, 65 Kan. 321.
Liable for Wrongful Taking of Property by Company Prior to Appointment. — *Ratcliff v. Adler*, 71 Ark. 269.
21. 5. Torts of Employees. — See *American Bonding, etc., Co. v. Baltimore, etc., R. Co.*, (C. C. A.) 124 Fed. Rep. 877.
Where the Receiver Is in Possession After the Termination of the Receivership he is liable for a tort committed by his employee. *Larsen v. U. S. Mortgage, etc., Co.*, 104 N. Y. App. Div. 76.
**22. 2. American Bonding, etc., Co. v. Baltimore, etc., R. Co., (C. C. A.) 124 Fed. Rep. 866; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, (C. C. A.) 120 Fed. Rep. 873, *affirmed* 195 U. S. 439.
23. 4. Reasonable Time for Election. — *Johnson v. Lehigh Valley Traction Co.*, 130 Fed. Rep. 932.
6. Adoption of Lease. — *Johnson v. Lehigh Valley Traction Co.*, 130 Fed. Rep. 932.
**25. 1. Western New York, etc., R. Co. v. Penn Refining Co., (C. C. A.) 137 Fed. Rep. 343 (where no steps have been taken to vacate the discharge); *Tobin v. Central Vermont R. Co.*, 185 Mass. 337.
26. 4. Receiver Represents the Court. — *Chicago City R. Co. v. People*, 116 Ill. App. 633, *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 26; *St. Louis, etc., R. Co. v. Bricker*, 65 Kan. 321; *Tobin v. Central Vermont R. Co.*, 185 Mass. 337; *Larsen v. U. S. Mortgage, etc., Co.*, 104 N. Y. App. Div. 76.
31. 4. Damages to Persons or Property. — *Robinson v. New York, etc., Electric Co.*, 99 N. Y. App. Div. 509, *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 31.
6. Torts Prior to Receivership. — *Hampton v. Norfolk, etc., R. Co.*, (C. C. A.) 127 Fed. Rep. 662. See also *Robinson v. New York, etc., Electric Co.*, 99 N. Y. App. Div. 509.
32. 2. A Claim for Writing Material and Printing has been held not to come within the *Vermont* statute giving a preference to claims "for services rendered or materials furnished to keep said road in repair or to run the same." *Bell v. St. Johnsbury, etc., R. Co.*, 76 Vt. 42.
34. 1. Wages. — *Security Sav., etc., Co. v. Goble, etc., R. Co.*, 44 Oregon 379.
6. A Claim for Ties furnished prior to the receivership does not take priority over the mortgage lien. *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183.
38. 3. Priority Between Receiver's Certificates. — Receiver's certificates issued for indebtedness contracted in compliance with an order of the court are entitled to priority over those issued for debts incurred by the company prior to the appointment of a receiver. *Bank of Commerce v. Central Coal, etc., Co.*, (C. C. A.) 115 Fed. Rep. 878.
6. Receivers' Certificates. — See *Townsend v. Oneonta, etc., R. Co.*, 88 N. Y. App. Div. 208; *Wiggins v. Neversink Light, etc., Co.*, (Supm. Ct. Spec. T.) 47 Misc. (N. Y.) 315.
Receiver's Certificates Are Prior to a Vendor's Lien for rails sold to the railroad. *Royal Trust Co. v. Washburn, etc., R. Co.*, (C. C. A.) 120 Fed. Rep. 11.
39. 2. Power to Authorize Issuance of Certificates. — *Bibber-White Co. v. White River Valley Electric R. Co.*, (C. C. A.) 115 Fed. Rep. 786; *Townsend v. Oneonta, etc., R. Co.*, 88 N. Y. App. Div. 208, *quoting* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 39.
**3. Townsend v. Oneonta, etc., R. Co., 88 N. Y. App. Div. 208, *quoting* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 39.
Power Largely Within Discretion of Court. — *Vandalia v. St. Louis, etc., R. Co.*, 209 Ill. 73.******

- 39. 3. For What Purposes Authorized** — *a.* IN GENERAL. — See note 4.
b. OPERATING EXPENSES. — See note 5.
40. c. NEW CONSTRUCTION. — See note 1.
42. XX. REMOVAL AND DISCHARGE — **3. Effect of Removal or Discharge.** — See note 2.

39. 4. Interest on Bonds. — Receiver's certificates cannot be authorized for the payment of interest due on mortgage bonds, thereby preventing the bonds from being declared due, against the objection of the trustee in the mortgage and a majority of the bondholders. *Townsend v. Oneonta, etc., R. Co., 88 N. Y. App. Div. 208.*

5. General Rule — Limited to Operating Expenses. — *Bibber-White Co. v. White River Valley Electric R. Co., (C. C. A.) 115 Fed. Rep. 786.*

Raising Money to Prosecute Valid Claim. — *Vandalia v. St. Louis, etc., R. Co., 209 Ill. 73.*

40. 1. New Construction. — *Bibber-White Co. v. White River Valley Electric R. Co., (C. C. A.) 115 Fed. Rep. 786.*

42. 2. Effect of Removal or Discharge. — *McGhee v. Willis, 134 Ala. 281.*

Discharge Terminates Liability to Employee for Injuries Received. — *Tobin v. Central Vermont R. Co., 185 Mass. 337.*

RECEIVING STOLEN PROPERTY.

BY H. W. HOYE.

44. II. NATURE AND GRADE OF OFFENSE — **1. Nature of Offense** — *b.* UNDER STATUTE. — See notes 5, 6.

45. III. ESSENTIAL ELEMENTS — **1. Larceny** — *a.* IN GENERAL. — See note 6.

46. f. LARCENY IN FOREIGN JURISDICTION. — See note 8.

2. Guilty Knowledge of Larceny. — See note 14.

47. See note 1.

3. Intent — *a.* IN GENERAL. — See note 3.

48. 4. Receiving — *a.* IN GENERAL — **Receiving by Agent.** — See note 8.

50. 7. From Whom Property Must Be Received. — See note 6.

IV. EVIDENCE — **1. Confessions.** — See note 7.

2. Testimony of Thief. — See note 10.

51. Whether Thief Is Accomplice. — See notes 1, 2.

4. Presumption from Recent Possession. — See notes 6, 7.

44. 5. Receiving Distinct Offense in United States. — *Watts v. People, 204 Ill. 233, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 44; State v. Pollock, 105 Mo. App. 273.*

6. Receiver Accessory under Some Statutes. — See *State v. King, 88 Minn. 175.*

45. 6. Proof of Larceny Essential. — *State v. Freedman, 3 Penn. (Del.) 403; Anthony v. State, 44 Fla. 1; State v. Pollock, 105 Mo. App. 273; State v. Fink, 186 Mo. 50; State v. Simon, 70 N. J. L. 409; People v. Ammon, 92 N. Y. App. Div. 205, affirmed 179 N. Y. 540; Bismark v. State, 45 Tex. Crim. 54; Curran v. State, 12 Wyo. 553.*

46. 8. Statutes Extending Offense to Larceny in Foreign Jurisdiction. — *Curran v. State, 12 Wyo. 553.*

14. Guilty Knowledge of Larceny Essential. — *State v. Freedman, 3 Penn. (Del.) 403; Anthony v. State, 44 Fla. 1; State v. Richmond, 186 Mo. 71; State v. Pollock, 105 Mo. App. 273; State v. Simon, 70 N. J. L. 409; Territory v. Claypool, 11 N. Mex. 568; People v. Ammon, 92 N. Y. App. Div. 205, affirmed 179 N. Y. 540; Curran v. State, 12 Wyo. 553.*

47. 1. Pat v. State, 116 Ga. 92; State v.

Druxinman, 34 Wash. 257. But see Rowland v. State, 140 Ala. 142.

3. Felonious Intent as Element of Offense. — *Goldsberry v. State, 66 Neb. 312; People v. Ammon, 92 N. Y. App. Div. 205, affirmed 179 N. Y. 540. Compare State v. Richmond, 186 Mo. 71.*

48. 8. Receiving by Agent. — *Delahoyde v. People, 212 Ill. 554.*

50. 6. Necessity of Receiving from Thief. — *Compare Curran v. State, 12 Wyo. 553.*

7. Confessions. — *Curran v. State, 12 Wyo. 553.*

10. Thief Competent Witness Against Receiver. — *State v. Freedman, 3 Penn. (Del.) 403; Anthony v. State, 44 Fla. 1; Birdsong v. State, 120 Ga. 850; State v. Simon, 71 N. J. L. 142.*

51. 1. Thief Held Not to Be Accomplice. — *Birdsong v. State, 120 Ga. 850; People v. Ammon, 92 N. Y. App. Div. 205, affirmed 179 N. Y. 540.*

2. Thief Held to Be Accomplice. — *Bismark v. State, 45 Tex. Crim. 54.*

6. No Presumption of Receiving Held to Arise from Mere Possession. — *State v. Spencer, 4 Penn. (Del.) 92; Scott v. State, 119 Ga. 423;*

- 52.** 8. Proof of Knowledge — *a.* IN GENERAL. — See note 7.
- 53.** *b.* CONVERSATIONS, ETC., BETWEEN THIEF AND RECEIVER. — See notes 1, 2.
- c.* POSSESSION OF OTHER STOLEN GOODS. — See note 6.
- 54.** *f.* FALSE DENIAL OF POSSESSION. — See note 7.
- g.* INADEQUACY OF PURCHASE PRICE. — See note 9.
- V. BAR TO PROSECUTION — 1. Former Acquittal.** — See note 12.

Palmer *v.* State, (Neb. 1903) 97 N. W. Rep. 235; State *v.* Adams, 133 N. Car. 667.

51. 7. Inference from Possession Combined with Other Circumstances. — State *v.* Eubank, 33 Wash. 293.

52. 7. Proof of Guilty Knowledge. — State *v.* Freedman, 3 Penn. (Del.) 403; Birdsong *v.* State, 120 Ga. 850; Weinberg *v.* People, 208 Ill. 15; Delahoyde *v.* People, 212 Ill. 554; State *v.* King, 88 Minn. 175; State *v.* Richmond, 186 Mo. 71; Goldsberry *v.* State, 66 Neb. 312; State *v.* Simon, 71 N. J. L. 142; Bismark *v.* State, 45 Tex. Crim. 54; State *v.* Druxinman, 34 Wash. 257.

53. 1. Admissibility of Conversations at Time of Receiving. — Anthony *v.* State, 44 Fla. 1.

2. State *v.* Simon, 70 N. J. L. 409, citing 24

AM. AND ENG. ENCYC. OF LAW (2d ed.) 53; Territory *v.* Claypool, 11 N. Mex. 568.

6. Goods Need Not Belong to Same Person. — Goldsberry *v.* State, 66 Neb. 312; People *v.* Doty, 175 N. Y. 164.

54. 7. False Denial of Possession. — Weinberg *v.* People, 208 Ill. 15.

9. Inadequacy of Purchase Price. — Weinberg *v.* People, 208 Ill. 15.

12. Effect of Former Acquittal. — An acquittal upon the charge of burglary is no defense to a charge of receiving stolen goods, even though the same goods are the subject-matter of both charges. Pat *v.* State, 116 Ga. 92. Nor is an acquittal from a charge of grand larceny a bar to a prosecution for receiving stolen goods. State *v.* Fink, 186 Mo. 50.

RECITALS.

60. II. OPERATION AS ESTOPPEL — 10. Persons Affected — *a.* PARTIES AND PRIVIES. — See note 2.

61. *b.* STRANGERS — Operation of Recital in Favor of Stranger. — See note 3.

65. 11. Particular Recitals — *d.* RECITAL OF SEAL. — See note 1.

66. *f.* EXCEPTIONS OR RESERVATIONS. — See note 3.

69. RECKLESS — RECKLESSLY — RECKLESSNESS. — See note 8.

70. RECLAMATION. — See note 2.

71. RECONSTRUCT — RECONSTRUCTION. — See note 5.

60. 2. Recitals Binding upon Parties and Privies. — Van Winkle *v.* Van Winkle, 95 N. Y. App. Div. 605, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 60.

61. 3. No Estoppel in Favor of Stranger. — Chicago, etc., R. Co. *v.* Abbott, 215 Ill. 427, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 61.

65. 1. Effect of Recital of Seal. — Davis *v.* Bingham, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 299.

66. 3. Chicago, etc., R. Co. *v.* Abbott, 215 Ill. 427, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 66.

69. 8. Gustafson *v.* Chicago, etc., R. Co., 128 Fed. Rep. 85.

"Recklessly" and "Wantonly" Synonymous. — Harrington *v.* Los Angeles R. Co., 140 Cal. 514.

70. 2. "Drainage of Land" Construed to Have Practically Same Application as Reclamation, the one being the means employed, the other the result. Laguna Drainage Dist. *v.* Charles Martin Co., 144 Cal. 209.

71. 5. Reconstruct. — McNillan *v.* Payne County, 14 Okla. 659.

Reconstruction as Applied to Corporations is a commercial and not a legal term, and, even as a commercial term, bears no exact definite meaning. *In re* South African Supply, etc., Co., (1904) 2 Ch. 268.

RECORDING ACTS.

By H. O'B. COOPER.

- 75. I. ORIGIN AND HISTORY** — 1. In England — At Common Law. — See note 1.
- 77. III. INSTRUMENTS ENTITLED TO RECORD** — 1. In General. — See notes 4, 6.
- 78. 2. Instruments Relating to Real Property** — *a. IN GENERAL.* — See note 15.
- 80. Wills.** — See notes 3, 4.
- b. CONVEYANCES OF EQUITABLE TITLE.* — See note 6.
- 81. Executory Contracts.** — See note 2.
- Equitable Mortgages.* — See note 3.
- c. MORTGAGES* — (1) *In General.* — See notes 6, 7.
- 82. (3) Assignment of Mortgage.** — See notes 3, 4.
- 84. (4) Release.** — See note 6.
- 85. e. LEASES.** — See notes 6, 7.
- Mortgages of Leaseholds.* — See note 10.
- 86. f. POWERS OF ATTORNEY.** — See notes 1, 2.
- 87. 3. Instruments Relating to Personal Property** — *a. IN GENERAL.* — See note 1.

75. 1. Recording Unknown at Common Law. — *Ilfeld v. De Baca*, (N. Mex. 1905) 79 Pac. Rep. 723; *Snyder v. Yates*, 112 Tenn. 309, 105 Am. St. Rep. 941.

77. 4. Recording Unnecessary in Absence of Statute. — *Rice v. Sally*, 176 Mo. 107; *De Lassus v. Winn*, 174 Mo. 636; *Geneseo First Nat. Bank v. National Live Stock Bank*, 13 Okla. 719.

6. Assignments for Benefit of Creditors. — *McCartney v. Earle*, (C. C. A.) 115 Fed. Rep. 462; *Huddleson v. Polk*, (Neb. 1903) 97 N. W. Rep. 624.

78. 15. Deed Conveying Easement. — *Sweetland v. Grants Pass New Water, etc., Co.*, (Oregon 1905) 79 Pac. Rep. 337.

Notice of Mining Claim. — *Oregon King Min. Co. v. Brown*, (C. C. A.) 119 Fed. Rep. 48.

80. 3. Wills Required to Be Recorded. — As to recording a copy of a will admitted to probate in a foreign state see *Matter of Law*, 80 N. Y. App. Div. 73, *affirmed* 175 N. Y. 471, and see generally the title PROBATE AND LETTERS OF ADMINISTRATION, 141. 5 *et seq.*

4. Need Not Be Recorded. — *McLavy v. Jones*, 31 Tex. Civ. App. 354.

6. Within Scope of Recording Acts. — *Stark v. Hicklin*, 112 Mo. App. 419.

81. 2. Contract to Convey Within Act. — *Kent v. Williams*, 146 Cal. 3.

3. Equitable Mortgages Within Recording Acts. — *Fullerton v. Provincial Bank*, (1903) A. C. 309; *Matthews v. Damainville*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 546, *reversed* 100 N. Y. App. Div. 311.

6. Mortgage a "Conveyance." — *Allison v. Manzke*, 118 Wis. 11.

7. Mortgages Must Be Recorded. — *Clayton v. Exchange Bank*, (C. C. A.) 121 Fed. Rep. 630; *Gibson v. Thomas*, 180 N. Y. 483.

Extension of Time of Payment. — *Weideman v. Zielinska*, 102 N. Y. App. Div. 163.

82. 3. Mortgage Assignments Not Within Acts. — *Geneseo First Nat. Bank v. National Live Stock Bank*, 13 Okla. 719.

4. Perry v. Fisher, 30 Ind. App. 261; *Artz v. Yeager*, 30 Ind. App. 677; *Gillian v. McDowall*, 66 Neb. 814; *Gibson v. Thomas*, 180 N. Y. 483; *Weideman v. Zielinska*, 102 N. Y. App. Div. 163.

When Assignment Deemed a "Conveyance." — *Breed v. National Bank*, 171 N. Y. 648, *affirming* 57 N. Y. App. Div. 468.

Assignment of Note Not Assignment of Mortgage. — *Perry v. Fisher*, 30 Ind. App. 261.

84. 6. Release Must Be Recorded. — *Gibson v. Thomas*, 85 N. Y. App. Div. 243, *affirmed* 180 N. Y. 483. See also *Swain v. McMillan*, 30 Mont. 433.

85. 6. In Massachusetts a lease or assignment of lease for less than seven years need not be recorded. *Collins v. Pratt*, 181 Mass. 345.

7. Lease Must Be Recorded. — *Jokinisky v. Miller*, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 239.

10. Lease and Mortgage Required to Be Recorded Together. — *Downing v. Glen Rock Oil Co.*, 207 Pa. St. 455.

86. 1. Powers of Attorney Included by Statutes. — *Wren v. Howland*, 33 Tex. Civ. App. 87.

2. When Recording Not Required. — *Rownd v. Davidson*, 113 La. 1047.

87. 1. Recording of Bill of Sale Not Required. — *Stuart v. Mitchum*, 135 Ala. 546.

Statutes Requiring Record of Assignment of Wages. — *Whitcomb v. Waterville*, 99 Me. 75; *Park Brew Co. v. McDermott*, 25 R. I. 95.

Assignment of Patent for Invention — Statute

87. *b.* **CONDITIONAL SALES.** — See note 9.

88. See note 1.

c. **CHATTEL MORTGAGES.** — See note 6.

89. **To What Mortgages Statutes Apply.** — See note 1.

90. *d.* **CHOSSES IN ACTION.** — See note 5.

IV. PLACE OF RECORDATION — 1. Instruments Affecting Real Property

— *a.* **IN GENERAL.** — See note 7.

91. *c.* **EFFECT OF CHANGE IN COUNTY LINES — After Recording.** — See note 4.

92. **2. Instruments Affecting Personal Property — a. IN GENERAL.** — See note 2.

Grantor's Residence. — See notes 3, 5, 7.

Situs of Property. — See note 9.

93. **Grantor's Residence and Situs of Property.** — See note 1.

Requiring Record. — *Paulus v. M. M. Buck Mfg. Co.*, (C. C. A.) 129 Fed. Rep. 594. And see the title **PATENTS**, **418.** 10 *et seq.*

87. 9. Conditional Sales Not Within Recording Acts. — *Troy Wagon Works Co. v. Hutton*, 53 W. Va. 154.

88. 1. Conditional Sales Must Be Recorded. — *In re Tweed*, 131 Fed. Rep. 355; *Thomas v. Cooksey*, 130 N. Car. 148; *Thompson v. Armstrong*, 11 N. Dak. 198.

Goods to Be Manufactured — No Recordation Required. — *Duntz v. Granger Brewing Co.*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 177, affirmed 96 N. Y. App. Div. 631.

The Assignment and Transfer of a conditional bill of sale need not be recorded in order to constitute a good muniment of title as against an innocent third person purchasing the personal property from the original vendor. *English v. Hill*, 116 Ga. 415.

New York Statute — Delivery of Contract in Duplicate — No Filing Necessary. — *Baldinger v. Levine*, 83 N. Y. App. Div. 130.

The New Jersey Statute does not apply to a contract made between nonresidents concerning personal property situate out of the state, the contract not contemplating the removal of the property into the state; nor does it apply to a sale on condition of payment on delivery. *Hirsch v. C. W. Leatherbee Lumber Co.*, 69 N. J. L. 509.

6. Chattel Mortgages Must Be Recorded. — *In re Tweed*, 131 Fed. Rep. 355; *In re H. G. Andrae Co.*, 117 Fed. Rep. 561; *Guras v. Porter*, 118 Fed. Rep. 668; *Cowden v. Mills*, 9 Idaho 626; *Cowden v. Finney*, 9 Idaho 619; *Rankin v. McFarlane Carriage Co.*, (Ky. 1903) 75 S. W. Rep. 221; *Lingle v. Owosso Sugar Co.*, (Mich. 1905) 102 N. W. Rep. 639; *Sachs v. Norn*, (Mich. 1905) 102 N. W. Rep. 983; *Knickerbocker Trust Co. v. Penn Cordage Co.*, 66 N. J. Eq. 305, 105 Am. St. Rep. 640; *Baughn v. Allen*, (Tex. Civ. App. 1902) 68 S. W. Rep. 207; *Groesbeck v. T. H. Thompson Milling Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 346. And see the title **CHATTEL MORTGAGES**, **1008.** 2 *et seq.*

Priority over Older Judgment. — By statute in *Georgia* a mortgage given to secure money furnished to aid in making a crop for the year of the date of the mortgage is superior to the lien of an older judgment, execution under which was levied on the crop prior to the recordation

of the mortgage. *Franklin v. Callaway*, 120 Ga. 382.

89. 1. Instrument Intended as Mortgage. — *Dunham v. Cramer*, 63 N. J. Eq. 151.

90. 5. Recording of Assignment of Claim for Rent Not Authorized. — *Bennett v. McKee*, (Ala. 1905) 38 So. Rep. 129.

Recording of Release of Personal Obligation Not Required. — *Rutherford v. Rutherford*, 55 W. Va. 56.

7. Must Record at Place Designated. — *Clayton v. Exchange Bank*, (C. C. A.) 121 Fed. Rep. 630; *De Lassus v. Winn*, 174 Mo. 636. See also *Wren v. Howland*, 33 Tex. Civ. App. 87.

91. 4. Change After Recording. — *Bivings v. Gosnell*, 133 N. Car. 574; *Williamson v. Work*, 33 Tex. Civ. App. 369.

92. 2. Record at Wrong Place of No Effect. — *Guras v. Porter*, 118 Fed. Rep. 668; *Cowden v. Finney*, 9 Idaho 619; *Cowden v. Mills*, 9 Idaho 626; *Day, etc., Lumber Co. v. Mack*, (Ky. 1902) 69 S. W. Rep. 712; *Rice v. Sally*, 176 Mo. 107; *De Lassus v. Winn*, 174 Mo. 636. See also *Russell v. St. Mart*, 180 N. Y. 355, reversing 83 N. Y. App. Div. 543.

Conditional Sale Contract — Residence of Vendee. — *Creamery Package Mfg. Co. v. Tagley*, 91 Minn. 79.

3. Situs of Property Immaterial. — *Clayton v. Exchange Bank*, (C. C. A.) 121 Fed. Rep. 630; *Day, etc., Lumber Co. v. Mack*, (Ky. 1902) 69 S. W. Rep. 712; *Rice v. Sally*, 176 Mo. 107. See also *Loeser v. Jorgenson*, 137 Mich. 220.

The Burden of Proving that the Mortgagor Is Not a Resident of the county where he had possession of the property is on the one attacking the mortgage. *In re Brannock*, 131 Fed. Rep. 819.

5. Temporary Residence. — *In re Brannock*, 131 Fed. Rep. 819.

7. Several Mortgagors Residing in Different Counties. — *Russell v. St. Mart*, 180 N. Y. 355.

9. Location at Time Instrument Executed. — *Clayton v. Exchange Bank*, (C. C. A.) 121 Fed. Rep. 630.

When Part of Property Is in Another County the mortgage must be recorded in both counties. *Guras v. Porter*, 118 Fed. Rep. 668.

Mortgagor Nonresident — Place Where Property Is. — *Clayton v. Exchange Bank*, (C. C. A.) 121 Fed. Rep. 630.

93. 1. Both Grantor's Residence and Situs of

93. b. REMOVAL OF PROPERTY FROM PLACE OF RECORD — To Another County. — See note 3.

To Another State. — See notes 5, 6.

94. c. CONFLICT OF LAWS. — See notes 1, 2.

V. TIME OF RECORDATION — 1. In General. — See note 3.

95. 2. As Affecting Priorities — a. WHERE STATUTE SPECIFIES NO TIME — Allowance of Reasonable Time. — See notes 2, 3.

Where Priority of Record Governs. — See note 4.

b. WHERE TIME LIMIT PRESCRIBED BY STATUTE — (1) In General. — See note 5.

96. (2) Effect of Not Recording Within Time Limited — (a) In General. — See note 1.

Where the Junior Instrument Is Recorded Within the Time Limited. — See note 3.

Where Neither Instrument Recorded in Time. — See note 5.

(b) Record Effective from Time of Recording. — See note 8.

97. See note 1.

VI. WHEN RECORD TAKES EFFECT — 1. In General — From Time of Filing. — See note 7.

98. The Officer's Indorsement. — See notes 2, 3.

99. 2. What Constitutes a Filing for Record. — See note 1.

Intent to Record. — See note 5.

Effect of Withdrawing Instrument. — See note 10.

Property. — *Guras v. Porter*, 118 Fed. Rep. 668; *Russell v. St. Mart*, 180 N. Y. 355.

93. 3. Must Record in County to Which Property Removed. — *Guras v. Porter*, 118 Fed. Rep. 668.

5. Mortgage Recorded in Another State. — *Foster v. McAlester*, (C. C. A.) 114 Fed. Rep. 145; *Scaling v. Wichita Falls First Nat. Bank*, (Tex. Civ. App. 1905) 87 S. W. Rep. 715. See also *F. E. Creelman Lumber Co. v. Lesh*, 73 Ark. 16.

6. Contrary Doctrine. — *Snyder v. Yates*, 112 Tenn. 309, 105 Am. St. Rep. 941.

94. 1. Lex Loci Contractus Governs. — *F. E. Creelman Lumber Co. v. Lesh*, 73 Ark. 16; *Snyder v. Yates*, 112 Tenn. 309, 105 Am. St. Rep. 941. See also *Emerson Co. v. Proctor*, 97 Me. 360.

When Law of Forum Controls. — Where the owner undertakes, in one state, according to its laws, to mortgage personal property in another state, and the mortgagee attempts to enforce the mortgage in the actual *situs* of the property against third parties domiciled there, the law of the forum will govern. *Smead v. Chandler*, 71 Ark. 505.

2. Where Property in the State. — See *In re Brannock*, 131 Fed. Rep. 819.

3. May Record at Any Time. — *Hallyburton v. Slagle*, 130 N. Car. 482. See also *Summerville v. Kelliher*, 144 Cal. 155.

95. 2. Reasonable Time Allowed. — *Dunham v. Cramer*, 63 N. J. Eq. 151. See also *In re H. G. Andrae Co.*, 117 Fed. Rep. 561.

3. What Constitutes Reasonable Time. — See *National Cash Register Co. v. Lesko*, 77 Conn. 276.

4. Question Governed by Priority of Record. — *Penrose v. Doherty*, 70 Ark. 256; *Commercial, etc., Bank v. Vass*, 130 N. Car. 590.

5. Statutory Period for Recording. — *Huddleson v. Polk*, (Neb. 1903) 97 N. W. Rep. 624; *McLeod v. Lloyd*, 43 Oregon 260.

Time Computed from Delivery. — *In re Gosch*, (C. C. A.) 126 Fed. Rep. 627, reversing 121 Fed. Rep. 602.

96. 1. Subsequent Instrument Entitled to Priority. — *Baxley v. Baxley*, 117 Ga. 60.

3. Where Junior Instrument Recorded Within Time Limited. — *Contra in Pennsylvania*, *Gillespie v. Buffalo, etc., R. Co.*, 204 Pa. St. 107.

5. First Recorded Has Priority. — *McLeod v. Lloyd*, 43 Oregon 260.

8. Instrument Not Void. — *Skilton v. Codington*, 105 N. Y. App. Div. 617. See also *Summerville v. Kelliher*, 114 Cal. 155.

An Assignment for Benefit of Creditors. — *Huddleson v. Polk*, (Neb. 1903) 97 N. W. Rep. 624.

97. 1. Blackwell v. British American Mortg. Co., 65 S. Car. 105; *Wilkins v. McCorkle*, 112 Tenn. 688. See also *Skilton v. Codington*, 105 N. Y. App. Div. 617.

7. Effective from Time of Filing. — *Durrence v. Northern Nat. Bank*, 117 Ga. 385; *Troy Wagon Works Co. v. Hutton*, 53 W. Va. 154. See also *Murray v. Zeller*, (N. J. 1904) 59 Atl. Rep. 261; *Wilkins v. McCorkle*, 112 Tenn. 688.

98. 2. Indorsement Not Essential. — *Day, etc., Lumber Co. v. Mack*, (Ky. 1902) 69 S. W. Rep. 712. See also *Conant's Estate*, 43 Oregon 530.

3. Indorsement Prima Facie Evidence. — *Day, etc., Lumber Co. v. Mack*, (Ky. 1902) 69 S. W. Rep. 712.

99. 1. Must Be to Officer or Deputy. — *Conant's Estate*, 43 Oregon 530.

Lodging with Clerk Constitutes Filing. — *Day, etc., Lumber Co. v. Mack*, (Ky. 1902) 69 S. W. Rep. 712.

5. Must Be Intent to Record. — *Gibson v. Thomas*, 85 N. Y. App. Div. 243, affirmed 180 N. Y. 483; *Conant's Estate*, 43 Oregon 530.

10. Withdrawal Suspends Operation of Record. — See *Murray v. Zeller*, (N. J. 1904) 59 Atl. Rep. 261.

100. VII. PREREQUISITES TO RECORDATION — 1. Validity of Instrument —

a. IN GENERAL. — See note 2.

b. SIGNING AND SEALING. — See note 4.

c. DELIVERY. — See notes 6, 7, 8.

Recording as Evidence of Delivery. — See note 9.

101. *d.* ACKNOWLEDGMENT OR PROOF OF EXECUTION. — See note 2.

102. Certificate of Authenticity. — See note 3.

Attestation. — See note 4.

103. Defect Not Apparent on Face. — See notes 1, 2.

e. DESCRIPTION OF PROPERTY CONVEYED OR AFFECTED. — See note 3.

104. See note 1.

105. VIII. MAKING THE RECORD — 1. Compliance with Statute. — See note 3.

106. 2. Requisite Steps to Obtain Registration — *d.* THE RECORD BOOK — Separate Books for Different Classes of Instruments. — See note 8.

107. See note 1.

108. Instrument in Form a Deed but in Fact a Mortgage. — See note 1.

3. Transcribing. — See note 3.

100. 2. Must Be Valid Instrument. — New England Nat. Bank *v.* Northwestern Nat. Bank, 171 Mo. 307.

4. Must Be Signed. — Marx *v.* Jordan, 84 Miss. 334, 105 Am. St. Rep. 457.

6. Delivery Essential. — Hogadone *v.* Grange Mut. F. Ins. Co., 133 Mich. 339; Van Auken *v.* Mizner, (Neb. 1902) 90 N. W. Rep. 637; Houston Land, etc., Co. *v.* Hubbard, (Tex. Civ. App. 1905) 85 S. W. Rep. 474.

7. Record Before Acceptance of No Validity. — See Owen *v.* Foley, 30 Tex. Civ. App. 86.

8. Rights of Third Parties Protected. — Wilcox *v.* Drought, 71 N. Y. App. Div. 402.

9. Recording Presumptive Evidence of Delivery. — La Fleure *v.* Seivert, 98 Ill. App. 234; Morrison *v.* Fletcher, (Ky. 1905) 84 S. W. Rep. 548; Johnson *v.* Johnson, (Tex. Civ. App. 1905) 85 S. W. Rep. 1023.

Filing for Record. — Luckhart *v.* Luckhart, 120 Iowa 248.

Limitation of Rule. — The recording of a deed is evidence of delivery and acceptance only so far as relates to the passing of title. The rule does not apply to a deed which imposes on the grantee an obligation to assume the payment of a pre-existing incumbrance upon the property. Swisher *v.* Palmer, 106 Ill. App. 432.

101. 2. Acknowledgment or Proof of Execution Essential. — Farson *v.* Gilbert, 114 Ill. App. 17; Koch *v.* West, 118 Iowa 468, 96 Am. St. Rep. 394; Farmers', etc., Bank *v.* Stockdale, 121 Iowa 748; Heisch *v.* Bell, 11 N. Mex. 523; Jokinisky *v.* Miller, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 239; Geneseo First Nat. Bank *v.* National Live Stock Bank, 13 Okla. 719; Hunton *v.* Wood, 101 Va. 54. See also the title ACKNOWLEDGMENTS, 490. 1, 526. 5 *et seq.*

102. 3. Certificate of Authenticity Essential. — Tweto *v.* Horton, 90 Minn. 451; New England Nat. Bank *v.* Northwestern Nat. Bank, 171 Mo. 307.

Sufficiency of Certificate. — See Durrence *v.* Northern Nat. Bank, 117 Ga. 385.

4. Attestation Required. — Baxley *v.* Baxley, 117 Ga. 60; Matter of Nash, (Surrogate Ct.)

37 Misc. (N. Y.) 706; Schultz *v.* Tonty Lumber Co., 36 Tex. Civ. App. 448. See also Clark *v.* Strong, 105 N. Y. App. Div. 179; Riviere *v.* Wilkens, 31 Tex. Civ. App. 454.

103. 1. Latent Defect Does Not Invalidate Record. — Fair *v.* Citizens' State Bank, 70 Kan. 612.

2. Record Vitiated by Latent Defect. — Compare Fair *v.* Citizens' State Bank, 70 Kan. 612.

3. Property Must Be Identified. — Woods *v.* Rose, 135 Ala. 297; Farmers', etc., Bank *v.* Stockdale, 121 Iowa 748; Thurlough *v.* Dresser, 98 Me. 161; Hardaway *v.* Jones, 100 Va. 481.

Actual Notice Cures Defects. — Cohee *v.* West Point First Nat. Bank, (Neb. 1901) 95 N. W. Rep. 610.

104. 1. Sufficient if Searcher Put on Inquiry. — *In re* Brannock, 131 Fed. Rep. 819; Woods *v.* Rose, 135 Ala. 297; Farmers', etc., Bank *v.* Stockdale, 121 Iowa 748; Cohee *v.* West Point First Nat. Bank, (Neb. 1901) 95 N. W. Rep. 610; Hayes *v.* Bertrand First State Bank, (Neb. 1904) 98 N. W. Rep. 423; Greer *v.* Crenshaw, (Tex. Civ. App. 1903) 76 S. W. Rep. 589; Hardaway *v.* Jones, 100 Va. 481; Williamson *v.* Payne, 103 Va. 551.

105. 3. Statutes Must Be Complied With. — Knickerbocker Trust Co. *v.* Penn Cordage Co., 66 N. J. Eq. 305, 105 Am. St. Rep. 640.

Notice of Mining Claim — Substantial Copy. — See Oregon King Min. Co. *v.* Brown, (C. C. A.) 119 Fed. Rep. 48.

106. 8. Ex p. Winford, (Tex. Crim. 1905) 85 S. W. Rep. 1146.

107. 1. Mortgage Including Realty and Personality. — Proper recordation in a series of books kept for recording instruments affecting real estate imparts notice to the world that both interest in realty and personality were conveyed. Long *v.* Gorman, (Mo. App. 1902) 79 S. W. Rep. 180.

108. 1. See Kent *v.* Williams, 146 Cal. 3. **3. Mortgage — Failure to Transcribe Clause Giving Power of Sale,** — See Shelby *v.* Bowden, 16 S. Dak. 531.

108. 4. Indexing — Necessity. — See note 7.

109. Indexing Essential. — See note 1.

Sufficiency. — See note 2.

A Mere Clerical Error. — See note 4.

An Omission to Make Proper Entries. — See note 5.

110. 5. Contents and Sufficiency — *a.* VALID INSTRUMENT. — See note 1.

c. IDENTITY OF PARTIES. — See note 6.

111. *d.* CLERICAL ERRORS. — See note 1.

6. Curing Errors in the Record — *b.* BY CURATIVE STATUTES. —

See note 6.

112. IX. RENEWAL OF RECORD — 1. Chattel Mortgages. — See note 2.

113. X. WITHHOLDING FROM RECORD AS EVIDENCE OF FRAUD. — See note 2.

When Deemed Fraudulent. — See note 3.

114. See note 1.

XI. FAILURE TO RECORD AS AFFECTING VALIDITY OF INSTRUMENT —

1. Through Fault of Recording Officer — Majority Rule. — See note 3.

115. Contrary Doctrine. — See note 1.

116. 2. Through Fault of Grantee — *a.* IN GENERAL — Usually Not Essential to Passing of Title. — See notes 1, 2.

118. *b.* AS AGAINST GRANTOR AND HIS LEGAL REPRESENTATIVES. — See note 2.

108. 7. Indexing Not Material. — Herndon v. Ogg, (Ky. 1905) 84 S. W. Rep. 754; Agurs v. Belcher, 111 La. 378, 100 Am. St. Rep. 485; Greenwood Loan, etc., Assoc. v. Childs, 67 S. Car. 251.

109. 1. Indexing Essential. — Koch v. West, 118 Iowa 468, 96 Am. St. Rep. 394.

Prima Facie Evidence of Indexing. — A certificate of the receipt and recordation of a deed is *prima facie* evidence that it was indexed. Chippewa River Land Co. v. J. L. Gates Land Co., 118 Wis. 345.

2. Sufficiency of Index. — See Fulkerson v. Taylor, 102 Va. 314.

4. Clerical Errors. — Agurs v. Belcher, 111 La. 378, 100 Am. St. Rep. 485.

5. Officer May Correct Omissions. — Agurs v. Belcher, 111 La. 378, 100 Am. St. Rep. 485.

110. 1. The Certificate of Acknowledgment. — Dean v. Gibson, 34 Tex. Civ. App. 508.

6. Must Give Names of Parties. — Johnson v. Wilson, 137 Ala. 468, 97 Am. St. Rep. 52.

111. 1. Clerical Errors. — Roberson v. Downing Co., 120 Ga. 833, 102 Am. St. Rep. 128; Central Nat. Bank v. Brecheisen, 65 Kan. 807.

6. Curative Acts. — See Williams v. Butterfield, (Mo. 1903) 77 S. W. Rep. 729, 182 Mo. 181.

112. 2. Chattel Mortgage Must Be Refiled. — Butte First Nat. Bank v. Beley, 32 Mont. 291.

A Mortgage of a Leasehold Interest. — Westchester Trust Co. v. Hobby Bottling Co., 102 N. Y. App. Div. 464.

Renewal Does Not Validate Void Mortgage. — Butte First Nat. Bank v. Beley, 32 Mont. 291.

113. 2. Withholding from Record Not Fraudulent. — *In re* Williams, 120 Fed. Rep. 542; Ward v. Parker, (Iowa 1905) 103 N. W. Rep. 104; News Pub. Co. v. Tyndale, (Neb. 1902) 96 N. W. Rep. 125.

3. Conveyance Fraudulent as to Intermediate Creditors. — Clayton v. Exchange Bank, (C. C.

A.) 121 Fed. Rep. 630; Ward v. Parker, (Iowa 1905) 103 N. W. Rep. 104. See also Harrison v. South Carthage Min. Co., 95 Mo. App. 80; Owen v. Foley, 30 Tex. Civ. App. 86; Lewis v. State, (Tex. Crim. 1905) 86 S. W. Rep. 1027.

Creditors Whose Claims Arise After Registration. — News Pub. Co. v. Tyndale, (Neb. 1902) 96 N. W. Rep. 125.

114. 1. Creditor Need Not Secure Lien. — Compare State Bank v. Backus, 160 Ind. 682, affirming (Ind. App. 1903) 66 N. E. Rep. 475.

3. Operation as Notice Not Prevented by Officer's Neglect. — Durrence v. Northern Nat. Bank, 117 Ga. 385; Scaling v. Wichita Falls First Nat. Bank, (Tex. Civ. App. 1905) 87 S. W. Rep. 715; Troy Wagon Works Co. v. Hutton, 53 W. Va. 154.

Recording Deed in Mortgage Book. — Greenfield v. Stout, 122 Ga. 303; Durrence v. Northern Nat. Bank, 117 Ga. 385.

115. 1. Officer's Neglect Prevents Operation as Notice. — Knickerbocker Trust Co. v. Penn Cordage Co., 66 N. J. Eq. 305, 105 Am. St. Rep. 640.

116. 1. Not Essential to Pass Legal Title. — Gibson v. Brown, 214 Ill. 330. And see *infra*, this title, **118.** 2.

2. Only Persons Within Statute Protected. — Smith v. Russell, (Colo. App. 1905) 80 Pac. Rep. 474; Thompson v. Armstrong, 11 N. Dak. 198.

118. 2. Valid Between Parties — England. — Capital, etc., Bank v. Rhodes, (1903) 1 Ch. 631.

United States. — Ward v. Ward, 131 Fed. Rep. 946; Clayton v. Exchange Bank, (C. C. A.) 121 Fed. Rep. 630.

Alabama. — Bronson v. Russell, (Ala. 1904) 37 So. Rep. 672.

Colorado. — Fischback v. Garrison Milling, etc., Co., (Colo. App. 1905) 79 Pac. Rep. 749.

Illinois. — Home Sav., etc., Bank v. Peoria

119. *c.* AS AGAINST THIRD PERSONS WITHOUT NOTICE—(1) *Purchasers*—(a) *Generally*.—See note 2.

120. (b) *What Purchasers Embraced*—Only Those Taking for *Value*.—See note 1. *What Purchasers for Value Included*.—See note 3.

122. (2) *Grantee in Quitclaim Deed*.—See notes 2, 3.

(3) *Mortgagee*.—See note 5.

123. See note 1.

124. (6) *Creditors*—(a) *Where Act Applies to Purchasers Only*.—See note 2.

125. (b) *Where Creditors Included in Terms of Act*—*aa.* IN GENERAL.—See note 1.

Agricultural, etc., Soc., 206 Ill. 9, 99 Am. St. Rep. 132; *Martin v. Sexton*, 112 Ill. App. 199.

Indiana.—*Blair v. Whittaker*, 31 Ind. App. 664; *Warner v. Warner*, 30 Ind. App. 578.

Kentucky.—*Kelly v. Bramblett*, (Ky. 1904) 81 S. W. Rep. 249.

Missouri.—*Fairbanks v. Baskett*, 98 Mo. App. 53. See also *Williams v. Butterfield*, 182 Mo. 181.

Nebraska.—*McKenzie v. Beaumont*, (Neb. 1903) 97 N. W. Rep. 225.

New Jersey.—*Law v. Smith*, (N. J. 1904) 59 Atl. Rep. 327.

New Mexico.—*Heisch v. Bell*, 11 N. Mex. 523.

North Carolina.—*Thomas v. Cooksey*, 130 N. Car. 148.

North Dakota.—*Thompson v. Armstrong*, 11 N. Dak. 198.

Rhode Island.—*Thompson v. Dyer*, 25 R. I. 321.

Utah.—*Johnson v. Hibbard*, 27 Utah 342.

Virginia.—*Hunton v. Wood*, 101 Va. 54.

Wyoming.—*Whalon v. North Platte Canal, etc., Co.*, 11 Wyo. 313.

119. 2. *Void as to Bona Fide Purchasers*—*United States*.—*Boynton v. Haggart*, (C. C. A.) 120 Fed. Rep. 819; *Clayton v. Exchange Bank*, (C. C. A.) 121 Fed. Rep. 630; *Paulus v. M. M. Buck Mfg. Co.*, (C. C. A.) 129 Fed. Rep. 594; *In re Tweed*, 131 Fed. Rep. 355.

Colorado.—*Fischback v. Garrison Milling, etc., Co.*, (Colo. App. 1905) 79 Pac. Rep. 749.

Illinois.—*Home Sav., etc., Bank v. Peoria Agricultural, etc., Soc.*, 206 Ill. 9, 99 Am. St. Rep. 132.

Indiana.—*Artz v. Yeager*, 30 Ind. App. 677; *Blair v. Whittaker*, 31 Ind. App. 664.

Iowa.—*Koch v. West*, 118 Iowa 468, 96 Am. St. Rep. 394.

Kentucky.—*Westinghouse Electric Mfg. Co. v. Citizens' St. R. Co.*, (Ky. 1902) 68 S. W. Rep. 463; *Goosby v. Johnson*, (Ky. 1902) 69 S. W. Rep. 697; *Rankin v. McFarlane Carriage Co.*, (Ky. 1903) 75 S. W. Rep. 221; *Flowers v. Moorman*, (Ky. 1905) 86 S. W. Rep. 545.

Louisiana.—*Harrison v. Ottman*, 111 La. 730.

Massachusetts.—*Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400.

Michigan.—*Sachs v. Norn*, (Mich. 1905) 102 N. W. Rep. 983.

Missouri.—*Fairbanks v. Baskett*, 98 Mo. App. 53.

New York.—*O'Brien v. Fleckenstein*, 180 N. Y. 350, 105 Am. St. Rep. 768; *Gibson v. Thomas*, 180 N. Y. 483.

North Carolina.—*Collins v. Davis*, 132 N. Car. 106.

South Dakota.—*Pierson v. Hickey*, 16 S. Dak. 46.

Texas.—*Sanger v. Jesse French Piano, etc., Co.*, (Tex. Civ. App. 1903) 75 S. W. Rep. 39; *Hall v. Keating Implement, etc., Co.*, 33 Tex. Civ. App. 526; *Garner v. Boyle*, 97 Tex. 460; *Stephens v. Herron*, (Tex. 1905) 87 S. W. Rep. 326.

Utah.—*Johnson v. Hibbard*, 27 Utah 342.

Virginia.—*Hunton v. Wood*, 101 Va. 54.

Wisconsin.—*Allison v. Manzke*, 118 Wis. 11.

Canada.—See *Fraser v. Mutchmor*, 8 Ont. L. Rep. 613.

120. 1. *Means Purchaser for Value*.—See *Collins v. Davis*, 132 N. Car. 106; *Hicks v. Pogue*, 33 Tex. Civ. App. 333.

Devises Held to Be Purchasers.—*Clark v. Strong*, 105 N. Y. App. Div. 179.

3. *Must Be in Good Faith*.—*Sewell v. Nelson*, 113 Ky. 171; *Russell v. St. Mart*, 83 N. Y. App. Div. 543, *reversed* 180 N. Y. 355; *State v. Coughran*, (S. Dak. 1905) 103 N. W. Rep. 31; *Sanger v. Jesse French Piano, etc., Co.*, (Tex. Civ. App. 1903) 75 S. W. Rep. 39.

Bona Fide Purchaser Means Purchaser Without Notice.—*Salmon v. Norris*, 82 N. Y. App. Div. 362; *Wilkins v. McCorkle*, 112 Tenn. 688. See also *Jones v. Glathart*, 100 Ill. App. 630.

122. 2. *Not Bona Fide Purchaser under Recording Acts*.—*Fowler v. Will*, (S. Dak. 1905) 102 N. W. Rep. 598.

3. *Deemed Bona Fide Purchaser*.—*Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400.

5. *Mortgagee a "Purchaser"*.—*Patterson v. Irvin*, (Ala. 1905) 38 So. Rep. 121; *O'Brien v. Fleckenstein*, 180 N. Y. 350, 105 Am. St. Rep. 768; *Douglas v. Miller*, 102 N. Y. App. Div. 94; *Allison v. Manzke*, 118 Wis. 11. See also *Fullerton v. Provincial Bank*, (1903) A. C. 309.

123. 1. *Subsequent Mortgagees Protected*.—*Crooks v. Jenkins*, 124 Iowa 317, 104 Am. St. Rep. 326.

124. 2. *Unrecorded Conveyance Good Against Creditors*.—*Ilfeld v. De Baca*, (N. Mex. 1905) 79 Pac. Rep. 723.

125. 1. *Creditors Embraced by Recording Acts*.—*In re H. G. Andrae Co.*, 117 Fed. Rep. 561; *Stockton v. National Bank*, 45 Fla. 590; *Anderson v. Adams*, 117 Ga. 919; *Westinghouse Electric Mfg. Co. v. Citizens' St. R. Co.*, (Ky. 1902) 68 S. W. Rep. 463; *Sachs v. Norn*, (Mich. 1905) 102 N. W. Rep. 983; *Harrison v. South Carthage Min. Co.*, 95 Mo. App. 80;

126. *bb. DISTINCTION BETWEEN SIMPLE AND LIEN CREDITORS — Where Confined to Lien Creditors.* — See note 1.

127. *Statutes Embracing General Creditors.* — See note 3.

128. *cc. DISTINCTION BETWEEN ANTECEDENT AND SUBSEQUENT CREDITORS.* — See note 2.

(7) Purchaser at Execution Sale — (a) Where Creditor Entitled to Protection. — See note 3.

129. *(b) Where Creditor Not Protected — Deemed a Bona Fide Purchaser.* — See note 1.

130. *(9) Assignee or Trustee for Grantor's Creditors.* — See notes 4, 5.

131. *(12) Wife Claiming Homestead.* — See note 2.

d. AS AGAINST THIRD PERSONS WITH NOTICE — (1) When Notice Equivalent to Recording — (a) In General. — See note 3.

135. *Purchaser with Notice from Bona Fide Purchaser.* — See note 3.

137. *(c) Burden of Proof.* — See notes 3, 4.

138. *e. NECESSITY FOR VALUABLE CONSIDERATION — (1) In General.* — See note 4.

139. *Consequently, a Mere Volunteer.* — See note 1.

Knickerbocker Trust Co. *v.* Penn Cordage Co., 66 N. J. Eq. 305, 105 Am. St. Rep. 640; *Piereson v. Hickey*, 16 S. Dak. 46; *Baughn v. Allen*, (Tex. Civ. App. 1902) 68 S. W. Rep. 207; *Hall v. Keating Implement, etc., Co.*, 33 Tex. Civ. App. 526.

126. 1. Lien Creditors Only Within Statute. — *Anderson v. Adams*, 117 Ga. 919; *State Bank v. Backus*, 160 Ind. 682, *affirming* (Ind. App. 1903) 66 N. E. Rep. 475; *Reischmann v. Masker*, 69 N. J. L. 353; *Skilton v. Codington*, 105 N. Y. App. Div. 617.

127. 3. In New York a Chattel Mortgage. — See *Cullin v. Ryder*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 485.

128. 2. Acts Applicable to Antecedent Creditors. — *Pierson v. Hickey*, 16 S. Dak. 46.

3. Where Creditor Protected, Purchaser Protected. — See *Hunton v. Wood*, 101 Va. 54.

129. 1. Purchaser Protected though Creditor Not. — *Sanger v. Jesse French Piano, etc., Co.*, (Tex. Civ. App. 1903) 75 S. W. Rep. 39.

130. 4. Assignee Not Protected. — *In re Thompson*, 122 Fed. Rep. 174, *affirmed* (C. C. A.) 128 Fed. Rep. 575. See also *In re Wise*, 121 Iowa 359; *Babcock v. Maxwell*, 29 Mont. 31.

5. Where Creditor Protected, Assignee Protected. — *In re H. G. Andrae Co.*, 117 Fed. Rep. 561.

131. 2. Mortgage by Widow — Setting Apart Homestead. — The validity of a mortgage by a widow is not affected by the fact that a court order setting apart a probate homestead to her was granted prior to the mortgage, but not entered until after its date. *Otto v. Long*, 144 Cal. 144.

3. Persons with Notice Not Protected — United States. — Last Chance Min. Co. *v.* Bunker Hill, etc., Min., etc., Co., (C. C. A.) 131 Fed. Rep. 579; *Clayton v. Exchange Bank*, (C. C. A.) 121 Fed. Rep. 630.

Alabama. — *Stuart v. Mitchum*, 135 Ala. 546. *Arkansas.* — *Kansas City, etc., R. Co. v. Joslin*, (Ark. 1905) 86 S. W. Rep. 435.

Idaho. — *Cowden v. Mills*, 9 Idaho 626; *Cowden v. Finney*, 9 Idaho 619.

Illinois. — *Jones v. Glathart*, 100 Ill. App. 630.

Iowa. — *Freeburg v. Eksell*, 123 Iowa 464.

Kentucky. — *Flowers v. Moorman*, (Ky. 1905) 86 S. W. Rep. 545. See also *Goosby v. Johnson*, (Ky. 1902) 69 S. W. Rep. 697.

Michigan. — *Schwartz v. Woodruff*, 132 Mich. 513.

Missouri. — See *Williams v. Butterfield*, 182 Mo. 181.

Nebraska. — *Cohee v. West Point First Nat. Bank*, (Neb. 1901) 95 N. W. Rep. 610; *Hayes v. Bertrand First State Bank*, (Neb. 1904) 98 N. W. Rep. 423.

New York. — *Cullin v. Ryder*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 485; *Matthews v. Damainville*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 546, *reversed* 100 N. Y. App. Div. 311; *Salmon v. Norris*, 82 N. Y. App. Div. 362.

North Carolina. — *Compare Collins v. Davis*, 132 N. Car. 106.

South Dakota. — *State v. Coughran*, (S. Dak. 1905) 103 N. W. Rep. 31.

Tennessee. — *Wilkins v. McCorkle*, 112 Tenn. 688.

Texas. — *Fullenwider v. Ferguson*, 30 Tex. Civ. App. 156; *Griffin v. Stone River Nat. Bank*, (Tex. Civ. App. 1904) 80 S. W. Rep. 254.

Wisconsin. — *Beebe v. Wisconsin Mortg. Loan Co.*, 117 Wis. 328.

Notice of an Invalid Mortgage as of a mortgage on a future crop in jurisdictions where such liens are not recognized, is of no effect. *McKinney v. Ellison*, (Tex. Civ. App. 1903) 75 S. W. Rep. 55. See generally the title CROPS, **312. 1 et seq.**

135. 3. Purchaser with Notice from Bona Fide Purchaser. — *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400.

137. 3. Burden on Prior Claimant. — *Wilkins v. McCorkle*, 112 Tenn. 688, *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 137.

4. Burden on Junior Claimant. — *Catrett v. J. S. Brown Hardware Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1045. See also *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400.

138. 4. Must Pay Valuable Consideration. — *Sewell v. Nelson*, 113 Ky. 171.

139. 1. Voluntary Conveyance Not Within Acts. — *Sewell v. Nelson*, 113 Ky. 171. But see

139. (2) *What a Sufficient Consideration* — (b) *Antecedent Indebtedness* — Not Deemed Sufficient Consideration. — See note 5.

142. XII. EFFECT OF RECORD — 2. As Constructive Notice — a. INSTRUMENTS NOT ENTITLED TO RECORD. — See note 3.

143. b. INSTRUMENTS ENTITLED TO RECORD — (i) *In General*. — See note 4.

144. Only Where Provided by Statute. — See note 1.

The Record of a Party Wall Agreement. — See note 6.

145. (2) *Voluntary Conveyance*. — See note 6.

146. (3) *Notice to Whom* — (a) *In General*. — See notes 3, 5.

(b) *Limitation to Subsequent Purchasers*. — See note 6.

148. (c) *Limitation to Persons Claiming Through Same Grantor* — aa. RECORD OF CONVEYANCE NOT IN LINE OF TITLE. — See note 5.

149. Conveyance by Grantee in Unrecorded Deed. — See note 1.

Clark v. Strong, 105 N. Y. App. Div. 179, holding devisees to be purchasers within the statute.

139. 5. *Antecedent Indebtedness Not Good Consideration*. — Wilcox v. Drought, 71 N. Y. App. Div. 402.

142. 3. *Unauthorized Record Imparts No Constructive Notice*. — Farmers', etc., Bank v. Stockdale, 121 Iowa 748; Tweto v. Horton, 90 Minn. 451; Mark v. Jordan, 84 Miss. 334, 105 Am. St. Rep. 457; New England Nat. Bank v. Northwestern Nat. Bank, 171 Mo. 307; Geneseo First Nat. Bank v. National Live Stock Bank, 13 Okla. 719; Hunton v. Wood, 101 Va. 54.

A Missouri Statute provides that a deed which has been recorded for one year, though not acknowledged, shall operate as notice. Williams v. Butterfield, (Mo. 1903) 77 S. W. Rep. 729.

143. 4. *Record Operates as Constructive Notice* — United States. — Foster v. McAlister, (C. C. A.) 114 Fed. Rep. 145.

Alabama. — Woods v. Rose, 135 Ala. 297.

California. — Kent v. Williams, 146 Cal. 3.

Colorado. — Smith v. Russell, (Colo. App. 1905) 80 Pac. Rep. 474.

District of Columbia. — Armstrong v. Ashley, 22 App. Cas. (D. C.) 368.

Georgia. — Anderson v. Leverette, 116 Ga. 732.

Illinois. — Havighorst v. Bowen, 214 Ill. 90.

Indiana. — Blair v. Whittaker, 31 Ind. App. 664.

Iowa. — Crooks v. Jenkins, 124 Iowa 317, 104 Am. St. Rep. 326; Stastny v. Pease, 124 Iowa 587.

Kentucky. — Lewis v. Sizemore, (Ky. 1904) 78 S. W. Rep. 122.

Minnesota. — Creamery Package Mfg. Co. v. Tagley, 91 Minn. 79.

Missouri. — Stark v. Hicklin, 112 Mo. App. 419. See also Williams v. Butterfield, 182 Mo. 181.

Nebraska. — State Bank v. Frey, (Neb. 1902) 91 N. W. Rep. 239; Loyal Mystic Legion v. Jones, (Neb. 1905) 102 N. W. Rep. 621.

New Jersey. — Mitchell v. D'Olier, 68 N. J. L. 375.

New York. — De Camp v. Wallace, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 436; McKenna v. Brooklyn Union El. R. Co., 95 N. Y. App. Div. 226; Matthews v. Damainville, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 546, reversed

on other grounds 100 N. Y. App. Div. 311; Russell v. St. Mart, 83 N. Y. App. Div. 543, reversed on other grounds 180 N. Y. 355.

Oregon. — Sweetland v. Grants Pass New Water, etc., Co., (Oregon 1905) 79 Pac. Rep. 337.

Rhode Island. — Park Brew Co. v. McDermott, 25 R. I. 95.

South Dakota. — Pierson v. Hickey, 16 S. Dak. 46.

Texas. — Greer v. Crenshaw, (Tex. Civ. App. 1903) 76 S. W. Rep. 589; Scaling v. Wichita Falls First Nat. Bank, (Tex. Civ. App. 1905) 87 S. W. Rep. 715.

Virginia. — Hardaway v. Jones, 100 Va. 481; Fulkerson v. Taylor, 102 Va. 314; Williamson v. Payne, 103 Va. 551.

West Virginia. — Troy Wagon Works Co. v. Hutton, 53 W. Va. 154.

The Only Purpose of Recording a Deed is to give notice. Kelly v. Bramblett, (Ky. 1904) 81 S. W. Rep. 249.

144. 1. De Lassus v. Winn, 174 Mo. 636; Rice v. Sally, 176 Mo. 107.

6. *Party Wall Agreement*. — Loyal Mystic Legion v. Jones, (Neb. 1905) 102 N. W. Rep. 621. See generally the title PARTY WALLS.

255. 3 et seq.

145. 6. *Possession Retained — No Notice to Grantee*. — See Hooper v. Vanstrum, 92 Minn. 406.

146. 3. *Said to Give Notice to All the World*. — Greenfield v. Stout, 122 Ga. 303; Blair v. Whittaker, 31 Ind. App. 664; Donnan v. Adams, 30 Tex. Civ. App. 615; Greer v. Crenshaw, (Tex. Civ. App. 1903) 76 S. W. Rep. 589.

5. *Only to Persons Included in Statute*. — Smith v. Russell, (Colo. App. 1905) 80 Pac. Rep. 474; Thompson v. Armstrong, 11 N. Dak. 198.

6. *Notice to Subsequent Purchasers Only*. — Armstrong v. Ashley, 22 App. Cas. (D. C.) 368; Chown v. Phelps, 26 Mont. 524; Runge v. Gilbough, (Tex. Civ. App. 1905) 87 S. W. Rep. 832.

148. 5. *Record Out of Line of Title Not Notice*. — Tennessee Coal, etc., Co. v. Gardner, 131 Ala. 509; Hart v. Gardner, 81 Miss. 650; Runge v. Gilbough, (Tex. Civ. App. 1905) 87 S. W. Rep. 832.

149. 1. *Conveyance by Grantee in Unrecorded*

149. Purchase-money Mortgage. — See note 2.

150. *bb.* RECORD OF CONVEYANCE BY STRANGER TO TITLE. — See note 3.

151. (4) Notice of What. — See notes 3, 4, 5.

152. See note 1.

Deed. — *Booker v. Booker*, 208 Ill. 529, 100 Am. St. Rep. 250; *Goosby v. Johnson*, (Ky. 1902) 69 S. W. Rep. 697; *Fullenwider v. Ferguson*, 30 Tex. Civ. App. 156.

149. 2. Record of Purchase-money Mortgage Not Notice to Subsequent Purchaser. — *Hart v. Gardner*, 81 Miss. 650.

150. 3. Record of Conveyance by Stranger to Record Title. — *Hart v. Gardner*, 81 Miss. 650; *Advance Thresher Co. v. Esteb*, 41 Oregon 469.

151. 3. Constructive Notice of Facts Shown by Record. — *Lombard v. La Dow*, (C. C. A.) 126 Fed. Rep. 119; *Thurlough v. Dresser*, 98 Me. 161; *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400; *Mitchell v. D'Olier*, 68 N. J. L. 375; *Fulkerson v. Taylor*, 102 Va. 314; *Waggoner v. Dodson*, 96 Tex. 415; *Thompson v. Rust*, 32 Tex. Civ. App. 441.

4. Matters as to Which Inquiry Suggested. — *Lombard v. La Dow*, (C. C. A.) 126 Fed. Rep. 119; *Thurlough v. Dresser*, 98 Me. 161; *State*

Bank v. Frey, (Neb. 1902) 91 N. W. Rep. 239; *Mitchell v. D'Olier*, 68 N. J. L. 375; *Church v. Lapham*, 94 N. Y. App. Div. 550; *Collins v. Davis*, 132 N. Car. 106; *Greer v. Crenshaw*, (Tex. Civ. App. 1903) 76 S. W. Rep. 589. See also *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400.

Things Reasonably Inferred. — *San Augustine County v. Madden*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1056.

5. Only Such Notice as Obtainable from Examination. — *Glassburn v. Wireman*, 126 Iowa 478; *Hart v. Gardner*, 81 Miss. 650; *Thompson v. Rust*, 32 Tex. Civ. App. 441.

152. 1. Right to Rely on Record. — *Boynton v. Haggart*, (C. C. A.) 120 Fed. Rep. 819; *Johnson v. Wilson*, 137 Ala. 468, 97 Am. St. Rep. 52; *Glassburn v. Wireman*, 126 Iowa 478; *McCusker v. Goode*, 185 Mass. 607; *Fullenwider v. Ferguson*, 30 Tex. Civ. App. 156; *Thompson v. Rust*, 32 Tex. Civ. App. 441.

RECORDS.

BY H. O'B. COOPER.

159. I. DEFINITION. — See note 2.

160. Archives. — See note 1.

III. JUDICIAL RECORDS — 1. Definition. — See note 4.

166. 5. Contents — What Record Must Show — *j.* RENDITION OF JUDGMENT. — See note 8.

167. *m.* SWEARING OF JURY. — See note 4.

n. ARRAIGNMENT AND PLEA OF ACCUSED. — See notes 7, 8.

168. *p.* PRESENCE OF DEFENDANT. — See note 2.

170. IV. LEGISLATIVE RECORDS — 2. Legislative Journal. — See note 2.

V. MISCELLANEOUS PUBLIC RECORDS — 1. What Are Public Records —

a. IN GENERAL. — See notes 3, 7.

173. *d.* TAX RECORDS. — See note 3.

e. MAPS AND PLATS. — See notes 9, 10.

159. 2. Definition. — See *Mercer v. Denne*, (1904) 2 Ch. 534, affirmed (1905) 2 Ch. 538.

160. 1. Instrument Recorded in Wrong County Not Archive. — *Wren v. Howland*, 33 Tex. Civ. App. 87.

4. Constable's Bond Held to Be "Judicial Record." — *Morgan v. Betterton*, 109 Tenn. 84.

166. 8. Rendition of Judgment. — *Thomas v. Thomas*, 98 Me. 184.

167. 4. Swearing of Jury. — *State v. Moore*, 57 W. Va. 146.

7. Arraignment. — *State v. Preston*, 107 La. 521.

8. Plea — *State v. Preston*, 107 La. 521; *State v. Moore*, 57 W. Va. 146.

168. 2. Presence of Defendant. — *State v. Moore*, 57 W. Va. 146.

170. 2. Journal a Public Record. — *Wilson v. Markley*, 133 N. Car. 616.

3. County Treasurer's Record Not Required by Statute Not Public. — *State v. Reed*, 36 Wash. 638.

7. The Records of a Town Clerk have been held to be the only competent evidence of what the voters did at a town meeting. *Cincinnati, etc., R. Co. v. People*, 205 Ill. 538.

173. 3. See *State v. Nevada Cent. R. Co.*, 26 Nev. 357.

The Tax Roll completed by the county clerk and placed in the hands of the county treasurer for collection is competent evidence, in a controversy between landlord and tenant, to show the amount of taxes levied on leased lands, which the tenant had agreed to pay. *Smith v. Scully*, 66 Kan. 139.

9. *U. S. v. Van Winkle*, (C. C. A.) 113 Fed. Rep. 903.

173. *f.* RECORDS OF PUBLIC INSTITUTIONS. — See note 15.

174. *g.* SIGNAL SERVICE RECORDS. — See note 1.

j. REPORTS OR RETURNS. — See note 5.

176. VI. QUASI-PUBLIC RECORDS — 6. Church or Parish Registers —

a. ENGLISH RULE. — See note 5.

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177. VII. AMENDMENT OF RECORDS — 1. Judicial Records — *a.* RIGHT TO AMEND. — See notes 2, 4.

178. See notes 1, 2.

b. HOW AMENDMENT PROCURED. — See note 4.

179. *c.* EVIDENCE TO SUPPORT AMENDMENT. — See note 1.

180. *f.* EFFECT ON RIGHTS OF THIRD PERSONS. — See note 2.

182. VIII. INSPECTION OF RECORDS — 2. The Right to Inspect — *a.* AT COMMON LAW — (1) *Necessity of Interest.* — See note 4.

183. (2) *Nature of Interest Required.* — See note 1.

A Citizen and Taxpayer. — See note 2.

(3) *Purpose for Which Inspection Sought.* — See note 3.

b. MODERN RULE — STATUTES — (1) *Rule Stated.* — See note 5.

185. (2) *Right of Particular Persons* — (b) *Insurer of Titles.* — See note 1.

(d) *Person Accused of Crime.* — See note 3.

(3) *Copies, Abstracts, and Memoranda* — (a) *Right to Make.* — See

note 4.

(5) *Regulations.* — See note 8.

173. 10. *Davis v. Clinton*, (Ky. 1904) 79 S. W. Rep. 259.

15. State Prison — Photograph and Measurements of Criminal. — *Molineux v. Collins*, 177 N. Y. 395.

174. 1. Weather Bureau. — Chicago, etc., R. Co. v. Zapp, 209 Ill. 339; *Nolt v. Crow*, 22 Pa. Super. Ct. 113; *Anderson v. Hilker*, 38 Wash. 632. See also *Mears v. New York*, etc., R. Co., 75 Conn. 171, 96 Am. St. Rep. 193.

5. County Treasurer's Statement in State Treasurer's Office Public Record. — *Harper v. Marion County*, 33 Tex. Civ. App. 653.

176. 5. English Rule — Established Church. — See *Collins v. German-American Mut. L. Assoc.*, 112 Mo. App. 209.

8. Church and Parish Registers Not Records. — See *Collins v. German-American Mut. L. Assoc.*, 112 Mo. App. 209.

177. 2. Amendment During Term. — *Wright v. Davis*, 120 Ga. 670; *Clark v. Hennessey Bank*, 14 Okla. 572.

After Verdict. — *State v. Bouline*, 107 La. 454.

Supreme Court Cannot Amend Record of Superior Court. — *Verzier v. Convard*, 75 Conn. 1.

4. Amendment as to Matters of Form. — *People v. District Ct.*, 33 Colo. 77; *Merritt v. State*, 122 Ga. 752; *Edinburgh Lombard Invest. Co. v. Walsh*, 70 Kan. 899; *Thomas v. Thomas*, 98 Me. 184. See also *Metzger v. Morley*, 197 Ill. 208, 90 Am. St. Rep. 158.

178. 1. Amendment After Appeal or Writ of Error. — *Markle v. Laisle*, (Iowa 1905) 102 N. W. Rep. 780.

2. Amendment After Affirmance of Judgment. — *Edinburgh Lombard Invest. Co. v. Walsh*, 70 Kan. 899.

4. Necessity for Notice. — See *Merritt v. State*, 122 Ga. 752.

179. 1. Fact Must Appear in Record. —

Nester v. Carney Bros. Co., 98 Ill. App. 630; *Becher v. Deuser*, 169 Mo. 159.

Minute of Judge or Clerk Necessary. — *Quigg v. People*, 211 Ill. 17.

180. 2. Rights of Third Persons Cannot Be Prejudiced. — *Gardner v. People*, 100 Ill. App. 254.

182. 4. Necessity of Interest. — *Sloan Filter Co. v. El Paso Reduction Co.*, 117 Fed. Rep. 504; *Payne v. Staunton*, 55 W. Va. 202, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 182, 183.

183. 1. *Payne v. Staunton*, 55 W. Va. 202.

2. *State v. Williams*, 110 Tenn. 549.

3. *Payne v. Staunton*, 55 W. Va. 202.

5. Any Person May Inspect. — *Bell v. Commonwealth Title Ins., etc., Co.*, 189 U. S. 131; *Marsh v. Sanders*, 110 La. 726; *State v. Williams*, 110 Tenn. 549; *Smithers v. Lowrance*, 35 Tex. Civ. App. 25. *Contra*, *Payne v. Staunton*, 55 W. Va. 202, wherein, however, *Dent, J.*, dissented, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 183.

Records Must Be Public. — *State v. Reed*, 36 Wash. 638.

185. 1. Insurer of Titles. — *Bell v. Commonwealth Title Ins., etc., Co.*, 189 U. S. 131.

3. Person Accused of Crime. — *People v. Foody*, (Ct. Gen. Sess.) 38 Misc. (N. Y.) 357; *Jenkins v. State*, 45 Tex. Crim. 173.

Persons Accused of Receiving Stolen Property have been held to be entitled to inspect informations and depositions in criminal proceedings against persons convicted of the theft of the property. *In re Chantler*, 8 Ont. L. Rep. 111.

4. Memoranda, Etc. — *Marsh v. Sanders*, 110 La. 726.

8. Regulations. — *Bell v. Commonwealth Title Ins., etc., Co.*, 189 U. S. 131; *Marsh v.*

186. (9) *Enforcement of Right.* — See note 9.

187. IX. RECORDS IN EVIDENCE — 1. Admissibility — a. IN GENERAL. — See note 1.

188. c. DEFECTS AND IRREGULARITIES. — See note 6.

190. 2. Primary or Secondary Evidence. — See note 7.

192. 3. Of What Record Is Evidence — b. JUDICIAL RECORDS — (1) *Reproduction, Terms, and Effect of Judgment.* — See note 3.

193. 4. Conclusiveness — a. JUDICIAL RECORDS — (1) *Rule Stated.* — See note 4.

194. (2) *Extrinsic Evidence to Aid, Vary, or Contradict.* — See note 1.

196. c. OTHER PUBLIC RECORDS — (1) *In General.* — See note 4.

197. (2) *Extrinsic Evidence to Aid, Vary, or Contradict.* — See note 5.

198. See note 2.

Evidence to Show that Document Not the True Record. — See note 3.

5. Judicial Notice of Records. — See notes 4, 5.

199. 6. Proof of Records — c. ORIGINAL RECORD — (1) *Admissible.* — See notes 1, 3, 4.

Sanders, 110 La. 726; *Smithers v. Lowrance*, 35 Tex. Civ. App. 25.

186. 9. *Mandamus.* — *Payne v. Staunton*, 55 W. Va. 202. See also *State v. Williams*, 110 Tenn. 549; *State v. Reed*, 36 Wash. 638. And see the title MANDAMUS, **817.** 5 *et seq.*

187. 1. *Admissibility in General.* — *Ferrell v. State*, 45 Fla. 26; *Quinby v. Ayers*, (Neb. 1901) 95 N. W. Rep. 464; *Nelson v. Brisbin*, (Neb. 1904) 98 N. W. Rep. 1057. See also *Mercer v. Denne*, (1904) 2 Ch. 534, *affirmed* (1905) 2 Ch. 538; *Shoup v. Marks*, (C. C. A.) 128 Fed. Rep. 32 (clerk's docket).

188. 6. *Omission of Revenue Stamp.* — It is not necessary that it should appear from the registration that there was any revenue stamp on the instrument admitted to record. *Ratliff v. Ratliff*, 131 N. Car. 425.

190. 7. *Primary Evidence* — *United States*. — *Bradley Timber Co. v. White*, (C. C. A.) 121 Fed. Rep. 779; *Blue Mountain Iron, etc., Co. v. Portner*, (C. C. A.) 131 Fed. Rep. 57.

Alabama. — *Anniston City Land Co. v. Edmondson*, 141 Ala. 366; *Kornegay v. Mayer*, 135 Ala. 141.

California. — *Allen v. McKay*, 139 Cal. 94; *Graybill v. De Young*, 140 Cal. 323.

Colorado. — See *Carhart v. Oddenkirk*, (Colo. App. 1905) 79 Pac. Rep. 303.

Connecticut. — *Davis v. Ives*, 75 Conn. 611; *State v. Thresher*, 77 Conn. 70.

Georgia. — *Jackson v. Ellis*, 116 Ga. 719; *Trentham v. Bluthenthal*, 118 Ga. 530.

Illinois. — *Cincinnati, etc., R. Co. v. People*, 205 Ill. 538. See also *Garms v. People*, 108 Ill. App. 631.

Montana. — *Spencer v. Spencer*, 31 Mont. 631.

Nebraska. — *Quinby v. Ayres*, (Neb. 1901) 95 N. W. Rep. 464; *Donner v. State*, (Neb. 1903) 95 N. W. Rep. 40.

New York. — *Mandelbaum v. New York City R. Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 377.

North Dakota. — *Amundson v. Wilson*, 11 N. Dak. 193; *Sykes v. Beck*, 12 N. Dak. 242.

Oregon. — *Baker County v. Huntington*, (Oregon 1905) 79 Pac. Rep. 187.

Pennsylvania. — *Mansfield v. Bell*, 24 Pa. Super. Ct. 447.

Texas. — *Matthews v. Thatcher*, 33 Tex. Civ.

App. 133; *Hicks v. Pogue*, 33 Tex. Civ. App. 333.

Wisconsin. — *Siegel v. Liberty*, 118 Wis. 599; *Mendel v. School Dist. No. 6*, 121 Wis. 80; *Paulson v. State*, 118 Wis. 89.

192. 3. *An Order of the Court* can be proved only by the court's record. *Cummings v. Brown*, 181 Mo. 711.

193. 4. *Judicial Record Imports Absolute Verity.* — *Blue Mountain Iron, etc., Co. v. Portner*, (C. C. A.) 131 Fed. Rep. 57; *Reddish v. Shaw*, 111 Ill. App. 337; *Hinchman v. Spaulding*, 137 Mich. 655; *Clendenen v. Red River Valley Nat. Bank*, 12 N. Dak. 51; *Boyn-ton v. Crockett*, 12 Okla. 57. See also *Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co.*, (C. C. A.) 131 Fed. Rep. 579.

194. 1. *Extrinsic Evidence Not Admissible to Contradict Judicial Record.* — *Blue Mountain Iron, etc., Co. v. Portner*, (C. C. A.) 131 Fed. Rep. 57; *Godfrey v. Phillips*, 209 Ill. 584; *Reddish v. Shaw*, 111 Ill. App. 337; *Clendenen v. Red River Valley Nat. Bank*, 12 N. Dak. 51. See also *Jamison v. New York, etc., Land Co.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 969.

196. 4. *Record Conclusive.* — *Allen v. McKay*, 139 Cal. 94.

197. 5. *Record Cannot Be Contradicted by Parol Evidence.* — *Terre Haute, etc., R. Co. v. Flora*, 29 Ind. App. 442; *Cowley v. School Dist. No. 3*, 130 Mich. 634. See also *People v. McCullough*, 210 Ill. 488; *Matthews v. Thatcher*, 33 Tex. Civ. App. 133.

198. 2. *Supplying Omission.* — *Riviere v. Wilkins*, 31 Tex. Civ. App. 454.

3. *Gulf, etc., R. Co. v. Holt*, 30 Tex. Civ. App. 330.

4. *Judicial Notice of Court Records.* — *Roberson v. State*, 45 Fla. 94. And see the title JUDICIAL NOTICE, **925.** 2 *et seq.*

5. *Judicial Notice of Legislative Records.* — *Stanford v. Bailey*, 122 Ga. 404; *Chicago, etc., R. Co. v. Liebel*, (Ky. 1905) 86 S. W. Rep. 549; *Missouri, etc., R. Co. v. Owens*, (Tex. Civ. App. 1903) 75 S. W. Rep. 579. And see the title JUDICIAL NOTICE, **930.** 1, 2.

199. 1. *Original Record* — *United States*. — *Jesse D. Carr Land, etc., Co. v. U. S.*, (C.

200. *d. COPY OF RECORD — (I) In General — (a) Admissible.* — See note 5.

201. *(b) Dignity as Evidence.* — See note 3.

(c) Original Must Be Evidence. — See note 4.

202. *(d) Copies of Lost Papers.* — See note 1.

C. A.) 118 Fed. Rep. 821; *U. S. v. Lew Poy Dew*, 119 Fed. Rep. 786; *Bradley Timber Co. v. White*, (C. C. A.) 121 Fed. Rep. 779; *Blue Mountain Iron, etc., Co. v. Portner*, (C. C. A.) 131 Fed. Rep. 57.

Alabama. — *Beal v. State*, 138 Ala. 94.

Arkansas. — *Wagner v. Arnold*, 72 Ark. 371; *Rogers v. State*, 72 Ark. 565; *Kelley v. Laconia Levee Dist.*, (Ark. 1905) 85 S. W. Rep. 249.

Connecticut. — *Waterbury Lumber, etc., Co. v. Hinckley*, 75 Conn. 187; *Church v. Pearne*, 75 Conn. 350; *Northrop v. Chase*, 76 Conn. 146.

Florida. — *Ferrell v. State*, 45 Fla. 26.

Idaho. — *Keenan v. Washington Liquor Co.*, 8 Idaho 383.

Indiana. — *Embree v. Emmerson*, (Ind. App. 1905) 74 N. E. Rep. 44.

Kansas. — *Mac Rae v. Kansas City Piano Co.*, 64 Kan. 580.

Kentucky. — *Davis v. Clinton*, (Ky. 1904) 79 S. W. Rep. 259.

Massachusetts. — *De Montague v. Bacharach*, 187 Mass. 128.

Missouri. — *Ohmeyer v. Supreme Forest, etc.*, 91 Mo. App. 189; *State v. Rodman*, 173 Mo. 681.

Nebraska. — *Quinby v. Ayres*, (Neb. 1901) 95 N. W. Rep. 464.

North Carolina. — *Ratliff v. Ratliff*, 131 N. Car. 425.

Tennessee. — *Morgan v. Betterton*, 109 Tenn. 84.

Texas. — *Riviere v. Wilkens*, 31 Tex. Civ. App. 454; *Valentine v. Sweatt*, 34 Tex. Civ. App. 135; *Schultz v. Tonty Lumber Co.*, 36 Tex. Civ. App. 448. See also *Bailey v. Fly*, 35 Tex. Civ. App. 410.

Utah. — *Salt Lake City Water, etc., Power Co. v. Salt Lake City*, 25 Utah 441.

Washington. — *Smith v. Veysey*, 30 Wash. 18; *Anderson v. Hilker*, 38 Wash. 632.

Canada. — See *Nova Scotia Steel Co. v. Bartlett*, 35 Can. Sup. Ct. 527.

Deeds. — It is provided by statute in *Missouri* that when a recorded deed is not within the power of the party wishing to use it, the record may be read in evidence without further proof. *Patton v. Fax*, 179 Mo. 525.

199. 3. Identity — Evidence. — *U. S. v. Lew Poy Dew*, 119 Fed. Rep. 786; *Glos v. Cessna*, 207 Ill. 69.

4. Authenticity and Genuineness. — *Chapman v. Duffy*, (Colo. App. 1905) 79 Pac. Rep. 746; *Glos v. Cessna*, 207 Ill. 69. See also *Jesse D. Carr Land, etc., Co. v. U. S.*, (C. C. A.) 118 Fed. Rep. 821; *Michaels v. People*, 208 Ill. 603.

200. 5. Copy of Record — United States. — *U. S. v. Lew Poy Dew*, 119 Fed. Rep. 786; *Laffan v. U. S.*, (C. C. A.) 122 Fed. Rep. 333; *St. Louis, etc., R. Co. v. Southwestern Telephone, etc., Co.*, (C. C. A.) 121 Fed. Rep. 276. See also *Bradley Timber Co. v. White*, (C. C. A.) 121 Fed. Rep. 779.

Alabama. — *Beal v. State*, 138 Ala. 94; *Burton v. Dangerfield*, 141 Ala. 285.

Arkansas. — *Wagner v. Arnold*, 72 Ark. 371; *Kelley v. Laconia Levee Dist.*, (Ark. 1905) 85 S. W. Rep. 249.

Connecticut. — *Northrop v. Chase*, 76 Conn. 146; *Waterbury Lumber, etc., Co. v. Hinckley*, 75 Conn. 187.

Georgia. — *McLanahan v. Blackwell*, 119 Ga. 64.

Illinois. — *Tift v. Greene*, 211 Ill. 389; *Boyd v. Chicago, etc., R. Co.*, 103 Ill. App. 199; *National Council, etc., v. O'Brien*, 112 Ill. App. 40.

Indiana. — See *Coppes v. Union Nat. Sav., etc., Assoc.*, 33 Ind. App. 367, construing the statute.

Kansas. — *Mac Rae v. Kansas City Piano Co.*, 64 Kan. 580.

Kentucky. — *Helton v. Belcher*, 114 Ky. 172.

Minnesota. — *Merz v. Chicago, etc., R. Co.*, 86 Minn. 33.

Missouri. — *Ohmeyer v. Supreme Forest, etc.*, 91 Mo. App. 189.

Nebraska. — *Quinby v. Ayres*, (Neb. 1901) 95 N. W. Rep. 464.

New York. — See *Bailey v. Fransioli*, 101 N. Y. App. Div. 140.

North Carolina. — *Ratliff v. Ratliff*, 131 N. Car. 425; *Wilson v. Markley*, 133 N. Car. 616.

South Dakota. — *Mears v. Smith*, (S. Dak. 1905) 102 N. W. Rep. 295.

Tennessee. — *Morgan v. Betterton*, 109 Tenn. 84.

Texas. — *Wren v. Howland*, 33 Tex. Civ. App. 87; *Harper v. Marion County*, 33 Tex. Civ. App. 653; *Smithers v. Lowrance*, 35 Tex. Civ. App. 25.

Copy Must Be Certified. — *Sykes v. Beck*, 12 N. Dak. 242.

Sufficiency of Certificate. — See *Glos v. Stern*, 213 Ill. 325.

Certificate — Presumption of Legality. — See *Woodworth v. McKee*, 126 Iowa 714.

Copies of Copies Not Admissible. — *Ruddock Cypress Co. v. Peyret*, 113 La. 867.

Right Statutory. — *Sykes v. Beck*, 12 N. Dak. 242.

201. 3. Copy Equal to Original in Dignity as Evidence. — *McLanahan v. Blackwell*, 119 Ga. 64.

4. Copy Not Evidence Unless Original Would Be. — *McLanahan v. Blackwell*, 119 Ga. 64; *Smithers v. Lowrance*, 35 Tex. Civ. App. 25; *McKinstry v. Collins*, 76 Vt. 221. See also *Tweto v. Horton*, 90 Minn. 451; *Wren v. Howland*, 33 Tex. Civ. App. 87.

Copy of Record Not Authorized by Law Not Competent Evidence. — *Williamson v. Work*, 33 Tex. Civ. App. 369.

202. 1. McLanahan v. Blackwell, 119 Ga. 64.

Lost Deed. — *Williamson v. Work*, 33 Tex. Civ. App. 369.

Recorded Instrument. — *Valentine v. Sweatt*, 34 Tex. Civ. App. 135.

202. (a) Copy of Transcript Filed on Change of Venue. — See note 2.

(2) *Authentication* — (a) Of Judicial Records — *aa.* AT COMMON LAW. — See note 10.

203. *bb.* STATUTORY PROVISIONS — (*aa.*) *Federal Statute* — This Mode of Authentication Is Not Exclusive. — See note 5.

(*bb.*) *State Statutes.* — See note 7.

(*cc.*) *Compliance with Statutes.* — See notes 8, 9.

204. *cc.* SEAL. — See note 1.

cc. ATTESTATION BY DEPUTY CLERK. — See note 8.

205. *ii.* RECORDS OF UNITED STATES COURTS. — See note 4.

jj. RECORDS OF JUSTICE OF THE PEACE. — See note 5.

(b) Of Other Public Records — *aa.* STATUTES. — See notes 6, 7.

bb. BY WHOM CERTIFIED. — See note 9.

206. *e.* CERTIFICATE OF CUSTODIAN AS TO CONTENTS. — See note 3.

g. PRINTED COPIES OF STATUTES, ETC. — See note 5.

207. 7. Whether Entire Record Must Be Produced — *a.* JUDICIAL RECORDS. — See note 2.

209. 8. Record Not to Be Submitted to Jury. — See note 3.

X. LOST AND DESTROYED RECORDS — 1. Restoration. — See note 4.

2. Evidence of Contents. — See note 9.

Certificate of Entry in Land. — *Martin v. Brand*, 182 Mo. 116.

202. 2. See *Taylor v. State*, 72 Ark. 613; *State v. Rodman*, 173 Mo. 681.

10. Certificate of Custodian. — *McLanahan v. Blackwell*, 119 Ga. 64; *Wren v. Howland*, 33 Tex. Civ. App. 87.

Testimony of Custodian. — *Smithers v. Lowrance*, 35 Tex. Civ. App. 25.

203. 5. Mode Provided by Statute Not Exclusive. — *People v. Miller*, 195 Ill. 621; *Tomlin v. Woods*, 125 Iowa 367. See also *Smithers v. Lowrance*, 35 Tex. Civ. App. 25.

7. As to the Requirements in Various States. — *Boyd v. Chicago*, etc., R. Co., 103 Ill. App. 199; *Merz v. Chicago*, etc., R. Co., 86 Minn. 33; *Morgan v. Betterton*, 109 Tenn. 84; *Smithers v. Lowrance*, 35 Tex. Civ. App. 25; *State v. Yourex*, 30 Wash. 611.

8. Necessity for Compliance with Statutes. — *Tift v. Greene*, 211 Ill. 389; *Alexander v. Grand Lodge*, etc., 119 Iowa 519; *Merz v. Chicago*, etc., R. Co., 86 Minn. 33; *Sykes v. Beck*, 12 N. Dak. 242; *Morgan v. Betterton*, 109 Tenn. 84; *International*, etc., R. Co. *v. Hall*, 35 Tex. Civ. App. 545.

9. Substantial Compliance Sufficient. — *State v. Rodman*, 173 Mo. 681.

Certificates Held Sufficient. — See *State v. Rodman*, 173 Mo. 681.

Certificate Must Be Authorized by Law. — *U. S. v. Lew Poy Dew*, 119 Fed. Rep. 786.

204. 1. Seal Necessary. — See *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140.

8. Attestation by Deputy Not Sufficient. — *Morgan v. Betterton*, 109 Tenn. 84.

205. 4. In Alabama the rule is the same as in Missouri. *Allison v. Robinson*, 136 Ala. 434.

5. Signature of Justice of the Peace. — See *Michaels v. People*, 208 Ill. 603 (record of proceedings before justice of another state); *Tomlin v. Woods*, 125 Iowa 367.

Transcript of Justice's Docket Admissible. — *Kerstetter v. Thomas*, 36 Wash. 620.

6. Statutes. — See *Florsheim v. Fry*, 109 Mo. App. 487.

7. Necessity for Compliance with Statutes. — *Hewitt v. Indian Territory Bank*, 64 Neb. 463.

9. Legal Custodian. — *Florsheim v. Fry*, 109 Mo. App. 487.

Clerk. — *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 86 Minn. 140.

206. 3. Certificate of Custodian. — *Coppes v. Union Nat. Sav., etc., Assoc.*, 33 Ind. App. 367; *Thompson v. Mann*, 53 W. Va. 432. See also *U. S. v. Lew Poy Dew*, 119 Fed. Rep. 786; *Kelley v. Laconia Levee Dist.*, (Ark. 1905) 85 S. W. Rep. 249.

5. Printed Copies. — *McCaffrey v. Thomas*, 4 Penn. (Del.) 437; *Chicago*, etc., R. Co. *v. Beaver*, 199 Ill. 34; *Campbell v. St. Louis*, etc., R. Co., 175 Mo. 161; *Hewitt v. Indian Territory Bank*, 64 Neb. 463; *Missouri*, etc., R. Co. *v. Owens*, (Tex. Civ. App. 1903) 75 S. W. Rep. 579; *Beard v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 824.

City Ordinance. — A book purporting to contain the ordinances of a city is not admissible as evidence without proof that it was printed and published by authority of the city council. *International*, etc., R. Co. *v. Hall*, 35 Tex. Civ. App. 545.

Foreign Laws. — In *Nebraska* it is held that a book purporting to contain the written laws of a foreign jurisdiction proves itself, and is admissible as evidence without other authentication. *Hewitt v. Indian Territory Bank*, 64 Neb. 463.

207. 2. Copy of Judgment Sufficient. — *Alexander v. Grand Lodge*, etc., 119 Iowa 519.

209. 3. Record Not to Be Submitted to Jury. — *Strohmeyer v. Wing*, (Tex. Civ. App. 1903) 77 S. W. Rep. 977.

4. Inherent Power of Courts. — *Roberson v. State*, 45 Fla. 94; *Becher v. Deuser*, 169 Mo. 159. See also *Bowers v. State*, 45 Tex. Crim. 185. And see the title LOST PAPERS AND RECORDS, 555. 7 *et seq.*, 559. 3 *et seq.*

9. Secondary Evidence. — *Glos v. Talcott*, 213

210. XIII. INDEXING RECORDS. — See note 3.

XV. REMOVAL, DESTRUCTION, ETC., OF RECORDS — 1. Statutes Regulating Removal. — See note 6.

211. 4. Penal Statutes. — See note 2.

215. REDEEM — REDEMPTION. — See note 2.

216. REDUCE — REDUCTION. — See note 3.

Ill. 81; *Morey v. Clopton*, 103 Mo. App. 368; *Warder, etc., Co. v. Libby*, 104 Mo. App. 140; *Williamson v. Work*, 33 Tex. Civ. App. 369; *Strohmeyer v. Wing*, (Tex. Civ. App. 1903) 77 S. W. Rep. 977. And see the titles *LOST PAPERS AND RECORDS*, **561. 3 et seq.**, **576. 1 et seq.**; *SECONDARY EVIDENCE*, **164. 1 et seq.**

Parol Evidence. — *Rhodus v. Heffernan*, (Fla. 1904) 36 So. Rep. 572; *Meyer v. Purcell*, 214 Ill. 62; *Baker County v. Huntington*, (Oregon 1905) 79 Pac. Rep. 187. See also *Mears v. Smith*, (S. Dak. 1905) 102 N. W. Rep. 295.

Certified Copy. — *Martin v. Brand*, 182 Mo.

116; *Valentine v. Sweatt*, 34 Tex. Civ. App. 135.

210. 3. Indexes. — See *Chosen Freeholders v. Conger*, 67 N. J. L. 444.

6. Removal, etc., of Records. — See *Miller v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 821.

211. 2. Penal Statutes. — *People v. Jewell*, (Mich. 1904) 101 N. W. Rep. 835; *People v. Mills*, 178 N. Y. 274.

215. 2. Ebelharr v. Tennelly, 118 Ky. 43.

216. 3. Reduce in its ordinary signification does not mean to cancel, destroy, or bring to naught, but to diminish, lower, or bring to an inferior state. *Green v. Sklar*, 188 Mass. 363.

REFEREES.

By J. HAVILAND SMITH.

219. I. DEFINITIONS — Referee. — See note 1.

220. II. CONSENT REFERENCES. — See note 2.

221. III. COMPULSORY REFERENCES — 1. In General. — See notes 3, 4.

222. 2. Constitutionality — *b. ACTIONS AT LAW* — (2) *In State Courts.* — See note 1.

3. When Granted — *a. ACTIONS INVOLVING LONG ACCOUNTS* — (1) *In General.* — See note 3.

223. See notes 1, 2.

224. (3) What Constitutes "Long Account." — See note 5.

225. (4) Actions for Attorneys' Fees. — See notes 1, 2.

(5) *Difficult Questions of Law Not Involved.* — See note 3.

219. 1. Referee Is Officer of Court. — *State Bank v. Showers*, 65 Kan. 431.

220. 2. Effect of Consent Reference — *Jury Trial Waived by Applying for or Acquiescing in Reference.* — *Williams v. Weeks*, 70 S. Car. 1.

Court Must Consent to Reference. — *J. L. Roper Lumber Co. v. Elizabeth City Lumber Co.*, 137 N. Car. 431.

221. 3. Power to Order Compulsory Reference of Action at Law. — *Ewart v. Kass*, 17 S. Dak. 220; *Kelly v. Oksall*, 17 S. Dak. 185.

Federal Court May Appoint Auditor in Action at Law. — *Fenno v. Primrose*, (C. C. A.) 119 Fed. Rep. 801.

4. Compulsory References May Be Made in Equity Suits under the *Wisconsin* statute, which is not confined to actions at law. *Winnabago County v. Dodge County*, 125 Wis. 42.

222. 1. Constitutionality of Compulsory References in State Courts. — *Tinsley v. Kemery*, 170 Mo. 310.

3. Long Accounts. — *Smith v. Scully*, 66 Kan. 139; *Citizens Coal Min. Co. v. McDermott*, 109 Mo. App. 306; *Boisnot v. Wilson*, 95 N. Y. App.

Div. 489; *Lewis v. Snook*, 88 N. Y. App. Div. 343, *affirmed* 179 N. Y. 519; *Ames v. French*, 83 N. Y. App. Div. 452; *Montague v. Best*, 65 S. Car. 455; *Winnabago County v. Dodge County*, 125 Wis. 42.

Reference Not Matter of Right. — *Hart v. Godkin*, 122 Wis. 646.

223. 1. Account Necessarily Involved. — *Sartorius v. Gottlieb*, 80 N. Y. App. Div. 112; *George F. Lee Coal Co. v. Meeker*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 162; *Prentice v. Huff*, 98 N. Y. App. Div. 111.

2. Directly Involved. — *George F. Lee Coal Co. v. Meeker*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 162.

224. 5. Test as to "Long Account." — *George F. Lee Coal Co. v. Meeker*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 162; *Sartorius v. Gottlieb*, 80 N. Y. App. Div. 112.

225. 1. References in Actions for Fees of Attorneys Denied. — *Prentice v. Huff*, 98 N. Y. App. Div. 111.

2. References Granted. — *Lewis v. Snook*, 88 N. Y. App. Div. 343, *affirmed* 179 N. Y. 519.

3. Must Be Pointed Out Specifically. — *George*

225. (6) *How Referability Determined.* — See note 4.

226. See note 3.

227. *d.* IN OTHER CASES. — See note 2.

IV. SELECTION OF REFEREE — 1. In General. — See note 3.

2. Persons Disqualified — *a.* ATTORNEY. — See note 5.

229. V. REMOVAL OF REFEREE — 1. For Bias or Misconduct. — See note 1.

VII. POWERS AND DUTIES OF REFEREE — 1. Powers — *a.* IN GENERAL. — See note 9.

230. *c.* TERMINATION OF AUTHORITY. — See note 4.

231. See note 1.
VIII. TRIAL OR HEARING BEFORE REFEREE — 2. Notice. — See note 6.

232. 4. Place of Hearing. — See note 1.

IX. REPORT OF REFEREE — 1. Form, Execution, and Contents —

a. FORM AND EXECUTION — Where There Are Several Referees. — See note 6.

234. *b.* CONTENTS — (5) *Arguments.* — See note 5.

235. 2. Filing Report — *b.* TIME OF FILING. — See note 4.

F. Lee Coal Co. v. Meeker, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 162.

225. 4. Complaint Determines Whether Referable. — *Kennedy v. Horikoshi*, 82 N. Y. App. Div. 415.

Pleadings Determine Referability of Case. — *Kenneth Invest. Co. v. National Bank of Republic*, 96 Mo. App. 125.

226. 3. Independent Issues to Be Tried First — *Weldon v. Brown*, 84 N. Y. App. Div. 482; *Jones v. Lester*, 77 N. Y. App. Div. 174. See also *Diehl v. Dreyer*, 84 N. Y. App. Div. 247; *Winnebago County v. Dodge County*, 125 Wis. 42.

Issue as to Fact of Adjustment. — The fact that one of the parties to an account claims that a portion of it has been adjusted, which the other denies, will not prevent a reference and determination of the entire account, including any incidental settlements or portions thereof. *Smith v. Scully*, 66 Kan. 139.

227. 2. Reference to Determine Question of Fact Arising upon Motion. — See *Weiss v. Schleimer*, 86 N. Y. App. Div. 611, holding that where the facts are not complicated, and the proof lies in a small compass, a reference should not be ordered.

Reference to Determine Disputed Claims Against Decedent's Estate. — *Dickinson v. Hoes*, (Supm. Ct.) 33 Civ. Pro. (N. Y.) 101.

Reference to Take Newly Discovered Testimony. — *State v. Marks*, 70 S. Car. 448.

Where the Parties to the Action Are Numerous, and the convenience of the witnesses and the ends of justice will be promoted thereby, a reference may be ordered under the *Idaho* statute. *Boise Irrigation, etc., Co. v. Stewart*, 10 Idaho 38.

North Carolina Statute — Cases Where Court of Equity Formerly Had Jurisdiction. — *Pinchback v. Bessemer Min., etc., Co.*, 137 N. Car. 171.

Reference in Foreclosure Suits. — See the title FORECLOSURE OF MORTGAGES, 9 ENCYC. OF PL. AND PR. 398, 399, and the Supplement thereto.

Reference in Divorce Proceedings. — See *Knott v. Knott*, (N. J. 1903) 54 Atl. Rep. 559. And see the title DIVORCE, 7 ENCYC. OF PL. AND PR. 115, and the Supplement thereto.

3. Impartiality Necessary. — *Smith v. Dunn*, 94 N. Y. App. Div. 429.

Official Referee. — A drainage referee is not an official referee within the meaning of the *Ontario* statute providing for references to any official referee. *McClure v. Brooke Tp.*, 5 Ont. L. Rep. 59.

5. Attorney of Either Party Disqualified. — To the same effect as *Carroll v. Lufkins*, 29 Hun (N. Y.) 17, stated in the original note, see *Cronon v. Avery*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 1.

229. 1. When Referee Removable. — *Smith v. Dunn*, 91 N. Y. App. Div. 200, 94 N. Y. App. Div. 429.

9. Authority Determined by Order. — *Parcher v. Dunbar*, 118 Wis. 401.

230. 4. Expiration at End of Time Fixed by Order. — *Peavy v. McDonald*, 119 Ga. 865, holding that expiration of authority cannot be waived.

231. 1. Authority Ended When Report Delivered. — *Union Bag, etc., Co. v. Allen Bros. Co.*, 94 N. Y. App. Div. 595.

Decision Cannot Be Changed in Matter of Substance After Filing. — *Union Bag, etc., Co. v. Allen Bros. Co.*, 94 N. Y. App. Div. 595.

Referee Cannot Settle Case. — *Union Bag, etc., Co. v. Allen Bros. Co.*, 94 N. Y. App. Div. 595.

6. Notice Necessary. — See *Ingersoll v. Weld*, 101 N. Y. App. Div. 365.

232. 1. Need Not Be Held in County of Venue. — *Winnebago County v. Dodge County*, 125 Wis. 42.

6. Report Should Be Signed by All. — *Hawkins v. Hall*, 4 Penn. (Del.) 291, holding that a report signed by only two of three referees and failing to show whether the third acted should be remanded.

234. 5. Should Not Contain Arguments. — *Steger v. Traveling Men's Bldg., etc., Assoc.*, 208 Ill. 236, 100 Am. St. Rep. 225.

235. 4. Time Fixed by Order. — *Peavy v. McDonald*, 119 Ga. 865.

Right of Court to Extend Time. — *Clark v. Hennessey Bank*, 14 Okla. 572.

Notice of Filing Required. — But see *Clark v. Hennessey Bank*, 14 Okla. 572.

Waiver of Time of Filing. — *Bradford v. Cline*, 12 Okla. 339.

236. X. EFFECT OF DEATH UPON REFERENCE — 1. Death of Referee. — See note 1.

XI. REVIEW OF DECISION — 1. Findings of Law. — See note 6.
2. Findings of Fact. — See note 7.

237. XII. FEES OF REFEREE — 1. In General. — See notes 1, 2.

2. Fees Fixed by Statute. — See note 3.

3. Fees Fixed by Agreement. — See notes 4, 6.

238. 4. When Fees Payable. — See note 1.

5. Who Liable for Fees. — See note 8.

REFERENCE. — See note 11.

241. REGISTRATION. — See note 6.

REGULAR. — See note 8.

243. REGULATE—REGULATING—REGULATION. — See note 5.

245. See notes 1, 2.

236. 1. Filing Testimony After Death of Referee. — The testimony taken by a referee who has died since taking it may be filed if it can be properly identified. *Davidson v. Cope-land*, 69 S. Car. 47.

6. See *Wade v. Peacock*, 121 Ga. 816.

7. Findings of Fact — *United States*. — *In re Royce Dry Goods Co.*, 133 Fed. Rep. 100; *Last Chance Min. Co. v. Bunker Hill etc., Min., etc., Co.*, (C. C. A.) 131 Fed. Rep. 579; *Buckingham v. Estes*, (C. C. A.) 128 Fed. Rep. 584.

Alabama. — *Noble v. Gilliam*, 136 Ala. 618; *Chancellor v. Teel*, 141 Ala. 634.

Arkansas. — *Greenshaw v. Combs*, (Ark. 1905) 85 S. W. Rep. 768.

Colorado. — *Johnson v. Johnson*, 18 Colo. App. 493; *Stephens v. Parvin*, 33 Colo. 60.

Georgia. — *Weed v. Gainesville, etc., R. Co.*, 119 Ga. 576.

Illinois. — *Leathe v. Thomas*, 109 Ill. App. 434; *Davenport v. Davenport*, 109 Ill. App. 93; *Schoenthaler v. Roskam*, 107 Ill. App. 427; *Assets Realization Co. v. Wightman*, 105 Ill. App. 618; *Ætna Ins. Co. v. Jacobson*, 105 Ill. App. 283.

Massachusetts. — *Joslin v. Goddard*, 187 Mass. 165.

Missouri. — *Arkansas Land Co. v. Ladd*, 103 Mo. App. 83; *Tufts v. Latshaw*, 172 Mo. 359; *Citizens Coal Min. Co. v. McDermott*, 109 Mo. App. 306.

New York. — *Curnen v. Reilly*, 99 N. Y. App. Div. 159; *Lexow v. Belding*, 89 N. Y. App. Div. 622; *Ocorr, etc., Co. v. Little Falls*, 77 N. Y. App. Div. 592, *affirmed* 178 N. Y. 622. See also *Smith v. Dunn*, 94 N. Y. App. Div. 429.

Pennsylvania. — *Oakley v. Luzerne*, 25 Pa. Super. Ct. 425; *Fell v. Betz*, 22 Pa. Super. Ct. 418; *May's Estate*, 22 Pa. Super. Ct. 77. See also *Fenn v. McCarrell*, 208 Pa. St. 615.

Virginia. — *Lusk v. Pelter*, 101 Va. 790.

West Virginia. — See *Allen v. Maxwell*, 56 W. Va. 227.

Stipulation that Findings of Fact Shall Have Effect of Verdict of Jury. — *Campbell v. Equitable L. Assur. Soc.*, 130 Fed. Rep. 786.

Force and Effect of Auditor's Report. — *Mt. Sinai Hospital v. Hyman*, 92 N. Y. App. Div. 270.

In Missouri. — *West v. Caruthersville Bank*, 110 Mo. App. 490.

237. 1. Entitled to Reasonable Fees. — See *Jordan v. Western Union Tel. Co.*, 69 Kan. 140.

2. Discretion of Trial Court. — *Winnebago County v. Dodge County*, 125 Wis. 42.

Federal Court May Regulate Compensation of Auditor and Determine Who Shall Pay It. — *Fenno v. Primrose*, (C. C. A.) 119 Fed. Rep. 801.

3. Statutory Fees. — *Hoops v. Fitzgerald*, 204 Ill. 325; *Smith v. Dunn*, 94 N. Y. App. Div. 429; *Goldzier v. Rosebault*, (Supm. Ct. App. T.) 84 N. Y. Supp. 240; *Harrington v. Bayles*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 388; *Cobb v. Rhea*, 137 N. Car. 295; *Winnebago County v. Dodge County*, 125 Wis. 42.

No Fee for Time Unnecessarily Spent — Referee's Oath Not Conclusive. — *Goldzier v. Rosebault*, (Supm. Ct. App. T.) 84 N. Y. Supp. 240.

No Fee for Receiving Judgment of Sale. — *Kant v. Bergman*, 97 N. Y. App. Div. 118.

Fees Must Be Itemized. — *Karsten v. Winkelman*, 209 Ill. 547; *Smyth v. Stoddard*, 203 Ill. 424, 96 Am. St. Rep. 314.

Stenographer's Fees Not Allowed. — *Smyth v. Stoddard*, 203 Ill. 424, 96 Am. St. Rep. 314.

Fees Allowed on Death of Referee. — *Winnebago County v. Dodge County*, 125 Wis. 42.

4. Stipulation for Increased Fees. — *Smith v. Dunn*, 94 N. Y. App. Div. 429.

6. Agreement to Be Definite. — *New York Mut. Sav., etc., Assoc. v. Westchester F. Ins. Co.*, 98 N. Y. App. Div. 285.

238. 1. Fees Payable in Advance. — *Cobb v. Rhea*, 137 N. Car. 295.

Fees Not Preferred Debt. — *Cobb v. Rhea*, 137 N. Car. 295.

8. Implied Promise to Pay. — *Goldzier v. Rosebault*, (Supm. Ct. App. T.) 84 N. Y. Supp. 240.

Discretion of Court as to Apportionment of Fees. — See *Moore v. Dickinson*, 117 Ga. 887.

11. Recommendation Synonymous with Reference. — *Kinney v. McFaul*, 122 Iowa 452.

241. 6. Registration. — *Yates v. Collins*, 118 Ky. 682; *People v. Carleton*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 523.

8. Regular. — *Wise v. State Veterinary Board*, 138 Mich. 428.

243. 5. Durland v. Durland, 67 Kan. 734; *Railroad Commission v. Kansas City Southern R. Co.*, 111 Ia. 133.

245. 1. Regulate Not Synonymous with Restrain. — *Madden v. State*, 68 Kan. 658.

2. *Butte v. Paltrovich*, 30 Mont. 18.

REINSURANCE.

By O. D. ESTEE.

248. I. DEFINITION. — See note 1.

249. II. NATURE OF REINSURANCE — 3. Creates No Privity Between Reinsurer and Party Originally Insured. — See note 6.

And a Direct Liability May Be Incurred by the Reinsurer. — See note 8.

4. Reinsurance and Double Insurance Distinguished. — See note 9.

253. III. POWERS OF INSURANCE COMPANIES IN RESPECT TO REINSURANCE — 2. Power to Transfer Assets in Consideration of Reinsurance — c. TRANSFER OF ENTIRE ASSETS. — See note 1.

254. V. CONSTRUCTION AND INTERPRETATION — 1. General Principles. — See note 4.

Risks Not Included in Contract. — See note 10.

256. 2. As Affected by Custom of Underwriters — Express Provisions of Contract Not Open to Contradiction. — See note 3.

258. VI. RIGHTS OF PARTY ORIGINALLY INSURED — 2. Under Reinsurance Contract Made for His Benefit — a. GENERAL PRINCIPLES. — See notes 4, 6.

262. VII. RIGHTS, DUTIES, AND LIABILITIES OF PARTIES TO THE CONTRACT — 3. In Respect to Waiver of Conditions and Increase of Risk. — See note 8.

265. 4. In Action on Contract of Reinsurance — f. EXTENT OF REINSURER'S LIABILITY — (1) In Absence of Special Stipulations. — See note 6.

266. Compromise Between Reinsured and Original Insured. — See note 4.

248. 1. Reinsurance Defined. — *Ruohs v. Traders F. Ins. Co.*, 111 Tenn. 405, 102 Am. St. Rep. 790, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 248.

249. 6. Reinsurance Creates No Privity Between Reinsurer and Party Originally Insured. — *Ruohs v. Traders F. Ins. Co.*, 111 Tenn. 405, 102 Am. St. Rep. 790, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 249.

8. *Ruohs v. Traders F. Ins. Co.*, 111 Tenn. 405, 102 Am. St. Rep. 790, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 249.

9. *Reinsurance and Double Insurance Distinguished.* — See *Ocean Steamship Co. v. Ætna Ins. Co.*, 121 Fed. Rep. 882.

253. 1. Transfer Ultra Vires as Against Dissenting Policy Holders. — *Raymond v. Security Trust, etc., Co.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 31, affirmed 101 N. Y. App. Div. 546.

254. 4. General Rules of Construction Applicable to Contracts of Reinsurance. — *Ruohs v. Traders F. Ins. Co.*, 111 Tenn. 405, 102 Am. St. Rep. 790, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 254, and quoting the whole text paragraph.

Rider Attached to Policy. — Where a "rider" setting forth the conditions of reinsurance was attached to a blank policy of fire insurance, it was held that the "rider" did not contain the whole contract, but should be read in the light of the clauses contained in the blank policy. *Victoria Montreal F. Ins. Co. v. Home Ins. Co.*, 35 Can. Sup. Ct. 208.

10. *Risks Outside the Contract.* — *Maritime Ins. Co. v. Stearns*, (1901) 2 K. B. 912.

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256. 3. Evidence of Usage Not Received to Contradict Express Terms of Contract. — *Ocean Steamship Co. v. Ætna Ins. Co.*, 121 Fed. Rep. 882; *Home Ins. Co. v. Continental Ins. Co.*, 180 N. Y. 389.

258. 4. Right of Original Insured to Sue on Contract of Reinsurance Made for His Benefit. — *Ruohs v. Travelers F. Ins. Co.*, 111 Tenn. 405, 102 Am. St. Rep. 790, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 258.

6. *Sale of Business and Good Will and Assumption of Policies.* — *Ruohs v. Traders F. Ins. Co.*, 111 Tenn. 405, 102 Am. St. Rep. 790, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 258.

262. 8. Liability of Reinsurer Shall Not Be Increased Without His Consent. — *Maritime Ins. Co. v. Stearns*, (1901) 2 K. B. 912, 71 L. J. K. B. 86, holding that the risk was materially increased, so as to avoid a policy of reinsurance, by a considerable delay in the sailing of a vessel insured.

265. 6. Liability of Reinsurer Measured by Liability of Reinsured. — The liability of the reinsurer to pay a loss can in no case exceed that of the reinsured, and consequently when the reinsured fails to take advantage of certain conditions in the original policy in settling a loss, he cannot recover the overpayment from the reinsurer. *Marten v. Steamship Owners' Underwriting Assoc.*, 87 L. T. N. S. 208, 71 L. J. K. B. 718.

266. 4. Reinsurer's Liability Unaffected by Compromise of Original Claim. — *Ocean Steamship Co. v. Ætna Ins. Co.*, 121 Fed. Rep. 882.

267. Liability as Affected by Salvage. — See note 1.

(2) *As Affected by Special Stipulations* — Stipulation that Policy Shall Be Subject to Settlement Made by Reinsured. — See note 2.

Stipulation for Prorating Loss. — See note 3.

269. 5. In Action Against Reinsured on Contract of Original Insurance — *c.* EFFECT OF REINSURER'S FAILURE TO DEFEND — (4) *Reinsurer Liable for Costs and Expenses of Defense.* — See note 4.

273. RELATE. — See note 5.

267. 1. Reinsurer's Liability Reduced by Salvage. — See *Western Assur. Co. v. Baden Marine Assur. Co.*, 22 Quebec Super. Ct. 374.

2. *Insurance Co. v. Associated Manufacturers' Mut. F. Ins. Corp.*, 174 N. Y. 541, affirming 70 N. Y. App. Div. 69, cited in the original note.

For the Construction of a Stipulation Concerning "Special Charges" contained in a contract reinsuring part of a marine risk, see *Western Assur. Co. v. Baden Marine Assur. Co.*, 22 Quebec Super. Ct. 374.

3. Loss Prorated under Terms of Policy. — *Home Ins. Co. v. Continental Ins. Co.*, 180 N. Y. 389, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 267.

269. 4. Reinsured May Recover Costs and Expenses of Unsuccessful Defense. — See *Ocean Steamship Co. v. Aetna Ins. Co.*, 121 Fed. Rep. 882.

273. 5. *Relating* means "in reference to," "in respect to," "in regard to." *Com. v. Mathues*, 210 Pa. St. 407.

RELATION.

275. I. DEFINITION AND SCOPE OF TITLE — Doctrine of Relation Defined. — See note 1.

II. VARIOUS APPLICATIONS OF DOCTRINE — 2. Conveyances of Real Property — *b.* PARTICULAR APPLICATIONS — (1) *In Equity.* — See note 5.

276. *c.* LIMITS OF APPLICATION — Provision for Date of Delivery of Deed. — See note 6.

277. III. OPERATION AND EFFECT OF DOCTRINE — 4. As Affecting Strangers to Contract — *a.* INNOCENT THIRD PERSONS. — See note 8.

278. *d.* TRESPASSERS — (2) *Rights of Purchaser as Against Trespasser* — (a) *In General.* — See note 4.

275. 1. Doctrine of Relation Defined. — U. S. *v. Anderson*, 194 U. S. 394; *Peyton v. Desmond*, (C. C. A.) 129 Fed. Rep. 1; *Emmons v. Harding*, 162 Ind. 154; *Krakow v. Wille*, 125 Wis. 284.

5. Doctrine Adopted in Equity. — *Peyton v. Desmond*, (C. C. A.) 129 Fed. Rep. 1; *Emmons v. Harding*, 162 Ind. 154.

276. 6. Limitation as to Time for Delivery Not Recognized. — See also *Krakow v. Wille*, 125 Wis. 284.

277. 8. Doctrine Not Applied to Injury of Innocent Third Persons. — *Emmons v. Harding*, 162 Ind. 154.

278. 4. Purchaser May Have Action Against Trespasser. — See *Krakow v. Wille*, 125 Wis. 284.

RELEASE AND DISCHARGE.

BY H. GANNAWAY.

283. I. DEFINITION AND SCOPE OF TITLE — Release Distinguished from Receipt. —

See note 5.

284. II. FORM AND KINDS. — See notes 6, 8.

286. III. DELIVERY AND ACCEPTANCE. — See notes 1, 4.

IV. SEAL. — See notes 9, 10.

287. V. CONSIDERATION. — See note 12.

288. See note 1.

In Some Instances No Consideration Is Required. — See note 2.

Release upon Part Payment of Debt. — See notes 6, 7, 8.

283. 5. Release Distinguished from Receipt. — *Davis v. Diamond Carriage, etc., Co.*, 146 Cal. 59; *Cardwell v. Stuart*, 92 Mo. App. 586; *Cammarata v. Pennsylvania Coal Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 787; *Eveson v. Ziegfeld*, 22 Pa. Super. Ct. 79; *Vaughan v. Mason*, 23 R. I. 348; *Engi v. Hardell*, 123 Wis. 407.

284. 6. Form and Kinds. — *Scottish Security Co. v. Starks*, 117 Ky. 609.

For a case in which two written instruments were together construed to be a release, see *Price v. Price*, (Ky. 1902) 66 S. W. Rep. 529.

8. Must Sometimes Be Written. — *Brosnan v. Kramer*, 135 Cal. 36 (release of lease); *Gary v. Newton*, 201 Ill. 170; *Valley Sav. Bank v. Mercer*, 97 Md. 458; *Miller v. Fox*, 111 Tenn. 336.

A Response "All Right" by a creditor of a firm, in a conversation with one of the partners, has been held in *New York* not to be a sufficient release of such partner's liability. *Isaac Goldman Co. v. Wilkes*, (Supm. Ct. App. T.) 88 N. Y. Supp. 390.

Release of Covenant. — Covenants may be released only by a contract in writing or an executed oral agreement. *Brosnan v. Kramer*, 135 Cal. 36.

286. 1. Delivery and Acceptance. — *Cleveland v. Rothschild*, 132 Mich. 625; *Boggs v. Pacific Steam Laundry Co.*, 171 Mo. 282.

4. A Release Dated on the Fourteenth Day of a Month cannot be offered in evidence on the ninth of the same month. *Rosenthal v. Rudnick*, 84 N. Y. App. Div. 611.

9. Gourley v. West Chicago St. R. Co., 96 Ill. App. 68.

10. Seal Necessary if No Consideration. — *Lynn v. Bean*, 141 Ala. 236; *Uvalde Asphalt Paving Co. v. New York*, 99 N. Y. App. Div. 327.

287. 12. Consideration — *United States*. — *Pneumatic Gun-Carriage, etc., Co. v. U. S.*, 36 Ct. Cl. 71; *Saling v. Bolander*, (C. C. A.) 125 Fed. Rep. 701.

Alabama. — *Lynn v. Bean*, 141 Ala. 236.

Maryland. — *Commercial, etc., Nat. Bank v. McCormick*, 97 Md. 703.

Missouri. — *Goodson v. National Masonic Acc. Assoc.*, 91 Mo. App. 339; *Harrison v. Mur-*

ray Iron Works Co., 96 Mo. App. 348; *Forbs v. St. Louis, etc., R. Co.*, 107 Mo. App. 661.

New York. — *Muschel v. Austern*, (Supm. Ct. App. T.) 84 N. Y. Supp. 956.

South Carolina. — *Hawkins v. Collins*, 61 S. Car. 537.

Texas. — *Woodall v. Pacific Mut. L. Ins. Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1090; *Gulf, etc., R. Co. v. Minter*, (Tex. Civ. App. 1905) 85 S. W. Rep. 477.

Utah. — *In re Bell*, (Utah 1905) 80 Pac. Rep. 615 (void consideration — agreement for divorce).

The Giving of a Note in settlement of past-due indebtedness is sufficient consideration to support a stipulation in the note releasing all claims for damages arising out of the original transaction. *Deering v. Walter*, (Neb. 1902) 96 N. W. Rep. 517.

288. 1. A Consideration Passing to a Third Person, at the releasor's request, is sufficient. *Headley v. Leavitt*, 65 N. J. Eq. 748.

2. Consideration Not Always Necessary. — *Mueller v. Renkes*, 31 Mont. 100.

6. Release upon Part Payment of Debt. — *Bostrom v. Gibson*, 111 Ill. App. 457; *Goodson v. National-Masonic Acc. Assoc.*, 91 Mo. App. 339; *Chamberlain v. Smith*, 110 Mo. App. 657; *Weinberg v. Novick*, (Supm. Ct. App. T.) 88 N. Y. Supp. 168; *Eveson v. Ziegfeld*, 22 Pa. Super. Ct. 79; *Standard Sewing Mach. Co. v. Gunter*, 102 Va. 568; *Herman v. Schlesinger*, 114 Wis. 382, 91 Am. St. Rep. 922.

Where, in consideration of a release an insolvent debtor pays a portion of the debt and gives to the creditor absolute title to the property held as collateral, and waives his right to take advantage of the Bankruptcy Law, there is a good consideration. *Herman v. Schlesinger*, 114 Wis. 382, 91 Am. St. Rep. 922.

A Payment in Advance of a part of the debt, no matter how short the time, is a good consideration. *Weiss v. Marks*, 206 Pa. St. 513.

The Payment of an Undisputed Debt does not form a consideration for a release of another debt, and such release is void. *Knights Templars', etc., L. Indemnity Co. v. Crayton*, 110 Ill. App. 648, affirmed 209 Ill. 550. See also *Siewing v. Tacke*, 112 Mo. App. 414.

289. See note 1.

A Promise of Employment Given to an Injured Employee. — See notes 3, 4, 5, 6.
The Acceptance of Relief from the Relief Department. — See note 8.

Payment of Doctor's Fees. — See note 9.

Where There Is an Antecedent Indebtedness. — See note 13.

290. Conditions Unperformed. — See note 4.

Failure of Consideration. — See note 5.

In Equity. — See note 8.

Evidence. — See note 10.

Burden of Proof. — See note 12.

VI. CONSTRUCTION — 1. Intention of Parties. — See note 13.

291. Ignorance of Full Effect. — See note 2.

Payment of a Liquidated Sum Unconditionally Due is not sufficient consideration to support a release for any claim for unliquidated damages. *Harrison v. Murray Iron Works Co.*, 96 Mo. App. 348; *Woodall v. Pacific Mut. L. Ins. Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1090.

288. 7. Uvalde Asphalt Paving Co. v. New York, 99 N. Y. App. Div. 327.

8. Part Payment Sufficient Where Claims in Dispute. — *San Juan v. St. John's Gas Co.*, 195 U. S. 510; *Sims v. Three States Lumber Co.*, (C. C. A.) 135 Fed. Rep. 1019; *Bingham v. Browning*, 97 Ill. App. 442, *affirmed* 197 Ill. 122; *Melcher v. Insurance Co. of Pennsylvania*, 97 Me. 512; *Tansey v. Kansas City, etc., R. Co.*, 90 Mo. App. 101; *School Dist. v. Matherly*, 90 Mo. App. 403; *Goodson v. National Masonic Acc. Assoc.*, 91 Mo. App. 339; *Worden v. Houston*, 92 Mo. App. 371; *Chamberlain v. Smith*, 110 Mo. App. 657; *Jones v. Keeler*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 221; *Rutherford v. Rutherford*, 55 W. Va. 56.

289. 1. A Waiver of the Right of Appeal, with payment of a smaller sum than the judgment, will constitute a sufficient consideration for the release of the judgment. *Williams v. Blumenthal*, 27 Wash. 24.

A Settlement of Pending Litigation, made in fairness and understanding, is binding. *Midlex Bank Co. v. Field*, 84 Miss. 646.

3. Promise of Employment a Consideration. — *Gourley v. West Chicago St. R. Co.*, 96 Ill. App. 68; *Burik v. Dundee Woolen Co.*, 66 N. J. L. 420; *Usher v. New York Cent., etc., R. Co.*, 76 N. Y. App. Div. 422, *affirmed* 179 N. Y. 544.

A release expressly stating that there has been no promise for future employment cannot be avoided by oral testimony of "allusions to future employment" which had not been granted. *Atchison, etc., R. Co. v. Vanordstrand*, 67 Kan. 386.

4. Missouri, etc., R. Co. v. Smith, 98 Tex. 47; *Gulf, etc., R. Co. v. Minter*, (Tex. Civ. App. 1905) 85 S. W. Rep. 477. But see *Boggs v. Pacific Steam Laundry Co.*, 171 Mo. 282; *Forbs v. St. Louis, etc., R. Co.*, 107 Mo. App. 661.

5. Illinois Cent. R. Co. v. Keebler, (Ky. 1905) 84 S. W. Rep. 1167. But see *Forbs v. St. Louis, etc., R. Co.*, 107 Mo. App. 661.

But Employment Actually Given under the contract is a sufficient consideration. *Carroll v. Missouri, etc., R. Co.*, 30 Tex. Civ. App. 1.

6. Walston v. F. D. Calkins Co., 119 Iowa 150; *Bjorklund v. Seattle Electric Co.*, 35 Wash. 439.

8. Acceptance of Relief from Relief Department. — *Pittsburgh, etc., R. Co. v. Gipe*, 160 Ind. 360; *Oyster v. Burlington Relief Dept., etc.*, 65 Neb. 789; *Fivey v. Pennsylvania R. Co.*, 67 N. J. L. 627, 91 Am. St. Rep. 445; *Baltimore, etc., R. Co. v. Hottman*, 25 Ohio Cir. Ct. 140.

One who has accepted relief from a relief department cannot prosecute a claim for damages merely because he has failed or refused to execute a release. *Carter v. Brunswick, etc., R. Co.*, 115 Ga. 853.

Acceptance of Benefits under an Insurance Policy, premiums on which have been paid by the employer, will not operate as a release of the employers' liability in the absence of contract. *Dover v. Mississippi River, etc., R. Co.*, 100 Mo. App. 330.

9. Payment of Doctor's Fees. — See *Davis v. Diamond Carriage, etc., Co.*, 146 Cal. 59.

13. Release Cannot Discharge Its Own Consideration. — See *Wyatt v. Wyatt*, 81 Miss. 219.

290. 4. Conditions Unperformed. — *Murto v. Lemon*, 19 Colo. App. 314; *Reed v. Jennings*, 196 Ill. 472.

Conditional Release by Joint Debtor. — See *Barnum v. Cochrane*, 139 Cal. 494.

5. Failure of Consideration. — *Illinois Cent. R. Co. v. Keebler*, (Ky. 1905) 84 S. W. Rep. 1167.

Where the Consideration Is the Payment of an Annuity, the consideration fails if the annuity is not paid, and the release may be avoided. *Brown v. Tilley*, 25 R. I. 579.

8. Family Settlements. — *Bunel v. O'Day*, 125 Fed. Rep. 303; *Mueller v. Renkes*, 31 Mont. 100.

10. Evidence. — *Stolenburg v. Diercks*, 117 Iowa 25.

12. Burden of Proof. — *Mueller v. Renkes*, 31 Mont. 100.

It Will Be Presumed that There Was a Good Consideration for the release in the absence of evidence to the contrary. *Adams v. Hopkins*, 144 Cal. 19.

13. Releases Construed in Accordance with Intention of Parties. — *Carey v. Bilby*, (C. C. A.) 129 Fed. Rep. 203; *Stolenburg v. Diercks*, 117 Iowa 25; *Harrison v. Henderson*, 67 Kan. 104, 100 Am. St. Rep. 386; *Price v. Price*, (Ky. 1902) 66 S. W. Rep. 529; *Brown v. American Freehold Land Mortg. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 1056; *Mandt Wagon Co. v. Fuller, etc., Mfg. Co.*, 120 Wis. 258.

291. 2. Effect Not Limited by Mistakes of Parties. — *Jackson v. Pennsylvania R. Co.*, 69 N. J. L. 79; *Abb v. Northern Pac. R. Co.*, 28 Wash. 428, 92 Am. St. Rep. 864.

- 291.** Language of Instrument. — See note 5.
292. Preliminary Negotiations. — See note 1.
293. 3. Release Construed as Covenant Not to Sue. — See note 6.
294. 4. General Words Restrained by Particular Recitals — As a Corollary. — See note 3.
 Where Only General Words Are Used. — See note 11.
295. 5. Release Containing Words of Reservation. — See notes 3, 4.
 VII. Who May Release — 2. Agents. — See note 6.
296. See note 1.
 An Agent Having Power to Release a Lien. — See note 8.
 Agents for Both Parties. — See note 9.
 3. Attorneys. — See notes 13, 14, 16.
297. 4. Husband and Wife — The Power of a Wife to Release Her Claims. — See note 8.
 5. Infants. — See note 12.
298. 6. Executors and Administrators. — See note 7.
299. 7. Parties Plaintiff — A Release by One of Several Parties Plaintiff. — See note 10.
 8. Trustees. — See note 12.

291. 5. The Words "Inheritance" and "Estate" in a release, in the absence of any showing as to what kind of property was intended, will be construed as including personalty as well as realty. *Stolenburg v. Diercks*, 117 Iowa 25.

292. 1. *Lanham v. Louisville, etc., R. Co.*, (Ky. 1905) 86 S. W. Rep. 680.

293. 6. Release Construed as Covenant Not to Sue. — *Carey v. Bilby*, (C. C. A.) 129 Fed. Rep. 203; *Hadley v. Bryan*, 70 Ark. 197; *Chicago v. Smith*, 95 Ill. App. 335; *Walsh v. Hanan*, 93 N. Y. App. Div. 580; *Robertson v. Trammell*, 98 Tex. 364.

294. 3. General Words Restrained by Particular Recitals. — *Bassett v. Lawrence*, 193 Ill. 494; *Scott v. Hay*, 90 Minn. 304.

11. A Release from All Rights of Action "Either on Within or Any Other Contract," is not limited to the contract on which it appears. *Clark v. Roberts*, 180 Mass. 259.

295. 3. Release Containing Words of Reservation. — *McBride v. Scott*, 132 Mich. 176, 102 Am. St. Rep. 416; *Dulaney v. Buffum*, 173 Mo. 1; *Smith v. Consolidated Gas Co.*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 131; *Abb v. Northern Pac. R. Co.*, 28 Wash. 428, 92 Am. St. Rep. 864.

4. Construed as Covenants Not to Sue. — *Carey v. Bilby*, (C. C. A.) 129 Fed. Rep. 203; *Hadley v. Bryan*, 70 Ark. 197; *Chicago v. Smith*, 95 Ill. App. 335; *Hirschfield v. Alsberg*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 141; *Walsh v. Hanan*, 93 N. Y. App. Div. 580; *Robertson v. Trammell*, 98 Tex. 364. See also *Barnum v. Cochran*, 139 Cal. 494.

6. Agents. — An agent having authority merely to collect or receive payment of a debt cannot release or compromise it. *Corbet v. Waller*, 27 Wash. 242. See also the title AGENCY, 1028. 3.

296. 1. Ratification. — See *Upton v. Dennis*, 133 Mich. 238.

8. Release of Lien. — See *Johnson v. Wilson*, 137 Ala. 468, 97 Am. St. Rep. 52.

9. Agents for Both Parties. — A release will be set aside for fraud where the person perpe-

trating the fraud, though previously the agent of the releasor, was at the time acting for heirs adversely interested. *Mullaney v. Mullaney*, 65 N. J. Eq. 384.

13. Attorneys. — *Danziger v. Pittsfield Shoe Co.*, 204 Ill. 145 (no authority to compromise); *Gray v. Howell*, 205 Pa. St. 211. See also *Flanagan v. Shaw*, 74 N. Y. App. Div. 508, affirmed 174 N. Y. 530; *Lowry v. Clark*, 20 Pa. Super. Ct. 357. Compare *Williams v. Blumenthal*, 27 Wash. 24.

As to the construction of an attorney's authority to release notes, see *Lyle v. Addicks*, 62 N. J. Eq. 123.

14. *Benedict v. Wilhoite*, (Ky. 1904) 80 S. W. Rep. 1155; *Budlong v. Budlong*, 31 Wash. 228.

An Attorney Is Presumed to Have Authority to compromise a pending suit in which he appeared. *Strattner v. Wilmington City Electric Co.*, 3 Penn. (Del.) 453.

16. Release of Mortgage. — A power of attorney is not necessary in order to release a mortgage to be recorded. *Adams v. Hopkins*, 144 Cal. 19.

297. 8. Release by Wife. — See *Haugh v. Peirce*, 97 Me. 281; *Wyatt v. Wyatt*, 81 Miss. 219; *Headley v. Leavitt*, 65 N. J. Eq. 748.

Void at Common Law. — *Stewart v. Conrad*, 100 Va. 128.

12. A Next Friend of an Infant has no power to release a judgment upon part payment thereof. *Fletcher v. Parker*, 53 W. Va. 422, 97 Am. St. Rep. 991.

298. 7. Executors and Administrators — Release of Claim for Death by Wrongful Act. — See *Mella v. Northern Steamship Co.*, 127 Fed. Rep. 416; *Logan v. Central Iron, etc., Co.*, 139 Ala. 548; *Mattoon Gas Light, etc., Co. v. Dolan*, 105 Ill. App. 1; *Pittsburgh, etc., R. Co. v. Gipe*, 160 Ind. 360; *Oyster v. Burlington Relief Dept.*, etc., 65 Neb. 789; *Doyle v. New York, etc., R. Co.*, 66 N. Y. App. Div. 398; *Baltimore, etc., R. Co. v. Hottman*, 25 Ohio Cir. Ct. 140.

299. 10. See *Ely v. Ely*, 70 N. J. L. 31.

12. Trustees. — See *Johnston v. Osment*, 108 Tenn. 32.

300. See note 2.

Fraud. — See note 3.

9. Cestuis Que Trustent. — See note 6.**301.** 11. Heirs. — See note 5.**302.** 15. Joint Tenants and Tenants in Common. — See note 8.**303.** 17. Parents. — See note 2.

18. Guardians. — See note 3.

19. Persons Non Compos Mentis. — See note 4.

VIII. SUBJECT-MATTER OF RELEASE — 1. Release of Joint Debtor. —

See note 6.

It Is a Qualification of the Rule Above Stated. — See note 7.

304. Applies to Release by Operation of Law. — See note 6.**305.** Rule Limited. — See notes 2, 3.

Legislation. — See note 4.

306. Under the Laws of the State of New York. — See note 1.

2. Release of Joint Tortfeasor. — See note 8.

Release According to Terms of Trust Deed. — See *Murto v. Lemon*, 19 Colo. App. 314.**300.** 2. *Murto v. Lemon*, 19 Colo. App. 314. See also *Delta County Land, etc., Co. v. Talcott*, 17 Colo. App. 316.**3. A Trustee's Release Reciting Payment of a Note** when in fact it had not been paid will be binding against an assignee of the note when the rights of innocent third parties have intervened. *Delta County Land, etc., Co. v. Talcott*, 17 Colo. App. 316.**6. Cestuis Que Trustent.** — See *Gorman v. McCabe*, 24 R. I. 245.**301.** 5. Heirs. — *Stolenburg v. Diercks*, 117 Iowa 25.For the construction of a release executed by father-in-law to son-in-law, as barring the rights of the sister-in-law, see *Etscheid v. Baker*, 112 Wis. 129.**302.** 8. Joint Tenants and Tenants in Common. — In *McCune v. Scott*, 18 Pa. Super. Ct. 263, it was held that a settlement and release of one tenant in common, stipulating that such settlement shall not interfere with the claim of the other tenant in common against the grantor, will not bar an action by the other tenant in common.**303.** 2. Parents. — See *New v. Southern R. Co.*, 116 Ga. 147.**3. Guardians.** — See *Knights Templars, etc., L. Indemnity Co. v. Crayton*, 110 Ill. App. 648, *affirmed* 209 Ill. 550.**4. Persons Non Compos Mentis.** — *Bertrand v. St. Louis Transit Co.*, 108 Mo. App. 70; *Cundall v. Haswell*, 23 R. I. 508; *Johnson v. Gulf, etc., R. Co.*, 36 Tex. Civ. App. 487.**Not Void, but Voidable.** — *Scott v. Hay*, 90 Minn. 304.**6. Release of a Joint Debtor.** — *Northrup v. Chambers*, 90 Mo. App. 61; *Moore v. Hanover Nat. Bank*, 80 N. Y. App. Div. 67; *Rutherford v. Rutherford*, 55 W. Va. 56. *Compare* *Pearl v. Cortright*, 81 Miss. 300.**Where a Firm Note Has Been Indorsed by the Individual Members of the firm**, the holder may covenant not to sue the firm and reserve his rights against the indorsers. *Fancuil Hall Nat. Bank v. Meloon*, 183 Mass. 66, 97 Am. St. Rep. 416.**7. Rule Qualified.** — *Valley Sav. Bank v. Mer-**cer*, 97 Md. 458; *Commercial, etc., Nat. Bank v. McCormick*, 97 Md. 703.**304.** 6. Applies to Release by Operation of Law. — *Northrup v. Chambers*, 90 Mo. App. 61.**305.** 2. Or by Agreement. — *Barnum v. Cochrane*, 139 Cal. 494. See also *Booth Bros., etc., Granite Co. v. Baird*, 83 N. Y. App. Div. 495.**3. Covenant Not to Sue.** — *Hirschfield v. Alsberg*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 141.**4. Legislation.** — *Harrier v. Bassford*, 145 Cal. 529; *Elizalde v. Murphy*, 146 Cal. 168; *Northrup v. Chambers*, 90 Mo. App. 61.In *Louisiana* such a release limits the liability of the joint debtors not released to their proportionate share of the entire debt or judgment. *Moore v. Hanover Nat. Bank*, 80 N. Y. App. Div. 67.**306.** 1. New York Law. — *Hunter v. Hunter*, 67 N. Y. App. Div. 470; *Siefke v. Minden*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 631.**8. Release of a Joint Tortfeasor** — *United States*. — *Carey v. Bilby*, (C. C. A.) 129 Fed. Rep. 203. *Arkansas*. — *Jones v. Chism*, 73 Ark. 14, *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 306.*Michigan*. — *McBride v. Scott*, 132 Mich. 176, 102 Am. St. Rep. 416.*Missouri*. — *Dulaney v. Buffum*, 173 Mo. 1; *Hubbard v. St. Louis, etc., R. Co.*, 173 Mo. 249.*New Jersey*. — *Rogers v. Cox*, 66 N. J. L. 432.*New York*. — *Smith v. Consolidated Gas Co.*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 131; *O'Brien v. Brooklyn Heights R. Co.*, 80 N. Y. App. Div. 474.*North Carolina*. — *Burns v. Womble*, 131 N. Car. 173.*Vermont*. — *Dufur v. Boston, etc., R. Co.*, 75 Vt. 165.*Washington*. — *Abb v. Northern Pac. R. Co.*, 28 Wash. 428, 92 Am. St. Rep. 864.*Compare* *Louisville, etc., Mail Co. v. Barnes*, 117 Ky. 860.**Nonsuit** cannot be entered as to one joint tortfeasor and a judgment rendered against the other. *Hart v. Allegheny County Light Co.*, 201 Pa. St. 234. *Compare* *Booth v. Dorsey*, 202 Pa.

307. Another Reason for the Rule. — See note 1.

Release Pro Tanto. — See note 2.

Applies to Quasi-joint Tortfeasors. — See note 3.

Where the Release of One Tortfeasor Is under Seal. — See note 4.

308. Release of One Not Liable. — See notes 1, 5, 9.**3. Release of Claims for Personal Injuries. — See note 10.**

False Representation as to Character of Paper Signed. — See note 11.

St. 381; *Minnich v. Lancaster, etc., Electric R. Co.*, 203 Pa. St. 632.

For Circumstances Held Not to Constitute the Relation of joint tortfeasors so that a release of one would release all, see *Momence Stone Co. v. Turrell*, 106 Ill. App. 160, *affirmed* 205 Ill. 515 (claim against railroad for injuries — release of guaranty company); *Fox v. Michigan Cent. R. Co.*, (Mich. 1904) 101 N. W. Rep. 624, 11 Detroit Leg. N. 648 (claim against railroad for injuries — release of dealer selling liquor to person injured); *Gilbert v. Finch*, 72 N. Y. App. Div. 38; *Ceraline Mfg. Co. v. Anthracite Beer Co.*, 25 Pa. Super. Ct. 94 (claims against two separate attaching creditors, release of one).

307. 1. *Carey v. Bilby*, (C. C. A.) 129 Fed. Rep. 203; *Dufur v. Boston, etc., R. Co.*, 75 Vt. 165; *Abb v. Northern Pac. R. Co.*, 28 Wash. 428, 92 Am. St. Rep. 864.

2. Release Pro Tanto. — *Louisville, etc., Mail Co. v. Barnes*, 117 Ky. 860; *Walsh v. Hanan*, 93 N. Y. App. Div. 580; *Nagle v. Hake*, 123 Wis. 256. But see *McBride v. Scott*, 132 Mich. 176, 102 Am. St. Rep. 416.

Right Expressly Reserved. — A release of one joint tortfeasor is no bar to a recovery against another joint tortfeasor where it expressly reserves the right to sue the latter. *Hirschfield v. Alsberg*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 141.

3. Applies to Quasi-joint Tortfeasors. — *Abb v. Northern Pac. R. Co.*, 28 Wash. 428, 92 Am. St. Rep. 864.

4. Release under Seal. — *Hubbard v. St. Louis, etc., R. Co.*, 173 Mo. 249; *Rogers v. Cox*, 66 N. J. L. 432; *Smith v. Consolidated Gas Co.*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 131. Compare *Walsh v. Hanan*, 93 N. Y. App. Div. 580.

308. 1. Release of One Not Liable. — The *Massachusetts* rule has been applied in *Missouri*. *Hubbard v. St. Louis, etc., R. Co.*, 173 Mo. 249.

5. *Hirschfield v. Alsberg*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 141.

9. *Iddings v. Citizens' State Bank*, (Neb. 1902) 92 N. W. Rep. 578.

10. Effect of Such Release. — *United States.* — *Chicago, etc., R. Co. v. Green*, 114 Fed. Rep. 676; *Shook v. Illinois Cent. R. Co.*, (C. C. A.) 115 Fed. Rep. 57.

Illinois. — *Hartley v. Chicago, etc., R. Co.*, 214 Ill. 78; *Gourley v. West Chicago St. R. Co.*, 96 Ill. App. 68.

Kansas. — *Atchison, etc., R. Co. v. Bennett*, 63 Kan. 781; *Atchison, etc., R. Co. v. Van-ordstrand*, 67 Kan. 386.

Louisiana. — *Kelly v. Homer Compress Co.*, 110 La. 983.

Ohio. — *Lake Shore, etc., R. Co. v. Vogelson*, 23 Ohio Cir. Ct. 361.

Pennsylvania. — *Ogden v. Philadelphia, etc., Traction Co.*, 202 Pa. St. 480; *Laird v. Union Traction Co.*, 208 Pa. St. 574.

Texas. — *Chicago, etc., R. Co. v. Cain*, (Tex. Civ. App. 1904) 84 S. W. Rep. 682; *Thompson v. Ft. Worth, etc., R. Co.*, 97 Tex. 590; *Blount v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1904) 82 S. W. Rep. 305.

Statutory Prohibition of Release. — Where by statute a common carrier is prohibited from contracting against liability to employees, releases by employees for injuries received by the negligence of the carrier have been held to be void. *Mexican Nat. R. Co. v. Jackson*, (C. C. A.) 118 Fed. Rep. 549; *Coley v. North Carolina R. Co.*, 129 N. Car. 407. See also *McDermion v. Southern Pac. R. Co.*, 122 Fed. Rep. 669 (*Missouri* statute); *Tarbell v. Rutland R. Co.*, 73 Vt. 347, 87 Am. St. Rep. 734.

11. False Representations as to Character of Paper Signed. — *Alabama.* — *Western R. Co. v. Arnett*, 137 Ala. 414.

Illinois. — *Chicago City R. Co. v. McClain*, 211 Ill. 589; *Chicago City R. Co. v. Uhter*, 212 Ill. 174; *Spring Valley Coal Co. v. Buzis*, 213 Ill. 341; *Gourley v. West Chicago St. R. Co.*, 96 Ill. App. 68.

Iowa. — *Coles v. Union Terminal R. Co.*, 124 Iowa 48; *Jaques v. Sioux City Traction Co.*, 124 Iowa 257.

Louisiana. — *Davenport v. F. B. Dubach Lumber Co.*, 112 La. 943.

Minnesota. — *Schus v. Powers-Simpson Co.*, 85 Minn. 447.

Nebraska. — *New Omaha Thomson-Houston Electric Light Co. v. Rombold*, (Neb. 1903) 93 N. W. Rep. 966; *Osborne v. Missouri Pac. R. Co.*, (Neb. 1904) 98 N. W. Rep. 685.

New Hampshire. — *Hidden v. Exeter, etc., St. R. Co.*, 72 N. H. 422.

New Jersey. — *Burik v. Dundee Woolen Co.*, 66 N. J. L. 420.

New York. — *Fleming v. Brooklyn Heights R. Co.*, 95 N. Y. App. Div. 110.

North Carolina. — *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. Car. 254.

Ohio. — *Lake Shore, etc., R. Co. v. Ehler*, 25 Ohio Cir. Ct. 37.

Pennsylvania. — *Clayton v. Consolidated Traction Co.*, 204 Pa. St. 536.

Texas. — *International, etc., R. Co. v. Harris*, (Tex. Civ. App. 1901) 65 S. W. Rep. 885, *affirmed* 95 Tex. 346; *Galloway v. San Antonio, etc., R. Co.*, (Tex. Civ. App. 1903) 78 S. W. Rep. 32; *Chicago, etc., R. Co. v. Williams*, (Tex. Civ. App. 1904) 83 S. W. Rep. 248; *Chicago, etc., R. Co. v. Cain*, (Tex. Civ. App. 1904) 84 S. W. Rep. 682.

Washington. — *Bjorklund v. Seattle Electric Co.*, 35 Wash. 439.

309. Must Exercise Reasonable Care. — See notes 1, 2, 3.

Proof. — See notes 4, 5.

4. Release of Mortgage Interests. — See notes 6, 7, 8, 9.

Where the Debt Is Released. — See note 10.

310. Whether a Release of a Mortgage Will Constitute a Discharge or an Assignment. — See note 4.

Parol Release. — See note 6.

Release by Mortgagee. — See note 7.

309. 1. Must Exercise Reasonable Care. — *Hartley v. Chicago, etc.*, R. Co., 214 Ill. 78; *Atchison, etc.*, R. Co. v. Vanordstrand, 67 Kan. 386; *Kelly v. Homer Compress Co.*, 110 La. 983; *Osborne v. Missouri Pac. R. Co.*, (Neb. 1904) 98 N. W. Rep. 685; *Chicago, etc.*, R. Co. v. Williams, (Tex. Civ. App. 1904) 83 S. W. Rep. 248.

Failure to Read Release Immaterial Where Fraud Shown. — *International, etc.*, R. Co. v. Shuford, 36 Tex. Civ. App. 251.

Interpreter Held to Be Agent of Tortfeasor. — *Burik v. Dundee Woolen Co.*, 66 N. J. L. 420.

Foreigner Ignorant of Language — Release Not Binding. — *Bjorklund v. Seattle Electric Co.*, 35 Wash. 439.

2. Kelly v. Homer Compress Co., 110 La. 983. *Compare* *Western R. Co. v. Arnett*, 137 Ala. 414.

3. Knowledge of Contents Presumed. — *Atchison, etc.*, R. Co. v. Vanordstrand, 67 Kan. 386; *Osborne v. Missouri Pac. R. Co.*, (Neb. 1904) 98 N. W. Rep. 685; *Fivey v. Pennsylvania R. Co.*, 67 N. J. L. 627, 91 Am. St. Rep. 445; *Chicago, etc.*, R. Co. v. Williams, (Tex. Civ. App. 1904) 83 S. W. Rep. 248.

4. Proof — England. — *Ellen v. Great Northern R. Co.*, 49 W. R. 395.

Alabama. — *Western R. Co. v. Arnett*, 137 Ala. 414.

California. — *Davis v. Diamond Carriage, etc.*, Co., 146 Cal. 59.

Illinois. — *Indiana, etc.*, R. Co. v. Fowler, 201 Ill. 152, 94 Am. St. Rep. 158; *Chicago City R. Co. v. McClain*, 211 Ill. 589; *Chicago City R. Co. v. Uhter*, 212 Ill. 174; *Spring Valley Coal Co. v. Buzis*, 213 Ill. 341; *Chicago Union Traction Co. v. Ludlow*, 108 Ill. App. 357.

Minnesota. — *Schus v. Powers-Simpson Co.*, 85 Minn. 447.

New Hampshire. — *Hidden v. Exeter, etc.*, St. R. Co., 72 N. H. 422.

North Carolina. — *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. Car. 254.

Pennsylvania. — *Clayton v. Consolidated Traction Co.*, 204 Pa. St. 536; *Clark v. Lehigh Valley R. Co.*, 24 Pa. Super. Ct. 609.

South Carolina. — *Griffin v. Southern R. Co.*, 66 S. Car. 77.

Texas. — *International, etc.*, R. Co. v. Harris, (Tex. Civ. App. 1901) 65 S. W. Rep. 885, affirmed 95 Tex. 346; *Chicago, etc.*, R. Co. v. Williams, (Tex. Civ. App. 1904) 83 S. W. Rep. 248; *Chicago, etc.*, R. Co. v. Cain, (Tex. Civ. App. 1904) 84 S. W. Rep. 682.

Washington. — *Bjorklund v. Seattle Electric Co.*, 35 Wash. 439.

5. Burden of Proof. — *Shook v. Illinois Cent. R. Co.*, (C. C. A.) 115 Fed. Rep. 57; *Western R. Co. v. Arnett*, 137 Ala. 414; *Central of*

Georgia R. Co. v. Goodwin, 120 Ga. 83; *St. Louis, etc.*, *Electric R. Co. v. Erlinger*, 112 Ill. App. 506; *Chicago, etc.*, R. Co. v. Jennings, 114 Ill. App. 622; *Atchison, etc.*, R. Co. v. Vanordstrand, 67 Kan. 386; *Fivey v. Pennsylvania R. Co.*, 67 N. J. L. 627, 91 Am. St. Rep. 445.

The releasor is not estopped from showing fraud in obtaining the release by the fact that he accepted employment from the company as part consideration for obtaining the release, not knowing of the fraud that had been practiced upon him at the time of beginning such employment. *Coles v. Union Terminal R. Co.*, 124 Iowa 48.

6. Release of Mortgage Interests. — See *Gadsden v. Johnson*, 65 Neb. 447.

7. Frerking v. Thomas, 64 Neb. 193.

8. Sullivan v. Neary, 186 Mass. 158.

9. Release of Prior Mortgage Through Mistake. — Where a pledgee of a note and mortgage for convenience surrendered the note and released the mortgage upon the execution of new securities, in ignorance of an intervening mortgage on the same property, he was held to be entitled to have the original mortgage restored and given its priority. *Laconia Sav. Bank v. Vittum*, 71 N. H. 465, 93 Am. St. Rep. 561.

10. Mortgage Released by Release of Debt. — *Carroll v. Haigh*, 97 Ill. App. 576, reversed on other points 197 Ill. 193; *Grogan v. Valley Trading Co.*, 30 Mont. 229. See also *Finnegan v. Janeway*, 85 Minn. 384.

310. 4. Discharge or Assignment. — *Walker v. Neil*, 117 Ga. 733; *Mankato First Nat. Bank v. Pope*, 85 Minn. 433.

6. There cannot be a valid release of a mortgage by the parties thereto agreeing, without consideration, that it shall be of no force. *Lynn v. Bean*, 141 Ala. 236.

7. Release by Mortgagee. — Where a mortgagee is required by the mortgage to release portions of the land upon the payment of certain sums, and he not only does this but releases a right of way over the unreleased portion, he has barred himself from restoring the mortgaged land unaltered. *In re Thuresson*, 3 Ont. L. Rep. 271.

A release of certain property is a valuable consideration sufficient to support a promise to hold the mortgagee harmless in the sale of the remaining property under the mortgage. *Foy v. Dawkins*, 138 Ala. 232.

The release of a mortgage by one mortgagee does not affect the rights of his comortgagee. *Howe v. White*, 162 Ind. 74.

The mortgagee may release the mortgage at any time without consideration, and with or without the consent of the mortgagor. *Mueller v. Renkes*, 31 Mont. 100.

310. The Mortgagee May, However, Agree with the Purchaser. — See note 9. Conversely. — See note 12.

311. If Third Parties Have Not Become Interested. — See note 1. And a Mortgagee May, at the Request of the Mortgagor. — See note 2. After the Assignment of the Debt Secured by the Mortgage. — See note 7.

312. By Purchaser of Mortgaged Premises. — See note 1.
5. Release of Contingent Interests. — See note 7.
6. Release of Judgment. — See note 9.
 Intention to Release Only Part of Judgment. — See note 12.

313. 7. Release of Insurance — The Payment and Acceptance of a Smaller Amount. — See notes 5, 6.

314. IX. VALIDITY AND EFFECT OF RELEASE — 1. Validity — Not Contrary to Public Policy. — See note 6.

Misrepresentation and Mistake as to Extent of Injuries. — See notes 8, 9, 10, 11, 12.

310. 9. Agreement with Vendee. — *Drumm-Flato Commission Co. v. Bernard*, 66 Kan. 568.

As to the Rights of an Assignee of the Mortgage, after a release of a part of the mortgaged premises but failure to record the release, see *Gibson v. Thomas*, 85 N. Y. App. Div. 243, affirmed 180 N. Y. 483.

12. A Release of One of Several Mortgaged Plots, describing the plot released, by metes and bounds, referring to a map, does not include easements to use private roads laid out on the map, but not mentioned in the release. *Queens County Sav. Bank v. Hudson*, 83 N. Y. App. Div. 629.

311. 1. When Mortgagee May Release. — *Foy v. Dawkins*, 138 Ala. 232; *Drumm-Flato Commission Co. v. Barnard*, 66 Kan. 568.

2. Release Without Notice to Junior Mortgagee. — Where a senior mortgagee has released portions of mortgaged property without notice to the junior mortgagees, the senior mortgagee is chargeable with the loss occasioned by the release, and is also to be credited with any benefit resulting to the junior mortgagees made possible only by the execution of the release. *Flanagan v. Shaw*, 74 N. Y. App. Div. 508, affirmed 174 N. Y. 530.

7. *Cheshire Provident Inst. v. Gibson*, (Neb. 1902) 89 N. W. Rep. 243; *Geneseo First Nat. Bank v. National Live Stock Bank*, 13 Okla. 719.

The Execution and Delivery of a Quitclaim Deed by an assignee of the mortgagee to the successor in interest of the mortgagor will release the mortgagee. *Nickell v. Tracy*, 100 N. Y. App. Div. 80.

312. 1. By Purchaser of Mortgaged Premises. — When a mortgage is released, a bona fide purchaser of the premises takes free of the mortgage whether the purchase was made before or after the release. *Mueller v. Renkes*, 31 Mont. 100.

7. *Stolenburg v. Diercks*, 117 Iowa 25; *Johnston v. Osment*, 108 Tenn. 32.

Must Be in Writing. — A release of an heir's expectancy, so far as it applies to realty, must be in writing. *Gary v. Newton*, 201 Ill. 170.

9. *Little v. Koerner*, 28 Ind. App. 625; *Williams v. Blumenthal*, 27 Wash. 24. See also *Fred v. Fred*, (N. J. 1901) 50 Atl. Rep. 776. Compare *Upton v. Dennis*, 133 Mich. 238;

Evers v. Ostheimer, (Supm. Ct. Tr. T.) 37 Misc. (N. Y.) 163; *Hearn v. Hearn*, 24 R. I. 328, wherein there was held to be fraud and misrepresentation.

12. *Smith v. Richards*, 129 N. Car. 267.

313. 5. Paying Less than Amount of Policy. — *Simons v. Supreme Council, etc.*, 178 N. Y. 263, reversing 82 N. Y. App. Div. 617; *Riggs v. Home Mut. F. Protection Assoc.*, 61 S. Car. 448.

6. *C. H. Brown Banking Co. v. Baker*, 99 Mo. App. 660.

A Release Given Through Mistake, on receipt of a much smaller sum than the face of the policy, may be set aside. *Goodson v. National Masonic Acc. Assoc.*, 91 Mo. App. 339.

314. 6. Not Contrary to Public Policy. — *Ferguson v. Grand Trunk R. Co.*, 20 Quebec Super. Ct. 54.

Contract with Employee's Next of Kin Releasing Employer Void. — *Tarbell v. Rutland R. Co.*, 73 Vt. 347, 87 Am. St. Rep. 734.

8. Misrepresentation and Mistake as to Extent of Injuries. — *Fleming v. Brooklyn Heights R. Co.*, 95 N. Y. App. Div. 110; *Jones v. Gulf, etc., R. Co.*, 32 Tex. Civ. App. 198; *International, etc., R. Co. v. Shuford*, 36 Tex. Civ. App. 251; *Bjorklund v. Seattle Electric Co.*, 35 Wash. 439 (fraudulent representations by releasee's surgeon).

9. *Ellen v. Great Northern R. Co.*, 49 W. R. 395; *Wilcox v. Chicago, etc., R. Co.*, 111 Fed. Rep. 435; *Great Northern R. Co. v. Fowler*, (C. C. A.) 136 Fed. Rep. 118.

10. *Shook v. Illinois Cent. R. Co.*, (C. C. A.) 115 Fed. Rep. 57; *Chicago, etc., R. Co. v. Wilcox*, (C. C. A.) 116 Fed. Rep. 913; *Atchison, etc., R. Co. v. Bennett*, 63 Kan. 781; *Louisville, etc., R. Co. v. Carter*, (Ky. 1902) 66 S. W. Rep. 508; *Quebe v. Gulf, etc., R. Co.*, 98 Tex. 6.

11. *Shook v. Illinois Cent. R. Co.*, (C. C. A.) 115 Fed. Rep. 57; *Chicago, etc., R. Co. v. Wilcox*, (C. C. A.) 116 Fed. Rep. 913; *Atchison, etc., R. Co. v. Bennett*, 63 Kan. 781; *Louisville, etc., R. Co. v. Carter*, (Ky. 1902) 66 S. W. Rep. 508; *Quebe v. Gulf, etc., R. Co.*, 98 Tex. 6. But see *Wilcox v. Chicago, etc., R. Co.*, 111 Fed. Rep. 435; *Houston, etc., R. Co. v. Brown*, (Tex. Civ. App. 1902) 69 S. W. Rep. 651.

- 314.** Innocent Misrepresentation. — See note 13.
- 315.** Taking Advantage of the Releasor's Mental Condition. — See notes 1, 2, 3.
2. Effect — In General. — See note 7.
Interest in Land. — See note 12.
- 316.** Release of "All Actions and Demands." — See notes 2, 6.
By Seaman. — See note 17.
- 317.** Release to Agent. — See note 4.
Revocation of Release. — See note 7.
- 318.** X. RESCINDING AND SETTING ASIDE RELEASE — 1. For Fraud. — See notes 1, 2.

314. 12. Atchison, etc., R. Co. v. Bennett, 63 Kan. 781; Quebe v. Gulf, etc., R. Co., 98 Tex. 6.

13. Great Northern R. Co. v. Fowler, (C. C. A.) 136 Fed. Rep. 118.

315. 1. Taking Advantage of the Releasor's Mental Condition. — St. Louis, etc., R. Co. v. Brown, 73 Ark. 42, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 315; Chicago Union Traction Co. v. Ludlow, 108 Ill. App. 357; Merrill v. Pike, 94 Minn. 186; Roberts v. Central Lead Co., 95 Mo. App. 581; State v. Stuart, 111 Mo. App. 478; Galloway v. San Antonio, etc., R. Co., (Tex. Civ. App. 1903) 78 S. W. Rep. 32; Johnson v. Gulf, etc., R. Co., 36 Tex. Civ. App. 487.

2. Questions for Jury. — Shook v. Illinois Cent. R. Co., (C. C. A.) 115 Fed. Rep. 57; Merrill v. Pike, 94 Minn. 186.

3. Instructions. — So in some cases the court may be justified in instructing the jury to find that the release is binding and a bar to recovery. Lake Shore, etc., R. Co. v. Vogelson, 23 Ohio Cir. Ct. 361.

7. Effect. — Barnes v. Richards, 86 L. T. N. S. 231, 71 L. J. K. B. 341; Gourley v. West Chicago St. R. Co., 96 Ill. App. 68; Illinois Cent. R. Co. v. Heath, 80 S. W. Rep. 502, 26 Ky. L. Rep. 19; Kelly v. Homer Compress Co., 110 La. 983; Wonderly v. Christian, 91 Mo. App. 158; Uvalde Asphalt Paving Co. v. New York, 99 N. Y. App. Div. 327; Luesenhop v. Einsfeld, 93 N. Y. App. Div. 68; Conlon v. Hearn, 96 N. Y. App. Div. 608; Laird v. Union Traction Co., 208 Pa. St. 574. See also Russ v. Union Oil Co., 113 La. 196.

12. Injuries Subsequent to Release. — A receipt in full for damages to a building, given on the construction by the releasee of a wall to prevent further damage, has been held not to operate as a release of damages subsequently accruing from defective construction of such wall. Paterson Extension R. Co. v. Church of Holy Communion, 68 N. J. L. 399.

316. 2. Release of "All Actions and Demands." — A receipt "in full of all demands" which is for an amount equal to wages due and a doctor's bill will not be construed as a release of the defendant's liability for plaintiff's injuries. Davis v. Diamond Carriage, etc., Co., 146 Cal. 59.

A release of the lien of taxes operates as a release, discharge, and cancellation of such taxes for any and all purposes. Beatrice v. Wright, (Neb. 1904) 101 N. W. Rep. 1039.

For the validity of a release from one partner to another of a claim by reason of an

advance to purchase a membership in the New York Stock Exchange, see Sterling v. Chapin, 102 N. Y. App. Div. 589.

A settlement between a trespasser and a car company "of all the matters in controversy in this suit," judgment thereon, and its payment, will constitute a release of the railroad company from liability. Blake v. Kansas City Southern R. Co., (Tex. Civ. App. 1905) 85 S. W. Rep. 430.

6. Release to Father and Trustee. — Where a son released "all claims and demands" against his father, this did not include the son's equitable title or claim to land conveyed to C. by the father in a trust deed. Suit v. Suit, 97 Md. 539.

17. By Seaman. — Where the statutes require that seamen shall be paid and discharged before a shipping commissioner, in whose presence a mutual release shall be signed and attested by him, if the parties agree upon a settlement and provide that the release "shall operate as a mutual discharge and settlement of all demands for wages, etc.," such release is conclusive on the parties. Petterson v. Empire Transp. Co., (C. C. A.) 111 Fed. Rep. 931.

But these statutes do not comprise contracts by men to navigate a vessel to and from Alaska, and while there to work as fishermen for taking and canning salmon, not being contracts for the performance of services as seamen. Domenico v. Alaska Packers' Assoc., 112 Fed. Rep. 554.

317. 4. Release to Agent. — Where an agency was terminated by a contract, stipulating that neither party should have any claim against the other for any matter connected with the agency, the release was held not to bar an action for an injury to the business of the former agent, not connected with the former agency. Brown v. American Freehold Land Mortg. Co., (Tex. Civ. App. 1904) 82 S. W. Rep. 1056.

7. Release of Wrong Claim by Mistake. — Where one of two mortgages was paid, and the mortgagee released the wrong one on the record by mistake, but discovered his mistake and canceled the release before the mortgagor or his assignee had knowledge of the release, there was held to be a valid revocation. Frost v. George, 181 Mass. 271.

318. 1. Rescinding and Setting Aside Release — For Fraud — Alabama. — Western R. Co. v. Arnett, 137 Ala. 414.

Illinois. — Chicago City R. Co. v. Uhter, 212 Ill. 174; Chicago Union Traction Co. v. Ludlow, 108 Ill. App. 357.

319. Determined by Nature of Fraud — When Court of Law Will Hear the Evidence. — See note 1.

Jurisdiction of Equity. — See note 2.

Modern Practice. — See note 3.

2. For Mistake — *a.* OF LAW. — See notes 4, 5.

Mistake Induced by Fraud. — See note 6.

320. *b.* OF FACT. — See note 1.

Iowa. — *Coles v. Union Terminal R. Co.*, 124 Iowa 48.

Kentucky. — *Illinois Cent. R. Co. v. Keebler*, (Ky. 1905) 84 S. W. Rep. 1167.

Louisiana. — *Davenport v. F. B. Dubach Lumber Co.*, 112 La. 943.

Missouri. — *State v. Stuart*, 111 Mo. App. 478.

New Jersey. — *Mullaney v. Mullaney*, 65 N. J. Eq. 384.

New York. — *Smith v. Irvin*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 262; *Toomey v. Whitney*, 94 N. Y. App. Div. 154; *Fleming v. Brooklyn Heights R. Co.*, 95 N. Y. App. Div. 110.

Rhode Island. — *Gorman v. McCabe*, 24 R. I. 245; *Hearn v. Hearn*, 24 R. I. 328; *Hunt v. Reilly*, 24 R. I. 68, 96 Am. St. Rep. 707 (three years' silence no bar).

South Dakota. — *Hedlum v. Holy Terror Min. Co.*, 16 S. Dak. 261.

Texas. — *Northwestern L. Assoc. v. Findley*, 29 Tex. Civ. App. 494; *Jones v. Gulf, etc.*, R. Co., 32 Tex. Civ. App. 198; *International, etc.*, R. Co. v. Shuford, 36 Tex. Civ. App. 251; *Rapid Transit R. Co. v. Smith*, 98 Tex. 553.

Washington. — *Bjorklund v. Seattle Electric Co.*, 35 Wash. 439.

Rights of Innocent Third Persons Protected. — *Delta County Land, etc., Co. v. Talcott*, 17 Colo. App. 316; *Bristow v. Thackston*, 187 Mo. 332, 106 Am. St. Rep. 472.

318. 2. Fraud Must Be Clearly Proved — *United States.* — *Chicago, etc., R. Co. v. Green*, 114 Fed. Rep. 676; *Chicago, etc., R. Co. v. Wilcox*, (C. C. A.) 116 Fed. Rep. 913.

Alabama. — *Western R. Co. v. Arnett*, 137 Ala. 414.

Colorado. — *Delta County Land, etc., Co. v. Talcott*, 17 Colo. App. 316.

Illinois. — *Chicago, etc., R. Co. v. Jennings*, 114 Ill. App. 622.

Kansas. — *Atchison, etc., R. Co. v. Bennett*, 63 Kan. 781.

Minnesota. — *Kelly v. Pioneer Press Co.*, 94 Minn. 448.

New Jersey. — *Fivey v. Pennsylvania R. Co.*, 67 N. J. L. 627, 91 Am. St. Rep. 445.

New York. — *Conlon v. Hearn*, 96 N. Y. App. Div. 608.

Pennsylvania. — *Laird v. Union Traction Co.*, 208 Pa. St. 574.

Texas. — *Missouri, etc., R. Co. v. Smith*, 28 Tex. Civ. App. 565.

Question Is for Jury. — *State v. Stuart*, 111 Mo. App. 478; *Griffin v. Southern R. Co.*, 66 S. Car. 77.

Fraud Going to Consideration Only. — A written release cannot be impeached for fraud not inhering in the execution of the release, but which only goes to the consideration thereof.

Quincy Horse R., etc., Co. v. Omer, 109 Ill. App. 238; *Mattoon Gas Light, etc., Co. v. Dolan*, 111 Ill. App. 333; *Hartley v. Chicago, etc., R. Co.*, 214 Ill. 78.

319. 1. Jurisdiction of Law. — *Chicago City R. Co. v. Uhter*, 212 Ill. 174; *Spring Valley Coal Co. v. Buzis*, 213 Ill. 341; *Hartley v. Chicago, etc., R. Co.*, 214 Ill. 78; *Quincy Horse R., etc., Co. v. Omer*, 109 Ill. App. 238; *Miller v. Mutual Reserve Fund L. Assoc.*, 113 Ill. App. 481.

2. Jurisdiction of Equity. — *Chicago City R. Co. v. Uhter*, 212 Ill. 174; *Quincy Horse R., etc., Co. v. Omer*, 109 Ill. App. 238; *Miller v. Mutual Reserve Fund L. Assoc.*, 113 Ill. App. 481; *Chicago, etc., R. Co. v. Jennings*, 114 Ill. App. 622; *Roberts v. Central Lead Co.*, 95 Mo. App. 581; *Smith v. Irvin*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 262; *Gorman v. McCabe*, 24 R. I. 245; *Russell v. Dayton Coal, etc., Co.*, 109 Tenn. 43; *Liskey v. Snyder*, 56 W. Va. 610.

3. Modern Practice. — *Doyle v. Diamond Flint Glass Co.*, 10 Ont. L. Rep. 567. See also *State v. Stuart*, 111 Mo. App. 478.

4. For Mistake — Of Law. — A court of equity may reform a release where the name of the party paying the consideration has been erroneously stated through mutual mistake, and may insert a part of the consideration whether omitted through mistake of fact or of law. *Chicago, etc., R. Co. v. Green*, 114 Fed. Rep. 676.

In *Illinois*, relief from a release executed by mistake can only be granted in a court of equity. *Chicago, etc., R. Co. v. Jennings*, 114 Ill. App. 622.

A Misrepresentation of the Legal Effect of a release will not avoid the instrument. *Jackson v. Pennsylvania R. Co.*, 69 N. J. L. 79.

5. Duress. — *Domenico v. Alaska Packers' Assoc.*, 112 Fed. Rep. 554; *Barnes v. Richards*, 86 L. T. N. S. 231, 71 L. J. K. B. 341.

For facts considered not to amount to legal duress see *Petterson v. Empire Transp. Co.*, (C. C. A.) 111 Fed. Rep. 931; *Naretti v. Scully*, 133 Fed. Rep. 828.

Duress May Be Waived, and a release so obtained ratified, as by a failure to return or offer to return money received in consideration of the release. *Cammarata v. Pennsylvania Coal Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 787.

6. Mistake Induced by Fraud. — *Goodson v. National Masonic Acc. Assoc.*, 91 Mo. App. 339.

320. 1. Mistake of Fact. — *Chicago, etc., R. Co. v. Wilcox*, (C. C. A.) 116 Fed. Rep. 913, reversing on other grounds 111 Fed. Rep. 435; *Willard v. Davis*, 122 Fed. Rep. 363; *Quebe v. Gulf, etc., R. Co.*, 98 Tex. 6.

320. Laches. — See note 2.

3. Inadequacy of Consideration. — See note 3.

4. Returning Money Paid upon Rescission of Release. — See notes 5, 6.

321. See note 1.

XI. EVIDENCE. — See note 3.

322. RELIGION — RELIGIOUS. — See note 1.

Proof Must Be Clear, Unequivocal, and Convincing. — Chicago, etc., *R. Co. v. Wilcox*, (C. C. A.) 116 Fed. Rep. 913; *Reimer v. Green Room Club*, (Supm. Ct. App. T.) 84 N. Y. Supp. 561; *Great Northern R. Co. v. Fowler*, (C. C. A.) 136 Fed. Rep. 118.

Where the Mistake of Fact Is Induced by Fraud the release will be set aside. *Goodson v. National Masonic Acc. Assoc.*, 91 Mo. App. 339.

Where the plaintiff bought a part of mortgaged land, but the deed misdescribed it so that the plaintiff had no record title thereto, and the mortgagee, upon foreclosure, made the plaintiff a party, but dismissed as to him, finding that he had no record title, the dismissal was held not to constitute a release of any of the mortgagee's rights against the plaintiff. *Coughanour v. Hutchinson*, 41 Oregon 419.

320. 2. Laches. — *Lutjen v. Lutjen*, 64 N. J. Eq. 773.

3. Inadequacy of Consideration. — *Toomey v. Whitney*, 94 N. Y. App. Div. 154; *Hearn v. Hearn*, 24 R. I. 328; *Russell v. Dayton Coal, etc., Co.*, 109 Tenn. 43; *Quebe v. Gulf, etc., R. Co.*, 98 Tex. 6; *In re Bell*, (Utah 1905) 80 Pac. Rep. 615; *Timm v. Timm*, 34 Wash. 228. See also *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. Car. 254. *Compare Chicago Union Traction Co. v. Mommsen*, 107 Ill. App. 353; *Illinois Cent. R. Co. v. Heath*, 80 S. W. Rep. 502, 26 Ky. L. Rep. 19; *Forbs v. St. Louis, etc., R. Co.*, 107 Mo. App. 661.

Evidence Merely Tending to Show inadequacy of consideration is not sufficient to show fraud in obtaining the release and does not avoid the same. *Mattoon Gas Light, etc., Co. v. Dolan*, 111 Ill. App. 333. See also *Chicago, etc., R. Co. v. Green*, 114 Fed. Rep. 676.

5. Returning Money Paid upon Rescission of Release. — *Hill v. Northern Pac. R. Co.*, (C. C. A.) 113 Fed. Rep. 914; *Niederhauser v. Detroit Citizens' St. R. Co.*, 131 Mich. 550; *McNealy v. Baldrige*, 106 Mo. App. 11; *Doyle v. New York, etc., R. Co.*, 66 N. Y. App. Div. 398. See also *Highlands v. Cumberland Valley Farmers' Mut. F. Ins. Co.*, 203 Pa. St. 134.

6. The True Rule. — *Roberts v. Central Lead Co.*, 95 Mo. App. 581; *Bjorklund v. Seattle Electric Co.*, 35 Wash. 439.

321. 1. Actual Return Unnecessary — *Alabama*. — *Western R. Co. v. Arnett*, 137 Ala. 414.

Arkansas. — *St. Louis, etc., R. Co. v. Brown*, 73 Ark. 42.

Illinois. — *Indiana, etc., R. Co. v. Fowler*,

201 Ill. 152, 94 Am. St. Rep. 158; *Spring Valley Coal Co. v. Buzis*, 213 Ill. 341; *Quincy Horse R., etc., Co. v. Omer*, 109 Ill. App. 238.

Iowa. — *Jaques v. Sioux City Traction Co.*, 124 Iowa 257.

Kentucky. — *McGill v. Louisville, etc., R. Co.*, 114 Ky. 358.

Minnesota. — *Merrill v. Pike*, 94 Minn. 186.

Missouri. — *Bertrand v. St. Louis Transit Co.*, 108 Mo. App. 70.

South Carolina. — *Austin v. Piedmont Mfg. Co.*, 67 S. Car. 122.

Texas. — *Northwestern L. Assoc. v. Findley*, 29 Tex. Civ. App. 494; *Jones v. Gulf, etc., R. Co.*, 32 Tex. Civ. App. 198; *International, etc., R. Co. v. Shuford*, 36 Tex. Civ. App. 251.

Washington. — *Bjorklund v. Seattle Electric Co.*, 35 Wash. 439; *Timm v. Timm*, 34 Wash. 228.

Canada. — See *Doyle v. Diamond Flint Glass Co.*, 10 Ont. L. Rep. 567.

3. Parol Evidence — *California*. — *Brosnan v. Kramer*, 135 Cal. 36.

Georgia. — *Conant v. Jones*, 120 Ga. 568.

Iowa. — *Stolenburg v. Diercks*, 117 Iowa 25.

Kansas. — *Drumm-Flato Commission Co. v. Barnard*, 66 Kan. 568; *Atchison, etc., R. Co. v. Vanordstrand*, 67 Kan. 386.

Kentucky. — *Lanham v. Louisville, etc., R. Co.*, (Ky. 1905) 86 S. W. Rep. 680.

Missouri. — *Boggs v. Pacific Steam Laundry Co.*, 171 Mo. 282.

New York. — *Uvalde Asphalt Paving Co. v. New York*, 99 N. Y. App. Div. 327.

Pennsylvania. — *Ogden v. Philadelphia, etc., Traction Co.*, 202 Pa. St. 480; *Dowd v. Crow*, 205 Pa. St. 214.

Rhode Island. — *Hearn v. Hearn*, 24 R. I. 328; *Vaughan v. Mason*, 23 R. I. 348.

Texas. — *Rapid Transit R. Co. v. Smith*, 98 Tex. 553.

West Virginia. — *Rutherford v. Rutherford*, 55 W. Va. 56.

Wisconsin. — *Mandt Wagon Co. v. Fuller, etc., Mfg. Co.*, 120 Wis. 258.

As to the Burden of Proof. — *Chicago, etc., R. Co. v. Jennings*, 114 Ill. App. 622; *Mann v. Alves*, (Ky. 1902) 66 S. W. Rep. 1011; *Reimer v. Green Room Club*, (Supm. Ct. App. T.) 84 N. Y. Supp. 561.

322. 1. Religious Use. — A bequest to a priest of a particular church or his successor "for the purpose of saying masses" for testator and his wife is a bequest for a *religious* use. *O'Donnell's Estate*, 209 Pa. St. 63.

RELIGIOUS SOCIETIES.

BY F. G. BAMMAN.

- 327. I. DEFINITIONS — 1. Religious Society.** — See note 1.
 2. Parish. — See note 2.
 3. Church. — See note 7.
- 329. II. FORMATION AND ORGANIZATION — 4. Religious Corporations —**
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- 327. 1. A Christian Science Church.** — First Church of Christ, Scientist, 205 Pa. St. 543, 97 Am. St. Rep. 753.
 2. "Parishes" Are Not Recognized by the law as corporate or political entities. *McEntee v. Bonacum*, 66 Neb. 651; *Riffe v. Proctor*, 99 Mo. App. 601.
 7. A Congregation Is an Assembly. — *Pulis v. Iserman*, 71 N. J. L. 408. See also *Riffe v. Proctor*, 99 Mo. App. 601.
329. 9. *Allen v. North Des Moines M. E. Church*, 127 Iowa 96.
330. 3. Church Not Incorporated. — *Globe Furniture Co. v. Jerusalem Baptist Church*, 103 Va. 559. See also *Stubbs v. St. John's Church*, 96 Md. 267.
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 8. What Is Sufficient Proof of Incorporation. — See *Congregational Church v. Cutler*, 76 Vt. 338.
332. 1. User. — *Congregational Church v. Cutler*, 76 Vt. 338.
333. 2. Rector Called by Vestry in Protestant Episcopal Church. — *Stubbs v. St. John's Church*, 96 Md. 267.
334. 2. Manner of Fixing Salary. — See *Gladstone Baptist Church v. Scott*, 74 S. W. Rep. 1075, 25 Ky. L. Rep. 237.
 7. Civil Jurisdiction of Action on Contract. — *Kelsey v. Jackson*, 123 Ga. 113; *Gladstone Baptist Church v. Scott*, 74 S. W. Rep. 1075, 25 Ky. L. Rep. 237.
 8. *Satterlee v. U. S.*, 20 App. Cas. (D. C.) 393.
 11. Where the Salary Is to Be Derived from Voluntary Subscriptions the members of the church are not personally liable therefor. *Riffe v. Proctor*, 99 Mo. App. 601.
**335. 10. Papailiou v. Manusos, 108 Ill. App. 272.
336. 5. Maryland Statute of 1798, c. 24, Gives Vestry Power of Removing Minister. — *Stubbs v. St. John's Church*, 96 Md. 267.
 6. Removal Must Not Be Arbitrary. — See *Irvine v. Elliott*, 206 Pa. St. 152; *Morris St. Baptist Church v. Dart*, 67 S. Car. 338, 100 Am. St. Rep. 727.
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- 338.** 2. Regulation of Membership. — See note 7.
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- 339.** See note 1.
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- 343.** V. TRUSTEES — 8. Powers — *a.* IN GENERAL. — See notes 7, 8.
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- 347.** 9. Treasurer. — See note 2.
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- 348.** VII. JURISDICTION OF CIVIL COURTS — 1. *In General.* — See note 1.
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- 350.** 3. Enforcement of Trust — *a.* IN GENERAL. — See note 3
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338. 7. Shaeffer *v.* Klee, 100 Md. 264.

10. Manner of Expulsion. — Hatfield *v.* De Long, 31 Ind. App. 210.

339. 1. See Cranfill *v.* Hayden, (Tex. Civ. App. 1903) 75 S. W. Rep. 573.

5. Smith *v.* Bowers, 171 N. Y. 669, *affirming* 57 N. Y. App. Div. 252. See also Jones *v.* Sacramento Ave. M. E. Church, 198 Ill. 626.

8. Civil Jurisdiction. — Hatfield *v.* De Long, 31 Ind. App. 210; Bonacum *v.* Murphy, (Neb. 1905) 104 N. W. Rep. 180; Pinke *v.* Bornhold, 8 Ont. L. Rep. 579, *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 339. See also Jones *v.* Sacramento Ave. M. E. Church, 198 Ill. 626.

340. 4. Reinke *v.* German Evangelical Lutheran Trinity Church, 17 S. Dak. 262.

343. 7. Powers Conferred by Statute. — Globe Furniture Co. *v.* Jerusalem Baptist Church, 103 Va. 559. See also Feiner *v.* Reiss, 98 N. Y. App. Div. 40.

8. Possession Vested in Trustees. — African Baptist Church *v.* White, 69 S. W. Rep. 757, 24 Ky. L. Rep. 646; Westminster Presb. Church *v.* Findley, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 173; Dayton *v.* Carter, 206 Pa. St. 491; Alexander *v.* Bowers, (Tex. Civ. App. 1904) 79 S. W. Rep. 342.

10. New York Laws of 1813, c. 60. — Westminster Presb. Church *v.* Findley, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 173.

344. 3. Papailiou *v.* Manusos, 108 Ill. App. 272; Dayton *v.* Carter, 206 Pa. St. 491.

345. 2. See Globe Furniture Co. *v.* Jerusalem Baptist Church, 103 Va. 559.

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346. 2. Unauthorized Acts of Trustees. — Globe Furniture Co. *v.* Jerusalem Baptist Church, 103 Va. 559.

6. See Globe Furniture Co. *v.* Jerusalem Baptist Church, 103 Va. 559.

10. See Copeland *v.* Hewett, 96 Me. 525.

347. 2. See Mt. Calvary Church *v.* Albers, 174 Mo. 331.

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348. 1. General Rule as to Jurisdiction of Civil Courts. — Papailiou *v.* Manusos, 108 Ill. App. 272; Shaeffer *v.* Klee, 100 Md. 264; Westminster Presb. Church *v.* Findley, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 173; Morris St. Baptist Church *v.* Dart, 67 S. Car. 338, 100 Am. St. Rep. 727; Reinke *v.* German Evangelical Lutheran Trinity Church, 17 S. Dak. 262.

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349. 2. Bonacum *v.* Murphy, (Neb. 1905) 104 N. W. Rep. 180; Gipson *v.* Morris, 36 Tex. Civ. App. 593.

3. Satterlee *v.* U. S., 20 App. Cas. (D. C.) 393.

6. Where Property Rights Are Involved. — Morris St. Baptist Church *v.* Dart, 67 S. Car. 338, 100 Am. St. Rep. 727; Alexander *v.* Bowers, (Tex. Civ. App. 1904) 79 S. W. Rep. 342.

350. 3. Trusts. — Mount *v.* Tuttle, 99 N. Y. App. Div. 433.

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360. 4. Control of Majority. — See notes 6, 7.

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366. *d.* POWER OF TRUSTEES. — See note 6.

370. X. LIABILITY ON CONTRACTS — 1. In General. — See note 5.

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351. 7. Grounds for Interference. — See Jones v. Sacramento Ave. M. E. Church, 198 Ill. 626.

353. 10. Church Leaving the Denomination. — See Pulis v. Iserman, 71 N. J. L. 408; Dochkus v. Lithuanian Ben. Soc., 206 Pa. St. 25.

355. 6. See Dochkus v. Lithuanian Ben. Soc., 206 Pa. St. 25.

356. 3. Where Property Charged with Trust. — Cape v. Plymouth Cong. Church, 117 Wis. 150.

358. 2. Peterson v. Christianson, (S. Dak. 1904) 101 N. W. Rep. 40.

8. Shaeffer v. Klee, 100 Md. 264.

11. Cape v. Plymouth Cong. Church, 117 Wis. 150.

359. 3. Dayton v. Carter, 206 Pa. St. 491.

7. The Right to Challenge a Contributor's Vote may be lost by estoppel. Davie v. Heal, 86 N. Y. App. Div. 517, affirmed 180 N. Y. 545.

360. 6. Power of Majority. — Gipson v. Morris, 36 Tex. Civ. App. 593.

7. See Gipson v. Morris, 36 Tex. Civ. App. 593.

9. Feiner v. Reiss, 98 N. Y. App. Div. 40.

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361. 2. See Feiner v. Reiss, 98 N. Y. App. Div. 40.

3. Title of Trustees. — Globe Furniture Co. v. Jerusalem Baptist Church, 103 Va. 559.

9. Conveyance to Bishop. — See Dochkus v. Lithuanian Ben. Soc., 206 Pa. St. 25.

363. 2. Effect of Bequest to Wardens and Vestry. — St. James Parish v. Bagley, 138 N. Car. 384.

5. Bequest to Unincorporated Society. — Murray v. Miller, 85 N. Y. App. Div. 414, affirmed 178 N. Y. 316.

12. Statute Applies to Unincorporated Societies. — See Feiner v. Reiss, 98 N. Y. App. Div. 40.

364. 9. Statutes. — See Jones v. Sacramento Ave. M. E. Church, 198 Ill. 626.

365. 3. New York Statute. — Feiner v. Reiss, 98 N. Y. App. Div. 40.

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366. 6. Jones v. Sacramento Ave. M. E. Church, 198 Ill. 626; Feiner v. Reiss, 98 N. Y. App. Div. 40.

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370. 5. See Allen v. North Des Moines M. E. Church, 127 Iowa 96.

7. East Baltimore Lumber Co. v. K'Nessett Israel Aushe S'Phard Congregation, 100 Md.

370. 3. Individual Liability of Members. — See note 10.

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372. XI ACTIONS BY AND AGAINST — 8. Quo Warranto. — See note 1.

XII. DISSOLUTION. — See note 4.

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125; Cann v. Church of Redeemer, 111 Mo. App. 164. See also Allen v. North Des Moines M. E. Church, 127 Iowa 96.

370. 10. Allen v. North Des Moines M. E. Church, 127 Iowa 96.

12. Riffe v. Proctor, 99 Mo. App. 601; Males v. Murray, 23 Ohio Cir. Ct. 396. See also Teed v. Parsons, 202 Ill. 455.

Lien of Judgment. — A judgment for church furniture bought by two trustees of a church constitutes no lien on the real estate of the congregation. Globe Furniture Co. v. Jerusalem Baptist Church, 103 Va. 559.

372. 1. See Dayton v. Carter, 206 Pa. St. 491.

4. Agreement of Members. — Allen v. North Des Moines M. E. Church, 127 Iowa 96.

7a. "Rely" and "Believe" Are Nearly Synonymous. — To rely is to depend on some one or some thing as worthy of confidence, to repose confidence, to trust: used with "on" or "upon." To believe is to accept as true on the testimony or authority of others, to have faith or confidence in the truth of any one or anything. Spencer v. Hersam, 31 Mont. 120.

8. Remain construed to mean "tarrying" or "loitering." Ghio v. Stephens, (Tex. Civ. App. 1904) 78 S. W. Rep. 1084. See also Tinkle v. Sweeney, 97 Tex. 190.

"Remaining" Used in Sense of "Other." — Smith v. Myers, 212 Pa. St. 51.

REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS.

BY H. W. HOYE.

378. 1. REMAINDERS — 1. Definition. — See note 1.

2. General Principles Applicable to Remainders — a. PRECEDENT PARTICULAR ESTATE — (1) Necessity to Support Remainder. — See note 4.

379. (2) Quantity of Particular Estate — Life Estate. — See note 7.

382. c. TIME OF VESTING IN RIGHT — (2) Remainders to Class — Some of Class in Esse. — See note 6.

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387. 4. Several Kinds of Remainders — a. VESTED REMAINDERS — (1) Definition. — See note 6.

388. In New York. — See note 1.

(2) General Principles Applicable to Vested Remainders — (a) Distinguishing Characteristic. — See note 3.

389. See note 1.

378. 1. Kent's Definition. — See Biggerstaff v. Van Pelt, 207 Ill. 611.

4. Necessity of Particular Estate. — Archer v. Jacobs, 125 Iowa 467.

379. 7. Statutes Affecting Remainders After Estate pur Autre Vie. — See Matter of Bogardus, (Surrogate Ct.) 43 Misc. (N. Y.) 473.

382. 6. Remainder to Class. — Fields v. Gwynn, 19 App. Cas. (D. C.) 99; Melton v. Camp, 121 Ga. 693; Archer v. Jacobs, 125 Iowa 467; Dalmazzo v. Simmons, (Ky. 1904) 78 S. W. Rep. 179; In re Vreeland, 66 N. J. Eq. 297; Reynolds v. Reynolds, 65 S. Car. 390; Blackburn v. Blackburn, 109 Tenn. 674.

383. 2. Contingency as to Class. — Waddell v. Waddell, 68 S. Car. 335.

387. 6. Other Definitions. — Fields v.

Lewis, 118 Ga. 573; Ruddell v. Wren, 208 Ill. 508.

388. 1. Vested Remainder under New York Statute. — A remainder after the death of the life tenant to "the person who shall then be known and recognized by the unincorporated ecclesiastical body now calling itself and known by the style of 'The Synod of the Reformed Presbyterian Church in North America, as its treasurer,'" is a vested remainder. Murray v. Miller, 85 N. Y. App. Div. 414, affirmed 178 N. Y. 316.

3. Fearne's Criterion Approved. — Roach v. Dance, 80 S. W. Rep. 1097, 26 Ky. L. Rep. 157; Howbert v. Cauthorn, 100 Va. 649.

389. 1. Compare Roach v. Dance, (Ky. 1904) 80 S. W. Rep. 1097.

389. The True Criterion. — See notes 2, 3, 5.

390. (c) Nature and Incidents of Remainderman's Interest — In General. — See note 9.

391. Subject to Execution and Attachment. — See note 1.

Rights and Remedies of Remainderman. — See notes 7, 8, 10.

392. Statute of Limitations. — See note 1.

Partition Among Remaindermen. — See note 2.

(d) Construction as Vested Remainder Favored. — See note 4.

Intention Governs. — See note 6.

393. Conditions as Affecting Nature of Remainder. — See note 3.

Doctrine of Survivorship. — See notes 4, 6.

389. 2. Present Interest to Be Enjoyed in Future. — *Jossey v. Brown*, 119 Ga. 758; *Callison v. Morris*, 123 Iowa 297, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 389; *Smith v. Smith*, 116 Wis. 570.

3. Uncertainty of Taking Effect in Possession. — *Fields v. Lewis*, 118 Ga. 573, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 389; *Sumpter v. Carter*, 115 Ga. 893.

5. Life Tenant with Power to Consume Entire Estate. — So where property is left in trust for the testator's grandson for life with the remainder to the children of the testator, the remainder is vested, even though the trustee has the power to sell the property and reinvest the proceeds. *Cruikshank v. Cruikshank*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 401.

390. 9. Vested Remainder Transferable by Deed. — *Smith v. Smith*, 116 Wis. 570.

391. 1. Vested Remainders Subject to Attachment. — *Compare Luquière v. Lee*, 121 Ga. 624.

Vested Remainder Subject to Execution. — *Kinkead v. Ryan*, 65 N. J. Eq. 726.

Vested Remainder Passes to Trustee in Bankruptcy. — *Watkins v. Bigelow*, 93 Minn. 361. And see the title INSOLVENCY AND BANKRUPTCY, 727. 7.

Sale by Order of Court. — In *North Carolina* it is held that where the estate is not earning an adequate income, it may be sold by order of the court, if there is a remainderman *in esse*, and this even if there is considerable possibility of other remaindermen coming into existence later. *Springs v. Scott*, 132 N. Car. 548.

7. Protection of Interests in General. — See *Levee Com'rs v. Nelms*, 84 Miss. 642.

So where an estate for life is left to A with remainder to B, giving to A power to sell, but prescribing that the funds arising from such sale shall be invested for the benefit of B, B is entitled to a decree in equity to enforce his rights. *Dickey v. Barnstable*, 122 Iowa 572.

8. Removal of Cloud on Title. — *Murray v. Quigley*, 119 Iowa 6, 97 Am. St. Rep. 276.

10. Recovery of Damages for Tort. — *Abernethy v. Orton*, 42 Oregon 437, 95 Am. St. Rep. 774.

392. 1. Statute of Limitations. — *Chicago, etc., R. Co. v. Vaughn*, 206 Ill. 234; *Turner v. Hause*, 199 Ill. 464; *Davis v. Willson*, 115 Ky. 639; *Charleston, etc., R. Co. v. Reynolds*, 69 S. Car. 481.

2. Consent of the Life Tenant is essential in *New York* to a partition of the estate at suit of the remaindermen. *Mersereau v. Camp*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 253.

4. Construction as Vested Remainder Favored —

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United States. — *McClellan v. Mackenzie*, (C. C. A.) 126 Fed. Rep. 701.

Georgia. — *Fields v. Lewis*, 118 Ga. 573.

Illinois. — *Boatman v. Boatman*, 198 Ill. 414.

Indiana. — *Nelson v. Nelson*, (Ind. App. 1904) 72 N. E. Rep. 482; *Burke v. Barrett*, 31 Ind. App. 635.

Iowa. — *Archer v. Jacobs*, 125 Iowa 467; *Callison v. Morris*, 123 Iowa 297; *Taylor v. Taylor*, 118 Iowa 407.

Kansas. — *McLaughlin v. Penney*, 65 Kan. 523.

New York. — *Kent v. Kent*, 99 N. Y. App. Div. 112; *Matter of Hitchins*, (Surrogate Ct.) 43 Misc. (N. Y.) 485, affirmed 101 N. Y. App. Div. 612; *Ogden v. Ogden*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 473; *Manhattan Real Estate, etc., Assoc. v. Cudlipp*, 80 N. Y. App. Div. 532; *Lewis v. Howe*, 174 N. Y. 340; *Arnot v. Arnot*, 75 N. Y. App. Div. 230.

Rhode Island. — *Rhode Island Hospital Trust Co. v. Noyes*, 26 R. I. 323.

Vermont. — *Burton v. Provost*, 75 Vt. 199.

Virginia. — *Howbert v. Cauthorn*, 100 Va. 649; *Allison v. Allison*, 101 Va. 537.

Wisconsin. — *In re Moran*, 118 Wis. 177; *Smith v. Smith*, 116 Wis. 570.

6. Intention Governs. — *In re Moran*, 118 Wis. 177.

Illustrations. — A devise to testator's widow for life, remainder to his daughters, but directing that on the decease of either of the daughters her share should go to her issue, or, in case of no issue, to her sister, is a vested remainder, the clause relating to the disposition of the property in case of the death of one daughter being held to refer to her death before the death of the life tenant. *Ketchum v. Ketchum*, 100 N. Y. App. Div. 423.

393. 3. Conditions as Affecting Nature of Remainder. — *Oetjen v. Diemmer*, 115 Ga. 1005; *Yarman v. Hawley*, 132 Mich. 321, 9 Detroit Leg. N. 630; *Scottish-American Mortg. Co. v. Bunckley*, 81 Miss. 599; *Bowen v. Hackney*, 136 N. Car. 187.

4. Doctrine of Survivorship. — *Loomer v. Loomer*, 76 Conn. 522; *Sumpter v. Carter*, 115 Ga. 893; *Burke v. Barrett*, 31 Ind. App. 635; *Tarbell v. Smith*, 125 Iowa 388; *Smith v. Smith*, 186 Mass. 138; *Coon v. Coon*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 693; *Wicker v. Wicker*, 70 S. Car. 33; *Allison v. Allison*, 101 Va. 537; *In re Moran*, 118 Wis. 177. But see *Schaeffer v. Schaeffer*, 54 W. Va. 681.

6. Words Importing Time of Possession. — *Buswell v. Newcomb*, 183 Mass. 111. But see *Schaeffer v. Schaeffer*, 54 W. Va. 681.

395. Equitable Conversion. — See note 1.

(e) Words Importing Time as Distinguished from Contingency — Words Denoting Time. — See note 3.

(f) Limitations in Default of Appointment. — See note 5.

396. *b.* CONTINGENT REMAINDERS — (1) *Definition.* — See note 1.

397. (2) *Classes of Contingent Remainders* — (b) *Exceptions* — *aa.* EXCEPTIONS TO FIRST CLASS. — See note 4.

399. (3) *Principles Relating to Contingent Remainders Generally* — (a) *Distinguishing Characteristic* — *aa.* CONTINGENT REMAINDERS AT COMMON LAW — *Present Incapacity, etc., Not True Criterion.* — See note 6.

400. *bb.* CONTINGENT REMAINDERS AS DEFINED BY STATUTE. — See note 3.

401. *cc.* CONTINGENT REMAINDERS IN JURISDICTIONS ADOPTING STATUTORY DEFINITION. — See note 1.

402. (b) *Nature of Particular Estate* — *aa.* REMAINDERS OF FREEHOLD — (*aa*) *Rule at Common Law* — When the Legal Estate Is in Trustees. — See note 1.

405. (d) *Nature of Remainderman's Interest* — *aa.* GENERAL PRINCIPLES — *Contingent Remainder Not an Estate.* — See notes 2, 4.

406. *Not Subject to Attachment or Execution.* — See note 2.

bb. DEVOLUTION AND TRANSFER — (*aa*) *Transfers Inter Vivos* — *aaa.* *Rule at Common Law* — *Alienability in General.* — See note 4.

407. *Mode of Transfer* — *By Estoppel.* — See note 3.

bbb. *Rule in Equity.* — See note 7.

ccc. *Statutory Rule.* — See note 8.

408. (*cc*) *Descent to Heir of Remainderman.* — See note 4.

413. (h) *Destruction of Contingent Remainders* — *aa.* HOW DESTRUCTION IS EFFECTED — (*bb*) *Modes of Determining Particular Estate* — *ccc.* *Merger of Particular Estate in Inheritance.* — See note 3.

395. 1. *Rule Not Affected by Equitable Conversion under Will.* — *Bates v. Spooner*, 75 Conn. 501.

3. *Words Importing Time and Not Contingency.* — *Archer v. Jacobs*, 125 Iowa 467; *Kinhead v. Ryan*, 64 N. J. Eq. 454; *Matter of Hitchins*, (Surrogate Ct.) 43 Misc. (N. Y.) 485, *affirmed* 101 N. Y. App. Div. 612; *Manhattan Real Estate, etc., Assoc. v. Audlipp*, 80 N. Y. App. Div. 532; *Matter of Ranken*, 101 N. Y. App. Div. 189, *affirmed* 182 N. Y. 519. But see *In re Melcher*, 24 R. I. 575.

5. *Remainder Over in Default of Appointment.* — *Graham v. Whitridge*, 99 Md. 248.

396. 1. *Contingent Remainder Defined.* — *Ward v. Ward*, 131 Fed. Rep. 946; *Fields v. Lewis*, 118 Ga. 573; *Thompson v. Adams*, 205 Ill. 552; *Ruddell v. Wren*, 208 Ill. 508; *Taylor v. Taylor*, 118 Iowa 407.

397. 4. *Devise to Widow for Life, and in Case She Marry, to Another.* — *Hoover v. Smith*, 96 Md. 393. But see *Thompson v. Adams*, 205 Ill. 552.

399. 6. *Remainder to Persons Answering Certain Description at Determination of Particular Estate.* — *Heberton v. McClain*, 135 Fed. Rep. 226; *Cronan v. Adams*, 185 Mass. 436; *Thall v. Dreyfus*, 84 N. Y. App. Div. 569; *Mulliken v. Earnshaw*, 209 Pa. St. 226; *Raleigh's Estate*, 206 Pa. St. 451; *Allison v. Allison*, 101 Va. 537; *Howbert v. Cauthorn*, 100 Va. 649.

On a devise in trust for the joint lives of A and B and the life of the survivor of them, and after the death of the survivor to the children of A, the remainder does not vest until both the joint life tenants are dead. *Denison v. Denison*, 96 N. Y. App. Div. 418.

400. 3. *Effect of New York Statute.* — *Mat-*

ter of Ryder, (Surrogate Ct.) 43 Misc. (N. Y.) 476; *Cook v. Straiton*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 206, *affirmed* 96 N. Y. App. Div. 625; *Lewis v. Howe*, 174 N. Y. 340; *Ogden v. Ogden*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 673.

401. 1. *Decisions Adopting New York Rule.* — *Archer v. Jacobs*, 125 Iowa 467; *Boatman v. Boatman*, 198 Ill. 414; *Chapin v. Nott*, 203 Ill. 341; *In re Moran*, 118 Wis. 177.

402. 1. *Legal Estate in Trustees.* — See *Brigham v. Peter Bent Brigham Hospital*, (C. C. A.) 134 Fed. Rep. 513.

405. 2. *Contingent Remainder Not an Estate.* — *Taylor v. Adams*, 93 Mo. App. 277.

4. *Injunction Against Waste.* — *Wiley v. Wiley*, (Neb. 1901) 95 N. W. Rep. 702.

406. 2. *Contingent Remainder Not Subject to Execution.* — *Compare* under the *Virginia* statute *Wilson v. Langhorne*, 102 Va. 631.

4. *Contingent Remainders Alienable — Ascertained Remainderman.* — *Ward v. Ward*, 131 Fed. Rep. 946.

407. 3. *Deed Operating by Way of Estoppel.* — See *Wilson v. Langhorne*, 102 Va. 631.

7. *Contingent Remainder Assignable in Equity.* — *McDonald v. Bayard Sav. Bank*, 123 Iowa 413; *Kornegay v. Miller*, 137 N. Car. 659, 107 Am. St. Rep. 489.

8. *Statutes Authorizing Conveyance of Contingent Remainder by Deed.* — *Wilson v. Langhorne*, 102 Va. 631.

Contingent Remainders May Be Mortgaged when the statute permits their devise. *Davis v. Willson*, 115 Ky. 639.

408. 4. *Contingent Remainder Transmissible by Descent.* — *Matter of Reith*, 144 Cal. 314.

413. 3. *Merger of Particular Estate in In-*

417. (5) *Double Contingencies or Contingency with Double Aspect.* — See note 6.

418. 5. *Acceleration of Remainders* — *a.* REMAINDERS PRECEDED BY VESTED INTERESTS — *Vested Remainder.* — See notes 5, 7.

419. *b.* REMAINDERS PRECEDED BY CONTINGENT INTERESTS. — See note 7.

420. II. REVERSIONS — 1. *Definition and General Principles* — *a.* REVERSION DEFINED — *Loose Use of Term "Revert."* — See note 3.

423. 2. *Incidents and Properties* — *c.* DEVOLUTION AND ALIENATION — *Descent and Devise.* — See note 6.

425. 4. *Loss or Extinction* — *Statute of Limitations and Adverse Possession.* — See note 2.

428. III. EXECUTORY INTERESTS — 2. *Definitions* — *c.* EXECUTORY DEVISE. — See note 7.

437. 4. *Classes of Executory Limitations Considered* — *c.* EXECUTORY LIMITATIONS OF CHATTEL INTERESTS — (2) *After Life Estate in Chattels Real or Personal* — (a) *In Chattels Personal* — *aa.* IN GENERAL. — See note 8.

441. (b) *In Terms for Years.* — See note 6.

442. (3) *After Limitations Which in Realty Would Create Estates Tail.* — See note 8.

446. 5. *Incidents and Characteristics* — *a.* VALIDITY OF EXECUTORY LIMITATIONS — (2) *Limitation on Repugnant Contingency* — (c) *Limitation After Gift with Absolute Power of Disposal.* — See note 1.

449. (d) *Limitation After Life Estate with Power of Disposal.* — See note 2.

456. *g.* DEVOLUTION AND ALIENATION. — See note 2.

459. REMEDY. — See note 3.

462. REMOVE — REMOVAL. — See note 2.

463. REM, PROCEEDINGS IN. — See note 2.

464. RENEW — RENEWAL. — See note 4.

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417. 6. *Contingency with Double Aspect.* — *Thomas v. Castle*, 76 Conn. 447; *Chapin v. Nott*, 203 Ill. 341; *McKee v. McKee*, (Ky. 1904) 82 S. W. Rep. 451.

418. 5. *Revocation or Forfeiture.* — *Fletcher v. Hohlitzell*, 209 Pa. St. 337, *quoting* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 418.

7. *Acceleration as Matter of Testamentary Intent.* — *In re Rogers*, 97 Md. 674.

419. 7. *Remainders Preceded by Contingent Interests.* — *Oetjen v. Diemmer*, 115 Ga. 1005.

420. 3. *Deed Expressing that Property Shall "Revert."* — *Biggerstaff v. Van Pelt*, 207 Ill. 611, *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 420.

423. 6. *Devisable.* — *Biggerstaff v. Van Pelt*, 207 Ill. 611.

425. 2. *Statute of Limitations — When Begins to Run.* — *Lewis v. Lewis*, 76 Conn. 586; *Dickinson v. Griggsville Nat. Bank*, 111 Ill. App. 183, *affirmed* 209 Ill. 350.

428. 7. *Executory Devise.* — *Rutledge v. Fishburne*, 66 S. Car. 155, 97 Am. St. Rep. 757.

437. 8. *Remainder After Life Interest in Chattel Good.* — *Dickinson v. Griggsville Nat. Bank*, 209 Ill. 350, *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 437; *Spengler v. Kuhn*, 212 Ill. 186,

441. 6. *Conveyance of Future Interest After Life Estate Reserved.* — *Gibson v. Thompson*, 83 S. W. Rep. 138, 26 Ky. L. Rep. 1085.

442. 8. *Remainder of Personality After Limitation Which in Realty Would Create Estate Tail Void.* — *Gillie v. Marsh*, 186 Mass. 336.

446. 1. *Limitation Over Inconsistent with Prior Absolute Gift.* — *Rowe v. Rowe*, 120 Iowa 17; *Dickinson's Estate*, 209 Pa. St. 59.

449. 2. *Gift for Life with Power of Appointment or Disposal.* — *Dickinson v. Griggsville Nat. Bank*, 209 Ill. 350; *Dana v. Dana*, 185 Mass. 156.

456. 2. *Executory Interests Devisable.* — *Hall v. Brownlee*, 164 Ind. 238, *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 455, 456.

459. 3. *Remedy.* — *State v. Barlow*, 70 Ohio St. 363.

462. 2. *"Removal" and "Discharge" Synonymous.* — *Cook v. Ceas*, 143 Cal. 221.

"Removal" Not Synonymous with "Vacating." — *Pagett v. Brooks*, 140 Ala. 257.

463. 2. *Proceedings in Rem.* — *Hill v. Henry*, 66 N. J. Eq. 150.

Proceedings to Vacate Streets held to be in rem. *Detroit Real Estate Invest. Co. v. Wayne Circuit Judge*, 137 Mich. 108.

Partition Suit held to be in rem. *Sandiford v. Hempstead*, 97 N. Y. App. Div. 163.

464. 4. *Renew.* — *Lowry Nat. Bank v. Fickett*, 122 Ga. 489.

466. RENT. — See note 2.

469. RENTAL — RENTAL VALUE. — See note 2.

470. REPAIR. — See note 4.

471. See note 1.

472. See note 2.

466. 2. Further Definition. — *Wegner v. Lubenow*, 12 N. Dak. 95.

469. 2. Rental. — See also *Western Union Tel. Co. v. American Bell Telephone Co.*, (C. C. A.) 125 Fed. Rep. 342.

470. 4. Replacing Rotten Stones in a Curb with New Stones is a repairing. *Perkinson v. Schnaake*, 108 Mo. App. 255.

471. 1. Repair Does Not Mean to Make New Thing. — *Gagnon v. U. S.*, 193 U. S. 451; *McCaffrey v. Omaha*, (Neb. 1904) 101 N. W. Rep. 251.

472. 2. Repair in Sense of Rebuild, Reconstruct, Etc. — *Heath v. Manson*, 147 Cal. 700, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 472.

REPLEVIN.

By B. B. CLARK.

477. I. DEFINITION AND HISTORY. — See note 1.

II. NATURE OF ACTION. — See notes 8, 10, 12.

478. See note 1.

III. JURISDICTION AND VENUE — Jurisdictional Amount. — See note 10.

479. The Venue. — See notes 1, 3, 4.

IV. PROPERTY WHICH MAY BE REPLEVIED — 1. In General — Personal Property. — See note 10.

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2. Real Property. — See note 11.

481. See notes 4, 5.

3. Identification. — See note 8.

482. Identity as Affected by Confusion. — See note 1.

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V. TITLE TO SUPPORT REPLEVIN — 1. In General. — See notes 12, 13.

477. 1. Definition. — *Three States Lumber Co. v. Blanks*, 133 Fed. 479, 66 C. C. A. 353; *Glass v. Basin, etc.*, Min. Co., 31 Mont. 21.

8. Replevin Action Ex Delicto. — *Tumulty v. Jordan*, 67 N. J. L. 509.

Replevin Is Not a Chancery Action which can be invoked for the cancellation of a contract. *Penton v. Hansen*, 13 Okla. 450.

10. *Jenkins v. Ontario*, 44 Oregon 72, 102 Am. St. Rep. 625.

12. Action Regarded as Quasi in Rem. — *Warren v. Leiter*, 24 R. I. 36.

478. 1. Statutory Extension of Scope of Action. — *Sloan v. First*, (Neb. 1902) 89 N. W. Rep. 760; *Fergus v. Gagnon*, (Neb. 1903) 93 N. W. Rep. 146; *Custer City First Nat. Bank v. Calkins*, 16 S. Dak. 445.

10. Test as to Amount. — *Knoche v. Perry*, 90 Mo. App. 483. See, however, *Widber v. Benjamin*, 75 Vt. 152.

479. 1. Venue. — *Byers v. Ferguson*, 41 Oregon 77.

3. *Brown v. Cogdell*, 136 N. Car. 32.

4. See *Fry v. Shafor*, 164 Ind. 699.

10. Title Deeds. — *Pasterfield v. Sawyer*, 132 N. Car. 258.

480. 2. Notes. — *Fair v. Citizens' State Bank*, 69 Kan. 353, 105 Am. St. Rep. 168; *Keim v. Vette*, 167 Mo. 389.

5. Insurance Policy. — *Saling v. Bolander*, 125 Fed. Rep. 701, 60 C. C. A. 469.

11. Real Property. — *Cutter v. Wait*, 131 Mich. 508, 100 Am. St. Rep. 619.

481. 4. Property Severed from Freehold. — *Cutter v. Wait*, 131 Mich. 508, 100 Am. St. Rep. 619.

5. Annexation under Agreement. — Page v. Urick, 31 Wash. 601, 96 Am. St. Rep. 924 (building).

8. Identification. — *W. J. Perry Live Stock Commission Co. v. Barto*, (Neb. 1902) 92 N. W. Rep. 762.

482. 1. Identity as Affected by Confusion. — *Mine La Motte Lead, etc., Co. v. White*, 106 Mo. App. 222; *St. Paul Boom Co. v. Kemp*, 125 Wis. 138. See, however, *W. J. Perry Live Stock Commission Co. v. Barto*, (Neb. 1902) 92 N. W. Rep. 762 (sheep).

6. Change in Form of Property. — *Mine La Motte Lead, etc., Co. v. White*, 106 Mo. App. 222.

12. General Ownership and Right to Possession. — *Hilman v. Brigham*, 117 Iowa 70; *Smith v. Wisconsin Invest. Co.*, 114 Wis. 151.

Title Acquired by Fraud. — *Mexico First Nat. Bank v. Ragsdale*, 171 Mo. 168; *Zahl v. Billings*, 118 Wis. 459 (fraud on creditors).

Married Woman May Maintain. — *Beagles v.*

- 483.** *Cestuis Quo Trustent.* — See note 1.
 Want of Title and Right to Possession. — See notes 4, 5, 6.
- 484.** **2. Right to Possession.** — See note 1.
3. Title or Right to Possession Acquired After Commencement of Action. — See note 2.
- 485.** **4. Special Property.** — See note 2.
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- 487.** **8. Title Dependent on Ownership of Real Estate.** — See notes 1, 2.
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- Corporation Cannot Maintain Where Effect Would Be to Try Title to Office. — Standard Gold Min. Co. v. Byers, 31 Wash. 100.
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- 482. 13. Executor May Maintain.** — Knoche v. Perry, 90 Mo. App. 483.
- 483. 1. Cestuis Qui Trustent.** — Fisher v. Alsten, 186 Mass. 549.
- 4. Both Title and Right to Possession Wanting** — Colorado. — Elliott v. Greeley First Nat. Bank, 30 Colo. 279; Israel v. Day, 17 Colo. App. 200.
- Illinois. — Swain v. Hutchinson First Nat. Bank, 100 Ill. App. 31, affirmed 201 Ill. 416.
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- Nebraska. — G. T. Northwall Co. v. Strong, (Neb. 1902) 89 N. W. Rep. 767; Cook v. Vaughn, (Neb. 1901) 95 N. W. Rep. 333; Dillrance v. Murphy, (Neb. 1901) 95 N. W. Rep. 608; Johnson v. Spaulding, (Neb. 1901) 95 N. W. Rep. 808.
- Rhode Island. — Schultz v. Grimwood, 27 R. I. 137.
- South Carolina. — Clerks' Benev. Union v. Knights of Columbus, 70 S. Car. 543.
- 5. Plaintiff Must Recover on Strength of His Title** — Georgia. — Central Bank v. Georgia Grocery Co., 120 Ga. 883.
- Indiana. — Morgan v. Jackson, 32 Ind. App. 169.
- Indian Territory. — Hancock v. Schockman, 4 Indian Ter. 138.
- Michigan. — Metropolitan Lumber Co. v. McColeman, (Mich. 1905) 103 N. W. Rep. 809.
- Missouri. — Bright v. Miller, 95 Mo. App. 270; Bowles Live Stock Commission Co. v. Hunter, 91 Mo. App. 436.
- Montana. — Gallick v. Bordeaux, 31 Mont. 328.
- Nebraska. — G. T. Northwall Co. v. Strong, (Neb. 1902) 89 N. W. Rep. 767; Chadron First Nat. Bank v. Hughes, (Neb. 1902) 92 N. W. Rep. 986.
- New Jersey. — Bierman v. Reinhorn, 71 N. J. L. 422.
- Oklahoma. — Robb v. Dobrinski, 14 Okla. 563; Boyce v. Augusta Camp No. 7429, 14 Okla. 642.
- Pennsylvania. — Johnson v. Groff, 22 Pa. Super. Ct. 85.
- 6. Burden of Proof.** — Jones v. Glathart, 100 Ill. App. 630; Gallick v. Bordeaux, 31 Mont. 328; G. T. Northwall Co. v. Strong, (Neb. 1902) 89 N. W. Rep. 767; Thayer County Bank v. Huddleson, (Neb. 1901) 95 N. W. Rep. 471; Kerfoot v. Illinois State Bank, 14 Okla. 104; Robb v. Dobrinski, 14 Okla. 563; Downtain v. Ray, 31 Tex. Civ. App. 298.
- 484. 1. Right to Possession Essential** — Arkansas. — American Soda Fountain Co. v. Futrall, 73 Ark. 464.
- California. — Summerville v. Stockton Milling Co., 142 Cal. 529.
- Florida. — Younglove v. Knox, 44 Fla. 743.
- Idaho. — Cunningham v. Stoner, 10 Idaho 549.
- Massachusetts. — Fisher v. Alsten, 186 Mass. 549.
- Michigan. — Hall v. Kalamazoo, 131 Mich. 404.
- Missouri. — Anthony v. Carp, 90 Mo. App. 387; Duke v. Duke, 93 Mo. App. 244; Story, etc., Piano Co. v. Gibbons, 96 Mo. App. 218.
- Montana. — Glass v. Basin, etc., Min. Co., 31 Mont. 21.
- Nebraska. — Moore v. Moran, 64 Neb. 84; Randall v. Gross, 67 Neb. 255.
- New Hampshire. — Chellis v. Grimes, 72 N. H. 104.
- New York. — Central Stock Yard, etc., Co. v. Mears, 89 N. Y. App. Div. 452.
- Oklahoma. — Penton v. Hansen, 13 Okla. 450; Robb v. Dobrinski, 14 Okla. 563.
- Texas. — Hines v. Shafer, (Tex. Civ. App. 1903) 74 S. W. Rep. 562.
- 2. Title or Right to Possession Acquired After Action Commenced.** — Hilman v. Brigham, 117 Iowa 70; Redinger v. Jones, 68 Kan. 627; Dillrance v. Murphy, (Neb. 1901) 95 N. W. Rep. 608; Burdick v. Chesebrough, 94 N. Y. App. Div. 532.
- 485. 2. Special Property.** — Kellar v. Van Brunt, (Neb. 1901) 95 N. W. Rep. 668; Suckstorf v. Butterfield, (Neb. 1903) 96 N. W. Rep. 654.
- 4. Prior Possession.** — Lieberman v. Clark, (Tenn. 1905) 85 S. W. Rep. 258; Dresser v. Lemma, 122 Wis. 387; Chessman v. Fenton, 13 Wyo. 436, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 485.
- 487. 1. Severance by Trespasser.** — Raber v. Hyde, (Mich. 1904) 101 N. W. Rep. 61;

- 488.** Sufficiency of Title. — See note 5.
10. Mortgagee. — See note 13.
489. See notes 2, 3.
490. **11. Vendor and Vendee** — *a.* IN GENERAL. — See note 6.
 In Executory Contracts of Sale. — See notes 7, 9.
491. *b.* CONDITIONAL SALES. — See note 1.
c. SALES PROCURED BY FRAUD. — See note 5.
492. See note 2.
12. Joint Tenants and Tenants in Common. — See note 3.
493. See note 2.
 One Partner. — See note 4.
494. VI. FOR WHAT TAKING OR DETENTION REPLEVIN WILL LIE — 1. In General. — See note 4.
495. Statutory Provisions. — See note 6.
 2. Necessity for Possession by Defendant. — See note 7.

Mine La Motte Lead, etc., Co. v. White, 106 Mo. App. 222; Lieberman v. Clark, (Tenn. 1905) 85 S. W. Rep. 258.

487. 2. A Vendor. — Cutter v. Wait, 131 Mich. 508, 100 Am. St. Rep. 619, following Michigan Mut. L. Ins. Co. v. Cronk, 93 Mich. 49.

A Mortgagee. — Compare Moore v. Moran, 64 Neb. 84 (building).

488. 5. Lieberman v. Clark, (Tenn. 1905) 85 S. W. Rep. 258.

13. Mortgagee. — Dodd v. Skelton, 65 Neb. 585; Culver v. Randle, 45 Oregon 491; Johnson v. Hillenbrand, (S. Dak. 1904) 101 N. W. Rep. 33; Klinkert v. Fulton Storage, etc., Co., 113 Wis. 493.

489. 2. Mexico First Nat. Bank v. Ragsdale, 171 Mo. 168.

3. Thompson v. Dyer, 25 R. I. 321, rehearing denied 25 R. I. 421.

490. 6. Vendor — Nonpayment — Sales on Credit. — Schenck v. Griffith, (Ark. 1905) 86 S. W. Rep. 850; Ettien v. Drum, 32 Mont. 311; Gilroy v. Everson-Hickok Co., 103 N. Y. App. Div. 574.

7. Vendee — Executory Contracts of Sale. — Bryant v. Dyer, 96 Mo. App. 455; Chellis v. Grimes, 72 N. H. 104; La Vie v. Crosby, 43 Oregon 612; Smith v. Wisconsin Invest. Co., 114 Wis. 151.

Loan to Be Repaid in Kind. — Where the plaintiff lent wheat to the defendant, to be repaid in kind from the defendant's crops when threshed, the plaintiff did not acquire thereby any title or right of possession to the defendant's wheat when threshed so as to enable him to maintain replevin therefor. Mattison v. Hoober, 104 Mo. App. 287.

9. Whittle v. Phelps, 181 Mass. 317.

491. 1. Vendor — Conditional Sales. — Painter v. Snyder, 22 Pa. Super. Ct. 603; Cox v. Burdett, 23 Pa. Super. Ct. 346; Page v. Urlick, 31 Wash. 601, 96 Am. St. Rep. 924.

5. Sales Procured by Fraud. — Fisher v. Brown, 111 Ill. App. 486; Stein v. Hill, 100 Mo. App. 38; Penton v. Hansen, 13 Okla. 450; National Cash Register Co. v. Bonneville, 119 Wis. 222.

Resort to an Inconsistent Remedy in Ignorance of the Fraud by which the vendee induced the sale is not such an election as will prevent the vendor from recovering the goods by replevin. Pekin Plow Co. v. Wilson, 66 Neb. 115.

492. 2. Bona Fide Purchaser. — Roach v. Johnson, 71 Ark. 344; Hochberger v. Baum, (Supm. Ct. App. T.) 85 N. Y. Supp. 385.

3. Cotenant. — Cornett v. Hall, 103 Mo. App. 353; Cinfel v. Malena, 67 Neb. 95; Johnson v. Groff, 22 Pa. Super. Ct. 85; Kehoe v. McConaghy, 29 Wash. 175; Schwarz v. Lee Gon, (Oregon 1905) 80 Pac. Rep. 110.

493. 2. Where One Tenant in Common Repudiates the Interest of the Other in property which is susceptible of division, the other may bring replevin for his share. Cornett v. Hall, 103 Mo. App. 353, applying the rule to joint tenants of cattle where one of the tenants had divided the property into two lots and sold one of such lots.

But the Rule Has No Application to an action of replevin to recover an undivided interest in goods, such as bales of hops, varying in weight, quality, and grade. Schwarz v. Lee Gon, (Oregon 1905) 80 Pac. Rep. 110.

4. Partners. — Calderwood v. Robertson, 112 Mo. App. 103; Cinfel v. Malena, 67 Neb. 95.

491. 4. Distress. — Ramsdell v. Seybert, 27 Pa. Super. Ct. 133.

495. 6. Statutory Change. — Clute v. Everhart, 137 Mich. 5; Hart v. Boston, etc., R. Co., 72 N. H. 410; Stephenson v. Lichtenstein, (N. J. 1905) 59 Atl. Rep. 1033.

7. Necessity for Possession by Defendant — Colorado. — Rachofsky v. Benson, 19 Colo. App. 178.

Indiana. — Morgan v. Jackson, 32 Ind. App. 169.

Kansas. — Redinger v. Jones, 68 Kan. 627.

Michigan. — Hall v. Kalamazoo, 131 Mich. 404.

Missouri. — See American Nat. Bank v. Strong, (Mo. 1905) 85 S. W. Rep. 639.

Montana. — Glass v. Basin, etc., Min. Co., 31 Mont. 21; Gallick v. Bordeaux, 31 Mont. 328.

New York. — Murray v. Lese, (Supm. Ct. App. T.) 86 N. Y. Supp. 581.

Oklahoma. — Robb v. Dobrinski, 14 Okla. 570, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 495.

Oregon. — Jenkins v. Ontario, 44 Oregon 72, 102 Am. St. Rep. 625.

Rhode Island. — Leiter v. Lyons, 24 R. I. 42.

496. See notes 1, 2.

497. See notes 1, 3, 6.

Estoppel to Deny Possession. — See notes 9, 11.

Exception to General Rule. — See note 12.

498. Constructive Possession. — See note 3.

499. 3. Seizure on Judicial Process — *b*. ATTACHMENT AND EXECUTION

— (1) *Replevin by Defendant*. — See note 3.

500. (2) *Replevin by Third Person*. — See note 5.

502. Proof to Maintain Action. — See note 4.

503. *c*. SEIZURE ON REPLEVIN — (2) *Cross-replevin by Third Person*. —

See note 9.

506. 9. Possession as Agent. — See note 2.

VII. DEMAND AND REFUSAL — 1. In General — Where Taking Wrongful.

— See note 5.

507. See note 4.

Where Possession Lawful. — See notes 5, 7.

508. Officer Taking Goods on Attachment or Execution. — See notes 4, 7, 8.

509. 2. Time of Demand. — See note 3.

4. Upon Whom Demand to Be Made. — See note 7.

510. 6. Waiver of Necessity for Demand — Inconsistent Defense. — See note 6.

511. See note 1.

496. 1. *Redinger v. Jones*, 68 Kan. 627. See, however, *Newberry v. Gibson*, 125 Iowa 575.

2. Plaintiff in Possession. — *Clute v. Everhart*, 137 Mich. 5.

497. 1. *Property Sold and Delivered*. — *Robb v. Dobrinski*, 14 Okla. 568.

3. *Rachofsky v. Benson*, 19 Colo. App. 178.

6. *Attachment or Execution Creditor*. — *Jenkins v. Ontario*, 44 Oregon 72, 102 Am. St. Rep. 625.

9. *McLeod v. Johnson*, 96 Me. 271; *McGinley v. Wirthle*, (Neb. 1904) 101 N. W. Rep. 244.

11. *Giving Redelivery Bond*. — *Strahorn-Hutton-Evans Commission Co. v. Heffner*, (Ark. 1905) 85 S. W. Rep. 784.

12. *Exception to General Rule*. — *Tyler v. Young*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 575; *Hitchcock v. Wimpleberg*, 103 N. Y. App. Div. 53, *affirming* (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 293.

498. 3. See *Cinfel v. Malena*, 67 Neb. 95.

499. 3. *Replevin by Attachment or Execution Defendant*. — *Young v. Evans*, 118 Iowa 144; *Kelso v. Youngren*, 86 Minn. 177; *Irey v. Gorman*, 118 Wis. 8.

500. 5. *General Rule*. — *Roach v. Johnson*, 71 Ark. 344; *Haberer v. Walzer*, 109 Ill. App. 371; *Greenberg v. Stevens*, 114 Ill. App. 483, *affirmed* 212 Ill. 606; *Jordan v. Crickett*, 123 Iowa 576; *Vicborn v. Pollock*, 133 Mich. 524; *Kastl v. Arthur*, 135 Mich. 278; *Finnell v. Milion*, 99 Mo. App. 552; *Gallick v. Bordeaux*, 31 Mont. 328; *Byrnes v. Eley*, (Neb. 1903) 97 N. W. Rep. 298; *Cheeseman v. Fenton*, 13 Wyo. 436.

502. 4. *Williams v. Finlayson*, (Fla. 1905) 38 So. Rep. 50; *Cheeseman v. Fenton*, 13 Wyo. 436, *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 502.

503. 9. *Against Officer*. — See *Fergus v. Gagnon*, (Neb. 1903) 93 N. W. Rep. 146.

506. 2. *Possession as Agent*. — *Engel v. Dado*, 66 Neb. 400. See also *Hazlett v. Hamilton Storage, etc., Co.*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 660 (warehouseman).

5. *Demand — Original Wrongful Taking or Detention*. — *Greenberg v. Stevens*, 212 Ill. 606, *affirming* 114 Ill. App. 483; *Log Owners Booming Co. v. Hubbell*, 135 Mich. 65; *Knapp v. Mahurin*, 72 N. H. 595.

507. 4. *Jumiska v. Andrews*, 87 Minn. 515.

5. *Demand to Terminate Rightful Possession*. — *Hardy v. Wallis*, 103 Ill. App. 141; *Rosenbaum v. King*, 114 Ill. App. 648; *Hall v. Bassler*, 96 N. Y. App. Div. 96; *Thompson v. Thompson*, 11 N. Dak. 208. See, however, *Norman Printers Supply Co. v. Ford*, 77 Conn. 461.

7. *Against Conditional Vendee*. — *Heinrich v. Van Wrickler*, 80 N. Y. App. Div. 250.

Waiver of Demand in Contract of Sale. — *Standard Furniture Co. v. Anderson*, 38 Wash. 582.

508. 4. *Officer Levying Attachment or Execution*. — *Greenberg v. Stevens*, 212 Ill. 606, *affirming* 114 Ill. App. 483 and *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 508.

7. *Greenberg v. Stevens*, 114 Ill. App. 483, *affirmed* 212 Ill. 606. See also *Littlefield v. Wilson*, (Neb. 1901) 95 N. W. Rep. 677.

8. *Greenberg v. Stevens*, 212 Ill. 606, *affirming* 114 Ill. App. 483.

509. 3. *Time of Demand*. — *Heinrich v. Van Wrickler*, 80 N. Y. App. Div. 250.

7. *Demand on Person in Possession*. — *Heinrich v. Van Wrickler*, 80 N. Y. App. Div. 250.

510. 6. *Relying on Inconsistent Defense*. — *California Cured Fruit Assoc. v. Stelling*, 141 Cal. 713; *Sellers v. Catron*, (Indian Ter. 1904) 82 S. W. Rep. 742; *Harding v. Kelso*, 91 Mo. App. 607; *Heagney v. J. I. Case Threshing Mach. Co.*, (Neb. 1903) 96 N. W. Rep. 175; *Thompson v. Thompson*, 11 N. Dak. 208.

511. 1. *Heagney v. J. I. Case Threshing Mach. Co.*, (Neb. 1903) 96 N. W. Rep. 175.

511. VIII. EXTENT OF RECOVERY BY PARTIES — 1. Where Plaintiff Is Successful — a. RECOVERY OF SPECIFIC PROPERTY. — See note 6.

b. DAMAGES FOR THE TAKING OR DETENTION — (1) In General. — See note 11.

512. See note 1.

Measure of Damages. — See notes 2, 3.

Remote Damages. — See note 5.

513. (2) Interest on Value. — See note 4.

(3) Deterioration in Value. — See note 7.

514. (4) Value of Use. — See note 1.

515. (7) Exemplary Damages. — See notes 2, 3.

c. RECOVERY FOR VALUE OF PROPERTY — (1) In General. — See notes 5, 6.

516. See notes 1, 3, 4.

517. (2) Assessment of Value — (a) In General. — See notes 1, 2.

(b) Assessment of Value in Point of Time. — See notes 5, 6.

(c) Where Value Increased by Defendant's Labor. — See note 9.

518. (d) Where Plaintiff Has Special Interest Only. — See note 1.

2. Where Defendant Is Successful — a. RETURN OF PROPERTY — (1) In General. — See note 3.

511. 6. *Benjamin v. Huston*, 16 S. Dak. 569.

11. Damages for Taking and Detention. — *Saling v. Bolander*, 125 Fed. Rep. 701, 60 C. C. A. 469; *Achenbach v. Pollock*, 64 Neb. 436.

512. 1. Nominal Damages. — *Taylor v. Plunkett*, 4 Penn. (Del.) 467.

2. Damages Recoverable. — *La Vie v. Crosby*, 43 Oregon 612, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 512.

3. Special Damages. — *Ocala Foundry, etc., Works v. Lester*, (Fla. 1905) 38 So. Rep. 51.

5. See *Haas v. Tough*, 67 Kan. 253, wherein items of damage claimed were held to be too remote and speculative.

513. 4. Interest on Value of Property. — *Follett Wool Co. v. Utica Trust, etc., Co.*, 84 N. Y. App. Div. 151.

7. Deterioration in Value. — *Jermyn v. Hunter*, 93 N. Y. App. Div. 175.

514. 1. Value of Use. — *Smith v. Stevens*, 33 Colo. 427; *Ocala Foundry, etc., Works v. Lester*, (Fla. 1905) 38 So. Rep. 51; *Cunningham v. Stoner*, 10 Idaho 549; *Benjamin v. Huston*, 16 S. Dak. 569.

515. 2. Exemplary Damages. — *Cox v. Burdett*, 23 Pa. Super. Ct. 346. See, however, *Tittle v. Kennedy*, 71 S. Car. 1.

3. Acree v. Bufford, 80 Miss. 565.

5. Where Property Cannot Be Had. — *Bishop, etc., Co. v. Keffer*, 69 N. J. L. 47; *Globe Oil Co. v. Messick Grocery Co.*, 136 N. Car. 354; *Custer City First Nat. Bank v. Calkins*, 16 S. Dak. 445.

6. Optional Judgment for Value. — *Hodges v. Cummings*, 115 Ga. 1000; *Sloan v. Fist*, (Neb. 1902) 89 N. W. Rep. 760; *McCarty v. Morgan*, 2 Neb. (unofficial) 274, 96 N. W. Rep. 489. See, however, *Warren v. Leiter*, 24 R. I. 36.

516. 1. Hynes v. Barnes, 30 Mont. 25; *Glass v. Basin, etc.*, Min. Co., 31 Mont. 21; *Bossard v. Vaughn*, 68 S. Car. 96.

3. Compare *Pauls v. Mundine*, (Tex. Civ. App. 1905) 85 S. W. Rep. 43.

4. Cathey v. Bowen, 70 Ark. 348; *Bishop, etc., Co. v. Keffer*, 69 N. J. L. 47.

The Fact that a Small Portion of the Property Remains in the defendant's possession is immaterial. Erreca v. Meyer, 142 Cal. 308.

517. 1. Admissibility of Evidence as to Value. — *Nolan v. Sevine*, 36 Tex. Civ. App. 489.

Amount for Which Defendant Sold Property Not Conclusive. — *Cowden v. Finney*, 9 Idaho 619.

2. Younglove v. Knox, 44 Fla. 743; *Ocala Foundry, etc., Works v. Lester*, (Fla. 1905) 38 So. Rep. 51; *Custer City First Nat. Bank v. Calkins*, 16 S. Dak. 445; *Dysart v. Terrell*, (Tex. Civ. App. 1902) 70 S. W. Rep. 986.

5. Assessment of Value as of Time of Trial. — *Nolan v. Sevine*, 36 Tex. Civ. App. 489.

Election. — In *Newberry v. Gibson*, 125 Iowa 575, it was held that where the plaintiff treats the conversion as of the time of the wrongful taking, his measure of damages is the value of the property at such time with interest from then; but if he elects to treat the conversion as of the time of the trial, he is entitled to recover the value of the property at such time together with the value of the use of the property prior thereto while wrongfully detained.

6. Assessment as of Time of Conversion. — *Osmers v. Furey*, 32 Mont. 581; *Cox v. Burdett*, 23 Pa. Super. Ct. 346; *Benjamin v. Huston*, 16 S. Dak. 569.

9. Good Faith of Defendant. — *Acree v. Bufford*, 80 Miss. 565.

518. 1. Special Property in Plaintiff, General Property in Defendant. — *Hodges v. Cummings*, 115 Ga. 1000; *Gallick v. Bordeaux*, 31 Mont. 328; *Muller v. Parcel*, (Neb. 1904) 99 N. W. Rep. 684; *Klinkert v. Fulton Storage, etc., Co.*, 113 Wis. 493.

3. Return of Property. — *Taylor v. Plunkett*, 4 Penn. (Del.) 467; *Pease v. Trench*, 98 Ill. App. 24, affirmed 197 Ill. 101; *Vichorn v. Pollock*, 133 Mich. 524; *Caldwell v. Ryan*, (Mo. 1904) 79 S. W. Rep. 743; *Harvey v. Ivory*, 35 Wash. 397.

519. See note 1.

Title Not in Issue. — See note 4.

Divestiture of Title Pending Action. — See note 9.

520. Demand for Return. — See notes 6, 7.(2) *Satisfaction and Enforcement of Judgment.* — See note 8.**521.** Condition in Which Property Must Be Returned. — See note 4.

Alternate Judgment. — See note 7.

b. DAMAGES FOR WRONGFUL TAKING BY PLAINTIFF. — See note 10.

522. Measure of Damages. — See note 2.

Interest on Value. — See note 9.

Special Damages. — See note 11.

The Depreciation in the Value of the Property. — See note 14.

Value of Use. — See note 15.

523. See note 1.

Counsel Fees and Expenses of Action. — See notes 2, 3.

c. RECOVERY FOR VALUE OF PROPERTY — (1) *In General.* — See note 8.Rule Applied in Action Between Husband and Wife. — *Beagles v. Beagles*, 95 Mo. App. 338.**519.** 1. Metropolitan Lumber Co. v. McColeman, (Mich. 1905) 103 N. W. Rep. 809.4. Defense of Nondetention. — *Clute v. Everhart*, 137 Mich. 5, holding that where the defendant did not have possession an alternative judgment in his favor is improper.9. *Legere v. Stewart*, 17 Colo. App. 472; *Culver v. Randle*, 45 Oregon 491.**520.** 6. *Freeman v. U. S. Fidelity, etc., Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 364.7. *Voorheis v. Leisure*, (Neb. 1901) 95 N. W. Rep. 676, following *Ulrich v. McConaughy*, 63 Neb. 10; *Harvey v. Ivory*, 35 Wash. 397.8. Tender of Property — Satisfaction of Alternate Judgment for Value. — *La Vie v. Crosby*, 43 Oregon 612.Where the Defendants Are Copartners, a return of the property to one of them is a sufficient compliance with a judgment for return. *Leve v. Frazier*, 42 Oregon 141.**521.** 4. *Fair v. Citizens' State Bank*, 69 Kan. 353, 105 Am. St. Rep. 168.7. *Koelling v. August Gast Bank Note, etc.*, Co., 103 Mo. App. 98.10. Damages for Taking. — *Adams v. Wright*, 74 Conn. 551; *Freeman v. Lavenue*, 99 Mo. App. 173; *La Vie v. Crosby*, 43 Oregon 612; *Cox v. Burdett*, 23 Pa. Super. Ct. 346.**522.** 2. Measure of Damages. — *Legere v. Stewart*, 17 Colo. App. 472; *Adams v. Wright*, 74 Conn. 551.9. Where the Value Is Assessed as of the Time of the Trial, the defendant is not also entitled to interest thereon from the time of the taking. *La Vie v. Crosby*, 43 Oregon 612. See generally *infra*, this title, **526**. 9 *et seq.*11. No Recovery for Injury to Business. — *Edwards v. Bricker*, 66 Kan. 241.14. Depreciation in Value. — *Franks v. Matson*, 211 Ill. 338; *Fair v. Citizens State Bank*, 69 Kan. 353, 105 Am. St. Rep. 168; *Cox v. Burdett*, 23 Pa. Super. Ct. 346.

Effect of Redelivery Bond. — Where the defendant regains possession of the property by giving a redelivery bond he cannot recover from the plaintiff damages for the deterioration in

the property subsequent to the time when he regained possession. *Katz v. Hlavac*, 88 Minn. 56.15. Value of Use. — *Adams v. Wright*, 74 Conn. 551; *McGrath v. Wilder*, 77 Vt. 431, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 522.**523.** 1. *Powers v. Benson*, 120 Iowa 428.Where Part of the Property Had a Usable Value in rendering a judgment for damages in case of nonreturn it was held to be proper to add to the value of the usable property its usable value from the time of taking to the date of judgment, and to the value of the nonusable property interest thereon from the same time. *State Bank v. Showers*, 65 Kan. 431.Election as to Time of Conversion. — Where the defendant elects to treat the conversion as taking place at the time when the property was taken under the writ of replevin he is not entitled to recover the value of the use of the property. *Coleman Implement Co. v. Strong*, 126 Iowa 598.2. Counsel Fees and Expenses of Action. — *Edwards v. Bricker*, 66 Kan. 241.3. *Edwards v. Bricker*, 66 Kan. 241.8. *Taylor v. Plunkett*, 4 Penn. (Del.) 467; *Franks v. Matson*, 211 Ill. 338; *Schnabel v. Thomas*, 98 Mo. App. 197; *Merchants' Nat. Bank v. McDonald*, 63 Neb. 363; *Skow v. Locks*, (Neb. 1902) 91 N. W. Rep. 204; *La Vie v. Crosby*, 43 Oregon 612; *Park v. Robinson*, 15 S. Dak. 551; *Harvey v. Ivory*, 35 Wash. 397.The Plaintiff May Show in Mitigation of Damages that the property was taken from his possession under executions against the defendant in the replevin action. *Meyer v. Michaels*, (Neb. 1903) 95 N. W. Rep. 63.Right to Recover Value in Separate Action. — It has been held that where the successful defendant fails to take a judgment in the alternative for a return of the property or for its value, he may, on the plaintiff's failure to return the property, recover the value in a separate action. *Johnson v. Boehme*, 66 Kan. 72, 97 Am. St. Rep. 357; *Caldwell v. Ryan*, (Mo. 1904) 79 S. W. Rep. 743.

- 524.** See notes 1, 2.
Option to Take Judgment for Value. — See note 4.
- 525.** Special Interest in Defendant. — See note 2.
- 526.** (3) *Proof of Value*. — See note 4.
The Burden of Proving. — See note 5.
Recitals in Plaintiff's Affidavit or Bond as Proof of Value. — See notes 6, 7.
Estimation of Value as Regards Time. — See notes 9, 10, 11.
- 527.** See note 1.
d. DISMISSAL, DISCONTINUANCE, AND NONSUIT. — See note 2.
- 528.** Want of Jurisdiction. — See note 1.
4. Costs. — See note 3.
- 529.** IX. REPLEVIN BOND — 1. Necessity for Bond. — See note 5.
- 530.** See notes 1, 5.
- 532.** 2. Form and Execution — *c.* SURETIES. — See note 4.
e. CONDITIONS. — See note 14.
- 533.** *h.* APPROVAL OF BOND AND JUSTIFICATION OF SURETIES. — See note 5.
j. CLERICAL ERRORS. — See note 8.
k. ESTOPPEL TO ALLEGE DEFECTS IN BOND. — See note 9.
- 534.** See notes 7, 9, 11.
- 524.** 1. Special Property in Defendant. — Metropolitan Lumber Co. v. McColeman, (Mich. 1905) 103 N. W. Rep. 809; G. T. Northwall Co. v. Strong, (Neb. 1902) 89 N. W. Rep. 767. See, however, Cheeseman v. Fenton, 13 Wyo. 436.
2. Koelling v. August Gast Bank Note, etc., Co., 103 Mo. App. 98; Caldwell v. Ryan, (Mo. 1904) 79 S. W. Rep. 743.
4. Leve v. Frazier, 42 Oregon 141.
- 525.** 2. Where Plaintiff General Owner. — McCormick Harvesting Mach. Co. v. Hill, 104 Mo. App. 544; Kronck v. Reid, 105 Mo. App. 430; Gaston v. Johnson, 107 Mo. App. 590; Sprague v. King, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 792; Strasser v. Goldberg, 120 Wis. 621.
- 526.** 4. Proof of Value. — Story, etc., Piano Co. v. Gibbons, 96 Mo. App. 218; Osmers v. Furey, 32 Mont. 581.
- 5.** Burden of Proof. — Wagner Typewriter Co. v. Robinson, (Supm. Ct. App. T.) 84 N. Y. Supp. 281; Martin v. Berry, (Tex. Civ. App. 1905) 87 S. W. Rep. 712.
- 6.** Recitals in Affidavit or Bond. — North Star House Furnishing Co. v. Rinkey, 92 Minn. 80; Park v. Robinson, 15 S. Dak. 551. See, however, Gilroy v. Everson-Hickok Co., 103 N. Y. App. Div. 574.
- The Appraisal in proceedings to determine the value of the property for the purpose of fixing the amount of the replevin bond is inadmissible. Snyder v. Anderson, (Neb. 1901) 95 N. W. Rep. 698.
- 7.** Compare Parke v. Robinson, 15 S. Dak. 551, approving Weyerhaeuser v. Foster, 60 Minn. 223, stated in the original note.
- 9.** Estimation of Value as Regards Time. — Powers v. Benson, 120 Iowa 428; State Bank v. Showers, 65 Kan. 431; Chandler v. Parker, 65 Kan. 860, 70 Pac. Rep. 368.
- 10.** Colean Implement Co. v. Strong, 126 Iowa 598.
- 11.** Gilroy v. Everson-Hickok Co., 103 N. Y. App. Div. 574; La Vie v. Crosby, 43 Oregon 612.
- Rise in Value of Corn Taken in Replevin and Consumed by Plaintiff. — See Schnabel v. Thomas, 98 Mo. App. 197.
- 527.** 1. La Vie v. Crosby, 43 Oregon 612.
2. Dismissal, Discontinuance, and Nonsuit. — Beagles v. Beagles, 95 Mo. App. 338; Cook v. Vaughn, (Neb. 1901) 95 N. W. Rep. 333; Morrill v. McNeill, (Neb. 1901) 91 N. W. Rep. 601.
- 528.** 1. Want of Jurisdiction. — Widber v. Benjamin, 75 Vt. 152.
3. Costs. — Gilbert v. Sprague, 196 Ill. 444; Stephenson v. Lichtenstein, (N. J. 1905) 59 Atl. Rep. 1033.
- 529.** 5. Necessity for Replevin Bond. — Three States Lumber Co. v. Blanks, (C. C. A.) 133 Fed. Rep. 481, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 529; McKinstry v. Collins, 74 Vt. 147.
- 530.** 1. Liability of Officer for Failure to Require Bond. — McKinstry v. Collins, 76 Vt. 221.
5. W. W. Kimball Co. v. Tasca, 26 R. I. 565, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 530.
- 532.** 4. Surety Company as Surety. — See Leiter v. Lyons, 24 R. I. 42.
- 14.** Conditions Too Onerous. — A replevin bond the conditions of which are more onerous on the surety than required by the statute is not good as a statutory bond. Leverett v. Meeks, 29 Tex. Civ. App. 523.
- 533.** 5. Time for Objecting to Sureties. — See Barton v. Shull, (Neb. 1903) 97 N. W. Rep. 292.
- 8.** Omission of the Date from bond will not render it insufficient. W. W. Kimball Co. v. Tasca, 26 R. I. 565.
- 9.** Estoppel to Allege Defects in Bond. — Douglass v. Unmack, 77 Conn. 181, 107 Am. St. Rep. 25; Central Nat. Bank v. Brecheisen, 65 Kan. 807; Mariany v. Lemaire, (Tex. Civ. App. 1904) 83 S. W. Rep. 215.
- 534.** 7. Hendley v. McIntyre, 132 N. Car. 276.

534. 3. Effect of Taking Bond. — See note 14.

4. Breach of and Recovery on Bonds — *a.* IN GENERAL. — See notes 16, 17, 19.

535. *b.* CONDITION FOR RETURN OF PROPERTY — (1) *In General.* — See notes 2, 3.

(2) *Performance of Duty to Return.* — See note 8.

536. See note 7.

Excuses for Nonreturn. — See note 13.

537. 3. *Extent of Recovery for Nonreturn* — (a) IN GENERAL. — See notes 1, 3, 4, 5, 6.

If the Right and Title to the Property Are Adjudicated. — See note 9.

538. See note 1.

Condition of Property. — See note 3.

(b) Proof of Value. — See note 5.

The Assessment of the Value. — See note 7.

539. Recitals as to Value in Replevin Writ and Bond. — See notes 4, 5.

c. CONDITION TO PROSECUTE ACTION — (1) *In General* — The Condition to "Prosecute" the Action. — See note 9.

540. To Prosecute to or with Effect. — See note 1.

534. 9. *Central Nat. Bank v. Brecheisen*, 65 Kan. 807.

11. *Douglass v. Galwey*, 76 Conn. 683.

14. Effect of Bond. — Compare *Katz v. Hlavac*, 88 Minn. 56.

16. *Klinkert v. Fulton Storage, etc., Co.*, 113 Wis. 493.

The Fact that a Third Person Intervenes in the replevin action, making claim to the property, does not in any way change the obligations or liability of the surety on the bond. *Katz v. American Bonding, etc., Co.*, 86 Minn. 168.

17. Conditions Independent. — *Myers v. Dixon*, 106 Ill. App. 322; *Pure Oil Co. v. Terry*, 209 Pa. St. 403.

19. Compare *Pure Oil Co. v. Terry*, 209 Pa. St. 403.

535. 2. Condition for Return of Property. — *Beatty v. Clarkson*, 110 Mo. App. 1; *Rogers v. U. S. Fidelity, etc., Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 203; *Verra v. Costantino*, (Municipal Ct.) 33 Civ. Pro. (N. Y.) 189.

3. *Myers v. Dixon*, 106 Ill. App. 322; *Kentucky Land, etc., Co. v. Crabtree*, (Ky. 1904) 80 S. W. Rep. 1161.

8. Affirmative Duty to Return. — *Douglass v. Galwey*, 76 Conn. 683; *MacRae v. Kansas City Piano Co.*, 69 Kan. 457, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 535.

536. 7. Condition of Property Returned. — *MacRae v. Kansas City Piano Co.*, 69 Kan. 457; *Johnson v. Mason*, 70 N. J. L. 13.

13. Excuse for Nonreturn. — *Three States Lumber Co. v. Blanks*, (C. C. A.) 133 Fed. Rep. 479, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 536.

537. 1. Extent of Recovery for Nonreturn. — *Franks v. Matson*, 211 Ill. 338; *Parish v. Smith*, 66 S. Car. 424.

Where, Pending the Replevin Suit, the Property Was Purchased by the Defendant, he cannot, in an action on bond, recover the full value of the property, but merely the amount paid by him therefor. *Pure Oil Co. v. Terry*, 209 Pa. St. 403.

3. *Magerstadt v. Harder*, 199 Ill. 271; *Freeman v. U. S. Fidelity, etc., Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 367, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 537.

Where Plaintiff and Defendant Joint Owners. — Where a judgment is returned for the defendant in replevin on the ground that he was a joint owner with the plaintiff, the defendant is entitled only to the value of his interest as a cotenant. *Kehoe v. McConaghy*, 29 Wash. 175.

4. *Ray v. Byrd*, 118 Ga. 86, following *Holmes v. Langston*, 110 Ga. 864; *Young v. Evans*, 118 Iowa 144; *Nichols, etc., Co. v. Bishop*, 12 Okla. 250.

5. Compare *Plano Mfg. Co. v. Downey*, 100 Ill. App. 36.

6. *Franks v. Matson*, 211 Ill. 338.

9. Effect of Adjudication of Title. — *Smith v. Bowers*, (Neb. 1902) 91 N. W. Rep. 521, affirming (Neb. 1902) 89 N. W. Rep. 596.

538. 1. *Magerstadt v. Harder*, 199 Ill. 271; *Freeman v. U. S. Fidelity, etc., Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 369, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 538.

Statutory Provision. — See *Gilbert v. Sprague*, 196 Ill. 444.

3. *Franks v. Matson*, 211 Ill. 338; *Fair v. Citizens' State Bank*, 69 Kan. 353, 105 Am. St. Rep. 168, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 538.

5. An Affidavit by the Agent of the Plaintiff in a replevin suit dismissed without prejudice is not admissible in proof of value in an action against a surety on the bond. *Edwards v. Bricker*, 66 Kan. 241.

7. Assessment of Value in Replevin Action. — *Smith v. Bowers*, (Neb. 1902) 89 N. W. Rep. 596, affirmed on rehearing (Neb. 1902) 91 N. W. Rep. 521; *Parish v. Smith*, 66 S. Car. 424.

539. 4. *Farson v. Gilbert*, 114 Ill. App. 17.

5. *Farson v. Gilbert*, 114 Ill. App. 17.

9. *Keenan v. Washington Liquor Co.*, 8 Idaho 383; *Kentucky Land, etc., Co. v. Crabtree*, (Ky. 1904) 80 S. W. Rep. 1161.

540. 1. To Prosecute "To" or "With Effect." — *Myers v. Dixon*, 106 Ill. App. 322.

- 540.** (2) *Extent of Recovery for Failure to Prosecute.* — See notes 8, 9, 10.
541. See note 5.
d. CONDITION TO PAY DAMAGES. — See notes 6, 7.
542. *e.* CONDITION TO PAY COSTS. — See note 4.
f. DISCHARGE OF SURETIES. — See notes 5, 7.
543. **X. REDELIVERY BOND** — Redelivery Bond. — See note 3.
544. See notes 4, 7.
Condition for Return of Property. — See notes 10, 13.
545. Condition of Property. — See note 1.
Condition for Payment of Judgment. — See notes 5, 6.

REPORT. — See note 9.

540. 8. Costs. — *Beagles v. Beagles*, 95 Mo. App. 338.

Stenographers' and Attorneys' Fees are not elements of recovery. *Gilbert v. American Surety Co.*, (C. C. A.) 121 Fed. Rep. 499. See also *Kentucky Land, etc., Co. v. Crabtree*, (Ky. 1904) 80 S. W. Rep. 1161.

9. Damages for Detention. — *Beagles v. Beagles*, 95 Mo. App. 338.

10. Value of Property. — *Keenan v. Washington Liquor Co.*, 8 Idaho 383; *Myers v. Dixon*, 106 Ill. App. 322; *Kentucky Land, etc., Co. v. Crabtree*, (Ky. 1904) 80 S. W. Rep. 1161; *Beagles v. Beagles*, 95 Mo. App. 338.

541. 5. *Franks v. Matson*, 211 Ill. 338.

6. Condition to Pay Damages. — *Edwards v. Bricker*, 66 Kan. 241.

7. *Daniels v. Mansbridge*, 4 Indian Ter. 104.

542. 4. *Katz v. American Bonding, etc., Co.*, 86 Minn. 168; *Sparks v. Hopsen*, 83 Miss. 124. See, however, *Spencer v. Davidson*, (Indian Ter. 1904) 82 S. W. Rep. 731.

The Fact that the Defendant Has Not Paid the Costs is immaterial. *Campbell v. Lane*, (Neb. 1902) 95 N. W. Rep. 1043.

5. The Attorney for the Defendant has no implied power to release a surety. *Lowry v. Clark*, 20 Pa. Super. Ct. 357.

The Fact that the Property Has Been Returned to the Defendant does not entitle the surety to have the penalty of the bond reduced, as the several clauses in the condition of the bond are separate and independent, and the obligee may recover full damages for every item within the limit of the penalty. *Hendley v. McIntyre*, 132 N. Car. 276.

An Appeal Bond given by the plaintiff does not discharge the replevin bond or affect in any way the liability of the sureties. *Campbell v. Lane*, (Neb. 1901) 95 N. W. Rep. 1043.

Want of Jurisdiction to render judgment is a defense to the sureties. *McBrayer v. Jordan*, (Neb. 1905) 103 N. W. Rep. 50.

7. *McBrayer v. Jordan*, (Neb. 1905) 103 N. W. Rep. 50.

543. 3. Redelivery Bond. — *Tumulty v. Jordan*, 67 N. J. L. 509; *Adams v. Wiesenthal*, 69 N. J. L. 65; *Painter v. Snyder*, 22 Pa. Super. Ct. 603.

Bond Need Not Be Signed by Defendant. — *Polite v. Bero*, 63 S. Car. 209.

544. 4. Compare *Katz v. Hlavac*, 88 Minn. 56.

7. *Boyce v. Augusta Camp No. 7429*, 14 Okla. 642.

Title in Third Person. — The defendant by giving a redelivery bond and securing possession of the property is not estopped from showing that the title was in a third person. *Boyce v. Augusta Camp No. 7429*, 14 Okla. 642.

10. *Gerlaugh v. Ryan*, 127 Iowa 226.

13. *Adams v. Wiesenthal*, 69 N. J. L. 65.

545. 1. Compare *Burke v. Graham*, 106 N. Y. App. Div. 108 (death of horse).

Value Estimated as of Date of Taking. — See *Johnson v. Groff*, 22 Pa. Super. Ct. 85.

5. Where the Plaintiff Elects to Take a Money Judgment for property retained by the defendant upon his redelivery bond, he necessarily waives the delivery of the property, and as a consequence releases the sureties from their agreement to deliver to the plaintiff if he recovers judgment therefor. *Gerlaugh v. Ryan*, 127 Iowa 226.

6. See *John Church Co. v. Dorsey*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 542.

9. Report. — *Gillette v. Peabody*, 19 Colo. App. 356.

REPRIEVE, PARDON, AND AMNESTY.

By F. G. BAMMAN.

551. I. CLASSIFICATION AND DEFINITIONS — 1. Pardon Defined — a. GENERAL DEFINITION. — See note 1.

552. 2. Amnesty or General Pardon. — See note 2.

557. IV. BY WHOM PARDONING POWER MAY BE EXERCISED — 2. In the United States — d. POWERS OF LEGISLATURE AS TO PARDONS — (2) Principle that Legislature Cannot Exercise or Impair Pardoning Power — (a) Rule Stated. — See note 5.

558. (b) Applications of Principle — Statutes Held to Be Encroachments upon Pardoning Power. — See note 2.

559. (c) Statutes Held Not to Be Encroachments upon Pardoning Power — ee. STATUTES REGULATING PUNISHMENT OF CRIME — (aa) In General. — See note 6.

561. (d) Legislature Cannot Delegate Pardoning Power. — See note 1.

(3) Principle that Legislature May Exercise Pardoning Power. — See note 3.

562. e. PARDONING POWERS OF OTHER BODIES OR OFFICERS — (1) In General. — See notes 2, 3.

566. V. NATURE AND EXTENT OF PARDONING POWER — 2. What Powers Are Included — a. IN GENERAL. — See note 1.

b. POWER TO GRANT AMNESTY. — See note 2.

c. POWER TO GRANT CONDITIONAL PARDONS. — See note 3.

e. POWER TO REMIT FINES AND PENALTIES — (1) In General. —

See note 5.

567. (2) After Payment. — See note 1.

f. POWER TO COMMUTE OR MITIGATE SENTENCES. — See note 4.

570. 6. When Power May Be Exercised — a. IN GENERAL. — See note 5.

571. b. BEFORE OR AFTER CONVICTION — Governor with Power to Pardon After Conviction. — See note 2.

551. 1. Definition of Pardon. — See *State v. Eby*, 170 Mo. 497; *In re Briggs*, 135 N. Car. 118.

552. 2. Amnesty Defined. — *State v. Eby*, 170 Mo. 497. See also *In re Briggs*, 135 N. Car. 118.

557. 5. Pardon an Executive Function Not Subject to Legislative Control. — *State v. Dalton*, 109 Tenn. 544.

A Provision that the Court May Reduce an Excessive Sentence is not an encroachment upon the powers of the executive branch of the government. *Palmer v. State*, (Neb. 1903) 97 N. W. Rep. 235.

558. 2. Statute Releasing from Prosecution. — *State v. Dalton*, 109 Tenn. 544.

559. 6. Statutes Regulating Punishment Not Encroachments upon Pardoning Power. — *State v. Stephenson*, 69 Kan. 405, 105 Am. St. Rep. 171, rehearing denied 69 Kan. 874 (dealing with indeterminate sentences).

561. 1. Legislature Cannot Delegate Pardoning Power to Court. — *State v. Dalton*, 109 Tenn. 544.

3. *In re Briggs*, 135 N. Car. 118.

562. 2. Courts Cannot Remit Fines. — *State v. Dalton*, 109 Tenn. 544.

3. Court Cannot Commute Sentence. — *State v. Dalton*, 109 Tenn. 544.

566. 1. "Pardon" Includes All Forms of Executive Clemency. — *State v. Eby*, 170 Mo. 497.

2. Power to Pardon Includes Power to Grant Amnesty. — *State v. Eby*, 170 Mo. 497.

3. Pardoning Power Includes Power to Annex Conditions. — *State v. Hunter*, 124 Iowa 569, 104 Am. St. Rep. 361.

5. Pardoning Power Includes Power to Remit Fines and Penalties. — *Meul v. People*, 198 Ill. 258. See also *State v. Eby*, 170 Mo. 497.

567. 1. Power to Remit Not Inclusive of Power to Restore. — *Meul v. People*, 198 Ill. 258.

4. Federal Prisoners. — A state statute providing for commutations of sentences with the approval of the governor does not apply to a federal prisoner. *U. S. v. Byers*, 127 Fed. Rep. 993. See also *In re Walters*, 128 Fed. Rep. 791.

570. 5. Pardon of Separate Parts of Punishment and at Different Times. — See *Miller v. State*, 46 Tex. Crim. 59.

571. 2. After Verdict and Before Sentence. — *Spafford v. Benzie* Circuit Judge, 136 Mich. 25, 10 Detroit Leg. N. 959.

- 571.** *c.* AFTER PUNISHMENT. — See note 5.
- 572.** 8 Rights of Third Persons Cannot Be Impaired — *a.* IN GENERAL. — See note 7.
- 575.** VI. CONSTRUCTION AND VALIDITY OF PARDONS — 1. Of Pardons in General — *b.* FORMAL REQUISITES — (1) *In General.* — See note 5.
- Recital of Crime or Offense. — See note 7.
- 576.** (2) *Immaterial Errors and Omissions.* — See note 7.
- 577.** Reasons for Granting Pardon Need Not Appear. — See note 2.
- 578.** *c.* DELIVERY AND ACCEPTANCE ESSENTIAL — (2) *Sufficiency of Delivery and Acceptance* — (a) *In General.* — See note 7.
- 580.** 2. Of Conditional Pardons — *b.* CONDITIONAL PARDON AS A CONTRACT. — See note 7.
- 581.** *d.* CONDITION SUBSEQUENT. — See note 1.
- e.* ILLEGAL CONDITION. — See note 2.
- 582.** *h.* CERTAIN MISCELLANEOUS CONDITIONS CONSIDERED. — See note 1.
- 583.** VII. PROOF OF PARDON. — See note 7.
- 584.** Lost Pardon — Parol Evidence. — See note 1.
- VIII. OPERATION AND EFFECT OF PARDON — 1. Of Pardons in General — *b.* GENERAL EFFECT OF PARDON — (1) *In General.* — See note 5.
- 585.** (2) *Effect of Pardon and of Amnesty the Same.* — See note 1.
- (4) *Upon Liability for Fines and Penalties* — (a) *In General.* — See note 7.
- 594.** (11) *Effect of Pardon After Punishment.* — See note 10.
- 595.** 2. Of Conditional Pardons — *c.* EFFECT OF VIOLATION OF CONDITION — (1) *Convict Liable to Rearrest and Recommitment.* — See note 5.
- 596.** (2) *Proceedings upon Rearrest.* — See note 1.
- 598.** IX. REVOCATION OF PARDON — 3. Rules Applicable to Statutory Pardon. — See note 2.
- 571.** 5. Pardon May Be Granted After Punishment. — *Locklin v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 305; *Miller v. State*, 46 Tex. Crim. 59.
- 572.** 7. Interests of Third Persons. — *Meul v. People*, 198 Ill. 258.
- 575.** 5. No Particular Form of Words Essential. — *Spafford v. Benzie Circuit Judge*, 136 Mich. 25, 10 Detroit Leg. N. 959.
7. Recital of Specific Offense Limits Operation of Pardon. — *Miller v. State*, 46 Tex. Crim. 59, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 575.
- 576.** 7. Immaterial Errors and Irregularities. — *Spafford v. Benzie Circuit Judge*, 136 Mich. 25, 10 Detroit Leg. N. 959; *Locklin v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 305.
- 577.** 2. Court Will Not Investigate Reasons for Pardoning. — *Locklin v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 305, holding that the erroneous recital of reasons for granting a pardon will not affect its validity.
- 578.** 7. What Constitutes Sufficient Delivery. — See *Spafford v. Benzie Circuit Judge*, 136 Mich. 25, 10 Detroit Leg. N. 959.
- 580.** 7. Conditional Pardon as a Contract. — *State v. Eby*, 170 Mo. 497.
- 581.** 1. Condition Subsequent. — *State v. Hunter*, 124 Iowa 569, 104 Am. St. Rep. 361.
2. Illegality of Condition. — See *State v. Hunter*, 124 Iowa 569, 104 Am. St. Rep. 361.
- 582.** 1. Condition that Prisoner Shall Not Visit Saloons. — See *State v. Hunter*, 124 Iowa 569, 104 Am. St. Rep. 361.
- 583.** 7. Pardon under Great Seal. — *Spafford v. Benzie Circuit Judge*, 136 Mich. 25, 10 Detroit Leg. N. 959. See also *Locklin v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 305.
- 584.** 1. *Yzaguirre v. State*, (Tex. Crim. 1904) 85 S. W. Rep. 14.
5. General Effect of Pardon. — *Locklin v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 305. See also *Gallagher v. People*, 211 Ill. 158.
- A Pardon Mentioning Only One of Two Convictions leaves the person under disability as to the other conviction. *Miller v. State*, 46 Tex. Crim. 59.
- 585.** 1. No Distinction Between Effect of Pardon and of Amnesty. — *State v. Eby*, 170 Mo. 497; *In re Briggs*, 135 N. Car. 118.
7. Pardon Discharges Liability for Fine or Penalty. — *State v. Eby*, 170 Mo. 497.
- 594.** 10. Pardon After Punishment Removes Disabilities. — See *Miller v. State*, 46 Tex. Crim. 59.
- 595.** 5. Pardon Stipulating for Rearrest. — *State v. Hunter*, 124 Iowa 569, 104 Am. St. Rep. 361.
- 596.** 1. Convict on Rearrest Not Entitled to Trial by Jury. — *State v. Hunter*, 124 Iowa 569, 104 Am. St. Rep. 361.
- 598.** 2. Statutory Pardon Not Revocable by Legislature. — See *State v. Eby*, 170 Mo. 497.

598. REPUGNANCY.— See note 7.

599. REPUTABLE.— See note 1.

600. REQUEST.— See note 4.

598. 7. Repugnancy.— *Lehman v. U. S.*, (C. C. A.) 127 Fed. Rep. 41.

599. 1. Reputable Defined.— *Wise v. State Veterinary Board*, 138 Mich. 428.

600. 4. To "Request" Is Not to "Empower," but to recognize that power to do the thing

requested already resides of right in the one of whom the *request* is made. *Brown v. Eastman*, 72 N. H. 356.

Same — *Request Held to Be Mandatory*.— *McCurdy v. McCallum*, 186 Mass. 464.

RESCISSION, CANCELLATION, AND REFORMATION.

BY E. C. ELLSBREE.

612. III. RESCISSION AND CANCELLATION — 1. Rescission in Equity — a. JURISDICTION AND ITS EXERCISE — (5) Where Contract Has Been Fully Performed — (a) Relief Granted Only in Extreme Cases.— See note 4.

613. (b) Where Fraud or Mistake Appears.— See notes 3, 5.

614. (6) In Cases of Fraud — (c) As Affected by Remedy at Law — bb. CONCURRENT JURISDICTION — (aa) Where Recovery of Money Is the Principal Relief Sought — aaa. Rule that Remedy at Law Is No Bar to Relief.— See note 6.

615. (bb) Where Rescission Is the Principal Relief Sought — aaa. Remedy at Law No Ground for Denying Relief.— See note 5.

617. (a) As Affected by Defense at Law — bb. RULE THAT DEFENSE AT LAW IS NO GROUND FOR DENYING RELIEF.— See note 2.

618. (e) Not Affected by Character of Property Involved — Sales of Chattels.— See note 2.

(7) *In Cases of Mistake — (a) General Principles.*— See note 3.

(b) *Mistake by One Party Ground for Rescission, Not for Reformation — aa. GENERAL PRINCIPLES.*— See notes 8, 9.

620. (8) In Cases of Breach of Contract — (b) Conveyance in Consideration of Promise to Support Grantor.— See note 2.

612. 4. Rescission of Executed Contracts Granted Only in Extreme Cases.— See *Youngstown Electric Light Co. v. Butler County Poor Dist.*, 21 Pa. Super. Ct. 95.

613. 3. Contracts Fully Performed Rescinded for Fraud.— *Findlay v. Baltimore Trust, etc., Co.*, 97 Md. 716; *Corbett v. McGregor*, (Tex. Civ. App. 1904) 84 S. W. Rep. 278. See also *Annis v. Ferguson*, (Ky. 1905) 84 S. W. Rep. 553.

5. Degree of Proof Necessary to Rescind Executed Contract.— *Wilson v. Maxon*, 56 W. Va. 194.

614. 6. Equity May Grant Relief Notwithstanding Remedy at Law.— *Hartwig v. Clark*, 138 Cal. 668; *Corbett v. McGregor*, (Tex. Civ. App. 1904) 84 S. W. Rep. 278.

615. 5. Granting Both Legal and Equitable Relief.— *Hubbard v. International Mercantile Agency*, (N. J. 1904) 59 Atl. Rep. 24; *Slayback v. Raymond*, 93 N. Y. App. Div. 326; *Edmonds v. Stern*, 89 N. Y. App. Div. 539.

617. 2. Relief Granted Notwithstanding Defense at Law.— *Hill v. Gettys*, 135 N. Car. 373.

618. 2. Wilson v. Maxon, 56 W. Va. 194,

citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 617.

3. Rescission for Mistake Which Prevents Assent.— *Hoops v. Fitzgerald*, 204 Ill. 325; *Castleman v. Castleman*, 184 Mo. 432; *Farmers' L. & T. Co. v. Suydam*, (Neb. 1903) 95 N. W. Rep. 867.

8. Equity Will Rescind for Unilateral Mistake.— *Coleman v. Illinois L. Ins. Co.*, (Ky. 1904) 82 S. W. Rep. 616; *Wirsching v. Grand Lodge, etc.*, (N. J. 1903) 56 Atl. Rep. 713; *Youngstown Electric Light Co. v. Butler County Poor Dist.*, 21 Pa. Super. Ct. 95. Compare *Stewart v. Dunn*, 77 N. Y. App. Div. 631, 79 N. Y. Supp. 123; *Travelers Ins. Co. v. Jones*, 32 Tex. Civ. App. 146.

9. Coleman v. Illinois L. Ins. Co., (Ky. 1904) 82 S. W. Rep. 616; *Wirsching v. Grand Lodge, etc.*, (N. J. 1903) 56 Atl. Rep. 713; *Youngstown Electric Light Co. v. Butler County Poor Dist.*, 21 Pa. Super. Ct. 95.

620. 2. Agreement to Support Grantor for Life Rescission for Breach by Grantee.— *Caudill v. Lemaster*, (Ky. 1904) 82 S. W. Rep. 1009; *Grant v. Bell*, 26 R. I. 288,

620. *b. CONDITIONS OF RELIEF* — (1) *Introductory*. — See note 5.

621. (3) *Placing Parties in Statu Quo* — (b) *Duty of Complainant to Make or Offer Restitution* — *aa. IN GENERAL*. — See note 2.

bb. WHETHER TENDER IS A PREREQUISITE TO SUIT. — See note 3.

622. See notes 2, 3.

(c) *Where Parties Cannot Be Placed in Statu Quo* — *aa. GENERAL PRINCIPLE*. — See note 6.

623. *cc. RESTITUTION RENDERED IMPOSSIBLE BY ACT OF DEFENDANT*. — See note 4.

624. (d) *When Restitution Unnecessary*. — See notes 1, 2.

625. *d. WAIVER AND LACHES*. — See notes 5, 6, 7.

626. *What Is "Reasonable Time" for Disaffirmance*. — See note 1.

Knowledge of Right Essential. — See note 3.

e. EFFECT OF RESCISSION. — See note 5.

627. *2. Cancellation in Equity Quia Timet* — *a. JURISDICTION*. — See note 1.

630. *b. PRINCIPLES GOVERNING EXERCISE OF JURISDICTION* — (4) *Particular Grounds for Granting or Denying Relief* — (b) *Defense Available at Law* — *cc. RELIEF GRANTED ONLY UNDER SPECIAL CIRCUMSTANCES* — (aa) *Principle Stated*. — See note 7.

620. 5. See *Bell v. Felt*, 102 Ill. App. 218, modified 205 Ill. 213.

621. 2. *Plaintiff Must Restore or Offer to Restore Benefits*. — *McLeod v. McLeod*, 137 Ala. 267; *Reynolds, etc., Mortg. Co. v. Martin*, 116 Ga. 495; *Cleckley v. Mutual Fidelity Co.*, 117 Ga. 466; *Harris v. Daly*, 121 Ga. 511; *Mortimer v. McMullen*, 202 Ill. 413; *Felt v. Bell*, 205 Ill. 213; *Knight v. Orchard*, 92 Mo. App. 466; *Anderson v. Anderson Food Co.*, 66 N. J. Eq. 209; *Fowler v. Meadow Brook Water Co.*, 208 Pa. St. 473; *Rumsey v. Shaw*, 25 Pa. Super. Ct. 386.

3. *Offer to Make Restitution Is Sufficient if Contained in Bill or Complaint — Distinction Between Rule at Law and Rule in Equity*. — *McLeod v. McLeod*, 137 Ala. 267; *Thompson v. Hardy*, (S. Dak. 1905) 102 N. W. Rep. 299; *Bostwick v. Mutual L. Ins. Co.*, 116 Wis. 392. See also *Hansen v. Allen*, 117 Wis. 61.

622. 2. *Russell v. Russell*, 129 Fed. Rep. 434; *Ware v. Couvillion*, 112 La. 43.

3. *Exception*. — Where the plaintiff is ignorant of what amount to tender, he is excused from making antecedent tender. *Derouen v. Romero*, 110 La. 209.

6. *Placing in Statu Quo Impossible*. — See *Youngstown Electric Light Co. v. Butler County Poor Dist.*, 21 Pa. Super. Ct. 95.

Where a Money Decree Will Compensate for any deficiency, rescission may be granted though a complete restoration of the *status quo* cannot be made. *Hoops v. Fitzgerald*, 204 Ill. 325.

623. 4. *Where Defendant Has Rendered Restitution Impossible*. — *Findlay v. Baltimore Trust, etc., Co.*, 97 Md. 716.

Restitution in Custodia Legis. — The party rescinding must do all that is practicable to place the other party in *statu quo*. What he cannot restore on account of opposition, he must put in *custodia legis*, so that it can be had upon request, at least before verdict, otherwise he cannot maintain his action. *McPheters v. Kimball*, 99 Me. 505.

Where the Defendant Refuses to Take Back the Property, a tender is rendered unnecessary. *Barrett v. Tyler*, 76 Vt. 108; *Bailey v. Manley*, 77 Vt. 157.

624. 1. *Restitution Held Unnecessary*. —

Hardy v. Dyas, 203 Ill. 211; *Call v. Shewmaker*, (Ky. 1902) 69 S. W. Rep. 749.

Things Not Received as a Consideration for the agreement need not be restored. *Hargardine-McKittrick Dry-Goods Co. v. Swofford Bros. Dry Goods Co.*, 65 Kan. 572.

2. *Things of No Value*. — *Harris v. Daly*, 121 Ga. 511; *Bailey v. Gilman Bank*, 99 Mo. App. 571; *Rumsey v. Shaw*, 25 Pa. Super. Ct. 386.

625. 5. *Relief Denied for Laches*. — *Ward v. Sherman*, 192 U. S. 168; *Shappirio v. Goldberg*, 192 U. S. 232, affirming 20 App. Cas. (D. C.) 185; *Evans v. Duke*, 140 Cal. 22; *Reynolds, etc., Mortg. Co. v. Martin*, 116 Ga. 495; *Provident Loan Trust Co. v. McIntosh*, 68 Kan. 452; *Dickman v. Dryden*, 90 Minn. 244; *Holdrege v. Watson*, (Neb. 1901) 96 N. W. Rep. 67; *Timmins v. Russell*, 13 N. Dak. 487; *Rumsey v. Shaw*, 25 Pa. Super. Ct. 386; *Travelers' Ins. Co. v. Jones*, 32 Tex. Civ. App. 146; *Bostwick v. Mutual L. Ins. Co.*, 116 Wis. 392.

6. *Conduct Showing Affirmance*. — *Russell v. Russell*, 129 Fed. Rep. 434; *Carlock v. Sweeney*, (Tex. Civ. App. 1904) 82 S. W. Rep. 469.

7. *Van Beck v. Milbrath*, 118 Wis. 42.

626. 1. *Reasonable Time for Disaffirmance a Question of Fact*. — *Beardsley v. Clem*, 137 Cal. 328.

When Question of Law. — Where the period suffered to elapse before the effort to rescind is so long that fair-minded men could not reasonably differ in opinion on the question, it becomes the duty of the court to pronounce the delay unreasonable as matter of law. *Manley v. Crescent Novelty Mfg. Co.*, 103 Mo. App. 135.

3. *Delay Without Knowledge of Right to Rescind*. — *Coolidge v. Rhodes*, 199 Ill. 24; *Walker v. Shepard*, 210 Ill. 100.

5. *Interest on Payments Made by the Plaintiff*, from the time of such payments respectively, may be allowed where a contract is set aside for fraud. *Hansen v. Allen*, 117 Wis. 61; *Nelson v. Allen*, 117 Wis. 91.

627. 1. *Cancellation Within Exclusive Jurisdiction of Equity*. — *Twogood v. Allee*, 125 Iowa 59.

630. 7. *Handley v. Sprinkle*, (Mont. 1904) 77 Pac. Rep. 296.

634. *dd.* PARTICULAR CIRCUMSTANCES CONSIDERED—(*cc*) *Where Invalidity Appears on Face of Instrument.*—See note 5.

636. (*gg*) *Where Instrument Is Negotiable*—*aaa.* In General.—See note 3.

637. (*hh*) *Where Instrument Was Procured by Fraud*—*aaa.* Principle Stated.—See note 1.

bbb. Denying Relief Where Defense at Law Adequate.—See note 2.

638. *ccc.* Granting Relief Though Defense at Law Adequate.—See note 3.

642. (5) *Conditions of Relief.*—See notes 1, 2.

(6) *Laches and Acquiescence.*—See note 3.

3. Adequacy of Legal Remedy or Defense.—See note 5.

643. 4. Rescission at Law or by Act of Party—*b.* GROUNDS FOR RE-SCISSION—(1) *Fraud, Misrepresentation, and Deceit.*—See note 6.

(2) *Nonperformance.*—See note 7.

644. See notes 3, 4.

(3) *Failure of Consideration.*—See note 7.

645. *c.* METHOD OF EFFECTING RESCISSION.—See notes 5, 6.

d. DUTIES OF PARTY RESCINDING—(1) *To Give Notice of Disaffirmance.*—See note 7.

646. (2) *To Place Other Party in Statu Quo.*—See note 1.

(3) *To Rescind in Toto.*—See note 4.

634. 5. Instrument Invalid on Its Face—Cancellation Denied.—*Boddie v. Bush*, 136 Ala. 560; *Carney v. Barnes*, 56 W. Va. 581.

Where Evidence Outside the Deed Is Required to prove it void, equity has jurisdiction. *Carney v. Barnes*, 56 W. Va. 581.

636. 3. Cancellation of Negotiable Instruments to Prevent Transfer to Bona Fide Holders.—*Handley v. Sprinkle*, (Mont. 1904) 77 Pac. Rep. 296.

637. 1. Cancellation of Instruments Procured by Fraud.—*Andrews v. Frierson*, 134 Ala. 626; *Cannon v. Gilmer*, 135 Ala. 302; *Dashner v. Buffington*, 170 Mo. 260.

Illustrations—Cancellation of Insurance Policies Procured by Fraud.—*Riggs v. Union L. Ins. Co.*, (C. C. A.) 129 Fed. Rep. 207.

2. Fraud an Adequate Defense at Law—Cancellation Denied.—*Cable v. U. S. Life Ins. Co.*, 191 U. S. 288, reversing (C. C. A.) 111 Fed. Rep. 19; *Such v. New York State Bank*, 127 Fed. Rep. 450; *Des Moines L. Ins. Co. v. Seitert*, 210 Ill. 157.

638. 3. Cancellation Decreed Although Defense of Fraud Adequate.—*Cribbs v. Walker*, (Ark. 1905) 85 S. W. Rep. 244.

642. 1. Rubie Combination Gold Min. Co. v. Princess Alice Gold Min. Co., 31 Colo. 158; *McAllen v. Hodge*, 94 Minn. 237.

2. *Gatje v. Armstrong*, 145 Cal. 370; *Jinks v. Moppin*, (Tex. Civ. App. 1904) 80 S. W. Rep. 390.

3. Remedy Denied for Delay and Acquiescence.—*Wilkes v. Phillips*, 120 Ga. 728; *Ferns v. Chapman*, 211 Ill. 597; *Horn v. Beatty*, 85 Miss. 504.

5. Principles Governing Adequacy of Legal Remedy.—*Carney v. Barnes*, 56 W. Va. 581.

643. 6. Rescission for Fraud.—*Wilson v. Maxon*, 56 W. Va. 194, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 643.

7. Discharge of Contract by Nonperformance or Breach.—*Seibel v. Purchase*, 134 Fed. Rep. 484.

644. 3. Preventing Performance by Other Party.—*Brown v. Rasin Monumental Co.*, 98 Md. 1.

4. Failure Must Be Total.—*Pittenger v. Pittenger*, 208 Ill. 582.

7. Failure of Consideration.—*Latimer v. Capay Valley Land Co.*, 137 Cal. 286; *Hartwig v. Clark*, 138 Cal. 668.

645. 5. Bringing Action Shows Sufficient Disaffirmance.—*Hartwig v. Clark*, 138 Cal. 668.

6. *Evans v. Jacobitz*, 67 Kan. 249; *Moran v. Palmer*, 36 Wash. 684; *Marsh v. Despard*, 56 W. Va. 132; *Smeesters v. Schroeder*, 123 Wis. 116.

7. Duty to Give Notice of Disaffirmance.—*Lamprey v. St. Paul, etc., R. Co.*, 89 Minn. 187; *Larson v. Minneapolis Threshing Mach. Co.*, 92 Minn. 62; *Corse v. Minnesota Grain Co.*, 94 Minn. 331; *Guss v. Nelson*, 14 Okla. 296, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 645.

646. 1. Restoration of Status Quo Necessary.—*Vance v. Newman*, 72 Ark. 359, 105 Am. St. Rep. 42; *Harris v. Daly*, 121 Ga. 511; *Robertson v. Merriam*, 106 Ill. App. 610; *Parsons Band Cutter, etc., Co. v. Mallinger*, 122 Iowa 703; *Boeker v. Crescent Belting, etc., Co.*, 101 Mo. App. 429; *Guss v. Nelson*, 14 Okla. 296, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 645; *Smith v. Detroit, etc., Gold Min. Co.*, 17 S. Dak. 413; *Barrett v. Tyler*, 76 Vt. 108.

Worthless Things Need Not Be Restored.—*Bailey v. Gilman Bank*, 99 Mo. App. 571.

Fair Offer to Return Sufficient.—*Corse v. Minnesota Grain Co.*, 94 Minn. 331.

4. Rescission Must Be of Entire Contract.—*Pike's Peak Paint Co. v. Masury*, 19 Colo. App. 286; *Morrow v. Moore*, 98 Me. 373, 99 Am. St. Rep. 410; *Norcross v. Wyman*, 187 Mass. 25; *Guss v. Nelson*, 14 Okla. 296; *Seattle Nat. Bank v. Powles*, 33 Wash. 21, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 645, 646.

647. *c.* LOSS OF RIGHT — (1) *By Default of Party Seeking to Rescind.* — See note 1.

IV. REFORMATION — 1. Jurisdiction — a. OF COURTS OF EQUITY. — See note 5.

648. 2. Grounds of Reformation — *a.* MISTAKE — (1) *Rule Stated.* — See note 3.

649. See note 1.

(2) *Must Be Mutual.* — See note 2.

650. See note 1.

(3) *Whether Relief May Be Granted in Case of Mistake of Law.* — See notes 2, 3.

647. 1. Loss of Right by Default. — Provident Loan Trust Co. v. McIntosh, 68 Kan. 452, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 647; Koerper v. Royal Invest. Co., 102 Mo. App. 543.

5. Jurisdiction of Courts of Equity. — Merki v. Merki, 212 Ill. 121, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 647, 648; Munson v. Herzog, 109 Ill. App. 302; Miles v. Miles, 84 Miss. 624; Wirsching v. Grand Lodge, etc., (N. J. 1903) 56 Atl. Rep. 713; Forester v. Van Auker, 12 N. Dak. 175.

Equitable Grounds for Relief Essential. — Null v. Elliott, 52 W. Va. 229.

648. 3. Mistake — *United States.* — Carrell v. McMurray, 136 Fed. Rep. 661, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 648.

Illinois. — Wiemer v. Himmel, 200 Ill. 374.

Indiana. — Smelser v. Pugh, 29 Ind. App. 614.

Iowa. — Brown v. Ward, 119 Iowa 604; Pierce v. Houghton, 122 Iowa 477.

Kentucky. — Pictet Spring Water Ice Co. v. Citizens' Ins. Co., (Ky. 1903) 71 S. W. Rep. 514.

Mississippi. — Hawkins v. Blair, (Miss. 1904) 36 So. Rep. 246; Moore v. Crump, 84 Miss. 612.

New Jersey. — Slack v. Craft, (N. J. 1904) 57 Atl. Rep. 1014.

New York. — Uihlein v. Matthews, 93 N. Y. App. Div. 57; Schuessler v. Fire Ins. Co., 103 N. Y. App. Div. 12.

North Carolina. — Pinchback v. Bessemer Min., etc., Co., 137 N. Car. 171.

Oklahoma. — Marshall v. Homier, 13 Okla. 264.

Pennsylvania. — Baab v. Houser, 203 Pa. St. 470.

Texas. — Norris v. W. C. Belcher Land Mortg. Co., 98 Tex. 176.

Wisconsin. — Rowell v. Smith, 123 Wis. 510.

649. 1. Mistake of Scrivener. — Allis v. Hall, 76 Conn. 322; Thomas v. Conrad, 114 Ky. 841; Nutall v. Nutall, (Ky. 1904) 82 S. W. Rep. 377; Newland v. Bellevue First Baptist Church Soc., 137 Mich. 335; Story v. Gammell, (Neb. 1903) 94 N. W. Rep. 982; Ferrell v. Ferrell, 53 W. Va. 515.

2. Mistake Must Be Mutual — *United States.* — Barker v. Pullman's Palace Car Co., 124 Fed. Rep. 555, affirmed (C. C. A.) 134 Fed. Rep. 70.

Arkansas. — McGuigan v. Gaines, 71 Ark. 614.

California. — Kee v. Davis, 137 Cal. 456.

Illinois. — Gray v. Merchants' Ins. Co., 113 Ill. App. 537.

Indiana. — St. Clair v. Marquell, 161 Ind. 56; Smelser v. Pugh, 29 Ind. App. 614; Webb v. Hammond, 31 Ind. App. 613; Johnson v. Sherwood, 34 Ind. App. 490.

Iowa. — Montgomery v. Mann, 120 Iowa 609; Bowman v. Besley, 122 Iowa 42; Conner v. Baxter, 124 Iowa 219.

Kentucky. — Coleman v. Illinois L. Ins. Co., (Ky. 1904) 82 S. W. Rep. 616.

Massachusetts. — Fowle v. Pitt, 183 Mass. 351.

Minnesota. — Fritz v. Fritz, 94 Minn. 264.

Missouri. — Meredith v. Holmes, 105 Mo. App. 343.

Nebraska. — Shelby v. Creighton, (Neb. 1902) 96 N. W. Rep. 382.

New Jersey. — Lutjen v. Lutjen, 64 N. J. Eq. 773; Aller v. Crouter, 64 N. J. Eq. 381.

New York. — Fox v. Coggeshall, 95 N. Y. App. Div. 410; Albro v. Gowland, 98 N. Y. App. Div. 474; Duke v. Stuart, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 120, affirmed 105 N. Y. App. Div. 376.

North Carolina. — Southern Finishing, etc., Co. v. Ozment, 132 N. Car. 839; Jones v. Warren, 134 N. Car. 390.

North Dakota. — Forester v. Van Auker, 12 N. Dak. 175.

Pennsylvania. — Youngstown Electric Light Co. v. Butler County Poor Dist., 21 Pa. Super. Ct. 95; Boyce v. Hamburg-Bremen F. Ins. Co., 24 Pa. Super. Ct. 589.

Rhode Island. — Lyons v. Lyons, 25 R. I. 494.

Texas. — Jackson v. Martin, (Tex. Civ. App. 1903) 73 S. W. Rep. 832; Silliman v. Taylor, 35 Tex. Civ. App. 490.

West Virginia. — Nutter v. Brown, 51 W. Va. 598; Le Comte v. Freshwater, 56 W. Va. 336. And see generally the title MISTAKE, **813. 1, 822. 4.**

Demand of Mutuality Does Not Apply to Mere Mistake of Scrivener. — Schrieber v. Goldsmith, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 381; Ferrell v. Ferrell, 53 W. Va. 515.

350. 1. Minds of Parties Must Have Met. — Conner v. Baxter, 124 Iowa 219.

"A court of equity has not power to reform an agreement; it can only correct the written evidence of the agreement to make it correspond to the understanding of the parties." Boyce v. Hamburg-Bremen F. Ins. Co., 24 Pa. Super. Ct. 589.

2. Mistake of Law. — Carrell v. McMurray, 136 Fed. Rep. 661, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 648 et seq.; Brown v. Ward,

650. (4) *Presumption and Burden of Proof.* — See notes 4, 5.

651. See note 1.

652. (5) *Evidence.* — See note 2.

6. FRAUD. — See notes 4, 6.

3. Instruments Which May Be Reformed — *a.* IN GENERAL. — See note 8.

653. See notes 1, 2.

b. NECESSITY FOR CONSIDERATION. — See note 9.

654. **4. Matters Which May Be Corrected.** — See note 9.

5. Who May Obtain Reformation — *a.* GRANTEE. — See notes 10, 11.

119 Iowa 604; Hopwood v. McCausland, 120 Iowa 218; Bortorff v. Lewis, 121 Iowa 27; Bonbright v. Bonbright, 123 Iowa 305; Conner v. Baxter, 124 Iowa 219; Stelpflug v. Wolfe, 127 Iowa 192; Wall v. Meilke, 89 Minn. 232; Lansing v. Commercial Union Assur. Co., (Neb. 1903) 93 N. W. Rep. 756; Richmond v. Ogden St. R. Co., 44 Oregon 48; Rowell v. Smith, 123 Wis. 510. And see the title MISTAKE, **816**. 3 *et seq.*

It Is a Mistake of Fact. — Wieneke v. Deputy, 31 Ind. App. 621.

650. **3.** Atlanta Trust, etc., Co. v. Nelms, 116 Ga. 915; Gray v. Merchants' Ins. Co., 113 Ill. App. 537.

4. Presumption. — Boulden v. Wood, 96 Md. 332; Meredith v. Holmes, 105 Mo. App. 343; Duke v. Stuart, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 120, *affirmed* 105 N. Y. App. Div. 376; Southern Finishing, etc., Co. v. Ozment, 132 N. Car. 839.

5. Burden of Proof. — Barker v. Pullman's Palace Car Co., 124 Fed. Rep. 555, *affirmed* (C. C. A.) 134 Fed. Rep. 70; Pierce v. Houghton, 122 Iowa 477; Coleman v. Illinois L. Ins. Co., (Ky. 1904) 82 S. W. Rep. 616; Meredith v. Holmes, 105 Mo. App. 343; Southern Finishing, etc., Co. v. Ozment, 132 N. Car. 839; Forester v. Van Auken, 12 N. Dak. 175.

651. **1. Evidence Must Be Clear and Satisfactory** — United States. — Willard v. Davis, 122 Fed. Rep. 363; Barker v. Pullman's Palace Car Co., 124 Fed. Rep. 555, *affirmed* (C. C. A.) 134 Fed. Rep. 70.

Alabama. — Keith v. Woodruff, 136 Ala. 443.

Arkansas. — McGuigan v. Gaines, 71 Ark. 614.

Connecticut. — Jenner v. Brooks, 77 Conn. 384.

Illinois. — Smith v. Rust, 112 Ill. App. 84; Gray v. Merchants' Ins. Co., 113 Ill. App. 537.

Iowa. — Brown v. Ward, 119 Iowa 604; Wold v. Newgard, (Iowa 1903) 94 N. W. Rep. 859; Montgomery v. Mann, 120 Iowa 609; Sauer v. Nehls, 121 Iowa 184; Bowman v. Besley, 122 Iowa 42; Pierce v. Houghton, 122 Iowa 477; Merchants' Nat. Bank v. Murphy, 125 Iowa 607.

Kansas. — Schaefer v. Mills, 69 Kan. 25.

Kentucky. — Coleman v. Illinois L. Ins. Co., (Ky. 1904) 82 S. W. Rep. 616.

Maryland. — Boulden v. Wood, 96 Md. 332.

Minnesota. — Wall v. Meilke, 89 Minn. 232; Humphreys v. Shellenberger, 89 Minn. 327; Mikiska v. Mikiska, 90 Minn. 258; Fritz v. Fritz, 94 Minn. 264.

Missouri. — Meredith v. Holmes, 105 Mo. App. 343.

New Jersey. — Aller v. Crouter, 64 N. J. Eq. 381; Anderson v. Anderson Food Co., 66 N. J. Eq. 209.

New York. — Roussel v. Lux, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 508; Albro v. Gowland, 98 N. Y. App. Div. 474; Duke v. Stuart, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 120, *affirmed* 105 N. Y. App. Div. 376.

North Carolina. — Southern Finishing, etc., Co. v. Ozment, 132 N. Car. 839.

North Dakota. — Forester v. Van Auken, 12 N. Dak. 175.

Pennsylvania. — Williamson v. Carpenter, 205 Pa. St. 164; Highlands v. Philadelphia, etc., R. Co., 209 Pa. St. 286; Snyder v. Phillips, 25 Pa. Super. Ct. 648.

Evidence Must Relate to Time of Execution of Instrument. — Williamson v. Carpenter, 205 Pa. St. 164.

652. **2. Parol Evidence.** — McGuigan v. Gaines, 71 Ark. 614; Kee v. Davis, 137 Cal. 456; Kitchens v. Usry, 121 Ga. 294; Wieneke v. Deputy, 31 Ind. App. 621; Western Wheeled Scraper Co. v. Stickleman, 122 Iowa 396; Nuttall v. Nuttall, (Ky. 1904) 82 S. W. Rep. 377; Story v. Gammell, (Neb. 1903) 94 N. W. Rep. 982; Aller v. Crouter, 64 N. J. Eq. 381; Forester v. Van Auken, 12 N. Dak. 175. See also Pictet Spring Water Ice Co. v. Citizens' Ins. Co., (Ky. 1903) 71 S. W. Rep. 514.

4. Reformation. — Le Comte v. Freshwater, 56 W. Va. 336. And see the title FRAUD AND DECEIT, **175**. 2.

6. Smelser v. Pugh, 29 Ind. App. 614; Daly v. Simonson, 126 Iowa 716; Fritz v. Fritz, 94 Minn. 264; Duke v. Stuart, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 120, *affirmed* 105 N. Y. App. Div. 376; Jones v. Warren, 134 N. Car. 390; Nutter v. Brown, 51 W. Va. 598.

8. Deed of Married Woman May Be Reformed. — Mills v. Driver, 72 Ark. 534.

653. **1. Supersedeas Bond.** — Nourse v. Weitz, 120 Iowa 708.

2. Insurance Policies. — See Pictet Spring Water Ice Co. v. Citizens Ins. Co., (Ky. 1903) 71 S. W. Rep. 514.

9. Necessity for Consideration. — Enos v. Stewart, 138 Cal. 112; Strayer v. Dickerson, 205 Ill. 257; Metcalfe v. Lowenstein, 35 Tex. Civ. App. 619. But see Jones v. McNealy, 139 Ala. 379, holding that a deed may be reformed whether it is one of bargain and sale or of gift.

654. **9. Description of Property.** — Adams v. Drews, 110 La. 456; Miles v. Miles, 84 Miss. 624; Silliman v. Taylor, 35 Tex. Civ. App. 490.

10. One of Two Purchasers from a Common Grantor may obtain the reformation of the deed

- 655.** *d.* ASSIGNEE. — See note 1.
6. Against Whom Relief Will Be Granted — *b.* PERSONS WITHOUT NOTICE. — See note 3.
656. **8.** Grounds for Refusing Reformation — *a.* LACHES. — See note 5.
657. *b.* NEGLIGENCE OF COMPLAINING PARTY. — See note 1.
e. FUTILITY OF REFORMATION. — See note 6.
9. Limits of Power to Reform. — See note 10.
658. **12.** Granting of Further Relief. — See note 5.

to the other where through mistake such deed purports to convey a part of the land conveyed to the plaintiff. *Jones v. McNealy*, 139 Ala. 379, pointing out that the grantee simply took the grantor's place in regard to the right to maintain the bill.

The "Party Aggrieved," within the meaning of the *California* statute, is one whose pecuniary interest is affected by the mistake. *Enos v. Stewart*, 138 Cal. 112.

A Mere Volunteer, not a party to any of the conveyances sought to be reformed, cannot sue for the reformation thereof. *Gould v. Glass*, 120 Ga. 50. See also *Miles v. Miles*, 84 Miss. 624.

651. **11.** Last Vendee. — See *White v. Shaffer*, 97 Md. 359.

655. **1.** Assignee. — *Pittsburgh Amusement Co. v. Ferguson*, 100 N. Y. App. Div. 453.

3. Intervening Rights Acquired Without Notice. — *Adams v. Drews*, 110 La. 456; *Slack v. Craft*, (N. J. 1904) 57 Atl. Rep. 1014.

656. **5.** Laches. — *Fritz v. Fritz*, 94 Minn. 264; *Young v. Marion-Sims College of Medicine*, 91 Mo. App. 214; *Van Beck v. Milbrath*, 118 Wis. 42.

Statute of Limitations Does Not Run. — *Wall v. Meilke*, 89 Minn. 232.

657. **1.** Negligence. — *Fritz v. Fritz*, 94

Minn. 264. Compare *Story v. Gammell*, (Neb. 1903) 94 N. W. Rep. 982.

If the Position of Either Party Has Not Been Changed in consequence thereof, relief may be granted notwithstanding negligence of the complainant. *Southern Finishing, etc., Co. v. Ozment*, 132 N. Car. 839.

Signing Contract Without Reading Negligence in Absence of Fraud. — *Youngstown Electric Light Co. v. Butler County Poor Dist.*, 21 Pa. Super. Ct. 95; *Ferrell v. Ferrell*, 53 W. Va. 515.

6. Day v. Shiver, 137 Ala. 185.

Where a Mortgage Has Become Extinct, the fact that property was omitted therefrom by mistake in the execution of the instrument furnishes no ground for reformation of either the mortgage or the decree of foreclosure. *Stewart v. Wilson*, 141 Ala. 405.

10. *Farmers' L. & T. Co. v. Suydam*, (Neb. 1903) 95 N. W. Rep. 867. See also *supra*, this title, **650.** 1.

658. **5.** Court Will Grant Full Relief. — *Palmer Steel, etc., Co. v. Heat, etc., Co.*, 160 Ind. 232, holding that the court, having acquired jurisdiction, will retain it for the purpose of granting whatever relief is appropriate, even though that proves to be only a money judgment.

RES GESTÆ.

BY JOHN SIMPSON.

662. II. STATEMENT OF GENERAL RULE. — See note 1.

Theory of Admission of Accompanying Declarations. — See note 2.

Whether Original Evidence or Exception to Hearsay. — See note 3.

663. See note 1.

III. THE MAIN OR PRINCIPAL FACT — **4.** Duration or Extent. — See note 9.

664. IV. THE ACCOMPANYING FACTS AND CIRCUMSTANCES — **2.** Expressions of Opinion. — See note 4.

662. **1.** General Doctrine of Res Gesta Stated. — *Pittsburgh Plate Glass Co. v. Kerlin Bros. Co.*, (C. C. A.) 122 Fed. Rep. 414; *Goodman v. State*, 122 Ga. 111; *Sutcliffe v. Iowa State Traveling Men's Assoc.*, 119 Iowa 220, 97 Am. St. Rep. 298; *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558; *State v. Tighe*, 27 Mont. 327. See also *Mumford v. State*, 45 Tex. Crim. 590.

2. Theory of Admission of Accompanying Declarations. — *Murray v. Boston, etc., R. Co.*, 72 N. H. 32.

3. *Shannon v. Castner*, 21 Pa. Super. Ct. 294.

663. **1.** See *Martin v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 657.

9. Duration and Extent of Principal Fact. — *Memphis St. R. Co. v. Shaw*, 110 Tenn. 467; *Scott v. State*, 46 Tex. Crim. 305; *Western Union Tel. Co. v. Uvalde Nat. Bank*, (Tex. Civ. App. 1903) 72 S. W. Rep. 232.

664. **4.** Expressions of Opinion Inadmissible as Parts of Res Gesta. — *Boone v. Oakland Transit Co.*, 139 Cal. 490.

664. V. RELATION BETWEEN MAIN FACT AND ACCOMPANYING FACTS—**1. Contemporaneousness.**— See note 6.

Antecedent Declarations. — See note 7.

665. Subsequent Declarations.— See notes 1, 2.**666. 2. Explanatory Character of Accompanying Facts.**— See note 1.

664. 6. Authorities Holding that Accompanying Declarations Must Be Contemporaneous.— State *v. Stallings*, (Ala. 1905) 38 So. Rep. 261; *Rulofson v. Billings*, 140 Cal. 452; *Boone v. Oakland Transit Co.*, 139 Cal. 490; *Haywood v. Hamm*, 77 Conn. 158; *Atchison, etc., R. Co. v. Logan*, 65 Kan. 748; *Fallon v. Rapid City*, 17 S. Dak. 570.

7. *Swift v. Griffin*, 109 Ill. App. 414.

665. 1. Narrative of Past Transaction Inadmissible— *United States*.— The *Maurice*, (C. C. A.) 135 Fed. Rep. 516; *Marande v. Texas, etc., R. Co.*, (C. C. A.) 124 Fed. Rep. 42.

Florida.— *Weightnovel v. State*, (Fla. 1903) 35 So. Rep. 856.

Illinois.— *Boyd v. West Chicago St. R. Co.*, 112 Ill. App. 50; *Swift v. Griffin*, 109 Ill. App. 414.

Indiana.— *Golibart v. Sullivan*, 30 Ind. App. 428.

Kentucky.— *Davis v. Com.*, (Ky. 1904) 77 S. W. Rep. 1101; *Early v. Louisville, etc., R. Co.*, 115 Ky. 13.

Minnesota.— *State v. Gallehugh*, 89 Minn. 212.

Missouri.— *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558; *Gotwald v. St. Louis Transit Co.*, 102 Mo. App. 492; *State v. Hendricks*, 172 Mo. 654; *Koenig v. Union Depot R. Co.*, 173 Mo. 698.

New York.— *Austin v. Bartlett*, 178 N. Y. 310; *Hall v. Uvalde Asphalt Paving Co.*, (Supm. Ct. App. T.) 92 N. Y. Supp. 46; *Norris v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 460.

North Carolina.— *Bumgardner v. Southern R. Co.*, 132 N. Car. 438; *Lyman v. Southern R. Co.*, 132 N. Car. 721.

North Dakota.— *Balding v. Andrews*, 12 N. Dak. 267; *Puls v. Grand Lodge, etc.*, 13 N. Dak. 559.

Rhode Island.— *Havens v. Rhode Island Suburban R. Co.*, 26 R. I. 48; *Chapman v. Pendleton*, 26 R. I. 573.

South Dakota.— *Fallon v. Rapid City*, 17 S. Dak. 570.

Texas.— *McCowen v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 46; *Freeman v. State*, 46 Tex. Crim. 318; *Carter v. State*, 44 Tex. Crim. 312; *Missouri, etc., R. Co. v. Tarwater*, 33 Tex. Civ. App. 116.

2. Subsequent Declaration Admissible Though Not Precisely Coincident— *United States*.— *Kansas City Southern R. Co. v. Moles*, (C. C. A.) 121 Fed. Rep. 351.

Alabama.— *Ferguson v. State*, 141 Ala. 20.

Colorado.— See *Union Casualty, etc., Co. v. Mondy*, 18 Colo. App. 395.

Kentucky.— See *Davis v. Com.*, (Ky. 1904) 77 S. W. Rep. 1101.

Michigan.— *Ensley v. Detroit United R. Co.*, 134 Mich. 195.

Missouri.— *Shaefer v. Missouri Pac. R. Co.*, 98 Mo. App. 445.

Montana.— *State v. Tighe*, 27 Mont. 327.

Nebraska.— *Pledger v. Chicago, etc., R. Co.*, (Neb. 1903) 95 N. W. Rep. 1057.

New Hampshire.— *Murray v. Boston, etc., R. Co.*, 72 N. H. 32.

New York.— *Scheir v. Quirin*, 77 N. Y. App. Div. 624, affirmed 177 N. Y. 568.

Rhode Island.— *State v. Epstein*, 25 R. I. 131.

South Carolina.— *Williams v. Southern R. Co.*, 68 S. Car. 369. See also *State v. McDaniel*, 68 S. Car. 304, 102 Am. St. Rep. 661.

South Dakota.— *State v. Mulch*, 17 S. Dak. 321.

Texas.— *Scott v. State*, 46 Tex. Crim. 536; *Taylor v. State*, (Tex. Crim. 1904) 80 S. W. Rep. 378; *Kenney v. State*, (Tex. Crim. 1903) 79 S. W. Rep. 817; *Vann v. State*, 45 Tex. Crim. 434, 107 Am. St. Rep. 997; *Berry v. State*, 44 Tex. Crim. 395.

Washington.— *Dixon v. Northern Pac. R. Co.*, 37 Wash. 310; *Lambert v. La Conner Trading, etc., Co.*, 30 Wash. 346; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25.

Wisconsin.— *Hupfer v. National Distilling Co.*, 119 Wis. 417; *Charley v. Potthoff*, 118 Wis. 258; *Bliss v. State*, 117 Wis. 596.

Extreme Cases Favoring Admissibility of Subsequent Declarations.— In *Guild v. Pringle*, 130 Fed. Rep. 419, the court refused to apply the doctrine of *Travellers' Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397, cited in the original note.

Immediately Subsequent Declaration—One Continuous Act.— *Trumbull v. Donahue*, 18 Colo. App. 460.

Evidence Showing How Long After the Main Event the Declarations Were Made must be produced so as to warrant an assumption that they were a part of the *res gestæ*. *Lumm v. Howells*, 27 Utah 80.

Admissibility Within Discretion of Trial Court.— Where the declarations are not precisely concurrent with the transaction each case must be decided upon its own circumstances, and their admissibility is within the discretion of the trial court. *State v. Lindsey*, 68 S. Car. 276; *State v. McDaniel*, 68 S. Car. 304, 102 Am. St. Rep. 661.

666. 1. Explanatory Character of Surrounding Facts Necessary.— *Moore v. Nashville, etc., R. Co.*, 137 Ala. 495; *Chicago City R. Co. v. White*, 110 Ill. App. 23; *Norris v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 460; *State v. Smith*, 43 Oregon 109; *Tiborsky v. Chicago, etc., R. Co.*, 124 Wis. 243. See also *Bumgardner v. Southern R. Co.*, 132 N. Car. 438.

Illustration.— In an action by the proprietor of a boarding house for damages caused by a nuisance it was held that the fact that two of her boarders refused to stay, elicited in a conversation between the plaintiff and them, was properly received in evidence as part of the *res gestæ* as calculated to explain the nature

666. VI. BY WHOM ACTS MAY BE PERFORMED — 2. Third Persons. — See note 3.

6. Co-conspirators. — See note 7.

667. VII. APPLICATION OF DOCTRINE TO SPECIFIC ISSUES — 1. Bodily Feelings — *b.* INSTINCTIVE EXPRESSIONS OF PAIN OR MALADY. — See note 6.

668. *c.* DESCRIPTIVE STATEMENTS OF PRESENT PAIN. — See note 2.

669. See notes 1, 2.

d. PAST SUFFERING OR PHYSICAL CONDITION. — See note 3.

670. *e.* STATEMENTS TO PHYSICIAN — (2) *Past Symptoms*. — See note 4.

(3) *Cause of Illness or Injury*. — See note 5.

671. (4) *Statements Made at Medical Examination for Purpose of Preparing Testimony*. — See note 3.

f. EXPRESSIONS OF PAIN SUBSEQUENT TO INJURY. — See note 7.

672. 2. Mental State or Feelings — *a.* IN GENERAL. — See note 2.

b. MOTIVE OR INTENTION — (1) *In General*. — See note 3.

673. (2) *Commission of Suicide*. — See note 5.

675. (4) *Payment or Delivery of Property*. — See note 1.

3. Crimes — *a.* IN GENERAL. — See note 11.

of the acts constituting the nuisance, but not as proof of the facts. *Hoffman v. Edison Electric Illuminating Co.*, 87 N. Y. App. Div. 371.

666. 3. Admissibility of Acts or Declarations of Third Person. — *Chicago Terminal Transfer R. Co. v. Stone*, (C. C. A.) 118 Fed. Rep. 19; *Proper v. Lake Shore, etc.*, R. Co., 136 Mich. 352; *Gulf, etc.*, R. Co. *v. Hall*, 34 Tex. Civ. App. 535.

7. See *Powers v. Com.*, 114 Ky. 237; *Lamb v. State*, (Neb. 1903) 95 N. W. Rep. 1050; *Martin v. State*, 44 Tex. Crim. 279.

667. 6. Instinctive Expressions of Pain or Malady — *Alabama*. — *Montgomery St. R. Co. v. Shanks*, 139 Ala. 489.

District of Columbia. — *District of Columbia v. Dietrich*, 23 App. Cas. (D. C.) 577.

Indiana. — *Cleveland, etc.*, R. Co. *v. Carey*, 33 Ind. App. 275; *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360.

Iowa. — *Robinson v. Halley*, 124 Iowa 443; *Hamilton v. Mendota Coal, etc., Co.*, 120 Iowa 147.

Massachusetts. — *Cashin v. New York, etc.*, R. Co., 185 Mass. 543.

Michigan. — *Styles v. Decatur*, 131 Mich. 443.

North Dakota. — *Puls v. Grand Lodge, etc.*, 13 N. Dak. 559.

South Carolina. — *Oliver v. Columbia, etc.*, R. Co., 65 S. Car. 1.

Texas. — *Arrington v. Texas, etc.*, R. Co., (Tex. Civ. App. 1902) 70 S. W. Rep. 551; *Ft. Worth, etc.*, R. Co. *v. Partin*, 33 Tex. Civ. App. 173; *International, etc.*, R. Co. *v. Cain*, 35 Tex. Civ. App. 539; *St. Louis Southwestern R. Co. v. Burke*, 36 Tex. Civ. App. 222.

668. 2. Distinction Between Descriptive Statements and Instinctive Manifestations Expressly Repudiated. — *Southern Indiana R. Co. v. Davis*, (Ind. App. 1903) 68 N. E. Rep. 191; *Indiana R. Co. v. Maurer*, 160 Ind. 25; *Battis v. Chicago, etc.*, R. Co., 124 Iowa 623; *Gosa v. Southern R. Co.*, 67 S. Car. 347.

669. 1. Jurisdictions Holding Descriptive Statements of Pain Inadmissible. — *Lake St. El. R. Co. v. Shaw*, 203 Ill. 39.

2. *St. Louis Southwestern R. Co. v. Brown*, 30 Tex. Civ. App. 57.

3. Declarations as to Past Suffering or Symptoms Inadmissible. — *Cashin v. New York, etc.*, R. Co., 185 Mass. 543; *State v. Raymo*, 76 Vt. 430.

670. 4. Statements as to Past Symptoms Held Inadmissible. — *Atlanta, etc.*, R. Co. *v. Gardner*, 122 Ga. 82.

5. Statement as to Cause of Illness Inadmissible. — *Shade v. Covington-Cincinnati El. R., etc.*, Co., (Ky. 1905) 84 S. W. Rep. 733; *Fallon v. Rapid City*, 17 S. Dak. 570; *Missouri, etc.*, R. Co. *v. Smith*, (Tex. Civ. App. 1904) 82 S. W. Rep. 787.

671. 3. Statement to Medical Expert for Purpose of Preparing Testimony Inadmissible. — *Comstock v. Georgetown Tp.*, 137 Mich. 541.

7. Expression of Pain Need Not Be Concurrent with Injury. — *Estes v. Missouri Pac. R. Co.*, 110 Mo. App. 725; *St. Louis Southwestern R. Co. v. Haynes*, (Tex. Civ. App. 1905) 86 S. W. Rep. 934.

Effect of Lapse of Time. — The interval of time between the injury and expression of pain goes to the weight of the testimony, but not to its admissibility. *Southern Indiana R. Co. v. Davis*, 32 Ind. App. 569.

672. 2. Expressions of Mental State or Feelings. — *Kerr v. Modern Woodmen of America*, (C. C. A.) 117 Fed. Rep. 593.

3. Declarations of Intention Admissible under Res Gesta Rule. — *Moody v. State*, 120 Ga. 868.

673. 5. Declaration of Intention to Commit Suicide. — *Rogers v. Manhattan L. Ins. Co.*, 138 Cal. 285. See also *Kerr v. Modern Woodmen of America*, (C. C. A.) 117 Fed. Rep. 593.

Mere Lapse of Time No Part of Res Gesta. — *Ross-Lewin v. Germania L. Ins. Co.*, (Colo. App. 1904) 78 Pac. Rep. 305.

675. 1. Statements Accompanying Delivery of Will Admissible in Probate Proceedings. — *Dolan v. Meehan*, (Tex. Civ. App. 1904) 80 S. W. Rep. 99.

11. Circumstances Surrounding Commission of Crime. — *Jones v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 5; *Patrick v. State*, 45 Tex. Crim. 587.

- 676.** *b.* OCCURRENCES LEADING UP TO CRIME. — See note 1.
c. HOMICIDE — (1) *In General.* — See note 2.
- 677.** (3) *Acts and Declarations of Accused.* — See note 2.
 Antecedent Acts or Declarations. — See note 3.
 Subsequent Declarations. — See notes 4, 5.
- 678.** See note 1.
 Declarations Against Interest. — See notes 3, 4.
 Subsequent Acts of Accused. — See note 5.
 (4) *Acts and Declarations of Deceased* — (a) Antecedent Declarations. — See note 6.
- 679.** See note 1.
 (b) Subsequent Declarations. — See note 4.
- 680.** See note 2.
- 681.** *d.* ASSAULT. — See notes 2, 3, 5, 6.
 Remark of Bystander. — See note 7.
e. LARCENY. — See note 8.
f. ROBBERY — Statements of Person Robbed. — See note 10.

Conversations Between Seller and Receiver of Stolen Goods. — State *v.* Simon, 70 N. J. L. 407.

676. 1. Prior Occurrences Leading Up to Crime. — People *v.* Linares, 142 Cal. 17; Elmore *v.* State, (Tex. Crim. 1904) 78 S. W. Rep. 521.

2. Application of Rule in Trials for Homicide. — Selby *v.* Com., (Ky. 1904) 80 S. W. Rep. 221; State *v.* Gianfala, 113 La. 463; Moran *v.* Territory, 14 Okla. 544; Bennett *v.* State, (Tex. Crim. 1904) 81 S. W. Rep. 30.

Remarks of Bystanders, Not Heard by Principals, Not Res Gestæ. — Baker *v.* State, 45 Tex. Crim. 392.

677. 2. Evidence Admitted of Facial Expression of Accused Two Hours Before Crime. — Hainsworth *v.* State, 136 Ala. 13.

3. Declarations of Accused Prior to Homicide Held Admissible to Show Quo Animo. — Hancock *v.* State, (Tex. Crim. 1904) 83 S. W. Rep. 696.

Prior Acts Showing Intent. — Cortez *v.* State, (Tex. Crim. 1904) 83 S. W. Rep. 812.

Prior Occurrences as Showing Motive. — Petrie *v.* Cartwright, 114 Ky. 103, 102 Am. St. Rep. 274; Terry *v.* State, 45 Tex. Crim. 264; Kipper *v.* State, 45 Tex. Crim. 377.

4. Declarations Subsequent to Homicide Held Admissible. — Vann *v.* State, 45 Tex. Crim. 434, 107 Am. St. Rep. 997. See also People *v.* Quimby, 134 Mich. 625.

5. Mere Narratives Inadmissible. — State *v.* McDaniel, 68 S. Car. 304, 102 Am. St. Rep. 661; Dodson *v.* State, 44 Tex. Crim. 200.

678. 1. State *v.* McCann, 43 Oregon 155.

3. Bateson *v.* State, 46 Tex. Crim. 34.

4. Johnson *v.* State, 46 Tex. Crim. 291.

5. Subsequent Acts of Accused. — Lyles *v.* State, (Tex. Crim. 1905) 86 S. W. Rep. 763.

6. Antecedent Declarations of Deceased Generally Inadmissible. — Weightnovel *v.* State, (Fla. 1903) 35 So. Rep. 856.

679. 1. McCormick *v.* State, 66 Neb. 337; State *v.* Laster, 71 N. J. L. 586.

Antecedent Acts and Frame of Mind of Deceased. — State *v.* Hunter, 118 Iowa 686.

4. Mere Narrative by Deceased of Past Event. — State *v.* Hendricks, 172 Mo. 654.

Interval of One Hour. — Wade *v.* State, 25 Ohio Cir. Ct. 279.

Interval of Four or Five Hours. — Brittain *v.* State, (Tex. Crim. 1905) 85 S. W. Rep. 278.

Interval of Six Hours. — Bowles *v.* Com., 103 Va. 816.

Interval of More than a Week. — Taylor *v.* State, 120 Ga. 857.

680. 2. Precise Concurrence in Point of Time Unnecessary. — Starks *v.* State, 137 Ala. 9; State *v.* Wilmbusse, 8 Idaho 608; State *v.* Foley, 113 La. 52, 104 Am. St. Rep. 493; Bowles *v.* Com., 103 Va. 816.

Statement Made in the Act of Falling by Person Shot. — Goodman *v.* State, 122 Ga. 111.

Statement Made Immediately After Difficulty, "I Am Killed." — Stevens *v.* State, 138 Ala. 71; Howard *v.* Com., (Ky. 1902) 70 S. W. Rep. 295.

681. 2. Acts and Declarations of Assailant. — Birmingham R., etc., Co. *v.* Mullen, 138 Ala. 614; Townley *v.* State, (Tex. Crim. 1904) 81 S. W. Rep. 309.

Prior Acts of Assailant Showing Animus and Forming Part of Continuous Difficulty. — Thomas *v.* State, 44 Tex. Crim. 344.

Acts of Third Person Connected with Assault. — State *v.* Thornhill, 177 Mo. 691.

3. Declaration of Person Assailed. — Flores *v.* State, (Tex. Crim. 1904) 79 S. W. Rep. 808; Taylor *v.* State, (Tex. Crim. 1904) 80 S. W. Rep. 378 (interval of a few minutes only).

5. Martin *v.* State, (Tex. Crim. 1904) 82 S. W. Rep. 657.

6. Compare Moody *v.* State, 120 Ga. 868; State *v.* Epstein, 25 R. I. 131.

7. Compare Collins *v.* Com., (Ky. 1902) 70 S. W. Rep. 187 (exclamations of wife and daughter of prosecutor admitted); Seawell *v.* Carolina Cent. R. Co., 133 N. Car. 515 (exclamations of witnesses of assault admitted).

8. Prior Acts and Declarations Constituting Parts of a Continuous Transaction. — Viberg *v.* State, 138 Ala. 100.

10. Statements on Regaining Consciousness, after robbery and a "knockout," are admissible as *res gesta*. State *v.* Ripley, 32 Wash. 182. See generally *supra*, this title, **680.** 2; *infra*, this title, **685.** 3.

682. *k.* ACTS AND DECLARATIONS OF THIRD PERSONS — Exclamations of Bystanders. — See note 7.

683. *4.* TORTS — *b.* PERSONAL INJURIES — (1) *Statements or Acts of Person Injured* — Narrative Statements. — See note 4.

684. Declaration in Response to Question. — See note 1.

Contemporaneous Declarations or Acts. — See notes 3, 4.

685. See note 1.

Constructive Extension of Time of Occurrence of the Principal Act. — See note 3.

Declarations Made While Suffering from Pain. — See note 4.

(2) *Conduct or Statements of Tortfeasor*. — See notes 6, 8.

686. (3) *Statements or Acts of Third Persons*. — See note 2.

Mere Narrative Statements. — See note 4.

5. *Contracts* — *a.* IN GENERAL. — See note 6.

687. *b.* STATEMENTS OR REPRESENTATIONS LEADING UP TO CONTRACT. — See note 4.

688. *c.* DECLARATIONS AFTER COMPLETION OF NEGOTIATIONS. — See note 3.

d. MEMORANDA AS PARS REI GESTÆ. — See note 4.

690. 6. *Declarations Explanatory of Possession* — *c.* DECLARATIONS IN DECLARANT'S FAVOR — (2) *Realty*. — See note 2.

691. *d.* FACT OF POSSESSION TO BE ESTABLISHED. — See note 1.

682. 7. *Exclamations of Bystanders Held Inadmissible*. — Indianapolis St. R. Co. *v.* Taylor, 164 Ind. 155; Baker *v.* State, 45 Tex. Crim. 392.

683. 4. *Narrative Statement Inadmissible*. — Boyd *v.* West Chicago St. R. Co., 112 Ill. App. 50; Atchison, etc., R. Co. *v.* Logan, 65 Kan. 748; Bumgardner *v.* Southern R. Co., 132 N. Car. 438; Garner *v.* Stamford Tp., 7 Ont. L. Rep. 50.

Conversation Inadmissible. — Potter *v.* Cave, 123 Iowa 98.

684. 1. *Statement in Response to Question*. — Klingaman *v.* Fish, etc., Co., (S. Dak. 1905) 102 N. W. Rep. 601. See also Southern Indiana R. Co. *v.* Davis, (Ind. App. 1903) 68 N. E. Rep. 191.

3. *Statements Made While Wrong Is Incomplete*. — Di Prisco *v.* Wilmington City R. Co., 4 Penn. (Del.) 527; Murray *v.* Boston, etc., R. Co., 72 N. H. 32.

4. *Declarations Need Not Be Precisely Coincident*. — Scheir *v.* Quirin, 77 N. Y. App. Div. 624, affirmed 177 N. Y. 568; Williams *v.* Southern R. Co., 68 S. Car. 369; Texas Cent. R. Co. *v.* Powell, (Tex. Civ. App. 1905) 86 S. W. Rep. 21; Gulf, etc., R. Co. *v.* Willoughby, (Tex. Civ. App. 1904) 81 S. W. Rep. 829; Missouri, etc., R. Co. *v.* Jones, 35 Tex. Civ. App. 584; Dixon *v.* Northern Pac. R. Co., 37 Wash. 310.

Declaration as to Cause of Injury Within Two Minutes After Its Occurrence Admitted. — Murray *v.* Boston, etc., R. Co., 72 N. H. 32.

685. 1. *Extreme Cases*. — Missouri, etc., R. Co. *v.* Schilling, 32 Tex. Civ. App. 417.

3. *Statements Made upon Regaining Consciousness*. — See Ft. Worth, etc., R. Co. *v.* Partin, 33 Tex. Civ. App. 173. And see *supra*, this title, **680.** 2, **681.** 10.

4. *Subsequent Declarations Made While Suffering from Pain*. — Compare Garner *v.* Stamford Tp., 7 Ont. L. Rep. 50.

6. *Conduct of Tortfeasor at Time of Injury*. —

Tri-City R. Co. *v.* Brennan, 108 Ill. App. 471; Strode *v.* Conkey, 105 Mo. App. 12.

8. *Acts of Tortfeasor Subsequent to Injury*. — Kansas City Southern R. Co. *v.* Moles, (C. C. A.) 121 Fed. Rep. 351; Trumbull *v.* Donahue, 18 Colo. App. 460.

Statements of Tortfeasor Subsequent to Injury. — South Covington, etc., St. R. Co. *v.* Riegler, (Ky. 1904) 82 S. W. Rep. 382.

686. 2. Chretien *v.* New Orleans R. Co., 113 La. 761, 104 Am. St. Rep. 519.

Test — Expression or Declaration Must Have Been Part of Occurrence. — Indianapolis St. R. Co. *v.* Whitaker, 160 Ind. 125.

4. *Mere Narrative Statements Inadmissible*. — Hot Springs St. R. Co. *v.* Hildreth, 72 Ark. 572; Indianapolis St. R. Co. *v.* Taylor, 164 Ind. 155; Indianapolis St. R. Co. *v.* Whitaker, 160 Ind. 125; Briggs *v.* East Broad Top R., etc., Co., 206 Pa. St. 564. See also Early *v.* Louisville, etc., R. Co., 115 Ky. 13.

6. *Contemporaneous Declarations to Explain Contract*. — People *v.* Sharp, 133 Mich. 378; Birmingham Trust, etc., Co. *v.* Whitney, 95 N. Y. App. Div. 280.

687. 4. *Acts in Course of Negotiations Admissible*. — Prentiss *v.* Strand, 116 Wis. 647.

688. 3. *Declarations After Completion of Negotiations*. — Frike *v.* Orr, 109 Ill. App. 200.

4. *A Memorandum of the Statement of a Party, of the making of which he was ignorant and which was not afterwards communicated to him, is inadmissible as part of the res gestæ*. Gans *v.* Wormser, 83 N. Y. App. Div. 505.

690. 2. *Declarations to Show Character and Extent of Claim to Realty*. — Banks *v.* McCandless, 119 Ga. 793.

Statements as to Grounds of Retention of Possession. — McDonald *v.* Bayha, 93 Minn. 139.

691. 1. *Fact of Possession to Be Established*. — McKnight *v.* U. S., (C. C. A.) 130 Fed. Rep. 659, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 691.

RESIDENCE, RESIDENT, ETC.

By H. N. ELDRIDGE.

692. I. DEFINITIONS — Reside. — See note 1.

693. Residence. — See notes 1, 2.

Dwelling House, Place of Abode, Etc. — See note 3.

694. See note 1.

695. Resident. — See note 1.

Nonresident. — See note 2.

696. II. INTENT. — See note 1.

Actual and Legal Residence. — See note 2.

697. See note 1.

III. ACQUISITION AND CHANGE OF RESIDENCE. — See note 3.

698. IV. TEMPORARY SOJOURN. — See note 2.

699. See note 1.

V. TWO PLACES OF RESIDENCE. — See notes 2, 3.

VI. FAMILY. — See note 4.

692. 1. Other Definitions. — The word "reside," in its ordinary sense, carries with it the idea of permanence as well as continuity. It does not mean living in one place and claiming a home in another. *Michael v. Michael*, 34 Tex. Civ. App. 630.

693. 1. Residence. — *Zebert v. Hunt*, 108 Fed. Rep. 449; *Stevens v. Larwill*, 110 Mo. App. 140.

"Residence" Implies a Place Where a Person Is Situated Through Choice, and a prisoner in a reformatory does not have a "residence" in the county in which the reformatory is located merely because of such imprisonment. *American Surety Co. v. Cosgrove*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 262.

2. Residence Does Not Depend upon the Manner of Living, which may be at housekeeping or lodging. *Tracy v. Tracy*, 62 N. J. Eq. 807.

3. Residence in Sense of Dwelling House or Usual Place of Abode. — *People v. Klammer*, 137 Mich. 399.

694. 1. The Word "Residence" Like the Word "Homestead" is not confined merely to the dwelling house, but it may include everything connected therewith used to make a home more comfortable and enjoyable. *Linn v. Ziegler*, 68 Kan. 528.

695. 1. A "Resident" and an "Inhabitant" mean the same thing. *Helle v. Deerfield Tp.*, 96 Ill. App. 462; *Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299; *Atkinson v. Washington and Jefferson College*, 54 W. Va. 32. But see *McFarlane v. Cornelius*, 43 Oregon 513.

2. Nonresident. — *In re Mulford*, 217 Ill. 249; *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29.

696. 1. Intent. — *In re Garneau*, (C. C. A.) 127 Fed. Rep. 677.

Whether a Person Is an "Actual Resident" of a Particular School District, within the meaning of Gen. Stat. Minn. 1894, § 3697, must depend

upon the facts of each particular case. *State v. Board of Education*, 91 Minn. 268.

2. Residence Held to Mean Actual Residence and Not Legal or Constructive Residence. — *People v. Owers*, 29 Colo. 535; *Michael v. Michael*, 34 Tex. Civ. App. 630; *Atkinson v. Washington and Jefferson College*, 54 W. Va. 32.

There Is a Legal Distinction Between "Domicil" and "Residence," although the terms are generally used as synonymous, the distinction depending upon the connection in which and the purposes for which the terms are used. *In re Garneau*, (C. C. A.) 127 Fed. Rep. 677.

697. 1. Legal Residence. — *Downs v. Downs*, 23 App. Cas. (D. C.) 381; *Sparks v. Sparks*, (Tenn. 1905) 88 S. W. Rep. 173.

3. Change of Residence — Question of Intent. — *In re Mulford*, 217 Ill. 249, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 697; *Pope v. Williams*, 98 Md. 59; *People v. Owers*, 29 Colo. 535; *Stevens v. Larwill*, 110 Mo. App. 140; *Tracy v. Tracy*, 62 N. J. Eq. 807.

698. 2. Temporary Sojourn Not Sufficient. — *Illinois L. Ins. Co. v. Shenehon*, 109 Fed. Rep. 674; *In re Mulford*, 217 Ill. 249; *Galveston, etc., R. Co. v. Cloyd*, (Tex. Civ. App. 1903) 78 S. W. Rep. 43.

699. 1. Temporary Sojourn Sometimes Sufficient. — *Brown's Adoption*, 25 Pa. Super. Ct. 259. See also *McFarlane v. Cornelius*, 43 Oregon 513.

2. Two Places of Residence. — *Zebert v. Hunt*, 108 Fed. Rep. 449; *Pearson v. West*, 97 Tex. 238.

3. Domicil. — *Zebert v. Hunt*, 108 Fed. Rep. 449; *State v. Allen*, 48 W. Va. 154, 86 Am. St. Rep. 29.

4. A Feme Covert's Residence Follows That of the Husband, but terminates with the reason upon which it rests, and when the union between the two ceases, and an attitude of hostility arises, they may each have a different residence. *Tracy v. Tracy*, 62 N. J. Eq. 807.

700. See note 1.

VII. RESIDENCE AND CITIZENSHIP. — See notes 2, 3.

701. RESIDUE — RESIDUARY. — See note 2.

702. Residuary. — See note 2.

700. 1. That a Man's Residence Is Not Necessarily Controlled by the Residence of His Family is well settled as a matter of law. *McCord v. Rosene*, (Wash. 1905) 80 Pac. Rep. 793.

2. Residence and Citizenship Distinguished. — *Illinois L. Ins. Co. v. Shenehon*, 109 Fed. Rep. 674.

3. The Words "Being Nonresidents of That State" Have Been Construed to be equivalent to the words "not being citizens of that state." *Madisonville Trac tion Co. v. St. Bernard Min. Co.*, 130 Fed. Rep. 789.

701. 2. Residue. — *Young v. Quimby*, 98 Me. 167. See also *Ricker v. Brown*, 183 Mass. 424.

702. 2. Residuary. — *Matter of Goggin*, (Surrogate Ct.) 43 Misc. (N. Y.) 233; *Wood's Estate*, 209 Pa. St. 16.

A Devise Which Does Not Include All the Testator's Real Estate may be a good "*residuary* devise" within the meaning of the English Wills Act, 1837, § 25. *Mason v. Ogden*, (1903) A. C. 1.

RES JUDICATA.

BY W. H. CROW.

709. II. NATURE AND STATEMENT OF PRINCIPLES — 1. Duchess of Kingston's Case. — See note 3.

710. See note 1.

2. Other Statements of the Law. — See note 4.

711. See note 1.

709. 3. See *Lamb v. Wahlenmaier*, 144 Cal. 91.

710. 1. First Proposition in Duchess of Kingston's Case Approved. — *Lamb v. Wahlenmaier*, 144 Cal. 91.

4. Judgment or Decree as a Bar — *United States*. — *Deposit Bank v. Frankfort*, 191 U. S. 499; *U. S. v. California, etc., Land Co.*, 192 U. S. 355; *In re Howard*, (C. C. A.) 135 Fed. Rep. 721.

California. — *Kline v. Mohr*, 142 Cal. 673; *Ivancovich v. Weilenman*, 144 Cal. 757.

Georgia. — *Evans v. Piedmont Nat. Bldg., etc., Assoc.*, 117 Ga. 940; *Ross v. Battle*, 117 Ga. 877; *Rountree v. Rentz*, 119 Ga. 885.

Illinois. — *Cormack v. Marshall*, 211 Ill. 519.

Iowa. — *Reynolds v. Lyon County*, 121 Iowa 733; *Defries v. McMeans*, 121 Iowa 540.

Kansas. — *Missouri, etc., R. Co. v. Allen*, 67 Kan. 838; *Wichita v. Rock Island Lumber, etc., Co.*, 68 Kan. 445.

Kentucky. — *Small v. Reeves*, (Ky. 1903) 76 S. W. Rep. 395; *Southern Planing Mill, etc., Co. v. Doerhoefer*, (Ky. 1904) 78 S. W. Rep. 882.

Louisiana. — *Hargrave v. Mouton*, 109 La. 533.

Maine. — *Paul v. Thorndike*, 97 Me. 87.

Michigan. — *Carpenter v. Carpenter*, 136 Mich. 362.

Minnesota. — *Phelps v. Western Realty Co.*, 89 Minn. 319.

Missouri. — *Champ Spring Co. v. B. Roth Tool Co.*, 96 Mo. App. 518.

Nebraska. — *Agnew v. Omaha Nat. Bank*, (Neb. 1903) 96 N. W. Rep. 189; *Parrotte v. Dryden*, (Neb. 1905) 102 N. W. Rep. 610.

New Jersey. — *Harper, etc., Co. v. Mountain Water Co.*, 65 N. J. Eq. 489, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 710.

New York. — *Mac Ardell v. Olcott*, 104 N. Y. App. Div. 263.

Oklahoma. — *Randolph v. Hudson*, 12 Okla. 516.

Oregon. — *Ruckman v. Union R. Co.*, 45 Oregon 578.

Texas. — *Allen v. Foster*, 32 Tex. Civ. App. 332.

Utah. — *Hearst v. Putnam Min. Co.*, 28 Utah 184, 107 Am. St. Rep. 607.

Virginia. — *Martin v. Columbian Paper Co.*, 101 Va. 699; *Baker v. Watts*, 101 Va. 702.

Wisconsin. — *State v. Whitcher*, 117 Wis.

668, 98 Am. St. Rep. 968; *Chicago, etc., R. Co. v. Racine*, 123 Wis. 102.

711. 1. Adjudication upon Any Fact or Matter in Issue as Res Judicata — *United States*. — *Ætna L. Ins. Co. v. Hamilton County*, (C. C. A.) 117 Fed. Rep. 82; *Gilbert v. American Surety Co.*, (C. C. A.) 121 Fed. Rep. 499; *Williamson v. McCaldin Bros. Co.*, (C. C. A.) 122 Fed. Rep. 63; *Reidinger v. Diamond Match Co.*, (C. C. A.) 123 Fed. Rep. 244; *Wilcox, etc., Sewing Mach. Co. v. Sherborne*, (C. C. A.) 123 Fed. Rep. 875; *Penfield v. Potts*, (C. C. A.) 126 Fed. Rep. 475; *Covington First Nat. Bank v. Covington*, 129 Fed. Rep. 792; *Columbia Ave. Sav. Fund, etc., Co. v. Dawson*, 130 Fed. Rep. 152; *Gordon v. Ware Nat. Bank*, (C. C. A.) 132 Fed. Rep. 444; *Watkins v. American Nat. Bank*, (C. C. A.) 134 Fed. Rep. 36; *Bedford Bowling Green Stone Co. v. Oman*, 134 Fed. Rep. 441, affirmed (C. C. A.) 134 Fed. Rep. 64; *U. S. v. McConnaughey*, (C. C. A.) 135 Fed. Rep. 350.

Arkansas. — *Geisreiter v. McCoy*, (Ark. 1905) 85 S. W. Rep. 86; *Neal v. Brandon*, (Ark. 1905) 85 S. W. Rep. 776.

California. — *Lamb v. Wahlenmaier*, 144 Cal. 91; *Greer v. Greer*, 142 Cal. 519; *Matter of Harrington*, 147 Cal. 124.

Illinois. — *Anderson v. West Chicago St. R. Co.*, 200 Ill. 329; *Baldwin v. Hanecy*, 204 Ill. 281; *Herschbach v. Cohen*, 207 Ill. 517, 99 Am. St. Rep. 233; *Brack v. Boyd*, 211 Ill. 290; *Merrifield v. Canal Com'rs*, 212 Ill. 456.

Indiana. — *Gutheil v. Goodrich*, 160 Ind. 92; *Greenfield Gas Co. v. Trees*, (Ind. 1905) 75 N. E. Rep. 2.

Iowa. — *Strow v. Allen*, (Iowa 1904) 98 N. W. Rep. 141; *State v. Cobb*, 123 Iowa 626.

Kansas. — *Union Pac. R. Co. v. Wyandotte County*, 69 Kan. 572.

Kentucky. — *New York L. Ins. Co. v. Weaver*, 114 Ky. 295; *Holtheide v. Smith*, (Ky. 1905) 84 S. W. Rep. 321.

Massachusetts. — *Butrick, Petitioner*, 185 Mass. 107.

Michigan. — *Burgess v. Stribling*, 134 Mich. 33; *Andreas v. School Dist. No. 4*, (Mich. 1904) 100 N. W. Rep. 1021.

Minnesota. — *Skordal v. Stanton*, 89 Minn. 511.

Missouri. — *Brown v. Missouri Pac. R. Co.*, 96 Mo. App. 164; *Menges v. Milton Piano Co.*, 96 Mo. App. 611; *Jones v. Hamm*, (Mo. App. 1903) 74 S. W. Rep. 150; *Kansas City Ex-*

- 712.** 3. *Res Judicata* and Estoppel — *a.* IN GENERAL. — See notes 2, 5.
713. *Res Judicata*. — See note 1.
714. *b.* ESTOPPEL BY JUDGMENT AND BY VERDICT — (1) *In General*. — See note 3.
715. (2) *Res Judicata* and *Stare Decisis*. — See notes 1, 3.
716. See notes 1, 3.

position *Driving Park v. Kansas City*, 174 Mo. 425; *Wilson v. Lubke*, 176 Mo. 210, 98 Am. St. Rep. 503; *Fiene v. Kirchaff*, 176 Mo. 516; *Edmonston v. Carter*, 180 Mo. 515; *Pickel Stone Co. v. Wall*, 108 Mo. App. 495; *Burnside v. Wand*, 108 Mo. App. 539.

Nebraska. — *Sutton First Nat. Bank v. Ashley*, (Neb. 1903) 93 N. W. Rep. 685; *Miles v. Ballantine*, (Neb. 1903) 93 N. W. Rep. 708; *Moore v. State*, 67 Neb. 535; *State v. Broatch*, 68 Neb. 687; *Martin v. Abbott*, (Neb. 1901) 95 N. W. Rep. 356; *Schlemme v. Omaha Gas Mfg. Co.*, (Neb. 1903) 96 N. W. Rep. 644; *McCarthy v. Birmingham*, (Neb. 1904) 99 N. W. Rep. 266; *Chicago, etc., R. Co. v. Cass County*, (Neb. 1904) 101 N. W. Rep. 11; *Platts-mouth First Nat. Bank v. Gibson*, (Neb. 1905) 104 N. W. Rep. 174.

New Jersey. — *Harper, etc., Co. v. Mountain Water Co.*, 65 N. J. Eq. 489.

New York. — *Anhalt v. Lightstone*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 822; *Prescott v. Le Conte*, 84 N. Y. App. Div. 641; *O'Connor v. Byrne*, 86 N. Y. App. Div. 627, affirmed 180 N. Y. 556; *Tenement House Dept. v. Moeschon*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 446, affirmed 89 N. Y. App. Div. 526; *Poillon v. Poillon*, 90 N. Y. App. Div. 71; *Parish v. Parish*, 175 N. Y. 181; *Franke v. Adams*, (Supm. Ct. App. T.) 86 N. Y. Supp. 293; *Sterling v. Sterling*, 98 N. Y. App. Div. 426.

North Dakota. — *Salemonson v. Thompson*, 13 N. Dak. 182.

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South Dakota. — *Turner Tp. v. Williams*, 17 S. Dak. 548.

Texas. — *Williams v. Wiley*, 96 Tex. 148; *Beardsley v. Thomas*, 31 Tex. Civ. App. 452; *W. C. Belcher Land Mortg. Co. v. Norris*, 34 Tex. Civ. App. 111; *Silliman v. Taylor*, 35 Tex. Civ. App. 490; *Ridgill v. Dupree*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1166; *Morris v. Kesterson*, (Tex. Civ. App. 1905) 88 S. W. Rep. 277.

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Washington. — *Lauman v. Hoofer*, 37 Wash. 382; *Lilly v. Eklund*, 37 Wash. 532.

Wisconsin. — *Rowell v. Smith*, 123 Wis. 510; *Arnold v. Randall*, 124 Wis. 1.

712. 2. *Res Judicata* as Estoppel — *United States*. — *Harding v. Harding*, 198 U. S. 317; *Covington v. Covington First Nat. Bank*, 108 U. S. 100; *Ætna L. Ins. Co. v. Hamilton County*, (C. C. A.) 117 Fed. Rep. 82; *Davenport v. Allen*, 120 Fed. Rep. 172; *Hanks Dental Assoc. v. International Tooth Crown Co.*, (C. C. A.) 122 Fed. Rep. 74; *Penfield v. Potts*, (C. C. A.) 126 Fed. Rep. 475.

Arkansas. — *Geisreiter v. McCoy*, (Ark. 1905) 85 S. W. Rep. 86.

Kentucky. — *Monroe v. Mattox*, (Ky. 1905) 85 S. W. Rep. 748.

Missouri. — *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425; *Harrison v. McReynolds*, 183 Mo. 533.

Nebraska. — *Curtis v. Zutavern*, 67 Neb. 183; *Nebraska L. & T. Co. v. Doman*, (Neb. 1903) 93 N. W. Rep. 1022; *Agnew v. Montgomery*, (Neb. 1904) 99 N. W. Rep. 820.

New York. — *Thorn v. De Breteuil*, 179 N. Y. 64; *Farmer v. A. D. Farmer, etc., Type Founding Co.*, 83 N. Y. App. Div. 218.

Ohio. — *Carlin v. Hower*, 24 Ohio Cir. Ct. 153.

Texas. — *Norton v. Wochler*, 31 Tex. Civ. App. 522.

5. *Res Judicata* and Estoppel Distinguished. — *Skordal v. Stanton*, 89 Minn. 511; *Rowell v. Smith*, 123 Wis. 510. And see *Allred v. Smith*, 135 N. Car. 457, *per* Clark, C. J., dissenting, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 712.

713. 1. *Res Judicata* a Rule Founded on Public Policy and Necessity. — *Deposit Bank v. Frankfort*, 191 U. S. 499; *Ætna L. Ins. Co. v. Hamilton County*, (C. C. A.) 117 Fed. Rep. 82; *Greer v. Greer*, 142 Cal. 519; *Allis v. Hall*, 76 Conn. 322; *Ross v. Battle*, 117 Ga. 877; *Weidner v. Lund*, 105 Ill. App. 454; *Stroup v. Pepper*, (Kan. 1903) 73 Pac. Rep. 896; *Small v. Reeves*, (Ky. 1903) 76 S. W. Rep. 395; *Dutton's Estate*, 208 Pa. St. 350; *Butler v. Thompson*, 52 W. Va. 311; *Lee v. Smith*, 54 W. Va. 89.

714. 3. Estoppel by Judgment and by Verdict. — *Stocker v. Nemaha County*, (Neb. 1904) 100 N. W. Rep. 308. Compare *Budlong v. Budlong*, 32 Wash. 672.

715. 1. Determination Both of Law and of Fact *Res Judicata*. — *Davenport v. Allen*, 120 Fed. Rep. 172; *Kline v. Mohr*, 142 Cal. 673; *Missouri, etc., R. Co. v. Allen*, 67 Kan. 838; *Chicago, etc., R. Co. v. Cass County*, (Neb. 1904) 101 N. W. Rep. 11; *State v. Broatch*, 68 Neb. 687.

3. General Distinction Between *Res Judicata* and *Stare Decisis*. — *Penfield v. Potts*, (C. C. A.) 126 Fed. Rep. 475; *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425; *State v. Broatch*, 68 Neb. 687.

716. 1. *Res Judicata* Basis of Doctrine of "Law of the Case." — *Orient Ins. Co. v. Leonard*, (C. C. A.) 120 Fed. Rep. 808; *Blankenship v. Whaley*, 142 Cal. 566; *Snyer v. Jack*, 140 Cal. 584; *Cincinnati, etc., R. Co. v. Wabash R. Co.*, 162 Ind. 303; *Ashcraft v. Cox*, 77 S. W. Rep. 718, 25 Ky. L. Rep. 1303; *Winter v. Supreme Lodge, etc.*, 101 Mo. App. 550; *Parrotte v. Dryden*, (Neb. 1905) 102 N. W. Rep. 610; *Hall v. State*, 92 N. Y. App. Div. 96; *Griffen v. Manice*, 174 N. Y. 505; *Brooks v. Western*

717. 5. Res Judicata and Collateral Attack — *a.* IN GENERAL. — See notes 5, 6.

718. See note 2.

719. See note 1.

720. *b.* FRAUD AND COLLUSION. — See notes 1, 2.

721. III. COURTS AND TRIBUNALS — 1. General Rule. — See note 1.

2. Courts — *a.* IN GENERAL. — See notes 2, 3.

b. PARTICULAR COURTS. — See note 4.

722. See note 4.

723. 3. Public Officers and Boards. — See notes 2, 3.

725. IV. PERSONS CONCLUDED — 1. General Rule. — See note 1.

Union Tel. Co., 28 Utah 21; Euting v. Chicago, etc., R. Co., 120 Wis. 651.

716. 3. Estoppel by Verdict. — Borches v. Arbuckle, 111 Tenn. 498.

Law of the Case. — Strickland v. Western, etc., R. Co., 119 Ga. 70; Heller v. Dailey, 34 Ind. App. 424; Bostwick v. Mutual L. Ins. Co., 122 Wis. 323.

717. 5. Collateral Attack and Res Judicata. — Groton Bridge, etc., Co. v. Clark Pressed Brick Co., 126 Fed. Rep. 552; Rupp v. McLachlan, 122 Iowa 343; Paul v. Thorndike, 97 Me. 87; Curtis v. Zutavern, 67 Neb. 183; Miles v. Ballantine, (Neb. 1903) 93 N. W. Rep. 708; Parrotte v. Dryden, (Neb. 1905) 102 N. W. Rep. 610; Baldwin v. Rice, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 64, *modified* 100 N. Y. App. Div. 241; Salemonson v. Thompson, 13 N. Dak. 182; Hartford F. Ins. Co. v. King, 31 Tex. Civ. App. 636; Dutton v. Wright, (Tex. Civ. App. 1905) 85 S. W. Rep. 1025; Budlong v. Budlong, 32 Wash. 672.

6. Direct Attack, Equitable or Statutory Relief, and Res Judicata. — Johnson v. Stebbins-Thompson Realty Co., 177 Mo. 581; Curtis v. Zutavern, 67 Neb. 183; Baldwin v. Rice, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 64, *modified* 100 N. Y. App. Div. 241.

718. 2. Erroneous or Irregular Judgments Res Judicata. — Deposit Bank v. Frankfort, 191 U. S. 499; Gordon v. Ware Nat. Bank, (C. C. A.) 132 Fed. Rep. 444; Lamb v. Wahlenmaier, 144 Cal. 91; Equitable Trust Co. v. Wilson, 200 Ill. 23; Rupp v. McLachlan, 122 Iowa 343; Stroup v. Pepper, (Kan. 1903) 73 Pac. Rep. 896; Levison v. Blumenthal, 25 Pa. Super. Ct. 55; Pantall v. Rochester, etc., Coal, etc., Co., 204 Pa. St. 158.

719. 1. Void Judgments Not Res Judicata. — Bartlett v. Slater, 182 Mass. 208.

720. 1. Fraud Going to the Jurisdiction of the Court. — Tremblay v. Aetna L. Ins. Co., 97 Me. 547, 94 Am. St. Rep. 521; Johnson v. Stebbins-Thompson Realty Co., 177 Mo. 581; Coleman v. Howell, 131 N. Car. 125.

2. Judgments Obtained by Fraud Res Judicata. — De Garcia v. San Antonio, etc., R. Co., (Tex. Civ. App. 1903) 77 S. W. Rep. 275; Rankin v. Hooks, (Tex. Civ. App. 1904) 81 S. W. Rep. 1005. *Compare* Campbell v. Sherley, (Ky. 1903) 76 S. W. Rep. 540.

721. 1. General Rule. — Wilson v. Smith, 117 Fed. Rep. 707, *affirmed* (C. C. A.) 126 Fed. Rep. 916; Covington First Nat. Bank v. Covington, 129 Fed. Rep. 792; Butler v. Thompson, 52 W. Va. 311,

2. Courts — In General. — Wilson v. Smith, 117 Fed. Rep. 709, *affirmed* (C. C. A.) 126 Fed. Rep. 916; Reynolds v. Lyon County, 121 Iowa 733; Rankin v. Hooks, (Tex. Civ. App. 1904) 81 S. W. Rep. 1005; Butler v. Thompson, 52 W. Va. 311; John O'Brien Lumber Co. v. Wilkinson, 123 Wis. 272.

The Amount Determined by the Supreme Court on Appeal is *res judicata* on new trial, even though the sum fixed was erroneous. Carpenter v. Lewis, 65 S. Car. 400.

3. Butler v. Thompson, 52 W. Va. 311.

4. Courts of Law and Equity. — Stocker v. Nemaha County, (Neb. 1904) 100 N. W. Rep. 308; McMurray v. Sisters of Charity, 68 N. J. L. 312; Condit v. Bigalow, 64 N. J. Eq. 504; Atty.-Gen. v. Central R. Co., (N. J. 1904) 59 Atl. Rep. 348; Randolph v. Hudson, 12 Okla. 516; Larkins v. Lindsay, 205 Pa. St. 534; Sowles v. Sartwell, 76 Vt. 70.

722. 4. County Courts. — Dutton v. Wright, (Tex. Civ. App. 1905) 85 S. W. Rep. 1025. See also Matter of Turner, 79 N. Y. App. Div. 495.

723. 2. Public Officers and Boards — General Rule. — Southern R. Co. v. Washington, etc., R. Co., 102 Va. 483.

3. Land Office. — Sage v. Maxwell, 91 Minn. 527.

Acts of City Council Not Within Rule. — Staples v. Brown, 113 Tenn. 639.

725. 1. Persons Concluded — In General — United States. — Fuller v. Venable, (C. C. A.) 118 Fed. Rep. 543; Davenport v. Allen, 120 Fed. Rep. 172; Bancroft v. Wicomico County, 121 Fed. Rep. 874; Hanks Dental Assoc. v. International Tooth Crown Co., (C. C. A.) 122 Fed. Rep. 74; Kinney v. Eastern Trust, etc., Co., (C. C. A.) 123 Fed. Rep. 297; *In re* Sears, (C. C. A.) 128 Fed. Rep. 275; Thompson v. Schenectady R. Co., (C. C. A.) 131 Fed. Rep. 577; Lynch v. Burt, (C. C. A.) 132 Fed. Rep. 417; Broadwell v. Banks, 134 Fed. Rep. 470; Fowler v. Stebbins, (C. C. A.) 136 Fed. Rep. 365; Westinghouse Electric, etc., Co. v. Jefferson Electric Light, etc., Co., 135 Fed. Rep. 365; Wicomico County v. Bancroft, (C. C. A.) 135 Fed. Rep. 977.

California. — Bell v. Solomons, 142 Cal. 59; Page v. W. W. Chase Co., 145 Cal. 578; Adams v. Hopkins, 144 Cal. 19.

Colorado. — Fleming v. Prudential Ins. Co., 19 Colo. App. 126.

Connecticut. — State v. Hartford St. R. Co., 76 Conn. 174; Storrs v. Robinson, 77 Conn. 207.

Georgia. — Archer v. Archer, 115 Ga. 950;

730. Estoppel Must Be Mutual. — See note I.

Ballard v. James, 117 Ga. 823; *Pate v. Wyly*, 118 Ga. 262; *Equitable Mortg. Co. v. McWaters*, 119 Ga. 337; *Hart v. Manson*, 119 Ga. 865; *Brenan Assoc. v. Harbison*, 120 Ga. 929; *Washington Exch. Bank v. Holland*, 121 Ga. 305; *Butler v. Tifton, etc.*, R. Co., 121 Ga. 817.

Illinois. — *Taylor v. Seiter*, 199 Ill. 555; *Anderson v. West Chicago St. R. Co.*, 200 Ill. 329; *Tinker v. Babcock*, 204 Ill. 571; *Lang v. Metzger*, 206 Ill. 475.

Indiana. — *Kratz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577.

Iowa. — *Koch v. West*, 118 Iowa 468, 96 Am. St. Rep. 394; *Long v. Wilson*, 119 Iowa 267, 97 Am. St. Rep. 315; *Hays v. Marsh*, 123 Iowa 81; *Atlee v. Bullard*, 123 Iowa 274; *Dows Real Estate, etc., Co. v. Emerson*, 125 Iowa 86; *In re Morgan*, 125 Iowa 247; *Jasper County v. Sparham*, 125 Iowa 464; *Kemp v. Des Moines*, 125 Iowa 640.

Kansas. — *Madden v. State*, 68 Kan. 658; *Holderman v. Hood*, 70 Kan. 267; *Stough v. Badger Lumber Co.*, 70 Kan. 713.

Kentucky. — *Otter View Land Co. v. Bolling*, (Ky. 1902) 70 S. W. Rep. 834; *Beverly v. Waller*, 115 Ky. 596; *Henderson County v. Henderson Bridge Co.*, 116 Ky. 164, 105 Am. St. Rep. 197; *Jefferson County v. Board of Valuation, etc.*, 117 Ky. 531; *Boyd v. Frankfort*, 117 Ky. 199; *Duff v. Cornett*, (Ky. 1904) 82 S. W. Rep. 1004; *Smith v. Cornett*, (Ky. 1904) 80 S. W. Rep. 1188; *Monroe v. Mattox*, (Ky. 1905) 85 S. W. Rep. 748.

Maine. — *Adams v. Clapp*, 99 Me. 169.

Maryland. — *Shryock v. Hensel*, 95 Md. 614; *Courtney v. William Knabe, etc., Mfg. Co.*, 97 Md. 499, 99 Am. St. Rep. 456; *Chesapeake Lighterage, etc., Co. v. Western Assur. Co.*, 99 Md. 433.

Massachusetts. — *Com. v. Newton*, 186 Mass. 286.

Michigan. — *Detroit v. Detroit R. Co.*, 134 Mich. 11; *Willsie v. Ionia*, 137 Mich. 445; *People v. Albers*, 137 Mich. 678.

Minnesota. — *Minnesota Debenture Co. v. Johnson*, 94 Minn. 150.

Missouri. — *Jones v. Silver*, 97 Mo. App. 231; *Belshe v. Batdorf*, 98 Mo. App. 627; *Calvert v. Hobbs*, 107 Mo. App. 7; *Packard v. Hannibal, etc., R. Co.*, 181 Mo. 421; *McCrillis v. Thomas*, 110 Mo. App. 699; *Perkins v. Goddin*, 111 Mo. App. 429; *Bristow v. Thackston*, 187 Mo. 332, 106 Am. St. Rep. 472.

Montana. — *Wagner v. St. Peters Hospital*, 32 Mont. 206.

Nebraska. — *Western Land Co. v. Buckley*, (Neb. 1902) 92 N. W. Rep. 1052; *Silk v. McDonald*, (Neb. 1903) 93 N. W. Rep. 212; *Gilbert v. Garber*, (Neb. 1903) 95 N. W. Rep. 1030; *Agnew v. Omaha Nat. Bank*, (Neb. 1903) 96 N. W. Rep. 189; *Goff v. Byers*, (Neb. 1903) 96 N. W. Rep. 1037; *Linton v. Cathers*, (Neb. 1903) 97 N. W. Rep. 800; *Agnew v. Montgomery*, (Neb. 1904) 99 N. W. Rep. 821; *Hamilton Nat. Bank v. American L. & T. Co.*, (Neb. 1904) 100 N. W. Rep. 202; *Fred Krug Brewing Co. v. Healey*, (Neb. 1904) 101 N. W. Rep. 329.

New Hampshire. — *Gerrish v. Whitfield*, 72

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New Jersey. — *Taylor v. Wahl*, 69 N. J. L. 471.

New Mexico. — *Lockhart v. Leeds*, (N. Mex. 1904) 76 Pac. Rep. 312.

New York. — *Stearns v. Shepard, etc., Lumber Co.*, 91 N. Y. App. Div. 53, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 724; *Fritz-tuskie v. Wauroski*, 83 N. Y. App. Div. 150; *Bath Gas Light Co. v. Rowland*, 84 N. Y. App. Div. 563, affirmed 178 N. Y. 631; *Ironwood v. Wickes*, 93 N. Y. App. Div. 164; *Berg v. Third Ave. R. Co.*, (N. Y. City Ct. Tr. T.) 89 N. Y. Supp. 433; *Downey v. Seib*, 102 N. Y. App. Div. 317; *Clark v. Durland*, 104 N. Y. App. Div. 615.

North Carolina. — *Carter v. White*, 131 N. Car. 14; *Finch v. Finch*, 131 N. Car. 271; *Southern L. & T. Co. v. Benbow*, 131 N. Car. 413; *McCall v. Zachary*, 131 N. Car. 466; *Allred v. Smith*, 135 N. Car. 443.

Pennsylvania. — *Seabury v. Fidelity Ins. Trust, etc., Co.*, 205 Pa. St. 234; *Levy v. Solomon*, 207 Pa. St. 478; *Piper's Estate*, 208 Pa. St. 636.

Rhode Island. — *Brierly v. Union R. Co.*, 26 R. I. 119.

South Carolina. — *Griffin v. Southern R. Co.*, 65 S. Car. 122; *Carpenter v. Lewis*, 65 S. Car. 400; *Montgomery v. Delaware Ins. Co.*, 67 S. Car. 399; *Bailey v. Wells*, 68 S. Car. 150; *Parrott v. Barrett*, 70 S. Car. 195.

South Dakota. — *McPherson v. Julius*, 17 S. Dak. 98; *Turner Tp. v. Williams*, 17 S. Dak. 548; *Bowdle v. Jencks*, (S. Dak. 1904) 99 N. W. Rep. 98; *Chapman v. Greene*, (S. Dak. 1904) 101 N. W. Rep. 351; *McLennon v. Fenner*, (S. Dak. 1905) 104 N. W. Rep. 218.

Tennessee. — *Cape v. Payne*, 111 Tenn. 128, 102 Am. St. Rep. 746; *Lindsay v. Allen*, 112 Tenn. 637; *Winchester Bank v. White*, 114 Tenn. 62; *Harris v. Columbia Water, etc., Co.*, 114 Tenn. 328.

Texas. — *Williams v. Wiley*, 96 Tex. 148; *Ellis v. Le Bow*, 30 Tex. Civ. App. 449; *Lochridge v. Corbett*, 31 Tex. Civ. App. 676; *Boles v. Walton*, 32 Tex. Civ. App. 595; *Campbell v. Upson*, 98 Tex. 442; *Sawyer v. Wieser*, (Tex. Civ. App. 1904) 84 S. W. Rep. 1101.

Virginia. — *Richmond v. Sitterding*, 101 Va. 354, 99 Am. St. Rep. 879; *Southern R. Co. v. Gregg*, 101 Va. 308.

Washington. — *Keene Guaranty Sav. Bank v. Lawrence*, 32 Wash. 572.

West Virginia. — *Sibley v. Stacey*, 53 W. Va. 292.

Wisconsin. — *Fordyce v. State*, 115 Wis. 608; *Connor v. Sheridan*, 116 Wis. 666; *Swennes v. Sprain*, 120 Wis. 68.

730. 1. Mutuality of Estoppel Essential. — *Westinghouse Electric, etc., Co. v. Jefferson Electric Light, etc., Co.*, 128 Fed. Rep. 751, 135 Fed. Rep. 365; *Madden v. State*, 68 Kan. 658; *Chesapeake Lighterage, etc., Co. v. Western Assur. Co.*, 99 Md. 433; *Buttrick, Petitioner*, 185 Mass. 107; *Allred v. Smith*, 135 N. Car. 443; *Everett v. Everett*, 180 N. Y. 452.

731. See note 1.

2. Only Adversary Parties Concluded. — See note 5.

732. 3. Coplaintiffs and Codefendants — *a.* IN GENERAL. — See notes 2, 3, 4.

733. 4. Absolute Identity of Parties in Both Suits Not Essential. — See note 6.

734. 5. Who Are Concluded Where Suits Are Heard Together. — See note 1.

6. Identity of Capacity Essential. — See note 2.

735. 7. Who Are Parties Within the Doctrine of Res Judicata — *a.* IN GENERAL. — See notes 3, 4.

736. *b.* NECESSITY OF NOTICE OR KNOWLEDGE OF SUIT. — See notes 1, 2, 3.

737. See note 1.

738. *d.* PERSONS PROSECUTING OR DEFENDING IN THE NAMES OF OTHERS — (1) *In General.* — See note 1.

739. See note 2.

731. 1. Allred *v.* Smith, 135 N. Car. 443; Kenne Guaranty Sav. Bank *v.* Lawrance, 32 Wash. 572.

5. Only Adversary Parties Concluded. — Madden *v.* State, 68 Kan. 658; Campbell *v.* Upson, 98 Tex. 442.

732. 2. Coplaintiffs and Codefendants Concluded by Adjudication Between Them. — Baldwin *v.* Hanecy, 204 Ill. 281; Madden *v.* State, 68 Kan. 658; Boston, etc., R. Co. *v.* Sargent, 72 N. H. 455.

3. When Coplaintiffs and Codefendants Are Not Concluded as Against Each Other. — Smith *v.* New Orleans, etc., R. Co., 109 La. 782.

4. Smith *v.* New Orleans, etc., R. Co., 109 La. 782.

733. 6. Absolute Identity of Parties Not Essential. — Price *v.* Carlton, 121 Ga. 21, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 733; Paul *v.* Thorndike, 97 Me. 87; Butrick, Petitioner, 185 Mass. 107; Brown *v.* Missouri Pac. R. Co., 96 Mo. App. 164; Jones *v.* Silver, 97 Mo. App. 231.

734. 1. Penfield *v.* Potts, (C. C. A.) 126 Fed. Rep. 475; Lee *v.* Hughes, (Ky. 1903) 77 S. W. Rep. 386; Arnold *v.* Randall, 124 Wis. 1.

2. Identity of Capacity Essential to Application of Principle. — U. S. *v.* California, etc., Land Co., 192 U. S. 355; Lauby *v.* Gill, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 334; Memphis City Bank *v.* Smith, 110 Tenn. 337.

735. 3. Parties Defined — *United States.* — Hanks Dental Assoc. *v.* International Tooth Crown Co., (C. C. A.) 122 Fed. Rep. 74; Riverside County *v.* Thompson, (C. C. A.) 122 Fed. Rep. 860; Ingersoll *v.* Coram, 127 Fed. Rep. 418.

Colorado. — Fleming *v.* Prudential Ins. Co., 19 Colo. App. 126.

Illinois. — Feitl *v.* Chicago City R. Co., 211 Ill. 288, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 735.

Louisiana. — Hargrave *v.* Mouton, 109 La. 533.

Maryland. — Courtney *v.* William Knabe, etc., Mfg. Co., 97 Md. 499, 99 Am. St. Rep. 436; Chesapeake Lighterage, etc., Co. *v.* Western Assur. Co., 99 Md. 433.

Massachusetts. — Butrick, Petitioner, 185 Mass. 107.

Michigan. — Carpenter *v.* Carpenter, 136 Mich. 362.

Missouri. — Johnson *v.* Stebbins-Thompson Realty Co., 177 Mo. 581.

New Hampshire. — Gerrish *v.* Whitfield, 72 N. H. 222.

New York. — Stearns *v.* Shepard, etc., Lumber Co., 91 N. Y. App. Div. 53, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 735.

South Carolina. — Griffin *v.* Southern R. Co., 65 S. Car. 122.

Texas. — Hartford F. Ins. Co. *v.* King, 31 Tex. Civ. App. 636; Campbell *v.* Upson, 98 Tex. 442.

Wisconsin. — Rowell *v.* Smith, 123 Wis. 510.

4. Mere Nominal Party Not Concluded. — Hanks Dental Assoc. *v.* International Tooth Crown Co., (C. C. A.) 122 Fed. Rep. 74; Page *v.* W. W. Chase Co., 145 Cal. 578; Fleming *v.* Prudential Ins. Co., 19 Colo. App. 126.

736. 1. Notice or Knowledge of Suit Essential. — Westinghouse Electric, etc., Co. *v.* Jefferson Electric Light, etc., Co., 128 Fed. Rep. 751; Griffin *v.* Collins, 122 Ga. 102; Holderman *v.* Hood, 70 Kan. 267; McCrellis *v.* Thomas, 110 Mo. App. 699; Lincoln *v.* Lincoln First Nat. Bank, 67 Neb. 401; Burkholder *v.* Hollicheck, (Neb. 1903) 95 N. W. Rep. 860; Campbell *v.* Upson, 98 Tex. 442; Southern R. Co. *v.* Gregg, 101 Va. 308.

2. Goff *v.* Byers, (Neb. 1903) 96 N. W. Rep. 1037.

3. Legal Service of Process. — Keene Guaranty Sav. Bank *v.* Lawrence, 32 Wash. 572.

737. 1. Persons Directly Interested and Having Knowledge of Pendancy Concluded. — Chesapeake Lighterage, etc., Co. *v.* Western Assur. Co., 99 Md. 433; Toledo Loan Co. *v.* Larkin, 25 Ohio Cir. Ct. 209.

738. 1. Prosecution or Defense of Suit in Another's Name. — Atlantic Trust Co. *v.* Dana, (C. C. A.) 128 Fed. Rep. 209; Archer *v.* Archer, 115 Ga. 950; Leathe *v.* Thomas, 109 Ill. App. 434; Stearns *v.* Shepard, etc., Lumber Co., 91 N. Y. App. Div. 53, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 737 [738]; Bailey *v.* Wells, 68 S. Car. 150; Hartford F. Ins. Co. *v.* King, 31 Tex. Civ. App. 636.

739. 2. Greenfield Gas Co. *v.* Trees, (Ind. 1905) 75 N. E. Rep. 2; Johnson *v.* De Pauw

740. (3) *Evidence Admissible to Show Real Situation of Parties.* — See note 4.

741. *e. PERSONS RESPONSIBLE OVER* — (1) *General Rule.* — See note 1. *Rationale of Rule.* — See note 3.

Notice or Knowledge of Action Essential to Estoppel. — See note 5.

743. (2) *Specific Applications of Rule.* — See note 6.

744. *f. INTERVENORS AND PERSONS BROUGHT INTO PENDING PROCEEDINGS* — (1) *In General.* — See note 3.

745. *h. WHO MAY BECOME PARTIES WITHIN THE DOCTRINE OF RES JUDICATA* — (1) *In General.* — See note 10.

746. *8. What Constitutes Privity* — *a. IN GENERAL.* — See note 7.

747. *Succession to Estate or Interest of a Party.* — See note 1.

Absolute Identity of Interest. — See note 5.

748. *b. CLASSIFICATION.* — See note 3.

c. VENDOR AND VENDEE. — See note 5.

749. *e. ASSIGNOR AND ASSIGNEE* — (1) *Judgment in Suit in Which Assignor Is a Party.* — See notes 2, 3.

f. LANDLORD AND TENANT — (2) *Judgment in Suit in Which Lessee Is a Party.* — See note 8.

750. *i. HUSBAND AND WIFE.* — See note 12.

751. *j. MINORS AND THEIR LEGAL REPRESENTATIVES.* — See note 3.

University, 116 Ky. 671; *Stearns v. Shepard*, etc., Lumber Co., 91 N. Y. App. Div. 53, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 737 [738] and supporting the whole text paragraph.

740. *4. Stearns v. Shepard, etc., Lumber Co., 91 N. Y. App. Div. 53, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 740 and quoting the whole text paragraph.*

741. *1. Conclusiveness of Judgment upon Persons Responsible Over to Defendant.* — *Eldred v. Johnson*, (Ark. 1905) 86 S. W. Rep. 670; *Feitl v. Chicago City R. Co.*, 211 Ill. 288, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 740 [741]; *South Bend Pulley Co. v. Fidelity, etc., Co.*, 32 Ind. App. 255; *Skelton v. Sharp*, 161 Ind. 383; *Minneapolis First Nat. Bank v. City Nat. Bank*, 182 Mass. 130, 94 Am. St. Rep. 637; *Lincoln v. Lincoln First Nat. Bank*, 67 Neb. 401; *Prescott v. Le Conte*, 83 N. Y. App. Div. 482, affirmed 178 N. Y. 585; *Mt. Vernon First Nat. Bank v. Lincoln First Nat. Bank*, 68 Ohio St. 43; *Rowell v. Smith*, 123 Wis. 510.

3. Mt. Vernon First Nat. Bank v. Lincoln First Nat. Bank, 68 Ohio St. 43.

5. Notice or Knowledge of Action Essential. — *Eldred v. Johnson*, (Ark. 1905) 86 S. W. Rep. 670; *South Bend Pulley Co. v. Fidelity, etc., Co.*, 32 Ind. App. 255; *Mt. Vernon First Nat. Bank v. Lincoln First Nat. Bank*, 68 Ohio St. 43.

743. *6. Landlord and Tenant.* — *Eldred v. Johnson*, (Ark. 1905) 86 S. W. Rep. 670.

744. *3. Intervenor Are Parties.* — *Atlantic Trust Co. v. Dana*, (C. C. A.) 128 Fed. Rep. 209; *Kline v. Mohr*, 142 Cal. 673; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 123 Iowa 437, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744.

745. *10. Principle Applicable to Corporations.* — Compare *Hearst v. Putnam Min. Co.*, 28 Utah 184, 107 Am. St. Rep. 607.

746. *7. Privity Defined.* — *Ingersoll v. Coram*, 127 Fed. Rep. 418; *Skelton v. Sharp*, 161 Ind. 383; *Hargrave v. Mouton*, 109 La. 533; *Sorensen v. Sorensen*, (Neb. 1904) 98 N. W. Rep. 837; *Lockhart v. Leeds*, (N. Mex. 1904) 76 Pac. Rep. 312; *Brierly v. Union R. Co.*, 26 R. I. 119; *Wilkins v. McCorkle*, 112 Tenn. 688; *Hearst v. Putnam Min. Co.*, 28 Utah 184, 107 Am. St. Rep. 607; *Rowell v. Smith*, 123 Wis. 510.

747. *1. Succession Subsequent to Institution of Suit Constitutes Privity.* — *Torrence v. Shedd*, 202 Ill. 498; *Hargrave v. Mouton*, 109 La. 533; *Sorensen v. Sorensen*, (Neb. 1904) 98 N. W. Rep. 837; *Jewett v. Schmidt*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 34; *Henry v. Thomas*, (Tex. Civ. App. 1903) 74 S. W. Rep. 599.

5. Allred v. Smith, 135 N. Car. 443.

748. *3. A Privity in Estate.* — *Male v. Chapman*, 134 Mich. 515, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 748.

5. Washington Exch. Bank v. Holland, 121 Ga. 305.

749. *2. Where Assignment Was Made After Institution of Suit.* — *Equitable Trust Co. v. Wilson*, 200 Ill. 23; *Shryock v. Hensel*, 95 Md. 614; *Lockhart v. Leeds*, (N. Mex. 1904) 76 Pac. Rep. 312; *Butterly v. Deering*, 102 N. Y. App. Div. 395; *Wilkins v. McCorkle*, 112 Tenn. 688; *Snyder v. Murdock*, 26 Utah 233.

3. Where Assignment Was Made Before Institution of Suit. — *Bailey v. Wells*, 68 S. Car. 150.

8. Judgment for or Against Lessee. — Compare *Prescott v. Le Conte*, 83 N. Y. App. Div. 482, affirmed 178 N. Y. 585.

750. *12. Judgment in Action in Which Wife Alone Is a Party.* — *Brierly v. Union R. Co.*, 26 R. I. 119.

751. *3. Minors and Their Legal Representatives.* — *Archer v. Archer*, 115 Ga. 950; *Fiene v. Kirchoff*, 176 Mo. 516; *Parish v. Parish*, 175 N. Y. 181.

751. *k.* PRINCIPAL AND AGENT AND MASTER AND SERVANT — (1) *Judgment to Which Agent or Servant Is a Party.* — See note 4.

752. *n.* CO-OWNERS. — See note 10.

753. See note 1.

g. PERSONAL REPRESENTATIVES AND LEGATEES, DISTRIBUTEES, OR CREDITORS — Administrator and Distributees or Creditors. — See note 8.

754. *r.* PERSONAL REPRESENTATIVES AND HEIRS OR DEVISEES — (2) *Rule under Statutes.* — See note 5.

755. *x.* COUNTY OR MUNICIPAL CORPORATION AND ITS CITIZENS. — See note 2.

y. PUBLIC OFFICERS AND SUCCESSORS. — See note 5.

9. Exceptions to and Modifications of General Rule — *b.* JUDGMENT CONCLUSIVE PROOF OF ITS OWN EXISTENCE. — See note 8.

756. See note 1.

c. JUDGMENT AS EVIDENCE OF A DEBT. — See notes 2, 3.

757. See note 2.

e. JUDGMENT AS LINK IN CHAIN OF TITLE. — See note 6.

Judgment of Probate Court. — See note 8.

758. Wherever a Deed Is Made under a Decree in Chancery. — See note 2.

759. *h.* WHEN PERSONS HAVING CONTINGENT INTERESTS WILL BE CONCLUDED. — See notes 3, 7.

760. *i.* JUDGMENTS IN SUITS ON JOINT OBLIGATIONS — (1) *Judgment Against One or More of the Obligors* — (a) General Rule at Common Law. — See note 1.

761. (c) Application of Rule to Partnership Obligations. — See note 3.

751. 4. Judgment in Suit to Which Agent or Servant Is a Party. — *Anderson v. West Chicago St. R. Co.*, 200 Ill. 329; *Anderson v. Fleming*, 160 Ind. 597.

752. 10. Co-owners. — *Allred v. Smith*, 135 N. Car. 443.

753. 1. *Carter v. White*, 131 N. Car. 14.
8. Administrator and Creditors. — *Moore v. Sloan*, 71 Ark. 599; *Hawley v. Wright*, 37 Nova Scotia 90, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753.

754. 5. Statutory Rule. — *Gunn v. James*, 120 Ga. 482.

755. 2. Adjudications on Matters of General Interest. — *Riverside County v. Thompson*, (C. C. A.) 122 Fed. Rep. 860; *Henderson County v. Henderson Bridge Co.*, 116 Ky. 164, 105 Am. St. Rep. 197; *State v. Hartford St. R. Co.*, 76 Conn. 174.

5. Privy Exists Between Successive Holders of an Office. — *State v. Clinton County*, 162 Ind. 580.

8. Judgment Conclusive Proof of Its Own Existence and Resulting Legal Consequences. — *Fowler v. Stebbins*, (C. C. A.) 136 Fed. Rep. 365.

756. 1. Time of Rendition. — *Chapman v. Greene*, (S. Dak. 1904) 101 N. W. Rep. 351.

2. Judgment Conclusive of Existence of Debt. — *Carmody v. Hanick*, 99 Mo. App. 357; *Burkholder v. Hollicheck*, (Neb. 1903) 95 N. W. Rep. 860; *Salemonson v. Thompson*, 13 N. Dak. 182; *Matter of Sanford*, 100 N. Y. App. Div. 479; *Lilly v. Eklund*, 37 Wash. 532.

Judgment, Suspended by Appeal, Not Evidence of Indebtedness. — *Cline v. Hackbarth*, 30 Tex. Civ. App. 591.

3. Judgment Only Prima Facie Evidence of Indebtedness. — *Tremblay v. Aetna L. Ins. Co.*, 97

Me. 547, 94 Am. St. Rep. 521; *McMurray v. Sisters of Charity*, 68 N. J. L. 312. Compare *Citizens' State Bank v. Porter*, (Neb. 1903) 93 N. W. Rep. 391.

757. 2. Judgment for Debt Due by Estate as Evidence Against Heir. — Compare *Siebert v. Steinmeyer*, 204 Pa. St. 419.

6. Judgment Admissible as Link in Chain of Title. — *Strow v. Allen*, (Iowa 1904) 98 N. W. Rep. 141; *McPherson v. Julius*, 17 S. Dak. 98; *Chapman v. Greene*, (S. Dak. 1904) 101 N. W. Rep. 351; *Ellis v. Le Baw*, 96 Tex. 532. And see *Allred v. Smith*, 135 N. Car. 443, per Clark, C. J., dissenting, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 757.

8. Judgment of Probate Court Affecting Title to Land. — *May v. Boyd*, 97 Me. 398, 94 Am. St. Rep. 509; *Bridgens v. West*, 35 Tex. Civ. App. 277.

758. 2. Where Deed Is Made under Decree in Chancery. — *Allred v. Smith*, 135 N. Car. 443, per Clark, C. J., dissenting, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 758.

759. 3. Contingent Interests. — *Hermann v. Parsons*, 117 Ky. 239.

7. *Hermann v. Parsons*, 117 Ky. 239.

760. 1. Judgment Against One or More of Several Joint Obligors. — *Armentrout v. Smith*, 56 W. Va. 356.

761. 3. Judgment Against a Partner on Partnership Obligation. — *Cowan v. Leming*, 111 Mo. App. 253; *Tootle v. Otis*, (Neb. 1901) 95 N. W. Rep. 681. See also *Figarra v. Saitta*, (Supm. Ct. App. T.) 91 N. Y. Supp. 728.

A Judgment Against a Partner in His Individual Capacity is not a bar to an action against the partnership. *Pate v. Wyly*, 118 Ga. 262.

762. (d) Rule under Statutes. — See note 5.

763. j. JUDGMENTS IN SUITS ON JOINT AND SEVERAL OBLIGATIONS — (1) *Effect of Judgment Against One Obligor or Against All Jointly.* — See notes 4, 5.

765. k. JUDGMENTS IN SUITS AGAINST JOINT TORTFEASORS — (2) *Judgment in Favor of One of the Tortfeasors.* — See note 2.

V. MATTERS CONCLUDED — 1. Statement of the Rule. — See note 3.

766. 2. Extent of Estoppel. — See notes 1, 2.

762. 5. Statutory Rule. — *Booth v. Huff*, 116 Ga. 8, 94 Am. St. Rep. 98.

763. 4. Judgment in Separate Suit Bar to Joint Action. — *Armentrout v. Smith*, 52 W. Va. 96.

5. Judgment Against One Obligor No Bar to Action Against Another. — *Booth v. Huff*, 116 Ga. 8, 94 Am. St. Rep. 98.

765. 2. Effect of Judgment in Favor of One Joint Tortfeasor. — *Richmond v. Sitterding*, 101 Va. 354, 99 Am. St. Rep. 879.

3. Matters Concluded in General — *Arizona*. — *Valley Bank v. Brodie*, (Ariz. 1904) 76 Pac. Rep. 617.

California. — *Kline v. Mohr*, 142 Cal. 673.

Connecticut. — *Storrs v. Robinson*, 77 Conn. 207.

Georgia. — *Evans v. Piedmont Nat. Bldg., etc.*, Assoc., 117 Ga. 940; *Ross v. Battle*, 117 Ga. 877; *Rountree v. Rentz*, 119 Ga. 885; *Latimer v. Irish-American Bank*, 119 Ga. 887; *Gunn v. James*, 120 Ga. 482; *Price v. Carlton*, 121 Ga. 12.

Iowa. — *Defries v. McMeans*, 121 Iowa 540; *Cook v. Des Moines*, 125 Iowa 611.

Maine. — *Tremblay v. Aetna L. Ins. Co.*, 97 Me. 547, 94 Am. St. Rep. 521.

Maryland. — *Norris v. Baumgardner*, 97 Md. 534.

Michigan. — *Rausch v. Briefer*, (Mich. 1904) 101 N. W. Rep. 523.

Missouri. — *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425.

Nebraska. — *McCarthy v. Birmingham*, (Neb. 1904) 99 N. W. Rep. 266.

New Jersey. — *Le Herisse v. Hess*, (N. J. 1904) 57 Atl. Rep. 808.

New Mexico. — *Lockhart v. Leeds*, (N. Mex. 1904) 76 Pac. Rep. 312.

New York. — *Tenement House Dept. v. Moeschén*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 446, affirmed 89 N. Y. App. Div. 526; *Franke v. Adams*, (Supm. Ct. App. T.) 86 N. Y. Supp. 293.

North Carolina. — *Skinner v. Terry*, 134 N. Car. 305; *Burwell v. Brodie*, 134 N. Car. 540.

Oklahoma. — *Randolph v. Hudson*, 12 Okla. 516.

Pennsylvania. — *Jenkins v. Scranton*, 205 Pa. St. 598; *Mack v. Logue*, 23 Pa. Super. Ct. 160; *Columbia Nat. Bank v. Dunn*, 207 Pa. St. 548; *Continental Title, etc., Co. v. Devlin*, 209 Pa. St. 380.

South Dakota. — *Selbie v. Graham*, (S. Dak. 1904) 100 N. W. Rep. 755.

Texas. — *Williams v. Wiley*, 96 Tex. 148.

Utah. — *Felkner v. Dooley*, 27 Utah 350.

Wisconsin. — *Arnold v. Randall*, 124 Wis. 1.

Canada. — *Canadian Breweries v. Allard*, 24 Quebec Super. Ct. 515.

766. 1. Questions Actually Litigated and Determined — *California*. — *Ivancovich v. Weilenman*, 144 Cal. 757.

Indiana. — *Gutheil v. Goodrich*, 160 Ind. 92.

Iowa. — *Reynolds v. Lyon County*, 121 Iowa 733.

Kansas. — *Wichita v. Rock Island Lumber, etc., Co.*, 68 Kan. 445.

Maine. — *Paul v. Thorndike*, 97 Me. 87.

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New York. — *O'Connor v. Byrne*, 86 N. Y. App. Div. 627, affirmed 180 N. Y. 556.

Oregon. — *Caseday v. Lindstrom*, 44 Oregon 309; *Ruckman v. Union R. Co.*, 45 Oregon 578.

Pennsylvania. — *Vankirk v. Patterson*, 204 Pa. St. 317.

South Dakota. — *Turner Tp. v. Williams*, 17 S. Dak. 548.

Virginia. — *Richmond v. Sitterding*, 101 Va. 354, 99 Am. St. Rep. 879.

Washington. — *Bond v. Chapman*, 34 Wash. 606.

2. Adjudication by Necessary Implication — *United States*. — *Gilbert v. American Surety Co.*, (C. C. A.) 121 Fed. Rep. 499; *Williamson v. McCaldin Bros. Co.*, (C. C. A.) 122 Fed. Rep. 63.

Georgia. — *Maynard v. Newton*, 116 Ga. 195.

Indiana. — *Gutheil v. Goodrich*, 160 Ind. 92.

Kansas. — *Stroup v. Pepper*, (Kan. 1903) 73 Pac. Rep. 896.

Maryland. — *Courtney v. William Knabe, etc., Mfg. Co.*, 97 Md. 499, 99 Am. St. Rep. 456.

Michigan. — *Burgess v. Stribling*, 134 Mich. 33.

Missouri. — *Brown v. Missouri Pac. R. Co.*, 96 Mo. App. 164; *Champ Spring Co. v. B. Roth Tool Co.*, 96 Mo. App. 518.

Nebraska. — *Martin v. Abbott*, (Neb. 1901) 95 N. W. Rep. 356; *Stocker v. Nemaha County*, (Neb. 1904) 100 N. W. Rep. 308; *Parrotte v. Dryden*, (Neb. 1905) 102 N. W. Rep. 610.

Plattsmouth First Nat. Bank v. Gibson, (Neb. 1905) 104 N. W. Rep. 174.

New York. — *Thorn v. De Breteuil*, 179 N. Y. 82, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 766; *Goldberg v. Schlessinger*, (Supm. Ct. App. T.) 86 N. Y. Supp. 209.

North Carolina. — *Best v. British American Mortg. Co.*, 133 N. Car. 20.

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Pennsylvania. — *Importers', etc., Nat. Bank v. Lyons*, 209 Pa. St. 136; *Hartman v. Pittsburg Inclined Plane Co.*, 23 Pa. Super. Ct. 360.

Rhode Island. — *Hazard v. Coyle*, 26 R. I. 361.

767. See note 1.

Tennessee.—*Memphis City Bank v. Smith*, 110 Tenn. 337.

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Washington.—*Lilly v. Eklund*, 37 Wash. 532.

West Virginia.—*Lee v. Smith*, 54 W. Va. 89.

767. 1. Right to Writ of Mandamus.—*State v. Hartford St. R. Co.*, 76 Conn. 174.

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Liability de Bonis Propriis of Administrator.—*Ross v. Battle*, 117 Ga. 877.

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Validity of Tax Deed.—*Napper v. Fitzpatrick*, (Mich. 1905) 102 N. W. Rep. 642.

Adjudication that Property Is Subject to Taxation.—*Defries v. McMeans*, 121 Iowa 540.

Validity of Claim in Bankruptcy.—*Hargadine-McKittrick Dry Goods Co. v. Hudson*, (C. C. A.) 122 Fed. Rep. 232.

Character of Covenant.—*Larkins v. Lindsay*, 205 Pa. St. 534.

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Amount of Auditor's Fee.—*McHenry v. Finletter*, 23 Pa. Super. Ct. 636.

Performance of Contract.—*Arthur Fritsch Foundry, etc., Co. v. Goodwin Mfg. Co.*, 100 Mo. App. 414.

Right of Lessee to Occupy Premises.—*Jones v. Hamm*, (Mo. App. 1903) 74 S. W. Rep. 150.

Adjudication of Claim of Widowhood.—*Matter of Harrington*, 147 Cal. 124.

Validity of Sale.—*Parish v. Parish*, 175 N. Y. 181.

Adjudication of Estoppel by Warranty Deed.—*Condit v. Bigalow*, 64 N. J. Eq. 504.

Validity of Appointment of Guardian.—*Norris v. Baumgardner*, 97 Md. 534.

Validity of Option to Purchase Land.—*Vankirk v. Patterson*, 204 Pa. St. 317.

Adjudication that Damages Are Excessive.—*Rueping v. Chicago, etc., R. Co.*, 123 Wis. 319.

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Rights in Mining Claim.—*Lauman v. Hooper*, 37 Wash. 382.

Allowance or Rejection of Claims Against Estate.—*Robertson v. Robertson*, (Ky. 1903) 72 S. W. Rep. 813.

Knowledge of Illegality of Contract.—*Sprague v. Voigtman*, (Supm. Ct. App. T.) 93 N. Y. Supp. 523.

Adjudication of Payment.—*Borches v. Arbuckle*, 111 Tenn. 498.

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Validity of Marriage.—*Burgess v. Stribling*, 134 Mich. 33.

Validity of Title to Land.—*Storrs v. Robinson*, 77 Conn. 207; *Elliott v. Haun*, (Ky. 1903) 74 S. W. Rep. 743; *Edmonston v. Carter*, 180 Mo. 515; *Maloney v. King*, 30 Mont. 414; *Dutton's Estate*, 208 Pa. St. 350.

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Decree that Property Is Not Exempt.—*Merki v. Merki*, 212 Ill. 121.

Adjudication on Account of Executor or Administrator.—*McDonald v. Holdom*, 208 Ill. 128; *Phalen v. U. S. Trust Co.*, 100 N. Y. App. Div. 264; *Piper's Estate*, 208 Pa. St. 636.

Validity of Contract.—*Deposit Bank v. Frankfurt*, 191 U. S. 499; *Hirshbach v. Ketchum*, 84 N. Y. App. Div. 258.

Construction of Contract.—*Georgia R., etc., Co. v. Wright*, 132 Fed. Rep. 912; *Cook v. Des Moines*, 125 Iowa 611; *Phelps v. Western Realty Co.*, 89 Minn. 319.

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Fact of Negligence.—*Anderson v. West Chicago St. R. Co.*, 200 Ill. 329; *Missouri, etc., R. Co. v. Eyer*, 96 Tex. 72.

Existence and Validity of Debts and Demands.—*Salemonson v. Thompson*, 13 N. Dak. 182.

Existence and Validity of Lien.—*Bond v. Carter*, (Tex. Civ. App. 1903) 73 S. W. Rep. 45.

Ownership of Fund.—*New York Telephone Co. v. Treat*, (C. C. A.) 130 Fed. Rep. 340; *Geisreiter v. McCoy*, (Ark. 1905) 85 S. W. Rep. 86; *Wichita v. Rock Island Lumber, etc., Co.*, 68 Kan. 445; *Maxwell v. England*, 115 Ky. 783; *Engel v. Union Square Bank*, 94 N. Y. App. Div. 244, affirmed 182 N. Y. 544.

Adjudication of Validity of Lien.—*W. C. Belcher Land-Mortg. Co. v. Norris*, 34 Tex. Civ. App. 111.

Right to Hold Office.—*Moores v. State*, 67 Neb. 535; *State v. Broatch*, 68 Neb. 687.

Validity of Mortgage.—*In re Reynolds*, 133 Fed. Rep. 585; *Continental Title, etc., Co. v. Devlin*, 209 Pa. St. 380.

Decree of Foreclosure of Mortgage.—*Stroup v. Pepper*, (Kan. 1903) 73 Pac. Rep. 896.

Adjudication of Dismissal of Foreclosure Proceedings.—*Schultz v. Schultz*, 118 Wis. 228.

Fact of Fraud.—*Gutheil v. Goodrich*, 160 Ind. 92; *Strow v. Allen*, (Iowa 1904) 98 N. W. Rep. 141; *Riley v. Ryan*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 151; *Fricke v. Wood*, 31 Tex. Civ. App. 167.

Validity of Sheriff's Return.—*Smoot v. Judd*, 184 Mo. 508.

772. Immaterial Issues. — See note 1.

Adjudication upon Collateral Questions. — See note 2.

773. 3. Matters Not Adjudicated — *a.* IN GENERAL. — See note 1.

775. *b.* MATTERS NOT IN ISSUE. — See note 3.

Duty of Trustee to Account. — *Felkner v. Dooly*, 27 Utah 350.

Liability on Note. — *Tinker v. Babcock*, 204 Ill. 571; *Skordal v. Stanton*, 89 Minn. 511; *Scott v. American Nat. Bank*, (Tex. Civ. App. 1904) 84 S. W. Rep. 445.

Decree Construing Will. — *Burkett v. Burkett*, 81 Miss. 593; *Jewett v. Schmidt*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 34.

Right to Purchase-money Paid for Land. — *Holtheide v. Smith*, (Ky. 1905) 84 S. W. Rep. 321.

Validity of Trust. — *Johnson v. De Pauw University*, 116 Ky. 671.

Decree Declaring Intervenor's Interest in Note. — *Kline v. Mohr*, 142 Cal. 673.

Decree in Partition of Land. — *Bartley v. Bartley*, 172 Mo. 208; *Moor v. Moor*, 31 Tex. Civ. App. 137.

Duty of City to Issue Warrants. — *Valley Bank v. Brodie*, (Ariz. 1904) 76 Pac. Rep. 617.

Existence of Trust in Respect to Property. — *Baker v. Bailey*, 204 Pa. St. 524.

Validity of Judgment. — *Parrotte v. Dryden*, (Neb. 1905) 102 N. W. Rep. 610.

772. 1. Immaterial Issues. — *Farmers' L. & T. Co. v. Hoffman House*, 96 N. Y. App. Div. 301; *Stokes v. Foote*, 172 N. Y. 327.

2. Matters Collaterally or Incidentally Considered. — *Harriman v. Northern Securities Co.*, 197 U. S. 244; *Williamson v. McCaldin Bros. Co.*, (C. C. A.) 122 Fed. Rep. 63; *Campbell v. Milliken*, (Colo. App. 1904) 78 Pac. Rep. 620; *In re Morgan*, 125 Iowa 247; *Tremblay v. Aetna L. Ins. Co.*, 97 Me. 547, 94 Am. St. Rep. 521; *Shryock v. Hensel*, 95 Md. 614; *Waterhouse v. Levine*, 182 Mass. 407; *Wilson v. Lubke*, 176 Mo. 210, 98 Am. St. Rep. 503; *Wagner v. St. Peter's Hospital*, 32 Mont. 206; *Mullaney v. Mullaney*, 65 N. J. Eq. 384; *Stokes v. Foote*, 172 N. Y. 327; *State v. O'Connor*, (Tex. 1903) 74 S. W. Rep. 899; *Matter of Lloyd*, 34 Wash. 84.

773. 1. Matters Not Adjudicated — *United States*. — *In re Sears*, (C. C. A.) 128 Fed. Rep. 275.

Georgia. — *Pate v. Wyly*, 118 Ga. 262; *Leffler v. Union Compress Co.*, 121 Ga. 40.

Illinois. — *Lusk v. Chicago*, 211 Ill. 183; *Pennsylvania Co. v. Bond*, 202 Ill. 95; *Cramer v. Wilson*, 202 Ill. 83; *Merrifield v. Canal Com'rs*, 212 Ill. 456; *Metropolis First Nat. Bank v. Leech*, 207 Ill. 215; *People v. Hathaway*, 206 Ill. 42; *Barkman v. Barkman*, 209 Ill. 269; *Henderson v. Kibbie*, 211 Ill. 556.

Indiana. — *McClaskey v. McDaniel*, (Ind. App. 1905) 74 N. E. Rep. 1023; *Grim v. Griffith*, 34 Ind. App. 559.

Iowa. — *Loetscher v. Dillon*, 119 Iowa 202; *Brown v. Lambie*, 119 Iowa 404; *Long v. Wilson*, 119 Iowa 267, 97 Am. St. Rep. 315.

Kentucky. — *Covington v. Covington First Nat. Bank*, 108 U. S. 100.

Maine. — *Tremblay v. Aetna L. Ins. Co.*, 97 Me. 547, 94 Am. St. Rep. 521.

Maryland. — *Dubreuil v. Gaither*, 98 Md. 541; *Courtney v. William Knabe, etc.*, Mfg. Co., 97 Md. 499, 99 Am. St. Rep. 456.

Massachusetts. — *Waterhouse v. Levine*, 182 Mass. 407; *Smith v. Stoughton*, 185 Mass. 329. *Missouri*. — *State v. Adams*, 101 Mo. App. 468.

Montana. — See *Flannery v. Campbell*, 30 Mont. 172.

Nebraska. — *Burkholder v. Hollicheck*, (Neb. 1903) 95 N. W. Rep. 860; *State v. Moores*, (Neb. 1903) 96 N. W. Rep. 1011; *Agnew v. Omaha Nat. Bank*, (Neb. 1903) 96 N. W. Rep. 189.

New York. — *Mertz v. Press*, 99 N. Y. App. Div. 443; *Matter of Roberts*, 98 N. Y. App. Div. 155; *New Union Telephone Co. v. Marsh*, 96 N. Y. App. Div. 122; *Farmer v. A. D. Farmer, etc.*, Type Founding Co., 83 N. Y. App. Div. 218; *Koeppel v. Macbeth*, 97 N. Y. App. Div. 299.

North Carolina. — *Burwell v. Brodie*, 134 N. Car. 540; *McCall v. Zachary*, 131 N. Car. 466.

Ohio. — *Rafferty v. Toledo Traction Co.*, 25 Ohio Cir. Ct. 411.

Oregon. — *McMahan v. Whelan*, 44 Oregon 402.

Pennsylvania. — *Wharton v. Harlan*, 24 Pa. Super. Ct. 61.

Rhode Island. — *Norman v. Sylvia*, 26 R. I. 438.

Washington. — *Hennessey v. Tacoma Smelting, etc., Co.*, 33 Wash. 423.

Wisconsin. — *Swennes v. Sprain*, 120 Wis. 68.

775. 3. Matters Not in Issue — *United States*. — *Abilene v. Cornell University*, (C. C. A.) 118 Fed. Rep. 379; *Fuller v. Venable*, (C. C. A.) 118 Fed. Rep. 543; *Kroegher v. Calivada Colonization Co.*, (C. C. A.) 119 Fed. Rep. 641; *Davenport v. Allen*, 120 Fed. Rep. 172; *Dennison Mfg. Co. v. Scharf Tag, etc., Co.*, (C. C. A.) 121 Fed. Rep. 313; *McNamara v. Home Land, etc., Co.*, (C. C. A.) 121 Fed. Rep. 797; *Gibboney v. Chosen Freeholders*, (C. C. A.) 122 Fed. Rep. 46; *Penfield v. Potts*, (C. C. A.) 126 Fed. Rep. 475.

Arkansas. — *Eldred v. Johnson*, (Ark. 1905) 86 S. W. Rep. 670; *Woman's Christian Nat. Library Assoc. v. Fordyce*, (Ark. 1904) 86 S. W. Rep. 417.

California. — *Curtin v. Salmon River Hydraulic Gold Min., etc., Co.*, 141 Cal. 308, 99 Am. St. Rep. 75.

Florida. — *Tampa v. Tampa Waterworks Co.*, 45 Fla. 600.

Georgia. — *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 116 Ga. 176; *Butler v. Tifton, etc., R. Co.*, 121 Ga. 817; *Price v. Carlton*, 121 Ga. 12.

Idaho. — *Small v. Harrington*, 10 Idaho 499. *Illinois*. — *Elmwood Cemetery Co. v. People*, 204 Ill. 468.

Indiana. — *Baltes Land, etc., Co. v. Sutton*, 30 Ind. App. 648; *Terre Haute, etc., R. Co. v.*

776. See note 1.

777. *c* MATTERS IN ISSUE BUT NOT DECIDED. — See note 1.

d. CHANGES OF CONDITION. — See note 3.

778. 4. Identity of Subject, Cause of Action, and Issue — *a.* RULE STATED. — See note 1.

b. IDENTITY OF THING SUED FOR. — See notes 2, 3, 4.

c. IDENTITY OF CAUSE OF ACTION — (1) *In General.* — See note 6.

779. See note 1.

State, 159 Ind. 438; Greenfield Gas Co. v. Trees, (Ind. 1905) 75 N. E. Rep. 2.

Iowa. — Matter of Dille, 119 Iowa 575.

Kentucky. — Hamilton v. Hamilton, (Ky. 1905) 84 S. W. Rep. 1156; Klenke v. Noonan, (Ky. 1904) 81 S. W. Rep. 241; Botto v. Botto, (Ky. 1904) 80 S. W. Rep. 174.

Louisiana. — State v. New Orleans Warehouse Co., 109 La. 64.

Massachusetts. — Crossman v. Griggs, 188 Mass. 217.

Michigan. — Bran v. Connery, 132 Mich. 88.

Missouri. — Scott v. Black, 96 Mo. App. 472; Patillo v. Martin, 107 Mo. App. 653; Burnside v. Wand, 108 Mo. App. 539.

Nebraska. — Malone v. Garver, (Neb. 1902) 92 N. W. Rep. 726; Hamilton Nat. Bank v. American L. & T. Co., 66 Neb. 67, (Neb. 1904) 100 N. W. Rep. 202.

New Hampshire. — Boston, etc., R. Co. v. Sargent, 72 N. H. 455; Cassidy v. Mudgett, 71 N. H. 491.

New Jersey. — Newcomb v. Lubrasky, 65 N. J. Eq. 125; Mercer County Traction Co. v. United New Jersey R., etc., Co., 64 N. J. Eq. 588; Hodge v. U. S. Steel Corp., 64 N. J. Eq. 90.

New York. — Figarra v. Saitta, (Supm. Ct. App. T.) 91 N. Y. Supp. 728; Minkoff v. Lipschuetz, (Supm. Ct. App. T.) 88 N. Y. Supp. 139; Russ v. Maxwell, 94 N. Y. App. Div. 107; Farmers' L. & T. Co. v. Hoffman House, 96 N. Y. App. Div. 301; McCollum v. Williamson, 96 N. Y. App. Div. 638; Lytle v. Crawford, 90 N. Y. App. Div. 603; Thorn v. De Breteuil, 86 N. Y. App. Div. 405, modified 179 N. Y. 64.

North Carolina. — McCall v. Webb, 135 N. Car. 356; Austin v. Austin, 132 N. Car. 262, 95 Am. St. Rep. 637; Debnam v. Chitty, 131 N. Car. 657.

Oregon. — Caseday v. Lindstrom, 44 Oregon 309; Ruckman v. Union R. Co., 45 Oregon 578.

Pennsylvania. — Siebert v. Steinmeyer, 204 Pa. St. 419; Seabury v. Fidelity Ins. Trust, etc., Co., 205 Pa. St. 234.

South Carolina. — Parrott v. Barrett, 70 S. Car. 195.

Texas. — Norris v. W. C. Belcher Land Mortg. Co., 98 Tex. 176; Hatch v. Hatch, 35 Tex. Civ. App. 373; Penn v. Case, 36 Tex. Civ. App. 4; Gulf, etc., R. Co. v. Roberts, (Tex. Civ. App. 1905) 86 S. W. Rep. 1052.

Virginia. — Southern R. Co. v. Washington, etc., R. Co., 102 Va. 483.

West Virginia. — Sibley v. Stacey, 53 W. Va. 292.

Wisconsin. — Montpelier Sav. Bank, etc., Co. v. School Dist. No. Five, 115 Wis. 622; Fordyce v. State, 115 Wis. 608; Fitch v. Hunting-

ton, 125 Wis. 204; Manitowoc Steam Boiler Works v. Manitowoc Glue Co., 120 Wis. 1.

776. 1. Questions Which Could Not Have Been Litigated. — Wyman v. Bowman, (C. C. A.) 127 Fed. Rep. 257; Huston v. Fatka, 30 Ind. App. 693; Meyer v. Moss, 110 La. 132; Shryock v. Hensel, 95 Md. 614; Earle v. Earle, 173 N. Y. 480; Levy v. Hohweisner, 101 N. Y. App. Div. 82; McMahan v. Whelan, 44 Oregon 402; McMichael v. McFalls, 23 Pa. Super Ct. 256; Matter of Lloyd, 34 Wash. 84.

777. 1. Matters in Issue but Not Decided. — Compare Clark v. Knox, 32 Colo. 342.

3. Change of Condition. — Bedford-Bowling Green Stone Co. v. Oman, 134 Fed. Rep. 452, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 777, affirmed (C. C. A.) 134 Fed. Rep. 64; Vincent v. Mutual Reserve Fund L. Assoc., 77 Conn. 281; Union Pac. R. Co. v. Wyandotte County, 69 Kan. 572; Louisville, etc., R. Co. v. Cumnock, (Ky. 1904) 77 S. W. Rep. 933; Shryock v. Hensel, 95 Md. 614; Teigen v. Drake, 13 N. Dak. 502; Hart v. Godkin, 122 Wis. 646. See also Sumner v. Sumner, 118 Ga. 408.

778. 1. Identity of Subject, Cause of Action, and Issue. — Vincent v. Mutual Reserve Fund L. Assoc., 77 Conn. 281; Price v. Carlton, 121 Ga. 12; Matter of Dille, 119 Iowa 575; Brown v. Missouri Pac. R. Co., 96 Mo. App. 164; Pickel Stone Co. v. Wall, 108 Mo. App. 495; Hamilton Nat. Bank v. American L. & T. Co., 66 Neb. 67; Turner Tp. v. Williams, 17 S. Dak. 548.

2. Title to Different Parcels of Land. — Shufflebarger v. Blanchard, 101 Va. 690.

3. Right to Recover Different Objects. — Hamilton Nat. Bank v. American L. & T. Co., 66 Neb. 67; Debnam v. Chitty, 131 N. Car. 657.

4. Diversity of Objects, but Identity of Issue. — Graves v. Currie, 132 N. Car. 307; Best v. British American Mortg. Co., 133 N. Car. 20; Lee v. Smith, 54 W. Va. 89.

6. Identity of Cause of Action. — Lindemann v. Rusk, 125 Wis. 210.

779. 1. Different Causes of Action, but Identity of Issue. — Vincent v. Mutual Reserve Fund L. Assoc., 77 Conn. 281; Price v. Carlton, 121 Ga. 21, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 779; Ross v. Battle, 117 Ga. 877; Stroup v. Pepper, (Kan. 1903) 73 Pac. Rep. 896; People v. Albers, 137 Mich. 678; State v. Broatch, 68 Neb. 687; Chicago, etc., R. Co. v. Cass County, (Neb. 1904) 101 N. W. Rep. 11; Mercer County Traction Co. v. United New Jersey R., etc., Co., 64 N. J. Eq. 588; New Jersey Junction R. Co. v. Jersey City, 70 N. J. L. 104; Ruckman v. Union R. Co., 45 Oregon 578; Importers, etc., Nat. Bank v. Lyons, 209 Pa. St. 136.

779. (3) *Different Causes of Action Arising from the Same Contract.* — See note 4.

780. (4) *Continuing Trespass or Nuisance.* — See note 1.
d. IDENTITY OF ISSUE. — See notes 2, 3.

781. The Test of Identity. — See note 2.

5. Matters Which Might Have Been Litigated — a. ACTIONS FOR THE SAME CAUSE — (1) *Statement of the Rule.* — See note 3.

782. See note 1.

779. 4. Judgment in Action for Instalment of Salary. — *Jenkins v. Scranton*, 205 Pa. St. 598; *Ornstein v. Yahr, etc.*, Drug Co., 119 Wis. 429.

780. 1. Continuing Nuisance. — *Bennett v. Marion*, 119 Iowa 473.

2. Identity of Issues. — *Price v. Carlton*, 121 Ga. 21, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) and supporting the whole text paragraph; *Stone v. Salisbury*, 209 Ill. 56; *Agnew v. Montgomery*, (Neb. 1904) 99 N. W. Rep. 820; *Lockhart v. Leeds*, (N. Mex. 1904) 76 Pac. Rep. 312; *Cuccurullo v. Societa, etc.*, 102 N. Y. App. Div. 276; *State v. Sandifer*, 68 S. Car. 204; *Lee v. Smith*, 54 W. Va. 89; *Adams v. Mulligan*, 20 Quebec Super. Ct. 251.

3. Actions Based on Different Grounds. — *Storrs v. Robinson*, 77 Conn. 207; *Gentry v. Pacific Livestock Co.*, 45 Oregon 233.

781. 2. Test of Identity. — *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 116 Ga. 176; *People v. Albers*, 137 Mich. 678; *Burkholder v. Hollicheck*, (Neb. 1903) 95 N. W. Rep. 860; *Lackhart v. Leeds*, (N. Mex. 1904) 76 Pac. Rep. 312; *State v. McEldowney*, 54 W. Va. 701, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 781.

3. Matters Which Might Have Been Litigated — *United States*. — *Bedford-Bowling Green Stone Co. v. Oman*, 134 Fed. Rep. 452, affirmed (C. C. A.) 134 Fed. Rep. 64; *Shinkle v. Vickery*, 117 Fed. Rep. 916, affirmed (C. C. A.) 130 Fed. Rep. 424; *Hanley v. Beatty*, (C. C. A.) 117 Fed. Rep. 59; *Ætna L. Ins. Co. v. Hamilton County*, (C. C. A.) 117 Fed. Rep. 82; *Allen v. Davenport*, (C. C. A.) 132 Fed. Rep. 209; *Brown v. Newton First Nat. Bank*, (C. C. A.) 132 Fed. Rep. 450; *Gordon v. Ware Nat. Bank*, (C. C. A.) 132 Fed. Rep. 444; *U. S. v. California, etc., Land Co.*, 192 U. S. 355.

California. — *Ivancovich v. Weilenman*, 144 Cal. 757.

Georgia. — *Conwell v. Neal*, 118 Ga. 626, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 781; *Price v. Carlton*, 121 Ga. 12; *Latimer v. Irish American Bank*, 119 Ga. 887; *Equitable Mortg. Co. v. McWaters*, 119 Ga. 337; *Sumner v. Sumner*, 118 Ga. 408; *Evans v. Piedmont Nat. Bldg., etc., Assoc.*, 117 Ga. 940; *Huntress v. Portwood*, 116 Ga. 351.

Illinois. — *Stone v. Salisbury*, 209 Ill. 56; *Baldwin v. Haney*, 204 Ill. 281; *Anderson v. West Chicago St. R. Co.*, 200 Ill. 329; *Hilgers v. Hicks*, 201 Ill. 374.

Indiana. — *State v. Clinton County*, 162 Ind. 597, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 781; *Cannon v. Castleman*, 162 Ind. 6.

Kansas. — *Stroup v. Pepper*, (Kan. 1903) 73 Pac. Rep. 896.

Kentucky. — *Klenke v. Noonan*, (Ky. 1904).

81 S. W. Rep. 241; *Moran v. Vicroy*, 117 Ky. 195; *New York L. Ins. Co. v. Weaver*, 114 Ky. 295; *Holttheide v. Smith*, (Ky. 1905) 84 S. W. Rep. 321.

Maine. — *Paul v. Thorndike*, 97 Me. 87.

Massachusetts. — *Barnes v. Huntley*, 188 Mass. 274.

Michigan. — *Napper v. Fitzpatrick*, (Mich. 1905) 102 N. W. Rep. 642.

Missouri. — *Jones v. Silver*, 97 Mo. App. 231; *Pickel Stone Co. v. Wall*, 108 Mo. App. 495.

Nebraska. — *Brand v. Garneau*, (Neb. 1903) 93 N. W. Rep. 219; *Plattsmouth First Nat. Bank v. Gibson*, (Neb. 1905) 104 N. W. Rep. 174; *Schlemme v. Omaha Gas Mfg. Co.*, (Neb. 1903) 96 N. W. Rep. 644; *Martin v. Abbott*, (Neb. 1901) 95 N. W. Rep. 356.

New Hampshire. — *Boston, etc., R. Co. v. Sargent*, 72 N. H. 455.

New Jersey. — *Mercer County Traction Co. v. United New Jersey R., etc., Co.*, 64 N. J. Eq. 588.

New Mexico. — *Grant County v. Cross*, (N. Mex. 1903) 73 Pac. Rep. 615.

New York. — *Earle v. Earle*, 173 N. Y. 480; *Franke v. Adams*, (Supm. Ct. App. T.) 86 N. Y. Supp. 293; *Poillon v. Poillon*, 90 N. Y. App. Div. 71; *Jewett v. Schmidt*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 34; *Goldberg v. Ziegler*, (Supm. Ct. App. T.) 92 N. Y. Supp. 777.

North Carolina. — *Burwell v. Brodie*, 134 N. Car. 540.

Ohio. — *Mengert v. Brinkerhoff*, 67 Ohio St. 472.

Oregon. — *Ruckman v. Union R. Co.*, 45 Oregon 578; *Casaday v. Lindstrom*, 44 Oregon 309.

Pennsylvania. — *Dutton's Estate*, 208 Pa. St. 350; *Baker v. Bailey*, 204 Pa. St. 524.

Rhode Island. — *Randall v. Carpenter*, 25 R. I. 644, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 781; *Mills v. Allen*, 26 R. I. 177.

South Carolina. — *State v. Sandifer*, 68 S. Car. 204; *Abbeville Electric Light, etc., Co. v. Western Electrical Supply Co.*, 66 S. Car. 328.

South Dakota. — *Selbie v. Graham*, (S. Dak. 1904) 100 N. W. Rep. 755.

Tennessee. — *Memphis City Bank v. Smith*, 110 Tenn. 337.

Texas. — *W. C. Belcher Land-Mortg. Co. v. Norris*, 34 Tex. Civ. App. 111; *Moor v. Moor*, 31 Tex. Civ. App. 137; *Williams v. Wiley*, 96 Tex. 148; *American Cotton Co. v. Heierman*, (Tex. Civ. App. 1904) 83 S. W. Rep. 845.

Virginia. — *Southern R. Co. v. Washington, etc., R. Co.*, 102 Va. 483.

West Virginia. — *State v. McEldowney*, 54 W. Va. 701, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 781; *State v. Boner*, 57 W. Va. 81; *Cresap v. Cresap*, 54 W. Va. 581; *Snyder v. Middle States Loan, etc., Co.*, 52 W. Va. 655.

782. 1. Matters of Defense Which Might Have

783. See notes 1, 2.

784. *b.* DIFFERENT CAUSES OF ACTION — (1) *Statement of the Rule.* — See note 4.

785. (2) *Matter of Set-off or Counterclaim* — (a) *In General.* — See note 2.

786. *c.* DIVISIBLE AND INDIVISIBLE CAUSES OF ACTION — (1) *Entire and Indivisible Causes of Action* — (a) *Statement of the Rule.* — See note 5.

787. (b) *Actions upon Contracts.* — See note 1.

(c) *Actions for Breaches of Contract.* — See note 2.

Been Pleased. — *Hauley v. Beatty*, (C. C. A.) 117 Fed. Rep. 59; *Groton Bridge, etc., Co. v. Clark Pressed Brick Co.*, 126 Fed. Rep. 552; *Brown v. Newton First Nat. Bank*, (C. C. A.) 132 Fed. Rep. 450; *Kelly v. Strouse*, 116 Ga. 872; *State v. Clinton County*, 162 Ind. 597, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 782; *Newman v. Gates*, (Ind. App. 1903) 67 N. E. Rep. 468; *Butrick, Petitioner*, 185 Mass. 107; *Earle v. Earle*, 173 N. Y. 480; *Mengert v. Brinkerhoff*, 67 Ohio St. 472; *Ruckman v. Union R. Co.*, 45 Oregon 578; *Memphis City Bank v. Smith*, 110 Tenn. 337; *State v. McEldowney*, 54 W. Va. 703, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 782.

783. 1. Defenses Cognizable in Equity Only. — *Johnson v. Amberson*, 140 Ala. 342; *Patillo v. Martin*, 107 Mo. App. 653; *Headley v. Leavitt*, 65 N. J. Eq. 748; *Mertz v. Press*, 99 N. Y. App. Div. 443; *Clark v. Hindman*, (Oregon 1905) 79 Pac. Rep. 56; *McMahan v. Whelan*, 44 Oregon 402. See also *Le Herisse v. Hess*, (N. J. 1904) 57 Atl. Rep. 808.

Bar by Failure to Set up Equitable Title in Ejectment. — *Dutton's Estate*, 208 Pa. St. 350.

2. When Relief Might Have Been Had in Prior Suit in Equity. — *Stroup v. Pepper*, (Kan. 1903) 73 Pac. Rep. 896; *Stocker v. Nemaha County*, (Neb. 1904) 100 N. W. Rep. 308; *Larkins v. Lindsay*, 205 Pa. St. 534.

784. 4. Estoppel of Former Judgment in Suit upon Different Causes of Action — *United States*. — *Columbia Ave. Sav. Fund, etc., Co. v. Dawson*, 130 Fed. Rep. 152; *Ætna L. Ins. Co. v. Hamilton County*, (C. C. A.) 117 Fed. Rep. 82; *Rankin v. Big Rapids*, (C. C. A.) 133 Fed. Rep. 670.

California. — *Curtin v. Salmon River Hydraulic Gold Min., etc., Co.*, 141 Cal. 308, 99 Am. St. Rep. 75.

Connecticut. — *Storrs v. Robinson*, 77 Conn. 207.

Georgia. — *Crew v. Hutcheson*, 115 Ga. 511.

Illinois. — *Baldwin v. Hauecy*, 204 Ill. 281; *Stone v. Salisbury*, 209 Ill. 56.

Iowa. — *Brown v. Lambe*, 119 Iowa 404.

Kentucky. — *Botto v. Botto*, (Ky. 1904) 80 S. W. Rep. 174.

Louisiana. — *State v. New Orleans Warehouse Co.*, 109 La. 64.

Massachusetts. — *Butrick, Petitioner*, 185 Mass. 107.

Michigan. — *Brand v. Connery*, 132 Mich. 88.

Missouri. — *Funk v. Seehorn*, 99 Mo. App. 587; *Menges v. Milton Piano Co.*, 96 Mo. App. 611.

Nebraska. — *Hamilton Nat. Bank v. American L. & T. Co.*, 66 Neb. 67; *Malone v. Garver*, (Neb. 1902) 92 N. W. Rep. 726; *Burkholder v. Hollicheck*, (Neb. 1903) 95 N. W. Rep. 860.

New Jersey. — *Pierce v. Old Dominion Copper Min., etc., Co.*, 67 N. J. Eq. 399.

New York. — *Rockefeller v. St. Regis Paper Co.*, 84 N. Y. App. Div. 636; *Mertz v. Press*, 99 N. Y. App. Div. 443; *Tuck v. Rottkowsky*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 386.

North Carolina. — *Robinson v. Lamb*, 131 N. Car. 229; *McCall v. Zachary*, 131 N. Car. 466.

Oregon. — *Ruckman v. Union R. Co.*, 45 Oregon 578; *Gentry v. Pacific Livestock Co.*, 45 Oregon 233.

Pennsylvania. — *Levy v. Solomon*, 207 Pa. St. 478; *Stockdale v. Maginn*, 207 Pa. St. 229; *Pantall v. Rochester, etc., Coal, etc., Co.*, 204 Pa. St. 158.

Rhode Island. — *Brierly v. Union R. Co.*, 26 R. I. 119; *Norman v. Sylvia*, 26 R. I. 438.

South Dakota. — *Selbie v. Graham*, (S. Dak. 1904) 100 N. W. Rep. 755.

Texas. — *Standefer v. Aultman, etc., Machinery Co.*, 34 Tex. Civ. App. 160.

Virginia. — *Southern R. Co. v. Washington, etc., R. Co.*, 102 Va. 483.

Wisconsin. — *Fordyce v. State*, 115 Wis. 608; *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1; *Swennes v. Sprain*, 120 Wis. 68.

A Recovery of Judgment upon an Interest Coupon Is Not Conclusive. — *Schmidt v. Louisville, etc., R. Co.*, (Ky. 1904) 84 S. W. Rep. 314.

785. 2. Omission to Plead Set-off or Counterclaim. — *Brown v. Newton First Nat. Bank*, (C. C. A.) 132 Fed. Rep. 450; *Shankle v. Whitley*, 131 N. Car. 168; *Mauney v. Hamilton*, 132 N. Car. 303; *Norton v. Wachler*, 31 Tex. Civ. App. 522.

786. 5. Entire and Indivisible Causes of Action. — *Watkins v. American Nat. Bank*, (C. C. A.) 134 Fed. Rep. 36; *Wilcox, etc., Sewing Mach. Co. v. Sherborne*, (C. C. A.) 123 Fed. Rep. 875; *Brown v. Newton First Nat. Bank*, (C. C. A.) 132 Fed. Rep. 450; *U. S. v. California, etc., Land Co.*, 192 U. S. 355; *Stroup v. Pepper*, (Kan. 1903) 93 Pac. Rep. 896; *Small v. Reeves*, (Ky. 1903) 76 S. W. Rep. 395; *Andreas v. School Dist. No. 4*, (Mich. 1904) 100 N. W. Rep. 1021; *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425; *Gordon v. Omaha*, (Neb. 1904) 99 N. W. Rep. 242; *Jenkins v. Scranton*, 205 Pa. St. 598; *State v. Sandifer*, 68 S. Car. 204; *Mallory v. Dawson Cotton Oil Co.*, 32 Tex. Civ. App. 294; *Ornstein v. Yahr, etc., Drug Co.*, 119 Wis. 429.

787. 1. Actions upon Contract. — *Maeder v. Wexler*, 98 N. Y. App. Div. 68, affirmed 182 N. Y. 519; *Pakas v. Hollingshead*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 287, affirmed 99 N. Y. App. Div. 472; *Hancock v. White Hall Tobacco Warehouse Co.*, 102 Va. 239.

2. Damages for Breaches of Contract. — *Ried-*

788. (e) Actions for Permanent Injuries to Land. — See note 3.

789. (2) *Independent Causes of Action* — (a) Statement of the Rule. — See note 3.

790. (c) Distinct and Independent Causes Arising from the Same Contract — *aa*. IN GENERAL. — See note 2.

791. *bb*. SEPARATE INSTALMENTS DUE UNDER CONTRACT — Recovery of All Instalments Due. — See note 1.

cc. AMOUNT DUE UNDER CONTRACT AND DAMAGES FOR ITS BREACH. — See note 2.

(d) Causes Arising from Distinct and Independent Torts. — See note 4.

(e) Distinct Causes Arising from Continuing Torts. — See note 5.

792. VI. NATURE AND REQUISITES OF JUDGMENT OR ORDER — 1. Necessity for Judgment — The Weight of Authority. — See notes 3, 4, 5.

793. 2. Judgment Must Be Final. — See note 6.

794. 3. Judgment Must Be on the Merits. — See note 2.

inger v. Diamond Match Co., (C. C. A.) 123 Fed. Rep. 244.

788. 3. Permanent Injuries to Land. — *Atchison, etc.*, R. Co. *v. Jones*, 110 Ill. App. 626; *Stutts v. Huntington Water Works Co.*, 33 Ind. App. 242; *Oliver v. Illinois Cent. R. Co.*, (Ky. 1903) 74 S. W. Rep. 1078.

789. 3. Independent Causes of Action — *Georgia*. — *Crew v. Hutcheson*, 115 Ga. 511.

Iowa. — *Matter of Dille*, 119 Iowa 575.

Kansas. — *Manley v. Park*, 68 Kan. 400.

Kentucky. — *Louisville, etc.*, R. Co. *v. Cumnock*, (Ky. 1904) 77 S. W. Rep. 933; *Woolley v. Louisville*, 114 Ky. 556.

Montana. — *Boucher v. Powers*, 29 Mont. 342.

Nebraska. — *Linton v. Cathers*, (Neb. 1903) 97 N. W. Rep. 800; *Chicago, etc.*, R. Co. *v. Cass County*, (Neb. 1904) 101 N. W. Rep. 11.

New York. — *Goldshear v. Barron*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 198; *Middleworth v. Blackwell*, 85 N. Y. App. Div. 613.

Pennsylvania. — *Pantall v. Rochester, etc.*, Coal, etc., Co., 204 Pa. St. 158; *Hartman v. Pittsburg Inclined Plane Co.*, 23 Pa. Super. Ct. 360.

Rhode Island. — *Norman v. Sylvia*, 26 R. I. 438.

Wisconsin. — *Montpelier Sav. Bank, etc.*, Co. *v. School Dist. No. Five*, 115 Wis. 622.

790. 2. Distinct and Independent Causes Arising from the Same Contract. — *Cox v. Wiley*, 183 Mass. 410; *Arthur Fritsch Foundry, etc.*, Co. *v. Goodwin Mfg. Co.*, 100 Mo. App. 414; *Menges v. Milton Piano Co.*, 96 Mo. App. 611.

791. 1. Recovery Must Include All Instalments Due. — *Wilcox, etc.*, Sewing Mach. Co. *v. Sherborne*, (C. C. A.) 123 Fed. Rep. 875; *Pakas v. Hollingshead*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 287, *affirmed* 99 N. Y. App. Div. 472; *Jenkins v. Scranton*, 205 Pa. St. 598.

2. Amount Due under Contract and Damages for Its Breach. — *Menges v. Milton Piano Co.*, 96 Mo. App. 611.

4. Separate Trespasses — Defense Available. — See *Norman v. Sylvia*, 26 R. I. 438.

5. Diversion of Stream. — *Schenrich v. South-west Missouri Light Co.*, 109 Mo. App. 406.

Damages from Flooding Lands. — *Barker v. Tennessee Paving Brick Co.*, (Ky. 1903) 71 S. W. Rep. 877; *Gulf, etc.*, R. Co. *v. Roberts*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1052; *Candler v. Asheville Electric Co.*, 135 N. Car. 12.

Obstruction of Stream. — *Southern R. Co. v. Cook*, 117 Ga. 286.

Damages from Pollution of Stream. — *Bennett v. Marion*, 119 Iowa 473; *Kewanee v. Otley*, 204 Ill. 402.

792. 3. Judgment, Not Verdict, Concludes Parties. — *Oklahoma City v. McMaster*, 196 U. S. 529; *Harris v. Gano*, 117 Ga. 934; *Chicago v. Goodwillie*, 208 Ill. 252; *Stubbings v. Durham*, 210 Ill. 542.

4. Control of Court. — *Harris v. Gano*, 117 Ga. 934. See also the title QUESTIONS OF LAW AND FACT, **563**. 1 *et seq.*

5. Judgment Necessary. — *Oklahoma City v. McMaster*, 196 U. S. 529; *Kansas City Southern R. Co. v. King*, (Ark. 1905) 85 S. W. Rep. 1131; *Harris v. Gano*, 117 Ga. 934; *Stubbings v. Durham*, 210 Ill. 551, *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 792; *Harnish v. Miles*, 111 Ill. App. 105; *Telegraph Co. v. Lee*, 125 Iowa 17; *Lebanon v. Knott*, (Ky. 1903) 72 S. W. Rep. 790; *Detroit v. Detroit R. Co.*, 134 Mich. 11; *Probate Ct. v. Potter*, 26 R. I. 202; *State v. State Treasurer*, 68 S. Car. 421, *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 792.

793. 6. Judgment Must Be Final. — *Tampa Waterworks Co. v. Tampa*, 124 Fed. Rep. 932; *Boatmen's Bank v. Fritzlen*, (C. C. A.) 135 Fed. Rep. 650; *Harris v. Gano*, 117 Ga. 934; *Chicago v. Hulbert*, 205 Ill. 346; *Spring Valley Coal Co. v. Patting*, 210 Ill. 342; *Harnish v. Miles*, 111 Ill. App. 105; *Telegraph Co. v. Lee*, 125 Iowa 17; *Freeman v. Lavenue*, 99 Mo. App. 173; *State v. Horton*, (Neb. 1904) 99 N. W. Rep. 501; *Agnew v. Omaha Nat. Bank*, (Neb. 1903) 96 N. W. Rep. 189; *Hamilton Nat. Bank v. American L. & T. Co.*, (Neb. 1904) 100 N. W. Rep. 202. See also *Sims v. Davis*, 70 S. Car. 362.

794. 2. Judgment Must Be on the Merits — *United States*. — *Gilbert v. American Surety Co.*, (C. C. A.) 121 Fed. Rep. 499; *Groton Bridge, etc.*, Co. *v. Clark Pressed Brick Co.*, 126 Fed. Rep. 552.

Connecticut. — *Allis v. Hall*, 76 Conn. 322.

Florida. — *Armstrong v. Manatee County*, (Fla. 1905) 37 So. Rep. 938.

Iowa. — *Telegraph Co. v. Lee*, 125 Iowa 17; *Williams v. Des Moines L. & T. Co.*, 126 Iowa 22.

Kentucky. — *Lebanon v. Knott*, (Ky. 1903) 72 S. W. Rep. 790.

- 796.** 4. Judgment by Confession or Consent. — See note 5.
797. 5. Judgment by Default. — See note 7.
799. 6. Judgment on Demurrer — *a.* FORMAL DEFECTS. — See note 1.
b. WHERE MERITS INVOLVED — (1) *General Rule.* — See note 2.
800. *e.* TO WHAT POINT ESTOPPEL EXTENDS. — See note 4.
801. 7. Nonsuit. — See note 1.
803. 11. Dismissal — *a.* GENERAL RULE STATED. — See note 2.
804. See note 1.

Michigan. — Hoffman v. Silverthorn, 137 Mich. 60.

Minnesota. — Day v. Mountin, 89 Minn. 297.

Nebraska. — Parrotte v. Dryden, (Neb. 1905) 102 N. W. Rep. 610; Walsh v. Walsh, (Neb. 1903) 95 N. W. Rep. 1025; Burkholder v. Hollicheck, (Neb. 1903) 95 N. W. Rep. 860.

New Hampshire. — Cook v. Lee, 72 N. H. 569.

New York. — Maeder v. Wexler, 98 N. Y. App. Div. 68, affirmed 182 N. Y. 519.

Pennsylvania. — Buchanan v. Banks, 203 Pa. St. 599.

South Dakota. — Selbie v. Graham, (S. Dak. 1904) 100 N. W. Rep. 755.

Tennessee. — Harris v. Columbia Water, etc., Co., 114 Tenn. 328.

Texas. — Hartford F. Ins. Co. v. King, 31 Tex. Civ. App. 636.

Virginia. — Richmond v. Sitterding, 101 Va. 354, 99 Am. St. Rep. 879; Southern R. Co. v. Washington, etc., R. Co., 102 Va. 483; Newberry v. Ruffin, 102 Va. 73.

Washington. — Union Bank v. Nelson, 32 Wash. 208.

Wisconsin. — Hart v. Godkin, 122 Wis. 646.

796. 5. Judgment by Confession or Consent. — Baldwin v. Rice, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 64, modified 100 N. Y. App. Div. 241; Hartford F. Ins. Co. v. King, 31 Tex. Civ. App. 636.

Unauthorized Consent. — Buchanan v. Banks, 203 Pa. St. 599.

797. 7. Doctrine of Res Judicata Applicable. — New York Telephone Co. v. Treat, (C. C. A.) 130 Fed. Rep. 340; Ruppini v. McLachlan, 122 Iowa 343; Taylor v. Sledge, 110 Tenn. 263.

799. 1. Demurrer for Formal Defects, Etc. — Vincent v. Mutual Reserve Fund L. Assoc., 77 Conn. 281; Butler v. Tifton, etc., R. Co., 121 Ga. 817; Terre Haute, etc., R. Co. v. State, 159 Ind. 438.

2. Where Merits Involved. — Dennison Mfg. Co. v. Scharf Tag, etc., Co., (C. C. A.) 121 Fed. Rep. 313; Gunn v. James, 120 Ga. 482; Stum v. Stum, 116 Ky. 534; Parrotte v. Dryden, (Neb. 1905) 102 N. W. Rep. 610; Grant County v. Cross, (N. Mex. 1903) 73 Pac. Rep. 615; Lockhart v. Leeds, (N. Mex. 1904) 76 Pac. Rep. 312; Hirshbach v. Ketchum, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 306, affirmed 84 N. Y. App. Div. 258; Willoughby v. Stevens, 132 N. Car. 254.

800. 4. Dennison Mfg. Co. v. Scharf Tag, etc., Co., (C. C. A.) 121 Fed. Rep. 313. See also Probate Ct. v. Potter, 26 R. I. 202.

801. 1. Nonsuit Not a Bar. — McClaine v. Rankin, (C. C. A.) 119 Fed. Rep. 110; Spring Valley Coal Co. v. Pating, 210 Ill. 342; Cassidy v. Mudgett, 71 N. H. 491; Galletto v.

Serafino, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 671; Honsinger v. Union Carriage, etc., Co., 175 N. Y. 229; Prevatt v. Harrelson, 132 N. Car. 250; Guthiel v. Gilmer, 27 Utah 506, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 801; Union Bank v. Nelson, 32 Wash. 208.

803. 2. Dismissal on Merits a Bar. — Shinkle v. Vickery, 117 Fed. Rep. 916, affirmed (C. C. A.) 130 Fed. Rep. 424; Groton Bridge, etc., Co. v. Clark Pressed Brick Co., 126 Fed. Rep. 552; Indian Land, etc., Co. v. Shoenfelt, (C. C. A.) 135 Fed. Rep. 484; Wood v. Wood, 134 Ala. 557; Wagenhurst v. Wineland, 22 App. Cas. (D. C.) 356; Hargis v. Robinson, 70 Kan. 589; Day v. Mountin, 89 Minn. 297; Oakes v. Ziemer, (Neb. 1904) 98 N. W. Rep. 443; Grant County v. Cross, (N. Mex. 1903) 73 Pac. Rep. 615; Maeder v. Wexler, 98 N. Y. App. Div. 68, affirmed 182 N. Y. 519; Jarvis v. New York House Wrecking Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 191.

804. 1. Dismissal Not a Bar Where Merits Not Involved — *United States.* — Glencove Granite Co. v. City Trust, etc., Co., (C. C. A.) 118 Fed. Rep. 386; Gilbert v. American Surety Co., (C. C. A.) 121 Fed. Rep. 499.

California. — Nevills v. Shortridge, 146 Cal. 277.

Connecticut. — Allis v. Hall, 76 Conn. 322.

District of Columbia. — Wagenhurst v. Wineland, 22 App. Cas. (D. C.) 356.

Georgia. — Sweeney v. Sweeney, 119 Ga. 76, 100 Am. St. Rep. 159. See also Huntress v. Portwood, 116 Ga. 351.

Illinois. — Chicago Terminal Transfer R. Co. v. Winslow, 216 Ill. 166; Durham v. Stubbings, 111 Ill. App. 10.

Kentucky. — Lebanon v. Knott, (Ky. 1903) 72 S. W. Rep. 790.

Nebraska. — Agnew v. Omaha Nat. Bank, (Neb. 1903) 96 N. W. Rep. 189; Oakes v. Ziemer, (Neb. 1904) 98 N. W. Rep. 443; Fred Krug Brewing Co. v. Healey, (Neb. 1904) 101 N. W. Rep. 329; Kendall v. Selby, 66 Neb. 60.

New York. — Goldman v. Tobias, (Supm. Ct. App. T.) 88 N. Y. Supp. 991.

North Carolina. — Sittou v. Edward-Eversole Lumber Co., 135 N. Car. 540.

Texas. — Logan v. Stephens County, (Tex. Civ. App. 1904) 81 S. W. Rep. 109.

Washington. — Von Tobel v. Stetson, etc., Mill Co., 32 Wash. 683.

Wyoming. — Tutty v. Ryan, 13 Wyo. 149.

An Entry of "Neither Party, No Further Action, Same Cause," extinguishes the plaintiff's cause of action, but does not debar the defendant from maintaining a cause of action growing out of the original action. Gendron v. Hovey, 98 Me. 139.

- 805.** **A Voluntary Dismissal.** — See note 1.
- 806.** **b. PRESUMPTION AS TO MERITS.** — See note 2.
c. DISMISSAL WITHOUT PREJUDICE. — See note 3.
- 807.** **d. DISMISSAL ON AGREEMENT.** — See notes 3, 4.
- 808.** **12. Discontinuance.** — See note 4.
13. Premature Action, Etc. — See note 5.
- 809.** See note 1.
14. Appealed Judgments — a. EFFECT OF PENDENCY OF APPEAL
 — (1) *Different Views on the Subject.* — See note 3.
- 810.** See note 1.
- 811.** (4) *Character of Appeal.* — See note 4.
 (7) *Foreign Judgment.* — See note 7.
- 812.** **b. AFFIRMANCE.** — See note 1.
c. REVERSAL — (1) Judgment of Reversal. — See notes 2, 3.
(2) Reversed Judgment. — See note 4.
d. AFFIRMANCE IN PART AND REVERSAL IN PART. — See note 5.
e. DISMISSAL OF APPEAL. — See note 6.

805. 1. Voluntary Dismissal by Plaintiff. — Cook v. Lee, 72 N. H. 569; Lindsay v. Allen, 112 Tenn. 637; Fischbeck v. Millenz, 119 Wis. 27. See also Wright v. Jett, 120 Ga. 995.

Order Allowing Withdrawal of Claim Not Res Judicata. — Huntress v. Portwood, 116 Ga. 351.

806. 2. Presumption that Dismissal in Equity Was on Merits. — Groton Bridge, etc., Co. v. Clark Pressed Brick Co., 126 Fed. Rep. 552; Indian Land, etc., Co. v. Shoenfelt, (C. C. A.) 135 Fed. Rep. 484; Oakes v. Ziemer, (Neb. 1904) 98 N. W. Rep. 443.

3. Dismissal "Without Prejudice." — Robinson v. American Car, etc., Co., (C. C. A.) 135 Fed. Rep. 693; Southern Pac. R. Co. v. U. S., (C. C. A.) 133 Fed. Rep. 651; Parlin, etc., Co. v. Hutson, 198 Ill. 389; Hargis v. Robinson, 70 Kan. 589; Cinfel v. Malena, 67 Neb. 95; Kendall v. Selby, 66 Neb. 60; Hawkins v. Mapes-Reeves Constr. Co., 82 N. Y. App. Div. 72, affirmed 178 N. Y. 236; Newberry v. Ruffin, 102 Va. 73; Von Tobel v. Stetson, etc., Mill Co., 32 Wash. 683.

807. 3. Dismissal on Agreement. — Hargis v. Robinson, 70 Kan. 589.

4. Lindsay v. Allen, 112 Tenn. 637.

808. 4. Discontinuance Not a Bar. — Lowndes v. Fishburne, 69 S. Car. 308.

5. Premature Action. — Nevills v. Shortridge, 146 Cal. 277; Telegraph Co. v. Lee, 125 Iowa 17; Barker v. Tennessee Paving Brick Co., (Ky. 1903) 71 S. W. Rep. 877; Waterhouse v. Levine, 182 Mass. 407; Lauer v. Smith, 24 Ohio Cir. Ct. 47; Tutty v. Ryan, 13 Wyo. 149.

809. 1. Tyler v. Bowen, 124 Iowa 452.

3. Judgment Not a Bar When Appeal Pending. — Russell v. Russell, 129 Fed. Rep. 434; Tampa Waterworks Co. v. Tampa, 124 Fed. Rep. 932; Brown v. Schintz, 203 Ill. 136; Rodney v. Gibbs, 184 Mo. 1; Gentry v. Pacific Livestock Co., 45 Oregon 233; Columbia Nat. Bank v. Dunn, 207 Pa. St. 548; Hennessy v. Tacoma Smelting, etc., Co., 33 Wash. 423; Tutty v. Ryan, 13 Wyo. 149.

810. 1. Judgment a Bar Notwithstanding Pendency of Appeal. — Reese v. Damato, 44 Fla. 692.

811. 4. Character of Appeal. — Butler v. Thompson, 52 W. Va. 311. Compare Tampa Waterworks Co. v. Tampa, 124 Fed. Rep. 932.

Writ of Error. — Reese v. Damato, 44 Fla. 692.

7. Foreign Judgment. — Hennessy v. Tacoma Smelting, etc., Co., 33 Wash. 423.

812. 1. Affirmance on Appeal. — See Grant County v. Cross, (N. Mex. 1903) 73 Pac. Rep. 615; Rueping v. Chicago, etc., R. Co., 123 Wis. 319. Compare Russell v. Russell, (C. C. A.) 134 Fed. Rep. 840.

Affirmance of Judgment of Costs as Taxed Res Judicata. — Hardwin v. Southern R. Co., 67 S. Car. 463.

Affirmance Res Judicata though Appellate Court Had No Jurisdiction. — McGraw v. Roller, 53 W. Va. 75.

2. Judgment of Reversal Not Res Judicata. — Empire State-Idaho Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co., (C. C. A.) 121 Fed. Rep. 973; Stubbings v. Durham, 210 Ill. 551, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 812; In re Maher, 210 Ill. 160; Gage v. People, 207 Ill. 61; Lanza v. Le Grand Quarry Co., 124 Iowa 659; Spees v. Boggs, 204 Pa. St. 504; Butler v. Thompson, 52 W. Va. 311.

3. When Judgment of Reversal May Be Res Judicata. — Quirk v. Rapid R. Co., 137 Mich. 493; Trotter v. Stayton, 45 Oregon 301; Butler v. Thompson, 52 W. Va. 311.

4. Reversed Judgment Not a Bar. — Hennessy v. Tacoma Smelting, etc., Co., (C. C. A.) 129 Fed. Rep. 40; Empire State-Idaho Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co., (C. C. A.) 121 Fed. Rep. 973; Gilbert v. American Surety Co., (C. C. A.) 121 Fed. Rep. 499; Stubbings v. Durham, 210 Ill. 542; In re Maher, 204 Ill. 25; Trotter v. Stayton, 45 Oregon 301.

5. Affirmance in Part and Reversal in Part. — Stipe v. Shirley, 33 Tex. Civ. App. 223. Compare Empire State-Idaho Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co., (C. C. A.) 121 Fed. Rep. 973.

6. Dismissal of Appeal. — Oakes v. Ziemer, (Neb. 1904) 98 N. W. Rep. 443.

814. VII. ACTIONS AND PROCEEDINGS, ORDERS AND JUDGMENTS — 2. Forms of Action — b. ELECTION OF REMEDIES — MERGER — (1) General Rule. — See note 2.

815. (2) *Limitations and Exceptions to Rule.* — See notes 2, 4.

817. 3. Interlocutory Orders, Judgments, or Decrees — a. GENERAL RULE. — See notes 5, 6.

818. c. APPEALABLE ORDERS. — See notes 4, 5.

822. 5. Real and Personal Actions — a. IN GENERAL. — See note 3.

823. b. ACTIONS INVOLVING TITLE OR POSSESSION OF PROPERTY — (1) In General. — See notes 1, 2.

826. (2) *Ejectment* — (b) *Under Statutes.* — See notes 1, 2.

827. 6. Proceedings in Rem — a. STATUS OR TITLE OF RES. — See notes 1, 3.

829. b. FRAUD AND COLLUSION — VOID JUDGMENTS. — See notes 1, 2.

831. 7. Criminal Prosecutions and Penal Actions — b. ESTOPPEL BY VERDICT. — See note 3.

814. 2. Election of Remedies. — *Williams v. Des Moines L. & T. Co.*, 126 Iowa 22; *Tyler v. Bowen*, 124 Iowa 452; *Nash v. D'Arcy*, 183 Mass. 30; *Packard v. Hannibal*, etc., R. Co., 181 Mo. 421; *Ornstein v. Yahr*, etc., Drug Co., 119 Wis. 429.

815. 2. Election of Inconsistent Remedies. — *Rowell v. Smith*, 123 Wis. 510.

4. Judgment Not a Bar Where Remedies Are Concurrent until Satisfaction of Claim or Demand. — *McClaine v. Rankin*, (C. C. A.) 119 Fed. Rep. 110.

817. 5. Interlocutory Orders, Judgments, and Decrees Subject to Be Vacated or Changed until Final Termination of Cause. — *Sumner v. Sumner*, 121 Ga. 10, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 817; *Hamilton Nat. Bank v. American L. & T. Co.*, (Neb. 1904) 100 N. W. Rep. 202; *Hart v. Godkin*, 122 Wis. 646.

6. Interlocutory Orders, Judgments, and Decrees Not Res Judicata. — *Collins v. Carr*, 116 Ga. 39; *Chicago v. Hulbert*, 205 Ill. 346; *Everett v. Everett*, 180 N. Y. 452; *Reilly v. Provost*, 98 N. Y. App. Div. 208.

818. 4. Interlocutory Orders Appealed. — *Societa, etc., v. Mantel*, (Cal. 1905) 81 Pac. Rep. 659.

5. Appealable Orders as a Bar or Estoppel in Other Litigation. — *Societa, etc., v. Mantel*, (Cal. 1905) 81 Pac. Rep. 659.

822. 3. Principles of Res Judicata Applicable to All Actions, Both Real and Personal. — *Paul v. Thorndike*, 97 Me. 87.

823. 1. See Generally and for Miscellaneous Illustrations. — *Swanson v. Smith*, 117 Ky. 116; *Moran v. Vicroy*, 117 Ky. 195; *Paul v. Thorndike*, 97 Me. 87; *Rausch v. Briefer*, (Mich. 1904) 101 N. W. Rep. 523; *Bartley v. Bartley*, 172 Mo. 208; *Tolleson v. Wagner*, 35 Tex. Civ. App. 577.

2. Actions of Forcible Entry and Detainer. — *Lent v. Curtis*, 24 Ohio Cir. Ct. 592; *Rankin v. Hooks*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1005.

Replevin and Detinue. — *Neal v. Brandon*, (Ark. 1905) 85 S. W. Rep. 777; *Ginsburg v. Morrall*, 105 Ill. App. 213; *Palmer v. People*, 111 Ill. App. 381; *Steuer v. Maguire*, 182 Mass. 575.

Suits or Proceedings to Determine Boundary

Lines — Actions Involving Questions of Boundary. — *German Protestant Orphan Asylum v. Barber Asphalt Paving Co.*, (Ky. 1904) 82 S. W. Rep. 632; *Adams v. Clapp*, 99 Me. 169.

Immaterial that Action Brought in Form of Trespass to Try Title. — *Herschbach v. Cohen*, 207 Ill. 524, 99 Am. St. Rep. 233, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 825.

826. 1. Statutes Permitting Two or More Trials. — *Miles v. Ballantine*, (Neb. 1903) 93 N. W. Rep. 708.

2. Statutory Action of Ejectment. — *Eldred v. Johnson*, (Ark. 1905) 86 S. W. Rep. 670; *Smith v. Holtheide*, (Ky. 1905) 84 S. W. Rep. 346; *Holcomb v. Combs*, (Ky. 1903) 76 S. W. Rep. 847; *Carpenter v. Carpenter*, 136 Mich. 362; *Miles v. Ballantine*, (Neb. 1903) 93 N. W. Rep. 708; *McCarthy v. Birmingham*, (Neb. 1904) 99 N. W. Rep. 266; *Hawkshurst v. Asbury Park*, 65 N. J. Eq. 496; *Place v. Rogers*, 101 N. Y. App. Div. 193; *Clark v. Hindman*, (Oregon 1905) 79 Pac. Rep. 56; *Dutton's Estate*, 208 Pa. St. 350. *Compare Buchanan v. Banks*, 203 Pa. St. 599.

Equitable Titles and Defenses. — *Rausch v. Briefer*, (Mich. 1904) 101 N. W. Rep. 523; *Hawkshurst v. Asbury Park*, 65 N. J. Eq. 496; *Baker v. Bailey*, 204 Pa. St. 524; *Dutton's Estate*, 208 Pa. St. 350.

827. 1. Sorensen v. Sorensen, (Neb. 1904) 98 N. W. Rep. 837.

3. Judgments or Sentences in Various Proceedings in Rem Conclusively Determine Status or Title of Res Against All Persons. — *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322; *McConkie v. Remley*, 119 Iowa 512; *May v. Boyd*, 97 Me. 398, 94 Am. St. Rep. 509; *Nebraska L. & T. Co. v. Doman*, (Neb. 1903) 93 N. W. Rep. 1022; *Sorensen v. Sorensen*, (Neb. 1904) 98 N. W. Rep. 827; *Piper's Estate*, 208 Pa. St. 636; *Snyder v. Murdock*, 26 Utah 233; *Fitch v. Huntington*, 125 Wis. 204.

829. 1. Fraud and Collusion. — *Campbell v. Sherley*, (Ky. 1903) 76 S. W. Rep. 540.

2. Void Judgments. — *Hamilton Nat. Bank v. American L. & T. Co.*, (Neb. 1904) 100 N. W. Rep. 202; *Schrenkeisen v. Kroll*, (Supm. Ct. App. T.) 85 N. Y. Supp. 1072. *Compare State v. Horton*, (Neb. 1904) 99 N. W. Rep. 503.

831. 3. Estoppel by Verdict in Criminal Prose-

831. 8. Criminal Prosecutions, Penal and Civil Actions. — See note 6.

833. 9. Foreign Judgments. — See note 1.

IX. PRESUMPTIONS AND BURDEN OF PROOF — 1. Presumption. — See note 5.

834. 2. Burden of Proof. — See notes 3, 4.

835. a. EVIDENCE. — See notes 1, 2, 3, 4, 5.

836. X. WAIVER OF ESTOPPEL. — See notes 1, 2.

837. RESPECTIVE — RESPECTIVELY. — See note 4.

839. RESTAURANT. — See note 2.

840. RESTRAIN — RESTRAINT. — See note 2.

cutions and Penal Actions. — *State v. Cobb*, 123 Iowa 626; *People v. Albers*, 137 Mich. 678.

831. 6. Criminal Prosecutions and Civil Actions. — *Canton v. McDaniel*, 188 Mo. 207; *People v. Snyder*, 90 N. Y. App. Div. 425, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 831. Compare *U. S. v. Seattle Brewing, etc., Co.*, 135 Fed. Rep. 597.

833. 1. Law of Res Judicata Applicable to Foreign Judgments. — *Glencove Granite Co. v. City Trust, etc., Co.*, (C. C. A.) 118 Fed. Rep. 386; *Columbia Ave. Sav. Fund, etc., Co. v. Dawson*, 130 Fed. Rep. 152; *Harding v. Harding*, 198 U. S. 317; *Campbell v. Milliken*, (Colo. App. 1904) 78 Pac. Rep. 620; *American Trading, etc., Co. v. Gottstein*, 123 Iowa 267; *Rew v. Independent School Dist.*, 125 Iowa 28, 106 Am. St. Rep. 282; *Tremblay v. Aetna L. Ins. Co.*, 97 Me. 547, 94 Am. St. Rep. 521; *Minneapolis First Nat. Bank v. City Nat. Bank*, 182 Mass. 130, 94 Am. St. Rep. 637; *Tootle v. Buckingham*, 190 Mo. 183; *Thompson v. Williams*, 67 N. J. Eq. 212; *Baldwin v. Rice*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 64, modified and affirmed 100 N. Y. App. Div. 241; *Richardson, etc., Co. v. Utah Stove, etc., Co.*, 28 Utah 85. Compare *Dunn v. Dilks*, 31 Ind. App. 673.

5. Presumption. — *Aetna L. Ins. Co. v. Hamilton County*, (C. C. A.) 117 Fed. Rep. 82; *Ivanovich v. Weilenman*, 144 Cal. 757; *Hoffman v. Silverthorn*, 137 Mich. 60; *Stocker v. Nemaha County*, (Neb. 1904) 100 N. W. Rep. 308.

834. 3. Identity. — *Ruprecht v. New York*, 102 N. Y. App. Div. 309; *Chicago, etc., R. Co. v. Racine*, 123 Wis. 102.

4. Burden of Proof. — *Kraft v. Holzmann*, 206 Ill. 552, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 834; *Hoffman v. Silverthorn*, 137 Mich. 60.

835. 1. Proof by Record at Former Trial. — *Gilfillan v. Shattuck*, 142 Cal. 27; *Greer v. Greer*, 142 Cal. 519; *Hanlon v. Goodyear*, 103 Mo. App. 416; *Goetschius v. Shapiro*, (Supm. Ct. App. T.) 88 N. Y. Supp. 171; *Nichols, etc., Co. v. Trower*, 14 Okla. 461; *Seabury v. Fidelity Ins. Trust, etc., Co.*, 205 Pa. St. 234; *Hartman v. Pittsburg Inclined Plane Co.*, 23 Pa. Super. Ct. 360; *Memphis City Bank v. Smith*, 110 Tenn. 337; *Union Bank v. Nelson*, 32 Wash. 208.

2. *Kraft v. Holzmann*, 206 Ill. 552, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 835; *Hirschbach v. Cohen*, 207 Ill. 517, 99 Am. St. Rep. 233; *Burkholder v. Hollicheck*, (Neb. 1903) 95 N. W. Rep. 860; *Cassidy v. Mudgett*, 71 N. H. 491.

3. *Waterhouse v. Levine*, 182 Mass. 407; *Nichols, etc., Co. v. Trower*, 14 Okla. 461.

4. *Gentry v. Pacific Livestock Co.*, 45 Oregon 233.

5. *Bennett v. Marion*, 119 Iowa 473; *Missouri, etc., R. Co. v. Allen*, 67 Kan. 838; *Anhalt v. Lightstone*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 822; *Tolmie v. Fidelity, etc., Co.*, 95 N. Y. App. Div. 352. See also *Siebert v. Steinmeyer*, 204 Pa. St. 419. Compare *Terre Haute, etc., R. Co. v. State*, 159 Ind. 438.

836. 1. Waiver by Agreement. — Compare *Belding v. Archer*, 131 N. Car. 287.

2. Failure to Plead Estoppel. — *Flannery v. Campbell*, 30 Mont. 172. Compare *Penfield v. Potts*, (C. C. A.) 126 Fed. Rep. 475.

837. 4. "Respectively" Used in Sense of Alternately. — *Com. v. Conroy*, 207 Pa. St. 212.

839. 2. Drug Store Where Soda and Ice Cream Are Sold is not a restaurant. *Matter of Henry*, 124 Iowa 358.

840. 2. Not Equivalent to Power to Prohibit or Suppress. — *Madden v. State*, 68 Kan. 658.

RESTRAINT OF TRADE.

By R. N. CHAFFEE.

- 842. II. RESTRAINT BY CONTRACT — 1. The General Rule.** — See note 1.
2. Origin of the Rule. — See note 3.
- 843. 3. Partiality — b. SPACE — (1) In General.** — See note 1.
Same Town. — See notes 2, 3.
- 844.** See notes 2, 3.
- 845. (2) General Restraints — (a) In England — Space Test Unsatisfactory.** — See note 6.
- 846. (b) In the United States — cc. RESTRICTIONS COVERING THE UNITED STATES.** — See note 3.
- 848. c. TIME — Unlimited Time Not Favored.** — See note 1.
Nature of Business as Influencing Time Limit. — See notes 2, 5.
Cases Grouped. — See note 6.
- 849. d. AS AFFECTED BY NATURE OF BUSINESS.** — See note 1.
Patents. — See note 3.
Quasi-public Corporations. — See note 5.
- 842. 1. The General Rule.** — National Enameling, etc., Co. v. Haberman, 120 Fed. Rep. 415; Robinson v. Suburban Brick Co., (C. C. A.) 127 Fed. Rep. 804; Ryan v. Hamilton, 205 Ill. 191; Andrews v. Kingsbury, 212 Ill. 97; Swigert v. Tilden, 121 Iowa 650, 100 Am. St. Rep. 374; Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230; Herpolsheimer v. Funke, (Neb. 1901) 95 N. W. Rep. 687; Roberts v. Lemont, (Neb. 1905) 102 N. W. Rep. 770; Bancroft v. Union Embossing Co., 72 N. H. 402; New York Bank Note Co. v. Hamilton Bank Note Engraving, etc., Co., 180 N. Y. 280; Hulen v. Earel, 13 Okla. 246; Monongahela River Consol. Coal, etc., Co. v. Jutte, 210 Pa. St. 288, 105 Am. St. Rep. 812.
- 3. National Enameling, etc., Co. v. Haberman,** 120 Fed. Rep. 415; Bancroft v. Union Embossing Co., 72 N. H. 402.
- 843. 1. Space.** — See Bancroft v. Union Embossing Co., 72 N. H. 402.
- 2. Same Town.** — Ballachulish Slate Quarries Co. v. Grant, Sc. Ct. of Sess. 5 F. 1105; Andrews v. Kingsbury, 212 Ill. 97; Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230.
- 3. Same City.** — Mitchell v. Branham, 104 Mo. App. 480.
- 844. 2. Township or County.** — Barr v. Craven, 89 L. T. N. S. 574; Trentman v. Wahrenburg, 30 Ind. App. 304; Ewing v. Davis, 25 Ohio Cir. Ct. 203.
- 3. Ten Miles.** — Espenson v. Koepke, 93 Minn. 278.
- Fifteen Miles.** — Edmundson v. Render, 90 L. T. N. S. 814.
- Twenty Miles.** — Tivoli v. Colley, 20 Times L. Rep. 437.
- Fifty Miles.** — Robinson v. Suburban Brick Co., (C. C. A.) 127 Fed. Rep. 804.
- One Hundred Miles.** — Swigert v. Tilden, 121 Iowa 650, 100 Am. St. Rep. 374.
- 845. 6. See Dowden v. Pook,** (1904) 1 K. B. 45.
- 846. 3. Restrictions Covering United States — Bad.** — Roberts v. Lemont, (Neb. 1905) 102 N. W. Rep. 770.
- 848. 1. Unlimited Time Not Favored.** — Roberts v. Lemont, (Neb. 1905) 102 N. W. Rep. 770.
- 2. Nature of Business as Influencing Time Limit.** — Ewing v. Davis, 25 Ohio Cir. Ct. 203. See also S. Jarvis Adams Co. v. Knapp, (C. C. A.) 121 Fed. Rep. 34.
- 5. See Ryan v. Hamilton,** 205 Ill. 191.
- 6. Three Years.** — Mitchell v. Branham, 104 Mo. App. 480.
- Five Years.** — Andrews v. Kingsbury, 212 Ill. 97; Trentman v. Wahrenburg, 30 Ind. App. 304; Espenson v. Koepke, 93 Minn. 278.
- Eight Years.** — Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230.
- Ten Years.** — Robinson v. Suburban Brick Co., (C. C. A.) 127 Fed. Rep. 804; Davis v. Booth, (C. C. A.) 131 Fed. Rep. 31; Swigert v. Tilden, 121 Iowa 650, 100 Am. St. Rep. 374; Monongahela River Consol. Coal, etc., Co. v. Jutte, 210 Pa. St. 288, 105 Am. St. Rep. 812.
- Twenty Years.** — American Fisheries Co. v. Lennen, (C. C. A.) 130 Fed. Rep. 533.
- 849. 1. As Affected by Nature of Business.** — Lamson Pneumatic Tube Co. v. Phillips, 91 L. T. N. S. 363; Swigert v. Tilden, 121 Iowa 650, 100 Am. St. Rep. 374.
- 3. Patents.** — U. S. Consolidated Seeded Raisin Co. v. Griffin, etc., Co., (C. C. A.) 126 Fed. Rep. 364; Whitson v. Columbia Phonograph Co., 18 App. Cas. (D. C.) 565; Squires v. Wason Mfg. Co., 182 Mass. 137; Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559; John D. Park, etc., Co. v. National Wholesale Druggists Assoc., 175 N. Y. 1, 96 Am. St. Rep. 578.
- 5. Quasi-public Corporations.** — Chicago, etc., R. Co. v. Southern Indiana R. Co., (Ind. App. 1904) 70 N. E. Rep. 843. See also Swigert v. Tilden, 121 Iowa 650, 100 Am. St. Rep. 374.

- 850.** Not to Engage in Similar Business. — See note 2.
 Restraint as to Particular Property. — See note 5.
 Giving Up All Business Whatsoever. — See note 6.
 A Covenant Not to Manufacture or Sell. — See note 8.
 4. Reasonableness — *a.* IN GENERAL. — See note 10.
- 851.** *b.* REASONABLENESS DEFINED. — See note 1.
d. EACH CASE TRIED BY ITS FACTS. — See note 2.
- 852.** *c.* RESTRAINING CONTRACT MUST BE ANCILLARY. — See note 1.
- 853.** 5. Consideration — *b.* ADEQUACY. — See note 1.
 Sale of Business, Consideration for Restraint. — See note 2.
- 854.** 6. Public Policy — *a.* IN GENERAL. — See note 2.
- 855.** *e.* COMPETITION AND MONOPOLIES — Evils of Competition. — See note 1.
f. EXCLUSIVE PRIVILEGES. — See notes 4, 7*a.*
 7. Severability of the Contract. — See note 11.
- 856.** 8. Rights of Assignee. — See note 4.

850. 2. Not to Engage in Similar Business. — *Trentman v. Wahrenburg*, 30 Ind. App. 304.

5. Restraint as to Particular Property. — *Sullivan v. Kohlenberg*, 31 Ind. App. 215.

6. Giving Up All Business Whatsoever. — *Latimer v. Fontaine*, 2 West. L. Rep. 191.

8. See *New York Bank Note Co. v. Hamilton Bank Note Engraving, etc., Co.*, 180 N. Y. 280.

10. Reasonableness. — *Swigert v. Tilden*, 121 Iowa 650, 100 Am. St. Rep. 374; *Bancroft v. Union Embossing Co.*, 72 N. H. 402, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 842-862; *New York Bank Note Co. v. Hamilton Bank Note Engraving, etc., Co.*, 180 N. Y. 280; *Monongahela River Consol. Coal, etc., Co. v. Jutte*, 210 Pa. St. 288, 105 Am. St. Rep. 812; *Gwynn v. Citizens Telephone Co.*, 69 S. Car. 434, 104 Am. St. Rep. 819, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 850; *Crump v. Ligon*, (Tex. Civ. App. 1904) 84 S. W. Rep. 250; *Slaughter v. Thacker Coal, etc., Co.*, 55 W. Va. 642, 104 Am. St. Rep. 1013.

851. 1. Reasonableness Defined. — *Davis v. Booth*, (C. C. A.) 131 Fed. Rep. 31; *Trentman v. Wahrenburg*, 30 Ind. App. 304; *Swigert v. Tilden*, 121 Iowa 650, 100 Am. St. Rep. 374; *Kronschabel-Smith Co. v. Kronschabel*, 87 Minn. 230; *Espenson v. Koepke*, 93 Minn. 278; *Herpolsheimer v. Funke*, (Neb. 1901) 95 N. W. Rep. 687; *Roberts v. Lemont*, (Neb. 1905) 102 N. W. Rep. 770; *Bancroft v. Union Embossing Co.*, 72 N. H. 402.

Question of Reasonableness Is One of Law for Court. — *Dowden v. Pook*, (1904) 1 K. B. 45.

2. Each Case Tried by Its Facts. — *Swigert v. Tilden*, 121 Iowa 650, 100 Am. St. Rep. 374. See also *Dowden v. Pook*, (1904) 1 K. B. 45.

852. 1. Restraining Contract Must Be Ancillary. — See *S. Jarvis Adams Co. v. Knapp*, (C. C. A.) 121 Fed. Rep. 34.

853. 1. Not Essential. — See *Ryan v. Hamilton*, 205 Ill. 194.

2. Sale of Business, Consideration for Restraint. — *Robinson v. Suburban Brick Co.*, (C. C. A.) 127 Fed. Rep. 804; *Kronschabel-Smith Co. v. Kronschabel*, 87 Minn. 230; *Pittsburg Stove, etc., Co. v. Pennsylvania Stove Co.*, 208 Pa. St. 37, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 853.

Statutory Provisions. — *Hulen v. Earle*, 13

Okla. 246; *Prescott v. Bidwell*, (S. Dak. 1904) 99 N. W. Rep. 93.

854. 2. Cases Turning upon Public Policy — *Contract Held to Be Opposed to Public Policy*. — *Fechtel v. Palm*, (C. C. A.) 133 Fed. Rep. 462; *Keene Syndicate v. Wichita Gas, etc., Co.*, 69 Kan. 284, 105 Am. St. Rep. 164; *Gwynn v. Citizens Telephone Co.*, 69 S. Car. 434, 104 Am. St. Rep. 819; *Slaughter v. Thacker Coal, etc., Co.*, 55 W. Va. 642, 104 Am. St. Rep. 1013.

Contract Held Not to Be Against Public Policy. — *S. Jarvis Adams Co. v. Knapp*, (C. C. A.) 121 Fed. Rep. 34; *American Fisheries Co. v. Lennen*, (C. C. A.) 130 Fed. Rep. 533; *Davis v. Booth*, (C. C. A.) 131 Fed. Rep. 31; *Whitson v. Columbia Phonograph Co.*, 18 App. Cas. (D. C.) 565; *Rugg v. Rohrbach*, 110 Ill. App. 532; *Sullivan v. Kohlenberg*, 31 Ind. App. 215; *Swigert v. Tilden*, 121 Iowa 650, 100 Am. St. Rep. 374; *Squires v. Wason Mfg. Co.*, 182 Mass. 137; *Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co.*, 177 Mo. 559; *Mitchell v. Branham*, 104 Mo. App. 480; *Sommers v. Myers*, 69 N. J. L. 24; *Raritan River R. Co. v. Middlesex, etc., Traction Co.*, 70 N. J. L. 732; *John D. Park, etc., Co. v. National Wholesale Druggists Assoc.*, 175 N. Y. 1, 96 Am. St. Rep. 578; *Monongahela River Consol. Coal, etc., Co. v. Jutte*, 210 Pa. St. 288, 105 Am. St. Rep. 812; *Texas, etc., R. Co. v. Texas Short Line R. Co.*, 35 Tex. Civ. App. 387.

855. 1. Evils of Competition. — *John D. Park, etc., Co. v. National Wholesale Druggists Assoc.*, 175 N. Y. 1, 96 Am. St. Rep. 578.

4. Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559.

7*a.* Exclusive Right to Lease Patented Machine Valid. — *Whitson v. Columbia Phonograph Co.*, 18 App. Cas. (D. C.) 565.

Exclusive Privilege of Running Device at Pleasure Resort Valid. — *Sommers v. Myers*, 69 N. J. L. 24. See also generally the title MONOPOLIES AND CORPORATE TRUSTS, **863.** 5 to **869.** 1.

11. Severability of the Restraint. — *Monongahela River Consol. Coal, etc., Co. v. Jutte*, 210 Pa. St. 288, 105 Am. St. Rep. 812. See also *U. S. Consolidated Seeded Raisin Co. v. Griffin, etc., Co.*, (C. C. A.) 126 Fed. Rep. 364.

856. 4. Rights of Assignee. — *Berry v.*

858. 10. Construction of Contract — *c.* IN THE LIGHT OF CHANGED CONDITIONS. — See note 1.

f. CONSTRUCTION IS FOR THE COURT. — See note 2.

859. 11. Breach of the Contract — *d.* ACTING AS AGENT OR EMPLOYEE. — See note 10.

861. 12. Remedies — *b.* INJUNCTION. — See note 2.

To Avoid Multiplicity of Actions. — See note 3.

Days, 5 Ont. L. Rep. 629. But see Berlitz School of Languages *v.* Duchêne, Sc. Ct. of Sess. 6 F. 181.

858. 1. In the Light of Changed Conditions. — *Swigert v. Tilden*, 121 Iowa 650, 100 Am. St. Rep. 374.

2. Construction Is for the Court. — *Bancroft v. Union Embossing Co.*, 72 N. H. 402, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 858. See also *Dowden v. Pook*, (1904) 1 K. B. 45.

859. 10. Acting as Agent or Employee. — *Compare Kerr v. Bowden*, 1 West. L. Rep. 28.

Acting as Servant Not Breach. — *Gophir Diamond Co. v. Wood*, (1904) 1 Ch. 950.

861. 2. Injunction. — *Robinson v. Suburban Brick Co.*, (C. C. A.) 127 Fed. Rep. 804; *Davis v. Booth*, (C. C. A.) 131 Fed. Rep. 31; *Ryan v. Hamilton*, 205 Ill. 191; *Andrews v. Kingsbury*, 212 Ill. 97; *Monongahela River Consol. Coal, etc., Co. v. Jutte*, 210 Pa. St. 288, 105 Am. St. Rep. 812; *Pittsburg Stove, etc., Co. v. Pennsylvania Stove Co.*, 208 Pa. St. 37.

No Injunction Where Liquidated Damages Stipulated. — *Hamilton Powder Co. v. Johnson*, 7 Quebec Pr. 236.

3. To Avoid Multiplicity of Actions. — *Davis v. Booth*, (C. C. A.) 131 Fed. Rep. 31.

RESTRAINTS ON ALIENATION.

BY WILL H. CROW.

864. I. ESTATES IN FEE SIMPLE — 1. Absolute Restraints — *a.* GENERAL RULE. — See notes 1, 4.

865. b. EXCEPTIONS TO RULE — (1) *Gifts to Charities.* — See note 10.

867. 2. Qualified or Partial Restraints — *b.* PROHIBITION OF ALIENATION FOR LIMITED TIME — In General. — See notes 1, 3.

Restraints Amounting to Perpetuities Invalid. — See note 6.

868. Where Legal Title Is Vested in Trustees. — See note 1.

869. f. PROHIBITION OF ALIENATION BY SALE. — See note 2.

870. III. ESTATES FOR LIFE — 1. Legal Life Estates. — See note 2.

872. VI. CONSTRUCTION OF CONDITIONS AND PROVISIONS AGAINST ALIENATION — 1. Restraints on Alienation Construed Strictly. — See note 7.

864. 1. Absolute Restraints on Alienation of Fee Void. — *Clark v. Clark*, 99 Md. 356; *Wool v. Fleetwood*, 136 N. Car. 460; *Murray v. Miller*, 178 N. Y. 316, affirming 86 N. Y. App. Div. 623.

4. Rule Not Applicable to Personalty in Wisconsin. — *Holmes v. Walter*, 118 Wis. 409, following *Becker v. Chester*, 115 Wis. 90.

865. 10. Gifts to Charities Not Within Rule Against Restraints on Alienation. — *Troutman v. De Boissiere Odd Fellows' Orphans' Home, etc., Assoc.*, 66 Kan. 1. See also *Farmers, etc., Bank v. Robinson*, 96 Mo. App. 385.

867. 1. Restraints on Alienation for Limited Time Valid. — *Call v. Shewmaker*, 69 S. W. Rep. 749, 24 Ky. L. Rep. 686; *Smith v. Isaacs*, 78 S. W. Rep. 434, 25 Ky. L. Rep. 1727; *Lawson v. Lightfoot*, (Ky. 1905) 84 S. W. Rep. 739; *Morton v. Morton*, 85 S. W. Rep. 1188, 27 Ky. L. Rep. 661.

3. Restraint on Alienation for Limited Time Void. — *Clark v. Clark*, 99 Md. 356; *Dresser v. Travis*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 358, affirmed 87 N. Y. App. Div. 632; *Smith v.*

Chesebrough, 82 N. Y. App. Div. 578, reversed on other grounds 176 N. Y. 317; *Wool v. Fleetwood*, 136 N. Car. 460; *Blackburn v. McCallum*, 33 Can. Sup. Ct. 65.

6. Restraints Amounting to Perpetuities Invalid. — *Loomer v. Loomer*, 76 Conn. 522; *Phillips v. Heldt*, 33 Ind. App. 388; *Morton v. Morton*, 85 S. W. Rep. 1188, 27 Ky. L. Rep. 661; *Casgrain v. Hammond*, 134 Mich. 419, 104 Am. St. Rep. 610, 10 Detroit Leg. N. 534.

868. 1. Where Legal Title Is Vested in Trustees. — *Becker v. Chester*, 115 Wis. 90. See also *Nichols v. Nichols*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 381.

869. 2. A Prohibition of Alienation of Property unless the Proceeds Be Reinvested for the benefit of the estate has been held to be valid. *Dulin v. Moore*, 96 Tex. 135.

870. 2. Legal Life Estates — **Provision Against Alienation Invalid.** — *Wool v. Fleetwood*, 136 N. Car. 466, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870.

872. 7. Restraints on Alienation Construed Strictly. — *Orrell v. Bay Mfg. Co.*, 83 Miss. 800.

875. RETAIL. — See note 2.

877. RETRAXIT. — See note 1.

RETROACTIVE OR RETROSPECTIVE LAWS. — See note 4.

881. REVENUE. — See notes 2, 3.

875. 2. Retail.— Standard Oil Co. v. Com., (Ky. 1904) 82 S. W. Rep. 970; Com. v. Poulin, 187 Mass. 568.

877. 1. Retraxit. — Lindsay v. Allen, 112 Tenn. 637.

Retraxit and Nonsuit Distinguished. — Waldron v. Angleman, 71 N. J. L. 166.

4. Retroactive or Retrospective Laws. — Investment Co. v. Hambach, 37 Wash. 633, citing

24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 877.

881. 2. "Revenue" Held Not to Include Revenue of Municipal Corporation. — Aachen, etc., F. Ins. Co. v. Omaha, (Neb. 1904) 100 N. W. Rep. 137.

3. Broad Sense. — *In re Magnes*, 32 Colo. 527. Includes Special Assessments. — Omaha v. Hodskins, (Neb. 1903) 97 N. W. Rep. 346.

REVENUE LAWS.

BY O. D. ESTEE.

887. III. CONSTITUTIONALITY OF REVENUE LAWS — Application of Provision Forbidding Tax on Exports. — See note 10.

888. IV. CONSTRUCTION OF REVENUE LAWS — 2. Laws Construed as System — Repeal by Implication Not Favored. — See note 5.

3. Ambiguities Resolved in Favor of Importer. — See note 8.

889. 4. Words Used in Commercial Sense — In General. — See notes 4, 5.

890. 5. Specific Designation to Prevail over General Description. — See note 6.

891. 7. Articles Grouped Together to Be Deemed of Kindred Nature. — See note 1.

10. Construction by Treasury Department Entitled to Consideration. — See note 5.

892. V. OPERATION OF REVENUE LAWS — 1. Laws Imposing Customs Duties — *a. PROPERTY SUBJECT TO DUTIES* — (3). *What Constitutes Importation.* — See notes 9, 10.

893. b. UNDER WHAT ACT DUTIABLE. — See note 11.

887. 10. Stamp Tax on Manifests for Clearance of Ship Cargoes Unconstitutional. — New York, etc., Mail Steamship Co. v. U. S., 125 Fed. Rep. 320.

888. 5. No Repeal Unless Acts Are Clearly Repugnant. — See U. S. v. National Surety Co., (C. C. A.) 122 Fed. Rep. 904.

8. Ambiguities Resolved in Favor of Importer. — See Swan, etc., Co. v. U. S., 190 U. S. 143; Benziger v. U. S., 192 U. S. 38; Wright v. Michigan Cent. R. Co., (C. C. A.) 130 Fed. Rep. 843. *Contra*, in Ontario by statute, Rex v. Algoma Cent. R. Co., 32 Can. Sup. Ct. 277, reversing 7 Can. Exch. 239, affirmed (1903) A. C. 478, 89 L. T. N. S. 109.

Internal Revenue Laws Construed Favorably to Taxpayer. — McNally v. Field, 119 Fed. Rep. 445. See also U. S. v. Mullins, (C. C. A.) 119 Fed. Rep. 334; U. S. v. Twenty Boxes Corn Liquor, 123 Fed. Rep. 135, affirmed (C. C. A.) 133 Fed. Rep. 910.

889. 4. Words Understood in Commercial Sense When They Have One. — Wright v. Michigan Cent. R. Co., (C. C. A.) 130 Fed. Rep. 843.

Where the Statute Contains Its Own Definition of the Terms Used. — Waddell v. U. S., 135 Fed. Rep. 211; Hahn v. U. S., 131 Fed. Rep. 1000, affirmed (C. C. A.) 135 Fed. Rep. 349.

Technical Term Applied to New Process After Passage of Act. — U. S. v. Bartman, (C. C. A.) 131 Fed. Rep. 833, reversing 123 Fed. Rep. 327.

Statutory Construction and Use by Congress and Departments Ordinarily Controlling. — Brennan v. U. S., (C. C. A.) 136 Fed. Rep. 743, reversing 129 Fed. Rep. 837.

5. Meaning in Ordinary Speech Controls in Absence of Commercial Meaning. — U. S. v. Nordlinger, (C. C. A.) 121 Fed. Rep. 690.

890. 6. Specific Designation to Prevail Over General Description. — U. S. v. Boden, 133 Fed. Rep. 839.

891. 1. Noscitur a Sociis. — Waddell v. U. S., 135 Fed. Rep. 211.

5. Weight of Construction by Treasury Department. — See U. S. v. National Surety Co., (C. C. A.) 122 Fed. Rep. 904.

892. 9. What Constitutes Importation. — American Sugar Refining Co. v. Bidwell, 124 Fed. Rep. 683; American Sugar Refining Co. v. Bidwell, 124 Fed. Rep. 677; Hartwell Lumber Co. v. U. S., 128 Fed. Rep. 306.

10. Arrival Outside Limits of Port of Entry Not Importation. — Hartwell Lumber Co. v. U. S., 128 Fed. Rep. 306.

893. 11. Tender of Consumption Entry. — See U. S. v. Perkins, 119 Fed. Rep. 384.

- 894.** See note 1.
- 898.** VI. REVENUE OFFICERS — 2. Liabilities of Revenue Officers — *c.* LIABILITY FOR WRONGFUL SEIZURE OF PROPERTY. — See note 3.
- 900.** VII. COLLECTION AND PAYMENT OF REVENUE — 1. Customs Duties — *b.* ENTRY AND INVOICE — (3) *Time of Entry.* — See note 2.
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 (6) *Necessity for Invoice.* — See note 8.
- 902.** (11) *Amendment of Invoice and Entry.* — See note 3.
- 905.** *d.* APPRAISEMENT, REAPPRAISEMENT, AND APPEAL ON QUESTION OF VALUE — (5) *Basis of Valuation* — (a) *Export Duties.* — See note 5.
 (e) *Commissions Paid by Importer.* — See note 6.
- 906.** (8) *Reappraisement* — (a) *In General.* — See note 1.
- 908.** *e.* LIQUIDATION, RELIQUIDATION, AND APPEAL TO GENERAL APPRAISERS — (3) *Time of Liquidation.* — See note 3.
- 909.** (8) *Goods Invoiced in Foreign Currency.* — See note 9.
- 910.** See note 4.
 (9) *General Rules of Classification* — Application of Similitude Clause. — See note 11.
- 911.** (10) *Reliquidation.* — See notes 6, 7.
 (11) *Appeal to General Appraisers.* — See note 9.
- 913.** *f.* BONDS AND BONDED WAREHOUSES — (4) *Bonded Warehouses* — (b) *Rate of Duty Payable on Withdrawal of Goods.* — See note 3.
- 914.** *g.* RECOVERY OF DUTIES — (1) *Liability in General.* — See note 1.
 The Consignee of Imported Goods Is the One Personally Liable. — See note 5.
- 915.** (3) *Recovery by Action* — In General. — See note 1.
- 916.** *j.* DRAWBACK — (1) *In General.* — See note 8.

Presidential Proclamation Covers Entire Day on Which Made. — *Howell v. Bidwell*, 124 Fed. Rep. 688.

894. 1. Goods in Possession of Customs Officers Subject to Change in Duties. — *De Pass v. Bidwell*, 124 Fed. Rep. 615.

898. 3. Certificate of Probable Cause. — See *Haymes v. Brown*, 132 Fed. Rep. 525.

900. 2. Merchandise May Be Entered Before Vessel. — *Hartwell Lumber Co. v. U. S.*, 128 Fed. Rep. 306.

4. Entry and Examination of Baggage. — *U. S. v. Harts*, 131 Fed. Rep. 886; *Dodge v. U. S.*, (C. C. A.) 131 Fed. Rep. 849. See also *One Pearl Chain v. U. S.*, (C. C. A.) 123 Fed. Rep. 371.

8. Invoice Necessary with Free Goods. — *Six Parcels Placer Gold v. U. S.*, (Ariz. 1904) 76 Pac. Rep. 473.

902. 3. Clerical Error in Invoice May Be Corrected. — *Gillespie v. U. S.*, 124 Fed. Rep. 106.

905. 5. Duties Levied by Foreign Country on Articles Sold for Consumption. — *Rheinstrom v. U. S.*, 118 Fed. Rep. 303; *Downs v. U. S.*, 187 U. S. 496.

Local Taxes Excluded. — *Rheinstrom v. U. S.*, 118 Fed. Rep. 303; *U. S. v. Downing*, 131 Fed. Rep. 653.

6. Commissions Paid by Importer Not to Be Added to Market Value. — *U. S. v. Lahey*, 132 Fed. Rep. 181.

906. 1. Right to Reappraisement in General. — *U. S. v. Lahey*, 132 Fed. Rep. 181.

908. 3. Time for Liquidation Not Fixed by Statute. — *Abner Doble Co. v. U. S.*, (C. C. A.) 119 Fed. Rep. 152.

909. 9. Pure Metal Value the Basis. — *Stone v. Whitridge*, (C. C. A.) 129 Fed. Rep. 33.

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910. 4. Value of Currency at Time of Exportation Governs. — *Lawrence v. U. S.*, 127 Fed. Rep. 750.

11. Application of Similitude Clause in General. — *Hahn v. U. S.*, 131 Fed. Rep. 1000; *Neresheimer v. U. S.*, 131 Fed. Rep. 977.

911. 6. No Reliquidation After One Year from Entry. — *Abner Doble Co. v. U. S.*, (C. C. A.) 119 Fed. Rep. 152.

7. Reliquidation May Be Had Before Expiration of Year. — *Neresheimer v. U. S.*, 131 Fed. Rep. 977.

9. Production of Sample of Uniform Goods Before General Appraisers Sufficient. — *Renvy v. U. S.*, 121 Fed. Rep. 441.

As to review by the general appraisers see further *infra*, this title, **921.** 4-6, **925.** 1 *et seq.*

913. 3. Where the Duty Was Abrogated while goods remained in bonded warehouse it was held that they might be withdrawn free of duty. *Mosle v. Bidwell*, (C. C. A.) 130 Fed. Rep. 334, reversing 119 Fed. Rep. 480.

914. 1. Unpaid Duties Personal Debt — When Liability Accrues. — *U. S. v. National Surety Co.*, (C. C. A.) 122 Fed. Rep. 904.

But Where the Importer Refused to Receive the Goods, because of their failure to correspond with sample, he was held not to be personally liable for duties. *U. S. v. O'Neill*, 122 Fed. Rep. 547, affirmed (C. C. A.) 129 Fed. Rep. 909.

5. Consignee Person Liable. — *U. S. v. Bishop*, (C. C. A.) 125 Fed. Rep. 181; *U. S. v. Vandiver*, 133 Fed. Rep. 252.

915. 1. Action Lies to Recover Duties. — *U. S. v. National Fibre Board Co.*, 133 Fed. Rep. 596.

916. 8. Drawback on Exported Articles Manu-

917. 2. Internal Revenue Taxes — *b.* WHEN TAX ACCRUES. — See note 7.

918. *f.* BONDS AND BONDED WAREHOUSES — (1) *Distillers' Bonds.* — See note 6.

(2) *Bonded Warehouses* — (a) In General. — See note 10.

922. VIII. REVIEW OF COLLECTOR'S DECISION — RETURN OF DUTIES ILLEGALLY ASSESSED — 2. Protest, Appeal, and Payment of Duties — *a.* NECESSITY FOR PROTEST. — See note 1.

b. TIME OF FILING. — See note 6.

923. *d.* FORM AND REQUISITES. — See note 6.

924. See note 1.

e. AMENDMENT OF PROTEST. — See note 5.

925. 3. Review Before General Appraisers — In General. — See note 1.

929. 5. Review by Circuit Court of Appeals and United States Supreme Court. — See note 1.

IX. RECOVERY BACK OF INTERNAL REVENUE TAXES ILLEGALLY EXACTED. — See notes 3, 4.

930. X. VIOLATIONS OF REVENUE LAWS — 1. What Constitutes Violation — *b.* SPECIFIC VIOLATIONS AND OFFENSES — Working in Distillery Which Has No Sign. — See note 2.

Miscellaneous Offenses. — See note 9.

932. 3. Proceedings for Condemnation and Forfeiture — *a.* IN GENERAL. — See note 1.

factured from Imported Materials. — See Swan, etc., Co. v. U. S., 190 U. S. 143, holding that no drawback shall be allowed on goods made out of imported materials where such goods were consumed on board a vessel sailing to a foreign port before it reached its destination.

Drawback on Crude Ore Refined and Exported. — In re Guggenheim Smelting Co., 126 Fed. Rep. 728, reversing 121 Fed. Rep. 153.

917. 7. Tax Attaches as Soon as Spirits Come into Existence. — U. S. v. National Surety Co., (C. C. A.) 122 Fed. Rep. 904.

918. 6. Sureties on General Bond Not Relieved from Liability by Execution of Warehouse Bond. — U. S. v. National Surety Co., (C. C. A.) 122 Fed. Rep. 904; U. S. v. Richardson, 127 Fed. Rep. 893.

10. Unlawful Removal from Warehouse Does Not Release Tax. — U. S. v. Mullins, (C. C. A.) 119 Fed. Rep. 334, holding further, however, that where the United States purchases spirits and withdraws them "free of tax," the distiller and his sureties are discharged from liability as regards a tax claimed for excessive shrinkage.

922. 1. Flint Eddy, etc., Trading Co. v. Bidwell, 123 Fed. Rep. 200.

6. Protest Filed Ten Days After Reliquidation Sufficient. — Sgobel v. Robertson, 126 Fed. Rep. 577. See also In re Brown, 121 Fed. Rep. 605, affirmed (C. C. A.) 127 Fed. Rep. 793; Dickson v. U. S., 131 Fed. Rep. 573.

Time Extended by Closing Customhouse on Local Holiday. — Frost v. Saltonstall, 129 Fed. Rep. 481.

923. 6. Requisites of Protest. — U. S. v. Fleitmann, 131 Fed. Rep. 396; Weil v. U. S., 124 Fed. Rep. 1006; Shaw v. U. S., (C. C. A.) 122 Fed. Rep. 443, reversing 117 Fed. Rep. 366; In re Solvay Process Co., 134 Fed. Rep. 678.

Sufficiency of Protest. — See Knowles v. U. S., (C. C. A.) 126 Fed. Rep. 737, reversing 122

Fed. Rep. 971; Bayersdorfer v. U. S., (C. C. A.) 126 Fed. Rep. 932, reversing 122 Fed. Rep. 968.

924. 1. U. S. v. Bayersdorfer, (C. C. A.) 126 Fed. Rep. 732; U. S. v. Knowles, (C. C. A.) 126 Fed. Rep. 737.

5. See U. S. v. Bayersdorfer, (C. C. A.) 126 Fed. Rep. 732.

925. 1. What Questions Are Open Before General Appraisers. — Stone v. Whitridge, (C. C. A.) 129 Fed. Rep. 33.

929. 1. Neresheimer v. U. S., 131 Fed. Rep. 977.

3. Voluntary Payments Not Recoverable in Absence of Statute. — Christie St. Commission Co. v. U. S., 126 Fed. Rep. 991. See generally the title TAXATION, 756. 8 et seq.

4. Appeal to Commissioner Condition Precedent. — Chesebrough v. U. S., 192 U. S. 253.

930. 2. Delivering Raw Material to Distillery Having No Sign. — Terry v. U. S., (C. C. A.) 120 Fed. Rep. 483.

9. Failure to Mark or Stamp Distilled Spirits. — U. S. v. Seven Barrels Whisky, 131 Fed. Rep. 806.

Substituting Spirits of Lower Proof in Stamped and Branded Package. — See Three Packages Distilled Spirits v. U. S., (C. C. A.) 129 Fed. Rep. 329.

Shipping Liquors under Name or Brand Other than That Known to Trade. — The statute has application only to dealers and distillers of spirits, etc. U. S. v. Twenty Boxes Corn Liquor, 123 Fed. Rep. 135, affirmed (C. C. A.) 133 Fed. Rep. 910.

Making False Statement in Declaration for Entry of Imported Goods. — U. S. v. Rosenthal, 126 Fed. Rep. 766.

Revenue Officer Permitting Entry of Goods at Less than Lawful Duty. — U. S. v. Rosenthal, 126 Fed. Rep. 766.

932. 1. Form of Proceedings for Condemnation — Whether in Admiralty or at Common Law.

932. *b.* WHAT MUST BE PROVED — Intent to Defraud Government. — See note 5.

933. *c.* JUDGMENT OF FORFEITURE. — See note 6.

f. EXTENT OF FORFEITURE. — See note 7.

934. 5. Remission of Penalties and Forfeitures. — See note 1.

935. XI. DOCUMENTARY STAMP TAXES — 5. Validity of Unstamped Documents. — See notes 5, 6, 7.

6. Right to Post-stamp Documents. — See note 10.

938. REVISE — REVISION. — See note 2.

939. [REVOLVER. — See note 3*a*.]

— U. S. *v.* One Hundred and Fifty Head of Cattle, 3 Ariz. 134.

932. 5. Proof of Fraudulent Intent No Longer Essential. — Six Parcels Placer Gold *v.* U. S., (Ariz. 1904) 76 Pac. Rep. 473.

When Fraudulent Intent Material. — Under the Tariff Act of 1897, proof of fraudulent intent is essential to a forfeiture of the goods, but not to recover the balance due on an undervaluation. U. S. *v.* Bishop, (C. C. A.) 125 Fed. Rep. 181.

933. 6. Innocent Purchaser for Value Cannot Avoid Forfeiture by Paying Duty. — U. S. *v.* One Dark Bay Horse, 130 Fed. Rep. 240.

Title to Property Forfeited vests in the United States at the time when the forfeiture is incurred and passes to the purchaser at a government auction. Pilcher *v.* Faircloth, 135 Ala. 311.

7. Personal Property on Distillery Premises Forfeited. — Pilcher *v.* Faircloth, 135 Ala. 311, holding that animals used in transporting spirits are subject to forfeiture.

934. 1. Remission Discretionary with Secretary. — U. S. *v.* Harts, 131 Fed. Rep. 886.

935. 5. Unstamped Instruments Valid in Absence of Fraudulent Intent. — Sioux City First

Nat. Bank *v.* Stone, (Iowa 1902) 91 N. W. Rep. 1076; Rowe *v.* Bowman, 183 Mass. 488.

6. Unstamped Instruments Admissible in Evidence in Absence of Fraudulent Intent. — Bottorff *v.* Lewis, 121 Iowa 27. See also Pierpont *v.* Johnson, 104 Ill. App. 27; Bryan *v.* McKees Rocks First Nat. Bank, 205 Pa. St. 7.

Unstamped Instruments Not Admissible in Evidence in Federal Courts. — Wheaton *v.* Weston, 128 Fed. Rep. 151.

7. Unstamped Instruments Admissible in State Courts. — Frank *v.* Bauer, 19 Colo. App. 445; Dillingham *v.* Parks, 30 Ind. App. 61; Spencer *v.* Taylor, 69 Kan. 493, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 935; Rowe *v.* Bowman, 183 Mass. 488; Sulpho-Saline Bath Co. *v.* Allen, 66 Neb. 295; Davis *v.* Evans, 133 N. Car. 320; Foster *v.* Pacific Clipper Line, 30 Wash. 155. See also Ratliff *v.* Ratliff, 131 N. Car. 425.

10. Post-stamping Allowed. — Sackett *v.* McCaffrey, (C. C. A.) 131 Fed. Rep. 219; Sioux City First Nat. Bank *v.* Stone, (Iowa 1902) 91 N. W. Rep. 1076.

938. 2. Revise. — Mathis *v.* State, 31 Fla. 291.

939. 3*a*. Revolver does not include a rifle. Taylor *v.* Seil, 120 Wis. 32.

REWARDS.

BY L. C. DARLINGTON.

942. II. THE OFFER — 2. Capacity to Make — *b.* PERSONS ACTING IN REPRESENTATIVE CAPACITY — (2) *Public Officers* — In General. — See note 10.

943. *c.* CORPORATIONS — (2) *Counties*. — See note 5.

3. To Whom May Be Made. — See note 11.

945. 4. For What May Be Made — *d.* OFFERS BY CORPORATIONS — (2) *Counties* — (b) Detection of Crime — In General. — See note 2.

952. III. THE ACCEPTANCE — 1. Nature and Elements. — See note 7.

2. Who May Accept — *b.* PUBLIC OFFICERS — Offer for Services Within Scope of Officers' Duty. — See note 12.

942. 10. Authority by Statute — Sufficient Compliance. — See Cummings *v.* Clinton County, 181 Mo. 162.

943. 5. Valid Offer by County. — See Carnes *v.* Police Jury, 110 La. 1011.

11. Offer to Community at Large. — Kinn *v.* Mineral Point First Nat. Bank, 118 Wis. 537, 99 Am. St. Rep. 1012.

945. 2. Detection of Crime. — See the title COUNTIES, 930. 1.

952. 7. Acceptance Implied from Performance. — Van Vlissingen *v.* Manning, 105 Ill. App. 255.

12. Public Officers. — Southwestern Tel., etc., Co. *v.* Priest, 31 Tex. Civ. App. 345.

A Discharged Officer may become entitled to a reward to which he could not lay claim be-

953. Where the Offer Relates to Matters Not Within the Scope of the Officer's Duty. — See note 3.

Illustrations. — See note 4.

955. *e.* SPECIAL INCAPACITY — Accessories. — See note 5.

IV. THE PERFORMANCE — 1. Effect. — See note 7.

2. Sufficiency — *a.* IN GENERAL — Must Be Coextensive with Offer. — See note 9.

956. Substantial Performance. — See note 1.

Proximate Cause. — See note 6.

957. *b.* PERFORMANCE BY AGENT. — See note 5.

959. **V. THE CONTRACT** — 2. The Claim — *b.* WHO ENTITLED TO RECOVER — (2) *Several Claimants* — (*a.*) *Joint Claims*. — See note 2.

Co-operation Alone Insufficient. — See note 5.

968. **RIGHT OF WAY.** — See note 2.

fore such discharge. *Cornwell v. St. Louis Transit Co.*, 100 Mo. App. 258, affirmed 106 Mo. App. 135.

953. 3. Matters Not Within Scope of Officer's Duties. — *Kinn v. Mineral Point First Nat. Bank*, 118 Wis. 537, 99 Am. St. Rep. 1012.

4. Sheriff Cannot Accept Offer — *For Arrest of Fugitive from Another State.* — *Brown v. Sandusky County*, 24 Ohio Cir. Ct. 481.

For Arrest and Conviction of One Whom It Is His Duty to Arrest. — *Gould v. Chickasaw County*, 85 Miss. 123.

955. 5. Vote Buyer Cannot Recover for Furnishing Evidence of Selling of Votes. — *Clinton County v. Davis*, 162 Ind. 60.

7. Performance Creates Contract. — *Van Vliissingen v. Manning*, 105 Ill. App. 255.

9. Performance Must Be Co-extensive with Offer. — *Gould v. Chickasaw County*, 85 Miss. 123; *Ralls County v. Stephens*, 104 Mo. App. 115; *Southwestern Tel., etc., Co. v. Priest*, 31 Tex. Civ. App. 345. See also *Peterson v. Mark*, 134 Mich. 594.

956. 1. Substantial Performance Sufficient. — *Kinn v. Mineral Point First Nat. Bank*, 118 Wis. 537, 99 Am. St. Rep. 1012.

6. *Ralls County v. Stephens*, 104 Mo. App. 115.

957. 5. Agency. — *Ralls County v. Stephens*, 104 Mo. App. 115.

959. 2. Joint Performance Creates Joint Claim. — *Kinn v. Mineral Point First Nat. Bank*, 118 Wis. 537, 99 Am. St. Rep. 1012.

5. See *Kinn v. Mineral Point First Nat. Bank*, 118 Wis. 537, 99 Am. St. Rep. 1012, holding that one intentionally evading participation in the arrest of a criminal is not entitled to share in the reward though he gave information leading to the arrest.

968. 2. Twofold Meaning. — *Brown v. Carolina Midland R. Co.*, 67 S. Car. 481.

Switchyard. — Grant of land to be used as a *right of way* held not to authorize use of land for switchyard. *Missouri, etc., R. Co. v. Anderson*, 36 Tex. Civ. App. 121.

RIOT.

BY E. C. ELLSBREE.

972. **II. ELEMENTS** — Joint Action Required. — See note 3.

973. Intent. — See notes 2, 3.

974. Unlawful Act — Lawful Act — Violence and Turbulence. — See note 3.

977. **RIPARIAN — RIPARIOUS.** — See note 6.

RIPARIAN OWNER OR PROPRIETOR. — See note 7.

972. 3. Joint Action Required. — *Turner v. State*, 120 Ga. 850; *Jemley v. State*, 121 Ga. 346.

973. 2. Common Intent Necessary. — *Jemley v. State*, 121 Ga. 346.

3. No Previous Conspiracy Necessary. — *Jemley v. State*, 121 Ga. 346.

974. 3. Charivari — Noise. — To the same effect as *State v. Brown*, 60 Ind. 95, 35 Am. Rep. 210, stated in the original note, see *Gil-*

more v. Fuller, 198 Ill. 130, reversing 99 Ill. App. 272.

977. 6. Riparian. — *Sutter v. Heckman*, 1 Alaska 188; *Clements v. Watkins Land, etc., Co.*, 36 Tex. Civ. App. 339.

7. The Expression "Riparian Owners," in its ordinary and popular signification, carries with it the title to the centre of the non-navigable stream upon which the land abuts. *Matter of Wilder*, 90 N. Y. App. Div. 262.

RIPARIAN RIGHTS.

979. III. WHAT RIGHTS INCLUDED—5. Right to Flow and Use.—See note 5.

980. Reasonable Use.—See note 2.

Obstruction, Diversion, and Pollution.—See note 3.

Entitled Only to Use of Water.—See note 6.

Increase of Flow.—See note 7.

Rule Applicable to Navigable Waters.—See note 8.

981. IV. UPON WHAT RIGHTS DEPEND.—See note 2.

V. NATURE OF RIGHTS.—See notes 7, 9.

Are Property.—See note 10.

982. See note 1.

VI. HOW RIGHTS LOST—1. In General.—See note 2.

2. Grant of Rights.—See note 5.

3. Nonuser.—See note 8.

984. RIVER.—See note 2.

979. 5. Rule as to Flow and Use.—Keck *v.* Venghause, 127 Iowa 529; Fahnestock *v.* Feldner, 98 Md. 335; West Arlington Imp. Co. *v.* Mount Hope Retreat, 97 Md. 191; Schumacher *v.* Shawhan, 93 Mo. App. 573; Meng *v.* Coffee, 67 Neb. 500; Crawford Co. *v.* Hathaway, 67 Neb. 325; Doremus *v.* Paterson, 65 N. J. Eq. 711; Penrhyn Slate Co. *v.* Granville Electric Light, etc., Co., 181 N. Y. 80; People *v.* Smith, 70 N. Y. App. Div. 543, *affirmed* 175 N. Y. 469; Oregon Constr. Co. *v.* Allen Ditch Co., 41 Oregon 209, 93 Am. St. Rep. 701; Filbert *v.* Dechert, 22 Pa. Super. Ct. 362; Stenger *v.* Tharp, 17 S. Dak. 13. And see the title WATERS AND WATERCOURSES, **354. 8 et seq.**

980. 2. West Arlington Imp. Co. *v.* Mt. Hope Retreat, 97 Md. 191; McCook Irrigation, etc., Co. *v.* Crews, (Neb. 1903) 96 N. W. Rep. 996; Harrington *v.* Demaris, (Oregon 1904) 77 Pac. Rep. 603. And see the title WATERS AND WATERCOURSES, **357. 2 et seq.**

3. Liability for Obstruction, Diversion, and Pollution.—U. S. Board, etc., Co. *v.* Moore, (Ind. App. 1904) 72 N. E. Rep. 487. And see the title WATERS AND WATERCOURSES, **368. 4, 377. 5, 384. 6.**

6. No Property in Water.—Boise City Irrigation, etc., Co. *v.* Stewart, 10 Idaho 38; Meng *v.* Coffee, 67 Neb. 500; Crawford Co. *v.* Hathaway, 67 Neb. 325. And see the title WATERS AND WATERCOURSES, **356. 2.**

7. Damages for Increase of Flow.—Keck *v.* Venghause, 127 Iowa 529. See also the title WATERS AND WATERCOURSES, **377. 8 et seq.**

8. Right Exists Though River Navigable.—Richards *v.* New York, etc., R. Co., 77 Conn. 501; James *v.* Seaboard Air Line R. Co., 67 S. Car. 188; Webster *v.* Harris, 111 Tenn. 668.

981. 2. Dependent upon Ownership of Banks or Shores.—Watkins Land Co. *v.* Clements, 98 Tex. 578, 36 Tex. Civ. App. 339. And see the title WATERS AND WATERCOURSES, **352. 12 et seq.**

7. Right Annexed to Land Itself.—Clark *v.* Allaman, (Kan. 1905) 80 Pac. Rep. 571; Oregon Constr. Co. *v.* Allen Ditch Co., 41 Oregon 209, 93 Am. St. Rep. 701; Filbert *v.* Dechert, 22 Pa. Super. Ct. 362. And see the title WATERS AND WATERCOURSES, **352. 8.**

9. Express Reservation Necessary to Preserve.—See Walker *v.* Lillingston, 137 Cal. 401; Knight *v.* Barr, 130 Mich. 673.

10. Rights Are Property.—Elberton *v.* Hobbs, 121 Ga. 749; Clark *v.* Allaman, (Kan. 1905) 80 Pac. Rep. 571; Crawford Co. *v.* Hathaway, 67 Neb. 325; Clements *v.* Watkins Land, etc., Co., 36 Tex. Civ. App. 339; Lathrop *v.* Racine, 119 Wis. 461. See also the title WATERS AND WATERCOURSES, **352. 5.**

982. 1. Subject to Improvements for Navigation.—Salliotte *v.* King Bridge Co., (C. C. A.) 122 Fed. Rep. 378.

2. Methods of Losing Right of Flow.—Walker *v.* Lillingston, 137 Cal. 401; Oregon Constr. Co. *v.* Allen Ditch Co., 41 Oregon 209, 93 Am. St. Rep. 701; Britt *v.* Reed, 42 Oregon 76; Harrington *v.* Demaris, (Oregon 1904) 77 Pac. Rep. 603; Schumacher *v.* Shawhan, 93 Mo. App. 573; Stenger *v.* Tharp, 17 S. Dak. 13; Clements *v.* Watkins Land, etc., Co., 36 Tex. Civ. App. 339. See also Samuels *v.* Armstrong, (Supm. Ct. Tr. T.) 46 Misc. (N. Y.) 481. And see the title WATERS AND WATERCOURSES, *passim*, especially **365. 1 et seq., 373. 6, 376. 3 et seq., 383. 7 et seq.**

No Prescriptive Right of Lower Owner to Receive Water as Against Upper Owners.—Crawford Co. *v.* Hathaway, 67 Neb. 325.

5. American Rule.—Doremus *v.* Paterson, 65 N. J. Eq. 711.

8. Right Not Lost by Nonuser.—Walker *v.* Lillingston, 137 Cal. 401.

984. 2. River.—Minor *v.* New Orleans, 115 La. 301; Dodge County *v.* Saunders County, (Neb. 1903) 97 N. W. Rep. 617; State *v.* Faudre, 54 W. Va. 122.

986. ROAD. — See note 1.

987. See note 1.

988. ROADBED — ROADWAY. — See note 4.

989. [ROAST. — See note 1.]

986. 1. Public and Not Private Road. — *Nichols v. Chicago, etc., R. Co.*, 125 Iowa 236.

987. 1. Road in Sense of or Including Railroad. — *Southern Illinois, etc., Bridge Co. v. Stone*, 174 Mo. 1.

988. 4. Roadbed Defined. — *Shreveport v. Shreveport Belt R. Co.*, 107 La. Ann. 785.

"Roadbed and Track" held to include right of

way. *St. Louis Southwestern R. Co. v. Grayson*, 72 Ark. 119.

989. 1. Roast as applied to metallic ores means to heat highly with access of air, but without fusing, for the purpose of driving off or volatilizing impurities or for oxidizing them. *U. S. v. United Verde Copper Co.*, (Ariz. 1903) 71 Pac. Rep. 954.

ROBBERY.

BY L. C. DARLINGTON.

994. III. ESSENTIALS — 2. Force or Fear — *a.* IN GENERAL. — See note 10.

995. See note 1.

996. *c.* MUST PRECEDE OR BE CONCOMITANT WITH TAKING. — See note 2.

997. *d.* DEGREE — (1) Force — (b) Particular Acts of Violence — *aa.* IN GENERAL. — See notes 8, 10.

998. *bb.* SNATCHING. — See note 6.

1002. 4. Must Be from Person or Presence. — See note 5.

1003. See note 1.

5. Ownership. — See notes 2, 4.

6. Animus Furandi — *a.* IN GENERAL. — See note 6.

1004. *b.* CLAIM OF RIGHT. — See notes 4, 8.

1005. V. EVIDENCE — *Res Gestæ*. — See note 14.

1006. Possession of Property. — See note 2.

Ownership. — See note 3.

Sufficiency to Convict. — See note 4.

994. 10. General Rule as to Violence. — *Colby v. State*, (Fla. 1903) 35 So. Rep. 189; *State v. Wasson*, 126 Iowa 320; *State v. Donohue*, (N. J. 1904) 59 Atl. Rep. 12; *State v. Davis*, 28 Utah 10.

995. 1. *Smith v. State*, 82 Miss. 793.

996. 2. Question of Time. — *People v. Stevens*, 141 Cal. 488; *Colby v. State*, (Fla. 1903) 35 So. Rep. 189; *Jones v. Com.*, 115 Ky. 592; *Dawson v. Com.*, (Ky. 1903) 74 S. W. Rep. 701; *State v. Graves*, 185 Mo. 713.

997. 8. *Bowlin v. State*, 72 Ark. 530, holding that cutting a rope to which the property is tied is not the violence contemplated.

10. *Colby v. State*, (Fla. 1903) 35 So. Rep. 189.

998. 6. Snatching Purse with Such Force as to Break Chain and Injure Finger Robbery. — *Smith v. State*, 117 Ga. 320, 97 Am. St. Rep. 165.

1002. 5. From the Person. — *Smith v. State*, 82 Miss. 793.

1003. 1. Statutes. — *People v. Stevens*, 141 Cal. 488.

2. Ownership of Property. — *Dorsey v. State*, 134 Ala. 553; *State v. Wasson*, 126 Iowa 320; *State v. Morgan*, 31 Wash. 226.

4. *State v. Montgomery*, 181 Mo. 19.

6. Intent. — *State v. Smith*, 174 Mo. 586; *State v. Graves*, 185 Mo. 713; *State v. Fordham*, 13 N. Dak. 494.

Instruction Need Not Specify Felonious Intent. — *State v. Rowland*, 174 Mo. 373; *State v. Spray*, 174 Mo. 569.

1004. 4. Claim of Right. — *State v. Wasson*, 126 Iowa 320.

8. *Fay v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 744.

1005. 14. *Res Gestæ*. — *People v. Linares*, 142 Cal. 17; *State v. Ripley*, 32 Wash. 182. And see the title *RES GESTÆ*, **681.** 10-12.

Prior Statements of Defendant. — See *Keating v. State*, 67 Neb. 560.

1006. 2. Possession of Stolen Property. — *State v. Wasson*, 126 Iowa 320; *State v. Hyatt*, 179 Mo. 344.

Sudden Acquisition of Money Admissible. — *People v. Sullivan*, 144 Cal. 471.

3. *State v. Howard*, 30 Mont. 518.

4. For Case Wherein the Evidence Was Held Sufficient. — *State v. Davis*, 186 Mo. 533.

Proof of Flight of Defendant Not Alone Sufficient. — *State v. Poe*, 123 Iowa 118, 101 Am. St. Rep. 307.

- 1008.** [ROTARY. — See note 5a.]
1010. RUBBLE STONES. — See note 1.
1011. RULE OF PROPERTY. — See note 1.
 RUNNING ACCOUNTS. — See note 7.
1012. RURAL. — See note 2.
1014. SAID. — See note 1.
1015. SALARY. — See note 3.
1017. See note 1.

1008. 5a. *Rotary* means turning, as a wheel on its axis. But there is nothing in the primary definition of *rotary* to indicate that necessarily the idea of continuous rotation is involved in the term. *Kip-Armstrong Co. v. King Philip Mills*, 130 Fed. Rep. 28.

1010. 1. "Rubble Stone" Not Synonymous With "Dimension Stone" or "Footing Stone." — *Nugent v. Armour Packing Co.*, (Mo. App. 1904) 81 S. W. Rep. 506.

1011. 1. Rule of Property. — *Yazoo, etc., R. Co. v. Adams*, 81 Miss. 90.

7. Running Account. — *Brock v. Wildey*, 125 Ga. 82, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1011.

1012. 2. Rural Real Estate is that located in the country, in an agricultural district. *Stees v. Bergmeier*, 91 Minn. 513.

1014. 1. Said. — See also *Trunkey v. Van Sant*, 176 N. Y. 535.

Said County. — See also *Moss v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 829.

1015. 3. Salary. — *Hopkins v. Cromwell*, 89 N. Y. App. Div. 481.

Salaried construed to refer to compensation for a fixed term and to services which were not in their nature menial. *State v. Duncan*, 1 Tenn. Ch. App. 334.

Per Annum Compensation. — *Atty.-Gen. v. Speed*, 183 Mo. 186.

The Salary of a Public Officer is a provision made by law for his maintenance and support during his term, to the end that, without anxiety concerning his means of subsistence, he may be able to devote himself entirely to the duties of his office. *Ruperich v. Baehr*, 142 Cal. 190.

Salary Imports Permanency of Employment. — *White v. Keohler*, 70 N. J. L. 526.

1017. 1. Time, Not Amount of Services Rendered. — *State v. Grant*, 12 Wyo. 1.

SALES.

BY JOHN LEHMAN.

1022. I. DEFINITION AND NATURE — 1. Definition. — See note 1.

1023. 2. Sales Distinguished from Other Transactions — *a.* IN GENERAL. — See notes 2, 3.

b. FROM BAILMENTS. — See note 5.

1024. *c.* FROM BAILMENT WITH RIGHT TO PURCHASE. — See notes 1, 2, 3.

1025. See note 1.

f. FROM LEASE OR HIRING. — See note 5.

1026. *h.* FROM CONSIGNMENTS. — See notes 1, 3, 4.

1027. *k.* FROM AGENCY. — See note 5.

1028. See note 1.

l. FROM CONTRACT FOR LABOR AND MATERIALS. — See note 2.

II. CONTRACT OF SALE — 1. Mutual Assent — *a.* IN GENERAL. —

See note 4.

1029. See notes 1, 2, 4, 5.

1022. 1. Sale Defined. — *Dunn v. Mayo Mills*, (C. C. A.) 134 Fed. Rep. 804; *Mensing v. Steiner-Mendinger Co.*, (Neb. 1903) 94 N. W. Rep. 633; *Still v. Cannon*, 13 Okla. 491.

1023. 2. Intent. — *Herring-Hall-Marvin Co. v. Smith*, 43 Oregon 315.

3. Construction of Particular Transactions. — *Williamson v. North Pac. Lumber Co.*, 42 Oregon 153.

5. Sale Distinguished from Bailment. — *In re Naylor Mfg. Co.*, 135 Fed. Rep. 206; *In re Galt*, (C. C. A.) 120 Fed. Rep. 64; *De Jaramillo v. U. S.*, 37 Ct. Cl. 208; *Singer Mfg. Co. v. Ellington*, 103 Ill. App. 517; *Scott Min.*, etc., Co. v. *Shultz*, 67 Kan. 605; *Potter v. Mt. Vernon Roller Mill Co.*, 101 Mo. App. 581. See also *Hagey v. Schroeder*, 30 Ind. App. 151, construing the contract to be one of sale.

Hiring Chattel under Agreement to Pay for It if Broken Not Sale. — *Brown v. Cuozzo*, 89 N. Y. App. Div. 619.

1024. 1. Option to Return if Unsuitable. — *In re Miller*, 135 Fed. Rep. 868; *O'Donnell v. Wing*, 121 Ga. 717; *Bauman Loan Co. v. Hatowsky*, 107 Ill. App. 181. See also *Weiner v. Gill*, (1905) 2 K. B. 172; *Donnelly v. Mitchell*, 119 Iowa 432; *Leiffer v. Post*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1007; *Hall v. Pierce*, 83 N. Y. App. Div. 312.

2. Absolute Option to Return. — *In re Miller*, 135 Fed. Rep. 868, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1024; *Furst v. Commercial Bank*, 117 Ga. 472.

3. Construction of Special Agreements. — *Curtin v. Ingle*, 143 Cal. 354; *Furst v. Commercial Bank*, 117 Ga. 472.

1025. 1. Exercise of Option. — *O'Donnell v. Wing*, 121 Ga. 717, holding further that a completed sale may result where the bailee treats the property as his own, as by a sale thereof.

5. Sale or Lease. — *Turnbow v. Beckstead*, 25 Utah 468, holding the contract to be a lease and not a sale. See also *Muirhead v. Dickson*, Sc. Ct. of Sess. 7 F. 686.

1026. 1. Sale for Account of Consignor. — *Fleet v. Hertz*, 201 Ill. 594, 94 Am. St. Rep. 192; *W. W. Kimball Co. v. First Nat. Bank*, 1 Tenn. Ch. App. 505.

3. Sale for Account of Consignee. — *Sutton v. Baker*, 91 Minn. 12; *Buffum v. Descher*, (Neb. 1901) 96 N. W. Rep. 352. But see *Langley v. Kahnert*, 9 Ont. L. Rep. 164, affirmed 36 Can. Sup. Ct. 397.

4. Sale or Consignment — Particular Contracts Construed. — To the same effect as *Pam v. Vilmar*, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 235, set out in the original note, see *Deburghraeve v. Autenrieth*, 24 Pa. Super. Ct. 267.

1027. 5. Sale or Agency. — *Lance v. Butler*, 135 N. Car. 419.

1028. 1. See *Gause v. Commonwealth Trust Co.*, 100 N. Y. App. Div. 427.

2. Sale or Contract for Work, Labor, and Materials. — *Ideal Wrench Co. v. Garvin Mach. Co.*, 92 N. Y. App. Div. 187, affirmed 181 N. Y. 573.

4. Mutual Assent Necessary. — *Johnston v. Fairmont Mills*, 129 Fed. Rep. 74, 63 C. C. A. 516; *Rider v. Wood*, 138 Ala. 235; *Singer v. Grand Rapids Match Co.*, 117 Ga. 86; *Joseph Joseph, etc., Co. v. Schonthal Iron, etc., Co.*, 99 Md. 382; *Kileen v. Kennedy*, 90 Minn. 414; *Brophy v. Idaho Produce, etc., Co.*, 31 Mont. 279; *San Antonio Gas, etc., Co. v. Marx*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1166.

1029. 1. Assent May Be Expressed or Implied. — See *Curtiss v. McCune*, (Neb. 1903) 94 N. W. Rep. 984.

Question for Jury. — *Hocking v. Hamilton*, (C. C. A.) 122 Fed. Rep. 417.

2. Acceptance of Offer Necessary. — *Huggins v. Southeastern Lime, etc., Co.*, 121 Ga. 311.

1029. *b. OFFER AND ACCEPTANCE.* — See notes 6, 7, 8.

1030. See notes 1, 2, 3, 4, 5.

1031. See notes 3, 6, 7, 8.

1032. See notes 1, 2, 4.

1033. See notes 3, 4.

1029. 4. Contract Becomes Binding on Acceptance. — *Cherokee Mills v. Gate City Cotton Mills*, 122 Ga. 268; *L. A. Becker Co. v. Alvey*, (Ky. 1905) 86 S. W. Rep. 974; *Kileen v. Kennedy*, 90 Minn. 414; *A. A. Cooper Wagon, etc., Co. v. Wooldridge*, 98 Mo. App. 648; *Jones v. Wattles*, 66 Neb. 533; *Beacon Falls Rubber Shoe Co. v. Burns*, 79 N. Y. App. Div. 639; *Reeves v. Bruening*, 13 N. Dak. 157; *Humphrey v. Timken Carriage Co.*, 12 Okla. 413; *Boyd v. Merchants, etc., Peanut Co.*, 25 Pa. Super. Ct. 199. See also *Penn Shovel Co. v. Phelps*, 24 Pa. Super. Ct. 595.

Order, until Accepted, Is Mere Proposal. — *Merchants' Exch. Co. v. Sanders*, (Ark. 1905) 84 S. W. Rep. 786.

5. John Single Paper Co. v. Hammermill Paper Co., 96 N. Y. App. Div. 535.

6. What Constitutes an Offer. — *Anglo-Newfoundland Fish, etc., Co. v. Smith*, 35 Nova Scotia 267.

7. Johnson v. Corbett, 95 Md. 746; *Wheeling Steel, etc., Co. v. Evans*, 97 Md. 305.

8. Advertisements, Price Lists, Etc. — If a merchant advertises by circulars soliciting generally shipments to him of goods at a stated price, he is liable, at least on a *quantum valebat*, for goods shipped to and accepted by him in accordance with such circulars. *Robinson v. Leatherbee Tie, etc., Co.*, 120 Ga. 901.

1030. 1. Specification of Quantity. — *Kileen v. Kennedy*, 90 Minn. 414; *Postal Tel. Cable Co. v. Akron Cereal Co.*, 23 Ohio Cir. Ct. 516.

Offer and Acceptance Complete — Seller's Right to Cancel for Failure to Furnish Specifications. — See *John Single Paper Co. v. Hammermill Paper Co.*, 96 N. Y. App. Div. 535.

"All" of Certain Goods in Seller's Possession Sufficient Identification. — *Nelson v. Hirsch, etc., Iron, etc., Co.*, 102 Mo. App. 498.

2. Heidelbaugh v. Cranston, 4 Penn. (Del.) 464; *National Cash Register Co. v. Dehn*, (Mich. 1905) 102 N. W. Rep. 965; *Masterson v. Heitmann*, (Tex. Civ. App. 1905) 87 S. W. Rep. 227.

3. Revocation of Offer. — *Johnston v. Fairmont Mills*, 129 Fed. Rep. 74, 63 C. C. A. 516; *Merchants' Exch. Co. v. Sanders*, (Ark. 1905) 84 S. W. Rep. 786; *Alderman v. New Departure Bell Co.*, 75 Conn. 519; *Huggins v. Southeastern Lime, etc., Co.*, 121 Ga. 311; *Durkee v. Schultz*, 122 Iowa 410; *L. A. Becker Co. v. Alvey*, (Ky. 1905) 86 S. W. Rep. 974, applying the rule to an order given to a traveling salesman, though the order itself provided against cancellation; *Kileen v. Kennedy*, 90 Minn. 414; *Reeves v. Bruening*, 13 N. Dak. 157; *Ingham v. Cisco Oil Mill*, (Tex. Civ. App. 1905) 86 S. W. Rep. 630; *L. J. Mueller Furnace Co. v. Meiklejohn*, 121 Wis. 605.

Provisions Against Cancellation Void When Without Consideration. — *Hallwood Cash Register Co. v. Finnegan*, (Supm. Ct. App. T.)

84 N. Y. Supp. 154; *Cary v. Appo*, (Supm. Ct. App. T.) 84 N. Y. Supp. 569.

4. L. A. Becker Co. v. Alvey, (Ky. 1905) 86 S. W. Rep. 974; *Worthington v. Herrmann*, 89 N. Y. App. Div. 627, *affirmed* 180 N. Y. 559.

Binding Contract Exists Where Option Exercised Before Offer Withdrawn. — *Kirwan v. Roberts*, 99 Md. 341.

5. Contract by Letter through Mail. — *Reeves v. Bruening*, 13 N. Dak. 157; *L. J. Mueller Furnace Co. v. Meiklejohn*, 121 Wis. 605. See also *McArdle v. Thames Iron Works*, 96 N. Y. App. Div. 139; *Reeves v. McCulloch*, 4 Quebec Pr. 285.

Acceptance of Option Must Be Received Before Option Expires. — *Kibler v. Caplis*, (Mich. 1905) 103 N. W. Rep. 531.

1031. 3. Notice of Revocation of Offer. — *Mitchell v. Wallace*, 87 S. W. Rep. 303, 27 Ky. L. Rep. 967; *Reeves v. Bruening*, 13 N. Dak. 157.

Mailing Countermand Shown — Burden of Proving Nonreceipt on Addressee. — *Merchants' Exch. Co. v. Sanders*, (Ark. 1905) 84 S. W. Rep. 786.

6. Time of Acceptance. — *Allen B. Wisley Co. v. Mathieson Alkali Works*, 107 Ill. App. 379; *Mitchell v. Wallace*, 87 S. W. Rep. 303, 27 Ky. L. Rep. 967; *Boyd v. Merchants', etc., Peanut Co.*, 25 Pa. Super. Ct. 199.

7. Bement v. Rockwell, 92 N. Y. App. Div. 44.

8. What Is Reasonable Time. — *Allen B. Wisley Co. v. Mathieson Alkali Works*, 107 Ill. App. 379; *Boyd v. Merchants', etc., Peanut Co.*, 25 Pa. Super. Ct. 199.

1032. 1. Acceptance Must Be Unconditional. — *Kileen v. Kennedy*, 90 Minn. 414.

2. Conformity of Acceptance to Offer. — *Rockford v. Mead*, 207 Ill. 423; *Rogers v. French*, 122 Iowa 18; *Brophy v. Idaho Produce, etc., Co.*, 31 Mont. 279. See also *infra*, this title, **1033. 3, 4.**

Order Pursuant to Terms of Offer Is Acceptance. — *Huggins v. Southeastern Lime, etc., Co.*, 121 Ga. 311.

4. Semon v. Coppes, etc., Co., (Ind. App. 1905) 74 N. E. Rep. 41, holding that a privilege to the purchaser to cancel an order "in event of an emergency," does not render the contract immaterial.

Proposal with Condition Destroying Mutuality. — See *American Agricultural Chemical Co. v. Kennedy*, 103 Va. 171 (proposal giving to maker right to cancel contract at any time).

1033. 3. Acceptance with Variations Constitutes Refusal. — *Fredrick Mfg. Co. v. Devlin*, (C. C. A.) 127 Fed. Rep. 71; *China, etc., Trading Co. v. Davis*, (C. C. A.) 119 Fed. Rep. 688; *Johnston v. Fairmont Mills*, 129 Fed. Rep. 74, 63 C. C. A. 516; *Four Oil Co. v. United Oil Producers*, 145 Cal. 623; *Chicago Curtain Stretcher Co. v. Paepcke-Leicht Lumber Co.*,

1034. See note 1.

1035. 3. Consideration or Price — *a.* IN GENERAL. — See note 4.

1036. *b.* AGREEMENT AS TO CONSIDERATION OR PRICE. — See note 3.

1037. 6. Construction of Contract — *a.* IN GENERAL. — See note 12.

1038. See notes 2, 3.

1039. See notes 4, 5, 6, 7.

1040. *b.* ENTIRE OR SEVERABLE CONTRACTS. — See note 1.

III. SUBJECTS OF SALE — 1. Title and Possession of Seller. — See note 3.

108 Ill. App. 249; *Stock v. Towle*, 97 Me. 408; *Kileen v. Kennedy*, 90 Minn. 414; *Wood v. Ellsworth*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 584. Compare *Butterfield v. Butterfield*, 18 Colo. App. 323.

1033. 4. Acceptance Constituting Counter Proposition. — *Pittsburgh Plate Glass Co. v. Kerlin Bros. Co.*, 122 Fed. Rep. 414, 58 C. C. A. 648; *Sloan v. Wolf Co.*, 124 Fed. Rep. 196, 59 C. C. A. 612; *Kansas City, etc., R. Co. v. McGuire Mfg. Co.*, 108 Ill. App. 258; *Wheeling Steel, etc., Co. v. Evans*, 97 Md. 305; *Joseph Joseph, etc., Co. v. Schonthal Iron, etc., Co.*, 99 Md. 382; *A. A. Cooper Wagon, etc., Co. v. Wooldridge*, 98 Mo. App. 648; *Brophy v. Idaho Produce, etc., Co.*, 31 Mont. 279; *San Antonio Gas, etc., Co. v. Marx*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1166; *Ingham v. Cisco Oil Mill*, (Tex. Civ. App. 1905) 86 S. W. Rep. 630; *Brigham v. American Bridge Co.*, (Wash. 1905) 80 Pac. Rep. 788.

1034. 1. Question of Fact on Conflicting Evidence. — *Elfring v. New Birdsall Co.*, 16 S. Dak. 252.

1035. 4. Money Consideration. — *Mensinger v. Steiner-Mendinger Co.*, (Neb. 1903) 94 N. W. Rep. 633 (money consideration or fixed money price). See also *Still v. Cannon*, 13 Okla. 491.

1036. 3. Price to Be Fixed by Valuers. — *Elberton Hardware Co. v. Hawes*, 122 Ga. 858, holding further that there is no contract if the persons appointed as valuers fail or refuse to act.

1037. 12. Construction of Contract. — See *Moore v. U. S.*, 38 Ct. Cl. 590, reversed on other grounds 196 U. S. 157; *Singer v. Grand Rapids Match Co.*, 117 Ga. 86; *Aldrich v. Bay State Constr. Co.*, 186 Mass. 489.

1038. 2. Stipulations as to Quality Construed. — *Glass v. Blazer*, 91 Mo. App. 564; *Buedingen Mfg. Co. v. Royal Trust Co.*, 90 N. Y. App. Div. 267, affirmed 181 N. Y. 563; *H. Herrmann Lumber Co. v. Heidelberg*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 465; *Shute v. Dickson Cotton Mills*, 132 N. Car. 271.

3. Stipulations as to Property and Rights Constructed. — *Newsome v. Brazell*, 118 Ga. 547.

1039. 4. Stipulations as to Remedy. — *Van Den Bosch v. Bouwman*, (Mich. 1904) 101 N. W. Rep. 832, holding that the seller may be authorized by the contract to seize and sell the property on default in payment, and hold the original purchaser for any balance upon his express promise to pay.

5. Particular Contracts Construed. — *United Engineering, etc., Co. v. Broadnax*, (C. C. A.) 136 Fed. Rep. 351; *Livermore v. Brauer*, 128 Fed. Rep. 265, 62 C. C. A. 647; *Equitable Mfg.*

Co. v. Howard, 140 Ala. 252; *Underhill v. Buckman Fruit Co.*, 97 Md. 229; *Merchants' Exch. Co. v. Weisman*, 132 Mich. 353; *Myers v. Steel Mach. Co.*, (N. J. 1904) 57 Atl. Rep. 1080; *Koch v. Bamford Bros. Silk Mfg. Co.*, 69 N. J. L. 252; *Buskirk v. Peck*, 57 W. Va. 360.

6. Province of Court and Jury. — *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182; *McCullough v. Armstrong*, 118 Ga. 424; *Delaware, etc., Canal Co. v. Mitchell*, 211 Ill. 379; *Chase v. Ainsworth*, 135 Mich. 119; *Cunningham v. O'Connor*, 136 Mich. 293; *Beacon Falls Rubber Shoe Co. v. Burns*, 79 N. Y. App. Div. 639; *Bell v. Mills*, 78 N. Y. App. Div. 42; *Manda v. Etienne*, 93 N. Y. App. Div. 609.

Where the Contract Is Wholly in Writing the construction is for the court. *Dunn v. Mayo Mills*, (C. C. A.) 134 Fed. Rep. 804; *Telluride Power Transmission Co. v. Crane Co.*, 208 Ill. 218; *Danziger v. Pittsfield Shoe Co.*, 204 Ill. 145; *Joseph Joseph, etc., Co. v. Schonthal Iron, etc., Co.*, 99 Md. 382. See also *Mason v. Lievre*, 145 Cal. 514.

If the Contract Is Partly in Writing and Partly by Parol, it is for the jury to say what the contract is. *Joseph Joseph, etc., Co. v. Schonthal Iron, etc., Co.*, 99 Md. 382.

Several Writings Construed Together. — *Eau Claire Canning Co. v. Western Brokerage Co.*, 213 Ill. 561; *Olcese v. Mobile Fruit, etc., Co.*, 211 Ill. 539.

7. Parol Evidence. — *Dunn v. Mayo Mills*, (C. C. A.) 134 Fed. Rep. 804; *Union Selling Co. v. Jones*, 128 Fed. Rep. 672, 63 C. C. A. 224; *Eau Claire Canning Co. v. Western Brokerage Co.*, 213 Ill. 561; *Rastetter v. Reynolds*, 160 Ind. 133; *Semon v. Coppes*, (Ind. App. 1905) 74 N. E. Rep. 41; *Toombs v. Stockwell*, 131 Mich. 633; *Helper v. MacKinnon Mfg. Co.*, (Mich. 1904) 101 N. W. Rep. 804; *Laclede Constr. Co. v. T. J. Moss Tie Co.*, 185 Mo. 25; *American Soda Fountain Co. v. Gerer's Bakery*, 14 Okla. 258; *Oliver v. Oregon Sugar Co.*, 42 Oregon 276; *Sherman Oil, etc., Co. v. Dallas Oil, etc., Co.*, (Tex. Civ. App. 1903) 77 S. W. Rep. 961; *Excelsior Wrapper Co. v. Messinger*, 116 Wis. 549. And see generally the title PAROL EVIDENCE, 1104. 5 *et seq.*, 1108. 2 *et seq.*

Usage of Trade May Be Shown to Explain Technical Terms. — *Soper v. Tyler*, 77 Conn. 104; *Morris v. Supplee*, 208 Pa. St. 253; *Gehl v. Milwaukee Produce Co.*, 116 Wis. 263.

1040. 1. Entire or Severable Contracts. — *Barrie v. Jerome*, 112 Ill. App. 329; *Spring v. Slayden-Kirksey Woolen Mills*, 106 Ill. App. 579; *Toby Furniture Co. v. Macmaster*, 12 Quebec K. B. 34.

3. Property Not Owned by Seller. — *Boulden*

1042. 2. Existence of Thing Sold — Potential Existence. — See note 5.

1043. See note 1.

3. After-acquired Property. — See note 5.

1045. IV. WHEN TITLE PASSES — 1. Executed and Executory Contracts Distinguished. — See note 3.

1046. See notes 1, 2.

1047. See note 1.

2. Intention Governs. — See note 4.

1048. See note 1.

1049. See notes 1, 6.

3. Rules as to Presumed Intention — *a.* SOMETHING REMAINING TO BE DONE. — See note 8.

1050. See note 1.

Goods to Be Shipped or Delivered. — See note 2.

v. Gough, 4 Penn. (Del.) 48; *Padgett v. Ford*, 117 Ga. 508; *Charles Moe Co. v. J. H. Logue Co.*, 108 Ill. App. 128; *Ball-Barnhart-Putman Co. v. Lane*, 135 Mich. 275; *Nichols v. Monjeau*, 132 Mich. 582; *Mensing v. Steiner-Mendinger Co.*, (Neb. 1903) 94 N. W. Rep. 633; *McQuale v. North American Smelting Co.*, 208 Pa. St. 504; *Ullman v. Biddle*, 53 W. Va. 415.

1042. 5. Potential Existence. — *Robinson v. Stricklin*, (Neb. 1905) 102 N. W. Rep. 479, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1042, but holding that the case at bar did not come within the rule.

1043. 1. Crops to Be Grown. — *Losecco v. Gregory*, 108 La. 648; *Glass v. Blazer*, 91 Mo. App. 564.

5. Sale of After-acquired Property Valid. — *Northington-Munger-Pratt Co. v. Farmers Gin, etc.*, Co., 119 Ga. 851, holding that the obligation may be made conditional upon the seller's ability to acquire the property.

1045. 3. Delivery Not Essential as Between Parties. — *Bill v. Fuller*, 146 Cal. 50; *Warner v. Warner*, 30 Ind. App. 578; *Glass v. Blazer*, 91 Mo. App. 564; *Richardson v. Insurance Co. of North America*, 136 N. Car. 314; *La Vie v. Toozee*, (Oregon 1905) 79 Pac. Rep. 413.

1046. 1. Executory Contracts of Sale. — *Low v. Broad*, (Tex. Civ. App. 1903) 77 S. W. Rep. 28.

2. Risk of Loss. — *Florence, etc., R. Co. v. Tennant*, 32 Colo. 71; *O'Donnell v. Wing*, 121 Ga. 717; *McCulloch v. Armstrong*, 118 Ga. 424; *Allen v. Elmore*, 121 Iowa 241; *Forsman v. Mace*, 111 La. 28; *Plunger Elevator Co. v. Day*, 184 Mass. 130; *Conkling v. Nicholas*, 133 Mich. 651; *Lummis v. Millville Mfg. Co.*, (N. J. 1905) 60 Atl. Rep. 219; *Richardson v. Insurance Co. of North America*, 136 N. Car. 314; *Porter v. Bridgers*, 132 N. Car. 92; *Orthwein v. Wichita Mills, etc., Co.*, 32 Tex. Civ. App. 600.

Sale of Future Crop — Loss Held to Fall on Buyer. — *Losecco v. Gregory*, 108 La. 648.

1047. 1. Rights of Third Persons. — *Low v. Broad*, (Tex. Civ. App. 1903) 77 S. W. Rep. 28.

4. Intention Governs. — *Gibson v. Chicago Packing, etc., Co.*, 108 Ill. App. 100; *Warner v. Warner*, 30 Ind. App. 578; *Barber v. Thomas*, 66 Kan. 463; *Forsman v. Mace*, 111 La. 28; *Frazier v. Atchison, etc., R. Co.*, 104 Mo. App. 355; *Buskirk v. Peck*, 57 W. Va.

360; *Roberts v. McWatty*, 123 Wis. 598; *Fromme v. O'Donnell*, 124 Wis. 529; *State v. Wharton*, 117 Wis. 558.

Contract Providing for Future Acceptance — Title Does Not Pass. — *In re Schujahn*, 120 Fed. Rep. 938, 57 C. C. A. 228.

1048. 1. Province of Court and Jury. — *Browning v. McNear*, 145 Cal. 277; *Wesoloski v. Wysoski*, 186 Mass. 495; *Adlam v. McKnight*, 32 Mont. 349, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1048; *Richardson v. Insurance Co. of North America*, 136 N. Car. 314.

1049. 1. Construction of Contract Question for Court. — *Buskirk v. Peck*, 57 W. Va. 360, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1048, 1049.

6. When Formal Delivery Unnecessary. — *Kessler v. Manhein*, 114 La. 619.

8. Presumption Against Passing of Title — *Arkansas*. — *Deutsch v. Dunham*, 72 Ark. 141, 105 Am. St. Rep. 21.

California. — *Mason v. Lievre*, 145 Cal. 514.

Georgia. — *Brunswick Grocery Co. v. Lamar*, 116 Ga. 1.

Iowa. — *Augustine v. McDowell*, 120 Iowa 401; *Allen v. Elmore*, 121 Iowa 241.

Minnesota. — *Potter v. Holmes*, 87 Minn. 477.

New York. — *Bayne v. Hard*, 77 N. Y. App. Div. 251, affirmed 174 N. Y. 534.

North Carolina. — *Porter v. Bridgers*, 132 N. Car. 92, 43 S. E. Rep. 551.

Ohio. — *Rheinstrom v. Steiner*, 69 Ohio St. 452, 100 Am. St. Rep. 699.

Oregon. — *Backhaus v. Buells*, 43 Oregon 569; *La Vie v. Toozee*, 43 Oregon 590; *La Vie v. Crosby*, 43 Oregon 612.

Washington. — *Robinson v. Thoma*, 30 Wash. 129.

Canada. — *Lee v. Culp*, 8 Ont. L. Rep. 210.

1050. 1. Presumption May Be Rebutted. — *Mayberry v. Lilly Mill Co.*, 112 Tenn. 564; *Buskirk v. Peck*, 57 W. Va. 360; *Fromme v. O'Donnell*, 124 Wis. 529; *State v. Wharton*, 117 Wis. 558; *Roberts v. McWatty*, 123 Wis. 598.

2. Goods to Be Shipped or Delivered. — *Hunter Bros. Milling Co. v. Kramer*, (Kan. 1905) 80 Pac. Rep. 963, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1050; *Northern Supply Co. v. Wangard*, 117 Wis. 624, 98 Am. St. Rep. 963.

1051. Goods to Be Weighed or Measured. — See note 1.

b. SALE OF SPECIFIC CHATTELS UNCONDITIONALLY. — See notes 2, 3.

1052. See notes 1, 2, 3.

1053. See notes 2, 3.

1054. *c.* SALE OF SPECIFIC CHATTELS CONDITIONALLY. — See note 2.

d. SALE OF CHATTELS NOT SPECIFIC — (1) *General Rule.* — See note 3.

1055. (2) *Part of Uniform Mass.* — See note 3.

1057. See note 1.

1058. See note 2.

1063. *e.* GOODS TO BE MANUFACTURED OR PROCURED. — See note 4.

1064. See note 5.

1065. See note 4.

1068. **V. DELIVERY OF GOODS — 1. Duty to Deliver.** — See note 6.

2. What Constitutes Delivery. — See note 8.

Acceptance on Arrival — Loss Pending Unloading Falls on Buyer. — *Lummis v. Millville Mfg. Co.*, (N. J. 1905) 60 Atl. Rep. 219.

1051. 1. Goods to Be Weighed or Measured. — *Colorado Trading, etc., Co. v. Oliver*, (Colo. App. 1904) 78 Pac. Rep. 308; *Allen v. Elmore*, 121 Iowa 241; *Wesolski v. Wysoski*, 186 Mass. 495; *Third Nat. Bank v. Smith*, 107 Mo. App. 178; *Allen v. Rushfort*, (Neb. 1904) 101 N. W. Rep. 1028.

2. Unconditional Sale and Delivery Passes Title. — *Craig v. Beardmore*, 7 Ont. L. Rep. 674.

3. Presumption that Title Passes in Advance of Delivery. — *In re Pease Car, etc.*, Works, 134 Fed. Rep. 919; *Mason v. Lievre*, 145 Cal. 514; *Barber v. Thomas*, 66 Kan. 463; *Third Nat. Bank v. Smith*, 107 Mo. App. 178; *McArthur v. Mathis*, 133 N. Car. 142; *La Vie v. Tooze*, (Oregon 1905) 79 Pac. Rep. 413; *Midland Nat. Bank v. Strickland*, 32 Tex. Civ. App. 91. See also *Augustine v. McDowell*, 120 Iowa 401; *Richardson v. Insurance Co. of North America*, 136 N. Car. 314.

1052. 1. Price Paid or Credit Extended. — *Bayne v. Hard*, 77 N. Y. App. Div. 251, *affirmed* 174 N. Y. 534.

2. Possession Retained as Security. — See *Buskirk v. Peck*, 57 W. Va. 360.

3. Payment a Condition Precedent in Cash Sales. — *Drake v. Scott*, 136 Ala. 261, 96 Am. St. Rep. 25; *Hilmer v. Hills*, 138 Cal. 134; *Charleston, etc., R. Co. v. Pope*, 122 Ga. 577 (involving the sale of cotton under the statute in *Georgia*); *Pate v. Wyly*, 118 Ga. 262; *Johnston v. Parrott*, 92 Mo. App. 199; *Frazier v. Atchison, etc., R. Co.*, 104 Mo. App. 355; *Hirsch v. C. W. Leatherbee Lumber Co.*, 69 N. J. L. 509; *Paulson v. Lyon*, 26 Utah 438.

1053. 2. Waiver of Requirement of Cash Payment. — *J. K. Armsby Co. v. Blum*, 137 Cal. 552; *Allen v. Rushfort*, (Neb. 1904) 101 N. W. Rep. 1028; *Albert v. R. Lewis Steiner Mfg. Co.*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 522; *Leavitt v. Rosenthal*, (Supm. Ct. App. T.) 84 N. Y. Supp. 530. See also *Third Nat. Bank v. Smith*, 107 Mo. App. 178. *Compare Drake v. Scott*, 136 Ala. 261, 96 Am. St. Rep. 25; *Paulson v. Lyon*, 26 Utah 438.

3. Conditional Delivery Not Waiver. — *Hart v. Boston, etc., R. Co.*, 72 N. H. 410.

1054. 2. Conditional Sales in General. — *In re George M. Hill Co.*, (C. C. A.) 123 Fed. Rep. 866; *Gibson v. Chicago Packing, etc., Co.*, 108 Ill. App. 100; *Plunger Elevator Co. v. Day*, 184 Mass. 130; *National Cash Register Co. v. Dehn*, (Mich. 1905) 102 N. W. Rep. 965; *Canton v. McDaniel*, 188 Mo. 207; *Fairbanks v. Baskett*, 98 Mo. App. 53; *Austin v. Welch*, 31 Tex. Civ. App. 526; *State v. Chamber of Commerce*, 121 Wis. 110. See also *Buskirk v. Peck*, 57 W. Va. 360.

3. Appropriation Necessary to Pass Title. — *Starr Brewery Co. v. Horst*, 120 Fed. Rep. 246, 58 C. C. A. 362; *Robinson v. Stricklin*, (Neb. 1905) 102 N. W. Rep. 479; *Huguenot Mills v. Jempson*, 68 S. Car. 367. *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1054; *American Hide, etc., Co. v. Chalkley*, 101 Va. 458.

1055. 3. Separation or Appropriation Held Unnecessary. — *Mason v. Lievre*, 145 Cal. 514 (by statute when parties agree on present transfer); *Adlam v. McKnight*, 32 Mont. 349 (under statute similar to that of California); *State v. Wharton*, 117 Wis. 558.

1057. 1. Separation or Appropriation Held Necessary. — *Taylor v. Fall River Ironworks*, 124 Fed. Rep. 826; *Augustine v. McDowell*, 120 Iowa 401; *Kellogg v. Frohlich*, (Mich. 1905) 102 N. W. Rep. 1057.

1058. 2. Sufficiency of Appropriation. — *Bayne v. Hard*, 77 N. Y. App. Div. 251, *affirmed* 174 N. Y. 534.

1063. 4. Completion Prima Facie Necessary. — *Haynes v. Quay*, 134 Mich. 229.

1064. 5. Title Passes upon Appropriation of Completed Article. — *William R. Trigg Co. v. Bucyrus Co.*, (Va. 1905) 51 S. E. Rep. 174.

1065. 4. Materials Furnished by Seller. — *Reid v. Macbeth*, (1904) A. C. 223.

1068. 6. See *Trinidad Asphalt Mfg. Co. v. Trinidad Asphalt Refining Co.*, 119 Fed. Rep. 134, 55 C. C. A. 566; *Anaconda Copper Min. Co. v. Houston*, 107 Ill. App. 183.

8. Placing Goods at Disposal of Buyer. — *Davis v. Alpha Portland Cement Co.*, 134 Fed. Rep. 274; *Kessler v. Manhein*, 114 La. 610, *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1068; *Ellis v. Riddick*, 34 Tex. Civ. App. 256; *Lum v. Hale*, (Tex. Civ. App. 1903) 75 S. W. Rep. 359.

1069. See note 4.

3. Place of Delivery. — See notes 6, 7, 8.

1070. See notes 7, 9.

1071. **5. Delivery to Carrier for Shipment.** — See notes 1, 2, 3, 4.

1072. See notes 3, 4, 5, 8, 10, 11.

1073. **7. Time of Delivery** — *a.* IN GENERAL. — See notes 1, 3, 5, 6.

1069. **4. Province of Court and Jury.** — *Lummis v. Millville Mfg. Co.*, (N. J. 1905) 60 Atl. Rep. 219.

6. Place Fixed by Contract. — *Moore v. U. S.*, 196 U. S. 157; *Fairbanks v. Midvale Min., etc., Co.*, 105 Mo. App. 644; *International Money Box Co. v. Southern Trust, etc., Co.*, 93 N. Y. App. Div. 309; *Goderich v. Holmes*, 32 Can. Sup. Ct. 211.

7. Presumption in Absence of Contract. — *Contra in Quebec*, *Lipschitz v. Rittner*, 4 Quebec Pr. 311.

8. Morel v. Stearns, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 639.

Delivery at Buyer's Office Sufficient. — *H. Krantz Mfg. Co. v. Gould Storage Battery Co.*, 83 N. Y. App. Div. 133.

1070. **7. Failure to Give Notice.** — *Buedingen Mfg. Co. v. Royal Trust Co.*, 90 N. Y. App. Div. 267, *affirmed* 181 N. Y. 563.

9. Change After Designation. — See *Acme Wood-flooring Co. v. Sutherland-Innes Co.*, 9 Com. Cas. (Eng.) 170.

1071. **1. Delivery to Carrier as Buyer's Agent.** — *Easton v. Wostenholm*, (C. C. A.) 137 Fed. Rep. 524; *National Bank v. Baltimore, etc., R. Co.*, 99 Md. 661, 105 Am. St. Rep. 321; *Alt-house v. McMillan*, 132 Mich. 145; *R. J. Schwab, etc., Co. v. Frieze*, 107 Mo. App. 553; *Third Nat. Bank v. Smith*, 107 Mo. App. 178; *Butts v. Hensey*, (Neb. 1905) 102 N. W. Rep. 1011; *Greif v. Seligman*, (Tex. Civ. App. 1904) 82 S. W. Rep. 533; *Keller v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 669; *Orthwein v. Wichita Mill, etc., Co.*, 32 Tex. Civ. App. 600.

Delivery Must Be as Good as If Made to Buyer Personally. — *Price v. Engelke*, 68 N. J. L. 567.

2. McCullough v. Armstrong, 118 Ga. 424; *Weil v. Stone*, 33 Ind. App. 112.

3. Freight Paid by Seller. — *State v. Intoxicating Liquors*, 98 Me. 464 (payment of express charges).

4. Hunter Bros. Milling Co. v. Kramer, (Kan. 1905) 80 Pac. Rep. 963.

1072. **3. Goods Sent C. O. D.** — *State v. Intoxicating Liquors*, 98 Me. 464; *Keller v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 669.

4. Consignment to Seller. — *McHenry v. Bulifant*, 207 Pa. St. 15.

Bill of Lading with Draft Attached — Title Remains in Seller. — *Portland Flouring Mills Co. v. British, etc., Marine Ins. Co.*, (C. C. A.) 130 Fed. Rep. 860; *Grayson County Nat. Bank v. Nashville, etc., R. Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 1094. See also *Hilmer v. Hills*, 138 Cal. 134.

5. Carrier as Seller's Agent. — *Herring-Hall-Marvin Co. v. Smith*, 43 Oregon 315; *Greif v. Seligman*, (Tex. Civ. App. 1904) 82 S. W. Rep. 533.

8. Notice of Shipment. — See *Steinhardt v. Bingham*, 90 N. Y. App. Div. 149, *affirmed* 182

N. Y. 326, wherein terms of the contract required notice.

10. Delivery of Bill of Lading. — *Cox v. Indiana Drug, etc., Co.*, (Miss. 1905) 37 So. Rep. 835.

11. Delivery F. O. B. — *J. K. Armsby Co. v. Blum*, 137 Cal. 552; *Hunter Bros. Milling Co. v. Kramer*, (Kan. 1905) 80 Pac. Rep. 963; *Samuel M. Lawder, etc., Co. v. Albert Mackie Grocery Co.*, 97 Md. 1; *Fairbanks v. Midvale Min., etc., Co.*, 105 Mo. App. 644; *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989; *Murphy v. Sagola Lumber Co.*, 125 Wis. 363.

Delivery to an Express Company Delivery to Purchaser. — *International Money Box Co. v. Southern Trust, etc., Co.*, 93 N. Y. App. Div. 309.

The Seller Is Ordinarily under No Obligation to Furnish Cars, under a contract for delivery f. o. b. *Evanston Elevator, etc., Co. v. Castner*, 133 Fed. Rep. 409; *Baltimore, etc., R. Co. v. Steel Rail Supply Co.*, (C. C. A.) 123 Fed. Rep. 655; *Hughes v. Knott*, 138 N. Car. 105. But see *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989. But the intention of the parties will control. *Davis v. Alpha Portland Cement Co.*, 134 Fed. Rep. 274.

1073. **1. Delivery Within Reasonable Time.** — *Oklahoma Vinegar Co. v. Hamilton*, 132 Ala. 593; *Soper v. Tyler*, 77 Conn. 104; *Walker v. Taylor*, 4 Penn. (Del.) 118; *Northington-Munger Pratt Co. v. Farmers' Gin, etc., Co.*, 119 Ga. 851, 100 Am. St. Rep. 210 (applying the rule under a contract to sell property to be acquired by the seller); *Conkling v. Nicholas*, 133 Mich. 651; *H. Krantz Mfg. Co. v. Gould Storage Battery Co.*, 83 N. Y. App. Div. 133.

3. What Is Reasonable Time Question for Jury. — *Dunn v. Mayo Mills*, (C. C. A.) 134 Fed. Rep. 804.

5. Performance by Buyer. — *Cottrell v. Smokeless Fuel Co.*, 129 Fed. Rep. 174; *Evanston Elevator, etc., Co. v. Castner*, 133 Fed. Rep. 409; *Baltimore, etc., R. Co. v. Steel Rail Supply Co.*, (C. C. A.) 123 Fed. Rep. 655 (failure of buyer to give shipping orders); *O'Brien v. Higley*, 162 Ind. 316; *Crusell v. Hermitage Planting, etc., Co.*, 114 La. 920; *Whitaker v. Sterling*, 136 Mich. 671; *Bonds v. Thomas J. Lipton Co.*, 85 Miss. 209; *Kiley v. Lee Canning Co.*, 105 N. Y. App. Div. 633; *Price v. New York*, 104 N. Y. App. Div. 198, *appeal dismissed* 182 N. Y. 516; *Hughes v. Knott*, 138 N. Car. 105; *Wells-Jones Plow Co. v. Deeds*, 1 Tenn. Ch. App. 400.

6. Time Fixed by Contract. — *Heidelbaugh v. Cranston*, 4 Penn. (Del.) 464; *White-Branch-McConkin-Shelton Hat Co. v. Carson*, 77 S. W. Rep. 366, 25 Ky. L. Rep. 1230; *Stock v. Towle*, 97 Me. 408; *James v. Crown Cereal Co.*, 90 Mo. App. 227; *Wall v. St. Joseph Artesian*

- 1074.** See notes 1, 2, 3, 5, 7, 8.
1075. See notes 1, 2.
1076. *c.* WITH REFERENCE TO PAYMENT OF PRICE. — See note 3.
1077. *d.* POSTPONEMENT OF DELIVERY. — See note 3.
8. Quantity to Be Delivered. — See note 5.
1078. See note 2.
1079. See notes 1, 2, 3.
1080. See notes 1, 2.
1081. 9. Quality to Be Delivered. — See note 4.

Ice, etc., Co., 112 Mo. App. 659; Price *v.* Engelke, 68 N. J. L. 567; Morel *v.* Stearns, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 639; Birkett *v.* Nichols, 98 N. Y. App. Div. 631; Wilson *v.* J. H. Flickinger Co., 76 N. Y. App. Div. 399.

1074. 1. Kellogg *v.* Frohlich, (Mich. 1905) 102 N. W. Rep. 1057, holding, however, that if, after the contract time has passed, the buyer offers to take the goods and pay the contract price, the seller must accept or he waives his claim for damages for the original breach.

2. See Fish *v.* Spicer, 77 Conn. 717.

Time May Be Extended by Agreement. — A. B. Farquhar Co. *v.* New River Mineral Co., 87 N. Y. App. Div. 329.

3. Time to Be Designated by Buyer — Failure to Give Shipping Directions. — See Wells *v.* Hartford Manilla Co., 76 Conn. 27.

Conflict Between Oral and Written Directions. — See Kiley *v.* Lee Canning Co., 105 N. Y. App. Div. 633.

5. Construction of Contract as to Time. — Danziger *v.* Pittsfield Shoe Co., 204 Ill. 145; Reed *v.* Illinois Cent. R. Co., 75 S. W. Rep. 200, 25 Ky. L. Rep. 389; Crusel *v.* Hermitage Planting, etc., Co., 114 La. 920; Jaques *v.* Parker, 188 Mass. 94; Carter *v.* Dodd, 186 Mass. 386; Nelson *v.* Hirsch, etc., Iron, etc., Co., 102 Mo. App. 498; Branower *v.* Independent Match Co., 83 N. Y. App. Div. 370; Kallis *v.* Lissberger, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 773; Hume *v.* Netter, (Tex. Civ. App. 1903) 72 S. W. Rep. 865.

Delivery by "Transit Car" Means Car Already Loaded. — Stock *v.* Towle, 97 Me. 408.

7. Gehl *v.* Milwaukee Produce Co., 116 Wis. 263.

8. Waiver of Delay. — Austin Mfg. Co. *v.* Snouffer, (Iowa 1905) 102 N. W. Rep. 128; Medart Pulley Co. *v.* Dubuque Turbine, etc., Co., 121 Iowa 244; Chattanooga Car, etc., Co. *v.* Lefebvre, 113 La. 487; Sutton *v.* Clarke, 42 Oregon 525.

1075. 1. "At Once." — See Oklahoma Vinegar Co. *v.* Hamilton, 132 Ala. 593.

"As Early as Possible." — See Chattanooga Car, etc., Co. *v.* Lefebvre, 113 La. 487.

2. Delivery "As Wanted" Does Not Mean "If Wanted." — Dunn *v.* Mayo Mills, (C. C. A.) 134 Fed. Rep. 804. See also Bill *v.* Fuller, 146 Cal. 50.

1076. 3. Payment and Delivery Concurrent. — See *infra*, this title, **1095. 1.**

1077. 3. Gehl *v.* Milwaukee Produce Co., 116 Wis. 263.

5. Quantity Fixed by Contract. Pittsburgh Plate Glass Co. *v.* Kerlin Bros. Co., 122 Fed.

Rep. 414, 58 C. C. A. 648; Shreveport Cotton Oil Co. *v.* Friedlander, 112 Ga. 1059; Price *v.* Engelke, 68 N. J. L. 567; U. S. Iron Co. *v.* Sloss-Sheffield Steel, etc., Co., 71 N. J. L. 1.

1078. 2. Exact Quantity Must Be Delivered. — Kalamazoo Corset Co. *v.* Simon, 129 Fed. Rep. 144, *affirmed* (C. C. A.) 129 Fed. Rep. 1005; Heidelberg *v.* Cranston, 4 Penn. (Del.) 464.

Purchaser Must Return Excess or Pay for It. — Levino *v.* Moore Co., 97 N. Y. App. Div. 109.

1079. 1. Buyer Liable for What He Receives and Retains. — Heidelberg *v.* Cranston, 4 Penn. (Del.) 464; Mead *v.* Rat Portage Lumber Co., 93 Minn. 343.

2. Refusal to Accept Deliveries — Subsequent Resumption of Acceptance Does Not Waive Prior Breach by Seller. — Helper *v.* MacKinnon Mfg. Co., (Mich. 1904) 101 N. W. Rep. 804.

3. Entire Contract — Acceptance of Part. — Delaware, etc., Canal Co. *v.* Mitchell, 211 Ill. 379; Salmon *v.* Brandmeier, 104 N. Y. App. Div. 66.

1080. 1. Particular Contracts Construed. — Delaware, etc., Canal Co. *v.* Mitchell, 211 Ill. 379; Scully *v.* Detroit Iron Furnace Co., 132 Mich. 333; New York Cent. Iron Works Co. *v.* U. S. Radiator Co., 174 N. Y. 331.

Uncertain Quantity — Want of Mutuality. — See Higbie *v.* Rust, 211 Ill. 333; Excelsior Wrapper Co. *v.* Messinger, 116 Wis. 549.

Amount May Become Fixed by Act of Parties. — Hathaway *v.* O'Gorman Co., 26 R. I. 476.

Estimate of Probable Output Not Guaranty. — Hatfield *v.* Thomas Iron Co., 208 Pa. St. 478.

2. "About," "More or Less," Etc. — See Pittsburgh Plate Glass Co. *v.* Kerlin Bros. Co., 122 Fed. Rep. 414, 58 C. C. A. 648; Moore *v.* U. S., 196 U. S. 157; Sherman Oil, etc., Co. *v.* Dallas Oil, etc., Co., (Tex. Civ. App. 1903) 77 S. W. Rep. 961. And see **ABOUT, 196. 3 et seq.**, and the title **MORE OR LESS, 873. 1 et seq.**

Quantity Between Two Amounts — Option with Purchaser. — A. B. Farquhar Co. *v.* New River Mineral Co., 87 N. Y. App. Div. 329; Ready *v.* J. L. Fulton Co., 179 N. Y. 399.

Contract to Furnish for Particular Use — No Breach for Failure to Furnish for Other Use. — Laclede Constr. Co. *v.* T. J. Moss Tie Co., 185 Mo. 25.

1081. 4. Particular Contracts Construed — United States. — H. D. Williams Cooperage Co. *v.* Scofield, 125 Fed. Rep. 916, 60 C. C. A. 564; McNamara *v.* Home Land, etc., Co., 121 Fed. Rep. 707, 58 C. C. A. 245.

Alabama. — Shackelford *v.* Sloss Iron, etc., Co., 140 Ala. 329.

- 1081.** 10. Inspection by Buyer. — See note 6.
1082. See notes 1, 2, 4, 5, 6, 7, 8, 9, 10.
1083. 11. Mode of Delivery — *b.* DELIVERY BY INSTALMENTS. — See note 2.
1084. See notes 1, 3.
c. SYMBOLICAL OR CONSTRUCTIVE DELIVERY. — See notes 5, 7.
1085. See note 3.
1086. See note 3.

Iowa. — Redhead *v.* Wyoming Cattle Invest. Co., 126 Iowa 410.

Louisiana. — Shreveport Cotton Oil Co. *v.* Friedlander, 112 La. 1059; Barrow *v.* Penick, 110 La. 572.

Maryland. — Joseph Joseph, etc., Co. *v.* Schonthal Iron, etc., Co., 99 Md. 382.

Missouri. — Hess *v.* Corwin, 109 Mo. App. 22; Brockman Commission Co. *v.* Kilbourne, 111 Mo. App. 542.

New York. — Cooper *v.* Payne, 103 N. Y. App. Div. 118; Drucklieb *v.* Universal Tobacco Co., 106 N. Y. App. Div. 470; James *v.* Libby, 103 N. Y. App. Div. 256; Falkenberg *v.* O'Neill, (Supm. Ct. App. T.) 88 N. Y. Supp. 378.

Ohio. — Rheinstrom *v.* Steiner, 69 Ohio St. 452, 100 Am. St. Rep. 699.

Compare Walker *v.* Taylor, 4 Penn. (Del.) 118.

1081. 6. Seller Must Allow Buyer to Inspect. — Weil *v.* Stone, 33 Ind. App. 112; Cooper *v.* Payne, 103 N. Y. App. Div. 118; Hardt *v.* Western Electric Co., 84 N. Y. App. Div. 249; Parker *v.* Fenwick, 138 N. Car. 209; Lenz *v.* Blake-McFall Co., 44 Oregon 569; Ellis *v.* Riddick, 34 Tex. Civ. App. 256; Northern Supply Co. *v.* Wangard, 117 Wis. 624, 98 Am. St. Rep. 963.

Purchaser Has Reasonable Time for Making Test. — Von Dohren *v.* John Deere Plow Co., (Neb. 1904) 98 N. W. Rep. 830.

1082. 1. Thick *v.* Detroit, etc., R. Co., 137 Mich. 708.

Slight Temporary Denial of Inspection Not Ground for Canceling Contract. — Naas *v.* Welter, 92 Minn. 404.

2. Refusal to Inspect. — Brooke *v.* Hill, 65 S. Car. 142.

4. Reasonable Time. — Drucklieb *v.* Universal Tobacco Co., 106 N. Y. App. Div. 470.

5. Stipulations as to Inspection. — Haegerstrand *v.* Anne Thomas Steamship Co., 10 Com. Cas. (Eng.) 67; Labrecque *v.* Duckett, 22 Quebec Super. Ct. 135; Cady *v.* Turnbull, (Ark. 1905, 84 S. W. Rep. 1025; Reed Smokeless Furnace Co. *v.* State, 34 Ind. App. 265; McCormick Harvesting Mach. Co. *v.* Dodkins, 73 S. W. Rep. 1129, 24 Ky. L. Rep. 2306; Davis *v.* Allen, 77 S. W. Rep. 1125, 25 Ky. L. Rep. 1424; Carr *v.* Loudon, 79 S. W. Rep. 211, 25 Ky. L. Rep. 1984; Potter *v.* Holmes, 87 Minn. 477; Beck, etc., Iron Co. *v.* Holbeck, 109 Mo. App. 179; Pratt *v.* Langston Mercantile Co., 111 Mo. App. 96.

Articles to Pass Particular Test. — See Underfeed Stoker Co. *v.* Hudson County Consumers' Brewing Co., 70 N. J. L. 649; Eureka Fire Hose Co. *v.* Reynolds, (Supm. Ct. App. T.) 86 N. Y. Supp. 753; Wheeler Condenser, etc., Co.

v. R. G. Packard Co., 83 N. Y. App. Div. 288, affirmed 178 N. Y. 571.

Full Contract Time Need Not Be Taken. — Haney-Campbell Co. *v.* Preston Creamery Assoc., 119 Iowa 188.

6. Delivery Incomplete until Inspection and Acceptance. — Northern Supply Co. *v.* Wangard, 117 Wis. 624, 98 Am. St. Rep. 963.

7. Waiver of Inspection. — Hano *v.* Simons, (Supm. Ct. App. T.) 92 N. Y. Supp. 337; Pratt *v.* S. Freeman, etc., Mfg. Co., 115 Wis. 648; Labrecque *v.* Duckett, 22 Quebec Super. Ct. 135.

8. Place of Inspection. — Atkinson *v.* Plimpton, 6 Ont. L. Rep. 566.

9. Possession for Purpose of Inspection. — Creamery Package Mfg. Co. *v.* Benton County Creamery Co., 120 Iowa 584; White-Branch-McConkin-Shelton Hat Co. *v.* Carson, 77 S. W. Rep. 366, 25 Ky. L. Rep. 1230; Hardt *v.* Western Electric Co., 84 N. Y. App. Div. 249; Northern Supply Co. *v.* Wangard, 117 Wis. 624, 98 Am. St. Rep. 963.

10. Notice of Result of Inspection. — See Jacobson *v.* Tallard, 116 Wis. 662, in which case, however, the rule was held not to be applicable.

1083. 2. Breach as to One Instalment. — Town *v.* Jepson, 133 Mich. 673; La Vallette *v.* Booth, 131 N. Car. 36 (upholding the purchaser's right to refuse to receive further instalments); Parker *v.* McKannon, 76 Vt. 96.

1084. 1. Baylis *v.* Weibezahl, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 178.

3. Severable Contracts. — Iowa Brick Mfg. Co. *v.* Herrick, 126 Iowa 721; Southern Car Mfg., etc., Co. *v.* Scullin-Gallagher Iron, etc., Co., (Tex. Civ. App. 1905) 85 S. W. Rep. 845.

5. Symbolical or Constructive Delivery Sufficient. — *In re* Pease Car, etc., Works, 134 Fed. Rep. 919; Avery Mfg. Co. *v.* Emsweller, 31 Ind. App. 291; Ott *v.* Sutcliffe, (N. J. 1905) 60 Atl. Rep. 965; Salmon *v.* Brandmeier, 104 N. Y. App. Div. 66.

7. Transfer of Warehouse Receipt. — *Contra*, where actual delivery is required by the contract. Gehl *v.* Milwaukee Produce Co., 116 Wis. 263.

1085. 3. Bill of Lading. — Jones-Pope Produce Co. *v.* Breedlove, (Ark. 1904) 83 S. W. Rep. 924; National Bank *v.* Baltimore, etc., R. Co., 99 Md. 661, 105 Am. St. Rep. 321; McKelvey *v.* Perham, 31 Mont. 602; Mitchell *v.* Baker, 208 Pa. St. 377; Orthwein *v.* Wichita Mill, etc., Co., 32 Tex. Civ. App. 600; Grayson County Nat. Bank *v.* Nashville, etc., R. Co., (Tex. Civ. App. 1904) 79 S. W. Rep. 1094.

1086. 3. Goods in Possession of Buyer. — McArthur *v.* Mathis, 133 N. Car. 142.

1086. 12. Excuse for Nondelivery or Delay — Destruction by Accident. — See note 6.

Repudiation of the Contract. — See note 7.

1087. See notes 1, 2, 3, 4.

Waiver or Consent. — See notes 5, 6.

Delay or Nondelivery Caused by the Buyer. — See note 7.

Mere Inability to Perform. — See note 8.

Mere Difficulty or Inconvenience. — See note 9.

The Contract Itself May Limit Liability. — See note 10.

1088. VI. ACCEPTANCE OF GOODS — 1. Duty to Accept. — See note 3.

2. What Constitutes Acceptance — a. IN GENERAL. — See notes 6, 7, 8.

1086. 6. Destruction of Mill Excuses Nondelivery of Mill's Product. — *Blodgett v. Johnson*, 72 N. H. 92.

7. Repudiation of Contract by Buyer. — *Lincoln v. Levi Cotton Mills Co.*, 128 Fed. Rep. 865, 63 C. C. A. 333; *Levy v. Glassberg*, (Supm. Ct. App. T.) 92 N. Y. Supp. 50; *Murphy v. Sagola Lumber Co.*, 125 Wis. 363.

1087. 1. Refusal to Accept Goods. — *Cousins v. Bowling*, 100 Mo. App. 452; *Lapham v. Bossemeyer*, (Neb. 1904) 98 N. W. Rep. 699.

2. Refusal to Pay Price. — *Ainsworth v. Roush*, 109 Ill. App. 299; *Newell v. New Holstein Canning Co.*, 119 Wis. 635.

3. Demands Inconsistent with Contract. — See *Cooney v. McKinney*, 25 Utah 329.

4. Severable Contract. — *Iowa Brick Mfg. Co. v. Herrick*, 126 Iowa 721; *Campbell, etc., Co. v. Weisse*, 121 Wis. 491 (holding that though a part of the goods delivered have not been paid for, the purchaser may sue for failure to deliver the balance).

5. Waiver or Consent. — *Jaques v. Parker*, 188 Mass. 94 (holding the evidence of waiver sufficient); *General Electric Co. v. National Contracting Co.*, 178 N. Y. 369. See also *Inman Mfg. Co. v. American Cereal Co.*, 124 Iowa 737.

Purchaser's Consent to Delay Not Available to Seller unless Communicated to Him. — *Birkett v. Nichols*, 98 N. Y. App. Div. 631.

Transaction Not Amounting to Waiver. — See *Nebraska Bridge Supply, etc., Co. v. Conway*, (Iowa 1905) 103 N. W. Rep. 122.

6. Question for Jury. — *Faddis v. Mason*, (C. C. A.) 122 Fed. Rep. 410.

7. Prevention by Buyer. — *Kelly v. Fahrney*, (C. C. A.) 123 Fed. Rep. 280; *Pierce v. Lukens*, 144 Cal. 397; *O'Brien v. Higley*, 162 Ind. 316; *Whitaker v. Sterling*, 136 Mich. 671; *Nelson v. Hirsch, etc., Iron, etc., Co.*, 102 Mo. App. 498; *Butler v. Hirzel*, 87 N. Y. App. Div. 462, *affirmed* 181 N. Y. 520; *McAvoy v. Commonwealth Title Ins., etc., Co.*, 27 Pa. Super. Ct. 271.

8. Inability to Perform. — *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182. See also *Newell v. New Holstein Canning Co.*, 119 Wis. 635.

Legal Interference Held to Excuse Nondelivery. — *J. H. Labaree Co. v. Crossman*, 100 N. Y. App. Div. 499.

9. Difficulty or Inconvenience. — *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182.

Interruption of Navigation No Excuse Where Delivery Possible Overland. — *Fleishman v. Meyer*, (Oregon 1905) 80 Pac. Rep. 209.

10. Contract Stipulations. — *Jessup, etc., Paper*

Co. v. Piper, 133 Fed. Rep. 108; *Union Trust Co. v. Webber-Seely Hardware Co.*, 73 Ark. 584 (holding, however, that nondelivery was not excused in the case at bar); *Arnold v. Malsby*, 120 Ga. 586; *Widman v. Straukamp*, (Supm. Ct. App. T.) 94 N. Y. Supp. 18; *Hatfield v. Thomas Iron Co.*, 208 Pa. St. 478.

Strikes — Operation of Contract Suspended, Not Avoided. — *Cottrell v. Smokeless Fuel Co.*, 129 Fed. Rep. 174.

Purchaser Not Required to Consent to Reduction of Quantity. — *Indian Mountain Jellico Coal Co. v. Asheville Ice, etc., Co.*, 134 N. Car. 574.

1088. 3. Moore v. U. S., 196 U. S. 157; *Lehman v. Salzgeber*, 124 Fed. Rep. 479; *Faddis v. Mason*, (C. C. A.) 122 Fed. Rep. 410; *Kirwan v. Roberts*, 99 Md. 341; *Backes v. Black*, (Neb. 1903) 97 N. W. Rep. 321; *Drucklieb v. Universal Tobacco Co.*, 106 N. Y. App. Div. 470.

6. Acceptance Distinguished from Receipt. — *In re George M. Hill Co.*, (C. C. A.) 123 Fed. Rep. 866; *Hardt v. Western Electric Co.*, 84 N. Y. App. Div. 249.

Taking Possession for the Purpose of Separating from the Mass the particular articles purchased is not an acceptance rendering the purchaser liable for the mass. *Jacobson v. Tallard*, 116 Wis. 662.

Mere Possession and Use under Objections to the Quality of the goods, in reliance on promises of the seller to correct defects or forego payment, will not constitute acceptance. *Kernan v. Crook*, 100 Md. 210.

7. Province of Court and Jury. — *Olcese v. Mobile Fruit, etc., Co.*, 211 Ill. 539; *Courtney v. William Knabe, etc., Mfg. Co.*, 97 Md. 499, 99 Am. St. Rep. 456 (holding that in the case at bar the question was one of law under all the testimony); *Springfield Engine Stop Co. v. Sharp*, 184 Mass. 266; *Baylis v. Weihezahl*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 178; *Cooper v. Payne*, 103 N. Y. App. Div. 118; *Parker v. Fenwick*, 138 N. Car. 209; *Loeper v. Haas*, 24 Pa. Super. Ct. 184. See also *McCormick Harvesting Mach. Co. v. Machmuller*, (Neb. 1901) 95 N. W. Rep. 507.

8. Sufficiency of Evidence to Show Acceptance. — *Inman Mfg. Co. v. American Cereal Co.*, 124 Iowa 737; *White-Branch-McConkin-Shelton Hat Co. v. Carson*, 77 S. W. Rep. 366, 25 Ky. L. Rep. 1230, *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1088; *Drucklieb v. Universal Tobacco Co.*, 106 N. Y. App. Div. 470. See also *Kinnard Press Co. v. Stanley*, 70 Kan. 770.

1089. See notes 2, 3.

b. DELAY IN REJECTION. — See note 4.

1090. See notes 1, 2, 3, 5, 6, 7, 8, 9.

1091. *c.* ACTS OF OWNERSHIP. — See notes 2, 3.

d. CONDITIONAL ACCEPTANCE. — See note 4.

e. ACCEPTANCE OF INSTALMENTS. — See notes 5, 6.

Bill of Sale Prima Facie Evidence. — Knoche v. Perry, 90 Mo. App. 483.

1089. 2. Implied Acceptance. — Cooper v. Payne, 103 N. Y. App. Div. 118, holding further that a rejection must be express.

Acceptance by Payment of Price Notwithstanding Complaint of Quality. — Casselli v. Mosso, (Supm. Ct. App. T.) 90 N. Y. Supp. 371.

3. Transfer of Possession Necessary. — Creamery Package Mfg. Co. v. Benton County Creamery Co., 120 Iowa 584.

4. Unreasonable Delay in Rejection. — Watts v. National Cash Register Co., 78 S. W. Rep. 118, 25 Ky. L. Rep. 1347; McCormick Harvesting Mach. Co. v. Arnold, 116 Ky. 508; Vogel v. Moore, 84 S. W. Rep. 557, 27 Ky. L. Rep. 94; Heimann v. Hatcher Mercantile Co., 106 Mo. App. 438; Van Dohren v. John Deere Plow Co., (Neb. 1904) 98 N. W. Rep. 830; MacEvoy v. Aronson, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 622; Cooper v. Payne, 103 N. Y. App. Div. 118; H. Herrmann Lumber Co. v. Heidelberg, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 465; Lipshitz v. McConnell, 80 N. Y. App. Div. 289. See also Root, etc., Co. v. Walton Salt Assoc., (Mich. 1905) 103 N. W. Rep. 844; Aird v. Pullan, Sc. Ct. of Sess. 7 F. 258.

1090. 1. Province of Court and Jury. — Rumsey v. Bessemer, 138 Ala. 329; Hess v. Corwin, 109 Mo. App. 22; Grabfelder v. Vosburgh, 90 N. Y. App. Div. 307; Bell v. Mills, 78 N. Y. App. Div. 42; Baylis v. Weibezahl, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 178.

Where Fair-minded Men Cannot Differ Question Is for Court. — Manley v. Crescent Novelty Mfg. Co., 103 Mo. App. 135.

2. Promptness and Diligence Required. — Dinwiddie v. Nash, 86 S. W. Rep. 517, 27 Ky. L. Rep. 668; Hazen v. Wilhelmie, 68 Neb. 79.

Failure to Examine No Excuse. — Telluride Power Transmission Co. v. Crane Co., 208 Ill. 218; O'Brien v. Higley, 162 Ind. 316; George D. Sisson Lumber, etc., Co. v. Haak, (Mich. 1905) 102 N. W. Rep. 946; Watkins v. Guthrie, (Miss. 1905) 38 So. Rep. 370; Field v. Schuster, 26 Pa. Super. Ct. 82. But see Campion v. Marston, 99 Me. 410.

3. Usage and Custom. — See Abel v. Murphy, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 648.

5. Special Contract Provisions. — See Kinnard Press Co. v. Stanley, 70 Kan. 770; Underfeed Stoker Co. v. Detroit Salt Co., 135 Mich. 431.

6. Waiver of Contract Provisions. — Reed Smokeless Furnace Co. v. State, 34 Ind. App. 265; Massillon Engine, etc., Co. v. Shirmer, 122 Iowa 699; Westinghouse Co. v. Meixel, (Neb. 1904) 101 N. W. Rep. 238; Peck v. Will, etc., Co., 98 N. Y. App. Div. 628.

More Expressions of Dissatisfaction Not Sufficient. — Pennsylvania Iron Works Co. v. Hygeian Ice, etc., Co., 185 Mass. 366.

7. Retaining Possession Merely to Secure Legal

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Charges Not Acceptance. — Weeks v. Robert A. Johnson Co., 116 Wis. 105.

8. Notice of Rejection Sufficient. — Gilbert v. Alton, 88 N. Y. App. Div. 62; Hardt v. Western Electric Co., 84 N. Y. App. Div. 249; Rheinstrom v. Steiner, 69 Ohio St. 452, 100 Am. St. Rep. 699.

Cost of Return Falls on Seller. — Cincinnati Butchers' Supply Co. v. Steinmetz, (Ind. App. 1905) 73 N. E. Rep. 950; Graham v. Hatch Storage Battery Co., 186 Mass. 226.

9. Northern Supply Co. v. Wangard, 117 Wis. 624, 98 Am. St. Rep. 963.

1091. 2. Retention and Use. — Watts v. National Cash Register Co., 78 S. W. Rep. 118, 25 Ky. L. Rep. 1347; Springfield Engine Stop Co. v. Sharp, 184 Mass. 266; Hazen v. Wilhelmie, 68 Neb. 79; Van Dohren v. John Deere Plow Co., (Neb. 1904) 98 N. W. Rep. 830; Zipp Mfg. Co. v. Pastorino, 120 Wis. 176.

Retention for Trial Under Agreement Not Acceptance. — McCormick Harvesting Mach. Co. v. Machmuller, (Neb. 1901) 95 N. W. Rep. 507; Parsons Band Cutter, etc., Co. v. Gadeke, (Neb. 1901) 95 N. W. Rep. 850.

Retention as Security for Loan Not Acceptance. — Inman Mfg. Co. v. American Cereal Co., 124 Iowa 737.

Use After Notice of Rejection Constitutes Acceptance. — Graham v. Hatch Storage Battery Co., 186 Mass. 226.

Buyer Has Reasonable Time After Trial to Signify Election. — Springfield Engine Stop Co. v. Sharp, 184 Mass. 266.

3. Subsequent Sale. — Strickland v. Parlin, etc., Co., 118 Ga. 213; Vogel v. Moore, 84 S. W. Rep. 557, 27 Ky. L. Rep. 94; Lenz v. Blake-McFall Co., 44 Oregon 569. Compare Hess v. Corwin, 109 Mo. App. 22.

4. Conditional Acceptance. — James v. Libby, 103 N. Y. App. Div. 256; Backes v. Erickson, (S. Dak. 1905) 103 N. W. Rep. 21; Parr v. Northern Electrical Mfg. Co., 117 Wis. 278; New Hamburg v. Klotz, 1 West. L. Rep. (Canada) 471. See also Scully v. Detroit Iron Furnace Co., 132 Mich. 333.

Express Condition Excludes All Others. — United Engineering, etc., Co. v. Broadnax, (C. C. A.) 136 Fed. Rep. 351.

5. Acceptance of Instalments. — Shackelford v. Sloss Iron, etc., Co., 140 Ala. 329; Coburn v. California Portland Cement Co., 144 Cal. 81; Norfolk Beet Sugar Co. v. Berger, (Neb. 1901) 95 N. W. Rep. 336; Koch v. Bamford Bros. Silk Mfg. Co., 69 N. J. L. 252; U. S. Iron Co. v. Sloss-Sheffield Steel, etc., Co., 71 N. J. L. 1; American Art Metal Novelty Co. v. Bosselman, (Supm. Ct. App. T.) 91 N. Y. Supp. 722; Hardt v. Western Electric Co., 84 N. Y. App. Div. 249; Lewis v. Barré, 14 Manitoba 32. Compare Weil v. Unique Electric Device Co., (N. Y. City Ct. Gen. T.) 39 Misc. (N. Y.) 527.

Instalment Cannot Be Refused Because of Defect

1092. See note 2.3. **Excuse for Nonacceptance.** — See notes 3, 4, 9.4. **Waiver of Objections.** — See notes 10, 12.**1093.** 5. **Effect of Acceptance.** — See notes 1, 3.

in Prior Accepted Instalment. — *Baylis v. Weibezahl*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 178.

1091. 6. **Entire Contracts.** — *Barrow v. Penick*, 110 La. 572.

1092. 2. **Severable Contracts.** — *Gilbert v. Alton*, 88 N. Y. App. Div. 62.

3. **Tender Not According to Contract.** — *Withers v. Moore*, 140 Cal. 591. But see, under a stipulation for acceptance, notwithstanding that the goods were not in accordance with the contract, *Leary v. Briggs*, Sc. Ct. of Sess. 6 F. 857.

Insufficient Grounds for Refusal. — See *Equitable Mfg. Co. v. Allen*, 76 Vt. 22.

4. **Goods Not of Designated Quality.** — *Coburn v. California Portland Cement Co.*, 144 Cal. 81; *Inman Mfg. Co. v. American Cereal Co.*, 124 Iowa 737; *Joseph Joseph, etc., Co. v. Schonthal Iron, etc., Co.*, 99 Md. 382; *Hess v. Corwin*, 109 Mo. App. 22; *Lewis v. Barré*, 14 Manitoba 32.

9. **Contract Stipulations.** — *Union League Club v. Blymyer Ice Mach. Co.*, 204 Ill. 117; *Hall v. Pierce*, 83 N. Y. App. Div. 312; *Camden Iron Works v. New York*, 104 N. Y. App. Div. 272. See also *Powers v. Briggs*, (Mich. 1905) 103 N. W. Rep. 194.

If Not "Satisfactory" — Determination Rests with Purchaser. — *Collins v. Tigner*, (Del. 1905) 60 Atl. Rep. 978; *Reeves v. Chandler*, 113 Ill. App. 167; *Inman Mfg. Co. v. American Cereal Co.*, 124 Iowa 737; *Haney-Campbell Co. v. Preston Creamery Assoc.*, 119 Iowa 188; *McCormick v. Finch*, 100 Mo. App. 641; *McAfee v. Meadows*, 32 Tex. Civ. App. 105; *Parr v. Northern Electrical Mfg. Co.*, 117 Wis. 278; *Weeks v. Robert A. Johnson Co.*, 116 Wis. 105.

10. **Buyer May Waive Objections.** — *Plunger Elevator Co. v. Day*, 184 Mass. 130; *Naas v. Welter*, 92 Minn. 404.

12. *Braithwaite v. Foreign Hardwood Co.*, (1905) 2 K. B. 543; *Peterson v. Mineral King Fruit Co.*, 140 Cal. 624; *Olcese v. Mobile Fruit, etc., Co.*, 211 Ill. 539; *Parkins v. Missouri Pac. R. Co.*, (Neb. 1904) 101 N. W. Rep. 1013; *Drucklieb v. Universal Tobacco Co.*, 106 N. Y. App. Div. 470; *Manda v. Etienne*, 93 N. Y. App. Div. 609; *United Fruit Co. v. Bisese*, 25 Pa. Super. Ct. 170. But see *Kalamazoo Corset Co. v. Simon*, 129 Fed. Rep. 144, *affirmed* (C. C. A.) 129 Fed. Rep. 1005.

1093. 1. **Acceptance as Waiver of Objections** — *Alabama*. — *Dalton v. Bunn*, 137 Ala. 175; *Eastern Granite Roofing Co. v. Chapman*, 140 Ala. 440; *Gibbony v. Wayne*, 141 Ala. 300.

California. — *Browning v. McNear*, 145 Cal. 277, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1902.

Connecticut. — *Vanderbeek v. Francis*, 75 Conn. 467. But see *Watson v. Bigelow Co.*, 77 Conn. 124, holding that acceptance of a thing manufactured under a contract does not waive the right to recover damages for a noncompliance with the contract.

Georgia. — *Cook v. Finch*, 117 Ga. 541; *Moultrie Repair Co. v. Hill*, 120 Ga. 730.

Illinois. — *Telluride Power Transmission Co. v. Crane Co.*, 208 Ill. 218.

Indiana. — *O'Brien v. Higley*, 162 Ind. 316.

Kansas. — *Kinkel v. Winne*, 67 Kan. 100.

Kentucky. — *Dinwiddie v. Nash*, 86 S. W. Rep. 517, 27 Ky. L. Rep. 668.

Maryland. — *Kernan v. Crook*, 100 Md. 210.

Michigan. — *George D. Sisson Lumber, etc., Co. v. Haak*, (Mich. 1905) 102 N. W. Rep. 946; *Brown v. Harris*, (Mich. 1905) 102 N. W. Rep. 960.

Mississippi. — *Watkins v. Guthrie*, (Miss. 1905) 38 So. Rep. 370.

Missouri. — *Heimann v. Hatcher-Mercantile Co.*, 106 Mo. App. 438; *Pratt v. Langston Mercantile Co.*, 111 Mo. App. 96.

Nebraska. — *Cohen v. Hawkins*, (Neb. 1905) 104 N. W. Rep. 179; *Hazen v. Wilhelmie*, 68 Neb. 79.

New York. — *Patch v. Smith*, 105 N. Y. App. Div. 208; *Lifshitz v. McConnell*, 80 N. Y. App. Div. 289; *Cooper v. Payne*, 103 N. Y. App. Div. 118; *Casselli v. Mosso*, (Supm. Ct. App. T.) 90 N. Y. Supp. 371; *Goldstein v. Hochberg*, (Supm. Ct. App. T.) 86 N. Y. Supp. 11; *Ideal Wrench Co. v. Garvin Mach. Co.*, 92 N. Y. App. Div. 187, *affirmed* 181 N. Y. 573; *James v. Libby*, 103 N. Y. App. Div. 256. See also *Heller v. Altman*, (Supm. Ct. App. T.) 91 N. Y. Supp. 769.

North Carolina. — *Parker v. Fenwick*, 138 N. Car. 209.

Ohio. — *Bowman Lumber Co. v. Anderson*, 70 Ohio St. 16.

Texas. — *McAfee v. Meadows*, 32 Tex. Civ. App. 105.

Canada. — *Labrecque v. Duckett*, 22 Quebec Super. Ct. 135.

Compare *Florence Oil, etc., Co. v. Farrar*, 119 Fed. Rep. 150, 55 C. C. A. 656.

New Contract After Rejection Binding. — *Vodrey Pottery Co. v. H. E. Horne Co.*, 117 Wis. 1.

Acceptance under Promise to Remedy Defect — Recovery Allowed on Failure to Remedy. — *National Computing Scale Co. v. Eaves*, 116 Ga. 511. See also *E. T. Kenney Co. v. Anderson*, 81 S. W. Rep. 663, 26 Ky. L. Rep. 367; *Warder, etc., Co. v. Myers*, (Neb. 1903) 96 N. W. W. Rep. 992; *Huck v. Bischoff*, (Supm. Ct. App. T.) 84 N. Y. Supp. 173. But see *Cleveland Linseed Oil Co. v. Buchanan*, 120 Fed. Rep. 906, 57 C. C. A. 498.

3. **Breach of Warranty Not Waived.** — *Frith v. Hollan*, 133 Ala. 583, 91 Am. St. Rep. 54; *Cook v. Finch*, 117 Ga. 541; *Daily v. Smith-Hippen Co.*, 111 Ill. App. 319; *Harrigan v. Advance Thresher Co.*, 81 S. W. Rep. 261, 26 Ky. L. Rep. 317; *Fairbanks v. Baskett*, 98 Mo. App. 53; *Doyle v. Parish*, 110 Mo. App. 470; *Narr v. Norman*, 113 Mo. App. 533; *White Mfg. Co. v. De La Vergne Refrigerating Mach.*

1094. See notes 1, 3.

VII. PAYMENT OR TENDER OF PRICE — 1. In General. — See notes 5, 6, 7.

1095. See notes 1, 3, 4, 5;

2. Cash or Credit Sales. — See notes 6, 10.

1096. Where the Sale Is Made on Credit. — See notes 2, 5.

4. Payment by Instalments. — See note 7.

5. Amount. — See note 9.

1097. See note 1.

Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 192; Baylis v. Weibezahl, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 178; Miller v. F. R. Patch Mfg. Co., 101 N. Y. App. Div. 22; Tansley v. Higgins, (Supm. Ct. App. T.) 88 N. Y. Supp. 1005; Lenz v. Blake-McFall Co., 44 Oregon 569. See also Northern Supply Co. v. Wanguard, 117 Wis. 624, 98 Am. St. Rep. 963. And see *infra*, this title, **1157. 10 et seq.**, and the title **WARRANTY, 184. 8 et seq.**

1094. 1. Damages for Delay. — Poland Paper Co. v. Foote, etc., Co., 118 Ga. 458; Medart Pulley Co. v. Dubuque Turbine, etc., Co., 121 Iowa 244; Wall v. St. Joseph Artesian Ice, etc., Co., 112 Mo. App. 659. But see Lucile Min. Co. v. Fairbanks, 87 S. W. Rep. 1121, 27 Ky. L. Rep. 1100.

3. Boothe v. Squaw Springs Water Co., 142 Cal. 573; Heidelberg v. Cranston, 4 Penn. (Del.) 464; O'Brien v. Higley, 162 Ind. 316, where the delay in the first instance was caused by the purchaser.

5. Rule Applies to Contract to Sell Property to Be Acquired. — Northington-Munger-Pratt Co. v. Farmers' Gin, etc., Co., 119 Ga. 851, 100 Am. St. Rep. 210.

Cash in Exchange for Shipping Documents — Reasonable Time After Tender of Documents Allowed. — Ryan v. Ridley, 8 Com. Cas. (Eng.) 105.

6. Contract Provisions. — Union Trust Co. v. Webber-Seely Hardware Co., 73 Ark. 584; Reeves v. Lamm, 120 Iowa 283; Town v. Jepson, 133 Mich. 673; Pratt v. S. Freeman, etc., Mfg. Co., 115 Wis. 648.

7. Construction of Special Contracts. — Samuel M. Lawder, etc., Co. v. Albert Mackie Grocery Co., 97 Md. 1; Toombs v. Stockwell, 131 Mich. 633; Buedingen Mfg. Co. v. Royal Trust Co., 90 N. Y. App. Div. 267, *affirmed* 181 N. Y. 563.

Time Given on Condition — Price Payable Immediately on Failure of Condition. — Messinger v. Woge, (Colo. App. 1904) 78 Pac. Rep. 314.

1095. 1. Payment and Delivery Concurrent. — Livermore v. Brauer, 128 Fed. Rep. 265, 62 C. C. A. 647; J. K. Armsby Co. v. Blum, 137 Cal. 552; Ainsworth v. Roush, 109 Ill. App. 299; Rogers v. French, 122 Iowa 18; Kibler v. Caplis, (Mich. 1905) 103 N. W. Rep. 531; Frazier v. Atchison, etc., R. Co., 104 Mo. App. 355; Bauer v. Blaha, (Supm. Ct. App. T.) 88 N. Y. Supp. 933; Hughes v. Knott, 138 N. Car. 105; Richardson v. Insurance Co. of North America, 136 N. Car. 314; Hand v. Matthews, 208 Pa. St. 155; Robinson v. Thoma, 30 Wash. 129. See also *supra*, this title, **1076. 3.**

Performance in Reasonable Time Required. — Blalock v. Clark, 133 N. Car. 308.

3. Blalock v. Clark, 133 N. Car. 308.

4. Payment by Check — Recovery of Possession Allowed on Dishonor. — Charleston, etc., R. Co. v. Pope, 122 Ga. 577.

Option as to Medium of Payment. — See Aldrich v. Bay State Constr. Co., 186 Mass. 489.

Evidence of Custom Admissible Where Contract Silent. — Mimaker v. California Canneries Co., 138 Cal. 239; Hughes v. Knott, 138 N. Car. 105; Blalock v. Clark, 137 N. Car. 140; Morris v. Supplee, 208 Pa. St. 253. See also Samuel M. Lawder, etc., Co. v. Albert Mackie Grocery Co., 97 Md. 1.

5. Payment as Condition Precedent. — Gibson v. Chicago Packing, etc., Co., 108 Ill. App. 100.

6. Payment as Condition Precedent to Delivery. — Hart v. Boston, etc., R. Co., 72 N. H. 410.

10. Cash Sale Presumed Prima Facie. — Messinger v. Woge, (Colo. App. 1904) 78 Pac. Rep. 314; Frazier v. Atchison, etc., R. Co., 104 Mo. App. 355; Hand v. Matthews, 208 Pa. St. 155, *citing* 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1905; Pratt v. S. Freeman, etc., Mfg. Co., 115 Wis. 648.

1096. 2. Sales on Credit — Rule Subject to Implied Warranty of Solvency. — F. W. Kavanaugh Mfg. Co. v. Rosen, 132 Mich. 44, 102 Am. St. Rep. 378; Pratt v. S. Freeman, etc., Mfg. Co., 115 Wis. 648.

5. Contract Provisions as to Credit. — See People v. Grant, (Mich. 1904) 100 N. W. Rep. 1006; Machale v. Leber, (Supm. Ct. App. T.) 88 N. Y. Supp. 958.

Time Runs from Date of Delivery. — Grabfelder v. Vosburgh, 90 N. Y. App. Div. 307.

7. Payment by Instalments. — Compare Iowa Brick Mfg. Co. v. Herrick, 126 Iowa 721.

9. Amount of Price or Payments — Construction of Contract. — Magnolia Compress Co. v. Smith, (Ark. 1905) 88 S. W. Rep. 563; Matthews Glass Co. v. Burk, 162 Ind. 608; Hagey v. Schroeder, 30 Ind. App. 151; Chase v. Ainsworth, 135 Mich. 119; Vivian v. Robertson, 176 Mo. 219; M. & E. Solomon Tobacco Co. v. Cohen, 95 N. Y. App. Div. 297; Bristol v. Mente, 79 N. Y. App. Div. 67, *affirmed* 178 N. Y. 599; Price v. New York, 104 N. Y. App. Div. 198, *appeal dismissed* 182 N. Y. 516; Drucklieb v. Universal Tobacco Co., 106 N. Y. App. Div. 470.

"Cost Price" Means Wholesale Cost to Seller. — Sylvester v. Ammons, 126 Iowa 140.

Contract Price Controls. — S. W. Bacon Fruit Co. v. Blessing, 122 Ga. 369; Plano Mfg. Co. v. Eich, (Iowa 1904) 97 N. W. Rep. 1106.

1097. 1. Reasonable Price Implied. — Kernan v. Crook, 100 Md. 210,

1097. IX. RESCISSION OR MODIFICATION OF CONTRACT — 1. By Mutual Consent — Rescission. — See note 7.

1098. See note 1.

1099. Modification of Contract. — See note 2.

2. By Seller — a. RIGHT TO RESCIND — (1) Grounds for Rescission — (b) Fraud and Deceit. — See note 5.

1100. See note 1.

1101. See notes 2, 3.

1103. (g) Breach or Nonperformance by Buyer — *aa. GENERAL RULE.* — See note 7.

1101. *bb. NONPAYMENT.* — See notes 1, 2, 4.

1105. (2) *Conditions of Rescission — (a) Return of Consideration.* — See note 1.

1106. *b. WAIVER OR LOSS OF RIGHT TO RESCIND.* — See note 1.

1107. 3. By Buyer — a. RIGHT TO RESCIND — (1) Grounds for Rescission — (b) Fraud and Deceit. — See notes 1, 2, 3.

1097. 7. Rescission by Mutual Consent. — Poland Paper Co. v. Foote, etc., Co., 118 Ga. 458. See also Osborne v. Ringland, 122 Iowa 329.

Consideration Necessary After Breach. — Brockman Commission Co. v. Kilbourne, 111 Mo. App. 542.

1098. 1. Consent Express or Implied. — Iroquois Furnace Co. v. Bignall Hardware Co., 201 Ill. 297.

Must Be Mutual Assent to Cancellation. — Central Coal, etc., Co. v. Good, 120 Fed. Rep. 793, 57 C. C. A. 161; Oklahoma Vinegar Co. v. Carter, 116 Ga. 140, 94 Am. St. Rep. 112; Backes v. Black, (Neb. 1903) 97 N. W. Rep. 321; Hathaway v. O'Gorman Co., 26 R. I. 476; J. P. Gentry Co. v. Margohus, 110 Tenn. 669.

Where Delay in Answering Not Consent to Proposal to Rescind. — Baltimore, etc., R. Co. v. Steel Rail Supply Co., (C. C. A.) 123 Fed. Rep. 655.

Consent to Hold Goods for Further Orders Not Consent to Rescind. — National Cash Register Co. v. Hill, 136 N. Car. 272.

Acceptance of Return of Property Implied Consent. — See Kendall v. Hardebeck, 163 Ind. 373.

1099. 2. Modification of Contract. — Prest v. Cole, 183 Mass. 283; General Electric Co. v. National Contracting Co., 178 N. Y. 369 (upholding oral modification of written contract, as to time of delivery); McArdle v. Thames Iron Works, 96 N. Y. App. Div. 139; Cooper v. Payne, 103 N. Y. App. Div. 118; James v. Libby, 103 N. Y. App. Div. 256; A. B. Farquhar Co. v. New River Mineral Co., 87 N. Y. App. Div. 329; Reeves v. Bruening, 13 N. Dak. 157; Robinson Mach. Co. v. Hazel Kirk Gas Coal Co., 204 Pa. St. 177; Backes v. Erickson, (S. Dak. 1905) 103 N. W. Rep. 21; Washington Iron Works v. McNaught, 35 Wash. 10. See also J. K. Armsby Co. v. Blum, 137 Cal. 552; American Cotton Co. v. Herring, 84 Miss. 693.

5. Fraud and Deceit in General. — Fisher v. Brown, 111 Ill. App. 486.

Seller Cannot Rescind as to Part of Entire Transaction. — Hochberger v. Baum, (Supm. Ct. App. T.) 85 N. Y. Supp. 385.

1100. 1. Misrepresentation of Financial Condition. — *In re Hildebrandt*, 120 Fed. Rep. 992; Mashburn v. Dannenberg Co., 117 Ga. 567;

Kuh, etc., Co. v. Glucklick, 120 Iowa 504; Tennent Shoe Co. v. Stovall, 78 S. W. Rep. 417, 25 Ky. L. Rep. 1615; Steel v. Webster, 188 Mass. 478; Pekin Plow Co. v. Wilson, 66 Neb. 115; Mills v. Brill, 105 N. Y. App. Div. 389; Zeeman v. Saleburg, 25 Pa. Super. Ct. 423; Ullman v. Biddle, 53 W. Va. 415. Compare Reed v. Felmlee, 25 Pa. Super. Ct. 37.

1101. 2. Mere Insolvency. — *In re Lewis*, 125 Fed. Rep. 143; Johnson v. Groff, 22 Pa. Super. Ct. 85.

3. Insolvency Coupled with Intent Not to Pay. — Stein v. Hill, 100 Mo. App. 38; Johnson v. Groff, 22 Pa. Super. Ct. 85.

1103. 7. Breach of Executory Contract. — St. Regis Paper Co. v. Santa Clara Lumber Co., (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 102, affirmed 105 N. Y. App. Div. 341. But see Hartnett v. Baker, 4 Penn. (Del.) 431.

1104. 1. Nonpayment Under Executory Contract. — Russell v. Stewart, 204 Pa. St. 211.

2. Nonpayment After Title Has Passed. — National Bank v. Baltimore, etc., R. Co., 99 Md. 661, 105 Am. St. Rep. 321.

4. Delivery and Payment by Instalments. — Minaker v. California Canneries Co., 138 Cal. 239; W. H. Purcell Co. v. Sage, 200 Ill. 342; Eastern Forge Co. v. Corbin, 182 Mass. 590 (wherein each shipment was to be paid for at a fixed time after shipment); Price v. New York, 104 N. Y. App. Div. 198, appeal dismissed 182 N. Y. 516; Ross-Meehan Foundry Co. v. Royer Wheel Co., 113 Tenn. 370.

Separate Orders — Failure to Pay for One Gives No Right to Rescind as to Other. — Southern Car Mfg., etc., Co. v. Scullin-Gallegher Iron, etc., Co., (Tex. Civ. App. 1905) 85 S. W. Rep. 845.

1105. 1. Necessity of Return or Tender of Consideration. — Kenova Transfer Co. v. Monongahela River Consol. Coal, etc., Co., 56 W. Va. 545.

1106. 1. Ratification of Contract. — *In re Hildebrandt*, 120 Fed. Rep. 992.

Necessity for Notice of Intention. — See Portland Ice Co. v. Connor, 24 Pa. Super. Ct. 493.

Rescission Not Waived by Receiving Payment for Prior Instalments. — Eastern Forge Co. v. Corbin, 182 Mass. 590.

1107. 1. Fraud and Deceit in General. — American Fine Art Co. v. Reeves Pulley Co.,

- 1108.** (e) Breach of Contract by Seller — *aa.* IN GENERAL. — See notes 5, 6.
cc. BREACH AS TO KIND OR QUALITY OF GOODS. — See note 9.
- 1109.** *dd.* REPUDIATION OF CONTRACT. — See note 3.
ee. BREACH OF WARRANTY. — See notes 4, 5, 6.
- 1110.** *ff.* NONDELIVERY. — See notes 2, 3, 4.
 (2) *Conditions of Rescission* — (a) Return of Goods. — See note 7.
- 1111.** See notes 1, 2, 3, 4.
 (b) Total or Partial Rescission. — See notes 5, 6.

127 Fed. Rep. 808, 62 C. C. A. 488; French, etc., Importing Co. v. Belleville Drug Co., (Ark. 1905) 86 S. W. Rep. 836; H. T. Conde Implement Co. v. Griggsby, 82 S. W. Rep. 458, 26 Ky. L. Rep. 768; Findlay v. Baltimore Trust, etc., Co., 97 Md. 716; Simonds v. Cash, 136 Mich. 558; Faust v. Koers, 111 Mo. App. 560; Fellows v. Judge, 72 N. H. 466; Pratt v. Darling, 125 Wis. 93. See also Brenard Mfg. Co. v. Citronelle Mercantile Co., 140 Ala. 602; Knoepker v. Ahman, 99 Mo. App. 30.

1107. 2. Misrepresentations as to Thing Sold. — *McRae v. Lonsby*, (C. C. A.) 130 Fed. Rep. 17; *Simonds v. Cash*, 136 Mich. 558; *Jesse French Piano, etc., Co. v. Nolan*, (Tex. Civ. App. 1905) 85 S. W. Rep. 821.

3. Fraudulent Concealment of Defects. — *Ducharme v. Charest*, 23 Quebec Super. Ct. 82.

1108. 5. Executory Contracts. — *Grafeman Dairy Co. v. St. Louis Dairy Co.*, 96 Mo. App. 495; *American Art Metal Novelty Co. v. Bosseiman*, (Supm. Ct. App. T.) 91 N. Y. Supp. 722.

6. Executed Contracts. — *Kernan v. Crook*, 100 Md. 210.

9. Breach as to Kind or Quality of Goods. — *Collins v. Camors*, 118 Ga. 646.

1109. 3. Repudiation of Contract by Seller. — *McCowan v. McKay*, 13 Manitoba 590.

4. Breach of Warranty Not Ground for Rescission. — *Computing Scales Co. v. Long*, 66 S. Car. 379 (holding, however, that the purchaser may rescind where the element of fraud is introduced); *Jesse French Piano, etc., Co. v. Thomas*, 36 Tex. Civ. App. 78; *Hulet v. Achey*, (Wash. 1905) 80 Pac. Rep. 1105.

5. Contrary View. — *Sloan v. Wolf Co.*, 124 Fed. Rep. 196, 59 C. C. A. 612; *Berkey v. Lefebure*, 125 Iowa 76; *Ruby Carriage Co. v. Kremer*, 81 S. W. Rep. 251, 26 Ky. L. Rep. 274; *Manley v. Crescent Novelty Mfg. Co.*, 103 Mo. App. 135 (recognizing the right to rescind where there is a breach of an express warranty); *Sloan Commission Co. v. Fry*, (Neb. 1903) 95 N. W. Rep. 862.

Recovery Back of Purchase Price. — See *George Lawley, etc., Corp. v. Park*, (C. C. A.) 138 Fed. Rep. 31; *Bunch v. Weil*, 72 Ark. 343; *White Mfg. Co. v. De La Vergne Refrigerating Mach. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 192; *Long v. Chapman*, 97 N. Y. App. Div. 241; *Rochevot v. Wolf*, 96 N. Y. App. Div. 506. And see *infra*, this title, **1158. 4.** and the title WARRANTY, **190. 8 et seq.**

6. Executory Contracts. — *Lenzi v. Blake-McFall Co.*, 44 Oregon 569.

1110. 2. Nondelivery. — *Kallis v. Lissberger*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 773; *Merchants' Trust Co. v. Potter*, 24 Pa. Super. Ct. 510.

3. Delivery by Instalments. — *U. S. Iron Co. v. Sloss-Sheffield Steel, etc., Co.*, 71 N. J. L. 1.

4. Entire Contracts. — *Tobey Furniture Co. v. Macmaster*, 21 Quebec Super. Ct. 336.

7. Necessity and Sufficiency of Return or Offer — *Alabama.* — *Eastern Granite Roofing Co. v. Chapman*, 140 Ala. 440; *Bessemer Ice Delivery Co. v. Brannen*, 138 Ala. 157.

Georgia. — *Beck Duplicator Co. v. Fulghum*, 118 Ga. 836; *Pound v. Williams*, 119 Ga. 904; *Harris v. Daly*, 121 Ga. 511.

Iowa. — *Parsons Band-Cutter, etc., Co. v. Mallinger*, 122 Iowa 703.

Kentucky. — *Nicholas, etc., Co. v. Caldwell*, 80 S. W. Rep. 1099, 26 Ky. L. Rep. 136; *J. I. Case Threshing Mach. Co. v. Lyons*, 72 S. W. Rep. 356, 24 Ky. L. Rep. 1862.

Louisiana. — *George v. Shreveport Cotton Oil Co.*, 114 La. 498.

Missouri. — *Manley v. Crescent Novelty Mfg. Co.*, 103 Mo. App. 135.

Nebraska. — *Sloan Commission Co. v. Fry*, (Neb. 1903) 95 N. W. Rep. 862.

New York. — *Cooper v. Payne*, 103 N. Y. App. Div. 118 (holding that the rule applies to conditional sales); *Baylis v. Weibezahl*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 178.

Oregon. — *Steiger v. Fronhofer*, 43 Oregon 178.

1111. 1. Exceptions and Qualifications to Rule. — The rule does not apply where the change in the situation of the parties is brought about by the seller. *Findlay v. Baltimore Trust, etc., Co.*, 97 Md. 716.

2. Goods Worthless. — *Eastern Granite-Roofing Co. v. Chapman*, 140 Ala. 440; *Abel v. Murphy*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 648; *Westinghouse Electric Mfg. Co. v. Troell*, 30 Tex. Civ. App. 200; *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554.

Rule Does Not Apply Where Contract Provides for Return of Property. — *Haynes v. Plano Mfg. Co.*, 36 Tex. Civ. App. 567.

3. Refusal of Seller to Accept Return. — *Abel v. Murphy*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 648; *Bailey v. Manley*, 77 Vt. 157.

4. Tender in Suit for Rescission. — *Keefuss v. Weilmunster*, 89 N. Y. App. Div. 306. See also *Ducharme v. Charest*, 23 Quebec Super. Ct. 82.

5. Entire Contracts. — *Barrow v. Penick*, 110 La. 572; *Salmon v. Bandmeier*, 104 N. Y. App. Div. 66; *H. Herrmann Lumber Co. v. Heidelberg*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 465; *Baylis v. Weibezahl*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 178.

Where the Purchaser Has Sold a Part of the Goods, he cannot rescind for the balance. *Pike's Peak Paint Co. v. Masury*, 19 Colo. App. 286; *Seattle Nat. Bank v. Powles*, 33 Wash.

1111. *b.* WAIVER OR LOSS OF RIGHT TO RESCIND. — See note 7.

1112. See note 1.

1113. See note 1.

c. WHAT CONSTITUTES RESCISSION. — See note 3.

X. REMEDIES OF SELLER — 1. Action for Damages — *a.* IN GENERAL — Where the Contract of Sale Is Still Executory. — See note 4.

1114. *b.* ACCRUAL OF CAUSE OF ACTION. — See notes 2, 3, 4, 6.

1115. *c.* MEASURE OF DAMAGES. — See note 1.

21. *Contra* where part of the goods were sold before discovery of the breach of warranty, *Bunch v. Weil*, 72 Ark. 343.

1111. 6. Severable Contracts. — *Weil v. Stone*, 33 Ind. App. 112. See also *Barnett v. Becker*, 25 Pa. Super. Ct. 22.

7. Delay in Rescission. — *Collins v. Tegner*, (Del. 1905) 60 Atl. Rep. 978; *Kessler v. Per-rong*, 22 Pa. Super. Ct. 578; *Spiegelberg v. Karr*, 24 Pa. Super. Ct. 339; *Brown v. Wise-man*, 20 Quebec Super. Ct. 304.

1112. 1. Ratification. — *Thomas China Co. v. C. W. Raymond Co.*, (C. C. A.) 135 Fed. Rep. 25; *Strickland v. Parlin*, etc., Co., 118 Ga. 213; *Chicago Trust, etc., Bank v. Ball*, 208 Ill. 256; *Tolman v. Coleman*, 104 Ill. App. 70; *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554. See also *Buedingen Mfg. Co. v. Royal Trust Co.*, 90 N. Y. App. Div. 267, affirmed 181 N. Y. 563.

No Waiver by Acts to Preserve Property. — *Faust v. Koers*, 111 Mo. App. 560.

Sale of Property Bars Right to Rescind. — *Barrett v. Tyler*, 76 Vt. 108.

1113. 1. Ignorance of Facts Authorizing Rescission. — *Boeker v. Crescent Belting, etc., Co.*, 101 Mo. App. 429.

3. What Constitutes Rescission. — *Dickey v. Winston Cigarette Mach. Co.*, 117 Ga. 131; *Parsons Band Cutter, etc., Co. v. Mallinger*, 122 Iowa 703; *Laird v. Cole*, 121 Iowa 146; *Boeker v. Crescent Belting, etc., Co.*, 101 Mo. App. 429.

Intention to Rescind Must Be Affirmatively Expressed. — *Spiegelberg v. Karr*, 24 Pa. Super. Ct. 339. See also *Keystone Mfg. Co. v. Hamp-ton*, 141 Ala. 415; *Von Dohren v. John Deere Plow Co.*, (Neb. 1904) 98 N. W. Rep. 830.

Must Be Effected in Manner Required by Contract. — *Larson v. Minneapolis Threshing Mach. Co.*, 92 Minn. 62.

4. Executory Contract — Action for Damages. — *Starr Brewery Co. v. Horst*, 120 Fed. Rep. 246, 58 C. C. A. 362; *Sherman Nursery Co. v. Aughenbaugh*, 93 Minn. 201, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1113; *Backes v. Black*, (Neb. 1903) 97 N. W. Rep. 321; *Barnett v. Becker*, 25 Pa. Super. Ct. 22; *American Hide, etc., Co. v. Chalkley*, 101 Va. 458.

Election of Remedies. — The bringing of a suit for the price is not such an election of remedies as will preclude the bringing an action for breach of contract. *Redhead v. Wyoming Cattle Invest. Co.*, 126 Iowa 410.

1114. 2. Performance by Vendor. — *Withers v. Moore*, 140 Cal. 591; *Bressler v. Kelly*, 34 Ind. App. 235; *Shreveport Cotton Oil Co. v. Friedlander*, 112 La. 1059; *Fowles v. Rupert*, (Mich. 1904) 101 N. W. Rep. 202.

3. Tender or Offer to Perform by Seller. —

Habeler v. Rogers, (C. C. A.) 131 Fed. Rep. 43; *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 94 Am. St. Rep. 112; *Thick v. Detroit, etc., R. Co.*, 137 Mich. 708; *Bonds v. Thomas J. Lipton Co.*, 85 Miss. 209; *Armstrong v. Heide*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 609; *Kiley v. Lee Canning Co.*, 105 N. Y. App. Div. 633; *McHenry v. Bulifant*, 207 Pa. St. 15.

Tender Unnecessary under Special Provisions of Contract. — *Prest v. Cole*, 183 Mass. 283.

4. Ability and Willingness to Perform. — *Iroquois Furnace Co. v. Bignall Hardware Co.*, 201 Ill. 297.

Ability to Procure Articles for Delivery Sufficient. — *Thick v. Detroit, etc., R. Co.*, 137 Mich. 708.

6. Anticipatory Breach. — *Lincoln v. Levi Cotton Mills Co.*, 128 Fed. Rep. 865, 63 C. C. A. 333; *Allen v. Field*, (C. C. A.) 130 Fed. Rep. 641; *Brazell v. Cohn*, 32 Mont. 556, applying the rule where the seller of the output of a business disposed of the business after repudiation of the contract by the purchaser of such output; *Baylis v. Weibezahl*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 178; *Parker v. McKan-non*, 76 Vt. 96.

1115. 1. Rule as to Measure of Damages — *United States*. — *Kinhead v. Lynch*, 132 Fed. Rep. 692, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1115.

Colorado. — *Kincaid v. Price*, 18 Colo. App. 73.

Iowa. — *Redhead v. Wyoming Cattle Invest. Co.*, 126 Iowa 410.

Massachusetts. — *Houghton v. Furbush*, 185 Mass. 251.

Michigan. — *Mohr Hardware Co. v. Dubey*, 136 Mich. 677.

Montana. — *Brazell v. Cohn*, 32 Mont. 556.

Nebraska. — *Backes v. Black*, (Neb. 1903) 97 N. W. Rep. 321.

New York. — *Belle of Bourbon Co. v. Leffler*, 87 N. Y. App. Div. 302. See also *Blick v. Fabian*, (Supm. Ct. App. T.) 86 N. Y. Supp. 207.

Pennsylvania. — *Blair v. Ford China Co.*, 26 Pa. Super. Ct. 374.

South Carolina. — *Huguenot Mills v. Jemp-son*, 68 S. Car. 367.

Tennessee. — *Mayberry v. Lilly Mill Co.*, 112 Tenn. 564.

Utah. — *McCall Co. v. Jennings*, 26 Utah 459.

Washington. — *Henry H. Schott Co. v. Stone*, 35 Wash. 252.

Wisconsin. — *Gehl v. Milwaukee Produce Co.*, 116 Wis. 263; *Pratt v. S. Freeman, etc., Mfg. Co.*, 115 Wis. 648; *Saveland v. Western Wisconsin R. Co.*, 118 Wis. 267.

1116. See notes 2, 4, 6.

1117. See notes 1, 2.

e. EVIDENCE AND BURDEN OF PROOF. — See note 10.

1118. See note 3.

The Burden of Proof. — See notes 6, 7.

f. QUESTIONS FOR COURT AND JURY. — See note 9.

2. Action for Price — *a.* WHERE CONTRACT IS EXECUTORY. —

See note 13.

1119. See note 1.

1120. See note 1.

Title Reserved until Payment. — See note 5.

b. WHERE CONTRACT IS EXECUTED. — See note 9.

1121. See notes 1, 3.

1116. 2. Damages Estimated at Time of Delivery. — *Duluth Furnace Co. v. Iron Belt Min. Co., (C. C. A.) 117 Fed. Rep. 138.*

4. Compensation for Actual Loss. — *Kinhead v. Lynch, 132 Fed. Rep. 692, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1116; Coburn v. California Portland Cement Co., 144 Cal. 81, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1116. See also Redhead v. Wyoming Cattle Invest. Co., 126 Iowa 410.*

6. Articles to Be Manufactured. — *Ludlow v. Peck-Williamson Heating, etc., Co., 116 Ky. 608, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1116.*

1117. 1. Difference Between Cost of Manufacture and Contract Price. — *Lincoln v. Levi Cotton Mills Co., 128 Fed. Rep. 865, 63 C. C. A. 333; Allen v. Field, (C. C. A.) 130 Fed. Rep. 641; United Engineering, etc., Co. v. Broadnax, (C. C. A.) 136 Fed. Rep. 351; Winslow Bros. Co. v. Du Puy, 208 Pa. St. 98; Mitchell v. Baker, 208 Pa. St. 377; Puritan Coke Co. v. Clark, 204 Pa. St. 556. See also Reed v. Illinois Cent. R. Co., 75 S. W. Rep. 200, 25 Ky. L. Rep. 389; Parker v. McKannon, 76 Vt. 96.*

Fixed Charges Constitute Element of Cost. — *Worrell v. Kinnear Mfg. Co., 103 Va. 719.*

Rule Confined to Unmanufactured Goods and Those Without Market Value. — *Belle of Bourbon Co. v. Leffler, 87 N. Y. App. Div. 302.*

2. Credits on Contract Price. — *Lincoln v. Levi Cotton Mills Co., 128 Fed. Rep. 865, 63 C. C. A. 333.*

Wholesaler Not Obligated to Sell at Retail in Order to Minimize Damages. — *Brazell v. Cohn, (Mont. 1905) 81 Pac. Rep. 339.*

10. Performance by Plaintiff — *Evidence of Quality.* — *Joseph Joseph, etc., Co. v. Schonthal Iron, etc., Co., 99 Md. 382.*

1118. 3. Evidence of Damages. — *Parker v. McKannon, 76 Vt. 96; Worrell v. Kinnear Mfg. Co., 103 Va. 719.*

6. Burden of Showing Performance. — *Stock v. Towle, 97 Me. 408; McCall Co. v. Jacobson, (Mich. 1905) 102 N. W. Rep. 969. See also Steinhart v. Bingham, 90 N. Y. App. Div. 149, affirmed 182 N. Y. 326.*

Burden on Defendant to Prove Rescission or Other Affirmative Defense. — *Iroquois Furnace Co. v. Bignall Hardware Co., 201 Ill. 297.*

7. Iroquois Furnace Co. v. Bignall Hardware Co., 201 Ill. 297.

9. Questions of Fact for Jury. — *Sloss Iron,*

etc., Co. v. Jackson Architectural Iron Works, 102 N. Y. App. Div. 316 (question of delivery).

13. Action for Damages Exclusive Remedy. — *Star Brewery Co. v. Horst, 120 Fed. Rep. 246, 58 C. C. A. 362; Browning v. McNear, 145 Cal. 277; Sherman Nursery Co. v. Aughenbaugh, 93 Minn. 201; Backes v. Black, (Neb. 1903) 97 N. W. Rep. 321.*

If the Purchaser Interdicts Performance by the seller, the remedy is for damages. — *McKelvey v. P-ham, 31 Mont. 602; Herring-Hall-Marvin Co. v. Smith, 43 Oregon 315; McHenry v. Bulifant, 207 Pa. St. 15; McCall Co. v. Jennings, 26 Utah 459.*

1119. 1. Contrary View. — *Kinhead v. Lynch, 132 Fed. Rep. 692, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1119; National Cash Register Co. v. Dehn, (Mich. 1905) 102 N. W. Rep. 965; American Cotton Co. v. Herring, 84 Miss. 693; Cowan v. De Hart, (Supm. Ct. App. T.) 84 N. Y. Supp. 576 (holding that no tender is necessary after breach and such election); Ideal Cash Register Co. v. Zunino, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 311; Levy v. Glassberg, (Supm. Ct. App. T.) 92 N. Y. Supp. 50; Butler v. Hirzel, 87 N. Y. App. Div. 462, affirmed 181 N. Y. 520; National Cash Register Co. v. Hill, 136 N. Car. 272, quoting 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1119, 1120; Mayberry v. Lilly Mill Co., 112 Tenn. 564, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1113, 1118; Henry H. Schott Co. v. Stone, 35 Wash. 252; Pratt v. S. Freeman, etc., Mfg. Co., 115 Wis. 648.*

1120. 1. Statutory Rule. — *Oklahoma Vinegar Co. v. Carter, 116 Ga. 140, 94 Am. St. Rep. 112, from which case it appears that under the statute in Georgia the vendor may recover the price where after default he stores and retains the goods for the purchaser, but where he does not do this he must sue for damages.*

5. Title Reserved until Payment. — *National Cash Register Co. v. Dehn, (Mich. 1905) 102 N. W. Rep. 965; Dowagiac Mfg. Co. v. Mahon, 13 N. Dak. 516; Herring-Hall-Marvin Co. v. Smith, 43 Oregon 315; Jaeggli v. Phears, 30 Tex. Civ. App. 212.*

9. Action for Price. — *Olcese v. Mobile Fruit, etc., Co., 211 Ill. 539; American Hide, etc., Co. v. Chalkley, 101 Va. 458.*

1121. 1. Goods Not Delivered. — *Habeler v. Rogers, (C. C. A.) 131 Fed. Rep. 43; Kin-*

1122. *c.* WHERE RIGHT OF ACTION ACCRUES. — See note 3.

Sales on Credit. — See note 4.

1123. If a Note or Other Security Is to Be Given. — See note 6.**1124.** See note 1.

Instalment Contracts. — See note 5.

1125. See note 1.

Partial Delivery. — See notes 2, 3.

Conditions Precedent. — See note 4.

d. AMOUNT OF RECOVERY. — See note 5.**1126.** See notes 1, 2, 3, 8, 9, 10.**1127.** See note 1.*e.* DEFENSES. — See notes 3, 6, 8.

head *v.* Lynch, 132 Fed. Rep. 692; Rastetter *v.* Reynolds, 160 Ind. 133.

1121. 3. When Delivery and Acceptance Necessary. — See Mead *v.* Rat Portage Lumber Co., 93 Minn. 343. But see Rastetter *v.* Reynolds, 160 Ind. 133; Butler *v.* Hirzel, 87 N. Y. App. Div. 462, affirmed 181 N. Y. 520.

1122. 3. Action Accrues on Sale and Tender of Goods. — F. C. Austin Mfg. Co. *v.* Colfax County, 67 Neb. 101.

4. Expiration of Credit. — Reeves *v.* Lamm, 120 Iowa 283; Grabfelder *v.* Vosburgh, 90 N. Y. App. Div. 307.

Contra Where Purchaser Refuses to Accept Article. — Inman Mfg. Co. *v.* American Cereal Co., 124 Iowa 737.

1123. 6. Failure to Give Agreed Security for Price. — See Hirschberg *v.* Marx, (Supm. Ct. App. T.) 94 N. Y. Supp. 342.

1124. 1. Waiver of Stipulation for Note. — See Reeves *v.* Lamm, 120 Iowa 283, wherein the order for the goods contained a clause making it the purchaser's written obligation in case no note should be executed.

5. Instalment Contracts. — U. S. *v.* Molloy, 127 Fed. Rep. 953, 62 C. C. A. 585; Minaker *v.* California Canneries Co., 138 Cal. 239; W. H. Purcell Co. *v.* Sage, 200 Ill. 342; Price *v.* New York, 104 N. Y. App. Div. 198, appeal dismissed 182 N. Y. 516.

The Right to Sue for Each Instalment which becomes due upon each delivery under the contract is also upheld. Barrie *v.* Jerome, 112 Ill. App. 329. See also White *v.* Corbin, (Supm. Ct. App. T.) 86 N. Y. Supp. 216.

1125. 1. Briggs *v.* Morgan, 104 Mo. App. 62, holding that the seller's remedy is not under the contract, but in assumpsit for the value of the goods delivered, not exceeding the contract price, and that in such action the buyer may set off damages for nondelivery of other instalments.

2. Partial Delivery. — Pittsburgh Plate Glass Co. *v.* Kerlin Bros. Co., 122 Fed. Rep. 414, 58 C. C. A. 648; Mead *v.* Rat Portage Lumber Co., 93 Minn. 343; Indian Mountain Jellico Coal Co. *v.* Asheville Ice, etc., Co., 134 N. Car. 574; Racine Shoe Mfg. Co. *v.* Badger Mfg. Co., 123 Wis. 94. See also Thorn *v.* Morgan, etc., Co., 135 Mich. 51; Oliver *v.* Oregon Sugar Co., 42 Oregon 276.

3. Performance a Condition Precedent. — Union Trust Co. *v.* Webber Seely Hardware Co., 73 Ark. 584; Stotesbury *v.* Power, 27 Mont. 469;

F. C. Austin Mfg. Co. *v.* Colfax County, 67 Neb. 101.

4. Performance or Waiver of Conditions Precedent. — Heidelbaugh *v.* Cranston, 4 Penn. (Del.) 464; McCormick Harvesting Mach. Co. *v.* Mackey, 100 Mo. App. 400; American Soda Fountain Co. *v.* Gerrer's Bakery, 14 Okla. 258; Equitable Mfg. Co. *v.* Cooley, 69 S. Car. 332; Backes *v.* Erickson, (S. Dak. 1905) 103 N. W. Rep. 21.

Delivery as Condition. — Midvale Steel Co. *v.* Camden Ironworks, 129 Fed. Rep. 246; American Label Co. *v.* Kander, (Supm. Ct. App. T.) 93 N. Y. Supp. 1108; Southern Car Mfg., etc., Co. *v.* Scullin-Gallagher Iron, etc., Co., (Tex. Civ. App. 1905) 85 S. W. Rep. 845.

Purchaser May Waive Performance of Conditions by Seller. — DeWitt *v.* Culpepper, 66 S. Car. 467.

Interdependent Conditions. — See Crocker *v.* Muller, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 685.

5. Contract Price. — S. W. Bacon Fruit Co. *v.* Blessing, 122 Ga. 369; Fairbanks *v.* Midvale Min., etc., Co., 105 Mo. App. 644; Field *v.* Schuster, 26 Pa. Super. Ct. 82.

1126. 1. Value or Market Price Immaterial. — Brown *v.* Harris, (Mich. 1905) 102 N. W. Rep. 960; Krauskopf *v.* Pennypack Yarn Finishing Co., 26 Pa. Super. Ct. 506.

2. Implied Assumpsit. — See Nugent *v.* Armour Packing Co., (Mo. App. 1904) 81 S. W. Rep. 506.

3. Market Price. — Meyer *v.* Jewell, (Supm. Ct. App. T.) 88 N. Y. Supp. 972.

8. Breach of Warranty in Reduction of Price. — Frith *v.* Hollan, 133 Ala. 583, 91 Am. St. Rep. 54; Moultrie Repair Co. *v.* Hill, 120 Ga. 730.

9. Inferior Quality of Goods in Mitigation. — Florence Oil, etc., Co. *v.* Farrar, 119 Fed. Rep. 150, 55 C. C. A. 656.

10. Waiver of Defects by Acceptance. — Cook *v.* Finch, 117 Ga. 541; Lifshitz *v.* McConnell, 80 N. Y. App. Div. 289; Bowman Lumber Co. *v.* Anderson, 70 Ohio St. 16; Attleboro Mfg. Co. *v.* Calhoun, 1 Tenn. Ch. App. 42.

Defendant May Show Damage from Latent Defects. — Freeman, etc., News Co. *v.* Mencken, 115 Ga. 1017.

1127. 1. Damages for Delay in Delivery. — Charles E. Dustin Co. *v.* St. Petersburg Invest. Co., 126 Fed. Rep. 816; Medart Pulley Co. *v.* Dubuque Turbine, etc., Co., 121 Iowa 244.

3. McRae *v.* Lonsby, (C. C. A.) 130 Fed. Rep. 17.

1128. See notes 3, 5.

f. PERSONS LIABLE FOR PRICE. — See note 6.

g. EVIDENCE AND BURDEN OF PROOF. — See note 8.

1131. See notes 1, 3, 4, 6, 7.

1132. See notes 1, 2.

h. PROVINCE OF COURT AND JURY. — See notes 4, 5.

1127. 6. Ownership by Third Person. — Central Coal, etc., Co. *v.* Good, 120 Fed. Rep. 793, 57 C. C. A. 161. See also Huffman Min., etc., Co. *v.* Georgia Min., etc., Co., 116 Ga. 701; Headley Lumber Co. *v.* Cranford, (Miss. 1905) 38 So. Rep. 548.

8. Set-off, Recoupment, and Counterclaim. — Charles E. Dustin Co. *v.* St. Petersburg Invest. Co., 126 Fed. Rep. 816; McRae *v.* Lonsby, (C. C. A.) 130 Fed. Rep. 17; Thomas China Co. *v.* C. W. Raymond Co., (C. C. A.) 135 Fed. Rep. 25; McNamara *v.* Home Land, etc., Co., 121 Fed. Rep. 797, 58 C. C. A. 245; Equitable Mfg. Co. *v.* Howard, 140 Ala. 252; National Computing Scale Co. *v.* Eaves, 116 Ga. 511; Thorn *v.* Morgan, etc., Co., 135 Mich. 51; Shute *v.* Dickson Cotton Mills, 132 N. Car. 271; Howland Pulp Co. *v.* Jessup, etc., Paper Co., 21 Pa. Super. Ct. 495; Rakestraw *v.* Woodward, 25 Pa. Super. Ct. 165.

Damnum Absque Injuria. — See Anaconda Copper Min. Co. *v.* Houston, 107 Ill. App. 183.

1128. 3. Destruction of Goods. — DeWitt *v.* Culpepper, 66 S. Car. 467.

5. Rescission. — Sloan Commission Co. *v.* Fry, (Neb. 1903) 95 N. W. Rep. 862. See also Roesch *v.* Young, 111 Ill. App. 34.

6. Person with Whom Contract Made. — Simpson *v.* Porter Bros. Co., 140 Cal. 667; Harde- man *v.* Bell, 120 Ga. 342; Martin *v.* Chouteau Land, etc., Co., 104 Mo. App. 232.

8. Evidence — Admissibility and Sufficiency — In General. — Snow *v.* Mastick, 138 Cal. xix, 71 Pac. Rep. 165; Bullion Milling Co. *v.* Gates Iron Works, 18 Colo. App. 472; Stock *v.* Schlew- ing, 19 Colo. App. 138; Kernan *v.* Crook, 100 Md. 210; Jefferson Bank *v.* Gossett, (Supm. Ct. App. T.) 86 N. Y. Supp. 752; Muhlstein *v.* Hertzberg, (Supm. Ct. App. T.) 85 N. Y. Supp. 1075.

Existence and Terms of Contract. — Courtney *v.* William Knabe, etc., Mfg. Co., 97 Md. 499, 99 Am. St. Rep. 456; Dowagiac Mfg. Co. *v.* Watson, 90 Minn. 100; Powell *v.* Price, 111 Mo. App. 320; Oltarsh *v.* Lewis, (Supm. Ct. App. T.) 88 N. Y. Supp. 127.

Parties to Contract. — O. M. Cockrum Co. *v.* Klein, (Ind. 1905) 74 N. E. Rep. 529; Esher *v.* Meeker, (N. J. 1905) 60 Atl. Rep. 35.

Delivery and Acceptance. — O'Connor *v.* Hitzler, (Colo. App. 1904) 80 Pac. Rep. 474; Danziger *v.* Pittsfield Shoe Co., 204 Ill. 145; American Electrical Works *v.* New England Electric R. Constr. Co., 186 Mass. 546; Muller *v.* Greenwald, (Supm. Ct. App. T.) 94 N. Y. Supp. 427; Hopkins *v.* Rodgers, (Supm. Ct. App. T.) 91 N. Y. Supp. 749; Goldstein *v.* Nathan, (Supm. Ct. App. T.) 88 N. Y. Supp. 980; Preston *v.* Barber, 31 Tex. Civ. App. 383.

Title of Seller. — Headley Lumber Co. *v.* Cranford, (Miss. 1905) 38 So. Rep. 548; Mor- gan *v.* Garretson, etc., Lumber Co., 105 Mo. App. 239.

Quality or Condition of Goods. — Carr *v.* Loudon, 79 S. W. Rep. 211, 25 Ky. L. Rep. 1984; Allington, etc., Mfg. Co. *v.* Detroit Red- uction Co., 133 Mich. 427; Skinner *v.* Kerwin Ornamental Glass Co., 103 Mo. App. 650; Lander *v.* Sheehan, 32 Mont. 25; Charter Gas- engine Co. *v.* Kellam, 79 N. Y. App. Div. 231; Robinson *v.* Snow, (Tex. Civ. App. 1903) 74 S. W. Rep. 328.

Price. — Matthews Glass Co. *v.* Burk, 162 Ind. 608.

Value or Market Value. — Beaudry *v.* Du- quette, 92 Minn. 158; Ampel *v.* Seifert, (Supm. Ct. App. T.) 84 N. Y. Supp. 122.

Rescission. — H. Krantz Mfg. Co. *v.* Gould Storage Battery Co., 83 N. Y. App. Div. 133.

1131. 1. Burden of Showing Executed Sale. — Martin *v.* Williams, 96 Mo. App. 249; Con- solidated Car Heating Co. *v.* Kahn, (Supm. Ct. App. T.) 84 N. Y. Supp. 919; Ampel *v.* Seifert, (Supm. Ct. App. T.) 84 N. Y. Supp. 122; Wil- son *v.* J. H. Flickinger Co., 76 N. Y. App. Div. 399; Ulmer *v.* McDonnell, 11 N. Dak. 391; Fraser *v.* McCurdy, 35 Nova Scotia 467.

Burden of Proof as to Delivery Is on Plaintiff. — Johnson *v.* Durant, 37 Nova Scotia 471.

3. Burden of Showing Terms of Contract. — Geiser Mfg. Co. *v.* Yost, 90 Minn. 47.

4. Burden of Showing Price or Value. — Meyer *v.* Jewell, (Supm. Ct. App. T.) 88 N. Y. Supp. 972.

6. Burden of Showing Performance. — Cope- land *v.* Boston Dairy Co., 184 Mass. 207; American Label Co. *v.* Kander, (Supm. Ct. App. T.) 93 N. Y. Supp. 1108.

Acceptance After Inspection or Opportunity Raises Presumption of Performance. — Field *v.* Schuster, 26 Pa. Super. Ct. 82.

7. Burden of Proving Affirmative Defense. — Pittsburg Plate Glass Co. *v.* Kerlin Bros. Co., 122 Fed. Rep. 414, 58 C. C. A. 648; Brenard Mfg. Co. *v.* Citronelle Mercantile Co., 140 Ala. 602; Heidelbaugh *v.* Cranston, 4 Penn. (Del.) 464; National Cash Register Co. *v.* Townsend, 137 N. Car. 652; Lenz *v.* Blake-McFall Co., 44 Oregon 569.

1132. 1. Burden of Proving Set-off, Recoup- ment, or Counterclaim. — Fredrick Mfg. Co. *v.* Devlin, (C. C. A.) 127 Fed. Rep. 71; Purity Ice Co. *v.* Hawley Down Draft Furnace Co., 22 App. Cas. (D. C.) 573; Carter *v.* Minton, 119 Ga. 474.

2. Burden of Showing New Matter in Avoidance. — Heidelbaugh *v.* Cranston, 4 Penn. (Del.) 464.

4. Questions for Court. — Cunningham *v.* O'Connor, 136 Mich. 293.

5. Questions of Fact for Jury. — Existence and terms of contract, L. A. Becker Co. *v.* Alvey, (Ky. 1905) 86 S. W. Rep. 974; Beaudry *v.* Duquette, 92 Minn. 158; Douglas *v.* New York Cent., etc., R. Co., 105 N. Y. App. Div. 65; Robinson Mach. Co. *v.* Hazel Kirk Gas Coal Co., 204 Pa. St. 177. Existence of contract

1133. 3. Statutory Remedy Against Goods — Thus, in Arkansas. — See notes 3, 6.

1134. 4. Recovery of Goods, Value, or Proceeds — *a.* BEFORE TITLE HAS PASSED. — See note 9.

Title Reserved until Payment. — See notes 11, 13.

1135. *b.* WHERE TITLE HAS PASSED — Fraud. — See note 8.

1136. *c.* ALTERNATIVE AND INCONSISTENT REMEDIES — ELECTION — See notes 3, 4.

1137. *d.* AS AGAINST THIRD PERSONS. — See notes 3, 5.

1138. See note 1.

1139. *e.* EVIDENCE AND BURDEN OF PROOF. — See note 1.

5. Resale and Action for Damages — *a.* STATEMENT OF RULE — In the United States. — See note 3.

alleged and delivery and acceptance, *Williams v. Brandt*, 90 N. Y. App. Div. 607. Acceptance of order and delivery of goods, *Humphrey v. Timken Carriage Co.*, 12 Okla. 413. Whether the transaction was a sale, *Heidelbaugh v. Cranston*, 4 Penn. (Del.) 464. What the parties intended by the contract, *Tunkhannock Ice Co. v. Franklin*, 22 Pa. Super. Ct. 147. Defense as to quantity, *Howland Pulp Co. v. Jessup*, etc., Paper Co., 21 Pa. Super. Ct. 495. Substitution of new time for payment, *Allum v. Nolle*, 25 Pa. Super. Ct. 220. Amount recoverable where the defendant relies on a new agreement as to part of the goods, *McAfee v. Dix*, 101 N. Y. App. Div. 69. Rescission, *H. Hirschberg Optical Co. v. Michaelson*, (Neb. 1901) 95 N. W. Rep. 461. Person to whom credit extended, *Jewell v. Posey*, 119 Iowa 412. Fraud and deceit, *Swink v. Anthony*, 96 Mo. App. 420. Compliance with or breach of contract, *U. S. v. Molloy*, 127 Fed. Rep. 953, 62 C. C. A. 585; *Potter v. Holmes*, 87 Minn. 477. Whether the plaintiff performed his contract and the amount the defendant should recover as a set-off, *Eastern Forge Co. v. Baizley*, 21 Pa. Super. Ct. 504. Acceptance amounting to waiver, *Campion v. Marston*, 99 Me. 410.

1133. 3. *Roach v. Johnson*, 71 Ark. 344.

6. *Roach v. Johnson*, 71 Ark. 344.

1134. 9. *Replevin*. — *Drake v. Scott*, 136 Ala. 261, 96 Am. St. Rep. 25; *Dodge v. Carter*, 140 Cal. 663 (holding that under a contract providing for a return of the property in case of default in payments, a proceeding for the recovery of possession is not a rescission, and tender of amounts previously paid is not a condition precedent); *Hart v. Boston*, etc., R. Co., 72 N. H. 410. See also *Furst v. Commercial Bank*, 117 Ga. 472. And see the title REPLEVIN, **490. 6 et seq.**

11. *Replevin*. — *Blair v. Johnson*, 111 Tenn. 111; *Page v. Urick*, 31 Wash. 601, 96 Am. St. Rep. 924.

13. *Trover*. — *Fussell v. Heard*, 119 Ga. 527 (holding that the measure of recovery is the unpaid balance of purchase price, with interest); *Lorain Steel Co. v. Norfolk*, etc., St. R. Co., 187 Mass. 500. And see the title TROVER AND CONVERSION, **665. 4 et seq.**

1135. 8. Recovery of Goods or Value in Case of Fraud. — *In re Hildebrant*, 120 Fed. Rep. 992; *Fisher v. Brown*, 111 Ill. App. 486; *Kuh*, etc., Co. v. *Glucklich*, 120 Iowa 504; *Tennent Shoe Co. v. Stovall*, 78 S. W. Rep. 417, 25

Ky. L. Rep. 1615; *Steel v. Webster*, 188 Mass. 478; *Pekin Plow Co. v. Wilson*, 6 Neb. 115.

1136. 3. Election of Remedies. — *In re Hildebrant*, 120 Fed. Rep. 992; *Padgett v. Ford*, 117 Ga. 508; *Standard Sewing Mach. Co. v. Alexander*, 68 S. Car. 506.

4. Mere Mistake as to Remedy, Promptly Corrected, Not Election. — *Pekin Plow Co. v. Wilson*, 66 Neb. 115; *Standard Sewing Mach. Co. v. Alexander*, 68 S. Car. 506.

1137. 3. Where Title Has Not Passed. — *Goodgame v. Sanders*, 140 Ala. 247; *Boulden v. Gough*, 4 Penn. (Del.) 48; *Padgett v. Ford*, 117 Ga. 508; *Charleston*, etc., R. Co. v. *Pope*, 122 Ga. 577; *Flannery v. Harley*, 117 Ga. 483; *Lorain Steel Co. v. Norfolk*, etc., St. R. Co., 187 Mass. 500; *Nichols v. Monjeau*, 132 Mich. 582; *Nebraska Moline Plow Co. v. Blackburn*, (Neb. 1905) 104 N. W. Rep. 178; *Turnbow v. Beckstead*, 25 Utah 468. See also *A. A. Cooper Wagon*, etc., Co. v. *Barnt*, 123 Iowa 32.

5. Where Title Has Passed — *Bona Fide Purchasers*. — *Mashburn v. Dannenberg Co.*, 117 Ga. 567.

1138. 1. Recovery Against Purchaser with Notice. — *Ullman v. Biddle*, 53 W. Va. 415.

1139. 1. Burden of Proof. — *Bentley v. Woolson Spice Co.*, (Neb. 1901) 95 N. W. Rep. 803.

3. Rule in United States — *United States*. — *Habeler v. Rogers*, (C. C. A.) 131 Fed. Rep. 43; *Kinhead v. Lynch*, 132 Fed. Rep. 692; *Baltimore*, etc., R. Co. v. *Steel Rail Supply Co.*, (C. C. A.) 123 Fed. Rep. 655.

Connecticut. — See *Fish v. Spicer*, 77 Conn. 717.

Iowa. — *Redhead v. Wyoming Cattle Invest. Co.*, 126 Iowa 410.

Michigan. — *Kellogg v. Frohlich*, (Mich. 1905) 102 N. W. Rep. 1057.

Mississippi. — *McDonald Cotton Co. v. Mayo*, (Miss. 1905) 38 So. Rep. 372; *American Cotton Co. v. Herring*, 84 Miss. 693; *Bonds v. Thomas J. Lipton Co.*, 85 Miss. 209.

Missouri. — *Nelson v. Hirsch*, etc., Iron, etc., Co., 102 Mo. App. 498.

New York. — *Blick v. Fabian*, (Supm. Ct. App. T.) 86 N. Y. Supp. 207; *General Electric Co. v. National Contracting Co.*, 178 N. Y. 369; *Heller v. Altman*, (Supm. Ct. App. T.) 91 N. Y. Supp. 769; *Levy v. Glassberg*, (Supm. Ct. App. T.) 92 N. Y. Supp. 50.

Pennsylvania. — *Puritan Coke Co. v. Clark*, 204 Pa. St. 556.

Tennessee. — *Mayberry v. Lilly Mill Co.*, 112

- 1140.** See notes 2, 3.
1142. *b.* MANNER, TIME, AND PLACE OF RESALE. — See notes 2, 3, 4.
1143. See notes 1, 2.
1144. 6. Lien — *a.* EXISTENCE OF LIEN. — See note 2.
1145. See note 3.
1147. *b.* HOW DIVESTED — (3) *By Delivery.* — See notes 2, 4.
1149. XI. REMEDIES OF BUYER — 2. Remedies Before Taking Possession —
a. IN GENERAL — Executory Contracts of Sale. — See notes 1, 2.
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 b. DAMAGES FOR NONDELIVERY — (1) *In General.* — See notes
 9, 10.
1150. See notes 1, 2, 4, 7.
 (2) *Measure of Damages* — (a) *In General.* — See note 10.

Tenn. 564, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1139.

Virginia. — American Hide, etc., Co. v. Chalkley, 101 Va. 458.

Washington. — Henry H. Schott Co. v. Stone, 35 Wash. 252.

Wisconsin. — Gehl v. Milwaukee Produce Co., 116 Wis. 263; Pratt v. S. Freeman, etc., Mfg. Co., 115 Wis. 648.

1140. 2. Resale Not Imperative. — Mayberry v. Lilly Mill Co., 112 Tenn. 564; Pratt v. S. Freeman, etc., Mfg. Co., 115 Wis. 648.

Notice that Seller Will Resell Not Election of Remedies. — Habeler v. Rogers, (C. C. A.) 131 Fed. Rep. 43.

3. Resale Held Necessary. — Kincaid v. Price, 18 Colo. App. 73.

1142. 2. Fair Sale in Good Faith Required. — Alden Speare's Sons Co. v. Hubinger, (C. C. A.) 129 Fed. Rep. 538; Baltimore, etc., R. Co. v. Steel Rail Supply Co., (C. C. A.) 123 Fed. Rep. 655; Brunswick Grocery Co. v. Lamar, 116 Ga. 1.

Sale Must Be for Cash. — Pratt v. S. Freeman, etc., Mfg. Co., 115 Wis. 648.

Effect of Vicious Sale. — An improper sale or a sale without notice, where notice is required, does not relieve the buyer from the effect of his breach, but only renders the sale not binding on him, and the seller may still recover his actual loss. McDonald Cotton Co. v. Mayo, (Miss. 1905) 38 So. Rep. 372; Nelson v. Hirsch, etc., Iron, etc., Co., 102 Mo. App. 498; Mayberry v. Lilly Mill Co., 112 Tenn. 564; Pratt v. S. Freeman, etc., Mfg. Co., 115 Wis. 648.

3. Time of Resale. — Alden Speare's Sons Co. v. Hubinger, (C. C. A.) 129 Fed. Rep. 538; Gehl v. Milwaukee Produce Co., 116 Wis. 263.

4. Notice Unnecessary. — Kellogg v. Frohlich, (Mich. 1905) 102 N. W. Rep. 1057.

1143. 1. Place of Resale. — See Bonds v. Thomas J. Lipton Co., 85 Miss. 209.

2. Comstock v. Price, 103 Ill. App. 19.

1144. 2. Wrongful Dispossession Does Not Defeat Lien. — McGill v. Chilhowee Lumber Co., 111 Tenn. 552.

1145. 3. Statutory Liens. — See Welsh's Succession, 111 La. 801.

1147. 2. Lien Lost by Delivery. — Meyers v. McAllister, 94 Minn. 510; Allen v. Rushfort, (Neb. 1904) 101 N. W. Rep. 1028.

4. Constructive Delivery. — Wilson v. Shaver, 3 Ont. L. Rep. 110.

1149. 1. Trover. — Hilmer v. Hills, 138

Cal. 134; Robinson v. Thoma, 30 Wash. 129. And see the title TROVER AND CONVERSION, **664.** 6.

2. Replevin. — Deutsch v. Dunham, 72 Ark. 141, 105 Am. St. Rep. 21; La Vie v. Tooze, 43 Oregon 590; La Vie v. Crosby, 43 Oregon 612; Backhaus v. Buells, 43 Oregon 569; Hand v. Matthews, 208 Pa. St. 155. And see the title REPLEVIN, **490.** 7.

8. Replevin. — Glass v. Blazer, 91 Mo. App. 564.

9. Action for Damages for Nondelivery. — Anglo Newfoundland Fish, etc., Co. v. Smith, 35 Nova Scotia 267; Underhill v. Buckman Fruit Co., 97 Md. 229; Cherokee Mills v. Gate City Cotton Mills, 122 Ga. 268.

Where the Seller Seizes the Property After Sale it destroys the delivery and the purchaser may sue as for a breach of the original contract. Deatz v. U. S., 38 Ct. Cl. 355.

Under Contract for Sale of Property to Be Acquired. — Northington-Munger-Pratt Co. v. Farmers Gin, etc., Co., 119 Ga. 851, 100 Am. St. Rep. 210.

10. South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165; Hume v. Netter, (Tex. Civ. App. 1903) 72 S. W. Rep. 865.

Rule Applies Where Delivery Not Made in Manner Provided by Contract. — Lillard v. Kentucky Distilleries, etc., Co., (C. C. A.) 134 Fed. Rep. 168.

Question for Jury. — Faddis v. Mason, (C. C. A.) 122 Fed. Rep. 410.

Evidence Insufficient to Show Breach of Contract. — See Masor v. Jacobus, (Supm. Ct. App. T.) 84 N. Y. Supp. 589.

1150. 1. W. H. Purcell Co. v. Sage, 200 Ill. 342; Town v. Jepson, 133 Mich. 673; Lapham v. Bossemeyer, (Neb. 1904) 98 N. W. Rep. 699; Wilson v. Shaver, 3 Ont. L. Rep. 110.

Purchaser Excused Where Performance Prevented by Seller. — Howell v. Dickerson, 104 Mo. App. 658.

2. Sufficient Tender Shown. — Bristol v. Mente, 79 N. Y. App. Div. 67, affirmed 178 N. Y. 599.

4. Walker v. Cooper, 97 Mo. App. 441.

7. Bussard v. Hibler, 42 Oregon 500; Campbell, etc., Co. v. Weisse, 121 Wis. 491.

10. Measure of Damages — General Rule — United States. — Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540; Haff v. Pilling, 134 Fed. Rep. 294; E. W. Bliss Co. v. Buffalo Tin Can Co., (C. C. A.) 131 Fed. Rep. 51;

1151. See note 1.

Nondelivery of Part. — See note 2.

1152. Nominal Damages. — See note 1.

Absence of Market Value. — See note 3.

(b) "Market Value." — See note 5.

(c) Time of Estimating Market Value. — See note 8.

1153. See note 1.

1154. Purchase in Market Before Time for Delivery. — See note 2.

(d) Place for Estimation of Market Value. — See notes 3, 5.

Absence of Market Value at Place of Delivery. — See note 6.

(e) Proof of Market Value. — See note 9.

1155. (f) Special Damages. — See notes 2, 3.

Jessup, etc., Paper Co. v. Piper, 133 Fed. Rep. 108; H. D. Williams Cooperage Co. v. Scofield, 125 Fed. Rep. 916, 60 C. C. A. 564.

Connecticut. — Righter v. Clark, (Conn. 1905) 60 Atl. Rep. 741.

Delaware. — Gruell v. Clark, 4 Penn. (Del.) 321; Hartnett v. Baker, 4 Penn. (Del.) 431.

District of Columbia. — Armour v. Gundersheimer, 23 App. Cas. (D. C.) 210.

Georgia. — Huggins v. Southeastern Limé, etc., Co., 121 Ga. 311.

Indiana. — Semon v. Coppes, etc., Co., (Ind. App. 1905) 74 N. E. Rep. 41.

Michigan. — Thorn v. Morgan, etc., Co., 135 Mich. 51. See also Trotter v. Tousey, 131 Mich. 624.

Minnesota. — Coxé v. Anoka Waterworks, etc., Co., 91 Minn. 50.

New York. — Falkenberg v. O'Neill, (Supm. Ct. App. T.) 88 N. Y. Supp. 378; Branower v. Independent Match Co., 83 N. Y. App. Div. 370.

North Carolina. — Indian Mountain Jellico Coal Co. v. Asheville Ice, etc., Co., 134 N. Car. 574.

Oregon. — Bussard v. Hibler, 42 Oregon 500.

Pennsylvania. — Morris v. Supplee, 208 Pa. St. 253; Boyd v. Merchants, etc., Peanut Co., 25 Pa. Super. Ct. 199.

Texas. — Woldert Grocery Co. v. Veltman, (Tex. Civ. App. 1904) 83 S. W. Rep. 224.

Wisconsin. — Vogt v. Schienebeck, 122 Wis. 491, 106 Am. St. Rep. 989; Kelley v. La Crosse Carriage Co., 120 Wis. 84, 102 Am. St. Rep. 971.

See also Nebraska Bridge Supply, etc., Co. v. Conway, (Iowa 1905) 103 N. W. Rep. 122.

1151. 1. Belden v. Krom, 34 Wash. 185, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1150.

2. Nondelivery of Part. — Atkinson v. Plimpton, 6 Ont. L. Rep. 566. See also Cutting Fruit Packing Co. v. Canty, 141 Cal. 692.

1152. 1. Nominal Damages. — Gruell v. Clark, 4 Penn. (Del.) 321; Jones v. Wattles, 66 Neb. 533.

3. Absence of Market Value. — Armeny v. Madson, etc., Co., 111 Ill. App. 621 (where the measure of damages was the loss of net profits); Ideal Wrench Co. v. Garvin Mach. Co., 92 N. Y. App. Div. 187, affirmed 181 N. Y. 573; O'Gara v. Ellsworth, 85 N. Y. App. Div. 216; Vogt v. Schienebeck, 122 Wis. 491, 106 Am. St. Rep. 989; Kelley v. La Crosse Carriage Co., 120 Wis. 84, 102 Am. St. Rep. 971.

5. Compare Righter v. Clark, (Conn. 1905) 60 Atl. Rep. 741, wherein the market price was held to be the wholesale price.

8. Time of Estimating Market Value. — Huggins v. Southeastern Lime, etc., Co., 121 Ga. 311; South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165; O'Gara v. Ellsworth, 85 N. Y. App. Div. 216.

1153. 1. Instalments. — Haff v. Pilling, 134 Fed. Rep. 294; Benton Fuel Co. v. O. W. Shipman Co., 136 Mich. 523.

Delivery Contract "During" Month — Price on Last Day of Month Governs. — J. P. Gentry Co. v. Margolius, 110 Tenn. 669.

1154. 2. Morris v. Supplee, 208 Pa. St. 253.

3. Place for Estimation of Market Value. — Armour v. Gundersheimer, 23 App. Cas. (D. C.) 210; South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165; Coxé v. Anoka Waterworks, etc., Co., 91 Minn. 50 (holding that the fact that the market value at the place of delivery included a profit to local dealers did not change the rule); O'Gara v. Ellsworth, 85 N. Y. App. Div. 216; J. P. Gentry Co. v. Margolius, 110 Tenn. 669; Woldert Grocery Co. v. Veltman, (Tex. Civ. App. 1904) 83 S. W. Rep. 224; Nottingham Coal, etc., Co. v. Preas, 102 Va. 820.

5. Value at Controlling Market May Be Shown. — Kibler v. Caplis, (Mich. 1905) 103 N. W. Rep. 531.

6. Absence of Market Value at Place of Delivery. — Righter v. Clark, (Conn. 1905) 60 Atl. Rep. 741; South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165; Woldert Grocery Co. v. Veltman, (Tex. Civ. App. 1904) 83 S. W. Rep. 224; Nottingham Coal, etc., Co. v. Preas, 102 Va. 820.

9. Bloom v. Americus Grocery Co., 116 Ga. 784.

1155. 2. Special Damages. — Lillard v. Kentucky Distilleries, etc., Co., (C. C. A.) 134 Fed. Rep. 168; Wallace v. Knoxville Woolen Mills, 117 Ky. 450, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1155; Thorn v. Morgan, etc., Co., 135 Mich. 51; Colvin v. McCormick Cotton Oil Co., 66 S. Car. 61; Fred W. Wolf Co. v. Galbraith, 35 Tex. Civ. App. 505; Keiley v. La Crosse Carriage Co., 120 Wis. 84, 102 Am. St. Rep. 971.

3. Union Foundry Works v. Columbia Iron, etc., Co., 112 Ill. App. 183; Creamery Package Mfg. Co. v. Benton County Creamery Co., 120 Iowa 584.

Mere Knowledge of Buyer's Purposes Insuff.

1155. Profits on Resale. — See note 5.

1156. See notes 2, 3.

(g) Duty of Purchaser to Minimize Damages. — See notes 5, 6, 7.

c. RECOVERY OF PRICE PAID. — See notes 8, 9.

1157. 3. Remedies After Taking Possession — a. IN GENERAL. — See notes 4, 5, 6.

Measure of Damages. — See notes 8, 9.

b. WARRANTY — (1) In General. — See note 10.

1158. See note 2.

cient. — *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540; *E. W. Bliss Co. v. Buffalo Tin Can Co.*, (C. C. A.) 131 Fed. Rep. 51; *Righter v. Clark*, (Conn. 1905) 60 Atl. Rep. 741.

1155. 5. Profits on Resale. — *Huggins v. Southeastern Lime, etc., Co.*, 121 Ga. 311; *South Gardiner Lumber Co. v. Bradstreet*, 97 Me. 165; *Woldert Grocery Co. v. Veltman*, (Tex. Civ. App. 1904) 83 S. W. Rep. 224.

1156. 2. Contract Contemplating Resale. — *Lapp v. Illinois Watch Co.*, 104 Ill. App. 255; *Currie Fertilizer Co. v. Krish*, 74 S. W. Rep. 268, 24 Ky. L. Rep. 2471; *Sun Mfg. Co. v. Egbert*, (Tex. Civ. App. 1904) 84 S. W. Rep. 667; *Woldert Grocery Co. v. Veltman*, (Tex. Civ. App. 1904) 83 S. W. Rep. 224; *Kelley v. La Crosse Carriage Co.*, 120 Wis. 84, 102 Am. St. Rep. 971. See also *Thorn v. Morgan, etc., Co.*, 135 Mich. 51; *Fred W. Wolf Co. v. Galbraith*, (Tex. Civ. App. 1905) 87 S. W. Rep. 390.

3. *Wilmoth v. Hamilton*, (C. C. A.) 127 Fed. Rep. 48; *Iowa Brick Mfg. Co. v. Herrick*, 126 Iowa 721; *F. W. Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, 102 Am. St. Rep. 378.

5. *Wallace v. Knoxville Woolen Mills*, 117 Ky. 450, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1156; *Chattanooga Car, etc., Co. v. Lefebvre*, 113 La. 487; *Thorn v. Morgan, etc., Co.*, 135 Mich. 51; *Indian Mountain Jellico Coal Co. v. Asheville Ice, etc., Co.*, 134 N. Car. 574. Compare *Sun Mfg. Co. v. Egbert*, (Tex. Civ. App. 1904) 84 S. W. Rep. 667.

Rule Applies on Delivery in Manner Not Contemplated by Contract. — *Lillard v. Kentucky Distilleries, etc., Co.*, (C. C. A.) 134 Fed. Rep. 168.

6. *Armeny v. Madson, etc., Co.*, 111 Ill. App. 621.

Plaintiff Need Not Actually Buy in Market. — *Nottingham Coal, etc., Co. v. Preas*, 102 Va. 820.

7. *Delaware, etc., Canal Co. v. Mitchell*, 211 Ill. 379; *Morris v. Supplee*, 208 Pa. St. 253.

8. Recovery of Price Paid. — *Kallis v. Lissberger*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 773.

9. *Graham v. Hatch Storage Battery Co.*, 186 Mass. 226; *Ideal Wrench Co. v. Garvin Mach. Co.*, 92 N. Y. App. Div. 187, affirmed 181 N. Y. 573; *Gilbert v. Alton*, 88 N. Y. App. Div. 62; *Altschul v. Koven*, (Supm. Ct. App. T.) 94 N. Y. Supp. 558.

1157. 4. *McCormick Harvesting Mach. Co. v. Allison*, 116 Ga. 445; *Dickey v. Winston Cigarette Mach. Co.*, 117 Ga. 131.

Rule Applies Only to Defects Discoverable by Ordinary Care. — *Wallace v. Knoxville Woolen Mills*, 117 Ky. 450.

5. *Seaboard Lumber Co. v. Cornelia Planing Mill Co.*, 122 Ga. 370; *Graham v. Hatch Storage Battery Co.*, 186 Mass. 226; *James v. Libby*, 103 N. Y. App. Div. 256. See also *Khan v. Duche*, 10 Com. Cas. (Eng.) 87.

6. *Kernan v. Crook*, 100 Md. 210; *Graham v. Hatch Storage Battery Co.*, 186 Mass. 226.

Money Expended to Make Machine Conform to Contract. — *Masterson v. Heitmann*, (Tex. Civ. App. 1905) 87 S. W. Rep. 227.

8. Measure of Damages. — *Seaboard Lumber Co. v. Cornelia Planing Mill Co.*, 122 Ga. 370; *Wallace v. Knoxville Woolen Mills*, 117 Ky. 450.

If the Purchaser Relies on the Seller's Promise to Correct Defects, the measure of damages is the difference in value between the subject of the sale as it existed and as it would be if made right. *Hano v. Simons*, (Supm. Ct. App. T.) 92 N. Y. Supp. 337.

9. *Bessemer Ice Delivery Co. v. Brannen*, 138 Ala. 157; *Wallace v. Knoxville Woolen Mills*, 117 Ky. 450.

10. Action for Damages for Breach of Warranty — *United States*. — *Thomas China Co. v. C. W. Raymond Co.*, (C. C. A.) 135 Fed. Rep. 25; *Cleveland Linseed Oil Co. v. Buchanan*, 120 Fed. Rep. 906, 57 C. C. A. 498; *Sloan v. Wolf Co.*, 124 Fed. Rep. 196, 59 C. C. A. 612.

California. — *Browning v. McNear*, 145 Cal. 277.

Georgia. — *Pound v. Williams*, 119 Ga. 904; *Americus Grocery Co. v. Brackett*, 119 Ga. 489.

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Louisiana. — See *George v. Shreveport Cotton Oil Co.*, 114 La. 498.

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Tennessee. — *Southern Brass, etc., Co. v. Exeter Mach. Works*, 109 Tenn. 67.

Texas. — *Ellis v. Riddick*, 34 Tex. Civ. App. 256; *C. H. Dean Co. v. Standifer*, (Tex. Civ. App. 1904) 83 S. W. Rep. 230.

Election of Remedies. — Where a purchaser, alleging a rescission, seeks to recover back the purchase price, and fails because there had been no rescission, he is not precluded from suing for a breach of warranty. *Zimmerman v. Robinson*, (Iowa 1905) 102 N. W. Rep. 814.

1158. 2. See *McCormick Harvesting Mach. Co. v. Arnold*, 116 Ky. 508; *Nichols-Shepard*

1158. Recoupment and Counterclaim. — See notes 3, 4.
 (2) *Measure of Damages.* — See note 7. See also the title WARRANTY, **209**. 2 *et seq.*

1159. See note 1.

Special Damages. — See note 2.

1160. See notes 3, 5, 6.

Co. v. Rhoadman, 112 Mo. App. 299; Heagney v. J. I. Case Threshing Mach. Co., (Neb. 1903) 96 N. W. Rep. 175; McCormick Harvesting Mach. Co. v. Brown, (Neb. 1904) 98 N. W. Rep. 697. And see the title WARRANTY, **197**. 10 *et seq.*

Duty to Give Notice of Defects. — See Sloan v. Wolf Co., 124 Fed. Rep. 196, 59 C. C. A. 612; Pratt v. Meyer, (Ark. 1905) 87 S. W. Rep. 123; Davis v. J. I. Case Threshing Mach. Co., 80 S. W. Rep. 1145, 26 Ky. L. Rep. 235; J. I. Case Threshing Mach. Co. v. Lyons, 72 S. W. Rep. 356, 24 Ky. L. Rep. 1862; Pratt v. Morris, 87 S. W. Rep. 783, 27 Ky. L. Rep. 1035; Advance Thresher Co. v. Curd, (Ky. 1905) 85 S. W. Rep. 690; E. T. Kenney Co. v. Anderson, (Ky. 1904) 81 S. W. Rep. 666; Nichols, etc., Co. v. Caldwell, 80 S. W. Rep. 1099, 26 Ky. L. Rep. 136; Huber Mfg. Co. v. Hunter, 99 Mo. App. 46; J. I. Case Threshing Mach. Co. v. Hall, 32 Tex. Civ. App. 214. And see the title WARRANTY, **201**. 8 *et seq.*

1158. 3. Recoupment and Counterclaim — *Alabama.* — Eastern Granite Roofing Co. v. Chapman, 140 Ala. 440, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1158.

California. — Browning v. McNear, 145 Cal. 277.

Georgia. — Pound v. Williams, 119 Ga. 904.
Iowa. — Massillon Engine, etc., Co. v. Shirmmer, 122 Iowa 699.

Kentucky. — Harrigan v. Advance Thresher Co., 81 S. W. Rep. 261, 26 Ky. L. Rep. 317.

Maine. — Campion v. Marston, 99 Me. 410.

Maryland. — Queen City Glass Co. v. Pittsburgh Clay Pot Co., 97 Md. 429.

Missouri. — Alabama Steel, etc., Co. v. Symons, 110 Mo. App. 41; New Birdsall Co. v. Keys, 99 Mo. App. 458; Fairbanks v. Baskett, 98 Mo. App. 53.

Nebraska. — Sloan Commission Co. v. Fry, (Neb. 1903) 95 N. W. Rep. 862.

New York. — Washington Hydraulic Press Brick Co. v. Sinnott, (Supm. Ct. Spec. T.) 92 N. Y. Supp. 504; Abel v. Murphy, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 648. But see Cluster Gaslight Co. v. Baker, (Supm. Ct. App. T.) 90 N. Y. Supp. 1034.

North Carolina. — Parker v. Fenwick, 138 N. Car. 209.

Oregon. — Steiger v. Fronhofer, 43 Oregon 178.

Canada. — Crompton, etc., Loom Works v. Hoffman, 5 Ont. L. Rep. 554.

And see the title WARRANTY, **195**. 8 *et seq.*

4. Collins v. Tigner, (Del. 1905) 60 Atl. Rep. 978. See also Lander v. Sheehan, 32 Mont. 25.

Judgment on Purchase Notes No Bar to Action for Breach of Warranty. — Standefer v. Aultman, etc., Machinery Co., 34 Tex. Civ. App. 160.

7. **Measure of Damages — General Rule.** — Sloan v. Wolf Co., 124 Fed. Rep. 196, 59 C. C. A. 612; Florence Oil, etc., Co. v. Farrar, 119

Fed. Rep. 150, 55 C. C. A. 656; Union Selling Co. v. Jones, 128 Fed. Rep. 672, 63 C. C. A. 224; Cummins v. Ennis, 4 Penn. (Del.) 424; Collins v. Tigner, (Del. 1905) 60 Atl. Rep. 978; Danville Coal, etc., Co. v. Vilter Mfg. Co., 79 S. W. Rep. 225, 25 Ky. L. Rep. 1974; Advance Thresher Co. v. Curd, (Ky. 1905) 85 S. W. Rep. 690; Doyle v. Parish, 110 Mo. App. 470; Narr v. Norman, 113 Mo. App. 533; Long v. Chapman, 97 N. Y. App. Div. 241; McQuade v. Newman, (Supm. Ct. App. T.) 88 N. Y. Supp. 363; Parker v. Fenwick, 138 N. Car. 209; Critcher v. Porter-McNeal Co., 135 N. Car. 542; Northern Supply Co. v. Wangard, 123 Wis. 1, 107 Am. St. Rep. 875. See also Wingate v. Johnson, 126 Iowa 154.

Advance in Value After Breach Immaterial. — Americus Grocery Co. v. Brackett, 119 Ga. 489.

Subsequent Depreciation in Market Price. — See Egbert v. Hanford Produce Co., 92 N. Y. App. Div. 252.

Difference Between Actual Value and Agreed Price. — See Harrigan v. Advance Thresher Co., (Ky. 1904) 81 S. W. Rep. 261, 26 Ky. L. Rep. 317.

If Property Is Worthless Purchaser May Recover Purchase Price. — Westinghouse Electric Mfg. Co. v. Troelt, 30 Tex. Civ. App. 206. See also Small v. Bartlett, 96 Mo. App. 550.

1159. 1. Thomas China Co. v. C. W. Raymond Co., (C. C. A.) 135 Fed. Rep. 25, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1158, 1159, and holding further that a promise to repair or replace is merely cumulative to other remedies; Miller v. F. R. Patch Mfg. Co., 101 N. Y. App. Div. 22; Crompton, etc., Loom Works v. Hoffman, 5 Ont. L. Rep. 554, holding also that loss of profits might be recovered.

Not Recoverable in Assumpsit on Implied Promise. — Griffith v. Williams Patent Crusher, etc., Co., 103 Mo. App. 32.

Confining Recovery to Cost of Remedying Defects. — Rochevot v. Wolf, 96 N. Y. App. Div. 506.

2. **Special Damages.** — Cincinnati Butchers' Supply Co. v. Steinmetz, (Ind. App. 1905) 73 N. E. Rep. 950; Galbreath v. Carnes, 91 Mo. App. 512; New York Hydraulic Press Brick Co. v. Gunn, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 330; Critcher v. Porter-McNeal Co., 135 N. Car. 542; Cleveland Punch, etc., Works Co. v. Consumers Carbon Co., 25 Ohio Cir. Ct. 307; Aultman, etc., Machinery Co. v. Capleman, 36 Tex. Civ. App. 523; C. H. Dean Co. v. Standifer, (Tex. Civ. App. 1904) 83 S. W. Rep. 230; Northern Supply Co. v. Wangard, 123 Wis. 1, 107 Am. St. Rep. 875.

Loss Actually Sustained Is Recoverable. — Cleveland Linseed Oil Co. v. Buchanan, 120 Fed. Rep. 906, 57 C. C. A. 498.

1160. 3. Cummins v. Ennis, 4 Penn. (Del.) 424.

1160. Rescission. — See note 7.

Duty of Purchaser to Minimize Damages. — See note 8.

c. FRAUD AND DECEIT. — See notes 9, 10, 11.

1161. *d.* DELAY IN DELIVERY. — See notes 2, 4.

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XII. BONA FIDE PURCHASERS — 1. Protection Afforded Bona Fide Purchasers — *a.* IN GENERAL. — See note 6.

1162. *b.* PURCHASER FROM THIEF. — See note 4.

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1165. *l.* PURCHASER FROM ONE INTRUSTED WITH APPARENT OWNERSHIP. — See note 6.

1166. *m.* PURCHASER FROM FRAUDULENT VENDEE. — See note 5.

1167. Identity. — See note 1.

1169. 2. Who Are Bona Fide Purchasers — *a.* IN GENERAL. — See note 1. Assignee in Bankruptcy or Insolvency. — See note 10.

1170. Attaching Creditors. — See note 2.

1171. *b.* VALUE — (1) *In General.* — See note 1.

1160. 5. *Punteney Mitchell Mfg. Co. v. T. G. Northwall Co.*, (Neb. 1904) 97 N. W. Rep. 1040.

6. *People's Sav. Bank v. Waterloo, etc.*, Rapid Transit R. Co., 118 Iowa 740; *Laird v. Cole*, 121 Iowa 146; *Danville Coal, etc., Co. v. Vilter Mfg. Co.*, 79 S. W. Rep. 225, 25 Ky. L. Rep. 1974; *Birdsinger v. McCormick Harvesting Mach. Co.*, 92 N. Y. App. Div. 35; *Critcher v. Porter-McNeal Co.*, 135 N. Car. 542; *Puget Sound Iron, etc., Works v. Clemmons*, 32 Wash. 36.

7. *Bernstein v. Loomis*, (Supm. Ct. App. T.) 87 N. Y. Supp. 134. See also *Berkey v. Lefebvre*, 125 Iowa 76.

8. *Washington Hydraulic Press Brick Co. v. Sinnott*, (Supm. Ct. Spec. T.) 92 N. Y. Supp. 504; *Northern Supply Co. v. Wangard*, 123 Wis. 1, 107 Am. St. Rep. 875.

9. *Fraud and Deceit.* — *Burnett v. Hensley*, 118 Iowa 575; *Huber Mfg. Co. v. Hunter*, 99 Mo. App. 46; *Mills v. Brill*, 105 N. Y. App. Div. 389; *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554. But see *Knoepker v. Ahman*, 99 Mo. App. 30.

10. *McRae v. Lonsby*, (C. C. A.) 130 Fed. Rep. 17; *Pike's Peak Paint Co. v. Masury*, 19 Colo. App. 286; *Swink v. Anthony*, 96 Mo. App. 420; *Pratt v. Hawes*, 118 Wis. 603.

11. *Pike's Peak Paint Co. v. Masury*, 19 Colo. App. 286.

Exception — Where Conditions Cannot Be Removed. — *Rumsey v. Shaw*, 25 Pa. Super. Ct. 386.

1161. 2. *Delay in Delivery.* — *Wall v. St. Joseph Artesian Ice, etc., Co.*, 112 Mo. App. 659. But see *Lucile Min. Co. v. Fairbanks*, 87 S. W. Rep. 1121, 27 Ky. L. Rep. 1100.

4. *Chattanooga Car, etc., Co. v. Lefebvre*, 113 La. 487.

5. *Measure of Damages.* — *Chattanooga Car, etc., Co. v. Lefebvre*, 113 La. 487; *Wall v. St. Joseph Artesian Ice, etc., Co.*, 112 Mo. App. 659.

6. *Caveat Emptor.* — *Gentry v. Singleton*, 128 Fed. Rep. 679, 63 C. C. A. 231, affirming 4

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1162. 4. *Purchase from Thief.* — *Gentry v. Singleton*, 128 Fed. Rep. 679, 63 C. C. A. 231, affirming 4 *Indian Ter.* 346; *Ball-Barnhart-Putman Co. v. Lane*, 135 Mich. 275. See generally the title LARCENY, 533. 3 *et seq.*

1163. 7. *Purchase from Bailee.* — *Gentry v. Singleton*, 128 Fed. Rep. 679, 63 C. C. A. 231, affirming 4 *Indian Ter.* 346; *Bauman Loan Co. v. Hatowsky*, 107 Ill. App. 181; *Nichols v. Monjeau*, 132 Mich. 582; *Ullman v. Biddle*, 53 W. Va. 415.

1164. 1. *Purchaser from Lessee of Personality Does Not Acquire Title as Against Owner.* — *Turnbow v. Beckstead*, 25 Utah 468.

2. *Purchase from Conditional Vendee.* — *Goodgame v. Sanders*, 140 Ala. 247; *People's Bank v. Estey*, 34 Can. Sup. Ct. 429.

1165. 6. *Purchase from One Intrusted with Apparent Ownership.* — *Third Nat. Bank v. Smith*, 107 Mo. App. 178; *People's Bank v. Estey*, 34 Can. Sup. Ct. 429.

1166. 5. *Purchase from Fraudulent Vendee.* — *National Bank v. Baltimore, etc., R. Co.*, 99 Md. 661, 105 Am. St. Rep. 321; *Large, etc., Co. v. Nott*, (Neb. 1901) 95 N. W. Rep. 484; *Hochberger v. Baum*, (Supm. Ct. App. T.) 85 N. Y. Supp. 385.

1167. 1. *Mistake as to Identity of Purchaser.* — *Smith Premier Typewriter Co. v. Stidger*, 18 Colo. App. 261.

1169. 1. *California Cured Fruit Assoc. v. Stelling*, 141 Cal. 713.

10. *Assignee in Bankruptcy.* — *Nebraska Moline Plow Co. v. Blackburn*, (Neb. 1905) 104 N. W. Rep. 178.

1170. 2. *Attaching Creditors.* — *Stein v. Hill*, 100 Mo. App. 38.

1171. 1. *Value.* — *Maddox v. Reynolds*, 72 Ark. 440.

- 1171.** (2) *Giving Security for Purchase Price.* — See note 5.
 (3) *Pre-existing Indebtedness* — (a) *In General.* — See note 8.
1172. See note 1.
1174. (4) *Adequacy of Price.* — See note 4.
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1175. See note 1.

- 1177. SALESMAN.** — See note 3.
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1171. 5. Negotiable Paper. — Nebraska Moline Plow Co. v. Blackburn, (Neb. 1905) 104 N. W. Rep. 178.

8. Pre-existing Indebtedness — General Rule. — Kops Bros. Co. v. Smith, 137 Mich. 28.

1172. 1. Mortgage or Pledge. — Mashburn v. Dannenberg Co., 117 Ga. 567; Corning First Nat. Bank v. Reid, 122 Iowa 280; Dexter v. Citizens' Nat. Bank, (Neb. 1903) 94 N. W. Rep. 530.

1174. 4. Fair Price. — Babcock Printing Press Mfg. Co. v. Herbert, 137 N. Car. 317.

11. Notice. — Maddox v. Reynolds, 72 Ark. 440; A. A. Cooper Wagon, etc., Co. v. Barnt, 123 Iowa 32; Sperling v. Stubblefield, 105 Mo. App. 489.

1175. 1. Putting on Inquiry. — Hirsch v. C. W. Leatherbee Lumber Co., 69 N. J. L. 509.

1177. 3. Salesman is used with reference to one selling goods for a merchant and not to the merchant himself. U. S. v. Gin Hing, (Ariz. 1904) 76 Pac. Rep. 639.

4. A Drug Store where soda water and ice cream are sold is not a *saloon*. Matter of Henery, 124 Iowa 358.

SALVAGE.

By A. W. VARIAN.

- 1181. I. DEFINITION.** — See note 1.

- 1182. Ground of Compensation.** — See note 1.

II. ESSENTIAL ELEMENTS OF VALID SALVAGE CLAIM — 2. Peril of the Property Saved. — See note 3.

- 1183. 3. Service Rendered** — *a. IN GENERAL.* — See note 5.

- 1184. d. SENDING ASSISTANCE TO DISTRESSED VESSEL.** — See note 4.

- 1185. f. SALVAGE AND TOWAGE DISTINGUISHED.** — See note 4.

- 1186. 4. Success of Service** — *a. IN GENERAL.* — See notes 4, 7.

- 1187.** See note 1.

1181. 1. Salvage Defined. — The Lottie E. Hopkins, 133 Fed. Rep. 405; Gilchrist Transp. Co. v. 110,000 Bushels No. 1 Northern Wheat, 120 Fed. Rep. 432; The Lyman M. Law, 122 Fed. Rep. 816; Central Stock Yard, etc., Co. v. Mears, 89 N. Y. App. Div. 452.

1182. 1. Ground of Allowance of Salvage Compensation. — The Lyman M. Law, 122 Fed. Rep. 816.

3. Property Must Have Been in Peril. — The Dumper No. 8, (C. C. A.) 129 Fed. Rep. 98; The Port Caledonia, (1903) P. 184, 89 L. T. N. S. 216. See also Fletcher v. Barge John I. Brady, 19 App. Cas. (D. C.) 174.

1183. 5. The Service Rendered — In General. — The Apache, 124 Fed. Rep. 905; Central Stock Yard, etc., Co. v. Mears, 89 N. Y. App. Div. 452.

Lying By in Readiness to Render Assistance. — The August Korff, (1903) P. 166; The Apache, 124 Fed. Rep. 905.

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1184. 4. Sending Assistance to Distressed Vessel. — The Marguerite Molinos, (1903) P. 160; The Flottbek, (C. C. A.) 118 Fed. Rep. 954.

1185. 4. Distinction Between Salvage and Towage. — Gilchrist Transp. Co. v. 110,000 Bushels No. 1 Northern Wheat, 120 Fed. Rep. 432; The Flottbek, (C. C. A.) 118 Fed. Rep. 954; The City of Genoa, 128 Fed. Rep. 206; The Lottie E. Hopkins, 133 Fed. Rep. 405.

1186. 4. Success of Service Necessary. — The Flottbek, (C. C. A.) 118 Fed. Rep. 954; Merritt, etc., Derrick, etc., Co. v. Tice, 77 N. Y. App. Div. 326. See also The Germania, (1904) P. 131, 90 L. T. N. S. 296.

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1187. 1. The Elswick Park, 89 L. T. N. S. 217.

- 1187.** *b.* EFFECT OF REQUEST FOR AID. — See note 3.
- 1188.** III. SUBJECTS OF SALVAGE — 2. Government Property. — See notes 1, 2.
- 1189.** IV. WHO MAY BE SALVORS — 1. In General. — See notes 7, 8.
- 1191.** Tug Aiding Tow. — See notes 3, 4.
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- 1192.** See note 1.
2. Officers and Crew of Salvaged Vessel. — See notes 4, 5.
- 1193.** See note 1.
- 1194.** 5. Crew of Salving Vessel — Crews of Vessels Owned by Same Persons. — See note 10.
- 1195.** 7. Owner of Salving Vessel — Vessel under Charter. — See note 5.
- 1196.** 10. Owner of Salvaged Vessel. — See note 10.
- 1197.** 12. Public Officers or Employees — *a.* IN GENERAL. — See notes 4, 5.
- 1198.** *e.* OFFICERS AND CREW OF MEN OF WAR. — See note 5.
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- 1200.** 5. Effect — *a.* UPON NATURE OF SERVICE. — See note 7.
- 1201.** Effect on Remedy. — See note 1.
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c. UPON SERVICES OUTSIDE OF CONTRACT. — See note 13.
- 1202.** *d.* UPON RIGHTS OF THIRD PERSONS — (1) *Parties in Interest* — (b) *Members of Crew.* — See notes 4, 7.

1187. 3. See *The August Korff*, (1903) P. 166, 89 L. T. N. S. 194. Compare *The Elswick Park*, (1904) P. 76, 89 L. T. N. S. 217.

1188. 1. Government Property. — *Hartford*, etc., *Transp. Co. v. U. S.*, 138 Fed. Rep. 618; *Rees v. U. S.*, 134 Fed. Rep. 146. But see *Young v. The Steamship Scotia*, (1903) A. C. 501, 89 L. T. N. S. 374.

Property in Hands of Custom Officers Subject to Suit. — *Cornell Steamboat Co. v. U. S.*, 130 Fed. Rep. 480.

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1189. 7. Persons under Duty to Preserve Property. — *The Dumper No. 8*, (C. C. A.) 129 Fed. Rep. 98; *The Duc d'Aumale*, (1904) P. 60.

8. Person Negligently Imperilling Property. — *The Duc d'Aumale*, (1904) P. 60, 89 L. T. N. S. 486.

1191. 3. Tug Aiding Tow. — See *In re Cobbold*, (1903) 2 Ch. 299, 88 L. T. N. S. 745.

4. *The Dumper No. 8*, (C. C. A.) 129 Fed. Rep. 98.

7. Vessels in Collision. — *The Duc d'Aumale*, (1904) P. 60, 89 L. T. N. S. 486.

1192. 1. *The Pine Forest*, 119 Fed. Rep. 999, affirmed (C. C. A.) 129 Fed. Rep. 700.

4. Officers and Crew of Salvaged Vessel. — *The Kolpino*, 73 L. J. P. 29; *Gilbraith v. Stewart Transp. Co.*, (C. C. A.) 121 Fed. Rep. 540; *The Dumper No. 8*, (C. C. A.) 129 Fed. Rep. 98.

5. Exception to Rule. — *Gilbraith v. Stewart Transp. Co.*, (C. C. A.) 121 Fed. Rep. 540.

1193. 1. Abandonment of Vessel and Discharge of Crew. — *Gilbraith v. Stewart Transp. Co.*, (C. C. A.) 121 Fed. Rep. 540.

1194. 10. *Rees v. U. S.*, 134 Fed. Rep. 146; *The Dumper No. 8*, (C. C. A.) 129 Fed. Rep. 98.

1195. 5. Vessels Under Charter. — *The Arizona*, 136 Fed. Rep. 1016.

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1196. 10. Where a Tug and Its Tow Are Owned by the Same Person, the tug may recover for salvage services performed in extinguishing a fire on the tow. *Gilchrist Transp. Co. v. 110,000 Bushels No. 1 Northern Wheat*, 120 Fed. Rep. 432.

1197. 4. Public Officers or Employees. — *The Lyman M. Law*, 122 Fed. Rep. 816.

5. See *The Marguerite Molinos*, (1903) P. 160, 89 L. T. N. S. 192, holding that the burden is on a lifeboat crew who have gone out for the purpose of saving life to prove that they have afterwards become entitled to a salvage against property.

1198. 5. Compare *The J. Emory Owen*, 128 Fed. Rep. 996.

8. Salvage Contracts. — See *The Friesland*, (1904) P. 345.

1200. 7. A Valid Contract May Be Made for work, labor, and services even though the subject-matter might furnish the basis of a claim for salvage. *Merritt, etc., Derrick, etc., Co. v. Tice*, 77 N. Y. App. Div. 326.

1201. 1. Contract Does Not Affect Admiralty Jurisdiction in United States. — Compare *Merritt, etc., Derrick, etc., Co. v. Tice*, 77 N. Y. App. Div. 326.

2. When Salvage Barred. — *The Apache*, 124 Fed. Rep. 905; *The Thomas Morgan*, 123 Fed. Rep. 781; *Merritt, etc., Derrick, etc., Co. v. Tice*, 97 N. Y. App. Div. 457.

13. *The Dumper No. 8*, (C. C. A.) 129 Fed. Rep. 98.

A General Contract for Towage Does Not Bar a Claim for Salvage although the salvage claim be based upon services performed in towing a vessel in danger to a place of safety. *The Flottbek*, (C. C. A.) 118 Fed. Rep. 954.

1202. 4. Contract of Owner as Affecting Master and Crew. — See *The Margery*, (1902) P. 157, 86 L. T. N. S. 863. See also *The Friesland*, (1904) P. 345, 91 L. T. N. S. 324.

7. *The Managua*, 126 Fed. Rep. 208.

- 1203.** 6. Grounds for Setting Aside — *a.* DURESS. — See note 5.
- 1204.** *c.* EXCESSIVE COMPENSATION — (1) *In General.* — See note 4. Harl Bargain. — See note 8.
- 1205.** VI. AMOUNT OF AWARD — 1. *In General.* — See note 7.
2. Quantum Meruit. — See note 8.
- 1206.** 3. Considerations in Determining Award — *a.* IN GENERAL — Steamers Favored. — See note 6.
- 1207.** Professional Salvors. — See note 1.
- Relation of Salvors to Property Salvaged. — See note 3.
- 1208.** *b.* LIBERAL AWARD — PUBLIC POLICY. — See note 6.
- 1209.** *c.* CHARACTER OF SERVICES. — See notes 1, 2, 3.
- 1210.** *d.* VALUE OF PROPERTY SALVED. — See notes 3, 6.
- Estimation of Value. — See note 9.
- 1211.** See note 8.
- e.* PERILS FROM WHICH PROPERTY SALVED. — See note 12.
- 1212.** See note 2.
- f.* PERSONAL PERILS OF SALVORS. — See note 4.
- g.* RISKS AND SACRIFICES OF SALVING SHIP. — See note 5.
- 1203.** 5. The Port Caledonia, (1903) P. 184, 89 L. T. N. S. 216.
- 1204.** 4. Unreasonable Compensation. — The Port Caledonia, (1903) P. 184.
8. The Lasca, 133 Fed. Rep. 1005, supporting the text paragraph generally.
- 1205.** 7. No Percentage Basis for Award. — The Lottie E. Hopkins, 133 Fed. Rep. 405; The Eliza Strong, (C. C. A.) 130 Fed. Rep. 99; Gilchrist Transp. Co. v. 110,000 Bushels No. 1 Northern Wheat, 120 Fed. Rep. 432; The Apache, 124 Fed. Rep. 905; The Flottbek, (C. C. A.) 118 Fed. Rep. 954.
8. Quantum Meruit Not Basis of Award. — The J. Emory Owen, 128 Fed. Rep. 996; The Lyman M. Law, 122 Fed. Rep. 816; The Apache, 124 Fed. Rep. 905; The Flottbek, (C. C. A.) 118 Fed. Rep. 954.
- 1206.** 6. Steamers Favored. — See The Theta, 135 Fed. Rep. 129.
- 1207.** 1. Professional Salvors. — See The Apache, 124 Fed. Rep. 905.
3. The Pine Forest, 119 Fed. Rep. 999, affirmed (C. C. A.) 129 Fed. Rep. 700, where the salving vessel was under contract to tow the salved vessel.
- 1208.** 6. Liberal Reward — Public Policy. — The Lottie E. Hopkins, 133 Fed. Rep. 405; The Eliza Strong, (C. C. A.) 130 Fed. Rep. 99; The J. Emory Owen, 128 Fed. Rep. 996; The Lyman M. Law, 122 Fed. Rep. 816; The Apache, 124 Fed. Rep. 905.
- 1209.** 1. Character of Services. — The Eliza Strong, (C. C. A.) 130 Fed. Rep. 99; The Flottbek, (C. C. A.) 118 Fed. Rep. 954.
2. Severity and Duration of Services. — The Apache, 124 Fed. Rep. 905; The Lyman M. Law, 122 Fed. Rep. 816.
3. Skill and Judgment. — The Apache, 124 Fed. Rep. 905; The Lyman M. Law, 122 Fed. Rep. 816; Gilchrist Transp. Co. v. 110,000 Bushels No. 1 Northern Wheat, 120 Fed. Rep. 432; The Flottbek, (C. C. A.) 118 Fed. Rep. 954.
- 1210.** 3. Value of Property Salvaged. — The Eliza Strong, (C. C. A.) 130 Fed. Rep. 99; The Ereza, 124 Fed. Rep. 659; The Lyman M. Law, 122 Fed. Rep. 816; Gilchrist Transp. Co. v. 110,000 Bushels No. 1 Northern Wheat, 120 Fed. Rep. 432; The Flottbek, (C. C. A.) 118 Fed. Rep. 954.
6. See The J. Emory Owen, 128 Fed. Rep. 996.
- 9. Where There Is No Market Value for the Ship Salvaged,** in the port where it is brought by the salvors, the *res* should be valued not on the basis of a forced sale, but as a "going concern" in the hands of a solvent owner using it for the particular purposes of his trade, at the sum for which the owner, as a reasonable man, would be willing to sell it. Vermont Steamship Co. v. Ship Abby Palmer, 8 Can. Exch. 446.
- 1211.** 8. The Proportion of Freight Actually Earned is to be taken as the basis of computation. Perriam v. Pacific Coast Co., (C. C. A.) 133 Fed. Rep. 140, in which case salvage took place just after the beginning of a voyage and freight was disregarded, the proportion earned being insignificant.
- 12.** Perils from Which Property Salvaged. — The Marguerite Molinos, (1903) P. 160; The Eliza Strong, (C. C. A.) 130 Fed. Rep. 99; The Apache, 124 Fed. Rep. 905; The Lyman M. Law, 122 Fed. Rep. 816; Gilchrist Transp. Co. v. 110,000 Bushels No. 1 Northern Wheat, 120 Fed. Rep. 432; The Flottbek, (C. C. A.) 118 Fed. Rep. 954; The City of Seattle, 1 Alaska 471.
- 1212.** 2. The Apache, 124 Fed. Rep. 905.
4. Personal Perils of Salvors. — The Eliza Strong, (C. C. A.) 130 Fed. Rep. 99; The Lyman M. Law, 122 Fed. Rep. 816; Gilchrist Transp. Co. v. 110,000 Bushels No. 1 Northern Wheat, 120 Fed. Rep. 432; The Flottbek, (C. C. A.) 118 Fed. Rep. 954; The City of Seattle, 1 Alaska 471.
5. Risks to Salving Vessel. — The Theta, 135 Fed. Rep. 129; The Eliza Strong, (C. C. A.) 130 Fed. Rep. 99; The Apache, 124 Fed. Rep. 905; The Lyman M. Law, 122 Fed. Rep. 816; Gilchrist Transp. Co. v. 110,000 Bushels No. 1 Northern Wheat, 120 Fed. Rep. 432; The Flottbek, (C. C. A.) 118 Fed. Rep. 954; The City of Seattle, 1 Alaska 471.

1213. Forfeiture of Insurance. — See note 6.

Risk of Incurring Liability to Owner of Cargo. — See note 7.

h. VALUE OF SALVING SHIP AND PROPERTY EMPLOYED. — See note 8.

1214. 5. Review of Award. — See notes 8, 9.

1215. See notes 2, 3.

6. Derelicts — *a. WHAT CONSTITUTES A DERELICT* — (1) *In General.* — See note 5.

1216. (3) *Spes Recuperandi and Animus Revertendi.* — See note 12.

1217. See note 4.

1218. *b. AMOUNT OF SALVAGE AWARD.* — See note 8.

1219. See notes 1, 5.

1220. VII. APPORTIONMENT OF SALVAGE — 2. Among Whom to Be Distributed — *a. IN GENERAL* — Assignment of Seamen's Claims. — See note 8.

1221. *b. DIFFERENT SETS OF SALVORS* — (1) *First Salvors* — Abandonment. — See note 6.

(2) *Cosalvors.* — See note 8.

Effect of Failure of Some of the Salvors to Claim Compensation. — See note 11.

1222. 3. Proportion to Be Received by Distributees — *a. BY OWNERS AND OFFICERS AND CREW.* — See note 1.

Steamers Favored. — See note 5.

1223. *b. BY OFFICERS AND MEMBERS OF CREW.* — See notes 1, 4.

Where Share Increased. — See note 5.

1213. 6. Forfeiture of Insurance. — See The Theta, 135 Fed. Rep. 129.

7. Liabilities to Owner of Cargo. — *Contra* under the Harter Act, 27 U. S. Stat. at L. 445, 4 Fed. Stat. ANNOT. 854, relieving from liability to the cargo owner. The Ereza, 124 Fed. Rep. 659; The Florence, 65 Fed. Rep. 248, affirmed (C. C. A.) 71 Fed. Rep. 527; The Chinese Prince, 61 Fed. Rep. 699. And see the title CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, 231. 4 *et seq.*

8. Value of Property Employed in Salvage Services. — Gilchrist Transp. Co. v. 110,000 Bushels No. 1 Northern Wheat, 120 Fed. Rep. 432; The Eliza Strong, (C. C. A.) 130 Fed. Rep. 99; The Ereza, 124 Fed. Rep. 659; The Lyman M. Law, 122 Fed. Rep. 816; The Flottbek, (C. C. A.) 118 Fed. Rep. 954; The City of Seattle, 1 Alaska 471.

1214. 8. Discretion of Trial Court. — Perriam v. Pacific Coast Co., (C. C. A.) 133 Fed. Rep. 140; The Edith L. Allen, (C. C. A.) 129 Fed. Rep. 209; The Apache, 124 Fed. Rep. 905; The Flottbek, (C. C. A.) 118 Fed. Rep. 954; The City of Seattle, 1 Alaska 471; Merritt, etc., Derrick, etc., Co. v. Tice, 77 N. Y. App. Div. 326.

9. Review on Appeal — Noninterference. — The Perriam v. Pacific Coast Co., (C. C. A.) 133 Fed. Rep. 140; The Eliza Strong, (C. C. A.) 130 Fed. Rep. 99.

1215. 2. Excessive Awards Reduced. — The Toscana, (1905) P. 148; The Edith L. Allen, (C. C. A.) 129 Fed. Rep. 209; The Flottbek, (C. C. A.) 118 Fed. Rep. 954.

3. Insufficient Awards Increased. — The Marcus Hook, (C. C. A.) 135 Fed. Rep. 744; Perriam v. Pacific Coast Co., (C. C. A.) 133 Fed. Rep. 140.

5. Definition. — See The Pinmore, 121 Fed. Rep. 423.

1216. 12. Leaving for Assistance. — The Eliza Strong, (C. C. A.) 130 Fed. Rep. 99.

1217. 4. Vague Intention. — The Lyman M. Law, 122 Fed. Rep. 816.

1218. 8. Allowance of Moiety. — The Theta, 135 Fed. Rep. 129.

1219. 1. The Theta, 135 Fed. Rep. 129; The Flottbek, (C. C. A.) 118 Fed. Rep. 954.

5. The Theta, 135 Fed. Rep. 129.

1220. 8. Payment to a Duly Authorized Agent for distribution is conclusive on the persons entitled to salvage and the vessel cannot be libeled for further payment. The Managua, 126 Fed. Rep. 208.

1221. 6. Actual Abandonment Necessary. — See The August Korff, (1903) P. 166.

8. Salvage by Several Sets of Salvors. — The Auguste Legembre, (1902) P. 123, 86 L. T. N. S. 358, holding that one who assists against the wishes of the master of the salvaged vessel, but at the request of a cosalvor, is entitled to remuneration; The Flottbek, (C. C. A.) 118 Fed. Rep. 954.

11. Owners of Property Benefited by Failure to Claim Salvage. — The J. Emory Owen, 128 Fed. Rep. 996.

1222. 1. Distribution Dependent upon Circumstances of Case. — The Minneapolis, (1902) P. 30; The J. Emory Owen, 128 Fed. Rep. 996.

5. Rule When Steamer Is Salvaging Vessel. — The J. Emory Owen, 128 Fed. Rep. 996.

No Hard and Fast Rule. — The Eliza Strong, (C. C. A.) 130 Fed. Rep. 99.

1223. 1. In Proportion to Wages. — See The Minneapolis, (1902) P. 30; The J. Emory Owen, 128 Fed. Rep. 996.

4. Shares Dependent upon Circumstances. — The Minneapolis, (1902) P. 30.

5. Increased Share for Extra Exertions. — The Minneapolis, (1902) P. 30.

- 1224.** *c.* BY DIFFERENT SETS OF SALVORS. — See note 1.
VIII. THE LIEN — 1. In General — Lien Recognized by Common-law Courts. — See note 7.
1225. **IX. RIGHT OF POSSESSION — 1. In General** — Derelicts. — See note 7.
1226. Retaining Possession to Secure Compensation. — See note 1.
X. EFFECT OF NEGLIGENCE OR MISCONDUCT OF SALVOR — 1. In General. — See note 5.
1229. Acts of Salvor Making Salvage Necessary. — See note 3.
1230. **XI. REMEDIES — 1. Suit Against Property Salvaged or Owner.** — See note 10.
1231. **SAME.** — See note 1.
1232. **SANCTION.** — See note 5.
[SAN DOMINGO MAHOGANY. — See note 6a.]
1233. **SANE — SANITY.** — See note 1.

1224. 1. Nature of Services Determines Compensation. — The *J. Emory Owen*, 128 Fed. Rep. 996. See also *The August Korff*, (1903) P. 166.

7. Lien Recognized by Common-law Courts. — *Central Stockyard, etc., Co. v. Mears*, 89 N. Y. App. Div. 452.

1225. 7. Right of Finder to Possession of Derelict. — *Central Stockyard, etc., Co. v. Mears*, 89 N. Y. App. Div. 452, citing 24 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1225.

1226. 1. *Central Stockyard, etc., Co. v. Mears*, 89 N. Y. App. Div. 452.

5. Effect of Agreement by Salvor to Pay Share of Salvage to Master of Salvaged Vessel. — See *The Kolpino*, 73 L. J. P. 29.

Duty to Deliver to Wreck Receiver — Excuse for Nondelivery. — See *The Glynoeron*, 21 Times L. Rep. 648.

1229. 3. Acts of Salvor Making Salvage Service Necessary. — *The Duc d' Aumale*, (1904)

P. 60, holding further that negligence of the master of the salving vessel bars the claim of his owners and crew. See also generally *supra*, this title, 1189. 8.

Collision Through Fault of Salving Vessel. — *The Pine Forest*, 119 Fed. Rep. 999, affirmed (C. C. A.) 129 Fed. Rep. 700.

1230. 10. *Spaulding v. Alaska Commercial Co.*, 1 Alaska 497.

1231. 1. Same Means Not Different or Other; Identical. — *Thomas v. U. S.*, 38 Ct. Cl. 129.

1232. 5. Sanction. — See *Commissioners Ct. v. Beall*, 98 Tex. 104.

6. *San Domingo Mahogany* as used in a building contract construed to mean any mahogany being of same color and texture though not grown at San Domingo. *Snoqualmi Realty Co. v. Moynihan*, 179 Mo. 629.

1233. 1. Sane. — *Waugh v. Moan*, 200 Ill. 298.

SATISFY, SATISFACTION, ETC.

1234. **I. DEFINITIONS.** — See note 1.

1236. **III. CONTRACTS — 1. General Rule.** — See note 1.

1237. 2. Matters of Taste. — See note 2.

1234. 1. Satisfy. — *Cox v. Royal Tribe*, 42 Oregon 365; *Foley v. State*, 11 Wyo. 464.

1236. 1. Promisee Sole Judge of His Satisfaction. — *Reeves v. Chandler*, 113 Ill. App. 167; *Haney-Campbell Co. v. Preston Creamery Assoc.*, 119 Iowa 188; *Barrett v. Raleigh Coal*

etc., Co., 51 W. Va. 416. See also *Union League Club v. Blymyer Ice Mach. Co.*, 204 Ill. 117.

1237. 2. Matters of Taste Not Involved. — See *Parlin v. Greenville*, (C. C. A.) 127 Fed. Rep. 55; *Reeves v. Chandler*, 113 Ill. App. 167.

SAVINGS BANKS.

By E. G. CHILTON.

1243. I. DEFINITION, NATURE, AND DISTINCTIONS — 1. Savings Institutions in the Strict Sense. — See note 1.

1244. 2. Savings Banks Assimilated to Ordinary Banks. — See note 1.

5. Tests as to True Character of Institution — Charter Powers — Name. — See note 4.

1246. III. LEGAL RELATION BETWEEN BANK AND DEPOSITORS — 2. The Various Views. — See notes 7, 9.

1247. 3. The Prevailing View. — See note 4.

To Put the Matter in Another Way. — See note 5.

1248. IV. OFFICERS AND AGENTS — 1. Trustees, Directors, or Managers — c. POWERS — (1) *General Rule*. — See note 2.

1255. VI. DEPOSITS — 2. By-laws as the Contract — a. NECESSITY AND PROPRIETY. — See note 5.

c. WHEN BINDING UPON DEPOSITOR — (1) *Assent Essential* — Notice. — See note 7.

1258. 6. Liability for Payment to Wrong Person — b. MEASURE OF CARE AND DILIGENCE — (1) *Ordinary Care and Diligence*. — See note 4.

1260. c. NEGLIGENCE OF BANK — (1) *Evidence Of* — (d) Dissimilarity Between Signatures. — See note 1.

(2) *Question of Law or Fact*. — See note 2.

1261. e. CERTAIN INSTANCES OF PAYMENTS CONSIDERED — (1) *To Person Presenting Pass Book*. — See note 3.

1243. 1. For Statements of the Nature and Functions of Savings Banks. — *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425, *affirmed* (N. J. 1904) 57 Atl. Rep. 1131.

1244. 1. Savings Institutions with Attributes of Commercial Banks. — *West v. Topeka Sav. Bank*, 66 Kan. 524, 97 Am. St. Rep. 385. See also *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425, *affirmed* (N. J. 1904) 57 Atl. Rep. 1131, discussing the nature and status of a surplus.

4. Name. — See *Langdale v. Citizens' Bank*, 121 Ga. 105, 104 Am. St. Rep. 94.

1246. 7. Law of Partnership Not Applicable. — Compare *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425, *affirmed* (N. J. 1904) 57 Atl. Rep. 1131.

9. A Savings Bank Is a Mere Trustee. — *State v. Savings Bank*, 87 Minn. 473.

1247. 4. *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425, *affirmed* (N. J. 1904) 57 Atl. Rep. 1131.

5. *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425, *affirmed* (N. J. 1904) 57 Atl. Rep. 1131.

1248. 2. The Board of Directors Is Clothed with the Management of the affairs and business of the bank. *West v. Topeka Sav. Bank*, 66 Kan. 524, 97 Am. St. Rep. 385. See the title BANKS AND BANKING, **843**, 8 *et seq.*, and generally the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

1255. 5. *Langdale v. Citizens' Bank*, 121

Ga. 105, 104 Am. St. Rep. 94. See also *Ferguson v. Harlem Sav. Bank*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 10.

By-laws Treated as Contract. — *Chase v. Waterbury Sav. Bank*, 77 Conn. 295; *Webber v. Cambridgeport Sav. Bank*, 186 Mass. 314.

7. Assent of Depositor. — *Kelley v. Buffalo Sav. Bank*, 88 N. Y. App. Div. 374, *reversed* 180 N. Y. 171, 105 Am. St. Rep. 720, on the application of the particular by-law to the case at bar; *Ferguson v. Harlem Sav. Bank*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 10.

1258. 4. Requisite Degree of Care. — *Chase v. Waterbury Sav. Bank*, 77 Conn. 295; *Langdale v. Citizen's Bank*, 121 Ga. 105, 104 Am. St. Rep. 94; *Ferguson v. Harlem Sav. Bank*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 10; *Kelley v. Buffalo Sav. Bank*, 180 N. Y. 171, 105 Am. St. Rep. 720, *reversing* 88 N. Y. App. Div. 374. See also *Moline State Sav. Bank v. Liggett*, 106 Ill. App. 223; *Mahon v. South Brooklyn Sav. Inst.*, 175 N. Y. 69, 96 Am. St. Rep. 603.

1260. 1. See *Chase v. Waterbury Sav. Bank*, 77 Conn. 295.

2. Law or Fact. — *Ferguson v. Harlem Sav. Bank*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 10.

Question of Due Care for Jury. — *Chase v. Waterbury Sav. Bank*, 77 Conn. 295.

1261. 3. Presentation of Pass Book. — *O'Brien v. Elmira Sav. Bank*, 99 N. Y. App. Div. 76.

1262. (3) *To Person Presenting Order and Pass Book — When Order Forged.*
— See notes 3, 4.

1263. (4) *By-law Requiring Notice of Loss of Pass Book.* — See note 1.
(5) *To Administrator of Deceased Depositor — Bank Must Show Administrator's Right.* — See note 7.

1264. (6) *False Personation and False Claim of Authority Distinguished.*
— See note 4.

(7) *To Donee of Deposit.* — See note 5.

1269. VIII. LOANS AND INVESTMENTS — 5. Certain Transactions Considered
— a. LOANS ON AND PURCHASE OF PERSONAL SECURITIES — Provision Construed
as Authorizing Loans on Personal Security. — See note 1.

1270. e. SPECULATIVE CONTRACTS AT STOCK BOARD. — See note 8.

1274. XI. INSOLVENCY, RECEIVERS, AND ASSIGNMENTS — 3. Order of Payment — Preferences — a. IN GENERAL — EQUITY JURISDICTION. — See note 5.

1275. c. AS BETWEEN DEPOSITORS AND CREDITORS. — See note 3a.
5. Set-off of Deposits Against Indebtedness — General Deposits. — See note 8.

1276. XII. NONUSER — FORFEITURE. — See note 7.

Payment on Presentation Effectual Where Plaintiff Had Deposited in Name of Acquaintance. — *Arkofsky v. State Sav. Bank*, 91 Minn. 440.

1262. 3. See *Chase v. Waterbury Sav. Bank*, 77 Conn. 295.

4. See *Langdale v. Citizens' Bank*, 121 Ga. 105, 104 Am. St. Rep. 94; *Ferguson v. Harlem Sav. Bank*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 10.

1263. 1. Compare *Kingsley v. Whitman Sav. Bank*, 182 Mass. 252, 94 Am. St. Rep. 650.

7. Payment to Person Other than Personal Representative Is at Bank's Peril. — *Mahon v. South Brooklyn Sav. Inst.*, 175 N. Y. 69, 96 Am. St. Rep. 603.

1264. 4. *Kingsley v. Whitman Sav. Bank*, 182 Mass. 252, 94 Am. St. Rep. 650.

5. Donee. — *Goelz v. People's Sav. Bank*, 31 Ind. App. 67; *Wickford Sav. Bank v. Corey*, 25 R. I. 217.

1269. 1. Loan to Officer of Bank. — Under a statute providing that a loan to one of the bank's officers shall only be made by the directors in the absence of the party desiring such loan, a loan to an officer of the bank on personal security not directly passed upon by

the board of directors is invalid. *German Sav. Bank v. Des Moines Nat. Bank*, 122 Iowa 737.

1270. 8. In Compromise of an Indebtedness, title to the shares of another corporation may be acquired by a savings bank. *Hill v. Shilling*, (Neb. 1903) 95 N. W. Rep. 24. And see generally the title BANKS AND BANKING, 798. 3 et seq., 802. 1.

1274. 5. See *State v. Corning State Sav. Bank*, 127 Iowa 198.

1275. 3a. Under Statute in Iowa depositors must be paid in full before other creditors become entitled to share in the general assets. *State v. Corning State Sav. Bank*, 127 Iowa 198.

8. *State v. Sav. Bank*, 87 Minn. 473.

1276. 7. Power of Managers to Dissolve Bank. — Where the managers of a savings bank had themselves formed a trust company, it was held that they were the holders of a public trust, and had no right by any contrivance to destroy the entity of the institution, while transferring to themselves its most valuable asset, its good will. *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425, affirmed (N. J. 1904) 57 Atl. Rep. 1131.

1. **SAWMILL.** — See note 1.
SCAFFOLDING. — See note 3.
2. **SCHEDULE.** — See note 3.
3. **SCHOOLHOUSE.** — See note 3.

1. 1. **A Sawmill Is a Manufacturing Establishment** within the meaning of a statute giving to laborers in such establishments a lien for wages prior to that of mortgages. *Graham v. Magann Fawke Lumber Co.*, 118 Ky. 192.

Planing Mill or Sash and Door Factory Not Sawmill. — *In re Gosch*, 121 Fed. Rep. 604.

3. **Scaffolding.** — *Elwin v. Woodward*, (1903) 1 K. B. 838; *Veazey v. Chattle*, (1902) 1 K. B. 494.

2. 3. **Schedule Equivalent to Inventory.** —

Chicago, etc., R. Co. v. People, 217 Ill. 169, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 2.

The Term "Schedule" Implies Something Written, and when used with reference to a railroad train imports a rule rather than a particular direction or agreement. *Draper v. Evansville, etc., R. Co.*, (Ind. 1905) 74 N. E. Rep. 889.

3. 3. **High School Held to Be a Schoolhouse.** — *Carling v. Jersey City*, 71 N. J. L. 154.

SCHOOLS.

By H. GANNAWAY.

7. I. **DEFINITIONS.** — See note 1.

8. **Common or Public Schools.** — See notes 2, 3, 4, 5, 6.

II. **TEACHER** — 1. **Qualification and Certificate** — a. **IN GENERAL.** —

See note 7.

9. See note 1.

b. **NECESSITY OF CERTIFICATE TO VALIDITY OF CONTRACT** — (1)

In General. — See note 4.

10. (3) **Effect of Subsequent Issuance of Certificate.** — See notes 3, 4.

11. d. **MANDAMUS TO COMPEL ISSUANCE OF CERTIFICATE.** — See note 6.

12. f. **REVOCATION OF LICENSE.** — See note 3.

2. **Contract** — a. **IN GENERAL.** — See note 8.

7. 1. **An Association Where Regular Gymnastic Exercises Are Taught**, and a teacher is constantly employed, is an institution of learning, within the constitutional meaning of the term. *German Gymnastic Assoc. v. Louisville*, 117 Ky. 958.

8. 2. **School Maintained by Orphan Asylum Society Not Common School.** — *Sargent v. Board of Education*, 117 N. Y. 317.

3. **Teaching Single Pupil at Home Held to Be Keeping Private School.** — *State v. Peterman*, 32 Ind. App. 665.

4. **A Manual Training and Polytechnic School** is not a public school. *State v. Schauss*, 23 Ohio Cir. Ct. 283.

5. *Fiske v. Huntington*, 179 Mass. 571.

6. "Common Schools," Within the **Kansas Constitution**, are free common schools. *Board of Education v. Dick*, (Kan. 1904) 78 Pac. Rep. 812.

7. **Statutory Requirement of Certificate of Qualification.** — *Arnold v. State*, 71 Ark. 367; *McCloskey v. School Dist. No. 5*, 134 Mich. 235, 10 Detroit Leg. N. 442; *Crabb v. School Dist. No. 1*, 93 Mo. App. 254. See also *Snell v. Glasgow*, 90 Minn. 111.

Different Qualifications for Men and Women May Be Required by Board of Education. — *Schlivinski v. Maxwell*, 80 N. Y. App. Div. 313, appeal dismissed 176 N. Y. 568.

Where Two of Three Examiners Decided that a

Teacher Had Passed an examination, she was held to be entitled to a certificate. *Northington v. Sublette*, 114 Ky. 72.

9. 1. **But in Michigan.** — The case of *Hale v. Risley*, 69 Mich. 599, cited in the original note has apparently been overruled. See *McCloskey v. School Dist. No. 5*, 134 Mich. 235, 10 Detroit Leg. N. 442.

4. **No Recovery on Contract of Unlicensed Teacher.** — *Arnold v. State*, 71 Ark. 367; *McCloskey v. School Dist. No. 5*, 134 Mich. 235, 10 Detroit Leg. N. 442.

10. 3. **Contract Held Not Validated by Subsequent Issuance of Certificate.** — *McCloskey v. School Dist. No. 5*, 134 Mich. 235, 10 Detroit Leg. N. 442.

4. *Crabb v. School District No. 1*, 93 Mo. App. 254.

11. 6. **Mandamus to Compel Issuance of Certificate.** — *Northington v. Sublette*, 114 Ky. 72.

12. 3. **Revocation of Teacher's License.** — *Bowman v. Ray*, 80 S. W. Rep. 516, 25 Ky. L. Rep. 2131.

8. **Authority to Contract with Teachers.** — *Denman v. Webster*, (Cal. 1902) 70 Pac. Rep. 1063; *Ewin v. Independent School Dist. No. 8*, 10 Idaho 102; *Harris v. Kill*, 108 Ill. App. 305; *Mingo v. Colored School Dist. A*, 113 Ky. 475; *Scott v. Pendley*, 114 Ky. 606; *Cowley v. School Dist. No. 3*, 130 Mich. 634; *Young v. Fountain Inn Graded School*, 64 S. Car. 131;

13. See note 1.

b. FORMAL REQUISITES — (1) *In General.* — See note 2.

14. (2) *Statutes Requiring Contracts in Writing.* — See note 1.

c. LIABILITY OF SUCCESSORS IN OFFICE. — See notes 5, 6, 7.

15. *d.* CONTRACT WITH DE FACTO OFFICERS. — See note 3.

3. Compensation — *a.* PERFORMANCE OF DUTIES AS PREREQUISITE TO COMPENSATION. — See note 5.

b. NECESSITY OF STIPULATION AS TO COMPENSATION. — See notes 7, 8.

16. *c.* CIRCUMSTANCES TO BE CONSIDERED IN REDUCTION — (1) *Closing School on Account of Prevalence of Epidemic.* — See note 2.

d. MANDAMUS TO COMPEL PAYMENT OF SALARY. — See note 8.

e. PENSIONS. — See note 9.

4. Termination of Employment — *a.* DISCHARGE — (1) *Discharge for Good Cause.* — See notes 10, 11.

Hemingway v. Joint School Dist. No. 1, 118 Wis. 294.

Right to Employ Member of Religious Order. — *Sargent v. Board of Education*, 76 N. Y. App. Div. 588, *affirmed* 177 N. Y. 317.

Employment of Relative of School Director Prohibited in Absence of Petition. — *Holt v. Watson*, 71 Ark. 87.

Contract to Employ Wife of Trustee Void as Against Public Policy. — *Nuckols v. Lyle*, 8 Idaho 589.

Employment of Teachers for Boys in Orphan Asylum. — See *Sargent v. Board of Education*, 177 N. Y. 317.

Whether More Women Teachers than Men Shall Be Appointed is in the discretion of the board. *Schlivinski v. Maxwell*, 80 N. Y. App. Div. 313, appeal dismissed 176 N. Y. 568.

Contract Void in Part. — See *Crabb v. School Dist. No. 1*, 93 Mo. App. 254.

13. 1. *Oil School Tp. v. Marting*, 27 Ind. App. 525.

2. Formal Requisites under Statutes. — *Lee v. York School Tp.*, 163 Ind. 339; *Taylor v. School Town*, 33 Ind. App. 675; *Shepherd v. Gambill*, 75 S. W. Rep. 223, 25 Ky. L. Rep. 333.

Signing by Majority of Trustees Held Sufficient. — See *Mingo v. Colored School Dist. A*, 113 Ky. 475.

Construction of Contract — Time of Teaching. — See *Crabb v. School Dist. No. 1*, 93 Mo. App. 254.

14. 1. Statutes Requiring Contracts to Be in Writing. — *Lee v. York School Tp.*, 163 Ind. 339; *Taylor v. School Town*, 33 Ind. App. 675, holding further that the contract may consist of more than one instrument.

5. Contracts Binding on Succeeding Boards. — *Polk v. Board of Education*, 140 Cal. xvii, 74 Pac. Rep. 47; *Hancock v. Board of Education*, 140 Cal. 554. But see *Board of Education v. Walker*, 71 Ohio St. 169.

6. Under Statute. — See *Williams v. Bagnelle*, 138 Cal. 699; *Norton v. Wilkes*, 93 Minn. 411; *Hemingway v. Joint School Dist. No. 1*, 118 Wis. 294.

7. Board Cannot Employ Teacher for Period Beyond Term of Office of Every Member. — *Board of Education v. Walker*, 71 Ohio St. 169.

15. 3. Contract with De Facto Officers. — *Polk v. Board of Education*, 140 Cal. xvii, 74

Pac. Rep. 47; *Hancock v. Board of Education*, 140 Cal. 554; *Noble v. White*, 77 S. W. Rep. 678, 25 Ky. L. Rep. 1282.

5. Compensation. — *Marquissee v. School Dist. No. 64*, (Neb. 1903) 97 N. W. Rep. 324. **Failure for Good Reason to Serve Entire Term.** — See *Williams v. Bagnelle*, 138 Cal. 699 (contract by directors for longer term actually held). Compare *Oakes v. School Dist. No. 3*, 98 Mo. App. 163 (unauthorized dismissal by board).

One Who Did Not Teach Because Enjoined at suit of one not having a valid contract cannot recover compensation, his remedy being upon the injunction bond. *Shepherd v. Gambill*, 75 S. W. Rep. 223, 25 Ky. L. Rep. 333.

Deduction for Absence Caused by Illness Valid. — *Murphy v. Board of Education*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 706, *affirmed* 76 N. Y. App. Div. 620.

Where Two Grades Were Consolidated by the school board after a teacher's contract had been made it was held that the teacher could not refuse to teach the consolidated grade and still recover salary, the contract being silent as to the particular service to be rendered. *Marquissee v. School Dist. No. 64*, (Neb. 1903) 97 N. W. Rep. 324.

7. Statute Requiring Contract to Fix Compensation. — *Taylor v. School Town*, 33 Ind. App. 675.

8. Recovery on Quantum Meruit. — Compare *Lee v. York School Tp.*, 163 Ind. 339.

16. 2. Closing School on Account of Epidemic No Ground for Deduction. — *Contra* (though recognizing the general rule) where the school was closed by the board of health, without voluntary action of the school officers. *School Dist. No. 16 v. Howard*, (Neb. 1904) 98 N. W. Rep. 666.

8. See *State v. McQuade*, 36 Wash. 579.

9. Pensioning Teachers — Statute Unconstitutional. — See *Hibbard v. State*, 65 Ohio St. 574, 64 N. E. Rep. 109.

10. Statutory Authority to Discharge for Cause. — *Stockton v. Board of Education*, 145 Cal. 246; *Ewin v. Independent School Dist. No. 8*, 10 Idaho 102; *Guilford School Tp. v. Roberts*, 28 Ind. App. 355; *Bowman v. Ray*, 80 S. W. Rep. 516, 25 Ky. L. Rep. 2131; *People v. Board of Education*, 174 N. Y. 169; *Hall-Moody Institute v. Copass*, 108 Tenn. 582.

17. See notes 1, 2.

- (2) *Discharge Without Cause* — (a) *In General*. — See notes 4, 5, 6, 7.
 (b) *Reservation of Right to Discharge at Pleasure*. — See note 8.

18. See note 1.

- (3) *Notice and Hearing*. — See note 2.

- (4) *By Whom Discharge May Be Made* — (a) *In General*. — See note 4.

19. See note 1.

- (5) *Remedies for Wrongful Discharge* — (a) *Action for Damages* — *aa. In*

GENERAL. — See note 6.

20. *bb. MEASURE OF DAMAGES*. — See note 2.

- (b) *Mandamus*. — See notes 8, 9.

16. 11. *Board of Education v. Stotlar*, 95 Ill. App. 250; *Robinson v. School Directors*, 96 Ill. App. 604.

Rescission for Fraudulent Representation. — In *New York* a by-law of a board of education providing that if a woman teacher marry her place shall become vacant, has been held to be void. *People v. Maxwell*, 177 N. Y. 494.

17. 1. *Dismissal for Incompetency or Neglect of Duty*. — *School Dist. No. 18 v. Davies*, 69 Kan. 162; *School Dist. No. 94 v. Gautier*, 13 Okla. 194.

Inability to Manage Pupils. — See *Hall-Moody Institute v. Copass*, 108 Tenn. 582, wherein, under the circumstances, the discharge was held not to be justified.

2. *Discharge for Immoral Conduct*. — *Bowman v. Ray*, 80 S. W. Rep. 516, 25 Ky. L. Rep. 2131. See also *Hall-Moody Institute v. Copass*, 108 Tenn. 582.

4. *Discharge Without Cause*. — *Henry School Tp. v. Meredith*, 32 Ind. App. 607; *Oakes v. School Dist. No. 3*, 98 Mo. App. 163; *Crabb v. School Dist. No. 1*, 93 Mo. App. 254; *Bogert v. Board of Education*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 10, *affirmed* 106 N. Y. App. Div. 56; *People v. Board of Education*, 174 N. Y. 169 (under statute).

5. *Oil School Tp. v. Marting*, 27 Ind. App. 525; *Henry School Tp. v. Meredith*, 32 Ind. App. 607.

6. *Appointment of Teacher to Smaller Salary and Lower Grade Equivalent to Removal*. — *People v. Board of Education*, 174 N. Y. 169.

7. *Board of Education v. Stotlar*, 95 Ill. App. 250; *Harris v. Kill*, 108 Ill. App. 305. See also *Stockton v. Board of Education*, 145 Cal. 246.

8. *Reservation in Contract of Right to Discharge at Pleasure*. — *School Dist. No. 94 v. Gautier*, 13 Okla. 194.

Contract Held Not to Justify Removal at Pleasure. — See *Henry School Tp. v. Meredith*, 32 Ind. App. 607; *School Dist. No. 94 v. Gautier*, 13 Okla. 194.

18. 1. *Under Statute Enumerating Causes of Dismissal*. — See *Bowman v. Ray*, 80 S. W. Rep. 516, 25 Ky. L. Rep. 2131.

The stipulation that the contract of employment "is to hold good as long * * * as the trustee sees fit" does not authorize the trustee to terminate the contract without cause. *Henry School Tp. v. Meredith*, 32 Ind. App. 607.

2. *Necessity of Notice and Hearing*. — *Bowman v. Ray*, 80 S. W. Rep. 516, 25 Ky. L. Rep.

2131; *People v. Board of Education*, 174 N. Y. 169; *Bogert v. Board of Education*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 10, *affirmed* 106 N. Y. App. Div. 56; *Murphy v. Maxwell*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 166.

Under the General School Laws of New York. — The rule set out in the original note has been changed by the new charter of New York city, so far as applicable to that city, and no teacher may be removed or discharged except on charges preferred and after trial. *Murphy v. Maxwell*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 166; *Bogert v. Board of Education*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 10, *affirmed* 106 N. Y. App. Div. 56.

Notice Must Be Reasonably Specific. — *Bowman v. Ray*, 80 S. W. Rep. 516, 25 Ky. L. Rep. 2131.

Trustees of Independent School Districts in Idaho may dismiss teachers without notice and hearing. *Ewin v. Independent School Dist. No. 8*, 10 Idaho 102.

4. *Dismissal Discretionary with Board of Education*. — *Board of Education v. Stotlar*, 95 Ill. App. 250.

Court May Review Board's Dismissal of Teacher. — *School Dist. No. 94 v. Gautier*, 13 Okla. 194. But see *School Dist. No. 18 v. Davies*, 69 Kan. 162.

19. 1. *School Dist. No. 18 v. Davies*, 69 Kan. 162; *School Dist. No. 94 v. Gautier*, 13 Okla. 194.

6. *Action for Damages for Wrongful Discharge*. — *Hancock v. Board of Education*, 140 Cal. 554; *Oil School Tp. v. Marting*, 27 Ind. App. 525; *Hornbeck v. State*, 33 Ind. App. 609; *Crabb v. School Dist. No. 1*, 93 Mo. App. 254; *Bogert v. Board of Education*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 10, *affirmed* 106 N. Y. App. Div. 56.

20. 2. *Measure of Damages*. — *Hancock v. Board of Education*, 140 Cal. 554; *Oil School Tp. v. Marting*, 27 Ind. App. 525; *Crabb v. School Dist. No. 1*, 93 Mo. App. 254; *Bogert v. Board of Education*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 10, *affirmed* 106 N. Y. App. Div. 56.

8. *Teacher Not a Public Officer*. — *Murphy v. Board of Education*, (Supm. Ct. Tr. T.) 38 Misc. (N. Y.) 706, *affirmed* 76 N. Y. App. Div. 620.

9. *Acceptance of Another Position No Bar to Mandamus*. — *O'Leary v. Board of Education*, 78 N. Y. App. Div. 475, *reversed* on other grounds 174 N. Y. 511.

Where the Services of the Teacher Are No

21. *b.* EXPIRATION OF TERM OF SERVICE — Where Duration of Term Is Fixed by Contract. — See notes 7, 8.

Where Duration of Contract Is Not Specified. — See note 10.

22. III. PUPIL — 1. Admission — *a.* IN GENERAL. — See note 2.

b. RESIDENCE. — See note 3.

c. SCHOOL AGE. — See note 4.

d. COLORED PUPILS — Right of Admission to Public Schools. — See note 5.

23. *e.* COMPULSORY EDUCATION ACTS. — See note 2.

f. VACCINATION AS A PREREQUISITE — Statutory Requirement. — See note 4.

In Absence of Statute. — See note 6.

24. See note 1.

g. PAYMENT OF TUITION. — See note 2.

2. Punishment — *a.* CORPORAL PUNISHMENT — (1) *In General.* — See note 4.

25. (2) *Wanton or Malicious Punishment.* — See note 1.

(3) *Excessive Punishment.* — See notes 2, 3, 4.

Longer Necessary, mandamus for reinstatement will not lie. *Cusack v. Board of Education*, 174 N. Y. 139.

21. 7. Term of Service in Contract Changed by Secretary — Authority Presumed. — *School Dist. No. 27 v. Wheat*, (Ark. 1904) 78 S. W. Rep. 755.

8. Contract for Employment of Professor One Year Reasonable. — *State Board of Agriculture v. Meyers*, (Colo. App. 1904) 77 Pac. Rep. 372.

10. Board Has Discretion to Put Teachers on Retired List. — *Bates v. Board of Education*, 139 Cal. 145.

22. 2. Statute Excluding Married Persons. — *Weir v. State*, 161 Ind. 435.

A School Board Has No Discretion to prohibit children of a resident from attending school. *State v. Penter*, 96 Mo. App. 416.

3. Statutory Requirements as to Residence of Pupils. — *Board of Education v. Foster*, 116 Ky. 484. See also *Wrentham v. Fales*, 185 Mass. 539; *School Dist. v. Matherly*, 90 Mo. App. 403; *Edmondson v. Board of Education*, 108 Tenn. 557.

Residence Question of Fact. — *State v. Penter*, 96 Mo. App. 416.

4. Legal School Age. — *Weir v. State*, 161 Ind. 435 (between six and twenty-one years).

5. Right of Admission of Colored Pupils to Public Schools. — See *Hooker v. Greenville*, 130 N. Car. 472.

23. 2. Compulsory Education Acts. — *State v. Bailey*, 157 Ind. 324; *State v. Peterman*, 32 Ind. App. 665.

Compulsory Education Act Held Constitutional. — *State v. Jackson*, 71 N. H. 552.

Statutory Provision for Boards of Truancy. — See *Featherngill v. State*, 33 Ind. App. 683.

Acts Not Construed So as to Imperil Child's Life. — *State v. Jackson*, 71 N. H. 552.

4. Statutes Held Constitutional. — *French v. Davidson*, 143 Cal. 658; *Viemeister v. White*, 179 N. Y. 235.

6. Requiring Vaccination Apart from Express Statute. — *Hutchins v. Durham*, 137 N. Car. 68.

24. 1. *Hutchins v. Durham*, 137 N. Car. 68.

2. Tuition Fees. — *Young v. Fountain Inn Graded School*, 64 S. Car. 131.

Board Has No Authority to Charge Incidental Fees. — *Young v. Fountain Inn Graded School*, 64 S. Car. 131.

Payment of Tuition by Nonresident. — *Fiske v. Huntington*, 179 Mass. 571; *Washington Academy v. Cruikshank*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 197; *Board of Education v. Foster*, 116 Ky. 484; *Wrentham v. Fales*, 185 Mass. 539.

Contract to Pay Tuition by Nonresident Enforceable. — *Wrentham v. Fales*, 185 Mass. 539.

Tuition Payable by Town or District of Residence. — *Kerr v. Perry School Tp.*, 162 Ind. 310; *Fiske v. Huntington*, 179 Mass. 571.

Statute Directory Merely. — *State v. Board of Education*, 12 Ohio Cir. Dec. 337.

Tuition Payable by School Corporation for Excess Over Proportionate Share. — *Boggs v. School Tp.*, (Iowa 1905) 102 N. W. Rep. 796.

Statutory Provision for Transfer of Pupils from One District to Another. — *Weir v. State*, 161 Ind. 435; *Kerr v. Perry School Tp.*, 162 Ind. 310.

4. Power of Teacher to Inflict Corporal Punishment. — *Haycraft v. Grigsby*, 88 Mo. App. 354; *Drum v. Miller*, 135 N. Car. 216, quoting 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 24; *State v. Thornton*, 136 N. Car. 610.

Whether Teacher Acts in Loco Parentis. — See *Drum v. Miller*, 135 N. Car. 216, quoting 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 24.

Moderate Correction by Teacher Authorized by Statute. — *Stephens v. State*, 44 Tex. Crim. 67.

Presumption that Punishment Was Lawful. — *State v. Thornton*, 136 N. Car. 610.

25. 1. Liability for Wanton or Malicious Punishment. — *Haycraft v. Grigsby*, 88 Mo. App. 354; *State v. Thornton*, 136 N. Car. 610 (revenge or malice); *Drum v. Miller*, 135 N. Car. 216.

2. Liability for Excessive Punishment. — *State v. Thornton*, 136 N. Car. 610; *Drum v. Miller*, 135 N. Car. 216.

Punishment Held Not to Be Excessive. — See *Stephens v. State*, 44 Tex. Crim. 67.

Directors who advise or encourage im-

25. *b. EXPULSION AND SUSPENSION* — (1) *Power to Expel* — (a) *School Board*. — See note 6.

26. (2) *Grounds for Expulsion* — (b) *In Absence of Express Regulations*. — See note 3.

(3) *Remedies* — (a) *Action for Damages*. — See note 7.

27. (b) *Mandamus*. — See note 2.

Right of Action in Parent or Guardian. — See note 3.

[(a) *Injunction* has been held to lie to restrain school directors from interfering with the attendance of a pupil.^{6a}]

c. OFFENSES OUT OF SCHOOL. — See note 9.

28. *IV. RULES AND REGULATIONS*. — See note 1.

29. See note 1.

V. TEXT-BOOKS AND COURSES OF STUDY — 1. *Text-books* — *a. POWER OF LEGISLATURE TO ESTABLISH UNIFORM SERIES*. — See notes 3, 4.

b. CHANGE OF SERIES. — See note 6.

30. *c. DELEGATION OF POWER OF ADOPTION OR CHANGE*. — See notes 2, 3.

moderate whipping are liable. *Haycraft v. Grigsby*, 88 Mo. App. 354.

Liability of Teacher for Personal Injury to Pupil. — *Drum v. Miller*, 135 N. Car. 204, 102 Am. St. Rep. 528.

25. 3. *State v. Thornton*, 136 N. Car. 610.

4. *Excessiveness a Question for the Jury*. — *Drum v. Miller*, 135 N. Car. 216.

The jury may infer malice from the excessiveness of the punishment. *State v. Thornton*, 136 N. Car. 610.

6. *Power of School Board to Suspend Pupils*. — *Harris v. Kill*, 108 Ill. App. 305; *Morrison v. Lawrence*, 181 Mass. 127; *Young v. Fountain Inn Graded School*, 64 S. Car. 131.

The Investigation of Charges May Be Delegated to a Committee of the board when its action is reviewed by the full board. *Miller v. Clement*, 205 Pa. St. 484.

26. 3. *Expulsion for Writing Articles Criticising Management of School*. — *Morrison v. Lawrence*, 186 Mass. 456.

Expulsion for Bearing False Witness Against Fellow Student. — *Goldstein v. New York University*, 76 N. Y. App. Div. 80.

7. *No Liability for Error of Judgment in Expelling Pupil*. — *Morrison v. Lawrence*, 181 Mass. 127.

27. 2. *Mandamus to Compel Reinstatement of Pupil*. — *Miller v. Dailey*, 136 Cal. 212; *Board of Public Education v. Felder*, 116 Ga. 788; *State v. Penter*, 96 Mo. App. 416; *Mizner v. School Dist. No. 11*, (Neb. 1901) 96 N. W. Rep. 128; *Edmondson v. Board of Education*, 108 Tenn. 557. See also *Miller v. Clement*, 205 Pa. St. 484, wherein mandamus was refused.

Remedies Provided by School Law Must Be First Exhausted. — *Stockton v. Board of Education*, (N. J. 1905) 59 Atl. Rep. 1061.

3. *Compare Weir v. State*, 161 Ind. 435.

6a. *Injunction*. — *Mizner v. School Dist. No. 11*, (Neb. 1901) 96 N. W. Rep. 128.

9. *Morrison v. Lawrence*, 181 Mass. 127.

Right of School Authorities to Control Pupils When Going to and from School. — See *Jones v. Cody*, 132 Mich. 13, 9 Detroit Leg. N. 499.

28. 1. *Power of Board to Adopt Reasonable Regulations*. — *Rule v. Geddes*, 23 App. Cas.

(D. C.) 31; *Alvord v. Chester*, 180 Mass. 20; *Jones v. Cody*, 132 Mich. 13, 9 Detroit Leg. N. 499; *Hutchins v. Durham*, 137 N. Car. 68.

Requiring Pupils to Pursue Particular Studies Held Reasonable. — *State v. Schauss*, 23 Ohio Cir. Ct. Rep. 283.

What Are Reasonable Rules a Question of Law. — *Koons v. Longum*, 93 Minn. 332.

A Rule Requiring Pupils to Pay a Rental Fee for Books as a prerequisite to admission, regardless of whether the pupils possess the books, is unreasonable. *Mathis v. Gordy*, 119 Ga. 817.

A Requirement that Teachers Shall Not Frequent Saloons in the vicinity of the school is reasonable. *Koons v. Longum*, 93 Minn. 332.

Regulations as to Receiving Callers Held to Be Unreasonable. — *Hall-Moody Institute v. Compass*, 108 Tenn. 582.

29. 1. *Power of Teacher to Make Rules*. — See *State v. Scheve*, 65 Neb. 877.

Teacher Not Liable to Storekeeper for Loss of Trade from Enforcement of Reasonable Rule. — *Jones v. Cody*, 132 Mich. 13, 9 Detroit Leg. N. 499.

3. *Legislative Power to Establish Uniform Series of Text-books*. — *Dickinson v. Cunningham*, 140 Ala. 527; *Atty.-Gen. v. Board of Education*, 133 Mich. 681, 10 Detroit Leg. N. 314.

4. *Authorizing Contract with Particular Publisher*. — *Dickinson v. Cunningham*, 140 Ala. 527.

6. *Statutory Provisions for Changing Text-books*. — *American Book Co. v. McElroy*, 76 S. W. Rep. 850, 25 Ky. L. Rep. 960; *Atty.-Gen. v. Board of Education*, 133 Mich. 681, 10 Detroit Leg. N. 314; *State v. Wilson*, 121 Wis. 523.

Mandamus Denied to Publisher. — *State v. Wilson*, 121 Wis. 523. See also *Atty.-Gen. v. Board of Education*, 133 Mich. 681, 10 Detroit Leg. N. 314.

Injunction Denied to Publisher. — *Rand v. Hartranft*, 29 Wash. 591.

Injunction Granted to Publisher Where Directors Failed to Use Book Adopted. — *Eaton v. Royal*, 36 Wash. 435.

30. 2. *Tanner v. Nelson*, 25 Utah 226; *Rand v. Hartranft*, 29 Wash. 591; *Westland Pub. Co. v. Royal*, 36 Wash. 399; *Rand v.*

- 30.** *d.* FREE TEXT-BOOKS. — See notes 4, 5.
 2. Courses of Study. — See note 6.
3. Religious Exercises. — See note 7.
- 31.** See note 1.
VI. SCHOOL DISTRICTS — 1. Nature and Purpose. — See note 2.
 Whether a Municipal Corporation. — See note 3.
 School Districts Independent of Municipality. — See note 5.
- 32.** 2. Formation and Organization — *a.* AUTHORITY TO CREATE --
 (1) *In General.* — See note 2.
 (2) *Delegation of Authority to Officials.* — See note 4.
 (3) *Submission of Question to Vote of Inhabitants.* — See note 6.
- 33.** *b.* REQUISITES AS TO DISTRICT LIMITS. — See note 2.
 Limitations as to Size. — See note 6.
c. PRESUMPTION OF LEGALITY OF FORMATION. — See note 7.
- 34.** *d.* NOT SUBJECT TO COLLATERAL ATTACK. — See note 1.
f. GRADED OR HIGH SCHOOL DISTRICTS. — See note 3.
 3. Alteration of Boundaries — *a.* IN GENERAL. — See notes 4, 5.

Royal, 36 Wash. 420; *Wagner v. Royal*, 36 Wash. 428.

State Text-book Commission. — *Dickinson v. Cunningham*, 140 Ala. 527; *Silver v. State Board of Education*, (Ind. App. 1904) 71 N. E. Rep. 667.

30. 3. *Harris v. Kill*, 108 Ill. App. 305; *Ries v. Hemmer*, 127 Iowa 408; *Madden v. Kinney*, 116 Wis. 561.

Power Vested in Local Board by City Charter. — *State v. Wilson*, 121 Wis. 523.

4. Provision for Furnishing Books to Poor Children. — *Miami County v. Falk*, 29 Ind. App. 683.

The Board of Education May Rent Books to pupils, but cannot force pupils to rent them when they already possess duplicate copies. *Mathis v. Gordy*, 119 Ga. 817.

5. *Harris v. Kill*, 108 Ill. App. 305.

6. Power of School Board to Fix Courses of Study. — Where the state board has the exclusive right to fix the courses of study, the local directors have no authority to adopt a course in conflict with that prescribed. *Wagner v. Royal*, 36 Wash. 428; *Rand v. Royal*, 36 Wash. 420; *Westland Pub. Co. v. Royal*, 36 Wash. 399.

Music May Be Prescribed by Trustees. — *W. P. Myers Pub. Co. v. White River School Tp.*, 28 Ind. App. 91.

7. Religious Exercises. — *State v. Scheve*, 65 Neb. 853, wherein on motion for rehearing, the original opinion was elaborated, the court holding that the question whether it is prudent or politic to permit Bible-reading is for the school authorities; but whether the practice of Bible-reading has taken the form of sectarian instruction is a question for the courts.

31. 1. **Repeating the Lord's Prayer and the Twenty-third Psalm** as a morning exercise, without comment, is held in *Kansas* not to be conducting a form of religious worship or teaching sectarian or religious doctrine. *Billard v. Board of Education*, 69 Kan. 53, 105 Am. St. Rep. 148.

2. Nature and Purpose of School Districts. — *State v. Ogan*, 159 Ind. 119; *Union School Dist. v. District No. 20*, 71 N. H. 269.

School District Made Body Corporate by Statute. — *Kellogg v. School Dist. No. 10*, 13 Okla. 285.

3. Board of Education Held to Be Municipal Corporation. — See *Whitehead v. Board of Education*, (Mich. 1905) 102 N. W. Rep. 1028.

A School District Has Been Held to Be a "Town," within the meaning of a statute requiring towns to maintain high schools. *Union School Dist. v. District No. 20*, 71 N. H. 269.

5. *Scott v. Goshen*, 162 Ind. 204; *State v. Buchanan*, (Tex. Civ. App. 1904) 83 S. W. Rep. 723.

32. 2. **Power of Legislature to Form School Districts.** — *Howe v. Board of Education*, (N. J. 1905) 60 Atl. Rep. 518. See also *Riccio v. Hoboken*, 69 N. J. L. 649.

The Law Must Be General and have uniform operation in the state. *State v. Spellmire*, 67 Ohio St. 77.

4. Power Vested in County Commissioners' Court. — See *Gerber v. Wright County*, 89 Minn. 351.

Appeal from County Superintendent to County Commissioners. — *Tilley v. Greer County*, (Okla. 1905) 79 Pac. Rep. 756.

6. Submission of Question to Vote of Inhabitants. — *State v. Cass County*, (Neb. 1903) 95 N. W. Rep. 6; *People v. Vanhorn*, (Colo. App. 1904) 77 Pac. Rep. 978.

33. 2. **Geographical Lines May Be Run According to Population.** — *Farley v. Gilbert*, 72 S. W. Rep. 1098, 24 Ky. L. Rep. 2109.

6. See *Jackson v. Brewer*, 112 Ky. 554.

7. Waiver of State's Right to Forfeiture for Irregular Formation. — See *State v. School Dist. No. 108*, 85 Minn. 230.

34. 1. **Not Subject to Collateral Attack.** — *Gale v. Knopf*, 193 Ill. 245; *Howe v. Board of Education*, (N. J. 1905) 60 Atl. Rep. 518.

3. Graded or 'High School Districts. — *Gale v. Knopf*, 193 Ill. 245; *Russell v. High School Board of Education*, 212 Ill. 327; *Taylor v. Russell*, 117 Ky. 539; *Territory v. Logan County High School*, 13 Okla. 605.

Laws Authorizing Cities to Charge Tuition for High Schools Unconstitutional. — *Board of Education v. Dick*, (Kan. 1904) 78 Pac. Rep. 812.

4. Power of Legislature to Alter Boundaries. — *People v. Keechler*, 194 Ill. 235; *Rural Independent School Dist. No. Ten v. New In-*

35. b. CREATING SCHOOL DISTRICTS IN TOWNS AND CITIES.—See note 1.

Annexing Contiguous Territory to Municipality.—See note 3.

Effect of Extension of City Limits.—See note 5.

c. DELEGATION OF POWER OF ALTERATION TO OFFICIALS.—See note 6.

36. d. CONSENT OF INHABITANTS—(1) *In General.*—See note 2.

(2) *Petition.*—See note 3.

37. (3) Submission to Voters.—See note 1.

e. NOTICE.—See note 2.

38. f. REGULARITY OF ALTERATION NOT SUBJECT TO COLLATERAL ATTACK.—See note 1.

g. EFFECT ON PROPERTY RIGHTS—(1) *In General.*—See note 3.

(2) *Real Estate.*—See note 6.

dependent School Dist., 120 Iowa 119; Ash v. Thorp, 65 Kan. 60; Atty.-Gen. v. Lowrey, 131 Mich. 639; Board of Education v. Board of Education, 76 N. Y. App. Div. 355, *affirmed* 179 N. Y. 556; Boesch v. Byrom, (Tex. Civ. App. 1904) 83 S. W. Rep. 18. See also Barber v. Alexander, 120 Ga. 30 (unconstitutional statute).

District Not Altered by Mere Change of Name.—State v. Ogan, 159 Ind. 119.

34. 5. Statutes Authorizing Alteration.—Gale v. Knopf, 193 Ill. 245; People v. Keechler, 194 Ill. 235; Rural Independent School Dist. No. Ten v. New Independent School Dist., 120 Iowa 119; Williams v. Core, 124 Iowa 213; Noble v. White, 77 S. W. Rep. 678, 25 Ky. L. Rep. 1282; State v. Denny, 94 Mo. App. 559; Meyers v. School Dist. 2-28-13, 96 Mo. App. 48; State v. McClain, 187 Mo. 409; State v. Buchanan, (Tex. Civ. App. 1904) 83 S. W. Rep. 723.

Forming Subdistricts or Divisions of District Not Amounting to Independent Districts.—Board of Education v. Board of Education, 67 Ohio St. 326.

Requirement of Signatures of Voters.—See People v. Rhodes, 109 Ill. App. 110.

35. 1. Creating School Districts in Towns and Cities.—See Barber v. Alexander, 120 Ga. 30.

Statute Authorizing Unincorporated Towns to Incorporate for School Purposes Only.—See Sutton v. School City, 28 Ind. App. 315.

3. Annexing Contiguous Territory to Municipality.—Maumee School Tp. v. School Town, 159 Ind. 423.

Request for Annexation by Majority of the Inhabitants and Affirmative Vote by City Council.—School Dist. No. 30 v. School Dist., 63 Neb. 44.

5. School Dist. No. 7 v. School Dist., 184 Mo. 140.

In *Illinois* the charters of cities provide that the cities have control. School Trustees v. School Inspectors, 214 Ill. 30.

6. Power Vested in School Trustees.—People v. Keechler, 194 Ill. 235.

Power Vested in County Superintendent.—Farley v. Gilbert, 72 S. W. Rep. 1098, 24 Ky. L. Rep. 2109; Kellogg v. School Dist. No. 10, 13 Okla. 285.

Power Vested in County Superintendent After Statutory Notice and Petition.—School Dist.

No. 44 v. Turner, 13 Okla. 71. See also Noble v. White, 77 S. W. Rep. 678, 25 Ky. L. Rep. 1282.

Power Vested in County Commissioners—Notice to and Assent of Voters Required.—State v. Patton, 108 Mo. App. 26.

Power in Town Board After Notice to Clerks of District Affected.—State v. Clifton, 113 Wis. 107. See also School Dist. v. Palmer, 41 Oregon 485.

36. 2. Necessity of Consent of Inhabitants.—People v. Keechler, 194 Ill. 235; Howell v. Shannon, 130 Mich. 556, 9 Detroit Leg. N. 159; Peth v. Martin, 31 Wash. 1.

Provision for Appeal in Case of Disagreement in Vote of Different Districts Affected.—State v. Wilson, 99 Mo. App. 675.

3. Petition by Voters.—People v. Keechler, 194 Ill. 235; Rural Independent School Dist. No. Ten v. New Independent School Dist., 120 Iowa 119; Gerber v. Wright County, 89 Minn. 351; School Dist. No. 44 v. Turner, 13 Okla. 71.

37. 1 Submission to Voters upon Petition and Notice.—People v. Van Horn, (Colo. App. 1904) 77 Pac. Rep. 978; Huyser v. School Inspectors, 131 Mich. 568, 9 Detroit Leg. N. 437.

2. Necessity of Notice.—Huyser v. School Inspectors, 131 Mich. 568, 9 Detroit Leg. N. 437; School District Number Four v. Smith, 90 Mo. App. 215; School Dist. No. 44 v. Turner, 13 Okla. 71; Peth v. Martin, 31 Wash. 1.

38. 1. Regularity of Alteration Not Subject to Collateral Attack.—Gale v. Knopf, 193 Ill. 245.

Proper Reason for Change of Boundaries Presumed.—Farley v. Gilbert, 72 S. W. Rep. 1098, 24 Ky. L. Rep. 2109.

Injunction is held to be the proper remedy where the county superintendent arbitrarily and without requisite petition and notice attempts to change boundaries. School Dist. No. 44 v. Turner, 13 Okla. 71.

3. Effect on Property Rights.—Old Forge School Dist.'s Indebtedness, 24 Pa. Super. Ct. 239. See also Atty.-Gen. v. Lowrey, 131 Mich. 639.

6. See Board of Education v. State, 64 Kan. 6; *In re* Wilkins Tp. School Dist., 18 Pa. Super. Ct. 203.

Compensation Required by Statute for Undue Proportion of Real Estate.—See Munhall Bor-

- 38.** (3) *Funds or Assets*. — See note 7.
39. (4) *Abolition of Old District*. — See note 2.
40. *h. APPORTIONMENT OF LIABILITIES*. — See notes 2, 4.
4. *Meetings* — *a. AUTHORITY TO CALL* — (1) *In General*. — See note 5.
41. *b. HOW CALLED*. — See note 7.
42. *Notice of Object of Meeting*. — See notes 1, 2.
c. PRESIDING OFFICER. — See note 8.
43. *h. RECORD OF MEETING* — *Records as Evidence*. — See note 5.
5. *Powers and Liabilities* — *a. IN GENERAL*. — See note 9.
44. *c. POWER TO CONTRACT*. — See note 2.
Borrowing Money and Issuance of Bonds. — See note 3.
Constitutional or Statutory Limitations. — See note 4.

ough School Dist. *v.* Mifflin Tp. School Dist., 207 Pa. St. 638.

Where a City Has Annexed Territory Containing School Property, it has been held in *Indiana* that in the absence of statute the school property becomes that of the city. *Maumee School Tp. v. School Town*, 159 Ind. 423.

38. 7. *Statutory Provision for Apportionment of Assets*. — *Sunol School Dist. v. Chipman*, 138 Cal. 251; *School Dist. No. 1 v. School Dist. No. 7*, 33 Colo. 43; *School Dist. No. 1 v. McCormick*, (Neb. 1903) 93 N. W. Rep. 956; *Munhall Borough School Dist. v. Mifflin Tp. School Dist.*, 207 Pa. St. 638; *In re Wilkins Tp. School Dist.*, 18 Pa. Super. Ct. 293; *School Dist. No. 9 v. School Dist. No. 5*, 118 Wis. 233.

Recovery of Proportion in Action for Money Had and Received. — *School Dist. No. 9 v. School Dist. No. 5*, 118 Wis. 233.

39. 2. See *In re School Committee*, 26 R. I. 164.

40. 2. *Assumption of Liabilities of Abolished District*. — *School Dist. No. 1 v. School Dist. No. 7*, 33 Colo. 43; *Maumee School Tp. v. School Town*, 159 Ind. 423.

4. *Apportionment under Statutes*. — *School Dist. No. 1 v. School Dist. No. 7*, 33 Colo. 43; *Board of Education v. State*, 64 Kan. 6.

5. *Authority to Call Meetings in General*. — *Goerd v. Trumm*, 118 Iowa 207; *Young v. Fountain Inn Graded School*, 64 S. Car. 131.

41. 7. *Goerd v. Trumm*, 118 Iowa 207; *Cunningham v. Board of Education*, 53 W. Va. 318.

42. 1. *Statement of Object of Meeting Required*. — *Benham v. Potter*, 77 Conn. 186; *Goerd v. Trumm*, 118 Iowa 207; *Lawson v. Lincoln*, 86 N. Y. App. Div. 217, *affirmed* 178 N. Y. 636.

2. *Sufficiency of Notice of Object*. — *Greenlees v. Picton Public School Board*, 2 Ont. L. Rep. 387; *Benham v. Potter*, 77 Conn. 186; *Stanton v. Board of Education*, 68 N. J. L. 496; *Lawson v. Lincoln*, 86 N. Y. App. Div. 217, *affirmed* 178 N. Y. 636.

8. *State v. Waterhouse*, 71 N. H. 488.

43. 5. *Records as Evidence*. — *Polk v. Board of Education*, 140 Cal. xvii, 74 Pac. Rep. 47.

9. *Powers of School Districts in General*. — *Sutton v. School City*, 28 Ind. App. 315 (no authority to contract for street); *State v. Umbarger*, 69 Kan. 66; *Kidd v. Truett*, 28 Tex. Civ. App. 618 (may hold local-option election).

44. 2. *Contracts Held Not Authorized by*

Statute. — See *Poling v. Board of Education*, 56 W. Va. 251.

Contract Must Be in Writing Signed by Parties. — *Perkins v. Independent School Dist.*, 99 Mo. App. 483.

3. *Power to Borrow Money and Issue Bonds*. — *Gamble v. Rural Independent School Dist.*, 132 Fed. Rep. 514; *Baltimore, etc., R. Co. v. People*, 195 Ill. 423; *Wabash R. Co. v. People*, 202 Ill. 9; *Board of Education v. Phillips*, 67 Kan. 549, 100 Am. St. Rep. 475; *State v. School Dist. No. 108*, 85 Minn. 230, wherein a district not legally organized was held to be liable for money advanced in good faith on its bonds; *Benton v. Scott*, 168 Mo. 378; *Niles v. Board of Education*, 70 N. J. L. 1; *State v. Brock*, 66 S. Car. 357; *Parkinson v. Seattle School Dist. No. 1*, 28 Wash. 335.

Issuance of Promissory Notes. — *Lincoln School Tp. v. Union Trust Co.*, (Ind. App. 1905) 73 N. E. Rep. 623. See also *Fairfield v. Rural Independent School Dist.*, (C. C. A.) 116 Fed. Rep. 838, *reversing* 111 Fed. Rep. 453.

Issuing Bonds Sole Method of Borrowing Money. — *Kellogg v. School Dist. No. 10*, 13 Okla. 285.

Liability on Substituted Bonds. — See *Oswego City Sav. Bank v. Board of Education*, 70 N. Y. App. Div. 538, *affirmed* 174 N. Y. 515.

4. *Limitations upon Power to Contract Indebtedness*. — *Baltimore, etc., R. Co. v. People*, 195 Ill. 423; *Wabash R. Co. v. People*, 202 Ill. 9; *Chicago, etc., R. Co. v. People*, 205 Ill. 625; *Russell v. High School Board of Education*, 212 Ill. 327; *Farmers, etc., State Bank v. School Tp.*, 118 Iowa 540; *Benton v. Scott*, 168 Mo. 378; *Thornburg v. School Dist. No. 3*, 175 Mo. 12; *Montpelier Sav. Bank, etc., Co. v. School Dist. No. 5*, 115 Wis. 622.

Validity of Judgment for Debt Contracted in Violation of Constitutional Limitation. — See *McGillivray v. Joint School Dist. No. 1*, 112 Wis. 354, 88 Am. St. Rep. 969.

The District Is Liable for the Debt evidenced by bonds exceeding the lawful limit, and the holder of such bonds may be subrogated to the rights of the original lender. *Geer v. School Dist. No. 11*, (C. C. A.) 111 Fed. Rep. 682.

Court Cannot Reduce Bonds to Amount Within Limit. — *Thornburg v. School Dist. No. 3*, 175 Mo. 12.

Vote for Unlawful Amount of Indebtedness Operative to Authorize Lawful Amount. — *Wabash R. Co. v. People*, 202 Ill. 9.

45. d. ACQUIRING AND HOLDING LANDS. — See note 2.

e. CAPACITY TO SUE AND BE SUED. — See note 3.

Employment of Attorneys. — See note 4.

g. LIABILITY FOR NEGLIGENCE OR TRESPASS BY OFFICERS OR AGENTS. — See notes 6, 8.

46. 6. Dissolution and Abolition. — See note 3.

VII. SCHOOL BUILDINGS — 1. **Erection or Acquisition** — *a. AUTHORITY TO ERECT.* — See note 5.

47. See note 1.

Officers Acting under Authority from District Meeting. — See notes 2, 3.

Building Committee. — See note 4.

48. Limitation of Power to Create Indebtedness. — See note 1.

b. CONTRACT WITH LOWEST RESPONSIBLE BIDDER. — See note 3.

c. RATIFICATION OF UNAUTHORIZED CONTRACT. — See notes 6, 7.

Contract Binding Up to Constitutional Limit. — *McGillivray v. Joint School Dist. No. 1*, 112 Wis. 354, 88 Am. St. Rep. 969.

No Recovery on Quantum Meruit. — See *Perkins v. Independent School Dist.*, 99 Mo. App. 483.

45. 2. Power to Acquire and Hold Lands. — See *Dawson v. Common School Dist. No. 40*, 115 Ky. 151; *Hayward v. School Dist. No. 9*, (Mich. 1905) 102 N. W. Rep. 999; *Niles v. Board of Education*, 70 N. J. L. 1.

3. Capacity to Sue and Be Sued. — *Hancock v. Board of Education*, 140 Cal. 554; *State v. Ogan*, 159 Ind. 119; *Poling v. Board of Education*, 50 W. Va. 374. See also *Fairfield v. Rural Independent School Dists.*, 111 Fed. Rep. 108.

Capacity Limited to Actions Relating to Corporate Rights. — *Board of Education v. Board of Education*, 76 N. Y. App. Div. 355, *affirmed* 179 N. Y. 556; *State v. School Com'rs*, 94 Md. 334.

Board Not Exempt from Suit as Agent of State. — *Oberdorfer v. Louisville School Board*, (Ky. 1905) 85 S. W. Rep. 696.

Effect of Repeal of Statute. — See *Wheeler v. Board of Control*, 137 Mich. 291.

Suits Should Be Brought in Name of Board. — *Gunnison v. Board of Education*, 176 N. Y. 11.

4. Employment of Attorneys. — *Kagy v. Independent Dist.*, 117 Iowa 694; *Phillips v. Butler County*, 187 Mo. 698. See also *Anderson v. School Dist. No. 15*, 89 N. Y. App. Div. 231.

Duty of City Attorney to Act for Board of Education. — *Denman v. Webster*, 139 Cal. 452.

The District Is Not Liable for Attorney Fees incurred by electors of the school district when sued in their individual capacity for libel arising from a report made by a committee of which they were members. *People v. Skinner*, 74 N. Y. App. Div. 58.

6. Whitehead v. Board of Education, (Mich. 1905) 102 N. W. Rep. 1028.

8. Board of Education Held to Be Municipal Corporation and Not Liable for Negligence of Employees or Agents. — *Whitehead v. Board of Education*, (Mich. 1905) 102 N. W. Rep. 1028.

46. 3. Statute Abolishing School Districts and Constituting Each Town a Single District. — *In re School Committee*, 26 R. I. 164.

Dissolution by Trustee — Power Dependent on Number of Pupils. — *State v. Seely*, 163 Ind. 244;

Advisory Board v. State, (Ind. 1905) 73 N. E. Rep. 700.

5. Power of District to Provide School Building. — *Hale v. Brown*, 70 Ark. 471.

Limitation of Power of Country District. — See *Kellogg v. School Dist. No. 10*, 13 Okla. 285.

Power to Provide Separate Houses for White and Colored Races. — See *Board of Education v. Kingfisher County*, 14 Okla. 322. And see the title **CIVIL RIGHTS**, 83. 5 *et seq.*

47. 1. Renting Building. — *Harris v. Kill*, 108 Ill. App. 305; *Cumberland Bank v. Simpson*, 77 S. W. Rep. 695, 25 Ky. L. Rep. 1227, which cases support the first paragraph of the original note.

Authority of Trustees with Consent of the County Board. — *Sligh v. Bowers*, 62 S. Car. 409.

Duty of Township Trustees to Provide Building. — *Advisory Board v. State*, (Ind. 1905) 73 N. E. Rep. 700.

2. Benham v. Potter, 77 Conn. 186.

3. Trustees Empowered by Statute to Provide Buildings. — *Young v. Fountain Inn Graded School*, 64 S. Car. 131.

4. Building Committee. — *School Dist. No. 3 v. Western Tube Co.*, 13 Wyo. 304.

Contracts with Relatives of Board Members, though not authorized by the electors, or approved by the superintendent, as required by law, have been upheld where they were executed. *Kagy v. Independent Dist.*, 117 Iowa 694.

48. 1. Limitation of Power to Create Indebtedness. — *Wabash R. Co. v. People*, 202 Ill. 9; *Scott v. Goshen*, 162 Ind. 204; *Farmers' Sav. Bank v. Independent School Dist.*, 122 Iowa 99; *School Dist. No. 3 v. Western Tube Co.*, 13 Wyo. 304.

After the Indebtedness Has Reached the Statutory Limit the school district may levy a tax for building purposes in addition. *Cincinnati, etc., R. Co. v. People*, 206 Ill. 387.

3. Statutes Requiring Contract to Be Let to Lowest Bidder. — *Criswell v. Everett School Dist. No. 24*, 34 Wash. 420; *School Dist. No. 3 v. Western Tube Co.*, 13 Wyo. 304.

6. Ratification of Voidable Contract. — *School Dist. No. 3 v. Western Tube Co.*, 13 Wyo. 304. See also *Criswell v. Everett School Dist. No. 24*, 34 Wash. 420, wherein the district was held to be liable for the reasonable value of the building only.

7. Contract for Indebtedness Beyond Lawful

- 49.** 2. Care and Control — *a.* IN GENERAL. — See note 2.
b. ALLOWING USE OF SCHOOL BUILDING FOR OTHER THAN SCHOOL PURPOSES. — See note 4.
- 50.** See notes 1, 2, 4.
- 3.** Site — *a.* AUTHORITY TO SELECT. — See notes 7, 8.
- 51.** See note 2.
b. TAKING SITE BY RIGHT OF EMINENT DOMAIN. — See note 3.
c. CHANGE OF SITE. — See note 6.
- 52.** 4. Sale of Building. — See note 1.
- VIII. OFFICERS — 1. Superintendents — a. STATE SUPERINTENDENT.**
 — See note 2.
b. COUNTY SUPERINTENDENT — (1) Powers. — See note 5.
- 53.** (2) Election, Term of Office, and Removal. — See notes 2, 3, 4.
 (3) Compensation. — See note 6.

Amount. — See School Dist. No. 3 *v.* Western Tube Co., 13 Wyo. 304.

49. 1. Duty of Board to Care for School Property. — Baggerly *v.* Lee, (Ind. App. 1905) 73 N. E. Rep. 921; Kellogg *v.* School Dist. No. 10, 13 Okla. 285.

Authority to Contract for Repairs. — Leonard *v.* State, 67 Neb. 635.

4. Use When Unoccupied for School Purposes — Construction of Indiana Statute. — See Baggerly *v.* Lee, (Ind. App. 1905) 73 N. E. Rep. 921.

50. 1. Lewis *v.* Bateman, 26 Utah 434.

2. Cannot Be Used for Theatrical Performances. — Sugar *v.* Monroe, 108 La. 677.

4. Use for Township Purposes. — Baggerly *v.* Lee, (Ind. App. 1905) 73 N. E. Rep. 921 (may be used when "unoccupied for common-school purposes").

Use for Other than School Purposes Is Permitted in some jurisdictions, where such use does not interfere with the regular school matters. Sugar *v.* Monroe, 108 La. 677; Lewis *v.* Bateman, 26 Utah 434.

7. Selection of Site by Voters. — Ladd *v.* School Dist. No. 6, (Neb. 1903) 97 N. W. Rep. 594; Kellogg *v.* School Dist. No. 10, 13 Okla. 285.

Selection at Annual School Meeting. — School Dist. No. 34 *v.* Stairs, (Neb. 1901) 95 N. W. Rep. 492.

Limitation of Discretion as to Location. — Kellogg *v.* School Dist. No. 10, 13 Okla. 285.

8. Power to Select Site Vested in Officers. — James *v.* Gettinger, 123 Iowa 199; Sligh *v.* Bowers, 62 S. Car. 409.

Suit by Taxpayer to Enjoin Erection upon Designated Site. — Compare Kellogg *v.* School Dist. No. 10, 13 Okla. 285.

51. 2. James *v.* Gettinger, 123 Iowa 199.

Designation of Site by Statute — Directory Merely. — Atty.-Gen. *v.* Lowrey, 131 Mich. 639.

3. Taking Site by Right of Eminent Domain. — Richland School Tp. *v.* Overmyer, 164 Ind. 382; Kellogg *v.* School Dist. No. 10, 13 Okla. 285.

6. Change of Site. — Benham *v.* Potter, 77 Conn. 186; Hayward *v.* School Dist. No. 9, (Mich. 1905) 102 N. W. Rep. 999; Livesay *v.* Whitney, 107 Mo. App. 475; School Dist. No. 34 *v.* Stairs, (Neb. 1901) 95 N. W. Rep. 492; Ladd *v.* School Dist. No. 6, (Neb. 1903) 97 N. W. Rep. 594; State *v.* Chester Tp., 25 Ohio Cir. Ct. 424; Sligh *v.* Bowers, 62 S. Car. 409.

Suit by Taxpayer to Enjoin Removal. — James *v.* Gettinger, 123 Iowa 199; School Dist. No. 34 *v.* Stairs, (Neb. 1901) 95 N. W. Rep. 492; Kellogg *v.* School Dist. No. 10, 13 Okla. 285.

Suit to Enjoin Removal by One Who Has Contributed to Establishment. — Packard *v.* Thiel College, 209 Pa. St. 349.

Directors Not Required to Give Notice of Removal. — James *v.* Gettinger, 123 Iowa 199.

Power to Change Site Implied from Power to Fix. — James *v.* Gettinger, 123 Iowa 199.

52. 1. Sale of School Buildings. — Sligh *v.* Bowers, 62 S. Car. 409. See also Crouch *v.* Posey, (Tex. Civ. App. 1902) 69 S. W. Rep. 1001.

A Sale May Be Directed by the Voters of the township, assembled in annual meeting. James *v.* Gettinger, 123 Iowa 199.

2. Superintendent Prohibited from Acting as Agent for Publisher, Etc. — See State *v.* Lawrence, 178 Mo. 350.

5. Powers of County Superintendent. — McGregor *v.* State, 31 Ind. App. 483.

Mandamus to Compel Performance of Duty by Superintendent. — People *v.* Vanhorn, (Colo. App. 1901) 77 Pac. Rep. 978; Northington *v.* Sublette, 114 Ky. 72; American Book Co. *v.* McElroy, 76 S. W. Rep. 850, 25 Ky. L. Rep. 960; Singleton *v.* Austin, 27 Tex. Civ. App. 88.

"Wilful Failure" to Settle Accounts Misdemeanor. — Tracy *v.* Com., 76 S. W. Rep. 184, 25 Ky. L. Rep. 669.

53. 2. Election or Appointment of County Superintendent. — State *v.* Acton, 31 Mont. 37; Fordyce *v.* State, 115 Wis. 608.

Women Held Eligible. — State *v.* Acton, 31 Mont. 37; Fordyce *v.* State, 115 Wis. 608.

Provision for Appointment in Case of Vacancy. — State *v.* Acton, 31 Mont. 37.

3. Term of Office. — State *v.* Acton, 31 Mont. 37.

4. New York City — Statute Protecting from Removal During Good Behavior and Competency. — People *v.* Board of Education, 174 N. Y. 169.

6. Compensation of County Superintendents. — Wilson *v.* Fisher, 140 Cal. 188; Piercy *v.* Smith, 117 Ky. 990; Chase County *v.* Kelley, (Neb. 1903) 95 N. W. Rep. 865; State *v.* Albright, 11 N. Dak. 22; Dickey County *v.* Denning, (N. Dak. 1905) 103 N. W. Rep. 422; Dickey County *v.* Hicks, (N. Dak. 1905) 103 N. W. Rep. 423.

54. c. CITY SUPERINTENDENT. — See note 1.2. **Commissioners.** — See note 2.3. **Boards of Education.** — See notes 3, 4.**55. 4. Directors, Trustees, etc., of School Districts — a. ELECTION.** — See note 1.**Qualification of Voters.** — See note 2.**Appointment to Fill Vacancy.** — See notes 3, 5, 6.b. **QUALIFICATION.** — See note 7.**56. c. ELIGIBILITY.** — See note 1.d. **TERM OF OFFICE.** — See note 5.e. **POWERS AND DUTIES — (1) In General.** — See notes 6, 7.(2) **Necessity of Corporate Action.** — See note 9.**Allowance for Traveling Expenses.** — *Henry v. Thurston County*, 31 Wash. 638.**54. 1. City Superintendent — Appointment of Deputy.** — A city superintendent cannot appoint a deputy to act for him as *ex officio* member of the board, but may appoint deputies to assist him in his duties. *Webster v. Board of Education*, 140 Cal. 331.2. **Provision for School Commissioners for Cities of Designated Size.** — *Akerman v. School Com'rs*, 118 Ga. 334.3. **Provision for State Boards of Education.** — *Com. v. Ginn*, (Ky. 1905) 85 S. W. Rep. 688.**Board of Education Is Public Corporation.** — *Cunningham v. Board of Education*, 53 W. Va. 318.4. **City Board of Education.** — *Chambers v. Solner*, 1 Alaska 271; *Whitehead v. Board of Education*, (Mich. 1905) 102 N. W. Rep. 1028; *Gunnison v. Board of Education*, 176 N. Y. 11; *Board of Public Education v. Ransley*, 209 Pa. St. 51.**55. 1. Election of City Trustees by Mayor and Council.** — *Schmohl v. Williams*, 215 Ill. 63; *State v. Ogan*, 159 Ind. 119.**Statute Fixing Time of Election.** — *State v. Ogan*, 159 Ind. 119; *Hillebrandt v. Devine*, 31 Tex. Civ. App. 402.**Where the Statute Requires a Vote to Be Taken Viva Voce**, an election by secret ballot is void. *Elliott v. Burke*, 113 Ky. 479.**Appointment by Legislature Violating Requirement of Uniformity.** — *Ellis v. Greaves*, 82 Miss. 36.**Regularity of Election of Trustees Cannot Be Attacked Collaterally.** — *Boesch v. Byrom*, (Tex. Civ. App. 1904) 83 S. W. Rep. 18.**Ratification of Irregular Election.** — *Deaver v. State*, 27 Tex. Civ. App. 453.**Validity of Election Without Notice or Subsequent Qualification.** — See *Buchanan v. Graham*, 36 Tex. Civ. App. 468.**Election Not Void Notwithstanding Mistake as to Boundaries of District.** — *Boesch v. Byrom*, (Tex. Civ. App. 1904) 83 S. W. Rep. 18.**Acts of De Facto Trustee Valid.** — *Rosell v. Board of Education*, 68 N. J. L. 498; *State v. Buchanan*, (Tex. Civ. App. 1904) 83 S. W. Rep. 723.2. **Women Held Eligible as Voters.** — *State v. Acton*, 31 Mont. 37.**Residence Must Be Bona Fide.** — *Ball v. Cawood*, (Ky. 1902) 67 S. W. Rep. 37.3. **Power of County Superintendent to Appoint to Fill Vacancies.** — See *Shepherd v. Common**School Dist. No. 2*, 76 S. W. Rep. 1084, 25 Ky. L. Rep. 1072.**Appointment to Be Made by County Court.** — *Click v. Sample*, 73 Ark. 194.**Appointment Before Vacancy Void.** — *Shepherd v. Gambill*, 75 S. W. Rep. 223, 25 Ky. L. Rep. 333.**Vacancy Filled Only at Annual Organization of Board.** — *Com. v. Pedder*, 208 Pa. St. 28.5. **Appointment in Writing Required.** — *Shepherd v. Common School Dist. No. 2*, 76 S. W. Rep. 1084, 25 Ky. L. Rep. 1072.6. *Click v. Sample*, 73 Ark. 194.7. **Qualification.** — *Click v. Sample*, 73 Ark. 194; *Buchanan v. Graham*, 36 Tex. Civ. App. 468.**Office Not Vacated by Failure to File Oath.** — *Click v. Sample*, 73 Ark. 194.**56. 1. Eligibility in General.** — *State v. Fasse*, (Mo. App. 1903) 71 S. W. Rep. 745. See also *State v. Van Patten*, 26 Nev. 273.5. **Holding Over.** — *Featherngill v. State*, 33 Ind. App. 683; *Elliott v. Burke*, 113 Ky. 479.**Statute Providing for Holding Over by Person Appointed to Fill Vacancy.** — See *Shepherd v. Gambill*, 75 S. W. Rep. 223, 25 Ky. L. Rep. 333.6. **Powers of School Trustees Derived from Statute.** — *Harris v. Kill*, 108 Ill. App. 305; *Silver v. State Board of Education*, (Ind. App. 1904) 72 N. E. Rep. 829.7. *Harris v. Kill*, 108 Ill. App. 305; *Silver v. State Board of Education*, (Ind. App. 1904) 72 N. E. Rep. 829; *Young v. Fountain Inn Graded School*, 64 S. Car. 131. See also *Washington County v. Saltville Land Co.*, 99 Va. 640.**Parish School Boards in Louisiana** have no power to sell the timber on school lands. *State v. Stark*, 111 La. 594.9. **Necessity of Corporate Action.** — *Robinson v. School Directors*, 96 Ill. App. 604; *Lincoln School Tp. v. American School Furniture Co.*, 31 Ind. App. 405; *Scott v. Pendley*, 114 Ky. 606; *State v. Lawrence*, 178 Mo. 350; *Beck v. Kerr*, 75 N. Y. App. Div. 173; *Moore v. School Dist. No. 71*, 11 Okla. 332; *Cunningham v. Board of Education*, 53 W. Va. 318; *Caxton Co. v. School Dist. No. 5*, 120 Wis. 374. See also *Greenlees v. Pictou Public School Board*, 2 Ont. L. Rep. 387. Compare *Leonard v. State*, 67 Neb. 635.**Contract of President of Board Held Invalid.** — *Moore v. Leonard Independent School Dist.*, (Tex. Civ. App. 1903) 74 S. W. Rep. 324.**Contract Signed by President and Secretary**

57. Majority of Votes Controlling. — See notes 2, 3.

58. See note 1.

(3) *Care and Management of Schools.* — See note 2.

(4) *Power to Contract* — (a) *In General.* — See note 3.

59. See note 1.

Limitations as to Amount of Indebtedness to Be Contracted. — See note 2.

(b) *Contracts for Supplies or Appendages* — *Supplies.* — See note 4.

60. (e) *Contract Between Board and One of Its Members.* — See note 10.

(f) *Ratification of Unauthorized or Informal Contract.* — See note 11.

61. (5) *Mandamus to Compel Performance of Duty.* — See note 2.

g. *PERSONAL LIABILITY* — (1) *On Contract.* — See notes 8, 9.

Valid. — *Rand v. Royal*, 36 Wash. 420. But see *Johnson v. School Corp.*, 117 Iowa 319.

Authorization by Board Presumed from Signing by Officers. — *Mitchelltree School Tp. v. Hall*. (Ind. App. 1903) 68 N. E. Rep. 919.

Ratification of Contract with Teacher. — See *Cowley v. School Dist. No. 3*, 130 Mich. 634, in which a doctrine contrary to that of the first paragraph of the original note is held.

Use by District of Furniture or Supplies as Ratification of Informal Contract. — *Haney School Furniture Co. v. School Dist. No. 1*, 133 Mich. 241, 10 Detroit Leg. N. 135. But see *Caxton Co. v. School Dist. No. 5*, 120 Wis. 374.

Informal Ratification by Board of Contract for Supplies. — *Haney School Furniture Co. v. School Dist. No. 1*, 133 Mich. 241, 10 Detroit Leg. N. 135.

Amendment of Certificate of Tax Levy. — *Indiana, etc., R. Co. v. People*, 201 Ill. 351.

Contract of Committee Valid When Ratified. — *Kraft v. Board of Education*, 67 N. J. L. 512.

Change of Contract by Secretary — Authorization Presumed. — *School Dist. No. 27 v. Wheat*, (Ark. 1904) 78 S. W. Rep. 755.

57. 2. Presence of Entire Board Unnecessary. — For the purchase of school supplies the *Wisconsin* statute requires that all the members of the board be present. *Caxton Co. v. School Dist. No. 5*, 120 Wis. 374.

Necessity of Clerk to Record Proceedings. — See *State v. Lawrence*, 178 Mo. 350.

3. Necessity of Notice. — *Scott v. Pendley*, 114 Ky. 606; *Shepherd v. Gambill*, 75 S. W. Rep. 223, 25 Ky. L. Rep. 333; *Beck v. Kerr*, 75 N. Y. App. Div. 173; *Cunningham v. Board of Education*, 53 W. Va. 318.

Want of Formal Call or Notice Held Immaterial When All Are Present. — *Hanna v. Wright*, 116 Iowa 275; *Decker v. School Dist. No. 2*, 101 Mo. App. 115.

Notice Failing to Specify Day Insufficient. — *Shepherd v. Gambill*, 75 S. W. Rep. 223, 25 Ky. L. Rep. 333.

58. 1. *Scott v. Pendley*, 114 Ky. 606 (notwithstanding the opinion of the absent member was known).

2. Care and Management of Schools. — *Harris v. Kill*, 108 Ill. App. 305; *Baggerly v. Lee*. (Ind. App. 1905) 73 N. E. Rep. 921; *Gunnison v. Board of Education*, 176 N. Y. 11; *Sligh v. Bowers*, 62 S. Car. 409; *Young v. Fountain Inn Graded School*, 64 S. Car. 131.

Power to Close Schools. — See *State v. Seely*, 163 Ind. 244.

Right to Abandon When "No School Indebtedness." — See *Hornbeck v. State*, 33 Ind. App. 609.

3. Power of Board to Contract. — *Mingo v. Colored School Dist. A*, 113 Ky. 475; *Sligh v. Bowers*, 62 S. Car. 409.

Contract for Services of Janitor Valid. — *Oberdorfer v. Louisville School Board*, (Ky. 1905) 85 S. W. Rep. 696.

59. 1. Burden of Proof. — *Martin v. Common School Dist. No. 61*, 93 Minn. 409.

2. Limitations as to Amount of Indebtedness to Be Contracted by Board. — *Baltimore, etc., R. Co. v. People*, 195 Ill. 423; *Union Nat. Bank v. Franklin School Tp.*, 31 Ind. App. 699.

Purchase of Supplies or Apparatus. — If supplies are illegally bought, no recovery can be had on *quantum meruit*, even though the supplies were necessary and used. *Union Nat. Bank v. Franklin School Tp.*, 31 Ind. App. 699.

4. Contracts for Supplies. — *Haney School Furniture Co. v. School Dist. No. 1*, 133 Mich. 241, 10 Detroit Leg. N. 135; *Board of Public Education v. Ransley*, 209 Pa. St. 51.

Furniture. — *Kraft v. Board of Education*, 67 N. J. L. 512.

Maps and Charts. — *Poling v. Board of Education*, 50 W. Va. 374.

Heating Apparatus. — *Board of Education v. National Surety Co.*, 183 Mo. 166; *School Dist. No. 3 v. Western Tube Co.*, 13 Wyo. 304. See also *Wheeler v. Board of Control*, 137 Mich. 291.

60. 10. Contract Between Board and Member Held Voidable. — See *State v. Fields*, 131 Ala. 201; *Miller v. Sullivan*, 32 Wash. 115.

Contract Between Board and Wife of Member Void. — *Nuckols v. Lyle*, 8 Idaho 589.

11. Ratification by Acceptance of Benefits. — *Washington Academy v. Cruikshank*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 197.

61. 2. Enforcing Performance of Duty by Mandamus. — *Akerman v. School Com'rs*, 118 Ga. 334; *Brooklyn Teachers Assoc. v. Board of Education*, 85 N. Y. App. Div. 47, *affirmed* 176 N. Y. 564; *Poling v. Board of Education*, 50 W. Va. 374.

8. No Personal Liability on Contract Made Expressly Binding on District. — *Hanna v. Wright*, 116 Iowa 275.

The Board Members May Be Held Liable as Sureties though not primarily liable as drawers. *Germania Bank v. Trapnell*, 118 Ga. 578.

9. Germania Bank v. Trapnell. 118 Ga. 578; *Ewin v. Independent School Dist. No. 8*, 10 Idaho 102; *Oppenheimer v. Greencastle School Tp.*, 164 Ind. 99; *Hanna v. Wright*, 116 Iowa 275; *Warford v. Temple*, (Ky. 1903) 73 S. W. Rep. 1023; *Cassopolis First Nat. Bank v. Carter*, (Mich. 1904) 101 N. W. Rep. 585.

- 62.** (2) *In Tort* — (b) *Misappropriation of Funds*. — See notes 5, 6.
h. REMOVAL OR VACATION OF OFFICE. — See notes 9, 10.
- 63.** **IX. SCHOOL FUNDS** — 1. *In General*. — See note 4.
- 64.** 2. *Legislative Control*. — See notes 1, 2.
Appropriation of Fund for Schools Other than Public Schools. — See note 3.
- 65.** 3. *Apportionment*. — See note 1.
- 66.** 4. *Investment* — *Constitutional Limitations as to Character of Investment and Security*. — See note 3.
 5. *Treasurer*. — See note 5.
- 67.** See note 1.

62. 5. *Liability for Misappropriation of School Funds*. — *Finney v. Garner*, 110 Tenn. 67.

6. *Finney v. Garner*, 110 Tenn. 67.

9. *Where the Boundaries Have Been Changed*, district trustees are not ousted where they live in the territory embraced within their districts as rearranged. *Farley v. Gilbert*, 72 S. W. Rep. 1098, 24 Ky. L. Rep. 2109.

10. *Members Cannot Be Removed Without Cause*. — *Akerman v. School Com'rs*, 118 Ga. 334.

63. 4. *Income from School Lands or from Investment of Proceeds of Sale*. — *McCord v. Slavin*, 143 Cal. 325; *State v. McMillan*, 12 N. Dak. 280; *Webb County v. School Trustees*, 95 Tex. 131; *Mills v. Needham*, 28 Tex. Civ. App. 547.

Funds Raised by Taxation. — *Koelling v. People*, 196 Ill. 353; *Board of Education v. Public Library*, 113 Ky. 234; *State v. Babcock*, 87 Minn. 234; *Dickson v. Burckmyer*, 67 S. Car. 526; *Webb County v. School Trustees*, 95 Tex. 131; *Washington County v. Saltville Land Co.*, 99 Va. 640; *State v. Hunter*, 119 Wis. 450.

Fines and Forfeitures. — *Lexington v. Board of Education*, 65 S. W. Rep. 827, 23 Ky. L. Rep. 1663; *Parish Board of Directors v. Hebert*, 112 La. 467; *State v. Sams*, (Neb. 1904) 99 N. W. Rep. 544; *School Dist. No. 30 v. School Dist.*, 63 Neb. 44; *School Directors v. Asheville*, 137 N. Car. 503.

Proceeds of Liquor Licenses. — *Chambers v. Solner*, 1 Alaska 271; *Steidl v. State*, 63 Neb. 695; *State v. Sams*, (Neb. 1904) 99 N. W. Rep. 544.

As to what constitutes license money, see *State v. Boyd*, 63 Neb. 829.

Distribution of License Money. — See *Kas v. State*, 63 Neb. 581.

Tax on Foreign Insurance Companies Not School Fund. — *Fuqua v. Hager*, (Ky. 1905) 84 S. W. Rep. 325.

School Fund Distinguished from Damages Received for Injuries to School Property. — See *Illinois Cent. R. Co. v. School Trustees*, 212 Ill. 406.

64. 1. *Legislative Control in General*. — *Washington County v. Saltville Land Co.*, 99 Va. 640.

Statute Permitting District Board to Use Certain Percentage of Funds in Transportation of Pupils. — *School Dist. No. 3 v. Atzenweiler*, 67 Kan. 609; *Newcomb v. Rockport*, 183 Mass. 74.

Prohibition Against Spending Principal of Fund. — *Chicago v. Chicago*, 207 Ill. 37.

2. *Appropriation of School Funds to Other than School Purposes Forbidden*. — *Chicago v. Chicago*, 207 Ill. 37; *Board of Education v. Public Library*, 113 Ky. 234; *State v. School Com'rs*, 94 Md. 334; *State v. McMillan*, 12 N. Dak. 280.

3. *Public Library*. — No part of the school tax can lawfully be expended in maintaining a public library to which the children of the schools have access only as part of the public. *Board of Education v. Public Library*, 113 Ky. 234.

Only Schools to Which All Children Between Five and Eighteen Years Old Are Admitted can share in the *New Jersey* fund for the support of public free schools. *Rutgers College v. Morgan*, 70 N. J. L. 460.

65. 1. *Apportionment of School Funds*. — *Sunol School Dist. v. Chipman*, 138 Cal. 251; *Elizabethtown Dist. Public Schools v. Morris*, 71 S. W. Rep. 654, 24 Ky. L. Rep. 1420; *Shriver v. Herring*, 97 Md. 19; *Fiske v. Huntington*, 179 Mass. 571; *Kas v. State*, 63 Neb. 581; *Board of Education v. Kingfisher County*, 14 Okla. 322.

Apportionment According to School Census. — *State v. Wedge*, 27 Nev. 61.

Statute Authorizing Equal Distribution Held Unconstitutional. — *Elliott v. Burke*, 113 Ky. 479.

Statutory Provision for Apportionment of Railroad Tax Between White and Colored Schools. — *Elizabethtown Dist. Public Schools v. Morris*, 71 S. W. Rep. 654, 24 Ky. L. Rep. 1420.

Apportionment by County Superintendent. — *Oge v. Froboese*, (Tex. Civ. App. 1902) 66 S. W. Rep. 688; *Wester v. Oge*, 29 Tex. Civ. App. 615.

"*Teachers' Fund*," "*Incidental Fund*," and "*Building Fund*." — *State v. District School Board*, 97 Mo. App. 613; *Livesay v. Whitney*, 107 Mo. App. 475.

66. 3. *Constitutional Provision Prohibiting Investment Except in Designated Government or Public Securities*. — *State v. Stuefer*, 66 Neb. 381; *State v. McMillan*, 12 N. Dak. 280.

Prohibition of Loan to Other Funds. — A deposit of the funds in a bank by the treasurer in his representative capacity is not a loan. *Hunt v. Hopley*, 120 Iowa 695.

5. *District Treasurer*. — *German v. Highland Park School Dist. No. 46*, 117 Ky. 907.

City Treasurer as Custodian of Fund. — *Times Pub. Co. v. White*, 23 R. I. 334.

City Treasurer ex-Officio Treasurer of School District. — *Com. v. Middleton*, 210 Pa. St. 582.

67. 1. *Where the Statute Requires that the Treasurer "Shall Hold" All Moneys, etc.*, he is not precluded from depositing them in a solvent bank. *Hunt v. Hopley*, 120 Iowa 695.

Mandamus to Compel Treasurer to Pay Orders Properly Drawn and Signed. — See *Leonard v. State*, 67 Neb. 635; *Com. v. Johnson*, 24 Pa.

67. Treasurer's Bond. — See notes 2, 3.

69. SCRAP STEEL. — See note 4.

71. SEABOARD. — See note 4.

SEALED. — See note 6.

Super. Ct. 490; Times Pub. Co. v. White, 23 R. I. 334.

Where the Duty Sought to Be Enforced Lies upon the Treasurer Himself, and not upon his successor in office, mandamus will lie though the term of office has expired. Kas v. State, 63 Neb. 581.

67. 2. Bond Required of Treasurer. — German v. Highland Park School Dist. No. 46, 117 Ky. 907; Smith v. Jones, 136 Mich. 532.

3. Liability on Bond. — Smith v. Jones, 136 Mich. 532.

Treasurer Protected in Payments on Warrants of County Superintendent. — Oge v. Froboese, (Tex. Civ. App. 1902) 66 S. W. Rep. 688.

A Township Is Liable to a school district for

school moneys lost through the defalcation of the township treasurer. Smith v. Jones, 136 Mich. 532.

69. 4. Busheling scrap consists of small pieces of wrought iron and steel. Lichtenstein v. Rabolinsky, 98 N. Y. App. Div. 516.

71. 4. Atlantic Seaboard. — See American Fisheries Co. v. Lennen, (C. C. A.) 130 Fed. Rep. 534, affirming 116 Fed. Rep. 217, stated in the original note.

6. Sealed, as used in the English Intoxicating Liquor Act, means "secured with any substance without the destruction of which the cork, plug, or stopper cannot be withdrawn." Mitchell v. Crawshaw, (1903) 1 K. B. 701.

SEALS.

BY E. C. ELLSBREE.

74. II. NATURE AND SUFFICIENCY — 2. Modern Rule — *a.* IN GENERAL. — See note 5.

76. *c.* RECITAL IN INSTRUMENT — (2) *When No Seal Is Affixed.* — See note 4.

78. 3. Questions of Law and Fact. — See note 3.

III. PRESUMPTION AS TO SEALING — 1. In General. — See note 7.

79. 2. Presumption of Proper Seal. — See note 1.

IV. AFFIXING SEAL UNNECESSARILY. — See note 4.

80. V. STATUTORY REGULATIONS. — See note 7.

82. SEAM. — See note 4.

74. 5. "L. S." — Hazleton Nat. Bank v. Kintz, 24 Pa. Super. Ct. 456.

76. 4. Mere Recital. — Davis v. Bingham, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 299.

78. 3. Brown v. Commercial F. Ins. Co., 21 App. Cas. (D. C.) 325.

7. A Failure of the Record to Show a Seal is not affirmative evidence of the absence of a seal when the record was made. Dana v. Jones, 91 N. Y. App. Div. 496.

79. 1. Presumption as to Sufficiency. — Collier v. Alexander, 142 Ala. 422.

Corporate Seal. — Kirkpatrick v. Eastern Milling, etc., Co., 135 Fed. Rep. 144.

4. Seal as Surplusage. — Hartnett v. Baker, 4 Penn. (Del.) 431.

80. 7. Daniel v. Garner, 71 Ark. 484; J. B. Streeter, Jr. Co. v. Janu, 90 Minn. 393.

82. 4. In Geology a Thin Layer or Stratum of Rock is called a *seam*. The same term is applied to coal. "Vein of coal," "coal bed," and coal *seam* are used as equivalent terms. Chapman v. Mill Creek, etc., Co., 54 W. Va. 193.

SEAMEN.

By M. G. BEAMAN.

89. III. SHIPMENTS AND SHIPPING ARTICLES — 1. Shipping Articles in General — a. FORM AND REQUISITES OF ARTICLES. — See note 10.

90. b. WHAT VESSELS WITHIN STATUTE REQUIRING ARTICLES. — See note 7.

92. 2. Conclusiveness and Binding Effect of Articles — a. IN GENERAL. — See notes 4, 6.

95. 3. Rights and Duties of Parties under Articles — c. COMPLIANCE WITH ARTICLES AS REGARDS DESCRIPTION OF VOYAGE — EFFECT OF DEVIATIONS — What Constitutes a Substantial Deviation. — See note 3.

4. Shipments Contrary to Statute — a. IN GENERAL. — See note 11.

96. IV. WAGES OF SEAMEN — 1. In General — a. DIFFERENT METHODS OF HIRING — (1) *Shipments for the Voyage or by the Month.* — See note 7.

98. e. WHEN RIGHT TO WAGES COMMENCES. — See note 1.

f. PAYMENT IN ADVANCE PROHIBITED BY STATUTE — ALLOTMENTS. — See notes 7, 8.

99. 3. How Affected by Idleness of Ship. — See note 8.

103. 9. How Affected by Sickness or Death of Seaman — a. RULE IN CASE OF SICKNESS. — See note 5.

105. 10. How Affected by Discharge or Severance of Connection with Vessel — b. JUSTIFIABLE DISCHARGE FOR MISCONDUCT. — See note 5.

108. 13. Forfeiture of Wages — a. CAUSES OF FORFEITURE — (1) *Willful Disobedience of Lawful Commands.* — See note 4.

109. (3) *Wrongful Desertion of Ship Before End of Voyage.* — See note 4.

110. (8) *Acts Held Insufficient to Warrant Forfeiture.* — See note 9a.

116. 16. Lien for Wages — i. PRIORITY OF LIEN. — See note 1.

89. 10. Articles Must Specify Time of Beginning Work. — *Bark Shetland v. Johnson*, 21 App. Cas. (D. C.) 416.

90. 7. Coasting Vessels Now Within Requirements of Statute. — *The Lillian*, 131 Fed. Rep. 375.

92. 4. Seamen Subject to Statutory Penalties from Time of Signing Articles. — *The Ida G. Farren*, 127 Fed. Rep. 766.

6. Articles Conclusive Only as Regards Stipulations Authorized by Law. — *Contra*, *The Lillian*, 131 Fed. Rep. 375.

95. 3. Deviation Question of Fact. — *The J. B. Williams*, 126 Fed. Rep. 590.

11. Seaman May Leave Service at Any Time. — *Kenney v. Blake*, (C. C. A.) 125 Fed. Rep. 672, affirming 117 Fed. Rep. 557.

96. 7. Hiring for Monthly Wages. — See *The Express*, 129 Fed. Rep. 655.

98. 1. Omission to Specify Time in Articles Taken Strongly Against Vessel. — *Bark Shetland v. Johnson*, 21 App. Cas. (D. C.) 416.

Statutory Provision May Be Waived by Prior Agreement. — *The Lillian*, 131 Fed. Rep. 375.

7. Unlawful Payment Does Not Absolve Master, Vessel, or Owner. — *The Alnwick*, 132 Fed. Rep. 117; *Kenney v. Blake*, (C. C. A.) 125 Fed. Rep. 672, affirming 117 Fed. Rep. 557.

8. Statute Applies to Foreign Vessels and Masters. — *Patterson v. Bark Eudora*, 190 U. S. 169; *Kenney v. Blake*, (C. C. A.) 125 Fed. Rep. 672, affirming 117 Fed. Rep. 557; *The Alnwick*, 132 Fed. Rep. 117.

99. 8. Provision for No Wages During Detention Valid. — *The Lillian*, 131 Fed. Rep. 375.

103. 5. Rule in Case of Sickness. — *McCarron v. Dominion Atlantic R. Co.*, 134 Fed. Rep. 762, holding that the term of employment governs where it is definite and extends beyond the voyage.

105. 5. Seaman Justifiably Discharged Not Entitled to Further Wages. — *The Annie*, 133 Fed. Rep. 325; *The Enterprise*, 127 Fed. Rep. 765.

108. 4. Statutory Forfeiture — Statute Must Be Strictly Pursued. — *The Cora F. Cressy*, 131 Fed. Rep. 144.

Fine for Disobedience — Statute Strictly Enforced. — *The St. Paul*, 133 Fed. Rep. 1002.

109. 4. For Cases in Which Forfeiture Was Refused. — *The Alnwick*, 132 Fed. Rep. 117.

110. 9a. The Fact that a Seaman Is an Escaped Convict does not forfeit his right to wages except from the time of his recapture. — *McCarron v. Dominion Atlantic R. Co.*, 134 Fed. Rep. 762.

116. 1. Priority of Lien in General. — *The Tergeste*, (1903) P. 26.

117. 17. Suits to Recover Wages — *a. ADMIRALTY JURISDICTION* — (2) *Jurisdiction of Suits Against Foreign Vessels* — (a) *In General*. — See note 12.

119. c. TIME LIMITATIONS — (1) *When Wages Are Due* — *By Statute*. — See note 10.

120. d. SET-OFFS AND DEDUCTIONS — (1) *In General*. — See note 11.

123. g. EVIDENCE — (2) *Competency of Master as Witness*. — See note 2.

(3) *Competency of Seamen as Witnesses for Each Other*. — See note 3.

V. PROVISIONS AND ANTISCORBUTICS — 2. *Statutory Requirements* —

b. ADDITIONAL COMPENSATION FOR SHORT ALLOWANCE. — See note 9.

126. VII. RIGHTS OF DISABLED SEAMEN — 1. *Right to Care at Expense of Ship, in General*. — See note 8.

127. 3. What Care of Disabled Seamen Includes. — See note 6.

128. Duty of Master to Put into Port. — See notes 1, 2.

4. *How Long Right Continues*. — See notes 3, 4.

130. IX. DISCHARGE OF SEAMEN — 2. *Causes for Discharge*. — See note 11.

133. X. RIGHT TO DAMAGES — 1. *For Personal Injuries Resulting from Negligence* — *a. IN GENERAL*. — See note 4.

Injuries Caused by Negligence of Fellow-servants. — See note 5.

134. b. WHERE INJURIES ARE AGGRAVATED BY WANT OF PROPER CARE. — See notes 4, 5.

c. SUITS FOR DAMAGES — (1) *Jurisdiction of Suits Against Foreign Vessels*. — See note 6.

(3) *Contributory Negligence as a Defense*. — See note 8.

117. 12. Exercise of Jurisdiction Against Foreign Vessels Discretionary. — See *The Alnwick*, 132 Fed. Rep. 117.

119. 10. No Penalty if Liability Contested in Good Faith. — *The St. Paul*, 133 Fed. Rep. 1002; *The Express*, 129 Fed. Rep. 655.

120. 11. As to Fines for Disobedience of Orders, see *The St. Paul*, 133 Fed. Rep. 1002.

123. 2. Competency of Master as Witness. — For a discussion of the statutes abolishing disqualification for interest, see the title *WITNESSES*, 978. 2 *et seq.*

3. Competency of Seamen as Witnesses for Each Other. — See the title *WITNESSES*, 978. 2 *et seq.*

9. No Excuse that Vessel Detained for Repairs After Being Provisioned. — *The Mary C. Hale*, 132 Fed. Rep. 800.

126. 8. Disabled Seamen Entitled to Care at Ship's Expense. — *The Iroquois*, 194 U. S. 240, *affirming* (C. C. A.) 118 Fed. Rep. 1003; *The Osceola*, 189 U. S. 158; *The Svaland*, 132 Fed. Rep. 932; *The Troop*, (C. C. A.) 128 Fed. Rep. 856, *affirming* 118 Fed. Rep. 769; *The Matterhorn*, (C. C. A.) 128 Fed. Rep. 863; *The Troy*, 121 Fed. Rep. 901. See also *Sanders v. Stimson Mill Co.*, 34 Wash. 357.

Shipowner Not Compelled to Furnish Surgical or Medical Attendance. — *Morgan v. British Yukon Nav. Co.*, 10 British Columbia 112.

127. 6. What Care of Disabled Seaman Includes in General. — *The Troop*, 118 Fed. Rep. 769, *affirmed* (C. C. A.) 128 Fed. Rep. 856.

Proper Treatment at Hospital. — *The Svaland*, 132 Fed. Rep. 932.

128. 1. Duty Dependent upon Circumstances of Case. — *The Iroquois*, 194 U. S. 240, *affirming* (C. C. A.) 118 Fed. Rep. 1003; *The Shenandoah*, 134 Fed. Rep. 304; *The Erskine M.*

Phelps, (C. C. A.) 131 Fed. Rep. 1; *The Svaland*, 132 Fed. Rep. 932.

2. Right Not Waived by Failure of Seaman to Claim. — *The Iroquois*, 194 U. S. 240, *affirming* (C. C. A.) 118 Fed. Rep. 1003.

3. How Long Right Continues — Until Cure Is Effected. — *McCarron v. Dominion Atlantic R. Co.*, 134 Fed. Rep. 762.

4. Under the English Statute — See *Anderson v. Rayner*, (1903) 1 K. B. 589.

No Liability After Rightful Discharge Before Completion of Contract. — *Lombard Steamship Co. v. Anderson*, (C. C. A.) 134 Fed. Rep. 568.

130. 11. Offenses Held Sufficient to Warrant Discharge — Refusal to Work. — *The Enterprise*, 127 Fed. Rep. 765.

133. 4. No Liability Where Owner Has Performed His Duty. — *The Osceola*, 189 U. S. 158; *The Svaland*, 132 Fed. Rep. 932; *The Troy*, 121 Fed. Rep. 901; *McCarron v. Dominion Atlantic R. Co.*, 134 Fed. Rep. 762.

No Liability for Injury from Severe Cold. — *The Rutherford*, 128 Fed. Rep. 189.

5. Engineer Fellow-servant of Oiler. — *McCarron v. Dominion Atlantic R. Co.*, 134 Fed. Rep. 762.

134. 4. Vessel Also Liable in Rem. — *The Iroquois*, 194 U. S. 240, *affirming* (C. C. A.) 118 Fed. Rep. 1003; *The Troop*, (C. C. A.) 128 Fed. Rep. 856, *affirming* 118 Fed. Rep. 769; *The Svaland*, 132 Fed. Rep. 932; *The Matterhorn*, (C. C. A.) 128 Fed. Rep. 863.

5. No Liability for Mere Error of Judgment. — *The Shenandoah*, 134 Fed. Rep. 304.

6. Jurisdiction of Suits Against Foreign Vessel in Discretion of Court. — *The Troop*, (C. C. A.) 128 Fed. Rep. 856, *affirming* 118 Fed. Rep. 769.

8. For a Case Where Damages Were Divided, see *The Watson*, 128 Fed. Rep. 201.

- 135.** 2. For Wrongful Discharge. — See note 2.
136. XI. DESERTION — 1. What Constitutes Desertion in General. — See note 10.
137. 2. When Seamen Are Justified in Leaving Vessel. — See note 4.
138. 3. Punishments for Desertion. — See note 6.
140. 8. Harboring or Secreting Deserters. — See note 11.
141. XII. LAWS FOR PROTECTION AND RELIEF OF SEAMEN — 1. Laws Providing for Return of Seamen to United States — *b.* RETURN OF DESTITUTE SEAMEN BY CONSULS. — See note 3.
142. XIII. CRIMES AND OFFENSES — 3. Unauthorized Boarding of Arriving Vessel. — See note 8.

[SEARCH. — See note 9a.]

135. 2. Measure of Damages for Wrongful Discharge. — See *The John R. Bergen*, 122 Fed. Rep. 98, holding that no damages were recoverable where the owner secured for the seaman other employment as good as that from which he was discharged.

136. 10. For Cases in Which It Was Held that There Was No Desertion. — *The Alnwick*, 132 Fed. Rep. 117.

137. 4. What Does Not Constitute Reasonable Cause. — *The Moonlight*, 125 Fed. Rep. 429.

138. 6. Desertion Punishable by Forfeiture of Wages. — *Keslake v. Board of Trade*, (1903) 2 K. B. 453; *The Ida G. Farren*, 127 Fed. Rep. 766; *The Moonlight*, 125 Fed. Rep. 429.

140. 11. For the Canadian Statute, see *Rex v. Martin*, 36 N. Bruns. 448.

141. 3. As to the English Statute, similar in effect to that of the United States, see *Board of Trade v. The Sailing Ship Glenpark*, (1904) 1 K. B. 682.

142. 8. Unauthorized Boarding of Arriving Vessel a Criminal Offense. — *Rex v. Abrahams*, (1904) 2 K. B. 859, 91 L. T. N. S. 493; *Rex v. Goldberg*, (1904) 2 K. B. 866, 91 L. T. N. S. 490.

9a. "Search" Defined as "the Act of Seeking or Looking for Something." — *Edwards v. Law*, 46 Fla. 203.

SEARCHES AND SEIZURES.

By A. A. WADSWORTH.

- 144.** I. DEFINITION — 1. Search. — See note 1.
145. II. CONSTITUTIONAL PROVISIONS — 1. Under Federal Constitution — Provision of Federal Constitution Not Applicable to States. — See note 4.
146. III. SEARCHES AND SEIZURES WHICH ARE AUTHORIZED — 2. Under Constitutional Provisions — *c.* ARTICLES HELD IN VIOLATION OF LAW — (1) *In General*. — See note 4.
147. (2) *Gaming Implements*. — See note 1.
IV. THE WARRANT — 1. Issuance — *b.* PROBABLE CAUSE. — See note 16.
148. Sufficiency of Showing. — See note 2.
[Time of Execution. — By statute in various jurisdictions a search-warrant can be executed only in the daytime in the absence of special authority expressed in the writ.^{10a}]
149. V. UNREASONABLE SEARCHES AND SEIZURES — 3. Search of Person. — See note 7.

144. 1. Ordinance Requiring Automobiles to Display Numbers Not Search. — *People v. Schneider*, (Mich. 1905) 103 N. W. Rep. 172.

145. 4. States Not Controlled by Federal Provision. — *Adams v. New York*, 192 U. S. 585, affirming 176 N. Y. 351.

146. 4. Seizure of Articles Used for Felonious Purpose. — *Woods v. Cottrell*, 55 W. Va. 476, 104 Am. St. Rep. 1004, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 146.

147. 1. Gaming Implements. — *Kite v. People*, 32 Colo. 5.

16. Probable Cause. — *State v. McGahey*, 12 N. Dak. 535.

148. 2. *State v. Patterson*, 13 N. Dak. 70; *State v. McGahey*, 12 N. Dak. 535.

10a. Not to Be Executed in Night-time. — *Petit v. Colmery*, 4 Penn. (Del.) 266 (defining night-time); *Kringle v. Kringle*, 123 Iowa 365.

149. 7. *Smith v. Jerome*, (Supm. Ct. Spec.

149. 4. Arrest Without Warrant. — See note 8.

5. Compulsory Production of Evidence. — See note 9.

Compulsory Production of Papers Before Congress. — See note 12.

150. 9. Liability for Unreasonable Search and Seizure — *a.* LIABILITY OF OFFICER. — See notes 6, 7.

b. LIABILITY OF PERSON APPLYING FOR WARRANT. — See note 9.

151. Showing Malice. — See note 3.

Exemplary Damages. — See note 8.

VI. SEARCHES AND SEIZURES UNDER LIQUOR ACTS — 1. Statutory Provisions. — See notes 9, 12.

Compliance with Statute Requisite. — See note 13.

152. 3. When Liquor Liable to Seizure — Liquor in Hands of Carrier. — See notes 5, 8.

153. 7. Status of Liquors After Seizure. — See note 15.

154. 8. Notice to Claimants. — See note 1.

VII. ADMISSIBILITY OF EVIDENCE SECURED BY SEARCH OR SEIZURE. — See note 10.

155. See note 1.

VIII. DISPOSITION OF PROPERTY. — See note 4.

160. SEAWORTHY. — See note 1.

T.) 47 Misc. (N. Y.) 22. See also Mayer v. Vaughan, 11 Quebec K. B. 340.

Statute Authorizing Search for Concealed Weapon Without Warrant. — Keady v. People, 32 Colo. 57.

Search of Prisoner with Intent to Rob Him. — See Jones v. State, (Tex. Crim. 1905) 88 S. W. Rep. 217.

149. 8. See State v. Byrd, (S. Car. 1905) 51 S. E. Rep. 542.

9. Production of Evidence. — *In re* Moser, (Mich. 1904) 101 N. W. Rep. 588.

12. Municipal Assembly May Compel Production of Books and Papers. — *Ex p.* Conrades, (Mo. App. 1904) 85 S. W. Rep. 150. See generally the title PRODUCTION OF DOCUMENTS, **184.** 11 *et seq.*

150. 6. Casselini v. Booth, 77 Vt. 255.

7. Action under Void Warrant. — Casselini v. Booth, 77 Vt. 255.

9. Liability of Complainant. — McClurg v. Brenton, 123 Iowa 368; Spangler v. Booze, 103 Va. 276.

151. 3. McClurg v. Brenton, 123 Iowa 368; J. D. Iler Brewing Co. v. Campbell, 66 Kan. 361.

8. Damages. — McClurg v. Brenton, 123 Iowa 368.

9. Seizure of Intoxicating Liquors. — State v. Fulkerson, 73 Ark. 163; State v. Dowdell, 98 Me. 460.

12. Statutes Constitutional. — State v. Stoffels, 89 Minn. 205.

13. Strict Compliance with Statute. — State v. McGahey, 12 N. Dak. 535.

152. 5. State v. American Express Co., 118 Iowa 447.

8. Smith v. Lafar, 67 S. Car. 491. See also State v. Intoxicating Liquors, 98 Me. 464.

153. 15. Action of Claim and Delivery Maintainable. — Moore v. Ewbanks, 66 S. Car. 374.

154. 1. Owner of Liquor Seized Entitled to Day in Court. — State v. Fulkerson, 73 Ark. 163.

10. Evidence Secured by Search and Seizure Admissible. — Adams v. New York, 192 U. S. 585, *affirming* 176 N. Y. 351; State v. Stoffels, 89 Minn. 205.

155. 1. Adams v. New York, 192 U. S. 585, *affirming* 176 N. Y. 351.

4. Disposition of Property. — State v. McMaster, 13 N. Dak. 58.

160. 1. Seaworthy. — The Southwark, 191 U. S. 1; Morse v. St. Paul F. & M. Ins. Co., 129 Fed. Rep. 233.

SECONDARY EVIDENCE.

By BASIL JONES.

162. I. DEFINITION. — See note 1.

III. ADMISSIBILITY — 1. In General. — See note 9.

164. 2. Loss or Destruction of Original — *a.* IN GENERAL. — See note 1.

162. 1. Definition under Montana Statute. — See *Capell v. Fagan*, 30 Mont. 507.

What Constitutes Best or Secondary Evidence Question of Law. — *Boyer v. Broffey*, 109 Ill. App. 94.

9. When Admissible — *United States*. — *Brown v. Harkins*, (C. C. A.) 131 Fed. Rep. 63.

Alabama. — *Stephens v. Head*, 138 Ala. 455. *Connecticut*. — See *Dawson v. Orange*, (Conn. 1905) 61 Atl. Rep. 101.

Florida. — See *Eatman v. State*, (Fla. 1904) 37 So. Rep. 576.

Georgia. — *Franklin v. Pritchard*, 122 Ga. 605.

Illinois. — *Abersol v. Elmwood Coal Co.*, 106 Ill. App. 235; *Sullivan v. People*, 108 Ill. App. 328; *Chicago, etc., Coal Co. v. Moran*, 210 Ill. 9.

Iowa. — *Merrill v. Timbrell*, 123 Iowa 375. See also *Faville v. State Trust Co.*, (Iowa 1903) 96 N. W. Rep. 1109; *Prewitt v. Wilson*, (Iowa 1905) 103 N. W. Rep. 365.

Kansas. — *Haas v. Chubb*, 67 Kan. 787; *State v. McCoy*, 70 Kan. 673.

Kentucky. — *Drake v. Holbrook*, (Ky. 1904) 78 S. W. Rep. 158; *Combs v. Krish*, (Ky. 1905) 84 S. W. Rep. 562.

Louisiana. — *Waller v. Cockfield*, 111 La. 595.

Massachusetts. — *Gould v. Hartley*, 187 Mass. 561.

Missouri. — *Estes v. Missouri Pac. R. Co.*, 110 Mo. App. 725; *Spencer v. Travelers Ins. Co.*, 112 Mo. App. 86.

Montana. — *Watson v. Colusa-Parrot Min., etc., Co.*, 31 Mont. 513; *Doll v. Hennessy Mercantile Co.*, (Mont. 1905) 81 Pac. Rep. 625.

New York. — *Taft v. Little*, 178 N. Y. 127.

North Carolina. — *Stancill v. Spain*, 133 N. Car. 76; *Avery v. Stewart*, 134 N. Car. 287.

North Dakota. — *Sykes v. Beck*, 12 N. Dak. 242.

Oregon. — See *Baker County v. Huntington*, (Oregon 1905) 79 Pac. Rep. 187.

Pennsylvania. — *Mansfield v. Bell*, 24 Pa. Super. Ct. 447.

South Carolina. — *Ragsdale v. Southern R. Co.*, 69 S. Car. 429.

South Dakota. — *Chambers v. Modern Woodmen of America*, (S. Dak. 1904) 99 N. W. Rep. 1107; *Easton v. Cranmer*, (S. Dak. 1905) 102 N. W. Rep. 944.

Texas. — *Rogers v. O'Barr*, (Tex. Civ. App. 1903) 76 S. W. Rep. 593; *Texas, etc., R. Co. v. Smith*, 34 Tex. Civ. App. 571; *Texas, etc., R. Co. v. Lynch*, (Tex. Civ. App. 1905) 87 S. W. Rep. 884.

See also the title DOCUMENTARY EVIDENCE, 920. 2, 3.

Alteration of Instrument — **Duplicate Admissible to Show Contents of Original.** — *Hayes v. Wagner*, 113 Ill. App. 299.

164. 1. Loss or Destruction — *Arkansas*. — *Hartford F. Ins. Co. v. Enoch*, 72 Ark. 47; *Arbuckle v. Matthews*, 73 Ark. 27.

California. — *Kenniff v. Caulfield*, 140 Cal. 34.

Florida. — *Rhodus v. Heffernan*, (Fla. 1904) 36 So. Rep. 572.

Georgia. — *Tilley v. Cox*, 119 Ga. 867; *Conant v. Jones*, 120 Ga. 568; *Trentham v. Bluthenthal*, 118 Ga. 530.

Illinois. — *Rudgear v. U. S. Leather Co.*, 206 Ill. 74; *Glos v. Talcott*, 213 Ill. 81; *Meyer v. Purcell*, 214 Ill. 62.

Iowa. — *Considine v. Dubuque*, 126 Iowa 283; *Brier v. Davis*, 122 Iowa 59.

Kentucky. — *Allen v. Hopson*, (Ky. 1904) 83 S. W. Rep. 575; *Ellison v. Dunlap*, (Ky. 1904) 78 S. W. Rep. 155.

Maryland. — *Safe Deposit, etc., Co. v. Turner*, 98 Md. 22.

Mississippi. — *McCaughn v. Young*, 85 Miss. 277; *Shannon v. Summers*, 86 Miss. 619.

Missouri. — *Leavenworth First Nat. Bank v. Wright*, 104 Mo. App. 242; *Liles v. Liles*, 183 Mo. 326; *Montgomery v. Dormer*, 181 Mo. 5; *Morey v. Clopton*, 103 Mo. App. 368; *Graton v. Holliday-Klotz Land, etc., Co.*, 189 Mo. 322.

Montana. — *Capell v. Fagan*, 30 Mont. 507; *Bond v. Hurd*, 31 Mont. 314.

Nebraska. — *Yeiser v. Cathers*, (Neb. 1903) 97 N. W. Rep. 840; *Gould v. State*, (Neb. 1904) 99 N. W. Rep. 541. See also *Williams v. Miles*, (Neb. 1905) 102 N. W. Rep. 482.

New York. — *Brunnemer v. Cook, etc., Co.*, 89 N. Y. App. Div. 406, reversed on other grounds 180 N. Y. 188; *Matter of Webster*, 106 N. Y. App. Div. 360.

Ohio. — *Burr v. Schute*, 25 Ohio Cir. Ct. 735.

Oklahoma. — *Randolph v. Hudson*, 12 Okla. 516.

Pennsylvania. — *Mulhearn v. Roach*, 24 Pa. Super. Ct. 483; *Richardson v. Morris*, 26 Pa. Super. Ct. 192.

South Carolina. — *Chiles v. Southern R. Co.*, 69 S. Car. 327.

Texas. — *Johnson v. Franklin*, (Tex. Civ. App. 1903) 76 S. W. Rep. 611; *Price v. Oatman*, (Tex. Civ. App. 1903) 77 S. W. Rep. 258; *Williamson v. Work*, 33 Tex. Civ. App. 369; *Houston, etc., R. Co. v. De Berry*, 34 Tex. Civ. App. 180; *Western Union Tel.-Co. v.*

165. *b. PROOF OF LOSS OR DESTRUCTION — (1) In General.* — See note 1.

166. *(2) Sufficiency of Search — (a) In General.* — See note 1.
Reasonable Search Necessary. — See notes 2, 3, 4, 5, 6.

167. Various Acts Need Not Be Shown. — See note 1.

Proof of Loss by Custodian. — See note 2.

(b) As Affected by Nature of Document. — See note 3.

(c) Papers on Record. — See note 4.

(d) *Sufficiency of Proof Discretionary with Court.* — See note 7.

169. GENUINENESS OF ORIGINAL MUST BE SHOWN. — See note 3.

3. Original in Hands of Adverse Party — a. NECESSITY OF NOTICE TO PRODUCE — (1) In General. — See note 5.

170. *(2) Nature of Action as Notice.* — See note 1.

Kapp, 35 Tex. Civ. App. 663; Yzaguirre v. State, (Tex. Crim. 1904) 85 S. W. Rep. 14.

Washington. — State v. Champoux, 33 Wash. 339.

Wisconsin. — Kelley v. La Crosse Carriage Co. 120 Wis. 84, 102 Am. St. Rep. 971; Schroeder v. Klipp, 120 Wis. 245.

Georgia Rule as to Proof by Oath of Party Applies Only to Instruments inter Partes. — Cox v. McDonald, 118 Ga. 414.

165. 1. Proof of Loss. — Arbuckle v. Matthews, 73 Ark. 27; Safe Deposit, etc., Co. v. Turner, 98 Md. 22; Post v. Leland, 184 Mass. 601; Graton v. Holliday-Klotz Land, etc., Co., 189 Mo. 322; Koehler v. Schilling, 70 N. J. L. 585; Kelley v. La Crosse Carriage Co., 120 Wis. 84, 102 Am. St. Rep. 971.

Sufficiency of Proof Under Illinois Statute. — See Glos v. Patterson, 209 Ill. 448.

Burden of Proof on Party Offering Secondary Evidence. — Bond v. Hurd, 31 Mont. 314.

166. 1. Kenniff v. Caulfield, 140 Cal. 34; Liles v. Liles, 183 Mo. 326.

2. Kenniff v. Caulfield, 140 Cal. 34; Everett v. Hart, (Colo. App. 1904) 77 Pac. Rep. 254; Liles v. Liles, 183 Mo. 326; Avery v. Stewart, 134 N. Car. 287.

Extent of Search Must Be Shown. — Cullinan v. Hosmer, 100 N. Y. App. Div. 148.

3. Brown v. Harkins, (C. C. A.) 131 Fed. Rep. 63; Kenniff v. Caulfield, 140 Cal. 34; Prussing v. Jackson, 208 Ill. 85. See also Koehler v. Schilling, 70 N. J. L. 585.

4. Search in Proper Places. — Kenniff v. Caulfield, 140 Cal. 34; Everett v. Hart, (Colo. App. 1904) 77 Pac. Rep. 254; Guilford Granite Co. v. Harrison Granite Co., 23 App. Cas. (D. C.) 1; Avery v. Stewart, 134 N. Car. 287.

5. Brown v. Harkins, (C. C. A.) 131 Fed. Rep. 63; Guilford Granite Co. v. Harrison Granite Co., 23 App. Cas. (D. C.) 1.

6. Kenniff v. Caulfield, 140 Cal. 34; Guilford Granite Co. v. Harrison Granite Co., 23 App. Cas. (D. C.) 1; McCaughn v. Young, 85 Miss. 277; Shannon v. Summers, 86 Miss. 619; Koehler v. Schilling, 70 N. J. L. 585; Randolph v. Hudson, 12 Okla. 516.

167. 1. Williamson v. Work, 33 Tex. Civ. App. 369.

2. Prussing v. Jackson, 208 Ill. 85. See also Sullivan v. People, 108 Ill. App. 328; Koehler v. Schilling, 70 N. J. L. 585.

3. Nature of Document. — Atchison, etc., R. Co. v. Palmore, 68 Kan. 545.

4. See Brown v. Harkins, (C. C. A.) 131 Fed. Rep. 63.

7. Court's Discretion. — Kenniff v. Caulfield, 140 Cal. 34; Cooley v. Collins, 186 Mass. 507; Liles v. Liles, 183 Mo. 326; Koehler v. Schilling, 70 N. J. L. 585.

Discretion to Be Exercised According to Law. — Avery v. Stewart, 134 N. Car. 287, disapproving Gillis v. Wilmington, etc., R. Co., 108 N. Car. 441, so far as that case seems to imply the existence of unlimited discretion.

Proper Exercise of Discretion. — See Cox v. McDonald, 118 Ga. 414.

169. 3. Proof of Genuineness and Execution. — State v. Leasia, 45 Oregon 410; Carter v. Wood, 103 Va. 68.

5. Notice to Produce — Arkansas. — Hartford F. Ins. Co. v. Enoch, 72 Ark. 47.

Connecticut. — British American Ins. Co. v. Wilson, 77 Conn. 559; City Bank v. Thorp, (Conn. 1905) 61 Atl. Rep. 428.

Illinois. — Wabash R. Co. v. Johnson, 114 Ill. App. 545; Rudgear v. U. S. Leather Co., 206 Ill. 74; Landt v. McCullough, 206 Ill. 214.

Kentucky. — Com. v. Parlin, etc., Co., (Ky. 1904) 80 S. W. Rep. 791.

Missouri. — State v. Barnett, 110 Mo. App. 592.

New York. — Hess-Mott Co. v. Brown, (Supm. Ct. App. T.) 84 N. Y. Supp. 168. See also Ehrlich v. Chevra Agudas Achin Aushi Wizna, (Supm. Ct. App. T.) 86 N. Y. Supp. 820.

South Carolina. — Aaron v. Southern R. Co., 68 S. Car. 98.

Texas. — Underwriters' F. Assoc. v. Henry, (Tex. Civ. App. 1904) 79 S. W. Rep. 1072; King v. Cisco Compress Co., 35 Tex. Civ. App. 653; Kothman v. Faseler, (Tex. Civ. App. 1904) 84 S. W. Rep. 390; Presidio County v. Clarke, (Tex. Civ. App. 1905) 85 S. W. Rep. 475.

Where There Is No Reason to Suppose that the Paper Is in the Hands of the Adverse Party, notice to produce is not essential. Kelley v. La Crosse Carriage Co., 120 Wis. 84, 102 Am. St. Rep. 971.

Secondary Evidence Admissible Where Production Cannot Be Compelled. — De Leon v. Territory, (Ariz. 1905) 80 Pac. Rep. 348; Speiser v. Phoenix Mut. L. Ins. Co., 119 Wis. 530.

170. 1. Nature of Action as Notice. — Presidio County v. Clarke, (Tex. Civ. App. 1905) 85 S. W. Rep. 475.

- 171.** (3) *Where Original Is Notice.* — See note 2.
 (4) *Original Executed in Duplicate.* — See note 3.
4. Where Original Is Not in Jurisdiction — a. RULE THAT NO EFFORT TO PRODUCE IS NECESSARY. — See note 5.
172. *b. CONTRARY RULE.* — See note 2.
173. *Original in Control of Party Offering Evidence.* — See note 1.
Original Not in Control of Party Offering Evidence. — See note 3.
5. Writings Collateral to Issue. — See note 5.
6. Voluminous Facts or Writings. — See note 6.
- 177. SECTARIAN.** — See note 2.
181. SECURE, SECURITY, ETC. — *Security.* — See note 1.

171. 2. Where Original Is Notice. — See *State v. Mulloy*, 111 Mo. App. 679.

3. Duplicate as Primary Evidence. — Where a contract is executed in duplicate, each party to it having a copy, one party, by proving that his copy is lost, has no right to prove the contents by parol where no steps have been taken to cause the other party to produce the duplicate copy in his possession. *Norris v. Billingsley*, (Fla. 1904) 37 So. Rep. 564.

Carbon Copy Admissible Without Notice to Produce Original. — *Chesapeake, etc., R. Co. v. Stock*, (Va. 1905) 51 S. E. Rep. 161.

5. Original Out of Jurisdiction. — *King v. Cisco Compress Co.*, 35 Tex. Civ. App. 653. See also *Tilley v. Cox*, 119 Ga. 867.

172. 2. Nelson Mfg. Co. v. Shreve, 104 Mo. App. 474; *Liles v. Liles*, 183 Mo. 326; *State v. Lentz*, 184 Mo. 223. See also *State v. Barnett*, 110 Mo. App. 592; *State v. Mulloy*, 111 Mo. App. 679.

173. 1. Original in Control of Party to Suit —

Secondary Evidence Not Admissible. — *King v. Cisco Compress Co.*, 35 Tex. Civ. App. 653.

3. Nelson Mfg. Co. v. Shreve, 104 Mo. App. 474. See also *Staunfield v. Jeutter*, (Neb. 1903) 96 N. W. Rep. 642.

5. Collateral Writings. — *State v. McKinnon*, 99 Me. 166; *Morgan v. Garretson, etc.*, *Lumber Co.*, 105 Mo. App. 239.

6. Voluminous Facts. — *Louisiana Purchase Exposition Co. v. Kuenzel*, 108 Mo. App. 105; *Mendel v. Boyd*, (Neb. 1904) 99 N. W. Rep. 493; *Sykes v. Beck*, 12 N. Dak. 242.

177. 2. King James Version of Bible Not a Sectarian Book. — *Hackett v. Brooksville Graded School Dist.*, (Ky. 1905) 87 S. W. Rep. 792.

181. 1. Bonds, Stocks, Etc. — *Wagner v. Scherer*, 89 N. Y. App. Div. 202 (promissory notes); *Stickel v. Atwood*, 25 R. I. 456.

Land Not Included in Term "Securities." — *Pratt v. Worrell*, 66 N. J. Eq. 194.

SEDUCTION.

BY LEO GOODMAN.

190. I. DEFINITION. — See note 3.

192. II. ELEMENTS OF SEDUCTION AS CIVIL WRONG — 5. Chastity of Woman — a. IN GENERAL. — See note 5

198. IV. COMMON-LAW ACTION — 2. Basis of Right of Action — a. RULE STATED. — See notes 4, 5.

200. f. MODERN RELAXATION OF RULE — (1) In General. — See note 2.

(3) *Slightest Service Sufficient.* — See note 5.

201. (4) Presumption of Service. — See note 1.

(5) *Right to Command Service Sufficient.* — See note 2.

(6) *Slightest Loss of Service Sufficient.* — See note 4.

190. 3. For Other Definitions. — *People v. Smith*, 132 Mich. 58.

192. 5. Chastity Necessary. — See *Swett v. Gray*, 141 Cal. 83.

198. 4. Right of Action Based on Relation of Master and Servant. — *Snider v. Newell*, 132 N. Car. 614.

5. Loss of Service Gist of Action. — *Snider v. Newell*, 132 N. Car. 614.

200. 2. Relaxation of Rule. — See *Snider v. Newell*, 132 N. Car. 614.

5. Slightest Service Sufficient. — *Snider v. Newell*, 132 N. Car. 614.

201. 1. Service Presumed. — *Snider v. Newell*, 132 N. Car. 614.

2. Right to Command Services Sufficient. — *Snider v. Newell*, 132 N. Car. 614.

4. Slightest Loss of Services Sufficient. — *Snider v. Newell*, 132 N. Car. 614.

207. VI. STATUTORY RIGHT OF ACTION — 1. Woman Seduced — a. IN GENERAL — Abolition of Feigned Issues — Action by Real Party in Interest. — See note 1.

211. VII. EVIDENCE IN CIVIL ACTIONS — 1. In General. — See note 7.

217. IX. DAMAGES — 1. Elements of Damage — a. COMMON-LAW RULE — (1) General Rule Stated. — See note 3.

218. b. LOSS OF SOCIAL STANDING. — See note 4.

d. MENTAL AND PHYSICAL ANGUISH. — See note 6.

222. 2. What May Be Considered in Estimating Damages — c. MATTERS IN MITIGATION — (4) Indifference of Parent. — See note 1.

223. 3. Exemplary, Punitive, or Vindictive Damages — a. MAY BE ALLOWED. — See note 4.

224. f. DISCRETION OF JURY. — See note 2.

4. Amount of Recovery — a. GENERAL RULE AS TO DISCRETION OF JURY. — See note 3.

X. LIMITATION OF ACTIONS — 1. Statutes. — See note 5.

226. XVI. SEDUCTION AS CRIMINAL OFFENSE — 2. Under Statutes. — See note 8.

227. XVII. ELEMENTS OF SEDUCTION AS A CRIME — 1. Illicit Sexual Intercourse. — See note 1.

2. Consent of Woman. — See note 2.

3. Arts, Persuasions, and Wiles — a. IN GENERAL. — See notes 5, 6, 7.

228. c. SUFFICIENCY OF ARTS, ETC. — (1) Generally. — See note 2.

(2) Promise of Marriage as a Seductive Art. — See note 3.

(3) Question for Jury. — See note 4.

d. FALSE AND FRAUDULENT MEANS — (2) Means Employed by Married Man. — See note 7.

e. YIELDING TO GRATIFY DESIRE. — See note 8.

229. 4. Promise of Marriage — a. NECESSITY FOR. — See note 2.

207. 1. Abolition of Feigned Issues — Action by Real Party in Interest. — Snider v. Newell, 132 N. Car. 614; Willeford v. Bailey, 132 N. Car. 402.

211. 7. General Rules Applicable. — People v. Tibbs, 143 Cal. 100.

217. 3. Common-law Rule as to Damages. — Willeford v. Bailey, 132 N. Car. 402; Snider v. Newell, 132 N. Car. 614.

218. 4. Loss of Social Standing. — Lampman v. Bruning, 120 Iowa 167.

6. Mental and Physical Anguish. — Lampman v. Bruning, 120 Iowa 167.

222. 1. Indifference of Parent. — Snider v. Newell, 132 N. Car. 614.

223. 4. Exemplary, Punitive, or Vindictive Damages May Be Allowed. — Snider v. Newell, 132 N. Car. 614; Willeford v. Bailey, 132 N. Car. 402.

224. 2. Discretion of Jury. — Willeford v. Bailey, 132 N. Car. 402.

3. Reluctance of Courts to Interfere with Verdicts. — Willeford v. Bailey, 132 N. Car. 402.

Verdicts Held Not Excessive. — Willeford v. Bailey, 132 N. Car. 402.

5. Under the Georgia Statute. — Davis v. Boyett, 120 Ga. 649, 102 Am. St. Rep. 118.

226. 8. Statutes. — Walton v. State, 71 Ark. 398; Caldwell v. State, 73 Ark. 139; State v. Brock, 186 Mo. 457, 105 Am. St. Rep. 625; State v. O'Hare, 36 Wash. 516, 104 Am. St. Rep. 970.

227. 1. Illicit Sexual Intercourse. — Walton v. State, 71 Ark. 398.

2. Consent Necessary. — Pope v. State, 137 Ala. 56.

5. Implied Requirement. — State v. O'Hare, 36 Wash. 516, 104 Am. St. Rep. 970.

6. Either Acts or Promise of Marriage Sufficient. — State v. O'Hare, 36 Wash. 516, 104 Am. St. Rep. 970.

7. Arts, etc., and Promise of Marriage Must Concur. — State v. Meals, 184 Mo. 244; Wisdom v. State, 45 Tex. Crim. 215; Fine v. State, 45 Tex. Crim. 290.

The Georgia Penal Code. — See Hill v. State, 122 Ga. 166.

228. 2. Sufficiency of Arts, Etc. — Hill v. State, 122 Ga. 166; State v. Stolley, 121 Iowa 111; State v. Eatherly, 185 Mo. 178, 105 Am. St. Rep. 567; State v. O'Hare, 36 Wash. 516, 104 Am. St. Rep. 970.

3. Promise of Marriage as a Seductive Art. — State v. Stolley, 121 Iowa 111.

4. Question for Jury. — State v. Eatherly, 185 Mo. 178, 105 Am. St. Rep. 567; State v. O'Hare, 36 Wash. 516, 104 Am. St. Rep. 970.

7. Means Employed by Married Man. — State v. Donovan, (Iowa 1905) 102 N. W. Rep. 791.

8. Yielding to Gratify Desire. — State v. Meals, 184 Mo. 244.

229. 2. Promise of Marriage. — Burnett v. State, 72 Ark. 398; Walton v. State, 71 Ark. 398; State v. Brock, 186 Mo. 457, 105 Am. St. Rep. 625; State v. Meals, 184 Mo. 244; State v. Hubbard, 170 Mo. 346; Wisdom v. State, 45 Tex. Crim. 215; Fine v. State, 45 Tex. Crim. 290.

230. *b.* PROMISE MUST BE MOVING CAUSE OF CONSENT. — See notes 1, 2, 3.

c. SUFFICIENCY OF PROMISE — (1) *Need Not Be Valid and Binding.* — See note 5.

(2) *Promise by Married Man.* — See note 8.

(3) *Promise Conditioned upon Intercourse.* — See note 11.

231. (4) *Promise Conditioned upon Pregnancy.* — See note 1.

232. 5. Chastity of Woman — *a.* NECESSARY ELEMENT. — See note 2.

233. *b.* INQUIRY CONFINED TO CHASTITY AT AND BEFORE TIME OF SEDUCTION. — See note 1.

c. WHAT CONSTITUTES CHASTITY — (1) *Personal Virtue.* — See note 2.

(3) *Effect of Previous Rape.* — See note 4.

(5) *Effect of Permitting Liberties and the Like.* — See note 6.

(6) *Reformation.* — See note 7.

234. *d.* QUESTION OF LAW AND FACT. — See note 2.

e. STATUTES REQUIRING "CHASTE CHARACTER." — See note 3.

236. 9. Whether Defendant Must Be Unmarried. — See note 2.

10. Age of Defendant. — See note 5.

XVIII. EVIDENCE AND BURDEN OF PROOF IN PROSECUTIONS FOR SEDUCTION — 2. Evidence in General — *a.* GENERAL RULES APPLICABLE. — See note 9.

b. PARTICULAR MATTERS — (1) *Subsequent Acts of Intercourse.* — See note 10.

(2) *Character of Woman's Family.* — See note 11.

237. 3. As to Sexual Intercourse — *b.* BIRTH OF CHILD. — See note 8.

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The Georgia Statute. — See *Pike v. State*, 121 Ga. 604.

230. 1. Promise Must Have Been Relied Upon. — See *Wisdom v. State*, 45 Tex. Crim. 215.

2. Promise Must Be Moving Cause of Consent. — *State v. Meals*, 184 Mo. 244; *Fine v. State*, 45 Tex. Crim. 290. See also *Wisdom v. State*, 45 Tex. Crim. 215.

3. Reference to Promise at Time of Intercourse Not Necessary. — *Burnett v. State*, 72 Ark. 398; *Fine v. State*, 45 Tex. Crim. 290.

5. Promise Need Not Be Valid and Binding. — *State v. Brock*, 186 Mo. 457, 105 Am. St. Rep. 625, holding that infancy cannot be set up to vitiate the promise.

8. Knowledge by Woman of Man's Marriage. — *Hoff v. State*, 83 Miss. 488.

11. Promise Conditioned upon Intercourse Not Sufficient. — *State v. Meals*, 184 Mo. 244.

231. 1. Promise Conditioned upon Pregnancy Not Sufficient. — *People v. Smith*, 132 Mich. 58. *Contra*, *State v. O'Hare*, 36 Wash. 516, 104 Am. St. Rep. 970, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 231 as to the general rule, but distinguishing the Washington statute from those in force in other jurisdictions.

232. 2. Previous Chastity of Woman Necessary. — *State v. Smith*, 124 Iowa 334; *Barnard v. States*, (Tex. Crim. 1903) 76 S. W. Rep. 475. See also *Caldwell v. State*, 73 Ark. 139, *overruling*, however, *Walton v. State*, 71 Ark. 398, as to the necessity for alleging chastity.

233. 1. Inquiry Confined to Chastity At and Before Time of Seduction. — *Barnard v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 475.

2. Actual Chastity and Not Reputation the Question. — *State v. Haupt*, 126 Iowa 152.

4. Effect of Previous Rape. — *Pope v. State*, 137 Ala. 56.

6. Permitting Liberties. — See *State v. Stolley*, 121 Iowa 111.

7. Reformation. — *State v. Hubbard*, 170 Mo. 346.

234. 2. Question of Fact. — *State v. Stolley*, 121 Iowa 111; *State v. Smith*, 124 Iowa 334.

3. "Chaste Character." — *State v. Stolley*, 121 Iowa 111.

236. 2. Provisions Regarding Both Single and Married Men. — See *Jordan v. State*, 120 Ga. 864.

5. Infant May Be Guilty of Seduction. — *State v. Brock*, 186 Mo. 457, 105 Am. St. Rep. 625.

9. Evidence of Calls of Other Men subsequent to the act of seduction is immaterial. *People v. Tibbs*, 143 Cal. 190.

10. Election of Particular Act — No Conviction on Subsequent Act. — *Pope v. State*, 137 Ala. 56. *Compare* *People v. Payne*, 131 Mich. 474.

11. Character of Woman's Family. — *People v. Payne*, 131 Mich. 474.

237. 8. Birth of Child Evidence of Intercourse. — *People v. Tibbs*, 143 Cal. 100.

238. 2. No Evidence of Defendant's Guilt. — *People v. Tibbs*, 143 Cal. 100.

3. Pregnancy. — *Merrell v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 979.

239. 6. As to Promise of Marriage — *a.* GENERALLY. — See note 4.
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240. 7. As to Chastity of Woman — *a.* PRESUMPTION AND BURDEN OF PROOF — (1) *In General.* — See notes 5, 6, 7.

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243. 11. Corroboration of Prosecutrix — *a.* RULE STATED. — See note 9.

244. *b.* EXTENT OF CORROBORATION REQUIRED — (1) *Generally.* — See note 1.

(2) *Evidence Connecting Defendant with Crime.* — See notes 2, 4.

245. (4) *To What Elements Corroboration Must Extend.* — See notes 2, 4.

c. CORROBORATION AS TO PARTICULAR ELEMENTS — (1) *Sexual Intercourse.* — See note 7.

246. (2) *Promise of Marriage.* — See notes 6, 7.

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247. *d.* QUESTIONS FOR COURT AND JURY. — See note 4.

12. Reasonable Doubt. — See note 5.

XX. DEFENSES IN PROSECUTION FOR SEDUCTION — 1. Honest Intention to Marry. — See note 7.

248. 2. Refusal of Prosecutrix to Marry Defendant. — See note 1.

XXI. WHEN PROSECUTION BARRED — 1. Statutes of Limitation — *a.* IN GENERAL. — See note 4.

2. Subsequent Marriage of Parties or Offer of Marriage — *a.* MARRIAGE OF PARTIES BARS PROSECUTION — (1) *Rule Stated.* — See note 7.

239. 4. Evidence Held Sufficient. — *State v. Maxwell*, 117 Iowa 482.

8. Admissions of Defendant. — *State v. Meals*, 184 Mo. 244; *Merrell v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 979.

240. 5. Presumption of Chastity. — *Caldwell v. State*, 73 Ark. 139; *People v. Smith*, 132 Mich. 58.

Presumption Rebuttable. — *Walton v. State*, 71 Ark. 398.

Evidence Sufficient to Overcome Presumption. — See *People v. Smith*, 132 Mich. 58.

6. Burden of Proof on Defendant. — *Caldwell v. State*, 73 Ark. 139.

7. Prosecution Must Prove Chastity. — *Walton v. State*, 71 Ark. 398, the authority of which case, however, is shaken by *Caldwell v. State*, 73 Ark. 139.

241. 1. Prosecution Must Prove Reformation. — *People v. Bressler*, 131 Mich. 390; *People v. Smith*, 132 Mich. 58.

12. Bad Reputation for Chastity May Be Shown. — *Walton v. State*, 71 Ark. 398.

243. 9. Corroboration of Prosecutrix Necessary. — *Keaton v. State*, 73 Ark. 265; *Barnard v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 475; *Wisdom v. State*, 45 Tex. Crim. 215.

244. 1. Extent of Corroboration Required. — *Wisdom v. State*, 45 Tex. Crim. 215.

Corroboration Must Be by Evidence Other than That of Prosecutrix. — *Barnard v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 475.

Evidence Amounting to Sufficient Corroboration. — *State v. Burns*, 119 Iowa 663; *State v. Smith*, 124 Iowa 334.

Evidence Not Amounting to Sufficient Corroboration. — *Barnard v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 475.

2. Commission of Crime May Be Proved by Prose-

cutrix Alone. — *Wisdom v. State*, 45 Tex. Crim. 215.

4. Corroboration Must Tend to Connect Defendant with Crime. — *Wisdom v. State*, 45 Tex. Crim. 215; *Barnard v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 475.

245. 2. Corroboration Must Extend to Sexual Intercourse. — *Keaton v. State*, 73 Ark. 265.

4. Corroboration Must Extend to Promise of Marriage. — *Keaton v. State*, 73 Ark. 265; *State v. Meals*, 184 Mo. 244.

7. Corroboration as to Sexual Intercourse. — *State v. Smith*, 124 Iowa 334; *Barnard v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 475.

Corroboration Held Sufficient. — *Fine v. State*, 45 Tex. Crim. 290.

246. 6. Competency and Sufficiency of Corroboration — Evidence. — *Fine v. State*, 45 Tex. Crim. 290; *State v. Meals*, 184 Mo. 244.

7. Circumstances Usually Attending Engagement. — *State v. Meals*, 184 Mo. 244.

10. Preparations for Marriage. — *People v. Tibbs*, 143 Cal. 100.

247. 4. Question for Jury. — *State v. Smith*, 124 Iowa 334; *State v. Hubbard*, 170 Mo. 346; *State v. Eatherly*, 185 Mo. 178, 105 Am. St. Rep. 567.

5. Reasonable Doubt. — *Walton v. State*, 71 Ark. 398.

7. Honest Intention to Marry No Defense. — *Swett v. Gray*, 141 Cal. 83.

248. 1. Refusal of Prosecutrix to Marry Defendant. — *Ingram v. Com.*, 114 Ky. 726.

4. Time for Commencing Prosecution. — *Ingram v. Com.*, 114 Ky. 726.

7. Prosecution Barred by Marriage. — *State v. O'Hare*, 36 Wash. 516, 104 Am. St. Rep. 970. See also *State v. Hubbard*, 170 Mo. 346. But

249. (2) *Good Faith Not Necessary.* — See note 2.

(3) *Effect of Subsequent Desertion.* — See note 4.

b. EFFECT OF UNACCEPTED OFFER — (1) *Under Statutes Making Marriage a Bar.* — See notes 7, 8.

250. (2) *Bona Fide Offer Sufficient* — (a) *In General.* — See note 1.

251. XXIV. KINDRED OFFENSES — 1. Defilement — *a.* STATUTES. — See note 6.

b. CONFIDING TO CARE, ETC. — See note 7.

252. SEEDS. — See note 10.

253. SEIZE, SEIZURE, ETC. — See note 2.

SEIZIN — SEISIN. — See note 3.

254. See note 1.

255. SELECT, SELECTION, ETC. — See note 1.

see *contra*, *In re Lewis*, 67 Kan. 562, 100 Am. St. Rep. 479.

249. 2. *Good Faith.* — Compare *In re Lewis*, 67 Kan. 562, 100 Am. St. Rep. 479.

4. *Contra* — Prosecution Renewable on Subsequent Desertion. — *Keaton v. State*, 73 Ark. 265; *Burnett v. State*, 72 Ark. 398.

7. *Unaccepted Offer Not Sufficient.* — *Swett v. Gray*, 141 Cal. 83.

8. *Unaccepted Offer Sufficient.* — *Ingram v. Com.*, 114 Ky. 726.

250. 1. *Bona Fide Offer Sufficient.* — *Ingram v. Com.*, 114 Ky. 726.

251. 6. *Statutes.* — *State v. Hesterly*, 182 Mo. 16.

7. *What Constitutes Confiding to Care, Etc.* — *State v. Hesterly*, 182 Mo. 16.

252. 10. "Grass Seed" Held Not to Include Canary Seed — Revenue Law. — *Nordlinger v. U. S.*, 127 Fed. Rep. 683.

253. 2. *Seize — Seizure.* — See *Robinson Gold Min. Co. v. Alliance Ins. Co.*, (1904) A. C. 359.

3. *Seisin and Possession.* — *Bragg v. Wiseman*, 55 W. Va. 333, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 253.

254. 1. *Estate.* — *Bragg v. Wiseman*, 55 W. Va. 330.

255. 1. *Select.* — *Petersburg School Dist. v. Peterson*, (N. Dak. 1905) 103 N. W. Rep. 756. See also *Sparks v. Deposit Bank*, 115 Ky. 469.

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258. II. REASON FOR RIGHT — 1. *Danger and Necessity* — *a.* IN GENERAL. — See note 2.

261. *b.* ACTUAL DANGER NOT NECESSARY. — See note 1.

258. 2. *Basis of Right of Self-defense* — *Alabama.* — *Morrell v. State*, 136 Ala. 44; *Angling v. State*, 137 Ala. 17; *Stewart v. State*, 137 Ala. 33.

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Louisiana. — *State v. Halliday*, 112 La. 846.

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West Virginia. — *State v. Davis*, 52 W. Va. 224; *State v. Cottrill*, 52 W. Va. 363.

261. 1. *Reasonable Appearance of Danger the Test* — *United States.* — *U. S. v. Lewis*, 111 Fed. Rep. 630; *Owens v. U. S.*, (C. C. A.) 130 Fed. Rep. 279.

Alabama. — *Jimmerson v. State*, 133 Ala. 18;

262. See note 1.

c. IMMINENCE OF DANGER. — See note 2.

d. BELIEF IN DANGER. — See note 3.

e. REASONABLENESS OF APPREHENSION. — See notes 5, 6.

263. Fears of Reasonable Man. — See notes 1, 2.

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82 S. W. Rep. 438; Finney v. Com., (Ky.

1904) 82 S. W. Rep. 636; O'Neil v. Com., (Ky.

1905) 85 S. W. Rep. 745. See also Havens v.

Com., (Ky. 1904) 82 S. W. Rep. 369.

New Jersey. — State v. Jones, 71 N. J. L.

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Appearance of Danger to Be Viewed from Slayer's Standpoint. — Adams v. State, (Tex. Crim. 1904) 84 S. W. Rep. 231; Holmes v. State, 124 Wis. 133.**"Due Care" or "Circumspection" as to Manner of Killing Not Necessary.** — People v. Thomson, 145 Cal. 717.**262. 1. Appearance of Danger Must Be Real.** — Chism v. State, (Tex. Crim. 1904) 78 S. W. Rep. 949.**2. Future Danger Insufficient — United States.** — U. S. v. Lewis, 111 Fed. Rep. 630,

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Delaware. — State v. Emory, (Del. 1904) 58 Atl. Rep. 1036.

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Kansas. — State v. Nelson, 65 Kan. 689;

State v. Appleton, 70 Kan. 217.

New York. — People v. Rodawald, 177 N. Y. 408.

North Carolina. — State v. Barrett, 132 N. Car. 1005.

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3. Necessity of Apprehension of Danger. — Mathews v. State, 136 Ala. 47; Hicklin v. Territory, (Ariz. 1905) 80 Pac. Rep. 340; Sylvester v. State, (Fla. 1903) 35 So. Rep. 142; Hutsell v. Com., (Ky. 1903) 75 S. W. Rep. 225; Terry v. State, 45 Tex. Crim. 264; Logan v. State, 46 Tex. Crim. 573; Coleman v. State, (Tex. Crim. 1905) 88 S. W. Rep. 238; Cole v. State, (Tex. Crim. 1905) 88 S. W. Rep. 341.**5. Mere Fear Insufficient.** — Wilson v. State, 140 Ala. 43; McClellan v. State, 140 Ala. 99; Williams v. State, 120 Ga. 870; People v. Rodawald, 177 N. Y. 408; State v. Smith, 43 Oregon 109. See also State v. Emory, (Del. 1904) 58 Atl. Rep. 1036.**Reasonableness of Slayer's Apprehension a Question for Jury.** — State v. Barrett, 132 N. Car. 1005; State v. Stockhammer, 34 Wash. 262.**6. Overt Act Necessary.** — State v. Halliday, 112 La. 846; Peoples v. State, (Miss. 1903) 33 So. Rep. 289.**263. 1. Reasonable Man the Test — United States.** — Owens v. U. S., (C. C. A.) 130 Fed. Rep. 279.

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Indian Territory. — Williams v. U. S., 4 Indian Ter. 269.

Kansas. — State v. Appleton 70 Kan. 217.

Oregon. — State v. Smith, 43 Oregon 109.

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263. *f.* WHAT APPREHENDED DANGER SUFFICIENT. — See notes 3, 4.

264. *g.* USE OF REASONABLY NECESSARY FORCE. — See notes 1, 2, 3, 4.
See also the title ASSAULT AND BATTERY, **977**. *i et seq.*

2. Provocation. — See note 6.

3. Threats. — See note 7.

265. What Constitutes Overt Act. — See note 1.

266. See notes 1, 3.

4. Prior Difficulties. — See note 4.

III. IN CASE OF MUTUAL COMBAT. — See note 5.

IV. IN CASE ACCUSED BRINGS ON THE DIFFICULTY — 1. In General. — See note 6.

268. Wreaking Malice. — See note 1.

2. What Constitutes Provocation — *a.* IN GENERAL. — See note 3.

269. *b.* INSULTING LANGUAGE. — See note 1.

Wisconsin. — *Holmes v. State*, 124 Wis. 133.

Word "Man" Used in Generic Sense — Applicable Where Accused Is Woman. — *Anderson v. State*, 117 Ga. 255.

263. 2. Fears of Coward or Drunken Man. — *State v. Allen*, 111 La. 154.

3. Killing to Prevent "Great Bodily Harm." — *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036; *State v. Bowers*, 65 S. Car. 207, 95 Am. St. Rep. 795; *State v. Thompson*, 68 S. Car. 133; *Brittain v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 278.

4. Simple Battery Will Not Justify. — *Kinman v. State*, 73 Ark. 126.

264. 1. Rule as to Amount of Force. — *Carroll v. Com.*, (Ky. 1904) 83 S. W. Rep. 552; *O'Neal v. Com.*, (Ky. 1905) 85 S. W. Rep. 745. Force Used Need Not Have Been "Actually Necessary." — *Schmidt v. State*, 124 Wis. 516.

2. Repelling Fist Attacks. — *Thayer v. State*, 138 Ala. 39; *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036.

3. *State v. Gray*, 43 Oregon 446. See also *Morgan v. State*, 119 Ga. 566.

4. Right to Kill. — *Helton v. Com.*, (Ky. 1905) 87 S. W. Rep. 1073.

6. Words and Gestures. — *Lynch v. People*, 33 Colo. 128.

7. Homicide Not Excused by Reason of Threats. — *Morrell v. State*, 136 Ala. 44.

In Texas. — *Newman v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 951; *Aldredge v. State*, (Tex. Crim. 1903) 72 S. W. Rep. 843; *Swain v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 335.

265. 1. Meaning of Overt Act. — *State v. Golden*, 113 La. 804, quoting 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 266 [265].

266. 1. Fielding *v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 1044.

3. *State v. Golden*, 113 La. 804, quoting 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 266 and supporting the whole text paragraph.

4. Killing Not Justified Because of Former Difficulties. — *Morrell v. State*, 136 Ala. 44.

5. No Right of Self-defense When Combat Is Mutual. — *Sanders v. State*, 134 Ala. 74; *Wheeler v. Com.*, (Ky. 1905) 87 S. W. Rep. 1106; *Johnson v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 824. See also the title ASSAULT AND BATTERY, **977**. 1. But see *People v. Thomson*, 145 Cal. 717, holding that where a sudden quarrel is in progress, one of the par-

ties may assail the other under such circumstances as to make it absolutely necessary for the other to kill in self-defense.

It Is Entering into a Combat Willingly that deprives the defendant of the right to rely on self-defense. *Christian v. State*, 46 Tex. Crim. 47.

6. Accused the Aggressor — *United States*. — *U. S. v. Lewis*, 111 Fed. Rep. 630.

Alabama. — *Reese v. State*, 135 Ala. 13; *Jarvis v. State*, 138 Ala. 17; *McClellan v. State*, 140 Ala. 99; *Burton v. State*, 141 Ala. 32.

California. — *People v. Glover*, 141 Cal. 233. *Florida.* — *Bassett v. State*, 44 Fla. 12; *Marlow v. State*, (Fla. 1905) 38 So. Rep. 653.

Illinois. — *Mackin v. People*, 214 Ill. 232. *Iowa.* — *State v. Smith*, (Iowa 1904) 99 N. W. Rep. 579.

Kentucky. — *Morrison v. Com.*, (Ky. 1903) 74 S. W. Rep. 277; *Morris v. Com.*, (Ky. 1905) 84 S. W. Rep. 560; *Wheeler v. Com.*, (Ky. 1905) 87 S. W. Rep. 1106; *Carnes v. Com.*, (Ky. 1905) 87 S. W. Rep. 1123.

Louisiana. — *State v. Clayton*, 113 La. 782. *New Mexico.* — *Territory v. Gonzales*, (N. Mex. 1902) 68 Pac. Rep. 925.

New York. — *People v. Filippelli*, 173 N. Y. 509.

North Carolina. — *State v. White*, 138 N. Car. 704.

Oregon. — *State v. Smith*, 43 Oregon 109. *South Carolina.* — *State v. Hutto*, 66 S. Car. 449; *State v. Foster*, 66 S. Car. 469.

Texas. — *Vann v. State*, 45 Tex. Crim. 434, 107 Am. St. Rep. 997; *Dent v. State*, 46 Tex. Crim. 166; *Garza v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 231. See also *McMahon v. State*, 46 Tex. Crim. 540; *Goodman v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 196.

West Virginia. — *State v. Davis*, 52 W. Va. 224; *State v. Kellison*, 56 W. Va. 690.

268. 1. Intent to Kill Deprives of Self-defense. — *Kyle v. People*, 215 Ill. 250.

3. Trivial Act. — *Smith v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 151.

The Mere Fact that the Defendant Sought the Deceased for the Purpose of Provoking a Difficulty does not *per se* forfeit his right of self-defense. *Barstado v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 344.

269. 1. *State v. Hammer*, 116 Iowa 284; *Stacy v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 327.

- 269.** *c.* CRIMINAL INTIMACY WITH WIFE. — See note 2.
d. PREPARATION. — See note 4.
e. SEEKING INTERVIEW. — See note 6.
f. INTENTION — In Texas. — See note 8.
- 270.** 3. Imperfect Self-defense. — See note 1.
 4. Abandonment of Difficulty. — See note 2.
- 271.** See notes 1, 2.
 V. DUTY TO RETREAT — 1. In General. — See note 4.
- 272.** 2. In Case of Murderous Assault. — See notes 1, 2.
- 273.** 3. From Dwelling. — See notes 5, 6.
- 274.** VI. RIGHT TO PURSUE. — See note 1.
 VII. RIGHT TO ATTACK. — See note 2.
 VIII. DEFENSE OF ANOTHER — 1. In General. — See notes 3, 4, 6, 7.
- 275.** 2. Defense of Persons Occupying Certain Relations. — See notes 2, 3.
 5. See also the title ASSAULT AND BATTERY, **981**. 2 *et seq.*

269. 2. Adultery as Provocation. — See Nicks *v. State*, 46 Tex. Crim. 241.

4. Right to Arm. — Nash *v. State*, 73 Ark. 399; Tardy *v. State*, 46 Tex. Crim. 214. See also Reynolds *v. Com.*, 114 Ky. 912.

6. Right to Seek Interview. — McVey *v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 740; Nelson *v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 143; Craiger *v. State*, (Tex. Crim. 1904) 88 S. W. Rep. 208.

8. Texas Rule. — Bearden *v. State*, 46 Tex. Crim. 144; Hjeronymus *v. State*, 46 Tex. Crim. 157.

270. 1. Chambers *v. State*, 46 Tex. Crim. 61; Craiger *v. State*, (Tex. Crim. 1904) 88 S. W. Rep. 208.

2. Effect of Abandonment. — Hicklin *v. Territory*, (Ariz. 1905) 80 Pac. Rep. 340; People *v. Glover*, 141 Cal. 233; Mackin *v. People*, 214 Ill. 232; State *v. Smith*, (Iowa 1904) 99 N. W. Rep. 579; Hellard *v. Com.*, (Ky. 1905) 84 S. W. Rep. 329; Lofton *v. State*, 79 Miss. 723; Jones *v. State*, 84 Miss. 194; State *v. Shockley*, (Utah 1905) 80 Pac. Rep. 870, *citing* 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 270. See also Bishop *v. State*, 73 Ark. 568; Harris *v. People*, 32 Colo. 211; Underwood *v. Com.*, (Ky. 1905) 84 S. W. Rep. 310. And see the title ASSAULT AND BATTERY, **980**. 1.

271. 1. See Scott *v. State*, 133 Ala. 112; Kyle *v. People*, 215 Ill. 250.

2. Notification Prevented by Fault of Assailant. — Pulpus *v. State*, 82 Miss. 548; State *v. Shockley*, (Utah 1905) 80 Pac. Rep. 870, *quoting* 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 271.

4. When Necessary to Retreat. — Bishop *v. State*, 73 Ark. 568; Hellard *v. Com.*, (Ky. 1905) 84 S. W. Rep. 329.

272. 1. Necessary to Retreat from Murderous Assault. — Jimmerson *v. State*, 133 Ala. 18; Stewart *v. State*, 137 Ala. 33; Sims *v. State*, 139 Ala. 74, 101 Am. St. Rep. 17; Gordon *v. State*, 140 Ala. 29; Mann *v. State*, 134 Ala. 1; Harbour *v. State*, 140 Ala. 103; Kirkland *v. State*, 141 Ala. 45; State *v. Emory*, (Del. 1904) 58 Atl. Rep. 1036; People *v. Fucarino*, 104 N. Y. App. Div. 437; Com. *v. Mitchka*, 209 Pa. St. 274; State *v. Foster*, 66 S. Car. 469; State *v. Hutto*, 66 S. Car. 449.

2. Unnecessary to Retreat from Murderous

Assault. — Hammond *v. People*, 199 Ill. 173; State *v. Petteys*, 65 Kan. 625; Connor *v. Com.*, (Ky. 1904) 81 S. W. Rep. 259; State *v. McKenzie*, 177 Mo. 699; State *v. Gibson*, 43 Oregon, 184; State *v. Stockhammer*, 34 Wash. 262; State *v. Kellison*, 56 W. Va. 690. Compare Bishop *v. State*, 73 Ark. 568.

Under Texas Statute No Duty to Retreat. — Alexander *v. State*, (Tex. Crim. 1902) 70 S. W. Rep. 748; Montgomery *v. State*, 45 Tex. Crim. 373. See also Connell *v. State*, 45 Tex. Crim. 142.

Under New Jersey Statute No Duty to Retreat. — State *v. Jones*, 71 N. J. L. 543.

Duty to Retreat When Defendant Partly at Fault. — Harris *v. People*, 32 Colo. 211.

273. 5. No Duty to Retreat from Dwelling. — McKinney *v. Com.*, (Ky. 1904) 82 S. W. Rep. 263; State *v. Kellison*, 56 W. Va. 690.

6. No Duty to Retreat from Premises. — Adkins *v. Com.*, (Ky. 1904) 82 S. W. Rep. 242.

274. 1. When Right to Pursue Exists. — State *v. Linhoff*, 121 Iowa 632; Wilson *v. State*, 46 Tex. Crim. App. 523.

2. When Right to Attack Exists. — Wells *v. Territory*, 14 Okla. 436. See also Peoples *v. State*, (Miss. 1903) 33 So. Rep. 289.

3. Right to Defend Another. — Taber *v. Com.*, (Ky. 1904) 82 S. W. Rep. 443; Carroll *v. Com.*, (Ky. 1904) 83 S. W. Rep. 552; State *v. Bowers*, 65 S. Car. 207, 95 Am. St. Rep. 795.

4. Right of Third Person Same as That of Person Defended. — Surginer *v. State*, 134 Ala. 120; Fletcher *v. Com.*, (Ky. 1904) 83 S. W. Rep. 588; State *v. Clark*, 134 N. Car. 698; Martinez *v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 234; Garza *v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 231.

6. See Alexander *v. State*, 118 Ga. 26.

7. See Chambers *v. State*, 46 Tex. Crim. 61.

275. 2. Husband and Wife. — McKinney *v. Com.*, (Ky. 1904) 82 S. W. Rep. 263.

3. Parent and Child. — Pratt *v. State*, (Ark. 1905) 87 S. W. Rep. 651; Alexander *v. State*, 118 Ga. 26; Thacker *v. Com.*, (Ky. 1903) 71 S. W. Rep. 931; McKinney *v. Com.*, (Ky. 1904) 82 S. W. Rep. 263.

5. Brother and Brother or Brother and Sister. — See Spaulding *v. State*, 162 Ind. 297; Havens *v. Com.*, (Ky. 1904) 82 S. W. Rep. 369; Taber *v. Com.*, (Ky. 1904) 82 S. W. Rep. 443.

276. IX. DEFENSE OF PROPERTY — 1. In General. — See notes 1, 2.

277. 3. Defense of Habitation — a. IN GENERAL. — See note 4.

278. c. PERSONS AGAINST WHOM RIGHT DOES NOT EXIST. — See note 4.

X. HOMICIDE COMMITTED WHEN ARREST MADE — 1. Officer Killed — a. WHEN ARREST LAWFUL. — See note 5.

279. Necessity for Knowledge of Official Character. — See note 3.

b. WHEN ARREST UNLAWFUL. — See note 4.

2. Person Resisting Killed. — See note 5.

XI. EVIDENCE — 2. Admissibility — a. IN GENERAL. — See note 7.

280. c. APPREHENSION OF DANGER. — See note 6.

g. PREVIOUS DIFFICULTIES AND ILL-FEELING. — See note 11.

281. h. THREATS MADE BY DECEASED. — See note 2.

282. i. CHARACTER OF DECEASED. — See notes 1, 2.

j. DECEASED GOING ARMED. — See note 3.

283. 3. Weight and Sufficiency. — See note 1.

4. Burden of Proof. — See note 2.

276. 1. Rule as to Protection of Property. — *Hans v. State*, (Neb. 1904) 100 N. W. Rep. 419; *State v. Kellison*, 56 W. Va. 690. And see the title ASSAULT AND BATTERY, **981. 7 et seq.**

2. When Owner May Slay Trespasser. — *Boykin v. State*, 86 Miss. 481; *Bearden v. State*, 44 Tex. Crim. 578.

277. 4. Right to Defend Habitation. — *State v. Emory*, (Del. 1904) 58 Atl. Rep. 1036. See also *Hayner v. People*, 213 Ill. 142, holding the general rule to be that a man in his own habitation may oppose an unlawful entry against his will, by one who in a violent manner attempts to enter with a purpose of assaulting or offering violence to him, even to the extent of taking life, although the circumstances may not be such as to justify a belief that there was actual peril of life or great bodily harm.

278. 4. Person on Business. — See *State v. Hargrave*, 188 Mo. 337.

5. Resisting Lawful Arrest. — *State v. Shaw*, 73 Vt. 149; *State v. Davis*, 52 W. Va. 224.

Arrest by Private Person. — *State v. Shockley*, (Utah 1905) 80 Pac. Rep. 865.

279. 3. Ignorance of Official Character. — See *State v. Rudolph*, 187 Mo. 67.

4. Resisting Unlawful Arrest. — *Coleman v. State*, 121 Ga. 594.

5. See *Havens v. Com.*, (Ky. 1904) 82 S. W. Rep. 369; *Com. v. Crowley*, 26 Pa. Super. Ct. 124.

7. Admissible Evidence. — See *Ellzey v. State*, (Miss. 1905) 37 So. Rep. 837.

280. 6. Apprehension of Danger. — *State v. Crawford*, 31 Wash. 260.

11. When Evidence of Previous Difficulties Admissible. — *State v. Golden*, 113 La. 791; *Pettis v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 312.

281. 2. When Threats Made by Deceased Admissible. — *Wilson v. State*, 140 Ala. 43; *State v. Golden*, 113 La. 791; *People v. Gaimari*, 176 N. Y. 84; *People v. Taylor*, 177 N. Y. 237; *State v. Ellis*, 30 Wash. 369.

282. 1. When Evidence of Dangerous Character of Deceased or Person Assaulted Admissible. — *Morrell v. State*, 136 Ala. 44; *Lynch v. People*, 33 Colo. 128; *Carle v. People*, 200 Ill. 494, 93

Am. St. Rep. 208; *Kiple v. People*, 215 Ill. 358; *Morrison v. Com.*, (Ky. 1903) 74 S. W. Rep. 277; *State v. Golden*, 113 La. 791; *State v. Ronk*, 91 Minn. 419; *People v. Gaimari*, 176 N. Y. 84; *People v. Rodawald*, 177 N. Y. 408; *State v. McDaniel*, 68 S. Car. 304, 102 Am. St. Rep. 661; *Burnett v. State*, 46 Tex. Crim. 116; *Cole v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 341.

2. When Evidence of Peaceable Character Admissible. — *Pettis v. State*, (Tex. Crim. 1904) 81 S. W. Rep. 312; *State v. Ellis*, 30 Wash. 369. See also *People v. Gallagher*, 75 N. Y. App. Div. 39, affirmed 174 N. Y. 505.

3. Deceased's Habit of Going Armed. — *Carle v. People*, 200 Ill. 494, 93 Am. St. Rep. 208; *State v. Privitt*, 175 Mo. 207; *State v. Ellis*, 30 Wash. 369; *State v. Crawford*, 31 Wash. 260.

283. 1. Jury to Determine Weight and Sufficiency. — *Richardson v. State*, 133 Ala. 78; *Reese v. State*, 135 Ala. 13; *Ringer v. State*, (Ark. 1905) 85 S. W. Rep. 410; *McKinney v. Com.*, (Ky. 1904) 82 S. W. Rep. 263; *State v. Golden*, 113 La. 791; *Peoples v. State*, (Miss. 1903) 33 So. Rep. 289; *State v. Williams*, 186 Mo. 128; *State v. Rudolph*, 187 Mo. 67; *Territory v. Watson*, (N. Mex. 1904) 78 Pac. Rep. 504.

For Cases Discussing the Sufficiency of Evidence to sustain the plea of self-defense, see *Frame v. State*, 73 Ark. 501; *Cavaness v. State*, 45 Tex. Crim. 209; *Chambless v. State*, (Tex. Crim. 1903) 77 S. W. Rep. 2.

2. Rule as to Burden of Proof — *United States v. U. S. v. Lewis*, 111 Fed. Rep. 630.

Alabama. — *Ragsdale v. State*, 134 Ala. 24; *Harbour v. State*, 140 Ala. 103; *Etheridge v. State*, 141 Ala. 29.

Arizona. — *Anderson v. Territory*, (Ariz. 1904) 76 Pac. Rep. 636.

Colorado. — *Zipperian v. People*, 33 Colo. 134.

Illinois. — See *Kiple v. People*, 215 Ill. 358.

Iowa. — *State v. Williams*, 122 Iowa 115; *State v. Smith*, (Iowa 1904) 99 N. W. Rep. 579; *State v. Usher*, 126 Iowa 287.

Kentucky. — *Thacker v. Com.*, (Ky. 1903) 71 S. W. Rep. 931; *Adkins v. Com.*, (Ky. 1904) 82 S. W. Rep. 242.

284. XII. SELF-DEFENSE A QUESTION OF FACT. — See note 2.**SELF-DESTRUCTION.** — See note 3.**SELL — SOLD.** — See note 7.*New Jersey.* — State *v. Jones*, 71 N. J. L. 543.*South Carolina.* — State *v. Hutto*, 66 S. Car. 449.*Texas.* — Vann *v. State*, 45 Tex. Crim. 434, 107 Am. St. Rep. 997.Compare State *v. Castle*, 133 N. Car. 769.**284. 2. What Is Self-defense a Question of Law.** — Tarver *v. State*, 137 Ala. 29; Sherrill*v. State*, 138 Ala. 3; Johnson *v. State*, 141 Ala. 37. See also State *v. Valentina*, 71 N. J. L. 552.**3. Self-destruction.** — Courtemanche *v. Supreme Court*, etc., 136 Mich. 30.**7. "Sold" Imports Consideration or Price.** — Howell *v. State*, 124 Ga. 699, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 284.

SENTENCE AND PUNISHMENT.

BY H. N. ELDRIDGE.

292. 1. SENTENCE — 1. Definition and Nature. — See note 1.**293. 2. Rendition — a. BY WHOM RENDERED — (2) Rendition by Other than Trial Judge.** — See note 5.*b. PLACE OF RENDITION.* — See note 9.**294. c. TIME OF RENDITION — (1) In General — (a) At Common Law.** — See note 3.**295. (b) Under Statutes — cc. STATUTES REQUIRING LAPSE OF CERTAIN TIME BETWEEN VERDICT AND SENTENCE.** — See note 4.**300. d. FORMALITIES — (5) Questions and Remarks by Court.** — See note 9.**303. 3. Sentence — b. CONTENTS — ESSENTIAL REQUISITES — (3) Sentence of Imprisonment — (b) Time of Imprisonment — aa. IN GENERAL.** — See notes 3, 6.*bb. WHERE DEFENDANT IS IN EXECUTION ON FORMER SENTENCE.* — See note 11.**307. (7) Sentence After Conviction on Two or More Indictments or Counts — Cumulative Sentences — (a) Sentence After Conviction on Two or More Indictments.** — See note 7.**309. (b) Sentence After Conviction on Two or More Counts — cc. WHERE DIFFERENT COUNTS CHARGE DIFFERENT OFFENSES — (aa) In General.** — See notes 4, 5, 6.**311. c. EFFECT OF ERROR IN SENTENCE — (1) In General — (a) At Common Law.** — See note 6.**292. 1. Sentence Is No Part of Conviction.** — State *v. Knowles*, 98 Me. 429.**293. 5. State v. Knotts**, 70 S. Car. 400.**9. In Open Court.** — State *v. Scarborough*, 70 S. Car. 288 (sentence for criminal contempt not committed in court's presence).**294. 3. May Be Deferred to Future Day During Term.** — *Ex p. Terry*, (Kan. 1905) 80 Pac. Rep. 586.**295. 4. Requirement that a Certain Time Shall Elapse Between Verdict and Sentence.** — Powers *v. Com.*, (Ky. 1904) 83 S. W. Rep. 146; People *v. Spencer*, 179 N. Y. 408.**300. 9. Remarks by the Court.** — State *v. Farrington*, (N. Car. 1906) 53 S. E. Rep. 954.**303. 3. Duration of Imprisonment Must Be Definitely Stated.** — *Ex p. Howard*, (Kan. 1905) 83 Pac. Rep. 1032.**6. In re Campbell**, 138 Mich. 597.**Statutes Held to Be Valid.** — Shular *v. State*, 160 Ind. 300; State *v. Stephenson*, 69 Kan. 405; State *v. Tyree*, (Kan. 1904) 77 Pac. Rep. 290(except as to one convicted of felony committed before enactment); People *v. Adams*, 176 N. Y. 351, affirming 85 N. Y. App. Div. 390.**Statute Prospective in Operation.** — *In re Lam-brecht*, 137 Mich. 450.**Requirement that Court Shall Fix Minimum Where Not Fixed by Law.** — *In re Leonard*, 137 Mich. 457.**11. Where Defendant Is in Execution on Former Sentence.** — Rigor *v. State*, 101 Md. 465.**307. 7. Successive Sentence Proper After Conviction on Two or More Indictments.** — Hightower *v. Hollis*, 121 Ga. 159.**309. 4. Separate Sentence on Each Count.** — Washington *v. State*, 51 Fla. 137.**5. Punishment Should Not Be Consolidated into One Sentence.** — See State *v. Darling*, 77 Vt. 67.**6. Cumulative Sentences Should Be Imposed.** — Chadwick *v. U. S.*, (C. C. A.) 141 Fed. Rep. 225.**311. 6. Cause Remitted to Lower Court for Proper Sentence.** — State *v. Houghton*, (Oregon 1904) 75 Pac. Rep. 822.

312. (2) *Sentence Partly Good and Partly Bad.* — See note 4.

314. 4. *Suspension — a. RIGHT TO SUSPEND — (2) Because of Defendant's Insanity.* — See note 1.

b. RIGHT TO PRONOUNCE SENTENCE AFTER SUSPENSION — (1) In General. — See note 7.

316. 5. *Amendment, Vacation, and Resentence — a. DURING TERM OF RENDITION — (2) After Execution Has Begun — (b) Where Sentence Is Void or Erroneous.* — See note 3.

319. II. *PUNISHMENT — 5. Character and Extent of Punishment — b. FOR MISDEMEANORS — (1) At Common Law.* — See note 3.

(2) *By Statute.* — See note 13.

320. *d. UNDER PROHIBITIVE STATUTES IMPOSING NO PENALTY.* — See note 6.

e. CONSTRUCTION OF STATUTORY PROVISIONS. — See note 7.

322. 6. *Place of Imprisonment — b. UNDER STATUTES — (4) Imprisonment of Federal Offenders in State Jails or Penitentiaries.* — See note 6.

(5) *Statutes Prescribing Imprisonment Without Specifying Place.* — See note 10.

323. (7) *Construction of Statutes.* — See note 2.

7. *Conformity of Punishment to Statute Prescribing It — a. IN GENERAL.* — See note 3.

324. *b. WHERE STATUTE ALLOWS DISCRETION WITHIN CERTAIN LIMITS.* — See note 3.

326. 9. *Computation of Term of Imprisonment — b. TIME DURING WHICH APPEAL IS PENDING.* — See note 6.

327. *c. PERIOD WHILE AT LARGE AFTER ESCAPE.* — See note 5.

329. 11. *Execution of Death Sentence — c. TIME AND PLACE.* — See note 5.

312. 4. *Sentence Partly Good and Partly Bad.* — *In re Welty*, 123 Fed. Rep. 122; *In re Sullivan*, (Cal. App. 1906) 84 Pac. Rep. 781.

A Sentence Imposing Two Penalties in the Alternative, One of Which Is Unauthorized, is not void, but may be enforced as to the penalty which is authorized. *Brown v. Atlanta*, 123 Ga. 497.

314. 1. *Suspension Because of Defendant's Insanity.* — *Ince v. State*, (Ark. 1905) 88 S. W. Rep. 818.

7. *Grundel v. People*, 33 Colo. 192, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 314.

316. 3. *Resentence After Appeal.* — One who procures a voidable sentence to be set aside on appeal may thereafter be properly sentenced, notwithstanding he may have served part of the voidable sentence. *State v. Tyree*, (Kan. 1904) 77 Pac. Rep. 290, affirmed, 70 Kan. 203. See also *McCormick v. State*, (Neb. 1904) 99 N. W. Rep. 237.

319. 3. *Com. v. Flaherty*, 29 Pa. Co. Ct. 238, quoting 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 319.

13. *Discretion of Court Generally Limited.* — *State v. Williams*, 114 La. 940; *State v. Sanders*, 68 S. Car. 192.

320. 6. *Com. v. Flaherty*, 25 Pa. Super. Ct. 490. See also *U. S. v. Powers*, 1 Alaska 180.

7. *Penal Statutes Strictly Construed.* — *Com. v. Fetterman*, 26 Pa. Super. Ct. 569.

322. 6. *What Punishment Essential to Authorize Imprisonment in State Penitentiary.* — *Regina v. Dunlop Steamship Co.*, 128 Fed. Rep. 784.

10. *Statutes Prescribing Imprisonment Without Specifying Place.* — See *U. S. v. Powers*, 1 Alaska 180.

323. 2. *Sentence to Jail of Another County Held to Be Proper.* — *Dawley v. Wilcox*, 25 R. I. 297.

3. *Punishment Must Conform to Statute Prescribing It.* — *Com. v. Fetterman*, 26 Pa. Super. Ct. 569.

324. 3. *Fitts v. Atlanta*, 121 Ga. 567.

326. 6. *Dimmick v. Tompkins*, 194 U. S. 540.

327. 5. *Effect of Escape.* — *Ex p. Moebus*, 137 Fed. Rep. 154.

329. 5. *Under the Florida Statute requiring that capital sentences shall be executed "within the walls or enclosure of the jail," a sentence that the defendant be hanged in the yard surrounding the common jail is reversible error.* *Webster v. State*, 47 Fla. 108.

SEPARATE PROPERTY OF MARRIED WOMEN.

By P. B. McKENZIE.

337. II. CREATION OF EQUITABLE SEPARATE ESTATE — 1. Mode of Creation — *a. INSTRUMENT CREATING SEPARATE PROPERTY.* — See note 3.

338. *b. INTENT TO CREATE SEPARATE ESTATE — When Property Is Given to a Married Woman by a Written Instrument.* — See note 1.

340. 2. By Whom Created — *b. BY HUSBAND.* — See note 1.

Relinquishment of Husband's Rights. — See notes 3, 4.

341. *c. BY WIFE — Earnings of Wife.* — See note 3.

345. III. SEPARATE ESTATES CREATED BY STATUTE — 2. General Scope of Statutes — *a. PURPOSE OF STATUTES.* — See note 5.

b. COMPLETE RESTORATION OF POWERS. — See notes 6, 8.

346. 3. Inventory or Schedule Required by Statute. — See note 2.

347. IV. CONSTITUTIONALITY AND CONSTRUCTION OF STATUTES — 2. Construction — *a. STRICT OR LIBERAL CONSTRUCTION — (2) Strict Construction.* — See note 2.

(3) *Liberal Construction.* — See notes 5, 6.

b. PROSPECTIVE OR RETROSPECTIVE CONSTRUCTION — (1) Prospective Construction — (a) General Rule. — See note 10.

348. (b) Property Acquired Before Enactment of Statute. — See note 1.

349. (e) Effect on Vested Rights — *aa. IN GENERAL.* — See note 1.

A Mere Expectancy. — See note 3.

bb. HUSBAND'S INTEREST IN WIFE'S PROPERTY — (aa) Real Estate. — See note 4.

350. V. WHAT PROPERTY STATUTES INCLUDE — 1. Property Owned at Time of Marriage. — See note 4.

337. 3. Creation of Separate Estate Before Marriage. — Wood *v.* Reamer, (Ky. 1904) 82 S. W. Rep. 572.

338. 1. Words Creating Separate Estate. — Wood *v.* Reamer, (Ky. 1904) 82 S. W. Rep. 572.

340. 1. Gifts from Husband. — Fletcher *v.* Wakefield, 75 Vt. 257, holding such gift good as against subsequent creditors; Hays *v.* Marsh, 123 Iowa 81.

3. Relinquishment of Marital Rights. — Leslie *v.* Bell, 73 Ark. 338.

4. Husband Constituting Himself Trustee for Wife. — Leslie *v.* Bell, 73 Ark. 338.

341. 3. Separate Estate in Earnings Acquired by Consent of Husband. — Briggs *v.* Devoe, 89 N. Y. App. Div. 115; Matter of Dailey, (Surrogate Ct.) 43 Misc. (N. Y.) 552.

345. 5. General Scope and Purpose of Statutes. — Carter *v.* Becker, 69 Kan. 524.

6. Lyon *v.* Lyon, 72 S. W. Rep. 1102, 24 Ky. L. Rep. 2100.

8. Feme sole in Respect to Separate Property. — King *v.* Ballou, 72 S. W. Rep. 771, 24 Ky. L. Rep. 1946; Robertson *v.* Robertson, 72 S. W. Rep. 813, 24 Ky. L. Rep. 2020; Johnston *v.* Johnston, 173 Mo. 91, 96 Am. St. Rep. 486; Furth *v.* March, 101 Mo. App. 329; Kriz *v.* Peege, 119 Wis. 105.

346. 2. Inventory or Schedule. — Clark *v.* Eltinge, 34 Wash. 323.

347. 2. Rule of Strict Construction. — Fretz *v.* Roth, (N. J. 1905) 59 Atl. Rep. 676.

5. Statute Liberally Construed. — Kriz *v.* Peege, 119 Wis. 105.

6. See Karlson *v.* Hanson, etc., Sawmill Co., 10 Idaho 361.

10. Wallace *v.* St. John, 119 Wis. 585.

348. 1. See Harris *v.* Whitely, 98 Md. 430.

349. 1. Vested Rights Not Affected. — Arnold *v.* Limeburger, 122 Ga. 72; Harris *v.* Whitely, 98 Md. 430; Johnston *v.* Johnston, 173 Mo. 91, 96 Am. St. Rep. 486; Hubbard *v.* Hubbard, 77 Vt. 73, 107 Am. St. Rep. 653.

3. Harris *v.* Whitely, 98 Md. 430.

4. Interest in Wife's Real Estate. — Hubbard *v.* Hubbard, 77 Vt. 73, 107 Am. St. Rep. 653.

Realty Converted into Personality. — Where the land of the wife owned at the time of the marriage was converted into money after the passage of an act making her personality her separate property, the rights of the husband in the land were held not to follow and attach to the money. Gordon *v.* Gordon, 183 Mo. 294.

350. 4. Property Acquired Before Marriage. — Brown *v.* Daugherty, 120 Fed. Rep. 526; Lyon *v.* Lyon, 72 S. W. Rep. 1102, 24 Ky. L. Rep. 2100; Vaun *v.* Edwards, 135 N. Car. 661; St. Louis Southwestern R. Co. *v.* Wright, 33 Tex. Civ. App. 80; Flannery *v.* Chidgey, 33

350. 2. Property Acquired After Marriage — *a.* BY GIFT. — See note 5.
b. BY PURCHASE — (1) *By Herself or with Her Money.* — See note 8.

351. See notes 1, 2.

Relinquishment of Homestead or Consideration for Deed. — See note 3.

Purchase on Credit. — See notes 4, 5.

353. (2) *Title Taken in Husband's Name.* — See note 3.

d. BY GIFTS AND TRANSFERS FROM HUSBAND — (1) *Gifts to Wife.* — See note 7.

354. See notes 1, 2, 3, 4.

(2) *Purchases by Husband in Wife's Name.* — See notes 5, 7, 9.

e. BY INCREASE AND PROFITS OF SEPARATE ESTATE — (1) *Profits.* — See note 10.

The Voluntary Expenditure of Labor by the Husband. — See note 12.

Tex. Civ. App. 638; Spencer *v.* Stockwell, 76 Vt. 176; Meyer *v.* Meyer, 123 Wis. 538.

350. 5. Gifts Made After Marriage. — Lyon *v.* Lyon, 72 S. W. Rep. 1102, 24 Ky. L. Rep. 2100; Shuttleworth *v.* McGillivray, 5 Ont. L. Rep. 536.

Property Acquired by Inheritance becomes the separate property of the wife. Carter *v.* Becker, 69 Kan. 524; Terrell *v.* Maupin, 83 S. W. Rep. 591, 26 Ky. L. Rep. 1203.

8. Purchase by Wife or with Wife's Money. — Hoeck *v.* Greif, 142 Cal. 119; Alferitz *v.* Arrivillaga, 143 Cal. 646; Pensacola First Nat. Bank *v.* Hirschowitz, (Fla. 1903) 35 So. Rep. 22; Lyon *v.* Lyon, 72 S. W. Rep. 1102, 24 Ky. L. Rep. 2100; Bracken *v.* Milner, 99 Mo. App. 187; Vann *v.* Edwards, 135 N. Car. 661; Carson *v.* Carson, 204 Pa. St. 466; Williamson *v.* Gore, (Tex. Civ. App. 1903) 73 S. W. Rep. 563.

Recitals in Deed Necessary. — In Texas it is necessary for the deed from a stranger to recite that the land is to be the separate property of the wife, otherwise it is community property. Flannery *v.* Chidgey, 33 Tex. Civ. App. 638.

351. 1. Hays *v.* Marsh, 123 Iowa 81; Hunter *v.* Magee, 31 Tex. Civ. App. 304.

Wife May Purchase Husband's Property at Sheriff's Sale. — Bracken *v.* Milner, 99 Mo. App. 187.

2. Rights as Against Husband's Creditors. — Van Horn *v.* Nelson, (Iowa 1904) 97 N. W. Rep. 1105.

3. Relinquishment of Homestead. — Davis *v.* Yonge, (Ark. 1905) 85 S. W. Rep. 90.

4. Purchase on Credit. — Thurston *v.* Osborne-McMillan Elevator Co., 13 N. Dak. 508. See also Fortier *v.* Barry, 111 La. 776.

5. Purchase on Personal Credit Allowed. — Kriz *v.* Peege, 119 Wis. 105.

353. 3. Title in Husband's Name — Trust in Favor of Wife. — Shook *v.* Southern Bldg., etc., Assoc., 140 Ala. 575; Carter *v.* Becker, 69 Kan. 524; Fretz *v.* Roth, (N. J. 1905) 59 Atl. Rep. 676; Gittings *v.* Winter, 101 Md. 194; Johnston *v.* Johnston, 173 Mo. 91, 96 Am. St. Rep. 486. See also Ball *v.* Ball, 97 N. Y. App. Div. 347.

7. Gifts from Husband. — Hoeck *v.* Greif, 142 Cal. 119; Alferitz *v.* Arrivillaga, 143 Cal. 646; Gould *v.* Glass, 120 Ga. 50; Johnston *v.* Johnston, 173 Mo. 91, 96 Am. St. Rep. 486;

Stark *v.* Kirchgraber, 186 Mo. 633, 105 Am. St. Rep. 629; Sparks *v.* Hurley, 208 Pa. St. 166, 101 Am. St. Rep. 926; Barnum *v.* Le Master, 110 Tenn. 638; Hunter *v.* Magee, 31 Tex. Civ. App. 304; Watts *v.* Bruce, 31 Tex. Civ. App. 347; Flannery *v.* Chidgey, 33 Tex. Civ. App. 638.

Gifts from Husband Expressly Excepted by Vermont Statute. — Fletcher *v.* Wakefield, 75 Vt. 257.

Necessary Clothes Given to a Wife by Her Husband become in Quebec her individual property. Robertson *v.* Honan, 24 Quebec Super. Ct. 510. See generally the title HUSBAND AND WIFE, **835.** 10 *et seq.*

354. 1. Voluntary Conveyances and Transfers. — Hunter *v.* Baxter, 210 Pa. St. 72.

Conveyance Binding Between Parties and Privies. — Hays *v.* Marsh, 123 Iowa 81.

Conveyance Void as to Subsequent Creditors. — Bracken *v.* Milner, 99 Mo. App. 187.

2. Wife as Bona Fide Purchaser. — Clark *v.* Ford, 126 Iowa 460; Ilfeld *v.* De Baca, (N. Mex. 1905) 79 Pac. Rep. 723.

3. Davis *v.* Younge, (Ark. 1905) 85 S. W. Rep. 90. See also Gould *v.* Glass, 120 Ga. 50.

4. Westmore *v.* Harz, 111 La. 305.

5. Purchases by Husband in Wife's Name. — Brown *v.* Daugherty, 120 Fed. Rep. 526; Alferitz *v.* Arrivillaga, 143 Cal. 646; Gould *v.* Glass, 120 Ga. 50; Grondenberg *v.* Grondenberg, 112 Ill. App. 615; Hanks *v.* Hanks, 114 Ill. App. 526; Clay *v.* Clay, 72 S. W. Rep. 810, 24 Ky. L. Rep. 2016.

Presumption Rebuttable. — Monahan *v.* Monahan, 77 Vt. 133.

7. Effect as to Existing Creditors. — Saunders *v.* Hamilton, (Ky. 1904) 82 S. W. Rep. 630; Watt *v.* Morrow, (S. Dak. 1905) 103 N. W. Rep. 45.

9. Purchase with Community Funds. — Contra, Hoeck *v.* Greif, 142 Cal. 119; Alferitz *v.* Arrivillaga, 143 Cal. 646.

10. Income and Profits of Separate Estate. — Brown *v.* Daugherty, 120 Fed. Rep. 526; Hayner *v.* McKee, (Ky. 1903) 72 S. W. Rep. 347; Carson *v.* Carson, 204 Pa. St. 466; Weakley *v.* Woodard, 2 Tenn. Ch. App. 586; Elliott *v.* Hawley, 34 Wash. 585, 101 Am. St. Rep. 1016.

12. Productiveness Increased by Services of Husband. — Hayner *v.* McKee, (Ky. 1903) 72 S. W. Rep. 347.

355. (3) *Rents*. — See note 2.

(4) *Crops Raised on Wife's Land* — (a) Generally. — See note 5.

(c) *By Management and Labor of Husband*. — See note 9.

357. *f. BY WIFE'S SERVICES AND EARNINGS* — (1) *Personal Services and Earnings*. — See notes 2, 3.

358. See notes 1, 4.

359. (2) *Proceeds of Separate Business*. — See notes 2, 3.

Husband as Agent or Employee. — See note 8.

360. See notes 1, 2, 4.

361. *g. RIGHT OF ACTION FOR TORT OR INJURY TO PROPERTY*. — See note 3.

Special Statutory Action. — See note 8.

[*h. PROCEEDS OF LIFE-INSURANCE POLICY*. — See note 8a.]

VI. OWNERSHIP OF PROPERTY — PRESUMPTIONS AND EVIDENCE —

1. *When Wife Has Possession*. — See note 11.

362. *Of Money*. — See note 5.

Of Land. — See note 7.

2. *When Husband Has Possession*. — See notes 10, 11.

363. *Under the Statutes*. — See notes 1, 2.

Gift Not Presumed. — See note 5.

364. 3. *When Possession Is Joint*. — See notes 1, 2, 3, 4.

355. 2. *Rents of Real Estate*. — *Anderson v. Davis*, 55 W. Va. 429.

Rents Community Property in Texas. — See the title *COMMUNITY PROPERTY*, **320**. 2.

5. *Crops Grown on Wife's Land*. — *Thurston v. Osborne-McMillan Elevator Co.*, 13 N. Dak. 508.

9. *Husband Assisting in Production of Crops*. — *Thurston v. Osborne-McMillan Elevator Co.*, 13 N. Dak. 508.

357. 2. *Wife's Earnings Not Her Separate Property in Absence of Express Statutory Provision*. — *Furth v. March*, 101 Mo. App. 329; *Fretz v. Roth*, (N. J. 1905) 59 Atl. Rep. 676; *Briggs v. Devoe*, 89 N. Y. App. Div. 115; *Monahan v. Monahan*, 77 Vt. 133.

3. *Earnings Made Separate Property by Express Provision*. — *Furth v. March*, 101 Mo. App. 329; *Matter of Dailey*, (Surrogate Ct.) 43 Misc. (N. Y.) 552; *Elliott v. Hawley*, 34 Wash. 585, 101 Am. St. Rep. 1016, construing *Oregon* statutes in force in *Alaska*.

358. 1. *Strict Limitation to Terms of Statute*. — *Compare Elliott v. Hawley*, 34 Wash. 585, 101 Am. St. Rep. 1016, holding that the words "by her own labor" in the statute included income from the labor of others employed by the wife.

4. *Agreement with Husband as to Services Outside of Household*. — *Contra, In re Domenig*, 128 Fed. Rep. 146. See generally the title *HUSBAND AND WIFE*, **854**. 3 *et seq.*

359. 2. *Funds Furnished by Husband*. — *Furth v. March*, 101 Mo. App. 329. See also *Elliott v. Hawley*, 34 Wash. 585, 101 Am. St. Rep. 1016 (mining enterprise).

3. *Keeping Boarding House*. — *Furth v. March*, 101 Mo. App. 329. See also *Briggs v. Devoe*, 89 N. Y. App. Div. 115.

8. *Hayner v. McKee*, (Ky. 1903) 72 S. W. Rep. 347.

360. 1. *Compensation to Husband*. — *Hayner v. McKee*, (Ky. 1903) 72 S. W. Rep. 347.

2. *Employment of Husband as Device to Defeat Creditors*. — *Torrey v. Dickinson*, 213 Ill. 36.

4. See *Hayner v. McKee*, (Ky. 1903) 72 S. W. Rep. 347.

361. 3. *Damages for Personal Injuries*. — *St. Louis Southwestern R. Co. v. Wright*, 33 Tex. Civ. App. 80.

8. *Special Statutory Action*. — Where the defendant in a bastardy proceeding gives a bond to secure the support of the prosecutrix and her child, and subsequently marries and abandons the prosecutrix, her rights under the bond are her separate property. *Meyer v. Meyer*, 123 Wis. 538.

8a. *Money Coming to a Widow under a Policy of Insurance upon her husband's life is her separate property*. *Doull v. Doelle*, 10 Ont. L. Rep. 411. See generally the title *BENEFICIARIES (IN INSURANCE)*, **1022**. 6 *et seq.*

11. *Rebutting Presumption*. — *Fretz v. Roth*, (N. J. 1905) 59 Atl. Rep. 676.

362. 5. *Possession of Money*. — *Fretz v. Roth*, (N. J. 1905) 59 Atl. Rep. 676.

7. *Possession of Land*. — *Hays v. Marsh*, 123 Iowa 81.

10. *Proceeds of Wife's Land*. — *Contra in Missouri* under statute. *Brown v. Daugherty*, 120 Fed. Rep. 526.

11. *Leslie v. Bell*, 73 Ark. 338.

363. 1. *Rebutting Presumption*. — *Rhine-smith's Case*, 25 Pa. Super. Ct. 300.

2. *No Title Acquired by Husband's Possession of Wife's Personalty*. — *Van Horn v. Nelson*, (Iowa 1904) 97 N. W. Rep. 1105.

5. *Gift Not Presumed from Possession*. — *Magerstadt v. Schaefer*, 213 Ill. 351.

364. 1. *Rebutting Presumption*. — *Van Horn v. Nelson*, (Iowa 1904) 97 N. W. Rep. 1105; *Carter v. Becker*, 69 Kan. 524.

2. *Persons with Knowledge of Facts Not Affected by Presumption*. — *Carter v. Becker*, 69 Kan. 524.

3. *Taxes on Wife's Land Paid by Husband*. —

364. 4. When Wife Has Title — *a.* PURCHASES BY WIFE. — See note 7.

365. *b.* PURCHASES BY HUSBAND. — See note 2.

5. When Husband Has Title — *a.* PRESUMPTION FROM NAKED TITLE. — See note 5.

366. *b.* PRESUMPTION WHEN WIFE FURNISHES CONSIDERATION. — See note 2.

6. When Title Is Joint. — See note 3.

7. Money Deposited — *a.* IN WIFE'S NAME. — See notes 4, 5.

367. *c.* IN NAME OF HUSBAND AND WIFE. — See note 1.

8. Notes, Mortgages, Etc. — *c.* PAYABLE TO HUSBAND AND WIFE. — See notes 10, 11.

368. VII. WIFE'S RIGHTS AND LIABILITIES WITH RESPECT TO SEPARATE ESTATE — 1. To Manage and Control — *a.* IN PERSON — (2) *Statutory Estate.* — See note 5.

369. See note 1.

b. BY AGENTS — (1) *In General* — Doctrine under Married Women's Acts. — See note 7.

(2) *Husband as Agent* — (a) Appointment — *aa.* IN GENERAL. — See note 8.

370. See notes 1, 2.

Statutory Agency of Husband. — See note 7.

371. *bb.* MODE OF APPOINTMENT. — See note 1.

See Van Horn *v.* Nelson, (Iowa 1904) 97 N. W. Rep. 1105.

364. 4. Possession by Husband Not Adverse to Wife. — Hunter *v.* Magee, 31 Tex. Civ. App. 304.

7. Texas — Purchase with Community Funds Presumed. — See Wren *v.* Howland, 33 Tex. Civ. App. 87.

365. 2. Purchase by Husband in Name of Wife. — De Bury *v.* De Bury, 36 N. Bruns. 57.

5. Title in Husband. — Torrey *v.* Dickinson, 213 Ill. 36; Magerstadt *v.* Schaefer, 213 Ill. 351; Ducansville Bldg., etc., Assoc. *v.* Ginter, 24 Pa. Super. Ct. 42; Rhinesmith's Case, 25 Pa. Super. Ct. 300.

Property Purchased with Savings from Husband's Money. — See Fretz *v.* Roth, (N. J. 1905) 59 Atl. Rep. 676.

366. 2. Consideration Furnished by Wife. — Shook *v.* Southern Bldg., etc., Assoc., 140 Ala. 575; Carter *v.* Becker, 69 Kan. 524; Gittings *v.* Winter, 101 Md. 194; Johnston *v.* Johnston, 173 Mo. 91, 96 Am. St. Rep. 486; Fritz *v.* Roth, (N. J. 1905) 59 Atl. Rep. 676. See also Ball *v.* Ball, 97 N. Y. App. Div. 347.

3. Joint Title. — Harrington *v.* Rawls, 136 N. Car. 65. See also June *v.* Labadie, 138 Mich. 52, 11 Detroit Leg. N. 469.

4. Deposits in Wife's Name Presumed to Be Hers. — Brown *v.* Daugherty, 120 Fed. Rep. 526; Klenke's Estate, 210 Pa. St. 572; Monahan *v.* Monahan, 77 Vt. 133.

5. Rebutting Presumption. — Fretz *v.* Roth, (N. J. 1905) 59 Atl. Rep. 676; Monahan *v.* Monahan, 77 Vt. 133.

367. 1. Deposits in Names of Husband and Wife. — Freese *v.* Hibernia Sav., etc., Soc., 139 Cal. 392.

To the same effect as Springfield Sav. Inst. *v.* Copeland, 160 Mass. 380, stated in the original note, see Klenke's Estate, 210 Pa. St. 572.

10. Notes, etc., Payable to Husband and Wife. — Where a husband and wife each lend money

to a third party and take a joint note and mortgage therefor, the wife's interest in the security is her separate estate, and there can be no right of survivorship in the husband. Johnston *v.* Johnston, 173 Mo. 91, 96 Am. St. Rep. 486.

11. Presumption of Gift to Wife. — Where a note and mortgage given for the purchase price of the husband's land were made payable to husband and wife, the presumption was held to be that the husband intended a gift to the wife of her interest in the note and mortgage. Gould *v.* Glass, 120 Ga. 50.

368. 5. Rights of Married Women to Full Control of Statutory Estate. — Gibson *v.* Kimmit, 113 Ill. App. 611; Johnston *v.* Johnston, 173 Mo. 91, 96 Am. St. Rep. 486.

369. 1. Husband May Not Dispose of Wife's Statutory Separate Property. — Carter *v.* Becker, 69 Kan. 524; McNeeley *v.* South Penn Oil Co., 52 W. Va. 616.

7. Agency as to Statutory Separate Estate. — Compare Spurlock *v.* Dornan, 182 Mo. 242.

8. Wife May Appoint Husband Her Agent. — Torrey *v.* Dickinson, 213 Ill. 36; Magerstadt *v.* Schaefer, 213 Ill. 351; Gibson *v.* Kimmit, 113 Ill. App. 611; Greenburg *v.* Palmieri, 71 N. J. L. 83.

Texas — Wife Cannot Appoint Husband as Agent to Sell. — Lewis *v.* Hoeldtke, (Tex. Civ. App. 1903) 76 S. W. Rep. 309.

370. 1. Husband Not Jure Mariti Wife's Agent. — Cox *v.* St. Louis, etc., R. Co., 111 Mo. App. 394.

2. Previous Authorization or Subsequent Ratification. — Berkmeir *v.* Peters, 111 Mo. App. 717; Harle *v.* Texas Southern R. Co., (Tex. Civ. App. 1905) 86 S. W. Rep. 1048; Neumeister *v.* Goddard, 125 Wis. 82.

7. Statutory Agency of Husband. — Dean *v.* Boyd, 86 Miss. 204.

371. 1. Verbal Appointment. — *Contra* as to agency to sell, Nason *v.* Single, 143 Cal. 363.

- 371.** *cc.* EVIDENCE. — See note 7.
- 372.** Conduct of Parties. — See note 1.
Declarations and Admissions. — See note 6.
(b) Nature and Extent of Agency — *bb.* GENERAL AGENCY. — See note 8.
- 373.** *cc.* SPECIAL AGENCY. — See note 6.
- 374.** (c) Rights, Duties, and Liabilities — *aa.* OF WIFE TO THIRD PERSONS —
(*bb.*) *Contracts of Husband* — Agency Undisclosed. — See notes 4, 5.
(*dd.*) *Torts and Frauds of Husband.* — See note 9.
- 375.** *cc.* OF HUSBAND TO THIRD PERSONS. — See note 9.
- 376.** (d) Compensation for Husband's Services — *bb.* RIGHTS OF HUSBAND'S CREDITORS
— Where There Is No Express Agreement for Compensation. — See notes 5, 6.
(e) Ratification of Husband's Acts. — See notes 7, 8.
- 377.** See note 1.
- 378.** 2. Sole Trader as to Separate Estate — *a.* RIGHTS AND LIABILITIES
AT COMMON LAW. — See note 1.
b. RIGHTS AND LIABILITIES IN EQUITY. — See note 3.
c. RIGHTS AND LIABILITIES UNDER STATUTES. — See note 4.
Married Woman Considered Feme Sole in Respect to Separate Property. — See
note 5.
- 379.** *e.* BUSINESS OF WIFE AND HUSBAND TOGETHER. — See note 10.
- 381.** 3. To Dispose of Separate Property — *a.* POWER OF DISPOSAL IN
GENERAL — (1) *Equitable Doctrine* — (a) English Rule. — See note 1.
(b) Rule in United States — *aa.* INCIDENT OF OWNERSHIP. — See note 5.
- 384.** *c.* REQUISITES AND VALIDITY OF CONVEYANCE — (2) *Concurrence
of Husband* — Joinder in Deed. — See note 4.

371. 7. Clear and Satisfactory Evidence Re-
quired. — *Brown v. Daugherty*, 120 Fed. Rep.
526.

372. 1. Conduct of Parties as Evidence of
Agency. — *Johnson v. Jones*, 82 Miss. 483.

6. Declarations of Husband Not Admissible to
Prove Agency for Wife. — *Just v. State Sav.
Bank*, 132 Mich. 600, 10 Detroit Leg. N. 36.

8. Acts of Agency in General — Binding Effect.
— *Taylor v. Angel*, 162 Ind. 670; *Quebec Bank
v. Jacobs*, 23 Quebec Super. Ct. 167.

373. 6. Special Agency — Extent in General.
— See *Rex v. Forbes*, 36 N. Bruns. 333.

374. 4. Undisclosed Agency. — *Popp v. Con-
nery*, 138 Mich. 84, 11 Detroit Leg. N. 478;
Dean v. Boyd, 86 Miss. 204; *Greenburg v.
Palmieri*, 71 N. J. L. 83; *Whipple v. Webb*,
(Supm. Ct. Spec. T.) 44 Misc. (N. Y.)
332.

5. Election to Hold Husband Personally. —
Greenburg v. Palmieri, 71 N. J. L. 83.

9. False Representations by Husband as Agent.
— *Contra* where a husband cannot lawfully be
appointed agent by his wife to sell her land.
Lewis v. Hoeldtke, (Tex. Civ. App. 1903) 76
S. W. Rep. 309.

375. 9. Contracts Not Authorized by Wife.
— *Lewis v. Hoeldtke*, (Tex. Civ. App. 1903)
76 S. W. Rep. 309.

376. 5. Gratuitous Services of Husband. —
Torrey v. Dickinson, 213 Ill. 36.

6. Creditor Held Entitled to Value of Husband's
Services. — See *Torrey v. Dickinson*, 213 Ill.
36.

7. Ratification by Wife. — *Whipple v. Webb*,
(Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 332;
Ascarete v. Pfaff, 34 Tex. Civ. App. 375;
Fletcher v. Brainerd, 75 Vt. 300; *Whiting v.
Doughton*, 31 Wash. 327.

8. Ratification by Acquiescence. — *Mitchell v.
Jodon*, 22 Pa. Super. Ct. 304.

377. 1. Ratification by Accepting Benefits. —
Continental Bldg., etc., Assoc. v. Wilson, 144
Cal. 776; *Western New York, etc., R. Co. v.
Rea*, 83 N. Y. App. Div. 576; *Whipple v.
Webb*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.)
332.

378. 1. Sole Trader — Common-law Rule. —
Pensacola First Nat. Bank v. Hirschowitz,
(Fla. 1903) 35 So. Rep. 22.

3. Sole Trader as to Separate Estate. — See
Weakley v. Woodard, 2 Tenn. Ch. App. 586.

4. Sole Traders by Statutory Authorization. —
Brown v. Daugherty, 120 Fed. Rep. 526; *Furth
v. March*, 101 Mo. App. 329; *Weakley v.
Woodard*, 2 Tenn. Ch. App. 586.

5. *Pensacola First Nat. Bank v. Hirschko-
witz*, (Fla. 1903) 35 So. Rep. 22; *Harvey v.
Johnson*, 133 N. Car. 352.

379. 10. Partnership with Husband Not Au-
thorized by Statute. — *Contra*, *Vizard v. Moody*,
119 Ga. 918; *Morrison v. Dickey*, 122 Ga.
353; *Heyman v. Heyman*, 210 Ill. 524; *Hoag-
lin v. Henderson*, 119 Iowa 720, 97 Am. St.
Rep. 335. And see *Elliott v. Hawley*, 34
Wash. 585, 101 Am. St. Rep. 1016.

381. 1. Power to Dispose of Equitable Sepa-
rate Estate — Rule in England. — *In re West*,
(1904) 1 Ch. 145, 89 L. T. N. S. 579.

5. Power of Disposal Denied by Statute. —
See *Vann v. Edwards*, 135 N. Car. 661.

384. 4. Joinder of Husband in Deed. —
Young v. Sheldon, 139 Ala. 444, 101 Am. St.
Rep. 44; *Collier v. Alexander*, 142 Ala. 422;
Shirk v. Stafford, 31 Ind. App. 247; *Hoffman
v. Colgan*, 74 S. W. Rep. 724, 25 Ky. L. Rep.
98; *Stroud v. Ross*, 82 S. W. Rep. 254, 26 Ky.
L. Rep. 521; *Furnish v. Lilly*, (Ky. 1905) 84

- 385.** See note 1.
Effect of Noncompliance with Statutory Requirement.— See note 6.
Circumstances Dispensing with Necessity of Joinder of Husband.— See notes 10, 11.
- 386.** See note 1.
(5) *Recording.* — See note 5.
(7) DEED EXECUTED BY ATTORNEY IN FACT. — See note 11.
- 387.** *d.* LIABILITY ON COVENANTS. — See notes 1, 3.
Estoppel by Covenants. — See note 5.
- 388.** *c.* LEASES — In the United States. — See notes 2, 5.
f. TRANSFERS OF PERSONALTY. — See notes 7, 8.
- 389.** 4. Power to Bind Separate Estate by Contract — *b.* EQUITABLE DOCTRINE — (1) *Doctrine Stated.* — See notes 2, 3.
390. The Principle. — See note 1.
(2) *Doctrine Applies to Statutory Estates.* — See note 2.
- 392.** *c.* STATUTORY CHANGES AND MODIFICATIONS OF EQUITABLE DOCTRINE — (1) *Power to Bind Statutory Separate Estate in General.* — See note 4.
394. (2) *Effect of Statutory Provisions* — (a) Statutes Authorizing Wife to Contract and Be Sued. — See note 3.
(e) *Statutory Restraints on Alienation* — *Privy Examination of Wife.* — See note 9.
- S. W. Rep. 734; *Smith v. Bruton*, 137 N. Car. 79; *Worrell v. Drake*, 110 Tenn. 303; *Tannery v. McMinn*, (Tex. Civ. App. 1905) 86 S. W. Rep. 640.
The Deed Must Be Actually Executed by the Husband. — *Morrison v. Balzer*, 35 Tex. Civ. App. 247.
- 385.** 1. Merely Signing Deed Held Sufficient. — *Peter v. Byrne*, 175 Mo. 233, 97 Am. St. Rep. 576.
6. Nonjoinder of Husband — Void Deed. — *Shirk v. Stafford*, 31 Ind. App. 247; *Morrison v. Balzer*, 35 Tex. Civ. App. 247.
No Estoppel Against Either. — *Compare Morrison v. Balzer*, 35 Tex. Civ. App. 247.
Conveyance of Wife's Property by Husband Ineffectual Though Wife Joins to Release Dower. — *Hendricks v. Musgrove*, 183 Mo. 300.
10. Joinder of Husband Dispensed With. — *See Worrell v. Drake*, 110 Tenn. 303.
11. Desertion by or Separation from Husband. — *Smith v. Bruton*, 137 N. Car. 79. See also *Worrell v. Drake*, 110 Tenn. 303.
- 386.** 1. Nonresidence of Husband. — *Collier v. Alexander*, 142 Ala. 422.
5. Registry of Gift Between Husband and Wife Required. — *McDougall Co. v. Brisvert*, 24 Quebec Super. Ct. 162.
11. Conveyance of Realty by Attorney in Fact. — *Linton v. Moorhead*, 209 Pa. St. 646; *Nolan v. Moore*, 96 Tex. 341, 97 Am. St. Rep. 911.
- 387.** 1. Covenants in Deed Not Binding on Married Woman. — *Smith v. Ingram*, 132 N. Car. 959, 95 Am. St. Rep. 680.
3. Statutory Liability on Covenants. — *McGuigan v. Gaines*, 71 Ark. 614.
5. No Estoppel to Assert After-acquired Title. — *Morrison v. Balzer*, 35 Tex. Civ. App. 247. See also *Hendricks v. Musgrove*, 183 Mo. 300.
- 388.** 2. Husband's Consent Required. — *See Winestine v. Ziglatzki-Marks Co.*, 77 Conn. 404.
5. Lease Not "Conveyance" Requiring Joinder of Husband. — *Shipley v. Smith*, 162 Ind. 526.
7. Absolute Power to Dispose of Personalty. —
- Stroud v. Ross*, 82 S. W. Rep. 254, 26 Ky. L. Rep. 521; *Kelley v. Snow*, 185 Mass. 288; *Vann v. Edwards*, 135 N. Car. 661.
Cannot Dispose of Personalty in Fraud of Husband's Rights. — *Bickel v. Bickel*, 79 S. W. Rep. 215, 25 Ky. L. Rep. 1945.
8. Assent or Joinder of Husband Required. — *Karlson v. Hanson*, etc., *Sawmill Co.*, 10 Idaho 361; *Word v. Kennon*, (Tex. Civ. App. 1903) 75 S. W. Rep. 365.
- 389.** 2. Cont acts Void at Law. — *Pensacola First Nat. Bank v. Hirschowitz*, (Fla. 1903) 35 So. Rep. 22; *Equitable Bldg.*, etc., *Assoc. v. King*, (Fla. 1904) 37 So. Rep. 181; *Pape v. Ludeman*, (N. J. 1904) 59 Atl. Rep. 9; *Harvey v. Johnson*, 133 N. Car. 352; *Vann v. Edwards*, 135 N. Car. 661.
3. Equitable Doctrine. — *Pensacola First Nat. Bank v. Hirschowitz*, (Fla. 1903) 35 So. Rep. 22; *Equitable Bldg.*, etc., *Assoc. v. King*, (Fla. 1904) 37 So. Rep. 181; *Pape v. Ludeman*, (N. J. 1904) 59 Atl. Rep. 9; *Adams v. Schmidt*, (N. J. 1905) 60 Atl. Rep. 345; *Harvey v. Johnson*, 133 N. Car. 352; *Vann v. Edwards*, 135 N. Car. 661; *Fletcher v. Brainerd*, 75 Vt. 300. But see *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959.
- 390.** 1. Reason of Doctrine. — *Adams v. Schmidt*, (N. J. 1905) 60 Atl. Rep. 345.
2. Doctrine Applies to Statutory Estates. — *Adams v. Schmidt*, (N. J. 1905) 60 Atl. Rep. 345.
- 392.** 4. General Scope of Statutory Provisions. — *Winestine v. Ziglatzki-Marks Co.*, 77 Conn. 404; *King v. Ballou*, 72 S. W. Rep. 771, 24 Ky. L. Rep. 1946; *Robertson v. Robertson*, 72 S. W. Rep. 813, 24 Ky. L. Rep. 2020; *Clay v. Mayer*, 183 Mo. 150.
- 394.** 3. Remedy by Personal Judgment and Execution. — *Young v. Hart*, 101 Va. 480; *Lumbermen's Nat. Bank v. Gross*, 37 Wash. 18; *Kriz v. Peege*, 119 Wis. 105.
9. Privy Examination of Wife Necessary to Bind Realty. — *Harvey v. Johnson*, 133 N. Car. 352.

- 394.** (f) Consent of Husband. — See note 10.
395. (i) Construction of Statutes. — See notes 4, 5.
396. e. WHETHER CONSIDERATION MUST BENEFIT WIFE OR PROPERTY. — See note 1.
397. See notes 1, 2.
398. f. INTENTION TO CHARGE SEPARATE ESTATE — (2) *Whether Intention Must Be Expressed.* — See note 3.
399. g. NECESSITY FOR HUSBAND'S CONSENT. — See note 5.
400. i. FORM OF CONTRACT. — See note 3.
401. j. WHETHER CONTRACT MUST BE IN WRITING. — See note 2.
 m. RULE AS TO AFTER-ACQUIRED PROPERTY. — See note 8.
402. n. FRAUD, UNFAIR ADVANTAGE, AND THE LIKE. — See note 1.
 o. ESTOPPEL. — See notes 2, 3.
403. q. PARTICULAR CLASSES OF CONTRACTS — (2) *Contracts in Reference to Separate Estate.* — See note 6.
405. (5) *Family Necessaries and Expenses.* — See notes 2, 3.
406. See notes 2, 3, 4.
407. See note 1.
408. (6) *Debt for Borrowed Money.* — See notes 1, 2.

394. 10. Consent of Husband Necessary. — *Harvey v. Johnson*, 133 N. Car. 352. But see *King v. Ballou*, 72 S. W. Rep. 771, 24 Ky. L. Rep. 1946.

395. 4. Strict Construction. — *Flannery v. Chidgey*, 33 Tex. Civ. App. 638.

5. Liberal Construction. — *Kriz v. Peege*, 119 Wis. 105.

396. 1. Benefit Necessary. — *John C. Groub Co. v. Smith*, 31 Ind. App. 685; *Harbaugh v. Tanner*, 163 Ind. 574; *Field v. Campbell*, 164 Ind. 389; *Davis v. Neighbors*, 34 Ind. App. 441.

Money Received Ostensibly for Benefit of Woman or Property. — To the same effect as *McVey v. Cantrell*, 70 N. Y. 295, 26 Am. Rep. 605, stated in the original note, see *June v. Labadie*, 138 Mich. 52, 11 Detroit Leg. N. 469. To the same effect as *Nourse v. Henshaw*, 123 Mass. 96, stated in the original note, see *Kriz v. Peege*, 119 Wis. 105.

Joint Note for Community Debt Binding on Wife's Separate Estate. — *Lumbermen's Nat. Bank v. Gross*, 37 Wash. 18.

397. 1. A Beneficial Consideration Is Not Necessary. — *Loizeaux v. Fremder*, 123 Wis. 193.

2. Benefit or Intention to Bind. — See *Harvey v. Johnson*, 133 N. Car. 352.

398. 3. Presumption. — *Lumbermen's Nat. Bank v. Gross*, 37 Wash. 18.

399. 5. Assent of Husband. — *Karlson v. Hanson*, etc., *Sawmill Co.*, 10 Idaho 361. See also, under the former statute in *Alabama*, *Horton v. Hill*, 138 Ala. 625.

400. 3. No Particular Form of Contract Necessary. — *Equitable Bldg., etc., Assoc. v. King*, (Fla. 1904) 37 So. Rep. 181.

401. 2. Statutes Requiring Writing. — *Equitable Bldg., etc., Assoc. v. King*, (Fla. 1904) 37 So. Rep. 181.

8. After-acquired Property Not Liable. — *Manahan v. Hart*, 24 Ohio Cir. Ct. 527. Compare *In re Wheeler*, (1904) 2 Ch. 66, 91 L. T. N. S. 227.

402. 1. Fraud, Unfair Advantage, and the

Like. — *Johnson v. Weber*, (Neb. 1903) 97 N. W. Rep. 585, holding that notice of the fraud by the party seeking to enforce liability must be shown.

2. Shook v. Southern Bldg., etc., Assoc., 140 Ala. 575; *Smith v. Ingram*, 132 N. Car. 959, 95 Am. St. Rep. 680; *Smith v. Bruton*, 137 N. Car. 79; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959.

3. Estoppel. — *Wilson v. Neu*, (Neb. 1901) 95 N. W. Rep. 502; *Hyatt v. Zion*, 102 Va. 909.

403. 6. A Contract to Pay Attorney's Fees. — Compare *McCurdy v. Dillon*, 135 Mich. 678, 10 Detroit Leg. N. 927.

Agreement for Common-law Arbitration. — See *Hoste v. Dalton*, 137 Mich. 522.

405. 2. Family Necessaries a Proper Charge. — *Minners v. Smith*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 648; *Flannery v. Chidgey*, 33 Tex. Civ. App. 638. *Contra*, *Breed v. Breed*, 125 Wis. 100, citing *Stack v. Padden*, 111 Wis. 44.

3. Contract Must Be on Credit of Wife. — *Hazard v. Potts*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 365; *Grandy v. Hadcock*, 85 N. Y. App. Div. 173; *Richards v. Young*, (Supm. Ct. App. T.) 84 N. Y. Supp. 265; *Ruhl v. Heintze*, 97 N. Y. App. Div. 442.

406. 2. Wife Not Liable for Family Necessaries. — *Anderson v. Davis*, 55 W. Va. 429; *Breed v. Breed*, 125 Wis. 100.

Wife Unable to Bind Separate Estate for Nurse's Services for Husband. — *Flannery v. Chidgey*, 33 Tex. Civ. App. 638.

3. Husband's Contract for Necessaries. — *Dillon v. Mandelbaum*, 97 N. Y. App. Div. 107; *Ruhl v. Heintze*, 97 N. Y. App. Div. 442; *Anderson v. Davis*, 55 W. Va. 429.

4. Both Husband and Wife Liable for Family Supplies. — *Gilman v. Matthews*, (Colo. App. 1904) 77 Pac. Rep. 366; *Clark v. Eltinge*, 34 Wash. 323, construing the *Montana* statute.

407. 1. What Are Necessaries. — *Gilman v. Matthews*, (Colo. App. 1904) 77 Pac. Rep. 366.

408. 1. Debt for Borrowed Money Held Binding. — *Lanier v. Olliff*, 117 Ga. 397; *June v.*

- 408.** (7) *Debts Contracted Before Marriage.* — See note 4.
- 409.** (8) *Debts Contracted by Husband.* — See note 2.
- (9) *Contracts Assuming Liability for Husband's Debts.* — See notes 4, 5.
- 410.** (10) *Joint Contracts of Husband and Wife.* — See note 1.
- (11) *Contracts Between Husband and Wife.* — See note 2.
- (14) *Purchase Price of Property Bought.* — See note 8.
- 411.** See note 2.
- 412.** (16) *Mortgages* — (a) *Power in General* — aa. *EQUITABLE DOCTRINE.* — See notes 1, 3.
- bb. *STATUTORY DOCTRINE.* — See notes 5, 6.
- 413.** (b) *Validity and Requisites* — bb. *JOINDER OR ASSENT OF HUSBAND.* — See note 8.
- 414.** See notes 1, 2.
- (c) *Debts Secured* — aa. *INDIVIDUAL DEBTS.* — See note 9.
- 415.** bb. *DEBTS OF THIRD PERSONS* — (bb) *Debts of Husband* — aaa. *Rule Permitting Mortgage for Husband's Debts.* — See note 4.
- 416.** See note 2.
- Consideration of Mortgage.* — See note 3.
- Absence of Fraud and Coercion.* — See note 5.
- bbb. *Rule Forbidding Mortgage for Husband's Debts.* — See note 8.

Labadie, 138 Mich. 52, 11 Detroit Leg. N. 469.

408. 2. June v. Labadie, 138 Mich. 52, 11 Detroit Leg. N. 469.

4. *Debts Contracted Before Marriage.* — See Birmingham Excelsior Money Soc. v. Lane, (1904) 1 K. B. 35, 89 L. T. N. S. 657.

409. 2. *Implied Authority.* — Popp v. Conery, 138 Mich. 84, 11 Detroit Leg. N. 478.

4. *Assuming Liability for Husband's Debts.* — Atlanta Suburban Land Corp. v. Austin, 122 Ga. 374.

Wife Liable for Incumbrances on Property Conveyed to Her by Husband. — Vizard v. Moody, 119 Ga. 918.

5. Hamilton v. Hamilton, 162 Ind. 430. Compare Johnson v. Leffler Co., 122 Ga. 670.

410. 1. *Joint Contracts.* — Lumbermen's Nat. Bank v. Gross, 37 Wash. 18; McClatchie v. Gilbert, 24 Quebec Super. Ct. 387.

2. *Contracts Between Husband and Wife.* — See Hoeck v. Greif, 142 Cal. 119; Fritz v. Fernandez, 45 Fla. 318.

Promissory Note by Wife to Husband Void in Massachusetts. — National Bank of Republic v. Delano, 185 Mass. 424.

8. *Property Purchased Bound for Price.* — See Conkling v. Levie, 66 Neb. 133, 136.

411. 2. *Debt for Purchase Money Binding.* — King v. Ballou, 72 S. W. Rep. 771, 24 Ky. L. Rep. 1946; Kriz v. Peege, 119 Wis. 105.

412. 1. *Power to Mortgage Incident to Separate Ownership.* — See Johnson v. Leffler Co., 122 Ga. 670.

3. *No Personal Liability.* — Loizeaux v. Fremder, 123 Wis. 193.

5. *Statutory Power to Mortgage.* — Collier v. Alexander, 142 Ala. 422; Equitable Bldg., etc., Assoc. v. King, (Fla. 1904) 37 So. Rep. 181; Hanna v. Cox, 69 S. Car. 423.

6. *No Personal Liability.* — Equitable Bldg., etc., Assoc. v. King, (Fla. 1904) 37 So. Rep. 181; Cook v. Landrum, (Ky. 1904) 82 S. W. Rep. 585; Loizeaux v. Fremder, 123 Wis. 193.

413. 8. *Assent or Joinder of Husband Required.* — Equitable Bldg., etc., Assoc. v. King, (Fla. 1904) 37 So. Rep. 181; Deutsch v. Questa, 116 Ky. 474.

414. 1. *Mortgage Void for Nonjoinder of Husband.* — Deutsch v. Questa, 116 Ky. 474.

2. *Void Mortgage Ground for Establishing Lien in Equity.* — See Equitable Bldg., etc., Assoc. v. King, (Fla. 1904) 37 So. Rep. 181.

9. *Where a Married Woman Has Power to Borrow Money.* — To the same effect as Pelzer v. Durham, 37 S. Car. 355, stated in the original note, see Caldwell v. Trezevant, 111 La. 410. See also Sigel-Campion Live-stock Commission Co. v. Haston, 68 Kan. 749, where it was held to be immaterial that the note and mortgage were transferred to the husband's creditor.

415. 4. *Authority to Give Mortgage for Husband's Debts.* — Sigel-Campion Live-stock Commission Co. v. Haston, 68 Kan. 749; Cook v. Landrum, (Ky. 1904) 82 S. W. Rep. 585; Wilson v. Neu, (Neb. 1901) 95 N. W. Rep. 502; Hollowell v. Daly, (N. J. 1903) 56 Atl. Rep. 234.

Pledge of Personality. — Just v. State Sav. Bank, 132 Mich. 600, 10 Detroit Leg. N. 36; Herr v. Reinoehl, 209 Pa. St. 483.

416. 2. *Prohibition Against Becoming Surety.* — Herr v. Reinoehl, 209 Pa. St. 483.

3. *Consideration — Pre-existing Debt.* — Conkling v. Levie, 66 Neb. 136.

5. *Evidence Held to Show Full Knowledge of Facts.* — Hamilton v. Hamilton, 162 Ind. 430.

8. *Mortgage for Husband's Debts Expressly Forbidden.* — Day v. Shiver, 137 Ala. 185; Shook v. Southern Bldg., etc., Assoc., 140 Ala. 575; Horton v. Hill, 138 Ala. 625; Henderson v. Brunson, 141 Ala. 674; Webb v. John Hancock Mut. L. Ins. Co., 162 Ind. 616; Davis v. Neighbors, 34 Ind. App. 441; Caldwell v. Trezevant, 111 La. 410.

Mortgage Valid to Discharge Lien Securing Husband's Debt. — Field v. Campbell, (Ind. App. 1903) 67 N. E. Rep. 1040, rehearing denied (Ind. App. 1903) 68 N. E. Rep. 911.

417. See note 2.

(cc) *Nature of Contract — Suretyship.* — See notes 3, 4.

418. See notes 2, 3, 4.

420. (17) *Contracts of Suretyship* — (a) *Capacity to Make* — *bb. STATUTORY RULE* — (*bb*) *Prohibitive Acts.* — See note 1.

(b) *Nature and Requisites of Contract* — *aa. WHAT CONSTITUTES SURETYSHIP IN GENERAL.* — See notes 3, 4.

421. *cc. CONSIDERATION.* — See note 2.

(18) *Promissory Note.* — See note 5.

(19) *Confession of Judgment.* — See note 6.

(20) *Contract for Services.* — See notes 7, 8.

422. (21) *Employment of Attorney.* — See note 1.

The Louisiana Prohibition Against Becoming Surety for the Husband does not affect the right to become surety for a partnership of which the husband is a member. *Stothart v. Hardie*, 110 La. 696.

417. 2. Estopped to Deny Validity of Mortgage. — See *Ft. Wayne Trust Co. v. Sihler*, 34 Ind. App. 140; *McGee v. Cunningham*, 69 S. Car. 470. But see *Trust, etc., Co. v. Gauthier*, (1904) A. C. 94, affirming 12 Quebec K. B. 281, holding that a wife's mortgage for the husband's purposes is absolutely void regardless of the mortgagee's *bona fides*.

3. Mortgage for Another's Debt Held Contract of Suretyship. — *Herbert v. Rupertus*, 31 Ind. App. 553; *Johnson v. Franklin Bank*, 173 Mo. 171; *White v. Smith*, 174 Mo. 186; *Higgins v. Deering Harvester Co.*, 181 Mo. 300; *McGowan v. Davenport*, 134 N. Car. 526; *Insurance Co. of North America v. Miller*, 24 Ohio Cir. Ct. 667; *Stewart v. Stewart*, 207 Pa. St. 59; *Schneider v. Sellers*, (Tex. Civ. App. 1904) 81 S. W. Rep. 126. See also *Vann v. Edwards*, 135 N. Car. 661.

4. Exoneration. — *Stewart v. Stewart*, 207 Pa. St. 59; *Schneider v. Sellers*, (Tex. Civ. App. 1904) 81 S. W. Rep. 126.

418. 2. Mortgage Discharged by Extending Time of Payment. — *Johnson v. Franklin Bank*, 173 Mo. 171; *White v. Smith*, 174 Mo. 186. See also *Vann v. Edwards*, 135 N. Car. 661; *De Barrera v. Frost*, 33 Tex. Civ. App. 580.

Joint Mortgage of Husband and Wife — Wife's Claim of Title Must Appear. — *Creighton v. Crane*, (Neb. 1905) 103 N. W. Rep. 284.

3. Release of Lien on Property of Principal Debtor. — *Schneider v. Sellers*, (Tex. Civ. App. 1904) 81 S. W. Rep. 126, 98 Tex. 380.

4. Perversion of Security. — See *Higgins v. Deering Harvester Co.*, 181 Mo. 300 (procuring additional signers or indorsers).

420. 1. Contracts of Suretyship Prohibited. — *Johnson v. Leffler Co.*, 122 Ga. 670; *John C. Groub Co. v. Smith*, 31 Ind. App. 685; *Webb v. John Hancock Mut. L. Ins. Co.*, 162 Ind. 616; *Harbaugh v. Tanner*, 163 Ind. 574; *Ft. Wayne Trust Co. v. Sihler*, 34 Ind. App. 140; *Field v. Campbell*, 164 Ind. 389; *Davis v. Neighbors*, 34 Ind. App. 441; *Planters' Bank, etc., Co. v. Major*, 76 S. W. Rep. 331, 25 Ky. L. Rep. 702, rehearing denied (Ky. 1904) 80 S. W. Rep. 1089; *Hines v. Hays*, 82 S. W. Rep. 1007, 26 Ky. L. Rep. 967; *Peter Adams Paper Co. v. Cassard*, 206 Pa. St. 170; *Hazelton Nat. Bank v. Kintz*, 24 Pa. Super. Ct. 456.

Contract Voidable but Not Void. — *Shirk v. Stafford*, 31 Ind. App. 247; *Field v. Campbell*, (Ind. App. 1903) 67 N. E. Rep. 1040, rehearing denied (Ind. App. 1903) 68 N. E. Rep. 911.

Husband's Consent or Order of Court Required. — *State v. St. Paul*, 111 La. 71.

3. Substance and Not Form of Contract Regarded. — *Henderson v. Brunson*, 141 Ala. 674; *Field v. Campbell*, (Ind. App. 1903) 67 N. E. Rep. 1040, rehearing denied 68 N. E. Rep. 911; *Herbert v. Rupertus*, 31 Ind. App. 553; *John C. Groub Co. v. Smith*, 31 Ind. App. 685; *Webb v. John Hancock Mut. L. Ins. Co.*, 162 Ind. 616; *Harbaugh v. Tanner*, 163 Ind. 574; *Field v. Campbell*, 164 Ind. 389; *Ft. Wayne Trust Co. v. Sihler*, 34 Ind. App. 140; *Davis v. Neighbors*, 34 Ind. App. 441; *Planters' Bank, etc., Co. v. Major*, 76 S. W. Rep. 331, 25 Ky. L. Rep. 702, rehearing denied (Ky. 1904) 80 S. W. Rep. 1089.

4. Benefit of Consideration. — *Field v. Campbell*, (Ind. App. 1903) 67 N. E. Rep. 1040, rehearing denied (Ind. App. 1903) 68 N. E. Rep. 911; *Herbert v. Rupertus*, 31 Ind. App. 553; *John C. Groub Co. v. Smith*, 31 Ind. App. 685; *Hamilton v. Hamilton*, 162 Ind. 430; *Harbaugh v. Tanner*, 163 Ind. 574; *Field v. Campbell*, 164 Ind. 389; *Ft. Wayne Trust Co. v. Sihler*, 34 Ind. App. 140; *Davis v. Neighbors*, 34 Ind. App. 441; *Planters' Bank, etc., Co. v. Major*, 76 S. W. Rep. 331, 25 Ky. L. Rep. 702, rehearing denied (Ky. 1904) 80 S. W. Rep. 1089.

Wife Held to Be Principal and Not Surety. — *Atlanta Suburban Land Corp. v. Austin*, 122 Ga. 374.

Borrowing Money to Give to Husband. — *McGee v. Cunningham*, 69 S. Car. 470.

421. 2. Consideration Moving Wholly to Principal. — *Loizeaux v. Fremder*, 123 Wis. 193.

5. Promissory Note. — *Kriz v. Peege*, 119 Wis. 105.

6. Confession of Judgment. — *Good Hope Bldg. Assoc. v. Amweg*, 22 Pa. Super. Ct. 143.

7. Agreement to Pay for Services in Procuring a Loan. — *Bonebrake v. Tauer*, 67 Kan. 827.

8. Services Which Husband Might Be Required to Provide. — *Bonebrake v. Tauer*, 67 Kan. 827; *Dearing v. Moran*, 78 S. W. Rep. 217, 25 Ky. L. Rep. 1545.

Not Bound by Contract for Services to Be Rendered to Husband. — *Flannery v. Chidgey*, 32 Tex. Civ. App. 638.

422. 1. Employment of Attorney. — *Field v.*

422. (22) *Stockholder's Liability*. — See note 2.

r. NATURE OF CHARGE ON SEPARATE ESTATE — See note 4.

5. To Bind Separate Estate by Conduct — *a.* LIABILITY FOR TORTS.

— See note 5.

423. *b.* BINDING SEPARATE ESTATE BY ESTOPPEL — Estoppel by Contract.

— See note 4.

425. 6. Restraints on Anticipation and Alienation — *c.* EFFECT OF RESTRAINT — (1) *In General*. — See note 1.

426. (2) *When Feme Is Discovert* — Remaining Separate Estate After Discoverture.

— See note 3.

427. VIII. HUSBAND'S RELATIONS TO SEPARATE ESTATE — 1. Liability of Separate Estate for Husband's Debts — *a.* STATUTORY PROVISIONS. — See note 1.

b. RENTS, PROFITS, AND INCREASE NOT LIABLE. — See note 2.

Increase Produced by Voluntary Services of Husband. — See note 3.

c. EFFECT OF HUSBAND'S POSSESSION OR CONTROL AS TO LIABILITY. — See note 4.

2. Rights and Liabilities of Husband in Regard to Separate Estate —

a. RIGHT TO MANAGE AND CONTROL. — See note 7.

428. *b.* RIGHT TO SELL OR ENCUMBER. — See notes 3, 4, 5.

c. LIABILITY TO ACCOUNT FOR PRINCIPAL OF SEPARATE ESTATE.

— See note 8.

Campbell, (Ind. App. 1903) 67 N. E. Rep. 1040, rehearing denied (Ind. App. 1903) 68 N. E. Rep. 911; McCurdy v. Dillon, 135 Mich. 678, 10 Detroit Leg. N. 927; Adams v. Schmidt, (N. J. 1905) 60 Atl. Rep. 345. Compare Dempsey v. Wells, 109 Mo. App. 470.

422. 2. *Stockholder's Liability*. — Christopher v. Norvell, (C. C. A.) 134 Fed. Rep. 842.

4. *Nature of Charge*. — Adams v. Schmidt, (N. J. 1905) 60 Atl. Rep. 345.

5. *Liability for Torts*. — Goken v. Dallugge, (Neb. 1904) 101 N. W. Rep. 244.

Liability for Fraud. — Lewis v. Hoeldtke, (Tex. Civ. App. 1903) 76 S. W. Rep. 309.

423. 4. *No Estoppel by Void Contract*. — Shook v. Southern Bldg., etc., Assoc., 140 Ala. 575; Ft. Wayne Trust Co. v. Sihler, 34 Ind. App. 140; Davis v. Neighbors, 34 Ind. App. 441; Smith v. Ingram, 132 N. Car. 959, 95 Am. St. Rep. 680; Gilbert v. White, 23 Pa. Super. Ct. 187; Tannery v. McMinn, (Tex. Civ. App. 1905) 86 S. W. Rep. 640; Harle v. Texas Southern R. Co., (Tex. Civ. App. 1905) 86 S. W. Rep. 1048. See further *infra*, this title, **437.** 7 *et seq.*

425. 1. *A Judgment Against a Married Woman in Respect of a Debt Contracted by Her Before Marriage cannot be enforced by way of equitable execution against her separate property subject to a restriction against anticipation, where the restriction is not contained in a settlement of her own property, made or entered into by herself*. Birmingham Excelsior Money Soc. v. Lane, (1904) 1 K. B. 35.

Property Liable to Costs though Subject to Restraint on Anticipation. — See Gordon v. Gordon, (1904) P. 163, 90 L. T. N. S. 597.

426. 3. *Remaining Separate Estate After Discoverture*. — Brown v. Dimbleley, (1904) 1 K. B. 28, 89 L. T. N. S. 424.

427. 1. *Separate Property Not Liable for Husband's Debts*. — Elliott v. Hawley, 34 Wash. 585, 101 Am. St. Rep. 1016, construing Oregon

statutes in force in Alaska; Carter v. Becker, 69 Kan. 524; Owsley v. Owsley, 77 S. W. Rep. 394, 25 Ky. L. Rep. 1194 Terry v. Warder, 78 S. W. Rep. 154, 25 Ky. L. Rep. 1486; Vann v. Edwards, 135 N. Car. 661; Sparks v. Hurley, 208 Pa. St. 166, 101 Am. St. Rep. 926; Anderson v. Davis, 55 W. Va. 429.

In Kentucky. — Hall v. Hall, 82 S. W. Rep. 269, 26 Ky. L. Rep. 553; Cook v. Landrum, (Ky. 1904) 82 S. W. Rep. 585.

2. *Rents, Profits, and Increase*. — Hayner v. McKee, (Ky. 1903) 72 S. W. Rep. 347; Anderson v. Davis, 55 W. Va. 429.

3. *Voluntary Services of Husband*. — Torrey v. Dickinson, 213 Ill. 36.

4. *Possession or Control of Husband*. — Torrey v. Dickinson, 213 Ill. 36; Hayner v. McKee, (Ky. 1903) 72 S. W. Rep. 347.

7. *Rights of Husband to Manage and Control*. — Karlson v. Hanson, etc., Sawmill Co., 10 Idaho 361.

Consent of Husband to Lease. — In Texas the husband may lease the wife's separate estate for one year, but a lease by him for a longer period without the wife's joinder is void. Ascarete v. Pfaff, 34 Tex. Civ. App. 375.

428. 3. *Sales*. — Carter v. Becker, 69 Kan. 524; McNeeley v. South Penn Oil Co., 52 W. Va. 616.

4. *Mortgages*. — Thurston v. Osborne-McMillan Elevator Co., 13 N. Dak. 508; Parish v. Austin, (Tex. Civ. App. 1903) 76 S. W. Rep. 583.

5. *Pledges*. — *Contra*, where the husband is agent of the wife with full authority to bind her in all matters. Brosseau v. Lowy, 209 Ill. 405.

8. *Liability of Husband to Account to Wife*. — Brown v. Daugherty, 120 Fed. Rep. 526; Huffman v. Huffman, (Ind. App. 1905) 73 N. E. Rep. 1096; Gittings v. Winter, 101 Md. 194; Johnston v. Johnston, 173 Mo. 91, 96 Am. St. Rep. 486; Brady v. Brady, (N. J. 1904) 58 Atl.

428. *d.* LIABILITY TO ACCOUNT FOR RENTS AND PROFITS. — See note 13.

429. 3. Notice of Nature of Property as Affecting Creditor's Rights. — See notes 2, 3, 4, 5.

4. Wife's Duties with Respect to Separate Estate — *b.* FAMILY EXPENSES. — See note 9.

IX. REMEDIES AND ACTIONS CONCERNING SEPARATE ESTATE — 1. Equitable Protection of Separate Estate — *a.* LIABILITY OF HUSBAND AS TRUSTEE — Wife's Right to Conveyance. — See note 13.

430. Lien on Property Bought with Her Money. — See note 9.

435. 3. Wife's Actions and Forms of Action — *a.* WIFE'S RIGHT OF ACTION — Property Purchased with Trust Funds. — See note 15.

b. PARTIES — (1) *Suit by Wife Alone.* — See note 16.

437. **XI. LOSS AND EXTINGUISHMENT — 2. Acquiescence and Estoppel — *a.* IN GENERAL — Where There Is Capacity to Contract. — See notes 10, 11.**

Where There Is Actual Fraud. — See note 12.

438. *b.* AS AGAINST PARTIES DEALING WITH WIFE — Acquiescence. — See note 3.

Acceptance of Benefits. — See notes 7, 8.

439. *c.* AS AGAINST PARTIES DEALING WITH HUSBAND — (1) *In General.* — See note 2.

(3) *Husband's Vendee* — Acquiescence in Sale. — See note 10.

440. (4) *Husband's Mortgagee or Assignee* — Title in Husband's Name. — See note 10.

Rep. 931; Ilfeld *v.* De Baca, (N. Mex. 1905) 79 Pac. Rep. 723; Young *v.* Valentine, 177 N. Y. 347.

428. 13. Implied Gift to Husband. — Stewart *v.* Stewart, 207 Pa. St. 59.

429. 2. Notice to Creditors of Wife's Title. — Chason *v.* Anderson, 119 Ga. 495.

3. Chason *v.* Anderson, 119 Ga. 495. See also Creighton *v.* Crane, (Neb. 1905) 103 N. W. Rep. 284.

4. Purchases by Husband with Wife's Money. — Davis *v.* Yonge, (Ark. 1905) 85 S. W. Rep. 90; Scott *v.* Powers, 78 S. W. Rep. 408, 25 Ky. L. Rep. 1640; Duncansville Bldg., etc., Assoc. *v.* Ginter, 24 Pa. Super. Ct. 42.

5. See Torrey *v.* Dickinson, 213 Ill. 36.

9. In Colorado the Iowa statute has been adopted. Gilman *v.* Matthews, (Colo. App. 1904) 77 Pac. Rep. 366.

13. Wife's Right to Conveyance. — Huffman *v.* Huffman, (Ind. App. 1905) 73 N. E. Rep. 1096.

430. 9. Lien on Property Bought with Her Money. — Gittings *v.* Winter, 101 Md. 194.

Lien for Improvements. — As against heirs the wife is entitled to a lien on the separate estate of the husband improved with money lent to him by her from her separate estate. Brady *v.* Brady, (N. J. 1904) 58 Atl. Rep. 931. See also Ilfeld *v.* De Baca, (N. Mex. 1905) 79 Pac. Rep. 723; Harvey *v.* Johnson, 133 N. Car. 352.

435. 15. Property Purchased with Trust Funds. — Gittings *v.* Winter, 101 Md. 194.

16. Wife May Sue Alone. — Briggs *v.* Devoe, 89 N. Y. App. Div. 115; Matter of Dailey, (Surrogate Ct.) 43 Misc. (N. Y.) 552; Smith *v.* Bruton, 137 N. Car. 79; Meyer *v.* Meyer, 123 Wis. 538.

Wife Deserted by Husband May Sue Alone. — Word *v.* Kennon, (Tex. Civ. App. 1903) 75 S. W. Rep. 365.

437. 10. Liability to Estoppel as if Feme Sole Involved in Capacity to Contract. — Field *v.* Campbell, (Ind. App. 1903) 68 N. E. Rep. 911. See also *supra*, this title, **423.** 1 *et seq.*

11. Estoppel by Acquiescence. — Western New York, etc., R. Co. *v.* Rea, 83 N. Y. App. Div. 576.

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438. 3. Statutory Method of Conveyance Not Waivable by Acquiescence. — Compare Morrison *v.* Balzer, 35 Tex. Civ. App. 247.

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8. Smith *v.* Ingram, 132 N. Car. 959, 95 Am. St. Rep. 680; Tannery *v.* McMinn, (Tex. Civ. App. 1905) 86 S. W. Rep. 640; Yock *v.* Mann, 57 W. Va. 187.

439. 2. Estoppel to Repudiate Lease. — Where a married woman permits her husband to lease her property as his own, being present and assisting in the making of the lease, she will be estopped from repudiating it. Western New York, etc., R. Co. *v.* Rea, 83 N. Y. App. Div. 576.

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SEPARATION (HUSBAND AND WIFE).

By E. C. ELLSBREE.

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SET-OFF, RECOUPMENT, AND COUNTER-CLAIM.

BY A. W. VARIAN.

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519. 3. *In re Philip Semmer Glass Co.*, (C. C. A.) 135 Fed. Rep. 77; *In re Shults*, 132 Fed. Rep. 573; *Frank v. Mercantile Nat. Bank*, 100 N. Y. App. Div. 449, affirmed 182 N. Y. 264. See also *Little v. City Nat. Bank*, 115 Ky. 629. Compare *Harris v. Jackson Second Nat. Bank*, 110 Tenn. 239.

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- 520.** 2. Claim Must Be Against Plaintiff. — Terry v. Warder, (Ky. 1904) 78 S. W. Rep. 154; Owsley v. Owsley, (Ky. 1903) 77 S. W. Rep. 394; Carpenter v. Fulmer, 118 Wis. 454. See also Moshassuck Encampment v. Arnold, 25 R. I. 65.
7. Claim Must Be Due to Defendant. — Drennen v. Gilmore, 132 Ala. 246, 90 Am. St. Rep. 902; Kinzie v. Riely, 100 Va. 709.
- 521.** 3. Claim Must Exist Between Parties Only. — Drennen v. Gilmore, 132 Ala. 246, 90 Am. St. Rep. 902; Carpenter v. Fulmer, 118 Wis. 454.
- 522.** 3. Claim Against Plaintiff by Defendant's Firm. — Fowler v. Billinger, 140 Ala. 240; Western Coal, etc., Co. v. Hollenbeck, 72 Ark.
- 523.** 6. Claim Must Exist Between All the Parties. — Hoaglin v. Henderson, 119 Iowa 720, 97 Am. St. Rep. 335; Carpenter v. Fulmer, 118 Wis. 454. Compare Wilson v. Exchange Bank, 122 Ga. 495.
7. Claim Against Part Only of Plaintiffs. — Hoaglin v. Henderson, 119 Iowa 720, 97 Am. St. Rep. 335; Collins v. Campbell, 97 Me. 23, 94 Am. St. Rep. 458.
9. Claims Against Individual Members of Plaintiff Firm. — Hoaglin v. Henderson, 119 Iowa 720, 97 Am. St. Rep. 335. See also Collins v. Campbell, 97 Me. 23, 94 Am. St. Rep. 458.
- 524.** 1. See Collins v. Campbell, 97 Me. 23, 94 Am. St. Rep. 458.
2. Hoaglin v. Henderson, 119 Iowa 720, 97 Am. St. Rep. 335.
3. Claim Owned by Part Only of Defendants Not Subject of Set-off. — In re Shults, 132 Fed. Rep. 573; Hoaglin v. Henderson, 119 Iowa 720, 97 Am. St. Rep. 335. Compare Canfield v. Arnett, 17 Colo. App. 426.
- 525.** 1. Claims Owned by Individual Members of Defendant's Firm. — In re Shults, 132 Fed. Rep. 573; Hoaglin v. Henderson, 119 Iowa 720, 97 Am. St. Rep. 335.
2. Claim Owned by Part Only of Defendants a Subject of Set-off. — See Wilson v. Exchange Bank, 122 Ga. 495.
- 526.** 1. Canfield v. Arnett, 17 Colo. App. 426; Wilson v. Exchange Bank, 122 Ga. 495.
8. See Owsley v. Owsley, (Ky. 1903) 77 S. W. Rep. 394.
- 528.** 11. Nix v. Ellis, 118 Ga. 345, 98 Am. St. Rep. 111; Little v. Sturgis, 127 Iowa 298.
12. Assignee's Right of Set-off. — Nix v. Ellis, 118 Ga. 345, 98 Am. St. Rep. 111.
- Assignment Must Have Been Made Before Commencement of Suit. — Ewen v. Wilbor, 99 Ill. App. 132, affirmed 208 Ill. 492; Storts v. Mills, 93 Mo. App. 201.
- 529.** 8. Right of Set-off Against Assignee. — Nix v. Ellis, 118 Ga. 345, 98 Am. St. Rep. 111; Little v. Sturgis, 127 Iowa 298; Little v. City Nat. Bank, 115 Ky. 629; New Farmers', etc., Bank v. Crowe, (Ky. 1904) 82 S. W. Rep. 287; Searritt Estate Co. v. J. F. Schmelzer, etc., Arms Co., 110 Mo. App. 406; Oliver v. Canan, 71 Ohio St. 360; Batavian Bank v. Minneapolis, etc., R. Co., 123 Wis. 389; Lillie v. Thomas, 1 West. L. Rep. 467. And see generally the title ASSIGNMENTS, 1080, i et seq.
- 531.** 1. Waiver. — Batavian Bank v. Minneapolis, etc., R. Co., 123 Wis. 389.
5. Set-off Available Against Payee Allowed Against Transferee. — Little v. Sturgis, 127 Iowa 298. See generally the title BILLS OF EXCHANGE AND PROMISSORY NOTES, 312, 4 et seq.

533. (4) *In Actions By and Against Trustees* — *Actions by Trustees*. — See notes 2, 3.

(5) *In Actions By and Against Executors and Administrators* — *Actions Against Executors and Administrators*. — See notes 7, 8.

534. *Actions by Executors or Administrators*. — See note 1.

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Presentation of Claim. — See note 7.

540. (8) *In Actions By and Against Principal and Agent* — (b) *On Contracts Made Without Disclosing Principal* — *dd. ACTIONS AGAINST AGENT*. — See note 1.

(10) *In Actions Against Principals, Principal and Sureties, and Sureties* — (a) *Actions Against Principal and Sureties* — *Principals' Right of Set-off*. — See note 6.

541. (c) *Actions Against Sureties*. — See note 2.

543. 9. *Set-off in Equity* — *c. GROUNDS FOR ALLOWING SET-OFF* — (1) *General Rule*. — See note 1.

544. See note 1.

(2) *Insolvency of Parties*. — See note 2.

545. *Claims Acquired After Insolvency*. — See note 2.

546. *When Claim to Be Set Off Must Be Due*. — See note 1.

(3) *Nonresidence of Parties*. — See note 4.

547. II. *RECOUPMENT* — 1. *Definition and General Consideration* — *b. ORIGIN AND NATURE* — *Common-law Origin*. — See note 4.

548. *Doctrine Applicable in Equity and in Admiralty*. — See note 1.

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533. 2. *Right of Set-off Against Trustees*. — *Nix v. Ellis*, 118 Ga. 345, 98 Am. St. Rep. 111. See also *Bankes v. Jarvis*, (1903) 1 K. B. 549.

3. *Jeffray v. Towar*, 63 N. J. Eq. 530.

7. *Executor's or Administrator's Right of Set-off*. — *Jester v. Knotts*, (Del. 1904) 57 Atl. Rep. 1094. See also *Matter of Robinson*, (Surrogate Ct.) 45 Misc. (N. Y.) 551.

8. *Howe v. Howe*, 97 Me. 422; *McCaffrey v. Kennett*, (N. H. 1905) 60 Atl. Rep. 96.

534. 1. *Set-off Against Executors and Administrators*. — *Jester v. Knotts*, (Del. 1904) 57 Atl. Rep. 1094; *Nix v. Ellis*, 118 Ga. 345, 98 Am. St. Rep. 111; *Little v. City Nat. Bank*, 115 Ky. 629; *Martin County Nat. Bank v. Bird*, 92 Minn. 110; *Hall v. Greene*, 24 R. I. 286.

Claim Against Executor Individually Cannot Be Set Off. — *Hancock v. Hancock*, (Ky. 1902) 69 S. W. Rep. 757.

2. *When Claim Must Have Matured*. — *Nix v. Ellis*, 118 Ga. 345, 98 Am. St. Rep. 111.

5. *Little v. City Nat. Bank*, 115 Ky. 629.

7. *Presentation of Claim Not Necessary*. — *Martin County Nat. Bank v. Bird*, 92 Minn. 110. See also *Hall v. Greene*, 24 R. I. 286.

Presentation Not Necessary Where Decedent's Estate Insolvent. — *Troup v. Mechanics' Nat. Bank*, 24 R. I. 377.

If Claim Not Presented Affirmative Relief Not Granted. — *Martin County Nat. Bank v. Bird*, 92 Minn. 110.

540. 1. *By Agent for Undisclosed Principal*. — *Gibbony v. Wayne*, 141 Ala. 300.

6. *Wilson v. Exchange Bank*, 122 Ga. 495; *Kinzie v. Riely*, 100 Va. 709.

541. 2. *Set-off by Surety of Claim Due to Principal Not Sued*. — *Kinzie v. Riely*, 100 Va. 709.

543. 1. *Fowler v. Bellinger*, 140 Ala. 240; *Coonan v. Loewenthal*, 147 Cal. 218; *Fitzgerald*

v. Wiley, 22 App. Cas. (D. C.) 329; *Fedarwisch v. Alsop*, 18 App. Cas. (D. C.) 318; *Collins v. Campbell*, 97 Me. 23, 94 Am. St. Rep. 458; *Wabash R. Co. v. Bowring*, 103 Mo. App. 158.

544. 1. See *Collins v. Campbell*, 97 Me. 23, 94 Am. St. Rep. 458.

2. *Insolvency*. — *Fowler v. Bellinger*, 140 Ala. 240; *Coonan v. Loewenthal*, 147 Cal. 218; *Fitzgerald v. Wiley*, 22 App. Cas. (D. C.) 329; *Fedarwisch v. Alsop*, 18 App. Cas. (D. C.) 318; *Little v. City Nat. Bank*, 115 Ky. 629; *Crummett v. Littlefield*, 98 Me. 317; *Collins v. Campbell*, 97 Me. 23, 94 Am. St. Rep. 458; *Jenkins v. Baltimore, etc., R. Co.*, 98 Md. 402; *Wabash R. Co. v. Bowring*, 103 Mo. App. 158; *O'Brien v. Dwyer*, 76 N. Y. App. Div. 516; *Le Clare v. Thibault*, 41 Oregon 601; *Meeder v. Goehring*, 23 Pa. Super. Ct. 457; *Troup v. Mechanics Nat. Bank*, 24 R. I. 377.

545. 2. *Nix v. Ellis*, 118 Ga. 345, 98 Am. St. Rep. 111; *Schlesinger v. Goldberg*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 149.

546. 1. *New Farmers', etc., Bank v. Crowe*, (Ky. 1904) 82 S. W. Rep. 287. See also *Troup v. Mechanics' Nat. Bank*, 24 R. I. 377.

4. *Fitzgerald v. Wiley*, 22 App. Cas. (D. C.) 329.

547. 4. *Common-law Origin*. — *Boothe v. Armstrong*, 76 Conn. 530.

Civil-law Origin. — See *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1.

548. 1. *Recoupment in Equity*. — See *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1.

4. *Remedy in Nature of Cross-action*. — *York Mfg. Co. v. Rothwell*, (C. C. A.) 119 Fed. Rep. 144.

7. *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1.

548. Purpose of Recoupment. — See note 8.

549. *c.* DISTINGUISHED FROM SET-OFF. — See note 2.

2. Recoupment for Breach of Contract Sued Upon — *a.* GENERAL RULE. — See note 3.

551. *c.* BREACH OF CONTRACT AS FAILURE OF CONSIDERATION. — See note 2.

d. APPLICATION OF RULE TO PARTICULAR CLASSES OF CONTRACTS — (1) *Contracts for Labor and Services — Construction Contracts and the Like.* — See note 4.

553. (3) *Contracts of Sale* — (a) In General. — See note 2.

(b) Breach of Warranty. — See note 4.

554. (c) Fraud, Misrepresentation, and Deceit. — See note 3.

555. Fraud by Lessor. — See note 1.

(d) Restoration of Property Unnecessary. — See note 3.

556. *e.* RECOUPMENT FOR BREACH OF IMPLIED TERM OF CONTRACT. — See note 7.

557. *h.* RECOUPMENT IN ACTION ON BILL OR NOTE — (1) *In General.* — See note 6.

559. 3. Recoupment of Claim Founded on Contract Against Claim Founded on Tort. — See note 1.

4. Recoupment of Claim Founded on Tort Against Claim Founded on Contract. — See note 2.

560. 6. Recoupment in Actions of Replevin. — See note 3.

8. Damages — *a.* MEASURE OF DAMAGES. — See note 7.

548. 8. Reason for Doctrine. — *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1; *Lloyd v. Manufacturers, etc., Warehouse Co.*, 102 Ill. App. 551.

549. 2. Distinctions Between Recoupment and Set-off. — *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1; *York Mfg. Co. v. Rothwell*, (C. C. A.) 119 Fed. Rep. 144; *Boothe v. Armstrong*, 76 Conn. 530; *Samaha v. Samaha*, 18 App. Cas. (D. C.) 76; *Lloyd v. Manufacturers, etc., Warehouse Co.*, 102 Ill. App. 551. See further *infra*, this title, **570.** 3 *et seq.*

3. Recoupment for Breach or Nonperformance by Plaintiff. — *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1; *Bullock-McCall-McDonnell Electric Co. v. Coleman*, 136 Ala. 610; *Gibbony v. Wayne*, 141 Ala. 300; *Ramsey v. Capshaw*, 71 Ark. 408; *Boothe v. Armstrong*, 76 Conn. 530; *Sloan Commission Co. v. Fry*, (Neb. 1903) 95 N. W. Rep. 862; *Commonwealth Roofing Co. v. Palmer Leather Co.*, 67 N. J. L. 566; *Charles E. Dustin Co. v. St. Petersburg Invest. Co.*, 126 Fed. Rep. 816; *Tenney v. Anderson Water, etc., Co.*, 69 S. Car. 430; *Blair v. Johnson*, 111 Tenn. 111; *Spears v. Netherlands F. Ins. Co.*, 31 Tex. Civ. App. 567.

551. 2. Recoupment and Failure of Consideration. — *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1.

4. Contracts to Furnish Services, Materials, Etc. — *Building Contracts.* — *Payne v. Amos Kent Brick, etc., Co.*, 110 La. 750; *Commonwealth Roofing Co. v. Palmer Leather Co.*, 67 N. J. L. 566; *Tenney v. Anderson Water, etc., Co.*, 69 S. Car. 430.

553. 2. Failure to Supply All Goods Contracted For. — *Gibbony v. Wayne*, 141 Ala. 300; *Eastern Forge Co. v. Baizley*, 21 Pa. Super. Ct. 504. See also *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1.

4. Recoupment for Breach of Warranty. — *Eastern Granite Roofing Co. v. Chapman*, 140 Ala. 440; *Massillon Engine, etc., Co. v. Shirmmer*, 122 Iowa 699; *Harrigan v. Advance Thresher Co.*, (Ky. 1904) 81 S. W. Rep. 261; *Queen City Glass Co. v. Pittsburg Clay Pot Co.*, 97 Md. 429; *New Birdsall Co. v. Keys*, 99 Mo. App. 458; *Sloan Commission Co. v. Fry*, (Neb. 1903) 95 N. W. Rep. 862; *Charles E. Dustin Co. v. St. Petersburg Invest. Co.*, 126 Fed. Rep. 816.

554. 3. Fraud, etc., in Sale of Personality. — *Huber Mfg. Co. v. Hunter*, 99 Mo. App. 46.

555. 1. Lessee May Recoup for False Representations as to Condition of Property. — *Bauer v. Taylor*, (Neb. 1903) 96 N. W. Rep. 268.

3. Purchaser Need Not Rescind Contract or Restore Property. — *Harrigan v. Advance Thresher Co.*, (Ky. 1904) 81 S. W. Rep. 261; *Huber Mfg. Co. v. Hunter*, 99 Mo. App. 46; *Steiger v. Fronhofer*, 43 Oregon 178. See also *Eastern Granite Roofing Co. v. Chapman*, 140 Ala. 440. Compare *Bessemer Ice Delivery Co. v. Brannen*, 138 Ala. 157.

556. 7. *New Birdsall Co. v. Keys*, 99 Mo. App. 458.

557. 6. Action on Bill or Note — Modern Rule. — *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1; *York Mfg. Co. v. Rothwell*, (C. C. A.) 119 Fed. Rep. 144.

559. 1. Claim Ex Contractu Recouped in Action of Tort. — *Lloyd v. Manufacturers, etc., Warehouse Co.*, 102 Ill. App. 551.

2. Recoupment for Tort in Action on Contract — *Lloyd v. Manufacturers, etc., Warehouse Co.*, 102 Ill. App. 551.

560. 3. Recoupment Not Allowed in Replevin. — *Blair v. Johnson*, 111 Tenn. 111.

7. *Bessemer Ice Delivery Co. v. Brannen*, 138 Ala. 157.

561. *c. RECOVERY OF EXCESS OVER PLAINTIFF'S DEMAND — (1) Excess Not Recoverable at Common Law.* — See note 3.

9. Statute of Limitations. — See note 7.

564. 12. Limitations of Doctrine — *j. CLAIMS MUST ARISE OUT OF SAME TRANSACTION OR RELATE TO SAME SUBJECT-MATTER — (1) General Principles.* — See notes 2, 3.

565. (3) *Promises of Plaintiff and Defendant Must Be Mutually Dependent — (a) Principle Stated.* — See note 4.

568. III. COUNTERCLAIM — 1. Definition and Nature — *a. DEFINITION.* — See notes 4, 5.

b. DEFENSE DISTINGUISHED FROM COUNTERCLAIM. — See notes 7, 8.

569. See note 5.

570. *c. SET-OFF AND RECOUPMENT DISTINGUISHED FROM COUNTERCLAIM.* — See notes 4, 6.

571. See notes 1, 2, 3, 8.

d. OBJECT OF STATUTE ALLOWING COUNTERCLAIMS. — See note 9.

572. 2. Essential Elements or Characteristics — *a. ESSENTIALS AS CAUSE OF ACTION.* — See note 1.

573. See notes 1, 2.

574. *b. RELATION TO PLAINTIFF'S CLAIM.* — See note 6.

575. See notes 2, 3.

561. 3. Excess Not Recoverable by Defendant — General Rule. — *Boothe v. Armstrong*, 76 Conn. 530.

7. Claim in Recoupment Not Barred by Statute of Limitations. — *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 561.

564. 2. Rule as to Same Transaction or Subject-matter. — *York Mfg. Co. v. Rothwell*, (C. C. A.) 119 Fed. Rep. 144.

3. Breach of Separate Contract. — *Thorn v. Morgan, etc., Co.*, 135 Mich. 51.

565. 4. See *York Mfg. Co. v. Rothwell*, (C. C. A.) 119 Fed. Rep. 144.

568. 4. For Other Definitions. — *Boothe v. Armstrong*, 76 Conn. 530; *Boucher v. Powers*, 29 Mont. 342; *Oliver v. Canan*, 71 Ohio St. 360; *Stolze v. Torrison*, 118 Wis. 315.

5. See *Boothe v. Armstrong*, 76 Conn. 530.

7. Counterclaim a Cause of Action. — *Turney v. Baker*, 103 Mo. App. 390; *Dunham v. Travis*, 25 Utah 65.

8. Affirmative Relief. — *Boothe v. Armstrong*, 76 Conn. 530; *Turney v. Baker*, 103 Mo. App. 390.

569. 5. *Boothe v. Armstrong*, 76 Conn. 530; *Dunham v. Travis*, 25 Utah 65. And see the title SET-OFF, COUNTERCLAIM, AND RECOUPMENT, 19 ENCYC. OF PL. AND PR. 746. I *et seq.*, and the Supplement thereto.

570. 4. Counterclaim Broader than Set-off and Recoupment. — *Boothe v. Armstrong*, 76 Conn. 530.

6. *Boothe v. Armstrong*, 76 Conn. 530.

571. 1. Technical Set-off Still Retained. — *Scarritt Estate Co. v. J. F. Schmelzer, etc.*, Arms Co., 110 Mo. App. 406. See also *Oliver v. Canan*, 71 Ohio St. 360.

2. Liquidated and Unliquidated Demands. — *Scarritt Estate Co. v. J. F. Schmelzer, etc.*, Arms Co., 110 Mo. App. 406; *S. Liebmann's*

Sons Brewing Co. v. De Nicolo, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 268.

3. Set-off Limited to Demands *Ex Contractu.* — *Patterson v. Bradley*, 4 Indian Ter. 124.

8. Admission of Plaintiff's Claim. — See *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1.

9. Object of Statute Allowing Counterclaims. — *Fitzgerald v. Wiley*, 22 App. Cas. (D. C.) 329; *McCormick Harvesting Mach. Co. v. Hill*, 104 Mo. App. 544; *Snohomish First Nat. Bank v. Parker*, 28 Wash. 234, 92 Am. St. Rep. 828.

572. 1. Cause of Action Against Plaintiff. — *King v. Coe Commission Co.*, 93 Minn. 52; *Turney v. Baker*, 103 Mo. App. 390; *Boucher v. Powers*, 29 Mont. 342; *Leigh v. Garysburg Mfg. Co.*, 132 N. Car. 167; *Tacoma Mill Co. v. Perry*, 32 Wash. 650; *Stolze v. Torrison*, 118 Wis. 315.

573. 1. Must Support Separate Action for Several Judgment. — *Thomssen v. Ertz*, 93 Minn. 280; *Reamer v. Morrison Express Co.*, 93 Mo. App. 501; *McCormick Harvesting Mach. Co. v. Hill*, 104 Mo. App. 544; *Le Clare v. Thibault*, 41 Oregon 601; *Roberts v. Jones*, 71 S. Car. 404; *Tacoma Mill Co. v. Perry*, 32 Wash. 650.

2. Defense but Not Counterclaim. — See *S. Liebmann's Sons Brewing Co. v. De Nicolo*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 268.

574. 6. Must Resist or Modify Plaintiff's Claims. — *Glide v. Kayser*, 142 Cal. 419; *Williams v. Clarke*, 82 N. Y. App. Div. 199; *Lundine v. Callaghan*, 82 N. Y. App. Div. 621; *Stolze v. Torrison*, 118 Wis. 315.

575. 2. Connection with Subject of Action. — *Burnett v. Burnett*, 86 N. Y. App. Div. 386; *Lundine v. Callaghan*, 82 N. Y. App. Div. 621; *Williams v. Clarke*, 82 N. Y. App. Div. 199.

3. Express Statutory Provision. — *Hancock v. Hancock*, (Ky. 1902) 69 S. W. Rep. 757; *Tacoma Mill Co. v. Perry*, 32 Wash. 650;

- 575.** *c.* ACCRUAL OF CAUSE OF ACTION. — See note 6.
576. See note 1.
e. MUTUALITY OF DEMANDS. — See note 6.
579. *h.* JOINT AND SEVERAL CLAIMS. — See note 1.
i. NUMBER AND JOINDER OF COUNTERCLAIMS. — See note 3.
3. In What Proceedings Available — *a.* GENERAL RULES. — See note 5.
b. PARTICULAR ACTIONS OR PROCEEDINGS. — See note 13.
580. See notes 2, 3, 4, 5.
581. See notes 1, 5, 7.
4. What May Be Counterclaimed — *a.* IN GENERAL. — See note 10.
582. *b.* CLAIMS EX CONTRACTU IN ACTIONS ON CONTRACT — (1) *General Rules.* — See notes 1, 2.
583. (2) *Actions Arising upon Contract.* — See note 2.
584. Tort Founded on Contract. — See notes 2, 3.
585. Implied Contracts. — See note 1.
Waiver of Tort. — See notes 3, 4.
586. (4) *Applications and Illustrations of Rules.* — See note 2.
587. See notes 1, 2, 4.

Stolze *v.* Torrison, 118 Wis. 315; Kuhn *v.* Sol. Heavenrich Co., 115 Wis. 447.

575. 6. Existence at Commencement of Action. — Marshall *v.* Harber, (Iowa 1902) 91 N. W. Rep. 774; Boucher *v.* Powers, 29 Mont. 342; Liberty Wall Paper Co. *v.* Stoner Wall Paper Mfg. Co., 178 N. Y. 219; Schlesinger *v.* Burland, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 206; Gordon *v.* Steinmetz, 71 Ohio St. 372; Tacoma Mill Co. *v.* Perry, 32 Wash. 650.

576. 1. Damage Caused by Institution of Suit. — Ingram *v.* Dailey, 123 Iowa 188.

Wrongful Attachment. — Marshall *v.* Harber, (Iowa 1902) 91 N. W. Rep. 774; Tacoma Mill Co. *v.* Perry, 32 Wash. 650.

6. Mutuality Necessary. — Scarritt Estate Co. *v.* J. F. Schmelzer, etc., Arms Co., 110 Mo. App. 406.

579. 1. Hunter *v.* Booth, 84 N. Y. App. Div. 585.

3. Baylis *v.* Weibezahl, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 178; Gordon *v.* Steinmetz, 71 Ohio St. 372; Le Clare *v.* Thibault, 41 Oregon 601.

5. Statute Governs. — White *v.* Whitney, (Neb. 1903) 94 N. W. Rep. 1012.

13. Actions Ex Delicto. — Tacoma Mill Co. *v.* Perry, 32 Wash. 650 (action of trespass).

Contra. — Comer *v.* Morgan County, 32 Ind. App. 477.

Not Allowed in Forcible Entry and Detainer. — Spellman *v.* Rhode, (Mont. 1905) 81 Pac. Rep. 395.

580. 2. Equitable Actions. — Boucher *v.* Powers, 29 Mont. 342.

3. Action to Foreclose Mortgage. — Penn Lumber Co. *v.* McPherson, 133 N. Car. 287.

4. Replevin. — McCormick Harvesting Mach. Co. *v.* Hill, 104 Mo. App. 544. Compare Blair *v.* Johnson, 111 Tenn. 111.

Contrary View. — Glide *v.* Kayser, 142 Cal. 419; Osmer *v.* Furey, 32 Mont. 581.

In Iowa. — Sylvester *v.* Ammons, 126 Iowa 140.

5. Ejectment. — Compare White *v.* Whitney, (Neb. 1903) 94 N. W. Rep. 1012.

581. 1. Mechanic's Lien Proceedings. —

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5. Summary Proceedings by Landlord. — Hunter *v.* Porter, 10 Idaho 72; S. Liebmann's Sons Brewing Co. *v.* De Nicolo, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 268.

Not Allowed in Action to Collect Assessment. — Lux, etc., Stone Co. *v.* Donaldson, 162 Ind. 481.

7. Counterclaim in Reply to Counterclaim. — Snyder *v.* Johnson, (Neb. 1903) 95 N. W. Rep. 692.

10. Statutory Provisions. — Boucher *v.* Powers, 29 Mont. 342; Tacoma Mill Co. *v.* Perry, 32 Wash. 650.

582. 1. Cause of Action Arising Out of Contract Sued Upon. — Thomas China Co. *v.* C. W. Raymond Co., (C. C. A.) 135 Fed. Rep. 25; Patterson *v.* Bradley, 4 Indian Ter. 124; Boucher *v.* Powers, 29 Mont. 342; Hagin *v.* Cayuga Lake Cement Co., 105 N. Y. App. Div. 269; Penn Lumber Co. *v.* McPherson, 133 N. Car. 287.

2. Actions Arising on Distinct Contract. — Crane *v.* Murray, 106 Mo. App. 697; Le Clare *v.* Thibault, 41 Oregon 601; Tacoma Mill Co. *v.* Perry, 32 Wash. 650; Vaughn *v.* Walsh, 122 Wis. 486.

583. 2. Illustrations — Ejectment and Claim for Rents and Profits. — White *v.* Whitney, (Neb. 1903) 94 N. W. Rep. 1012.

584. 2. Torts in Contract or Fiduciary Relations. — Hagin *v.* Cayuga Lake Cement Co., 105 N. Y. App. Div. 269.

3. Breach of Contract Amounting to Tort. — Le Clare *v.* Thibault, 41 Oregon 601. See also Hagin *v.* Cayuga Lake Cement Co., 105 N. Y. App. Div. 269.

585. 1. Implied Contracts. — Crane *v.* Murray, 106 Mo. App. 697.

3. Waiver of Tort and Claim in Assumpsit. — Crane *v.* Murray, 106 Mo. App. 697.

4. See White *v.* Whitney, (Neb. 1903) 94 N. W. Rep. 1012.

586. 2. Contracts of Sale. — Thomas China Co. *v.* C. W. Raymond Co., (C. C. A.) 135 Fed. Rep. 25; Shepherd *v.* Padgett, 91 Mo. App. 473.

587. 1. Services Rendered. — Patterson *v.*

588. *c. CLAIMS ARISING OUT OF SAME TRANSACTION — (1) General Rules.* — See note 6.

589. See note 1.

(2) *What Constitutes Same Transaction.* — See notes 2, 5, 6, 7.

590. See note 2.

(3) *Tort and Contract.* — See notes 3, 4, 5.

591. See notes 1, 3.

592. (4) *Applications and Illustrations of Rules.* — See notes 1, 5, 6.

593. See notes 2, 6.

594. See note 1.

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Bradley, 4 Indian Ter. 124; Boucher *v.* Powers, 29 Mont. 342; Hagin *v.* Cayuga Lake Cement Co., 105 N. Y. App. Div. 269.

587. 2. *Claims Between Landlord and Tenant.* — White *v.* Whitney, (Neb. 1903) 94 N. W. Rep. 1012; Kitchen Bros. Hotel Co. *v.* Philbin, (Neb. 1902) 96 N. W. Rep. 487; Hirsch *v.* Olmesdahl, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 757.

4. *Pledges.* — McCormick Harvesting Mach. Co. *v.* Hill, 104 Mo. App. 544.

588. 6. *Claims Arising Out of Same Transaction.* — Patterson *v.* Bradley, 4 Indian Ter. 124; Thomssen *v.* Ertz, 93 Minn. 280; Crane *v.* Murray, 106 Mo. App. 697; Reamer *v.* Morrison Express Co., 93 Mo. App. 501; Potter *v.* Lohse, 31 Mont. 91; Boucher *v.* Powers, 29 Mont. 342; Hagin *v.* Cayuga Lake Cement Co., 105 N. Y. App. Div. 269; Frick *v.* Freudenthal, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 348; Benton *v.* Moore, (County Ct.) 42 Misc. (N. Y.) 660; O'Brien *v.* Dwyer, 76 N. Y. App. Div. 516; Le Clare *v.* Thibault, 41 Oregon 601; Gwynn *v.* Citizens' Telephone Co., 69 S. Car. 434, 104 Am. St. Rep. 819; Peters *v.* Lewis, 33 Wash. 617.

589. 1. *Lundine v. Callaghan*, 82 N. Y. App. Div. 621; *Stolze v. Torrison*, 118 Wis. 315.

2. *"Transaction" Broader than "Contract."* — King *v.* Coe Commission Co., 93 Minn. 52, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 589; *Wrege v. Jones*, 13 N. Dak. 267; *Roberts v. Jones*, 71 S. Car. 404.

5. *Commercial or Business Affair.* — Glide *v.* Kayser, 142 Cal. 419.

6. *Includes All Facts and Circumstances Out of Which Cause of Action Arose.* — See McCormick Harvesting Mach. Co. *v.* Hill, 104 Mo. App. 544; *Tacoma Mill Co. v. Perry*, 32 Wash. 650.

7. *Different Aspects of Same State of Facts.* — King *v.* Coe Commission Co., 93 Minn. 52, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 589; *Wrege v. Jones*, 13 N. Dak. 267.

590. 2. *New Facts as Part of Entire Transaction.* — King *v.* Coe Commission Co., 93 Minn. 52, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 589 [590].

3. *Immaterial Whether Claims Are in Tort or upon Contract.* — Patterson *v.* Bradley, 4 Indian Ter. 124; King *v.* Coe Commission Co., 93 Minn. 52; Crane *v.* Murray, 106 Mo. App. 697; McCormick Harvesting Mach. Co. *v.* Hill, 104 Mo. App. 544; Benton *v.* Moore, (County Ct.)

42 Misc. (N. Y.) 660; O'Brien *v.* Dwyer, 76 N. Y. App. Div. 516; Le Clare *v.* Thibault, 41 Oregon 601. Compare *Lundine v. Callaghan*, 82 N. Y. App. Div. 621.

4. *Counterclaims for Tort Refusal.* — Thomssen *v.* Ertz, 93 Minn. 280; Story *v.* Richardson, 91 N. Y. App. Div. 381, affirmed 181 N. Y. 584; *Lundine v. Callaghan*, 82 N. Y. App. Div. 621; *Gerry v. Siebrecht*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1034.

5. *Counterclaims for Tort Allowed.* — Shepherd *v.* Padgitt, 91 Mo. App. 473.

591. 1. *View that Different Torts Cannot Arise Out of Same Transaction.* — Roberts *v.* Jones, 71 S. Car. 404.

3. *One Tort Consequent upon Another.* — Roberts *v.* Jones, 71 S. Car. 404. See also *Wrege v. Jones*, 13 N. Dak. 267.

592. 1. *Fraud.* — Shepherd *v.* Padgitt, 91 Mo. App. 473.

5. *Damage Caused by Principal Suit.* — Marshall *v.* Harber, (Iowa 1902) 91 N. W. Rep. 774; *Ingram v. Dailey*, 123 Iowa 188; *Tacoma Mill Co. v. Perry*, 32 Wash. 650.

6. *Negligent Performance of Contract.* — Patterson *v.* Bradley, 4 Indian Ter. 124; Hagin *v.* Cayuga Lake Cement Co., 105 N. Y. App. Div. 269.

593. 2. *Counterclaim in Action for Rent.* — See White *v.* Whitney, (Neb. 1903) 94 N. W. Rep. 1012.

6. *Distinct Torts by Landlord.* — Gerry *v.* Seibrecht, (Supm. Ct. App. T.) 88 N. Y. Supp. 1034; *George A. Fuller Co. v. Manhattan Constr. Co.*, (Supm. Ct. App. T.) 44 Misc. (N. Y.) 219.

594. 1. *Counterclaims Allowed.* — Boucher *v.* Powers, 29 Mont. 342; *Peters v. Lewis*, 33 Wash. 617.

Counterclaims Not Allowed. — Glide *v.* Kayser, 142 Cal. 419; *Kuhn v. Sol. Heavenrich Co.*, 115 Wis. 447.

Action for Slander — Separate Slander Not Subject of Counterclaim. — *Wrege v. Jones*, 13 N. Dak. 267.

2. *Claims Connected with Subject of Action.* — Crane *v.* Murray, 106 Mo. App. 697; Gwynn *v.* Citizens' Telephone Co., 69 S. Car. 434, 104 Am. St. Rep. 819; *Peters v. Lewis*, 33 Wash. 617.

3. *Distinct Claims.* — Rensberger *v.* Britton, 31 Colo. 77; *Williams v. Clarke*, 82 N. Y. App. Div. 199; *Frick v. Freudenthal*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 348; *Burnett v. Burnett*, 86 N. Y. App. Div. 386.

- 595.** (2) *Subject of Action.* — See notes 3, 4.
- 596.** See note 1.
- (3) *Connection with Subject of Action.* — See notes 2, 4.
- 597.** See notes 1, 3, 4.
- 598.** (4) *Tort and Contract* — *Statement of Rule.* — See notes 1, 2, 4.
- 599.** In an *Action for a Tort.* — See note 5.
- 600.** See note 1.
- 601.** (5) *Applications and Illustrations of Rules.* — See note 3.
- 602.** See notes 1, 2.
- 603.** See note 7.
- 604.** 5. *Parties Between Whom Allowed* — *a. IN GENERAL.* — See note 2.
b. WHO MAY INTERPOSE COUNTERCLAIMS — (2) *Persons Sued in Representative Capacity.* — See note 5.
- 605.** See note 1.
- c. AGAINST WHOM COUNTERCLAIMS MAY BE INTERPOSED* —
- (2) *Assignees.* — See note 4.
- 608.** (4) *Government.* — See notes 1, 5.
- 609.** 6. *Equitable Counterclaims.* — See notes 1, 2.
- 610.** IV. *SET-OFF OF JUDGMENTS* — 1. *In General.* — See notes 3, 4, 5.
- 595.** 3. *Right in Question as Subject of Action.* — McCormick Harvesting Mach. Co. v. Hill, 104 Mo. App. 544; Steinmetz v. Cosmopolitan Range Co., (Supm. Ct. App. T.) 47 Misc. (N. Y.) 611.
- 4.** *Facts Constituting Cause of Action.* — Reamer v. Morrison Express Co., 93 Mo. App. 501; McCormick Harvesting Mach. Co. v. Hill, 104 Mo. App. 544; Potter v. Lohse, 31 Mont. 91; Le Clare v. Thibault, 41 Oregon 601.
- 596.** 1. *Origin and Ground of Plaintiff's Claim.* — Osmer v. Furey, 32 Mont. 581; Potter v. Lohse, 31 Mont. 91. See also McCormick Harvesting Mach. Co. v. Hill, 104 Mo. App. 544.
- 2.** *Immediate and Direct Connection.* — Le Clare v. Thibault, 41 Oregon 601. See also Laird v. Cole, 121 Iowa 146.
- 4.** *Same Parties or Same Time.* — Lundine v. Callaghan, 82 N. Y. App. Div. 621; Wrege v. Jones, 13 N. Dak. 267; Roberts v. Jones, 71 S. Car. 404.
- 597.** 1. *Infringement of Same or Reciprocal Rights.* — See Wrege v. Jones, 13 N. Dak. 267.
- 3.** *Title to Land* is not a proper counterclaim to an action for trespass *vi et armis*. Stolze v. Torrison, 118 Wis. 315.
- 4.** *One Wrong Furnishing Motive or Reason for Another.* — See Glide v. Kayser, 142 Cal. 419; Wrege v. Jones, 13 N. Dak. 267.
- 598.** 1. *Counterclaims in Tort Allowed in Actions upon Contract.* — Patterson v. Bradley, 4 Indian Ter. 124; Benton v. Moore, (County Ct.) 42 Misc. (N. Y.) 660; Le Clare v. Thibault, 41 Oregon 601.
- 2.** *Counterclaims in Tort Allowed in Actions for Tort.* — O'Brien v. Dwyer, 76 N. Y. App. Div. 516.
- 4.** McCormick Harvesting Mach. Co. v. Hill, 104 Mo. App. 544; Potter v. Lohse, 31 Mont. 91.
- 599.** 5. *Actions for Tort* — *Counterclaim for Distinct Tort.* — Wrege v. Jones, 13 N. Dak. 267; Roberts v. Jones, 71 S. Car. 404.
- 600.** 1. *Actions for Tort* — *Counterclaim on Distinct Contract.* — Thomssen v. Ertz, 93 Minn. 280; Potter v. Lohse, 31 Mont. 91.
- 601.** 3. *Counterclaims Involving Sales.* — O'Brien v. Dwyer, 76 N. Y. App. Div. 516.
- 602.** 1. *Counterclaim Between Landlord and Tenant.* — Ingram v. Dailey, 123 Iowa 188; Roberts v. Jones, 71 S. Car. 404.
- 2.** *Replevin* — *Defendant May Counterclaim for Overpayment on Goods.* — McCormick Harvesting Mach. Co. v. Hill, 104 Mo. App. 544.
- 603.** 7. *Judgments as Counterclaims.* — Dowdell v. Carpy, 137 Cal. 333; Hart v. Godkin, 122 Wis. 646.
- 604.** 2. *General Rule.* — Scarritt Estate Co. v. J. F. Schmelzer, etc., Arms Co., 110 Mo. App. 406. See also Richter v. Hanneman, 119 Fed. Rep. 471.
- Bailee May Counterclaim for Conversion of Bailed Property.* — Langfelder v. Renouf, (Supm. Ct. App. T.) 84 N. Y. Supp. 236.
- 5.** *Claim of Undisclosed Principal Cannot Be Set Off in Suit Against Agent.* — Gibbony v. Wayne, 141 Ala. 300.
- 605.** 1. *Claims in Different Capacity.* — See Richter v. Hanneman, 119 Fed. Rep. 471.
- 4.** *Claims Against Assignor.* — State Bank v. Hayes, 16 S. Dak. 365.
- 608.** 1. *Not Allowed Against Government.* — U. S. v. Warren, 12 Okla. 350.
- 5.** See U. S. v. Warren, 12 Okla. 350.
- 609.** 1. *Connection with Subject-matter of Action.* — Le Clare v. Thibault, 41 Oregon 601.
- 2.** *Equity Jurisdiction.* — Jenkins v. Baltimore, etc., R. Co., 98 Md. 402; Le Clare v. Thibault, 41 Oregon 601.
- 610.** 3. *Power of Court of Equity.* — Coonan v. Loewenthal, 147 Cal. 218; Leathe v. Thomas, 109 Ill. App. 434; Collins v. Campbell, 97 Me. 23, 94 Am. St. Rep. 458; Martin County Nat. Bank v. Bird, 92 Minn. 110; Wabash R. Co. v. Bowring, 103 Mo. App. 158; Tice v. Fleming, 173 Mo. 49; Oliver v. Canan, 71 Ohio St. 360; Leitz v. Hohman, 22 Pa. Super. Ct. 1, 207 Pa. St. 289, 99 Am. St. Rep. 791.
- 4.** Collins v. Campbell, 97 Me. 23, 94 Am. St. Rep. 458; Leitz v. Hohman, 207 Pa. St. 289, 99 Am. St. Rep. 791.

- 612.** See note 1.
613. 2. Basis of Power. — See note 1.
614. 3. Discretion of Court — Courts of Law. — See notes 1, 4, 5.
 A Party Applying to a Court of Equity. — See note 6.
 4. To Whom Relief Granted. — See note 7.
615. See notes 1, 4.
 A Bona Fide Assignee. — See note 5.
616. 5. Protection of Rights of Third Persons. — See note 5.
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618. See notes 1, 2, 5.
619. See note 1.
620. 6. Requisites of Judgment — *a.* IN GENERAL. — See note 2.
623. *c.* JUDGMENTS IN DIFFERENT COURTS. — See note 4.
d. NATURE OF CLAIMS ON WHICH JUDGMENTS WERE BASED —
 (1) *In General.* — See notes 8, 9.
624. See note 4.
 (2) *Exemptions.* — See notes 5, 6.
625. *e.* MUTUALITY OF PARTIES. — See note 2.
626. *f.* JUDGMENTS IN INDIVIDUAL AND REPRESENTATIVE CAPACITIES. — See note 2.

627. SETTLE, SETTLEMENT, ETC. — Pay — Payment — Adjustment. — See note 3.

610. 5. Power of Law Courts. — Collins *v.* Campbell, 97 Me. 23, 94 Am. St. Rep. 458; Martin County Nat. Bank *v.* Bird, 92 Minn. 110; Leitz *v.* Hohman, 207 Pa. St. 289, 99 Am. St. Rep. 791.

612. 1. Power Exercised on Equitable Principles. — Wabash R. Co. *v.* Bowring, 103 Mo. App. 158; Leitz *v.* Hohman, 22 Pa. Super. Ct. 1, 207 Pa. St. 289, 99 Am. St. Rep. 791.

The Criterion. — Collins *v.* Campbell, 97 Me. 23, 94 Am. St. Rep. 458.

613. 1. Basis of Power — Control over Suits. — Coonan *v.* Loewenthal, 147 Cal. 218; Collins *v.* Campbell, 97 Me. 23, 94 Am. St. Rep. 458; Martin County Nat. Bank *v.* Bird, 92 Minn. 110; Leitz *v.* Hohman, 207 Pa. St. 289, 99 Am. St. Rep. 791.

614. 1. Discretion of Court. — Collins *v.* Campbell, 97 Me. 23, 94 Am. St. Rep. 458; Martin County Nat. Bank *v.* Bird, 92 Minn. 110; Leitz *v.* Hohman, 22 Pa. Super. Ct. 1, 207 Pa. St. 289, 99 Am. St. Rep. 791. See also Wabash R. Co. *v.* Bowring, 103 Mo. App. 158.

4. Martin County Nat. Bank *v.* Bird, 92 Minn. 110.

5. Leitz *v.* Hohman, 22 Pa. Super. Ct. 1.

6. Equity. — Leitz *v.* Hohman, 207 Pa. St. 289, 99 Am. St. Rep. 791.

7. To Whom Relief Granted. — Compare Collins *v.* Campbell, 97 Me. 23, 94 Am. St. Rep. 458.

615. 1. Collins *v.* Campbell, 97 Me. 23, 94 Am. St. Rep. 458.

4. Equitable Ownership. — See Collins *v.* Campbell, 97 Me. 23, 94 Am. St. Rep. 458.

5. Assignee. — See Martin County Nat. Bank *v.* Bird, 92 Minn. 110.

616. 5. Lien of Attorney for Costs. — L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., (C. C. A.) 128 Fed. Rep. 332.

617. 2. Assignee Takes Subject to Existing Right of Set-off. — Coonan *v.* Loewenthal, 147 Cal. 218; Wabash R. Co. *v.* Bowring, 103 Mo.

App. 158. See also Collins *v.* Campbell, 97 Me. 23, 94 Am. St. Rep. 458.

618. 1. Coonan *v.* Loewenthal, 147 Cal. 218; Collins *v.* Campbell, 97 Me. 23, 94 Am. St. Rep. 458; Wabash R. Co. *v.* Bowring, 103 Mo. App. 158.

2. Coonan *v.* Loewenthal, 147 Cal. 218; Wabash R. Co. *v.* Bowring, 103 Mo. App. 158.

5. Assignee of Demand Prior to Judgment. — L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., (C. C. A.) 128 Fed. Rep. 332, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 618.

619. 1. L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., (C. C. A.) 128 Fed. Rep. 332, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 618.

620. 2. Frye-Bruhn Co. *v.* Meyer, (C. C. A.) 121 Fed. Rep. 533.

623. 4. Compare Frye-Bruhn Co. *v.* Meyer, (C. C. A.) 121 Fed. Rep. 533, holding that a foreign judgment cannot be set off until sued upon and put into judgment in the state where the action is brought.

8. Nature of Claims on Which Judgments Based. — Leitz *v.* Hohman, 22 Pa. Super. Ct. 1.

9. Cole *v.* Shanahan, 24 R. I. 427. But see Leitz *v.* Hohman, 207 Pa. St. 289, 99 Am. St. Rep. 791.

624. 4. Compare Leitz *v.* Hohman, 207 Pa. St. 289, 99 Am. St. Rep. 791.

5. Exemptions. — See Staggs *v.* Piland, 31 Tex. Civ. App. 245.

6. Treat *v.* Wilson, 65 Kan. 729; Wabash R. Co. *v.* Bowring, 103 Mo. App. 158; Leitz *v.* Hohman, 22 Pa. Super. Ct. 1. See also Thompson *v.* Thompson, 117 Ky. 526.

625. 2. Collins *v.* Campbell, 97 Me. 23, 94 Am. St. Rep. 458.

626. 2. Martin County Nat. Bank *v.* Bird, 92 Minn. 110.

627. 3. Accounting — Adjustment. — Greene County *v.* Light, 72 Ark. 41.

630. SEVERABLE CONTRACTS. — See note 2.

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631. SEVERANCE. — See note 2.

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630. 2. Severable Contracts. — *Miller v. Delaware Ins. Co.*, 14 Okla. 81.

5. "Several" Construed as Meaning "Respective." — *Brown v. Hawkins*, 26 R. I. 400.

631. 2. Severance. — *Wormley v. Wormley*, 207 Ill. 422, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 631. See generally ENCYC. OF PL. AND PR., titles ANSWERS IN CODE PLEADING, vol. 1, p. 861; PLEAS AT LAW, vol. 16, p. 579.

6. English Statute. — *Haedicke v. Friern Barnet Urban Dist. Council*, (1904) 2 K. B. 807; *Thompson v. Eccles. Corp.*, (1904) 2 K. B. 1; *Jackson v. Wimbledon Urban Dist. Council*, (1904) 2 K. B. 359; *Wilkinson v. Llandaff, etc., Rural Dist. Council*, (1903) 2 Ch. 695; *Silles v. Fulham Borough Council*, (1903) 1 K. B. 829.

SHALL.

633. I. STATUTES — 1. Construed as Mandatory. — See note 1.

634. 2. Construed as Permissive. — See note 1.

635. III. FUTURITY. — See note 2.

636. SHARE — Share of Stock. — See note 4.

633. 1. Construed as Mandatory. — *Madderom v. Chicago*, 194 Ill. 572; *Warfield-Pratt-Howell Co. v. Averill Grocery Co.*, 119 Iowa 75.

634. 1. Construed as Permissive. — *State v. Douglas County*, 27 Nev. 469; *Sherrod v. Hughes*, 110 Tenn. 311.

635. 2. Futurity. — *Com. v. Mathues*, 210

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636. 4. Share of Stock. — *Cummings v. People*, 211 Ill. 392.

SHELLEY'S CASE (RULE IN).

By O. D. ESTEE.

639. I. STATEMENT AND ORIGIN OF RULE. — See note 1.

640. II. NOT RULE OF INTENTION. — See note 3.

641. See note 1.

650. III. GENERAL REVIEW OF RULE — 7. Limitation Must Be to Heirs qua Heirs — *a. GENERAL PRINCIPLE.* — See note 1.

651. Children. — See note 2.

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652. Superadded Words. — See note 2.

639. 1. Statement of Rule. — *Lacy v. Floyd*, (Tex. Civ. App. 1905) 84 S. W. Rep. 857.

640. 3. Not Rule of Intention. — *Decmer v. Kessinger*, 206 Ill. 57; *Wool v. Fleetwood*, 136 N. Car. 460, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 640.

641. 1. Express Declaration Against Operation of Rule. — *Wool v. Fleetwood*, 136 N. Car. 460, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 640 [641].

650. 1. Heirs qua Heirs. — *Wool v. Fleet-*

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651. 2. Remainder to "Children." — *Hauser v. Craft*, 134 N. Car. 319.

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653. 3. Illinois. — *Deemer v. Kessinger*, 206 Ill. 57.

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SHERIFFS AND CONSTABLES.

BY H. N. ELDRIDGE.

664. IV. APPOINTMENT OR ELECTION — 4. Appointment to Fill Vacancy — Sheriffs. — See notes 4, 7.

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669. VIII. POWERS, DUTIES, AND LIABILITIES — 1. In General — Mandamus to Compel Performance of Duties. — See note 13.

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666. 2. Validity as Common-law Bond. — *Hines v. Norris*, (Tex. Civ. App. 1904) 81 S. W. Rep. 791.

667. 10. Holding Over. — See *Hammondsport Law, etc., Assoc. v. Kinzell*, (County Ct.) 43 Misc. (N. Y.) 505.

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669. 13. Mandamus Lies to Compel Performance. — *State v. Stokes*, 99 Mo. App. 236.

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671. 3. Attendance at Court. — See *Johnson v. Price*, (Fla. 1904) 36 So. Rep. 1031.

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674. 2. Requirement as to Recordation Directory Merely. — *Orchard v. Peake*, 69 Kan. 510.

5. Constable Cannot Appoint Special Deputy to Sell under Execution. — *Stacy v. Bernard*, (Colo. App. 1904) 78 Pac. Rep. 615.

675. 6. Deputy May Appraise and Sell Land under Decree of Foreclosure. — *Post v. Smith*, (Neb. 1901) 95 N. W. Rep. 500.

676. 8. Cases Declaring Liability of Sheriff for Deputy. — *Stephens v. Head*, 138 Ala. 455; *Fields v. Vallance*, (Ky. 1905) 87 S. W. Rep. 770; *Bowditch v. Harmon*, 183 Mass. 290; *Parrott v. McDonald*, (Neb. 1904) 100 N. W. Rep. 132.

677. 4. Unofficial Acts of Deputy. — *Munis v. Oliver*, 24 Pa. Super. Ct. 64.

- 678.** See note 2.
- 679.** (3) *Action to Enforce Liability, Evidence, and Damages* — Damages Compensatory and Exemplary. — See note 6.
- 680.** 10. In Regard to Execution of Civil Process — *a. DUTY TO EXECUTE AND LIABILITY FOR NOT EXECUTING* — (1) *In General* — (a) *Duty to Execute and Return.* — See note 5.
- 684.** (g) *Liability for Defaults in Regard to Sale of Property.* — See note 5.
- 685.** (2) *When Title to Property Disputed* — (b) *Indemnity* — *aa. RIGHT TO DEMAND.* — See notes 1, 2.
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- 690.** (6) *Excuses and Defenses* — (a) *Press of Business.* — See note 1.
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- 691.** (f) *Execution Impossible Notwithstanding Use of Due Diligence.* — See note 2.
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- 694.** (7) *Evidence — Burden of Proof* — (a) *In General.* — See note 6.
- 695.** (8) *Damages* — (a) *In General.* — See note 5.
- 696.** See note 1.
- 697.** *b. PROTECTION AFFORDED BY PROCESS* — (1) *General Rules* — *Process Fair on Face.* — See note 7.
- 698.** *Process Void on Face.* — See note 4.

678. 2. No Liability on Deputy's Unofficial Contracts. — *Munis v. Oliver*, 24 Pa. Super. Ct. 66.

679. 6. Compensatory Damages Alone Unless Deputy's Act Ratified. — *Foley v. Martin*, 142 Cal. 261.

680. 5. Officers Liable for Failure to Execute and Return Process in General. — Beck, etc., *Hardware Co. v. Knight*, 121 Ga. 287; *State v. Rainey*, 99 Mo. App. 218; *State v. Stokes*, 99 Mo. App. 236.

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684. 5. Officer Liable for Refusal or Neglect to Sell Property. — *Crowe v. Buchanan*, 36 Nova Scotia 1. See also *Moore v. Rooks*, 71 Ark. 562.

685. 1. Indemnity — Doubt as to Ownership. — See *People v. Finch*, 19 Colo. App. 512.

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687. 4. To Sheriff by Contract. — *Leader v. Mattingly*, 140 Ala. 444.

5. Sheriff May Sue Before Paying Judgment. — *Teague v. Collins*, 134 N. Car. 62.

689. 2. Officer Liable for Contempt of Court. — Beck, etc., *Hardware Co. v. Knight*, 121 Ga. 287.

4. Action Maintainable upon Official Bond. — Beck, etc., *Hardware Co. v. Knight*, 121 Ga. 287. See also *People v. Finch*, 19 Colo. App. 512.

5. Officer Liable to Amercement in Summary Proceeding. — See *Johnson v. Price*, (Fla. 1904) 36 So. Rep. 1031.

690. 1. Press of Business No Excuse. — *Johnson v. Price*, (Fla. 1904) 36 So. Rep. 1032.

citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 690.

5. Irregularities in Process, Proceedings, or Judgment No Defense. — *Johnson v. Price*, (Fla. 1904) 36 So. Rep. 1031.

691. 2. Execution Impossible. — Beck, etc., *Hardware Co. v. Knight*, 121 Ga. 287. See also *Johnson v. Price*, (Fla. 1904) 36 So. Rep. 1031; *Hale v. Bickett*, 34 Tex. Civ. App. 369.

692. 1. Good Defense that Debtor Had No Property Subject to Process. — See *Johns v. Robinson*, 119 Ga. 59.

4. Omission Due to Plaintiff's Conduct or Instructions. — *Parrott v. McDonald*, (Neb. 1904) 100 N. W. Rep. 132.

5. Omission Due to Conduct or Instructions of Attorney. — *Parrott v. McDonald*, (Neb. 1904) 100 N. W. Rep. 132.

694. 6. Burden of Proving Matters of Defense or in Mitigation of Damages. — Beck, etc., *Hardware Co. v. Knight*, 121 Ga. 287; *Johns v. Robinson*, 119 Ga. 59.

695. 5. Prima Facie Measure of Damages. — *Hale v. Bickett*, 34 Tex. Civ. App. 369.

No Presumption as to Measure of Damages in Suit for Failure to Execute Mesne Process. — Beck, etc., *Hardware Co. v. Knight*, 121 Ga. 287.

696. 1. Insolvency of Execution Defendant. — Compare *Hale v. Bickett*, 34 Tex. Civ. App. 369.

697. 7. Process Fair on Face Protects. — *Adamson v. Noble*, 137 Ala. 668.

698. 4. Process Void on Face. — *Hagar v. Haas*, 66 Kan. 333.

Void Process Properly Excluded from Evidence. — *Stephens v. Head*, 138 Ala. 455.

- 699.** (3) *Superseded Process*. — See note 8.
 (4) *As Affected by Questions of Jurisdiction*. — See note 11.
- 701.** *c. TORTIOUS ACTS COMMITTED UNDER COLOR OF VALID PROCESS* — (2) *Oppressive Use of Process*. — See note 6.
 (3) *Excessive Levy*. — See note 7.
- 702.** (6) *Seizing Property Not Subject to Writ* — (a) *General Rule*. — See note 2.
- 704.** (c) *Confusion of Goods*. — See note 1.
 (d) *Property Fraudulently Conveyed*. — See note 3.
- 705.** (12) *Failure to Discharge Liens on Property*. — See note 4.
 (16) *Measure of Damages*. — See note 10.
- 706.** 11. *In Regard to Property Held under Process* — *a. DUTY TO RETAIN POSSESSION* — (1) *In General*. — See note 5.
- 707.** *Termination of Duty to Hold*. — See note 10.
- 708.** (2) *Delivery to Receiptor* — (a) *In General* — *Liability of Officer for Receiptor's Acts*. — See note 4.
- 712.** *b. LIABILITY FOR INJURY TO OR LOSS OF PROPERTY* — *The Officer Is Not an Insurer*. — See note 4.
- 714.** 12. *In Regard to Funds* — *a. LIABILITY FOR FAILURE TO PAY OVER* — (1) *In General*. — See note 6.
- 715.** (4) *Statutory Penalties for Wrongful Detention*. — See note 7.
- 716.** *c. LIABILITY FOR TAXES*. — See note 3.
d. CONDITIONS PRECEDENT TO LIABILITY — (3) *Order of Court*. — See note 10.
- 719.** 14. *Liabilities for Taking Insufficient Security* — *a. IN GENERAL*. — See note 2.
- 720.** *e. DAMAGES RECOVERABLE*. — See note 8.
 15. *Criminal Liability*. — See note 12.

699. 8. *Superseded Process*. — *Western Seed, etc., Co. v. McDonald*, (Neb. 1904) 99 N. W. Rep. 517. See also *Wilbur v. Stokes*, 117 Ga. 545.

11. *Jurisdiction of Subject-matter* — *Officer Protected*. — *Wilbur v. Stokes*, 117 Ga. 545; *Magerstadt v. People*, 105 Ill. App. 316; *State v. Rainey*, 99 Mo. App. 218.

701. 6. *Oppressive Use or Abuse of Process*. — See *Ahearn v. Connell*, 72 N. H. 238.

7. *Excessive Levy*. — See *Burdge v. Kelchner*, 66 Kan. 642.

702. 2. *Seizure of Property Not Authorized to Be Seized* — *Property of Third Person*. — *Adams v. Noble*, 137 Ala. 668; *Burton v. Dangerfield*, 141 Ala. 285; *Rasco v. Jefferson*, (Ala. 1905) 38 So. Rep. 246; *Hunt v. Hammel*, 142 Cal. 456; *Baum v. Turner*, (Ky. 1903) 76 S. W. Rep. 129; *Aldous v. Olverson*, 17 S. Dak. 190. See also *Beaman v. Stewart*, 19 Colo. App. 222.

704. 1. *Confusion of Goods*. — See the title *EXECUTIONS*, 659. 2.

3. *Property Fraudulently Conveyed*. — *Carson v. Hawley*, (C. C. A.) 122 Fed. Rep. 55, holding further that the officer is not affected by any subsequent affirmation or ratification of the sale made without his consent; *Williams v. Finlayson*, (Fla. 1905) 38 So. Rep. 50.

705. 4. *Failure to Discharge Mortgages and Liens*. — *Fletcher v. Wrighton*, 184 Mass. 547.

10. *Value of Goods Converted*. — *Beaman v. Stewart*, 19 Colo. App. 222, holding it to be

immaterial that the owner of the goods paid only a normal price for them.

706. 5. *Leaving Property with Defendant*. — *Johns v. Robinson*, 119 Ga. 59.

707. 10. *Lien Dissolved by Operation of Law*. — *Hennessey First Nat. Bank v. Hesser*, 14 Okla. 115.

708. 4. *Liability of Officer for Acts of Receiptor*. — *Fields v. Vallance*, (Ky. 1905) 87 S. W. Rep. 770.

712. 4. *Officer Not Insurer*. — *O'Bryan v. Webb*, 142 Ala. 259, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 712; *Standard Wine Co. v. Chipman*, 135 Mich. 273, 106 Am. St. Rep. 394.

714. 6. *Officer Liable for Wrongful Failure to Pay over in General*. — *Yank v. Bordeaux*, 29 Mont. 74.

715. 7. *Statutory Penalties for Failure to Pay over Money*. — *Rickards v. Bemis*, (Tex. Civ. App. 1903) 78 S. W. Rep. 239.

716. 3. *Liability for Taxes*. — *Baker County v. Huntington*, (Oregon 1905) 79 Pac. Rep. 187.

10. See *Rickards v. Bemis*, (Tex. Civ. App. 1903) 78 S. W. Rep. 239.

719. 2. *Insufficient Replevin Bond*. — *Stern v. Knowlton*, 184 Mass. 29.

720. 8. *Measure of Damages*. — *Stern v. Knowlton*, 184 Mass. 29.

12. *Indictable for Wilful Breach of Duty*. — *Ormond v. Ball*, 120 Ga. 916 (refusal to execute warrant).

723. IX. LIABILITIES ON OFFICIAL BONDS — 1. Nature and Extent of Liability — *a.* IN GENERAL — Bond Strictly Construed. — See note 5.

c. ACTS DONE IN OFFICIAL CAPACITY. — See note 10.

724. *e.* DISTINCTION BETWEEN VIRTUE OF OFFICE AND COLOR OF OFFICE. — See notes 12, 13.

726. *g.* AMOUNT OF LIABILITY — (2) Liability for Statutory Penalties. — See note 4.

2. Liability for Particular Acts or Omissions — *a.* BREACHES OF DUTY IN REGARD TO EXECUTION OF PROCESS. — See notes 8, 11, 19.

727. *c.* SEIZURE OF EXEMPT PROPERTY — Sale of Exempt Property. — See note 10.

730. X. COMPENSATION — 1. In General. — See note 3.

2. Salary and Fees. — See note 5.

735. 3. Expenses and Unofficial Services. — See note 3.

723. 5. Strict Construction. — *Felonicher v. Stingley*, 142 Cal. 630.

10. Official Acts. — *Felonicher v. Stingley*, 142 Cal. 630; *Black v. Moore*, 35 Tex. Civ. App. 613.

724. 12. Not Liable for Acts Done Colore Officii. — See *Huddleson v. Polk*, (Neb. 1903) 97 N. W. Rep. 624; *Comstock-Castle Stove Co. v. Caulfield*, (Neb. 1901) 95 N. W. Rep. 783.

13. Distinction Disregarded. — *Hall v. Tierney*, 89 Minn. 407. See also *State v. Dierker*, 101 Mo. App. 636.

726. 4. Penalties. — *Compare Moore v. Rooks*, 71 Ark. 562.

8. Liable for Refusal of Constable to Serve Execution. — *State v. Rainey*, 99 Mo. App. 218.

11. Death of Officer Good Defense for Failure to Return Execution. — *Moore v. Rooks*, 71 Ark. 562.

19. Liable for Sheriff's Failure to Account for Money Deposited with Him as Indemnity. — *Comstock-Castle Stove Co. v. Caulfield*, (Neb. 1901) 95 N. W. Rep. 783.

727. 10. Fowler v. State, 99 Md. 594. See also *Baughn v. Allen*, (Tex. Civ. App. 1903) 73 S. W. Rep. 1063.

730. 3. Constitutionality and General Construction of Various Statutes. — *People v. Leech*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 435.

5. Attendance upon Courts. — *People v. Livingston County*, 89 N. Y. App. Div. 152; *Robinson v. Smith County*, 33 Tex. Civ. App. 251.

Service of Subpœnas. — *Deitrick v. Northumberland County*, 24 Pa. Super. Ct. 22; *O'Leary v. Northumberland County*, 24 Pa. Super. Ct. 24.

Services at Elections — Making Returns to Court. — *Edwards v. McLean*, 23 Pa. Super. Ct. 43.

Service of Writ of Certiorari. — *McMichael v. Southern R. Co.*, 117 Ga. 518.

Right to Poundage on Termination of Attachment. — *Plummer v. International Power Co.*, 88 N. Y. App. Div. 452; *O'Brien v. American Surety Co.*, 88 N. Y. App. Div. 526; *O'Brien v. Allen*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 693; *B. P. Ducas Co. v. American Silk Dyeing, etc., Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 878.

735. 3. Expense of Keeping and Caring for Property Levied Upon. — *Alexander v. Wilson*, 145 Cal. xviii, 79 Pac. Rep. 274.

SHERIFFS' SALES.

BY H. N. ELDRIDGE.

747. V. WHAT MAY BE SOLD — 1. In General. — See note 7.

2. Personality Primarily Liable. — See note 11.

748. 8. Equitable Estates. — See note 8.

750. 15. Homestead — *a.* IN GENERAL. — See note 7.

b. RESERVATION. — See note 10.

754. VII. WHO MAY PURCHASE — 1. Sheriff. — See note 3.

747. 7. Land Encumbered by Liens Salable Subject to Liens. — *Weber v. Gardner*, (Ky. 1904) 80 S. W. Rep. 481.

11. See Allen v. Farley, (Ky. 1903) 76 S. W. Rep. 538.

748. 8. Land Held on Secret Trust for Debtor Not Subject to Levy. — *Macfarlane v. Dorsey*, (Fla. 1905) 38 So. Rep. 512.

750. 7. Homestead. — *Herring v. Johnston*,

(Ky. 1903) 72 S. W. Rep. 793; *Flynn v. Kalamazoo Circuit Judge*, 136 Mich. 23; *Whitworth v. McKee*, 32 Wash. 83.

10. Sale Void. — See *Kessner v. Phillips*, 189 Mo. 515.

754. 3. Bidding as Agent. — *Trank v. Gysling*, 13 Pa. Dist. 714, 30 Pa. Co. Ct. 386, quoting 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 754, and supporting the whole text paragraph,

- 755.** 5. Execution Plaintiff. — See notes 3, 4.
 6. Execution Defendant. — See note 10.
- 756.** 8. Fraudulent Grantee. — See note 4.
- VIII. APPRAISEMENT — 1. Necessity For. — See note 8.
- 757.** 2. Who May Act as Appraisers — *a.* STATUTORY QUALIFICATIONS. — See note 5.
- 759.** 8. Vacation of Appraisal — *b.* GROUNDS FOR VACATING. — See note 5.
- 760.** IX. ADVERTISEMENT OR NOTICE OF SALE — 1. Necessity For — *a.* IN GENERAL. — See note 2.
b. NOTIFYING DEFENDANT. — See note 3.
 2. Methods of Advertising — *a.* POSTING NOTICES. — See note 4.
- 762.** 6. Effect of Failure to Give Notice, or Defect Therein. — See note 12.
- 763.** 8. Presumption that Proper Notice Was Given. — See note 4.
 X. TIME OF SALE — 1. Statutory Regulation. — See note 6.
 3. Holidays and Sundays. — See note 10.
- 765.** XI. PLACE OF SALE — 2. Regulated by Statute. — See note 8.
- 769.** XIV. MODE OF SALE — 2. Dividing Property — *a.* DISCRETION OF OFFICER. — See note 2.
 3. When Sale en Masse Is Proper — *a.* SALE IN PARCELS IMPRACTICABLE. — See note 5.
b. WHERE THERE ARE NO BIDS ON SEPARATE PARCELS. — See note 6.
- 770.** 5. Waiver of Sale in Parcels by Defendant. — See note 4.
- 771.** XV. GENERAL CONDUCT OF SALE — 1. In General. — See note 1.
 XVI. BIDS — 2. Sale to Highest Bidder. — See note 12.
- 775.** XX. CERTIFICATE OF SALE — 1. Necessity For. — See note 1.
 3. Requisites — *a.* DESCRIPTION OF PROPERTY — SUFFICIENCY. — See note 3.
- 776.** *d.* CONSTRUCTION OF CERTIFICATE — Operation of Certificate as Conveyance. — See note 5.

755. 3. Execution Plaintiff May Purchase. — See *Beidler v. Beidler*, 71 Ark. 318; *Burton v. Kipp*, 30 Mont. 275.

4. Chargeable with Notice of Irregularities. — See *Throckmorton v. O'Reilly*, (N. J. 1903) 55 Atl. Rep. 56.

10. See *Atlee v. Bullard*, 123 Iowa 274, holding that a surety may purchase his principal's property where a judgment has been entered against both.

756. 4. Fraudulent Grantee. — See *Edwards v. Olin*, 121 Iowa 143.

Fraudulent Grantee Wife of Execution Debtor. — *Bracken v. Milner*, 99 Mo. App. 187.

8. No Appraisal of Realty Necessary in Kansas. — *Armstead v. Jones*, (Kan. 1905) 80 Pac. Rep. 56.

757. 5. Qualifications. — See *White v. Laurel Land Co.*, (Ky. 1904) 82 S. W. Rep. 571 (disinterested and intelligent housekeeper may act though a minor); *Flynn v. Kalamazoo Circuit Judge*, 136 Mich. 23 (persons qualified to act as jurors required).

759. 5. Appraisement Can Be Assailed Only for Fraud. — See *Hamilton v. Perry*, (Ky. 1903) 76 S. W. Rep. 52.

760. 2. Notice of Sale. — *Burton v. Kipp*, 30 Mont. 275.

3. Personal Notice Required Where Interest in Realty Sold. — *Reilley v. Anderson*, 33 Wash. 58.

4. Posting Notice. — *Whitworth v. McKee*, 32 Wash. 83.

762. 12. Failure to Give Notice — Defects in Notice. — *Burton v. Kipp*, 30 Mont. 275; *Whitworth v. McKee*, 32 Wash. 83. Compare *Reilley v. Anderson*, 33 Wash. 58.

763. 4. See *White v. Laurel Land Co.*, (Ky. 1904) 82 S. W. Rep. 571; *Whitworth v. McKee*, 32 Wash. 83.

6. Time of Sale. — *Scott v. Powers*, (Ky. 1904) 78 S. W. Rep. 408.

10. *Lumpkin v. Cureton*, 119 Ga. 64.

765. 8. *Jones v. Rogers*, 85 Miss. 802.

769. 2. *Palmour v. Roper*, 119 Ga. 10.

Statute Empowering Debtor to Direct Order of Sale. — See *Burton v. Kipp*, 30 Mont. 275.

5. When Sale en Masse Proper. — *Palmour v. Roper*, 119 Ga. 10.

6. *Burton v. Kipp*, 30 Mont. 275.

770. 4. See *Allen v. Farley*, (Ky. 1903) 76 S. W. Rep. 538.

771. 1. Sheriff Involuntary Agent of Debtor in Effecting Conveyance. — *Brady v. Carteret Realty Co.*, 66 N. J. Eq. 243.

12. See *Burton v. Kipp*, 30 Mont. 275.

775. 1. Certificate Not Prerequisite to Execution of Sheriff's Deed. — *Armstead v. Jones*, (Kan. 1905) 80 Pac. Rep. 56.

3. See *McCormick v. McCormick Harvesting Mach. Co.*, 120 Iowa 593.

776. 5. *Dixon v. Dixon*, 89 N. Y. App. 603, reversing on other grounds 38 Misc. (N. Y.) 652.

- 777.** XXI. SHERIFF'S RETURN OF SALE — 2. Office of Return. — See note 6.
- 778.** 3. Necessity of Return — *a.* IN GENERAL — False Return. — See note 2.
- 779.** 4. Requisites of Return. — See note 1.
5. Effect of Return as Evidence — *a.* AS BETWEEN PARTIES. — See note 2.
- 780.** 6. Construction of Return — *c.* PRESUMPTION. — See note 6.
7. Amendment of Return. — See note 7.
- 781.** See note 1.
- XXII. CONFIRMATION OF SALE — 2. Necessity of Confirmation. — See note 4.
3. Right to Have Sale Confirmed. — See note 6.
- 782.** 8. Appeal from Order of Confirmation. — See note 5.
- 786.** XXIII. VACATION OF SALE — 3. Grounds for Vacating Sale —
- b.* FRAUD — In General. — See note 8.
- 790.** *f.* IRREGULARITIES IN WRIT OF EXECUTION. — See note 3.
- h.* SALE AFTER PAYMENT OR DISCHARGE OF JUDGMENT. — See note 5.
- 791.** *k.* EXCESSIVE LEVY. — See note 2.
- l.* FAILURE TO GIVE NOTICE OF SALE. — See note 3.
- m.* INADEQUACY OF PRICE — (1) *Statement of General Rules.* — See note 4.
- 793.** Where Inadequacy of Price Is So Gross as to Shock Conscience. — See note 2.
- (4) *Gross Inadequacy of Price Accompanied by Other Circumstances of Inequity* — In General. — See note 5.
- 797.** *n.* MISCELLANEOUS GROUNDS. — See note 7.
- 777.** 6. Return Insufficient to Pass Title. — Jones *v.* Rogers, 85 Miss. 802.
- 778.** 2. False Return. — See Philadelphia Sav. Fund Soc. *v.* Purcell, 24 Pa. Super. Ct. 205.
- 779.** 1. Requisites of Return. — See Jones *v.* Rogers, 85 Miss. 802, wherein the description of the property was held to be insufficient.
- Return Should Show Publication of Notice. — Hazen *v.* Webb, 68 Kan. 308.
- For a Sufficient Record of Return, see Boyer *v.* Webber, 22 Pa. Super. Ct. 35.
2. Conclusive as Between Parties. — Flynn *v.* Kalamazoo Circuit Judge, 136 Mich. 23.
- 780.** 6. Presumption. — Whitworth *v.* McKee, 32 Wash. 83.
7. Amendment. — See Flynn *v.* Kalamazoo Circuit Judge, 136 Mich. 23.
- Sheriff Cannot Be Compelled to Perfect Incomplete Return. — Flynn *v.* Kalamazoo Circuit Judge, 138 Mich. 126.
- 781.** 1. Chambers *v.* Butte First Nat. Bank, 133 Fed. Rep. 978, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 780.
4. See Hendryx *v.* Evans, 120 Iowa 310.
6. Right to Have Sale Confirmed. — Crouch *v.* Dakota, etc., R. Co., (S. Dak. 1904) 101 N. W. Rep. 727, holding that the court cannot look beyond the report of sale.
- 782.** 5. Appeals. — See Hendryx *v.* Evans, 120 Iowa 310, holding that the order of confirmation continues in full force during the pendency of an appeal.
- 786.** 8. Fraud as Ground for Vacating Sale. — See Lengert *v.* Chaninell, 208 Pa. St. 229, 101 Am. St. Rep. 931.
- Inadequate Appraisal and Purchase by Appraiser. — Hamilton *v.* Perry, (Ky. 1903) 76 S. W. Rep. 52.
- 790.** 3. Sale on Execution Not Signed by Proper Officer Void. — Merguire *v.* O'Donnell, 139 Cal. 6, 96 Am. St. Rep. 91.
5. Sale After Payment or Discharge of Judgment. — See Hamilton *v.* Perry, (Ky. 1903) 76 S. W. Rep. 52.
- 791.** 2. Excessive Levy. — Compare McCoy *v.* Brooks, (Ariz. 1905) 80 Pac. Rep. 365.
- Excessive Levy Through Debtor's Fault Not Ground for Setting Aside. — Lumpkin *v.* Cureton, 119 Ga. 64.
3. Vacation of Sale Because of Failure to Give Notice to Defendant in Execution. — Moore *v.* Snowball, 36 Tex. Civ. App. 495, holding further that a return of notice may be impeached in the proceeding.
4. General Rule that Sale Will Not Be Set Aside Because of Inadequacy of Price. — Mayberry *v.* Whittier, 144 Cal. 322; Palmour *v.* Roper, 119 Ga. 10; Carpenter *v.* Anderson, 33 Tex. Civ. App. 484; Bank *v.* Doherty, 37 Wash. 32.
- Question of Inadequacy of Price Raised but Not Decided. — Wenham *v.* International Packing Co., 213 Ill. 397.
- 793.** 2. Where Inadequacy of Price Is So Gross as to Shock Conscience. — McCoy *v.* Brooks, (Ariz. 1905) 80 Pac. Rep. 365; Carpenter *v.* Anderson, 33 Tex. Civ. App. 484. See also Throckmorton *v.* O'Reilly, (N. J. 1903) 55 Atl. Rep. 56.
5. Gross Inadequacy of Price Accompanied by Other Circumstances of Inequity. — Barstow *v.* Beckett, 122 Fed. Rep. 140; Simmons *v.* Sharpe, 138 Ala. 451; McKenzie *v.* Pound, 121 Ga. 708; Burton *v.* Kipp, 30 Mont. 275. See also Bank *v.* Doherty, 37 Wash. 32.
- 797.** 7. Refusal to Accept Payment of Judgment and Costs Sufficient. — McCoy *v.* Brooks, (Ariz. 1905) 80 Pac. Rep. 365.

- 798.** 4. Time of Making Objection — Estoppel — *a.* LACHES. — See note 1.
- 799.** Excuse for Laches. — See note 2.
After Delivery of Deed to Purchaser. — See note 5.
After Time for Redemption Has Expired. — See note 7.
- 803.** 7. Protection of Purchasers Who Have Not Participated in Fraud or Irregularity — Who Are Not Bona Fide Purchasers. — See note 3.
- 804.** Reimbursement of Purchaser for Taxes and Improvements. — See note 2.
Reimbursement of Purchaser for Purchase Money Paid. — See note 4.
- 807.** XXIV. SHERIFF'S DEED — 1. Execution and Delivery — *a.* NECES-
SITY. — See note 1.
b. WHEN TO BE MADE. — See note 7.
- 808.** *c.* BY WHOM TO BE MADE. — See note 11.
- 809.** 2. Requisites — *b.* STATUTORY RECITALS. — See note 13.
- 810.** Misrecitals. — See note 5.
- 811.** See note 1.
c. DESCRIPTION OF PROPERTY. — See note 4.
- 812.** *d.* ACKNOWLEDGMENT. — See note 4.
Sufficiency. — See note 15.
- 813.** 3. Recording. — See note 4.
4. Amending or Reforming — *b.* REFORMATION BY COURT. — See
note 12.
- 814.** 6. Effect — *a.* RELATION BACK. — See notes 3, 8.
b. CONCLUSIVENESS. — See note 10.
- 815.** See note 5.
- 816.** Effect of Erroneously Executed Deed. — See note 1.

Sale of Realty Notwithstanding Existence of
Personalty Insufficient. — *Allen v. Farley*, (Ky.
1903) 76 S. W. Rep. 538.

798. 1. Laches. — *Ryan v. Woodin*, 9 Idaho
525; *Hill v. Gatliff*, 69 Kan. 179.

799. 2. Laches May Be Explained and Ex-
cused. — See *Throckmorton v. O'Reilly*, (N.
J. 1903) 55 Atl. Rep. 56.

5. Doctrine that Sale Cannot Be Set Aside on
Motion After Delivery of Deed. — *Lengert v.*
Chanel, 208 Pa. St. 229, 101 Am. St. Rep. 931.

7. After Time for Redemption Has Expired. —
Barstow v. Beckett, 122 Fed. Rep. 140 (execu-
tion defendant mentally incompetent).

803. 3. Where Purchaser Has Committed
Fraud. — *Barstow v. Beckett*, 122 Fed. Rep. 140.
See also *Carpenter v. Anderson*, 33 Tex. Civ.
App. 484.

804. 2. Reimbursement for Taxes. — *Davis*
v. Yonge, (Ark. 1905) 85 S. W. Rep. 90.

4. Reimbursement of Purchaser for Purchase
Money Paid. — *Carpenter v. Anderson*, 33 Tex.
Civ. App. 484. See also *Zimmerman v. Mc-*
Masters, (Ky. 1903) 76 S. W. Rep. 6.

Tender Held to Be Unnecessary Where Sale Void.
— *Cox v. Spurgin*, 210 Ill. 398.

807. 1. Deed Necessary to Pass Title. — See
Jones v. Rogers, 85 Miss. 802.

Presumption of Execution of Deed from Apparent
Ownership for Years. — *Manning v. Kansas, etc.,*
Coal Co., 181 Mo. 359.

7. Before Expiration of Redemption Period. —
Compare Porter v. Watson, 69 Kan. 349, hold-
ing that error in prematurely ordering a deed
may be corrected at the same term of court on
notice, no rights of third parties having inter-
vened.

808. 11. Successor May Execute Deed. —
Armstead v. Jones, (Kan. 1905) 80 Pac. Rep. 56.

809. 13. Statutory Provisions Enumerated. —
Landon v. Morris, (Ark. 1905) 86 S. W. Rep. 672.

810. 5. Misrecitals Not Fatal. — *Armstead*
v. Jones, (Kan. 1905) 80 Pac. Rep. 56.

811. 1. Variance from Return. — *Jackson v.*
Guntton, 26 Pa. Super. Ct. 203.

4. Aider by Evidence Aliunde. — *Buckner v.*
Vanceleave, 34 Tex. Civ. App. 312. See also
Edrington v. Hermann, (Tex. Civ. App. 1903)
74 S. W. Rep. 936.

812. 4. Acknowledgment Not Conclusive. —
Compare Jackson v. Guntton, 26 Pa. Super. Ct.
214, holding that the acknowledgment is a judi-
cial act, and concludes all mere irregularities.

15. Sufficiency of Acknowledgment. — *Mosier v.*
Momsen, 13 Okla. 41.

813. 4. Clerical Error as to Date of Filing
Immaterial Except as to Innocent Purchasers. —
Mason v. Perkins, 180 Mo. 702.

12. No Reformation of Void Deed. — *Landon v.*
Morris, (Ark. 1905) 86 S. W. Rep. 672.

814. 3. After Lapse of Long Period of Time.
— See *Dixon v. Dixon*, 89 N. Y. App. Div.
603, reversing on other grounds 38 Misc. (N.
Y.) 652.

8. Relation Back to Execution of Deed. — See
Mason v. Perkins, 180 Mo. 702.

10. Presumptive Evidence of Title. — *Sweeney*
v. Sweeney, 119 Ga. 76, 100 Am. St. Rep. 159;
Kimmel v. Meier, 106 Ill. App. 251; *Cummings*
v. Brown, 181 Mo. 711. See also *Jackson v.*
Guntton, 26 Pa. Super. Ct. 203.

815. 5. Not Conclusive as to Strangers. —
Compare Mason v. Perkins, 180 Mo. 702, hold-
ing that a recital of payment of the purchase
money to the sheriff was conclusive.

816. 1. Effect of Erroneously Executed Deed.
— *Manning v. Kansas, etc., Coal Co.*, 181 Mo.
359 (erroneous description of land).

821. XXVI. TITLE ACQUIRED BY PURCHASER — 4. As Affected by Irregularities in Proceedings and Sale. — See note 10.

822. 5. Quantum of Estate or Interest Acquired by Purchaser — *a.* PURCHASER ACQUIRES DEBTOR'S TITLE OR INTEREST ONLY. — See note 9.

823. See note 1.

825. *d.* AS AFFECTED BY RECORDING ACTS. — See note 1.

Effect of Notice Subsequent to Acquisition of Lien. — See note 6.

826. *e.* AS AFFECTED BY PRIOR LIENS AND INCUMBRANCES — (2) *Mortgages.* — See note 5.

828. *k.* TITLE OR INTEREST HELD BY PURCHASER DURING REDEMPTION PERIOD — (2) *Right to Possession — Rents and Profits.* — See note 10.

831. XXVII. RIGHTS AND REMEDIES OF PURCHASER — 5. Right to Avoid Previous Fraudulent Conveyance. — See note 5.

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836. *e.* SALE BY EXECUTION CREDITOR — RIGHTS OF PURCHASER — (1) *In General.* — See note 9.

840. XXIX. ENFORCEMENT OF BID — 4. By Resale and Recovery of Deficiency — *a.* IN GENERAL. — See note 3.

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848. *d.* TIME OF REDEMPTION — Extension of Time. — See note 2.

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850. XXXIII. LIABILITIES OF SHERIFF — 3. Liability to Execution Defendant — *c.* PENALTY FOR FAILURE TO GIVE NOTICE OF SALE. — See note 1.

821. 10. Purchaser Not Affected. — *Cochran v. Cochran*, (Neb. 1901) 95 N. W. Rep. 778.

822. 9. Caveat Emptor and No Warranty. — *Pullen v. Simpson*, (Ark. 1905) 86 S. W. Rep. 801; *English v. Otis*, 125 Iowa 555.

823. 1. Purchaser Takes Debtor's Title Only. — *Milner, etc., Co. v. De Loach Mill Mfg. Co.*, 139 Ala. 645, 101 Am. St. Rep. 63; *Costello v. Friedman*, (Ariz. 1903) 71 Pac. Rep. 935; *Newport Bank v. Watson*, (Ark. 1903) 74 S. W. Rep. 15; *Rippe v. Badger*, 125 Iowa 725; *Markley v. Carbondale Invest. Co.*, 67 Kan. 535; *Matador Land, etc., Co. v. Cooper*, (Tex. Civ. App. 1905) 87 S. W. Rep. 235; *Jones v. Herrick*, 35 Wash. 434. See also *Littlefield v. Ramsey*, 181 Mo. 613.

New Jersey Statute — Sheriff's Deed Passes Same Title as Deed of Bargain and Sale by Judgment Debtor. — *Brady v. Carteret Realty Co.*, 66 N. J. Eq. 243.

825. 1. Modification of Rule by Recording Acts. — *Sanger v. Collum*, (Tex. Civ. App. 1904) 78 S. W. Rep. 401.

6. Notice Before Sale Sufficient to Charge Purchaser. — *Spring v. Raymond*, 134 Mich. 84.

826. 5. Right of Purchaser to Assail Mortgage. — *Ismon v. Loder*, 135 Mich. 345.

828. 10. Purchaser Entitled to Rents and Profits During Redemption Period. — *Mau v. Kearney*, 143 Cal. 506.

Washington Statute. — *Kennedy v. Trumble*, 32 Wash. 614.

831. 5. Purchaser Successor to Creditor's Right. — See *Rutherford v. Carr*, (Tex. 1905) 87 S. W. Rep. 815.

833. 4. Stranger Purchasing in Good Faith Not Affected by Subsequent Reversal or Vacation of Judgment. — *Di Nola v. Allison*, 143 Cal. 106, 101 Am. St. Rep. 84.

834. 6. Execution Creditor Purchasing at His Own Sale Must Make Restitution on Reversal of Judgment. — *Di Nola v. Allison*, 143 Cal. 106, 101 Am. St. Rep. 84; *English v. Otis*, 125 Iowa 555; *Nelson v. Beatrice*, (Neb. 1901) 96 N. W. Rep. 288.

836. 9. *Di Nola v. Allison*, 143 Cal. 106, 101 Am. St. Rep. 84.

840. 3. Resale May Be Had and Deficiency Recovered. — *Hughes v. Miller*, 205 Pa. St. 627.

846. 2. Statutes Authorizing Redemption. — *Lynch v. Burt*, (C. C. A.) 132 Fed. Rep. 417 (construing the *North Dakota* statute); *Roose v. Gove*, 32 Colo. 522; *Warden v. Troutman*, (Ky. 1903) 74 S. W. Rep. 1085; *McMillan v. Bagby*, (Ky. 1904) 83 S. W. Rep. 610; *Stocker v. Puckett*, 17 S. Dak. 267; *Kennedy v. Trumble*, 32 Wash. 614.

Holder of Subsequent Judgment Lien May Redeem. — *Hunter v. Mauseau*, 91 Minn. 124.

Purchaser at Prior Execution Sale May Redeem. — *Porter v. Watson*, 69 Kan. 349.

848. 2. Voluntary Parol Agreement for Extension of Time, Made After Term for Redemption, Not Binding. — *Herring v. Johnston*, (Ky. 1903) 72 S. W. Rep. 793.

3. No Compensation Where Sheriff Illegally Acts as Auctioneer and Purchaser. — *Trank v. Gysling*, 13 Pa. Dist. 713, 30 Pa. Co. Ct. 386.

850. 1. Statute Providing for Penalty and Damages. — See *Burton v. Kipp*, 30 Mont. 275.

SHIPS AND SHIPPING.

By H. O'B. COOPER.

864. I. SHIPPING REGULATIONS — 2. Registry of Vessels — c. PLACE OF REGISTRY. — See note 4.

865. 3. Enrolment and License — a. NECESSITY FOR. — See note 6.

869. 5. Regulations for Safety and Comfort of Passengers — c. PRECAUTIONS AGAINST FIRE. — See note 5.

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871. 7. Tonnage Duties — b. CONSTITUTIONALITY OF STATE STATUTES. — See note 4.

8. Harbor Regulations. — See note 8.

874. II. SALE AND TRANSFER — 7. Mortgages — a. IN GENERAL. — See note 7.

876. c. RIGHT TO EARNINGS. — See note 2.

8. Recording Acts — a. IN UNITED STATES — (1) Provisions of Act of Congress. — See note 8.

877. (4) Place to Record. — See note 8.

880. III. OWNERSHIP AND CONTROL — 2. Relation of Part Owners — a. INTEREST IN VESSEL. — See note 9.

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865. 6. "Port" Defined. — See *Hartwell Lumber Co. v. U. S., 128 Fed. Rep. 306; Com. v. Ayer, etc., Tie Co., 117 Ky. 171.*

869. 5. Precautions Against Fire. — See *The Texas, 134 Fed. Rep. 909.*

8. Life-saving Apparatus on Passenger Vessel. — See *U. S. v. Van Schaick, 134 Fed. Rep. 592.*

871. 4. Constitutionality of State Statute. — See *Way v. New Jersey Steamboat Co., 133 Fed. Rep. 188.*

8. Harbor Masters. — See *Hartwell Lumber Co. v. U. S., 128 Fed. Rep. 306.*

874. 7. See The Gordon Campbell, 131 Fed. Rep. 963.

876. 2. When Mortgagee Becomes Entitled to Earnings. — *Merchants Banking Co. v. Cargo of Steamship Afton, 134 Fed. Rep. 727, 67 C. A. 618, reversing 125 Fed. Rep. 258.*

8. Recording Conveyance Necessary. — See *Arnold v. Eastin, 116 Ky. 686.* See also *The Gordon Campbell, 131 Fed. Rep. 963.*

877. 8. Place to Record — Home Port. — See *Arnold v. Eastin, 116 Ky. 686.*

880. 9. Insurance in Different Proportions. — See *The Schooner Nantasket, 39 Ct. Cl. 119.*

883. 3. No Admiralty Jurisdiction — Jurisdiction of State Courts. — See *Reynolds v. Nielson, 116 Wis. 483, 96 Am. St. Rep. 1000.*

886. 6. Powers and Duties of Ship's Husband. — See *The S. L. Watson, (C. C. A.) 118 Fed. Rep. 945.*

888. 12. Copy of Last Enrolment and of Bill of Sale Held to Be Competent Evidence. — See *Vincent v. Soper Lumber Co., 113 Ill. App. 463.*

889. 8. Liability of Owner, Master, and Ship. — See *The Robert Dollar, 115 Fed. Rep. 218; The Underwriter, 119 Fed. Rep. 713; Callahan v. Aetna Indemnity Co., 33 Wash. 583.* See also *The No. 6, (C. C. A.) 114 Fed. Rep. 115.*

890. 1. Test of Liability. — See *The Underwriter, 119 Fed. Rep. 713; Callahan v. Aetna Indemnity Co., 33 Wash. 583.* See also *The Surprise, (C. C. A.) 129 Fed. Rep. 873.*

891. 1. Liability of Person Having Possession. — See *The Barge David Wallace v. Bain, 8 Can. Exch. 205.*

893. 6. Custom Cannot Prevail Against Statutory Rule. — See *The Alfred W. Booth, 127 Fed. Rep. 453.*

7. Custom Not in Conflict with Rules. — See *National Dredging Co. v. Monsen, (C. C. A.) 126 Fed. Rep. 930.*

895. 6. Vessels Affected by Regulations. — See note 9.

896. V. GENERAL RULES AFFECTING LIABILITY FOR INJURIES BY VESSELS — 1. General Duty to Avoid Collision — *a.* PRECAUTIONS NECESSARY. — See notes 4, 5, 6.

897. Evidence and Burden of Proof. — See note 3.

b. SPECIAL CIRCUMSTANCES JUSTIFYING, REQUIRING, OR EXCUSING DEPARTURE FROM RULES. — See notes 4, 7.

898. Exceptions Not Favored. — See note 2.

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899. 2. Negligence or Fault as Ground of Liability — *a.* RULE STATED. — See note 1.

900. *b.* EFFECT OF VIOLATION OF STATUTE. — See notes 2, 5. English Rule. — See note 7.

901. Canadian Rule. — See note 4.

902. *c.* DEGREE OF CARE REQUIRED. — See note 6.

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903. See note 1.

904. *f.* EQUIPMENT OF VESSEL — (2) *Officers and Crew.* — See notes 1, 2.

g. DISABLEMENT. — See note 11.

905. *h.* ERRORS IN EXTREMIS. — See note 1.

895. 9. War Vessels. — *Watts v. U. S.*, 123 Fed. Rep. 105, holding that a naval vessel was bound by the regulations even in time of war.

896. 4. Neglect of Precautions a Fault. — *The George W. Roby*, (C. C. A.) 111 Fed. Rep. 601.

5. When Circumstances Special. — *The Ashton*, (1905) P. 21; *The Columbia*, (C. C. A.) 109 Fed. Rep. 660; *The Lakme*, 113 Fed. Rep. 772; *The Mary C. Elphicke*, 115 Fed. Rep. 375, *affirmed* (C. C. A.) 123 Fed. Rep. 405; *The Ocean*, 115 Fed. Rep. 229; *Hall v. Chisholm*, (C. C. A.) 117 Fed. Rep. 807; *The Richmond*, 124 Fed. Rep. 993; *The Wallace B. Flint*, 125 Fed. Rep. 426, *affirmed* (C. C. A.) 130 Fed. Rep. 338.

6. Precautions Necessary. — *The Columbia*, (C. C. A.) 109 Fed. Rep. 660; *The Mary C. Elphicke*, 115 Fed. Rep. 375, *affirmed* (C. C. A.) 123 Fed. Rep. 405; *Hall v. Chisholm*, (C. C. A.) 117 Fed. Rep. 807.

897. 3. *The Sitka*, 132 Fed. Rep. 861.

4. General Prudential Rules. — *The Zampa*, 113 Fed. Rep. 541; *The Queen Elizabeth*, (C. C. A.) 122 Fed. Rep. 406.

7. Rule to Keep Course. — *The Queen Elizabeth*, (C. C. A.) 122 Fed. Rep. 406.

898. 2. Immediate Danger Necessary. — *The Zampa*, 113 Fed. Rep. 541; *The Queen Elizabeth*, (C. C. A.) 122 Fed. Rep. 406.

14. Presumption that Vessels Will Comply with Rules. — *The Sea King*, (C. C. A.) 114 Fed. Rep. 535; *The Buena Ventura*, 117 Fed. Rep. 988; *The Acilia*, (C. C. A.) 120 Fed. Rep. 455; *The Straits of Dover*, (C. C. A.) 120 Fed. Rep. 900; *The Dorchester*, 121 Fed. Rep. 889; *The Mary C. Elphicke v. Pittsburgh Steamship Co.*, (C. C. A.) 123 Fed. Rep. 405.

899. 1. Collision Without Fault. — *The Europa*, 116 Fed. Rep. 696.

900. 2. Rule at Common Law. — *The Alfred W. Booth*, 127 Fed. Rep. 453.

5. Presumption of Fault. — *The Frank S. Hall*, 116 Fed. Rep. 559.

7. See *Hamburg Packet Co. v. Desrochers*, 8 Can. Exch. 263.

901. 4. Canadian Rule. — *Hamburg Packet Co. v. Desrochers*, 8 Can. Exch. 263.

902. 6. Ordinary Care Only Required. — *The Ovingdean Grange*, (1902) P. 208; *The Rotherfield*, 123 Fed. Rep. 460.

8. Ordinary Care Defined. — *The Northland*, 125 Fed. Rep. 58.

10. Burden of Proof of Contributory Fault. — *The Bayonne*, 110 Fed. Rep. 462; *The Northern Queen*, 117 Fed. Rep. 906; *The Phillip Minch*, (C. C. A.) 128 Fed. Rep. 578; *The Edward Smith*, (C. C. A.) 135 Fed. Rep. 32; *Foster v. Merchants', etc.*, Transp. Co., 134 Fed. Rep. 964.

903. 1. *The Columbia*, (C. C. A.) 109 Fed. Rep. 660; *The Atlantis*, (C. C. A.) 119 Fed. Rep. 568; *The Phillip Minch*, (C. C. A.) 128 Fed. Rep. 578; *Foster v. Merchants', etc.*, Transp. Co., 134 Fed. Rep. 964.

904. 1. Competency. — *The Delmar*, 125 Fed. Rep. 130.

2. Station. — *The Alabama*, (C. C. A.) 126 Fed. Rep. 332.

11. See *The El Cid*, 124 Fed. Rep. 1009.

905. 1. Errors in Extremis Not Faults. — *Davidson v. Georgian Bay Nav. Co.*, 33 Can. Sup. Ct. 1; *The Columbia*, (C. C. A.) 109 Fed. Rep. 660; *The Bayonne*, 110 Fed. Rep. 462; *The Livingstone*, (C. C. A.) 113 Fed. Rep. 879; *The Elizabeth*, 114 Fed. Rep. 757; *The Ponce*, 116 Fed. Rep. 55; *The Teaser*, 118 Fed. Rep. 81, *reversed* on other grounds (C. C. A.) 127 Fed. Rep. 305; *The Atlantis*, (C. C. A.) 119 Fed. Rep. 568; *The Queen Elizabeth*, (C. C. A.) 122 Fed. Rep. 406; *Meders v. La Compagnie Generale Transatlantique*, 122 Fed. Rep. 1018; *The Chicago*, (C. C. A.) 125 Fed. Rep. 712; *The Prudence*, 124 Fed.

906. See note 2.

i. INEVITABLE ACCIDENT. — See notes 3, 4, 5.

907. See note 2.

908. Burden of Proof. — See note 1.

909. 3. Duty to Stand By After Collision. — See notes 3, 7, 10.

910. VI. SAIL VESSELS MEETING OR CROSSING — 2. Closehauled Vessels —
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911. 3. Closehauled and Free. — See note 3.

912. 7. Duty of Vessel Required to Give Way. — See notes 1, 3.

8. Duty of Vessel Having Right of Way — a. TO KEEP COURSE. —

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914. 9. Evidence. — See note 6.

VII. STEAM VESSELS MEETING OR CROSSING — 2. Meeting End On. —
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915. Vessels Are Meeting End On. — See note 6.

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3. Crossing Courses. — See notes 8, 9.

Rep. 939, *affirmed* (C. C. A.) 134 Fed. Rep. 358; *In re Rend*, 126 Fed. Rep. 564; The Transfer No. 14, (C. C. A.) 127 Fed. Rep. 305; The Virginia Jackson, 130 Fed. Rep. 221; The Susquehanna, 134 Fed. Rep. 641; The Gladys, 135 Fed. Rep. 601. See also Hall v. Chisholm, (C. C. A.) 117 Fed. Rep. 807; U. S. v. Charles G. Dunn Co., 124 Fed. Rep. 705; The Edward Smith, (C. C. A.) 135 Fed. Rep. 32.

906. 2. Vessel Must Be Free from Prior Contributing Fault. — The Protector, (C. C. A.) 113 Fed. Rep. 868; Minnesota Steamship Co. v. Lehigh Valley Transp. Co., (C. C. A.) 129 Fed. Rep. 22. See also The Edward Smith, (C. C. A.) 135 Fed. Rep. 32.

3. In Case of Inevitable Accident Neither Liable. — *Dunton v. Allan Line Steamship Co.*, 115 Fed. Rep. 250, *affirmed* (C. C. A.) 119 Fed. Rep. 590; The Cornell, 134 Fed. Rep. 694; Kenova Transp. Co. v. Monongahela River Consol. Coal, etc., Co., 56 W. Va. 70. See also The Homer, (C. C. A.) 109 Fed. Rep. 572; The El Cid, 124 Fed. Rep. 1009.

4. Inevitable Accident Defined. — The Fontana, (C. C. A.) 119 Fed. Rep. 853; The Mary S. Blees, 120 Fed. Rep. 44; The Australia, (C. C. A.) 120 Fed. Rep. 220; The Rebecca, (C. C. A.) 122 Fed. Rep. 619; The Surf, 132 Fed. Rep. 880.

5. Reasonable Care Only Required. — The Severn, 113 Fed. Rep. 578; *Dunton v. Allan Steamship Co.*, (C. C. A.) 119 Fed. Rep. 590; The Fontana, (C. C. A.) 119 Fed. Rep. 853.

907. 2. Fault of Either Party. — The Severn, 113 Fed. Rep. 578; The Cornell, 134 Fed. Rep. 694.

908. 1. Burden of Proof. — The Drumcraig, 133 Fed. Rep. 804.

909. 3. English Statutes. — The Harvest Home, (1904) P. 409.

7. Excuse for Failure. — The Trader, 129 Fed. Rep. 462.

10. The Trader, 129 Fed. Rep. 462.

910. 14. Closehauled on Different Tacks. — The Zampa, 113 Fed. Rep. 541; The Mary Buhne, (C. C. A.) 118 Fed. Rep. 1000. See also The Margaret B. Roper, (C. C. A.) 111 Fed. Rep. 623.

911. 3. Closehauled and Free. — The Mary Buhne, (C. C. A.) 118 Fed. Rep. 1000; The Queen Elizabeth, (C. C. A.) 122 Fed. Rep. 406; The Richard F. C. Hartley, 124 Fed. Rep. 708; The Pierre Corneille, 133 Fed. Rep. 604; The Eagle Wing, 135 Fed. Rep. 826. See also The Margaret B. Roper, (C. C. A.) 111 Fed. Rep. 623.

913. 1. Crossing Ahead. — The Richard F. C. Hartley, 124 Fed. Rep. 708.

3. May Adopt Any Course. — The Queen Elizabeth, (C. C. A.) 122 Fed. Rep. 406.

5. Privileged Vessel to Hold Her Course. — The Hawthornbank, (1904) P. 120; The Queen Elizabeth, (C. C. A.) 122 Fed. Rep. 406; The Richard F. C. Hartley, 124 Fed. Rep. 708; The Eagle Wing, 135 Fed. Rep. 826.

914. 6. Burden of Proof. — The Richard F. C. Hartley, 124 Fed. Rep. 708; The Eagle Wing, 135 Fed. Rep. 826.

8. Steamers Meeting End On. — The Teaser, 118 Fed. Rep. 81, *reversed* on other grounds (C. C. A.) 127 Fed. Rep. 305; The Dorchester, 121 Fed. Rep. 889; The Peconia, 124 Fed. Rep. 848; The Edgar F. Luckenbach, 124 Fed. Rep. 947; The Richmond, 124 Fed. Rep. 993; The Transfer No. 14, (C. C. A.) 127 Fed. Rep. 305; The Trader, 129 Fed. Rep. 462; The Three Brothers, 136 Fed. Rep. 479; The Transfer No. 10, 137 Fed. Rep. 666.

9. Manœuvre Must Be Seasonably Made. — The John I. Brady, 115 Fed. Rep. 204, *affirmed* (C. C. A.) 131 Fed. Rep. 235; The Mary C. Elphicke, 115 Fed. Rep. 375, *affirmed* (C. C. A.) 123 Fed. Rep. 405; The C. R. Hoyt, 136 Fed. Rep. 671.

915. 6. The James A. Lawrence, (C. C. A.) 117 Fed. Rep. 228.

7. Exceptions. — The Lakme, (C. C. A.) 118 Fed. Rep. 972; The Transfer No. 10, 137 Fed. Rep. 666.

8. Crossing Courses. — The Ashton, (1905) P. 21; The Thomas B. Garland, 110 Fed. Rep. 687; The Ocean, 115 Fed. Rep. 229; The Straits of Dover, (C. C. A.) 120 Fed. Rep. 900; The Dorchester, 121 Fed. Rep. 889; Watts v. U. S., 123 Fed. Rep. 105; The Kaga Maru, 123 Fed. Rep. 139; The Chicago, (C. C. A.) 125 Fed. Rep. 712; Shortland Bros. Co. v. New York,

916. 4. Duty of Vessel Required to Keep Out of Way — Crossing Ahead. — See notes 8, 9, 10.

917. Duty to Slacken Speed or Stop. — See note 1.

Safe Margin. — See note 4.

5. Duty of Privileged Vessel — To Keep Course. — See note 6.

To Keep Speed. — See note 9.

918. In Case of Immediate Danger. — See note 4.

6. Duty to Slacken Speed, Stop, and Reverse. — See note 5.

919. VIII. STEAM AND SAIL VESSELS — 1. Steam Vessels to Keep Out of Way. — See note 2.

920. 3. General Precautions — Crossing Ahead. — See note 4.

Care and Vigilance. — See note 6.

921. 4. Duty of Steam Vessel to Keep Away by Safe Margin. — See notes 2, 5, 8, 13.

129 Fed. Rep. 973; The Virginia Jackson, 130 Fed. Rep. 221; The Susquehanna, 134 Fed. Rep. 641; The Steinway, (C. C. A.) 135 Fed. Rep. 344.

Vessel Leaving Dock. — See The Sunlight, (1904) P. 100; The Central, 122 Fed. Rep. 747; The New York Central No. 2, 132 Fed. Rep. 167. And see *infra*, this title, **967**. 1.

915. 9. River and Harbor Navigation. — The C. J. Reno, 121 Fed. Rep. 149; Foster v. Merchants, etc., Transp. Co., 134 Fed. Rep. 964; The New Hampshire, (C. C. A.) 136 Fed. Rep. 769.

916. 8. Crossing Ahead. — The Ashton, (1905) P. 21; The Thomas B. Garland, 110 Fed. Rep. 687; The Ocean, 115 Fed. Rep. 229; The Elizabeth, 116 Fed. Rep. 225; The James A. Lawrence, (C. C. A.) 117 Fed. Rep. 228; The Joseph M. Clark, 119 Fed. Rep. 459; The Straits of Dover, (C. C. A.) 120 Fed. Rep. 900; Watts v. U. S., 123 Fed. Rep. 105; The Chicago, (C. C. A.) 125 Fed. Rep. 712; The Steinway, (C. C. A.) 135 Fed. Rep. 344.

9. See Shortland Bros. Co. v. New York, 129 Fed. Rep. 973.

10. The Skipsea, (1905) P. 32; Shortland Bros. Co. v. New York, 129 Fed. Rep. 973. See also The Wallace B. Flint, 125 Fed. Rep. 426, *affirmed* (C. C. A.) 130 Fed. Rep. 338.

917. 1. Duty to Slacken Speed or Stop. — The Ashton, (1905) P. 21; The Ocean, 115 Fed. Rep. 229; The Joseph M. Clark, 119 Fed. Rep. 459; The Straits of Dover, (C. C. A.) 120 Fed. Rep. 900; The N. & W. 2, 122 Fed. Rep. 171; The Chicago, (C. C. A.) 125 Fed. Rep. 712; The Bayonne, 128 Fed. Rep. 288; The Trader, 129 Fed. Rep. 462; The Georgetown, 135 Fed. Rep. 854; The C. R. Hoyt, 136 Fed. Rep. 671.

4. Keep Away by Safe Margin. — The Yuma, (C. C. A.) 132 Fed. Rep. 964.

6. Preferred Vessel Must Keep Course and Speed. — The James A. Lawrence, (C. C. A.) 117 Fed. Rep. 228; The Buena Ventura, 117 Fed. Rep. 988; The Joseph M. Clark, 119 Fed. Rep. 459; The Straits of Dover, (C. C. A.) 120 Fed. Rep. 900; The C. J. Reno, 121 Fed. Rep. 149; The N. & W. 2, 122 Fed. Rep. 171; The Chicago, (C. C. A.) 125 Fed. Rep. 712; Shortland Bros. Co. v. New York, 129 Fed. Rep. 973; The Virginia Jackson, 130 Fed. Rep. 221; New York v. New York, etc., Ferry Co., 130 Fed. Rep. 397; The New York Central No. 2, 132 Fed. Rep. 167; The Susquehanna, 134 Fed. Rep.

641; Foster v. Merchants', etc., Transp. Co., 134 Fed. Rep. 964; The Steinway, (C. C. A.) 135 Fed. Rep. 344; The John Fleming, 136 Fed. Rep. 917.

9. Speed. — The James A. Lawrence, (C. C. A.) 117 Fed. Rep. 228; The Buena Ventura, 117 Fed. Rep. 988; The Joseph M. Clark, 119 Fed. Rep. 459; The Straits of Dover, (C. C. A.) 120 Fed. Rep. 900; The C. J. Reno, 121 Fed. Rep. 149; The Chicago, (C. C. A.) 125 Fed. Rep. 712; The Virginia Jackson, 130 Fed. Rep. 221; The New York Central No. 2, 132 Fed. Rep. 167; The Steinway, (C. C. A.) 135 Fed. Rep. 344.

918. 4. Immediate Danger of Collision Creates Special Circumstances. — The Chicago, (C. C. A.) 125 Fed. Rep. 712.

5. Duty to Stop and Reverse. — See *In re* Rapid Transit Ferry Co., 124 Fed. Rep. 786; The Peconia, 124 Fed. Rep. 848; The Spartan Prince, 126 Fed. Rep. 885; The New York Central No. 19, 127 Fed. Rep. 473; The Gladiator, 132 Fed. Rep. 876; The Susquehanna, 134 Fed. Rep. 641; Foster v. Merchants', etc., Transp. Co., 134 Fed. Rep. 964.

919. 2. Steam Vessel to Keep Out of Way of Sail Vessel. — The Devonian, 110 Fed. Rep. 588; Wilder's Steamship Co. v. Low, (C. C. A.) 112 Fed. Rep. 161; The Richmond, 114 Fed. Rep. 208; Jacobsen v. Dalles, etc., Nav. Co., (C. C. A.) 114 Fed. Rep. 705; The Elizabeth, 114 Fed. Rep. 757; The Pilot Boy, (C. C. A.) 115 Fed. Rep. 873; The Ardanrose, 115 Fed. Rep. 1010; The Alene, 116 Fed. Rep. 57; The Gadsby, 120 Fed. Rep. 851; Medero v. La Compagnie Generale Transatlantique, 122 Fed. Rep. 1018; The Prudence, 124 Fed. Rep. 939, *affirmed* (C. C. A.) 134 Fed. Rep. 358; The Delmar, 125 Fed. Rep. 130; The Helen G. Moseley, (C. C. A.) 128 Fed. Rep. 402; The Anson M. Bangs, (C. C. A.) 129 Fed. Rep. 103; The Transfer No. 11, 130 Fed. Rep. 1019; Donald v. Guy, 135 Fed. Rep. 429; The John Fleming, 136 Fed. Rep. 486; Chicago Transit Co. v. Campbell, 110 Ill. App. 366.

920. 4. Crossing Ahead. — Wilder's Steamship Co. v. Low, (C. C. A.) 112 Fed. Rep. 161; The Elizabeth, 114 Fed. Rep. 757; Chadwick v. Wiley, 131 Fed. Rep. 1003.

6. Care and Vigilance Required. — The Prudence, (C. C. A.) 134 Fed. Rep. 358.

921. 2. Duty to Stop. — Wilder's Steamship Co. v. Low, (C. C. A.) 112 Fed. Rep. 161; The

922. 5. Duty of Sail Vessel to Beat Out Her Tack. — See notes 4, 8.

6. Duty of Sail Vessel to Keep Her Course — *a.* GENERAL RULE. —

See note 10.

923. See note 2.

924. *d.* CHANGE OF COURSE — (1) *When Excusable — To Avoid Immediate Danger.* — See note 9.

925. (2) *When Required.* — See notes 2, 6, 7.

926. 7. Presumptions and Burden of Proof. — See notes 2, 3.

IX. OVERTAKING VESSELS — 1. Definition. — See note 5.

927. See note 1.

2. Overtaking Vessel to Keep Out of Way. — See notes 2, 3.

4. Necessary Precautions. — See notes 8, 9, 10.

928. See notes 1, 5.

929. 5. Vessel Ahead to Keep Her Course. — See notes 3, 5.

930. 6. Burden of Proof. — See note 4.

Elizabeth, 114 Fed. Rep. 757; The Transfer No. 11, 130 Fed. Rep. 1019; Donald *v.* Guy, 135 Fed. Rep. 429.

921. 5. Safe Margin. — The Delmar, 125 Fed. Rep. 130.

8. The Delmar, 125 Fed. Rep. 130.

13. Drifting. — The Transfer No. 11, 130 Fed. Rep. 1019.

922. 4. Sail Vessel Must Beat Out Her Tack. — Jacobsen *v.* Dalles, etc., Nav. Co., (C. C. A.) 114 Fed. Rep. 705; The Anson M. Bangs, (C. C. A.) 129 Fed. Rep. 103.

8. The Prudence, (C. C. A.) 134 Fed. Rep. 358.

10. Sail Vessel to Keep Her Course. — The Devonian, 110 Fed. Rep. 588; Wilder's Steamship Co. *v.* Low, (C. C. A.) 112 Fed. Rep. 161; The Richmond, 114 Fed. Rep. 208; Jacobsen *v.* Dalles, etc., Nav. Co., (C. C. A.) 114 Fed. Rep. 705; The Elizabeth, 114 Fed. Rep. 757; The Pilot Boy, (C. C. A.) 115 Fed. Rep. 873; The Europa, 116 Fed. Rep. 696; The W. S. Tompkins, 116 Fed. Rep. 59; Medero *v.* La Compagnie Generale Transatlantique, 122 Fed. Rep. 1018; The Prudence, 124 Fed. Rep. 939, *affirmed* (C. C. A.) 134 Fed. Rep. 358; The Delmar, 125 Fed. Rep. 130; The Anson M. Bangs, (C. C. A.) 129 Fed. Rep. 103; Donald *v.* Guy, 135 Fed. Rep. 429; The John Fleming, 136 Fed. Rep. 486. See also The Emperor, 115 Fed. Rep. 447; The Senator Sullivan, 117 Fed. Rep. 176, *affirmed* (C. C. A.) 125 Fed. Rep. 1005.

923. 2. Keep Steady Course. — The Senator Sullivan, 117 Fed. Rep. 176, *affirmed* (C. C. A.) 125 Fed. Rep. 1005.

924. 9. To Avoid Imminent Danger. — Medero *v.* La Compagnie Generale Transatlantique, 122 Fed. Rep. 1018; The John Fleming, 136 Fed. Rep. 486. See also The Alene, 116 Fed. Rep. 57.

925. 2. Duty to Change Course. — The Massaguet, 124 Fed. Rep. 97.

6. The Devonian, 110 Fed. Rep. 588.

7. The Devonian, 110 Fed. Rep. 588.

926. 2. Burden of Proof on Steamer. — The Richmond, 114 Fed. Rep. 208; The Pilot Boy, (C. C. A.) 115 Fed. Rep. 873; The Ardanrose, 115 Fed. Rep. 1010; The Delmar, 125 Fed. Rep. 130. Compare Chicago Transit Co. *v.* Campbell, 110 Ill. App. 366.

3. Change of Course Must Be Clearly Shown. — The Pilot Boy, (C. C. A.) 115 Fed. Rep. 873.

5. Immaterial that Foremost Vessel Is Backing. — The Sicilian Prince, 128 Fed. Rep. 133.

927. 1. Subsequent Alteration of Bearing. — The Sicilian Prince, 128 Fed. Rep. 133.

2. Overtaking Vessel to Keep Clear. — The Aureole, (C. C. A.) 113 Fed. Rep. 224; The Nathan Hale, (C. C. A.) 113 Fed. Rep. 865; The Fleetwing, 114 Fed. Rep. 409; The Captain Sam, 115 Fed. Rep. 1000; The Atlantis, (C. C. A.) 119 Fed. Rep. 568; The Rebecca, (C. C. A.) 122 Fed. Rep. 619; The Bernicia, 122 Fed. Rep. 886; The Sicilian Prince, 128 Fed. Rep. 133; The Edward Smith, (C. C. A.) 135 Fed. Rep. 32; Lake Shore Transit Co. *v.* Corrigan, (C. C. A.) 137 Fed. Rep. 484. See also Gaffner *v.* Pigott, (C. C. A.) 116 Fed. Rep. 486.

3. Inability to See Vessel Ahead. — The Bernicia, 122 Fed. Rep. 886.

8. Overtaking Vessel Must Not Crowd on Course. — The Aureole, (C. C. A.) 113 Fed. Rep. 224; The Fleetwing, 114 Fed. Rep. 409.

9. Approaching Vessels. — Lake Shore Transit Co. *v.* Corrigan, (C. C. A.) 137 Fed. Rep. 484.

10. Sheer by Vessel Ahead. — See The Fleetwing, 114 Fed. Rep. 409.

928. 1. Must Wait Opportunity to Pass. — The Mesaba, 111 Fed. Rep. 215; The Atlantis, (C. C. A.) 119 Fed. Rep. 568; Lake Shore Transit Co. *v.* Corrigan, (C. C. A.) 137 Fed. Rep. 484. See also The Falcon, 116 Fed. Rep. 753.

5. Suction in Passing. — The Mesaba, 111 Fed. Rep. 215; The Aureole, (C. C. A.) 113 Fed. Rep. 224; The Falcon, 116 Fed. Rep. 753; The Atlantis, (C. C. A.) 119 Fed. Rep. 568; The Fontana, (C. C. A.) 119 Fed. Rep. 853.

929. 3. Vessel Ahead to Keep Her Course. — The Mesaba, 111 Fed. Rep. 215; Gaffner *v.* Pigott, (C. C. A.) 116 Fed. Rep. 486; The Atlantis, (C. C. A.) 119 Fed. Rep. 568; Lake Shore Transit Co. *v.* Corrigan, (C. C. A.) 137 Fed. Rep. 484.

5. Vessel Ahead Must Not Embarrass the Other. — Gaffner *v.* Pigott, (C. C. A.) 116 Fed. Rep. 486.

930. 4. Burden of Proof. — The Aureole, (C. C. A.) 113 Fed. Rep. 224; The Atlantis, (C. C. A.) 119 Fed. Rep. 568.

930. X. VESSELS IN Tow — 2. Tug and Tow Treated as One Vessel. — See notes 6, 9.

931. 3. Degree of Care Required of Tug — *a.* ORDINARY CARE AND SKILL. — See note 3.

b. KNOWLEDGE OF CONDITIONS. — See notes 4, 5, 8.

c. PASSING OTHER VESSELS. — See notes 9, 10.

932. 4. Care in Navigation of Tow. — See notes 12, 13, 14.

933. See notes 2, 3.

6. Equipment of Tow. — See notes 9, 10, 11, 12.

934. 7. Making Up Tow — *c.* LENGTH OF TOW. — See note 7.

935. See note 1.

d. FASTENINGS. — See note 4.

8. Leaving or Casting Off Tow. — See note 9.

936. 9. Liability for Damages — *b.* INJURY TO TOW — (1) *Liability of Tug.* — See note 6.

930. 6. Tug and Tow Treated as Single Vessel under Steam. — The Gladys, 135 Fed. Rep. 601.

9. The Gladys, 135 Fed. Rep. 601.

931. 3. Tug Not Common Carrier. — Hughes *v.* Pennsylvania R. Co., (C. C. A.) 113 Fed. Rep. 925; The Alabama, 114 Fed. Rep. 214, *modified* (C. C. A.) 126 Fed. Rep. 332; Rebstock *v.* Gilchrist Transp. Co., 132 Fed. Rep. 174; Winslow *v.* Thompson, (C. C. A.) 134 Fed. Rep. 546; Kenova Transp. Co. *v.* Monongahela River Consol. Coal, etc., Co., 56 W. Va. 70.

4. Care Commensurate with Risk. — The Teaser, 118 Fed. Rep. 81, *reversed* on other grounds (C. C. A.) 127 Fed. Rep. 305; Rebstock *v.* Gilchrist Transp. Co., 132 Fed. Rep. 174.

Effect of Defective Steering Gear. — Van Eyken *v.* Erie R. Co., 117 Fed. Rep. 712.

5. Rebstock *v.* Gilchrist Transp. Co., 132 Fed. Rep. 174.

8. Rebstock *v.* Gilchrist Transp. Co., 132 Fed. Rep. 174; Winslow *v.* Thompson, (C. C. A.) 134 Fed. Rep. 546.

9. Passing Other Vessels. — The Doris, 108 Fed. Rep. 552; The Protector, (C. C. A.) 113 Fed. Rep. 868; The Sea King, (C. C. A.) 114 Fed. Rep. 535; The Ottawa, 124 Fed. Rep. 742; The Edgar F. Luckenbach, 124 Fed. Rep. 947; The Prudence, 124 Fed. Rep. 939, *affirmed* (C. C. A.) 134 Fed. Rep. 358; Welch *v.* Philadelphia, etc., R. Co., 125 Fed. Rep. 419; The Alfred W. Booth, 127 Fed. Rep. 453; The Bayonne, 128 Fed. Rep. 288; Britain Steamship Co. *v.* J. B. King Transp. Co., (C. C. A.) 131 Fed. Rep. 62; The John Fleming, 136 Fed. Rep. 486; The Bee, (C. C. A.) 138 Fed. Rep. 303.

10. The Sea King, (C. C. A.) 114 Fed. Rep. 535; The John F. Gaynor, 115 Fed. Rep. 382, *affirmed* (C. C. A.) 130 Fed. Rep. 856; The Edgar F. Luckenbach, 124 Fed. Rep. 947; Rebstock *v.* Gilchrist Transp. Co., 132 Fed. Rep. 174.

932. 12. Care in Navigation of Tow. — Rebstock *v.* Gilchrist Transp. Co., 132 Fed. Rep. 174; The Sitka, 132 Fed. Rep. 861. See also The Yuma, 117 Fed. Rep. 804, *affirmed* (C. C. A.) 132 Fed. Rep. 964.

13. Must Follow Tug. — The Columbia (C. C. A.) 109 Fed. Rep. 660; The George Presley, (C. C. A.) 111 Fed. Rep. 555; The Yuma, 117 Fed. Rep. 804, *affirmed* (C. C. A.) 132 Fed.

Rep. 964; The Alfred W. Booth, 123 Fed. Rep. 172; Rebstock *v.* Gilchrist Transp. Co., 132 Fed. Rep. 174.

Must Observe Tug's Signals. — Lake Michigan, etc., Transp. Co. *v.* Union Towing, etc., Co., (C. C. A.) 112 Fed. Rep. 155.

14. The Alfred W. Booth, 123 Fed. Rep. 172.

933. 2. General Duty to Avoid Collision. — The Sitka, 132 Fed. Rep. 861.

3. Duty of Tug to Cut Hawser. — See The Columbia, (C. C. A.) 109 Fed. Rep. 660.

9. Equipment of Tow. — The Echo, 131 Fed. Rep. 622.

Defective Steering Gear. — The Alfred W. Booth, (C. C. A.) 135 Fed. Rep. 519, *affirming* 123 Fed. Rep. 172.

Defective Rudder. — The Ottawa, 124 Fed. Rep. 742.

10. Liability of Tug. — See The Nettie L. Tice, 110 Fed. Rep. 461; The New York Central No. 22, 124 Fed. Rep. 750.

11. No Knowledge of Conditions — Tug Not Liable. — The Alfred W. Booth, 123 Fed. Rep. 172.

12. Liability of Tow. — The Alfred W. Booth, (C. C. A.) 135 Fed. Rep. 519.

934. 7. Length of Tow. — The Alabama, 114 Fed. Rep. 214, *modified* (C. C. A.) 126 Fed. Rep. 332; The Captain Sam, 115 Fed. Rep. 1000; The Gertrude, (C. C. A.) 118 Fed. Rep. 130; The Prudence, 124 Fed. Rep. 939, *affirmed* (C. C. A.) 134 Fed. Rep. 358; The J. C. Austin, 124 Fed. Rep. 952; Welch *v.* Philadelphia, etc., R. Co., 125 Fed. Rep. 419; The Admiral Schley, (C. C. A.) 131 Fed. Rep. 433; The John Fleming, 136 Fed. Rep. 486; The Bee, (C. C. A.) 138 Fed. Rep. 303. See also The Teaser, 118 Fed. Rep. 81, *reversed* (C. C. A.) 127 Fed. Rep. 305, on the ground that due care was actually exercised.

Long Hawsers in New York Bay Condemned — Utmost Care Required. — The New York Central No. 22, 124 Fed. Rep. 750.

935. 1. Unnecessarily Long Hawser. — The Captain Sam, 115 Fed. Rep. 1000.

4. Fastenings. — The Lyndhurst, 129 Fed. Rep. 843.

9. See The Alabama, (C. C. A.) 126 Fed. Rep. 332.

936. 6. Liability of Tug for Injury to Tow. — The Alabama, (C. C. A.) 126 Fed. Rep. 332.

937. See note 2.

(3) *Liability of Third Vessels.* — See note 5.

c. INJURY TO THIRD VESSELS — (1) *Liability of Tug.* — See notes

6, 8.

938. (2) *Liability of Tow.* — See notes 2, 3, 6.

d. JOINT LIABILITY — Of Tug and Third Vessel. — See note 9.

939. XI. VESSELS AT REST, AT ANCHOR, OR AT WHARVES — 1. Vessels at Rest, Not Anchored. — See note 4.

2. Vessels Coming to Anchor — *b.* DUTY TO GIVE CLEAR BERTH TO OTHERS. — See note 13.

940. See notes 1, 3.

3. Vessels at Anchor — *a.* DUTY OF MOVING VESSEL. — See notes 4, 5, 6.

b. PLACE OF ANCHORAGE. — See notes 7, 8.

941. See notes 1, 2.

Local Regulations. — See notes 5, 6, 7, 10, 11, 12.

942. Navigating over Anchorage Grounds. — See note 1.

Liability for Injuries. — See note 3.

c. DRIFTING VESSELS. — See notes 5, 6.

937. 2. The Yuma, 117 Fed. Rep. 894, *affirmed* (C. C. A.) 132 Fed. Rep. 964.

5. Liability of Third Vessel. — The Alabama, (C. C. A.) 126 Fed. Rep. 332.

6. Liability of Tug to Third Vessel. — The Echo, 131 Fed. Rep. 622; *In re Walsh*, (C. C. A.) 136 Fed. Rep. 557.

Joint Liability of Tugs. — *Rebstock v. Gilchrist Transp. Co.*, 132 Fed. Rep. 174.

8. See The Echo, 131 Fed. Rep. 622.

938. 2. The Sitka, 132 Fed. Rep. 861.

3. See The Alfred W. Booth, (C. C. A.) 135 Fed. Rep. 519.

6. Negligence of Pilot of Tow. — The Yuma, (C. C. A.) 132 Fed. Rep. 964.

9. Joint Liability of Tug and Third Vessel. — The John I. Brady, 115 Fed. Rep. 204, *affirmed* (C. C. A.) 131 Fed. Rep. 235.

939. 4. Vessel at Rest Not Anchored. — The John F. Gaynor, 115 Fed. Rep. 382, *affirmed* (C. C. A.) 130 Fed. Rep. 856; The Ponce, 116 Fed. Rep. 55; Britain Steamship Co. v. J. B. King Transp. Co., (C. C. A.) 131 Fed. Rep. 62.

13. Duty to Give Clear Berth. — The Juniata, 124 Fed. Rep. 861.

940. 1. The Juniata, 124 Fed. Rep. 861.

3. Drifting Vessels. — The Robert Rickmers, 131 Fed. Rep. 638.

4. Moving Vessel Liable for Collision. — The Annex No. 5, 117 Fed. Rep. 754; The Allan Joy, 123 Fed. Rep. 344; The Genesta, 125 Fed. Rep. 423; The City of Birmingham, 125 Fed. Rep. 506; The Adato, 126 Fed. Rep. 579; *Rebstock v. Gilchrist Transp. Co.*, 132 Fed. Rep. 174; The Amiral Cecille, 134 Fed. Rep. 673. See also The Mary S. Blees, 120 Fed. Rep. 44; The El Cid, 124 Fed. Rep. 1009.

5. Unless Anchored Vessel at Fault. — The Amiral Cecille, 134 Fed. Rep. 673.

6. Duty to Give Wide Berth. — The City of Birmingham, 125 Fed. Rep. 506; The Adato, 126 Fed. Rep. 579; The Col. John M. Gaynor, (C. C. A.) 130 Fed. Rep. 856; The North Star, 132 Fed. Rep. 145; The City of Birmingham, (C. C. A.) 138 Fed. Rep. 555.

7. Anchoring in Fairway. — *Connolly v. Bran-*

dywine Granite Co., 108 Fed. Rep. 99; The Maggie Ellen, 115 Fed. Rep. 442, *affirmed* (C. C. A.) 120 Fed. Rep. 662; The Banan, 116 Fed. Rep. 900; The Caldý, 123 Fed. Rep. 802; The Newburgh, 124 Fed. Rep. 954, *reversed* on question of fact (C. C. A.) 130 Fed. Rep. 321; The Idlewild, 129 Fed. Rep. 846; The Charles E. Matthews, 132 Fed. Rep. 143; The City of Birmingham, (C. C. A.) 138 Fed. Rep. 555.

8. Necessity. — The Northern Queen, 117 Fed. Rep. 906.

941. 1. The Newburgh, 124 Fed. Rep. 954, *reversed* on question of fact (C. C. A.) 130 Fed. Rep. 321.

2. Precautions to Warn Others. — The Kennebec, (C. C. A.) 108 Fed. Rep. 300; The Maggie Ellen, 115 Fed. Rep. 442, *affirmed* (C. C. A.) 120 Fed. Rep. 662; The John H. Starin, (C. C. A.) 122 Fed. Rep. 236; The Caldý, 123 Fed. Rep. 802.

5. Local Regulations Fixing Anchorage. — The Charles E. Matthews, 132 Fed. Rep. 143; The Amiral Cecille, 134 Fed. Rep. 673.

6. See The Allan Joy, 123 Fed. Rep. 344.

7. Outside Anchorage Grounds. — The James D. Leary, 110 Fed. Rep. 685, *affirmed* (C. C. A.) 113 Fed. Rep. 1019; The John H. Starin, (C. C. A.) 122 Fed. Rep. 236; The Idlewild, 129 Fed. Rep. 846; The Charles E. Matthews, 132 Fed. Rep. 143; The Amiral Cecille, 134 Fed. Rep. 673.

10. See The Amiral Cecille, 134 Fed. Rep. 673.

11. The Juniata, 124 Fed. Rep. 861. See also The Amiral Cecille, 134 Fed. Rep. 673.

12. See The Severn, 113 Fed. Rep. 578.

942. 1. Navigating over Anchorage Grounds. — The Mary Weaver, 124 Fed. Rep. 977. See also The Newburgh, (C. C. A.) 130 Fed. Rep. 321.

3. Moving Vessel Must Keep Away. — The Idlewild, 129 Fed. Rep. 846; *Rebstock v. Gilchrist Transp. Co.*, 132 Fed. Rep. 174.

5. Insufficient Ground Tackle. — The Port Victoria, (1902) P. 25; The Severn, 113 Fed. Rep. 578; The Robert Rickmers, 131 Fed. Rep. 638.

- 942.** *d. DUTY OF ANCHORED VESSEL.* — See note 12.
- 943.** See note 3.
4. Vessels Getting under Way. — See notes 9, 11.
- 944.** 5. Dredging and Wrecking Vessels. — See notes 1, 3.
6. Vessels Moored at Wharves — *a. GENERAL RULE OF LIABILITY OF MOVING VESSEL.* — See note 7.
- b. PLACE AND MANNER OF MOORING* — (1) *Obstructing Navigation.* — See note 10.
- 945.** Mooring Across the End of a Pier or Dock. — See note 8.
- (2) *Obstructing Slips.* — See note 9.
- Obstructing Ferry Slips. — See note 11.
- 946.** (3) *Manner of Mooring* — (a) Fastenings and Fenders. — See note 7.
- (b) Breaking Adrift — Care in Mooring. — See notes 9, 10.
- 947.** See note 1.
- (c) Mooring Alongside Other Vessels. — See note 10.
- 948.** Injuries by Pounding, Careening, Etc. — See note 2.
- 949.** *d. MAKING LANDING.* — See note 6.
- 950.** Moving Other Vessels. — See note 6.
- e. MOVING FROM DOCK.* — See note 10.
- 951.** 7. Vessels Aground. — See note 11.
- 952.** 8. Presumption and Burden of Proof. — See notes 5, 7, 8.
- 954.** XII. LIGHTS, SIGNALS, LOOKOUTS — 1. Lights — *b. LIGHTS FOR VESSELS UNDER WAY* — (4) *Steam Vessels Towing.* — See notes 8, 12.

- 942.** 6. The Severn, 113 Fed. Rep. 578.
12. Negligent and Insufficient Anchor Watch. — See The Caldys, 123 Fed. Rep. 802.
- 943.** 3. The James D. Leary, 110 Fed. Rep. 685, *affirmed* (C. C. A.) 113 Fed. Rep. 1019. See also The Adato, 126 Fed. Rep. 579.
9. Care in Getting under Way. — The O. L. Halenbeck, 112 Fed. Rep. 159; *In re* Rapid Transit Ferry Co., 124 Fed. Rep. 786; The Phillip Minch, (C. C. A.) 128 Fed. Rep. 578; Shortland Bros. Co. v. New York, 129 Fed. Rep. 973.
11. See The Joseph M. Clark, 119 Fed. Rep. 459.
- 944.** 1. Dredging and Wrecking Vessels. — National Dredging Co. v. Monsen, (C. C. A.) 126 Fed. Rep. 930.
3. Compliance with Regulations. — National Dredging Co. v. Monsen, (C. C. A.) 126 Fed. Rep. 930.
7. Moving Vessel Must Avoid Collision. — Bank Shipping Co. v. The City of Seattle, 10 British Columbia 513; The Mary S. Blees, 120 Fed. Rep. 44; The Guy G. Major, 124 Fed. Rep. 95. See also Spencer v. Bertrand, (C. C. A.) 133 Fed. Rep. 46.
10. Obstructing Channel. — See Hughes v. Pennsylvania R. Co., (C. C. A.) 113 Fed. Rep. 925.
- 945.** 8. The Buenos Aires, 119 Fed. Rep. 493; The Chauncey M. Depew, 130 Fed. Rep. 59; The Minneapolis, (C. C. A.) 130 Fed. Rep. 111.
9. Notice of Obstruction. — See Erie R. Co. v. Oceanic Steam Nav. Co., 121 Fed. Rep. 440; The Roma, 138 Fed. Rep. 218.
11. Obstruction of New York Ferry Slips. — See Erie R. Co. v. Oceanic Steam Nav. Co., 121 Fed. Rep. 440.
- 946.** 7. Vessel Must Be So Moored as to Avoid Injury from Ordinary Contacts. — The Andrew Welch, 122 Fed. Rep. 557.
9. Care in Mooring. — The Drumcraig, 133 Fed. Rep. 804. See also The Atlas, 115 Fed. Rep. 856.
10. Tempestuous Weather Must Be Anticipated. — The Andrew Welch, 122 Fed. Rep. 557.
- 947.** 1. The Drumcraig, 133 Fed. Rep. 804. See also The Atlas, 115 Fed. Rep. 856.
10. Vessels Mooring Alongside Must Guard Against Injury. — The Adelaide, 131 Fed. Rep. 1002.
- 948.** 2. Grounding and Careening. — The Adelaide, 131 Fed. Rep. 1002.
- 949.** 6. Vessels Making Landing Must Use Care. — The Guy G. Major, 124 Fed. Rep. 95; The Harry B. Hollins, 125 Fed. Rep. 430.
- 950.** 6. May Move Other Vessels. — See The Minneapolis, (C. C. A.) 130 Fed. Rep. 111.
10. Due Care in Moving from Dock. — The Despatch, 120 Fed. Rep. 856.
- 951.** 11. Care in Approaching Grounded Vessels. — The City of Macon, (C. C. A.) 121 Fed. Rep. 686, *affirming* 100 Fed. Rep. 139, cited in the original note. [In this case the moving vessel was held to be liable, the statement of the text to the contrary being an inadvertence.]
- 952.** 5. Burden of Proof on Moving Vessel. — The Homer, (C. C. A.) 109 Fed. Rep. 572; The Banan, 116 Fed. Rep. 900. See also The Severn, 113 Fed. Rep. 578; The Andrew Welch, 122 Fed. Rep. 557.
7. Rich v. Hamburg-American Packet Co., 117 Fed. Rep. 751.
8. The Rotherfield, 123 Fed. Rep. 460. See also The Mary S. Blees, 120 Fed. Rep. 44; Rebstock v. Gilchrist Transp. Co., 132 Fed. Rep. 174.
- Vessel Aground. — See The City of Macon, (C. C. A.) 121 Fed. Rep. 686.
- 954.** 8. Lights of Steam Vessels Towing. — The Echo, 131 Fed. Rep. 622.

- 954.** (5) *Vessels in Tow*. — See note 13.
- 955.** See notes 2, 3.
(9) *Vessels of War*. — See note 11.
- 956.** *c. LIGHTS FOR VESSELS NOT UNDER WAY OR NOT IN COMMAND* — (3) *Vessels at Anchor*. — See notes 6, 7.
- 957.** (5) *Vessels at Wharf, River Bank, Etc.* — See note 8.
- 958.** *d. LOCATION AND VISIBILITY OF LIGHTS* — (1) *Location of Lights*. — See note 8.
(2) *Character of Lights*. — See note 16.
- 959.** (3) *Loss, Temporary Disablement, or Extinguishment*. — See note 5.
(4) *Obscured Lights*. — See notes 8, 9.
e. LIGHTS FOR OVERTAKEN VESSEL. — See note 12.
- 960.** *Manner of Carrying or Exhibiting Light*. — See notes 5, 7.
Sufficiency of Light. — See note 8.
f. EXHIBITING TORCH OR FLARE-UP LIGHT — *Present International and Inland Rules*. — See note 11.
- 961.** *Application of the Rule*. — See note 2.
- 962.** *i. FAILURE TO SEE LIGHTS*. — See note 1.
j. EFFECT OF FAILURE TO COMPLY WITH REGULATIONS. — See notes 3, 4.
- 963.** *k. EVIDENCE* — (1) *Presumptions and Burden of Proof*. — See notes 3, 5.
- 964.** (2) *Weight of Evidence*. — See notes 1, 2.
- 954.** 12. *Absence of Lights*. — *Foster v. Merchants', etc.*, Transp. Co., 134 Fed. Rep. 964.
13. *Vessels in Tow*. — *The Winfield S. Cahill*, 130 Fed. Rep. 989; *Foster v. Merchants', etc.*, Transp. Co., 134 Fed. Rep. 964.
- 955.** 2. *Inspectors' Rule 11*. — *The Nettie L. Tice*, 110 Fed. Rep. 461.
3. *The Komuk*, 120 Fed. Rep. 841; *The New York Central No. 22*, 124 Fed. Rep. 750.
11. *Naval Lights and Recognition Signals*. — See *Watts v. U. S.*, 123 Fed. Rep. 105.
- 956.** 6. *Anchor Lights*. — *The Maggie Ellen*, (C. C. A.) 120 Fed. Rep. 662.
7. *Rule of Maritime Law*. — *The John H. Starin*, (C. C. A.) 122 Fed. Rep. 236.
- 957.** 8. *In Channel*. — See *The Kennebec*, (C. C. A.) 108 Fed. Rep. 300, holding that lights were required by common prudence.
Scow Attending Dredge Required to Show Light. — *National Dredging Co. v. Monsen*, (C. C. A.) 126 Fed. Rep. 930.
- 958.** 8. *Foster v. Merchants', etc.*, Transp. Co., 134 Fed. Rep. 964.
16. *The Maggie Ellen*, 115 Fed. Rep. 442, *affirmed* (C. C. A.) 120 Fed. Rep. 662. *
- 959.** 5. *Lights Being Trimmed or Extinguished by Accident*. — See *In re Brooklyn Ferry Co.*, 115 Fed. Rep. 564, *affirmed* (C. C. A.) 121 Fed. Rep. 741.
8. *Lights Obscured by Sails*. — *The Iberia*, 117 Fed. Rep. 718, *affirmed* (C. C. A.) 123 Fed. Rep. 865.
9. *Lights Obscured by Tow Alongside*. — *The Winfield S. Cahill*, 130 Fed. Rep. 989; *Foster v. Merchants', etc.*, Transp. Co., 134 Fed. Rep. 964.
12. *Lights for an Overtaken Vessel*. — *The Bernicia*, 122 Fed. Rep. 886.
- 960.** 5. *Manner of Displaying Light*. — See *The Valley Forge*, (C. C. A.) 124 Fed. Rep. 192.
7. *Frequently Exhibited*. — See *The Bernicia*, 122 Fed. Rep. 886.
8. *Efficiency*. — See *The Bernicia*, 122 Fed. Rep. 886.
11. *The Kaiserine Maria Theresia*, 125 Fed. Rep. 145.
- 961.** 2. *The J. C. Ames*, 121 Fed. Rep. 918.
- 962.** 1. *Failure to See Lights*. — *The Sunlight*, (1904) P. 100; *The Bergen*, 108 Fed. Rep. 555, *affirmed* (C. C. A.) 128 Fed. Rep. 920; *The Zampa*, 113 Fed. Rep. 541; *The Helen G. Moseley*, 117 Fed. Rep. 760, *affirmed* (C. C. A.) 128 Fed. Rep. 402; *The Queen Elizabeth*, (C. C. A.) 122 Fed. Rep. 406; *The Massassagua*, 124 Fed. Rep. 97; *The Benjamin Franklin*, 127 Fed. Rep. 457; *The Trader*, 129 Fed. Rep. 462; *The Dauntless*, (C. C. A.) 129 Fed. Rep. 715; *The Idlewild*, 129 Fed. Rep. 846.
3. *Effect of Failure to Comply with Rules*. — *The Arthur*, 108 Fed. Rep. 557; *The Hartford*, 125 Fed. Rep. 559; *The Winfield S. Cahill*, 130 Fed. Rep. 989. See also *The Pierre Corneille*, 133 Fed. Rep. 604.
4. *The Livingstone*, (C. C. A.) 113 Fed. Rep. 879.
- 963.** 3. *Breach of Regulations Prima Facie Contributing Fault*. — *The Maling*, 110 Fed. Rep. 227, *modified* 116 Fed. Rep. 107; *The Komuk*, 120 Fed. Rep. 841; *Foster v. Merchants, etc.*, Transp. Co., 134 Fed. Rep. 964.
5. *Proof as to Lights*. — See *The John H. Starin*, (C. C. A.) 122 Fed. Rep. 236.
- 964.** 1. *Weight of Evidence*. — *The Alabama*, 114 Fed. Rep. 214, *modified* (C. C. A.) 126 Fed. Rep. 332; *The John H. Starin*, (C. C. A.) 122 Fed. Rep. 236.
2. *The Alabama*, 114 Fed. Rep. 214, *modified* (C. C. A.) 126 Fed. Rep. 332.

- 964.** 2. Signals — *a.* NECESSITY AND SUFFICIENCY OF SIGNALS — (2) *Rules Imperative.* — See notes 5, 8.
- 965.** (3) *Distance at Which Signals Must Be Given.* — See notes 4, 5.
- b.* PROPER SIGNALS — (3) *Vessels Approaching Bend in Channel.* — See note 15.
- 966.** (5) *Overtaking Vessels.* — See notes 6, 7, 8, 9.
- (6) *Vessels at Anchor, Etc.* — See note 10.
- 967.** (7) *Vessels Moving from Docks.* — See note 1.
- 968.** *c.* GIVING AND ANSWERING SIGNALS — (3) *Failure to Answer Signals.* — See notes 1, 2, 3, 4.
- (4) *Signaling Departure from Rules — Right to Dictate Course.* — See note 5.
- Risk of Departure. — See note 7.
- 969.** The Assent of the Other Vessel. — See note 2.
- (5) *Cross or Confusing Signals.* — See notes 5, 6.
- (6) *Compliance with Signals.* — See note 9.
- 970.** See note 1.
- (7) *Danger or Alarm Signals.* — See notes 2, 3, 4.

964. 5. Rules Imperative. — The Frank S. Hall, 116 Fed. Rep. 559; The Straits of Dover, (C. C. A.) 120 Fed. Rep. 900; The C. J. Reno, 121 Fed. Rep. 149; The North Star, 132 Fed. Rep. 145; The Georgetown, 135 Fed. Rep. 854. See also The Deutschland, 129 Fed. Rep. 964.

Full Speed Astern — Sailing Vessel Entitled to Signal. — The Triton, (C. C. A.) 118 Fed. Rep. 329.

Literal Compliance with Rules Required. — The Maling, 110 Fed. Rep. 227, modified 116 Fed. Rep. 107.

8. Failure to Hear No Excuse. — The Mahanoy, 126 Fed. Rep. 587.

965. 4. When Distant a Half Mile. — The Richmond, 124 Fed. Rep. 993; The Bayonne, 128 Fed. Rep. 288.

5. Failure to Give Signals. — The Richmond, 124 Fed. Rep. 993; *In re Rend*, 126 Fed. Rep. 564; The Wallace B. Flint, (C. C. A.) 130 Fed. Rep. 338; The John I. Brady, (C. C. A.) 131 Fed. Rep. 235.

15. Signals When Approaching Bend. — The New York Central No. 19, 127 Fed. Rep. 473.

966. 6. Signals for Overtaking Vessels. — The Fleetwing, 114 Fed. Rep. 409; The North Star, 132 Fed. Rep. 145; The Steinway, (C. C. A.) 135 Fed. Rep. 344.

7. Signals for Overtaken Vessels. — The North Star, 132 Fed. Rep. 145.

8. Signals Must Be Answered. — The Mesaba, 111 Fed. Rep. 215; The Steinway, (C. C. A.) 135 Fed. Rep. 344.

9. Agreement by Signal Necessary. — The Mesaba, 111 Fed. Rep. 215; The North Star, 132 Fed. Rep. 145.

10. Signals Not Required as to Vessels at Rest. — The Maling, 110 Fed. Rep. 227 (holding the giving of signals to be a fault), modified *sub nom.* The S. A. McCaulley, 116 Fed. Rep. 107.

967. 1. Vessels Moving from Docks. — The Captain Sam, 115 Fed. Rep. 1000; The Sitka, 132 Fed. Rep. 861. See further *supra*, this title, 915, 8.

968. 1. Failure to Answer. — The Mesaba, 111 Fed. Rep. 215; The Elizabeth, 116 Fed. Rep. 225.

2. The De Veaux Powell, 120 Fed. Rep. 522;

The Peconic, 124 Fed. Rep. 848; The Wallace B. Flint, (C. C. A.) 130 Fed. Rep. 338.

3. Duty to Stop. — The Senator D. C. Chase, (C. C. A.) 108 Fed. Rep. 110; The Thomas B. Garland, 110 Fed. Rep. 687; The George W. Roby, (C. C. A.) 111 Fed. Rep. 601; The Elizabeth, 116 Fed. Rep. 225; The Peconic, 124 Fed. Rep. 848; The Wallace B. Flint, 125 Fed. Rep. 426, affirmed (C. C. A.) 130 Fed. Rep. 338; The Spartan Prince, 126 Fed. Rep. 885; National Dredging Co. v. Monsen, (C. C. A.) 126 Fed. Rep. 930; The C. R. Hoyt, 136 Fed. Rep. 671; The Atlantic City, 136 Fed. Rep. 996.

No Duty to Stop Where Greater Danger Would Result Therefrom. — The Transfer No. 14, (C. C. A.) 127 Fed. Rep. 305, reversing 118 Fed. Rep. 81.

4. Contributing Fault. — The C. R. Hoyt, 136 Fed. Rep. 671. See also Brooklyn Ferry Co. v. U. S., 122 Fed. Rep. 696.

5. Right to Dictate Course. — The Peconic, 124 Fed. Rep. 848.

7. The Elizabeth, 116 Fed. Rep. 225. See also The Valley Forge, (C. C. A.) 124 Fed. Rep. 192.

969. 2. The Arthur M. Palmer, 115 Fed. Rep. 417.

5. Cross Signals Forbidden. — Brooklyn Ferry Co. v. U. S., 122 Fed. Rep. 696.

6. Duty to Give Danger Signal and Stop. — The Glenogle, 122 Fed. Rep. 503; Brooklyn Ferry Co. v. U. S., 122 Fed. Rep. 696; The Kaga Maru, 123 Fed. Rep. 139; The Mahanoy, 126 Fed. Rep. 587; The Trader, 129 Fed. Rep. 462. See also The Alabama, (C. C. A.) 126 Fed. Rep. 332.

9. Duty to Comply with Signal. — The Lakme, 113 Fed. Rep. 772, affirmed (C. C. A.) 118 Fed. Rep. 972; *In re Brooklyn Ferry Co.*, 115 Fed. Rep. 564, affirmed (C. C. A.) 121 Fed. Rep. 741; The Dauntless, 116 Fed. Rep. 543; The Edgar F. Luckenbach, 124 Fed. Rep. 947; The Richmond, 124 Fed. Rep. 993; The S. S. Wyckoff, 138 Fed. Rep. 418. See also The Livingstone, (C. C. A.) 113 Fed. Rep. 879.

970. 1. Answering Vessel May Assume Compliance. — The S. S. Wyckoff, 138 Fed. Rep. 418.

2. Danger Signals. — The Joseph M. Clark,

970. *d. EVIDENCE.* — See note 9.

971. **3. Lookouts** — *a. NECESSITY* — (2) *Vessels under Way.* — See notes 3, 7, 8.

(3) *Stationary Vessels.* — See notes 10, 11, 12, 13.

972. See notes 2, 5.

b. SUFFICIENCY — (1) *Competency in General.* — See note 7.

(2) *Designation and Duties.* — See note 12.

973. See note 1.

(3) *Number of Lookouts.* — See note 3.

(4) *Officers as Lookouts.* — See note 10.

(5) *Station of Lookout.* — See note 11.

974. See notes 4, 5, 8.

A Lookout Astern. — See note 9.

119 Fed. Rep. 459; The Glenogle, 122 Fed. Rep. 503; The Valley Forge, (C. C. A.) 124 Fed. Rep. 192; The Alabama, (C. C. A.) 126 Fed. Rep. 332; The Straits of Dover, (C. C. A.) 120 Fed. Rep. 900.

970. **3.** See The Transfer No. 10, 137 Fed. Rep. 666.

4. See The Acilia, (C. C. A.) 120 Fed. Rep. 455.

9. *Evidence.* — Schlotterer v. Brooklyn, etc., Ferry Co., 75 N. Y. App. Div. 330.

971. **3. Lookout Required on Vessels under Way.** — The Northland, 125 Fed. Rep. 58; The Mahanoy, 126 Fed. Rep. 587; New York v. New York, etc., Ferry Co., 130 Fed. Rep. 397; The H. S. Beard, 134 Fed. Rep. 648; Foster v. Merchants', etc., Transp. Co., 134 Fed. Rep. 964; Grube v. Hamburg-American Steamship Co., 176 N. Y. 383.

7. On Tug. — The Robert Burnett, 134 Fed. Rep. 700; Foster v. Merchants', etc., Transp. Co., 134 Fed. Rep. 964.

8. On Tow. — The A. P. Skidmore, 108 Fed. Rep. 972.

10. Vessels at Anchor. — Rich v. Hamburg-American Packet Co., 117 Fed. Rep. 751.

11. Exceptional Circumstances. — The De Veaux Powell, 120 Fed. Rep. 522.

12. Anchor Watch in Frequented Roadstead. — Connolly v. The Brandywine Granite Co., 108 Fed. Rep. 99; The James D. Leary, 110 Fed. Rep. 685, *affirmed* (C. C. A.) 113 Fed. Rep. 1019; The John H. Starin, (C. C. A.) 122 Fed. Rep. 236.

13. In Bad Weather. — Dominion Coal Co. v. The Steamship Lake Ontario, 32 Can. Sup. Ct. 507; Connolly v. Brandywine Granite Co., 108 Fed. Rep. 99; The James D. Leary, 110 Fed. Rep. 685, *affirmed* (C. C. A.) 113 Fed. Rep. 1019.

972. **2. Unfrequent Anchorage.** — Rich v. Hamburg-American Packet Co., 117 Fed. Rep. 751.

5. Lookout, When Necessary. — The John H. Starin, (C. C. A.) 122 Fed. Rep. 236.

7. Competency of Lookout. — The Richmond, 114 Fed. Rep. 208; The Pilot Boy, (C. C. A.) 115 Fed. Rep. 873; The J. C. Ames, 121 Fed. Rep. 918; The Gladiator, 132 Fed. Rep. 876.

12. Special Designation. — The J. C. Ames, 121 Fed. Rep. 918; Brooklyn Ferry Co. v. U. S., 122 Fed. Rep. 696; The Prudence, 124 Fed. Rep. 939, *affirmed* (C. C. A.) 134 Fed. Rep. 358; The Dauntless, (C. C. A.) 129 Fed. Rep.

715; The John I. Brady, (C. C. A.) 131 Fed. Rep. 235; The Echo, 131 Fed. Rep. 622. See also The New York Central No. 19, 127 Fed. Rep. 473.

973. **1. Pilot or Wheelman Not Proper Lookout.** — The George W. Roby, (C. C. A.) 111 Fed. Rep. 601. See also The New York Central No. 22, 124 Fed. Rep. 750.

3. See Watts v. U. S., 123 Fed. Rep. 105.

10. Officer of Deck Not Proper Lookout. — The George W. Roby, (C. C. A.) 111 Fed. Rep. 601; The Pilot Boy, (C. C. A.) 115 Fed. Rep. 873; The J. C. Ames, 121 Fed. Rep. 918; Brooklyn Ferry Co. v. U. S., 122 Fed. Rep. 696; The Prudence, 124 Fed. Rep. 939, *affirmed* (C. C. A.) 134 Fed. Rep. 358; The Echo, 131 Fed. Rep. 622.

11. Must Be Stationed in Bows. — The Arthur M. Palmer, 115 Fed. Rep. 417; The Pilot Boy, (C. C. A.) 115 Fed. Rep. 873; The Banan, 116 Fed. Rep. 900; The New York Central No. 22, 124 Fed. Rep. 750; The Prudence, 124 Fed. Rep. 939, *affirmed* (C. C. A.) 134 Fed. Rep. 358; The Silvia, 127 Fed. Rep. 615; The Horatio Hall, 127 Fed. Rep. 620; The Dauntless, (C. C. A.) 129 Fed. Rep. 715; New York v. New York, etc., Ferry Co., 130 Fed. Rep. 397; The Vedamore, 131 Fed. Rep. 154; The John I. Brady, (C. C. A.) 131 Fed. Rep. 235; The Echo, 131 Fed. Rep. 622.

974. **4. Bridge of Steamer.** — The Pilot Boy, (C. C. A.) 115 Fed. Rep. 873.

Removal to Bridge Justified by Weather. — The Kaiserine Maria Theresia, 125 Fed. Rep. 145, holding, however, that removal of the lookout to the bridge imposes on the vessel a duty to slacken speed so as to be under control and able to reverse promptly.

5. Pilot House Not Proper Place. — The George W. Roby, (C. C. A.) 111 Fed. Rep. 601; The Arthur M. Palmer, 115 Fed. Rep. 417; The De Veaux Powell, 120 Fed. Rep. 522; The New York Central No. 22, 124 Fed. Rep. 750.

8. Lookout on Vessel Towed Alongside. — The James A. Lawrence, (C. C. A.) 117 Fed. Rep. 228.

9. Lookout Astern. — The Senator D. C. Chase, (C. C. A.) 108 Fed. Rep. 110; The Northland, 125 Fed. Rep. 58; The Deutschland, 129 Fed. Rep. 964.

Lookout Required When No Set Light Astern. — The Bernicia, 122 Fed. Rep. 886.

Lookout Needed at Stern of Tug Towing Barges Without Rudders. — The Col. John F. Gaynor, (C. C. A.) 130 Fed. Rep. 856,

- 974.** (6) *Vigilance Required.* — See note 11.
- 975.** *Duty to Keep to Station.* — See notes 6, 8.
c. DUTY OF LOOKOUT. — See note 15.
d. EFFECT OF ABSENCE OF LOOKOUT. — See note 18.
- 976.** See notes 1, 2, 3.
e. EVIDENCE—(1) *Presumptions and Burden of Proof.* — See note 4.
 (2) *Evidence of Negligence.* — See note 5.
- 977.** **XIII. FOG OR THICK WEATHER—2. Care in Navigation—***a. PRECAUTIONS NECESSARY.* — See notes 6, 8.
In the Case of Ferry Boats. — See note 9.
- 978.** See note 2.
3. Discontinuance of Navigation—Anchoring—River and Harbor Navigation. — See notes 10, 11.
- 979.** See note 1.
Ocean Navigation. — See note 6.
- 980.** *b. MEANS OF GIVING SIGNALS—Substitution of Other Means.* — See note 1.

974. 11. Vigilance Required. — *Rich v. Hamburg-American Packet Co.*, 117 Fed. Rep. 751; *The Helen G. Moseley*, 117 Fed. Rep. 760, *affirmed* (C. C. A.) 128 Fed. Rep. 402; *The Colorado*, 117 Fed. Rep. 796; *The Prudence*, 124 Fed. Rep. 939, *affirmed* (C. C. A.) 134 Fed. Rep. 358; *The Genesta*, 125 Fed. Rep. 423; *The Spartan Prince*, 126 Fed. Rep. 885; *The Horatio Hall*, 127 Fed. Rep. 620; *The Helen G. Moseley*, (C. C. A.) 128 Fed. Rep. 402. See also *The Gladiator*, 132 Fed. Rep. 876.

975. 6. Lookout Must Stick to His Station. — *The Northland*, 125 Fed. Rep. 58.

8. Helping Others. — *The Joseph M. Clark*, 119 Fed. Rep. 459.

15. Duty to Report Vessels. — See *The Richmond*, 114 Fed. Rep. 208.

18. Absence of Lookout Renders Vessel Liable. — *The Devonian*, 110 Fed. Rep. 588; *The George W. Roby*, (C. C. A.) 111 Fed. Rep. 601; *The O. L. Halenbeck*, 112 Fed. Rep. 159; *Wilders' Steamship Co. v. Low*, (C. C. A.) 112 Fed. Rep. 161; *The Arthur M. Palmer*, 115 Fed. Rep. 417; *The Captain Sam*, 115 Fed. Rep. 1000; *The Banan*, 116 Fed. Rep. 900; *The James A. Lawrence*, (C. C. A.) 117 Fed. Rep. 228; *The Komuk*, 120 Fed. Rep. 841; *The Dauntless*, 121 Fed. Rep. 420, *modified* (C. C. A.) 129 Fed. Rep. 715; *The J. C. Ames*, 121 Fed. Rep. 918; *Brooklyn Ferry Co. v. U. S.*, 122 Fed. Rep. 696; *The Commerce*, 123 Fed. Rep. 178; *The Iberia*, (C. C. A.) 123 Fed. Rep. 865; *In re Rapid Transit Ferry Co.*, 124 Fed. Rep. 786; *The Prudence*, 124 Fed. Rep. 939, *affirmed* (C. C. A.) 134 Fed. Rep. 358; *The Northland*, 125 Fed. Rep. 58; *Welch v. Philadelphia, etc., R. Co.*, 125 Fed. Rep. 419; *The Hartford*, 125 Fed. Rep. 550; *The Mahanoy*, 126 Fed. Rep. 587; *New York v. New York, etc., Ferry Co.*, 130 Fed. Rep. 397; *The Winfield S. Cahill*, 130 Fed. Rep. 989; *The Sitka*, 132 Fed. Rep. 861; *The H. S. Beard*, 134 Fed. Rep. 648; *The Robert Burnett*, 134 Fed. Rep. 700; *Foster v. Merchants', etc., Transp. Co.*, 134 Fed. Rep. 964; *The Cypromene*, 135 Fed. Rep. 558; *The Fannie Hayden*, 137 Fed. Rep. 280.

976. 1. Except Where It Did Not Contribute. — *The London*, (1904) P. 355; *The Columbia*, (C. C. A.) 109 Fed. Rep. 660; *The Livingstone*

(C. C. A.) 113 Fed. Rep. 879; *Erie R. Co. v. Oceanic Steam Nav. Co.*, 121 Fed. Rep. 440; *The N. & W. 2*, 122 Fed. Rep. 171; *The Edgar F. Luckenbach*, 124 Fed. Rep. 947; *The Tarpon*, 132 Fed. Rep. 277; *The Cornell*, 134 Fed. Rep. 694; *The Fannie Hayden*, 137 Fed. Rep. 280. See also *The Arthur M. Palmer*, 115 Fed. Rep. 417.

2. The Iberia, 117 Fed. Rep. 718, *affirmed* (C. C. A.) 123 Fed. Rep. 865; *The Anson M. Bangs*, (C. C. A.) 129 Fed. Rep. 103; *The Roma*, 138 Fed. Rep. 218. See also *The W. S. Tompkins*, 116 Fed. Rep. 59; *The James A. Lawrence*, (C. C. A.) 117 Fed. Rep. 228.

3. The Gadsby, 120 Fed. Rep. 851.

4. Absence of Lookout Prima Facie Evidence of Fault. — *The George W. Roby*, (C. C. A.) 111 Fed. Rep. 601; *The Pilot Boy*, (C. C. A.) 115 Fed. Rep. 873; *The Captain Sam*, 115 Fed. Rep. 1000; *The Banan*, 116 Fed. Rep. 900; *The Fontana*, (C. C. A.) 119 Fed. Rep. 853; *The Fannie Hayden*, 137 Fed. Rep. 280.

5. Evidence of Negligence. — *The Municipal*, 108 Fed. Rep. 895; *The O. L. Halenbeck*, 112 Fed. Rep. 159; *The Zampa*, 113 Fed. Rep. 541; *The Richmond*, 114 Fed. Rep. 208. See also *The John H. Starin*, 113 Fed. Rep. 419, *reversed* (C. C. A.) 122 Fed. Rep. 236; *The Captain Sam*, 115 Fed. Rep. 1000.

977. 6. In Track of Ferry Boats. — See *The Admiral Schley*, (C. C. A.) 131 Fed. Rep. 433; *The Bellingham*, 138 Fed. Rep. 619.

8. Seeking Anchorage. — *The Vedamore*, 131 Fed. Rep. 154.

9. Ferry Boats Must Use Greatest Care. — *The Amiral Cecille*, 134 Fed. Rep. 673; *The Chicago*, 134 Fed. Rep. 1013.

978. 2. Obstructing Ferry Course. — *The Chicago*, 134 Fed. Rep. 1013.

10. See *The A. P. Skidmore*, (C. C. A.) 115 Fed. Rep. 791.

11. See *Consolidation Coal Co. v. The Admiral Schley*, 115 Fed. Rep. 378, *affirmed* (C. C. A.) 131 Fed. Rep. 433.

979. 1. Proceeding to Anchorage. — *The Newburgh*, (C. C. A.) 130 Fed. Rep. 321.

6. Path of Ocean Steamers—Greatest Care Required. — *The Eagle Point*, (C. C. A.) 120 Fed. Rep. 449.

980. 1. Substitution of Other Means. — *The*

980. *c.* SUFFICIENCY. — See note 4.

981. *d.* PROPER AND NECESSARY SIGNALS — (2) *Sail Vessels under Way.* — See notes 3, 4.

(3) *Vessels Towing or in Tow* — Application of Rules. — See note 11.

982. (4) *Vessels at Anchor, at Wharf, Etc.* — See note 3.

Vessels Moored at Wharf. — See note 9.

983. *e.* MISTAKES AS TO LOCATION, OR FAILURE TO HEAR SIGNALS. — See note 5.

5. Speed and Course — *a.* SPEED OF STEAM VESSELS — (1) *Moderate Speed* — The Rules. — See notes 8, 9.

Dependent on Circumstances. — See note 10.

984. See notes 1, 2.

Definition. — See notes 3, 4.

985. *Particular Speeds.* — See notes 2, 3, 4, 6.

986. (2) *Excuses.* — See note 4.

London, (1904) P. 355. See also Quinette v. Bisso, (C. C. A.) 136 Fed. Rep. 825.

980. **4. Strict Compliance Necessary.** — The London, (1904) P. 355; Consolidation Coal Co. v. The Admiral Schley, 115 Fed. Rep. 378, *affirmed* (C. C. A.) 131 Fed. Rep. 433. See also The Eagle Point, (C. C. A.) 120 Fed. Rep. 449.

981. **3. Sail Vessels under Way.** — The Frank S. Hall, 116 Fed. Rep. 559.

4. Burrows v. Gower, 119 Fed. Rep. 616.

11. Obligation of Tug. — Consolidation Coal Co. v. The Admiral Schley, 115 Fed. Rep. 378, *affirmed* (C. C. A.) 131 Fed. Rep. 433.

982. **3. Vessels at Anchor.** — The Mary Weaver, 124 Fed. Rep. 977; Federal Ins. Co. v. Starin, 134 Fed. Rep. 1010.

Barge Anchored. — The Commerce, 123 Fed. Rep. 178.

Sign of Bell. — See The Annex No. 5, 117 Fed. Rep. 754.

9. Vessel at Wharf under Duty to Answer Signal of Approaching Vessel. — The McCaldin Brothers, 117 Fed. Rep. 779.

983. **5. Evidence.** — See The Chicago, 134 Fed. Rep. 1013.

8. Speed. — The Glenogle, 122 Fed. Rep. 503; The Charlotte, 124 Fed. Rep. 989, *affirmed* (C. C. A.) 128 Fed. Rep. 38; The Benjamin Franklin, 127 Fed. Rep. 457; The Newburgh, (C. C. A.) 130 Fed. Rep. 321; Wineman v. The Ship Hiawatha, 7 Can. Exch. 446.

9. The El Monte, 114 Fed. Rep. 796; The Eagle Point, (C. C. A.) 120 Fed. Rep. 449, *reversing* on the facts 114 Fed. Rep. 971.

10. Moderate Speed Depends upon Circumstances. — The Eagle Point, 114 Fed. Rep. 971, *reversed* on other grounds (C. C. A.) 120 Fed. Rep. 449; *In re La Bourgogne*, 117 Fed. Rep. 261; The Northern Queen, 117 Fed. Rep. 906; The Chicago, 134 Fed. Rep. 1013; Quinette v. Bisso, (C. C. A.) 136 Fed. Rep. 825.

984. **1. Quinett v. Bisso,** (C. C. A.) 136 Fed. Rep. 825. See also The Cypromene, 135 Fed. Rep. 558.

2. See The Eagle Point, (C. C. A.) 120 Fed. Rep. 449, *reversing* on the facts 114 Fed. Rep. 971.

3. "Moderate Speed" Purely Relative Term. — Quinette v. Bisso, (C. C. A.) 136 Fed. Rep. 825.

4. The McCaldin Brothers, 117 Fed. Rep. 779; The Northern Queen, 117 Fed. Rep. 906;

Watts v. U. S., 123 Fed. Rep. 105; The Kaga Maru, 123 Fed. Rep. 139; The Belgium King, (C. C. A.) 125 Fed. Rep. 869.

985. **2. The Eagle Point,** 114 Fed. Rep. 971, *reversed* on other grounds (C. C. A.) 120 Fed. Rep. 449.

3. The El Monte, 114 Fed. Rep. 796.

4. Bare Steerageway. — See *In re Clyde*, Steamship Co., 134 Fed. Rep. 95; The George W. Roby, (C. C. A.) 111 Fed. Rep. 601.

6. Particular Speeds Held Excessive. — Two and a half miles an hour in close proximity to a dock, The McCaldin Brothers, 117 Fed. Rep. 779; six miles an hour on Lake Huron, The George W. Roby, (C. C. A.) 111 Fed. Rep. 601; six knots an hour in a frequented part of the ocean, *In re Clyde* Steamship Co., 134 Fed. Rep. 95; Watts v. U. S., 123 Fed. Rep. 105; six and a half miles an hour on the great lakes in the track of vessels, Wineman v. The Ship Hiawatha, 7 Can. Exch. 446; seven and a half to nine miles an hour in the Mississippi river, above New Orleans, Quinette v. Bisso, (C. C. A.) 136 Fed. Rep. 825; eight miles an hour in the Hudson river, The Newburgh, (C. C. A.) 130 Fed. Rep. 321, *reversing* on other grounds 124 Fed. Rep. 954; eight knots an hour coming out of Boston harbor, Consolidated Coal Co. v. The Admiral Schley, 115 Fed. Rep. 378, *affirmed* (C. C. A.) 131 Fed. Rep. 433; eight and nine knots an hour one hundred and fifty miles east of Sandy Hook in the frequented track of commerce, The Eagle Point, (C. C. A.) 120 Fed. Rep. 449; eight and a half knots in the Pacific ocean, The Belgian King, (C. C. A.) 125 Fed. Rep. 869; nine knots an hour in Tacoma harbor, The Glenogle, 122 Fed. Rep. 503; ten miles an hour in York river, The Charlotte, 124 Fed. Rep. 989, *affirmed* (C. C. A.) 128 Fed. Rep. 38; ten knots an hour below Cape Henlopen, The Frank S. Hall, 116 Fed. Rep. 559; or on Long Island Sound, The Chelsea, 135 Fed. Rep. 616; or in Seattle harbor, The Bellingham, 138 Fed. Rep. 619; or in the track of ocean liners, *In re La Bourgogne*, 117 Fed. Rep. 261; twelve and a half miles an hour at the head of St. Mary's river, The Northern Queen, 117 Fed. Rep. 906; fifteen miles an hour in Columbia river, The Cypromene, 135 Fed. Rep. 558.

986. **4. Passenger Steamers on Established Routes,** running regularly on schedule time, are

987. b. SPEED OF SAIL VESSELS — No Absolute Rule Can Be Extracted from the Cases. — See note 4.

c. CHANGE OF COURSE. — See notes 6, 8, 10.

988. d. DUTY TO SLACKEN SPEED, STOP, OR REVERSE ON HEARING FOG SIGNALS — (1) *General Rule.* — See notes 4, 5, 6.

989. (3) Fog Signal Heard Ahead or Abeam. — See notes 1, 2, 3, 4.

990. XIV. NARROW CHANNELS, RIVERS, HARBORS, AND CANALS — 1. *Narrow Channels* — *a. CHANNEL DEFINED.* — See note 4.

b. OBSTRUCTING CHANNEL. — See notes 7, 8.

Rafts. — See notes 11, 12.

991. c. PRECAUTIONS NECESSARY. — See notes 1, 2, 3, 4, 6.

d. STARBOARD-SIDE RULE. — See notes 9, 10.

entitled to no exception. *The Bellingham*, 138 Fed. Rep. 619.

987. 4. Speeds Held Not Immoderate. — Six knots an hour in Long Island Sound, *The Chelsea*, 135 Fed. Rep. 616.

6. See *The Belgian King*, (C. C. A.) 125 Fed. Rep. 869.

8. *Hall v. North Pac. Coast R. Co.*, 134 Fed. Rep. 309.

10. *Hall v. North Pac. Coast R. Co.*, 134 Fed. Rep. 309; *The Chelsea*, 135 Fed. Rep. 616.

988. 4. Duty to Slacken Speed, Stop, or Reverse. — *The Challenge*, (1904) P. 41; *The Britannia*, (1905) P. 98; *The Steamship Pawnee v. Roberts*, 32 Can. Sup. Ct. 509; *The George W. Roby*, (C. C. A.) 111 Fed. Rep. 601; *Hunter v. The Tellus*, 113 Fed. Rep. 525, *affirmed* (C. C. A.) 125 Fed. Rep. 869; *In re Clyde Steamship Co.*, 134 Fed. Rep. 95.

Vessel Hearing Signal Not in Fog. — See *The Bernard Hall*, 86 L. T. N. S. 658.

5. *In re Clyde Steamship Co.*, 134 Fed. Rep. 95.

6. *The George W. Roby*, (C. C. A.) 111 Fed. Rep. 601.

989. 1. Distance Material. — *Compare The Britannia*, (1905) P. 98.

2. *The George W. Roby*, (C. C. A.) 111 Fed. Rep. 601; *The Glenogle*, 122 Fed. Rep. 503; *The Kaga Maru*, 123 Fed. Rep. 139; *The Belgian King*, (C. C. A.) 125 Fed. Rep. 869.

3. *In Case of Uncertainty.* — *The George W. Roby*, (C. C. A.) 111 Fed. Rep. 601; *Hunter v. The Tellus*, 113 Fed. Rep. 525, *affirmed* (C. C. A.) 125 Fed. Rep. 869; *The El Monte*, 114 Fed. Rep. 706; *Consolidated Coal Co. v. The Admiral Schley*, 115 Fed. Rep. 378, *affirmed* (C. C. A.) 131 Fed. Rep. 433; *The Glenogle*, 122 Fed. Rep. 503; *The Kaga Maru*, 123 Fed. Rep. 139; *The Belgian King*, (C. C. A.) 125 Fed. Rep. 869; *In re Clyde Steamship Co.*, 134 Fed. Rep. 95.

4. *Signals Indicating Near Approach.* — *The Challenge*, (1904) P. 41; *The Belgian King*, (C. C. A.) 125 Fed. Rep. 869; *The Bellingham*, 138 Fed. Rep. 619.

990. 4. Channel Defined. — See *The Northern Queen*, 117 Fed. Rep. 906.

Narrow Channels. — *The Gustafsberg*, (1905) P. 10; *The Ashton*, (1905) P. 21; *The Glengariff*, (1905) P. 106; *The Benjamin Franklin*, 127 Fed. Rep. 457; *The Bee*, (C. C. A.) 138 Fed. Rep. 303.

Upper Bay of New York Held to Be Channel. — *The Alfred W. Booth*, 127 Fed. Rep. 453.

7. See *The Maggie Ellen*, (C. C. A.) 120 Fed. Rep. 662.

Steamers Coming up Abreast. — *Minnesota Steamship Co. v. Lehigh Valley Transp. Co.*, (C. C. A.) 129 Fed. Rep. 22.

8. *Unwieldy Tow.* — See *The Alabama*, (C. C. A.) 126 Fed. Rep. 332.

11. *Rafts.* — *Hall v. Chisholm*, (C. C. A.) 117 Fed. Rep. 807. See generally the title *BOOM COMPANIES*, 710. 3 *et seq.*

Raft Grounded — *Other Navigators Bound to Submit to Reasonable Delay.* — *The Mary*, 123 Fed. Rep. 609.

12. *Hall v. Chisholm*, (C. C. A.) 117 Fed. Rep. 807.

991. 1. Easy and Cautious Movements. — *Welch v. Philadelphia, etc., R. Co.*, 125 Fed. Rep. 419; *The Bayonne*, 128 Fed. Rep. 288. See also *The Alabama*, (C. C. A.) 126 Fed. Rep. 332.

2. *Attempts to Pass.* — *The Sicilian Prince*, 128 Fed. Rep. 133; *The North Star*, 132 Fed. Rep. 145.

3. *Towing on Long Hawser.* — *The New York Central No. 22*, 124 Fed. Rep. 750.

4. *Liability to Sheer.* — *The Dictator*, 132 Fed. Rep. 164.

6. *Stopping and Reversing.* — *The George Presley*, (C. C. A.) 111 Fed. Rep. 555; *Hall v. Chisholm*, (C. C. A.) 117 Fed. Rep. 807; *The Northland*, 125 Fed. Rep. 58; *Welch v. Philadelphia, etc., R. Co.*, 125 Fed. Rep. 419.

9. *Starboard-side Rule.* — *The Sea King*, (C. C. A.) 114 Fed. Rep. 535; *The Dauntless*, 121 Fed. Rep. 420, *modified* (C. C. A.) 129 Fed. Rep. 715; *The Mary C. Elphicke v. Pittsburgh Steamship Co.*, (C. C. A.) 123 Fed. Rep. 405; *The Dauntless*, (C. C. A.) 129 Fed. Rep. 715; *The Tarpon*, 132 Fed. Rep. 277; *The Transfer No. 10*, 137 Fed. Rep. 666.

Fairway Defined. — *The Glengariff*, (1905) P. 106.

10. *Waters Included in Rule.* — The rule has been held to be applicable to the river Thames, *The Gustafsberg*, (1905) P. 10; to the river Humber, *The Ashton*, (1905) P. 21; to the entrance to Queenstown harbor, *The Glengariff*, (1905) P. 106; to New Haven harbor, *The John H. Starin*, 113 Fed. Rep. 419, *reversed* on other grounds (C. C. A.) 122 Fed. Rep. 236; to a dredged channel in Chesapeake Bay six hundred feet wide, *The Acilia*, (C. C. A.) 120 Fed. Rep. 455; to the North River, *The Mahanoy*, 126 Fed. Rep. 587; *The Benjamin Franklin*, 127 Fed. Rep. 457; to New York upper bay, *The*

992. See note 1.

Exceptions. — See notes 8, 9, 10.

e. DUTY TO WAIT UNTIL VESSEL HAS PASSED. — See note 11.

993. See note 2.

f. SAIL VESSELS — *Sail and Steam.* — See notes 4, 6.

994. 3. River Navigation — *a.* STARBOARD-SIDE RULE. — See notes 4, 6.

995. *c.* SAIL VESSELS. — See note 2.

996. *e.* WESTERN RIVERS — (3) *Right of Way.* — See note 5.

998. *h.* EAST RIVER. — See note 1.

Application of Rule. — See note 5.

999. 4. Harbor Navigation — *b.* NAVIGATION IN HARBOR. — See note 11.

1001. *d.* COMING TO OR LEAVING SLIPS AND WHARVES — *Right of Way.* — See note 2.

Care Required. — See note 5.

e. TURNING IN STREAM. — See note 9.

5. Rules Applicable to Ferryboats. — See note 11.

1002. 6. Waters Connecting Great Lakes. — See note 12.

1003. 8. Speed. — See notes 11, 12.

1004. Suction and Swell. — See notes 3, 4.

Alfred W. Booth, 127 Fed. Rep. 453; The Sicilian Prince, 128 Fed. Rep. 133; to the East River, New York harbor, The New Hampshire, (C. C. A.) 136 Fed. Rep. 769.

992. 1. Keep Well over to Starboard Side. — The Bayonne, 128 Fed. Rep. 288; Minnesota Steamship Co. v. Lehigh Valley Transp. Co., (C. C. A.) 129 Fed. Rep. 22.

8. Heavily Encumbered Tug. — The George Presley, (C. C. A.) 111 Fed. Rep. 555; The Alabama, 114 Fed. Rep. 214, *modified* (C. C. A.) 126 Fed. Rep. 332; The Jamestown, 114 Fed. Rep. 593.

9. Mitchell Transp. Co. v. Green, (C. C. A.) 120 Fed. Rep. 49.

10. The Jamestown, 114 Fed. Rep. 593.

11. Descending Steamers Have Right of Way. — Davidson v. Georgian Bay Nav. Co., 33 Can. Sup. Ct. 1; The Mary C. Elphicke v. Pittsburgh Steamship Co., (C. C. A.) 123 Fed. Rep. 405.

993. 2. The Mary C. Elphicke v. Pittsburgh Steamship Co., (C. C. A.) 123 Fed. Rep. 405.

4. Sail Vessel Entitled to Channel. — See The Devonian, 110 Fed. Rep. 588.

6. Holding Course. — See The Devonian, 110 Fed. Rep. 588.

994. 4. Starboard-side Rule. — The John I. Brady, 115 Fed. Rep. 204, *affirmed* (C. C. A.) 131 Fed. Rep. 235; The C. J. Reno, 121 Fed. Rep. 149; The Dauntless, 121 Fed. Rep. 420, *modified* (C. C. A.) 129 Fed. Rep. 715; The Richmond, 124 Fed. Rep. 993; The Bayonne, 128 Fed. Rep. 288; The Winfield S. Cahill, 130 Fed. Rep. 989; The Transfer No. 10, 138 Fed. Rep. 221. See also The Horatio Hall, 127 Fed. Rep. 620.

6. Exceptions. — The George Presley, (C. C. A.) 111 Fed. Rep. 555; The Bayonne, 128 Fed. Rep. 288.

995. 2. Drifting. — Compare Welch v. Philadelphia, etc., R. Co., 125 Fed. Rep. 419, holding a becalmed sailing yacht to be in fault for failure to anchor at the side of a narrow channel through which unwieldy tows were passing.

996. 5. Duty to Keep to Side of Channel. — The Spartan Prince, 126 Fed. Rep. 885.

998. 1. Duty to Keep to Middle of River. — The Emperor, 115 Fed. Rep. 447; The Teaser, 118 Fed. Rep. 81, *reversed* on other grounds (C. C. A.) 127 Fed. Rep. 305; Brooklyn Ferry Co. v. U. S., 122 Fed. Rep. 696; The Hartford, 125 Fed. Rep. 559; The Spartan Prince, 126 Fed. Rep. 885; The New York Central No. 19, 127 Fed. Rep. 473; New York v. New York, etc., Ferry Co., 130 Fed. Rep. 397; The Transit, 130 Fed. Rep. 996; The Surf, 132 Fed. Rep. 880; The Steinway, (C. C. A.) 135 Fed. Rep. 344; The Transfer No. 10, 137 Fed. Rep. 666.

5. Rounding Battery. — The Spartan Prince, 126 Fed. Rep. 885.

999. 11. Great Caution Required. — The John H. Starin, 113 Fed. Rep. 419, *reversed* on other grounds (C. C. A.) 122 Fed. Rep. 236. See also The Transit, 130 Fed. Rep. 996.

1001. 2. The Horatio Hall, 127 Fed. Rep. 620.

5. Care in Leaving Pier. — The Horatio Hall, 127 Fed. Rep. 620.

9. The Sicilian Prince, 128 Fed. Rep. 133.

11. Must Not Be Embarrassed. — New York v. New York, etc., Ferry Co., 130 Fed. Rep. 397.

1002. 12. Right of Way of Descending Vessel. — Davidson v. Georgian Bay Nav. Co., 33 Can. Sup. Ct. 1; The Yuma, 117 Fed. Rep. 894, *affirmed* (C. C. A.) 132 Fed. Rep. 964.

1003. 11. Great Caution Required. — The Acilia, (C. C. A.) 120 Fed. Rep. 455; The Rotherfield, 123 Fed. Rep. 460. See also The Mauch Chunk, 124 Fed. Rep. 671.

12. Under Control. — Hall v. Chisholm, (C. C. A.) 117 Fed. Rep. 807. See also The Cypromene, 135 Fed. Rep. 558.

1004. 3. The St. Paul, 124 Fed. Rep. 103; The North Star, 132 Fed. Rep. 145.

4. Unusual Suction and Swell. — The Rotherfield, 123 Fed. Rep. 460; The Kaiser Wilhelm der Grosse, 134 Fed. Rep. 1012; The Asbury Park, 136 Fed. Rep. 269, 138 Fed. Rep. 617. See also The St. Paul, 124 Fed. Rep. 103.

- 1004.** Sheering from Course. — See note 9.
- 1005.** Effect of Local Law. — See notes 2, 3.
- 1006.** XV. ENFORCEMENT OF LIABILITY FOR INJURIES — 1. Jurisdiction. — See notes 6, 7.
In the United States. — See note 8.
- 1008.** 3. Persons or Property Liable — *a.* VESSELS — Public Vessels. — See note 7.
- 1009.** *b.* OWNERS. — See note 1.
- 1010.** *g.* EFFECT OF NEGLIGENCE OF LICENSED PILOT — (1) *General Rule.* — See note 3.
(2) *Compulsory Pilotage* — (b) What Constitutes — In the United States. — See note 7.
- 1011.** (c) Effect of Employment under Compulsory Law — *aa.* ENGLISH RULE — (*aa*) *Exemption from Liability Stated.* — See notes 4, 5, 6.
- 1012.** (*cc*) *Command of Vessel.* — See note 1.
- 1014.** (*ff*) *Contributing Faults.* — See note 3.
- 1015.** *bb.* RULE IN UNITED STATES. — See notes 1, 2.
- 1016.** 5. Evidence — *c.* PRESUMPTIONS AND BURDEN OF PROOF. — See note 13.
- 1017.** See note 1.
Contributory Fault. — See note 6.
The Violation of Rules of Navigation. — See note 8.
Failure to Call Witness. — See note 9.

1004. 9. Smelling the Ground. — The Caldy, 123 Fed. Rep. 802.

1005. 2. Local Statute Limiting Speed. — The Gladiator, 132 Fed. Rep. 876.

3. Particular Speed Held Excessive. — Eight knots an hour in the Patapsco river at night, The Caldy, 123 Fed. Rep. 802; ten miles an hour in the St. Clair river at night, American Steamship Co. v. American Steel Barge Co., (C. C. A.) 129 Fed. Rep. 65.

1006. 6. Jurisdiction of Admiralty Courts. — Elder Dempster Shipping Co. v. Pouppirt, (C. C. A.) 125 Fed. Rep. 732; *In re Clyde Steamship Co.*, 134 Fed. Rep. 95.

7. Elder Dempster Shipping Co. v. Pouppirt, (C. C. A.) 125 Fed. Rep. 732; The San Rafael, 134 Fed. Rep. 749.

8. Admiralty Has Jurisdiction of Injury to Beacon Attached to Bottom of Channel. — The Blackheath, 195 U. S. 361, reversing 122 Fed. Rep. 112.

1008. 7. War Vessel — Suit Against United States by Special Act of Congress. — Watts v. U. S., 123 Fed. Rep. 105.

1009. 1. A City. — The Major Reybold, 111 Fed. Rep. 414. See also Townsend v. Boston, 187 Mass. 283.

1010. 3. Liability for Acts of Licensed Pilot. — See The Glenogle, 122 Fed. Rep. 503; Donald v. Guy, 127 Fed. Rep. 228.

7. Where Pilotage Optional. — See The Robert Dollar, 115 Fed. Rep. 218.

1011. 4. The Mercedes de Larrinaga, (1904) P. 215.

5. The Ole Bull, (1905) P. 52; The Sussex, (1904) P. 236.

6. The Sussex, (1904) P. 236.

1012. 1. Where a Pilot Acquiesces in the order of the master placing him where he is not in effective control of the vessel, the pilot is liable for damages to another vessel. Green-

ock Towing Co. v. Hardie, Sc. Ct. of Sess. 4 F. 215.

1014. 3. Contributing Fault. — See Rich v. Hamburg-American Packet Co., 117 Fed. Rep. 751.

1015. 1. Rule in United States. — Crisp v. U. S., etc., Steamship Co., 124 Fed. Rep. 748.

2. Harrison v. Hughes, (C. C. A.) 125 Fed. Rep. 860; Donald v. Guy, 127 Fed. Rep. 228. But see Crisp v. U. S., etc., Steamship Co., 124 Fed. Rep. 748.

Recovery from Pilot by Shipowner Held Liable. — See Donald v. Guy, 135 Fed. Rep. 429.

1016. 13. Presumption of Fault. — Minnesota Steamship Co. v. Lehigh Valley Transp. Co., (C. C. A.) 129 Fed. Rep. 22.

1017. 1. Burden of Proof on Libellant. — The Gertrude, (C. C. A.) 118 Fed. Rep. 130; The John H. Starin, 124 Fed. Rep. 744; Chicago Transit Co. v. Campbell, 110 Ill. App. 366.

6. The Columbia, (C. C. A.) 109 Fed. Rep. 660; The Bayonne, 110 Fed. Rep. 462; The Livingstone, (C. C. A.) 113 Fed. Rep. 870; The Northern Queen, 117 Fed. Rep. 906; The Atlantis, (C. C. A.) 119 Fed. Rep. 568; The Australia, (C. C. A.) 120 Fed. Rep. 220; Davidson v. American Steel Barge Co., (C. C. A.) 120 Fed. Rep. 250; The John H. Starin, (C. C. A.) 122 Fed. Rep. 236; The Iberia, (C. C. A.) 123 Fed. Rep. 865; The Northland, 125 Fed. Rep. 58; The Chicago, (C. C. A.) 125 Fed. Rep. 712; The Transfer No. 14, (C. C. A.) 127 Fed. Rep. 305; American Steamship Co. v. American Steel Barge Co., (C. C. A.) 129 Fed. Rep. 65; The Newburgh, (C. C. A.) 130 Fed. Rep. 321; The Admiral Schley, (C. C. A.) 131 Fed. Rep. 433; The Tarpon, 132 Fed. Rep. 277.

8. Effect of Violation of Rules. — Minnesota Steamship Co. v. Lehigh Valley Transp. Co., (C. C. A.) 129 Fed. Rep. 22.

9. Failure to Call Witness. — The Edgar F.

- 1019.** *d. ADMISSIBILITY — Declarations and Admissions.* — See note 1.
Expert and Opinion Evidence. — See note 6.
e. WEIGHT AND SUFFICIENCY — Preponderance of Evidence — Inscrutable Fault. — See note 10.
1020. *Evidence of Persons on Vessels.* — See note 4.
Disinterested Onlookers. — See note 8.
1021. *Probabilities.* — See notes 7, 8.
Character of Injury. — See note 10.
1022. *6. Damages — a. IN GENERAL.* — See note 6.
1023. *Burden of Proof and Presumption.* — See note 1.
b. AMOUNT RECOVERABLE AS AFFECTED BY DEGREE OF NEGLIGENCE — (1) Rules Stated. — See note 9.
1024. See notes 1, 2.
1026. (2) *Mutual Fault* — (b) *Disparity in Degrees of Negligence.* — See note 4.
(c) *Methods of Computing Amount Recoverable.* — See notes 6, 7, 8.
1027. *Necessity of Pleading Damages.* — See note 1.

Luckenbach, 124 Fed. Rep. 947; The Adato, 126 Fed. Rep. 579; The Gladys, 135 Fed. Rep. 601; The Georgetown, 135 Fed. Rep. 854.

1019. 1. *Statements by Master and Crew.* — The Severn, 113 Fed. Rep. 578.

6. *Expert and Opinion Evidence.* — See Lambert v. La Conner Trading, etc., Co., 37 Wash. 113.

10. *Preponderance of Evidence.* — Chicago Transit Co. v. Campbell, 110 Ill. App. 366; The Margaret B. Roper, (C. C. A.) 111 Fed. Rep. 623; The Gertrude, (C. C. A.) 118 Fed. Rep. 130; The John H. Starin, 124 Fed. Rep. 744; Kenova Transp. Co. v. Monongahela River Consol. Coal, etc., Co., 56 W. Va. 70. See also Rees v. Walton, 204 Pa. St. 412.

1020. 4. *Testimony of Vessel's Own Crew.* — The Richmond, 114 Fed. Rep. 208; The Captain Sam, 115 Fed. Rep. 1000; The Dorchester, 121 Fed. Rep. 889; Minnesota Steamship Co. v. Lehigh Valley Transp. Co., (C. C. A.) 129 Fed. Rep. 22; The Sitka, 132 Fed. Rep. 861; The Georgetown, 135 Fed. Rep. 854.

8. *Disinterested Onlookers.* — The Valley Forge, (C. C. A.) 124 Fed. Rep. 192; The Charlotte, 124 Fed. Rep. 989, *affirmed* (C. C. A.) 128 Fed. Rep. 38; The Georgetown, 135 Fed. Rep. 854. See also The Itasca, 117 Fed. Rep. 885.

1021. 7. *Probabilities.* — The Margaret B. Roper, (C. C. A.) 111 Fed. Rep. 623; The Nathan Hale, (C. C. A.) 113 Fed. Rep. 865; The Helen G. Moseley, 117 Fed. Rep. 760, *affirmed* (C. C. A.) 128 Fed. Rep. 402.

8. *The Emperor*, 115 Fed. Rep. 447; *In re La Bourgogne*, 117 Fed. Rep. 261. See also The Senator Sullivan, 117 Fed. Rep. 176, *affirmed* (C. C. A.) 125 Fed. Rep. 1005.

10. *Character of Injury.* — See The Helen G. Moseley, (C. C. A.) 128 Fed. Rep. 402.

1022. 6. *Remote and Consequential Damages.* — The Glenogle, 122 Fed. Rep. 503; The Alabama, (C. C. A.) 126 Fed. Rep. 332.

1023. 1. *Burden of Proof.* — The Amiral Cecille, 134 Fed. Rep. 673.

9. *Fault of Person Injured.* — The Bayonne, 110 Fed. Rep. 462; The Thomas B. Garland, 110 Fed. Rep. 687. See also The Maling, 110 Fed. Rep. 227, *modified* 116 Fed. Rep. 107.

1024. 1. *Inevitable Accident.* — Dunton v. Allan Steamship Co., (C. C. A.) 119 Fed. Rep. 590.

2. *Mutual Fault.* — The Arthur, 108 Fed. Rep. 557; The Doris, 108 Fed. Rep. 552; The James D. Leary, 110 Fed. Rep. 685, *affirmed* (C. C. A.) 113 Fed. Rep. 1019; The Devonian, 110 Fed. Rep. 588; The George Presley, (C. C. A.) 111 Fed. Rep. 555; The O. L. Halenbeck, 112 Fed. Rep. 159; The Alabama, 114 Fed. Rep. 214, *modified* (C. C. A.) 126 Fed. Rep. 332; The El Monte, 114 Fed. Rep. 796; The Mary C. Elphicke, 115 Fed. Rep. 375, *affirmed* (C. C. A.) 123 Fed. Rep. 405; The Arthur M. Palmer, 115 Fed. Rep. 417; The Emperor, 115 Fed. Rep. 447; *In re Brooklyn Ferry Co.*, 115 Fed. Rep. 564, *affirmed* (C. C. A.) 121 Fed. Rep. 741; The Frank S. Hall, 116 Fed. Rep. 559; The Colorado, 117 Fed. Rep. 796; Hall v. Chisholm, (C. C. A.) 117 Fed. Rep. 807; The Itasca, 117 Fed. Rep. 885; The Yuma, 117 Fed. Rep. 894, *affirmed* (C. C. A.) 132 Fed. Rep. 964; The Komuk, 120 Fed. Rep. 841; The Glenogle, 122 Fed. Rep. 503; Brooklyn Ferry Co. v. U. S., 122 Fed. Rep. 696; The Mauch Chunk, 124 Fed. Rep. 671; The Mary Weaver, 124 Fed. Rep. 977; Welch v. Philadelphia, etc., R. Co., 125 Fed. Rep. 419; The Mahanoy, 126 Fed. Rep. 587; National Dredging Co. v. Monsen, (C. C. A.) 126 Fed. Rep. 930; The H. B. Moore, Jr., (C. C. A.) 127 Fed. Rep. 319; The Alfred W. Booth, 127 Fed. Rep. 453; The Frank S. Hall, 128 Fed. Rep. 816; The Trader, 129 Fed. Rep. 462; The Idlewild, 129 Fed. Rep. 846; The Sitka, 132 Fed. Rep. 861; The Gladiator, 132 Fed. Rep. 876; The C. R. Hoyt, 136 Fed. Rep. 671; The Atlantic City, 136 Fed. Rep. 996; The City of Birmingham, (C. C. A.) 138 Fed. Rep. 555; The Bellingham, 138 Fed. Rep. 619.

1026. 4. *Slight Fault on Part of Respondent.* — The Phillip Minch, 128 Fed. Rep. 578.

6. *Where Only One Vessel Injured.* — Wineman v. The Ship Hiawatha, 7 Can. Exch. 446; The H. B. Moore, Jr., (C. C. A.) 127 Fed. Rep. 319; The Amiral Cecille, 134 Fed. Rep. 673.

7. *Where Both Vessels Are Injured.* — The Glenogle, 122 Fed. Rep. 503; The Trader, 129 Fed. Rep. 462; The C. R. Hoyt, 136 Fed. Rep. 671.

8. See The Glenogle, 122 Fed. Rep. 503.

1027. 1. *Necessity of Pleading Damages.* — The Itasca, 117 Fed. Rep. 885.

1027. (e) Injury to Innocent Vessel by Mutual Fault of Two Others — *aa*. WHERE ONLY ONE VESSEL LIBELED. — See note 6.

Subrogation of Vessel Libeled to Rights of Libelant. — See note 8.

1028. *bb*. WHERE BOTH VESSELS IN FAULT ARE BEFORE COURT. — See note 1.

(f) Where Faults of Three Vessels Concur in Injury. — See note 3.

1029. *c*. LOSS OF OR INJURY TO VESSEL — (1) *Total Loss* — (b) *Value as Measure of Damages*. — See notes 1, 2.

(c) *Expense of Fruitless Efforts to Save*. — See note 11.

1030. See note 1.

(d) *Cost of Survey*. — See note 4.

1031. (f) *Prospective Profits from Use of Ship*. — See notes 4, 5.

(g) *Interest on Value of Vessel and Net Freight*. — See note 9.

1032. *Time from Which Allowed*. — See note 1.

(2) *Injuries Less than Total Loss* — (a) *In General*. — See note 10.

1033. (c) *Items for Which Recovery Allowed* — *aa*. *EXPENSE OF RAISING AND REPAIRING* — (*aa*) *Statement of Rule*. — See note 5.

1034. (*cc*) *Additional Allowance for Permanent Depreciation*. — See notes 9, 10.

1035. (*gg*) *Deduction for New Material*. — See note 6.

1036. (*hh*) *Cost of Superintending Repairs* — See notes 2, 3, 4.

(*ii*) *Proof of Cost of Raising and Repairing*. — See note 7.

bb. *LOSS OF USE OF VESSEL*. — See note 8.

1037. *cc*. *TOWAGE AND WHARFAGE*. — See note 11.

1038. *ff*. *EXPENSE OF SAVING AND CARING FOR CARGO*. — See note 1.

1027. 6. See *The Maling*, 110 Fed. Rep. 227, modified 116 Fed. Rep. 107; *The Conemaugh*, 135 Fed. Rep. 240.

8. *Contribution Rather than Subrogation*. — See *The Conemaugh*, 135 Fed. Rep. 240.

1028. 1. *American Rule*. — *The Maling*, 110 Fed. Rep. 227, modified 116 Fed. Rep. 107; *The Edward Smith*, (C. C. A.) 135 Fed. Rep. 32; *The Bellingham*, 138 Fed. Rep. 610.

3. *Where Faults of Three Vessels Concur in Injury*. — See *The Maling*, 110 Fed. Rep. 227, modified 116 Fed. Rep. 107.

1029. 1. *Measure of Damages in Case of Total Loss*. — *The Menominee*, 125 Fed. Rep. 530; *The Frank S. Hall*, 128 Fed. Rep. 815; *The Reno*, (C. C. A.) 134 Fed. Rep. 555.

2. *Market Value*. — *The Frank S. Hall*, 128 Fed. Rep. 815.

English Rule Contra. — *The Harmonides*, (1903) P. 1.

11. *Cost of Raising and Examining Wreck*. — *The Reno*, (C. C. A.) 134 Fed. Rep. 555.

1030. 1. *Obstruction to Navigation*. — *The Reno*, (C. C. A.) 134 Fed. Rep. 555.

4. *Cost of Survey*. — *The Glenogle*, 122 Fed. Rep. 503.

Cost of Survey Apportioned Where Damage Due Only in Part to Collision. — *The John F. Gaynor*, 124 Fed. Rep. 743.

1031. 4. *Profits of Future Use*. — *The Menominee*, 125 Fed. Rep. 530.

5. *Where Performance of Charter-party Commenced*. — *The George W. Roby*, (C. C. A.) 111 Fed. Rep. 601.

9. *Interest Allowed*. — *The Menominee*, 125 Fed. Rep. 530; *The Reno*, (C. C. A.) 134 Fed. Rep. 555.

Not Allowed in Suit Against United States. — *Watts v. U. S.*, 129 Fed. Rep. 222.

1032. 1. *Time from Which Interest Allowed*. — *The Menominee*, 125 Fed. Rep. 530. See also *The Mahanoy*, 127 Fed. Rep. 773.

10. *Restitutio in Integrum the Rule*. — *The Itasca*, 117 Fed. Rep. 885; *The Reno*, (C. C. A.) 134 Fed. Rep. 555.

1033. 5. *Expense of Raising and Repairing*. — *The Glenogle*, 122 Fed. Rep. 503; *The Reno*, (C. C. A.) 134 Fed. Rep. 555. See also *The Port Victoria*, (1902) P. 25.

Burden of Proving Cost on Plaintiff. — *The Reno*, (C. C. A.) 134 Fed. Rep. 555.

1034. 9. *Allowance for Permanent Depreciation*. — *The Alabama*, (C. C. A.) 126 Fed. Rep. 332; *The McIlvaine*, 126 Fed. Rep. 434.

10. *Evidence*. — *The Alabama*, (C. C. A.) 126 Fed. Rep. 332.

1035. 6. *When Injuries Due to Worn-out Condition*. — See *The Itasca*, 117 Fed. Rep. 885; *The Sequoia*, 132 Fed. Rep. 625.

1036. 2. *Cost of Superintendence*. — *The Dorchester*, 134 Fed. Rep. 564.

3. *No Recovery Where Regular Duties Are Not Interrupted*. — *The Itasca*, 117 Fed. Rep. 885.

4. *No Allowance Where Master Was Owner*. — *The McIlvaine*, 126 Fed. Rep. 434.

7. *Manner of Proving Expenditures*. — The cost of repairs is proved *prima facie* by testimony that the repairs were rendered necessary by reason of the collision, that they were made, and at the lowest price, and by the testimony of the ship's agents that they had paid the bills. *The Bratsberg*, 127 Fed. Rep. 1005.

8. See *The Itasca*, 117 Fed. Rep. 885; *The Sequoia*, 132 Fed. Rep. 625; *The Menominee*, 125 Fed. Rep. 530.

1037. 11. *Wharfage*. — *The Sequoia*, 132 Fed. Rep. 625.

Dock Charges. — *The Acanthus*, (1902) P. 17. *Other Repairs* — *Division of Expense*. — See *The Bratsberg*, 127 Fed. Rep. 1005.

1038. 1. *The Glenogle*, 122 Fed. Rep. 503; *The Sequoia*, 132 Fed. Rep. 625 (services of watchman).

1038. *gg.* COST OF MAKING PROTEST AND PROCURING NEW RATING AT LLOYDS — Cost of Procuring New Insurance Rating. — See note 5.

hh. LOSS OF FREIGHT. — See note 7.

d. LOSS OF OR INJURY TO CARGO — (2) *Total Loss* — Value at Place of Shipment Measure of Damages. — See note 11.

1039. (3) *Injuries Less than Total Loss.* — See note 5.

1040. (5) *When Injury or Loss Due to Mutual Fault of Colliding Vessels.* — See note 2.

1043. *f.* PERSONAL INJURIES — (1) *When Due Solely to Fault of Vessel Libeled.* — See note 1.

(3) *Injuries Due to Mutual Fault of Colliding Vessels.* — See note 8.

1044. (4) *Injuries Resulting in Death.* — See note 1.

1045. 7. Costs — *a.* GENERAL RULES — To Successful Party. — See note 11.

1046. *b.* MUTUAL FAULT. — See note 3.

c. INEVITABLE ACCIDENT. — See note 6.

1047. *g.* COSTS OF APPEAL. — See note 4.

1049. XVI. LIMITATION OF VESSEL OWNER'S LIABILITY — 1. History of Rule — Other Statutes. — See note 8.

1050. 2. Vessels and Interests to Which Limitation Applies — *a.* TERRITORIAL APPLICATION OF RULES — Vessels. — See note 6.

b. PERSONS AND INTERESTS — Owners. — See note 15.

1051. Freight Pending. — See notes 5, 10.

1052. 3. Value of Interest — How Determined. — See note 5.

4. Losses and Injuries Subject to Limitation. — See notes 7, 9, 11.

1054. 5. Privity or Knowledge of Owner — Application of Rule. — See notes 1, 3.

6. Mode or Obtaining Benefit of Limitation. — See note 7.

1038. 5. Cost of Procuring New Insurance Rating. — The *Sequoia*, 132 Fed. Rep. 625.

7. The *Glenogle*, 122 Fed. Rep. 503.

11. Cost and Place of Shipment. — The *Menominee*, 125 Fed. Rep. 530.

1039. 5. Measure of Damages for Injury to Cargo. — See The *Oneida*, (C. C. A.) 128 Fed. Rep. 687.

1040. 2. Mutual Fault. — The *Eagle Point*, 136 Fed. Rep. 1010.

1043. 1. Sole Fault of Colliding Vessel. — The *Homer*, (C. C. A.) 109 Fed. Rep. 572.

8. Passengers and Persons to Whom Negligence Not Imputable. — *Quinette v. Bisso*, (C. C. A.) 136 Fed. Rep. 825; *Louisville, etc., Packet Co. v. Mulligan*, (Ky. 1903) 77 S. W. Rep. 704; *Grube v. Hamburg-American Steamship Co.*, 176 N. Y. 383.

1044. 1. Wrongful Death. — *In re La Bourgogne*, 117 Fed. Rep. 261; *Williams v. Quebec Steamship Co.*, 126 Fed. Rep. 591.

1045. 11. To Successful Party. — The *Thomas M. Parsons*, 129 Fed. Rep. 972.

1046. 3. The *James D. Leary*, 110 Fed. Rep. 685, *affirmed* (C. C. A.) 113 Fed. Rep. 1019; The *George Presley*, (C. C. A.) 111 Fed. Rep. 555; *In re Brooklyn Ferry Co.*, 115 Fed. Rep. 564, *affirmed* (C. C. A.) 121 Fed. Rep. 741; The *Colorado*, 117 Fed. Rep. 796; *Hall v. Chisholm*, (C. C. A.) 117 Fed. Rep. 807; The *Mary Weaver*, 124 Fed. Rep. 977; The *Frank S. Hall*, 128 Fed. Rep. 816; The *Trader*, 129 Fed. Rep. 462; The *City of Birmingham*, (C. C. A.) 138 Fed. Rep. 555; The *Bellingham*, 138 Fed. Rep. 619. See also The *Maling*, 110 Fed. Rep. 227,

modified 116 Fed. Rep. 107; The *Alabama*, 114 Fed. Rep. 214, *modified* (C. C. A.) 126 Fed. Rep. 332.

6. *Dunton v. Allan Line Steamship Co.*, 115 Fed. Rep. 250, *affirmed* (C. C. A.) 119 Fed. Rep. 590.

1047. 4. Costs of Appeal. — The *London*, (1905) P. 152.

1049. 8. See *In re Pacific Mail Steamship Co.*, (C. C. A.) 130 Fed. Rep. 76.

1050. 6. Vessel at Dock Being Altered and Refitted. — See *In re Michigan Steamship Co.*, 133 Fed. Rep. 577.

15. The *San Rafael*, 134 Fed. Rep. 749.

1051. 5. Freight Pending. — *In re La Bourgogne*, 117 Fed. Rep. 261, defining what constitutes a "voyage."

10. Unearned Freight. — *In re La Bourgogne*, 117 Fed. Rep. 261.

1052. 5. Negligence of Tug — Surrender of Tug. — See *Van Eyken v. Erie R. Co.*, 117 Fed. Rep. 712.

7. Collision. — *In re Rend*, 126 Fed. Rep. 564.

9. Baggage. — *In re Rend*, 126 Fed. Rep. 564.

11. Personal Injuries and Loss of Life. — *In re Rend*, 126 Fed. Rep. 564.

1054. 1. Duty to Provide Seaworthy Vessel and Competent Persons. — *In re Pacific Mail Steamship Co.*, (C. C. A.) 130 Fed. Rep. 76.

3. *Van Eyken v. Erie R. Co.*, 117 Fed. Rep. 712. See also The *George W. Roby*, (C. C. A.) 111 Fed. Rep. 601.

7. Modes of Obtaining Limitation of Liability. — See *In re Davidson Steamship Co.*, 133 Fed. Rep. 411.

- 1058.** [SHIPSIDE. — See note a.]
 SHOP. — See note 8.
1059. SHORE. — See note 2.
1061. SHOW. — See note 5.
1062. SICK — SICKNESS. — See note 6.

1058. a. A Direction to Deliver Merchandise *shipside* means a delivery at some wharf to which a ship can come. *Lee v. St. Louis, etc.*, R. Co., 136 N. Car. 534.

8. A Stall Composed of a Board and Trestles has been held to be a *shop* within the meaning of the *English Shop Hours Act*. *Smith v. Kyle*, (1902) 1 K. B. 286.

1059. 2. Shore. — *Mellor v. Walmesley*, (1905) 2 Ch. 164.

1061. 5. "Show" in Sense of "Make Appear." — *Matter of Lee*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 642.

1062. 6. Insane Person Is "Sick" Person. — *Union Tp. v. Lawrence County*, 13 Pa. Dist. 646.

SIGN — SIGNATURE.

- 1064.** I. DEFINITION. — See note 3.
1065. II. INTENTION. — See note 1.
1066. IV. MARK. — See note 1.
 VI. PRINTED SIGNATURE — STAMP. — See note 3.

- 1067.** SIMILAR. — See note 10.
1070. SITE. — See note 7.
1071. SITUS. — See note 4.

1064. 3. "Signing" and "Execution" Not Synonymous Terms. — *Hayes v. Ammon*, 90 N. Y. App. Div. 604.

1065. 1. Intention. — U. S. Fidelity, etc., Co. v. Siegmann, 87 Minn. 175.

1066. 1. Signature Includes Mark. — *Elston v. Roop*, 133 Ala. 331; *Iowa Loan, etc., Co. v. Greenman*, 63 Neb. 268.

3. Printed Signature. — *Philadelphia v. Meighan*, 15 Pa. Dist. 10, *quoting* 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1066.

1067. 10. The Word "Similar" Does Not Mean Identical in Form and Substance, but having characteristics in common. *State v. Weston*, 29 Mont. 125.

1070. 7. Definite Boundaries Not Necessarily Implied in Term "Site." — *Petersburg School Dist. v. Peterson*, (N. Dak. 1905) 103 N. W. Rep. 756.

1071. 4. Situs of Personal Property. — See *Com. v. Union Refrigerator Transit Co.*, 118 Ky. 131.

SLANDER OF TITLE OR PROPERTY.

BY O. D. ESTEE.

1077. III. GROUNDS OF ACTION — 6. Elements Requisite to Recovery —
 b. PARTICULAR ELEMENTS CONSIDERED — (1) *Title of Plaintiff*. — See note 7.

1078. (2) *Falsity of Statement, Malice, and Want of Lawful Occasion*. — See notes 2, 3.

1079. (3) *Special Damage* — (a) *Generally*. — See note 7.

1077. 7. Title or Interest Essential. — *Butts v. Long*, 106 Mo. App. 313.

1078. 2. Falsity Essential. — *Butts v. Long*, 106 Mo. App. 313; *Young v. Geiske*, 209 Pa. St. 515.

3. Statements Must Have Been Made Maliciously. — *Young v. Geiske*, 209 Pa. St. 515.

1079. 7. Special Damage Gist of Action. — *Young v. Geiske*, 209 Pa. St. 515. See also *Butts v. Long*, 106 Mo. App. 313.

1081. IV. PRIVILEGED COMMUNICATIONS — 2. Assertion of Title or Interest in Defendant — a. IN GENERAL. — See note 2.

1084. VII. INJUNCTION TO RESTRAIN SLANDER OF TITLE — In England. — See note 11.

1086. VIII. JACTITATION OF TITLE — The Action Admits Three Defenses. — See note 1.

1081. 2. Bona Fide Assertion of Supposed Right Not Actionable. — Butts *v.* Long, 106 Mo. App. 313.

1084. 11. See Dunlop Pneumatic Tyre Co. v. Talbot, 20 Times L. Rep. 88.

1086. 1. Where Defendant Claims Title in Himself. — See Handlin *v.* Dodd, 110 La. 936, discussing the question of costs.

SLEEPING-CAR COMPANIES.

1110. I. CHARACTER AND STATUS. — See note 1.

1117. II. DUTIES AND LIABILITIES — 6. As to Property of Passenger — a. NOT LIABLE AS INNKEEPER OR CARRIER. — See note 7.

1118. b. DEGREE OF CARE REQUIRED — (1) In General. — See note 4.

1120. (5) Baggage in Custody of Employees. — See note 2.

1127. [SMELTER RETURNS. — See note 5a.]

1110. 1. Under the Mississippi Constitution. — Pullman Co. *v.* Kelly, 86 Miss. 87, holding that as a common carrier the company is under obligation to give to passengers notice of arrival at their destination and opportunity to leave the train.

1117. 7. Not Innkeeper or Carrier. — See Nashville, etc., R. Co. *v.* Lillie, 112 Tenn. 331, 105 Am. St. Rep. 947.

1118. 4. Degree of Care. — See Hatch *v.* Pullman Sleeping Car Co., (Tex. Civ. App. 1905) 84 S. W. Rep. 246.

1120. 2. Baggage in Charge of Employee. — See Arthur *v.* Pullman Co., (Supm. Ct. App. T.) 44 Misc. (N. Y.) 229.

1127. 5a. Smelter returns means returns from ore less the smelter charges. Frank *v.* Bauer, 19 Colo. App. 445.

SOCIETIES, CLUBS, AND UNINCORPORATED ASSOCIATIONS.

By H. W. HOYE.

1131. II. LEGAL STATUS OF UNINCORPORATED ASSOCIATIONS — Commercial Associations. — See note 1.

Social Clubs. — See note 2.

III. ORGANIZATION — 1. Constitution and By-laws. — See note 3.

1132. IV. MEETINGS — 2. Quorum. — See note 5.

1133. V. RIGHTS AND LIABILITIES — 1. Capacity to Hold Property. — See note 1.

1131. 1. Associations Organized for Profit. — United Press *v.* A. S. Abell Co., 87 N. Y. App. Div. 344; Industrial Lumber Co. *v.* Texas Pine Land Assoc., 31 Tex. Civ. App. 375.

2. Association Not for Profit. — St. Paul Typothetae *v.* Bookbinders Union No. 37, 94 Minn. 351.

3. Constitution Contract Between Members. — Kalbitzer *v.* Goodhue, 52 W. Va. 435.

1132. 5. Quorum Presumed to Have Been

Present. — Coombs *v.* Harford, 99 Me. 426. See also the title QUORUM, 591. 3.

1133. 1. The Right of an Association to Sue cannot be defeated by the action of some of the members, who claim to be satisfied, since the funds belong to the association and not to the individual members. Detroit Light Guard Band *v.* First Michigan Independent Infantry, 134 Mich. 598, 10 Detroit Leg. N. 585.

- 1133.** 2. Application of Funds. — See note 4.
Fund Subscribed for Particular Purpose. — See note 5.
- 1135.** VI. MEMBERSHIP AND ITS INCIDENTS — 3. Interest of Members in Property of Association. — See notes 5, 6.
- 1136.** Distribution of Funds upon Dissolution of Association. — See notes 1, 2, 3.
4. Liability of Members — *a.* TO ASSOCIATION — (1) *For Dues and Assessments* — Liability for Dues. — See note 5.
Liability for Assessments. — See notes 7, 9.
b. TO THIRD PERSONS — (1) *Upon Contracts Made by or on Behalf of Association* — (a) Associations Organized for Business or Profit. — See note 14.
- 1137.** See note 1.
(b) Social or Political Clubs and Societies. — See notes 3, 4.
- 1139.** VII. OFFICERS, AGENTS, AND COMMITTEES — 4. Power to Bind Association — *b.* POWER TO BIND ASSOCIATION BY CONTRACT — But an Association Formed for Social, Beneficial, or Political Purposes. — See note 4.
- 1140.** 5. Personal Liability — *a.* TO MEMBERS. — See note 11.
- 1141.** 6. Removal. — See note 8.
- 1133.** 4. *Kalbitzer v. Goodhue*, 52 W. Va. 435.
5. Contributions for Specific Purposes. — See *North Louisiana Baptist Assoc. v. Milliken*, 110 La. 1002.
- 1135.** 5. Interest of Members in Property of Associations. — *Franklin v. Burnham*, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 566.
6. Interest Lost by Withdrawal from Society. — *Coombs v. Harford*, 99 Me. 426.
- 1136.** 1. Funds of Disbanded Lodge. — *Compare Grand Grove, etc., v. Mullen*, 24 Ohio Cir. Ct. 239.
2. Distribution Among Members. — *Hopkins v. Crossley*, 132 Mich. 612.
3. *Contra* in case of heirs of a member who died after dissolution of the association. *Hopkins v. Crossley*, 132 Mich. 612.
5. Liability for Dues. — *L'Association des Barbiers, etc., v. Gagne*, 27 Quebec Super. Ct. 47.
But where a member receives a notice, in accordance with the by-laws, that unless his dues are paid he will be dropped from the rolls at a specified time, he has a right to assume that he will be so dropped and is not liable for dues accruing thereafter. *Westchester Golf Club v. Pinkney*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 338.
7. Liability for Assessment. — *Harington v. Sendall*, (1903) 1 Ch. 921, 72 L. J. Ch. 396, 88 L. T. N. S. 323, 51 W. R. 463.
9. *Wise v. Perpetual Trustee Co.*, (1903) A. C. 139, 72 L. J. P. C. 31, 87 L. T. N. S. 569, 51 W. R. 241.
14. Liability of Members of Business Association. — See *United Press v. A. S. Abell Co.*, 87 N. Y. App. Div. 344, holding that a cause of action against the association is merged in a judgment against one member.
- 1137.** 1. *McKinnie v. Postles*, 4 Penn. (Del.) 16.
3. *St. Paul Typothetæ v. St. Paul Bookbinders' Union No. 37*, 94 Minn. 351.
4. Members of Social Club Not Per Se Liable for Its Debts. — *Detroit Light Guard Band v. First Michigan Independent Infantry*, 134 Mich. 508, 10 Detroit Leg. N. 585; *Lightbourn v. Walsh*, 97 N. Y. App. Div. 187; *Hosman v. Kinneally*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 76.
- 1139.** 4. Contract by Officers of Social Club. — *Castner v. Rinne*, 31 Colo. 256; *Hosman v. Kinneally*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 76; *Lightbourn v. Walsh*, 97 N. Y. App. Div. 187.
- 1140.** 11. *Coombs v. Harford*, 99 Me. 426.
- 1141.** 8. Elected Officer Removable Only by Body that Elected Him. — *Tanner v. Ranken*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 488.

SODOMY.

1144. I. DEFINITIONS AND DISTINCTIONS. — See note 1.

1145. Statutory Definitions. — See note 1.

Synonyms and Distinctions. — See notes 4, 6.

1146. II. ELEMENTS OF CRIME — 1. Penetration. — See notes 1, 2.

2. Emission — *b.* UNITED STATES RULE. — See note 12.

1147. III. ATTEMPT. — See note 2.

VIII. EVIDENCE. — See note 11.

1148. Good Character. — See note 2.

1151. SOLICIT — SOLICITING. — See note 4.

1144. 1. Definition. — Herring *v.* State, 119 Ga. 711.

Immaterial Whether Committed on Man or on Woman. — Adams *v.* State, (Tex. Crim. 1905) 86 S. W. Rep. 334.

1145. 1. Statutory Definitions. — State *v.* McGruder, 125 Iowa 741. See also People *v.* Oates, 142 Cal. 12.

4. See Herring *v.* State, 119 Ga. 711.

6. See Herring *v.* State, 119 Ga. 709.

1146. 1. Elements of Crime — Penetration. — White *v.* Com., 115 Ky. 473; Green *v.* State, (Tex. Crim. 1904) 79 S. W. Rep. 304.

2. Proof. — State *v.* McGruder, 125 Iowa 741; Almendaris *v.* State, (Tex. Crim. 1903) 73 S. W. Rep. 1055.

12. White *v.* Com., 115 Ky. 473.

1147. 2. See People *v.* Oates, 142 Cal. 12.

11. For Evidence Held Not to Show Guilt Beyond a Reasonable Doubt. — See Mullins *v.* State, 45 Tex. Crim. 465.

1148. 2. Good Character. — See Mullins *v.* State, 45 Tex. Crim. 465.

1151. 4. "Soliciting" and "Taking" Not Convertible Terms. — Sandefur-Julian Co. *v.* State, 72 Ark. 11.

SOLICITATION TO COMMIT CRIME.

1153. II. GENERAL DOCTRINE. — See note 2.

1154. III. TO WHAT CRIMES APPLICABLE. — See note 1.

1156. SOLVENCY — SOLVENT. — See notes 1, 2.

1159. SOUND — SOUNDNESS. — See note 1.

1161. SPEAKING DEMURRER. — See note 10.

1162. SPECIAL. — See note 1.

1153. 2. A Mere Solicitation to Commit a Crime with Intent to Commit the Crime is "an act done with intent to commit a crime, and tending * * * to effect its commission," within the meaning of Pen. Code N. Y., § 34. People *v.* Mills, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 195.

The Offense of Soliciting the Commission of Murder, under the *English Offenses Against the Person Act*, 1861, is not complete unless there has been some communication by the accused to the person alleged to have been solicited, although it is not necessary that the mind of such person should have been affected by such communication. Rex *v.* Krause, 66 J. P. 121.

1154. 1. Soliciting Bribe Held to Be Misdemeanor Where Bribery Is Felony. — State *v.* Sullivan, 110 Mo. App. 75.

1156. 1. Solvency. — Colburn *v.* Seymour, 32 Colo. 430.

2. Ability to Pay in Ordinary Course of Business. — Kingsley *v.* Merrill, 122 Wis. 185.

1159. 1. Sound Health means freedom from disease or ailment that affects the system seriously. Atlantic, etc., R. Co. *v.* Douglas, 119 Ga. 658.

Sound Mind and Memory Equivalent to Sanity. — *In re* Arrowsmith, 206 Ill. 357.

1161. 10. Speaking Demurrer. — O'Shaughnessy *v.* Humes, 129 Fed. Rep. 960, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1161.

1162. 1. Special. — Jeannette Borough School Directors, 14 Pa. Dist. 355.

Special and General Contrasted. — Little Rock *v.* North Little Rock, 72 Ark. 195.

SPECIAL OR LOCAL ASSESSMENTS.

BY B. B. CLARK.

- 1168.** I. DEFINITION. — See note 1.
1169. II. GENERAL POWER TO LEVY ASSESSMENTS — 1. In General. — See note 6.
2. Power of Municipalities. — See note 7.
1171. See note 1.
1172. III. GENERAL CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS — 1. In General. — See note 1.
3. Taking Private Property Without Compensation. — See notes 3, 4.
1173. 4. Due Process of Law. — See note 3.
1174. 5. Provisions Relating to Taxation. — See notes 3, 4, 6.
1176. IV. NATURE OF IMPROVEMENTS FOR WHICH ASSESSMENTS MAY BE LEVIED — 1. In General. — See notes 1, 6, 7.
1177. 2. Improvements Previously Constructed. — See note 2.
3. Opening and Vacating Streets. — See note 4.
4. Grading and Paving Streets. — See note 9.

1168. 1. Definition. — *Denver v. Kennedy*, 33 Colo. 80; *Brockenbrough v. Water Com'rs*, 134 N. Car. 23, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1168.

1169. 6. *Denver v. Kennedy*, 33 Colo. 80, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1168.

7. Power of Municipalities. — *Allen v. Davenport*, 132 Fed. Rep. 209, 65 C. C. A. 641; *Miservey v. People*, 208 Ill. 646; *Klein v. Nugent Gravel Co.*, (Ind. App. 1903) 66 N. E. Rep. 486; *Bluffton v. Miller*, 33 Ind. App. 521; *Button v. Kremer*, 114 Ky. 463; *Hawkins v. Horton*, 91 Minn. 285; *Rosell v. Neptune City*, 68 N. J. L. 509; *Harriott Avenue*, 24 Pa. Super. Ct. 597; *Blanchard v. Barre*, 77 Vt. 420; *Cain v. Elkins*, 57 W. Va. 9.

Removal of Garbage. — See *Trephagen v. South Omaha*, (Neb. 1903) 96 N. W. Rep. 248.

The Repeal of the Statute Conferring the Power before an assessment is levied will prevent further assessment thereunder though proceedings therefor were instituted at the time of the repeal. *Martin v. Oskaloosa*, (Iowa 1904) 99 N. W. Rep. 557.

Improvement at Request of Abutting Owners — Municipality May Recover on Implied Contract. — *Nome v. Lang*, 1 Alaska 593.

1171. 1. Strict Construction of Statutes. — *Board of Improvement v. Cotter*, 71 Ark. 556; *Chicago v. Nodeck*, 202 Ill. 257; *Kilgallen v. Chicago*, 206 Ill. 557; *Klein v. Nugent Gravel Co.*, 162 Ind. 509, reversing (Ind. App. 1903) 66 N. E. Rep. 486; *Bluffton v. Miller*, 33 Ind. App. 521; *Greendale v. Suit*, 163 Ind. 282; *Button v. Kremer*, 114 Ky. 463; *Morse v. Omaha*, 67 Neb. 426; *Gilfeather v. Grout*, 101 N. Y. App. Div. 150, appeal dismissed 182 N. Y. 522.

After a Great Lapse of Time and General Acquiescence in the Construction put upon the statute by those acting openly under it, the court will

not invalidate an assessment made thereunder unless imperatively required by the language of the statute. *Wells v. Street Com'rs*, 187 Mass. 451.

1172. 1. Constitutional Restriction. — See *Hicks v. Bristol*, 102 Va. 861.

3. Taking Property Without Compensation. — *Rude v. St. Marie*, 121 Wis. 645, quoting 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1172.

4. *White v. Gove*, 183 Mass. 333.

1173. 3. Due Process of Law. — *Denver v. Kennedy*, 33 Colo. 80, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1173.

1174. 3. Provisions Relating to Taxation. — *Kadderly v. Portlands*, 44 Oregon 118, rehearing denied 44 Oregon 160.

4. *Meier v. St. Louis*, 180 Mo. 391.

6. *Hager v. Gast*, (Ky. 1905) 84 S. W. Rep. 556.

1176. 1. Local Improvements. — *Denver v. Kennedy*, 33 Colo. 80.

Stock Fences Held to Be Local Improvement. — *Chatham County v. Seaboard Air Line R. Co.*, 133 N. Car. 216.

6. *Boals v. Bachmann*, 201 Ill. 340; *Chicago v. Carpenter*, 201 Ill. 402.

7. *Culver v. Yonkers*, 180 N. Y. 524, affirming 80 N. Y. App. Div. 309.

1177. 2. *Seattle v. Kelleher*, 195 U. S. 351; *Warren v. Street Com'rs*, 187 Mass. 290; *New England Hospital v. Street Com'rs*, 188 Mass. 88. Compare *Schintgen v. La Cross*, 117 Wis. 158.

4. Opening Streets. — *Espert v. Chicago*, 201 Ill. 264; *New England Hospital v. Street Com'rs*, 188 Mass. 88; *Rowe v. Assessment Com'rs*, 69 N. J. L. 600; *Quirk v. Seattle*, 38 Wash. 25.

9. Grading and Paving Streets. — *Deane v. Indiana Macadam, etc., Co.*, 161 Ind. 371; *Philadelphia v. Pemberton*, 208 Pa. St. 214; *Perrysville Avenue*, 210 Pa. St. 537; *East Street*, 210

1178. See note 1.

5. Repaving and Regrading Streets. — See note 4.

1179. See note 1.

In Pennsylvania. — See notes 3, 6.

In Kentucky. — See note 7.

6. Maintaining and Repairing Streets. — See note 10.

1180. See notes 1, 2.

7. Curbing and Guttering. — See note 3.

8. Constructing Sidewalks. — See notes 5, 6.

1181. See note 1.

9. Constructing Sewers. — See notes 2, 3.

Pa. St. 539; *Kettle v. Dallas*, 35 Tex. Civ. App. 632.

1178. 1. Construction of Statutes Conferring Powers. — *Gallaher v. Garland*, 126 Iowa 206; *Tarman v. Atchison*, 69 Kan. 483; *Louisiana Imp. Co. v. Baton Rouge Electric, etc., Co.*, 114 La. 534; *Sedalia v. Abell*, 103 Mo. App. 431; *Kirkville v. Coleman*, 103 Mo. App. 215; *Barber Asphalt Paving Co. v. Field*, 188 Mo. 182; *Dunn v. Parentum*, 23 Pa. Super. Ct. 332; *Philadelphia v. Pemberton*, 25 Pa. Super. Ct. 323.

4. Repaving and Regrading. — *Bush v. Peoria*, 215 Ill. 517, quoting 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1178; *Lux, etc., Stone Co. v. Donaldson*, 162 Ind. 481. Compare *Wreford v. Detroit*, 132 Mich. 348.

Repaving and Repairs Distinguished. — See *American Bonding Co. v. Ottumwa*, (C. C. A.) 137 Fed. Rep. 572; *Field v. Chicago*, 198 Ill. 224; *Bush v. Peoria*, 215 Ill. 515; *McCaffrey v. Omaha*, (Neb. 1904) 101 N. W. Rep. 251.

No Power to Assess for Repaving Where Existing Paving Is in Good Condition. — *Gage v. People*, 205 Ill. 547.

1179. 1. Auditor-Gene. *v. Chase*, 132 Mich. 630; *Schintgen v. La Crosse*, 117 Wis. 158.

3. Pennsylvania Rule. — *Philadelphia v. Pemberton*, 208 Pa. St. 214.

6. East Street, 210 Pa. St. 539.

7. Kentucky Rule. — *Catlettsburg v. Self*, 115 Ky. 669; *Wymond v. Barber Asphalt Paving Co.*, (Ky. 1903) 77 S. W. Rep. 203; *Adams v. Ashland*, (Ky. 1904) 80 S. W. Rep. 1105.

Cost of Depressing Street under Railway Tracks Not Assessable Against Property Owners. — *Kreiger v. Gosnell*, 70 S. W. Rep. 683, 24 Ky. L. Rep. 1095, following *Louisville Steam Forge Co. v. Mehler*, 112 Ky. 438.

10. Maintenance and Repair of Streets. — *Fair Haven, etc., R. Co. v. New Haven*, 77 Conn. 667; *Bush v. Peoria*, 215 Ill. 515; *Fridman v. Norwood*, 25 Ohio Cir. Ct. 258; *Philadelphia v. Pemberton*, 208 Pa. St. 214. See, however, *La Veine v. Kansas City*, 67 Kan. 239; *Heman v. Gilliam*, 171 Mo. 258.

What Constitutes Repairs. — See *Barber Asphalt Paving Co. v. Muchenberger*, 105 Mo. App. 47; *Perkinson v. Schnaake*, 108 Mo. App. 255.

1180. 1. *Diver v. Keokuk Sav. Bank*, 126 Iowa 691; *Barber Asphalt Paving Co. v. Garr*, 115 Ky. 334; *Bacas v. Adler*, 112 La. 806; *St. Louis Quarry, etc., Co. v. Frost*, 90 Mo. App. 677; *Barber Asphalt Paving Co. v. Peck*, 186 Mo. 506; *Allen v. Labsap*, 188 Mo. 692; *Green*

River Asphalt Co. v. St. Louis, 188 Mo. 576; *People v. Featherstonhaugh*, 172 N. Y. 112, dismissing appeal 67 N. Y. App. Div. 625; *Williamsport v. Hughes*, 21 Pa. Super. Ct. 443; *Philadelphia v. Pemberton*, 208 Pa. St. 214; *Erie v. Grant*, 24 Pa. Super. Ct. 109; *Philadelphia v. Pemberton*, 25 Pa. Super. Ct. 323.

2. *Williamsport v. Hughes*, 21 Pa. Super. Ct. 443; *Erie v. Grant*, 21 Pa. Super. Ct. 461; *Philadelphia v. Pemberton*, 208 Pa. St. 214; *Young v. Tacoma*, 31 Wash. 153.

Separating Cost of Repair from Cost of Original Construction. — See *Fair Haven, etc., R. Co. v. New Haven*, 77 Conn. 667.

3. Curbing and Guttering. — *Downing v. Des Moines*, 124 Iowa 289 (curbing parkways in centre of street).

5. Sidewalks. — *Gage v. Chicago*, 203 Ill. 26; *Storrs v. Chicago*, 208 Ill. 364.

6. *Pierson v. People*, 204 Ill. 456.

1181. 1. Construction of Statutes Conferring Power. — *Iowa*. — *Zalesky v. Cedar Rapids*, 118 Iowa 714; *Burget v. Greenfield*, 120 Iowa 432.

Kansas. — *Leavenworth v. Jones*, 69 Kan. 857.

Kentucky. — *Eversole v. Walsh*, (Ky. 1903) 76 S. W. Rep. 358.

Louisiana. — *Redersheimer v. Bruning*, 113 La. 343.

Michigan. — *Cuming v. Gleason*, (Mich. 1905) 103 N. W. Rep. 537.

Missouri. — *Springfield v. Mills*, 99 Mo. App. 141; *Heman Constr. Co. v. McManus*, 102 Mo. App. 649.

Nebraska. — *Omaha v. Gsanter*, (Neb. 1903) 93 N. W. Rep. 407; *Bemis v. McCloud*, (Neb. 1903) 97 N. W. Rep. 828, affirming (Neb. 1903) 96 N. W. Rep. 214.

New York. — *Walden v. Relyea*, 89 N. Y. App. Div. 241.

Pennsylvania. — *Pittsburg v. Biggert*, 23 Pa. Super. Ct. 540; *Chester v. Lane*, 24 Pa. Super. Ct. 359.

Wisconsin. — *Waukesha v. Randles*, 120 Wis. 470.

2. Sewers. — *Spalding v. Denver*, 33 Colo. 172; *Minneapolis, etc., R. Co. v. Lindquist*, 119 Iowa 144; *Fisher v. Chicago*, 213 Ill. 268; *Rich v. Woods*, (Ky. 1904) 82 S. W. Rep. 578; *Smith v. Worcester*, 182 Mass. 232; *White v. Gove*, 183 Mass. 333; *Rude v. St. Marie*, 121 Wis. 643, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1181.

3. *Shannon v. Omaha*, (Neb. 1905) 103 N. W. Rep. 53. See, however, *Philadelphia v. Meighan*, 27 Pa. Super. Ct. 160.

- 1181.** The Existence and Extent of the Power. — See note 5.
1182. 10. Constructing Drains. — See note 1.
 13. Waterworks, Pipes, and Mains. — See note 4.
1183. See note 2.
 14. Bridges. — See note 3.
 16. Street Sprinkling and Sweeping. — See note 10.
1184. V. PROPERTY SUBJECT TO ASSESSMENT — 1. In General. — See note 3.
 2. Benefits to Property. — See note 7.
1185. See notes 3, 5.
1186. 5. Public Property — The Property of the United States. — See note 4.
 Municipal or State Property. — See notes 5, 6.
1187. See notes 1, 2, 7.
 6. Property of Railroad Companies. — See note 9.
1188. See notes 1, 2, 6.
1189. See note 4.
 7. Location of Property Assessable — a. IN GENERAL. — See notes 7, 8, 9, 10, 11.

1181. 5. Construction of Statutes. — *Atkins v. Boston*, 188 Mass. 77; *Prior v. Buehler*, etc., *Constr. Co.*, 170 Mo. 439; *South Highland Land, etc.*, *Co. v. Kansas City*, 172 Mo. 523; *Donovan v. Oswego*, 90 N. Y. App. Div. 397; *Cain v. Elkins*, 57 W. Va. 9.

Making House Connections. — *Boyce v. Tuhey*, 163 Ind. 202.

1182. 1. Drainage. — *Rude v. St. Marie*, 121 Wis. 643, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1182.

4. Waterworks, Pipes, and Mains. — *Gordon v. Chicago*, 201 Ill. 623; *Washburn v. Chicago*, 202 Ill. 210; *Cicero v. Green*, 211 Ill. 241; *Doughten v. Camden*, 71 N. J. L. 426.

1183. 2. *Donovan v. Oswego*, 90 N. Y. App. Div. 397.

3. Bridges. — *Denver v. Kennedy*, 33 Colo. 80.

10. *Hawes v. Fliegler*, 87 Minn. 319.

1184. 3. Construction of Statutes as to Property Assessable. — *Denver v. Kennedy*, 33 Colo. 80, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1184; *Collier v. Western Paving, etc.*, *Co.*, 180 Mo. 362; *Meier v. St. Louis*, 180 Mo. 391; *State v. St. Louis*, 183 Mo. 230.

Street Forming Boundary Line — Improvement of City's Half Assessable Against Abutting Owners. — *Central Covington v. Busse*, (Ky. 1904) 80 S. W. Rep. 210.

Town "Lots" Held Not to Include Large Unplatted Tract. — *Greendale v. Suit*, 163 Ind. 282.

7. Property Not Benefited. — *Duane v. Chicago*, 198 Ill. 471; *McChesney v. Chicago*, 213 Ill. 592; *Sheriffs v. Chicago*, 213 Ill. 620; *Clark v. Chicago*, 214 Ill. 318; *State v. District Ct.*, 90 Minn. 540 (sewer).

1185. 3. Matter of Wheeler, (County Ct.) 39 Misc. (N. Y.) 484. See also *infra*, this title, **1195.** 4.

5. *Louisville, etc.*, *R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, affirming 116 Ky. 856; *Chicago Union Traction Co. v. Chicago*, 204 Ill. 363, 207 Ill. 544, 607, 215 Ill. 410.

1186. 4. Property of Crown Not Assessable. — *Hornsey Urban Dist. Council v. Hennell*, (1902) 2 K. B. 73, 71 L. J. K. B. 479, 86 L. T. N. S. 423, 50 W. R. 521.

6. Municipal Property. — *Barber Asphalt Paving*

Co. v. St. Joseph, 183 Mo. 451; Matter of Opening West Two Hundred and Fifty-ninth St., (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 600.

6. State Property. — See *Hager v. Gast*, (Ky. 1905) 84 S. W. Rep. 556, holding that the legislature was not prohibited from authorizing assessments against state property.

1187. 1. *Orth v. Park*, 117 Ky. 779.
 Property Held in Trust by State for Individuals Not State Property. — *State v. Elizabeth*, 66 N. J. L. 688, affirming 65 N. J. L. 483.

2. *Pittsburg v. Sterrett Subdistrict School*, 204 Pa. St. 635.

7. *Chicago v. Chicago*, 207 Ill. 37.

9. Property of Railroad Companies. — *Chicago Union Traction Co. v. Chicago*, 202 Ill. 576, 204 Ill. 363, 207 Ill. 544, 607; *Minneapolis, etc.*, *R. Co. v. Lindquist*, 119 Iowa 144; *Figg v. Louisville, etc.*, *R. Co.*, 116 Ky. 135; *Erie R. Co. v. Paterson*, (N. J. 1905) 59 Atl. Rep. 1031, distinguishing *State v. Elizabeth*, 37 N. J. L. 330.

1188. 1. Right of Way. — *Louisville, etc.*, *R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, affirming 116 Ky. 856; *Minneapolis, etc.*, *R. Co. v. Lindquist*, 119 Iowa 144; *Figg v. Louisville, etc.*, *R. Co.*, 116 Ky. 135; *Louisville, etc.*, *R. Co. v. Barber Asphalt Paving Co.*, 116 Ky. 856; *Chatham County v. Seaboard Air Line R. Co.*, 133 N. Car. 216. But see *Southern California R. Co. v. Workman*, 146 Cal. 80.

Parts of Right of Way Leased by Company. — *Chicago Union Traction Co. v. Chicago*, 202 Ill. 576.

2. Right of Way in Streets. — *Fair Haven, etc.*, *R. Co. v. New Haven*, 75 Conn. 442.

6. *Louisville, etc.*, *R. Co. v. Barber Asphalt Paving Co.*, 116 Ky. 856; *Figg v. Louisville, etc.*, *R. Co.*, 116 Ky. 135.

1189. 4. *Fair Haven, etc.*, *R. Co. v. New Haven*, 75 Conn. 442; *Harriott Avenue*, 24 Pa. Super. Ct. 597.

7. Location of Property Assessable. — *Wolff v. Denver*, (Colo. App. 1904) 77 Pac. Rep. 364, quoting 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1189; *Moody v. Spoto*, 112 Ia. 1008; *Prior v. Buehler, etc.*, *Constr. Co.*, 170 Mo. 439; *Meier v. St. Louis*, 180 Mo. 391; *Kettle v. Dallas*, 35 Tex. Civ. App. 632.

- 1190.** See note 5.
b. "ABUTTING" PROPERTY. — See note 7.
1191. See note 6.
Corner Lots. — See note 7.
d. "ADJACENT" PROPERTY. — See note 11.
1192. *f.* "FRONTING" PROPERTY. — See notes 4, 9, 10.
h. "SQUARE" OR "BLOCK." — See note 15.
1193. 8. *Agricultural Lands in City Limits.* — See notes 2, 3, 4.
 9. *Homestead.* — See note 9.
 10. *Statutory Exemptions.* — See notes 10, 11.
1194. See note 1.

VI. AMOUNT OF ASSESSMENT AND APPORTIONMENT — 1. In General.

— See note 3.

1198. 8. *California.* — *O'Dea v. Mitchell*, 144 Cal. 374.

Colorado. — *Wolff v. Denver*, (Colo. App. 1904) 77 Pac. Rep. 364, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1189; *Denver v. Kennedy*, 33 Colo. 80.

Kentucky. — *Barber Asphalt Paving Co. v. Garr*, 115 Ky. 334.

Michigan. — *Auditor Gen. v. Hoffman*, 132 Mich. 198; *Nowlen v. Benton Harbor*, 134 Mich. 401; *Power v. Detroit*, (Mich. 1905) 102 N. W. Rep. 288.

Minnesota. — *State v. District Ct.*, 90 Minn. 294; *State v. District Ct.*, (Minn. 1905) 103 N. W. Rep. 744.

Missouri. — *South Highland Land, etc., Co. v. Kansas City*, 172 Mo. 523; *Barber Asphalt Paving Co. v. Beck*, 186 Mo. 506.

Montana. — *Beck v. Holland*, 29 Mont. 234; *McMillan v. Butte*, 30 Mont. 220.

New York. — *Matter of Opening Seventy-first St.*, 87 N. Y. App. Div. 52; *Matter of Hollister*, 180 N. Y. 518, affirming 96 N. Y. App. Div. 501; *Harriman v. Yonkers*, 181 N. Y. 24, affirming 82 N. Y. App. Div. 408.

Texas. — *Kettle v. Dallas*, 35 Tex. Civ. App. 632.

Village Trustees Owning Property Involved Not Disqualified to Act. — *Colliss v. Highland Park*, 132 Mich. 152.

9. *Walker v. Chicago*, 202 Ill. 531 (sewer); *Allison Land Co. v. Tenafly*, 69 N. J. L. 587, affirming 68 N. J. L. 205.

10. *Harriman v. Yonkers*, 181 N. Y. 24; *Wabash Avenue*, 26 Pa. Super. Ct. 305.

11. *Voris v. Pittsburg Plate Glass Co.*, 163 Ind. 599.

1190. 5. *Central Covington v. Busse*, (Ky. 1904) 80 S. W. Rep. 210.

Extension of Limits of Municipality so as to Bring Property Within Limits. — See *Hollister v. Rochester*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 599, affirmed 96 N. Y. App. Div. 501.

7. *Intervention of Narrow Strip Between Lot and Street.* — See *Damkoehler v. Milwaukee*, 124 Wis. 144.

1191. 6. *Compare Helm v. Witz*, (Ind. App. 1905) 73 N. E. Rep. 846. *Contra* under the *Indiana* statute providing that the lots "bordering" on the street shall be liable. *Klein v. Nugent Gravel Co.*, 162 Ind. 509.

7. *Corner Lots.* — *Rich v. Woods*, (Ky. 1904) 82 S. W. Rep. 578.

Division of Corner Lot. — See *Langlois v. Cameron*, 201 Ill. 301.

11. "Adjacent." — *Mound City Constr. Co. v. Macgurn*, 97 Mo. App. 403.

1192. 4. "Fronting." — *Button v. Kremer*, 114 Ky. 463; *Barber Asphalt Paving Co. v. Kiene* 99 Mo. App. 528.

9. *Damkoehler v. Milwaukee*, 124 Wis. 144.

10. See *Felt v. Ballard*, 38 Wash. 300, holding, under a statute making corner property liable to the centre of the block, that the fact that the streets did not intersect at right angles was immaterial.

15. "Square" or "Block." — *Button v. Kremer*, 114 Ky. 463; *Wagner v. Gast*, (Ky. 1903) 71 S. W. Rep. 533; *Park v. Orth*, (Ky. 1903) 73 S. W. Rep. 1015; *Park v. Cane*, (Ky. 1903) 73 S. W. Rep. 1121; *Louisville R. Co. v. Southwestern Alcatraz Asphalt, etc., Co.*, (Ky. 1903) 74 S. W. Rep. 237; *Pfaffinger v. Kremer*, 115 Ky. 498; *Wymond v. Barber Asphalt Paving Co.*, (Ky. 1903) 77 S. W. Rep. 203; *Specht v. Barber Asphalt Paving Co.*, (Ky. 1904) 80 S. W. Rep. 1106; *German Protestant Orphan Asylum v. Barber Asphalt Paving Co.*, (Ky. 1904) 82 S. W. Rep. 632.

1193. 2. *Agricultural Lands in Cities.* *Barber Asphalt Paving Co. v. Garr*, 115 Ky. 334; *Duker v. Barber Asphalt Paving Co.*, (Ky. 1903) 74 S. W. Rep. 744.

3. *Washburn v. Chicago*, 198 Ill. 506.

4. See *Washburn v. Chicago*, 202 Ill. 210.

9. *Homestead.* — *Kettle v. Dallas*, 35 Tex. Civ. App. 632.

10. **General Exemption from Taxation Does Not Relieve from Special Assessments.** — *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425.

11. **Exemption from Liability for Assessment.** — *Cleneay v. Norwood*, 137 Fed. Rep. 962; *Matter of Opening East One Hundred and Seventy-sixth St.*, 85 N. Y. App. Div. 347; *Matter of Opening Lafayette Ave.*, 103 N. Y. App. Div. 496.

1194. 1. *Leggett v. Detroit*, 137 Mich. 247.

Dedication for Street — Covenant Against Expense for Maintenance, etc., Runs with Land. — *Browne v. Palmer*, 66 Neb. 287.

3. **Assessment Not to Exceed Special Benefits — Illinois.** — *Cicero v. Green*, 211 Ill. 241.

Iowa. — *Iowa Pipe, etc., Co. v. Callanan*, 125 Iowa 358.

Kentucky. — *Louisville v. Bitzer*, 115 Ky. 359; *Pfaffinger v. Kremer*, 115 Ky. 498; *Duker*

1195. See notes 3, 4.

2. Constitutional and Statutory Restrictions as to Amount. — See notes 5, 7.

1196. See note 1.

3. Matters to Be Included in Estimating Cost of Improvement. — See note 3.

Condemnation Proceedings. — See note 8.

1197. See note 1.

Expense of Levying Assessment. — See note 4.

Expense of Collecting Assessments. — See notes 6, 7.

Interest on Borrowed Money. — See note 8.

1198. 4. Apportionment Between Public and Property Benefited. — See note 1.

5. Apportionment Between Property Owners — *a*. IN GENERAL. — See note 3.

1199. See note 1.

Omission to Assess Property Liable. — See notes 3, 4.

v. Barber Asphalt Paving Co., (Ky. 1903) 74 S. W. Rep. 744.

Massachusetts. — *White v. Gove*, 183 Mass. 333; *Harwood v. Street Com'rs*, 183 Mass. 348. *Nebraska*. — *Morse v. Omaha*, 67 Neb. 426. *New Jersey*. — *Rosell v. Neptune City*, 68 N. J. L. 509.

Ohio. — *Hendrickson v. Toledo*, 23 Ohio Cir. Ct. 256; *Yost v. Toledo*, etc., R. Co., 24 Ohio Cir. Ct. 169; *Blair v. Cary*, 24 Ohio Cir. Ct. 560; *Fridman v. Norwood*, 25 Ohio Cir. Ct. 258; *Price v. Toledo*, 25 Ohio Cir. Ct. 617.

Pennsylvania. — *Philadelphia v. Pemberton*, 208 Pa. St. 214.

Texas. — *Kettle v. Dallas*, 35 Tex. Civ. App. 632.

Wisconsin. — *Friedrich v. Milwaukee*, 118 Wis. 254.

1195. 3. Nature of Special Benefits. — *Jones v. Chicago*, 206 Ill. 374.

4. Remote and Contingent Benefits Not Regarded. — *Gordon v. Chicago*, 201 Ill. 623. See also *supra*, this title, **1185**. 3. Compare *Minneapolis*, etc., R. Co. *v. Lindquist*, 119 Iowa 144.

Benefit from Increased Fire Protection to Be Considered. — *Chicago Union Traction Co. v. Chicago*, 202 Ill. 576.

5. Restrictions as to Taxation. — *Dyer v. Newport*, (Ky. 1904) 80 S. W. Rep. 1127; *Blair v. Cary*, 24 Ohio Cir. Ct. 560.

7. Restrictions as to Assessments. — *Norton v. Fisher*, 33 Ind. App. 132; *Owens v. Marion*, 127 Iowa 469; *Corliss v. Highland Park*, 132 Mich. 152, *affirmed* on rehearing 132 Mich. 159; *Nowlen v. Benton Harbor*, 134 Mich. 401; *Mound City Constr. Co. v. Macgurn*, 97 Mo. App. 403; *Matter of Opening Robbins Ave.*, 83 N. Y. App. Div. 513; *Matter of Acquiring Title to Whitlock Ave.*, 178 N. Y. 421; *Matter of Opening Lafayette Ave.*, 103 N. Y. App. Div. 496; *Drake v. Cincinnati*, 25 Ohio Cir. Ct. 373; *Ferry v. Tacoma*, 34 Wash. 652.

1196. 1. Mound City Constr. Co. *v. Macgurn*, 97 Mo. App. 403.

3. Matters Entering into Cost of Improvement. — *Donovan v. Oswego*, 90 N. Y. App. Div. 307.

Connecting Sewer — Cost of Constructing Main Sewer Considered. — *Bassett v. New Haven*, 76 Conn. 70.

8. Condemnation Proceedings. — *Chicago v. Cook*, 105 Ill. App. 353, *affirmed* 204 Ill. 373.

1197. 1. Matter of East One Hundred and Fifty-eighth St., (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 598; Matter of Riverside Park, 95 N. Y. App. Div. 552.

4. Expense of Levying Assessment. — *McChesney v. Chicago*, 201 Ill. 344, 205 Ill. 528; *Gage v. People*, 207 Ill. 377; *Storrs v. Chicago*, 208 Ill. 364.

Statutory Change. — *Betts v. Naperville*, 214 Ill. 380.

6. Collecting Assessments. — *Cicero v. Green*, 211 Ill. 241.

Statutory Change. — *Lanphere v. Chicago*, 212 Ill. 440.

7. *McChesney v. Chicago*, 201 Ill. 344; *Gage v. People*, 207 Ill. 377.

8. Interest on Instalment Payments Assessable as Part of Cost. — *Cicero v. Green*, 211 Ill. 241. As to instalment payments see generally *infra*, this title, **1231**. 4, 5.

Reassessment — Interest Not to Be Included. — *Chicago v. Hulbert*, 205 Ill. 346.

1198. 1. Apportionment Between Public and Property Benefited. — *Peru v. Bartels*, 214 Ill. 515; *Cheney v. Beverly*, 188 Mass. 81; *Auditor Gen. v. Hoffman*, 132 Mich. 198; *Power v. Detroit*, (Mich. 1905) 102 N. W. Rep. 288; *Richards v. Low*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 500; *Matter of Opening Quarry Road*, 84 N. Y. App. Div. 418.

3. Equality in Assessments. — *Denver v. Kennedy*, 33 Colo. 80; *Matter of Opening West Two Hundred and Fifty-ninth St.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 600; *Donovan v. Oswego*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 201; *Matter of Opening Grant Ave.*, 76 N. Y. App. Div. 87, *affirmed* 175 N. Y. 509; *Matter of Wheeler*, (County Ct.) 39 Misc. (N. Y.) 484.

1199. 1. *White v. Gove*, 183 Mass. 333.

3. Omission to Assess Property Liable. — *Denver v. Dumars*, 33 Colo. 94; *Chicago v. Nodeck*, 202 Ill. 257, *following* *McFarlane v. Chicago*, 185 Ill. 242; *American Hide*, etc., Co. *v. Chicago*, 203 Ill. 451; *Storrs v. Chicago*, 208 Ill. 364; *Klein v. Nugent Gravel Co.*, 162 Ind. 509, *reversing* (Ind. App. 1903) 66 N. E. Rep. 486; *Helm v. Witz*, (Ind. App. 1905) 73 N. E. Rep.

1200. *b.* ACCORDING TO ACTUAL BENEFITS. — See note 1.

c. ACCORDING TO VALUE. — See note 2.

1201. See note 1.

d. ACCORDING TO AREA. — See note 2.

e. ACCORDING TO FRONTAGE. — See note 3.

1202. See note 1.

1203. See note 3.

Variance in Depth of Lots. — See note 5.

Corner Lots. — See note 11.

1204. *f.* ACCORDING TO COST OF IMPROVEMENT IN FRONT OF LOT.

— See notes 1, 3.

VII. ASSESSMENT PROCEEDINGS — 1. General Compliance with Statutory Provisions. — See note 4.

846; *Beck v. Holland*, 29 Mont. 234; *Wales v. Warren*, 66 Neb. 455; *Harriman v. Yonkers*, 82 N. Y. App. Div. 408, *affirmed* 181 N. Y. 24.

Determination as to Whether Omitted Property Was Benefited. — See *Jones v. Chicago*, 206 Ill. 374.

Unjust Discrimination in Apportionment Authorizes Refusal to Confirm Assessment. — Matter of Opening Grant Ave., 175 N. Y. 509, *affirming* 76 N. Y. App. Div. 87.

1199. 4. *Peru v. Bartels*, 214 Ill. 515.

1200. 1. **Apportionment According to Benefits.** — *Beck v. Holland*, 29 Mont. 234.

2. **Apportionment According to Value.** — *Kansas City v. Gibson*, 66 Kan. 501; *Meier v. St. Louis*, 180 Mo. 391; *Kettle v. Dallas*, 35 Tex. Civ. App. 632.

1201. 1. *Moody v. Spotorno*, 112 La. 1008.

2. **Apportionment According to Area.** — *Louisville, etc., R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, *affirming* 116 Ky. 856; *Denver v. Dumars*, 33 Colo. 94; *Denver v. Kennedy*, 33 Colo. 80; *Spalding v. Denver*, 33 Colo. 172; *Walker v. Detroit*, 138 Mich. 639; *Minneapolis, etc., R. Co. v. Lindequist*, 119 Iowa 144; *Louisville R. Co. v. Southwestern Alcatraz Asphalt, etc., Co.*, (Ky. 1903) 74 S. W. Rep. 237; *Prior v. Buehler, etc., Constr. Co.*, 170 Mo. 439; *Meier v. St. Louis*, 180 Mo. 391; *McMillan v. Butte*, 30 Mont. 220; *Kettle v. Dallas*, 35 Tex. Civ. App. 632.

3. **Apportionment According to Frontage — United States.** — *Seattle v. Kelleher*, 195 U. S. 351.

Alabama. — *Montgomery v. Moore*, 140 Ala. 638.

Colorado. — *Denver v. Londoner*, 33 Colo. 104; *Denver v. Campbell*, 33 Colo. 162.

Connecticut. — *Bassett v. New Haven*, 76 Conn. 70.

Illinois. — *Peru v. Bartels*, 214 Ill. 515.

Indiana. — *Deane v. Indiana Macadam, etc., Co.*, 161 Ind. 371; *Brown v. Central Bermudez Co.*, 162 Ind. 452; *Voris v. Pittsburg Plate Glass Co.*, 163 Ind. 599.

Kentucky. — *Louisville v. Bitzer*, 115 Ky. 359. *Massachusetts.* — *Cheney v. Beverly*, 188 Mass. 81; *Harwood v. Donovan*, 188 Mass. 487.

Minnesota. — *Diamond v. Mankato*, 89 Minn. 48.

Missouri. — *Prior v. Buehler, etc., Constr. Co.*, 170 Mo. 439; *Heman v. Gilliam*, 171 Mo. 258; *St. Charles v. Deemar*, 174 Mo. 122; *Meier v. St. Louis*, 180 Mo. 391; *Ross v. Gates*, 183 Mo. 338; *Mound City Constr. Co. v. Macgurn*,

97 Mo. App. 403; *Barber Asphalt Paving Co. v. Kiene*, 99 Mo. App. 528; *Barber Asphalt Paving Co. v. Munn*, 185 Mo. 552.

Montana. — *Beck v. Holland*, 29 Mont. 234.

Nebraska. — *John v. Connell* (Neb. 1904) 98 N. W. Rep. 457; *Shannon v. Omaha*, (Neb. 1905) 103 N. W. Rep. 53.

New Jersey. — *Doughten v. Camden*, 71 N. J. L. 426.

New York. — *Donovan v. Oswego*, 90 N. Y. App. Div. 397, *reversing* (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 291; Matter of Opening Clinton Ave., 106 N. Y. App. Div. 31. But see *Donovan v. Oswego*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 291.

Ohio. — *Shoemaker v. Cincinnati*, 68 Ohio St. 603.

Pennsylvania. — *Franklin v. Hancock*, 204 Pa. St. 110.

Texas. — *Kettle v. Dallas*, 35 Tex. Civ. App. 632.

Virginia. — *Adams v. Roanoke*, 102 Va. 53.

Washington. — *Alexander v. Tacoma*, 35 Wash. 366.

Frontage Rule Improper Unless Benefits Are Equal and Uniform. — *Morse v. Omaha*, 67 Neb. 426.

Different Character of Paving on Street Improved as a Whole. — See *Cossitt Land Co. v. Neuscheler*, (N. J. 1905) 60 Atl. Rep. 1128.

Narrow Strip of Land. — See *Iowa Pipe, etc., Co. v. Callanan*, 125 Iowa 358.

1202. 1. *Franklin v. Hancock*, 204 Pa. 110. See, however, *White v. Gove*, 183 Mass. 333.

1203. 3. *People v. Stearns*, 213 Ill. 184, *following* *People v. Latham*, 203 Ill. 9; *White v. Gove*, 183 Mass. 333; *Harwood v. Street Com'rs*, 183 Mass. 348; *Donovan v. Oswego*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 291; Matter of *Wheeler*, (County Ct.) 39 Misc. (N. Y.) 484; *Friedrich v. Milwaukee*, 118 Wis. 254.

5. **Variance in Depth of Lots.** — *Compare Cossitt Land Co. v. Neuscheler*, (N. J. 1905) 60 Atl. Rep. 1128.

11. **Ohio Rule.** — *Fridman v. Norwood*, 25 Ohio Cir. Ct. 258.

1204. 1. **According to Cost of Improvement in Front of Lot.** — See *Doughten v. Camden*, 71 N. J. L. 426, distinguishing between improvements which are primarily for the public welfare and those primarily for the benefit of the landowner.

3. *Pierson v. People*, 204 Ill. 456.

4. **Strict Compliance with Statutes — United**

- 1205.** See notes 1, 2, 3.
2. Estoppel to Object to Assessment. — See note 4.
1206. See notes 1, 2.
1207. See note 1.
3. Petition by Property Owners. — See notes 3, 4, 5.
1208. See note 3.

States. — *Allen v. Davenport*, 132 Fed. Rep. 209, 65 C. C. A. 641.

Colorado. — *Mitchell v. Titus*, 33 Colo. 385.

Illinois. — *Field v. Chicago*, 198 Ill. 224; *Chicago v. Nodeck*, 202 Ill. 257; *Jeffris v. Cash*, 207 Ill. 405; *Lyman v. Chicago*, 211 Ill. 209.

Indiana. — *Clay City v. Bryson*, 30 Ind. App. 490; *Brown v. Central Bermudez Co.*, 162 Ind. 452; *Klein v. Nugent Gravel Co.*, 162 Ind. 509, *reversing* (Ind. App. 1903) 66 N. E. Rep. 486; *Bluffton v. Miller*, 33 Ind. App. 521.

Iowa. — *Zalesky v. Cedar Rapids*, 118 Iowa 714.

Minnesota. — *State v. Foster*, 94 Minn. 412.

Missouri. — *St. Louis v. Koch*, 169 Mo. 587; *Sedalia v. Scott*, 104 Mo. App. 595.

Nebraska. — *Morse v. Omaha*, 67 Neb. 426; *Farmers' L. & T. Co. v. Hastings*, (Neb. 1902) 96 N. W. Rep. 104; *Eddy v. Omaha*, (Neb. 1904) 101 N. W. Rep. 25.

Pennsylvania. — *Franklin v. Hancock*, 204 Pa. St. 110; *Harriott Avenue*, 24 Pa. Super. Ct. 597; *Erie v. Willis*, 26 Pa. Super. Ct. 459.

Vermont. — *Blanchard v. Barre*, 77 Vt. 420.

Wisconsin. — *Waukesha v. Randles*, 120 Wis. 470.

Recommendation by Local Board of Improvement.

— *Kilgallen v. Chicago*, 206 Ill. 557; *Gage v. Chicago*, 207 Ill. 56; *Ryan v. People*, 207 Ill. 74; *Becker v. Chicago*, 208 Ill. 126; *Storrs v. Chicago*, 208 Ill. 364; *Chicago Union Traction Co. v. Chicago*, 209 Ill. 444.

Selection of Materials for Paving by Property Owners. — *Ross v. Gates*, 183 Mo. 338.

Burden of Proof Is on Municipality. — *Trephagen v. South Omaha*, (Neb. 1903) 96 N. W. Rep. 248.

1205. 1. *Rosell v. Neptune City*, 68 N. J. L. 509.

2. Quantum Meruit. — *Carter v. Cemansky*, 126 Iowa 506. *Compare* *Doughten v. Camden*, 71 N. J. L. 426.

3. Remedial Statutes. — *Davenport v. Allen*, 120 Fed. Rep. 172 (*quantum meruit* recovery under *Iowa* statute); *Langan v. Bitzer*, (Ky. 1904) 82 S. W. Rep. 280.

4. Estoppel to Object to Irregularities. — *Cummings v. Kearney*, 141 Cal. 156; *Denver v. Campbell*, 33 Colo. 162; *Taylor v. Patton*, 160 Ind. 4; *Lux, etc., Stone Co. v. Donaldson*, 162 Ind. 481; *Barber Asphalt Paving Co. v. Gaar*, 115 Ky. 334; *Bacas v. Adler*, 112 La. 806, *citing* 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1205; *Auditor Gen. v. Hoffman*, 132 Mich. 198; *Nowlen v. Benton Harbor*, 134 Mich. 401; *Hill-O'Meara Constr. Co. v. Hutchinson*, 100 Mo. App. 294; *Morse v. Omaha*, 67 Neb. 426; *Aberdeen v. Lucas*, 37 Wash. 190. *Compare* *Clay City v. Bryson*, 30 Ind. App. 490; *Collier v. Western Paving, etc., Co.*, 180 Mo. 362.

Estoppel by Express Agreement. — *Hendrickson v. Toledo*, 23 Ohio Cir. Ct. 256.

1206. 1. **Want of Jurisdiction.** — *Pennsylvania Co. v. Cole*, 132 Fed. Rep. 668; *Gallaher v. Garland*, 126 Iowa 206; *Hall v. Moore*, (Neb. 1902) 92 N. W. Rep. 294; *Morse v. Omaha*, 67 Neb. 426; *Walden v. Relyea*, 89 N. Y. App. Div. 241.

Improvement under Unconstitutional Statute. — *Perkinson v. Hoolan*, 182 Mo. 189.

2. Covington v. Brinckman, (Ky. 1904) 79 S. W. Rep. 234.

1207. 1. *Carter v. Cemansky*, 126 Iowa 506; *Omaha v. Gsanter*, (Neb. 1903) 93 N. W. Rep. 407.

Purchaser under Tax Sale Not Estopped to Contest Assessment. — *Fitzgerald v. Sioux City*, 125 Iowa 396.

Grantee Estopped Where Part Consideration Is Agreement to Pay Assessment. — *Eddy v. Omaha*, (Neb. 1904) 101 N. W. Rep. 25.

3. Consent of Property Owners. — *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618; *Auditor Gen. v. Chase*, 132 Mich. 630; *Diamond v. Mankato*, 89 Minn. 48.

4. Statutes Requiring Petition by Property Owners — Arkansas. — *Board of Improvement v. Cotter*, 71 Ark. 556.

Illinois. — *Vennum v. Milford*, 202 Ill. 423; *Brookfield v. Sterling*, 214 Ill. 100; *L'Hote v. Milford*, 212 Ill. 418; *Guyer v. Rock Island*, 215 Ill. 144.

Kentucky. — *Covington v. Brinckman*, (Ky. 1904) 79 S. W. Rep. 234.

Maine. — *Kidson v. Bangor*, 99 Me. 139.

Minnesota. — *State v. District Ct.*, 89 Minn. 292; *Hawkins v. Horton*, 91 Minn. 285.

Nebraska. — *Portsmouth Sav. Bank v. Omaha*, 67 Neb. 50; *Omaha v. Gsanter*, (Neb. 1903) 93 N. W. Rep. 407; *Morse v. Omaha*, 67 Neb. 426; *South Omaha v. Tighe*, 67 Neb. 572; *Jones v. South Omaha*, (Neb. 1902) 94 N. W. Rep. 957; *McCaffrey v. Omaha*, (Neb. 1904) 101 N. W. Rep. 251.

New York. — *Donovan v. Oswego*, 90 N. Y. App. Div. 397, *reversing* (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 291.

Vermont. — *Blanchard v. Barre*, 77 Vt. 420.

5. By Whom Signed. — *South Omaha v. Tighe*, 67 Neb. 572, sustaining a finding of insufficiency where the only evidence of ownership was a recital in the petition itself.

President or Secretary of Corporation Not Authorized to Sign as to Corporate Land. — *Morse v. Omaha*, 67 Neb. 426.

General Manager of Corporation. — See *Trephagen v. South Omaha*, (Neb. 1903) 96 N. W. Rep. 248.

Executor to Whom Land Is Devised in Trust May Sign. — *Portsmouth Sav. Bank v. Omaha*, 67 Neb. 50.

Withdrawal from Petition. — See *Knopf v. Gilsonite Roofing, etc., Co.*, 92 Mo. App. 270.

1208. 3. **Husband May Sign for Wife in Her**

1209. Determination of Sufficiency of Petition. — See notes 2, 4, 5.

Estoppel to Question Sufficiency. — See note 6.

4. Estimate of Expenses and Plans of Improvement. — See note 9.

1210. See notes 2, 4.

5. Contract for Improvement. — See notes 5, 6, 7.

1211. See notes 2, 3, 4.

6. Ordinances and Resolutions — *a.* IN GENERAL. — See notes 7, 8.

1212. Determination of Necessity for Improvement. — See notes 3, 4, 5.

Presence and with Her Authority. — Portsmouth Sav. Bank v. Omaha, 67 Neb. 50.

1209. 2. Determination of Sufficiency of Petition. — Compare Guyer v. Rock Island, 215 Ill. 144.

4. The Burden of Proving that signatures to the petition were not authorized is on the person attacking the assessment. Hendrickson v. Toledo, 23 Ohio Cir. Ct. 256.

5. Denver v. Londoner, 33 Colo. 104; Roth v. Forsee, 107 Mo. App. 471.

6. Estoppel to Object to Sufficiency of Petition Where Plaintiff Appeared in Proceedings. — See Rowe v. Assessment Com'rs, 69 N. J. L. 600.

9. Estimate of Cost and Plans. — McChesney v. Chicago, 201 Ill. 344; Bickerdike v. Chicago, 203 Ill. 636; Chicago v. Nodeck, 202 Ill. 257; Lusk v. Chicago, 211 Ill. 183; Lyman v. Chicago, 211 Ill. 209; Jones v. Chicago, 213 Ill. 92; Hulbert v. Chicago, 213 Ill. 452; Clark v. Chicago, 214 Ill. 318; Chicago Union Traction Co. v. Chicago, 215 Ill. 410; Cheney v. Beverly, 188 Mass. 81; De Soto v. Showman, 100 Mo. App. 323; Kirksville v. Coleman, 103 Mo. App. 215; Moss v. Fairbury, 66 Neb. 671.

Effect of Variance in Cost from Preliminary Estimate. — Auditor Gen. v. Chase, 132 Mich. 630.

Itemizing Estimate. — See Peoria v. Ohl, 209 Ill. 52.

Omission of Item of Work from Estimate Will Not Invalidate Assessment. — Chicago v. Singer, 202 Ill. 75.

1210. 2. Bevier v. Watson, 113 Mo. App. 506.

4. People v. Latham, 203 Ill. 9; Jeffris v. Cash, 207 Ill. 405; Miservey v. People, 208 Ill. 646; Haven v. New York, 173 N. Y. 611, affirming 67 N. Y. App. Div. 90.

5. Contract for Improvement. — Clay City v. Bryson, 30 Ind. App. 490.

Effect of Invalid Provision in Contract as to Employment of Labor. — Inge v. Public Works, 135 Ala. 187, 93 Am. St. Rep. 20; McChesney v. People, 200 Ill. 146; Sweet v. People, 200 Ill. 536; Wells v. People, 201 Ill. 435; Glover v. People, 201 Ill. 545; De Wolf v. People, 202 Ill. 73; Gage v. People, 207 Ill. 61; Doyle v. People, 207 Ill. 75; Thompson v. People, 207 Ill. 334; St. Louis Quarry, etc., Co. v. Frost, 90 Mo. App. 677.

Effect of Contractor's Failure to Perform Contract. — Creed v. McCombs, 146 Cal. 449; Wells v. People, 201 Ill. 435; Gage v. People, 200 Ill. 432; McCain v. Des Moines, (Iowa 1905) 103 N. W. Rep. 979; Spalding v. Forsee, 109 Mo. App. 675; Barber Asphalt Paving Co. v. Munn, 185 Mo. 552; Schibel v. Merrill, 185 Mo. 534; Allen v. Labsap, 188 Mo. 692 (time of performance); Heman v. Larkin, 108 Mo. App. 392.

Failure to Perform Contract in Required Time. — Wheeler v. St. Louis, 90 Mo. App. 106; Schoenberg v. Heyer, 91 Mo. App. 389; Smith v. Westport, 105 Mo. App. 221; Hilgert v. Barber Asphalt Paving Co., 107 Mo. App. 385.

Acceptance of Work by Municipality Conclusive as to Performance of Contract. — Lux, etc., Stone Co. v. Donaldson, 162 Ind. 481; Eversole v. Walsh, (Ky. 1903) 76 S. W. Rep. 358; Baldrick v. Gast, (Ky. 1904) 79 S. W. Rep. 212.

6. Allen v. Davenport, 132 Fed. Rep. 209, 65 C. C. A. 641; People v. Peyton, 214 Ill. 376; Kansas City v. Askew, 105 Mo. App. 84.

7. Chicago v. Hanreddy, 211 Ill. 24, affirming 102 Ill. App. 1; Roth v. Forsee, 107 Mo. App. 471.

1211. 2. Allen v. Davenport, 132 Fed. Rep. 209, 65 C. C. A. 641; Diamond v. Mankato, 89 Minn. 48; Sisson v. Buffalo, (Supm. Ct. Eq. T.) 41 Misc. (N. Y.) 236; People v. Buffalo, (Supm. Ct. Spec. T.) 84 N. Y. Supp. 434. Compare Philadelphia v. Pemberton, 208 Pa. St. 214.

3. Compare Philadelphia v. Hood, 211 Pa. St. 189.

4. Eustace v. People, 213 Ill. 424; Louisiana v. Shaffner, 104 Mo. App. 101; Barton v. Kansas City, 110 Mo. App. 31.

7. Ordinances and Resolutions. — City St. Imp. Co. v. Taylor, 138 Cal. 364; City St. Imp. Co. v. Babcock, 139 Cal. 690; McLaughlin v. Chicago, 198 Ill. 518; People v. Birch, 201 Ill. 81; Paxton v. Bogardus, 201 Ill. 628; Walker v. People, 202 Ill. 34; Chicago v. Nodeck, 202 Ill. 257; Chicago Union Traction Co. v. Chicago, 208 Ill. 187; Lanphere v. Chicago, 212 Ill. 440; Eckert v. Walnut, 117 Iowa 629; Martin v. Oskaloosa, (Iowa 1904) 99 N. W. Rep. 557, 126 Iowa 680; Stutsman v. Burlington, 127 Iowa 563; Dickey v. Holmes, 109 Mo. App. 721.

Amendment of Ordinance. — See Johnson v. People, 202 Ill. 306.

Recommendation of Ordinance by Board of Local Improvement. — See Dodge v. Chicago, 201 Ill. 68; Wells v. Chicago, 202 Ill. 448; Walker v. Chicago, 202 Ill. 531; Chicago Union Traction Co. v. Chicago, 202 Ill. 576.

8. Sedalia v. Abell, 103 Mo. App. 431.

1212. 3. Determination of Necessity for Improvement. — Kirksville v. Coleman, 103 Mo. App. 215; Blanchard v. Barre, 77 Vt. 420.

4. Morse v. Omaha, 67 Neb. 426.

5. Conclusiveness of Determination. — Jones v. Chicago, 213 Ill. 92; Clark v. Chicago, 214 Ill. 318; Ton v. Chicago, 216 Ill. 331; Wabash Avenue, 26 Pa. Super. Ct. 305.

Review of Determination as to Necessity for Improvement. — Field v. Barber Asphalt Paving Co., 194 U. S. 618; Duker v. Barber Asphalt Paving Co., (Ky. 1903) 74 S. W. Rep. 744; Wells v. Chicago, 202 Ill. 448; Walker v. Chi-

1213. *b. ENACTMENT.* — See notes 1, 4.

c. REQUISITES AS TO FORM AND SUFFICIENCY. — See notes 5, 7.

1214. See notes 1, 2, 3.

1215. See note 1.

7. *Notice in Assessment Proceedings* — *a. IN GENERAL.* — See note 4.

1216. See notes 1, 2, 3.

1217. *Notice and Protest Against Ordinance for Improvement.* — See notes 1, 2.

cago, 202 Ill. 531; Pierson v. People, 204 Ill. 456; Akers v. Kolkmeier, 97 Mo. App. 520; Heman v. Franklin, 99 Mo. App. 346.

Ordinance Replacing Macadam Paving with Asphalt Held to Be Invalid as Unreasonable. — Chicago v. Brown, 205 Ill. 568.

1213. 1. ENACTMENT. — Louisville v. Gast, (Ky. 1904) 81 S. W. Rep. 693; Dollar Sav. Bank v. Ridge, 183 Mo. 506; McGuire v. East Cleveland, 25 Ohio Cir. Ct. 497.

4. *Votes Necessary.* — Cossitt Land Co. v. Neuscheler, (N. J. 1905) 60 Atl. Rep. 1128.

Statute Requiring Consent of All Members of Council — Consent of Mere Quorum Not Sufficient. — Crickenberger v. Westfield, 71 N. J. L. 467.

Councilman Not Disqualified by Having Signed Petition. — Erie v. Grant, 24 Pa. Super. Ct. 109.

5. *Caption of Ordinance — Variance.* — See Chicago Union Traction Co. v. Chicago, 207 Ill. 544.

7. *People v. Grover*, 203 Ill. 24; *Storrs v. Chicago*, 208 Ill. 364; *Ton v. Chicago*, 216 Ill. 331. See, however, *Bates v. Twist*, 138 Cal. 52; *San Francisco Paving Co. v. Egan*, 146 Cal. 635.

Sidewalks on Different Streets Not to Be Provided for in One Ordinance. — *People v. Latham*, 203 Ill. 9.

1214. 1. Description of Improvement — California. — City St. Imp. Co. v. Taylor, 138 Cal. 364; *Buckman v. Hatch*, 139 Cal. 53, reversing (Cal. 1902) 70 Pac. Rep. 221; *Williamson v. Joyce*, 140 Cal. 669.

Illinois. — *People v. Birch*, 201 Ill. 81; *People v. Smith*, 201 Ill. 454; *Paxton v. Bogardus*, 201 Ill. 628; *Washburn v. Chicago*, 202 Ill. 210; *McDowell v. People*, 204 Ill. 499; *Wetmore v. Chicago*, 206 Ill. 367; *Lusk v. Chicago*, 211 Ill. 183; *Cicero v. Green*, 211 Ill. 241; *Chicago v. Ayers*, 212 Ill. 59; *McChesney v. Chicago*, 213 Ill. 592.

Indiana. — *Bluffton v. Miller*, 33 Ind. App. 521.

Missouri. — *Kirksville v. Coleman*, 103 Mo. App. 215; *Louisiana v. Shaffner*, 104 Mo. App. 101; *Kansas City v. Askew*, 105 Mo. App. 84; *Smith v. Westport*, 105 Mo. App. 221; *Haag v. Ward*, 186 Mo. 325.

Reference to Other Records for Specific Description. — *Chase v. Trout*, 146 Cal. 350; *People v. Burke*, 206 Ill. 358; *Lanphere v. Chicago*, 212 Ill. 440; *Dickey v. Holmes*, 109 Mo. App. 721.

2. *Minute Description Not Required.* — *Dowling v. Hibernia Sav., etc., Soc.*, 143 Cal. 425; *Burghard v. Fitch*, (Ky. 1903) 72 S. W. Rep. 778; *Gage v. Chicago*, 201 Ill. 93, 203 Ill. 26, 207 Ill. 56, 216 Ill. 107; *McChesney v. Chicago*, 201 Ill. 344, 205 Ill. 611; *Chicago v. Singer*, 202 Ill. 75; *Walker v. Chicago*, 202 Ill. 531; *Chicago v. Hulbert*, 205 Ill. 346; *People v. Burke*, 206 Ill. 358; *Chicago Union Traction Co. v. Chicago*,

207 Ill. 544, 215 Ill. 410; *Cicero v. Green*, 211 Ill. 241; *Lanphere v. Chicago*, 212 Ill. 440; *Jones v. Chicago*, 213 Ill. 92; *Hilgert v. Barber Asphalt Paving Co.*, 107 Mo. App. 385; *Richardson v. Omaha*, (Neb. 1905) 104 N. W. Rep. 172.

Ordinance Need Not Specify Width of Street to Be Paved. — *Perry v. People*, 206 Ill. 334; *Jones v. Chicago*, 213 Ill. 92.

3. *Guyar v. Rock Island*, 215 Ill. 144.

1215. 1. Smith v. Chicago, 214 Ill. 155.

4. *Notice — Necessity For.* — *Beach v. Jersey City*, 71 N. J. L. 87; *Sears v. Atlantic City*, (N. J. 1905) 60 Atl. Rep. 1093.

Creditor Secured by Deed of Trust Not Entitled to Notice. — *Richmond v. Williams*, 102 Va. 733.

Property Owner Notified Cannot Object to Failure to Notify Others. — *Louisiana v. McAllister*, 104 Mo. App. 152.

Notice to Life Tenant. — See *Peck v. Bridgeport*, 75 Conn. 417.

1216. 1. Mobile v. Mobile Light, etc., Co., 141 Ala. 442; *Daly v. Gubbins*, (Ind. App. 1905) 73 N. E. Rep. 833; *Zalesky v. Cedar Rapids*, 118 Iowa 714; *Redersheimer v. Bruning*, 113 La. 343; *Portsmouth Sav. Bank v. Omaha*, 67 Neb. 50; *Shannon v. Omaha*, (Neb. 1904) 100 N. W. Rep. 298; *Walden v. Relyea*, 89 N. Y. App. Div. 241; *Pittsburg v. Biggett*, 23 Pa. Super. Ct. 540. See, however, *Erie v. Willis*, 26 Pa. Super. Ct. 459.

2. *Chase v. Trout*, 146 Cal. 350; *Denver v. Dumars*, 33 Colo. 94; *Denver v. Londoner*, 33 Colo. 104; *Denver v. Kennedy*, 33 Colo. 80; *Citizens' Sav. Bank, etc., Co. v. Chicago*, 215 Ill. 174, citing 25 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1216; *Auditor Gen. v. Hoffman*, 132 Mich. 198; *Meier v. St. Louis*, 180 Mo. 391; *Kettle v. Dallas*, 35 Tex. Civ. App. 632.

3. *Matter of New York*, 77 N. Y. App. Div. 136; *Adams v. Roanoke*, 102 Va. 53; *Alexander v. Tacoma*, 35 Wash. 366.

1217. 1. Notice and Protest Against Ordinance. — *Pacific Paving Co. v. Sullivan Estate Co.*, 137 Cal. 261; *City St. Imp. Co. v. Laird*, 138 Cal. 27; *Bates v. Twist*, 138 Cal. 52; *Gray v. Burr*, 138 Cal. 109; *City St. Imp. Co. v. Babcock*, 139 Cal. 690; *Dowling v. Hibernia Sav., etc., Soc.*, 143 Cal. 425; *Walker v. Chicago*, 202 Ill. 531; *Chicago v. Walsh*, 203 Ill. 318; *Auditor Gen. v. Calkins*, 136 Mich. 1; *Haven v. New York*, 173 N. Y. 611, affirming 67 N. Y. App. Div. 90; *Joyce v. Barron*, 67 Ohio St. 264; *Portland v. Oregon Real Estate Co.*, 43 Oregon 423.

Signature by Agent to Remonstrance Against Improvement. — See *Sedalia v. Scott*, 104 Mo. App. 595.

Withdrawal of Remonstrants. — See *Knopf v. Gilsonite Roofing, etc., Co.*, 92 Mo. App. 279; *Sedalia v. Scott*, 104 Mo. App. 595.

- 1217.** *b.* FORM OF NOTICE. — See note 3.
c. TIME OF NOTICE. — See note 4.
- 1218.** See note 1.
d. SERVICE OF NOTICE. — See notes 3, 5.
- 1219.** 9. By Whom Assessment to Be Made — *a.* IN GENERAL. — See note 8.
- 1220.** Delegation of Power. — See notes 1, 2, 3.
b. APPOINTMENT OF ASSESSORS, COMMISSIONERS, ETC. — See notes 5, 6.
- 1221.** *c.* QUALIFICATIONS. — See note 4.
- 1222.** 10. General Mode of Assessment. — See notes 2, 6, 7.
 11. Form and Contents of Assessment. — See note 8.
- 1223.** See notes 1, 2.
- 1224.** 12. Confirmation of Report and Assessment — *a.* IN GENERAL. — See notes 6, 7.

Time of Filing Remonstrance. — See *McKee v. Pendleton*, 162 Ind. 667.

Effect of Remonstrance to Defeat Improvement. — See *Greendale v. Suit*, 163 Ind. 282; *Maley v. Clark*, 33 Ind. App. 149.

Changing Plan of Improvement After Hearing. — See *McChesney v. Chicago*, 205 Ill. 611; *Chicago v. Kerfoot*, 208 Ill. 387.

Publication of Amendment of Ordinance. — See *People v. Burke*, 206 Ill. 358.

Notice of Adjourned Hearing Need Not Be Given. — *McChesney v. Chicago*, 201 Ill. 344.

Right to Remonstrate Limited to Resident Property Owners. — *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618.

1217. 2. *Washburn v. Chicago*, 198 Ill. 506; *Gage v. Chicago*, 203 Ill. 26.

3. Form of Notice. — *Gage v. Chicago*, 201 Ill. 93; *Lanphere v. Chicago*, 212 Ill. 440; *Donovan v. Oswego*, 90 N. Y. App. Div. 397.

Description by Number of City Blocks Sufficient. — *St. Louis v. Koch*, 169 Mo. 587.

4. Time of Notice. — *Barber Asphalt Paving Co. v. Muchenberger*, 105 Mo. App. 47.

Notice Need Not Necessarily Be Before Improvement Is Made. — *Schintgen v. La Crosse*, 117 Wis. 158.

1218. 1. *Field v. Chicago*, 198 Ill. 224; *McChesney v. Chicago*, 201 Ill. 344.

3. Personal Notice. — *Denver v. Dumars*, 33 Colo. 94.

5. Notice by Publication. — *Palmer v. Port Huron*, (Mich. 1905) 102 N. W. Rep. 996.

Personal Notice Sufficient under Provision for Notice by Publication. — *Peck v. Bridgeport*, 75 Conn. 417.

Publication on Sunday Held to Be Valid. — *Denver v. Dumars*, 33 Colo. 94; *Denver v. Londoner*, 33 Colo. 104.

1219. 8. By Whom Made. — *Storrs v. Chicago*, 208 Ill. 364; *Bakman v. Hackensack Imp. Commission*, 70 N. J. L. 499; *Matter of Opening Locust Ave.*, 93 N. Y. App. Div. 416.

1220. 1. Delegation of Power. — *Franklin v. Hancock*, 204 Pa. St. 110.

2. *Spalding v. Denver*, 33 Colo. 172; *Heman Constr. Co. v. Loevy*, 179 Mo. 455; *Heman v. Farish*, 97 Mo. App. 393.

3. *Bassett v. New Haven*, 76 Conn. 70; *Franklin v. Hancock*, 204 Pa. St. 110.

5. Appointment. — *Citizens' Sav. Bank, etc., Co. v. Chicago*, 215 Ill. 174.

6. *Sumner v. Milford*, 214 Ill. 388.

1221. 4. Disinterested. — *Murr v. Naperville*, 210 Ill. 371.

Relationship of Commissioner to Property Owners Not Disqualification. — *Rowe v. Assessment Com'rs*, 69 N. J. L. 600.

Interest in Contract for Improvement Does Not Disqualify. — *Betts v. Naperville*, 214 Ill. 380.

1222. 2. Statutory Requirements. — *Reed v. Bates*, 115 Ky. 437.

Assessment Not Disturbed for Irregularities Where No Injury Appears. — *Button v. Gast*, (Ky. 1903) 73 S. W. Rep. 1014; *Barber Asphalt Paving Co. v. Garr*, 115 Ky. 334; *Snyder v. Barber Asphalt Pav. Co.*, (Ky. 1903) 73 S. W. Rep. 1118; *Zender v. Barber Asphalt Paving Co.*, (Ky. 1903) 74 S. W. Rep. 201; *Baldrick v. Gast*, (Ky. 1904) 79 S. W. Rep. 212.

6. *Chicago Union Traction Co. v. Chicago*, 207 Ill. 544; *Gill v. Patton*, 118 Iowa 88; *Stutsman v. Burlington*, 127 Iowa 563; *Barber Asphalt Paving Co. v. Peck*, 186 Mo. 506.

Adjacent Lots Assessed as One Property Regardless of Improvements. — *Hill-O'Meara Constr. Co. v. Sessinghouse*, 106 Mo. App. 163.

Separate Assessments Sustained Against Railroad's Land Divided by Tracks. — *Minneapolis, etc., R. Co. v. Lindquist*, 119 Iowa 144.

7. *Chicago Union Traction Co. v. Chicago*, 204 Ill. 363 (interests of owner and lessee respectively not regarded); *Duker v. Barber Asphalt Paving Co.*, (Ky. 1903) 74 S. W. Rep. 744.

8. Assessment Must Show that Amount Is Not in Excess of Benefits. — *Rosell v. Neptune City*, 68 N. J. L. 509.

Sufficiency of Assessment to Impose Personal Liability. — See *Franklin v. Hancock*, 204 Pa. St. 110.

1223. 1. Description of Property. — *Pennsylvania Co. v. Cole*, 132 Fed. Rep. 668; *Gage v. Chicago*, 216 Ill. 107; *Hamar v. Leihy*, 124 Wis. 265.

2. Name of Owner. — *Pennsylvania Co. v. Cole*, 132 Fed. Rep. 668; *Brown v. Otis*, 98 N. Y. App. Div. 554.

Provision for Assessing Lands of Decedent in Name of Estate. — See *Peck v. Bridgeport*, 75 Conn. 417.

1224. 6. Confirmation of Report and Assessment. — *American Hide, etc., Co. v. Chicago*, 203 Ill. 451; *Thompson v. People*, 207 Ill. 334;

- 1225.** *b.* NOTICE OF APPLICATION FOR CONFIRMATION. — See note 2.
d. HEARING AND TRIAL ON CONFIRMATION. — See note 5.
1226. *e.* AMENDMENT AND CORRECTION OF REPORT. — See note 3.
f. OPERATION AND EFFECT OF CONFIRMATION. — See note 5.
1227. See note 1.
13. Review of Assessment. — See notes 2, 3.
14. Reassessment. — See note 6.
1228. See notes 1, 3.
15. Curative Acts. — See note 6.
1229. See notes 1, 3, 4.

Chicago Union Traction Co. *v.* Chicago, 207 Ill. 544; Lyman *v.* Chicago, 211 Ill. 209; Gage *v.* Chicago, 211 Ill. 109; Lusk *v.* Chicago, 211 Ill. 183; Richards *v.* Jerseyville, 214 Ill. 67; Spring Steel Fence, etc., Co. *v.* Anderson, 32 Ind. App. 138; Matter of Ft. Washington Ridge Road, 82 N. Y. App. Div. 163; Matter of Opening Locust Ave., 93 N. Y. App. Div. 416.

1224. 7. Auditor Gen. *v.* Hoffman, 132 Mich. 198.

1225. 2. Notice of Application for Confirmation. — Langlois *v.* Cameron, 201 Ill. 301; Spring Steel Fence, etc., Co. *v.* Anderson, 32 Ind. App. 138.

5. Hearing and Trial on Confirmation. — Matter of Opening of East One Hundred and Seventy-sixth St., 85 N. Y. App. Div. 347.

Objectors' Right to Separate Hearings. — See People *v.* Carter, 210 Ill. 122.

Confirmation Denied on Ground that Commissioners Were Coerced. — Matter of Opening Seventy-first St., 87 N. Y. App. Div. 52.

1226. 3. Amendment and Correction of Report. — Thompson *v.* People, 207 Ill. 334.

5. Operation and Effect of Confirmation — California. — Lambert *v.* Bates, 137 Cal. 676; Duncan *v.* Ramish, 142 Cal. 686.

Colorado. — Denver *v.* Dumars, 33 Colo. 94; Spalding *v.* Denver, 33 Colo. 172.

Illinois. — Walker *v.* People, 202 Ill. 34; Johnson *v.* People, 202 Ill. 306; Chew *v.* People, 202 Ill. 380; Bass *v.* People, 203 Ill. 206; People *v.* Fuller, 204 Ill. 290; Chicago *v.* Hulbert, 205 Ill. 346; Perry *v.* People, 206 Ill. 334; Gage *v.* People, 207 Ill. 61, 377; Ryan *v.* People, 207 Ill. 74; Thompson *v.* People, 207 Ill. 334; Lyman *v.* Chicago, 211 Ill. 209; People *v.* Illinois Cent. R. Co., 213 Ill. 367; Sumner *v.* Milford, 214 Ill. 388; Harman *v.* People, 214 Ill. 454; Goldstein *v.* Milford, 214 Ill. 528.

Indiana. — Deane *v.* Indiana Macadam, etc., Co., 161 Ind. 371; Lux, etc., Stone Co. *v.* Donaldson, 162 Ind. 481; Brown *v.* Central Bermudez Co., 162 Ind. 452; Boyce *v.* Tuhey, 163 Ind. 202.

Iowa. — Minneapolis, etc., R. Co. *v.* Lindquist, 119 Iowa 144; Marshalltown Light, etc., Co. *v.* Marshalltown, 127 Iowa 637.

Minnesota. — Hause *v.* St. Paul, 94 Minn. 115.

Washington. — Alexander *v.* Tacoma, 35 Wash. 366.

1227. 1. Klein *v.* Nugent Gravel Co., 162 Ind. 509, reversing (Ind. App. 1903) 66 N. E. Rep. 486.

2. Review of Confirmation. — Shepard *v.* People, 200 Ill. 508; Lingle *v.* Chicago, 212 Ill. 512; Fisher *v.* Chicago, 213 Ill. 268; Ziegler *v.* Chi-

cago, 213 Ill. 61; City Bond Co. *v.* Bruner, 34 Ind. App. 659; City Bond Co. *v.* Wells, 34 Ind. App. 675.

Municipality May Appeal from Order Denying Confirmation. — Chicago *v.* Singer, 202 Ill. 75; Chicago *v.* Hulbert, 205 Ill. 346.

3. Deane *v.* Indiana Macadam, etc., Co. 161 Ind. 371; Kadderly *v.* Portland, 44 Oregon 118, rehearing denied 44 Oregon 160.

6. Right to Make New Assessment Conferroc. — California. — City St. Imp. Co. *v.* Emmons, 138 Cal. 297.

Illinois. — Chicago *v.* Hulbert, 205 Ill. 346; Holden *v.* Chicago, 212 Ill. 289; Doremus *v.* Chicago, 212 Ill. 513; Chicago *v.* Sherman, 212 Ill. 498.

Iowa. — Gill *v.* Patton, 118 Iowa 88; Zalesky *v.* Cedar Rapids, 118 Iowa 714; Crawford *v.* Mason, 123 Iowa 301; Martin *v.* Oskaloosa, (Iowa 1904) 99 N. W. Rep. 557, 126 Iowa 680.

Kentucky. — Orth *v.* Park, 117 Ky. 779; Specht *v.* Barber Asphalt Paving Co., (Ky. 1904) 80 S. W. Rep. 1106.

Massachusetts. — Warren *v.* Street Com'rs, 187 Mass. 290.

Michigan. — Corliss *v.* Highland Park, 132 Mich. 152; Farr *v.* Detroit, 136 Mich. 200.

Minnesota. — State *v.* District Ct., (Minn. 1905) 103 N. W. Rep. 881.

Missouri. — State *v.* St. Louis, 183 Mo. 230.

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Oregon. — Kadderly *v.* Portland, 44 Oregon 118.

Washington. — Young *v.* Tacoma, 31 Wash. 153; Alexander *v.* Tacoma, 35 Wash. 366.

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Duty of Court to Make Reassessment on Certiorari. — Zahn *v.* Rutherford, (N. J. 1905) 60 Atl. Rep. 1123.

1228. 1. Warren *v.* Street Com'rs, 187 Mass. 290; Hayday *v.* Ocean City, 69 N. J. L. 22.

Reassessment After Sale of Assessment Bonds Not Invalid as Taxation for Private Purposes. — Schintgen *v.* La Crosse, 117 Wis. 158.

3. Cody *v.* Cicero, 203 Ill. 322; Chicago *v.* Noonan, 210 Ill. 18; Cicero *v.* Green, 211 Ill. 241; Chicago *v.* Richardson, 213 Ill. 96; Sheriffs *v.* Chicago, 213 Ill. 620; Wilmette *v.* People, 214 Ill. 107.

6. Curative Acts. — Denver *v.* Dumars, 33 Colo. 94; Gorton *v.* Chicago, 201 Ill. 534; Gardiner *v.* Collins, (Mass. 1905) 74 N. E. Rep. 341.

1229. 1. Compare McManus *v.* Hornaday, 124 Iowa 267, 104 Am. St. Rep. 316.

3. Allen *v.* Davenport, 132 Fed. Rep. 209, 65 C. C. A. 641.

- 1929.** VIII. ENFORCEMENT AND COLLECTION — 1. Remedy in General. — See note 5.
- 1230.** See note 4.
- 2.** By Whom Assessment to Be Enforced. — See note 7.
- 1231.** 4. Payment in Instalments. — See notes 4, 5.
- 5.** Interest. — See note 7.
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- 1233.** 8. Sale of Land. — See note 1.
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- 1234.** 9. Special Tax Bill or Certificate. — See notes 1, 2.

1929. 4. Compare *Farr v. Detroit*, 136 Mich. 200.

5. Statutory Provisions. — *Downey v. People*, 205 Ill. 230; *Gage v. People*, 205 Ill. 547, 213 Ill. 347, 410, 457, 468; *Dickey v. People*, 213 Ill. 51; *People v. Record*, 212 Ill. 62; *Cummings v. People*, 213 Ill. 443; *City Bond Co. v. Bruner*, 34 Ind. App. 659; *City Bond Co. v. Wells*, 34 Ind. App. 675; *Ross v. Van Natta*, 164 Ind. 557; *Gaertner v. Louisville Artificial Stone Co.*, 114 Ky. 160; *Excelsior Springs v. Henry*, 99 Mo. App. 450; *Barber Asphalt Paving Co. v. Kiene*, 99 Mo. App. 528.

1230. 4. *Scire Facias*. — *Philadelphia v. Lukens*, 22 Pa. Super. Ct. 298; *Philadelphia v. Kehoe*, 22 Pa. Super. Ct. 320.

7. Enforcement by Municipality. — *Central Ohio R. Co. v. Bellaire*, 67 Ohio St. 297.

Owners of Street Improvement Bonds May Enforce. — *Scott v. Hayes*, 162 Ind. 548.

1231. 4. **Payment in Instalments.** — *Treat v. Chicago*, 125 Fed. Rep. 644, affirmed (C. C. A.) 130 Fed. Rep. 443 (*Illinois* statute); *Corliss v. Highland Park*, 132 Mich. 159.

Improper Division into Instalments Does Not Necessarily Invalidate Assessment. — *Munn v. Boston*, 183 Mass. 421.

5. *McChesney v. Chicago*, 201 Ill. 344, 213 Ill. 592; *Hulbert v. Chicago*, 213 Ill. 452; *Sumner v. Milford*, 214 Ill. 388; *Gage v. Chicago*, 216 Ill. 107; *Scott v. Hayes*, 162 Ind. 548.

Provision for Maturing Subsequent Instalments on Failure to Pay Instalment Due. — See *Marion Bond Co. v. Blakely*, 30 Ind. App. 374, rehearing denied 30 Ind. App. 375.

Payment of Instalment as Waiver of Objection to Assessment. — See *McDonald v. People*, 206 Ill. 624; *Downey v. People*, 205 Ill. 230.

7. Compare *Gilfeather v. Grout*, 101 N. Y. App. Div. 150, appeal dismissed 182 N. Y. 522.

As to Interest on Instalments as a part of the cost of the improvement, see *supra*, this title, **1197.** 8.

1232. 1. *Lincoln v. Lincoln St. R. Co.*, 67 Neb. 469.

Interest on Instalments. — *Chicago v. People*, 215 Ill. 235; *Gage v. Chicago*, 216 Ill. 107.

2. Attorney's Fees. — *Brown v. Central Bermudez Co.*, 162 Ind. 452; *Scott v. Hayes*, 162 Ind. 548.

3. *Barber Asphalt Paving Co. v. Peck*, 186 Mo. 506; *Perkinson v. Schnaake*, 108 Mo. App. 255; *St. Joseph v. Forsee*, 110 Mo. App. 237.

5. Limitation of Actions. — *Shepard v. People*,

200 Ill. 508; *Mecartney v. People*, 202 Ill. 51; *Fitzgerald v. Sioux City*, 125 Iowa 396; *Lexington v. Crosthwaite*, (Ky. 1904) 78 S. W. Rep. 1130; *Ross v. Gates*, 183 Mo. 338; *Young v. Tacoma*, 31 Wash. 153.

Retrospective Operation of Statute Changing Duration of Lien of Assessment. — *Walker v. People*, 202 Ill. 34.

6. *Lexington v. Bowman*, (Ky. 1905) 84 S. W. Rep. 1161.

Limitations Held Not to Run in Absence of Special Statute. — *Mecartney v. People*, 202 Ill. 51.

1233. 1. **Sale of Land.** — *Glos v. Collins*, 110 Ill. App. 121; *Boals v. Bachmann*, 201 Ill. 340; *Gage v. People*, 207 Ill. 377; *Pfaffinger v. Kremer*, 115 Ky. 498; *Hawes v. Fliegler*, 87 Minn. 319; *Davis v. Evans*, 174 Mo. 307; *Kirby v. Waterman*, 17 S. Dak. 314.

Rights of Purchaser Governed by Rule Caveat Emptor. — *Glos v. Collins*, 110 Ill. App. 121.

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4. Purchase by Municipality. — *Schneider v. Detroit*, 135 Mich. 570.

6. Redemption from Sale. — *Lexington v. Woolfolk*, 117 Ky. 708.

1234. 1. **Special Tax Bill or Certificate.** — *City St. Imp. Co. v. Rontet*, 140 Cal. 55; *State v. Smith*, 177 Mo. 69; *Bevier v. Watson*, 113 Mo. App. 506.

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Form and Contents. — *St. Joseph v. Forsee*, 110 Mo. App. 127 (omitting name of owner of land).

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Performance in Reasonable Time Sufficient. — *Heman v. Gilliam*, 171 Mo. 258.

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2. Prima Facie Evidence. — *City St. Imp. Co. v. Laird*, 138 Cal. 27; *Heman v. Larkin*, (Mo. App. 1902) 70 S. W. Rep. 907; *Heman v. Far-*

1234. 10. Lien — *a.* IN GENERAL. — See notes 4, 6.

1235. *b.* WHEN LIEN ATTACHES. — See note 5.

c. DISCHARGE AND DURATION OF LIEN. — See note 8.

1236. See note 1.

d. PERFECTING LIEN. — See note 4.

e. PRIORITIES. — See notes 5, 6.

1237. See notes 1, 2, 4.

1238. 11. Personal Liability. — See notes 1, 2, 3.

1239. IX. REMEDIES OF PROPERTY OWNERS — 1. Recovery of Assessments Paid. — See note 6.

1240. Payment under Protest. — See notes 5, 6.

Compulsory Payment. — See note 7.

1241. 2. Equitable Relief. — See note 9.

1242. See notes 1, 2, 3, 4.

ish, 97 Mo. App. 393; Heman Constr. Co. v. McManus, 102 Mo. App. 649; Wales v. Warren, 66 Neb. 455.

1234. 4. Lien of Assessments. — Cemansky v. Fitch, 121 Iowa 186; Fitzgerald v. Sioux City, 125 Iowa 396.

6. Statutes Conferring Liens. — O'Dea v. Mitchell, 144 Cal. 374; Voris v. Pittsburg Plate Glass Co., 163 Ind. 599; Voris v. Gallaher, (Ky. 1905) 87 S. W. Rep. 775; Hall v. Moore, (Neb. 1902) 92 N. W. Rep. 294; Philadelphia v. Pemberton, 208 Pa. St. 214; Philadelphia v. Nell, 25 Pa. Super. Ct. 347; Philadelphia v. Peyton, 25 Pa. Super. Ct. 350; Erie v. Willis, 26 Pa. Super. Ct. 459; Martin v. Greenwood, 27 Pa. Super. Ct. 245.

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1235. 5. When Lien Attaches. — Laakmann v. Pritchard, 160 Ind. 24; Cemansky v. Fitch, 121 Iowa 186.

8. Lien Merged in Judgment Thereafter Governed by Rule as to Lien of Judgments. — Hinckley v. Seattle, 37 Wash. 269.

Estoppel to Assert Lien as Against Subsequent Purchaser of Land. — See Elder v. Fox, 18 Colo. App. 263.

1236. 1. Statutes Fixing Duration of Lien. — Williamson v. Joyce, 140 Cal. 669; Page v. W. W. Chase Co., 145 Cal. 578; Fitzgerald v. Sioux City, 125 Iowa 396; Voris v. Gallaher, (Ky. 1905) 87 S. W. Rep. 775; Heman v. Larkin, (Mo. App. 1902) 70 S. W. Rep. 907; Haag v. Ward, 186 Mo. 325; Barber Asphalt Paving Co. v. Meservey, 103 Mo. App. 186; Philadelphia v. Hey, 20 Pa. Super. Ct. 480; Tarentum v. Moorhead, 26 Pa. Super. Ct. 273.

4. Sufficiency of Claim for Lien. — Philadelphia v. Kehoe, 22 Pa. Super. Ct. 320.

5. Priorities. — Seattle v. Kelleher, 195 U. S. 351.

6. Kirby v. Waterman, 17 S. Dak. 314; Richmond v. Williams, 102 Va. 733.

1237. 1. Lincoln v. Lincoln St. R. Co., 67 Neb. 469; Martin v. Greenwood, 27 Pa. Super. Ct. 245.

2. O'Dea v. Mitchell, 144 Cal. 374; Chase v. Trout, 146 Cal. 350.

4. Keene v. Seattle, 31 Wash. 202.

1238. 1. Personal Liability Upheld. — Lincoln v. Lincoln St. R. Co., 67 Neb. 469; Matter of Elsner, 86 N. Y. App. Div. 207; Franklin v.

Hancock, 204 Pa. St. 110; Pittsburg v. Biggert, 23 Pa. Super. Ct. 540.

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2. Langan v. Bitzer, (Ky. 1904) 82 S. W. Rep. 280; Heman Constr. Co. v. Loevy, 179 Mo. 455; Omaha v. State, (Neb. 1903) 94 N. W. Rep. 979; Harriott Avenue, 24 Pa. Super. Ct. 597.

No Personal Liability in Absence of Statute. — Franklin v. Hancock, 204 Pa. St. 110.

Purchaser Taking Property Subject to Lien Does Not Incur Personal Liability. — Page v. W. W. Chase Co., 145 Cal. 578.

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1239. 6. Recovery of Assessments Paid Denied. — South Omaha v. McGavock, (Neb. 1904) 100 N. W. Rep. 805; McCall v. Rochester, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 129; Haven v. New York, 173 N. Y. 611, affirming 67 N. Y. App. Div. 90; Shirley v. Waukesha, 124 Wis. 239.

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1240. 5. Payment under Protest. — Haven v. New York, 173 N. Y. 611, affirming 67 N. Y. App. Div. 90.

6. Greenhood v. MacDonald, 183 Mass. 342; Omaha v. Hodgskins, (Neb. 1903) 97 N. W. Rep. 346, following Wilson v. Auburn, 27 Neb. 435; South Omaha v. McGavock, (Neb. 1904) 100 N. W. Rep. 805.

7. Limitation of Actions. — Dnnison v. New York, 182 N. Y. 24, affirming 93 N. Y. App. Div. 612.

1241. 9. Equitable Relief — Vacation of Assessment. — Bluffton v. Miller, 33 Ind. App. 521; Donovan v. Oswego, 90 N. Y. App. Div. 397; Harriman v. Yonkers, 181 N. Y. 24. See also Pleasants v. Shreveport, 110 La. 1046.

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1242. 1. Injunction. — Gallaher v. Garland,

1243. Where the Work Has Been Done. — See notes 4, 5.

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1244. 3. Certiorari. — See note 5.

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126 Iowa 206; *Diver v. Keokuk Sav. Bank*, 126 Iowa 691; *Joyce v. Barron*, 67 Ohio St. 264; *Cain v. Elkins*, 57 W. Va. 9.

1242. 2. Casting Cloud on Title. — *Field v. Barber Asphalt Paving Co.*, 117 Fed. Rep. 925, modified 194 U. S. 618.

3. Adequate Remedy at Law. — *Peck v. Bridgeport*, 75 Conn. 417; *Lyman v. Chicago*, 211 Ill. 209; *McKee v. Pendleton*, 162 Ind. 667; *Minneapolis, etc., R. Co. v. Lindquist*, 119 Iowa 144; *Greenhood v. MacDonald*, 183 Mass. 342; *Fajder v. Aitkin*, 87 Minn. 445; *Diamond v. Mankato*, 89 Minn. 48; *Lanning v. Chosen Freeholders*, 64 N. J. Eq. 161; *Kadderly v. Portland*, 44 Oregon 118, rehearing denied 44 Oregon 160.

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1243. 4. Conditions to Equitable Relief. — *Denver v. Londoner*, 33 Colo. 104; *Denver v. Kennedy*, 33 Colo. 80; *Spalding v. Denver*, 33 Colo. 172.

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5. Iowa Pipe, etc., Co. v. Callanan, 125 Iowa 358.

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1244. 5. Certiorari. — *Tileston v. Street Com'rs*, 182 Mass. 325; *Lanning v. Chosen Freeholders*, 64 N. J. Eq. 161.

1245. 6. Limitations. — *Rosell v. Neptune City*, 68 N. J. L. 509; *Lanning v. Chosen Freeholders*, 64 N. J. Eq. 161.

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SPECIFIC PERFORMANCE.

BY M. G. BEAMAN.

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- 23.** *c. LAWFULNESS* — (1) *General Rule* — *Public Policy*. — See note 3.
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- 27.** (3) *Inadequacy of Consideration* — (a) *General Rule*. — See notes 1, 2.
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26. 11. Where Contract Executed. — Robb v. Washington, etc., College, 103 N. Y. App. Div. 327.

27. 1. Inadequacy of Consideration. — Hamilton v. Hamilton, 162 Ind. 430, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 26, 27; Bush v. Whitaker, (Supm. Ct. Spec. T.) 45 Misc. (N.

Y.) 74. See also Goldstein v. Curtis, 63 N. J. Eq. 454, affirmed (N. J. 1903) 59 Atl. Rep. 639.

2. Norris v. Clark, 72 N. H. 442.

28. 1. Gross Inadequacy. — Berry v. Frisbie, Ky. 1905) 86 S. W. Rep. 558; Wolford v. Steele, (Ky. 1905) 84 S. W. Rep. 327.

3. Montana Statute. — See Traphagen v. Kirk, 30 Mont. 562.

7. Contract under Seal. — Forthman v. Deters, 206 Ill. 159, 99 Am. St. Rep. 145.

10. Mutuality. — Kane v. Luckman, 131 Fed. Rep. 609; Los Angeles, etc., Oil, etc., Co. v. Occidental Oil Co., 144 Cal. 528; Gage v. Cummings, 209 Ill. 120; Bauer v. Lumaghi Coal Co., 209 Ill. 316; Ormsby v. Graham, 123 Iowa 202; Engler v. Garrett, 100 Md. 387; Baltimore Humane Impartial Soc. v. Pierce, 99 Md. 352; Harlow v. Oregonian Pub. Co., 45 Oregon 520, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 28; Prusiecke v. Ramzinski, (Tex. Civ. App. 1904) 81 S. W. Rep. 771. See also Schwab v. Baremore, (Minn. 1905) 104 N. W. Rep. 10; Baumhoff v. Oklahoma City Electric, etc., Co., 14 Okla. 127.

29. 3. Gibson v. Brown, 214 Ill. 330.

30. 1. Performance on One Side. — Vance v. Newman, 72 Ark. 359, 105 Am. St. Rep. 42; Bird v. Potter, 146 Cal. 286; Burnell v. Bradbury, 67 Kan. 762; Dickson v. Stewart, (Neb. 1904) 98 N. W. Rep. 1085; Lone Star Salt Co. v. Texas Short Line R. Co., (Tex. Civ. App. 1905) 86 S. W. Rep. 355. See also Brownson v. Perry, (Kan. 1905) 81 Pac. Rep. 197; Engler v. Garrett, 100 Md. 387; Tenney v. Turner, 111 Mo. App. 597.

Doctrine of Mutuality of Remedy Does Not Apply if Defendant Has Conveyed Before Suit. — Nason v. Lingle, 143 Cal. 363.

3. Options. — Hamilton v. Hamilton, 162 Ind. 430, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 30; Watkins v. Youll, (Neb. 1903) 96 N. W. Rep. 1042.

6. Berry v. Frisbie, (Ky. 1905) 86 S. W. Rep. 558.

31. 2. Unilateral Contracts. — Carter v. Love, 206 Ill. 310; Cummins v. Beavers, 103 Va. 230, 106 Am. St. Rep. 881; Frank v. Stratford-Hancock, 13 Wyo. 37.

- 31.** (7) *Mutuality Subsequently Taken Away or Supplied.* — See notes 4, 5.
 (8) *Conflict of Cases.* — See note 7.
- 32.** See notes 2, 4.
f. CERTAINTY — (1) *General Rule.* — See note 5.
- 34.** Illustrations. — See note 6.
- 36.** (3) *Description of Property Conveyed.* — See notes 4, 9.
- 37.** (4) *Time of Performance.* — See note 5.
 (5) *Price and Consideration.* — See note 9.
- 38.** See note 3.
 (6) *Where Contract Capable of Being Made Certain* — (b) *Uncertainty Cured by Acts of Parties.* — See notes 7, 8.
- 39.** *g.* ENFORCEABILITY — (1) *General Rule.* — See note 1.
 (4) *Acts Beyond Defendant's Ability* — (a) *General Rule.* — See note 10.
- 40.** (b) *Where No Title in Defendant.* — See notes 2, 3, 4.
 (5) *Approximate Relief.* — See note 6.
 (6) *Conditions to Be Performed by Complainant.* — See note 7.
 3. *Rule in Case of Conditional Contracts.* — See note 8.
- 41.** 4. *Performance of Conditions Precedent* — *a.* GENERAL RULE. — See note 3.

31. 4. *Gibson v. Brown*, 214 Ill. 330.
 5. See *Gage v. Cummings*, 209 Ill. 120, explained in *Gibson v. Brown*, 214 Ill. 330.

7. *Law v. Smith*, (N. J. 1904) 59 Atl. Rep. 327; *Pederson v. Dibble*, 12 N. Dak. 572.

32. 2. *Standiford v. Thompson*, (C. C. A.) 135 Fed. Rep. 991.

4. *Lone Star Salt Co. v. Texas Short Line R. Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 355.

Contra by Statute in California. — *Los Angeles, etc., Oil, etc., Co. v. Occidental Oil Co.*, 144 Cal. 528.

5. *Contract Must Be Certain.* — *Kane v. Luckman*, 131 Fed. Rep. 609; *Meyer v. Quiggle*, 140 Cal. 495; *Patterson v. Farmington St. R. Co.*, 76 Conn. 628; *Engler v. Garrett*, 100 Md. 387; *Rosenwald v. Middlebrook*, 188 Mo. 58; *Largey v. Leggat*, 30 Mont. 148; *Tillery v. Land*, 136 N. Car. 537; *Meyer Land Co. v. Pecor*, (S. Dak. 1904) 101 N. W. Rep. 39; *Lone Star Salt Co. v. Texas Short Line R. Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 355, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 32. See also *Leary v. Corvin*, 181 N. Y. 222.

34. 6. *Contracts Too Uncertain for Enforcement.* — *Patterson v. Farmington St. R. Co.*, 76 Conn. 628; *Dreiske v. Joseph N. Eisendrath Co.*, 214 Ill. 199; *Brown v. Swarthout*, 134 Mich. 585; *Welch v. Williams*, 85 Miss. 301; *Traphagen v. Kirk*, 30 Mont. 562.

Contracts Sufficiently Certain for Enforcement. — *Howison v. Bartlett*, 141 Ala. 593; *Fowler v. Fowler*, 204 Ill. 82; *Neal v. Parker*, 98 Md. 254; *Owens v. Carthage, etc., R. Co.*, 110 Mo. App. 320; *Butler v. Murphy*, 106 Mo. App. 287; *Lester Agricultural Chemical Works v. Selby*, (N. J. 1904) 59 Atl. Rep. 247; *Naughton v. Elliott*, (N. J. 1905) 59 Atl. Rep. 869; *Claphan v. Barber*, 65 N. J. Eq. 550; *Baumbhoff v. Oklahoma City Electric, etc., Co.*, 14 Okla. 127.

36. 4. *Description of Property.* — *Tippins v. Phillips*, 123 Ga. 415; *Dreiske v. Joseph N. Eisendrath Co.*, 214 Ill. 199; *Bauer v. Lumaghi Coal Co.*, 209 Ill. 316; *Kirkpatrick v. Pettis*, 127 Iowa 611; *Hakell v. Renfrow*, 14

Okla. 674. See also *Powers v. Rude*, 14 Okla. 381.

Description by Metes and Bounds Sufficient. — *Rodman v. Robinson*, 134 N. Car. 503.

Street and Number and Name of Occupant Sufficient. — *Engler v. Garrett*, 100 Md. 387.

9. *Fowler v. Fowler*, 204 Ill. 82.

37. 5. *Veum v. Sheeran*, (Minn. 1905) 104 N. W. Rep. 135.

9. *Price to Be Determined by Arbitration.* — *Schneider v. Reed*, 123 Wis. 488.

38. 3. *Lester Agricultural Chemical Works v. Selby*, (N. J. 1904) 59 Atl. Rep. 247.

7. *Levandowski v. Althouse*, 136 Mich. 631. See also *Naughton v. Elliott*, (N. J. 1905) 59 Atl. Rep. 869.

8. *Curry v. Kentucky Western R. Co.*, (Ky. 1904) 78 S. W. Rep. 435.

39. 1. *Where Decree Not Enforceable.* — *Wilhite v. Skelton*, 5 Indian Ter. 621, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 38.

10. *Inability of Defendant to Perform.* — *Farson v. Fogg*, 205 Ill. 326. See also *Speer v. Erie R. Co.*, (N. J. 1905) 60 Atl. Rep. 197.

40. 2. *Where No Title in Defendant.* — *Boone v. Graham*, 215 Ill. 511; *Ormsby v. Graham*, 123 Iowa 202; *Riley v. Allen*, (Kan. 1905) 81 Pac. Rep. 186, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 40. See also *Southworth v. Brownlow*, 84 Miss. 405; *Pinchback v. Bessemer Min., etc., Co.*, 137 N. Car. 171.

Joint Owners Compelled to Convey Jointly. — *Resnick v. Campbell*, (N. J. 1904) 59 Atl. Rep. 452.

3. *Innocent Third Parties.* — *Coleman v. Dunton*, 99 Me. 121.

No Relief if Conveyance Made Before Contract — *Weaver v. Snively*, (Neb. 1905) 102 N. W. Rep. 77.

4. See *Jacobson v. Rechnitz*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 135.

6. *Norwood v. Tyson*, 138 Ala. 269.

7. *Moore v. Tuohy*, 142 Cal. 342.

8. *Conditional Contracts.* — See *David v. Balmat*, 90 N. Y. App. Div. 529.

41. 3. *Performance of Conditions Precedent.* —

42. *d.* TENDER OR OFFER TO PERFORM — (1) *In General*. — See notes 6, 7, 8.

43. (2) *Where Contract Abandoned or Repudiated*. — See note 2.

e. DEPENDENT COVENANTS — CONTEMPORANEOUS PERFORMANCE.

— See note 5.

5. Party Seeking Performance Must Himself Do Equity. — See note 6.

44. See note 1.

6. Demand. — See notes 3, 5.

45. **7.** Effect of Plaintiff's Fraud, Misrepresentation, or Bad Faith —

a. GENERAL RULE. — See notes 3, 4.

46. *a.* CONCEALMENT OF MATERIAL FACTS. — See note 8.

47. **8.** Mistake. — See note 9.

48. See note 1.

V. FORM AND CONSTRUCTION OF CONTRACT — 2. Signature of Party. —

See note 4.

3. Construction — *a.* IN GENERAL. — See note 5.

49. **VI. REQUIREMENTS OF STATUTE OF FRAUDS — 1. General Rule. —** See note 5.

50. **2. Doctrine of Part Performance — a. IN GENERAL — Interests in Land.** — See note 8.

52. Theory of the Cases. — See note 1.

Mere Refusal to Perform. — See note 3.

c. JURISDICTIONS IN WHICH DOCTRINE DENIED. — See note 7.

53. *e.* PERFORMANCE MUST HAVE BEEN ON FAITH OF CONTRACT. — See notes 2, 3.

Wold *v.* Newgaard, 123 Iowa 233; Clay *v.* Mayer, 183 Mo. 150; Frank *v.* Stratford-Handcock, 13 Wyo. 37.

42. **6. Offer to Perform.** — Forthman *v.* Deters, 206 Ill. 159, 99 Am. St. Rep. 145; Boldt *v.* Early, 33 Ind. App. 434, 104 Am. St. Rep. 255; Lanyon *v.* Chesney, 186 Mo. 540; Kuntz *v.* Schnugg, 99 N. Y. App. Div. 191. See also Mason *v.* Atkins, 73 Ark. 491; De Hihns *v.* Free, 70 S. Car. 344; Stein *v.* Waddell, 37 Wash. 634.

7. Excuse for Default. — Harris *v.* Greenleaf, 117 Ky. 817; Connely *v.* Haggarty, 65 N. J. Eq. 596.

8. Nature of Offer. — Murray *v.* Harbor, etc., Bldg., etc., Assoc., 91 N. Y. App. Div. 397.

Tender Must Be Absolute and Unconditional. — Terry *v.* Keim, 122 Ga. 43.

43. **2. Abandonment of Contract.** — Christiansen *v.* Aldrich, 30 Mont. 446; Kreutzer *v.* Lynch, 122 Wis. 474.

5. Dependent Covenants. — Cole *v.* Killam, 187 Mass. 213.

6. Hutchinson *v.* Hutchinson, (N. J. 1904) 58 Atl. Rep. 528; York *v.* Searles, 97 N. Y. App. Div. 331.

44. **1. The Plaintiff's Duty.** — Clay *v.* Mayer, 183 Mo. 150; Reynolds *v.* Hooker, 76 Vt. 184.

3. Where Demand Would Be Unavailing. — See Elsbury *v.* Shull, 32 Ind. App. 556.

5. Kreutzer *v.* Lynch, 122 Wis. 474.

45. **3. Fraud.** — Schneider *v.* Schneider, 125 Iowa 1; Schmitz *v.* Peterson, 113 La. 134; O'Connor *v.* Lighthizer, 34 Wash. 152.

4. Miller *v.* Fulmer, 25 Pa. Super. Ct. 106.

46. **8. Concealment of Material Facts.** — York *v.* Searles, 97 N. Y. App. Div. 331.

47. **9. Mistake of Fact.** — Reid *v.* Slocum, 34

Wash. 173. See also Kelly *v.* Johnson, 135 N. Car. 650.

48. **1. Contract Enforced Where Mistake on Part of Defendant Alone Is Due to His Negligence.** — Naughton *v.* Elliott, (N. J. 1905) 59 Atl. Rep. 869.

4. Signature of Party. — Engler *v.* Garrett, 100 Md. 387.

5. See Tingle *v.* Patch, 93 Minn. 437.

49. **5. Statute of Frauds.** — Kane *v.* Luckman, 131 Fed. Rep. 609; Ruff Brewing Co. *v.* Schanz, 114 Ill. App. 508; Ormsby *v.* Graham, 123 Iowa 202; Rosenwald *v.* Middlebrook, 188 Mo. 58; Lozier *v.* Hill, (N. J. 1904) 59 Atl. Rep. 234; Swift *v.* Delaware, etc., R. Co., 66 N. J. Eq. 34; Jayne *v.* Brown, 93 N. Y. App. Div. 617; Moody *v.* Howe, 17 S. Dak. 545; Rowell *v.* Smith, 123 Wis. 510.

Signatures of Parties. — Vance *v.* Newman, 72 Ark. 359, 105 Am. St. Rep. 42; Bird *v.* Potter, 146 Cal. 286 (by statute); Charlton *v.* Columbia Real Estate Co., (N. J. 1905) 60 Atl. Rep. 192. See also Engler *v.* Garrett, 100 Md. 387.

50. **8. Part Performance — General Rule.** — Veum *v.* Sheeran, (Minn. 1905) 104 N. W. Rep. 135; Best *v.* Grolapp, (Neb. 1903) 96 N. W. Rep. 641, (Neb. 1904) 99 N. W. Rep. 837; Cooper *v.* Colson, 66 N. J. Eq. 328; Clement *v.* Young-McShea Amusement Co., (N. J. 1905) 60 Atl. Rep. 419; Collins *v.* Fidelity Trust Co., 33 Wash. 136. See also Coleman *v.* Dunton, 99 Me. 121.

52. **1.** See Rowell *v.* Smith, 123 Wis. 510.

3. Mere Refusal by Defendant. — Largey *v.* Leggat, 30 Mont. 148.

7. Doctrine Denied. — Doty *v.* Doty, (Ky. 1904) 80 S. W. Rep. 803.

53. **2. Acts Done on Faith of Contract.** — Lay

- 53.** Whether All the Acts Done Called for by the Contract or Prove It. — See note 5.
- 54.** See note 2.
- f.* INADEQUACY OF DAMAGES. — See notes 4, 5, 6.
- g.* PAYMENT OF PURCHASE MONEY — (1) *General Rule* — Payment of the Whole or a Part of the Purchase Money. — See note 8.
- 55.** (3) *Payment Accompanied by Other Acts.* — See note 7.
- 56.** *h.* CHANGE OF POSSESSION — (1) *In General.* — See note 1.
- 57.** Tender of Deed. — See note 1.
- (2) *Possession and Improvements.* — See note 2.
- 58.** (4) *Continuance of Existing Possession* — Rule Stated. — See note 3.
- (5) *Necessity for and Nature of Possession* — Possession Held Essential. — See note 8.
- 59.** Nature of Possession Required. — See note 2.
- i.* CONTRACT MUST BE CERTAIN AND DEFINITE, AND PART PERFORMANCE CLEARLY SHOWN. — See note 6.
- 61.** *o.* GUARANTIES. — See note 1.
- 62.** VII. RULE OF JUDICIAL DISCRETION — 1. In General. — See note 4.

v. Lay, (Ark. 1905) 87 S. W. Rep. 1026; Seitman *v.* Seitman, 204 Ill. 504; Lozier *v.* Hill, (N. J. 1904) 59 Atl. Rep. 234; Cooper *v.* Colson, 66 N. J. Eq. 328; Dechenbach *v.* Rima, 45 Oregon 500; J. L. Gates Land Co. *v.* Ostrander, 124 Wis. 287.

53. 3. Dickinson *v.* Barrow, (1904) 2 Ch. 339, 91 L. T. N. S. 161; Rosenwald *v.* Middlebrook, 188 Mo. 58; Plunkett *v.* Bryant, 101 Va. 814; McKay *v.* Calderwood, 37 Wash. 194; Browder *v.* Phinney, 37 Wash. 70; J. L. Gates Land Co. *v.* Ostrander, 124 Wis. 287.

Acts Done Partly in Reliance on Contract Held to Be Sufficient. — Bringham *v.* Texas Co., (Tex. Civ. App. 1905) 87 S. W. Rep. 893.

5. Veum *v.* Sheeran, (Minn. 1905) 104 N. W. Rep. 135.

54. 2. Plunkett *v.* Bryant, 101 Va. 814.

4. Inadequacy of Relief by Damages. — Venable *v.* Stamper, 102 Va. 30.

5. Personal Services. — Cooper *v.* Colson, 66 N. J. Eq. 328.

6. Teske *v.* Dittberner, (Neb. 1903) 98 N. W. Rep. 57; Best *v.* Grolapp, (Neb. 1903) 96 N. W. Rep. 641, (Neb. 1904) 99 N. W. Rep. 837; Winfield *v.* Bowen, 65 N. J. Eq. 636.

8. Payment of Purchase Money. — Ross *v.* Cook, (Kan. 1905) 80 Pac. Rep. 38, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 54; Riddell *v.* Riddell, (Neb. 1903) 97 N. W. Rep. 609; Cooper *v.* Colson, 66 N. J. Eq. 328, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 54; Lozier *v.* Hill, (N. J. 1904) 59 Atl. Rep. 234; Shipman *v.* Shipman, 65 N. J. Eq. 556; Halsell *v.* Renfrow, 14 Okla. 674; Terry *v.* Craft, (Tex. Civ. App. 1905) 87 S. W. Rep. 844. See also Chamberlain *v.* Abrams, 36 Wash. 587.

55. 7. Payment Together with Other Acts. Lee *v.* Wrixon, 37 Wash. 47, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 55.

56. 1. Mere Possession Insufficient. — Wisconsin, etc., R. Co. *v.* McKenna, (Mich. 1905) 102 N. W. Rep. 281; West *v.* Webster, (Tex. Civ. App. 1905) 87 S. W. Rep. 106; Terry *v.* Craft, (Tex. Civ. App. 1905) 87 S. W. Rep. 844; Johnson *v.* Upper, 38 Wash. 603.

57. 1. Tender of Deed. — See Schneider *v.* Vogler, (Neb. 1904) 97 N. W. Rep. 1018.

2. Improvements. — Burnell *v.* Bradbury, 67 Kan. 762; Hubbard *v.* Kansas City Stained Glass Works, etc., Co., 188 Mo. 18; Piatt *v.* Seif, 207 Pa. St. 614; Bringham *v.* Texas Co., (Tex. Civ. App. 1905) 87 S. W. Rep. 893; McKay *v.* Calderwood, 37 Wash. 194; Ratliff *v.* Sommers, 55 W. Va. 30. See also Kuteman *v.* Carroll, (Tex. Civ. App. 1904) 80 S. W. Rep. 842.

58. 3. Where Party Already in Possession. — Bradt *v.* Hartson, (Neb. 1903) 96 N. W. Rep. 1008.

8. Possession Held Essential. — Sherlock *v.* Van Asselt, 34 Wash. 141.

59. 2. Must Be Exclusive. — Roberts *v.* Templeton, (Oregon 1905) 80 Pac. Rep. 481.

Must Be with Consent of Vendor. — Halsell *v.* Renfrow, 14 Okla. 674.

Joint Possession with Vendor Sufficient Where Contract Is to Convey Undivided Interest. — McKay *v.* Calderwood, 37 Wash. 194.

6. Contract Must Be Certain and Definite. — Seitman *v.* Seitman, 204 Ill. 504; Asbury *v.* Hicklin, 181 Mo. 658; Cooper *v.* Colson, 66 N. J. Eq. 328; Venable *v.* Stamper, 102 Va. 30.

61. 1. Doctrine Applies to Verbal Promise to Make Guaranty. — Rowell *v.* Smith, 123 Wis. 510.

62. 4. General Rule as to Court's Discretion. — United States. — Meehan *v.* Nelson, (C. C. A.) 137 Fed. Rep. 731; Western Union Tel. Co. *v.* Pennsylvania Co., (C. C. A.) 129 Fed. Rep. 849; Kane *v.* Luckman, 131 Fed. Rep. 609.

Illinois. — Bauer *v.* Lumaghi Coal Co., 209 Ill. 316; Dreiske *v.* Joseph N. Eisendrath Co., 214 Ill. 199; Farson *v.* Fogh, 205 Ill. 326; India Tea Co. *v.* Petersen, 108 Ill. App. 16.

Indiana. — Boldt *v.* Early, 33 Ind. App. 434, 104 Am. St. Rep. 255; Elsbury *v.* Shull, 32 Ind. App. 556.

Iowa. — Ormsby *v.* Graham, 123 Iowa 202; Moetzel *v.* Koch, 122 Iowa 196.

Kentucky. — Ratterman *v.* Campbell, (Ky. 1904) 80 S. W. Rep. 1155.

Michigan. — Cox *v.* Raider, 138 Mich. 249; Rathbone *v.* Groh, 137 Mich. 373.

Missouri. — Cable *v.* Jones, 179 Mo. 606.

Montana. — Christiansen *v.* Aldrich, 30 Mont. 446.

New Hampshire. — Norris *v.* Clark, 72 N. H. 442.

- 63.** This General Principle May Be Said to Be Qualified. — See note 1.
- 64.** Where a Valid Legal Contract Is Established. — See note 1.
- 65.** 2. Mere Fact of Legal Contract. — See note 2.
3. Imposition of Conditions upon Plaintiff. — See note 4.
- 66.** 4. Performance of Conditions Subsequent. — See note 2.
7. Enforcement of Forfeitures. — See note 7.
- 67.** 8. Consideration of Public Interests. — See note 2.
9. Contract Should Be Fair, Just, and Equitable — *a.* GENERAL RULE.
- See note 3.
- 68.** See note 1.
- b.* FACT THAT CONTRACT ENFORCEABLE AT LAW. — See note 5.
- c.* UNCONSCIONABLE CONTRACTS. — See note 6.
- 69.** See note 1.
- e.* CONSIDERATION OF TIME WHEN CONTRACT MADE. — See notes 4, 6.
- 70.** 10. Effect of Change of Value — Rule Stated. — See note 1.
- VIII. RULE WHERE PLAINTIFF IN DEFAULT — 1. In General. — See note 8.
- 71.** 3. Fact that Plaintiff's Default Would Not Justify Rescission. — See note 5.
- 72.** 5. Waiver of Default — Acquiescence — Mutual Failure to Perform. — See note 5.
6. Performance Prevented by Plaintiff or Defendant. — See note 6.

New York. — International Paper Co. v. Hudson River Water Power Co., 92 N. Y. App. Div. 56.

North Carolina. — Boles v. Caudle, 133 N. Car. 528; Tillery v. Land, 136 N. Car. 537.

North Dakota. — Hunter v. Coe, 12 N. Dak. 505.

West Virginia. — Ratliff v. Sommers, 55 W. Va. 30.

63. 1. Discretion Not Arbitrary. — Butman v. Butman, 213 Ill. 104; Law v. Smith, (N. J. 1904) 59 Atl. Rep. 327; Prusiecke v. Ramzinski, (Tex. Civ. App. 1904) 81 S. W. Rep. 771. See also Brevator v. Creech, 186 Mo. 558.

64. 1. Fowler v. Fowler, 204 Ill. 82; Faraday Coal, etc., Co. v. Owens, (Ky. 1904) 80 S. W. Rep. 1171; Yazoo, etc., R. Co. v. Southern R. Co., 83 Miss. 746; Boles v. Caudle, 133 N. Car. 528.

65. 2. Mere Legal Contract Not Alone Sufficient. — Stubbings v. Durham, 210 Ill. 542; Farson v. Fogg, 205 Ill. 326; Silberschmidt v. Silberschmidt, 112 Ill. App. 58; McCutcheon v. Rewleigh, (Ky. 1903) 76 S. W. Rep. 50.

4. May Impose Terms. — King v. Raab, 123 Iowa 632; Hunter v. Coe, 12 N. Dak. 505.

66. 2. Plaintiff's Inability to Perform. — Moore v. Tuohy, 142 Cal. 342; Cowles v. Rochester Folding Box Co., 179 N. Y. 87, affirming 81 N. Y. App. Div. 414.

7. Forfeitures. — Harris v. Greenleaf, 117 Ky. 817.

67. 2. Swift v. Delaware, etc., R. Co., 66 N. J. Eq. 34.

3. Contract Must Be Fair. — Meehan v. Nelson, (C. C. A.) 137 Fed. Rep. 731, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 67; Bauer v. Lumaghi Coal Co., 209 Ill. 316; Silberschmidt v. Silberschmidt, 112 Ill. App. 58; India Tea Co. v. Petersen, 108 Ill. App. 16;

Goodwine v. Kelley, 33 Ind. App. 57; Moetzel v. Koch, 122 Iowa 196; Bradford v. Smith, 123 Iowa 41; Berry v. Frisbie, (Ky. 1905) 86 S. W. Rep. 558; Engler v. Garrett, 100 Md. 387. See also Dreiske v. Joseph N. Eisendrath Co., 214 Ill. 199; Rosenwald v. Middlebrook, 188 Mo. 58.

68. 1. Meehan v. Nelson, (C. C. A.) 137 Fed. Rep. 731; Ormsby v. Graham, 123 Iowa 202; McCutcheon v. Rawleigh, (Ky. 1903) 76 S. W. Rep. 50; Rathbone v. Groh, 137 Mich. 373; Speer v. Erie R. Co., (N. J. 1905) 60 Atl. Rep. 197; Jayne v. Brown, 93 N. Y. App. Div. 617; Schimpff v. Dime Deposit, etc., Bank, 208 Pa. St. 380.

5. Stubbings v. Durham, 210 Ill. 542, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 68; Moetzel v. Koch, 122 Iowa 196.

6. Unconscionable Contracts. — Berry v. Frisbie, (Ky. 1905) 86 S. W. Rep. 558; Wolford v. Steele, (Ky. 1905) 84 S. W. Rep. 327; Ratterman v. Campbell, (Ky. 1904) 80 S. W. Rep. 1155.

69. 1. Rodman v. Robinson, 134 N. Car. 503.

4. See Harris v. Greenleaf, 117 Ky. 817.

6. Sanders v. Newton, 140 Ala. 335, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 69; Cox v. Raider, 138 Mich. 249. See also King v. Raab, 123 Iowa 632.

70. 1. Mere Change of Value. — Harris v. Greenleaf, 117 Ky. 817.

8. Where Plaintiff in Default — General Rule. — See Brown v. Widen, (Iowa 1905) 103 N. W. Rep. 158.

71. 5. Moetzel v. Koch, 122 Iowa 196; Miller v. Fulmer, 25 Pa. Super. Ct. 106.

72. 5. Cranwell v. Clinton Realty Co., 67 N. J. Eq. 540.

6. Altoona Electrical, etc., Co. v. Kittanning, etc., St. R. Co., 126 Fed. Rep. 559; Connely v. Haggarty, 65 N. J. Eq. 596.

- 73.** See note 1.
7. Provision in Contract for Forfeiture on Default. — See note 4.
8. Time as Essence of Contract — *a.* GENERAL RULE. — See notes 6, 7.
- 74.** *b.* WHERE TIME OF ESSENCE, NO ENFORCEMENT BY PARTY IN DEFAULT. — See notes 2, 3.
c. WHEN TIME DEEMED OF ESSENCE AND WHEN NOT — (1) *In General* — No General Rule Can Be Stated. — See note 6.
- 75.** See note 2.
Nature of Contract Considered. — See notes 3, 4.
Mutual Failure to Perform at Contract Time. — See note 5.
- 76.** (2) *Test — Question of Injury.* — See notes 1, 2.
(3) *Fluctuating Values — Change of Value or Circumstances.* — See note 5.
- 77.** 9. Performance Within Reasonable Time. — See note 3.
- 78.** IX. LACHES — 1. In General. — See note 2.
- 79.** 2. Action Need Not Be Barred by Statute. — See note 1.
5. Mere Delay. — See note 5.
- 80.** 9. Acquiescence in Violation of Contract — Plaintiff's Acquiescence. — See note 7.
- 81.** 10. Vendee in Possession. — See note 5.
11. Delay and Change of Circumstances — *a.* IN GENERAL. — See note 6.
- 73.** 1. Readiness to Perform. — *Clay v. Mayer*, 183 Mo. 150.
- 4.** Forfeiture at Election of Vendor. — *Murray v. Harbor, etc., Bldg., etc., Assoc.*, 91 N. Y. App. Div. 397.
- 6.** Time as Essence of Contract. — *Hosmer v. Wyoming R., etc., Co.*, (C. C. A.) 129 Fed. Rep. 883; *Vance v. Newman*, 72 Ark. 359, 105 Am. St. Rep. 42; *Ellis v. Bryant*, 120 Ga. 890; *Cranwell v. Clinton Realty Co.*, 67 N. J. Eq. 540; *Wright-Blodgett Co. v. Astoria Co.*, 45 Oregon 224; *Pennsylvania Min. Co. v. Martin*, 210 Pa. St. 53; *Cosby v. Honaker*, 57 W. Va. 512.
- 7.** *Hosmer v. Wyoming R., etc., Co.*, (C. C. A.) 129 Fed. Rep. 883; *Pennsylvania Min. Co. v. Smith*, 207 Pa. St. 210. See also *Gumaer v. Draper*, 33 Colo. 122.
- 74.** 2. Where Plaintiff in Default. — *Woods v. McGraw*, (C. C. A.) 127 Fed. Rep. 914; *Patterson v. Farmington St. R. Co.*, 76 Conn. 628; *Smith v. Krall*, 9 Idaho 535; *Garcin v. Pennsylvania Furnace Co.*, 186 Mass. 405; *Blanchard v. Archer*, 93 N. Y. App. Div. 459. See also *Powers v. Rude*, 14 Okla. 381.
- 3.** Waiver. — *Murray v. Harbor, etc., Bldg., etc., Assoc.*, 91 N. Y. App. Div. 397; *Kuhn v. Skelley*, 25 Pa. Super. Ct. 185; *Zeimantz v. Blake*, (Wash. 1905) 80 Pac. Rep. 822; *Cosby v. Honaker*, 57 W. Va. 512. See also *Ellis v. Bryant*, 120 Ga. 890.
- 6.** Express Stipulation or Necessary Implication. — *Standiford v. Thompson*, (C. C. A.) 135 Fed. Rep. 991; *Patterson v. Farmington St. R. Co.*, 76 Conn. 628; *Garcin v. Pennsylvania Furnace Co.*, 186 Mass. 405; *Blanchard v. Archer*, 93 N. Y. App. Div. 459; *Baldwin v. McGrath*, 90 N. Y. App. Div. 199.
- 75.** 2. *Boldt v. Early*, 33 Ind. App. 434, 104 Am. St. Rep. 255.
- 3.** See *Woods v. McGraw*, (C. C. A.) 127 Fed. Rep. 914.
- 4.** Contracts in Regard to Realty — Change of Possession — Improvements. — *Cranwell v. Clinton Realty Co.*, 67 N. J. Eq. 540.
- 5.** *Tingue v. Patch*, 93 Minn. 437.
- 76.** 1. *Test.* — *Miller v. Bronson*, 26 R. I. 62.
- 2.** *Vance v. Newman*, 72 Ark. 359, 105 Am. St. Rep. 42; *Ellis v. Bryant*, 120 Ga. 890; *Harris v. Greenleaf*, 117 Ky. 817.
- Vendor Compensated by Interest on Purchase Price.** — *Pennsylvania Min. Co. v. Martin*, 210 Pa. St. 53.
- 5.** *Standiford v. Thompson*, (C. C. A.) 135 Fed. Rep. 991; *Boldt v. Early*, 33 Ind. App. 434, 104 Am. St. Rep. 255; *Findley v. Koch*, 126 Iowa 131.
- Rule Inapplicable Where Increase Slight and Purchase Price Partly Paid.** — *Vance v. Newman*, 72 Ark. 359, 105 Am. St. Rep. 42. See also *Harris v. Greenleaf*, 117 Ky. 817.
- 77.** 3. Performance in Reasonable Time. — *Gibson v. Brown*, 214 Ill. 330; *Hawes v. Swanzey*, 123 Iowa 51; *Burnell v. Bradbury*, 67 Kan. 762; *Veum v. Sheeran*, (Minn. 1905) 104 N. W. Rep. 135; *Tingue v. Patch*, 93 Minn. 437; *Cranwell v. Clinton Realty Co.*, 67 N. J. Eq. 540.
- 78.** 2. Cases Where, under Particular Circumstances, Such Laches as Bars Relief. — *Bauer v. Lumaghi Coal Co.*, 209 Ill. 316; *Henderson v. Beatty*, 124 Iowa 163; *Lozier v. Hill*, (N. J. 1904) 59 Atl. Rep. 234.
- 79.** 1. Equity Ordinarily Follows Statute of Limitations. — *Brown v. Arnold*, (C. C. A.) 131 Fed. Rep. 723, reversing 127 Fed. Rep. 387.
- 5.** Mere Delay. — *Law v. Smith*, (N. J. 1904) 59 Atl. Rep. 327; *Rowell v. Smith*, 123 Wis. 510.
- Delay of Two Years Not Laches.** — *Pennsylvania Min. Co. v. Martin*, 210 Pa. St. 53.
- 80.** 7. Acquiescence. — *Smith v. Krall*, 9 Idaho 535. See also *Milmoe v. Murphy*, 65 N. J. Eq. 767.
- 81.** 5. Vendee in Possession. — *Ratliff v. Sommers*, 55 W. Va. 30.
- 6.** Delay Coupled with Change of Conditions. —

83. X. PARTIAL PERFORMANCE — 2. Separable Contracts. — See note 2.

3. Acceptance in Full of Part Performance. — See note 3.

6. Partial Performance with Compensation for Residue — *a. GENERAL RULE.* — See note 8.**84.** See note 1.**85. d. RULE AS TO VENDEE.** — See note 2.**XI. DAMAGES IN LIEU OF OR IN ADDITION TO SPECIFIC PERFORMANCE —**1. Damages in Lieu of Performance — *a. GENERAL RULE.* — See note 3.**86. e. WHERE PLAINTIFF KNEW PERFORMANCE IMPOSSIBLE.** — See note 3.*g. CASE MADE MUST CALL FOR EQUITABLE RELIEF.* — See note 6.**87. XII. CONTRACTS CLASSIFIED ACCORDING TO NATURE AND SUBJECT-MATTER — 2. Adoption.** — See note 7.**88. 3. Alternative Contracts — a. IN GENERAL.** — See note 1.*c. LIQUIDATED DAMAGES.* — See note 6.**89. 4. Arbitration — a. GENERAL RULE.** — See note 1.**90. 7. Bonds.** — See note 7.**91. 8. Compromises.** — See note 2.9. Contracts for Testamentary Provisions — *a. IN GENERAL.* — See note 6.**93. g. PAROL AGREEMENTS.** — See note 2.**94. 10. Contracts to Construct, Erect, or Repair — b. EXCEPTIONS.** — See notes 5, 7, 10.Henderson *v.* Beatty, 124 Iowa 163; Findley *v.* Koch, 126 Iowa 131.**83. 2. Separable Contracts.** — Western Union Tel. Co. *v.* Pennsylvania Co., (C. C. A.) 129 Fed. Rep. 849.3. Columbus *v.* Cleveland, etc., R. Co., 25 Ohio Cir. Ct. 663; Hughes *v.* Antill, 23 Pa. Super. Ct. 290; Steadman *v.* Hendy, 102 Va. 382.8. Part Performance and Compensation. — Clinton *v.* Shugart, 126 Iowa 179; Capstick *v.* Crane, 66 N. J. Eq. 341; Tillery *v.* Land, 136 N. Car. 537. See also Ormsby *v.* Graham, 123 Iowa 202.Contra if Difference in Value Incapable of Computation. — See Millmoe *v.* Murphy, 65 N. J. Eq. 767.**84. 1. Thompson *v.* Colby,** 127 Iowa 234; Bradford *v.* Smith, 123 Iowa 41; Payne *v.* Melton, 69 S. Car. 370. See also *infra*, this title, **99. 1.**Value Too Uncertain — Purchaser Must Take Deed and Rely on Covenants. — Cowan *v.* Kane, 211 Ill. 572.**85. 2. Lanyon *v.* Chesney,** 186 Mo. 540.3. Damages in Lieu of Performance. — Altoona Electrical, etc., Co. *v.* Kittanning, etc., St. R. Co., 126 Fed. Rep. 559; Speer *v.* Erie R. Co., (N. J. 1905) 60 Atl. Rep. 197; Fleming *v.* Ellison, 124 Wis. 36.Lien Given for Purchase Price Paid. — Clay *v.* Mayer, 183 Mo. 150.**86. 3. Impossibility of Performance Known to Plaintiff.** — Farson *v.* Fogg, 205 Ill. 326; Ormsby *v.* Graham, 123 Iowa 202; Kerlin *v.* Knipp, 207 Pa. St. 649; Peters *v.* Van Horn, 37 Wash. 550.Nominal Damages Allowed. — Eggert *v.* Pratt, 126 Iowa 727.6. Case Must Call for Equitable Relief. — Farson *v.* Fogg, 205 Ill. 326; Findley *v.* Koch, 126 Iowa 131.**87. 7. Adoption of Children.** — See Grantham *v.* Gossett, 182 Mo. 651.**88. 1. Welch *v.* Williams,** 85 Miss. 301.6. Lone Star Salt Co. *v.* Texas Short Line R. Co., (Tex. Civ. App. 1905) 86 S. W. Rep. 355, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 88.**89. 1. Contract to Submit to Arbitration.** — Kennedy *v.* Monarch Mfg. Co., 123 Iowa 344; Schneider *v.* Reed, 123 Wis. 488.**90. 7. Title Bond.** — Handy *v.* Rice, 98 Me. 504.**91. 2. Compromises.** — Price *v.* Price, 133 N. Car. 494.6. Contracts for Testamentary Provisions. — Laird *v.* Vila, 93 Minn. 45, 106 Am. St. Rep. 420; Asbury *v.* Hicklin, 181 Mo. 658; Teske *v.* Dittberner, (Neb. 1903) 98 N. W. Rep. 57; Best *v.* Grolapp, (Neb. 1903) 96 N. W. Rep. 641, affirmed (Neb. 1904) 99 N. W. Rep. 837; Bush *v.* Whitaker, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 74; Rhoades *v.* Schwartz, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 648; Earnhardt *v.* Clement, 137 N. Car. 91; Price *v.* Price, 133 N. Car. 494; Jordan *v.* Abney, 97 Tex. 296. See also the title DEBTS OF DECEDENTS, **1020. 5.****93. 2. Parol Agreements.** — Clawson *v.* Brewer, 67 N. J. Eq. 201; Laird *v.* Vila, 93 Minn. 45, 106 Am. St. Rep. 420; Rosenwald *v.* Middlebrook, 188 Mo. 58; Grantham *v.* Gossett, 182 Mo. 651; Asbury *v.* Hicklin, 181 Mo. 658; McKee *v.* Higbee, 180 Mo. 263; Lozier *v.* Hill, (N. J. 1904) 59 Atl. Rep. 234; Cooper *v.* Colson, 66 N. J. Eq. 328; Winfield *v.* Bowen, 65 N. J. Eq. 636; Earnhardt *v.* Clement, 137 N. Car. 91; Spencer *v.* Spencer, 26 R. I. 237. And see the title VERBAL AGREEMENTS (STATUTE OF FRAUDS), **893. 7 et seq.****94. 5. Columbus *v.* Cleveland, etc., R. Co.,** 25 Ohio Cir. Ct. 663.7. Owens *v.* Carthage, etc., R. Co., 110 Mo. App. 320.

95. 12. Continuing Contracts — Successive Acts — *a.* GENERAL RULE. — See note 4.

96. *b.* EXCEPTIONS. — See note 1.

14. Gifts — *a.* GENERAL RULE. — See note 8.

97. *b.* DONEE IN POSSESSION — IMPROVEMENTS. — See note 2.

98. 15. Husband and Wife — *a.* IN GENERAL. — See notes 4, 5.

c. REFUSAL OF WIFE TO JOIN IN HUSBAND'S DEED. — See note 9.

99. *d.* COMPENSATION OR INDEMNITY FOR DOWER RIGHT. — See note 1.

e. MARRIED WOMEN — (1) *In General.* — See note 4.

(2) *Rule under Statutes.* — See note 5.

100. 16. Insurance. — See note 5.

17. Options — *a.* GENERAL RULE. — See note 7.

101. See notes 4, 5.

19. Patents. — See note 10.

102. 20. Personal Services. — See note 5.

103. 21. Personal Property Contracts — *a.* IN GENERAL. — See notes 1, 3.

b. PROPERTY HAVING MARKET VALUE. — See note 4.

c. WHERE REMEDY AT LAW INADEQUATE — (1) *General Rule.* —

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104. 22. Real Property Contracts — *a.* IN GENERAL. — See note 10.

94. 10. See *Columbus v. Cleveland*, etc., R. Co., 25 Ohio Cir. Ct. 663.

95. 4. Contract Contemplating Successive Acts. — *Moore v. Tuohy*, 142 Cal. 342; *Wilhite v. Skelton*, 5 Indian Ter. 621; *Matthews v. Southern Ohio Traction Co.*, 25 Ohio Cir. Ct. 652.

96. 1. Operation of Railroads. — *Lone Star Salt Co. v. Texas Short Line R. Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 355.

8. *Brevator v. Creech*, 186 Mo. 558.

97. 2. Possession and Improvements. — *Walker v. Neil*, 117 Ga. 733.

98. 4. Contracts of Husband and Wife. — *Hazen v. Colossal Cavern Co.*, (Ky. 1903) 76 S. W. Rep. 116; *Goldstein v. Curtis*, 63 N. J. Eq. 454, *affirmed* (N. J. 1903) 59 Atl. Rep. 639.

5. *Washington State Bank v. Dickson*, 35 Wash. 641.

9. *Rodman v. Robinson*, 134 N. Car. 503; *Hughes v. Antill*, 23 Pa. Super. Ct. 290.

Performance Decreed unless Refusal of Wife Pleaded. — *Campbell v. Beard*, 57 W. Va. 501.

99. 1. *Bradford v. Smith*, 123 Iowa 41; *Thompson v. Colby*, 127 Iowa 234; *Payne v. Melton*, 69 S. Car. 370. See also *Cowan v. Kane*, 211 Ill. 572.

Statute Providing for Payment to Wife. — See *Handy v. Rice*, 98 Me. 504.

Performance Not Compelled under Agreement that Contract Void if Title Not Good. — *Schwab v. Baremore*, ((Minn. 1905) 104 N. W. Rep. 10.

4. *Goldstein v. Curtis*, 63 N. J. Eq. 454, *affirmed* (N. J. 1903) 59 Atl. Rep. 639.

5. Separate Property. — *Clay v. Mayer*, 183 Mo. 150.

Contract Valid Where Made Enforced in Another State. — *Law v. Smith*, (N. J. 1904) 59 Atl. Rep. 327.

100. 5. Annuity Policy May Be Enforced in Equity. — See *Mutual L. Ins. Co. v. Blair*, 130 Fed. Rep. 971.

7. Options. — *Carter v. Love*, 206 Ill. 310;

Watkins v. Youll, (Neb. 1903) 96 N. W. Rep. 1042; *Hughes v. Antill*, 23 Pa. Super. Ct. 290; *Cummins v. Beavers*, 103 Va. 230, 106 Am. St. Rep. 881; *Frank v. Stratford-Handcock*, 13 Wyo. 37. See also *Hamilton v. Hamilton*, 162 Ind. 430.

101. 4. *Woods v. McGraw*, (C. C. A.) 127 Fed. Rep. 914; *Patterson v. Farmington St. R. Co.*, 76 Conn. 628.

5. *Frank v. Stratford-Handcock*, 13 Wyo. 37.

10. Patents. — See *Pressed Steel Car Co. v. Hansen*, 128 Fed. Rep. 444, *affirmed* (C. C. A.) 137 Fed. Rep. 403.

102. 5. Contracts for Personal Services. — *Moore v. Tuohy*, 142 Cal. 342; *Matthews v. Southern Ohio Traction Co.*, 25 Ohio Cir. Ct. 652; *Harlow v. Oregonian Pub. Co.*, 45 Oregon 520. See also *Wood v. Iowa Bldg., etc., Assoc.*, 126 Iowa 464.

Contract Enforced if Services Not Skilled. — See *Neal v. Parker*, 98 Md. 254.

103. 1. Contracts as to Personal Property. — *Kane v. Luckman*, 131 Fed. Rep. 609; *Dorman v. McDonald*, (Fla. 1904) 36 So. Rep. 52; *Hendry v. Whidden*, (Fla. 1904) 37 So. Rep. 571; *Butler v. Wright*, 103 N. Y. App. Div. 463.

3. *Ridenbaugh v. Thayer*, 10 Idaho 662, *citing* 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 103, and quoting the whole text paragraph; *Law v. Smith*, (N. J. 1904) 59 Atl. Rep. 327.

4. Market Value Easily Ascertained. — *Ridenbaugh v. Thayer*, 10 Idaho 662, *quoting* 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 103.

5. Damages Inadequate. — *Livesley v. Johnston*, 45 Oregon 30, 106 Am. St. Rep. 647; *Bay City Irrigation Co. v. Sweeney*, (Tex. Civ. App. 1904) 81 S. W. Rep. 545. See also *Gilbert v. Bunnell*, 92 N. Y. App. Div. 284.

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104. 10. Contracts for Lands — General Rule. — *Covert v. Brinkerhoff*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 230.

105. See note 2.

106. *b. CONTRACTS OF SALE — (1) Suits by Vendor — (a) In General.* — See note 2.

(b) *Title to Be Conveyed — aa. IN GENERAL.* — See note 5.

108. *gg. RESERVATIONS, CONDITIONS, RESTRICTIONS.* — See note 6.

hh. IMMATERIAL DEFECTS — TECHNICALITIES. — See note 8.

109. (c) *"Marketable" Title — aa. GENERAL RULE.* — See note 5.

110. See note 2.

111. *bb. DANGER OF LITIGATION.* — See note 7.

112. (d) *Vendee Should State Objection.* — See note 5.

113. (g) *Question for Court — aa. IN GENERAL.* — See note 1.

(h) *Tender of Title — aa. GENERAL RULE.* — See note 6.

114. *bb. WHEN TENDER UNNECESSARY.* — See note 3.

cc. ACQUISITION OF TITLE BY VENDOR. — See note 8.

115. *Acquiescence in Vendor's Delay.* — See note 6.

116. (2) *Suits by Vendee — (a) In General.* — See note 2.

(b) *Inability of Vendor to Perform.* — See note 5.

(c) *Partial Performance — Compensation.* — See note 7.

(d) *Payment or Tender — aa. GENERAL RULE.* — See note 8.

117. See notes 3, 4.

Vendor's Defenses. — See note 5.

bb. WHEN TENDER UNNECESSARY. — See note 7.

105. 2. *Carnegie Natural Gas Co. v. South Penn Oil Co.*, 56 W. Va. 402, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 105.

Mineral Rights. — *Campbell v. Virginia-Carolina Chemical Co.*, 68 S. Car. 440.

106. 2. Suit by Vendor. — *Block v. Donovan*, 13 N. Dak. 1. See also *Pederson v. Dibble*, 12 N. Dak. 572.

5. Good Title to Be Conveyed. — *Day v. Mountin*, (C. C. A.) 137 Fed. Rep. 756; *Eversole v. Eversole*, (Ky. 1905) 85 S. W. Rep. 186; *Kuntz v. Schnugg*, 99 N. Y. App. Div. 191.

108. 6. Easements. — *Eversole v. Eversole*, (Ky. 1905) 85 S. W. Rep. 186.

8. Technical Objections. — *Gibson v. Brown*, 214 Ill. 330, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 108.

109. 5. Marketable Title. — See *Schwab v. Baremore*, (Minn. 1905) 104 N. W. Rep. 10.

110. 2. Ormsby v. Graham, 123 Iowa 202; *Potter v. Ogden*, (N. J. 1905) 59 Atl. Rep. 673; *Downey v. Seib*, 102 N. Y. App. Div. 317; *Felix v. Devlin*, 90 N. Y. App. Div. 103, affirmed on resubmission 91 N. Y. App. Div. 613; *Miller v. Bronson*, 26 R. I. 62.

111. 7. See *George v. Thomas*, 90 L. T. N. S. 505.

112. 5. Gibson v. Brown, 214 Ill. 330.

113. 1. Sufficiency of Deed — Question for Court. — *Lanyon v. Chesney*, 186 Mo. 540.

6. Tender by Vendor. — *Lanyon v. Chesney*, 186 Mo. 540.

114. 3. Where Tender Dispensed With. — See *Boldt v. Early*, 33 Ind. App. 434, 104 Am. St. Rep. 255.

8. Where Vendor Did Not Have Title When Contract Made. — *Day v. Mountin*, (C. C. A.) 137 Fed. Rep. 756; *Gibson v. Brown*, 214 Ill. 330; *Harriman v. Tyndale*, 184 Mass. 534; *Baumeister v. Demuth*, 84 N. Y. App. Div. 394, affirmed 178 N. Y. 630.

115. 6. Gibson v. Brown, 214 Ill. 330,

citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 115; *Hawes v. Swanzy*, 123 Iowa 51.

116. 2. Hughes v. Antill, 23 Pa. Super. Ct. 290; *Steadman v. Handy*, 102 Va. 382.

Refusal to Take Defective Title Estops Vendee to Demand Such Title Subsequently. — *Riley v. Allen*, (Kan. 1905) 81 Pac. Rep. 186.

5. Boone v. Graham, 215 Ill. 511; *Ormsby v. Graham*, 123 Iowa 202; *Weaver v. Snively*, (Neb. 1905) 102 N. W. Rep. 77.

Contracts Enforced Where Two Defendants Can Convey Though One Alone Could Not. — *Resnick v. Campbell*, (N. J. 1904) 59 Atl. Rep. 452.

7. Partial Performance — Election by Vendee. — *Cowan v. Kane*, 211 Ill. 572; *Clinton v. Shugart*, 126 Iowa 179, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 116; *Tillery v. Land*, 136 N. Car. 537. See also *Ormsby v. Graham*, 123 Iowa 202; *Capstick v. Crane*, 66 N. J. Eq. 341.

No Right to Abatement for Failure to Repair. — *Sokolski v. Bittenwieser*, 96 N. Y. App. Div. 18.

8. Payment or Tender by Vendee. — *Terry v. Keim*, 122 Ga. 43; *Hughes v. Antill*, 23 Pa. Super. Ct. 290.

Refusal of Tender on One Ground Is Waiver of Sufficiency on Others. — *Rankin v. Rankin*, 216 Ill. 132.

117. 3. Ability and Willingness to Perform. — *Hosmer v. Wyoming R., etc., Co.*, (C. C. A.) 129 Fed. Rep. 883; *Harris v. Greenleaf*, 117 Ky. 817; *Cole v. Killam*, 187 Mass. 213; *Murray v. Harbor, etc., Bldg., etc., Assoc.*, 91 N. Y. App. Div. 397.

4. See *Mason v. Atkins*, 73 Ark. 491.

5. Canwell v. Clinton Realty Co., 67 N. J. Eq. 540.

7. When Tender by Vendee Unnecessary. — *Keppler v. Wright*, 31 Ind. App. 512; *Christiansen v. Aldrich*, 30 Mont. 446; *Zeimantz v. Blake*, (Wash. 1905) 80 Pac. Rep. 822; *Kreutzer v. Lynch*, 122 Wis. 474.

- 118.** See note 1.
 (e) *Tender of Deed.* — See note 2.
 (f) *Vendee's Refusal to Accept Title.* — See notes 4, 5.
- 119.** (g) *Contracts to Reconvey.* — See note 2.
- 120.** *d. EASEMENTS.* — See note 4.
f. LEASES — (1) *In General.* — See note 8.
 (2) *Covenants in Leases.* — See note 4.
- 121.** *23. Stock in Corporations* — *b. WHEN CONTRACT ENFORCED* —
 (1) *In General.* — See note 3.
- 123.** *d. STOCK SUBSCRIPTIONS — TRANSFERS.* — See note 11.
- 124.** *24. Support and Maintenance.* — See note 1.
26. Miscellaneous. — See note 12.
- 125.** **XIII. RULE AS TO PRIVIES AND REPRESENTATIVES — 1. In General.** —
 See note 1.
2. Heirs and Devisees. — See note 3.
- 126.** *3. Vendees and Assignees — The Assignee of a Contract.* — See note 2.
A Vendee. — See note 7.
- 127.** *Innocent Purchasers.* — See note 2.
- XIV. EVIDENCE AND BURDEN OF PROOF — 4. Fraud or Mistake.** —
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- 128.** *8. Parol Evidence — a. GENERAL RULE.* — See notes 6, 9.
- 129.** *b. TO IDENTIFY PROPERTY CONVEYED.* — See note 3.
c. WHERE PROPERTY INSUFFICIENTLY DESCRIBED. — See note 5.
- 130.** *9. Burden of Proof — a. GENERAL RULE — Distinction Between Plaintiff and Defendant.* — See note 5.
- 118.** *1. Conner v. Baxter, 124 Iowa 219.*
2. Preparation of Deed. — *Wellmaker v. Wheatley, 123 Ga. 201.*
4. Milmo v. Murphy, 65 N. J. Eq. 767.
5. Contra if Time Is of Essence. — *Baldwin v. McGrath, 90 N. Y. App. Div. 199.*
- 119.** *2. See McBerty v. Hyde, 211 Pa. St. 123, holding that the rule applies even if consideration is paid.*
- 120.** *4. Easements.* — *Edwards v. Moundsville Land Co., 56 W. Va. 43.*
8. Leases. — *Pittsburgh Amusement Co. v. Ferguson, 100 N. Y. App. Div. 453.*
Contract to Purchase Lease Enforced. — *Covert v. Brinkerhoff, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 230.*
- 121.** *4. Contra, Peer v. Wadsworth, 67 N. J. Eq. 191.*
- 122.** *3. Contracts for Sale of Stock.* — See *Altoona Electrical, etc., Co. v. Kittanning, etc., St. R. Co., 126 Fed. Rep. 559.*
Mere Fact of No Market Value Insufficient. — *Butler v. Wright, 103 N. Y. App. Div. 463.*
- 123.** *11. Kennedy v. Thompson, 97 N. Y. App. Div. 296.*
Contract Enforced if Stock Has No Market Value. — *Selover v. Isle Harbor Land Co., 91 Minn. 451.*
- 124.** *1. Prusiecke v. Ranzinski, (Tex. Civ. App. 1904) 81 S. W. Rep. 771.*
12. Contract to Have Decree Entered. — See *Norwood v. Tyson, 138 Ala. 269.*
- 125.** *1. General Rule as to Privies and Representatives.* — *Tingue v. Patch, 93 Minn. 437, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 125.*
3. Performance by Him Impossible. — If the vendor conveys the land after suit begun, and then dies, the action should be revived and the decree for damages obtained against the personal representative, and not the heir. *Fleming v. Ellison, 124 Wis. 36.*
- 126.** *2. Right of Assignee.* — *Randolph v. Wheeler, 182 Mo. 145.* See also *Harriman v. Tyndale, 184 Mass. 534.*
Vendor Cannot Hold Assignee to Performance. — *Forbes v. Reynard, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 154.*
- 7. Right of Vendee.** — *Fowler v. Fowler, 204 Ill. 82; Forthman v. Deters, 206 Ill. 159, 99 Am. St. Rep. 145; Handy v. Rice, 98 Me. 504; Engler v. Garrett, 100 Md. 387; Cranwell v. Clinton Realty Co., 67 N. J. Eq. 540; Hunter v. Coe, 12 N. Dak. 505; Henry v. Black, 210 Pa. St. 245, 105 Am. St. Rep. 802; Cummins v. Beavers, 103 Va. 230, 106 Am. St. Rep. 881; Frank v. Straiford-Handcock, 13 Wyo. 37.* See also *Hadaway v. Smedley, 119 Ga. 264; Elsbury v. Shull, 32 Ind. App. 556.*
- 127.** *2. Innocent Purchasers.* — *Boone v. Graham, 215 Ill. 511; Coleman v. Dunton, 99 Me. 121.* See also *Tobin v. Larkin, 187 Mass. 279.*
- 11. Fraud or Mistake.** — *O'Connor v. Lighthizer, 34 Wash. 152.*
- 128.** *6. Parol Evidence.* — *Lozier v. Hill, (N. J. 1904) 59 Atl. Rep. 234.*
- 9. Reynolds v. Hooker, 76 Vt. 184.**
- 129.** *3. Parol Evidence to Identify Property.* — *Wellmaker v. Wheatley, 123 Ga. 201; Fowler v. Fowler, 204 Ill. 82.* See also *Howison v. Bartlett, 141 Ala. 593.*
- 5. Powers v. Rude, 14 Okla. 381; Halsell v. Renfrow, 14 Okla. 674.**
- 130.** *5. Deeds v. Stephens, 10 Idaho 332; Boldt v. Early, 33 Ind. App. 434, 104 Am. St. Rep. 255; Rosenwald v. Middlebrook, 188 Mo. 58; McKee v. Higbee, 180 Mo. 263.*

130. *b.* MUST ESTABLISH CONTRACT. — See note 6.

c. CONDITIONS PRECEDENT. — See note 8.

131. *e.* TO EVADE STATUTE OF FRAUDS. — See note 2.

f. ORAL CONTRACTS TO CONVEY LAND. — See notes 3, 5.

h. AFFIRMATIVE DEFENSES. — See note 7.

i. CASES DECIDED UPON PARTICULAR FACTS. — See note 10.

132. XV. OPERATION AND EFFECT OF DECREE — 1. How Decree Operates

— *a.* GENERAL RULE — In *Personam*. — See note 1.

133. *b.* SITUS OF SUBJECT-MATTER. — See note 2.

134. 3. Effect upon Title to Property. — See notes 4, 6.

135. XVI. WAIVER, FORFEITURE, AND ABANDONMENT — 2. Forfeiture by Default. — See note 1.

3. Abandonment. — See note 2.

4. Action at Law. — See note 5.

136. SPEEDY TRIAL. — See note 8.

130. 6. Making of Contract and Its Terms. — Pressed Steel Car Co. *v.* Hansen, (C. C. A.) 137 Fed. Rep. 403, *affirming* 128 Fed. Rep. 444; Patterson *v.* Farmington St. R. Co., 76 Conn. 628; Deeds *v.* Stephens, 10 Idaho 332.

8. Forthman *v.* Deters, 206 Ill. 159, 99 Am. St. Rep. 145; Boldt *v.* Early, 33 Ind. App. 434, 104 Am. St. Rep. 255.

131. 2. Halsell *v.* Renfrow, 14 Okla. 674.

3. Oral Contracts — Evidence Must Be Clear. — Warren *v.* Gay, 123 Ga. 243; Deeds *v.* Stephens, 10 Idaho 332; Seitman *v.* Seitman, 204 Ill. 504; Lozier *v.* Hill, (N. J. 1904) 59 Atl. Rep. 234.

5. Rosenwald *v.* Middlebrook, 188 Mo. 58.

7. Affirmative Defenses. — Steele *v.* Robertson, (Ark. 1905) 87 S. W. Rep. 117; Thompson *v.* Colby, 127 Iowa 234; Cape Fear Lumber Co. *v.* Matheson, 69 S. Car. 87. See also Christiansen *v.* Aldrich, 30 Mont. 446.

10. Evidence Held Insufficient to Warrant Decree. — Pressed Steel Car Co. *v.* Hansen, 128 Fed. Rep. 444, *affirmed* (C. C. A.) 137 Fed. Rep. 403; Lay *v.* Lay, (Ark. 1905) 87 S. W. Rep. 1026; Ford *v.* Smith, 121 Ga. 300; Seitman *v.* Seitman, 204 Ill. 504; Johnson *v.* Stratton, 109 Ill. App. 481; Findley *v.* Koch, 126 Iowa 131; Berry *v.* Frisbie, (Ky. 1905) 86 S. W. Rep. 558; Ratterman *v.* Campbell, (Ky. 1904) 80 S. W. Rep. 1155; Laybourn *v.* Zinns, (Minn. 1905) 103 N. W. Rep. 563; Rosenwald *v.* Middlebrook, 188 Mo. 58; Grantham *v.* Gossett, 182 Mo. 651; Brevator *v.* Creech, 186 Mo. 558; Asbury *v.* Hicklin, 181 Mo. 658; McKee *v.* Higbee, 180 Mo. 263; Lozier *v.* Hill, (N. J. 1904) 59 Atl. Rep. 234; Davis *v.* Davis, 96 N. Y. App. Div. 611; Sherlock *v.* Van Asselt, 34 Wash. 141.

Cases in Which Evidence Held Sufficient. —

Bird *v.* Potter, 146 Cal. 286; Fortner *v.* Wiggins, 121 Ga. 26; Fowler *v.* Fowler, 204 Ill. 82; McDavid *v.* Sutton, 205 Ill. 544; Ellsbury *v.* Shull, 32 Ind. App. 556; Sauer *v.* Nehls, 121 Iowa 184; Hazen *v.* Colossal Cavern Co., (Ky. 1903) 76 S. W. Rep. 116; Veum *v.* Sherman, (Minn. 1905) 104 N. W. Rep. 135 Cable *v.* Jones, 179 Mo. 606; Butler *v.* Murphy, 106 Mo. App. 287; Winfield *v.* Bowen, 65 N. J. Eq. 636; Clawson *v.* Brewer, 67 N. J. Eq. 201; Marvel *v.* Fralinger, 65 N. J. Eq. 161; International Paper Co. *v.* Hudson River Water Power Co., 92 N. Y. App. Div. 56; Shaw *v.* Benesh, 37 Wash. 457; Ratliff *v.* Sommers, 55 W. Va. 30.

132. 1. In *Personam*. — Silver Camp Min. Co. *v.* Dickert, 31 Mont. 488.

133. 2. Situs of Subject-matter. — Western Union Tel. Co. *v.* Pittsburg, etc., R. Co., 137 Fed. Rep. 435; Rea *v.* Ferguson, 126 Iowa 704; Donaldson *v.* Allen, 182 Mo. 626, *citing* 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 133.

134. 4. See Skinner *v.* Terry, 134 N. Car. 305.

6. See Kelly *v.* Bramblett, (Ky. 1904) 81 S. W. Rep. 249.

New Jersey Statute — Title Passes in Case of Refusal to Convey After Decree. — Goldstein *v.* Curtis, (N. J. 1903) 59 Atl. Rep. 639, *affirming* 63 N. J. Eq. 454.

135. 1. Watkins *v.* Youll, (Neb. 1903) 96 N. W. Rep. 1042.

2. Abandonment. — Cox *v.* Raider, 138 Mich. 249; Milmo *v.* Murphy, 65 N. J. Eq. 767. See also Henderson *v.* Beatty, 124 Iowa 163.

Abandonment May Be by Parol. — Wadge *v.* Kittleson, 12 N. Dak. 452.

5. See Pyle *v.* Crebs, 112 Ill. App. 480.

136. 8. Speedy Trial. — See Sample *v.* State, 138 Ala. 259.

SPENDTHRIFTS AND SPENDTHRIFT TRUSTS.

BY E. C. ELLSBREE.

139. II. SPENDTHRIFT TRUSTS — 2. Validity — b. AMERICAN DOCTRINE — Rule Stated. — See note 4.

142. 3. Creation of Trust — a. EXPRESS WORDS NOT NECESSARY. — See note 1.

151. SPIRIT — SPIRITS. — See note 1.

153. SQUARE. — See note 5.

139. 4. Rule Stated. — Moore v. Sinnott, 117 Ga. 1010; Wenzel v. Powder, 100 Md. 36; Gray v. Hawkins, 133 N. Car. 1. But see Honaker v. Duff, 101 Va. 675.

142. 1. Words Insufficient to Create Spendthrift Trust. — It has been held that where there is no provision in the deed attempting to place a restraint on the alienation of the income, and no prohibition against the seizure of that income by creditors of the beneficiary,

a spendthrift trust will not be inferred. Wenzel v. Powder, 100 Md. 36. See also Gray v. Hawkins, 133 N. Car. 1.

151. 1. The Phrase "Spirits Manufactured or Distilled from Grain or other materials," in the revenue law, has been held to include cordials. U. S. v. Wile, (C. C. A.) 130 Fed. Rep. 331.

153. 5. Public Use. — See Fessler v. Union, 67 N. J. Eq. 14.

STARE DECISIS.

BY H. O'B. COOPER.

160. II. GENERAL CONSIDERATION. — See note 6.

161. III. APPLICATION OF RULE — 1. In General. — See note 5.

162. 2. Decisions Construing Common Law. — See note 2.

3. Decisions Construing Constitutional Questions. — See note 4.

163. 5. Decisions of Court of Last Resort — a. IN GENERAL. — See note 4.

b. DECISIONS BINDING ON LOWER COURTS. — See note 6.

164. c. EFFECT OF CHANGE IN DECISION. — See notes 3, 5.

165. e. DECISION BY DIVIDED COURT. — See note 3.

Number of Judges Concurring. — See notes 4, 5.

160. 6. Parke v. Boulware, 9 Idaho 225.

"Certainty of the Law Is More Essential to justice than absolute correctness." Lonstorf v. Lonstorf, 118 Wis. 159.

Founded on Expediency and Public Policy. — Walling v. Bown, 9 Idaho 740.

161. 5. How Applied. — Morris v. Hitchcock, 194 U. S. 384; Parke v. Boulware, 9 Idaho 225; Walling v. Bown, 9 Idaho 740.

162. 2. Construction of Common Law. — Akers v. Jefferson County Sav. Bank, 120 Ga. 1066.

4. Doctrine Peculiarly Applicable. — See Walling v. Bown, 9 Idaho 740.

163. 4. Decision by Court of Last Resort. — Rodwell v. Rowland, 137 N. Car. 617.

6. Duty of Inferior Court to Follow. — Southern R. Co. v. Phillips, 119 Ga. 146; Fidelity, etc., Co. v. Nisbet, 119 Ga. 316; Thomas v. Blair, 111 La. 678; Ballou v. U. S. Flour Milling Co., 67 N. J. Eq. 188; Marshall v. Buffalo, 63 N.

Y. App. Div. 603, affirmed 176 N. Y. 545; New York L. Ins. Co. v. English, (Tex. Civ. App. 1904) 79 S. W. Rep. 616; White v. Simonton, 34 Tex. Civ. App. 464; Lonstorf v. Lonstorf, 118 Wis. 159; John O'Brien Lumber Co. v. Wilkinson, 123 Wis. 272. See also Rueping v. Chicago, etc., R. Co., 123 Wis. 319.

164. 3. Change in Decision. — State v. Bell, 136 N. Car. 674.

5. State v. Bell, 136 N. Car. 674. See also the title JUDGMENTS, 838. 1, and see the title NEW TRIAL, 14 ENCYC. OF PL. AND PR. 836.

165. 3. Decision by Divided Court. — State v. McClung, (Fla. 1904) 37 So. Rep. 51. See also Baldwin v. Burt, (Neb. 1902) 96 N. W. Rep. 401.

4. Number Concurring. — State v. McClung, (Fla. 1904) 37 So. Rep. 51.

5. Compare Henry F. Mitchell Co. v. Mathues, 134 Fed. Rep. 493.

- 165.** 6. Decisions of Co-ordinate Courts. — See notes 11, 12.
- 166.** Rule Discretionary. — See note 1.
7. Decisions of Intermediate Courts. — See notes 5, 8.
- 167.** 8. Decision by Divided Court. — See note 1.
9. Where Precedent Has Been Approved by Legislature. — See note 3.
- 168.** 12. Dicta — *a.* IN GENERAL. — See note 13.
- 169.** See notes 2, 3.
- b.* INTERPRETATION OF LANGUAGE OF COURT — (2) *General Expressions.* — See note 8.
- 170.** *c.* REASONING AND ILLUSTRATIONS IN OPINION. — See note 1.
- d.* QUESTIONS NOT ARGUED. — See note 3.
- 171.** *e.* WHERE SEVERAL POINTS ARE DECIDED. — See note 2.
- 172.** V. FEDERAL DECISIONS AS PRECEDENTS IN STATE COURTS — 1. Construction of Federal Constitution and Statutes — *a.* FEDERAL CONSTITUTION — (1) *In General.* — See notes 1, 2.
- (2) *Constitutionality of Federal Statutes.* — See note 5.
- 173.** *b.* FEDERAL STATUTES AND TREATIES. — See note 3.
- Illustrations. — See note 7.
- 176.** 3. Where Federal Court Has Appellate Jurisdiction. — See note 1.
- 177.** VII. DECISIONS OF COURTS OF ANOTHER STATE AS PRECEDENTS —
1. Construction of Constitutions and Statutes of Other States. — See notes 1, 2.
- 178.** 2. Decisions of Inferior Courts — In the Case of a Conflict. — See note 2.
7. Adopted Statutes. — See note 7.
- 165.** 11. Co-ordinate Courts. — *Brill v. Peckham Mfg. Co.*, 129 Fed. Rep. 139; *Texas, etc., R. Co. v. Mahaffey*, 98 Tex. 392.
- 12. Federal Circuit Courts.** — *Boatmen's Bank v. Fritzlen*, (C. C. A.) 135 Fed. Rep. 650. But see *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 120 Fed. Rep. 672, *reversed* (C. C. A.) 123 Fed. Rep. 869.
- 166.** 1. Rule Not Arbitrary. — *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 120 Fed. Rep. 672, *reversed* on other grounds (C. C. A.) 123 Fed. Rep. 869.
5. Decisions of Intermediate Courts. — *Charles v. Arthur*, (Supm. Ct. App. T.) 84 N. Y. Supp. 284.
- Effect on Supreme Court. — In *Kansas*, while the decision of the Court of Appeals, in a case which has been determined and remanded to the District Court, will be deemed ordinarily to be settled law in error to the Supreme Court, yet when such decision was erroneous it will not be followed. *Lorimer v. Fairchild*, 68 Kan. 328.
- Decision of Supreme Court that Question Not Involved. — *Ex p. Conley*, (Tex. Crim. 1903) 75 S. W. Rep. 301.
8. *Charles v. Arthur*, (Supm. Ct. App. T.) 84 N. Y. Supp. 284.
- 167.** 1. Decision by Divided Court. — *State v. McClung*, (Fla. 1904) 37 So. Rep. 51. See also *Baldwin v. Burt*, (Neb. 1903) 96 N. W. Rep. 401.
3. Legislative Ratification. — *Walling v. Bown*, 9 Idaho 740.
- 168.** 13. Dicta. — *People v. Tax Com'rs*, 174 N. Y. 417; *People v. Police Com'rs*, 174 N. Y. 450, 95 Am. St. Rep. 596; *Rodwell v. Rowland*, 137 N. Car. 617. See also *Flint v. Chaloupka*, (Neb. 1904) 99 N. W. Rep. 825.
- Decision Based on Repealed Statute. — See *Elfiring v. New Birdsall Co.*, 17 S. Dak. 350.
- 169.** 2. *Williams v. Chicago, etc., R. Co.*, 106 Mo. App. 61.
3. *Baltimore v. Alleghany County*, 99 Md. 1; *Williams v. Chicago, etc., R. Co.*, 106 Mo. App. 61; *Sprague v. Northern Pac. R. Co.*, 122 Wis. 509, 106 Am. St. Rep. 997. See also *Lancaster County v. McDonald*, (Neb. 1905) 103 N. W. Rep. 78.
8. General Expressions. — *King v. Pomeroy*, (C. C. A.) 121 Fed. Rep. 287.
- 170.** 1. Reasons and Illustrations. — *People v. Tax Com'rs*, 174 N. Y. 417.
3. Points Not Argued. — *Knight v. Shelton*, 134 Fed. Rep. 424.
- 171.** 2. Decision on Several Points. — *Union Pac. R. Co. v. Mason City, etc., R. Co.*, (C. C. A.) 128 Fed. Rep. 230.
- 172.** 1. Construction of Federal Constitution. — *In re Letcher*, 145 Cal. 563.
- Extradition Between States. — See *Ex p. Dennison*, (Neb. 1904) 101 N. W. Rep. 1045.
2. *State v. Scampini*, 77 Vt. 92.
5. Constitutionality of Federal Statute. — See *Dent v. U. S.*, (Ariz. 1904) 76 Pac. Rep. 455.
- 173.** 3. Federal Statutes. — *McLucas v. St. Joseph, etc., R. Co.*, 67 Neb. 603.
7. Land Laws in General. — *Hunt v. Hauser Malting Co.*, 90 Minn. 282.
- 176.** 1. Under Appellate Jurisdiction. — *Dent v. U. S.*, (Ariz. 1904) 76 Pac. Rep. 455.
- 177.** 1. Decisions of Other States. — *Clark v. Knowles*, 187 Mass. 35, 105 Am. St. Rep. 376.
2. See *Coveney v. Conlin*, 20 App. Cas. (D. C.) 303.
- 178.** 2. Conflicting Decisions. — See *Campbell v. American Ben. Club Fraternity*, 100 Mo. App. 249.
7. *Stein v. Morrison*, 9 Idaho 426.
- Rule Gives Way to Express Provision Inserted in Statute. — *Missouri Pac. R. Co. v. State*, 69 Kan. 552.

179. IX. RETROSPECTIVE EFFECT OF CHANGE OF DECISION — Effect on Contract Rights. — See note 3.

180. X. ERRONEOUS PRECEDENTS AS RULES OF PROPERTY — 1. In General. — See notes 5, 8.

181. 2. Where Real Property Is Involved. — See note 2.

183. XI. LIMITATION OF RULE. — See note 5.

184. Nature of Right Involved. — See note 2.

Unconstitutional Decisions. — See note 4.

185. XII. LAW OF THE CASE — 1. General Statement of Doctrine. — See note 1.

Rule Not Imperative. — *State v. Mortensen*, 26 Utah 312; *Dixon v. Ricketts*, 26 Utah 215.

Decisions of Other State Not Blindly Followed. — *Ancient Order of Hibernians v. Sparrow*, 29 Mont. 132.

English Statute — Construction of English Courts Persuasive. — *Jarvis v. Hitch*, 161 Ind. 217.

179. 3. Impairment of Contracts. — *State v. Bell*, 136 N. Car. 674; *Price v. Toledo*, 25 Ohio Cir. Ct. 617.

180. 5. Strict Application — Rule of Property. — *Lacy v. Gunn*, 144 Cal. 511; *Parke v. Boulware*, 9 Idaho 225; *Wilkins v. Chicago*, etc., R. Co., 110 Tenn. 442. See also *Logan County v. Carnahan*, 66 Neb. 685.

8. Contracts. — *Parke v. Boulware*, 9 Idaho 225.

181. 2. Where Real Property Involved. — *Wilkins v. Chicago*, etc., R. Co., 110 Tenn. 442. See also *Logan County v. Carnahan*, 66 Neb. 685.

183. 5. Rule Not Inflexible. — *Hall v. Blackman*, 9 Idaho 555; *McEvoy v. Sault Ste. Marie*, 136 Mich. 172; *Wahoo v. Netheway*, (Neb. 1905) 102 N. W. Rep. 86; *New Omaha Thomson-Houston Electric Light Co. v. Rombold*, (Neb. 1905) 102 N. W. Rep. 475; *School Directors v. Asheville*, 137 N. Car. 503; *State v. Lewis*, 69 Ohio St. 202; *Lonstorf v. Lonstorf*, 118 Wis. 159. See also *Logan County v. Carnahan*, 66 Neb. 685.

184. 2. When Departed From. — See *Logan County v. Carnahan*, 66 Neb. 685.

4. School Directors v. Asheville, 137 N. Car. 503; *State v. Lewis*, 69 Ohio St. 202.

185. 1. Law of the Case — *United States*. — *Mutual L. Ins. Co. v. Hill*, 193 U. S. 551; *Orient Ins. Co. v. Leonard*, (C. C. A.) 120 Fed. Rep. 808; *Burow v. Grand Lodge*, etc., (C. C. A.) 134 Fed. Rep. 1021.

Alabama. — *Bostick v. Jacobs*, 141 Ala. 508.

Arizona. — *Gila Valley*, etc., R. Co. v. *Lyon*, (Ariz. 1905) 80 Pac. Rep. 337.

California. — *Raymond v. Glover*, 144 Cal. 548; *Senior v. Anderson*, 138 Cal. 716; *Limberg v. Glenwood Lumber Co.*, 145 Cal. 255.

Colorado. — *Great Plains Water Co. v. Lamar Canal Co.*, 31 Colo. 96; *Rio Grande County v. Pbye*, 31 Colo. 176.

Florida. — *Tampa Waterworks Co. v. Tampa*, (Fla. 1904) 36 So. Rep. 174.

Georgia. — *Atlanta Trust*, etc., Co. v. *Nelms*, 119 Ga. 630; *Brooks v. Miller*, 118 Ga. 676; *Strickland v. Western*, etc., R. Co., 119 Ga. 70; *Crew v. Hutcheson*, 119 Ga. 142; *Pritchard v. McCrary*, 122 Ga. 606.

Idaho. — *Coats v. Harris*, 9 Idaho 470.

Illinois. — *Christensen v. People*, 114 Ill. App. 40.

Indiana. — *Heller v. Dailey*, 34 Ind. App. 424.

Iowa. — *Born v. Home Ins. Co.*, 120 Iowa 299.

Kansas. — *State v. Morrison*, 67 Kan. 144.

Kentucky. — *Covington v. Asman*, (Ky. 1904) 80 S. W. Rep. 154; *Woodland Cemetery Co. v. Ellison*, (Ky. 1904) 80 S. W. Rep. 169; *Union Cent. L. Ins. Co. v. Galvin*, (Ky. 1904) 81 S. W. Rep. 239; *Chenault v. Quisenberry*, (Ky. 1904) 81 S. W. Rep. 690; *U. S. Fidelity*, etc., Co. v. *Blackley*, (Ky. 1905) 85 S. W. Rep. 196; *Laughlin v. Boughner*, (Ky. 1905) 84 S. W. Rep. 300; *Ayer*, etc., *Tie Co. v. Com.*, (Ky. 1905) 85 S. W. Rep. 1096; *Ashcraft v. Cox*, (Ky. 1903) 77 S. W. Rep. 718; *Booth v. Bethel*, (Ky. 1904) 78 S. W. Rep. 868; *Vanceburg*, etc., *Turnpike Road Co. v. Maysville*, etc., R. Co., 117 Ky. 275; *Wilson v. Louisville Nat. Banking Co.*, (Ky. 1903) 76 S. W. Rep. 1095.

Louisiana. — *Thompson v. Vance*, 111 La. 548.

Maryland. — *Wells*, etc., *Council No. 14 v. Littleton*, 100 Md. 416.

Michigan. — *Fitzgerald v. Benton Harbor*, 132 Mich. 645.

Mississippi. — *Nutt v. Knut*, 84 Miss. 465.

Missouri. — *Ashby v. Elsberry*, etc., *Gravel Road Co.*, 111 Mo. App. 79; *Hayward v. Smith*, 187 Mo. 464; *Brooks v. Barth*, 112 Mo. App. 268; *State v. Stuart*, 102 Mo. App. 26, 111 Mo. App. 478.

Nebraska. — *Edney v. Baum*, (Neb. 1903) 97 N. W. Rep. 252; *Parrotte v. Dryden*, (Neb. 1905) 102 N. W. Rep. 610; *New Omaha Thomson-Houston Electric Light Co. v. Rombold*, (Neb. 1905) 102 N. W. Rep. 475; *Farrell v. Bouck*, (Neb. 1904) 101 N. W. Rep. 1018; *Merrill v. Van Camp*, (Neb. 1903) 96 N. W. Rep. 617.

New Hampshire. — *Olney v. Boston*, etc., R. Co., (N. H. 1904) 59 Atl. Rep. 387.

New Jersey. — *Fulton v. Grieb Rubber Co.*, (N. J. 1905) 60 Atl. Rep. 37.

New York. — *Skilton v. Codington*, 105 N. Y. App. Div. 617; *Lewis v. Upton*, 90 N. Y. App. Div. 453, *affirmed* 181 N. Y. 515; *Cunningham v. Nilson*, (Supm. Ct. App. T.) 84 N. Y. Supp. 669; *Globe*, etc., *F. Ins. Co. v. Robbins*, etc., Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 995; *Porter v. International Bridge Co.*, 79 N. Y. App. Div. 358, *affirmed* 175 N. Y. 467.

North Carolina. — *Harrington v. Rawls*, 136 N. Car. 65. *Compare School Directors v. Asheville*, 137 N. Car. 503.

South Dakota. — *Richardson v. Dybedahl*, 17 S. Dak. 629.

188. 2. Relations to Res Judicata and Stare Decisis. — See note 2.

189. See note 1.

3. Reasons for Doctrine. — See note 3.

190. 4. Application of Doctrine — *a.* IN GENERAL. — See note 1.

191. *c.* QUESTIONS OF LAW AND FACT. — See note 2.

d. CHANGED CIRCUMSTANCES ON SECOND TRIAL — (1) *Different State of Facts on Second Trial.* — See note 3.

192. (2) *Subject-matter Same but Parties Different.* — See note 1.

e. POINT DECIDED AND DICTA. — See notes 2, 3.

193. See notes 1, 2.

Utah. — Brooks v. Western Union Tel. Co., 28 Utah 21.

Vermont. — Dietrich v. Hutchinson, 75 Vt. 389.

Washington. — Bailey v. Cascade Timber Co., 35 Wash. 295; Miller v. Lake Irrigation Co., 33 Wash. 132.

West Virginia. — Collins v. Sherwood, 53 W. Va. 336.

Wisconsin. — Zimmer v. Fox River Valley Electric R. Co., 123 Wis. 643; Eggett v. Allen, 119 Wis. 625.

Doctrine Not Applicable Where No Judgment Rendered Because of Defective Record. — Magnolia Park Co. v. Tinsley, 96 Tex. 364.

Divided Court. — See Baldwin v. Burt, (Neb. 1902) 96 N. W. Rep. 401.

188. 2. **Conclusiveness of Decision on Former Appeal Stated as Res Judicata.** — Guarantee Co. of North America v. Phenix Ins. Co., (C. C. A.) 124 Fed. Rep. 170; Gordon v. Ware Nat. Bank, (C. C. A.) 132 Fed. Rep. 444; De Loach v. Planters', etc., Mut. F. Assoc., 122 Ga. 385; Heymann v. Southern R. Co., 122 Ga. 608; Christensen v. People, 114 Ill. App. 40; Westfall v. Wait, (Ind. 1905) 73 N. E. Rep. 1089; McNeill v. Thompson, (Ky. 1905) 84 S. W. Rep. 1145; Richmond Second Nat. Bank v. Fitzpatrick, (Ky. 1905) 84 S. W. Rep. 1150; Gray Tie, etc., Co. v. Farmers' Bank, (Ky. 1903) 74 S. W. Rep. 174; Quirk v. Rapid R. Co., 137 Mich. 493; Herf, etc., Chemical Co. v. Lackawanna Line, 100 Mo. App. 164; Winter v. Supreme Lodge, etc., 101 Mo. App. 550; Copeland v. Metropolitan St. R. Co., 78 N. Y. App. Div. 418, affirmed 177 N. Y. 570; Carpenter v. Lewis, 65 S. Car. 400; Jones v. Charleston, etc., R. Co., 65 S. Car. 410; Collins v. Sherwood, 53 W. Va. 336; John O'Brien Lumber Co. v. Wilkinson, 123 Wis. 272.

189. 1. **No Final Determination or Rights Involved.** — Where the only question presented by the former appeal in no manner involved the final determination of the case or the rights of the parties upon the trial thereof, it is the duty of the court upon the second appeal to decide it as if presented for the first time. Carter v. White, 134 N. Car. 466, 101 Am. St. Rep. 853.

3. **Rule Held to Be One of Expediency.** — Hastings First Nat. Bank v. Farmers', etc., Bank, (Neb. 1901) 95 N. W. Rep. 1062.

190. 1. **Overruled Case.** — Price v. Toledo, 25 Ohio Cir. Ct. 617.

Modification Before Final Decision. — See Jones v. Charleston, etc., R. Co., 65 S. Car. 410.

191. 2. **Decision on Facts Not Law of Case.** — See Thuis v. Vincennes, (Ind. App. 1905) 73 N. E. Rep. 1098.

3. **New State of Facts on Second Trial.** — Thuis v. Vincennes, (Ind. App. 1905) 73 N. E. Rep. 1098; Buehner Chair Co. v. Feulner, 164 Ind. 368; Midland Steel Co. v. Citizens Nat. Bank, 34 Ind. App. 107; Lanza v. Le Grand Quarry Co., 124 Iowa 659; Hamilton Nat. Bank v. American L. & T. Co., (Neb. 1904) 100 N. W. Rep. 202; McCord v. Hill, 117 Wis. 306. See also Blankenship v. Whaley, 142 Cal. 566; Westfall v. Wait, (Ind. 1905) 73 N. E. Rep. 1089; Russ v. American Cereal Co., 121 Iowa 639; Fitzgerald v. Benton Harbor, 132 Mich. 645; Winter v. Supreme Lodge, etc., 101 Mo. App. 550; Wiggins v. Federal Stock, etc., Co., 77 Conn. 507; Vann v. Edwards, 135 N. Car. 661; Zimmer v. Fox River Valley Electric R. Co., 123 Wis. 643.

Immaterial Variance. — Snyder v. Jack, 140 Cal. 584; Seeton v. Dunbarton, (N. H. 1905) 59 Atl. Rep. 944.

Effect of Reversal for Insufficiency of Pleadings with Leave to Amend. — See Stafford v. St. John, 164 Ind. 277; Johnson v. Sherman County Irrigation, etc., Co., (Neb. 1904) 98 N. W. Rep. 1096.

192. 1. **Same Matter Between Different Parties.** — Walker Patent Pivoted Bin Co. v. Miller, 132 Fed. Rep. 823. See also Hamilton Nat. Bank v. American L. & T. Co., (Neb. 1904) 100 N. W. Rep. 202.

Second Appeal by Successor in Interest. — See Great Plains Water Co. v. Lamar Canal Co., 31 Colo. 96.

2. **Appellate Court Bound by Former Decision in Same Case.** — Oldig v. Fisk, (Neb. 1901) 95 N. W. Rep. 492; Hastings First Nat. Bank v. Farmers', etc., Bank, (Neb. 1901) 95 N. W. Rep. 1062.

3. **Point May Be Determined Though Not Expressly Treated in Opinion.** — Oldig v. Fisk, (Neb. 1901) 95 N. W. Rep. 492; Curtis v. Albee, 86 N. Y. App. Div. 145. See also Badische Aniline, etc., Fabrik v. Klipstein, 125 Fed. Rep. 543.

193. 1. **Presumption of Due Consideration.** — Dinkelspiel v. Central Kentucky Insane Asylum, (Ky. 1903) 73 S. W. Rep. 771; Curtis v. Albee, 86 N. Y. App. Div. 145. See also Badische Aniline, etc., Fabrik v. Klipstein, 125 Fed. Rep. 543.

2. **Dicta.** — Hunter v. Porter, 10 Idaho 72; Rushville v. Rushville Natural Gas Co., 164 Ind. 162; Yank v. Bordeaux, 29 Mont. 74; Williams v. Miles, 68 Neb. 479; Hastings First Nat. Bank v. Farmers', etc., Bank, (Neb. 1901) 95 N. W. Rep. 1062; Hoagland v. Stewart, (Neb. 1904) 100 N. W. Rep. 133; Carly v. Boner, (Neb. 1905) 102 N. W. Rep. 761; Rowan

193. Point Not Raised. — See note 4.**f. NEW TRIAL AND PROCEEDINGS THEREIN — (1) In General.** — See note 6.

v. Chenoweth, 55 W. Va. 325. See also *Flint v. Chaloupka*, (Neb. 1904) 99 N. W. Rep. 825.

193. 4. Point Not Raised or Considered. — *Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57; *Hunter v. Porter*, 10 Idaho 72; *Gage v. People*, 207 Ill. 61; *Vann v. Edwards*, 135 N. Car. 661; *Rowan v. Chenoweth*, 55 W. Va. 325.

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By A. W. VARIAN.

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266. 5. Vacant Lands Only May Be Entered. — Gray *v.* Peay, (Ky. 1904) 82 S. W. Rep. 1006. See also Hall *v.* Blanton, (Ky. 1904) 77 S. W. Rep. 1110.

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5. *Purchase by Owners of Neighboring Lands*.—Stafford v. Terrell, 97 Tex. 522; Knippa v. Brown, (Tex. Civ. App. 1904) 82 S. W. Rep. 658.

Equitable Owner May Purchase.—Bone v. Cowan, (Tex. Civ. App. 1904) 84 S. W. Rep. 385.

7. *Quantities in Which Land May Be Sold*.—Conn v. Terrell, 97 Tex. 578.

8. Conn v. Terrell, 97 Tex. 578.

300. 2. Conn v. Terrell, 97 Tex. 578.

A Mere Occupant who is not a bona fide pur-

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chaser cannot purchase additional land. Trevey v. Lowrie, 33 Tex. Civ. App. 606.

301. 2. *Residence*.—Forrester v. Berry, 35 Tex. Civ. App. 175.

After Death of Applicant Proof Not Required.—Taylor v. Lewis, (Tex. Civ. App. 1905) 85 S. W. Rep. 1011.

9. *Action of Commissioner Not Final*.—Knippa v. Brown, (Tex. Civ. App. 1904) 82 S. W. Rep. 658.

Determination as to Isolation of Land Not Final.—Burnam v. Terrell, 97 Tex. 309.

Presumption in Favor of Validity of Action of Land Commissioner.—Weckesser v. Lewis, 35 Tex. Civ. App. 18.

302. 2. *When Rejected Applicant May Maintain Action to Recover Land*.—Lewis v. Scharbauer, 33 Tex. Civ. App. 220.

4. See Forrester v. Berry, 35 Tex. Civ. App. 175.

6. *Mandamus to Reinstall Purchaser*.—See McDowell v. Terrell, (Tex. 1905) 87 S. W. Rep. 668.

7. *Right of Purchaser to Sell*.—Smith v. Coble, (Tex. Civ. App. 1905) 87 S. W. Rep. 170.

Purchaser of Additional Lands May Resell Before Occupancy.—Miller v. Hallford, 34 Tex. Civ. App. 243.

303. 2. Smith v. Coble, (Tex. Civ. App. 1905) 87 S. W. Rep. 170.

4. *Forfeiture for Nonpayment of Interest*.—Lawless v. Wright, (Tex. Civ. App. 1905) 86 S. W. Rep. 1039.

6. *Reinstatement of Claim*.—Lawless v. Wright, (Tex. Civ. App. 1905) 86 S. W. Rep. 1039.

Land Not Subject to Resale Before Notice Sent to County Clerk.—Boswell v. Terrell, 97 Tex. 259.

304. 1. *Length of Lease*.—Sanford v. Terrell, (Tex. 1905) 87 S. W. Rep. 655.

8. *Payment of Rent*.—Angle v. Terrell, 97 Tex. 509. See also Sherrod v. Terrell, 97 Tex. 165.

9. *Cancellation for Nonpayment of Rent*.—

304. Nonpayment of Rent Only Cause for Which Commissioner Can Cancel. — See note 11.

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305. (ii) *When Leased Lands May Be Sold.* — See notes 5, 6, 7.

306. 5. Other States. — See note 2.

307. North Carolina. — See notes 1, 3.

308. IX. TOWN SITES — 1. Acts of Congress — a. GENERAL LEGISLATION — (1) *Provisions of Statutes.* — See note 7.

309. (2) *Title and Interest Acquired by Trustees* — (a) In General. — See note 1.

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310. (3) *Validity and Conclusiveness of Acts and Conveyances of Trustees.* — See notes 3, 4.

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311. (c) *Who May Be Occupants.* — See note 1.

314. (10) *State Acts Giving Effect to Act of Congress.* — See note 9.

315. b. SPECIAL LEGISLATION — (2) *For Oklahoma and Alaska.* — See note 4.

316. X. BOUNTY AND DONATION LANDS — 3. Oregon Donation Act — e. CONDITIONS PRECEDENT. — See note 8.

321. 10. Oklahoma Grant. — See note 4.

324. XII. GRANTS IN AID OF RAILROADS — 2. Construction of Railroad Grants. — See note 13.

325. 3. Title of Railroads — a. NATURE OF TITLE. — See note 3.

Bradford v. Brown, (Tex. Civ. App. 1904) 84 S. W. Rep. 392; Angle v. Terrell, 97 Tex. 509; Anderson v. Terrell, 97 Tex. 74.

After Cancellation, Lease Cannot Be Reinstated. — Wilson v. Smith, (Tex. Civ. App. 1904) 82 S. W. Rep. 818.

304. 10. Lessee Cannot Re-lease until All Arrears Are Paid. — Angle v. Terrell, 97 Tex. 509.

11. Scott v. Slaughter, 35 Tex. Civ. App. 524; Martin v. Terrell, 97 Tex. 118.

12. *Right of Lessee to Purchase on Expiration of Lease.* — Jones v. Lohman, 36 Tex. Civ. App. 418.

305. 5. When Leased Lands Cannot Be Sold. — Perry v. Rutherford, (Tex. Civ. App. 1905) 87 S. W. Rep. 1054; Jones v. Lohman, 36 Tex. Civ. App. 418; Pruitt v. Scrivner, (Tex. Civ. App. 1903) 77 S. W. Rep. 976; McDowell v. Terrell, (Tex. 1905) 87 S. W. Rep. 668.

Sale May Be Made with Consent of Lessee. — Jones v. Wright, 98 Tex. 457.

6. *Absolute Lease District.* — Martin v. Terrell, 97 Tex. 118.

7. *Right of Lessees to Purchase.* — Jones v. Wright, 98 Tex. 457.

Assignee of Lease Cannot Purchase During Time of Lease. — Martin v. Terrell, 97 Tex. 118.

306. 2. Sales. — *Ex p. Young*, (Ark. 1905) 85 S. W. Rep. 1133; Schlbrede v. State Land Board, (Oregon 1905) 81 Pac. Rep. 703; Twigg v. State Board of Land Com'rs, 27 Utah 241; State v. Callvert, 37 Wash. 124; Welsh v. Callvert, 34 Wash. 250.

Leasing of Public Land. — American Sulphur, etc., Co. v. Brennan, (Colo. App. 1905) 79 Pac. Rep. 750.

307. 1. Janney v. Blackwell, 138 N. Car. 437.

3. *History and Statement of Disposal of "Chero-*

kee Lands" in North Carolina. — Bealmear v. Hutchins, 134 Fed. Rep. 257.

No Estate Acquired in Lands by Mere Entry. — Janney v. Blackwell, 138 N. Car. 437.

308. 7. *Deed of Trustee.* — See Robertson v. Martin, (Ariz. 1904) 76 Pac. Rep. 614.

309. 1. *Double Trust.* — Robertson v. Martin, (Ariz. 1904) 76 Pac. Rep. 614.

4. *Title of Occupied Lots.* — Robertson v. Martin, (Ariz. 1904) 76 Pac. Rep. 614.

310. 3. *Judicial Nature of Acts.* — Board of Education v. Mansfield, 17 S. Dak. 72, 106 Am. St. Rep. 771.

4. *Conclusiveness of Findings of Fact.* — Board of Education v. Mansfield, 17 S. Dak. 72, 106 Am. St. Rep. 771.

7. *Occupants Entitled to Town-site Lots.* — Osgood v. Donnelly, 1 Alaska 385; Sawyer v. Van Hook, 1 Alaska 108.

311. 1. *Nonresident an Occupant.* — See Twigg v. State Board of Land Com'rs, 27 Utah 241.

314. 9. *State Acts in Pursuance of Act of Congress.* — Robertson v. Martin, (Ariz. 1904) 76 Pac. Rep. 614.

315. 4. *Oklahoma Town-site Law.* — Watt v. Amos, 14 Okla. 178.

316. 8. *Conditions Precedent.* — See U. S. v. Oregon, etc., R. Co., 133 Fed. Rep. 953.

321. 4. *Oklahoma Grant — Act of March 3, 1901.* — See Watt v. Amos, 14 Okla. 178.

324. 13. *Strict Construction of Railroad Grants.* — Compare U. S. v. St. Anthony R. Co., 192 U. S. 24; Moon v. Salt Lake County, 27 Utah 435.

325. 3. *Nature of Title of Railroads — Grant to State in Aid of Railroad.* — Knepper v. Sands, 194 U. S. 476; Galloway v. Doe, 136 Ala. 315.

- 325.** Act Both Grant and Law. — See note 5.
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- 326.** *b.* TIME OF VESTING — (1) *As to Place Lands.* — See note 1.
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 (2) *As to Indemnity Lands.* — See note 3.
- 327.** *c.* CONDITIONS PRECEDENT TO VESTING OF TITLE — (2) *Construction of Road.* — See notes 4, 5.
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- 329.** 4. Withdrawal of Lands Granted — *a.* BY SECRETARY OF INTERIOR. — See note 6.
- 330.** *b.* BY OPERATION OF LAW. — See note 4.
c. REVOCATION OF WITHDRAWAL — Effect of Withdrawal. — See note 7.
5. Rights as Against Settlers — *a.* WITHIN PLACE LIMITS. — See note 9.
- 331.** See note 1.
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- 332.** Meaning of "Attached." — See note 1.
b. WITHIN INDEMNITY LIMITS. — See note 7.
- 333.** Railroad Must Favor Settler. — See note 3.
 6. Selection of Lands by Railroad — *a.* IN PLACE LIMITS — (1) *Location* — One-half to Be Taken on Each Side. — See note 5.
- 334.** (5) *Mineral Lands.* — See note 9.
- 335.** *b.* IN INDEMNITY LIMITS — Approval by Secretary. — See note 1.
 7. Conflicting Grants — Priority. — See note 5.
- 325.** 5. Act Both Grant and Law. — *Toltec Ranch Co. v. Cook*, 191 U. S. 532; *Sage v. Rudnick*, 91 Minn. 325. See also *Galloway v. Doe*, 136 Ala. 315.
6. Railroad May Bring Ejectment. — *Sage v. Rudnick*, 91 Minn. 325, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 325.
- 326.** 1. Vesting of Title as to Lands Within Place Limits. — U. S. *v. Montana Lumber, etc.*, Co., 196 U. S. 573; U. S. *v. Northern Pac. R. Co.*, 193 U. S. 1; U. S. *v. Anderson*, 194 U. S. 394; *Toltec Ranch Co. v. Cook*, 191 U. S. 532; U. S. *v. Losekamp*, (C. C. A.) 127 Fed. Rep. 959; *Sage v. Maxwell*, 91 Minn. 527; *Sage v. Rudnick*, 91 Minn. 325; *Traphagen v. Kirk*, 30 Mont. 562; *Moon v. Salt Lake County*, 27 Utah 435. See also *Atty.-Gen. v. Atty.-Gen.*, 34 Can. Sup. Ct. 287, *per* Girouard, J., dissenting, construing a crown grant and citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 326. Compare U. S. *v. Oregon, etc.*, R. Co., 133 Fed. Rep. 953.
2. Grant to State. — *Galloway v. Doe*, 136 Ala. 315; *Sage v. Maxwell*, 91 Minn. 527. See also *Knepper v. Sands*, 194 U. S. 476.
3. Indemnity Lands. — *Gertgens v. O'Connor*, 191 U. S. 237, affirming 85 Minn. 481; U. S. *v. Anderson*, 194 U. S. 394; *Humbird v. Avery*, 195 U. S. 480; *Oregon Short Line R. Co. v. Quigley*, 10 Idaho 770.
- 327.** 4. Construction of Road as Condition Precedent. — See *Oregon Short Line R. Co. v. Quigley*, 10 Idaho 770.
5. Construction Within Prescribed Time. — *Knepper v. Sands*, 194 U. S. 476.
7. Paying Cost of Survey. — Compare U. S. *v. Losekamp*, (C. C. A.) 127 Fed. Rep. 959.
- 329.** 6. Withdrawal of Lands by Secretary of Interior. — *Humbird v. Avery*, 195 U. S. 480; U. S. *v. Oregon, etc.*, R. Co., 133 Fed. Rep. 953; *Northern Lumber Co. v. O'Brien*, 134 Fed. Rep. 303.
- 330.** 4. Withdrawal by Operation of Law. — *Oregon Short Line R. Co. v. Quigley*, 10 Idaho 770.
7. Effect of Withdrawal. — *Oregon Short Line R. Co. v. Quigley*, 10 Idaho 770.
9. Rights as Against Settlers in Place Limits. — U. S. *v. Chicago, etc.*, R. Co., 195 U. S. 524; *Southern Pac. R. Co. v. U. S.*, (C. C. A.) 133 Fed. Rep. 662; U. S. *v. Losekamp*, (C. C. A.) 127 Fed. Rep. 959; U. S. *v. Oregon, etc.*, R. Co., 133 Fed. Rep. 953; *Oregon Short Line R. Co. v. Quigley*, 10 Idaho 770; *Sage v. Maxwell*, 91 Minn. 527. See also *Gertgens v. O'Connor*, 191 U. S. 237.
- 331.** 1. Grant to Railroad Excludes Private Claims. — U. S. *v. Oregon, etc.*, R. Co., 133 Fed. Rep. 953. See also *Oregon Short Line R. Co. v. Quigley*, 10 Idaho 770.
3. Meaning of "Claims" and "Rights." — U. S. *v. Oregon, etc.*, R. Co., 133 Fed. Rep. 953.
- 332.** 1. Meaning of "Attached." — U. S. *v. Oregon, etc.*, R. Co., 133 Fed. Rep. 953.
7. Duty of Settler. — *Gertgens v. O'Connor*, 191 U. S. 237.
- 333.** 3. Railroad Must Favor Settler. — Compare *Gertgens v. O'Connor*, 191 U. S. 237.
5. One-half to Be Taken on Each Side. — U. S. *v. Montana Lumber, etc.*, Co., 196 U. S. 573.
- 334.** 9. Mineral Lands. — *Traphagen v. Kirk*, 30 Mont. 562.
- 335.** 1. Approval by Secretary. — U. S. *v. Anderson*, 194 U. S. 394; *Humbird v. Avery*, 195 U. S. 480; *Sage v. Maxwell*, 91 Minn. 527.
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- 336.** Overlapping Grants. — See note 2.
- 337.** 9. Right of Way over Public Lands — *b.* NATURE OF GRANT — (2) *Grant to Named Railroad.* — See note 1.
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- 338.** *f.* OVER SCHOOL LANDS. — See note 6.
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- 339.** 10. Transportation of Troops and Mails. — See note 4.
- 341.** XIII. GRANTS FOR INTERNAL IMPROVEMENTS — 3. Wagon-road Grants — *a.* IN GENERAL. — See note 11.
- 342.** *c.* TERMS AND CONDITIONS OF GRANTS. — See note 2.
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- 344.** XIV. SWAMP-LAND GRANTS — 1. In General. — See notes 1, 2, 3.
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- 345.** Louisiana Grant. — See note 1.
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- 346.** 4. Legal Subdivisions. — See note 8.
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- 347.** 6. Identification of Lands — *b.* ON FAILURE OF SECRETARY OF INTERIOR TO DETERMINE CHARACTER OF LAND — (4) *Failure of State Officers to Select.* — See note 8.
- 349.** 7. Conflicts Between State and Federal Grants — *a.* IN GENERAL. — See note 9.
- 350.** See note 2.

336. 2. Two Grants to Same Company. — See *U. S. v. Northern Pac. R. Co.*, 193 U. S. 1.

337. 1. Grants to Named Railroad. — *Oregon Short Line R. Co. v. Quigley*, 10 Idaho 770.

5. Nature of Title. — *Oregon Short Line R. Co. v. Quigley*, 10 Idaho 770; *McLucas v. St. Joseph, etc.*, R. Co., 67 Neb. 612.

6. Right Exclusive. — *Oregon Short Line R. Co. v. Quigley*, 10 Idaho 770. See also *Trophagen v. Kirk*, 30 Mont. 562.

338. 6. In Texas Railroad May Acquire School Lands. — *Texas Cent. R. Co. v. Bowman*, 97 Tex. 417.

8. Settler Must Complete Title. — *Oregon Short Line R. Co. v. Quigley*, 10 Idaho 770.

339. 4. An Unaided Railroad Running in Part over Tracks of a Land-grant Road is not required to transport freight for the government at the reduced rates applicable to land-grant roads. *U. S. v. Astoria, etc.*, R. Co., 131 Fed. Rep. 1006.

341. 11. Act of February 25, 1867. — *Eastern Oregon Land Co. v. Andrews*, 45 Oregon 203.

Act of March 3, 1869. — *Nichols v. Southern Oregon Co.*, 135 Fed. Rep. 232.

342. 2. Governor to Certify Completion of Road. — *Nichols v. Southern Oregon Co.*, 135 Fed. Rep. 232.

8. Issuance of Patents. — *Nichols v. Southern Oregon Co.*, 135 Fed. Rep. 232.

344. 1. Grant in Presenti. — *Cotton Belt Lumber Co. v. Kelly*, (Ark. 1905) 86 S. W. Rep. 436, rehearing denied (Ark. 1905) 86 S. W. Rep. 827. Compare *Vicksburg, etc.*, R. Co. v. Tibbs, 112 La. 51.

2. See *Atty.-Gen. v. Atty.-Gen.*, 34 Can. Sup. Ct. 287, per Girouard, J., dissenting, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 344.

3. Patent Relates Back to Date of Act. — *Cotton Belt Lumber Co. v. Kelly*, (Ark. 1905) 86 S. W. Rep. 436, rehearing denied (Ark. 1905) 86 S. W. Rep. 827.

6. In Canada the determination of the lands as swamp lands is held to be a condition precedent to the passing of title to such lands under a grant from the crown. *Atty.-Gen. v. Atty.-Gen.*, 34 Can. Sup. Ct. 287.

7. Title Inchoate until Identification. — *Cotton Belt Lumber Co. v. Kelly*, (Ark. 1905) 86 S. W. Rep. 436, rehearing denied (Ark. 1905) 86 S. W. Rep. 827.

8. See *Cotton Belt Lumber Co. v. Kelly*, (Ark. 1905) 86 S. W. Rep. 436, rehearing denied (Ark. 1905) 86 S. W. Rep. 827; *Vicksburg, etc.*, R. Co. v. Tibbs, 112 La. 51.

345. 1. Louisiana Grant of 1849. — *Hall v. Bossier Levee*, 111 La. 913.

12. *Hall v. Bossier Levee*, 111 La. 913.

346. 8. *Hall v. Bossier Levee*, 111 La. 913.

9. School Sections Previously Granted to State Excluded. — *State v. Jennings*, (Fla. 1903) 35 So. Rep. 986.

11. *Cotton Belt Lumber Co. v. Kelly*, (Ark. 1905) 86 S. W. Rep. 436, rehearing denied (Ark. 1905) 86 S. W. Rep. 827.

347. 8. Failure of State Officers to Select Land. — See *Vicksburg, etc.*, R. Co. v. Tibbs, 112 La. 51.

349. 9. Conflict Between State and Federal Grants. — Compare *Cotton Belt Lumber Co. v. Kelly*, (Ark. 1905) 86 S. W. Rep. 436, rehearing denied (Ark. 1905) 86 S. W. Rep. 827.

350. 2. Land Not Accepted by State Subject to Subsequent Grant. — *Vicksburg, etc.*, R. Co. v. Tibbs, 112 La. 51.

- 350.** *b.* CONFIRMATION BY STATE OF FEDERAL GRANTS. — See note 4.
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- 351.** **9. Disposition of Swamp Lands by State** — *a.* GENERAL POWER OF STATE. — See note 8.
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- 354.** *d.* GENERAL RIGHTS OF PURCHASERS. — See note 1.
- 355.** **XV. SCHOOL AND UNIVERSITY GRANTS** — **1. By Federal Government** — *b.* TITLE AND TENURE OF STATE OR TERRITORY — (1) *Vesting of Title* — (a) *In General.* — See note 1.
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- 356.** (3) *Tenure.* — See note 4.
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- 361.** **2. By States.** — See note 1.
- 362.** **3. Sales and Leases of School and University Lands** — *c.* CONSENT OF INHABITANTS OF TOWNSHIP — (1) *In General.* — See note 11.

350. **4. Confirmation by State of Federal Grant.** — See *Cotton Belt Lumber Co. v. Kelly*, (Ark. 1905) 86 S. W. Rep. 436, rehearing denied (Ark. 1905) 86 S. W. Rep. 827.

6. Conflicting Grants to State. — *Vicksburg, etc., R. Co. v. Tibbs*, 112 La. 51.

351. **8. Grants to Counties.** — *Nelson v. Harrison County*, 126 Iowa 436.

352. **1. Phillips v. Butler County**, 187 Mo. 698.

353. **3. Actual Settlers.** — *Polk v. Sleeper*, 143 Cal. 70.

354. **1. General Rights of Purchasers.** — *Miller v. Wattier*, 44 Oregon 347.

355. **1. Survey, Identification, or Selection Determines When Title Vests.** — *State v. Jennings*, (Fla. 1903) 35 So. Rep. 986; *State v. Brimmer*, (Neb. 1905) 102 N. W. Rep. 242; *State v. Tanner*, (Neb. 1905) 102 N. W. Rep. 235; *State v. Bednar*, (Neb. 1905) 102 N. W. Rep. 241; *State v. McCright*, (Neb. 1905) 102 N. W. Rep. 241.

3. *Completion of Survey.* — See *State v. Jennings*, (Fla. 1903) 35 So. Rep. 986.

5. Reservation Does Not Pass Title. — *Compare State v. Jennings*, (Fla. 1903) 35 So. Rep. 986.

356. **4. Title in State in Trust for Township.** — *State v. Stark*, 111 La. 594; *State v. Brimmer*, (Neb. 1905) 102 N. W. Rep. 242; *State v. McCright* (Neb. 1905) 102 N. W. Rep. 241; *State v. Tanner*, (Neb. 1905) 102 N. W. Rep. 235; *State v. Bednar*, (Neb. 1905) 102 N. W. Rep. 241.

357. **4. Subsequent Confirmation or Grant Inoperative.** — *State v. Jennings*, (Fla. 1903) 35 So. Rep. 986.

8. Compact Between General Government and State. — *State v. Jennings*, (Fla. 1903) 35 So. Rep. 986.

358. **1. Sale by State Unauthorized Before Survey.** — See *State v. Jennings*, (Fla. 1903) 35 So. Rep. 986.

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9. Board of Educational Lands and Funds. — *State v. Tanner*, (Neb. 1905) 102 N. W. Rep. 235; *State v. McCright*, (Neb. 1905) 102 N. W. Rep. 241; *State v. Brimmer*, (Neb. 1905) 102 N. W. Rep. 242; *State v. Bednar*, (Neb. 1905) 102 N. W. Rep. 241.

359. **1. Unauthorized Acts of School Boards or Directors of School Districts.** — *State v. Stark*, 111 La. 594, holding that a school board cannot make a valid contract for the sale of timber from school lands.

360. **5. Title Vests upon Selection of Land According to Directions of Congress.** — *State v. McCright*, (Neb. 1905) 102 N. W. Rep. 241; *State v. Tanner*, (Neb. 1905) 102 N. W. Rep. 235; *State v. Brimmer*, (Neb. 1905) 102 N. W. Rep. 242; *State v. Bednar*, (Neb. 1905) 102 N. W. Rep. 241.

361. **1. Nebraska Educational Lands.** — See *McMurtry v. Engelhardt*, (Neb. 1904) 98 N. W. Rep. 40.

362. **11. Consent of Inhabitants Required in Louisiana.** — *State v. Stark*, 111 La. 594.

- 363.** *e.* WHO MAY MAKE SALE OR LEASE. — See note 10.
- 364.** *g.* MODE OF CONDUCTING SALE. — See note 8.
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- 374.** XVI. LAND DEPARTMENT OFFICIALS AND PROCEEDINGS — 1. General Statement — Federal Land Department. — See notes 3, 4.
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363. 10. School Board. — *State v. Stark*, 111 La. 594.

364. 8. Statute Mandatory. — *State v. Stark*, 111 La. 594.

370. 2. Only Income from Proceeds Available for School Purposes. — *Roach v. Gooding*, (Idaho 1905) 81 Pac. Rep. 642.

371. 7. Legal Title Not in Holder of Certificate. — *Brooke v. Eastman*, 17 S. Dak. 339.

372. 6. Subject to Sale on Execution. — *Brooke v. Eastman*, 17 S. Dak. 339.

374. 3. Establishment of Federal Land Department. — *Humbird v. Avery*, 195 U. S. 480; *Le Marchel v. Teegarden*, 133 Fed. Rep. 826; *Behrends v. Goldstein*, 1 Alaska 518.

4. Part of the Interior Department. — *U. S. v. Schlierholz*, 133 Fed. Rep. 333.

7. Statutory Provisions for State Land Boards, Etc. — *State v. Smith*, 111 La. 319.

376. 3. Supervisory Power of Commissioner. — *U. S. v. Schlierholz*, 133 Fed. Rep. 333; *Male v. Chapman*, 134 Mich. 511.

377. 1. Controversies Between Pre-emption Settlers. — *Male v. Chapman*, 134 Mich. 511; *Tiernan v. Miller*, (Neb. 1903) 96 N. W. Rep. 661.

4. Supervisory Power of Secretary of Interior. — *U. S. v. Schlierholz*, 133 Fed. Rep. 333.

5. Eastern Oregon Land Co. *v.* Andrews, 45 Oregon 203, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 377.

379. 3. Power of State Land Officers to Make and Modify Regulations. — *Weckesser v. Lewis*, 35 Tex. Civ. App. 18.

4. See *Van Lear v. Eisele*, 126 Fed. Rep. 823.

7. Cancellation of Entries by Federal Land Department. — *Hill v. McCord*, 195 U. S. 395;

Humbird v. Avery, 195 U. S. 480; *U. S. v. Clark*, (C. C. A.) 138 Fed. Rep. 294, affirming 125 Fed. Rep. 774; *Peyton v. Desmond*, (C. C. A.) 129 Fed. Rep. 1; *U. S. v. Clark*, 125 Fed. Rep. 774; *Le Fevre v. Amonson*, (Idaho 1905) 81 Pac. Rep. 71.

380. 2. Effect of Cancellation on Purchaser from Entryman. — *Humbird v. Avery*, 195 U. S. 480; *Peyton v. Desmond*, (C. C. A.) 129 Fed. Rep. 1. Compare *U. S. v. Clark*, 125 Fed. Rep. 774, affirmed (C. C. A.) 138 Fed. Rep. 294.

4. Cancellation for Fraud. — *Hill v. McCord*, 195 U. S. 395; *U. S. v. Clark*, (C. C. A.) 138 Fed. Rep. 294, affirming 125 Fed. Rep. 774; *Peyton v. Desmond*, (C. C. A.) 129 Fed. Rep. 1; *Bay v. Oklahoma Southern Gas, etc., Co.*, 13 Okla. 425.

381. 3. Necessity of Proper Notice and Hearing. — *Peyton v. Desmond*, (C. C. A.) 129 Fed. Rep. 1.

382. 2. Cancellation Erroneous in Law. — See *Hill v. McCord*, 195 U. S. 395.

383. 5. No Jurisdiction to Annul Patents. — *Emblen v. Lincoln Land Co.*, 94 Fed. Rep. 710, affirmed 184 U. S. 660; *Peyton v. Desmond*, (C. C. A.) 129 Fed. Rep. 1; *U. S. v. Clark*, 125 Fed. Rep. 774, affirmed (C. C. A.) 138 Fed. Rep. 294; *Humbird v. Avery*, 195 U. S. 480; *Hill v. McCord*, 195 U. S. 395; *Sage v. Rudnick*, 91 Minn. 325, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 383; *Welsh v. Callvert*, 34 Wash. 250. See also *Smith v. McClain*, (Tex. Civ. App. 1905) 87 S. W. Rep. 212.

State Lands. — *State v. Hughes*, (Tex. Civ. App. 1904) 79 S. W. Rep. 608.

384. 5. Effect in Courts of Pendency of Matters Before Land Department. — *Hill v. McCord*, 195 U. S. 395;

385. See note 1.

Interference with Officials by Mandamus or Injunction. — See notes 2, 3.

386. (b) Protection of Possessory Rights — *aa.* IN GENERAL. — See note 1.

Protection of Homestead Entries. — See note 3.

387. *bb.* ENFORCEMENT OF CONTRACTS RELATING TO POSSESSORY RIGHTS. — See note 2.

388. (2) *Subsequent to Issuance of Patent* — (a) IN GENERAL. — See note 1.

389. Adjudications as to Physical Character of Lands. — See notes 2, 4, 6.

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Circumstances Giving Right of Review. — See note 11.

390. (b) Collateral Attack — *aa.* IN GENERAL. — See note 1.

195 U. S. 395; *Peyton v. Desmond*, (C. C. A.) 129 Fed. Rep. 1; *Smith v. Love*, (Fla. 1905) 38 So. Rep. 376; *State v. Smith*, 111 La. 319.

385. 1. Taking Jurisdiction of Action Between Contestants in Advance of Action of Land Department. — *Humbird v. Avery*, 195 U. S. 480; *Northern Lumber Co. v. O'Brien*, 124 Fed. Rep. 819; *Le Fevre v. Amonson*, (Idaho 1905) 81 Pac. Rep. 71; *Sims v. Morrison*, 92 Minn. 341; *McDonald v. Union Pac. R. Co.*, (Neb. 1903) 97 N. W. Rep. 440; *Tiernan v. Miller*, (Neb. 1903) 96 N. W. Rep. 661.

2. Interference with Officers by Injunction Not Allowable. — *Humbird v. Avery*, 195 U. S. 480; *Tiernan v. Miller*, (Neb. 1903) 96 N. W. Rep. 661.

3. Mandamus Against Land Officers. — *Humbird v. Avery*, 195 U. S. 480; *State v. Smith*, 111 La. 319.

386. 1. Jurisdiction of Courts to Protect Right of Possession. — *Northern Lumber Co. v. O'Brien*, 124 Fed. Rep. 819. Compare *Tiernan v. Miller*, (Neb. 1903) 96 N. W. Rep. 661.

Contract Affecting Interest in Land Not Enforceable in State Courts. — *Sims v. Morrison*, 92 Minn. 341.

3. *Tiernan v. Miller*, (Neb. 1903) 96 N. W. Rep. 661.

387. 2. Enforcement of Contracts Relating to Possession. — See *Gertgens v. O'Connor*, 191 U. S. 237.

388. 1. Conclusiveness of Decision of Land Department — *United States*. — *Hill v. McCord*, 195 U. S. 395; *Small v. Rakestraw*, 196 U. S. 403; *Gertgens v. O'Connor*, 191 U. S. 237; *Commonwealth Title Ins., etc., Co. v. U. S.*, 37 Ct. Cl. 532, affirmed 193 U. S. 651; *Elliot v. U. S.*, 37 Ct. Cl. 136; *Peyton v. Desmond*, (C. C. A.) 129 Fed. Rep. 1; *U. S. v. Clark*, 125 Fed. Rep. 774, affirmed (C. C. A.) 138 Fed. Rep. 294.

Alaska. — *Behrends v. Goldsteen*, 1 Alaska 518.

California. — *People v. Gay*, 141 Cal. 41.

Idaho. — *Le Fevre v. Amonson*, (Idaho 1905) 81 Pac. Rep. 71.

Minnesota. — *Buffalo Land, etc., Co. v. Strong*, 91 Minn. 84.

Montana. — *Graham v. Great Falls Water Power, etc., Co.*, 30 Mont. 393; *Traphagen v. Kirk*, 30 Mont. 562.

North Dakota. — *Martinson v. Marzolf*, (N. Dak. 1905) 103 N. W. Rep. 937.

Oklahoma. — *Cagle v. Dunham*, 14 Okla. 610; *Estes v. Timmons*, 12 Okla. 537.

Oregon. — *Miller v. Wattier*, 44 Oregon 347.

South Dakota. — *Sanford v. King*, (S. Dak. 1905) 103 N. W. Rep. 28.

Washington. — *Welsh v. Callvert*, 34 Wash. 250.

Conclusiveness of Adjudication of State Land Officials. — *State v. Hughes*, (Tex. Civ. App. 1904) 79 S. W. Rep. 608.

Decision Not Reviewable on Ground of Perjured Testimony. — *Cagle v. Dunham*, 14 Okla. 610; *Estes v. Timmons*, 12 Okla. 537.

389. 2. Adjudication as to Swamp Lands. — *Williamson v. Baugh*, 71 Ark. 491.

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4. Decision as to Mineral Lands. — *Behrends v. Goldsteen*, 1 Alaska 518; *People v. Gay*, 14 Cal. 41; *Le Fevre v. Amonson*, (Idaho 1905) 81 Pac. Rep. 71; *Traphagen v. Kirk*, 30 Mont. 562.

6. Agricultural Lands. — *Bay v. Oklahoma Southern Gas, etc., Co.*, 13 Okla. 425.

9. See *Peyton v. Desmond*, (C. C. A.) 129 Fed. Rep. 1.

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11. Circumstances Giving Right of Review. — *Hill v. McCord*, 195 U. S. 395; *Commonwealth Title Ins., etc., Co. v. U. S.*, 37 Ct. Cl. 532, affirmed 193 U. S. 651; *Le Fevre v. Amonson*, (Idaho 1905) 81 Pac. Rep. 71; *Buffalo Land, etc., Co. v. Strong*, 91 Minn. 84.

390. 1. Patent Not Subject to Collateral Attack. — *Le Marchel v. Teegarden*, 133 Fed. Rep. 826; *Peyton v. Desmond*, (C. C. A.) 129 Fed. Rep. 1; *People v. Gay*, 141 Cal. 41; *Quinn v. Baldwin Star Coal Co.*, 19 Colo. App. 497; *Gebo v. Clarke Fork Coal Min. Co.*, 30 Mont. 87; *Tiernan v. Miller*, (Neb. 1903) 96 N. W. Rep. 661; *Sanford v. King*, (S. Dak. 1905) 103 N. W. Rep. 28; *Welsh v. Callvert*, 34 Wash. 250; *Demars v. Hickey*, 13 Wyo. 371. See also *Henry v. McCoy*, 131 N. Car. 586.

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- 391.** See note 1.
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- 392.** *dd.* **CONFLICTING PATENTS.** — See note 5.
- 393.** *ff.* **VOID PATENTS** — (*aa*) *In General.* — See notes 2, 4.
- 394.** **Where Government Is Without Title.** — See notes 1, 2.
- 395.** **Lands Reserved or Dedicated to Special Purpose.** — See note 1.
(bb) **Presumption of Validity.** — See note 6.
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- 396.** *(c)* **Direct Attack** — *aa.* **SUIT BY GOVERNMENT** — (*aa*) *In General.* — See notes 3, 4.
- 397.** *(cc)* **Fraud, Mistake, and Error of Law.** — See notes 1, 3.
bb. **SUIT BY PRIVATE INDIVIDUAL** — (*aa*) *In General* — **Bill to Declare Patentee Trustee.** — See note 7.
- 399.** *(bb)* **Error or Misconstruction of Law.** — See note 1.
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(cc) **Fraud.** — See note 3.
- 400.** See notes 1, 4.
Character of Fraud Required. — See note 5.
- 391. 1. Patent Prevails Over Equitable Claim in Action at Law.** — *Peyton v. Desmond*, (C. C. A.) 129 Fed. Rep. 1; *Quinn v. Baldwin Star Coal Co.*, 19 Colo. App. 497; *Jones v. Wright*, 98 Tex. 457.
- 2. Fraud No Ground for Collateral Attack.** — *Tieman v. Miller*, (Neb. 1903) 96 N. W. Rep. 661. See also *Gebo v. Clarke Fork Coal Min. Co.*, 30 Mont. 87.
- State Lands.** — *Janney v. Blackwell*, 138 N. Car. 437; *Henry v. McCoy*, 131 N. Car. 586; *State v. Hughes*, (Tex. Civ. App. 1904) 79 S. W. Rep. 608.
- 3. State Lands.** — *Weckesser v. Lewis*, 35 Tex. Civ. App. 18.
- Irregularity No Ground for Collateral Attack.** — *Janney v. Blackwell*, 138 N. Car. 437.
- 392. 5. State Lands.** — *Henry v. McCoy*, 131 N. Car. 586.
- 393. 2. Collateral Attack on Patent Void for Want of Jurisdiction.** — *Sanford v. King*, (S. Dak. 1905) 103 N. W. Rep. 28.
- 4. Void Patents to State Lands.** — *Lockhard v. Asher Lumber Co.*, 123 Fed. Rep. 480, *reversed* on other grounds (C. C. A.) 131 Fed. Rep. 689; *Janney v. Blackwell*, 138 N. Car. 437.
- 394. 1. Where Title Has Never Been in Government.** — *Davis v. Moyles*, 76 Vt. 25.
- 2. Lands Previously Transferred from Government.** — *Sage v. Rudnick*, 91 Minn. 325, *citing* 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 394.
- State Lands.** — *Janney v. Blackwell*, 138 N. Car. 437.
- 395. 1. Lands Reserved or Dedicated to Special Purpose.** — *Sanford v. King*, (S. Dak. 1905) 103 N. W. Rep. 28.
- 6. Presumption of Validity of Patent.** — U. S. v. Stinson, 197 U. S. 200, *affirming* (C. C. A.) 125 Fed. Rep. 907; *Hooper v. Young*, 140 Cal. 274, 98 Am. St. Rep. 56; *Eastern Oregon Land Co. v. Andrews*, 45 Oregon 203.
- State Lands.** — *Weckesser v. Lewis*, 35 Tex. Civ. App. 18; *Stolley v. Lilwall*, (Tex. Civ. App. 1905) 84 S. W. Rep. 689; *Taylor v. Lewis*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1011; *Jones v. Wright*, 98 Tex. 457; *Hood v. Pursley*, (Tex. Civ. App. 1905) 87 S. W. Rep. 870; *Holt v. Cave*, (Tex. Civ. App. 1905) 85 S. W. Rep. 309.
- 7. Collateral Attack by Stranger.** — *Hood v. Pursley*, (Tex. Civ. App. 1905) 87 S. W. Rep. 870.
- 396. 3. When Government May Sue to Annul Patent.** — U. S. v. Clark, (C. C. A.) 138 Fed. Rep. 294, *affirming* 125 Fed. Rep. 774; *Lynch v. U. S.*, 13 Okla. 142.
- 4. Lynch v. U. S.**, 13 Okla. 142.
- 397. 1. Patent Obtained by Fraud or Imposition.** — U. S. v. Clark, (C. C. A.) 138 Fed. Rep. 294, *affirming* 125 Fed. Rep. 774; *Lynch v. U. S.*, 13 Okla. 142.
- State Lands.** — See *State v. Hughes*, (Tex. Civ. App. 1904) 79 S. W. Rep. 608.
- 3. Clear Proof of Fraud, etc., Essential.** — U. S. v. Stinson, 197 U. S. 200, *affirming* (C. C. A.) 125 Fed. Rep. 907; U. S. v. Clark, (C. C. A.) 138 Fed. Rep. 294, *affirming* 125 Fed. Rep. 774; U. S. v. Detroit Timber, etc., Co., 124 Fed. Rep. 393, *reversed* on other grounds (C. C. A.) 131 Fed. Rep. 668.
- 7. Bill to Declare Patentee Trustee.** — *Humbird v. Avery*, 195 U. S. 480; *Le Marchel v. Teegarden*, 133 Fed. Rep. 826; *Smith v. Love*, (Fla. 1905) 38 So. Rep. 376; *Gebo v. Clarke Fork Coal Min. Co.*, 30 Mont. 87; *Miller v. Wattier*, 44 Oregon 347. See also *Cagle v. Dunham*, 14 Okla. 610; *Baldwin v. Keith*, 13 Okla. 624.
- 399. 1. Error or Misconstruction of Law.** — *Le Marchel v. Teegarden*, 133 Fed. Rep. 826.
- State Grant of Federal Land Void.** — See *Williamson v. Baugh*, 71 Ark. 491.
- 2. Clear Mistake of Law Essential.** — *Le Marchel v. Teegarden*, 133 Fed. Rep. 826.
- 3. Patent Obtained Through Fraud.** — *Le Marchel v. Teegarden*, 133 Fed. Rep. 826; *Smith v. Love*, (Fla. 1905) 38 So. Rep. 376. See also *Lynch v. U. S.*, 13 Okla. 142.
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- 400. 1. Compare Estes v. Timmons**, 12 Okla. 537.
- 4. See Smith v. Love**, (Fla. 1905) 38 So. Rep. 376.
- 5. Character of Fraud Required.** — *Gebo v. Clarke Fork Coal Min. Co.*, 30 Mont. 87; *Cagle v. Dunham*, 14 Okla. 610.

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XVII. INCHOATE RIGHT OR TITLE AND GRANT — 1. Right and Title Prior to Issuance of Patent — b. AFTER RIGHT TO PATENT COMPLETE — (1) Title. — See note 5.

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403. 2. *Decisions of Land Department as Aids to Statutory Construction.* — *McMichael v. Murphy*, 197 U. S. 304; *Lynch v. U. S.*, (C. C. A.) 138 Fed. Rep. 535; *McCorkle v. Herron*, (Iowa 1905) 103 N. W. Rep. 988. See also *Gross v. Hafemann*, 91 Minn. 1. And see generally the title **STATUTES, 633, 2 et seq.**

5. *Equitable Title.* — *Nicholson v. Congdon*, (Minn. 1905) 103 N. W. Rep. 1034; *Anderson v. Wilder*, 83 Miss. 606. See also *Joplin v. Chachere*, 192 U. S. 94.

404. 2. *Descent, Alienation, etc.* — See *Holloway v. Miller*, 84 Miss. 776; *Logue v. Atkeson*, 35 Tex. Civ. App. 303.

4. *Right to Possession.* — *Tyee Consol. Min. Co. v. Langstedt*, (C. C. A.) 136 Fed. Rep. 124; *Bay v. Oklahoma Southern Gas, etc., Co.*, 13 Okla. 425.

5. *Right of Maintain Possessory Action.* — *Tyee Consol. Min. Co. v. Langstedt*, (C. C. A.) 136 Fed. Rep. 124.

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405. 1. *Warrants Held to Be Assignable.* — *Nicholson v. Congdon*, (Minn. 1905) 103 N. W. Rep. 1034; *Gilbert v. McDonald*, 94 Minn. 289.

2. *Preferential Rights Held to Be Assignable.* — *Gertgens v. O'Connor*, 191 U. S. 227; *Anthra-*

cite Mesa Coal Min. Co. v. U. S., 38 Ct. Cl. 57.

406. 1. *Nicholson v. Congdon*, (Minn. 1905) 103 N. W. Rep. 1034.

5. *Adams v. Church*, 193 U. S. 510; *U. S. v. Detroit Timber, etc., Co.*, (C. C. A.) 131 Fed. Rep. 668; *Gilbert v. McDonald*, 94 Minn. 289; *Twiggs v. State Board of Land Com'rs*, 27 Utah 241; *Peterson v. Sloss*, (Wash. 1905) 81 Pac. Rep. 744. See also *Holloway v. Miller*, 84 Miss. 776.

6. *Gertgens v. O'Connor*, 191 U. S. 237; *Adams v. Church*, 193 U. S. 510; *U. S. v. Detroit Timber, etc., Co.*, (C. C. A.) 131 Fed. Rep. 668; *McElhaney v. McElhaney*, 125 Iowa 279.

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407. 2. *Adams v. Church*, 193 U. S. 510; *Gilbert v. McDonald*, 94 Minn. 289; *Peterson v. Sloss*, (Wash. 1905) 81 Pac. Rep. 744.

3. *Gilbert v. McDonald*, 94 Minn. 289; *Eimer v. Wellsand*, 93 Minn. 444; *Anderson v. Wilder*, 83 Miss. 606; *Peterson v. Sloss*, (Wash. 1905) 81 Pac. Rep. 744.

408. 7. *Traffic in Public Lands Restricted.* — *Collins v. Bounds*, (Miss. 1904) 36 So. Rep. 689; *Orrell v. Bay Mfg. Co.*, 83 Miss. 800.

409. 1. *Orrell v. Bay Mfg. Co.*, 83 Miss. 800; *Collins v. Bounds*, (Miss. 1904) 36 So. Rep. 689.

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412. 5. *Peaslee v. Walker*, 34 Tex. Civ. App. 297.

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413. (4) *Involuntary Alienation*. — See note 2.

417. *b. INTERESTS ACQUIRED FROM STATE* — (3) *Land Warrants and Scrip*. — See note 5.

420. (4) *Interest under Certificate of Purchase* — *Involuntary Alienation*. — See note 6.

3. Manner of Granting Public Lands — *a. BY PATENT* — (1) *In General*. — See notes 9, 10.

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432. *e. DEATH OF GRANTEE BEFORE ISSUANCE OF PATENT* — (2) *Practice Adopted to Avoid Rule* — (b) *Construction of Certificate, Patent, or Confirmation to Heirs, Etc.* — *bb. WHETHER HEIRS TAKE BY DESCENT OR BY PURCHASE*. — See note 2.

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417. 5. *Land Warrants*. — *Nicholson v. Congdon*, (Minn. 1905) 103 N. W. Rep. 1034.

420. 6. *Brooke v. Eastman*, 17 S. Dak. 339.

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10. *Patent Passes Title*. — *Gertgens v. O'Connor*, 191 U. S. 237; *Toltec Ranch Co. v. Cook*, 191 U. S. 532; *Tyee Consol. Min. Co. v. Langstedt*, (C. C. A.) 136 Fed. Rep. 124.

422. 6. *Registration Not Necessary to Pass Title*. — *Janney v. Blackwell*, 138 N. Car. 437.

17. *Date of Execution or Issuance*. — See *Tyee Consol. Min. Co. v. Langstedt*, (C. C. A.) 136 Fed. Rep. 124.

19. *Date of Entry or Pre-emption Settlement*.

— *U. S. v. Detroit Timber, etc. Co.*, (C. C. A.) 131 Fed. Rep. 668; *Peyton v. Desmond*, (C. C. A.) 129 Fed. Rep. 1; *Nicholson v. Congdon*, (Minn. 1905) 103 N. W. Rep. 1034; *McCorkell v. Herron*, (Iowa 1905) 103 N. W. Rep. 988; *Janney v. Blackwell*, 138 N. Car. 437; *Washington Rock Co. v. Young*, (Utah 1905) 80 Pac. Rep. 382. See also *Gilbert v. McDonald*, 94 Minn. 289.

423. 1. *Date of Act Granting Land*. — *Cotton Belt Lumber Co. v. Kelly*, (Ark. 1905) 86 S. W. Rep. 436, rehearing denied (Ark. 1905) 86 S. W. Rep. 827; *Joplin v. Chachere*, 192 U. S. 94.

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8. *Words Expressing Intent* — “*Hereby Is Granted*.” — *Toltec Ranch Co. v. Cook*, 191 U. S. 532.

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424. 4. *Subsequent Patent Merely Evidence of Title*. — *Joplin v. Chachere*, 192 U. S. 94; *Toltec Ranch Co. v. Cook*, 191 U. S. 532; *Levy v. Gause*, 112 La. 789.

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8. *When Confirmation Takes Effect*. — *Joplin v. Chachere*, 192 U. S. 94.

425. 5. *Strict Construction of Grant to Corporation or Private Individual*. — *Story v. Woolverton*, 31 Mont. 346.

426. 1. *Reason for Rule*. — *Story v. Woolverton*, 31 Mont. 346.

9. *Intent of Parties*. — *Proctor v. Maine Cent. R. Co.*, 96 Me. 458.

427. 1. *Hogg v. Lusk*, (Ky. 1905) 86 S. W. Rep. 1128; *McCoy v. Cassidy*, (Ky. 1905) 86 S. W. Rep. 1130.

4. *Possibility of Present Identification Unnecessary*. — *Compare Atty.-Gen. v. Atty.-Gen.*, 34 Can. Sup. Ct. 287.

432. 2. *No Title in Ancestor — Heirs Take by Purchase, Not by Descent*. — *Demars v. Hickey*, 13 Wyo. 371.

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441. 6. *Exceptions and Reservations* — *b. RESERVATIONS* — (1) *Unauthorized and Repugnant Reservation.* — See note 7.

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453. XXI. *DEPREDATIONS ON PUBLIC LANDS* — 3. *Inclosures* — *Meaning of Prohibition.* — See note 4.

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454. 4. *Intent as Affecting Liability* — *a. CUTTING TIMBER.* — See note 1.

5. *Grants to Railroads.* — See notes 7, 8, 9.

432. 10. *Holloman v. Bullock*, 82 Miss. 405; *Demars v. Hickey*, 13 Wyo. 371.

433. 1. *All Rights Which Can Be Relinquished by Patent.* — *Compare Kelsay v. Eaton*, 45 Oregon 70, 106 Am. St. Rep. 662.

441. 7. *Unauthorized Reservation Void.* — See *People v. Gay*, 141 Cal. 41.

444. 1. *Purchasers of Legal Title for Value and Without Notice.* — *U. S. v. Chicago, etc., R. Co.*, 195 U. S. 524; *U. S. v. Clark*, (C. C. A.) 138 Fed. Rep. 294, *affirming* 125 Fed. Rep. 774; *U. S. v. Detroit Timber, etc., Co.*, (C. C. A.) 131 Fed. Rep. 668.

3. *Purchasers of Equitable Titles.* — *U. S. v. Clark*, (C. C. A.) 138 Fed. Rep. 294, *affirming* 125 Fed. Rep. 774. *Compare U. S. v. Detroit Timber, etc., Co.*, (C. C. A.) 131 Fed. Rep. 668.

4. *Purchase for Value and Without Notice Good Defense Against Government.* — *U. S. v. Stinson*, 197 U. S. 200, *affirming* (C. C. A.) 125 Fed. Rep. 907; *U. S. v. Clark*, (C. C. A.) 138 Fed. Rep. 294, *affirming* 125 Fed. Rep. 774; *U. S. v. Chicago, etc., R. Co.*, 195 U. S. 524; *U. S. v. Detroit Timber, etc., Co.*, (C. C. A.) 131 Fed. Rep. 668; *Lynch v. U. S.*, 13 Okla. 142.

445. 1. *Purchasers with Notice.* — See *U. S. v. Clark*, (C. C. A.) 138 Fed. Rep. 294, *affirming* 125 Fed. Rep. 774; *U. S. v. Detroit Timber, etc., Co.*, (C. C. A.) 131 Fed. Rep. 668.

447. 2. *Estoppel Against United States.* — *U. S. v. Stinson*, (C. C. A.) 125 Fed. Rep. 907.

448. 4. *Laches Not Imputable to Government.* — *Iowa R. Land Co. v. Fehring*, 126 Iowa 1.

Applicability of Laches Against County. — *Palmer v. Jones*, 188 Mo. 163.

5. *Laches Not Imputable to United States in Proceeding to Annul Land Patent.* — *U. S. v. Clark*, (C. C. A.) 138 Fed. Rep. 294, *affirming* 125 Fed. Rep. 774. *Compare U. S. v. Stinson*,

(C. C. A.) 125 Fed. Rep. 907, *affirmed* 197 U. S. 200.

9. See *Tyee Consol. Min. Co. v. Langstedt*, (C. C. A.) 136 Fed. Rep. 124; *Lewis v. Johnson*, 1 Alaska 529; *Iowa R. Land Co. v. Fehring*, 126 Iowa 1.

449. 3. *Patent Is Evidence of Facts Recited Therein.* — *Eastern Oregon Land Co. v. Andrews*, 45 Oregon 203.

Unsigned Indorsement of Cancellation on Patent Not Evidence of Cancellation. — *Slattery v. Heilperin*, 110 La. 86.

6. *Patent Evidence of Performance of Prerequisites.* — *U. S. v. Stinson*, 197 U. S. 200, *affirming* (C. C. A.) 125 Fed. Rep. 907.

450. 1. *Copy Admissible When Original Is Admissible.* — *Smithers v. Lowrance*, 35 Tex. Civ. App. 25.

2. *Absence of Original Must Be Accounted For.* — See *Tolleson v. Wagner*, 35 Tex. Civ. App. 577.

453. 4. *Inclosing Even Sections with Odd.* — *Cardwell v. U. S.*, (C. C. A.) 136 Fed. Rep. 593. See also *Thomas v. U. S.*, (C. C. A.) 136 Fed. Rep. 159.

7. *Nuisance.* — *Cardwell v. U. S.*, (C. C. A.) 136 Fed. Rep. 593; *Thomas v. U. S.*, (C. C. A.) 136 Fed. Rep. 159.

454. 1. *Burden of Proving Lawful Purpose Is on Defendant in Trover for Timber.* — *U. S. v. Denver, etc., R. Co.*, 191 U. S. 84.

7. *Meaning of "Adjacent."* — *U. S. v. St. Anthony R. Co.*, 192 U. S. 524, *affirming* (C. C. A.) 114 Fed. Rep. 722.

8. *Mixed Question.* — *U. S. v. St. Anthony R. Co.*, 192 U. S. 524.

9. *And Even Lands Lying from Seventeen to Twenty-six Miles Distant.* — *U. S. v. St. Anthony R. Co.*, 192 U. S. 524, *affirming* (C. C. A.) 114 Fed. Rep. 722.

- 455.** Extent of Right. — See note 1.
 Right to Buy Timber Unlawfully Cut. — See note 3.
 7. Damages — A Wilful Trespasser. — See note 9.
- 456.** 8. Defenses — *a.* IN GENERAL. — See note 7.
b. RIGHTS OF HOMESTEADERS TO USE TIMBER. — See note 8.
- 457.** Cutting under Inchoate Right to Land. — See note 7.
- 460.** 9. Evidence — Burden of Proof — On Government. — See note 5.
 XXII. OFFENSES AGAINST LAND LAWS — 1. Forgery. — See note 11.
 2. Fraud. — See note 12.
 3. Perjury. — See note 14.

- 462.** [STATE INSTITUTION. — See note 1*a.*]
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455. 1. Extent of Right. — U. S. v. St. Anthony R. Co., 192 U. S. 524.

3. Railroad Entitled to Money Collected by Government for Removal of Timber Within Indemnity Limits. — U. S. v. Anderson, 194 U. S. 394.

9. Wilful Trespasser Liable for Full Value. — U. S. v. St. Anthony R. Co., 192 U. S. 524.

456. 7. Cutting Timber Prima Facie Illegal. — U. S. v. Denver, etc., R. Co., 191 U. S. 84.

8. Rights of Homesteaders to Use Timber. — Orrell v. Bay Mfg. Co., 83 Miss. 800.

457. 7. Cutting under Inchoate Right to Land. — See Orrell v. Bay Mfg. Co., 83 Miss. 800.

460. 5. *Contra*, U. S. v. Denver, etc., R. Co., 191 U. S. 84, reversing 9 N. Mex. 382.

11. Forgery of Title Papers. — U. S. v. McKinley, 127 Fed. Rep. 166.

12. Conspiracy to Defraud. — U. S. v. Hyde, 132 Fed. Rep. 545.

14. False Swearing. — U. S. v. Eddy, 134 Fed. Rep. 114.

462. 1*a.* A National Guard Armory has been held to be a *state institution*. Burris v. Fox, N. Y. App. Div. 507.

4. Chief of Police Held Not to Be State Officer. — Peterson v. Culpepper, 72 Ark. 230.

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By F. G. BAMMAN.

468. IV. STATE BOUNDARIES — 1. Power to Establish — Effect. — See note 2.

2. Jurisdiction of Court — How Exercised — The Supreme Court of the United States. — See note 4.

469. 3. River as Boundary. — See note 1.

4. Possession under Claim of Title. — See note 2.

5. Certain State Boundaries. — See note 3.

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470. Power to Modify or Annul. — See note 2.

471. VI. STATE BONDS — 2. Where Purpose Illegal. — See note 1.

468. 2. Boundaries — Consent of Congress. — Central R. Co. v. Jersey City, 70 N. J. L. 81; Rodriguez v. Hernandez, 35 Tex. Civ. App. 78.

4. See Wedding v. Meyler, 192 U. S. 573.

469. 1. Missouri v. Nebraska, 196 U. S. 23; Central R. Co. v. Jersey City, 70 N. J. L. 81; Parsons v. Hunt, 98 Tex. 420; Franzini v. Layland, 120 Wis. 72.

Concurrent Jurisdiction. — Wedding v. Meyler, 192 U. S. 573; State v. Seagraves, 111 Mo. App. 353.

2. See Franzini v. Layland, 120 Wis. 72.

3. Certain State Boundaries — Michigan and Canada. — Chicago Transit Co. v. Campbell, 110 Ill. App. 366 (middle of Lake Huron).

Texas and Indian Territory. — Parsons v. Hunt, 98 Tex. 420.

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4. Tennessee v. Virginia, 190 U. S. 64; Central R. Co. v. Jersey City, 70 N. J. L. 81.

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470. 2. Tennessee v. Virginia, 190 U. S. 64.

471. 1. Purpose Illegal. — See Robinson v. Lee, 122 Fed. Rep. 1012, affirmed 106 U. S. 64.

Bonds issued for a purpose in violation of the enabling act and the state constitution are void. State v. McMillan, 12 N. Dak. 280.

- 471. 3. Where Directions of Statute Not Observed.** — See note 2.
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- 472. VII. APPROPRIATIONS, FUNDS, DEBTS, ETC.** — **1. Appropriations** — *a. NECESSITY FOR.* — See note 2.
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- 473. c. PURPOSE** — (1) *In General — Moral Obligation.* — See note 3.
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- 475. e. DURATION.** — See note 6.
- 476. f. QUESTIONING VALIDITY OF APPROPRIATION LAW.** — See note 1.
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- 480. XII. RESPONSIBILITY FOR ACTS OF OFFICERS** — **1. Limits of Responsibility** — *a. IN GENERAL* — Where the Acts Are Within the Scope of the Officer's Authority. — See note 1.
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- 481. d. ESTOPPEL** — *The State Is Never Estopped.* — See note 7.
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- 482. 2. Contracts** — *a. IN GENERAL* — *The Extent of the State's Liability.* — See notes 2, 3, 5.
- 483. b. OFFICER'S AUTHORITY TO CONTRACT** — *Implied Authority.* — See note 3.
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471. 2. See *Robinson v. Lee*, 122 Fed. Rep. 1012, affirmed 196 U. S. 64.

3. *State v. McMillan*, 12 N. Dak. 280.

472. 2. Appropriation as Prerequisite. — *Bickerdike v. State*, 144 Cal. 681; *Bosworth v. Shuck*, 81 S. W. Rep. 240, 26 Ky. L. Rep. 324; *Boyd v. Dunbar*, 44 Oregon 380; *State v. State Treasurer*, 68 S. Car. 411. See also *Sweeney v. Com.*, (Ky. 1904) 82 S. W. Rep. 639.

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3. Incurring Indebtedness. — See *Tipton v. Parker*, 71 Ark. 193.

Appropriation of Revenues in Anticipation of Receipt — Held Not Incurring of Indebtedness. — *Stein v. Morrison*, 9 Idaho 426.

An Appropriation to a Charitable Society, being a gratuity, does not create an indebtedness. *Hager v. Kentucky Children's Home Soc.*, 83 S. W. Rep. 605, 26 Ky. L. Rep. 1133.

473. 3. See *Elting v. Hickman*, 172 Mo. 237; *State v. Froehlich*, 118 Wis. 129, 99 Am. St. Rep. 985.

474. 6. Kentucky Live Stock Breeders' Assoc. v. Hager, 85 S. W. Rep. 738, 27 Ky. L. Rep. 518.

7. Roads as Internal Improvements. — See *Bonsal v. Yellott*, 100 Md. 481.

475. 6. *Stein v. Morrison*, 9 Idaho 426.

476. 1. The Auditor Is to Judge of the lawfulness of the purpose of an expenditure, not by the motives of those authorizing it, but by the expenditure itself. *Phelps v. Auditor-Gen.*, 136 Mich. 439, 11 Detroit Leg. N. 86.

3. See *Bickerdike v. State*, 144 Cal. 681; *Stein v. Morrison*, 9 Idaho 426.

8. See *Robinson v. Lee*, 122 Fed. Rep. 1012, affirmed 196 U. S. 64.

477. 5. *Russ v. Com.*, 210 Pa. St. 544, 105 Am. St. Rep. 825.

480. 1. State Bound by Acts of Officer Within Scope of Authority. — *Russ v. Com.*, 210 Pa. St. 544, 105 Am. St. Rep. 825.

4. State Held to Be Precluded by Laches of Officers. — *Soule v. People*, 205 Ill. 618.

7. Officer's Mistake of Law. — See *Sweeney v. Com.*, (Ky. 1904) 82 S. W. Rep. 639.

8. State Not Liable for Torts of Officers. — *White v. Alabama Insane Hospital*, 138 Ala. 479.

481. 7. Unauthorized Acts of Officers Not Estoppel. — *State v. Paxson*, 119 Ga. 730; *State v. New Orleans Debenture Redemption Co.*, 112 La. 1. And see the title ESTOPPEL, 396. 7 et seq.

8. *State v. Paxson*, 119 Ga. 730.

482. 2. Authorized Contracts. — *Opinion of Justices*, 72 N. H. 601.

3. Unauthorized Contracts. — *Phelps v. Auditor Gen.*, 136 Mich. 439, 11 Detroit Leg. N. 86.

5. Unconstitutional Contracts. — *Oxnard Beet Sugar Co. v. State*, (Neb. 1905) 102 N. W. Rep. 80, holding against a state's liability to pay a bounty under an unconstitutional statute.

483. 3. Implied Authority Limited to Acts Essential to Exercise of Express Powers. — *Opinion of Justices*, 72 N. H. 601.

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485. XIII. SUITS BY OR AGAINST STATE — 1. Suits by State — a. IN STATE COURTS — Rule Stated. — See note 9.

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486. 2. Suits Against State — a. IN STATE COURTS — (1) Consent Necessary. — See note 6.

(2) *Who May Give Consent.* — See note 7.

487. (3) Effect of Consent. — See note 3.

(4) *Consent May Be Conditional.* — See note 4.

(5) *Constitutional Provision Not Self-executing.* — See note 5.

(6) *Construction of Statutes Authorizing Suit.* — See notes 6, 7, 9.

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489. b. IN FEDERAL COURTS — ELEVENTH AMENDMENT TO CONSTITUTION — (1) Origin and Purpose. — See note 3.

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493. STATIONERY. — See note 7.

485. 9. State's Right to Sue. — State v. Paxson, 119 Ga. 730.

11. State v. Cloudt, (Tex. Civ. App. 1904) 84 S. W. Rep. 415. See also State v. New Orleans Debenture Redemption Co., 112 La. 1.

486. 6. Necessity for Consent. — State v. Mortensen, (Neb. 1903) 95 N. W. Rep. 831; Boyd v. Dunbar, 44 Oregon 380; C. & J. Michel Brewing Co. v. State, (S. Dak. 1905) 103 N. W. Rep. 40. See also San Luis Obispo County v. Gage, 139 Cal. 398; Small v. State, 10 Idaho 1.

7. People v. Sanitary Dist., 210 Ill. 171. See also Small v. State, 10 Idaho 1.

Consent of State Officer Not Sufficient. — Proper v. Sanitary Dist., 210 Ill. 171, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 486.

487. 3. See Bickerdike v. State, 144 Cal. 681.

4. May Impose Conditions. — State v. Mortensen, (Neb. 1903) 95 N. W. Rep. 831.

5. Constitutional Authority to Legislature. — State v. Mortensen, (Neb. 1903) 95 N. W. Rep. 831.

6. Statutes Strictly Construed. — C. & J. Michel Brewing Co. v. State, (S. Dak. 1905) 103 N. W. Rep. 40. Compare Christie-St. Commission Co. v. U. S., (C. C. A.) 136 Fed. Rep. 326, affirming 129 Fed. Rep. 506.

7. See White v. Alabama Insane Hospital, 138 Ala. 479.

9. State v. Mortensen, (Neb. 1903) 95 N. W. Rep. 831.

488. 1. Chandler v. Dix, 194 U. S. 590. See also Williams v. State, 94 N. Y. App. Div. 489.

6. Suits Against State Officers. — White v. Alabama Insane Hospital, 138 Ala. 479; State v. Mortensen, (Neb. 1903) 95 N. W. Rep. 831.

7. Morenci Copper Co. v. Freer, 127 Fed. Rep. 199; State v. State Treasurer, 68 S. Car. 411. See also Prout v. Starr, 188 U. S. 537.

9. A Suit to Restrain the State Auditor, Treasurer, etc., from paying out money under a void appropriation is not a suit against the state. Burke v. Snively, 208 Ill. 328.

Mandamus Proceeding Against Public Board to Compel Performance of Contract for Convict Labor Held to Be Suit Against State. — State v. Mortensen, (Neb. 1903) 95 N. W. Rep. 831.

For Other Cases wherein the general subject is discussed, see Prout v. Starr, 188 U. S. 537; Camden Interstate R. Co. v. Catlettsburg, 129 Fed. Rep. 421; Southern R. Co. v. Greensboro Ice, etc., Co., 134 Fed. Rep. 82; Morenci Copper Co. v. Freer, 127 Fed. Rep. 199; Chicago in Trust for Schools v. Chicago, 207 Ill. 37; Board of Education v. Volk, 72 Ohio St. 469; State v. State Treasurer, 68 S. Car. 411.

489. 2. See Morenci Copper Co. v. Freer, 127 Fed. Rep. 199.

490. 11. See Prout v. Starr, 188 U. S. 537.

493. 7. Postage Not Included Within Term Stationery. — Crook v. Commissioners' Ct., (Ala. 1905) 39 So. Rep. 383.

STATIONS (RAILROAD).

By B. B. CLARK.

496. II. ESTABLISHMENT AND EQUIPMENT OF STATIONS — 1. General Powers of Railroad Companies. — See note 4.

497. 3. Legislative Power to Regulate — a. IN GENERAL. — See note 6.

498. Delegation of Power. — See note 5.

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500. III. ABANDONMENT AND CHANGE OF LOCATION — Legislative Prohibitions. — See note 3.

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502. 2. Construction. — See note 6.

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503. 4. Remedies for Breach. — See note 3.

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VII. INJURIES TO PERSONS AT STATIONS — 1. Liability in General. — See note 9.

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496. 4. Power of Company to Locate. — Nashville, etc., R. Co. v. State, 137 Ala. 439.

497. 6. Power of Legislature. — Nashville, etc., R. Co. v. State, 137 Ala. 439.

Regard Is to Be Had to the Ability of the Road, in View of Its Entire Business, to establish and maintain the depot, and not to the situation at some special locality. Morgan's Louisiana, etc., R., etc., Co. v. Railroad Commission, 109 La. 247.

498. 5. Power to Locate Station Not Given to Commissioners by Alabama Statute. — Nashville, etc., R. Co. v. State, 137 Ala. 439.

Review of Order of Commission. — See Morgan's Louisiana, etc., R., etc., Co. v. Railroad Commission, 109 La. 247.

8. No Obligation to Maintain Waiting Room unless Ordered by Railroad Commissioners. — Com. v. Illinois Cent. R. Co., (Ky. 1905) 86 S. W. Rep. 542.

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499. 1. St. Louis Southwestern R. Co. v. Wallace, 32 Tex. Civ. App. 312.

500. 3. Railroad Commissioners. — State v. Northern Pac. R. Co., 90 Minn. 277, holding further that abandonment is not justified by expense of maintenance or diminution of profits alone.

5. Contracts to Locate Stations Upheld. — St. Louis, etc., R. Co. v. Crandall, (Ark. 1905) 86 S. W. Rep. 855; Lyman v. Suburban R. Co., 190

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501. 6. Inhibition Against Other Stations. — See Butler v. Tifton, etc., R. Co., 121 Ga. 817.

502. 6. Contract for "Railroad Station" Held to Require Passenger Station. — St. Louis, etc., R. Co. v. Crandall, (Ark. 1905) 86 S. W. Rep. 855.

11. Permanency of Station. — St. Louis, etc., R. Co. v. Crandall, (Ark. 1905) 86 S. W. Rep. 855.

503. 3. Action for Damages. — St. Louis, etc., R. Co. v. Crandall, (Ark. 1905) 86 S. W. Rep. 855.

504. 1. Increase in Land Values. — Brooklyn Hills Imp. Co. v. New York, etc., R. Co., 178 N. Y. 593, affirming 80 N. Y. App. Div. 508.

506. 4. Eminent Domain. — McCormick v. Louisiana, etc., R. Co., 109 La. 764; Cane Belt R. Co. v. Hughes, 31 Tex. Civ. App. 565.

7. Government Grants — Use of Streets for Stations. — Capdevielle v. New Orleans, etc., R. Co., 110 La. 904.

8. Compare Dennis v. Mobile, etc., R. Co., 137 Ala. 649, 97 Am. St. Rep. 69.

9. Platforms. — Lehigh Valley R. Co. v. Dupont, (C. C. A.) 128 Fed. Rep. 840; Harris v. Pittsburgh, etc., R. Co., 32 Ind. App. 600; Mathieson v. Burlington, etc., R. Co., 125 Iowa 90; Atchison, etc., R. Co. v. Holloway, (Kan. 1905) 80 Pac. Rep. 31; Leveret v. Shreveport Belt R. Co., 110 La. 399; Dotson v. Erie R. Co., 68 N. J. L. 679.

507. 1. Approaches and Exits. — Illinois Cent. R. Co. v. Keegan, 210 Ill. 150, affirming 112 Ill. App. 28; Glenn v. Lake Erie, etc., R. Co., (Ind. App. 1905) 73 N. E. Rep. 861; Cotant v. Boone Suburban R. Co., 125 Iowa 46;

- 508.** See note 1.
Condition of Premises. — See notes 3, 7.
Degree of Care. — See notes 10, 13.
- 509.** See note 2.
2. To Whom Duty Is Due. — See notes 5, 6.
- 510.** See notes 5, 7.
- 511.** See notes 1, 2.
3. Particular Instances — *a.* **LIGHTING STATIONS.** — See note 5.
- 512.** *b.* **ICE AND OBSTRUCTIONS ON PLATFORMS, ETC.** — See notes 1, 2, 3.
- 513.** *d.* **STAIRWAYS.** — See note 3.
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Lemon v. Grand Rapids, etc., R. Co., 136 Mich. 647; *Fitzgerald v. New York Cent., etc., R. Co.,* 84 N. Y. App. Div. 59, *affirmed* 179 N. Y. 559; *Smoak v. Savannah, etc., R. Co.,* 65 S. Car. 299.

507. 4. *Lucas v. St. Louis, etc., R. Co.,* 174 Mo. 270.

6. Public Ways. — *Compare* *Leveret v. Shreveport Belt R. Co.,* 110 La. 399.

7. Station Grounds. — *Howland v. New York, etc., R. Co.,* 26 R. I. 138; *San Antonio, etc., R. Co. v. Turney,* 33 Tex. Civ. App. 626.

508. 1. *Hathaway v. New York, etc., R. Co.,* 182 Mass. 286; *Archer v. Union Pac. R. Co.,* 110 Mo. App. 349.

3. Condition of Premises. — *Maxfield v. Maine Cent. R. Co.,* 100 Me. 79.

San Antonio, etc., R. Co. v. Turney, 33 Tex. Civ. App. 626.

10. Degree of Care. — *Atlantic, etc., R. Co. v. Owens,* 123 Ga. 393.

13. *Georgia, etc., R. Co. v. Brown,* 120 Ga. 380; *Glenn v. Lake Erie, etc., R. Co.,* (Ind. App. 1905) 73 N. E. Rep. 861; *McCormick v. Detroit, etc., R. Co.,* (Mich. 1905) 104 N. W. Rep. 390 (only reasonable care required); *Wagner v. Brooklyn Heights R. Co.,* 95 N. Y. App. Div. 219.

509. 2. **Relaxation of Rule as to Carriers of Passengers in Transit.** — *Glenn v. Lake Erie, etc., R. Co.,* (Ind. App. 1905) 73 N. E. Rep. 861; *Maxfield v. Maine Cent. R. Co.,* 100 Me. 79; *Fremont, etc., R. Co. v. Hagblad,* (Neb. 1904) 101 N. W. Rep. 1033. See, however, *San Antonio, etc., R. Co. v. Turney,* 33 Tex. Civ. App. 626.

5. Alighting and Departing Passengers. — *Albin v. Chicago, etc., R. Co.,* 103 Mo. App. 308.

An Arriving Passenger Is Not Required to Leave the Depot Instantly upon His Arrival, without regard to circumstances, but may remain at the station such time as is reasonably necessary to prepare for his departure; and what is a reasonable time depends upon the facts of the particular case. *St. Louis Southwestern R. Co. v. Wallace,* 32 Tex. Civ. App. 312.

6. Persons on Freight Business. — *Smoak v. Savannah, etc., R. Co.,* 65 S. Car. 299. *Compare* *Texas Cent. R. Co. v. Harbison,* 98 Tex. 490 (deliveryman of express company).

510. 5. **Friends of Passengers.** — *Atlantic, etc., R. Co. v. Owens,* 123 Ga. 393, *citing* 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 510; *Morrow v. Atlanta, etc., Air Line R. Co.,* 134 N. Car. 92. See, however, *Sullivan v. Minne-*

apolis, etc., R. Co., 90 Minn. 390 (person coming to station after it was closed).

Bystander Aiding Invalid, at Request of Conductor, to Get on Train. — *Bishop v. Illinois Cent. R. Co.,* (Ky. 1904) 77 S. W. Rep. 1099.

7. Persons Without Business at Station. — *Means v. Southern California R. Co.,* 144 Cal. 473; *Klugherz v. Chicago, etc., R. Co.,* 90 Minn. 17; *Andrews v. Yazoo, etc., R. Co.,* 86 Miss. 129; *Quantz v. Southern R. Co.,* 137 N. Car. 136; *Hern v. Southern Pac. R. Co.,* (Utah 1905) 81 Pac. Rep. 902.

511. 1. *Means v. Southern California R. Co.,* 144 Cal. 473.

2. *Houston, etc., R. Co. v. Ollis,* (Tex. Civ. App. 1904) 83 S. W. Rep. 850.

5. Lighting Stations. — *St. Louis, etc., R. Co. v. Marshall,* (Kan. 1905) 81 Pac. Rep. 169; *Harvey v. Louisiana Western R. Co.,* 114 La. 1065; *Albin v. Chicago, etc., R. Co.,* 103 Mo. App. 308; *Gerhart v. Wabash R. Co.,* 110 Mo. App. 105; *Abbott v. Oregon R. Co.,* (Oregon 1905) 80 Pac. Rep. 1012.

512. 1. **Ice and Snow.** — *Illinois Cent. R. Co. v. Keegan,* 210 Ill. 150, *affirming* 112 Ill. App. 28; *Harris v. Pittsburgh, etc., R. Co.,* 32 Ind. App. 600; *Maxfield v. Maine Cent. R. Co.,* 100 Me. 79; *Lemon v. Grand Rapids, etc., R. Co.,* 136 Mich. 647. See also the title CARRIERS OF PASSENGERS, 572. 1.

Grease on Platform. — *Newcomb v. New York Cent., etc., R. Co.,* 182 Mo. 687. See also the title CARRIERS OF PASSENGERS, 572. 1.

2. Obstructions. — *Illinois Cent. R. Co. v. Hopkins,* 200 Ill. 122; *Chicago, etc., R. Co. v. Gore,* 105 Ill. App. 16, *affirmed* 202 Ill. 188, 95 Am. St. Rep. 224; *Matthieson v. Burlington, etc. R. Co.,* 125 Iowa 90. See also the title CARRIERS OF PASSENGERS, 572. 1. *Compare* *Pitkin v. New York Cent., etc., R. Co.,* 94 N. Y. App. Div. 31.

3. *Wagner v. Brooklyn Heights R. Co.,* 95 N. Y. App. Div. 219.

Freight Piled on Platform. — *Matthieson v. Burlington, etc., R. Co.,* 125 Iowa 90.

513. 3. *Illinois Cent. R. Co. v. Keegan,* 210 Ill. 150, *affirming* 112 Ill. App. 28.

6. Proximity of Platform to Tracks. — See *Lauterer v. Manhattan R. Co.,* 128 Fed. Rep. 540, 63 C. C. A. 38, and see the title CARRIERS OF PASSENGERS, 572. 1.

7. *Dotson v. Erie R. Co.,* 68 N. J. L. 679, *approving* *Matthews v. Pennsylvania R. Co.,* 148 Pa. St. 491.

- 513.** *h.* HANDLING BAGGAGE. — See note 10.
514. *i.* OPERATION OF TRAINS. — See notes 1, 2, 3, 4.
515. *k.* INJURIES FROM ACTS OF THIRD PERSONS. — See notes 2, 3, 4.
 Injuries from Acts of Postal Agents. — See note 6.
516. 4. Contributory Negligence. — See note 3.
517. See notes 2, 3, 4, 5.
518. Crossing Tracks. — See note 1.

519. STATUARY. — See note 2.

513. 10. Handling Baggage. — Atlantic, etc., R. Co. *v.* Owens, 123 Ga. 393; Holcombe *v.* Southern R. Co., 66 S. Car. 6. See also the title CARRIERS OF PASSENGERS, **572. 1.**

514. 1. Operation of Trains. — Willis *v.* Vicksburg, etc., R. Co., (La. 1905) 38 So. Rep. 892; Livingston *v.* Wabash R. Co., 170 Mo. 452; Albin *v.* Chicago, etc., R. Co., 103 Mo. App. 308.

2. Object Protruding from Train. — Chicago, etc., R. Co. *v.* Thrasher, 35 Ind. App. 58.

Brakeman's Body Projecting from Car. — Texas, etc., R. Co. *v.* Russell, (Tex. Civ. App. 1903) 74 S. W. Rep. 569.

3. Operation of Trains on Intervening Track. — Atchison, etc., R. Co. *v.* Holloway, (Kan. 1905) 80 Pac. Rep. 31. See also the title CARRIERS OF PASSENGERS, **572. 1.**

Running a Special Train at a high rate of speed on tracks adjacent to the platform, slightly ahead of a schedule train, is not negligence *per se*. Lehigh Valley R. Co. *v.* Dupont, (C. C. A.) 128 Fed. Rep. 840.

4. Unloading Cars — United States. — Kansas City Southern R. Co. *v.* Moles, (C. C. A.) 121 Fed. Rep. 351.

Georgia. — Central of Georgia R. Co. *v.* Duffey, 116 Ga. 346; Atlanta, etc., R. Co. *v.* Roberts, 116 Ga. 505.

Illinois. — Rock Island, etc., R. Co. *v.* Dormady, 103 Ill. App. 127.

Kentucky. — Louisville, etc., R. Co. *v.* Logsdon, 114 Ky. 746; Cincinnati, etc., R. Co. *v.* Vaught, (Ky. 1904) 78 S. W. Rep. 859; Kentucky, etc., Bridge, etc., Co. *v.* Sydor, (Ky. 1904) 82 S. W. Rep. 989; Louisville, etc., R. Co. *v.* Smith, (Ky. 1905) 84 S. W. Rep. 755.

Massachusetts. — Pratt *v.* New York, etc., R. Co., 187 Mass. 5.

Michigan. — Brown *v.* Pontiac, etc., R. Co., 133 Mich. 371.

Minnesota. — Klugherz *v.* Chicago, etc., R. Co., 90 Minn. 17.

Missouri. — Tateman *v.* Chicago, etc., R. Co., 96 Mo. App. 448.

Texas. — St. Louis Southwestern R. Co. *v.* Brown, 30 Tex. Civ. App. 57; St. Louis Southwestern R. Co. *v.* Kennemore, (Tex. Civ. App. 1904) 81 S. W. Rep. 802; Houston, etc., R. Co. *v.* Jones, (Tex. Civ. App. 1904) 83 S. W. Rep. 29.

Utah. — Copley *v.* Union Pac. R. Co., 26 Utah 361.

And see the title RAILROADS, **739. 5 et seq.**

515. 2. Assaults by Third Persons. — Tate *v.* Illinois Cent. R. Co., (Ky. 1904) 81 S. W. Rep. 256.

Crowds at Station. — See Wagner *v.* Brooklyn Heights R. Co., 95 N. Y. App. Div. 219. And see the title CARRIERS OF PASSENGERS, **572. 1.**

3. Acts Not Anticipated. — Miller *v.* West Jersey, etc., R. Co., 71 N. J. L. 363.

4. Tate *v.* Illinois Cent. R. Co., (Ky. 1904) 81 S. W. Rep. 256.

6. Mail Bag Thrown by Postal Clerk. — Carver *v.* Minneapolis, etc., R. Co., 120 Iowa 346. And see the title CARRIERS OF PASSENGERS, **572. 1.**

516. 3. Contributory Negligence. — Sweet *v.* Union Pac. R. Co., 65 Kan. 812; Hathaway *v.* New York, etc., R. Co., 182 Mass. 286; Abbott *v.* Oregon R. Co., (Oregon 1905) 80 Pac. Rep. 1012.

517. 2. Hill *v.* Indianapolis, etc., R. Co., 31 Ind. App. 98.

3. See Matthieson *v.* Burlington, etc., R. Co., 125 Iowa 90 (freight piled on platform).

4. Lehigh Valley R. Co. *v.* Dupont, (C. C. A.) 128 Fed. Rep. 840; Matthieson *v.* Burlington, etc., R. Co., 125 Iowa 90.

5. Compare Zumault *v.* Kansas City Suburban Belt R. Co., 175 Mo. 288; Dotson *v.* Erie R. Co., 68 N. J. L. 679.

518. 1. Crossing Tracks. — White *v.* New York Cent., etc., R. Co., 174 N. Y. 543.

519. 2. Customs Act. — U. S. *v.* American Express Co., 139 Fed. Rep. 89.

STATUTES.

BY ALFRED PIZEY.

529. II. CLASSIFICATION — 1. In Respect to Nature and Object — *a.* DECLARATORY — (2) *Affirmative.* — See note 8.

530. *c.* PENAL. — See notes 6, 8.

531. 2. In Respect to Subject-matter — *b.* PRIVATE. — See note 5.

532. *c.* GENERAL — Certain Terms Distinguished. — See notes 3, 4.

d. LOCAL. — See note 6.

Local and Public. — See note 11.

533. 3. In Respect to Compliance Required — *a.* MANDATORY. — See note 6.

534. 5. In Respect to Time of Taking Effect — *b.* RETROSPECTIVE. — See note 1.

6. In Respect to Duration — *b.* TEMPORARY. — See note 7.

535. III. ENACTMENT — 1. The Legislature — *a.* CONSTITUTION AND STATUS — (5) *Power of Courts to Examine into Status* — (b) Rule as to Election and Qualification of Legislators — *aa.* GENERAL RULE STATED. — See note 4.

536. *c.* EXTRA SESSIONS — (2) *Field of Legislation.* — See notes 4, 5.

2. General Rule as to Compliance with Constitutional Requirements. —

See note 8.

529. 8. *Rosin v. Lidgerwood Mfg. Co.*, 89 N. Y. App. Div. 245.

530. 6. Penal Statutes. — *Massillon Engine, etc., Co. v. Wilkes*, (Tenn. 1904) 82 S. W. Rep. 316.

8. *Massillon Engine, etc., Co. v. Wilkes*, (Tenn. 1904) 82 S. W. Rep. 316.

531. 5. Private Statute One Which Applies to an Individual, Association, or Corporation. — *Little v. State*, 137 Ala. 659; *Sisk v. Cargile*, 138 Ala. 164; *Wallace v. Board of Revenue*, 140 Ala. 491.

532. 3. *Baltimore v. Allegany County*, 99 Md. 1; *Gentsch v. State*, 71 Ohio St. 151.

Under Alabama Constitution. — See *Little v. State*, 137 Ala. 659; *Wallace v. Board of Revenue*, 140 Ala. 491; *State v. Thompson*, 142 Ala. 98.

Whether Local or General to Be Determined by Effect on Whole People Rather than Extent of Territory. — *Waterman v. Hawkins*, (Ark. 1905) 86 S. W. Rep. 844, citing *State v. Yancy*, 123 Mo. 391.

Part of Statute May Be Local and Part General. — *State v. Patterson*, 134 N. Car. 612.

4. *Pepin Tp. v. Sage*, (C. C. A.) 129 Fed. Rep. 659; *Sanchez v. Fordyce*, 141 Cal. 427; *In re Zhizhuzza*, 147 Cal. 328; *Boise City Irrigation, etc., Co. v. Stewart*, 10 Idaho 38, 62, quoting 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 532; *Baltimore v. Allegany County*, 99 Md. 1; *State v. Rogers*, 93 Minn. 55.

Law Having Universal Operation as to All Persons and Things in Same Category. — *Gentsch v. State*, 71 Ohio St. 151.

No Degrees of Generality. — *Ex p. Jackson*, 143 Cal. 564.

6. See *State v. Price*, 71 N. J. L. 249.

Law Applying to Subdivisions of State Less than Whole. — *Wallace v. Board of Revenue*, 140

Ala. 491; *Little v. State*, 137 Ala. 659; *Sisk v. Cargile*, 138 Ala. 164.

11. For Instances of Statutes Possessing This Dual Character. — *Wallace v. Board of Revenue*, 140 Ala. 491; *Mt. Vernon v. Evens, etc., Fire Brick Co.*, 204 Ill. 32. See also *Bennett v. Nichols*, (Ariz. 1905) 80 Pac. Rep. 392; *L'Hote v. Milford*, 212 Ill. 418; *State v. Etchman*, 189 Mo. 648; *State v. Price*, 71 N. J. L. 249.

North Carolina Statutes Relating to Cherokee Lands Are Public and Local. — *Bealmear v. Hutchins*, 134 Fed. Rep. 257.

533. 6. Mandatory and Permissive Statutes Contrasted. — See *Picton v. Cass County*, 13 N. Dak. 242.

534. 1. *Investment Co. v. Hambach*, 37 Wash. 629.

7. *Cincinnati St. R. Co. v. Horstman*, 72 Ohio St. 93.

535. 4. Each House Sole Judge of Election and Qualification of Members. — *Corbett v. Naylor*, 25 R. I. 520. See further the title *Quo WARRANTO*, 610. 4.

536. 4. Field of Legislation at Extra Sessions. — *State v. Fair*, 35 Wash. 127, 102 Am. St. Rep. 897.

5. The Entire Proclamation of the Governor Should Be Considered. — *Parsons v. People*, 32 Colo. 221; *State v. Clancy*, 30 Mont. 539.

Legislation Held Within Terms of Proclamations. — *Parsons v. People*, 32 Colo. 221; *State v. Clancy*, 30 Mont. 539, holding that the proclamation should be liberally construed in order to give effect to the statutes enacted.

Legislature May Either Act or Refuse to Act on Subjects Submitted. — *Baker v. Kaiser*, (C. C. A.) 126 Fed. Rep. 317; *Parsons v. People*, 32 Colo. 221; *State v. Clancy*, 30 Mont. 539.

8. Compliance with Constitutional Requirements. — *Cahill v. Hogan*, 180 N. Y. 304, affirming 99

537. See notes 1, 2.

538. 4. Parliamentary Rules. — See note 2.

5. Introduction — *b.* NOTICE OF INTRODUCTION. — See notes 5, 6.

c. TIME FOR INTRODUCTION. — See notes 9, 10.

539. 6. Readings — *a.* REQUIREMENT OF THREE READINGS. — See note 4.

c. WHETHER READING MUST BE IN FULL. — See note 9.

540. *d.* APPLICATION TO AMENDMENTS. — See note 3.

f. SUBSTITUTE BILL. — See note 7.

541. 7. Reference to Committees. — See note 6.

8. Printing of Bills. — See note 7.

9. Passage — *a.* CONCURRENCE OF BOTH HOUSES NECESSARY. —

See note 10.

542. *b.* VOTE NECESSARY TO PASS. — See notes 2, 4.

543. *d.* METHODS OF VOTING — (2) *Yeas and Nays on Final Passage* — (*b.*) To What Bills Applicable. — See note 7.

544. (*c.*) What Is the Final Passage. — See note 3.

N. Y. App. Div. 619, which affirmed (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 360.

Mandatory and Directory Provisions. — See Smith *v.* Jennings, 67 S. Car. 324.

537. 1. When Journal Shows Failure to Observe Constitutional Provisions. — Andrews *v.* People, 33 Colo. 193; People *v.* McCullough, 210 Ill. 488.

2. Presumption. — Henderson County *v.* Travelers' Ins. Co., (C. C. A.) 128 Fed. Rep. 817; Waterman *v.* Hawkins, (Ark. 1905) 86 S. W. Rep. 844; State *v.* Cantwell, 179 Mo. 245; Colburn *v.* McDonald, (Neb. 1904) 100 N. W. Rep. 961. See also State *v.* Moore, (Ark. 1905) 88 S. W. Rep. 881.

As to Legislative Journals in Evidence see *infra*, this title, **553.** 3 *et seq.*

538. 2. Rules. — Smith *v.* Jennings, 67 S. Car. 324.

5. Laws Held Not Within Requirement of Notice. — State *v.* Thompson, 142 Ala. 98; Law *v.* State, 142 Ala. 62; Waterman *v.* Hawkins, (Ark. 1905) 86 S. W. Rep. 844.

In Texas. — Boesch *v.* Byrom, (Tex. Civ. App. 1904) 83 S. W. Rep. 18.

Alabama Constitution — Substance, Not Mere Subject, of Bill Must Be Stated. — Wallace *v.* Board of Revenue, 140 Ala. 491; Hooton *v.* Mellon, 142 Ala. 245; Lancaster *v.* Gafford, 139 Ala. 372; Tillman *v.* Porter, 142 Ala. 372; Brame *v.* State, (Ala. 1905) 38 So. Rep. 1031; Elba *v.* Rhodes, 142 Ala. 689; Alford *v.* Hicks, 142 Ala. 355.

6. Courts Will Not Inquire as to Notice. — Waterman *v.* Hawkins, (Ark. 1905) 86 S. W. Rep. 844. *Contra* under the existing Alabama constitution, Wallace *v.* Board of Revenue, 140 Ala. 491; Lancaster *v.* Gafford, 139 Ala. 372; Kumpe *v.* Irwin, 140 Ala. 460; Elba *v.* Rhodes, 142 Ala. 689.

Publication in Pamphlet Laws Prima Facie Evidence of Notice. — Van Cleave *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 183, *per* Fort, J., reversed on other grounds 71 N. J. L. 574.

Restrictions on Testimony as to Lack of Notice. — See Bray *v.* Williams, 137 N. Car. 387.

9. Same General Object. — People *v.* Loomis, 135 Mich. 556, 10 Detroit Leg. N. 877.

10. Amendment Not Connected with Original

Object. — People *v.* Loomis, 135 Mich. 556, 10 Detroit Leg. N. 877.

539. 4. Three Readings Required Only as to Tax Measures. — New Hanover County *v.* Armour Packing Co., 135 N. Car. 62; Brown *v.* Stewart, 134 N. Car. 357.

Reading Presumed. — Henderson County *v.* Travelers' Ins. Co., (C. C. A.) 128 Fed. Rep. 817, following Carr *v.* Coke, 116 N. Car. 223, 47 Am. St. Rep. 801.

Several Readings on Same Day Permissible in Absence of Constitutional Prohibition. — Bray *v.* Williams, 137 N. Car. 387.

9. Reading in Full Required. — Com. *v.* Hazen, 207 Pa. St. 52; Phenix Ins. Co. *v.* Perkins, (S. Dak. 1905) 101 N. W. Rep. 1110 (two readings).

540. 3. Rule Not Applicable to Amendments — State *v.* Cronin, (Neb. 1904) 101 N. W. Rep. 325, 327. See also Chatham County *v.* Stafford, 138 N. Car. 453.

7. Substitute Bill. — See Archibald *v.* Clark, 112 Tenn. 532.

541. 6. Reference to Committees. — Walker *v.* Montgomery, 139 Ala. 468.

Report of Conference Committee — Signature by Majority of Members from Each House Necessary. — Board of Revenue *v.* Crow, 141 Ala. 126.

7. Printing Bills. — Com. *v.* Hazen, 207 Pa. St. 52.

10. Concurrence of Both Houses Necessary. — Rogers *v.* State, 72 Ark. 565.

542. 2. Majority of All Elected Members. — State *v.* Moore, (Ark. 1905) 88 S. W. Rep. 881.

4. Vote Necessary to Pass Private, Local, or Special Acts, Etc. — Law *v.* State, 142 Ala. 62; State *v.* Moore, (Ark. 1905) 88 S. W. Rep. 881.

543. 7. Graves *v.* Moore County, 135 N. Car. 49; New Hanover County *v.* Armour Packing Co., 135 N. Car. 62.

Provision Not Applicable to Statute Empowering County to Issue Bonds for Refunding Purposes. — Henderson County *v.* Travelers' Ins. Co., (C. C. A.) 128 Fed. Rep. 817.

Provision Not Applicable to Motion to Reconsider Action Taken on Passage of Bill. — Andrews *v.* People, 33 Colo. 193.

544. 3. Adoption of Amendments. — *Contra*

- 544.** (d) Entry on Journal. — See note 4.
 10. Amendment During Passage — *a.* PROHIBITION OF AMENDMENTS CHANGING ORIGINAL PURPOSE. — See note 6.
- 545.** 11. Signing by Presiding Officers — *a.* CONSTITUTIONAL REQUIREMENT. — See note 4.
b. WHETHER MANDATORY OR DIRECTORY. — See note 6.
- 547.** 13. Presentation to Executive — *a.* IN GENERAL. — See note 3.
b. MODE OF PRESENTATION. — See note 7.
- 548.** 14. Functions of the Executive — *a.* IN GENERAL. — See note 6.
b. APPROVAL — (3) *Bill Must Be That Passed.* — See note 12.
- 549.** (4) *Withdrawal of Approval.* — See note 6.
- 550.** *c.* DISAPPROVAL OR VETO — (4) *Return of Bill* — (*a.*) IN GENERAL. — See note 4.
 (b) *Mode of Return.* — See note 5.
 (5) *Passage over Veto.* — See note 9.
- 551.** *d.* FAILURE TO ACT — (1) *In General.* — See note 1.
 (5) *Effect of Adjournment* — (*a.*) IN GENERAL. — See note 11.
- 552.** 15. Legislative Journal — *b.* EFFECT OF OMISSIONS. — See notes 3, 5.
- 553.** *d.* JOURNAL AS EVIDENCE — (1) *Public Record.* — See note 3.
 (2) *Conclusiveness.* — See notes 6, 7.
- 554.** (3) *Proof* — (b) *Transcript.* — See note 3.
- 555.** 16. Enrolled Bill — *c.* ENROLLED BILL AS EVIDENCE — (1) *In General.* — See note 3.

under the *Alabama* constitution. Board of Revenue *v.* Crow, 141 Ala. 126.

Substitute Bill Considered as an Amendment. — Callison *v.* Brake, (C. C. A.) 129 Fed. Rep. 196, affirming 122 Fed. Rep. 722.

544. 4. Entry on Journal Necessary. — Board of Revenue *v.* Crow, 141 Ala. 126; Graves *v.* Moore County, 135 N. Car. 49.

6. Amendment During Passage. — Southern R. Co. *v.* Mitchell, 139 Ala. 629; People *v.* Sours, 31 Colo. 369, 102 Am. St. Rep. 34.

545. 4. Signing in Presence of House. — State *v.* Mickey, (Neb. 1905) 102 N. W. Rep. 679; State *v.* Cahill, 12 Wyo. 225, the latter case holding that where signing is shown by the journal, the presence of the house will be presumed.

6. State *v.* Mickey, (Neb. 1905) 102 N. W. Rep. 679; State *v.* Cahill, 12 Wyo. 225.

Sufficiency of Journal Entry. — See Younger *v.* Hehn, 12 Wyo. 289, 1 Am. St. Rep. 946.

547. 3. Presentation to Executive. — Monroe *v.* Green, 71 Ark. 527.

Only Resolutions That Commit State to Participation in Matter Need Be Presented. — Russ *v.* Com., 210 Pa. St. 544, 105 Am. St. Rep. 825, reversing 7 Dauphin Co. Rep. (Pa.) 158.

7. See State *v.* South Norwalk, 77 Conn. 257.

548. 6. Deprivation of Veto Power over Measures Referred to People — Confined to Measures Referred by Legislature. — Kaddery *v.* Portland, 44 Oregon 118.

12. Bill Must Be That Passed. — Yancy *v.* Waddell, 139 Ala. 524.

549. 6. People *v.* McCullough, 210 Ill. 488, holding further that parol evidence was not admissible to show relinquishment of possession; Alleghany County *v.* Warfield, 100 Md. 816.

550. 4. Provision Allowing Three Days Means Days During Which House in Session. — State *v.* South Norwalk, 77 Conn. 257.

5. Mode of Return. — State *v.* South Norwalk, 77 Conn. 257.

9. Passage over Veto. — Smith *v.* Jennings, 67 S. Car. 324.

551. 1. Time Allowed Runs from Presentation with Reasonable Opportunity to Inspect and Consider. — State *v.* South Norwalk, 77 Conn. 257. See also *supra*, this title, **547.** 7.

Does Not Become Law Where Not Presented Within Time Allotted. — Monroe *v.* Green, 71 Ark. 527.

Executive May Waive Time Allowed. — Hunt *v.* State, 72 Ark. 241, 105 Am. St. Rep. 34.

11. Extension of Time. — Smith *v.* Jennings, 67 S. Car. 324.

552. 3. Omissions. — Andrews *v.* People, 33 Colo. 193.

5. Entering Amendments on Journal. — Board of Revenue *v.* Crow, 141 Ala. 126.

553. 3. Judicial Notice of Contents of Journals Not Taken. — Peckham *v.* People, 32 Colo. 140, following Marean *v.* Stanley, 21 Colo. 43. See generally the title JUDICIAL NOTICE, **930.** 1.

6. Conclusiveness. — New Hanover County *v.* Armour Packing Co., 135 N. Car. 62. Compare Rogers *v.* State, 72 Ark. 565.

7. Journals Cannot Be Contradicted. — Wilson *v.* Markley, 133 N. Car. 616. See also Andrews *v.* People, 33 Colo. 193; People *v.* McCullough, 210 Ill. 488.

Bill Not Required to Be Enrolled — Court Not Restricted to Journals as Evidence. — People *v.* Sours, 31 Colo. 369, 102 Am. St. Rep. 34.

554. 3. Transcript. — See New Hanover County *v.* Armour Packing Co., 135 N. Car. 62.

555. 3. *Ex p.* Bush, (Fla. 1904) 37 Sq. Rep. 177.

- 555.** (2) *Presumption*. — See notes 4, 5.
- 557.** (3) *Conclusiveness* — (b) *View that Journal May Be Looked To*. — See note 6.
- 558.** See note 2.
- 559.** (d) *Distinction in North Carolina*. — See note 6.
- 560.** 18. *Form of Enactment* — *a. TITLE*. — See note 1.
b. ENACTING CLAUSE. — See notes 3, 4.
Words Indicating Joint Resolution. — See note 7.
- 561.** *d. BILL OR RESOLUTION*. — See note 2.
- 562.** 19. *Evidence of Enactment*. — See notes 1, 3.
 IV. *TIME OF TAKING EFFECT* — 2. *Where No Time Is Fixed*. — See note 10.
- 564.** 5. *From Future Day Named* — *When There Is a General Law*. — See note 2.
- 565.** *Reference Is to Time of Operation*. — See note 2.
- 566.** 6. *From Publication* — *Requirement as to Newspapers*. — See note 3.
 7. *From Publication and Circulation*. — See note 11.
- 567.** 8. *Upon a Contingency*. — See notes 1, 3.

555. 4. *Presumption*. — *People v. Sours*, 31 Colo. 369, 102 Am. St. Rep. 34; *State v. Cahill*, 12 Wyo. 225.

5. *Evidence Must Be Clear and Convincing*. — *State v. Cahill*, 12 Wyo. 225.

557. 6. *Legislative Journals May Be Looked To*. — *Rogers v. State*, 72 Ark. 565; *People v. Sours*, 31 Colo. 369, 102 Am. St. Rep. 34; *People v. McCullough*, 210 Ill. 488; *Colburn v. McDonald*, (Neb. 1904) 100 N. W. Rep. 961; *Brown v. Stewart*, 134 N. Car. 357; *New Hanover County v. Armour Packing Co.*, 135 N. Car. 62; *State v. Cahill*, 12 Wyo. 225.

Enrolled Bill and Journals Constitute Only Admissible Evidence. — *State v. Mickey*, (Neb. 1905) 102 N. W. Rep. 679.

558. 2. *Journals Control*. — *State v. Cahill*, 12 Wyo. 225.

559. 6. *Distinction*. — *Wilson v. Markley*, 133 N. Car. 616. See also *Board of Revenue v. Crow*, 141 Ala. 126.

560. 1. *Necessity for Title*. — *Ham v. Levee Com'rs*, 83 Miss. 534; *Bill Posting Sign Co. v. Atlantic City*, 71 N. J. L. 72.

3. *Substantial Compliance Sufficient*. — *State v. Cucullu*, 110 La. 1087.

4. *Provision Mandatory*. — *Smith v. Jennings*, 67 S. Car. 324.

Statute Containing No Enacting Clause Void. — *Walden v. Whigham*, 120 Ga. 646.

7. *Sustaining as Resolution*. — *Smith v. Jennings*, 67 S. Car. 324.

561. 2. *Adoption and Amendment of Municipal Charters by Resolution Permitted*. — *Sheehan v. Scott*, 145 Cal. 684; *Harrison v. Roberts*, 145 Cal. 173.

562. 1. *Parol Evidence Admissible to Show that Governor's Signature Was Written by Mistake*. — *Allegany County v. Warfield*, 100 Md. 516.

3. *Stipulation of Parties*. — *Peckham v. People*, 32 Colo. 140.

10. *Executive Approval*. — *In re Appointment of Assistant Dist. Atty.*, 14 Pa. Dist. 635.

Bill Dependent for Validity on Prior Enactment of Another Bill. — See *Wright v. Overstreet*, 122 Ga. 633.

Evidence — *Statute Itself Conclusive as to Date*

of Approval. — *Gibson v. Anderson*, (C. C. A.) 131 Fed. Rep. 39 (Act of Congress).

564. 2. *A Provision Authorizing a Vote on the Question of Acceptance of a statute brings the act within the exception to the general law, and the act takes effect upon being thus approved*. *State v. Wenzel*, 72 N. H. 396. See also *Foy v. Gardiner Water Dist.*, 98 Me. 82.

Offense Committed on Day Penal Statute Takes Effect Punishable Thereunder. — *State v. Robinson*, 70 S. Car. 468.

Constitutional Provision as to Time Permissive — Legislature May Extend. — *State v. Trehwitt*, 113 Tenn. 561.

565. 2. *Statutes of Limitation*. — See *Lamb v. Powder River Live Stock Co.*, (C. C. A.) 132 Fed. Rep. 434; *Curtis v. Boquillas Land, etc., Co.*, (Ariz. 1904) 76 Pac. Rep. 612, *affirming* on rehearing (Ariz. 1903) 71 Pac. Rep. 924; *Edelstein v. Carlile*, 33 Colo. 54; *Wooster v. Bateman*, 126 Iowa 552. And see the title *LIMITATION OF ACTIONS*, 176. 2 *et seq.*

566. 3. *Publication in Official State Paper*. — See *State v. Topeka*, 68 Kan. 177.

11. *Publication and Circulation*. — Under the *Louisiana* constitution a law is promulgated at the capital of the state on the date of its publication, and throughout the state in twenty days thereafter. *Railroad Commission v. Kansas City Southern R. Co.*, 111 La. 133.

567. 1. See *Davis v. State*, 141 Ala. 84, *citing Hand v. Stapleton*, 135 Ala. 162; *Boston, etc., Smelting Co. v. Elder*, (Colo. App. 1904) 77 Pac. Rep. 258, *approved* in *Denver v. Adams County*, 33 Colo. 1; *In re O'Brien*, 29 Mont. 530; *Picton v. Cass County*, 13 N. Dak. 242.

3. See *Santa Rosa v. Bower*, 142 Cal. 299; *Boor v. Tolman*, 113 Ill. App. 322; *Sykes v. People*, 132 Ill. 32 (creation of banking corporations); *Board of Education v. Winchester*, (Ky. 1905) 87 S. W. Rep. 768; *Foy v. Gardiner Water Dist.*, 98 Me. 82; *Territory v. Logan County High School*, 13 Okla. 605; *Fouts v. Hood River*, (Oregon 1905) 81 Pac. Rep. 370 (local option liquor laws); *McGonnell's License*, 209 Pa. St. 327, *reversing* 24 Pa. Super. Ct. 642 (repeal of liquor-license statute); *Ex p. Thompkins*, (Tex. Crim. 1904) 83 S. W. Rep. 379 (local option stock law).

567. 9. When Containing Emergency Clause. — See note 7.

568. 11. Postponement of Operation of Part. — See note 5.

V. CONSTITUTIONALITY — 1. General Principles — The Principle of the English Law. — See note 9.

A Territorial Statute. — See note 11.

569. Question Must Be Directly Involved. — See note 1.

4. Wisdom, Propriety, or Policy of Statute. — See notes 5, 6.

567. 7. Emergency Clause — Limitation of Power. — *Kaddery v. Portland*, 44 Oregon 118, followed in *Dallas v. Hallock*, 44 Oregon 246.

568. 5. Provisions Taking Effect at Different Times. — *State v. Wenzel*, 72 N. H. 396, citing *Workman v. Worcester*, 118 Mass. 168; *Fouts v. Hood River*, (Oregon 1905) 81 Pac. Rep. 370; *State v. Scampini*, 77 Vt. 92; *National Council, etc., v. State Council, etc.*, (Va. 1905) 51 S. E. Rep. 166. See also *Price v. Liquor License Com'rs*, 98 Md. 346.

9. Constitutionality — Generally. — *Northern Securities Co. v. U. S.*, 193 U. S. 197, affirming 120 Fed. Rep. 721; *State v. Moore*, (Ark. 1905) 88 S. W. Rep. 881; *Turner v. Coffin*, 9 Idaho 338; *Levy v. State*, 161 Ind. 251; *Atkinson v. Woodmansee*, 68 Kan. 71; *Yates v. Collins*, 82 S. W. Rep. 282, 26 Ky. L. Rep. 558, rehearing denied (Ky. 1904) 82 S. W. Rep. 973; *State v. Galusha*, (Neb. 1905) 104 N. W. Rep. 197; *Raritan River R. Co. v. Middlesex, etc. Traction Co.*, 70 N. J. L. 732; *Tarrant County v. Butler*, 35 Tex. Civ. App. 421; *State v. Dodge*, 76 Vt. 197; *Ellinger v. Com.*, 102 Va. 100. See also the title CONSTITUTIONAL LAW, **1079**. 5.

No Direct Proceeding for Determining Constitutionality. — *State v. Butler*, 178 Mo. 272. See also *Smith v. Perth Amboy*, 70 N. J. L. 194.

11. Territorial Legislation. — *Garrett v. London, etc.*, *F. Ins. Co.*, (Okla. 1905) 81 Pac. Rep. 421. See also *Territory v. Gutierrez*, (N. Mex. 1904) 78 Pac. Rep. 139; *Burke v. Malaby*, 14 Okla. 650. Compare *In re Wynn-Johnson*, 1 Alaska 630.

569. 1. Question Must Be Directly Involved — *United States*. — *Hartford F. Ins. Co. v. Perkins*, 125 Fed. Rep. 502; *Knight v. Shelton*, 134 Fed. Rep. 423.

Alabama. — *Bray v. State*, 140 Ala. 172.

California. — *Matter of Johnson*, 139 Cal. 532, 96 Am. St. Rep. 161.

Georgia. — *Mathis v. Gordy*, 119 Ga. 817; *Oglesby v. State*, 123 Ga. 506.

Idaho. — *Jack v. Grangeville*, 9 Idaho 291; *Bear Lake County v. Budge*, 9 Idaho 703; *State v. Jones*, 9 Idaho 693.

Michigan. — *Teagan Transp. Co. v. Assessors*, (Mich. 1905) 102 N. W. Rep. 273, 11 Detroit Leg. N. 731; *King v. Concordia F. Ins. Co.*, (Mich. 1905) 103 N. W. Rep. 616.

New York. — *Pelin v. New York Cent., etc., R. Co.*, 102 N. Y. App. Div. 71; *People v. Wells*, 99 N. Y. App. Div. 364, affirmed 181 N. Y. 252.

North Carolina. — *Parish v. East Coast Cedar Co.*, 133 N. Car. 478, 98 Am. St. Rep. 718, followed in *J. L. Roper Lumber Co. v. Elizabeth City Lumber Co.*, 135 N. Car. 742; *State v. Lytle*, 138 N. Car. 738.

Oregon. — *Lake County v. Schroder*, (Oregon 1905) 81 Pac. Rep. 943.

South Carolina. — Compare *Johnson v. Spartan Mills*, 68 S. Car. 339.

Vermont. — *Blanchard v. Barre*, 77 Vt. 420. See also the title CONSTITUTIONAL LAW, **1084**. 5 et seq.

Court Will Not Determine Constitutionality When Decision Can Be Rested on Other Grounds. — *Bray v. State*, 140 Ala. 172; *White v. Sun Pub. Co.*, 164 Ind. 426; *Weir v. State*, 161 Ind. 435; *State v. Balch*, 178 Mo. 392.

Question Cannot Be Raised for First Time on Appeal. — *Cummings v. People*, 211 Ill. 392; *Tarkio v. Clark*, 186 Mo. 285; *State v. Bland*, 186 Mo. 691; *Matter of Andersen*, 178 N. Y. 416, reversing on other grounds 91 N. Y. App. Div. 563.

By Whom Question May Be Raised. — See *Denver v. Adams County*, 33 Colo. 1; *People v. Olsen*, 215 Ill. 620; *Board of Education v. Board of Education*, 76 N. Y. App. Div. 355, affirmed 179 N. Y. 556; *Robertson v. Grant County*, 14 Okla. 407; *Phenix Ins. Co. v. Perkins*, (S. Dak. 1905) 101 N. W. Rep. 1110. And see the title CONSTITUTIONAL LAW, **1090**. 1 et seq.

Estoppel to Question Constitutionality. — See *infra*, this title, **571**. 2.

Court Will Not Raise Question of Constitutionality. — *State v. Bland*, 186 Mo. 691.

Fullest Argument Required. — *Iowa Cent. Bldg., etc., Assoc. v. Klock*, (Iowa 1905) 104 N. W. Rep. 352.

Concurrence of Three Judges Required. — *Funkhouser v. Spahr*, 102 Va. 306.

5. Wisdom, Propriety, or Policy of Statute — United States. — *Atkin v. Kansas*, 191 U. S. 207; *Northern Securities Co. v. U. S.*, 193 U. S. 197, affirming 120 Fed. Rep. 721; *McCray v. U. S.*, 195 U. S. 27; *Olsen v. Smith*, 195 U. S. 332, affirming (Tex. Civ. App. 1902) 68 S. W. Rep. 320; *Jacobson v. Massachusetts*, 197 U. S. 11, affirming 183 Mass. 242; *Lochner v. New York*, 198 U. S. 45, reversing on other grounds 177 N. Y. 145, which affirmed 73 N. Y. App. Div. 120; *Kane v. Erie R. Co.*, (C. C. A.) 133 Fed. Rep. 681, reversing 128 Fed. Rep. 474. *Arkansas*. — *State v. Moore*, (Ark. 1905) 88 S. W. Rep. 881.

Colorado. — *In re Magnes*, 32 Colo. 527.

Connecticut. — *State v. Feingold*, 77 Conn. 326; *State v. Reynolds*, 77 Conn. 131.

Indiana. — *U. S. Express Co. v. State*, 164 Ind. 196.

Iowa. — *Sisson v. Buena Vista County*, (Iowa 1905) 104 N. W. Rep. 454.

Kansas. — *State v. Durein*, 70 Kan. 14.

Kentucky. — *Com. v. Reinecke Coal Min. Co.*, 117 Ky. 885; *Yates v. Collins*, 82 S. W. Rep. 282, 26 Ky. L. Rep. 558, rehearing denied (Ky. 1904) 82 S. W. Rep. 973.

Louisiana. — *State v. Merchants' Trading Co.*, 114 La. 529.

569. 5. Motives of Legislature. — See note 7.

570. 6. Possibility of Unfair Enforcement. — See note 1.

7. Partial Invalidity — The Rule Is. — See note 2.

Maryland. — State *v.* Hyman, 98 Md. 596.
Montana. — MacGinniss *v.* Boston, etc.,
Consol. Copper, etc., Min. Co., 29 Mont. 428;
State *v.* Clancy, 30 Mont. 539.

Nebraska. — O'Reilly *v.* Hoover, (Neb.
1903) 97 N. W. Rep. 470; State *v.* Back, (Neb.
1904) 100 N. W. Rep. 952; Beatrice *v.* Wright,
(Neb. 1904) 101 N. W. Rep. 1039; State *v.*
Galusha, (Neb. 1905) 104 N. W. Rep. 197.

New Hampshire. — State *v.* Ramseyer, (N.
H. 1904) 58 Atl. Rep. 958.

New York. — Matter of Andersen, 178 N. Y.
416, reversing on other grounds 91 N. Y. App.
Div. 563; Tenement House Dept. *v.* Moeschén,
89 N. Y. App. Div. 526, affirming (Supm. Ct.
Spec. T.) 41 Misc. (N. Y.) 446; Pratt Institute
v. New York, 99 N. Y. App. Div. 525; Tenement
House Dept. *v.* Moeschén, (Supm. Ct.
App. T.) 84 N. Y. Supp. 577, affirmed 90 N. Y.
App. Div. 603, 179 N. Y. 325; New York *v.*
Chelsea Jute Mills, (Municipal Ct.) 43 Misc.
(N. Y.) 266.

North Carolina. — Spencer *v.* Seaboard Air
Line R. Co., 137 N. Car. 107; State *v.* Barrett,
138 N. Car. 630.

Ohio. — Cincinnati St. R. Co. *v.* Horstman,
72 Ohio St. 93.

Oregon. — Kadderly *v.* Portland, 44 Oregon
118.

Pennsylvania. — Russ *v.* Com., 210 Pa. St.
544, 105 Am. St. Rep. 825, reversing 7 Dauphin
Co. Rep. (Pa.) 158; Com. *v.* Mellet, 27 Pa.
Super. Ct. 41; Allentown *v.* Wagner, 27 Pa.
Super. Ct. 485.

Texas. — Douthit *v.* State, 36 Tex. Civ. App.
396, modified on other grounds 98 Tex. 344;
Ex p. Thompkins, (Tex. Crim. 1904) 83 S. W.
Rep. 379.

Virginia. — See Zircle *v.* Southern R. Co.,
102 Va. 17, 102 Am. St. Rep. 805.

Wisconsin. — Tilly *v.* Mitchell, etc., Co., 121
Wis. 1, 105 Am. St. Rep. 1007.

Canada. — In re Coal Mines Regulation Act,
10 British Columbia 408, per Martin, J. See
also *infra*, this title, **599**. 1 and the title CON-
STITUTIONAL LAW, **1087**. 1 et seq.

569. 6. Adams *v.* Kuykendall, 83 Miss. 571.

7. Legislative Motives. — State *v.* Moore, (Ark.
1905) 88 S. W. Rep. 881; Board of Education
v. Board of Education, 76 N. Y. App. Div. 355,
affirmed 179 N. Y. 556. And see the title CON-
STITUTIONAL LAW, **1087**. 5.

The Presumption of Law. — See Rutgers College
v. Morgan, 70 N. J. L. 460, and see the title
CONSTITUTIONAL LAW, **1086**. 1.

570. 1. Unfair Execution of Statute. — Mc-
Cray *v.* U. S., 105 U. S. 27; Michigan R. Tax
Cases, 138 Fed. Rep. 223; Hopkins's Appeal,
77 Conn. 644; Chicago *v.* Noonan, 210 Ill. 18;
Newman *v.* Lake, 70 Kan. 848; State *v.* Hyman,
98 Md. 596; Beatrice *v.* Wright, (Neb. 1904)
101 N. W. Rep. 1039; Marsh *v.* Stonebraker,
(Neb. 1904) 98 N. W. Rep. 699; State *v.* Bar-
rett, 138 N. Car. 630; State *v.* Stark County,
(N. Dak. 1905) 103 N. W. Rep. 913; Jeffrey *v.*
State, 26 Ohio Cir. Ct. 591; State *v.* Briggs, 45
Oregon 366; Matter of Thompson, 36 Wash. 377.

Defect Rendering Statute Susceptible of Abuse
Does Not Render It Unconstitutional. — Brooks *v.*
Tripp, 135 N. Car. 159.

2. Partial Invalidity — United States. —
McDonald *v.* Southern Express Co., 134 Fed.
Rep. 282.

Arkansas. — Woods *v.* Carl, (Ark. 1905) 87
S. W. Rep. 621; *Ex p.* Deeds, (Ark. 1905) 87
S. W. Rep. 1030.

California. — Deyoe *v.* Superior Ct., 140 Cal.
476, 98 Am. St. Rep. 73; Matter of Campbell,
143 Cal. 623; Matter of Johnson, 139 Cal. 532.

Connecticut. — State *v.* Dow, 78 Conn. 53.

Georgia. — Toney *v.* Macon, 119 Ga. 83;
Sayer *v.* Brown, 119 Ga. 539.

Idaho. — Johnston *v.* Savidge, (Idaho 1905)
81 Pac. Rep. 616.

Illinois. — Kellyville Coal Co. *v.* Harrier, 207
Ill. 624, 99 Am. St. Rep. 240; Strong *v.* Dign-
nan, 207 Ill. 385, 99 Am. St. Rep. 225; Pettibone
v. West Chicago Park, 215 Ill. 304.

Iowa. — Layman *v.* Iowa Telephone Co., 123
Iowa 591; Smith *v.* Peterson, 123 Iowa 672;
Brady *v.* Mattern, 125 Iowa 158, 106 Am. St.
Rep. 291.

Kansas. — Weber *v.* Chicago, etc., R. Co., 69
Kan. 611.

Maine. — Soper *v.* Lawrence Bros. Co., 98
Me. 268, 99 Am. St. Rep. 397.

Maryland. — Storck *v.* Baltimore, 101 Md.
476.

Massachusetts. — Com. *v.* Anselvich, 186
Mass. 376, 104 Am. St. Rep. 590; Lentell *v.*
Boston, etc., St. R. Co., 187 Mass. 445; Wheel-
wright *v.* Boston, 188 Mass. 521.

Missouri. — State *v.* Birch, 186 Mo. 205;
Haag *v.* Ward, 186 Mo. 325.

Nebraska. — State *v.* Insurance Co. of North
America, (Neb. 1904) 99 N. W. Rep. 36, re-
versed on rehearing on other grounds, (Neb.
1904) 100 N. W. Rep. 405; State *v.* Sams,
(Neb. 1904) 99 N. W. Rep. 544; State *v.*
Galusha, (Neb. 1905) 104 N. W. Rep. 197;
Scott *v.* Flowers, 61 Neb. 620.

New Hampshire. — Williams *v.* Park, 72 N.
H. 305.

New Jersey. — Fagan *v.* Payen, (N. J. 1904)
59 Atl. Rep. 568, reversing sub nom. Matter of
Fagan, 70 N. J. L. 341; State *v.* Corrigan, (N.
J. 1905) 60 Atl. Rep. 515; State *v.* Davis, (N.
J. 1905) 61 Atl. Rep. 2.

New York. — People *v.* Van De Carr, 91 N.
Y. App. Div. 20, affirmed 178 N. Y. 425, 102
Am. St. Rep. 516.

North Carolina. — Harper *v.* New Hanover
County, 133 N. Car. 106; State *v.* McGinnis,
138 N. Car. 724.

Pennsylvania. — See Emerick's Petition, 30
Pa. Co. Ct. 289.

South Carolina. — State *v.* Virginia-Carolina
Chemical Co., 71 S. Car. 544.

Texas. — St. Louis Southwestern R. Co. *v.*
Hall, 98 Tex. 480.

Vermont. — State *v.* Scampini, 77 Vt. 92.

Washington. — Shook *v.* Sexton, 37 Wash. 509.

And see the title CONSTITUTIONAL LAW,
1088. 1 et seq.

571. Parts of Section. — See note 1.

8. Total Invalidity. — See notes 2, 3.

572. See note 1.

9. Titles and Subjects — *a.* CONSTITUTIONAL PROVISIONS. — See note 2.

b. PURPOSE OF PROVISIONS. — See note 3.

573. *c.* WHETHER PROVISIONS DIRECTORY OR MANDATORY. — See notes 1, 4.

d. TO WHAT ACTS PROVISIONS APPLICABLE. — See notes 7, 8.

Presumption Is that Legislature Intended Enactment to Be Effective in Entirety. — *Riccio v. Hoboken*, 69 N. J. L. 649, reversing 69 N. J. L. 104, citing *Iowa L. Ins. Co. v. Eastern Mut. L. Ins. Co.*, 64 N. J. L. 340.

571. 1. Rule Applies to Sections of Statute. — *Mitchell v. State*, 141 Ala. 90; *State v. Scampini*, 77 Vt. 92. See also *Murphy v. Wheatley*, 100 Md. 358; *State v. Gage*, 72 Ohio St. 210.

Provisos. — *Haag v. Ward*, 186 Mo. 325.

Rule Applied to Section of Codification. — *Pump v. Lucas County*, 69 Ohio St. 448.

2. Total Unconstitutionality. — *Burke v. Snively*, 208 Ill. 328; *Chicago, etc., Coal Co. v. People*, 214 Ill. 421, affirming 114 Ill. App. 75; *Oxnard Beet Sugar Co. v. State*, (Neb. 1905) 102 N. W. Rep. 80; *Matter of O'Berry*, 179 N. Y. 285, affirming 91 App. Div. 3; *Phenix Ins. Co. v. Perkins*, (S. Dak. 1905) 101 N. W. Rep. 1110; *Payne v. Staunton*, 55 W. Va. 202. And see the title CONSTITUTIONAL LAW, 1091. 2.

Unconstitutional Law May Be Color to Support De Facto Corporation. — See *Hancock v. Board of Education*, 140 Cal. 554; *Topeka v. Dwyer*, 70 Kan. 244, quoting *Ashley v. Presque Isle County*, (C. C. A.) 60 Fed. Rep. 55. And see the title DE FACTO CORPORATIONS, 750. 1, 751. 1.

Person Who Benefits by Unconstitutional Legislation Estopped to Deny Its Validity. — See *Shepard v. Barron*, 194 U. S. 553; *Hoertz v. Jefferson Southern Pond Draining Co.*, (Ky. 1905) 84 S. W. Rep. 1141; *Leahy v. Jefferson Southern Pond Draining Co.*, (Ky. 1905) 84 S. W. Rep. 1181. Compare *U. S. v. Seven Packages Tea*, 126 Fed. Rep. 224, distinguishing the case of one who is compelled to act under the statute to preserve his property; *Bray v. Williams*, 137 N. Car. 387.

Estoppel Is by Acts of Parties, Not by Virtue of Statute. — *Mt. Vernon v. State*, 71 Ohio St. 428, 104 Am. St. Rep. 783.

3. Change of Judicial Construction as Affecting Contract Rights. — See *Price v. Toledo*, 25 Ohio Cir. Ct. 617; *State v. Hall*, 25 Ohio Cir. Ct. 361. And see the title STARE DECISIS, 179. 4.

572. 1. Immaterial that Bill Unconstitutional Where Objection Removed Before Enactment. — *Morrison v. Kent*, 135 Mich. 38, 10 Detroit Leg. N. 678.

2. For Instances of Special Provisions relating to appropriation bills, revenue bills, etc., see *Southern R. Co. v. Mitchell*, 139 Ala. 629; *Sullivan v. Gage*, 145 Cal. 759; *State v. Edmunds*, 127 Iowa 333; *Carpenter v. Central Covington*, 81 S. E. Rep. 919, 26 Ky. L. Rep. 430; *U. S. Fidelity, etc., Co. v. Somerset Board of Education*, 80 S. W. Rep. 1191, 26 Ky. L. Rep. 246.

Constitutional Direction for Legislation on

Particular Subject Does Not Exempt from Requirement. — *Bell v. First Judicial Dist. Ct.*, (Nev. 1905) 81 Pac. Rep. 875.

3. Purpose of Provisions — *United States*. — *Baker v. Kaiser*, (C. C. A.) 126 Fed. Rep. 317.

California. — *Law v. San Francisco*, 144 Cal. 384.

Delaware. — *Monaghan v. Lewis*, (Del. 1905) 59 Atl. Rep. 948, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 572.

Iowa. — *Sisson v. Buena Vista County*, (Iowa 1905) 104 N. W. Rep. 454.

Kansas. — *School Dist. No. 3 v. Atzenweiler*, 67 Kan. 609; *Ex p. Schley*, (Kan. 1905) 80 Pac. Rep. 631.

Maryland. — *Price v. Liquor License Com'rs*, 98 Md. 346; *Queen Anne's County v. Talbot County*, 99 Md. 13; *Kafka v. Wilkinson*, 99 Md. 238.

Michigan. — *Grimm v. Secretary of State*, 137 Mich. 134, 11 Detroit Leg. N. 218, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 572.

Minnesota. — *Atwell v. Parker*, 93 Minn. 462.

Missouri. — *Ex p. Loving*, 178 Mo. 194; *State v. Cantwell*, 179 Mo. 245.

Montana. — *State v. Brown*, 29 Mont. 179; *State v. McKinney*, 29 Mont. 375.

Nebraska. — *Chicago, etc., R. Co. v. Sporer*, (Neb. 1904) 100 N. W. Rep. 813; *Oxnard Beet Sugar Co. v. State*, (Neb. 1905) 102 N. W. Rep. 80.

New York. — *People v. Howe*, 177 N. Y. 499, reversing on other grounds 88 N. Y. App. Div. 158.

Pennsylvania. — *Dickinson Tp. Road*, 23 Pa. Super. Ct. 34; *Nissley v. Lancaster County*, 13 Pa. Dist. 489; *Com. v. Atty.-Gen.*, 13 Pa. Dist. 521, 30 Pa. Co. Ct. 53; *Clinton County v. Lock Haven*, 29 Pa. Co. Ct. 641.

Virginia. — *Ellinger v. Com.*, 102 Va. 100.

Washington. — *Seattle, etc., Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, affirmed 195 U. S. 624.

573. 1. Provision Directory Only. — *Jones v. Franklin County*, 25 Ohio Cir. Ct. 510.

4. Provision Deemed Mandatory. — *Law v. San Francisco*, 144 Cal. 384; *State v. McKinney*, 29 Mont. 375; *Oxnard Beet Sugar Co. v. State*, (Neb. 1905) 102 N. W. Rep. 80; *Garrigan v. Kennedy*, (S. Dak. 1904) 101 N. W. Rep. 1081.

7. Proposal of Constitutional Amendment. — *People v. Sours*, 31 Colo. 369, 102 Am. St. Rep. 34, citing *Nesbit v. People*, 19 Colo. 441.

8. In Bills Excepted from the Constitutional Provision it is competent to embody any provisions germane to the subject-matter, whether expressed in or covered by the title or not. *Southern R. Co. v. Mitchell*, 139 Ala. 629.

573. Codes and Compilations. — See note 9.

574. Municipal Ordinances. — See note 3.

e. HOW PROVISIONS CONSTRUED. — See notes 4, 5, 6, 7.

575. Long Acquiescence in the Constitutionality. — See note 1.

f. SINGLENESSE OF SUBJECT — (1) *In General.* — See note 2.

(2) *When Act Not Objectionable for Plurality.* — See notes 7, 8.

573. 9. Codes, Digests, and Revisions Specifically Excepted from Requirement. — Southern R. Co. v. Mitchell, 139 Ala. 629.

Civil Proceedings Cannot Be Included in Compilation of Criminal Proceedings. — State v. Tie-man, 32 Wash. 294, 98 Am. St. Rep. 854.

574. 3. Applied to Ordinances by Statute. — Cleveland Electric R. Co. v. Cleveland, 137 Fed. Rep. 111 (Ohio statute); Louisville v. Wehmhoff, 116 Ky. 812, 845; Com. v. Larkin, 27 Pa. Super. Ct. 397; Ehrhardt v. Seattle, 33 Wash. 664.

4. Not Given Strained or Technical Construction. — State v. Hahn, 70 Kan. 877; *Ex p.* Schley, (Kan. 1905) 80 Pac. Rep. 631.

5. Must Be Enforced Against Abuses. — Monaghan v. Lewis, (Del. 1905) 59 Atl. Rep. 948, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 574; *Ex p.* Schley, (Kan. 1905) 80 Pac. Rep. 631; Queen Anne's County v. Talbot County, 99 Md. 13; Kafka v. Wilkinson, 99 Md. 238; Com. v. Kebort, 26 Pa. Super. Ct. 584, reversing on other grounds 13 Pa. Dist. 677, 30 Pa. Co. Ct. 164.

6. Liberal Construction in Favor of Act — United States. — Baker v. Kaiser, (C. C. A.) 126 Fed. Rep. 317.

California. — Deyoe v. Superior Ct., 140 Cal. 476, 98 Am. St. Rep. 73.

Delaware. — Monaghan v. Lewis, (Del. 1905) 59 Atl. Rep. 948, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 574.

Illinois. — Christy v. Elliott, 216 Ill. 31.

Kansas. — School Dist. No. 3 v. Atzenweiler, 67 Kan. 609; *Ex p.* Schley, (Kan. 1905) 80 Pac. Rep. 631.

Maryland. — Price v. Liquor License Com'rs, 98 Md. 346; Queen Anne's County v. Talbot County, 99 Md. 13; Kafka v. Wilkinson, 99 Md. 238.

Michigan. — National Loan, etc., Co. v. Detroit, 136 Mich. 451, 11 Detroit Leg. N. 68.

Minnesota. — State v. Leland, 91 Minn. 321; State v. Boehm, 92 Minn. 374; Watkins v. Bigelow, 93 Minn. 210; Atwell v. Parker, 93 Minn. 462; Merchants' Nat. Bank v. East Grand Forks, 94 Minn. 246.

Montana. — State v. McKinney, 29 Mont. 375.

Ohio. — Chittenden v. Columbus, 26 Ohio Cir. Ct. 531.

Pennsylvania. — Stroudsburg v. Shick, 24 Pa. Super. Ct. 442.

South Carolina. — Riley v. Charleston Union Station Co., 71 S. Car. 457.

South Dakota. — Garrigan v. Kennedy, (S. Dak. 1904) 101 N. W. Rep. 1081.

Virginia. — Ellinger v. Com., 102 Va. 100.

7. In Doubtful Case Act Valid. — Deyoe v. Superior Ct., 140 Cal. 476, 98 Am. St. Rep. 73; Turner v. Coffin, 9 Idaho 338; *Ex p.* Schley, (Kan. 1905) 80 Pac. Rep. 631; State v. McKinney, 29 Mont. 375; Corscadden v. Haswell,

88 N. Y. App. Div. 158, reversed on other grounds 177 N. Y. 499.

575. 1. Long Acquiescence in Constitutionality. — See Atwell v. Parker, 93 Minn. 462.

2. "Object" Means End or Aim of Statute. — State v. Davis, (N. J. 1905) 61 Atl. Rep. 2.

An Amendment Changing the Word "Object" to "Subject" makes imperative a broader construction. *Ex p.* Hernan, 45 Tex. Crim. 343, citing Stone v. Brown, 54 Tex. 341.

7. Act May Contain Any Number of Provisions. — Law v. San Francisco, 144 Cal. 384; Lang v. Friesenecker, 213 Ill. 598; *Ex p.* Loving, 178 Mo. 194.

8. Acts Containing But One General Subject — United States. — Baker v. Kaiser, (C. C. A.) 126 Fed. Rep. 317.

Alabama. — Dudley v. Birmingham R., etc., Co., 139 Ala. 453.

California. — Ah King v. Police Ct., 139 Cal. 718; Anglo-Californian Bank v. Field, 146 Cal. 644.

Colorado. — People v. Sours, 31 Colo. 369, 102 Am. St. Rep. 34; El Paso County v. Teller County, 32 Colo. 310; Chicago Lumber Co. v. Newcomb, 19 Colo. App. 265.

Delaware. — Monaghan v. Lewis, (Del. 1905) 59 Atl. Rep. 948, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 575.

Florida. — Schiller v. State, (Fla. 1905) 38 So. Rep. 706.

Georgia. — Kemp v. State, 120 Ga. 157; Bonner v. Milledgeville R. Co., 123 Ga. 115.

Idaho. — Boise City Irrigation, etc., Co. v. Stewart, 10 Idaho 38, 62.

Illinois. — Christy v. Elliott, 216 Ill. 31.

Indiana. — Levy v. State, 161 Ind. 251.

Iowa. — Boggs v. School Tp., (Iowa 1905) 102 N. W. Rep. 796.

Kansas. — School Dist. No. 3 v. Atzenweiler, 67 Kan. 609; Wichita v. Missouri, etc., Telephone Co., 70 Kan. 441.

Kentucky. — Hyser v. Com., 116 Ky. 410; Louisville v. Wehmoff, 116 Ky. 812, 845.

Louisiana. — Browne v. Providence, 114 La. 631, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 575; American Homestead Co. v. Karstendiek, 111 La. 884; Shreveport v. Tidwell, 112 La. 172.

Maryland. — Price v. Liquor License Com'rs, 98 Md. 346; Queen Anne's County v. Talbot County, 99 Md. 13.

Michigan. — Hughes v. Love, 136 Mich. 169, 10 Detroit Leg. N. 990; National Loan, etc., Co. v. Detroit, 136 Mich. 451, 11 Detroit Leg. N. 68; Ovid First Nat. Bank v. Steel, 136 Mich. 588, 11 Detroit Leg. N. 120; Grimm v. Secretary of State, 137 Mich. 134, 11 Detroit Leg. N. 218; American Matinee Assoc. v. Secretary of State, (Mich. 1905) 104 N. W. Rep. 141, 12 Detroit Leg. N. 262; Fonia v. Frazer, (Mich. 1905) 104 N. W. Rep. 147, 12 Detroit Leg. N. 259.

Minnesota. — State v. Boehm, 92 Minn. 374;

577. Illustrations. — See note 2.

578. See notes 3, 8, 14, 15.

(3) *When Act Objectionable for Plurality* — (a) *In General*. — See note 19.

579. That Both Subjects Are Expressed in the Title. — See note 2.

(b) *How Far Act Void*. — See note 4.

g. EXPRESSION OF SUBJECT IN TITLE — (1) *Discretion of Legislature in Choice of Title*. — See note 6.

(2) *What a Sufficient Expression of Subject* — (a) *In General* — *Expression of General Subject Sufficient*. — See note 7.

580. Subject Not Expressed — *Misleading Title*. — See note 1.

Watkins v. Bigelow, 93 Minn. 210; *Merchants' Nat. Bank v. East Grand Forks*, 94 Minn. 246.

Missouri. — *State v. Allen*, 178 Mo. 555.

New York. — *New York v. Chelsea Jute Mills*, (Municipal Ct.) 43 Misc. (N. Y.) 266.

Nebraska. — *Chicago, etc., R. Co. v. Anderson*, (Neb. 1904) 101 N. W. Rep. 1019; *McMahon v. State*, (Neb. 1904) 97 N. W. Rep. 1035; *Oxnard Beet Sugar Co. v. State*, (Neb. 1905) 102 N. W. Rep. 80.

Pennsylvania. — *Phillips v. Barnhart*, 27 Pa. Super. Ct. 26; *Com. v. Fisher*, 27 Pa. Super. Ct. 175; *Com. v. Caulfield*, 27 Pa. Super. Ct. 279, *affirmed* 211 Pa. St. 644; *Fire Warden v. Huntingdon County*, 30 Pa. Co. Ct. 532.

Tennessee. — *Arbuckle v. McCutcheon*, 111 Tenn. 514; *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697.

Texas. — *Oak Cliff v. State*, (Tex. Civ. App. 1903) 77 S. W. Rep. 24, *affirmed* 97 Tex. 383; *Borden v. Trespacios Rice, etc., Co.*, 98 Tex. 494, *affirming* (Tex. Civ. App. 1904) 82 S. W. Rep. 461.

Virginia. — *Ellinger v. Com.*, 102 Va. 100.

Washington. — *Jensen-King-Byrd Co. v. Williams*, 35 Wash. 161; *Seattle, etc., Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, *affirmed* without opinion 195 U. S. 624; *Weed v. Goodwin*, 36 Wash. 31.

Wisconsin. — *State v. Vanhuse*, 120 Wis. 15.

Precedents Valuable Only to Assist in Application of General Principles. — *Ex p. Schley*, (Kan. 1905) 80 Pac. Rep. 631.

Incidental Matter in Proviso Does Not Make Statute Plural. — *State v. Baker*, 112 La. 801.

Statutes Held Not to Violate Prohibition — Statute Changing Names and Fixing Status of Different Persons. — *Atwell v. Parker*, 93 Minn. 462.

Statute Dealing with Both Anthracite and Bituminous Mining. — *Com. v. Schulte*, 13 Pa. Dist. 294, *affirmed* 26 Pa. Super. Ct. 95.

Statute Redistricting County and Abolishing Certain Offices. — *State v. Hamby*, 114 Tenn. 361.

577. 2. Cities of Two Classes. — *Browne v. Providence*, 114 La. 631.

578. 3. Taxation on Property and Privileges. — *In re Magnes*, 32 Colo. 527.

8. Roads and Bridges. — See *Sault Ste. Marie Bridge Co. v. Powers*, 138 Fed. Rep. 262.

14. Crime — Definition and Punishment. — *Gothard v. People*, 32 Colo. 11; *State v. Davis*, (N. J. 1905) 61 Atl. Rep. 2.

15. Punishment Prescribed for Several Crimes. — *State v. Leland*, 91 Minn. 321.

19. Acts Void for Plurality. — *Jackson Square*

v. New Orleans, 112 La. 957; *Fornia v. Frazer*, (Mich. 1905) 104 N. W. Rep. 147, 12 Detroit Leg. N. 259; *Oxnard Beet Sugar Co. v. State*, (Neb. 1905) 102 N. W. Rep. 80. See also *Bell v. First Judicial Dist. Ct.*, (Nev. 1905) 81 Pac. Rep. 875.

Statute Providing for Election and Changing Term of Office Invalid. — *State v. Thompson*, 142 Ala. 98.

Act Amending Two Independent Statutes Objectionable. — *Com. v. Schulte*, 13 Pa. Dist. 294, *affirmed* 26 Pa. Super. Ct. 95.

579. 2. Both Subjects in Title. — *Com. v. Larkin*, 27 Pa. Super. Ct. 397. See also *Oxnard Beet Sugar Co. v. State*, (Neb. 1905) 102 N. W. Rep. 80.

4. Act Plural — Title Single. — *State v. Savant*, (La. 1905) 38 So. Rep. 974.

6. Choice of Title in Discretion of Legislature. — *State v. McKinney*, 29 Mont. 375; *People v. Howe*, 177 N. Y. 499, *reversing* on other grounds 88 N. Y. App. Div. 158; *State v. Scott*, 32 Wash. 279; *State v. Vanhuse*, 120 Wis. 15.

7. Expression of General Subject Sufficient. — *Lang v. Friesenecker*, 213 Ill. 598; *Merchants' Nat. Bank v. East Grand Forks*, 94 Minn. 246; *Bridgewater v. Big Beaver Bridge Co.*, 210 Pa. St. 105; *Philadelphia Co.'s Petition*, 210 Pa. St. 490; *Stroudsburg v. Shick*, 24 Pa. Super. Ct. 442; *Com. v. Kebort*, 26 Pa. Super. Ct. 584, *reversing* on other grounds 13 Pa. Dist. 677, 30 Pa. Co. Ct. 164; *Hollenbach v. Berks County*, 14 Pa. Dist. 243; *Com. v. A* —, 30 Pa. Co. Ct. 554; *State v. Vanhuse*, 120 Wis. 15.

Requirement Not Applicable to Compiler's Headlines to Chapter of Statutes. — *State v. Graham*, 34 Wash. 81.

580. 1. Subject Not Adequately Expressed. — *Turner v. Coffin*, 9 Idaho 338; *Com. v. Hazen*, 207 Pa. St. 52; *Moore v. Moore*, 23 Pa. Super. Ct. 73; *Cornplanter Tp. Road*, 26 Pa. Super. Ct. 29; *Marysville Water Co. v. West Fairview, etc., Electric St. R. Co.*, 13 Pa. Dist. 365; *Nissley v. Lancaster County*, 13 Pa. Dist. 489; *Com. v. Densmore*, 13 Pa. Dist. 639, 29 Pa. Co. Ct. 217; *Corr v. Philadelphia*, 14 Pa. Dist. 35; *Clinton County v. Lock Haven*, 29 Pa. Co. Ct. 641; *Juniata Tp. Bridge*, 31 Pa. Co. Ct. 277; *Com. v. Rabe*, 31 Pa. Co. Ct. 365; *Armour v. Western Constr. Co.*, 36 Wash. 529.

Possibility of Suggestions or Inferences Dehors Language Used Is Not Enough. — *Cahill v. Hogan*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 360, *affirmed* 99 N. Y. App. Div. 619, 180 N. Y. 304; *Com. v. Atty.-Gen.*, 13 Pa. Dist. 521, 30 Pa. Co. Ct. 53; *Dickinson Tp. Road*, 23 Pa. Super. Ct. 34.

581. (b) No Necessity to Index Contents of Act. — See note 2.

582. (c) Generality of Title — *aa.* WHEN NOT OBJECTIONABLE. — See note 1.

Title Broader than Act. — See notes 2, 3, 4.

bb. WHEN OBJECTIONABLE. — See note 5.

583. (d) Effect of Specification of Details — Redundancy. — See note 2.

(5) *How Language of Title Construed.* — See note 3.

581. 2. Title Need Not Index Provisions — *California.* — *Deyoe v. Superior Ct.*, 140 Cal. 476, 98 Am. St. Rep. 73.

Colorado. — *El Paso County v. Teller County*, 32 Colo. 310; *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265.

Delaware. — *Monaghan v. Lewis*, (Del. 1905) 59 Atl. Rep. 948.

Illinois. — *People v. People's Gas Light, etc.*, Co., 205 Ill. 482, 98 Am. St. Rep. 244.

Indiana. — *Baltimore, etc., R. Co. v. Whiting*, 161 Ind. 228; *Bowlin v. Cochran*, 161 Ind. 486; *Western Union Tel. Co. v. Braxtan*, (Ind. 1905) 74 N. E. Rep. 985.

Kansas. — *Wichita v. Missouri, etc., Telephone Co.*, 70 Kan. 441; *Ex p. Schley*, (Kan. 1905) 80 Pac. Rep. 631.

Kentucky. — *Com. v. McConnell*, 116 Ky. 358.

Louisiana. — *Browne v. Providence*, 114 La. 631, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 581.

Maryland. — *Queen Anne's County v. Talbot County*, 99 Md. 13.

Minnesota. — *Atwell v. Parker*, 93 Minn. 462; *Merchants' Nat. Bank v. East Grand Forks*, 94 Minn. 246.

Montana. — *State v. McKinney*, 29 Mont. 375.

Pennsylvania. — *Com. v. Hazen*, 207 Pa. St. 52; *Stroudsburg v. Shick*, 24 Pa. Super. Ct. 442; *Com. v. Kebort*, 26 Pa. Super. Ct. 584, reversing on other grounds 13 Pa. Dist. 677, 30 Pa. Co. Ct. 164; *Com. v. Fisher*, 27 Pa. Super. Ct. 175; *Nissley v. Lancaster County*, 13 Pa. Dist. 489; *Lee v. Wayne County*, 14 Pa. Dist. 15, 29 Pa. Co. Ct. 649; *Juniata Tp. Bridge*, 31 Pa. Co. Ct. 277; *Com. v. Rabe*, 31 Pa. Co. Ct. 365.

Utah. — *Nystrom v. Clark*, 27 Utah 186.

Washington. — *State v. Graham*, 34 Wash. 81; *McKnight v. McDonald*, 34 Wash. 98; *Seattle, etc., Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, affirmed without opinion 195 U. S. 624.

"Substance" Not Required to Appear in Title. — *Wallace v. Board of Revenue*, 140 Ala. 491.

Title Need Not Designate Purposes of Act. — *State v. Cantwell*, 179 Mo. 245.

582. 1. Generality of Title No Objection — *Arkansas.* — *State v. Moore*, (Ark. 1905) 88 S. W. Rep. 881.

California. — *Law v. San Francisco*, 144 Cal. 384.

Colorado. — *People v. Sours*, 31 Colo. 369, 102 Am. St. Rep. 34; *In re Magnes*, 32 Colo. 527.

Delaware. — *Monaghan v. Lewis*, (Del. 1905) 59 Atl. Rep. 948, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582.

Illinois. — *People v. People's Gas Light, etc.*, Co., 205 Ill. 482, 98 Am. St. Rep. 244; *Lang v. Friesenecker*, 213 Ill. 598.

Indiana. — *Baltimore, etc., R. Co. v. Whiting*, 161 Ind. 228; *Bowlin v. Cochran*, 161 Ind. 486.

Iowa. — *Sisson v. Buena Vista County*, (Iowa 1905) 104 N. W. Rep. 454; *State v. Edmunds*, 127 Iowa 333.

Kansas. — *Wichita v. Missouri, etc., Telephone Co.*, 70 Kan. 441.

Minnesota. — *State v. Leland*, 91 Minn. 321; *State v. Gunn*, 92 Minn. 436; *Watkins v. Bigelow*, 93 Minn. 210; *Atwell v. Parker*, 93 Minn. 462; *Merchants Nat. Bank v. East Grand Forks*, 94 Minn. 246.

Missouri. — *Ex p. Loving*, 178 Mo. 194.

New York. — *People v. Howe*, 177 N. Y. 499, reversing on other grounds 88 N. Y. App. Div. 158.

Pennsylvania. — *Parker Tp. School Dist. v. Bruin Borough School Trp.*, 13 Pa. Dist. 769; *Lee v. Wayne County*, 14 Pa. Dist. 15, 29 Pa. Co. Ct. 649.

Tennessee. — *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697.

2. Title Broader than Act Not Invalid. — *Nichols, etc., Co. v. Loyd*, 111 Tenn. 145; *State v. Hamby*, 114 Tenn. 361; *Seattle, etc., Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, affirmed without opinion 195 U. S. 624.

Provision Narrowing Scope of Act. — *State v. Davis*, (N. J. 1905) 61 Atl. Rep. 2.

3. Plurality in Title but Not in Act. — *Monaghan v. Lewis*, (Del. 1905) 59 Atl. Rep. 948, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582; *Western Union Tel. Co. v. Braxtan*, (Ind. 1905) 74 N. E. Rep. 985.

4. Surplusage Disregarded. — *Nichols, etc., Co. v. Loyd*, 111 Tenn. 145.

5. Title Bad for Generality. — *Com. v. Hazen*, 207 Pa. St. 52.

583. 2. Specification of Details Does Not Vitiates Title. — *Baker v. Kaiser*, (C. C. A.) 126 Fed. Rep. 317; *El Paso County v. Teller County*, 32 Colo. 310; *Western Union Tel. Co. v. Braxtan*, (Ind. 1905) 74 N. E. Rep. 985; *Browne v. Providence*, 114 La. 631; *Goodbar v. Memphis*, 113 Tenn. 20; *Borden v. Trespalacios Rice, etc.*, Co., 98 Tex. 494, affirming (Tex. Civ. App. 1904) 82 S. W. Rep. 461; *Weed v. Goodwin*, 36 Wash. 31.

3. Title Liberally Construed. — *Deyoe v. Superior Ct.*, 140 Cal. 476, 98 Am. St. Rep. 73; *Hargis v. Perry County*, (Ind. 1905) 73 N. E. Rep. 915, quoting 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 583; *Bowlin v. Cochran*, 161 Ind. 486 (construction of words relating to time); *State v. Hahn*, 70 Kan. 877; *Price v. Liquor License Com'rs*, 98 Md. 346; *State v. Leland*, 91 Minn. 321; *Watkins v. Bigelow*, 93 Minn. 210; *Atwell v. Parker*, 93 Minn. 462; *Merchants' Nat. Bank v. East Grand Forks*, 94 Minn. 246; *Stroudsburg v. Shick*, 24 Pa. Super. Ct. 442; *Com. v. A—*, 30 Pa. Co. Ct. 554; *Garrigan v. Kennedy*, (S. Dak. 1904) 101 N. W. Rep. 1081; *Ellinger v. Com.*, 102 Va. 100; *Armour v. Western Constr. Co.*, 36 Wash. 529.

Title Construed in the Light of Existing Laws

583. Words Taken in Popular Sense. — See note 4.

584. Meaningless Words. — See note 1.

The Court Cannot Reconstruct a Title. — See note 2.

(4) *What Provisions Covered by Title* — (a) *Matters Germane to Subject Expressed* — *aa. IN GENERAL.* — See note 7.

on Same Subject. — *Perry County v. Lindemann*, (Ind. 1905) 73 N. E. Rep. 912.

583. 4. Act Sustained if Either Technical or Popular Meaning Sufficient. — *Com. v. Kebort*, 26 Pa. Super. Ct. 584, reversing 13 Pa. Dist. 677, 30 Pa. Co. Ct. 164.

Words Construed — Collateral. — *Matter of Campbell*, 143 Cal. 623.

"Formation" of Company. — *Wichita v. Missouri, etc., Telephone Co.*, 70 Kan. 441.

Public Waters. — *Boise City Irrigation, etc., Co. v. Stewart*, 10 Idaho 38, 62.

Revenue. — *In re Magnes*, 32 Colo. 527; *Omaha v. Hodgskins*, (Neb. 1903) 97 N. W. Rep. 346.

The Legislature Cannot Reverse the Meaning of the English Language and say in the body of the act that the words used in the title shall have a meaning which they would not otherwise have. *Turner v. Coffin*, 9 Idaho 338.

584. 1. Meaningless Words Discarded. — *Nichols, etc., Co. v. Loyd*, 111 Tenn. 145; *State v. Scott*, 32 Wash. 279.

2. Words May Be Supplied by Intendment if Necessity Is Obvious. — *Nichols, etc., Co. v. Loyd*, 111 Tenn. 145.

7. Title Covers Germane Matters — United States. — *Baker v. Kaiser*, (C. C. A.) 126 Fed. Rep. 317.

Alabama. — *Little v. State*, 137 Ala. 659; *Dudley v. Birmingham R., etc., Co.*, 139 Ala. 453; *Bray v. State*, 140 Ala. 172; *Montgomery v. Moore*, 140 Ala. 638; *Wallace v. Board of Revenue*, 140 Ala. 491; *Dickinson v. Cunningham*, 140 Ala. 527.

Arkansas. — *State v. Moore*, (Ark. 1905) 88 S. W. Rep. 881.

California. — *Deyoe v. Superior Ct.*, 140 Cal. 476, 98 Am. St. Rep. 73; *French v. Davidson*, 143 Cal. 658; *Southern Pac. R. Co. v. Pomona*, 144 Cal. 339; *Anglo-Californian Bank v. Field*, 146 Cal. 644.

Colorado. — *Graves v. People*, 32 Colo. 127; *Parsons v. People*, 32 Colo. 221; *Smith v. People*, 32 Colo. 251; *El Paso County v. Teller County*, 32 Colo. 310; *Gothard v. People*, 32 Colo. 11; *In re Magnes*, 32 Colo. 527; *School Dist. No. 1 v. School Dist. No. 7*, 33 Colo. 43; *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265.

Delaware. — *Monaghan v. Lewis*, (Del. 1905) 59 Atl. Rep. 948, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 582, 584.

Florida. — *Schiller v. State*, (Fla. 1905) 38 So. Rep. 706.

Georgia. — *Oglesby v. State*, 121 Ga. 602; *Fitts v. Atlanta*, 121 Ga. 567, 104 Am. St. Rep. 167.

Idaho. — *Boise City Irrigation, etc., Co. v. Stewart*, 10 Idaho 38, 62.

Illinois. — *People v. People's Gas Light, etc., Co.*, 205 Ill. 482, 98 Am. St. Rep. 244; *Chicago v. Cicero*, 210 Ill. 290; *Christy v. Elliott*, 216 Ill. 31.

Indiana. — *Hargis v. Perry County*, (Ind. 1905) 73 N. E. Rep. 915, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 583-590; *Levy v. State*, 161 Ind. 251; *Bowlin v. Cochran*, 161 Ind. 486; *Baltimore, etc., R. Co. v. Whiting*, 161 Ind. 228, followed in *Peelle v. State*, 161 Ind. 378; *Perry County v. Lindemann*, (Ind. 1905) 73 N. E. Rep. 912.

Iowa. — *Boggs v. School Tp.*, (Iowa 1905) 102 N. W. Rep. 796; *Sisson v. Buena Vista County*, (Iowa 1905) 104 N. W. Rep. 454.

Kansas. — *School Dist. No. 3 v. Atzenweiler*, 67 Kan. 609; *Manley v. Mayer*, 68 Kan. 377; *La Harpe v. Elm Tp. Gas, etc., Co.*, 69 Kan. 97; *State v. Hahn*, 70 Kan. 877; *Ex p. Schley*, (Kan. 1905) 80 Pac. Rep. 631.

Kentucky. — *Com. v. McConnell*, 116 Ky. 358; *Hyser v. Com.*, 116 Ky. 410; *Kentucky Live Stock Breeders' Assoc. v. Hager*, 85 S. W. Rep. 738, 27 Ky. L. Rep. 518.

Louisiana. — *Levy's Succession*, (La. 1905) 39 So. Rep. 37.

Maryland. — *Price v. Liquor License*, 98 Md. 346; *Queen Anne's County v. Talbot County*, 99 Md. 13.

Michigan. — *Paye v. Grosse Pointe Tp.*, 134 Mich. 524, 10 Detroit Leg. N. 638; *National Loan, etc., Co. v. Detroit*, 136 Mich. 451, 11 Detroit Leg. N. 68; *Grinky v. Wayne Probate Judge*, 137 Mich. 49, 11 Detroit Leg. N. 177; *Grimm v. Secretary of State*, 137 Mich. 134, 11 Detroit Leg. N. 218; *American Matinee Assoc. v. Secretary of State*, (Mich. 1905) 104 N. W. Rep. 141, 12 Detroit Leg. N. 262; *Fornia v. Frazer*, (Mich. 1905) 104 N. W. Rep. 147, 12 Detroit Leg. N. 259.

Minnesota. — *Gaare v. Clay County*, 90 Minn. 530; *State v. Boehm*, 92 Minn. 374; *State v. Gunn*, 92 Minn. 436; *Merchants' Nat. Bank v. East Grand Forks*, 94 Minn. 246.

Missouri. — *Ex p. Loving*, 178 Mo. 194; *State v. Allen*, 178 Mo. 555; *State v. Cantwell*, 179 Mo. 245; *State v. Preferred Tontine Mercantile Co.*, 184 Mo. 160.

Montana. — *State v. McKinney*, 29 Mont. 375.

Nebraska. — *Woodrough v. Douglas County*, (Neb. 1904) 98 N. W. Rep. 1002.

New Jersey. — *Vreeland v. Pierson*, 70 N. J. L. 508.

New York. — *New York v. Chelsea Jute Mills*, (Municipal Ct.) 43 Misc. (N. Y.) 266.

Ohio. — *Chittenden v. Columbus*, 26 Ohio Cir. Ct. 531.

Oregon. — *State v. Briggs*, 45 Oregon 366, 376; *Allison v. Hatton*, (Oregon 1905) 80 Pac. Rep. 101.

Pennsylvania. — *Com. v. Fisher*, 27 Pa. Super. Ct. 175; *Com. v. Caulfield*, 27 Pa. Super. Ct. 279, affirmed 211 Pa. St. 644; *Nicholson Borough*, 27 Pa. Super. Ct. 570; *Parker Tp. School Dist. v. Bruin Borough School Dist.*, 13 Pa. Dist. 769.

South Dakota. — *Harris v. Stearns*, 17 S. Dak. 439; *State v. Barber*, (S. Dak. 1904) 101

588. *bb.* MEANS TO FACILITATE ACCOMPLISHMENT OF PURPOSE. — See notes 2, 4.

589. *(b)* Matters Outside Scope of Title — *aa.* IN GENERAL. — See note 1.

590. *bb.* RESTRICTIVE TITLE — ACT BROADER THAN TITLE. — See note 2.

591. *(c)* Repeal of Previous Acts. — See notes 2, 3.

When Not Covered. — See note 4.

(5) Amending and Supplemental Acts — *(a)* What a Sufficient Title — *aa.* IN GENERAL. — See note 5.

592. See note 1.

Trivial Errors in Describing the Title. — See note 2.

N. W. Rep. 1078; *Garrigan v. Kennedy*, (S. Dak. 1904) 101 N. W. Rep. 1081.

Tennessee. — *Arbuckle v. McCutcheon*, 111 Tenn. 514; *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697.

Texas. — *Gulf, etc., R. Co. v. Fromme*, 98 Tex. 459; *Oak Cliff v. State*, (Tex. Civ. App. 1903) 77 S. W. Rep. 24, *affirmed* 97 Tex. 383; *Ex p. Hernan*, 45 Tex. Crim. 343.

Utah. — *Nystrom v. Clark*, 27 Utah 186.

Washington. — *State v. Graham*, 34 Wash. 81; *McKnight v. McDonald*, 34 Wash. 98; *Jensen-King-Bird Co. v. Williams*, 35 Wash. 161; *State v. Fraternal Knights, etc.*, 35 Wash. 338; *Seattle, etc., Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, *affirmed* without opinion 195 U. S. 624; *Goudy v. Meath*, 38 Wash. 126; *State v. Nichols*, 38 Wash. 309.

Term "Food" in Pure-food Law Broad Enough to Include Drink. — *Com. v. Kebort*, 26 Pa. Super. Ct. 584, *reversing* 13 Pa. Dist. 677, 30 Pa. Co. Ct. 164. *Contra*, *Com. v. Pfoutz*, 22 Lanc. L. Rev. 102.

588. 2. Means to Accomplish Purpose Expressed. — *Riley v. Charleston Union Station Co.*, 71 S. Car. 457.

4. Punishment for Violation. — *Schiller v. State*, (Fla. 1905) 38 So. Rep. 706; *Western Union Tel. Co. v. Braxtan*, (Ind. 1905) 74 N. E. Rep. 985; *State v. Preferred Tontine Mercantile Co.*, 184 Mo. 160; *Com. v. A—*, 30 Pa. Co. Ct. 554 (statute providing both civil and criminal remedies).

589. 1. Provisions Outside Scope of Title — *Alabama.* — *Watson v. State*, 140 Ala. 134.

California. — *Provident Mut. Bldg.-Loan Assoc. v. Davis*, 143 Cal. 253.

Idaho. — *Turner v. Coffin*, 9 Idaho 338.

Indiana. — *Wabash R. Co. v. Young*, 162 Ind. 102.

Nebraska. — *Wheeler v. State*, (Neb. 1905) 102 N. W. Rep. 773.

New York. — *Cahill v. Hogan*, 180 N. Y. 304, *affirming* 99 N. Y. App. Div. 619, which *affirmed* (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 360.

Pennsylvania. — *Com. v. Hazen*, 207 Pa. St. 52; *Moore v. Moore*, 23 Pa. Super. Ct. 73; *Barnes v. Philadelphia, etc., R. Co.*, 27 Pa. Super. Ct. 84, *affirming* 13 Pa. Dist. 363; *Com. v. Densmore*, 13 Pa. Dist. 639, 29 Pa. Co. Ct. 217; *Juniata Tp. Bridge*, 31 Pa. Co. Ct. 277; *Com. v. Rabe*, 31 Pa. Co. Ct. 365.

Tennessee. — *State v. Trewhitt*, 113 Tenn. 561.

Virginia. — *Ellinger v. Com.*, 102 Va. 100.

Washington. — *Armour v. Western Constr. Co.*, 36 Wash. 529; *State v. Case*, 39 Wash. 177.

Meaning of Words. — Two subjects of legislation cannot be germane where it is necessary

to change the meaning of words to place them in the same class or category, and where provisions applicable to one are incongruous when applied to the other. *Beary v. Narrau*, 113 La. 1034.

Substance Rather than Letter Considered. — *State v. Hanson*, 93 Minn. 182.

590. 2. Act Broader than Title — Restrictive Title. — *Matter of Melone*, 141 Cal. 331; *Hargis v. Perry County*, (Ind. 1905) 73 N. E. Rep. 915, *citing* 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590; *State v. Dalcourt*, 112 La. 420; *Smith v. Annapolis*, 97 Md. 736; *Kafka v. Wilkinson*, 99 Md. 238; *Watkins v. Bigelow*, 93 Minn. 210, *citing* 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 590; *State v. Hanson*, 93 Minn. 182; *People v. Howe*, 177 N. Y. 499, *reversing* on other grounds 88 N. Y. App. Div. 158; *Moore v. Moore*, 23 Pa. Super. Ct. 73; *Armour v. Western Constr. Co.*, 36 Wash. 529.

591. 2. Repeal by Implication. — *Woodrough v. Douglas County*, (Neb. 1904) 98 N. W. Rep. 1092.

Title Need Not Express Implied Amendment. — *Lang v. Friesenecker*, 213 Ill. 598.

3. Repeal of Germane Laws. — *Phillips v. Barnhart*, 27 Pa. Super. Ct. 26. See also *State v. Newland*, 37 Wash. 428.

Reference in Title to Repeal Mere Surplusage. — *Monaghan v. Lewis*, (Del. 1905) 59 Atl. Rep. 948.

4. Repeal Not Expressed in Title. — *Smith v. Annapolis*, 97 Md. 736; *State v. Sams*, (Neb. 1904) 99 N. W. Rep. 544.

5. Amending Act — Reference to Original Act Sufficient. — *Matter of Campbell*, 143 Cal. 623; *Com. v. Atty.-Gen.*, 13 Pa. Dist. 521, 30 Pa. Co. Ct. 53.

Reference by Giving Date of Approval and Page in Pamphlet Laws Insufficient. — *Dickinson Tp. Road*, 23 Pa. Super. Ct. 34.

Distinction Between Amending and Supplemental Acts. — See *Com. v. Atty.-Gen.*, 13 Pa. Dist. 521, 30 Pa. Co. Ct. 53; *Stroudsburg v. Shick*, 24 Pa. Super. Ct. 442. And see *infra*, this title, **708. 2.**

592. 1. Anglo-Californian Bank *v.* Field, 146 Cal. 644; *Sayer v. Brown*, 119 Ga. 539; *Chicago, etc., R. Co. v. Sporer*, (Neb. 1904) 100 N. W. Rep. 813; *Allentown v. Wagner*, 27 Pa. Super. Ct. 485; *Goodbar v. Memphis*, 113 Tenn. 20. See also *Bridgewater v. Big Beaver Bridge Co.*, 210 Pa. St. 105.

2. Error in Reference to Section Repealed — Repeal by Implication Only. — *State v. Knoll*, 65 Kan. 767.

Where Reference Insufficient Statute May Stand as Independent Act, — *State v. Scott*, 32 Wash. 279.

- 92.** *bb.* REFERENCE TO AMENDED ACT BY NUMBER ONLY. — See notes 4, 5.
- 593.** (b) **Matters Covered by Title — Provisions Germane to Original Title.** — See note 2.
- 594.** See note 1.
- Independent Title to Amending Act. — See note 4.
- (c) **Matters Outside Scope of Title.** — See note 5.
- Restricted Title to Amending Act. — See note 6.
- 595.** See note 1.
- (6) *Repealing Acts.* — See note 2.
- (7) *How Far Defective Title Vitiates Act* — (a) **When Void in Part Only.**
- See notes 4, 5.

592. 4. Reference by Number Sufficient. — *Ross v. Aguirre*, 191 U. S. 60 (*California* statute); *People v. Oates*, 142 Cal. 12; *State v. Jones*, 9 Idaho 693; *Chicago, etc., R. Co. v. Sporer*, (Neb. 1904) 100 N. W. Rep. 813; *State v. Scott*, 32 Wash. 279. See also *Hollibaugh v. Hehn*, 13 Wyo. 269, as to designation of one of the several compilations in a statute amending the Revised Statutes.

5. Insufficient Identification of Act Amended. — *State v. Brown*, 29 Mont. 179; *Com. v. Schulte*, 26 Pa. Super. Ct. 95, *affirming* 13 Pa. Dist. 294.

593. 2. Covers Provisions Germane to Original Title — Alabama. — *Bray v. State*, 140 Ala. 172.

Idaho. — *State v. Jones*, 9 Idaho 693.

Illinois. — *Lang v. Friesenecker*, 213 Ill. 598.

Kansas. — *Leavenworth v. Leavenworth City, etc., Water Co.*, 69 Kan. 82; *La Harpe v. Elm Tp. Gas, etc., Co.*, 69 Kan. 97.

Maryland. — *Brown v. Maryland Telephone, etc., Co.*, 101 Md. 574.

Minnesota. — *State v. Crosby*, 92 Minn. 176.

Nebraska. — *Moline v. State*, (Neb. 1904) 100 N. W. Rep. 810; *Chicago, etc., R. Co. v. Sporer*, (Neb. 1904) 100 N. W. Rep. 813.

Pennsylvania. — *Stroudsburg v. Shick*, 24 Pa. Super. Ct. 442; *Com. v. Webster*, 13 Pa. Dist. 199; *Weeks v. Franklin*, 13 Pa. Dist. 286, 29 Pa. Co. Ct. 47; *Com. v. Atty.-Gen.*, 13 Pa. Dist. 521, 30 Pa. Co. Ct. 53; *Hollenbach v. Berks County*, 14 Pa. Dist. 243; *Com. v. Rothermal*, 30 Pa. Co. Ct. 145.

Tennessee. — *Goodbar v. Memphis*, 113 Tenn. 20; *Memphis v. Hastings*, 113 Tenn. 142.

An Amendatory Act Which Is Restricted and Local in Its Application, though amendatory of a general statute, is not rendered invalid by not expressing that fact in its title. *Humboldt Bldg. Assoc. Co. v. Ducker*, (Ky. 1904) 82 S. W. Rep. 969.

Act Affecting Another Statute than One Expressly Amended. — See *McEwan v. Pennsylvania, etc., R. Co.*, (N. J. 1905) 60 Atl. Rep. 1130.

Act Supplemental of One of Several Codes. — See *Deyoe v. Superior Ct.*, 140 Cal. 476, 98 Am. St. Rep. 73; *Butte County v. Merrill*, 141 Cal. 396.

594. 1. Purposes of Amending Act Different from Act Amended. — See *Hollenbach v. Berks County*, 14 Pa. Dist. 243.

Amending Act May Create New Offenses. — *Hyser v. Com.*, 116 Ky. 410.

Amending Act May Radically Change Provisions of Original Act. — *Sayer v. Brown*, 119 Ga. 539.

4. Independent Title. — *Com. v. Reinecke Coal*

Min. Co., 117 Ky. 885; *Dickinson Tp. Road*, 23 Pa. Super. Ct. 34; *Stroudsburg v. Shick*, 24 Pa. Super. Ct. 442; *Com. v. Webster*, 13 Pa. Dist. 199.

5. Matters Outside Scope of Title. — *State v. Jones*, 9 Idaho 693; *Beary v. Narrau*, 113 La. 1034; *Smith v. Annapolis*, 97 Md. 736; *People v. De Blaay*, 137 Mich. 402, 11 Detroit Leg. N. 323; *Watkins v. Bigelow*, 93 Minn. 210; *Godwin v. Harris*, (Neb. 1904) 98 N. W. Rep. 439; *Knight v. Lancaster County*, (Neb. 1905) 103 N. W. Rep. 1064; *Moore v. Moore*, 23 Pa. Super. Ct. 73; *Nissley v. Lancaster County*, 13 Pa. Dist. 489; *Com. v. Atty.-Gen.*, 13 Pa. Dist. 521, 30 Pa. Co. Ct. 53; *Hollenbach v. Berks County*, 14 Pa. Dist. 243; *State v. Fields*, 68 S. Car. 148. See also *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201; *Shreveport v. Tidwell*, 112 La. 172.

6. Restricted Title to Amending Act. — *Smith v. Annapolis*, 97 Md. 736; *People v. Howe*, 177 N. Y. 499, *reversing* on other grounds 88 N. Y. App. Div. 158; *Cahill v. Hogan*, 180 N. Y. 304, *affirming* 99 N. Y. App. Div. 619, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 360.

Effect of Specification of Details. — Where the title to an act which is not a supplemental act, but only amendatory, specifies in detail the nature and extent of the changes which it proposes to make in the original act, its provisions must be limited to the subjects specified in its title. *Martin v. Luzerne County*, 13 Pa. Dist. 800.

595. 1. Amendment of Specified Section. — *Beary v. Narrau*, 113 La. 1034, *citing* *State v. American Sugar Refining Co.*, 106 La. 565; *Preston v. Stover*, (Neb. 1903) 97 N. W. Rep. 812.

2. Cannot Contain Affirmative Legislation. — *Kafka v. Wilkinson*, 99 Md. 238; *State v. Sams*, (Neb. 1904) 99 N. W. Rep. 544. See also *Queen Anne's County v. Talbot County*, 99 Md. 13.

4. Oak Cliff v. State, (Tex. Civ. App. 1903) 77 S. W. Rep. 24, *affirmed* 97 Tex. 383; *McLaury v. Watelsky*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1045.

5. Void Only as to Provisions Outside Title. — *Watson v. State*, 140 Ala. 134; *Deyoe v. Superior Ct.*, 140 Cal. 476, 98 Am. St. Rep. 73; *State v. Savant*, (La. 1905) 38 So. Rep. 974; *Smith v. Annapolis*, 97 Md. 736; *Kafka v. Wilkinson*, 99 Md. 238; *State v. Cronin*, (Neb. 1904) 101 N. W. Rep. 325, 327; *State v. Davis*, (N. J. 1905) 61 Atl. Rep. 2; *Corscadden v. Haswell*, 88 N. Y. App. Div. 158, *reversed* on other grounds 177 N. Y. 499; *Moore v. Moore*,

596. VI. PRINCIPLES OF INTERPRETATION AND CONSTRUCTION — 1. Meaning of Terms — A Canon or Rule of Construction. — See note 6.

597. 2. Construction a Judicial Function. — See notes 1, 2.

3. Object and General Scope of Doctrine. — See notes 3, 4, 5.

598. 4. Whether Intention Deduced from Letter or Spirit of Statute — a. WHERE MEANING PLAIN, THE LETTER CONTROLS — (1) General Statement. — See notes 1, 2.

23 Pa. Super. Ct. 73; *Com. v. Caulfield*, 27 Pa. Super. Ct. 279, *affirmed* 211 Pa. St. 644; *Com. v. Rabe*, 31 Pa. Co. Ct. 365.

596. 6. Rules as to Rights Apart from Remedy Same in Equity as at Law. — A. L. & E. F. Goss Co. v. Greenleaf, 98 Me. 436.

Legislature Presumed to Frame Statutes with Reference to Rules. — A. L. & E. F. Goss Co. v. Greenleaf, 98 Me. 436.

597. 1. Construction for Court. — *Yates v. Collins*, 82 S. W. Rep. 282, 26 Ky. L. Rep. 558, rehearing denied (Ky. 1904) 82 S. W. Rep. 973; *Evans v. Police Jury*, 114 La. 771; *State v. Fry*, 186 Mo. 198; *Barnett v. Pemiscot County Ct.*, 111 Mo. App. 693; *McCall v. Webb*, 135 N. Car. 356. See also *Caddo v. Red River*, 114 La. 366, 370.

Election Laws. — *State v. Metcalf*, (S. Dak. 1904) 100 N. W. Rep. 923; *State v. Houser*, 122 Wis. 534.

Meaning of Statutory Language Question of Law, Not of Fact. — *National F. Ins. Co. v. Hanberg*, 215 Ill. 378; *People v. Peden*, 109 Ill. App. 560.

Whether an Enactment Is General or Local, public or private, is a question of law for the court, and is not determined by the nature of the act in which the enactment is found, nor by its publication in the public or private statutes. — *State v. Patterson*, 134 N. Car. 612.

2. Courts Must Not Legislate. — *U. S. v. York*, 131 Fed. Rep. 323; *White v. U. S.*, 191 U. S. 545, *citing* *Dewey v. U. S.*, 178 U. S. 510; *Austin v. Cahill*, (Tex. 1905) 88 S. W. Rep. 542.

3. Legislative Intent the Object of Interpretation — United States. — *Interstate Commerce Commission v. Baird*, 194 U. S. 25; *U. S. v. Crossley*, 196 U. S. 327; *Goldenberg v. U. S.*, (C. C. A.) 130 Fed. Rep. 108, *affirming* 124 Fed. Rep. 1003; *Miller v. U. S.*, (C. C. A.) 133 Fed. Rep. 337.

Idaho. — *Idaho Mut. Co-operative Ins. Co. v. Myer*, 10 Idaho 294.

Indiana. — *Hendershot v. State*, 162 Ind. 69; *Abbott v. Inman*, 35 Ind. App. 262.

Kentucky. — *Louisville v. Wehmhoff*, 116 Ky. 812, 845.

Missouri. — *Grimes v. Reynolds*, 94 Mo. App. 578, 589, *affirmed* 184 Mo. 679, 694.

New Hampshire. — *Williams v. Park*, 72 N. H. 305.

New Jersey. — *Walker v. Hyland*, 70 N. J. L. 69.

New Mexico. — *Territory v. Albright*, (N. Mex. 1904) 78 Pac. Rep. 204; *Territory v. Gutierrez*, (N. Mex. 1904) 78 Pac. Rep. 130.

New York. — *New York Cent., etc., R. Co. v. Buffalo, etc., Electric R. Co.*, 96 N. Y. App. Div. 471; *Topham v. Interurban St. R. Co.*, 96 N. Y. App. Div. 323, *reversing* on other grounds (Supm. Ct. App. T.) 42 Misc. (N. Y.) 503.

North Carolina. — *New Hanover County v. Armour Packing Co.*, 135 N. Car. 62.

Oklahoma. — *Randolph v. Hudson*, 12 Okla. 516.

Pennsylvania. — *In re Martin*, 209 Pa. St. 266; *Com. v. Brown*, 210 Pa. St. 29, *affirming* 25 Pa. Super. Ct. 269; *Com. v. Real Estate Trust Co.*, 211 Pa. St. 51, *affirming* 26 Pa. Super. Ct. 149; *Perkiomen, etc., Turnpike Road*, 25 Pa. Super. Ct. 462, *affirming* 28 Pa. Co. Ct. 545; *Roddy v. Reynolds*, 31 Pa. Co. Ct. 145.

South Carolina. — *Kitchen v. Southern R. Co.*, 68 S. Car. 554.

Washington. — *Scouten v. Whatcom*, 33 Wash. 273; *State v. Maynard*, 35 Wash. 168.

Construction Defined as Ascertainment of Meaning of Language to Those Using It. — *Opinion of Justices*, 72 N. H. 605.

4. Courts Must Find Intent of Legislature in Statute Itself. — *Ross v. Beaudry*, (1905) A. C. 570; *White v. U. S.*, 191 U. S. 545; *Holmes v. Marshall*, 145 Cal. 777, 104 Am. St. Rep. 86; *Cummings v. People*, 211 Ill. 392.

5. When Province of Construction or Interpretation Begins. — *Nottage v. Sawmill Phoenix*, 133 Fed. Rep. 979; *Johnson v. State*, 141 Ala. 7; *Taylor v. School Town*, 33 Ind. App. 675; *Davern v. Decatur County*, 34 Ind. App. 44; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931; *State v. Houser*, 122 Wis. 534; *State v. Bisping*, 123 Wis. 267; *Smith v. Chicago, etc., R. Co.*, 124 Wis. 120. See also *People v. Fitzgerald*, 180 N. Y. 269, *affirming* 96 N. Y. App. Div. 242.

598. 1. Ordinary Reading of Statute Controls Primarily — United States. — *Lochner v. New York*, 198 U. S. 45, *reversing* on other grounds 177 N. Y. 145, which *affirmed* 73 N. Y. App. Div. 120; *Moffitt v. U. S.*, (C. C. A.) 128 Fed. Rep. 375; *U. S. v. York*, 131 Fed. Rep. 323.

Arkansas. — *Towson v. Denson*, (Ark. 1905) 86 S. W. Rep. 661.

Colorado. — *Litch v. People*, 19 Colo. App. 421.

Georgia. — *Barnes v. Carter*, 120 Ga. 895.

Illinois. — *Gillett v. Gillett*, 207 Ill. 136.

Indiana. — *Pittsburgh, etc., R. Co. v. Lightheiser*, 163 Ind. 247.

Iowa. — *Woodring v. Rooney*, 121 Iowa 595.

Kansas. — *Fischer v. Moore*, 69 Kan. 191; *State v. Kelly*, (Kan. 1905) 81 Pac. Rep. 450.

Kentucky. — *Galloway v. Bradburn*, 82 S. W. Rep. 1013, 26 Ky. L. Rep. 977.

Massachusetts. — *Greenfield, etc., St. R. Co. v. Greenfield*, 187 Mass. 352.

Missouri. — *State v. Butler*, 178 Mo. 272.

New York. — *O'Reilly v. Brooklyn Heights R. Co.*, 95 N. Y. App. Div. 253, *affirmed* 179 N. Y. 450; *Crapo v. Syracuse*, 98 N. Y. App. Div. 376.

North Carolina. — *New Hanover County v. Armour Packing Co.*, 135 N. Car. 62.

Oregon. — *Barringer v. Loder*, (Oregon 1905) 81 Pac. Rep. 778.

598. (2) Results, Motives, and Policy Not Considered. — See note 3.

Pennsylvania. — McGonnell's License, 209 Pa. St. 327, *reversing* on other grounds 24 Pa. Super. Ct. 642; *Russ v. Com.*, 210 Pa. St. 544, 105 Am. St. Rep. 825, *reversing* 7 Dauphin Co. Rep. (Pa.) 158; *Com. v. Real Estate Trust Co.*, 211 Pa. St. 51, *affirming* 26 Pa. Super. Ct. 149; *Com. v. Mellet*, 27 Pa. Super. Ct. 41; *Martin v. Greenwood*, 27 Pa. Super. Ct. 245, *reversing* 14 Pa. Dist. Ct. 23, 30 Pa. Co. Ct. 573.

Virginia. — Funkhouser *v.* Spahr, 102 Va. 306.

Canada. — Canadian Pac. R. Co. *v.* James Bay R. Co., 36 Can. Sup. Ct. 42.

598. 2. Words to Be Taken in Ordinary Acceptation — *England.* — Lamplough *v.* Kent Waterworks Co., (1903) 1 Ch. 375, *affirmed* (1904) A. C. 27; *Urban Dist. Council v. Rural Dist. Council*, (1904) A. C. 171, 90 L. T. N. S. 653, *reversing* (1903) 1 K. B. 554; *Toronto R. Co. v. Toronto*, (1904) A. C. 809, 91 L. T. N. S. 541; *Fenton v. Thorley*, (1903) A. C. 443; *Higgins v. Campbell*, (1904) 1 K. B. 328, 89 L. T. N. S. 660.

Canada. — *In re Coal Mines Regulation Act*, 10 British Columbia 408, *per* Martin, J.; *Canadian Pac. R. Co. v. James Bay R. Co.*, 36 Can. Sup. Ct. 42.

United States. — *U. S. v. Burton*, 131 Fed. Rep. 552; *Hyde v. Shine*, 199 U. S. 62.

Alabama. — *State v. Shugart*, 138 Ala. 86, 100 Am. St. Rep. 17.

Alaska. — *In re Pacific Cold Storage Co.*, 1 Alaska 429.

Arkansas. — *Sandefur-Julian Co. v. State*, 72 Ark. 11.

California. — *Mill Valley v. House*, 142 Cal. 698.

Colorado. — *Litch v. People*, 19 Colo. App. 421.

Florida. — *Simmons v. Hanne*, (Fla. 1905) 39 So. Rep. 77.

Idaho. — *Phipps v. Grover*, 9 Idaho 415.

Illinois. — *Tinker v. Catlin*, 205 Ill. 108, *reversing* 102 Ill. App. 264.

Indiana. — *Lowe v. Lawrenceburg Roller Mills Co.*, 161 Ind. 495; *State v. Flynn*, 161 Ind. 554; *Townsend v. Meneley*, (Ind. App. 1905) 74 N. E. Rep. 274; *Cheney v. State*, (Ind. 1905) 74 N. E. Rep. 892; *Indianapolis, etc., Rapid Transit R. Co. v. Andis*, 33 Ind. App. 625.

Iowa. — *Beickler v. Guenther*, 121 Iowa 419; *Waukon v. Fisk*, 124 Iowa 464; *Banco de Sonora v. Bankers' Mut. Casualty Co.*, 124 Iowa 576, 104 Am. St. Rep. 367; *McLeod v. Chicago, etc., R. Co.*, 125 Iowa 270.

Kansas. — *Bailey v. Kelly*, 70 Kan. 869.

Kentucky. — *Standard Oil Co. v. Com.*, 82 S. W. Rep. 1020, 26 Ky. L. Rep. 985; *Wilson v. Petzold*, 116 Ky. 873; *Lewis v. Maysville, etc., R. Co.*, (Ky. 1903) 76 S. W. Rep. 526; *Hackett v. Brooksville Graded School Dist.*, (Ky. 1905) 87 S. W. Rep. 792.

Louisiana. — *Louisiana Western R. Co. v. Crossman*, 111 La. 611.

Maryland. — *State v. Shipley*, 98 Md. 657.

Massachusetts. — *Barron v. Boston*, 187 Mass. 168; *Green v. Sklar*, 188 Mass. 363.

Michigan. — *Atty.-Gen. v. McVichie*, 138 Mich. 387, 11 Detroit Leg. N. 591.

Mississippi. — *Southern R. Co. v. Cheaves*, 84 Miss. 565.

Missouri. — *Kneisley Lumber Co. v. Edward B. Stoddard Co.*, 113 Mo. App. 306.

Montana. — *Oppenheimer v. Regan*, 32 Mont. 110; *Pirrie v. Moule*, (Mont. 1905) 81 Pac. Rep. 390.

Nebraska. — *Dodge County v. Saunders County*, (Neb. 1903) 97 N. W. Rep. 617, *rehearing denied* (Neb. 1904) 100 N. W. Rep. 934; *Cizek v. Cizek*, (Neb. 1904) 99 N. W. Rep. 28, *reversing* on rehearing on other grounds (Neb. 1903) 96 N. W. Rep. 657; *McCaffrey v. Omaha*, (Neb. 1904) 101 N. W. Rep. 251.

New Jersey. — *Alleghany Co. v. Allen*, 69 N. J. L. 270; *Bates Mach. Co. v. Trenton, etc., R. Co.*, 70 N. J. L. 684.

North Carolina. — *Graves v. Moore County*, 135 N. Car. 49.

Ohio. — *Lake Shore, etc., R. Co. v. Liidtke*, 69 Ohio St. 384; *Leo Ebert Brewing Co. v. State*, 25 Ohio Cir. Ct. 601.

Oklahoma. — *McMillan v. Payne County*, 14 Okla. 659.

Oregon. — *Egan v. North American Sav., etc., Co.*, 45 Oregon 139; *Schroeder v. Multnomah County*, 45 Oregon 92.

Pennsylvania. — *Brown v. Radnor Tp. Electric Light Co.*, 208 Pa. St. 453; *Com. v. Real Estate Trust Co.*, 211 Pa. St. 51, *affirming* 26 Pa. Super. Ct. 149; *Jeannette Borough School Directors*, 14 Pa. Dist. 352.

Rhode Island. — *Fox v. Clarke*, 25 R. I. 515.

South Dakota. — *Crary v. Chicago, etc., R. Co.*, (S. Dak. 1904) 100 N. W. Rep. 18.

Texas. — *Conn v. Terrell*, 97 Tex. 578; *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214.

Utah. — *State v. Shockley*, 29 Utah 25.

Washington. — *Puget Sound Pub. Co. v. Times Printing Co.*, 33 Wash. 551; *Compton v. Seattle*, 38 Wash. 514.

Wisconsin. — *State v. Zillmann*, 121 Wis. 472; *Buell v. Arnold*, 124 Wis. 65.

See also *infra*, this title, 605. 9.

3. Unambiguous Meaning Must Be Enforced — *United States.* — *U. S. v. McClellan*, 127 Fed. Rep. 971; *Moffitt v. U. S.*, (C. C. A.) 128 Fed. Rep. 375; *Wolff v. Choctaw, etc., R. Co.*, 133 Fed. Rep. 601; *Kane v. Erie R. Co.*, (C. C. A.) 133 Fed. Rep. 681, *reversing* 128 Fed. Rep. 474; *Westinghouse Electric, etc., Co. v. Stanley Instrument Co.*, (C. C. A.) 138 Fed. Rep. 823; *White v. U. S.*, 191 U. S. 545; *Lowe v. U. S.*, 38 Ct. Cl. 170, *affirmed* 194 U. S. 193; *Thomas v. U. S.*, 38 Ct. Cl. 113, 710, *reversed* on other grounds 195 U. S. 418; *Smith v. U. S.*, 38 Ct. Cl. 257; *Switzer v. U. S.*, 38 Ct. Cl. 275; *Fulford v. U. S.*, 38 Ct. Cl. 548.

Alaska. — *Brace v. Solner*, 1 Alaska 361.

California. — *Wilson v. Fisher*, 140 Cal. 188.

Colorado. — *Hornbeke v. White*, (Colo. App. 1904) 76 Pac. Rep. 926.

District of Columbia. — *Holden v. U. S.*, 24 App. Cas. (D. C.) 318.

Illinois. — *In re Northwestern University*, 206 Ill. 64; *Gillett v. Gillett*, 207 Ill. 136.

Indiana. — *Kerr v. Perry School Tp.*, 162 Ind. 310; *Kemp v. Adams*, 164 Ind. 258; *Pere Marquette R. Co. v. Baertiz*, (Ind. 1905) 74 N. E.

599. See note 1.

Rep. 51; Chicago, etc., *R. Co. v. Indianapolis*, etc., *Traction Co.*, (Ind. 1905) 74 N. E. Rep. 513; *Cheney v. State*, (Ind. 1905) 74 N. E. Rep. 892.

Indian Territory. — *Campbell v. Cameron*, 5 Indian Ter. 323.

Iowa. — *Wells v. Kelley*, 121 Iowa 577.

Kansas. — *Fischer v. Moore*, 69 Kan. 191; *Clark v. Mitchell County*, 69 Kan. 542; *State v. Kelly*, (Kan. 1905) 81 Pac. Rep. 450.

Kentucky. — *Johnson v. Bradley-Watkins Tie Co.*, 85 S. W. Rep. 726, 27 Ky. L. Rep. 540; *Hager v. Lucas*, 86 S. W. Rep. 552, 27 Ky. L. Rep. 710.

Louisiana. — *State v. Williams*, 110 La. 957.

Missouri. — *State v. Vette*, 179 Mo. 408.

Montana. — *Story v. Woolverton*, 31 Mont. 346.

Nebraska. — *State v. Insurance Co. of North America*, (Neb. 1904) 99 N. W. Rep. 36, reversed on rehearing on other grounds (Neb. 1904) 100 N. W. Rep. 405.

New Mexico. — *Territory v. Gutierrez*, (N. Mex. 1904) 78 Pac. Rep. 139.

New York. — *People v. Miller*, 94 N. Y. App. Div. 567; *Dauids v. Brooklyn Heights R. Co.*, 104 N. Y. App. Div. 23, reversing (County Ct.) 45 Misc. (N. Y.) 208, affirmed 182 N. Y. 526; *People v. Columbia County*, 105 N. Y. App. Div. 319.

North Dakota. — *State v. Stark County*, (N. Dak. 1905) 103 N. W. Rep. 913.

Ohio. — *Detroit Southern R. Co. v. Lawrence County*, 71 Ohio St. 454; *Drake v. Cincinnati*, 25 Ohio Cir. Ct. 373.

Oregon. — *Sehlbrede v. State Land Board*, (Oregon 1905) 81 Pac. Rep. 702.

Pennsylvania. — *Jermyn v. Scranton*, 212 Pa. St. 598, affirming 5 Lack. Jur. (Pa.) 293; *Pennsylvania R. Co. v. Bogert*, 209 Pa. St. 589.

South Carolina. — *Kitchen v. Southern R. Co.*, 68 S. Car. 554.

South Dakota. — *Erickson v. Conniff*, (S. Dak. 1904) 101 N. W. Rep. 1104.

Texas. — *International, etc., R. Co. v. Still*, (Tex. Civ. App. 1905) 88 S. W. Rep. 257.

Virginia. — *Immigration Soc. v. Com.*, 103 Va. 46.

Washington. — *State v. Callvert*, 34 Wash. 58; *State v. Maynard*, 35 Wash. 168; *Ridgway v. Davenport*, 37 Wash. 134.

West Virginia. — *Waldron v. Taylor*, 52 W. Va. 284.

Wisconsin. — *State v. Houser*, 122 Wis. 534; *State v. Bisping*, 123 Wis. 267; *Smith v. Chicago, etc., R. Co.*, 124 Wis. 120.

Canada. — *Montreal v. Cantin*, 35 Can. Sup. Ct. 223.

599. 1. When Meaning Plain, Consequences and Motives Not to Be Considered — *United States*. — *Citizens' Bank v. Parker*, 192 U. S. 73, reversing 52 La. Ann. 1086; *Havmes v. Brown*, 122 Fed. Rep. 525; *U. S. v. Williams*, 132 Fed. Rep. 894; *U. S. v. Rossi*, (C. C. A.) 133 Fed. Rep. 380; *Sharp v. U. S.*, (C. C. A.) 138 Fed. Rep. 878, reversing 13 Okla. 522.

Arkansas. — *Towson v. Denson*, (Ark. 1905) 86 S. W. Rep. 661.

California. — *Matter of Firth*, 145 Cal. 236;

Marin County Water Co. v. Marin County, 145 Cal. 586.

Georgia. — *Sutton v. Hancock*, 118 Ga. 436; *Barnes v. Carter*, 120 Ga. 895; *Hightower v. Hollis*, 121 Ga. 159.

Illinois. — *Fish v. McGann*, 205 Ill. 179, affirming 107 Ill. App. 538; *Dorman v. Droll*, 215 Ill. 262; *Andel v. People*, 106 Ill. App. 558; *Wilson v. Cedarville*, 109 Ill. App. 316.

Indiana. — *Clinton County v. Davis*, 162 Ind. 60; *Davern v. Decatur County*, 34 Ind. App. 44.

Iowa. — *Matter of Kuhn*, 125 Iowa 449; *Bell v. Hamm*, 127 Iowa 343.

Kansas. — *Atchison, etc., R. Co. v. Atchison Grain Co.*, 68 Kan. 585, modifying on rehearing (Kan. 1902) 70 Pac. Rep. 933; *State v. American Book Co.*, 69 Kan. 1; *La Harpe v. Elm Tp. Gas, etc., Co.*, 69 Kan. 97.

Louisiana. — *State v. Bordelon*, 113 La. 21; *Conery v. His Creditors*, 113 La. 420.

Mississippi. — *Yazoo, etc., R. Co. v. Humphrey*, 83 Miss. 721. See also *Orrell v. Bay Mfg. Co.*, 83 Miss. 800.

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North Dakota. — *Roberts v. Bope*, (N. Dak. 1905) 103 N. W. Rep. 935; *Knight v. Cass County*, (N. Dak. 1905) 103 N. W. Rep. 940.

Ohio. — *Roe v. New York, etc., R. Co.*, 13 Ohio Dec. 260, affirmed 25 Ohio Cir. Ct. 628.

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Tennessee. — *Webster v. State*, 110 Tenn. 491.

Texas. — *Tinkle v. Sweeney*, 97 Tex. 190; *Minter v. State*, 33 Tex. Civ. App. 182.

Washington. — *Healy Lumber Co. v. Morris*, 33 Wash. 490, 99 Am. St. Rep. 964; *State v. Callvert*, 34 Wash. 58; *Johnson v. Seattle Electric Co.*, 39 Wash. 211; *Price v. Seattle*, 39 Wash. 376.

Wisconsin. — *Smith v. Chicago, etc., R. Co.*, 124 Wis. 120.

Wyoming. — *State v. Grant*, (Wyo. 1905) 81 Pac. Rep. 795.

Canada. — *In re Coal Mines Regulation Act*, 10 British Columbia 408, per Martin, J. See also *Toronto v. Bell Telephone Co.*, 6 Ont. L. Rep. 335, reversing 3 Ont. L. Rep. 465, affirmed (1905) A. C. 52.

And see *supra*, this title, **569. 5 et seq.**, and the title **CONSTITUTIONAL LAW, 1087. 1 et seq.**

English Practice Contrasted. — See *Schnaier v. Navarre Hotel, etc., Co.*, 182 N. Y. 83, reversing 82 N. Y. App. Div. 25.

600. (3) *Nothing Added to or Taken from Statute* — (a) **General Statement.**
— See note 2.

601. **Exceptions and General Words.** — See notes 1, 2.

600. 2. **Court May Not Add to or Take from Statute** — *England.* — See *Municipal Council v. Austral Freezing Works*, (1905) A. C. 161.

United States. — *U. S. v. St. Anthony R. Co.*, 192 U. S. 524; *U. S. v. United Verde Copper Co.*, 196 U. S. 207, *affirming* (Ariz. 1903) 71 Pac. Rep. 954; *U. S. v. Crosley*, 196 U. S. 327; *In re Page*, 128 Fed. Rep. 317; *Moffitt v. U. S.*, (C. C. A.) 128 Fed. Rep. 375; *U. S. v. York*, 131 Fed. Rep. 323; *Dolan v. U. S.*, (C. C. A.) 133 Fed. Rep. 440; *U. S. v. Twenty Boxes Corn Whisky*, (C. C. A.) 133 Fed. Rep. 910, *affirming* 123 Fed. Rep. 135; *Chance v. U. S.*, 38 Ct. Cl. 75.

Arizona. — See *Territory v. Flores*, 3 Ariz. 215.

Arkansas. — *Ex p. Deeds*, (Ark. 1905) 87 S. W. Rep. 1030.

Georgia. — *Turner v. Turner*, 123 Ga. 5, 107 Am. St. Rep. 79.

Illinois. — *Andel v. People*, 106 Ill. App. 558.

Indiana. — *Pere Marquette R. Co. v. Baertz*, (Ind. 1905) 74 N. E. Rep. 51; *Chicago, etc., R. Co. v. Indianapolis, etc., Traction Co.*, (Ind. 1905) 74 N. E. Rep. 513.

Iowa. — *Wells v. Kelley*, 121 Iowa 577; *State v. Armour Packing Co.*, 124 Iowa 323. See also *Westlake v. Scott County*, 125 Iowa 314.

Kansas. — *State v. American Book Co.*, 69 Kan. 1; *Fischer v. Moore*, 69 Kan. 191; *Clark v. Mitchell County*, 69 Kan. 542.

Louisiana. — *New York L. Ins. Co. v. Neal*, 114 La. 652. See also *Bennett v. Police Jury*, 113 La. 68.

Maine. — See *Curtis v. Androscoggin Lodge No. 24*, 99 Me. 356.

Maryland. — *Storck v. Baltimore*, 101 Md. 476. See also *MacLellan v. Marine*, 98 Md. 53.

Michigan. — *Blanchard v. Detroit, etc., R. Co.*, (Mich. 1905) 103 N. W. Rep. 170, 12 Detroit Leg. N. 30.

Missouri. — *State v. Woodside*, 112 Mo. App. 451.

Nebraska. — *State v. Insurance Co. of North America*, (Neb. 1904) 99 N. W. Rep. 36, *reversed* on rehearing on other grounds (Neb. 1904) 100 N. W. Rep. 405.

New Hampshire. — See *Wilder v. Concord*, 72 N. H. 259.

New Jersey. — *De Raismes v. De Raismes*, 70 N. J. L. 15. See also *Knickerbocker Trust Co. v. Penn Cordage Co.*, 66 N. J. Eq. 305.

New York. — *People v. Deyo*, 181 N. Y. 425, *reversing* 103 N. Y. App. Div. 126; *People v. Monroe County Ct.*, 105 N. Y. App. Div. 1.

North Carolina. — *New Hanover County v. Armour Packing Co.*, 135 N. Car. 62; *Nicholson v. Transylvania R. Co.*, 138 N. Car. 516.

North Dakota. — *Kennedy v. Stonehouse*, 13 N. Dak. 232.

Ohio. — See *Jones v. Franklin County*, 25 Ohio Cir. Ct. 510.

Oklahoma. — *Geneseo First Nat. Bank v. National Live Stock Bank*, 13 Okla. 719.

Pennsylvania. — *Olyphant Sewage Drainage Co. v. Olyphant*, 211 Pa. St. 526; *Milton Nat. Bank v. Beaver*, 25 Pa. Super. Ct. 494.

Rhode Island. — See *In re Tillinghast*, 25 R. I. 338.

South Dakota. — *In re Larsen*, (S. Dak. 1904) 100 N. W. Rep. 738; *Erickson v. Conniff*, (S. Dak. 1904) 101 N. W. Rep. 1104; *Gibson v. Allen*, (S. Dak. 1905) 104 N. W. Rep. 275.

Texas. — *Medlin v. Seideman*, (Tex. Civ. App. 1905) 88 S. W. Rep. 250; *Runnels v. State*, 45 Tex. Crim. 446; *Cox v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 812.

Utah. — See *Matter of Pugsley*, 27 Utah 489.

Washington. — *Johnson v. Seattle Electric Co.*, 39 Wash. 211.

Wisconsin. — *Rude v. St. Marie*, 121 Wis. 634; *Birdsall v. Kewaunee County*, 124 Wis. 576; *Hanley v. State*, 125 Wis. 306.

Court Cannot Modify, Amend, or Repeal Statute. — *Barnes v. Carter*, 120 Ga. 895.

601. 1. **Limitations or Exceptions Not to Be Imported into Statute** — *England.* — *Ross v. Beaudry*, (1905) A. C. 570.

United States. — *Holden v. Stratton*, 198 U. S. 202, *reversing* (C. C. A.) 113 Fed. Rep. 141; *Hyde v. Shine*, 199 U. S. 62; *Schauble v. Schulz*, (C. C. A.) 137 Fed. Rep. 389. See also *James v. Appel*, 192 U. S. 129. *Compare U. S. v. Joe Dick*, 134 Fed. Rep. 988; *Jacobson v. Massachusetts*, 197 U. S. 11, *affirming* 183 Mass. 242; *United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co.*, 133 Fed. Rep. 930.

California. — *Holmes v. Marshall*, 145 Cal. 777, 104 Am. St. Rep. 86; *People v. Curtis*, (Cal. 1905) 81 Pac. Rep. 674.

District of Columbia. — *Holden v. U. S.*, 24 App. Cas. (D. C.) 318.

Idaho. — *Compare Grice v. Woodworth*, 10 Idaho 459.

Indiana. — *Pittsburgh, etc., R. Co. v. Light-heiser*, 163 Ind. 247. *Compare U. S. Express Co. v. State*, 164 Ind. 196.

Louisiana. — *State v. Williams*, 111 La. 179; *State v. Michel*, 113 La. 4. See also *In re Dimmick*, 111 La. 655.

Minnesota. — *Compare Kelly v. Faribault*, (Minn. 1905) 104 N. W. Rep. 231.

Mississippi. — *Yazoo, etc., R. Co. v. Metcalf*, 84 Miss. 242; *Southern R. Co. v. Cheaves*, 84 Miss. 565.

North Carolina. — *Blair v. Coakley*, 136 N. Car. 405.

Ohio. — *Guilder v. State*, 26 Ohio Cir. Ct. 221.

South Dakota. — *State v. Patterson*, (S. Dak. 1904) 100 N. W. Rep. 162.

Tennessee. — *Christian v. John*, 111 Tenn. 92; *Southern R. Co. v. Maxwell*, 113 Tenn. 464.

Exceptions Implied. — See *Pabst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144, *affirmed* 198 U. S. 17; *Southern R. Co. v. Ragsdale*, 119 Ga. 773; *State v. Bordelon*, 113 La. 21; *State v. Jones*, 113 La. 208; *State v. Hawkins*, 103 Mo. App. 251; *State v. Tower*, 185 Mo. 79; *Chicago, etc., R. Co. v. Seveck*, (Neb. 1904) 101 N. W. Rep. 981; *Ex p. Small*, 60 S. Car. 43; *Griffin v. State*, (Tex. Crim. 1905) 87 S.

601. (b) *Casus Omissus Not supplied.* — See note 3.

b. WHERE MEANING IN DOUBT, THE SPIRIT CONTROLS—

(1) *Effect of Ambiguous Language.* — See note 4.

602. See notes 1, 2.

(2) *Intention and Object.* — See note 4.

W. Rep. 155; *Starr v. Sampselle*, 55 W. Va. 442; *Charmley v. Charmley*, 125 Wis. 297.

Exceptions Read into Statute Requiring Railroads to Fence Tracks. — See *McGuire v. St. Louis*, etc., R. Co., 113 Mo. App. 79; *Acord v. St. Louis Southwestern R. Co.*, 113 Mo. App. 84; *Foster v. Kansas City Southern R. Co.*, 112 Mo. App. 67. Compare *Mattes v. Great Northern R. Co.*, (Minn. 1905) 104 N. W. Rep. 234. And see generally the title RAILROADS, **734. 1 et seq.**

601. 2. General Words. — U. S. Express Co. v. State, 164 Ind. 196.

3. Omissions Not Supplied — *United States.* — *In re Scott*, 126 Fed. Rep. 981; *Nottage v. Sawmill Phenix*, 133 Fed. Rep. 979; *Bealmear v. Hutchins*, 134 Fed. Rep. 257; *The Ben R.*, (C. C. A.) 134 Fed. Rep. 784.

Alabama. — *State v. Crenshaw*, 138 Ala. 506.

Indiana. — *Pere Marquette R. Co. v. Baertz*, (Ind. 1905) 74 N. E. Rep. 51.

Indian Territory. — *Parrott v. Crawford*, 5 Indian Ter. 103.

Kansas. — *Gray v. Stewart*, 70 Kan. 429; *State v. Wilson*, (Kan. 1905) 80 Pac. Rep. 639.

Kentucky. — *Com. v. Duncan*, 84 S. W. Rep. 526, 27 Ky. L. Rep. 86.

Maine. — *A. L. & E. F. Goss Co. v. Greenleaf*, 98 Me. 436.

Massachusetts. — *Salem First Universalist Soc. v. Bradford*, 185 Mass. 310.

Mississippi. — *State v. Richardson*, 86 Miss. 439.

Missouri. — *School Dist. No. 7 v. School Dist.*, 184 Mo. 140. See also *Bevier v. Watson*, 113 Mo. App. 506.

New Jersey. — *Jersey City v. Hamilton*, 70 N. J. L. 48; *Darling v. Murphy*, 70 N. J. L. 435. See also *In re Arnot*, 67 N. J. Eq. 434; *In re Miller*, 67 N. J. Eq. 431.

New Mexico. — *Territory v. Albright*, (N. Mex. 1904) 78 Pac. Rep. 204.

New York. — *Matter of Wolfe*, 89 N. Y. App. Div. 349, affirmed 179 N. Y. 599.

Ohio. — *Schumacher v. McCallip*, 69 Ohio St. 500.

Oregon. — *Flanders v. Multnomah County*, 43 Oregon 583.

Pennsylvania. — *Cornplanter Tp. Road*, 26 Pa. Super. Ct. 29.

Tennessee. — *Collier v. Union R. Co.*, 113 Tenn. 96; *Heath v. Manire*, 114 Tenn. 105.

Texas. — *Missouri*, etc., R. Co. v. Freeman, 97 Tex. 394.

Washington. — *Johnson v. Seattle Electric Co.*, 39 Wash. 211.

West Virginia. — *Virginia Acc. Ins. Co. v. Dawson*, 53 W. Va. 619.

Canada. — *Montreal v. Cantin*, 35 Can. Sup. Ct. 223.

See also *infra*, this title, **654. 2.**

Rule Same in Equity as at Law. — *A. L. & E. F. Goss Co. v. Greenleaf*, 98 Me. 436.

4. Failure of Literal Interpretation. — *Montreal*

v. Cantin, 35 Can. Sup. Ct. 223, *per* Girouard, J., citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 601.

602. 1. Where the Letter Fails to Give the Sense — *United States.* — *Pooler v. U. S.*, (C. C. A.) 127 Fed. Rep. 509; *Rothschild v. Adler-Weinberger Steamship Co.*, (C. C. A.) 130 Fed. Rep. 866, reversing 123 Fed. Rep. 145; *Jasper v. U. S.*, 38 Ct. Cl. 202.

California. — *Grannis v. Superior Ct.*, 146 Cal. 245, 106 Am. St. Rep. 23, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 601, 602, 603.

Connecticut. — *Stapleberg v. Stapleberg*, 77 Conn. 31.

Indiana. — *Abbott v. Inman*, 35 Ind. App. 262.

Kansas. — *State v. American Book Co.*, 69 Kan. 1.

Maine. — *Carrigan v. Stillwell*, 99 Me. 434.

Michigan. — *In re Lambrecht*, 137 Mich. 450, 11 Detroit Leg. N. 289.

New Hampshire. — *Leighton v. Concord*, etc., R. Co., 72 N. H. 224.

New York. — *New York Cent.*, etc., R. Co. v. Buffalo, etc., Electric R. Co., 96 N. Y. App. Div. 471; *Topham v. Interurban St. R. Co.*, 96 N. Y. App. Div. 323, reversing (Supm. Ct. App. T.) 42 Misc. (N. Y.) 503; *Lux v. New York City R. Co.*, (Municipal Ct.) 45 Misc. (N. Y.) 222; *Matter of American Security*, etc., Co., (Surrogate Ct.) 45 Misc. (N. Y.) 529.

North Carolina. — *Walker v. Southern R. Co.*, 137 N. Car. 163.

Ohio. — *Kenton v. Board of Education*, 70 Ohio St. 172.

Pennsylvania. — *Russ v. Com.*, 210 Pa. St. 544, 105 Am. St. Rep. 825, reversing 7 Dauphin Co. Rep. (Pa.) 158.

South Carolina. — *Kitchen v. Southern R. Co.*, 68 S. Car. 554.

Texas. — *Douthit v. State*, 98 Tex. 344, modifying on other grounds 36 Tex. Civ. App. 396; *Oak Cliff v. Etheridge*, (Tex. Civ. App. 1903) 76 S. W. Rep. 602; *Von Diest v. San Antonio Traction Co.*, 33 Tex. Civ. App. 577; *Medlin v. Seideman*, (Tex. Civ. App. 1905) 88 S. W. Rep. 250.

West Virginia. — *Old Dominion Bldg.*, etc., Assoc. v. Sohn, 54 W. Va. 101; *Wellsburg*, etc., R. Co. v. Pan Handle Traction Co., 56 W. Va. 18.

Wisconsin. — *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931.

2. Only Where There Is Ambiguity. — *U. S. v. Williams*, 132 Fed. Rep. 894; *Johnson v. State*, 141 Ala. 7; *State v. Bordelon*, 113 La. 21; *Little v. United Presb. Theological Seminary*, 72 Ohio St. 417.

4. Intention and Object Regarded — *United States.* — *U. S. v. United Verde Copper Co.*, 196 U. S. 207, affirming (Ariz. 1903) 71 Pac. Rep. 954; *U. S. v. Buettner*, (C. C. A.) 133 Fed. Rep. 163; *Dolan v. U. S.*, (C. C. A.) 133

604. See notes 1, 2, 3, 4.(3) *Subject-matter*. — See note 5.

Fed. Rep. 440. See also *U. S. v. Blendaur*, (C. C. A.) 128 Fed. Rep. 910, *reversing* 122 Fed. Rep. 703.

Alaska. — *In re Wynn-Johnson*, 1 Alaska 630.

Arkansas. — See *Greene County v. Light*, 72 Ark. 41.

Illinois. — See *Andel v. People*, 106 Ill. App. 558; *Boyer v. Onion*, 108 Ill. App. 612; *Palmer v. People*, 109 Ill. App. 269; *Marquette Third Vein Coal Co. v. Dielie*, 110 Ill. App. 684, *affirmed* 208 Ill. 116; *Zellers v. White*, 208 Ill. 518, 100 Am. St. Rep. 243, *affirming* 106 Ill. App. 183.

Indiana. — *Cheney v. State*, (Ind. 1905) 74 N. E. Rep. 892.

Iowa. — See *McKee v. Home Sav., etc., Co.*, 122 Iowa 731.

Kentucky. — See *Yates v. Collins*, 82 S. W. Rep. 282, 26 Ky. L. Rep. 558, *rehearing denied* (Ky. 1904) 82 S. W. Rep. 973.

Massachusetts. — See *Com. v. Alexander*, 185 Mass. 551.

Michigan. — See *Coffin v. Ontonagon Circuit Judge*, (Mich. 1905) 103 N. W. Rep. 835, 12 Detroit Leg. N. 219.

Missouri. — *State v. Snyder*, 182 Mo. 462; *Kneisley Lumber Co. v. Edward B. Stoddard Co.*, 113 Mo. App. 306; *State v. Carr*, 178 Mo. 229. See also *State v. Deck*, 108 Mo. App. 292; *Evans v. McFarland*, 186 Mo. 703.

Montana. — See *Swain v. McMillan*, 30 Mont. 433; *Daly Bank, etc., Co. v. Great Falls St. R. Co.*, 32 Mont. 298.

Nebraska. — *State v. Galusha*, (Neb. 1905) 104 N. W. Rep. 197. See also *Farmers' Irrigation Dist. v. Frank*, (Neb. 1904) 100 N. W. Rep. 286; *Dodge County v. Saunders County*, (Neb. 1904) 100 N. W. Rep. 934, *denying rehearing* (Neb. 1903) 97 N. W. Rep. 617; *Western Union Tel. Co. v. Omaha*, (Neb. 1905) 103 N. W. Rep. 84.

New Jersey. — See *O'Connor v. International Silver Co.*, (N. J. 1904) 59 Atl. Rep. 321.

New York. — *New York Cent., etc., R. Co. v. Buffalo, etc., Electric R. Co.*, 96 N. Y. App. Div. 471, *quoting* 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 602; *Matter of Trask*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 244. See also *People v. Morgan*, 178 N. Y. 433, *reversing* 86 N. Y. App. Div. 577.

North Carolina. — *Waynesville v. Satterthwait*, 136 N. Car. 226; *Walker v. Southern R. Co.*, 137 N. Car. 163; *Spencer v. Seaboard Air Line R. Co.*, 137 N. Car. 107.

North Dakota. — *Sonnesyn v. Akin*, 12 N. Dak. 227.

Ohio. — See *Lewis v. State*, 69 Ohio St. 473; *Humphreys v. State*, 70 Ohio St. 67, 101 Am. St. Rep. 888.

Oregon. — See *Kelsay v. Eaton*, 45 Oregon 70; *Grande Ronde Electrical Co. v. Drake*, (Oregon 1905) 78 Pac. Rep. 1031.

Pennsylvania. — *Loyalsock Tp. Road*, 26 Pa. Super. Ct. 219, 230, *affirming* 9 Del. Co. Rep. (Pa.) 117; *Radnor Tp. v. Bell*, 27 Pa. Super. Ct. 1. See also *Corr v. Philadelphia*, 14 Pa. Dist. 35.

South Dakota. — *State v. Yegge*, (S. Dak. 1905) 103 N. W. Rep. 17.

Tennessee. — See *Trentham v. Moore*, 111 Tenn. 346.

Texas. — *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214. See also *Holly v. Simmons*, (Tex. Civ. App. 1905) 85 S. W. Rep. 325.

Washington. — See *American Bridge Co. v. Wheeler*, 35 Wash. 40.

West Virginia. — *State v. Gaughan*, 55 W. Va. 692; *Wellsburg, etc., R. Co. v. Pan Handle Traction Co.*, 56 W. Va. 18. See also *Chesapeake, etc., R. Co. v. Deepwater R. Co.*, 57 W. Va. 641.

Wisconsin. — See *Superior First Nat. Bank v. Douglas County*, 124 Wis. 15.

604. 1. Clerical Errors. — *Beaudin v. Oregon Short Line R. Co.*, 31 Mont. 238.

2. Words Rejected and Substituted. — *Egan v. North American Sav., etc., Co.*, 45 Oregon 139; *Kitchen v. Southern R. Co.*, 68 S. Car. 554; *Johnson v. Brice*, 112 Tenn. 59; *Witherspoon v. Jernigan*, 97 Tex. 98, *reversing* (Tex. Civ. App. 1903) 73 S. W. Rep. 39. See also *Alabama, etc., Lumber Co. v. Tisdale*, 139 Ala. 250; *Glos v. Patterson*, 204 Ill. 540; *In re Scheuer*, 31 Mont. 606; *Carey v. State*, 70 Ohio St. 121. And see *infra*, this title, **653. 6 et seq.**

3. Policy of Legislature. — *Hoffman v. H. M. Loud, etc., Lumber Co.*, 138 Mich. 10, 12 Detroit Leg. N. 356, *affirming* on rehearing 138 Mich. 5; *Canton v. Canton Cotton Warehouse Co.*, 84 Miss. 268; *Austin v. Cahill*, (Tex. 1905) 88 S. W. Rep. 542. See also *Emory v. Laurel*, 3 Penn. (Del.) 67; *Opinion of Justices*, 72 N. H. 605.

Settled Legislative Policy and Practice Considered. — *State v. Campana*, 76 Conn. 549; *Com. v. Walker*, 80 S. W. Rep. 185, 25 Ky. L. Rep. 2122; *Louisville v. Werne*, 80 S. W. Rep. 224, 25 Ky. L. Rep. 2196; *Tansey v. Striger*, (Ky. 1903) 76 S. W. Rep. 537, *citing* *Hoke v. Richie*, 100 Ky. 66; *State v. Speed*, 183 Mo. 186; *Bigelow v. Whitcomb*, 72 N. H. 473; *Williams v. Park*, 72 N. H. 305.

4. Conflicting Provisions. — *Yazoo, etc., R. Co. v. Metcalf*, 84 Miss. 242; *Immigration Soc. v. Com.*, 103 Va. 46; *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101.

5. Words Interpreted by Subject-matter — England. — *Korten v. West Sussex County Council*, 20 Cox C. C. 402, 88 L. T. N. S. 466.

United States. — *Lowe v. U. S.*, 38 Ct. Cl. 170, *affirmed* 194 U. S. 193; *U. S. v. St. Anthony R. Co.*, 102 U. S. 524.

Alabama. — *State v. Shugart*, 138 Ala. 86, 100 Am. St. Rep. 17.

Alaska. — *Brace v. Solner*, 1 Alaska 361.

Arkansas. — *Improvement Dist. No. 60 v. Cotter*, 71 Ark. 556.

California. — See *Swasey v. Shasta County*, 141 Cal. 392.

Georgia. — *Chatham County v. Gaudry*, 120 Ga. 121.

Illinois. — *Cleveland, etc., R. Co. v. Baker*, 106 Ill. App. 500.

604. (4) *Expressio Unius Est Exclusio Alterius*. — See note 6.

605. May Not Overrule Legislative Intent. — See note 1.

Where the Language of the Statute May Fairly Embrace Many Different Cases. — See note 2.

And Where There Is Some Necessity for Mentioning a Particular Thing. — See note 3.

But When the Law Is in the Affirmative. — See note 5.

Converse of Rule. — See note 7.

5. Interpretation of Words and Phrases — a. POPULAR MEANING PRESUMED. — See notes 8, 9.

Kansas. — State *v.* Kelley, (Kan. 1905) 81 Pac. Rep. 450.

Kentucky. — Com. *v.* Trent, 117 Ky. 34.

Louisiana. — State *v.* Butler, 114 La. 596.

Maine. — State *v.* Kaufman, 98 Me. 546; State *v.* Canadian Pac. R. Co., 100 Me. 202.

Minnesota. — Purcell *v.* East Grand Forks, 91 Minn. 486.

Missouri. — State *v.* Fry, 186 Mo. 198.

New Hampshire. — Opinion of Justices, 72 N. H. 605.

New York. — New York Cent., etc., R. Co. *v.* Buffalo, etc., Electric R. Co., 96 N. Y. App. Div. 471.

— See Carey *v.* State, 70 Ohio St. 121.

Pennsylvania. — Com. *v.* Brown, 210 Pa. St. 29, affirming 25 Pa. Super. Ct. 269.

Wisconsin. — Chippewa Bridge Co. *v.* Durand, 122 Wis. 85, 106 Am. St. Rep. 931; Merrill R., etc., Co. *v.* Merrill, 119 Wis. 249.

First and Most Indispensable Rule Is to Ascertain Subject and Intent of Statute. — Standard Oil Co. *v.* Com., (Ky. 1904) 82 S. W. Rep. 970, affirmed on rehearing 83 S. W. Rep. 557, 26 Ky. L. Rep. 1187.

604. 6. Expressio Unius Est Exclusio Alterius — *United States*. — Condon *v.* Eureka Springs, 135 Fed. Rep. 566; Smith *v.* U. S., 38 Ct. Cl. 257.

California. — Payne *v.* Morey, 144 Cal. 130; Stone *v.* Harris, 146 Cal. 555.

District of Columbia. — Alfred Richards Brick Co. *v.* Trott, 23 App. Cas. (D. C.) 284.

Idaho. — Jack *v.* Grangeville, 9 Idaho 291.

Indiana. — Scott *v.* Laporte, 162 Ind. 34; Couchman *v.* Prather, 162 Ind. 250, affirming (Ind. App. 1903) 68 N. E. Rep. 599; Silver *v.* State Board of Education, 35 Ind. App. 438, affirming on rehearing (Ind. App. 1904) 71 N. E. Rep. 667.

Iowa. — Olds *v.* Forrester, 126 Iowa 456.

Kentucky. — Com. *v.* Wisconsin Chair Co., 84 S. W. Rep. 535, 27 Ky. L. Rep. 170, followed in Com. *v.* Farmers' Bank, 84 S. W. Rep. 732, 27 Ky. L. Rep. 153.

Minnesota. — Mathews *v.* Lincoln County, 90 Minn. 348.

Montana. — State *v.* Acton, 31 Mont. 37; State *v.* McKinney, 29 Mont. 375.

Nebraska. — State *v.* Insurance Co. of North America, (Neb. 1904) 99 N. W. Rep. 36, reversed on rehearing on other grounds (Neb. 1904) 100 N. W. Rep. 405.

New York. — Harrison *v.* Wallis, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 492; Matter of American Security, etc., Co., (Surrogate Ct.) 45 Misc. (N. Y.) 529, citing Aultman, etc., Co. *v.* Syme, 163 N. Y. 54, 79 Am. St. Rep. 565.

Ohio. — Cleveland, etc., R. Co. *v.* Urbana, etc., R. Co., 26 Ohio Cir. Ct. 180.

Pennsylvania. — Moore *v.* Moore, 23 Pa. Super. Ct. 73; Compton *v.* Sankey, 13 Pa. Dist. 535, 29 Pa. Co. Ct. 25; Com. *v.* Frederick, 30 Pa. Co. Ct. 662, affirmed 27 Pa. Super. Ct. 228.

Texas. — Missouri, etc., R. Co. *v.* Rines, (Tex. Civ. App. 1905) 84 S. W. Rep. 1092.

Utah. — Oregon Short Line R. Co. *v.* Jones, 29 Utah 147.

Wisconsin. — In re Milwaukee Southern R. Co., 124 Wis. 490.

Wyoming. — State *v.* Grant, (Wyo. 1905) 81 Pac. Rep. 795.

When Two or More Things Are So Related that one necessarily suggests the other, the failure to enumerate as to one is conclusive of an intention to exclude. U. S. *v.* Mitchell, 136 Fed. Rep. 896.

Rule Especially Cogent in Construing Statutes Authorizing Use of Public Moneys. — Oneida County *v.* Tibbits, 125 Wis. 9.

For Illustrations and Applications of the Rule see Field *v.* U. S., (C. C. A.) 137 Fed. Rep. 6; Consumers' Gas Trust Co. *v.* Quinby, (C. C. A.) 137 Fed. Rep. 882; Bailey *v.* Kelly, 70 Kan. 869; Combs *v.* Eversole, (Ky. 1905) 86 S. W. Rep. 560; Candelaria *v.* Vallejos, (N. Mex. 1905) 81 Pac. Rep. 589; Barker *v.* State, 69 Ohio St. 68.

605. 1. Scott *v.* Laporte, 162 Ind. 34. See also U. S. *v.* Brown, (C. C. A.) 136 Fed. Rep. 550, affirming 126 Fed. Rep. 446; Multnomah County *v.* Title Guarantee, etc., Co., (Oregon 1905) 80 Pac. Rep. 409.

2. Moline *v.* State, (Neb. 1904) 100 N. W. Rep. 810.

3. State *v.* Houghton, 142 Ala. 90. See also Wheeling R. Co. *v.* Toledo R., etc., Co., 72 Ohio St. 368, 106 Am. St. Rep. 622.

5. See *Pennsylvania Telephone Co. v. Hoover*, 209 Pa. St. 555, affirming 24 Pa. Super. Ct. 96.

7. See Atchison, etc., R. Co. *v.* Atchison Grain Co., 68 Kan. 585, modifying on rehearing (Kan. 1902) 70 Pac. Rep. 933; Corcoran *v.* Boston, 185 Mass. 325; Morrison *v.* Kent, 135 Mich. 38, 10 Detroit Leg. N. 678.

8. The Popular Sense. — In re U. S. Hotel Co., (C. C. A.) 134 Fed. Rep. 225; Waynesville *v.* Satterthwait, 136 N. Car. 226, quoting 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 605; Com. *v.* Hoover, 25 Pa. Super. Ct. 133, reversing 13 Pa. Dist. 45, 29 Pa. Co. Ct. 413; In re Perkiomen, etc., Turnpike Road, 28 Pa. Co. Ct. 545, affirmed 25 Pa. Super. Ct. 462.

9. Presumption that Words Used in Popular Sense. — Leggett *v.* U. S., 131 Fed. Rep. 817;

606. *b. TECHNICAL WORDS — (1) In General.* — See notes 1, 2.

607. *Thus, in Revenue Laws.* — See note 1.

(2) *Legal Terms.* — See note 2.

608. *c. ASSOCIATED WORDS — NOSCITUR A SOCIIS — It Is a Fundamental Principle.* — See note 1.

d. GENERAL WORDS AND THEIR LIMITATION — (1) Intention Controls — Clear Intention May Restrain General Words. — See note 2.

General Words Prima Facie Taken Generally. — See note 3.

Waynesville *v.* Satterthwait, 136 N. Car. 226, quoting 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 605; Waddick *v.* Merrell, 26 Ohio Cir. Ct. 437; Com. *v.* Kebort, 13 Pa. Dist. 677, 30 Pa. Co. Ct. 164, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 605, reversed on other grounds 26 Pa. Super. Ct. 584; Com. *v.* Real Estate Trust Co., 211 Pa. St. 51, affirming 26 Pa. Super. Ct. 149. See also *supra*, this title, **583**, 4, **598**, 2.

606. 1. Technical Words Taken Technically. — State *v.* Flynn, 161 Ind. 554; Standard Oil Co. *v.* Com., 82 S. W. Rep. 1020, 26 Ky. L. Rep. 985; Cizek *v.* Cizek, (Neb. 1904) 99 N. W. Rep. 28, reversing on rehearing (Neb. 1903) 96 N. W. Rep. 657; Vann *v.* Edwards, 135 N. Car. 661; Moore *v.* American Industrial Co., 138 N. Car. 304; Bergman *v.* Bond, 14 Manitoba 503. See also Wheaton *v.* Weston, 128 Fed. Rep. 151. Compare Springer *v.* District of Columbia, 23 App. Cas. (D. C.) 59; State *v.* Biggs, 133 N. Car. 729.

2. When a Word Has Both a Popular and a Technical Meaning. — See Gertgens *v.* O'Connor, 191 U. S. 237, affirming 85 Minn. 481, citing U. S. *v.* Winona, etc., R. Co., 165 U. S. 463; Dolan *v.* U. S., (C. C. A.) 133 Fed. Rep. 440; Cheney *v.* State, (Ind. 1905) 74 N. E. Rep. 892; Daly Bank, etc., Co. *v.* Great Falls St. R. Co., 32 Mont. 298; State *v.* Marble, 72 Ohio St. 21, 106 Am. St. Rep. 570.

607. 1. Revenue Laws. — Hempstead *v.* Thomas, (C. C. A.) 129 Fed. Rep. 907, reversing 123 Fed. Rep. 346; U. S. *v.* Reiss, (C. C. A.) 136 Fed. Rep. 741, reversing 126 Fed. Rep. 578; German *v.* U. S., (C. C. A.) 137 Fed. Rep. 817.

2. Legal Terms. — Govin *v.* Chicago, 132 Fed. Rep. 848; Matter of Ross, 140 Cal. 282; Com. *v.* Standard Oil Co., (Ky. 1905) 87 S. W. Rep. 1090; Dalton *v.* St. Louis, etc., R. Co., 113 Mo. App. 71; Manufacturers' Land, etc., Co. *v.* Camden, 71 N. J. L. 490; Vann *v.* Edwards, 135 N. Car. 661; Jones *v.* Madison County, 137 N. Car. 579, reversing on rehearing 135 N. Car. 218; Fisher *v.* Western Union Tel. Co., 119 Wis. 146. See also Rosenberger *v.* Harris, 136 Fed. Rep. 1001; U. S. *v.* Green, 136 Fed. Rep. 618; Birlew *v.* St. Louis, etc., R. Co., 104 Mo. App. 561. Compare Colonial, etc., Mortg. Co. *v.* Northwest Thresher Co., (N. Dak. 1905) 103 N. W. Rep. 915; Colonial, etc., Mortg. Co. *v.* Flemington, (N. Dak. 1905) 103 N. W. Rep. 929; Paine *v.* Dodds, (N. Dak. 1905) 103 N. W. Rep. 931.

Illustrations — Abduction. — King *v.* Hanson, 13 N. Dak. 85.

Adoption. — Cunningham *v.* Lawson, 111 La. 1024.

Case — Cause. — Barnett *v.* Pemiscot County Ct., 111 Mo. App. 693.

Charitable. — In re Vineland Historical, etc., Soc., 66 N. J. Eq. 291.

Debt. — In re Bailies, 127 Iowa 124.

Equitable Defense. — New York *v.* Holzderber, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 509.

Form — Substance. — Thibodeaux *v.* Thibodeaux, 112 La. 906.

Gift Enterprise. — Humes *v.* Little Rock, 138 Fed. Rep. 929; Winston *v.* Beeson, 135 N. Car. 271.

Land. — Stauffer *v.* Cincinnati, etc., R. Co., 33 Ind. App. 356; White *v.* Cincinnati, etc., R. Co., 34 Ind. App. 287.

Record. — State *v.* Harman, 57 W. Va. 447.

Resident Freeholder. — Campbell *v.* Moran, (Neb. 1904) 99 N. W. Rep. 499.

Trespass. — Suter *v.* Wenatchee Water Power Co., 35 Wash. 1, 102 Am. St. Rep. 881.

Common-law Meanings Followed. — Welty *v.* U. S., 14 Okla. 7, approving Axhelm *v.* U. S., 9 Okla. 321, and Hughes *v.* Territory, 8 Okla. 28.

608. 1. Associated Words — General Rule. — Hempstead *v.* Thomas, (C. C. A.) 129 Fed. Rep. 907, reversing 123 Fed. Rep. 346; In re U. S. Hotel Co., (C. C. A.) 134 Fed. Rep. 225; Rosenberger *v.* Harris, 136 Fed. Rep. 1001; Wall *v.* Deaf, etc., Asylum, 145 Cal. 468; Bietzell *v.* District of Columbia, 21 App. Cas. (D. C.) 49; Milbourne *v.* State, 161 Ind. 364; Bailey *v.* Kelly, 70 Kan. 869; Hutchinson's Succession, 112 La. 656; State *v.* Savant, (La. 1905) 38 So. Rep. 974; State *v.* Herring, 70 N. J. L. 34; Esquibel *v.* Chaves, (N. Mex. 1904) 78 Pac. Rep. 505; Winston *v.* Beeson, 135 N. Car. 271; State *v.* Marble, 72 Ohio St. 21, 106 Am. St. Rep. 570; Langley *v.* Kahnert, 9 Ont. L. Rep. 164, affirming 7 Ont. L. Rep. 356. See also Vokes *v.* Eaton, 85 S. W. Rep. 174, 27 Ky. L. Rep. 358.

2. General Language Limited. — Beitzell *v.* District of Columbia, 21 App. Cas. (D. C.) 49; Clinton County *v.* Davis, 162 Ind. 60; State *v.* American Book Co., 69 Kan. 1; Gulf, etc., R. Co. *v.* Adams, 85 Mass. 772; State *v.* Fry, 186 Mo. 198; People *v.* Cahill, 181 N. Y. 403, affirming mem. judgment 102 N. Y. App. Div. 620; Orange County *v.* Ellsworth, 98 N. Y. App. Div. 275; McGrady *v.* Terrell, 98 Tex. 427; Jenkins *v.* State, (Tex. Crim. 1903) 77 S. W. Rep. 224; State *v.* Eldredge, 27 Utah 477. See also Elliott *v.* Harris, 24 App. Cas. (D. C.) 11; Cummings *v.* People, 213 Ill. 443; State *v.* Harrison, 162 Ind. 542.

General Words Restricted and Those of Narrower Meaning Expanded to Effectuate Intent. — Immigration Soc. *v.* Com., 103 Va. 46.

General Words May Be Taken Distributively When Intention Requires. — Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101.

3. General Words Taken Generally. — Pitts-

609. Other Illustrations. — See note 2.

burgh, etc., *R. Co. v. Lightheiser*, 163 Ind. 247; *State v. Edmunds*, 127 Iowa 333; *Corcoran v. Boston*, 185 Mass. 325; *State v. Barlow*, 70 Ohio St. 363; *San Antonio, etc., R. Co. v. Burns*, (Tex. 1905) 87 S. W. Rep. 1144.

Restricted Meaning Must Be Ascertained from Statute. — *Nelson v. Bridge*, 98 Tex. 523.

For Various Illustrations and Applications of the rule see the following cases:

United States. — *Heckman v. Sutter*, (C. C. A.) 128 Fed. Rep. 393, *affirming* 1 Alaska 188.

Arizona. — *Miller v. Territory*, (Ariz. 1905) 80 Pac. Rep. 321.

Arkansas. — *Hodges v. Harkleroad*, (Ark. 1905) 85 S. W. Rep. 779.

California. — *Walther v. Sierra R. Co.*, 141 Cal. 288.

Delaware. — *Philadelphia, etc., R. Co. v. Winkler*, 4 Penn. (Del.) 387.

Illinois. — *Cleveland, etc. R. Co. v. Baker*, 106 Ill. App. 500.

Iowa. — *Getchell, etc., Lumber, etc., Co. v. Peterson*, 124 Iowa 599.

Kansas. — *Watson v. Keystone Iron-works Co.*, 70 Kan. 61, *reversing* 70 Kan. 43.

Massachusetts. — *Baker v. Fall River*, 187 Mass. 53; *Allen v. Com.*, 188 Mass. 59; *Hurley v. Com.*, 188 Mass. 443.

Minnesota. — *Tucker v. Lincoln County*, 90 Minn. 406.

Missouri. — *State v. Butler*, 178 Mo. 272.

Montana. — *State v. Red Lodge*, 30 Mont. 338.

Nebraska. — *State v. Insurance Co. of North America*, (Neb. 1904) 99 N. W. Rep. 36, *reversed* on rehearing on other grounds (Neb. 1904) 100 N. W. Rep. 405; *Lobeck v. State*, (Neb. 1904) 101 N. W. Rep. 247.

New Hampshire. — *Hendry v. North Hampshire*, 72 N. H. 351.

New Jersey. — *Chosen Freeholders v. Central R. Co.*, (N. J. 1904) 59 Atl. Rep. 303.

New Mexico. — *Territory v. Gutierrez*, (N. Mex. 1904) 78 Pac. Rep. 139.

New York. — *People v. Mezger*, 98 N. Y. App. Div. 237, *affirmed* 181 N. Y. 511.

North Dakota. — *Wrege v. Jones*, 13 N. Dak. 267.

Oregon. — *Smith v. Wilcox*, 44 Oregon 323.

Texas. — *Texas Cent. R. Co. v. Bowman*, 97 Tex. 417; *Gulf, etc., R. Co. v. Howard*, 97 Tex. 513; *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214; *Lodwick Lumber Co. v. Taylor*, (Tex. Civ. App. 1905) 87 S. W. Rep. 358.

609. 2. Enlarged Meaning in Accordance with Legislative Intent — *United States.* — *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1, *reversing* (C. C. A.) 117 Fed. Rep. 462; *U. S. v. Chicago, etc., R. Co.*, 195 U. S. 524, *affirming* (C. C. A.) 116 Fed. Rep. 969; *Tsoi Yui v. U. S.*, 129 Fed. Rep. 585, *affirmed* (C. C. A.) 133 Fed. Rep. 1022; *Rankin v. Herod*, 130 Fed. Rep. 390; *U. S. v. Jefferson*, 134 Fed. Rep. 299; *In re Cambridge Lumber Co.*, 136 Fed. Rep. 983.

Alaska. — *Tyee Consol. Min. Co. v. Langstedt*, 1 Alaska 439.

Arkansas. — *St. Louis Southwestern R. Co. v. Grayson*, 72 Ark. 119; *Louisiana, etc., R. Co. v. State*, (Ark. 1905) 88 S. W. Rep. 559.

District of Columbia. — *Tyner v. U. S.*, 23 App. Cas. (D. C.) 324.

Illinois. — *Strong v. Lewis*, 204 Ill. 35; *Chicago, etc., Electric R. Co. v. Spence*, 213 Ill. 220.

Indian Territory. — *Ammons v. Brunswick-Balke Collender Co.*, 5 Indian Ter. 636.

Iowa. — *German Trust Co. v. Board of Equalization*, 121 Iowa 325.

Kentucky. — *Com. v. Young Men's Christian Assoc.*, 116 Ky. 711, *citing* *Kentucky Female Orphan School v. Louisville*, 100 Ky. 470; *German Protestant Orphan Asylum v. Barber Asphalt Paving Co.*, (Ky. 1904) 82 S. W. Rep. 632; *Standard Oil Co. v. Com.*, (Ky. 1904) 82 S. W. Rep. 970, *affirmed* on rehearing 83 S. W. Rep. 557, 26 Ky. L. Rep. 1187.

Minnesota. — *Tomlinson v. Phelps*, 93 Minn. 350.

Missouri. — *State v. Tower*, 185 Mo. 79.

Montana. — *Hoar v. Hennessy*, 29 Mont. 253.

Nebraska. — *Moline v. State*, (Neb. 1904) 100 N. W. Rep. 810.

New York. — *New York Architectural Terra-Cotta Co. v. Williams*, 102 N. Y. App. Div. 1.

Pennsylvania. — *Brown's Adoption*, 25 Pa. Super. Ct. 259; *Hollenbach v. Berks County*, 14 Pa. Dist. 243.

Rhode Island. — *Taylor v. Bliss*, 26 R. I. 16.

South Carolina. — *Kitchen v. Southern R. Co.*, 68 S. Car. 554.

Tennessee. — *Foppiano v. Speed*, 113 Tenn. 167; *Plyley v. Allison*, 113 Tenn. 500; *Hercules Powder Co. v. Knoxville, etc., R. Co.*, 113 Tenn. 382.

Texas. — *Gulf, etc., R. Co. v. Rogers*, (Tex. Civ. App. 1903) 82 S. W. Rep. 822; *Bone v. Cowan*, (Tex. Civ. App. 1904) 84 S. W. Rep. 385.

Utah. — *Gibbs v. Gibbs*, 26 Utah 382; *Oregon Short Line R. Co. v. Jones*, 29 Utah 147.

Washington. — *Ramsay v. Tacoma Land Co.*, 31 Wash. 351, *affirmed* 106 U. S. 360.

Wisconsin. — *In re Moran*, 118 Wis. 177; *Merrill R., etc., Co. v. Merrill*, 119 Wis. 249.

Words Restricted — *United States.* — *Hackfeld v. U. S.*, 197 U. S. 442, *reversing* (C. C. A.) 125 Fed. Rep. 596; *Allen v. Clark*, (C. C. A.) 126 Fed. Rep. 738, *affirming* 114 Fed. Rep. 374; *Cunard Steamship Co. v. Stranahan*, 134 Fed. Rep. 318.

Arkansas. — *Haggart v. Ranney*, 73 Ark. 344.

California. — *Stockton v. Board of Education*, 145 Cal. 246.

Connecticut. — *Berlin Iron Bridge Co. v. Connecticut River Banking Co.*, 76 Conn. 477; *Bulkeley's Appeal*, 77 Conn. 45.

Georgia. — *Georgia R., etc., Co. v. Joiner*, 120 Ga. 905.

Illinois. — *Illinois, etc., R. Co. v. Freeman*, 210 Ill. 270; *Felsenthal v. Kline*, 214 Ill. 121.

Indian Territory. — *Parrott v. Crawford*, 5 Indian Ter. 103.

Iowa. — *Chrisman v. Omaha, etc., R., etc., Bridge Co.*, 125 Iowa 133.

Kentucky. — *Louisville v. Werne*, 80 S. W. Rep. 224, 25 Ky. L. Rep. 2196.

Maine. — *Carrigan v. S'illwell*, 99 Me. 434.

609. (2) *Ejusdem Generis Rule*. — See note 4.

610. It Is Immaterial, It Has Been Held, Whether the Generic Term Precedes or Follows. — See note 1.

Legislative Intent. — See note 2.

Subjects of Different Nature. — See note 4.

611. *g.* PRESUMPTION AS TO MEANING OF WORDS — (1) *Same Throughout Act*. — See note 1.

(2) *Same as in Former Act in Pari Materia*. — See notes 3, 4.

Minnesota. — *Lucy v. Freeman*, 93 Minn. 274.

Nebraska. — *Chicago, etc., R. Co. v. Richardson County*, (Neb. 1904) 100 N. W. Rep. 950; *Lancaster County v. McDonald*, (Neb. 1905) 103 N. W. Rep. 78; *State Electro-Medical Institute v. State*, (Neb. 1905) 103 N. W. Rep. 1078.

New Hampshire. — *Williams v. Park*, 72 N. H. 305.

New Mexico. — *Esquibel v. Chaves*, (N. Mex. 1904) 78 Pac. Rep. 505.

New York. — *Matter of Trask*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 244.

North Dakota. — *National Bank of Commerce v. Pick*, 13 N. Dak. 74.

Pennsylvania. — *Kurrie v. Cottingham*, 209 Pa. St. 12.

Rhode Island. — *Atty.-Gen. v. Clarke*, 26 R. I. 470; *Stevens v. Union R. Co.*, 26 R. I. 90 (qualified).

Texas. — *Angle v. Terrell*, 97 Tex. 509.

Virginia. — *Stultz v. Pratt*, 103 Va. 536.

West Virginia. — *Stafford v. Mingo County Ct.*, (W. Va. 1905) 51 S. E. Rep. 2.

609. 4. *Ejusdem Generis Rule* — *United States*. — U. S. v. *Burton*, 131 Fed. Rep. 552.

Alabama. — *Norris v. Oakman*, 138 Ala. 411.

Arkansas. — *St. Louis, etc., R. Co. v. Love*, (Ark. 1905) 86 S. W. Rep. 395; *Leiper v. Minnig*, (Ark. 1905) 86 S. W. Rep. 407.

California. — *Wall v. Deaf, etc., Asylum*, 145 Cal. 468.

Colorado. — *Gillette v. Peabody*, 19 Colo. App. 356.

Connecticut. — *Etchells v. Wainwright*, 76 Conn. 534.

District of Columbia. — *Dancy v. Clark*, 24 App. Cas. (D. C.) 487.

Florida. — *State v. Vasquez*, (Fla. 1905) 38 So. Rep. 830.

Georgia. — *Coker v. Atlanta, etc., R. Co.*, 123 Ga. 483.

Illinois. — *Harris v. Kill*, 108 Ill. App. 305.

Indiana. — *State v. Carroll County*, 162 Ind. 183.

Kansas. — *Williams v. Vincent*, 70 Kan. 595.

Louisiana. — *State v. Fontenot*, 112 La. 628, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 609; *State v. Michel*, 113 La. 4.

Missouri. — *State v. Lockett*, 188 Mo. 415, approving *State v. Rosenblatt*, 185 Mo. 114.

New Mexico. — *Esquibel v. Chaves*, (N. Mex. 1904) 78 Pac. Rep. 505.

Pennsylvania. — *Philadelphia v. Pemberton*, 208 Pa. St. 214, affirming 12 Pa. Dist. 743, 29 Pa. Co. Ct. 252, 25 Pa. Super. Ct. 323.

Texas. — *Ex p. Heyman*, 45 Tex. Civ. App. 532; *Fuller v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 832.

Utah. — *State v. Eldredge*, 27 Utah 477.

Canada. — *Matter of Legislation Respecting Sunday Observance*, 35 Can. Sup. Ct. 581.

Rule Especially Applicable to Statutes Regulating Costs. — *Hempstead County v. Harkness*, 73 Ark. 600.

610. 1. *State v. Fontenot*, 112 La. 628, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 609. See also *Smith v. Hightstown*, 71 N. J. L. 536.

2. *Intent*. — *Dolan v. U. S.*, (C. C. A.) 133 Fed. Rep. 440; *Miller v. U. S.*, (C. C. A.) 133 Fed. Rep. 337; *State v. Butler*, 178 Mo. 272; *State v. Harter*, 188 Mo. 516; *Territory v. Gutierrez*, (N. Mex. 1904) 78 Pac. Rep. 139.

4. *State v. Edmunds*, 127 Iowa 333; *Vokes v. Eaton*, 85 S. W. Rep. 174, 27 Ky. L. Rep. 358. See also *Chatham County v. Gaudry*, 120 Ga. 121; *Schroeder v. Bohlson*, (Ky. 1905) 84 S. W. Rep. 535.

611. 1. *Rule Stated and Limited*. — U. S. v. *Wile*, (C. C. A.) 130 Fed. Rep. 331, affirming 124 Fed. Rep. 1023.

Rule Yields to Plain Intent of Statute. — *Wall v. Deaf, etc., Asylum*, 145 Cal. 468.

3. *Words in Act to Be Given the Same Meaning as in Former Act in Pari Materia*. — *Corbett v. Pearce*, (1904) 2 K. B. 422, 90 L. T. N. S. 781; *In re Coal Mines Regulation Act*, 10 British Columbia 408, per *Martin, J.*; *Mosle v. Bidwell*, (C. C. A.) 130 Fed. Rep. 334, reversing 119 Fed. Rep. 480; *Cotton v. Wiscasset, etc., R. Co.*, 98 Me. 511; *People v. Priest*, 90 N. Y. App. Div. 520, affirmed 180 N. Y. 532; *Orange County v. Ellsworth*, 98 N. Y. App. Div. 275; *Hearst v. McClellan*, 102 N. Y. App. Div. 336; *Waddick v. Merrell*, 26 Ohio Cir. Ct. 437; *Com. v. Pocono Mountain Ice Co.*, 23 Pa. Super. Ct. 267; *In re Bigelow*, 17 S. Dak. 331; *Oneida County v. Tibbits*, 125 Wis. 9. See also *Ex p. Keith*, (Tex. Crim. 1904) 83 S. W. Rep. 683, per *Henderson, J.*, concurring.

Different Interpretation May Be Warranted by Context. — *Loyalsock Tp. Road*, 26 Pa. Super. Ct. 219, 230, affirming 9 Del. Co. Rep. (Pa.) 117.

Different Words Construed as Synonymous to Accomplish Purpose of Act. — *Com. v. Conroy*, 207 Pa. St. 212.

4. *Decisions under One Act in Pari Materia Apply under Another*. — *United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co.*, 133 Fed. Rep. 930; *U. S. v. Oregon, etc., R. Co.*, 133 Fed. Rep. 953; *In re Harper*, 133 Fed. Rep. 970; *Com. v. Pocono Mountain Ice Co.*, 23 Pa. Super. Ct. 267. See also *Grimes v. Reynolds*, 94 Mo. App. 578, 589, affirmed 184 Mo. 679, 604.

When Decisions Are Conflicting. — See *Hackfeld v. U. S.*, 197 U. S. 442, reversing (C. C.

611. *h.* TO WHAT TIME WORDS OR DESCRIPTIONS REFERRED. — See note 5.

612. See note 1.

6. Grammar and Collocation of Words — *a.* GENERAL RULE. — See note 2.

b. MALA GRAMMATICA NON VITIAT. — See note 3.

d. COLLOCATION — (1) *In General.* — See note 5.

613. See note 1.

(2) *Qualifying Phrases Confined to Next Antecedent.* — See note 5.

(3) *Reddenda Singula Singulis.* — See note 7.

614. **7.** Implication of Incidents — *a.* GENERAL DOCTRINE. — See notes 2, 3.

b. AS TO POWERS AND DUTIES. — See notes 6, 7.

A.) 125 Fed. Rep. 596; *Irwin v. U. S.*, 38 Ct. Cl. 87.

611. **5.** Meaning of Words as at Time of Passage of Act. — See *Brown v. Visalia*, 141 Cal. 372; *Greenville v. Beauto*, 99 Me. 214; *State v. Tower*, 185 Mo. 79. Compare *Com. v. Hawkins*, 14 Pa. Dist. 592, holding the term "carriages" to include automobiles, though the latter vehicles were unknown at the time of the enactment.

Words in Present Tense. — See *Com. v. Bradley*, 210 Pa. St. 66, *affirming* 34 Pittsb. Leg. J. N. S. (Pa.) 276; *McGrady v. Terrell*, 98 Tex. 427.

612. **1.** Words of Time. — *Chance v. U. S.*, 38 Ct. Cl. 75; *Fischer v. Moore*, 69 Kan. 191. See also *McCaleb v. Rector*, (Tex. Civ. App. 1904) 78 S. W. Rep. 956.

Act Incorporated in Later Act Speaks from Time of Incorporation. — *Lamplough v. Kent Waterworks Co.*, (1903) 1 Ch. 575, *affirmed* (1904) A. C. 27.

Reference to Time of Passage of Act Applied to Time of Taking Effect. — *Mills v. Osteopathic Registration, etc.*, 135 Mich. 525, 10 Detroit Leg. N. 855.

Future Language Held to Be Applicable to Existing Facts. — See *Hollenbach v. Berks County*, 14 Pa. Dist. 243; *Murdaugh v. Oxford*, 14 Pa. Dist. 501.

"*Theretofore.*" — See *Com. v. Mills*, 26 Pa. Super. Ct. 549.

2. Rules of Grammar — *England.* — *Lamplough v. Kent Waterworks Co.*, (1903) 1 Ch. 575, *affirmed* (1904) A. C. 27; *Neagle v. Nixon's Nav. Co.*, (1904) 1 K. B. 339, 90 L. T. N. S. 49; *Rex v. Vasey*, (1905) 2 K. B. 748.

United States. — *Crawford v. Burke*, 195 U. S. 176, *reversing* 201 Ill. 581; *U. S. v. York*, 131 Fed. Rep. 323; *In re Cambridge Lumber Co.*, 136 Fed. Rep. 983.

Indiana. — *Maley v. Clark*, 33 Ind. App. 149.

Iowa. — *State v. Heath*, 125 Iowa 585.

Kentucky. — *Berry v. Lewis*, 84 S. W. Rep. 526, 27 Ky. L. Rep. 109, denying rehearing (Ky. 1904) 82 S. W. Rep. 252.

Minnesota. — *State v. Scaffer*, (Minn. 1905) 104 N. W. Rep. 139, *citing* 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 612.

Nebraska. — *Chicago, etc., R. Co. v. Anderson*, (Neb. 1904) 101 N. W. Rep. 1019.

Pennsylvania. — *Hollenbach v. Berks County*, 14 Pa. Dist. 243. See also *Pennsylvania Telephone Co. v. Hoover*, 209 Pa. St. 555, *affirming* 24 Pa. Super. Ct. 96.

Texas. — *Douthitt v. State*, 98 Tex. 344, *modifying* on other grounds 36 Tex. Civ. App. 396.

3. Bad Grammar Does Not Defeat Statutes. — See *Wilder v. Concord*, 72 N. H. 259.

5. Order of Words Regarded. — *Fischer v. Moore*, 69 Kan. 191.

613. **1.** Changing Order of Words. — *Chicago, etc., R. Co. v. Anderson*, (Neb. 1904) 101 N. W. Rep. 1019; *Com. v. Danville Bessemer Co.*, 207 Pa. St. 302, *affirming* 6 Dauphin Co. Rep. (Pa.) 65.

5. Qualifying Words and Phrases. — *State v. Scaffer*, (Minn. 1905) 104 N. W. Rep. 139. See also *Govin v. Chicago*, 132 Fed. Rep. 848; *Murphy v. Wheatley*, 100 Md. 358; *Adams County v. Kansas City, etc., R. Co.*, (Neb. 1904) 99 N. W. Rep. 245; *State v. Back*, (Neb. 1904) 100 N. W. Rep. 952.

7. Reddenda Singula Singulis. — *Territory v. Hale*, (N. Mex. 1905) 81 Pac. Rep. 583.

614. **2.** Intent Not Imputed. — See *Nottage v. Sawmill Phoenix*, 133 Fed. Rep. 979.

3. Matter Implied Is Part of Law. — *Union Trust Co. v. Preston Nat. Bank*, 136 Mich. 460; *Cleveland, etc., R. Co. v. Urbana, etc., R. Co.*, 26 Ohio Cir. Ct. 180; *In re Demarco*, 77 Vt. 445.

6. Implied Powers. — *Jack v. Grangeville*, 9 Idaho 291; *Corker v. Elmore County*, 10 Idaho 255; *Boyce v. Tuhey*, 163 Ind. 202; *State v. Topeka*, 68 Kan. 177; *Canton v. Canton Cotton Warehouse Co.*, 84 Miss. 268; *Adams v. Kuykendall*, 83 Miss. 571; *Grimes v. Reynolds*, 94 Mo. App. 578, 589, *affirmed* 184 Mo. 679, 694; *Litchfield v. Bond*, 105 N. Y. App. Div. 229; *Rodwell v. Rowland*, 137 N. Car. 617; *Wyoming County Auditors*, 30 Pa. Co. Ct. 631; *Ayres v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1905) 88 S. W. Rep. 436; *In re Demarco*, 77 Vt. 445. See also *Hopkins's Appeal*, 77 Conn. 644.

For Various Illustrations of the principle see *Vernon v. San Bernardino County*, 142 Cal. 513; *Downing v. Des Moines*, 124 Iowa 289; *Hutchinson's Succession*, 112 La. 656; *Redersheimer v. Bruning*, 113 La. 343; *Hazlehurst v. Mayes*, 84 Miss. 7, *approving* *Gulf Coast Ice, etc., Co. v. Bowers*, 80 Miss. 581; *New London v. Davis*, (N. H. 1904) 59 Atl. Rep. 369, *quoting* *Albany v. Abbott*, 61 N. H. 157; *Walker v. Hyland*, 70 N. J. L. 69; *People v. Ingham*, 107 N. Y. App. Div. 41; *King v. Hanson*, 13 N. Dak. 85.

7. See *See v. Wabash R. Co.*, 123 Iowa

615. d. AS TO CONFERRING JURISDICTION. — See note 1.

The Creation of a New Jurisdiction. — See note 2.

616. 8. Construing Entire Statute as One Whole — a. ALL PARTS TAKEN TOGETHER — (1) General Rule. — See note 1.

In Construing a Section of an Act. — See note 2.

617. (2) Codes or Revised Statutes. — See note 2.**618. (3) Repealed or Unconstitutional Clauses. — See note 2.**

b. EVERY CLAUSE TO BE GIVEN EFFECT — (1) General Rule. —

See note 3.

445; *Lockwood v. Dover*, (N. H. 1905) 61 Atl. Rep. 32; *Walker v. Hyland*, 70 N. J. L. 69; *Belcher's Estate*, 211 Pa. St. 615, *approving dictum in In re Handley*, 181 Pa. St. 339.

Duties Imposed by Implication Are Those Which Are Necessarily Connected with the Subject to which the statutes relate. *Genesee First Nat. Bank v. National Live Stock Bank*, 13 Okla. 719.

615. 1. Grant of Jurisdiction to Inferior Tribunal — Supervising Power. — *Pennsylvania R. Co. v. Bogert*, 209 Pa. St. 589.

2. Extension of Jurisdiction. — See U. S. *v. Barrett*, 135 Fed. Rep. 189; U. S. *v. Churchyard*, 132 Fed. Rep. 82.

616. 1. All Parts of Statute Construed Together — United States. — *Scottish Union, etc., Ins. Co. v. Bowland*, 196 U. S. 611; *Carter v. Gear*, 197 U. S. 348; *Greenleaf v. National Assoc.*, 130 Fed. Rep. 209; *Murphy v. U. S.*, 39 Ct. Cl. 178.

District of Columbia. — *Maschaur v. Maschaur*, 23 App. Cas. (D. C.) 87.

Illinois. — *Cummings v. People*, 211 Ill. 392; *Cummings v. People*, 213 Ill. 443; *Van Vuren v. Longstreet*, 108 Ill. App. 159.

Indiana. — See *Western Union Tel. Co. v. Braxtan*, (Ind. 1905) 74 N. E. Rep. 987.

Iowa. — *German Trust Co. v. Board of Equalization*, 121 Iowa 325; *Hodge v. Muscatine County*, 121 Iowa 482, 104 Am. St. Rep. 304.

Kansas. — *State v. Kelly*, (Kan. 1905) 81 Pac. Rep. 450.

Kentucky. — *Com. v. Trent*, 117 Ky. 34; *Louisville v. Werne*, 80 S. W. Rep. 224, 25 Ky. L. Rep. 2196; *Standard Oil Co. v. Com.*, (Ky. 1904) 82 S. W. Rep. 970, *affirmed on rehearing* 83 S. W. Rep. 557, 26 Ky. L. Rep. 1187.

Michigan. — *People v. Bird*, 138 Mich. 31, 11 Detroit Leg. N. 461.

Mississippi. — *Allen v. Caffee*, 85 Miss. 766.

Missouri. — *State v. Harter*, 188 Mo. 516.

New Hampshire. — *Opinion of Justices*, 72 N. H. 605.

New York. — *Crapo v. Syracuse*, 98 N. Y. App. Div. 376; *Schinzel v. Best*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 455; *Matter of American Security, etc., Co.*, (Surrogate Ct.) 45 Misc. (N. Y.) 529.

North Carolina. — *Waynesville v. Satterthwait*, 136 N. Car. 226.

Pennsylvania. — *Com. v. Danville Bessemer Co.*, 207 Pa. St. 302, *affirming* 6 Dauphin Co. Rep. (Pa.) 65; *In re Martin*, 209 Pa. St. 266; *Com. v. Brown*, 210 Pa. St. 20, *affirming* 25 Pa. Super. Ct. 260; *Munhall v. Mifflin Twp.*, 210 Pa. St. 527; *Com. v. Real Estate Trust Co.*, 211 Pa. St. 51, *affirming* 26 Pa. Super. Ct. 149.

South Carolina. — *Kitchen v. Southern R. Co.*, 68 S. Car. 554.

Vermont. — *State v. Scampini*, 77 Vt. 92.

West Virginia. — *Wellsburg, etc., R. Co. v. Pan Handle Traction Co.*, 56 W. Va. 18.

Old Statutes Incorporated in New to Be Read as Part of New. — *Chelsea Waterworks Co. v. Metropolitan Water Board*, (1904) 2 K. B. 77.

2. Construing Section of Statute. — *Montreal v. Cantin*, 35 Can. Sup. Ct. 223, *per* Girouard, J., *quoting* 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 616.

617. 2. Sections of Code Construed as One Statute. — *Mineral Farm Min. Co. v. Barrick*, 33 Colo. 410; *Kenyon v. Cedar Rapids*, 124 Iowa 195; *Cedar Rapids, etc., R. Co. v. Cummins*, 125 Iowa 430; *Powers Mercantile Co. v. Blethen*, 91 Minn. 339; *State v. Thomas*, 183 Mo. 220; *McKivergan v. Alexander, etc., Lumber Co.*, 124 Wis. 60. See also *German Trust Co. v. Board of Equalization*, 121 Iowa 325.

In California the Four Codes Are to Be Construed as One Statute. — *Matter of Miner*, 143 Cal. 194. See also *People v. Norris*, 144 Cal. 422.

Montana and South Dakota — Different Codes Construed as One Statute. — *State v. Donlan*, 32 Mont. 256; *Gibson v. Allen*, (S. Dak. 1905) 104 N. W. Rep. 275.

618. 2. Unconstitutional Provisions. — *Fagan v. Payen*, (N. J. 1904) 59 Atl. Rep. 568, *reversing on other grounds* *Matter of Fagan*, 70 N. J. L. 341; *Hollenbach v. Berks County*, 14 Pa. Dist. 243.

3. Construction to Give Effect to Every Part of Act — United States. — U. S. *v. York*, 131 Fed. Rep. 323; *Dolan v. U. S.*, (C. C. A.) 133 Fed. Rep. 440.

Alaska. — *Chambers v. Solner*, 1 Alaska 271; *Brace v. Solner*, 1 Alaska 361.

Arizona. — *Don Yan v. Ah You*, 4 Ariz. 109.

Arkansas. — *Improvement Dist. No. 60 v. Cotter*, 71 Ark. 556; *Plunkett v. State*, 72 Ark. 409.

Colorado. — *Denver v. Campbell*, 33 Colo. 162.

Florida. — *State v. Givens*, (Fla. 1904) 37 So. Rep. 308.

Illinois. — *Crozer v. People*, 206 Ill. 464; *Andel v. People*, 106 Ill. App. 558.

Indiana. — *State v. Flynn*, 161 Ind. 554.

Iowa. — *German Trust Co. v. Board of Equalization*, 121 Iowa 325; *Minneapolis, etc., R. Co. v. Gowrie, etc., R. Co.*, 123 Iowa 543; *Diver v. Keokuk Sav. Bank*, 126 Iowa 691.

Kansas. — *Kennedy v. Haskell*, 67 Kan. 612; *Dever v. Humphrey*, 68 Kan. 750.

Kentucky. — *Standard Oil Co. v. Com.*, (Ky. 1904) 82 S. W. Rep. 970, *affirmed on rehearing* 83 S. W. Rep. 557, 26 Ky. L. Rep. 1187.

619. (2) *General and Particular Clauses.* — See notes 1, 2.

c. CLAUSES ABSOLUTELY IRRECONCILABLE. — See note 3.

620. See note 1.9. Statutes in *Pari Materia* — a. GENERAL DOCTRINE. — See note 5.

Louisiana. — State *v.* Fontenot, 112 La. 628; Laporte *v.* Libby, 114 La. 570.

Maryland. — Price *v.* Liquor License Com'rs, 98 Md. 346. See also Evans Marble Co. *v.* International Trust Co., 101 Md. 210.

Massachusetts. — Stevens *v.* Bradford, 185 Mass. 439; Boston *v.* Boston El. R. Co., 186 Mass. 274.

Mississippi. — Yazoo, etc., R. Co. *v.* Metcalf, 84 Miss. 242.

Montana. — *In re* Scheuer, 31 Mont. 606.

Nebraska. — State *v.* Nolan, (Neb. 1904) 98 N. W. Rep. 657.

New Mexico. — Orman *v.* Van Arsdell, (N. Mex. 1904) 78 Pac. Rep. 48.

Ohio. — Kenton *v.* Board of Education, 70 Ohio St. 172.

Oklahoma. — Carpenter *v.* Russell, 13 Okla. 277; Giles *v.* Dennison, (Okla. 1904) 78 Pac. Rep. 174.

Pennsylvania. — Munhall *v.* Mifflin Tp., 210 Pa. St. 527, quoting 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 618; Jermyn *v.* Scranton, 212 Pa. St. 598, affirming 5 Lack. Jur. (Pa.) 293; Altoona *v.* Morrison, 24 Pa. Super. Ct. 417; York Gazette Co. *v.* York County, 25 Pa. Super. Ct. 517; Tarentum *v.* Moorhead, 26 Pa. Super. Ct. 273.

South Carolina. — Kitchen *v.* Southern R. Co., 68 S. Car. 554; Townes *v.* Alexander, 69 S. Car. 23.

Vermont. — State *v.* Jewett, 76 Vt. 435; *In re* Demarco, 77 Vt. 445.

Virginia. — Funkhouser *v.* Spahr, 102 Va. 306.

Washington. — Easson *v.* Seattle, 32 Wash. 405.

West Virginia. — Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101; Wellsburg, etc., R. Co. *v.* Pan Handle Traction Co., 56 W. Va. 18; Mosser *v.* Moore, 56 W. Va. 478, *per* Dent, J.

Wisconsin. — Equitable L. Assur. Soc. *v.* Host, 124 Wis. 657.

Two Reasonable Readings — That Avoiding Repugnance to Be Adopted. — Leas *v.* Merriman, 132 Fed. Rep. 510.

619. 1. General and Particular Clauses — United States. — Kepner *v.* U. S., 195 U. S., 100; Guthrie *v.* Sparks, (C. C. A.) 131 Fed. Rep. 443; Schoellkopf, etc., Co. *v.* U. S., 139 Fed. Rep. 58.

District of Columbia. — Gwin *v.* Brown, 21 App. Cas. (D. C.) 295.

Indiana. — Elkhart *v.* Lipschitz, 164 Ind. 671.

Louisiana. — Laporte *v.* Libby, 114 La. 570.

Michigan. — Woodworth *v.* Kalamazoo, 135 Mich. 233, 10 Detroit Leg. N. 761.

Missouri. — State *v.* Dabbs, 182 Mo. 359.

Nebraska. — State *v.* Nolan, (Neb. 1904) 98 N. W. Rep. 657.

New York. — People *v.* Columbia County, 105 N. Y. App. Div. 319; Topham *v.* Interurban St. R. Co., 96 N. Y. App. Div. 323, reversing (Supm. Ct. App. T.) 42 Misc. (N. Y.) 503.

Ohio. — Detroit Southern R. Co. *v.* Lawrence County, 71 Ohio St. 454.

Pennsylvania. — Com. *v.* State Treasurer, 13 Pa. Dist. 231, 29 Pa. Co. Ct. 545, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 619, affirmed 210 Pa. St. 372.

South Dakota. — Sanford *v.* King, (S. Dak. 1905) 103 N. W. Rep. 28, quoting 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 618, 619.

Texas. — Austin *v.* Cahill, (Tex. 1905) 88 S. W. Rep. 542, citing Erwin *v.* Blanks, 60 Tex. 583.

Washington. — McKnight *v.* McDonald, 34 Wash. 98. See also Tacoma Mill Co. *v.* Perry, 32 Wash. 650.

Revenue Laws. — Goldenberg *v.* U. S., 124 Fed. Rep. 1003, affirmed (C. C. A.) 130 Fed. Rep. 108; Brennan *v.* U. S., (C. C. A.) 136 Fed. Rep. 743, reversing 129 Fed. Rep. 837. And see the title REVENUE LAWS, 890. 7.

2. Com. *v.* State Treasurer, 13 Pa. Dist. 231, 29 Pa. Co. Ct. 545, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 619, affirmed 210 Pa. St. 372. See also Lansing *v.* State, (Neb. 1905) 102 N. W. Rep. 254.

3. **Last Clause Governs.** — Guthrie *v.* Sparks, (C. C. A.) 131 Fed. Rep. 443; Browne *v.* Providence, 114 La. 631; Price *v.* Liquor License Com'rs, 98 Md. 346; State *v.* Taylor, 186 Mo. 608; *In re* Scheuer, 31 Mont. 606; State *v.* Insurance Co. of North America, (Neb. 1904) 99 N. W. Rep. 36, reversed on rehearing on other grounds (Neb. 1904) 100 N. W. Rep. 405; Joseph Speidel Grocery Co. *v.* Warder, 56 W. Va. 602, quoting 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 619; Mosser *v.* Moore, 56 W. Va. 478, *per* Dent, J., concurring, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 618, 619; Birdsall *v.* Kewaunee County, 124 Wis. 576.

620. 1. Section Treating Specifically of Matter Prevails as to It. — Sutton *v.* Hancock, 118 Ga. 436; Hubbard *v.* State, (Neb. 1904) 100 N. W. Rep. 153; State *v.* Cruikshank, 13 N. Dak. 337. See also State *v.* Ellis, 110 La. 1042; Walls *v.* State, 45 Tex. Crim. 329.

5. **Statutes in Pari Materia Construed Together — United States.** — Mosle *v.* Bidwell, (C. C. A.) 130 Fed. Rep. 334, reversing 119 Fed. Rep. 480; Schmidt *v.* U. S., (C. C. A.) 133 Fed. Rep. 257; U. S. *v.* Oregon, etc., R. Co., 133 Fed. Rep. 953; Christie-St. Commission Co. *v.* U. S., (C. C. A.) 136 Fed. Rep. 326, affirming 129 Fed. Rep. 506; White *v.* U. S., 191 U. S. 545.

Alaska. — Brace *v.* Solner, 1 Alaska 361.

Arkansas. — Towson *v.* Denson, (Ark. 1905) 86 S. W. Rep. 661.

Georgia. — Walton County *v.* Morgan County, 120 Ga. 548.

Illinois. — Anel *v.* People, 106 Ill. App. 558.

Indiana. — Welty *v.* Ward, 164 Ind. 457.

Iowa. — Freeman *v.* Independence, 123 Iowa 1.

Kansas. — Cherokee, etc., Coal, etc., Co. *v.* Crawford County, (Kan. 1905) 80 Pac. Rep. 601; State *v.* Myers (Kan. 1905) 80 Pac. Rep.

622. Statutes Are in *Pari Materia*. — See note 1.

623. Where Meaning Clear, Resort to Other Statutes Generally Improper. — See note 1.
b. CONTEMPORANEOUS STATUTES. — See note 4.

624. *c.* SUBSEQUENT STATUTES. — See note 2.

d. EXPIRED AND REPEALED STATUTES. — See note 3.

625. *e.* CODES, REVISIONS, AND RE-ENACTMENTS. — See notes 1, 2.

638; *State v. Wilson* (Kan. 1905) 80 Pac. Rep. 639.

Massachusetts. — *Lentell v. Boston, etc.*, 51 N. W. Rep. 187 Mass. 445.

Missouri. — *Barnett v. Pemiscot County Ct.*, 111 Mo. App. 693.

Nebraska. — *State v. Royse*, (Neb. 1904) 98 N. W. Rep. 459, denying rehearing (Neb. 1903) 97 N. W. Rep. 473, (Neb. 1902) 91 N. W. Rep. 559; *Barker v. Glendore*, (Neb. 1904) 99 N. W. Rep. 548; *State v. Tanner*, (Neb. 1905) 102 N. W. Rep. 235; *Farmers', etc., Irrigation Co. v. Gothenburg Water Power, etc., Co.*, (Neb. 1905) 102 N. W. Rep. 487.

New York. — *Orange County v. Ellsworth*, 98 N. Y. App. Div. 275, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620; *O'Reilly v. Brooklyn Heights R. Co.*, 95 N. Y. App. Div. 253, affirmed 179 N. Y. 450; *Crapo v. Syracuse*, 98 N. Y. App. Div. 376; *Matter of American Security, etc., Co.*, (Surrogate Ct.) 45 Misc. (N. Y.) 529.

North Carolina. — *State v. Patterson*, 134 N. Car. 612, per Douglas, J., dissenting, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620.

Ohio. — *Pleasant Hill v. Miami County*, 71 Ohio St. 133; *Gentsch v. State*, 71 Ohio St. 151.

Pennsylvania. — *Hoffman's Estate*, 209 Pa. St. 357, reversing 29 Pa. Co. Ct. 105; *Russ v. Com.*, 210 Pa. St. 544, 105 Am. St. Rep. 825, reversing 7 Dauphin Co. Rep. (Pa.) 158; *Com. v. Real Estate Trust Co.*, 211 Pa. St. 51, affirming 26 Pa. Super. Ct. 149. See also *Dryden v. Pittsburgh, etc., R. Co.*, 208 Pa. St. 316; *Snyder v. Baltimore, etc., R. Co.*, 210 Pa. St. 500.

South Dakota. — *In re Larsen*, (S. Dak. 1904) 100 N. W. Rep. 738.

Tennessee. — *Posey v. Posey*, 113 Tenn. 588; *Red River Furnace Co. v. Tennessee Cent. R. Co.*, 113 Tenn. 697; *Ehrlich v. Weber*, 114 Tenn. 711.

Utah. — *Twiggs v. Land Com'rs*, 27 Utah 241.

West Virginia. — *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101; *Chesapeake, etc., R. Co. v. Deepwater R. Co.*, 57 W. Va. 641; *Wellsburg, etc., R. Co. v. Pan Handle Traction Co.*, 56 W. Va. 18.

Wyoming. — *Rice v. Tilton*, 13 Wyo. 420.

A Remedy Provided by One Statute. — *Matter of Madrid*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 431. See also *Grimes v. Reynolds*, 94 Mo. App. 578, 589, affirmed 184 Mo. 679, 694.

622. 1. Illustrations of Statutes Held in *Pari Materia* — *The Sections of a Code Referring to the Same Subject-matter*. — *Lewis v. Southern R. Co.*, (Ala. 1905) 38 So. Rep. 1023.

Mechanics and Maritime Lien Statutes. — *Bennett v. Beadle*, 142 Cal. 239.

Practice Act and Attachment Act. — *Smith v. Collyot*, 69 N. J. L. 365.

Statutes Punishing Unlawful Intercourse Between Sexes. — *Loose v. State*, 120 Wis. 115.

Insurance Laws. — *Rothschild v. Adler-Weinberger Steamship Co.*, (C. C. A.) 130 Fed. Rep. 886, reversing 123 Fed. Rep. 145.

Acts Limiting the Liability of Shipowners. — *Rudolf v. Brown*, 137 Fed. Rep. 106.

Acts for Statutory Construction, of Universal Application. — *Walker v. Hyland*, 70 N. J. L. 69.

Acts Relating to Use of Mails to Defraud. — *Rosenberger v. Harris*, 136 Fed. Rep. 1001.

Sunday Law and General Police Power Statutes. — *Com. v. Hoover*, 25 Pa. Super. Ct. 133, reversing 13 Pa. Dist. 45, 29 Pa. Co. Ct. 413.

Not in *Pari Materia* — *Railroad Fence Law and Stock Law*. — *Growney v. Wabash R. Co.*, 102 Mo. App. 442.

Divorce Statute and Statute Respecting Separate Maintenance. — *Pike v. Pike*, 112 Ill. App. 243.

623. 1. When Act Clear No Resort to Other Statutes. — *Gillett v. Gillett*, 207 Ill. 136.

Resort to Prior Acts Proper to Solve but Not to Create Ambiguity. — *Cheney v. State*, (Ind. 1905) 74 N. E. Rep. 892.

4. Acts in *Pari Materia* Passed at Same Session. — *Lincoln School Tp. v. American School Furniture Co.*, 31 Ind. App. 405; *Louisiana Nav., etc., Co. v. Doullut*, 114 La. 906; *State v. Patterson*, 134 N. Car. 612, per Douglas, J., dissenting, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 620 et seq.; *State v. State Treasurer*, 68 S. Car. 411; *McGrady v. Terrell*, 98 Tex. 427; *Twiggs v. Land Com'rs*, 27 Utah 241.

Code Provisions. — *Grannis v. Superior Ct.*, 146 Cal. 245, 106 Am. St. Rep. 23, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 623, 624. And see *supra*, this title, **617. 1, 2.**

624. 2. Subsequent Statutes. — *Lincoln School Tp. v. American School Furniture Co.*, 31 Ind. App. 405; *Russ v. Com.*, 210 Pa. St. 544, 105 Am. St. Rep. 825, reversing 7 Dauphin Co. Rep. (Pa.) 158.

3. Expired and Repealed Acts Considered. — *Campbell v. Hallihan*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 409; *Chesapeake, etc., R. Co. v. Deepwater R. Co.*, 57 W. Va. 641; *Wellsburg, etc., R. Co. v. Pan Handle Traction Co.*, 56 W. Va. 18. Compare *Lockwood v. District of Columbia*, 24 App. Cas. (D. C.) 569.

Statute Enacted and Repealed at Same Session Entitled to Little Work. — *Angle v. Terrell*, 97 Tex. 509.

625. 1. Construction of Code or Statutory Revision. — *Rex v. Abrahams*, (1904) 2 K. B. 859, 91 L. T. N. S. 493; *U. S. v. York*, 131 Fed. Rep. 323; *Porter v. Prince*, 188 Mass. 80; *Daly Bank, etc., Co. v. Great Falls St. R. Co.*, 32 Mont. 298; *Runnels v. State*, 45 Tex. Crim. 446. See also *Jones v. Miller*, 35 Wash. 499.

Order in Which Statutes Arranged in Revision Immaterial. — *Rice v. Tilton*, 13 Wyo. 420.

2. Alteration in Acts Consolidated. — *U. S. v. York*, 131 Fed. Rep. 323.

625. *g.* PRIVATE STATUTES. — See notes 5, 6.

626. 10. Aids to Interpretation — *a.* INTRINSIC FROM INCIDENTS AND FORM — (1) *Preamble.* — See note 1.

627. When Words Clear, Resort to Preamble Improper. — See note 2.

(2) *Title.* — See note 5.

628. In the United States. — See note 5.

629. Resorted to Only in Case of Ambiguity. — See note 1.

Effect of Constitutional Requirement that Subject Be Expressed in Title. —

See note 5.

630. (3) *Chapter Titles and Section Headings* — Heading So Used as to Be Part of Subsequent Sections. — See note 2.

Headings Are Commonly Used in the United States. — See note 4.

(4) *Marginal Notes.* — See notes 7, 10.

631. (6) *Punctuation.* — See notes 8, 9.

632. *b.* EXTRINSIC OR EXTERNAL — (1) *History, the Old Law and Mischief.* — See notes 1, 2.

625. 5. Private Acts Conferring Privilege and General Acts. — Compare *Heath v. Manire*, 114 Tenn. 105, holding that corporations existing under special charters are not bound by the limitations of a general corporation law.

6. Two Special Acts Not in *Pari Materia.* — See *Watauga Water Co. v. Scott*, 111 Tenn. 321.

626. 1. Preamble No Part of Act, but States Intention. — *Cooper Hospital v. Camden*, 70 N. J. L. 478; *Hewson v. Ontario Power Co.*, 36 Can. Sup. Ct. 596, affirming 8 Ont. L. Rep. 88, which affirmed 6 Ont. L. Rep. 11. See also *Russ v. Com.*, 210 Pa. St. 544, 105 Am. St. Rep. 825, reversing 7 Dauphin Co. Rep. (Pa.) 158.

Preamble Cannot Cure Inherent Defects in Act. — *Gemmer v. State*, 163 Ind. 150.

627. 2. No Resort to Preamble When Meaning Plain. — *McCain v. Des Moines*, (Iowa 1905) 103 N. W. Rep. 979.

5. Title No Part of Act. — See *Rosin v. Lidgerwood Mfg. Co.*, 89 N. Y. App. Div. 245.

628. 5. United States Rule — Title Consulted. — *White v. U. S.*, 191 U. S. 545; *Western Union Tel. Co. v. Braxtan*, (Ind. 1905) 74 N. E. Rep. 985; *Schafer v. Schafer*, (Neb. 1904) 99 N. W. Rep. 482; *Rosin v. Lidgerwood Mfg. Co.*, 89 N. Y. App. Div. 245; *Topham v. Interurban St. R. Co.*, 96 N. Y. App. Div. 323, reversing (Supm. Ct. App. T.) 42 Misc. (N. Y.) 503; *State v. Patterson*, 134 N. Car. 612; *State v. Garland*, 134 N. Car. 749; *Com. v. Rabe*, 31 Pa. Co. Ct. 365. See also *People v. Bird*, 138 Mich. 31, 11 Detroit Leg. N. 461.

Chapter Headlines in Codification of Laws No Part of Title. — *State v. Graham*, 34 Wash. 81.

629. 1. When Statutes Plain Title Not Resorted To. — *Cornell v. Coyne*, 192 U. S. 418; *State v. Patterson*, 134 N. Car. 612.

5. In the Case of Bills Not Affected by the Constitutional Provision, the titles which they bear on introduction are no part of the bills themselves. *Southern R. Co. v. Mitchell*, 139 Ala. 629.

630. 2. Heading Grammatically a Part of Following Sections. — See *M'Ewan v. Perth Magistrates*, Sc. Ct. of Sess. 7 F. 414.

4. See *Laws v. Troutt*, 147 Cal. 172; *Brennan v. Roberts*, 125 Iowa 615; *State v. Garland*, 134 N. Car. 749; *Schwartz v. West*, (Tex. Civ. App. 1904) 84 S. W. Rep. 282.

Indexes or Headlines of Sections as Aids to In-

terpretation. — See *Maschaur v. Maschaur*, 23 App. Cas. (D. C.) 87.

Heading Cannot Change Obvious Meaning of Language in Body of Act. — *State v. Bisping*, 123 Wis. 267.

7. Marginal Notes. — See *M'Ewan v. Perth Magistrates*, Sc. Ct. of Sess. 7 F. 414.

10. Marginal Indexes and Notes Accompanying Codes or Revised Statutes, as reported to the legislature, and adopted by it, are to be taken and read as a part thereof. *U. S. v. Green*, 136 Fed. Rep. 618; *State v. Nease*, (Oregon 1905) 80 Pac. Rep. 897. See also *Mackey v. Miller*, (C. C. A.) 126 Fed. Rep. 161.

631. 8. Punctuation Disregarded. — *Crawford v. Burke*, 195 U. S. 176, reversing 201 Ill. 581; *Chicago, etc., R. Co. v. Voelker*, (C. C. A.) 129 Fed. Rep. 522, reversing 116 Fed. Rep. 867; *Lorenz v. U. S.*, 24 App. Cas. (D. C.) 337; *Maley v. Clark*, 33 Ind. App. 149.

Court Cannot Repunctuate So as to Include Classes that Are Clearly Excluded. — *U. S. v. York*, 131 Fed. Rep. 323. See also *Saunders v. Adams Express Co.*, 71 N. J. L. 270; *Esquimalt Water Works Co. v. Victoria*, 10 British Columbia 193.

Changes in Punctuation on Re-enactment of Statute of Little Significance. — *South Haven v. Van Buren Probate Judge*, (Mich. 1905) 103 N. W. Rep. 521.

9. Resort to Punctuation. — *Maley v. Clark*, 33 Ind. App. 149; *Blood v. Beal*, 100 Me. 30.

632. 1. Evil to Be Remedied. — *Moffitt v. U. S.*, (C. C. A.) 128 Fed. Rep. 375; *Van Vuren v. Longstreet*, 108 Ill. App. 159; *Durland v. Durland*, 67 Kan. 734.

2. State of Law at Passage of Act and Matters of History Examined — *United States*. — *Pooler v. U. S.*, (C. C. A.) 127 Fed. Rep. 509; *Stone v. Whitridge*, (C. C. A.) 129 Fed. Rep. 33; *Govin v. Chicago*, 132 Fed. Rep. 848; *In re Seaholm*, (C. C. A.) 136 Fed. Rep. 144; *Irwin v. U. S.*, 38 Ct. Cl. 87; *Jasper v. U. S.*, 38 Ct. Cl. 202; *Murphy v. U. S.*, 38 Ct. Cl. 511.

California. — *Grannis v. Superior Ct.*, 146 Cal. 245, 106 Am. St. Rep. 23, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 632.

Georgia. — *Acree v. State*, 122 Ga. 144.

Indiana. — *Bailey v. State*, 163 Ind. 165; *Lincoln School Tp. v. American School Furniture Co.*, 31 Ind. App. 405; *New Albany v.*

633. See note 1.

(2) *Contemporaneous Exposition and Long Usage* — (a) **General Rule.**
— See note 2.

634. Where Rights of Property Depend on Established Usage. — See note 2.
Rule Not Applied Where Language Unambiguous. — See note 3.

635. (b) Construction by Inferior Courts. — See note 3.

(c) **Practical or Executive Construction** — *aa.* **GENERAL RULE.** — See note 4.

Stier, 34 Ind. App. 615. See also *Indianapolis, etc., Rapid Transit R. Co. v. Andis*, 33 Ind. App. 625.

Iowa. — Bell v. Hamm, 127 Iowa 343.

Kentucky. — Taylor v. Russell, 117 Ky. 539; Standard Oil Co. v. Com., (Ky. 1904) 82 S. W. Rep. 970, affirmed on rehearing 83 S. W. Rep. 557, 26 Ky. L. Rep. 1187.

Michigan. — Hoffman v. H. M. Loud, etc., Lumber Co., 138 Mich. 10, 12 Detroit Leg. N. 356, affirming on rehearing 138 Mich. 5.

Missouri. — State v. Speed, 183 Mo. 186.

Montana. — See Daly Bank, etc., Co. v. Great Falls St. R. Co., 32 Mont. 298.

New York. — People v. Lochner, 177 N. Y. 145, 101 Am. St. Rep. 773, affirming 73 N. Y. App. Div. 120, reversed on other grounds 108 U. S. 45; New York v. Chelsea Jute Mills, (Municipal Ct.) 43 Misc. (N. Y.) 266; People v. Fitzgerald, 180 N. Y. 269, affirming 96 N. Y. App. Div. 242; Topham v. Interurban St. R. Co., 96 N. Y. App. Div. 323, reversing (Supm. Ct. App. T.) 42 Misc. (N. Y.) 503; Lux v. New York City R. Co., (Municipal Ct.) 45 Misc. (N. Y.) 222.

North Carolina. — Jones v. Madison County, 137 N. Car. 579, reversing on rehearing 135 N. Car. 218.

Pennsylvania. — Dryden v. Pittsburg, etc., R. Co., 208 Pa. St. 316; Com. v. Hoover, 13 Pa. Dist. 45, 29 Pa. Co. Ct. 413, reversed on other grounds 25 Pa. Super. Ct. 133.

Utah. — Moon v. Salt Lake County, 27 Utah 435.

West Virginia. — Chesapeake, etc., R. Co. v. Deepwater R. Co., 57 W. Va. 641; Wellsburg, etc., R. Co. v. Pan Handle Traction Co., 56 W. Va. 18.

Canada. — Canadian Pac. R. Co. v. James Bay R. Co., 36 Can. Sup. Ct. 42.

The History of a Country, Its Topography and Condition. — See State v. Kelly, (Kan. 1905) 81 Pac. Rep. 450.

Certain General Facts of Common Knowledge. — See Jacobson v. Massachusetts, 197 U. S. 11, affirming 183 Mass. 242.

Sources Which Court May Consult. — Generally speaking, the sources to which the court may resort are the law itself and other considerations, facts, or circumstances of which the court can take judicial notice. The taking of testimony has been seldom permitted and only under extraordinary circumstances. Tenement House Dept. v. Moesch, 89 N. Y. App. Div. 526, affirming (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 446; New York v. Chelsea Jute Mills, (Municipal Ct.) 43 Misc. (N. Y.) 266.

Public Discussion Leading to Enactment May Be Regarded. — State v. Kelly, (Kan. 1905) 81 Pac. Rep. 450.

Construction of Provisos. — See State v. Tower, 185 Mo. 79.

Re-enacted Statutes Speak as of Time of Original Enactment. — Smith v. Colly, 69 N. J. L. 365.

633. 1. Resort to Extrinsic Facts Only Where There Is Ambiguity. — Holden v. U. S., 24 App. Cas. (D. C.) 318; Culbertson v. Abbeville County, 70 S. Car. 457. See also Murphy v. U. S., 38 Ct. Cl. 511.

2. Contemporary Exposition and Usage. — Western Union Tel. Co. v. Pennsylvania R. Co., 195 U. S. 540, affirming (C. C. A.) 123 Fed. Rep. 33, which reversed 120 Fed. Rep. 981; Govin v. Chicago, 132 Fed. Rep. 848; Brennan v. U. S., (C. C. A.) 136 Fed. Rep. 743, reversing 129 Fed. Rep. 837; Galm v. U. S., 39 Ct. Cl. 55; Nye v. Foreman, 215 Ill. 285; Bigelow v. Whitcomb, 72 N. H. 473; Com. v. Paine, 207 Pa. St. 45; Canadian Pac. R. Co. v. James Bay R. Co., 36 Can. Sup. Ct. 42. See also Com. v. Conroy, 207 Pa. St. 212.

The Constitutionality of a Statute Will Be Presumed. — See Cramer v. Southern Ohio L. & T. Co., 72 Ohio St. 395.

Construction and Acquiescence May Be Considered in reaching a conclusion as to the power granted, but cannot supply the absence of power. Arnsperger v. Crawford, 101 Md. 247; Colbert v. State, (Miss. 1905) 39 So. Rep. 65; State v. Butler, 178 Mo. 272; *Ex p.* Heyman, 45 Tex. Crim. 532; State v. Ide, 35 Wash. 576, 102 Am. St. Rep. 914; Kingsley v. Merrill, 122 Wis. 185. See also Yazoo, etc., R. Co. v. Southern R. Co., 83 Miss. 746.

634. 2. Where Rights of Property Have Grown Up on Long Usage. — Atwell v. Parker, 93 Minn. 462; State v. Gunter, 36 Tex. Civ. App. 381.

3. Language Must Be Ambiguous. — Houghton v. Payne, 194 U. S. 88, affirming 22 App. Cas. (D. C.) 234; U. S. v. Dietrich, 126 Fed. Rep. 671; Knight v. Shelton, 134 Fed. Rep. 423.

635. 3. Prior Decisions Conflicting. — *In re* U. S. Hotel Co., (C. C. A.) 134 Fed. Rep. 225; Stevens v. Union R. Co., 26 R. I. 90.

4. Practical Construction Strong Evidence of Meaning — *United States.* — McMichael v. Murphy, 197 U. S. 304; Hackfeld v. U. S., 197 U. S. 442, reversing (C. C. A.) 125 Fed. Rep. 596; Irwin v. U. S., 38 Ct. Cl. 87; Lorsch v. U. S., 135 Fed. Rep. 214.

Connecticut. — State v. South Norwalk, 77 Conn. 257.

Indiana. — Scott v. Laporte, 162 Ind. 34.

Iowa. — McCorkell v. Herron, (Iowa 1905) 103 N. W. Rep. 988.

Massachusetts. — See Boston v. Boston El. R. Co., 186 Mass. 274; Smith v. Wenz, 187 Mass. 421.

Minnesota. — Dewey v. Kimball, 89 Minn. 454; State v. Northern Pac. R. Co., (Minn. 1905) 103 N. W. Rep. 731.

Mississippi. — Downing v. Hinds County, 84 Miss. 29.

636. See note 1.

bb. CHARACTER OF PRACTICE OR USAGE — **Local or Special Custom.** — See note 3.

637. (4) *Legislative Construction* — (a) **General Rule.** — See notes 1, 2, 3, 4.

(b) **Statutory Construction Laws and Provisions.** — See notes 5, 7, 8.

Missouri. — Barber Asphalt Paving Co. v. Meservey, 103 Mo. App. 186.

New York. — Tiffany v. Jamestown, 179 N. Y. 455, affirming 88 N. Y. App. Div. 620.

Ohio. — State v. Smith, 71 Ohio St. 13, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 635.

Wisconsin. — Equitable L. Assur. Soc. v. Host, 124 Wis. 657.

In the Construction of Constitutions. — State v. Dow, 78 Conn. 53.

Rule Especially Applicable Where Statute Re-enacted After Construction Given. — Fuqua v. Hager, (Ky. 1905) 84 S. W. Rep. 325; Louisville v. Louisville School Board, (Ky. 1905) 84 S. W. Rep. 729.

636. 1. Not Controlling. — Houghton v. Payne, 194 U. S. 88, affirming 22 App. Cas. (D. C.) 234; Mantle v. Casey, 31 Mont. 408; People v. Buffalo, (Supm. Ct. Spec. T.) 84 N. Y. Supp. 434; State v. Smith, 71 Ohio St. 13.

3. Local or Special Custom Cannot Control General Statute. — See Chicago Union Traction Co. v. Chicago, 209 Ill. 444.

637. 1. Interpretation Not for Legislature. — State v. Fry, 186 Mo. 198.

2. Legislative Construction Not Authoritative. — Collier v. Alexander, 142 Ala. 422; Denver v. Adams County, 33 Colo. 1; Morgan Park v. Knopf, 210 Ill. 453.

An Erroneous Legislative Interpretation of a Pre-existing Statute. — *In re* Taylor, 5 Indian Ter. 219; Territory v. Albright, (N. Mex. 1904) 78 Pac. Rep. 204.

Intention of Legislature Prevails over Prior Construction Law. — Mosle v. Bidwell, (C. C. A.) 130 Fed. Rep. 334, reversing 119 Fed. Rep. 480.

3. Legislative Construction Respectfully Considered. — People v. Sours, 31 Colo. 369, 102 Am. St. Rep. 34; Denver v. Adams County, 33 Colo. 1; Nye v. Foreman, 215 Ill. 285; Halsey v. Belle Plaine, (Iowa 1905) 104 N. W. Rep. 494; Berger v. Multnomah County, 45 Oregon 402; State v. Superior Ct., 36 Wash. 381. See also *Irwin v. U. S.*, 38 Ct. Cl. 87.

In the Construction of Constitutions. — Agricultural, etc., College v. Hager, 87 S. W. Rep. 1125, 27 Ky. L. Rep. 1178.

4. Declaratory Act Not Retroactive. — State v. Fry, 186 Mo. 198.

5. Words Importing Singular May Be Applied to Plural. — Smith v. McArthur, (1904) A. C. 389; Alloway v. Rural Municipality, 15 Manitoba 188; U. S. v. Perry, 133 Fed. Rep. 841; Lorsch v. U. S., 135 Fed. Rep. 214; David v. People, 204 Ill. 479; Kirk v. Roberson, 76 S. W. Rep. 183, 25 Ky. L. Rep. 633; McPheeters v. Ronning, (Minn. 1905) 103 N. W. Rep. 889; Hunter v. Erie R. Co., 70 N. J. L. 101; O'Neill v. Hoboken, (N. J. 1905) 60 Atl. Rep. 50.

"Person" to Include "Corporation." — *In re* United Button Co., 137 Fed. Rep. 668; Southern R. Co. v. Jones, 33 Ind. App. 333; Buell v. Arnold, 124 Wis. 65. And see generally the title PERSON, 741. 6 *et seq.*

Real Estate — Real Property — Personal Prop-

erty. — See *Summerville v. Stockton Milling Co.*, 142 Cal. 529.

Road Declared to Mean Any Public Highway Unless Otherwise Specified. — Nichols v. Chicago, etc., R. Co., 125 Iowa 236.

"Railroads" to Include "Interurban Street Railroads." — Cedar Rapids, etc., R. Co. v. Cummins, 125 Iowa 430; McLeod v. Chicago, etc., R. Co., 125 Iowa 270.

"Railroad Company" to Include Contractor, Lessee, Etc. — McKivergan v. Alexander, etc., Lumber Co., 124 Wis. 60.

Insurance Company — Insurance Corporation. — See Grand Lodge, etc., v. Edwards, (Ky. 1905) 85 S. W. Rep. 701.

"Town" to Include Cities, Wards, or Districts. — Tucker v. Lincoln County, 90 Minn. 406; State v. Hunter, 119 Wis. 60.

Masculine Gender to Include Feminine. — Walker v. Hyland, 70 N. J. L. 69.

Debtor — Creditor — Obligation. — See *Sonnysyn v. Akin*, 12 N. Dak. 227.

"Corporation." — See *Wilson v. D. W. Alderman*, etc., Co., 69 S. Car. 176.

7. Rules of General Interpretation — California. — Weaver v. San Francisco, 146 Cal. 728.

Indiana. — Cheney v. State, (Ind. 1905) 74 N. E. Rep. 892.

Iowa. — State v. Hortman, 122 Iowa 104; Kelley v. Cedar Falls, 123 Iowa 660; *In re* Bailies, 127 Iowa 124.

Kentucky. — Com. v. Trent, 117 Ky. 34; Standard Oil Co. v. Com., 82 S. W. Rep. 1020, 26 Ky. L. Rep. 985.

Missouri. — State v. Vette, 179 Mo. 408.

Montana. — *In re* Scheuer, 31 Mont. 606.

New Jersey. — Walker v. Hyland, 70 N. J. L. 69.

North Dakota. — *Sonnysyn v. Akin*, 12 N. Dak. 227; Colonial, etc., Mortg. Co. v. Northwest Thresher Co., (N. Dak. 1905) 103 N. W. Rep. 915.

South Dakota. — Phenix Ins. Co. v. Perkins, (S. Dak. 1905) 101 N. W. Rep. 1110.

Wisconsin. — Birdsall v. Kewaunee County, 124 Wis. 576.

Canada. — Canadian Pac. R. Co. v. James Bay R. Co., 36 Can. Sup. Ct. 42.

Rule for Computing Time. — See *State v. Dewey*, (Neb. 1905) 102 N. W. Rep. 1015; *Biggs v. Geneva*, 100 N. Y. App. Div. 25. And see the title TIME (COMPUTATION OF).

8. For Various Illustrations of Interpretation Clauses for Particular Acts see Six Parcels Placer Gold v. U. S., (Ariz. 1904) 76 Pac. Rep. 473 (custom duties statute); U. S. v. Gin Hing, (Ariz. 1904) 76 Pac. Rep. 639 (Chinese exclusion act); Peterson v. Mineral King Fruit Co., 140 Cal. 624 (statute relating to agency); Jones v. Police Com'rs, 141 Cal. 96 (statute of limitations); Hartley v. Vermillion, 141 Cal. 339 (statute relating to highways); Bakersfield, etc., Oil Co. v. Kern County, 144 Cal. 148 (revenue law); State v. Boies, 68 Kan. 167 (statute punishing malicious mischief); Hamilton v. Murray, 29 Mont. 80 (statute relating to new

638. See note 3.

(5) *Opinions and Motives of Legislators.* — See note 5.

639. (6) *Legislative Journals and Reports of Committees* — *Legislative Journals.* — See notes 4, 5.

640. See note 1.

Reports of Committees. — See note 2.

11. Consequences to Be Guarded Against — c. UNCONSTITUTIONALITY.

— See note 7.

trials); *Bordeaux v. Bordeaux*, 30 Mont. 36 (divorce statute); *State v. Red Lodge*, 30 Mont. 338 (statute relating to highways and roads); *Omaha v. Hodskins*, (Neb. 1903) 97 N. W. Rep. 346 (revenue law); *State v. Fleming*, (Neb. 1903) 97 N. W. Rep. 1063 (revenue law); *Sonnesyn v. Akin*, 12 N. Dak. 227 (revenue law); *State v. Larson*, 12 N. Dak. 474 (bail statute); *Dight v. Chapman*, 44 Oregon 265 (federal bankruptcy act); *Brooke v. Eastman*, 17 S. Dak. 339 (sales statute); *Murphy v. Dafoe*, (S. Dak. 1904) 99 N. W. Rep. 86 (adverse possession statute); *Fitz Henry v. Munter*, 33 Wash. 629 (sales statute); *Kingsley v. Merrill*, 122 Wis. 185 (revenue law).

Improvements Defined by Occupying Claimant's Act. — *Northern Invest. Co. v. Bargquist*, 93 Minn. 106.

638. 3. Binding on Court. — *McCorkell v. Herron*, (Iowa 1905) 103 N. W. Rep. 988. See also *State v. Edmunds*, 127 Iowa 333; *Wrought Iron Range Co. v. Campen*, 135 N. Car. 506; *State v. Ninestein*, 132 N. Car. 1039.

Limitation of Rule. — The legislature cannot change the meaning of the words so as to make that a crime which would not be a crime if called by its proper name. *Plymouth v. Cooper*, 135 N. Car. 1.

5. Opinions of Individual Legislators Generally Inadmissible. — *Mosle v. Bidwell*, (C. C. A.) 130 Fed. Rep. 334, reversing 119 Fed. Rep. 480; *Funkhouser v. Spahr*, 102 Va. 306.

As to Motives of Legislators see *supra*, this title, 569. 7, 8.

639. 4. Legislative History Not Generally Admissible. — *Compare Johnson v. Southern Pac. R. Co.*, 196 U. S. 1, reversing (C. C. A.) 117 Fed. Rep. 462; *Mosle v. Bidwell*, (C. C. A.) 120 Fed. Rep. 334, reversing 119 Fed. Rep. 480.

5. General Rule — Identifying Act. — *Scouten v. Whatcom*, 33 Wash. 273.

640. 1. Broader Rule. — See *State v. Kelly*, (Kan. 1905) 81 Pac. Rep. 450; *Oak Cliff v. State*, 97 Tex. 383, affirming (Tex. Civ. App. 1903) 77 S. W. Rep. 24.

2. Committees of the Legislature. — *Compare Mosle v. Bidwell*, (C. C. A.) 130 Fed. Rep. 334, reversing 119 Fed. Rep. 480, holding that the court may consult the reports of committees in order to ascertain the legislative intent; *Binns v. U. S.*, 194 U. S. 486, citing *Holy Trinity Church v. U. S.*, 143 U. S. 457.

7. All Presumptions in Favor of Constitutionality — *United States.* — *Buttfield v. Stranahan*, 192 U. S. 470; *Binns v. U. S.*, 194 U. S. 486; *Papst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144, affirmed 198 U. S. 17; *U. S. v. Byers*, 127 Fed. Rep. 993. See also *Greenleaf v. National Assoc.*, 130 Fed. Rep. 209; *Farmers' L. & T. Co. v. Sioux Falls*, 131 Fed. Rep. 890, reversed on other grounds (C. C. A.) 136 Fed. Rep. 721.

Arkansas. — *Waterman v. Hawkins*, (Ark. 1905) 86 S. W. Rep. 844.

California. — *Matter of Campbell*, 143 Cal. 623; *Ex p. Bunkers*, (Cal. 1905) 81 Pac. Rep. 748.

Connecticut. — *Waterbury v. Platt*, 76 Conn. 435; *State v. Feingold*, 77 Conn. 326.

Indiana. — *U. S. Express Co. v. State*, 164 Ind. 196.

Kentucky. — *Sanders v. Com.*, 117 Ky. 1; *Standard Oil Co. v. Com.*, 82 S. W. Rep. 1020, 26 K. L. Rep. 985; *Board of Education v. Winchester*, (Ky. 1905) 87 S. W. Rep. 768.

Maryland. — *State v. Hyman*, 98 Md. 596; *Parker v. State*, 99 Md. 189.

Minnesota. — *Lake Crystal v. Blue Earth County*, 91 Minn. 247; *State v. Gunn*, 92 Minn. 436; *Kline v. Minnesota Iron Co.*, 93 Minn. 63; *Atwell v. Parker*, 93 Minn. 462.

Mississippi. — *State v. Woodruff*, 83 Miss. 111.

Missouri. — *State v. Cantwell*, 179 Mo. 245.

Nebraska. — *Chicago, etc., R. Co. v. Richardson County*, (Neb. 1904) 100 N. W. Rep. 950; *Aachen, etc., F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3.

New Hampshire. — *Leighton v. Concord, etc., R. Co.*, 72 N. H. 224.

New Jersey. — *East Orange v. Hussey*, 70 N. J. L. 244.

New York. — *People v. Wells*, 181 N. Y. 252, affirming 99 N. Y. App. Div. 364; *People v. Fitzgerald*, 180 N. Y. 269, affirming 96 N. Y. App. Div. 242; *Board of Education v. Board of Education*, 76 N. Y. App. Div. 355, affirmed 179 N. Y. 556; *People v. MacWilliams*, 91 N. Y. App. Div. 176; *Matter of Riverside Park*, 95 N. Y. App. Div. 550; *Matter of Borup*, 102 N. Y. App. Div. 262, affirmed 182 N. Y. 222.

North Carolina. — *Carr v. Duplin County*, 136 N. Car. 125.

Oklahoma. — *Burke v. Malaby*, 14 Okla. 650.

Pennsylvania. — *Com. v. State Treasurer*, 13 Pa. Dist. 231, 29 Pa. Co. Ct. 545, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 619, affirmed 210 Pa. St. 372; *Com. v. Mellet*, 27 Pa. Super. Ct. 41; *Com. v. Fisher*, 27 Pa. Super. Ct. 175.

Rhode Island. — *Opie v. Clancy*, 27 R. I. 42.

Texas. — See *Supreme Lodge, etc., v. Johnson*, 98 Tex. 1, reversing (Tex. Civ. App. 1903) 77 S. W. Rep. 661; *Austin v. Cahill*, (Tex. 1905) 88 S. W. Rep. 542.

Virginia. — *Harrison v. Thomas*, 103 Va. 333.

Washington. — *Armour v. Western Constr. Co.*, 36 Wash. 529.

West Virginia. — *Morrison v. Leach*, 55 W. Va. 126.

Canada. — *Hewson v. Ontario Power Co.*, 36 Can. Sup. Ct. 506, affirming 8 Ont. L. Rep. 88, which affirmed 6 Ont. L. Rep. 11.

642. Doubt Resolved in Favor of Statute. — See note 1.

Strict and Broad Construction. — See notes 4, 5.

643. Implication and Forced Construction. — See note 2.*d.* DISREGARD OF INTERNATIONAL AND INTERSTATE LAW —**(2)** Extraterritorial Operation. — See note 5.**644.** General Words Restrained. — See note 1.*e.* INCLUDING GOVERNMENT. — See notes 2, 3.

Unquestioning Acquiescence in the Constitutionality. — *Miller v. Enterprise Canal, etc., Co.*, 142 Cal. 208, 100 Am. St. Rep. 115.

Construction Against Exercise of Doubtful Power. — See *Stein v. Morrison*, 9 Idaho 426.

Prior Decisions Assuming Validity Entitled to Weight, but Not Conclusive. — *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151, 105 Am. St. Rep. 916.

Court Will Not Accept Agreement of Counsel that Statute Is Invalid. — *Mestas v. Diamond Coal, etc., Co.*, 12 Wyo. 414.

642. 1. Benefit of Doubt Given to Statute — United States. — *Kane v. Erie R. Co.*, (C. C. A.) 133 Fed. Rep. 681, reversing 128 Fed. Rep. 474.

Arkansas. — *State v. Moore*, (Ark. 1905) 88 S. W. Rep. 881.

California. — *Deyoe v. Superior Ct.*, 140 Cal. 476, 98 Am. St. Rep. 73.

Connecticut. — *State v. Reynolds*, 77 Conn. 131.

Illinois. — *People v. People's Gas Light, etc., Co.*, 205 Ill. 482, 98 Am. St. Rep. 244; *Lynch v. Malley*, 215 Ill. 374.

Indiana. — *Levy v. State*, 161 Ind. 251.

Iowa. — *Sisson v. Buena Vista County*, (Iowa 1905) 104 N. W. Rep. 454.

Kansas. — *State v. Kelly*, (Kan. 1905) 81 Pac. Rep. 450.

Kentucky. — *Agricultural, etc., College v. Hager*, 87 S. W. Rep. 1125, 27 Ky. L. Rep. 1178.

Maine. — *Soper v. Lawrence Bros. Co.*, 98 Me. 268, 99 Am. St. Rep. 397.

Michigan. — *Olds v. State Land Office Com'r*, 134 Mich. 442.

Missouri. — *State v. Etchman*, 189 Mo. 648.

Montana. — *In re O'Brien*, 29 Mont. 530.

Nebraska. — *Omaha v. Hodgskins*, (Neb. 1903) 97 N. W. Rep. 346; *State v. Fleming*, (Neb. 1903) 97 N. W. Rep. 1063; *Chicago, etc., R. Co. v. Sporer*, (Neb. 1904) 100 N. W. Rep. 813; *State v. Galusha*, (Neb. 1905) 104 N. W. Rep. 197.

New Jersey. — See *Fagan v. Payen*, (N. J. 1904) 59 Atl. Rep. 568, reversing on other grounds 70 N. J. L. 341.

New York. — *Wright v. Hart*, 103 N. Y. App. Div. 218, reversed on other grounds 182 N. Y. 330; *New York v. Chelsea Jute Mills*, (Municipal Ct.) 43 Misc. (N. Y.) 266.

North Carolina. — *State v. Lytle*, 138 N. Car. 738.

Pennsylvania. — *Russ v. Com.*, 210 Pa. St. 544, 105 Am. St. Rep. 825, reversing 7 Dauphin Co. Rep. (Pa.) 158; *Phillips v. Barnhart*, 27 Pa. Super. Ct. 26; *Parker Tp. School Dist. v. Bruin Borough School Dist.*, 13 Pa. Dist. 769; *Lee v. Wayne County*, 14 Pa. Dist. 15, 29 Pa. Co. Ct. 649; *Hollenbach v. Berks County*, 14 Pa. Dist. 243.

Texas. — *Tarrant County v. Butler*, 35 Tex. Civ. App. 421.

Virginia. — *National Council, etc., v. State Council, etc.*, (Va. 1905) 51 S. E. Rep. 166.

Wyoming. — *State v. Cahill*, 12 Wyo. 225.

Rule Fully Applicable to Eminent Domain Statutes. — *Ulmer v. Lime Rock R. Co.*, 98 Me. 579.

4. Restricted Construction. — *Atty.-Gen. v. Electric Storage Battery Co.*, 188 Mass. 239.

5. When Broad Construction Favored. — *State v. Kelly*, (Kan. 1905) 81 Pac. Rep. 450.

643. 2. Forced Construction Not Allowed. — *McDonald v. Southern Express Co.*, 134 Fed. Rep. 282; *Ex p. Deeds*, (Ark. 1905) 87 S. W. Rep. 1030; *Newton County v. State*, 161 Ind. 616; *School City v. Hayes*, 162 Ind. 193; *Sanders v. Com.*, 117 Ky. 1; *Parish v. East Coast Cedar Co.*, 133 N. Car. 478, 98 Am. St. Rep. 718, followed *J. L. Roper Lumber Co. v. Elizabeth City Lumber Co.*, 135 N. Car. 742; *Wrought Iron Range Co. v. Campen*, 135 N. Car. 506; *Com. v. Mellet*, 27 Pa. Super. Ct. 41; *Com. v. Kebort*, 13 Pa. Dist. 677, 30 Pa. Co. Ct. 164, reversed on other grounds 26 Pa. Super. Ct. 584; *Block v. Schwartz*, 27 Utah 387, 101 Am. St. Rep. 971. See also *Yazoo, etc., R. Co. v. Southern R. Co.*, 83 Miss. 746; *Austin v. Cahill*, (Tex. 1905) 88 S. W. Rep. 542.

The Fact that a Statute Is Humane or Benevolent in Intention will not save it if it is violative of the letter and spirit of the constitution. *Ex p. Lovings*, 178 Mo. 194; *Com. v. Fisher*, 27 Pa. Super. Ct. 175, approving *Mansfield's Case*, 22 Pa. Super. Ct. 224.

Natural Effect and Not Proclaimed Purpose of Statute Governs. — *Lochner v. New York*, 198 U. S. 45, reversing on other grounds 177 N. Y. 145, 101 Am. St. Rep. 773, which affirmed 73 N. Y. App. Div. 120; *People v. Bootman*, 95 N. Y. App. Div. 469, affirmed on other grounds 180 N. Y. 1.

5. Against Extraterritoriality. — *Bennett v. Beadle*, 142 Cal. 239; *State v. Clark*, 178 Mo. 20.

644. 1. General Terms Restricted to Avoid Such Consequence. — *Wallace v. United Electric Co.*, 211 Pa. St. 473.

As to Statutes Conferring Rights in General Language which have been held to include nonresidents as well as residents, see *Strong v. Dignan*, 207 Ill. 385, 99 Am. St. Rep. 225; *Cleveland, etc., R. Co. v. Osgood*, (Ind. App. 1904) 70 N. E. Rep. 839.

2. Prerogatives Not Taken Away Except by Necessary Implication. — See *State v. American Book Co.*, 69 Kan. 1, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 644.

3. States and United States Not Bound by General Words in Statute. — *Ruperich v. Baehr*, 142 Cal. 190; *State v. American Book Co.*, 69 Kan.

645. See notes 1, 2.

f. OUSTING JURISDICTION. — See note 3.

646. *g.* UNREASON AND INJUSTICE. — See note 2.

647. See note 1.

1, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 644; *A. L. & E. F. Goss Co. v. Greenleaf*, 98 Me. 436; *National Bond, etc., Co. v. Daskam*, 91 Minn. 81.

Mechanics' Lien Statutes Not Construed to Give Lien on Public Property. — *Neal-Millard Co. v. Chatham Academy*, 121 Ga. 208. *Compare Williams v. Rowell*, 145 Cal. 259. See generally the title MECHANICS' LIENS, 295. 1 et seq.

Statutes Disposing of Public Lands — Lands in Actual Occupation of Government Excluded. — *Scott v. Carew*, 196 U. S. 100, affirming (*C. C. A.*) 121 Fed. Rep. 1021.

Ultimate Test Not Municipal Ownership, but Public Use. — *Stiles v. Newport*, 76 Vt. 154. See also *State v. New Orleans*, 112 La. 408, citing *State v. New Orleans*, 110 La. 406.

645. 1. Statutes Establishing General Rules of Procedure in Civil Actions. — *Allen v. Clark*, (*C. C. A.*) 126 Fed. Rep. 738, affirming 114 Fed. Rep. 374.

Federal Bankruptcy Act. — See *Olds v. Forrester*, 126 Iowa 456.

Curative Provisions as to Tax Sales Applied to Purchase by State. — *Starr v. Sampselle*, 55 W. Va. 442, overruling *McGee v. Sampselle*, 47 W. Va. 352.

2. When the Subject-matter of a Statute Is One in Which the State Is the Chief Party In Interest. — *Ruperich v. Baehr*, 142 Cal. 190.

3. No Intent to Oust Jurisdiction Presumed. — *Eudora v. Hartig*, 68 Kan. 742.

Express Words Not Always Necessary to Bar Jurisdiction. — *Crosfield v. Manchester Ship Canal Co.*, (1904) 2 Ch. 123, 90 L. T. N. S. 557, reversed (1905) A. C. 421 as to the application of the principle, though not as to the principle itself.

646. 2. Presumption Against Unreason and Injustice. — *United States.* — *In re Bogen*, 134 Fed. Rep. 1019; *Jasper v. U. S.*, 38 Ct. Cl. 202; *Murphy v. U. S.*, 39 Ct. Cl. 178. See also *Beavers v. Henkel*, 194 U. S. 73.

Illinois. — *Sauter v. Anderson*, 112 Ill. App. 580; *Pennsylvania Co. v. Chicago*, 113 Ill. App. 638.

Indiana. — *Lincoln School Tp. v. American School Furniture Co.*, 31 Ind. App. 405.

Kentucky. — *Louisville v. Wehmhoff*, 116 Ky. 812, 845.

Maryland. — *Evans Marble Co. v. International Trust Co.*, 101 Md. 210.

New Jersey. — *Rutgers College v. Morgan*, 70 N. J. L. 460.

North Carolina. — *Goodwin v. Clayton*, 137 N. Car. 224, 107 Am. St. Rep. 456.

Texas. — *Oak Cliff v. Etheridge*, (*Tex. Civ. App.* 1903) 76 S. W. Rep. 602.

Virginia. — *Immigration Soc. v. Com.*, 103 Va. 46; *Stultz v. Pratt*, 103 Va. 536.

647. 1. Sensible Construction to Avoid Unreasonable and Unjust Consequences. — *England.* — *Horner v. Franklin*, (1904) 2 K. B. 877, 91 L. T. N. S. 564, affirmed (1905) 1 K. B. 479.

United States. — *Jacobson v. Massachusetts*, 197 U. S. 11, affirming 183 Mass. 242; *Pabst*

Brewing Co. v. Crenshaw, 120 Fed. Rep. 144, affirmed 198 U. S. 17; *Pooler v. U. S.*, (*C. C. A.*) 127 Fed. Rep. 509; *Moffitt v. U. S.*, (*C. C. A.*) 128 Fed. Rep. 375; *United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co.*, 133 Fed. Rep. 930; *U. S. v. Joe Dick*, 134 Fed. Rep. 988.

Arkansas. — See *Towson v. Denson*, (*Ark.* 1905) 86 S. W. Rep. 661.

California. — *San Francisco Sav. Union v. Reclamation Dist. No. 124*, 144 Cal. 639.

Connecticut. — See *State v. Campana*, 76 Conn. 549.

District of Columbia. — *Weigand v. District of Columbia*, 22 App. Cas. (*D. C.*) 559.

Illinois. — See *Cicero v. Green*, 211 Ill. 241; *In re Maplewood Coal Co.*, 213 Ill. 283; *Chicago v. People*, 114 Ill. App. 145.

Indiana. — *Clinton County v. Davis*, 162 Ind. 60.

Indian Territory. — *Parrott v. Crawford*, 5 Indian Ter. 103.

Iowa. — See *Culbertson v. Salinger*, 122 Iowa 12.

Kansas. — See *Connell v. Moore*, 70 Kan. 88.

Kentucky. — *Cincinnati, etc., R. Co. v. Com.*, 83 S. W. Rep. 562, 26 Ky. L. Rep. 1106; *White v. Com.*, 85 S. W. Rep. 753, 27 Ky. L. Rep. 561. See also *Wilson v. Com.*, 82 S. W. Rep. 427, 26 Ky. L. Rep. 685.

Maine. — *Carrigan v. Stillwell*, 99 Me. 434. See also *Penobscot Log Driving Co. v. West Branch Driving, etc., Co.*, 99 Me. 452.

Massachusetts. — See *Newton v. Newton*, 188 Mass. 226.

Michigan. — *C. H. Little Co. v. Woodward Ave. Cemetery Assoc.*, 135 Mich. 248, 10 Detroit Leg. N. 748; *Mills v. Osteopathic Registration, etc.*, 135 Mich. 525, 10 Detroit Leg. N. 855. See also *Rikerd Lumber Co. v. Chrouch*, 135 Mich. 703, 106 Am. St. Rep. 416.

Minnesota. — *Mathews v. Lincoln County*, 90 Minn. 348; *Betts v. Newman*, 91 Minn. 5; *Lake Crystal v. Blue Earth County*, 91 Minn. 247. See also *State v. Hausewedell*, 94 Minn. 177.

Missouri. — *Hilbert v. Barber Asphalt Paving Co.*, 107 Mo. App. 385. See also *State v. Balch*, 178 Mo. 392.

New Hampshire. — *New London v. Davis*, (*N. H.* 1904) 59 Atl. Rep. 369.

New York. — *People v. Fitzgerald*, 180 N. Y. 269, affirming 96 N. Y. App. Div. 242; *Rosin v. Lidgerwood Mfg. Co.*, 89 N. Y. App. Div. 245; *New York Cent., etc., R. Co. v. Buffalo, etc., Electric R. Co.*, 96 N. Y. App. Div. 471; *Topham v. Interurban St. R. Co.*, 96 N. Y. App. Div. 323, reversing (*Supm. Ct. App. T.*) 42 Misc. (*N. Y.*) 503.

North Carolina. — *Walker v. Southern R. Co.*, 137 N. Car. 163.

Ohio. — See *Carey v. State*, 70 Ohio St. 121; *United Presb. Theological Seminary v. Little*, 25 Ohio Cir. Ct. 609.

Oregon. — *The Aurelia*, 45 Oregon 285.

Texas. — *Tinkle v. Sweeney*, 97 Tex. 190;

648. See note 1.*h.* ABSURDITY. — See note 2.*i.* INCONVENIENCE. — See notes 3, 4.**649.** *j.* INEFFECTIVENESS. — See note 1.

Austin *v.* Cahill, (Tex. 1905) 88 S. W. Rep. 542; Oak Cliff *v.* Etheridge, (Tex. Civ. App. 1903) 76 S. W. Rep. 602; Medlin *v.* Seideman, (Tex. Civ. App. 1905) 88 S. W. Rep. 250.

Virginia. — Pardee *v.* Com., 102 Va. 905.

West Virginia. — Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101; Morrison *v.* Leach, 55 W. Va. 126.

Intelligent Purpose to Be Attributed to Legislation. — Murphy *v.* U. S., 38 Ct. Cl. 511.

648. 1. Injustice Must Be Manifest. — See Hopkins's Appeal, 77 Conn. 644.

2. Presumption Against Absurdity — *United States*. — *Pabst Brewing Co. v. Crenshaw*, 120 Fed. Rep. 144, affirmed 198 U. S. 17.

California. — *Gibson v. Twaddle*, (Cal. 1905) 81 Pac. Rep. 727.

District of Columbia. — *Weigand v. District of Columbia*, 22 App. Cas. (D. C.) 559.

Indiana. — *State v. Flynn*, 161 Ind. 554.

Kentucky. — *Com. v. Rosenfield*, 80 S. W. Rep. 1178, 25 Ky. L. Rep. 2229, rehearing denied (Ky. 1904) 82 S. W. Rep. 433.

Maine. — *Carrigan v. Stillwell*, 99 Me. 434.

Michigan. — *In re Lambrecht*, 137 Mich. 450, 11 Detroit Leg. N. 289.

Missouri. — See *State v. Cook*, 178 Mo. 189.

Nebraska. — *Beatrice v. Wright*, (Neb. 1904) 101 N. W. Rep. 1039.

New Hampshire. — Opinion of Justices, 72 N. H. 605.

New York. — *Wuest v. New York*, 89 N. Y. App. Div. 262; *Matter of Trask*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 244.

South Carolina. — *Kitchen v. Southern R. Co.*, 68 S. Car. 554.

Texas. — *Medlin v. Seideman*, (Tex. Civ. App. 1905) 88 S. W. Rep. 250; *Von Diest v. San Antonio Traction Co.*, 33 Tex. Civ. App. 577.

Virginia. — *Immigration Soc. v. Com.*, 103 Va. 46.

Canada. — *Canadian Pac. R. Co. v. James Bay R. Co.*, 36 Can. Sup. Ct. 42; *Esquimalt Water Works Co. v. Victoria*, 10 British Columbia 193.

Rule Applicable Only Where Language Ambiguous. — *Kennedy v. Stonehouse*, 13 N. Dak. 232. And see *supra*, this title, **602. 2.**

For Various Applications of the Principle see *Adams v. New York*, 192 U. S. 585, affirming 176 N. Y. 351, which affirmed 85 N. Y. App. Div. 390; *Chicago, etc., Coal Co. v. People*, 114 Ill. App. 75, affirmed 214 Ill. 421; *Cedar Rapids, etc., R. Co. v. Cummins*, 125 Iowa 430; *Uhls v. Allard*, 69 Kan. 825; *Hargis v. Parker*, (Ky. 1905) 85 S. W. Rep. 704; *Hickory v. Southern R. Co.*, 137 N. Car. 189; *State v. Tague*, 76 Vt. 118; *State v. Yankee*, 120 Wis. 573.

3. Presumption Against Inconvenience. — *Carrigan v. Stillwell*, 99 Me. 434; *Hilgert v. Barber Asphalt Paving Co.*, 107 Mo. App. 385; *Farrar v. Harper*, 133 N. Car. 71; *Horning's Case*, 26 Pa. Super. Ct. 282; *Immigration Soc. v. Com.*, 103 Va. 46; *Montreal v. Cantin*, 35 Can. Sup. Ct. 223, per Girouard, J., citing 26 AM. AND

ENG. ENCYC. OF LAW (2d ed.) 648. See also *Betts v. U. S.*, (C. C. A.) 132 Fed. Rep. 228; *Connell v. Moore*, 70 Kan. 88; *Stevens v. Union R. Co.*, 26 R. I. 90.

4. Ambiguity Must Be Present. — *Ex p. Deeds*, (Ark. 1905) 87 S. W. Rep. 1030; *Nelson v. Harrison County*, 126 Iowa 436; *Phelps v. Auditor Gen.*, 136 Mich. 439; *Collier v. Union R. Co.*, 113 Tenn. 96.

649. 1. Construction Against Ineffectiveness — *United States*. — *Scottish Union, etc., Ins. Co. v. Bowland*, 196 U. S. 611; *Whitwell v. Continental Tobacco Co.*, (C. C. A.) 125 Fed. Rep. 454.

California. — *Bickerdike v. State*, 144 Cal. 698; *San Francisco Sav. Union v. Reclamation Dist. No. 124*, 144 Cal. 639.

Iowa. — *Davenport Gas., etc., Co. v. Davenport*, 124 Iowa 22.

Kentucky. — *Beasley v. Adams*, 82 S. W. Rep. 249, 26 Ky. L. Rep. 573.

Maine. — *Foy v. Gardiner Water Dist.*, 98 Me. 82.

Michigan. — See *People v. Byers*, 135 Mich. 45.

Nebraska. — *Dodge County v. Saunders County*, (Neb. 1903) 97 N. W. Rep. 617, rehearing denied (Neb. 1904) 100 N. W. Rep. 934; *Parker v. Glendore*, (Neb. 1904) 99 N. W. Rep. 548.

New Hampshire. — *Wilder v. Concord*, 72 N. H. 259. See also Opinion of Justices, 72 N. H. 605.

North Carolina. — *Spencer v. Seaboard Air Line R. Co.*, 137 N. Car. 107.

Pennsylvania. — *Com. v. Bradley*, 210 Pa. St. 66, affirming 34 Pittsb. Leg. J. N. S. (Pa.) 276; *Jeannette Borough School Directors*, 14 Pa. Dist. 352; *Com. v. Cannon*, 30 Pa. Co. Ct. 637.

Texas. — *Minter v. State*, 33 Tex. Civ. App. 182.

Wisconsin. — *In re Milwaukee Southern R. Co.*, 124 Wis. 490.

For Illustrations of the Application of the Rule see the following cases:

Arkansas. — *State v. Fulkerson*, 73 Ark. 163.

California. — *Sweeny v. Adams*, 141 Cal. 558; *Grannis v. Superior Ct.*, 146 Cal. 245, 106 Am. St. Rep. 23.

Colorado. — *Anaconda Min. Co. v. Anaconda*, 33 Colo. 70.

Connecticut. — *Middletown, etc., Bridge Co. v. Middletown*, 77 Conn. 314.

Georgia. — *Chatham County v. Gaudry*, 120 Ga. 121.

Illinois. — *Zellers v. White*, 208 Ill. 518, 100 Am. St. Rep. 243, affirming 106 Ill. App. 183; *Chicago v. Hanreddy*, 211 Ill. 24, affirming 102 Ill. App. 1; *Chicago, etc., Coal Co. v. People*, 214 Ill. 421, affirming 114 Ill. App. 75.

Indiana. — *Chicago, etc., R. Co. v. Indianapolis, etc., Traction Co.*, (Ind. 1905) 74 N. E. Rep. 512.

Iowa. — *Woolf v. Nauman Co.*, (Iowa 1905) 103 N. W. Rep. 785.

649. *k.* UNNECESSARY CHANGE IN LAW — (1) *In General.* — See notes 3, 4.

650. Application of Presumption to Codes. — See note 1.

(2) *Adopting Language of Settled Meaning.* — See note 2.

651. (3) *Change of Phraseology.* — See note 1.

Kansas. — *Forbes v. Mohr*, 69 Kan. 342.

Kentucky. — *Com. v. Ginn*, (Ky. 1905) 85 S. W. Rep. 688; *Belknap v. Com.*, (Ky. 1905) 85 S. W. Rep. 693.

Maine. — *State v. Kaufman*, 98 Me. 546.

Maryland. — *State v. Maryland Agricultural, etc., Assoc.*, 98 Md. 216.

Massachusetts. — *Com. v. Coleman*, 184 Mass. 198; *Nashua River Paper Co. v. Com.*, 184 Mass. 279; *Com. v. Alexander*, 185 Mass. 551.

Michigan. — *Waters v. Johnson*, 134 Mich. 436; *Williams v. Brown*, 137 Mich. 569, 11 Detroit Leg. N. 365.

Mississippi. — *Jackson v. Whiting*, 84 Miss. 163.

Missouri. — *Phoenix Planing Mill Co. v. Harrison*, 108 Mo. App. 603; *Reed v. Goldneck*, 112 Mo. App. 310.

Montana. — *Murphy v. Levengood*, 31 Mont. 34.

Nebraska. — *State v. Tanner*, (Neb. 1905) 102 N. W. Rep. 235.

New York. — *People v. Wells*, 181 N. Y. 252, affirming 99 N. Y. App. Div. 364; *Topham v. Interurban St. R. Co.*, 96 N. Y. App. Div. 323, reversing (Supm. Ct. App. T.) 42 Misc. (N. Y.) 503; *New York v. Chelsea Jute Mills*, (Municipal Ct.) 43 Misc. (N. Y.) 266.

Oregon. — *Grande Ronde Electrical Co. v. Drake*, (Oregon 1905) 78 Pac. Rep. 1031.

South Carolina. — *Jordan v. Wilson*, 69 S. Car. 256.

Tennessee. — *Harmon v. Tyler*, 112 Tenn. 8.

Wisconsin. — *State v. Yankee*, 120 Wis. 573.

Canada. — *Cameron v. Dauphin*, 14 Manitoba 573.

649. 3. Law Not Changed Except as Specified — *United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co.*, 133 Fed. Rep. 930; *Stapleberg v. Stapleberg*, 77 Conn. 31; *Hager v. Franklin*, (Ky. 1905) 84 S. W. Rep. 541, denying rehearing (Ky. 1904) 81 S. W. Rep. 926; *Ludwick v. Kent Circuit Judge*, 138 Mich. 106; *People v. Priest*, 90 N. Y. App. Div. 520, affirmed 180 N. Y. 532; *Weir v. Barker*, 104 N. Y. App. Div. 112; *Pittsburgh, etc., R. Co. v. Tod*, 72 Ohio St. 156; *Kitchen v. Southern R. Co.*, 68 S. Car. 554; *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101. See also *People v. Chin Yuen*, 144 Cal. xvii, 77 Pac. Rep. 954. And see *infra*, this title, **662.** 8.

Statute Not Modified by Amendment of Another Statute, unless Intent Plain. — *Matter of Hardin*, 97 N. Y. App. Div. 493, affirming (Surrogate Ct.) 44 Misc. (N. Y.) 441.

4. **Statute Not Presumed to Be Without Purpose.** — *Mosle v. Bidwell*, (C. C. A.) 130 Fed. Rep. 334, reversing 119 Fed. Rep. 480; *Reed v. Goldneck*, 112 Mo. App. 310; *International, etc., R. Co. v. Still*, (Tex. Civ. App. 1905) 88 S. W. Rep. 257; *Fensom v. Canadian Pac. R. Co.*, 8 Ont. L. Rep. 688, affirming 7 Ont. L. Rep. 254.

650. 1. **View in the United States.** — *Mackey v. Miller*, (C. C. A.) 126 Fed. Rep.

161; *Campbell's Appeal*, 76 Conn. 284; *Turner v. Turner*, 123 Ga. 5, 107 Am. St. Rep. 79; *State v. Hoffman*, 71 N. J. L. 285; *Cleveland, etc., R. Co. v. Urbana, etc., R. Co.*, 26 Ohio Cir. Ct. 180; *Hayes v. Kelley*, 111 Tenn. 294; *Rice v. Tilton*, 13 Wyo. 420.

2. **Re-enactment and Use of Phrases Judicially Interpreted — England.** — *Maguire v. Liverpool*, (1905) 1 K. B. 767.

United States. — *Kepner v. U. S.*, 195 U. S. 100; *U. S. v. Bayersdorfer*, (C. C. A.) 126 Fed. Rep. 732, reversing 122 Fed. Rep. 968; *In re Harper*, 133 Fed. Rep. 970; *In re U. S. Hotel Co.*, (C. C. A.) 134 Fed. Rep. 225; *Irwin v. U. S.*, 38 Ct. Cl. 87. See also *Knight v. Shelton*, 134 Fed. Rep. 423.

Connecticut. — *Campbell's Appeal*, 76 Conn. 284.

Illinois. — *Sharp v. Sharp*, 213 Ill. 332.

Indiana. — *Brown v. Miller*, 162 Ind. 684.

Kansas. — *Bailey v. Kelly*, 70 Kan. 869.

Kentucky. — *Sanderson v. Hunt*, 116 Ky. 435; *Galloway v. Bradburn*, 82 S. W. Rep. 1013, 26 Ky. L. Rep. 977.

Louisiana. — *Crescent Bed Co. v. New Orleans*, 111 La. 124.

Maryland. — *Baltimore v. Allegany County*, 99 Md. 1.

Massachusetts. — *Shelton v. Sears*, 187 Mass. 455.

Michigan. — *McEvoy v. Sault Ste. Marie*, 136 Mich. 172, 10 Detroit Leg. N. 1036.

Mississippi. — *Middlesex Banking Co. v. Field*, 84 Miss. 646; *Allen v. Caffee*, 85 Miss. 766.

New Jersey. — See *Smith v. Colloty*, 69 N. J. L. 365.

New York. — *People v. Reilly*, 85 N. Y. App. Div. 71, affirmed 178 N. Y. 609.

North Carolina. — *Winston v. Beeson*, 135 N. Car. 271.

North Dakota. — *Sonnesyn v. Akin*, 12 N. Dak. 227; *National Bank of Commerce v. Pick*, 13 N. Dak. 74.

Oklahoma. — *Welty v. U. S.*, 14 Okla. 7.

South Dakota. — *Brooke v. Eastman*, 17 S. Dak. 339.

Tennessee. — *Walker v. Bobbitt*, 114 Tenn. 700.

Texas. — *State v. Russell*, (Tex. Civ. App. 1905) 85 S. W. Rep. 288.

Virginia. — *Swift v. Wood*, 103 Va. 494.

A **Practical or Executive Construction of a Former Act.** — *Brennan v. U. S.*, (C. C. A.) 136 Fed. Rep. 743, reversing 129 Fed. Rep. 837; *U. S. v. Crucible Steel Co.*, (C. C. A.) 137 Fed. Rep. 384, affirming 132 Fed. Rep. 269; *Fuqua v. Hager*, (Ky. 1905) 84 S. W. Rep. 325; *Louisville v. Louisville School Board*, (Ky. 1905) 84 S. W. Rep. 729.

Rule Lacks Weight Where Prior Decisions Conflicting. — *National Supply Co. v. Stranahan*, 161 Ind. 602.

651. 1. **Amendments, Re-enactments, and**

652. The Omission of a Word. — See note 1.

A Material Change of Expression. — See notes 2, 3.

653. 12. Effect of Mistakes or Omissions, Substantial or Formal — b. CORRECTION OF ERRORS, OMISSIONS, OR MISUSE OF WORDS — (1) General Rule. — See note 6.**654.** See notes 1, 2.(2) *Interpolation and Elimination.* — See note 6.**655.** See note 1.

Revisions. — *Vanderbilt v. Eidman*, 196 U. S. 480; *Schmidt v. U. S.*, (C. C. A.) 133 Fed. Rep. 257; *Campbell's Appeal*, 76 Conn. 284; *State v. Reynolds*, 77 Conn. 131; *Eastwood v. Crane*, 125 Iowa 707; *Saunders v. Adams Express Co.*, 71 N. J. L. 270; *People v. Cohen*, 91 N. Y. App. Div. 89; *Matter of Madrid*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 431; *Farrar v. Harper*, 133 N. Car. 71; *Kitchen v. Southern R. Co.*, 68 S. Car. 554. See also *Logsdon v. Logsdon*, 109 Ill. App. 194.

652. 1. Omission of Words in Amendments, Etc. — *Campbell's Appeal*, 76 Conn. 284; *Eastwood v. Crane*, 125 Iowa 707; *Com. v. Walker*, 80 S. W. Rep. 185, 25 Ky. L. Rep. 2122; *State v. Williams*, 93 Minn. 155; *Opie v. Clancy*, 27 R. I. 42; *Kitchen v. Southern R. Co.*, 68 S. Car. 554. See also *State v. Tague*, 76 Vt. 118.

2. Material Change of Expression — United States. — *Crawford v. Burke*, 195 U. S. 176, reversing 201 Ill. 581; *In re Levey*, 133 Fed. Rep. 572; *In re Harper*, 133 Fed. Rep. 970; *In re George Halbert Co.*, (C. C. A.) 134 Fed. Rep. 236.

Connecticut. — See *Gallup's Appeal*, 76 Conn. 617.

Florida. — *Johnson v. Wilson*, (Fla. 1904) 37 So. Rep. 179.

Indiana. — *National Supply Co. v. Stranahan*, 161 Ind. 602. See also *Cheney v. State*, (Ind. 1905) 74 N. E. Rep. 892.

Iowa. — *Martin v. Oskaloosa*, 126 Iowa 680.

Louisiana. — See *Eichorn v. New Orleans, etc., R., etc., Co.*, 112 La. 236, 104 Am. St. Rep. 437.

Michigan. — *People v. Harris*, 135 Mich. 136.

Nebraska. — See *State v. Weston*, (Neb. 1903) 96 N. W. Rep. 668.

New Hampshire. — See *Wilder v. Concord*, 72 N. H. 259.

New Jersey. — *State v. Hoffman*, 71 N. J. L. 285. See also *McKensy v. McKensy*, 65 N. J. Eq. 633.

New York. — *People v. Wells*, 97 N. Y. App. Div. 312, affirmed 180 N. Y. 534.

Ohio. — *State v. Marble*, 72 Ohio St. 21, 106 Am. St. Rep. 570; *Cramer v. Southern Ohio L. & T. Co.*, 72 Ohio St. 395.

Oregon. — See *Kelsay v. Eaton*, 45 Oregon 70.

Pennsylvania. — *Roddy v. Reynolds*, 31 Pa. Co. Ct. 145.

Texas. — *Martin v. Terrell*, 97 Tex. 118.

3. Omission of Material Words. — *U. S. v. One Bay Horse, etc.*, 128 Fed. Rep. 207; *U. S. v. York*, 131 Fed. Rep. 323; *Wolff v. Choctaw, etc., R. Co.*, 133 Fed. Rep. 601; *Little v. Holley-Brooke Hardware Co.*, (C. C. A.) 133 Fed. Rep. 874; *State v. Western Union Tel. Co.*, (Ark. 1905) 88 S. W. Rep. 834; *Atlantic City v. Feretti*, 70 N. J. L. 489; *Elfring v. New*

Birdsall Co., 17 S. Dak. 350; *Superior First Nat. Bank v. Douglas County*, 124 Wis. 15. See also *Carrigan v. Stillwell*, 99 Me. 434.

For Illustrations of the Principle see *Leiper v. Minnig*, (Ark. 1905) 86 S. W. Rep. 407; *Tathwell v. Cedar Rapids*, 122 Iowa 50; *Poole v. French*, (Kan. 1905) 80 Pac. Rep. 997; *State v. Gill*, (Mo. 1905) 88 S. W. Rep. 628; *People v. Cox*, 106 N. Y. App. Div. 299, affirming (County Ct.) 45 Misc. (N. Y.) 311; *State v. Edwards*, 134 N. Car. 636; *State v. Klondike Machine*, 76 Vt. 426.

653. 6. Mistakes, Omissions, Etc. — *Rex v. Vasey*, (1905) 2 K. B. 748; *State v. Crenshaw*, 138 Ala. 506; *Com. v. Rosenfield*, 80 S. W. Rep. 1178, 25 Ky. L. Rep. 2229, rehearing denied (Ky. 1904) 82 S. W. Rep. 433; *Beaudin v. Oregon Short Line R. Co.*, 31 Mont. 238; *Esquimalt Water Works Co. v. Victoria*, 10 British Columbia 193. And see *supra*, this title, **604. 1 et seq.**

Altering Structure of Sentences. — *Chicago, etc., R. Co. v. Anderson*, (Neb. 1904) 101 N. W. Rep. 1019; *Goudy v. Meath*, 38 Wash. 126.

654. 1. Error Must Be Manifest. — *In re Seaholm*, (C. C. A.) 136 Fed. Rep. 144; *Kitchen v. Southern R. Co.*, 68 S. Car. 554. See also *Pennsylvania Telephone Co. v. Hoover*, 24 Pa. Super. Ct. 96, affirmed 209 Pa. St. 555.

Error Must Appear on Face of Act or from Other Acts in Pari Materia. — *Jones v. Franklin County*, 25 Ohio Cir. Ct. 510.

2. Casus Omissus. — See *supra*, this title, **601. 3.**

6. Words Altered or Supplied. — *Rex v. Vasey*, (1905) 2 K. B. 748; *Western Assur. Co. v. Halliday*, 127 Fed. Rep. 830; *U. S. v. York*, 131 Fed. Rep. 323; *Watson v. State*, 140 Ala. 134; *Mariposa County v. Madera County*, 142 Cal. 50; *Bailey v. State*, 163 Ind. 165; *Carbajal's Succession*, 111 La. 944; *Cheney v. Beverly*, 188 Mass. 81; *State v. Clancy*, 30 Mont. 539; *Douthit v. State*, 98 Tex. 344, modifying on other grounds 36 Tex. Civ. App. 396; *Newton v. Theresa Village Mut. F. Ins. Co.*, 125 Wis. 289; *Curle v. Brandon*, 24 Can. L. T., 279. See also *Clarke v. Addeman*, 26 R. I. 168. And see *supra*, this title **604. 2.**

655. 1. Eliminating Words. — *Rex v. Vasey*, (1905) 2 K. B. 748; *Schmidt v. U. S.*, (C. C. A.) 133 Fed. Rep. 257; *Tyee Consol. Min. Co. v. Langstedt*, 1 Alaska 439; *Voris v. Pittsburg Plate Glass Co.*, 163 Ind. 599; *Louisville v. Wehmhoff*, 116 Ky. 812, 845; *Miller v. Northern Pac. R. Co.*, 30 Mont. 289; *State v. Clancy*, 30 Mont. 539; *Campbell v. Hallihan*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 409; *King v. Hanson*, 13 N. Dak. 85; *Kitchen v. Southern R. Co.*, 68 S. Car. 554. See also *Metcalfe v. Com.*, (Ky. 1905) 86 S. W. Rep. 534.

655. (3) *Obvious or Clerical Errors.* — See note 2.

656. *c.* STATUTES VOID FOR UNCERTAINTY. — See note 1.

657. See notes 1, 2.

13. *Evasions.* — See note 3.

VII. PARTICULAR APPLICATIONS OF PRINCIPLES OF CONSTRUCTION —

1. *Strict and Liberal Construction* — *a.* *STRICT CONSTRUCTION* — (1) *Definition.* — See note 5.

658. (2) *Penal Statutes* — (a) *In General.* — See note 1.

659. See notes 1, 2, 3.

655. 2. Obvious Errors. — *People v. Bradford*, (Cal. 1905) 81 Pac. Rep. 712 ("part II") read "part I"); *Belknap v. Com.*, (Ky. 1905) 85 S. W. Rep. 693 ("years" read "days"); *Matter of Riverside Park*, 95 N. Y. App. Div. 552 ("one-third" read "one-fourth"); *De Borbon's Estate*, 211 Pa. St. 623 ("payable" read "demandable"); *Martin v. Luzerne County*, 13 Pa. Dist. 801 ("seventh" read "sixth"); *Kitchen v. Southern R. Co.*, 68 S. Car. 554 ("of" read "or"); *Baldwin v. Travis County*, (Tex. Civ. App. 1905) 88 S. W. Rep. 480 ("attached" read "taxed"). And see *supra*, this title, **604. 1.**

"And" and "Or" Interchanged. — See *German Trust Co. v. Board of Equalization*, 121 Iowa 325; *Kennedy v. Haskell*, 67 Kan. 612; *Com. v. Teel*, 30 Pa. Co. Ct. 566; and see **AND, 333. 2 et seq.**

656. 1. Statute Unmeaning. — *Lockwood v. District of Columbia*, 24 App. Cas. (D. C.) 569; *Storck v. Baltimore*, 101 Md. 476.

657. 1. *Schulte v. Schleeper*, 210 Ill. 357, reversing *sub nom.* *Schulte v. Menke*, 111 Ill. App. 212; *McDonald v. Carlin*, 163 Ind. 342; *Storck v. Baltimore*, 101 Md. 476; *Com. v. Alexander*, 185 Mass. 551; *State v. Richardson*, 86 Miss. 439.

2. If Capable of Any Reasonable Construction Not Void. — *Mariposa County v. Madera County*, 142 Cal. 50; *Wilder v. Quebec*, 25 Quebec Super. Ct. 128.

Examples of Statutes Not Void for Uncertainty. — *State v. Clancy*, 30 Mont. 539; *Borden v. Trespacios Rice, etc., Co.*, 98 Tex. 494, affirming (Tex. Civ. App. 1904) 82 S. W. Rep. 461.

3. Courts Will Not Permit Evasion of Statute. — *Atkinson v. State*, 33 Ind. App. 8; *Com. v. Trent*, 117 Ky. 34; *Mason v. Byrley*, (Ky. 1904) 84 S. W. Rep. 767; *New York L. Ins. Co. v. Neal*, 114 La. 652; *Blood v. Beal*, 100 Me. 30; *State v. Hand*, 71 N. J. L. 137, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 657; *State v. Gaughan*, 55 W. Va. 692.

Courts Should Not Devitalize Statute by Strained Interpretation. — *Atlanta v. Chattanooga Foundry, etc., (C. C. A.)* 127 Fed. Rep. 23.

5. Strict Construction Defined. — *Georgia R., etc., Co. v. Wright*, 132 Fed. Rep. 912.

Scope of Rule — Not Substitute for All Other Rules. — *Citizens' Bank v. Parker*, 192 U. S. 73, reversing 52 La. Ann. 1086.

658. 1. Strict Construction of Penal Statutes — *United States.* — *Hackfeld v. U. S.*, 197 U. S. 442, reversing (C. C. A.) 125 Fed. Rep. 506; *U. S. v. Twenty Boxes Corn Whisky*, (C. C. A.) 133 Fed. Rep. 910, affirming 123 Fed. Rep. 135; *Cunard Steamship Co. v. Stranahan*, 134 Fed. Rep. 318; *The Ben R.*, (C. C. A.) 134 Fed.

Rep. 784; *Field v. U. S.*, (C. C. A.) 137 Fed. Rep. 6.

Georgia. — *McAllister v. State*, 122 Ga. 744. *Illinois.* — *Schulte v. Schleeper*, 210 Ill. 357; *Long v. People*, 109 Ill. App. 197.

Kansas. — *State v. Wilson*, (Kan. 1905) 80 Pac. Rep. 639.

Massachusetts. — *Com. v. Strauss*, 188 Mass. 229.

Minnesota. — *Price v. Denison*, (Minn. 1905) 103 N. W. Rep. 728, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 658.

Missouri. — *State v. Butler*, 178 Mo. 272; *State v. Balch*, 178 Mo. 392.

New Jersey. — *Board of Health v. Summit*, (N. J. 1903) 56 Atl. Rep. 125.

New Mexico. — *Esquibel v. Chaves*, (N. Mex. 1904) 78 Pac. Rep. 505.

New York. — *People v. Bootman*, 180 N. Y. 1, affirming 95 N. Y. App. Div. 469.

North Carolina. — *State v. Dunn*, 134 N. Car. 663.

Ohio. — *K. B. Co. v. Batie*, 25 Ohio Cir. Ct. 482; *Leo Ebert Brewing Co. v. State*, 25 Ohio Cir. Ct. 601.

Pennsylvania. — *Com. v. Fetterman*, 26 Pa. Super. Ct. 569; *Caine v. Kelly*, 13 Pa. Dist. 570; *Com. v. Densmore*, 13 Pa. Dist. 639, 29 Pa. Co. Ct. 217; *Com. v. Teel*, 30 Pa. Co. Ct. 566.

Virginia. — *Kloss v. Com.*, 103 Va. 864.

Wisconsin. — *Taylor v. Seil*, 120 Wis. 32.

Rule Subject to Canon Requiring Reasonable Construction. — *U. S. v. Whelpley*, 125 Fed. Rep. 616.

Not Construed as Fixing Absolute Liability Regardless of Inten — *State v. Chicago, etc., R. Co.*, 122 Iowa 22, 101 Am. St. Rep. 254. See generally the title **CRIMINAL LAW, 284. 4 et seq**

Violation Must Be of Spirit of Act. — *Moffitt v. U. S.*, (C. C. A.) 128 Fed. Rep. 375 (Contract Labor Law); *Matter of Cullinan*, 93 N. Y. App. Div. 427, affirming (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 3, citing *Matter of Cullinan*, 75 N. Y. App. Div. 301 (Liquor law).

Statutes Enacted for Public Good to Receive Equitable Construction. — *Tyner v. U. S.*, 23 App. Cas. (D. C.) 324. To similar effect see *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1, reversing (C. C. A.) 117 Fed. Rep. 462 (automatic car coupling acts); *Chicago, etc., R. Co. v. Voelker*, (C. C. A.) 129 Fed. Rep. 522, reversing 116 Fed. Rep. 867 (automatic car coupling acts); *Cleveland, etc., R. Co. v. Baker*, 106 Ill. App. 500 (statute requiring signal on approaching crossing). And see *infra*, this title, **670. 1, 677. 2.**

659. 1. Reason of Rule. — *U. S. v. York*, 131 Fed. Rep. 323; *Matter of Kuhn*, 125 Iowa 449.

659. Under Express Statutes. — See note 4.

(b) Rule Applicable to Other than Strictly Criminal Statutes. — See note 5.

660. (c) Extension of Penal Statutes to Things Not in Esse at Time of Passage. — See note 2.

661. (e) Statutes Both Penal and Remedial. — See note 1.

(3) Statutes in Derogation of Common Right. — See note 3.

Statutes Working a Forfeiture or Confiscation of Private Property. — See note 4.

662. Statutes Restricting and Regulating Use of Private Property. — See note 3.

659. 2. Penal Statutes Not Extended Beyond Obvious Meaning — *United States*. — Northern Securities Co. v. U. S., 193 U. S. 197, affirming

120 Fed. Rep. 721; U. S. v. Wood, 127 Fed. Rep. 171; Rothschild v. Adler-Weinberger Steamship Co., (C. C. A.) 130 Fed. Rep. 866, reversing 123 Fed. Rep. 145; U. S. v. York, 131 Fed. Rep. 323; The Ben R., (C. C. A.) 134 Fed. Rep. 784; Field v. U. S., (C. C. A.) 137 Fed. Rep. 6.

Iowa. — Matter of Kuhn, 125 Iowa 449.

Kentucky. — Com. v. Trent, 117 Ky. 34.

Louisiana. — State v. Fontenot, 112 La. 628.

Maine. — State v. Bunker, 98 Me. 389; State v. Kaufman, 98 Me. 546.

Michigan. — Blanchard v. Detroit, etc., R. Co., (Mich. 1905) 103 N. W. Rep. 170, 12 Detroit Leg. N. 30.

Oklahoma. — Genesee First Nat. Bank v. National Live Stock Bank, 13 Okla. 719.

Texas. — Houston, etc., R. Co. v. Brown. (Tex. Civ. App. 1905) 85 S. W. Rep. 44.

Chinese Exclusion Acts. — U. S. v. Leo Won Tong, 132 Fed. Rep. 190.

3. Intent of Legislature Not to Be Defeated by Technical Application of Rule — *United States*. — Northern Securities Co. v. U. S., 193 U. S. 197,

affirming 120 Fed. Rep. 721; Johnson v. Southern Pac. R. Co., 196 U. S. 1, reversing (C. C. A.) 117 Fed. Rep. 462; Hackfeld v. U. S., 197 U. S. 442, reversing (C. C. A.) 125 Fed. Rep. 596; U. S. v. McClellan, 127 Fed. Rep. 971; Dolan v. U. S., (C. C. A.) 133 Fed. Rep. 440.

Colorado. — See Overland Cotton Mill Co. v. People, 32 Colo. 263, 105 Am. St. Rep. 74.

District of Columbia. — Tyner v. U. S., 23 App. Cas. (D. C.) 324.

Illinois. — Zellers v. White, 208 Ill. 518, 100 Am. St. Rep. 243, affirming 106 Ill. App. 183.

Indiana. — U. S. Express Co. v. State, 164 Ind. 196. See also Parker v. State, 31 Ind. App. 650.

Kentucky. — Com. v. Trent, 117 Ky. 34.

Louisiana. — In re Dimmick, 111 La. 655.

Maine. — State v. Kaufman, 98 Me. 546.

Missouri. — State v. Hesterly, 182 Mo. 16; State v. Tower, 185 Mo. 79.

Ohio. — Barker v. State, 69 Ohio St. 68.

Pennsylvania. — Com. v. Cannon, 30 Pa. Co. Ct. 637.

Texas. — Douthit v. State, 98 Tex. 344, modifying on other grounds 36 Tex. Civ. App. 396.

Vermont. — Ex p. Demarco, 77 Vt. 445.

West Virginia. — State v. Gaughan, 55 W. Va. 692.

Chinese Exclusion Acts to Receive Sensible Construction to Effectuate Intent. — U. S. v. Hung Chang, (C. C. A.) 134 Fed. Rep. 19, reversing 126 Fed. Rep. 400.

Exceptions Not Read into Unambiguous Act. — U. S. v. Southern R. Co., 135 Fed. Rep. 122.

4. Statutory Provisions for Construction of Penal Statutes. — Smith v. McArthur, (1904) A. C. 389; Miller v. Territory, (Ariz. 1905) 80 Pac. Rep. 321; Com. v. Trent, 117 Ky. 34.

Penal Provisions in Election Law. — Com. v. Combs, (Ky. 1905) 86 S. W. Rep. 697; Adams v. Roberts, 83 S. W. Rep. 1035, 26 Ky. L. Rep. 1271.

Statute for Suppressing Lotteries and Unchartered Banks. — State v. Gaughan, 55 W. Va. 692 per Brannon, J., concurring.

Statute Relating to Gaming. — Fuller v. State, 83 Miss. 30.

5. Strict Construction of Statutes Not Strictly Criminal. — State v. Western Union Tel. Co., (Ark. 1905) 88 S. W. Rep. 834; Van Vuren v. Longstreet, 108 Ill. App. 159; Matter of Kuhn, 125 Iowa 449; Wellborn v. Muller, 84 Miss. 726; Schnaier v. Navarre Hotel, etc., Co., 182 N. Y. 83, reversing 82 N. Y. App. Div. 25; Hoboken Beef Co. v. Hand, 104 N. Y. App. Div. 390; Health Dept. v. Owen, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 221, affirming 94 N. Y. App. Div. 425; Dixon v. Sheridan, 125 Wis. 60. And see the title FINES AND PENALTIES, 55. 5 et seq.

Usury Statutes. — In re Wilde, 133 Fed. Rep. 562.

Discharge Proceedings in Bankruptcy. — In re Neely, 134 Fed. Rep. 667.

Copyright Laws. — Black v. Imperial Book Co., 8 Ont. L. Rep. 9, modifying on other grounds 5 Ont. L. Rep. 184.

660. 2. Things Not in Esse Held Included. — People v. Kriesel, 136 Mich. 80, 10 Detroit Leg. N. 972. See also Birmingham Corp. v. Birmingham Canal Nav., 3 Local Gov. Rep. 1287, 21 Times L. Rep. 548.

661. 1. Statutes Construed Strictly in Part. — Tucker v. State, 163 Ind. 403.

3. Strict Construction of Statute in Derogation of Common Right. — Illinois State Trust Co. v. St. Louis, etc., R. Co., 208 Ill. 419; Matter of Kuhn, 125 Iowa 449, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 661; Gray v. Stewart, 70 Kan. 429, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 661; Whalen v. Equitable Acc. Co., 99 Me. 231; Com. v. Beck, 187 Mass. 15; Southport, etc., R. Co. v. Platt Land, 133 N. Car. 266; Hoffman's Estate, 209 Pa. St. 357, reversing 29 Pa. Co. Ct. 105. See also People v. Harris, 135 Mich. 136.

4. Statutes Working a Forfeiture or Confiscation of Private Property Strictly Construed. — Matter of Kuhn, 125 Iowa 449.

Usury Statute. — Finney v. Moore, 9 Idaho 284.

662. 3. Statutes Regulating the Disposition of Private Property. — Orrell v. Bay Mfg. Co., 83 Miss. 800.

662. Statutes in Derogation of Personal Rights. — See notes 4, 6.

Statutes Abridging Power to Make Contracts. — See note 7.

(4) *Statutes in Derogation of Common Law* — (a) *In General*. — See note 8.

664. Remedial Statutes. — See note 1.

665. (c) Abrogation of Rule by Statute. — See note 2.

(d) Constructive Repeal of Common Law. — See notes 3, 4.

(5) *Statutes Delegating Powers*. — See note 5.

Statute Limiting Rights of Aliens under Former Statute. — *Ehrlich v. Weber*, 114 Tenn. 711.

662. 4. Statutes in Derogation of Personal Rights. — *Com. v. Wong Chung*, 186 Mass. 231.

Statute Not Construed to Deprive Officer of Office Unless Intent Plain. — *Territory v. Albright*, (N. Mex. 1904) 78 Pac. Rep. 204, citing *Territory v. Ashenfelter*, 4 N. Mex. 85.

6. Statutes in Restraint of Useful Callings. — *Rossi v. Edinburgh*, (1905) A. C. 21; *Hennan v. Duckworth*, 90 L. T. N. S. 546; *Lockwood v. District of Columbia*, 24 App. Cas. (D. C.) 569. Compare *White v. Mears*, 44 Oregon 215.

7. Statute Abridging Power to Contract. — *Com. v. Strauss*, 188 Mass. 229; *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832.

8. Strict Construction of Statutes in Derogation of Common Law — *United States*. — *Brunswick Terminal Co. v. National Bank*, 192 U. S. 386, affirming 112 Fed. Rep. 812; *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1, reversing (C. C. A.) 117 Fed. Rep. 462.

Alabama. — *Smith v. McCadden*, 138 Ala. 284.

Colorado. — *Denver v. Bradbury*, 19 Colo. App. 441.

Illinois. — *Van Vuren v. Longstreet*, 108 Ill. App. 159; *Chicago, etc., Coal Co. v. People*, 114 Ill. App. 75, affirmed 214 Ill. 421; *McNemar v. Cohn*, 115 Ill. App. 31.

Iowa. — *Wells v. Kelley*, 121 Iowa 577.

Michigan. — *Oesterreich v. Detroit*, 137 Mich. 415, citing *Tattan v. Detroit*, 128 Mich. 650.

New Jersey. — *State v. Herring*, 70 N. J. L. 34.

New York. — *Schmaier v. Navarre Hotel, etc., Co.*, 182 N. Y. 83, reversing 82 N. Y. App. Div. 25; *Rosin v. Lidgerwood Mfg. Co.*, 89 N. Y. App. Div. 245; *Matter of Andersen*, 91 N. Y. App. Div. 563, reversed on other grounds 178 N. Y. 416.

North Carolina. — *Smathers v. Western Carolina Bank*, 135 N. Car. 410.

Ohio. — *Cleveland, etc., R. Co. v. Shanower*, 70 Ohio St. 166.

Wisconsin. — *Richardson v. Stuesser*, 125 Wis. 66.

See also *supra*, this title, **649. 3.**

Mechanics' Liens. — *Fleming v. Prudential Ins. Co.*, 19 Colo. App. 126; *Reaves v. Meredith*, 123 Ga. 444; *Campbell v. Cameron*, 5 Indian Ter. 323; *Cheesborough v. Asheville Sanatorium*, 134 N. Car. 245; *Compton v. Sankey*, 13 Pa. Dist. 535, 29 Pa. Co. Ct. 25; *Walter v. Powell*, 13 Pa. Dist. 667.

State Maritime Liens. — See *The Mary F. Chisholm*, 129 Fed. Rep. 814; *Guffey v. Alaska, etc., Steamship Co.*, (C. C. A.) 130 Fed. Rep. 271.

Statutes Conferring Right of Succession on Ille-

gitimate Children Strictly Construed. — *Reynolds v. Hitchcock*, 72 N. H. 340. But see *contra Townsend v. Meneley*, (Ind. App. 1905) 74 N. E. Rep. 274.

Attachment Statutes Strictly Construed. — *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832.

Employers' Liability Act. — See *Langlois v. Dunn Worsted Mills*, 25 R. I. 645.

Creditors' Claims Against Estate Not in Derogation of Common Law. — *Empire State Min. Co. v. Mitchell*, 29 Mont. 55.

Statute Providing Procedure for Establishing Heirship Liberally Construed. — *In re Marchant*, 121 Wis. 526.

664. 1. *Weber v. Chicago, etc., R. Co.*, 69 Kan. 611; *Matter of Andersen*, 91 N. Y. App. Div. 563, reversed on other grounds 178 N. Y. 416; *Smith v. Boston, etc., R. Co.*, 99 N. Y. App. Div. 94, affirmed 181 N. Y. 132.

665. 2. Rule of Strict Construction Abrogated by Statute. — *Schroeder v. Bohlson*, (Ky. 1905) 84 S. W. Rep. 535; *Garrison v. Territory*, 13 Okla. 690.

Rule Abrogated Only as to Codes or Particular Statutes. — See *Burns v. Superior Ct.*, 140 Cal. 1; *Ruperich v. Baehr*, 142 Cal. 190; *Mellen v. McMannis*, 9 Idaho 418; *Tathwell v. Cedar Rapids*, 122 Iowa 50; *Colonial, etc., Mortg. Co. v. Northwest Thresher Co.*, (N. Dak. 1905) 103 N. W. Rep. 915.

Mechanics' Lien Statute. — *William H. Jackson Co. v. Haven*, 87 N. Y. App. Div. 236; *Martin v. Ambrose A. Gavigan Co.*, 107 N. Y. App. Div. 279; *Seattle Lumber Co. v. Sweeney*, 33 Wash. 691.

3. Constructive Repeal of the Common Law. — *State v. Ensley*, 142 Ala. 661; *McCurdy v. Otto*, 140 Cal. 48; *Drady v. District Ct.*, 126 Iowa 345, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 665; *Doyle v. Kirby*, 184 Mass. 409; *State v. Bonner*, 178 Mo. 424; *Rosin v. Lidgerwood Mfg. Co.*, 89 N. Y. App. Div. 245; *Box v. Lanier*, 112 Tenn. 393; *Smits v. Hogan*, 35 Wash. 290.

4. Chicago, etc., Coal Co. v. People, 214 Ill. 421, affirming 114 Ill. App. 75. See also *Wright v. Fleischman*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 533, modified on other grounds 99 N. Y. App. Div. 547. *distinguishing Savage v. Gerstner*, 36 N. Y. App. Div. 220.

5. Strict Construction of Statutes Delegating Powers. — *Cleveland Electric R. Co. v. Cleveland*, 137 Fed. Rep. 111; *Murphy v. Wheatley*, 100 Md. 358; *State v. Butler*, 178 Mo. 272; *Topham v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 503, reversed on other grounds 96 N. Y. App. Div. 323; *South Western State Normal School*, 26 Pa. Super. Ct. 99.

666. See notes 1, 2.

Delegation of Power of Eminent Domain. — See note 3.

667. Delegation of Power to Levy Taxes. — See notes 1, 2.

668. (6) *Statutes Imposing Liabilities.* — See note 1.

Statutes Giving Right of Action for Death by Wrongful Act. — See notes 3, 4.

Statutes Imposing Costs. — See note 6.

(7) *Exemptions from Liabilities.* — See note 7.

669. See note 1.

Doubtful Claims Resolved Against Corporation. — Elkhart *v.* Lipschutz, 164 Ind. 671.

Charters of Beneficial Associations Liberally Construed. — Sheehan *v.* Journeymen Butchers' Protective, etc., Assoc., 142 Cal. 489.

666. 1. Rule as to Public Corporations Stated. — Mobile *v.* Mobile Light, etc., Co., 141 Ala. 442. See also Porter *v.* Vinzant, (Fla. 1905) 38 So. Rep. 607; Walker *v.* McNelly, 121 Ga. 114.

Power of Municipality to Subscribe to Stock of Private Corporation. — Voss *v.* Waterloo Water Co., 163 Ind. 69, 106 Am. St. Rep. 201.

Statute Intended for Public Good Liberally Construed. — Phillips *v.* Butler County, 187 Mo. 698. Compare Atty.-Gen. *v.* London County Council, (1901) 1 Ch. 781, 84 L. T. N. S. 245, affirmed (1902) A. C. 165, 86 L. T. N. S. 161.

Power to Park Highways Liberally Construed. — See Downing *v.* Des Moines, 124 Iowa 289.

Distinction Between Legislative and Governmental Powers. — See Henderson *v.* Young, 83 S. W. Rep. 583, 26 Ky. L. Rep. 1152; Stone *v.* Chicago, 207 Ill. 492.

2. Strict Construction of Powers of Private Corporation. — Anglo-American Land, etc., Co. *v.* Lombard, (C. C. A.) 132 Fed. Rep. 721; Board of Education *v.* Board of Education, 76 N. Y. App. Div. 355, affirmed 179 N. Y. 556; Pennsylvania Telephone Co. *v.* Hoover, 209 Pa. St. 555, affirming 24 Pa. Super. Ct. 96.

3. Delegation of Power of Eminent Domain. — Leavenworth *v.* Leavenworth City, etc., Water Co., 69 Kan. 82; Louisiana Nav., etc., Co. *v.* Doullut, 114 La. 906; Tarkio *v.* Clark, 186 Mo. 285; Southport, etc., R. Co. *v.* Platt Land, 133 N. Car. 266; South Western State Normal School, 26 Pa. Super. Ct. 99; Richmond, etc., R. Co. *v.* Johnston, 103 Va. 456. See also Snee *v.* West Side Belt R. Co., 210 Pa. St. 480. Compare McEwan *v.* Pennsylvania, etc., R. Co., (N. J. 1905) 60 Atl. Rep. 1130; *In re Milwaukee Southern R. Co.*, 124 Wis. 490.

Provisions Plainly Conferring Power Must Be Regarded. — Petersburg School Dist. *v.* Petersen, (N. Dak. 1905) 103 N. W. Rep. 756.

Words "Right of Eminent Domain" Not Essential. — Brown *v.* Radnor Tp. Electric Light Co., 208 Pa. St. 453.

667. 1. Statutes Delegating Power to Tax. — Martin *v.* Oskaloosa, (Iowa 1904) 99 N. W. Rep. 557; Aachen, etc., F. Ins. Co. *v.* Omaha, (Neb. 1904) 101 N. W. Rep. 3; Gilfeather *v.* Grout, 101 N. Y. App. Div. 150, appeal dismissed 182 N. Y. 522. Compare as to local assessments *In re Dundas St. Bridges*, 8 Ont. L. Rep. 52.

2. Power to Sell Land for Taxes. — State *v.* Scott, 92 Minn. 210; Roessler *v.* Romer, 92 Minn. 218; Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101.

668. 1. Strict Construction of Statutes Creating Liabilities. — Improvement Dist. No. 60 *v.* Cotter, 71 Ark. 556; Van Vuren *v.* Longstreet, 108 Ill. App. 159; Weber *v.* Chicago, etc., R. Co., 69 Kan. 611; Police Jury *v.* Johnson, 111 La. 279; Hardin *v.* Morgan, 70 N. J. L. 484; Smith *v.* Boston, etc., R. Co., 99 N. Y. App. Div. 94, affirmed 181 N. Y. 132. See also Beaudin *v.* Bay City, 136 Mich. 333, 11 Detroit Leg. N. 29; Westbrook *v.* Miller, 98 N. Y. App. Div. 590; Schroeder *v.* Multnomah County, 45 Oregon 92.

Statutes Giving Fees or Other Compensation to Public Officers. — Reese *v.* Cleburne County, 139 Ala. 299; Foreman *v.* People, 209 Ill. 567. See also State *v.* Police Com'rs, 108 Mo. App. 98.

3. Strict Construction of Statutes Making Death by Wrongful Act Actionable. — Bowen *v.* Illinois Cent. R. Co., (C. C. A.) 136 Fed. Rep. 306; Chicago Bridge, etc., Co. *v.* La Mantia, 112 Ill. App. 43; Cleveland, etc., R. Co. *v.* Osgood, (Ind. App. 1904) 70 N. E. Rep. 839.

4. Liberal Construction of Statutes Making Death by Wrongful Act Actionable. — Vance *v.* Southern R. Co., 138 N. Car. 460.

6. Statutes Giving Costs. — Hempstead County *v.* Harkness, 73 Ark. 600; Rieker *v.* Danville, 204 Ill. 191; Veidt *v.* Missouri, etc., R. Co., 109 Mo. App. 102; Roth Tool Co. *v.* Champ Spring Co., 108 Mo. App. 618; Manewal *v.* Proctor, 112 Mo. App. 315; Elfring *v.* New Birdsall Co., 17 S. Dak. 350. Compare State *v.* Police Com'rs, 108 Mo. App. 98.

7. Homestead Exemptions and Exemptions from Executions — Liberal Construction. — Holmes *v.* Marshall, 145 Cal. 777, 104 Am. St. Rep. 86; McCorkell *v.* Herron, (Iowa 1905) 103 N. W. Rep. 988; Teske *v.* Dittberner, (Neb. 1903) 98 N. W. Rep. 57, reversing on rehearing 65 Neb. 167, 101 N. W. Rep. 614; Matter of Pugsley, 27 Utah 489.

669. 1. Exemptions from Taxation. — See Citizens' Bank *v.* Parker, 192 U. S. 73, reversing 52 La. Ann. 1086; Kohn's Succession, (La. 1905) 38 So. Rep. 898; McHenry Baptist Church *v.* McNeal, 86 Miss. 22; Williams *v.* Park, 72 N. H. 305; Cooper Hospital *v.* Camden, 70 N. J. L. 478; Rochester *v.* Rochester R. Co., 182 N. Y. 99, reversing 98 N. Y. App. Div. 521; People *v.* Reilly, 85 N. Y. App. Div. 71, affirmed 178 N. Y. 609; Sinnemahoning Iron, etc., So. *v.* Shaffer, 14 Pa. Dist. 368; Lake Drummond Canal, etc., Co. *v.* Com., 103 Va. 337; Rex *v.* Algoma Cent. R. Co., 32 Can. Sup. Ct. 277, reversing 7 Can. Exch. 239, affirmed (1903) A. C. 478, 89 L. T. N. S. 109.

Exception to Rule — Statute Substituting Other Form of Payment. — Chicago, etc., R. Co. *v.* Douglas County, 122 Wis. 273, approving Merrill R., etc., Co. *v.* Merrill, 119 Wis. 249.

- 669.** (8) *Statutes Imposing Taxes* — (a) *In General*. — See notes 2, 3.
 (b) *Tariff Laws*. — See note 5.
670. (9) *Statutes Affecting Jurisdiction of Courts*. — See note 2.
671. (10) *Statutes Conferring Right to Sue State*. — See note 1.
 (11) *Statutory Remedies and Proceedings*. — See notes 2, 3.

669. 2. Rule Applied in Canada. — *Contra* in Ontario by express statute. *Rex v. Algoma Cent. R. Co.*, 32 Can. Sup. Ct. 277, reversing 7 Can. Exch. 239, affirmed (1903) A. C. 478, 89 L. T. N. S. 109.

3. Strict Construction in United States. — *Eidman v. Tilghman*, (C. C. A.) 136 Fed. Rep. 141, affirming 131 Fed. Rep. 651; *Ashe Carson Co. v. State*, 138 Ala. 108; *Lockwood v. District of Columbia*, 24 App. Cas. (D. C.) 569; *Standard Oil Co. v. Swanson*, 121 Ga. 412; *Matter of Wolfe*, 89 N. Y. App. Div. 349, affirmed 179 N. Y. 599. And see the title **TAXATION, 618. 5.**

Rule Does Not Apply to Provisions for Benefit of Property Owners. — *Chase v. Trout*, 146 Cal. 350; *City St. Imp. Co. v. Babcock*, 139 Cal. 692. See also *Douglass v. Byers*, 69 Kan. 59.

Provisions Merely Regulating Manner of Collection Not Within Rule. — *Lexington v. Woolfolk*, 117 Ky. 708. See also *Eliot v. Prime*, 98 Me. 48, citing *Cressey v. Parks*, 76 Me. 534; *Topsham v. Blondell*, 82 Me. 156.

5. U. S. v. Riggs, (C. C. A.) 136 Fed. Rep. 583, affirming 131 Fed. Rep. 568. And see the title **REVENUE LAWS, 888. 8 et seq.**

670. 2. Statutes Creating Courts of Limited Jurisdiction. — *Kemp v. Adams*, 164 Ind. 258; *Schepman v. Buhner*, 32 Ind. App. 562; *Cumberland Valley R. Co. v. Martin*, 100 Md. 165; *Oppenheimer v. Regan*, 32 Mont. 110; *State v. McKain*, 56 W. Va. 128.

Special Powers Conferred on Courts of General Jurisdiction. — *Scott v. State*, 141 Ala. 39; *Matter of Ryder*, 141 Cal. 366; *State v. Foster*, 111 La. 939; *Collier v. Carter*, 100 Md. 381; *In re Scheuer*, 31 Mont. 606; *Darling v. Murphy*, 70 N. J. L. 435; *Wellsburg, etc., R. Co. v. Pan Handle Traction Co.*, 56 W. Va. 18.

Statutory Boards. — *Horton v. Driskell*, 13 Wyo. 66.

Powers Conferred on Judge in Vacation. — See *Accousi v. G. A. Stowers Furniture Co.*, (Tex. Civ. App. 1904) 83 S. W. Rep. 1104; *Mau v. Stoner*, 12 Wyo. 478.

671. 1. Statutes Conferring Right to Sue State. — *White v. Alabama Insane Hospital*, 138 Ala. 479, citing *Moody v. State Prison*, 128 N. Car. 12, and *Maia v. Eastern State Hospital*, 97 Va. 507. And see the title **STATES, 487. 6.**

2. New Remedy Cumulative Apart from Express Language or Necessary Implication — *England*. — *Gale v. Rhymney, etc., Gas, etc., Co.*, 89 L. T. N. S. 399; *Meltham Spinning Co. v. Huddersfield Corp.*, 89 L. T. N. S. 403; *Devonport v. Tozer*, (1902) 2 Ch. 182, 86 L. T. N. S. 612, affirmed (1903) 1 Ch. 759, 88 L. T. N. S. 113; *Atty.-Gen. v. Asheborne Recreation Ground Co.*, (1903) 1 Ch. 101, 87 L. T. N. S. 561.

Alabama. — *Ryall v. Allen*, (Ala. 1905) 38 So. Rep. 851. See also *Prince v. State*, 140 Ala. 158.

Florida. — *Futch v. Adams*, (Fla. 1904) 36 So. Rep. 575.

Georgia. — *Kavanaugh v. Southern R. Co.*, 120 Ga. 62.

Indiana. — *State v. Soale*, (Ind. App. 1905) 74 N. E. Rep. 1111.

Iowa. — *Swinney v. Chicago, etc., R. Co.*, 123 Iowa 219. See also *Hoyt v. Gouge*, 125 Iowa 603.

Nebraska. — *Heist v. Jacoby*, (Neb. 1904) 98 N. W. Rep. 1058.

New York. — *Rosin v. Lidgerwood Mfg. Co.*, 89 N. Y. App. Div. 245.

North Carolina. — See *Lexington Grocery Co. v. Southern R. Co.*, 136 N. Car. 396; *In re Young*, 137 N. Car. 552.

Ohio. — *Johnson Coal Min. Co. v. Hocking Valley R. Co.*, 14 Ohio Dec. 209.

Washington. — *King v. Branscheid*, 32 Wash. 634; *State v. Klein*, 38 Wash. 475. See also *Woodcock v. Guy*, 33 Wash. 234.

Cumulative Remedy Against Conspiracy. — *Chicago, etc., Coal Co. v. People*, 214 Ill. 421, affirming 114 Ill. App. 75.

Mechanics' Lien Statute Does Not Abrogate Remedy on Debt. — *Hatcher v. Hendrie, etc., Mfg., etc., Co.*, (C. C. A.) 133 Fed. Rep. 267.

Criminal and Quasi-criminal Proceedings Concurrent. — *Com. v. Teel*, 30 Pa. Co. Ct. 566.

3. Statutes Prescribing Exclusive Mode of Procedure — *England*. — *Meltham Spinning Co. v. Huddersfield Corp.*, 89 L. T. N. S. 403.

Colorado. — *Pilgrim Consol. Min. Co. v. Teller County*, (Colo. App. 1904) 78 Pac. Rep. 617.

Illinois. — *Sweeney v. Chicago Telephone Co.*, 212 Ill. 475; *Baltimore, etc., R. Co. v. Campbell*, 109 Ill. App. 25.

Indiana. — *Couchman v. Prather*, 162 Ind. 250, affirming (Ind. App. 1903) 68 N. E. Rep. 599; *Lafayette, etc., Rapid R. Co. v. Butner*, 162 Ind. 460.

Iowa. — *Wahkonsa Invest. Co. v. Ft. Dodge*, 125 Iowa 148; *Newton v. McKay*, (Iowa 1905) 102 N. W. Rep. 827; *Stevens v. Carroll*, (Iowa 1905) 104 N. W. Rep. 433.

Kansas. — *Steinbach v. Murphy*, 70 Kan. 487. *Massachusetts.* — *Selectmen v. Templeton St. R. Co.*, 184 Mass. 294.

Minnesota. — *Justus v. Ramsey County*, 94 Minn. 72.

Missouri. — *Phelps v. Brumback*, 107 Mo. App. 16.

Nebraska. — *Heist v. Jacoby*, (Neb. 1904) 98 N. W. Rep. 1058; *Dawes County v. Furay*, (Neb. 1904) 99 N. W. Rep. 271; *Durkee v. Kochler*, (Neb. 1905) 103 N. W. Rep. 767.

New York. — *Torge v. Salamanca*, 176 N. Y. 324, reversing 86 N. Y. App. Div. 211; *Rosin v. Lidgerwood Mfg. Co.*, 89 N. Y. App. Div. 245.

North Carolina. — *State v. Liles*, 134 N. Car. 735; *Wilson v. Green*, 135 N. Car. 343.

Ohio. — *Johnson Coal Min. Co. v. Hocking Valley R. Co.*, 14 Ohio Dec. 209.

South Carolina. — *Matheny v. Aiken*, 68 S. Car. 163.

Texas. — *Gulf, etc., R. Co. v. Moore*, 98 Tex. 302, reversing (Tex. Civ. App. 1904) 80 S. W. Rep. 426.

672. See notes 1, 3.

673. (12) *Private Acts*—(a) *In General*.—See note 1.

674. See note 2.

Wisconsin.—*State v. Houser*, 122 Wis. 534; *State v. Williams*, 123 Wis. 61; *Buell v. Arnold*, 124 Wis. 65.

Rule Inapplicable Where Remedy Violates Constitutional Guaranties.—*Cleveland, etc., R. Co. v. Polecat Drainage Dist.*, 213 Ill. 83.

Exception—Right to Injunction May Coexist with Statutory Remedy.—*Atty.-Gen. v. Ashborne Recreation Ground Co.*, (1903) 1 Ch. 101, 87 L. T. N. S. 561.

Statute Construed to Effectuate Legislative Intent.—*Robertson v. Grant County*, 14 Okla. 407.

Statutes Not Unconstitutional.—*Com. v. Andrews*, 24 Pa. Super. Ct. 571.

Limitation of Remedy Treated as Limitations of Right.—*Davis v. Mills*, 194 U. S. 451; *Hawley v. Griffin*, 121 Iowa 691; *Weber v. Chicago, etc., R. Co.*, 69 Kan. 611; *Negaubauer v. Great Northern R. Co.*, 92 Minn. 184; *South Omaha v. McGavock*, (Neb. 1904) 100 N. W. Rep. 805, citing *Swaney v. Gage County*, 64 Neb. 627; *Poff v. New England Telephone, etc., Co.*, 72 N. H. 164; *Rosin v. Lidgerwood Mfg. Co.*, 89 N. Y. App. Div. 245.

Examples of rights and remedies in regard to which the rule has been applied are the following:

Statutory Right of Redemption.—*Logan County v. McKinley-Lanning L. & T. Co.*, (Neb. 1904) 101 N. W. Rep. 991, reversing on rehearing (Neb. 1903) 97 N. W. Rep. 642.

Proceedings to Contest Elections.—*McWhorter v. Dorr*, 57 W. Va. 608.

Appellate Procedure.—*Caldwell v. State*, 12 Wyo. 206.

New Trials in Criminal Cases.—*Hubbard v. State*, (Neb. 1904) 100 N. W. Rep. 153.

Mode of Proof.—*Borden v. U. S.*, 132 Fed. Rep. 205.

Mode of Waiver of Trial by Jury.—*Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832.

Remedy for Enforcing Lien of Street Assessment.—*Page v. W. W. Chase Co.*, 145 Cal. 578.

Statutory Provisions Prescribing Penalties.—*Esquivel v. Chaves*, (N. Mex. 1904) 78 Pac. Rep. 505.

672. 1. Strict Pursuance of Exclusive Statutory Remedy Required.—*United States*.—See *Lynch v. Burt*, (C. C. A.) 132 Fed. Rep. 417 (right of redemption from execution sales).

Arizona.—*Lacey v. Parks*, (Ariz. 1905) 80 Pac. Rep. 367.

California.—*Freshour v. Howard*, 142 Cal. 501.

Illinois.—*Merrick v. Carter*, 205 Ill. 73; *Schulte v. Schleeper*, 210 Ill. 357. See also *Foreman v. People*, 209 Ill. 567 (right of public officer to compensation).

Indiana.—*Pittsburgh, etc., R. Co. v. Lightheiser*, 163 Ind. 247; *Lake County v. Jarnecke*, 164 Ind. 658; *Cleveland, etc., R. Co. v. Osgood*, (Ind. App. 1904) 70 N. E. Rep. 839; *Silver v. State Board of Education*, 35 Ind. App. 438, affirming on rehearing (Ind. App.

1904) 71 N. E. Rep. 667; *Cain v. State*, (Ind. App. 1905) 74 N. E. Rep. 1102.

Kansas.—*Weber v. Chicago, etc., R. Co.*, 69 Kan. 611; *Becker v. Atchison, etc., R. Co.*, 70 Kan. 193.

Maryland.—*Evans Marble Co. v. International Trust Co.*, 101 Md. 210.

Massachusetts.—*Smith v. Thomson-Houston Electric Co.*, 188 Mass. 371.

Michigan.—*Frolich v. Beecher*, (Mich. 1905) 102 N. W. Rep. 736, 11 Detroit Leg. N. 835.

Minnesota.—See *Nielsen v. Albert Lea*, 91 Minn. 388 (attorney's lien).

Missouri.—*Bennett v. Hall*, 184 Mo. 407.

Nebraska.—*Cizek v. Cizek*, (Neb. 1904) 99 N. W. Rep. 28, reversing on rehearing (Neb. 1903) 96 N. W. Rep. 657.

New York.—See *Lewis v. New York*, 106 N. Y. App. Div. 454 (mode of purchasing supplies for city).

Pennsylvania.—*Forst's License*, 208 Pa. St. 578.

Tennessee.—*Harmon v. Tyler*, 112 Tenn. 8.

Utah.—*Jungk v. Snyder*, 28 Utah 1.

3. Remedy Implied Where Right Given.—*Devonport v. Tozer*, (1902) 2 Ch. 182, 86 L. T. N. S. 612, affirmed (1903) 1 Ch. 759, 88 L. T. N. S. 113; *Atty.-Gen. v. Ashborne Recreation Ground Co.*, (1903) 1 Ch. 101, 87 L. T. N. S. 561; *Tyee Consol. Min. Co. v. Langstedt*, 1 Alaska 439; *Dobbins v. Colorado, etc., R. Co.*, 19 Colo. App. 257; *La Porte Carriage Co. v. Sullender*, (Ind. App. 1904) 71 N. E. Rep. 922; *State v. American Book Co.*, 69 Kan. 1; *Young v. Renshaw*, 102 Mo. App. 173; *Yonge v. St. Louis Transit Co.*, 109 Mo. App. 235; *Blair v. Coakley*, 136 N. Car. 405. See also *State v. Durein*, 70 Kan. 14; *Gibbs v. Manchester*, (N. H. 1905) 61 Atl. Rep. 128; *David v. Brooklyn Heights R. Co.*, 104 N. Y. App. Div. 23, reversing (County Ct.) 45 Misc. (N. Y.) 208, affirmed 182 N. Y. 526; *McCall v. Marion County*, 43 Oregon 536.

A Statute Which Prohibits an Act.—*Parish v. Louisville, etc., R. Co.*, 78 S. W. Rep. 186, 25 Ky. L. Rep. 1524.

673. 1. Private Acts Conferring Special Privileges and Rights.—*Cornell v. Coyne*, 192 U. S. 418; *Cleveland Electric R. Co. v. Cleveland*, 137 Fed. Rep. 111; *Story v. Woolverton*, 31 Mont. 346; *People v. Miller*, 94 N. Y. App. Div. 567; *O'Reilly v. Brooklyn Heights R. Co.*, 95 N. Y. App. Div. 253, affirmed 179 N. Y. 450; *Southport, etc., R. Co. v. Platt Land*, 133 N. Car. 266.

Rule Applied to Statute Conferring Right on Municipality.—*Finchley Electric Light Co. v. Finchley Urban Dist. Council*, (1903) 1 Ch. 437, 58 L. T. N. S. 215, reversing (1902) 1 Ch. 866.

Greater Liberality Where Statutes Intended to Subserve Public Interests.—*Moon v. Salt Lake County*, 27 Utah 435. See also *U. S. v. St. Anthony R. Co.*, 192 U. S. 524; *Montreal Park, etc., R. Co. v. Chateaugay, etc., R. Co.*, 13 Quebec K. B. 306, reversed on other grounds 35 Can. Sup. Ct. 48.

674. 2. Manifest Intention of Legislature Not

674. *b. LIBERAL CONSTRUCTION* — (1) *Definition*. — See note 5.

675. (2) *Early Application of Rule*. — See note 1.

676. (3) *Modern Rule*. — See note 1.

(4) *Remedial Statutes*. — See note 4.

677. *Applications of Rule*. — See notes 2, 3, 4.

678. See notes 9, 16, 18a.

2. Provisos, Exceptions, and Saving Clauses — *a. DEFINITIONS* — *Proviso*. — See note 19.

679. See notes 1, 2.

Exceptions. — See note 4.

b. CONSTRUCTION OF PROVISO. — See note 7.

680. See note 1.

to Be Defeated. — Canadian Pac. R. Co. *v.* James Bay R. Co., 36 Can. Sup. Ct. 42.

674. 5. By an Equitable Construction. — O'Reilly *v.* Brooklyn Heights R. Co., 95 N. Y. App. Div. 253, *affirmed* 179 N. Y. 450.

675. 1. Statute Relating to Charitable Trusts, 43 Eliz., c. 4. — See Woman's Christian Nat. Library Assoc. *v.* Fordyce, (Ark. 1905) 86 S. W. Rep. 417.

676. 1. Ancient Application of Rule Repudiated. — State *v.* Woodside, 112 Mo. App. 451.

4. Remedial Statutes Liberally Construed. — Meridian Land, etc., Co. *v.* Ormund, 82 Miss. 758; Fisher *v.* Traders' Mut. L. Ins. Co., 136 N. Car. 217.

677. 2. Acts for Suppression of Fraud. — Matter of Seaman, 146 Cal. 455, 106 Am. St. Rep. 53, *per* Beatty, C. J.; Tyner *v.* U. S., 23 App. Cas. (D. C.) 324; Banks *v.* McCandless, 119 Ga. 793; Meridian Land, etc., Co. *v.* Ormund, 82 Miss. 758.

3. Acts in Furtherance of Proper Administration of Justice. — Graton *v.* Holliday-Klotz Land, etc., Co., 189 Mo. 322; Emerson *v.* Nash, 124 Wis. 369.

Statutes Giving the Right of Appeal. — Charmley *v.* Charmley, 125 Wis. 297. See also *Horning's Case*, 26 Pa. Super. Ct. 282 (appeal by intervening taxpayers).

Statutes Relating to Amendments. — Nelson *v.* Montgomery First Nat. Bank, 139 Ala. 578; Perrin *v.* Mallory Commission Co., (Ariz. 1904) 76 Pac. Rep. 476; Kroetch *v.* Empire Mill Co., 9 Idaho 277; Cooke *v.* Cain, 35 Wash. 353. See also Crawford *v.* Alexander, 5 Indian Ter. 161; Westover *v.* Van Dorn Ironworks Co., (Neb. 1903) 97 N. W. Rep. 598.

Statutes Extending the Time Within Which New Actions May Be Brought. — Atlanta, etc., R. Co. *v.* Wilson, 119 Ga. 781; McMillan *v.* Reume, 137 Mich. 1.

Statutes Relating to Pleading and Proof. — Pittsburgh, etc., R. Co. *v.* Lightheiser, 163 Ind. 247.

Statutes Relating to Negotiable Instruments. — Harrison *v.* National Bank, 108 Ill. App. 493, *affirmed* 207 Ill. 630.

Statute Relating to Change of Venue. — Grimes *v.* Ericson, 92 Minn. 164.

4. Acts Providing for Redemption of Property Sold for Taxes. — Pike *v.* Richardson, 136 Mich. 414, 11 Detroit Leg. N. 43; Hoffman *v.* Auditor Gen., 136 Mich. 689, 11 Detroit Leg. N. 201; Cain *v.* Brown, 54 W. Va. 656; Mosser *v.* Moore, 56 W. Va. 478.

678. 9. Employers' Liability Act. — See Toledo, etc., R. Co. *v.* Bond, 35 Ind. App. 142; Southern R. Co. *v.* Cheaves, 84 Miss. 565. Compare Quinlan *v.* Lackawanna Steel Co., 107 N. Y. App. Div. 176; Cleveland, etc., R. Co. *v.* Shanower, 70 Ohio St. 166.

16. Gertgens *v.* O'Connor, 191 U. S. 237, *affirming* 85 Minn. 481.

18a. Other Examples of statutes to which the rule has been held to be applicable are the following:

Statute Prohibiting Disclosure of Confidential Communications. — Battis *v.* Chicago, etc., R. Co., 124 Iowa 623.

Statute Imposing Duty on Railroads to Fence Right of Way. — Evansville, etc., R. Co. *v.* Huffman, 32 Ind. App. 425; Evans *v.* Utica, etc., R. Co., (County Ct.) 44 Misc. (N. Y.) 345.

Election Statutes. — Lane *v.* Bailey, 29 Mont. 548; Murphy *v.* Levensgood, 31 Mont. 34; Earl *v.* Lewis, 28 Utah 116; *In re* Provincial Elections Act, 10 British Columbia 114.

Statute Removing Disability of Minor to Administer Estate of Decedent. — Matter of Turner, 143 Cal. 438.

Statute Clothing Illegitimate Children with Right of Inheritance. — Townsend *v.* Meneley, (Ind. App. 1905) 74 N. E. Rep. 274. But see *contra* Reynolds *v.* Hitchcock, 72 N. H. 340.

Civil Damage Acts. — Currier *v.* McKee, 99 Me. 364.

19. Office of Proviso. — White *v.* U. S., 191 U. S. 545; Futch *v.* Adams, (Fla. 1904) 36 So. Rep. 575; Kline *v.* Minnesota Iron Co., 93 Minn. 63.

679. 1. Powers Not Conferred by Provisos. — Newman *v.* Lake, 70 Kan. 848.

2. White *v.* U. S., 191 U. S. 545; Kline *v.* Minnesota Iron Co., 93 Minn. 63.

4. See Nathan *v.* Spokane County, 35 Wash. 26, 102 Am. St. Rep. 888.

7. Construction of Proviso with Reference to Enacting Clause. — See Com. *v.* Linaugh, 13 Pa. Dist. 486.

680. 1. Proviso as Independent Enactment. — U. S. *v.* Whitridge, 197 U. S. 135.

"Provided" in Sense of "But" or "And". — See Interstate Commerce Commission *v.* Baird, 194 U. S. 25; Brace *v.* Solner, 1 Alaska 361, *quoting* Georgia R., etc., Co. *v.* Smith, 128 U. S. 174, set out in the original note.

Proviso May Extend Rather than Limit Preceding Matter. — Interstate Commerce Commission *v.* Baird, 194 U. S. 25.

680. *d.* STRICT CONSTRUCTION OF PROVISIO. — See notes 5, 6.

681. *e.* HARMONIZING PROVISIO AND ENACTING CLAUSE. — See note 1.
Where There Is Direct Repugnance. — See notes 4, 6.

f. GENERAL SAVING CLAUSES RELATING TO REPEALING ACTS. —

See note 7.

682. 3. General and Special Laws — In Many of the States There Are Constitutional Inhibitions. — See note 1.

680. 5. Strict Construction of Provisos. — Boston Traveler Co. v. Purdy, (C. C. A.) 137 Fed. Rep. 717; Towson v. Denson, (Ark. 1905) 86 S. W. Rep. 661; Futch v. Adams, (Fla. 1904) 36 So. Rep. 575; Steen v. Kirkpatrick, 84 Miss. 63; Sherman Nursery Co. v. Aughenbaugh, 93 Minn. 201.

6. Liberal Construction of Provisos in Statutes Strictly Construed. — Bonbright v. Schoettler, (C. C. A.) 127 Fed. Rep. 320.

681. 1. Harmonizing Proviso and Enacting Clause. — White v. U. S., 191 U. S. 545.

4. Saving Clause Repugnant to Purview Invalid. — Cummings v. People, 211 Ill. 392, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 681.

6. Repugnant Proviso Held Invalid. — See Nathan v. Spokane County, 35 Wash. 26, 102 Am. St. Rep. 888.

7. General Saving Clauses Relating to Repealing Acts. — Connell v. Crosby, 210 Ill. 380, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 681; Consolidated Barb Wire Co. v. Stevenson, (Kan. 1905) 79 Pac. Rep. 1085; Com. v. Anselvich, 186 Mass. 376, 104 Am. St. Rep. 590; Hunter v. Lang, (Neb. 1904) 98 N. W. Rep. 690; Wolcott v. Henninger, 1 Neb. (unofficial) 552, 96 N. W. Rep. 612, citing Hanscom v. Meyer, 61 Neb. 798; Dickinson v. Chosen Freeholders, 71 N. J. L. 589, affirming 71 N. J. L. 159, followed in Dickinson v. Rippe, 71 N. J. L. 596; Lang v. Lutz, 83 N. Y. App. Div. 534, affirmed 180 N. Y. 254; Webster v. White Plains, 93 N. Y. App. Div. 398; Lexington Grocery Co. v. Southern R. Co., 136 N. Car. 396, citing Dyer v. Ellington, 126 N. Car. 941; Charles v. Fawley, 71 Ohio St. 50; Blumle v. Kramer, 14 Okla. 366, 373. See also *infra*, this title, 757. 4 et seq.

Statute Limiting Operation of Code Applies to Future Amendments. — San Francisco Sav. Union v. Reclamation Dist. No. 124, 144 Cal. 630.

Statute Not Applicable When Different Intent Appears. — Davidson v. Witthaus, 106 N. Y. App. Div. 182.

Statute Not Applicable Where No Right Had Accrued at Time of Repeal. — State v. Ellis, (Kan. 1905) 79 Pac. Rep. 1066, 1133.

682. 1. Uniform Operation of General Laws — United States. — Shepard v. Barron, 194 U. S. 553 (Ohio constitution); Greenwich Ins. Co. v. Carroll, 125 Fed. Rep. 121.

California. — Deyoe v. Superior Ct., 140 Cal. 476, 98 Am. St. Rep. 73; Sanchez v. Fordyce, 141 Cal. 427; Ruperich v. Baehr, 142 Cal. 190; *Ex p.* Gerino, 143 Cal. 412.

Idaho. — Bear Lake County v. Budge, 9 Idaho 703; Boise City Irrigation, etc., Co. v. Stewart, 10 Idaho 38, 62.

Mississippi. — Adams v. Kuykendall, 83 Miss. 571; Adams v. Mississippi Lumber Co., 84 Miss. 23.

Missouri. — State v. Handler, 178 Mo. 383, citing *Ex p.* Handler, 176 Mo. 383.

Nebraska. — State v. Insurance Co. of North America, (Neb. 1904) 99 N. W. Rep. 36, reversed on rehearing on other grounds (Neb. 1904) 100 N. W. Rep. 405; Farmers' Irrigation Dist. v. Frank, (Neb. 1904) 100 N. W. Rep. 286.

Nevada. — *Ex p.* Boyce, 27 Nev. 299.

New Jersey. — Tippet v. McGrath, 70 N. J. L. 110.

New Mexico. — Territory v. Gutierrez, (N. Mex. 1904) 78 Pac. Rep. 139.

North Dakota. — Picton v. Cass County, 13 N. Dak. 242.

Ohio. — Gentsch v. State, 71 Ohio St. 151; Slatmyer v. Springborn, 26 Ohio Cir. Ct. 100; Cleveland, etc., R. Co. v. Urbana, etc., R. Co., 26 Ohio Cir. Ct. 180; Childs v. Perry, 26 Ohio Cir. Ct. 543; Roe v. New York, etc., R. Co., 13 Ohio Dec. 260, affirmed 25 Ohio Cir. Ct. 628. See also Cramer v. Southern Ohio L. & T. Co., 72 Ohio St. 395, quoting with approval State v. Spellmire, 67 Ohio St. 86.

Wisconsin. — State v. Erickson, 120 Wis. 435.

Purpose of Constitutional Provision. — See Van Cleve v. Passaic Valley Sewerage Com'rs, 71 N. J. L. 183, reversed on other grounds 71 N. J. L. 574.

Uniformity Merely One of the Tests of Generality. — Com. v. Middleton, 210 Pa. St. 582, affirming 7 Dauphin Co. Rep. (Pa.) 170. See also Com. v. Brown, 210 Pa. St. 29, affirming 25 Pa. Super. Ct. 269.

Ordinances Not Within Constitutional Provision. — *In re Zhizhuzza*, 147 Cal. 328.

When a General Law Exists. — Georgia Empire Mut. Ins. Co. v. Wright, 118 Ga. 796; Sayer v. Brown, 119 Ga. 539; Barber v. Alexander, 120 Ga. 30; Baltimore v. Allegany County, 99 Md. 1; Nystrom v. Clark, 27 Utah 186. See also State v. Vanhuse, 120 Wis. 15.

Exception — Law Fixing Time of Holding Courts. — Sisk v. Cargile, 138 Ala. 164; Little v. State, 137 Ala. 659; Dudley v. Birmingham R., etc., Co., 139 Ala. 453.

Inhibition Against Legislation or Suspension of General Law for Benefit of Individual or Private Corporation. — Yazoo, etc., R. Co. v. Southern R. Co., 83 Miss. 746, approved in State v. Mobile, etc., R. Co., 86 Miss. 172, holding a railroad company to be a private corporation within the meaning of the statute; Marsh v. Stoncbraker, (Neb. 1904) 98 N. W. Rep. 699, holding a provision for the publication of state statutes by an individual not to be prohibited; Red River Furnace Co. v. Tennessee Cent. R. Co., 113 Tenn. 697.

Number of Laws Relative to Single Subject Not Limited. — Louisville v. Wehmhoff, 116 Ky. 842, 845.

683. Legislative Question. — See note 1.
The Test. — See note 2.

Question Whether Law General Is for Courts. — *Rambo v. Larrabee*, 67 Kan. 634.

The Prohibition Does Not Prevent Legislation on a Special Subject, such as the establishment and maintenance of a state fair. *Kentucky Live Stock Breeders' Assoc. v. Hager*, (Ky. 1905) 85 S. W. Rep. 738, 27 Ky. L. Rep. 518; *Berman v. Minnesota State Agricultural Soc.*, 93 Minn. 130.

683. 1. Legislative Determination. — *St. Louis Southwestern R. Co. v. Grayson*, 72 Ark. 119; *Waterman v. Hawkins*, (Ark. 1905) 86 S. W. Rep. 844; *Mt. Vernon v. Evens*, etc., *Fire Brick Co.*, 204 Ill. 32; *Wooster v. Bateman*, 126 Iowa 552; *Rambo v. Larrabee*, 67 Kan. 634; *Weston v. Ryan*, (Neb. 1903) 97 N. W. Rep. 347; *Smith v. Havens Relief Fund Soc.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 594. See also *State v. Price*, 71 N. J. L. 249; *Com. v. Webster*, 13 Pa. Dist. 199; *Oak Cliff v. State*, (Tex. Civ. App. 1903) 77 S. W. Rep. 24, *affirmed* 97 Tex. 383, *citing Indianapolis v. Navin*, 151 Ind. 139.

Constitutional Provisions Making Question Judicial One. — *Pepin Tp. v. Sage*, (C. C. A.) 129 Fed. Rep. 659 (construing *Minnesota statutes*); *State v. Etchman*, 189 Mo. 648.

2. Test as to Whether Law General or Special — United States. — *Greenwich Ins. Co. v. Carroll*, 125 Fed. Rep. 121; *Kane v. Erie R. Co.*, (C. C. A.) 133 Fed. Rep. 681, *reversing* 128 Fed. Rep. 474.

Alabama. — *Hooper v. State*, 141 Ala. 111; *State v. Thompson*, 142 Ala. 98.

Arizona. — *Bennett v. Nichols*, (Ariz. 1905) 80 Pac. Rep. 392.

Arkansas. — *Little Rock v. North Little Rock*, 72 Ark. 195.

California. — *Deyoe v. Superior Ct.*, 140 Cal. 476, 98 Am. St. Rep. 73; *Brown v. Visalia*, 141 Cal. 372; *Sanchez v. Fordyce*, 141 Cal. 427; *Ruperich v. Baehr*, 142 Cal. 190; *Ex p. Gerino*, 143 Cal. 412; *Ex p. Jackson*, 143 Cal. 564; *French v. Davidson*, 143 Cal. 658; *Ex p. Whitley*, 144 Cal. 167; *Tucker v. Barnum*, 144 Cal. 266; *Bickerdike v. State*, 144 Cal. 698; *Lacy v. Gunn*, 144 Cal. 511; *Anglo-Californian Bank v. Field*, 146 Cal. 644.

Florida. — *Givens v. Hillsborough County*, (Fla. 1903) 35 So. Rep. 88.

Georgia. — *Ætna. Ins. Co. v. Brigham*, 120 Ga. 925; *Lamar v. Prosser*, 121 Ga. 153.

Idaho. — *Bear Lake County v. Budge*, 9 Idaho 703; *Boise City Irrigation*, etc., *Co. v. Stewart*, 10 Idaho 38, 62.

Illinois. — *Mt. Vernon v. Evens*, etc., *Fire Brick Co.*, 204 Ill. 32; *Downey v. People*, 205 Ill. 230; *People v. People's Gas Light*, etc., *Co.*, 205 Ill. 482, 98 Am. St. Rep. 244; *L'Hote v. Milford*, 212 Ill. 418.

Kansas. — *Leavenworth v. Leavenworth City*, etc., *Water Co.*, 69 Kan. 82.

Kentucky. — *Com. v. Reinecke Coal Min. Co.*, 117 Ky. 885; *Yates v. Collins*, (Ky. 1904) 82 S. W. Rep. 973, *denying rehearing* of 82 S. W. Rep. 282, 26 Ky. L. Rep. 558; *Hager v. Kentucky Children's Home Soc.*, 83 S. W. Rep.

605, 26 Ky. L. Rep. 1133; *Hager v. Gast*, 84 S. W. Rep. 556, 27 Ky. L. Rep. 129.

Louisiana. — *American Homestead Co. v. Karstendiek*, 111 La. 884.

Massachusetts. — *Squire v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322.

Minnesota. — *Kaiser v. Campbell*, 90 Minn. 375; *Le Tourneau v. Hugo*, 90 Minn. 420; *Stees v. Bergmeier*, 91 Minn. 513; *State v. Gunn*, 92 Minn. 436; *State v. Rogers*, 93 Minn. 55.

Mississippi. — See *Ex p. Fritz*, 86 Miss. 210.

Missouri. — *Ex p. Loving*, 178 Mo. 194; *State v. Cantwell*, 179 Mo. 245; *State v. Dabbs*, 182 Mo. 359; *State v. Speed*, 183 Mo. 186; *State v. Tower*, 185 Mo. 79.

Montana. — *In re O'Brien*, 29 Mont. 530.

New Jersey. — *Riccio v. Hoboken*, 69 N. J. L. 649, *reversing* 69 N. J. L. 104; *Tippett v. McGrath*, 70 N. J. L. 110, *affirmed* 71 N. J. L. 338; *Rutgers College v. Morgan*, 70 N. J. L. 460; *Schwarz v. Dover*, 70 N. J. L. 502; *Dickinson v. Hudson County*, 71 N. J. L. 159; *State v. Price*, 71 N. J. L. 249. See also *Hopper v. Stack*, 69 N. J. L. 562.

North Dakota. — *Picton v. Cass County*, 13 N. Dak. 242.

Ohio. — *Gentsch v. State*, 71 Ohio St. 151; *Cincinnati St. R. Co. v. Horstman*, 72 Ohio St. 93; *Cramer v. Southern Ohio L. & T. Co.*, 72 Ohio St. 395; *Roe v. New York*, etc., *R. Co.*, 13 Ohio Dec. 260, *affirmed* 25 Ohio Cir. Ct. 628; *North Bend v. Cincinnati*, etc., *Electric St. R. Co.*, 25 Ohio Cir. Ct. 268; *Cincinnati*, etc., *Traction Co. v. Felix*, 25 Ohio Cir. Ct. 393; *Geiger v. State*, 25 Ohio Cir. Ct. 742.

Oregon. — *White v. Mears*, 44 Oregon 215.

Pennsylvania. — *Philadelphia Co.'s Petition*, 210 Pa. St. 490; *Com. v. Densmore*, 13 Pa. Dist. 639, 29 Pa. Co. Ct. 217.

South Carolina. — *Severance v. Murphy*, 67 S. Car. 409.

Tennessee. — *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151, 105 Am. St. Rep. 916.

Texas. — *Ex p. Thompkins*, (Tex. Crim. 1904) 83 S. W. Rep. 379.

Wisconsin. — *State v. Policemen's Pension Fund*, 121 Wis. 44.

Existing Conditions as Basis — Purpose of Law Temporary. — *Dickinson v. Hudson County*, 71 N. J. L. 159.

Acts Revisory or Amendatory of Corporate Charters. — See *Longview v. Crawfordville*, 164 Ind. 117; *State v. Bangor*, 98 Me. 114.

History and Circumstances of Enactment Do Not Render Law Special. — *State v. Clancy*, 30 Mont. 539.

Population Only Proper Basis of Legislation Classifying Cities and Counties. — *Beltz v. Pittsburgh*, 26 Pa. Super. Ct. 66.

For Other Examples of statutes held not to infringe constitutional prohibitions against special or local laws on particular subjects see *Sisk v. Cargile*, 138 Ala. 164 (taxation); *Dudley v. Birmingham R.*, etc., *Co.*, 139 Ala. 453 (change of venue); *Starr Burying Ground Assoc. v. North Lane Cemetery Assoc.*, 77

686. See note 1.

687. The Effect and Not the Form. — See note 1.

The Constitutional Restrictions Apply to Direct Legislation. — See note 2.
Power of Repeal Not Destroyed. — See note 3.

688. In the Absence of a Constitutional Prohibition. — See note 1.

Practical Construction. — See note 2.

4. Mandatory or Directory — *a.* IN GENERAL. — See notes 4, 7, 8.

689. *b.* AFFIRMATIVE AND NEGATIVE TERMS. — See note 1.

Conn. 83 (condemnation of property); Wheelwright *v.* Boston, 188 Mass. 521 (construction of streets and bridges); Wallace *v.* Reno, 27 Nev. 71 (taxation); Matter of New York, etc., Bridge, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 184; citing Sun Printing, etc., Assoc. *v.* New York, 152 N. Y. 257 (right to lay railroad tracks).

686. 1. When Statute Local or Special — *United States.* — Pepin Tp. *v.* Sage, (C. C. A.) 129 Fed. Rep. 659.

Illinois. — Horwich *v.* Walker-Gordon Laboratory Co., 205 Ill. 497, 98 Am. St. Rep. 254; Strong *v.* Dignan, 207 Ill. 385, 99 Am. St. Rep. 225; Pettibone *v.* West Chicago Park Com'rs, 215 Ill. 304.

Indiana. — School City *v.* Hayes, 162 Ind. 193; Longview *v.* Crawfordsville, 164 Ind. 117.

Kentucky. — Droege *v.* McInerney, 87 S. W. Rep. 1085, 27 Ky. L. Rep. 1137.

Minnesota. — State *v.* Justus, 90 Minn. 474; Thomas *v.* St. Cloud, 90 Minn. 477.

Nebraska. — State *v.* Scott, (Neb. 1904) 100 N. W. Rep. 812, affirming on rehearing (Neb. 1904) 97 N. W. Rep. 1021.

New Jersey. — Riccio *v.* Hoboken, 69 N. J. L. 649, reversing 69 N. J. L. 104; Tippet *v.* McGrath, 70 N. J. L. 110, affirmed 71 N. J. L. 338; Perrine *v.* Jersey Cent. Traction Co., 70 N. J. L. 168; Matter of Fagan, 70 N. J. L. 341; Van Cleve *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 183, reversed on other grounds 71 N. J. L. 574; Halsey *v.* Nowrey, 71 N. J. L. 481; Dickinson *v.* Chosen Freeholders, 71 N. J. L. 589, affirming 71 N. J. L. 159, followed in Dickinson *v.* Rippe, 71 N. J. L. 596.

North Dakota. — State *v.* Stark County, (N. Dak. 1905) 103 N. W. Rep. 913.

Ohio. — Pump *v.* Lucas County, 69 Ohio St. 448; Schumacher *v.* McCallip, 69 Ohio St. 500; Gentsch *v.* State, 71 Ohio St. 151; Mt. Vernon *v.* State, 71 Ohio St. 428, 104 Am. St. Rep. 783; Price *v.* Toledo, 25 Ohio Cir. Ct. 617.

Pennsylvania. — Beltz *v.* Pittsburgh, 26 Pa. Super. Ct. 66; Old Forge School Dist., 27 Pa. Super. Ct. 586, affirming 4 Lack. Jur. (Pa.) 362. See also Com. *v.* Middleton, 210 Pa. St. 582, affirming 7 Dauphin Co. Rep. (Pa.) 170; Tennessee Producers' Marble Co. *v.* Grant, 14 Pa. Dist. 453.

Texas. — Presidio County *v.* Jeff Davis County, (Tex. Civ. App. 1903) 77 S. W. Rep. 278.

687. 1. Effect and Not Form Controls. — Nettleton's Appeal, 76 Conn. 235; L'Hote *v.* Milford, 212 Ill. 418; Longview *v.* Crawfordsville, 164 Ind. 117; Van Cleve *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 183, reversed on other grounds 71 N. J. L. 574; Com. *v.* Middleton, 210 Pa. St. 582, affirming 7 Dauphin Co.

Rep. (Pa.) 170, quoting Com. *v.* Gilligan, 195 Pa. St. 504.

2. Nettleton's Appeal, 76 Conn. 235; Levy *v.* State, 161 Ind. 251; State *v.* Etchman, 189 Mo. 648; Hopper *v.* Stack, 69 N. J. L. 562.

3. Repeal Amounting to Violation of Inhibition Void. — Little *v.* State, 137 Ala. 659; Cleveland, etc., R. Co. *v.* Urbana, etc., R. Co., 26 Ohio Cir. Ct. 180.

Express Authority to Repeal Existent Local or Special Laws. — See Pepin Tp. *v.* Sage, (C. C. A.) 129 Fed. Rep. 659, construing the constitution of *Minnesota*.

688. 1. Where Special Laws Not Prohibited. — Greenwich Ins. Co. *v.* Carroll, 125 Fed. Rep. 121 (*Iowa* constitution); Sisk *v.* Cargile, 138 Ala. 164; Fouts *v.* Hood River, (Oregon 1905) 81 Pac. Rep. 370; Neely *v.* Fell, 30 Pa. Co. Ct. 470; Severance *v.* Murphy, 67 S. Car. 409. See also State *v.* Policemen's Pension Fund, 121 Wis. 44.

South Carolina Constitution — Special Charter Allowed on Concurrent Resolution. — Riley *v.* Charleston Union Station Co., 71 S. Car. 457.

In Some of the States Certain Subjects Are Exempted. — Sayer *v.* Brown, 119 Ga. 539; Barber *v.* Alexander, 120 Ga. 30; Oak Cliff *v.* State, (Tex. Civ. App. 1903) 77 S. W. Rep. 24, affirmed 97 Tex. 383. See also Red River Furnace Co. *v.* Tennessee Cent. R. Co., 113 Tenn. 697.

Special Provisions in General Laws. — Severance *v.* Murphy, 67 S. Car. 409.

2. Davis *v.* Grunig, 143 Cal. 336.

4. Mandatory Statutes — General Rules. — See Wirral Rural Dist. Council *v.* Carter, (1903) 1 K. B. 646, 89 L. T. N. S. 171; Cape Breton Electric Co. *v.* Slater, 24 Can. L. T. 135; State *v.* Myers, (Kan. 1905) 80 Pac. Rep. 638; State *v.* McNay, 100 Md. 622; State *v.* Barry, (N. Dak. 1905) 103 N. W. Rep. 637.

Statutes Empowering Public Officers to Perform Public Duties Mandatory. — Litchfield *v.* Bond, 105 N. Y. App. Div. 229. And see the title PUBLIC OFFICERS, **365**, 3.

When the Law Directs Something to Be Done in a Given Manner, or at a Particular Time or Place, there is an implied prohibition against any other mode or time or place for doing the act. State *v.* Stark County, (N. Dak. 1905) 103 N. W. Rep. 913.

7. Pittsburgh, etc., R. Co. *v.* Tod, 72 Ohio St. 156; Stover *v.* Foltz, 13 Pa. Dist. 636, 29 Pa. Co. Ct. 479.

8. The Difficulty in Fixing Any Settled Discriminate Point. — Hubbert *v.* Campbellville Lumber Co., 191 U. S. 70, affirming (C. C. A.) 112 Fed. Rep. 718.

689. 1. Negative Terms. — Swortfiguer *v.*

689. *c.* TIME AND MODE OF PROCEEDING BY PUBLIC OFFICERS. — See note 6.

691. Provisions in Regard to the Assessment and Collection of Taxes. — See note 1.
Provisions Concerning the Conduct of Elections. — See note 2.

Statutes Requiring the Instructions of the Court. — See note 3.

d. CONFERRING POWERS, PRIVILEGES, OR IMMUNITIES. — See note 5.

692. *c.* REGULATING JUDICIAL PROCEDURE. — See note 1.

White, 141 Cal. 576; Smith *v.* Chicago, etc., R. Co., 124 Wis. 120.

689. 6. Time, Mode, etc., of Proceeding by Public Officers—*California*.—Otto *v.* Long, 144 Cal. 144.

Idaho.—Boise City Irrigation, etc., Co. *v.* Stewart, 10 Idaho 38, 62.

Indiana.—Hendershot *v.* State, 162 Ind. 69.
Compare Silver *v.* State Board of Education, 35 Ind. App. 438, affirming on rehearing (Ind. App. 1904) 71 N. E. Rep. 667.

Iowa.—Bevering *v.* Smith, 121 Iowa 607; Tomlin *v.* Woods, 125 Iowa 367.

Massachusetts.—McQuesten *v.* Atty.-Gen., 187 Mass. 185.

Minnesota.—McMillan *v.* Freeborn County, 93 Minn. 16.

Montana.—Burton *v.* Kipp, 30 Mont. 275.

Nebraska.—Boettcher *v.* Lancaster County, (Neb. 1905) 103 N. W. Rep. 1075.

New Jersey.—Cord *v.* Newlin, 71 N. J. L. 438.

Ohio.—State *v.* Barlow, 70 Ohio St. 363.

Pennsylvania.—Erie *v.* Willis, 26 Pa. Super. Ct. 459; Lancaster *v.* Norbeck, 14 Pa. Dist. 271.

South Carolina.—State *v.* Cornell, 70 S. Car. 409.

West Virginia.—State *v.* Taylor, 57 W. Va. 228.

Canada.—Canadian Pac. R. Co. *v.* Allan, 19 Quebec Super. Ct. 57.

And see the title PUBLIC OFFICERS, **365.** 4.
Statute Requiring Cause to Be Heard at Next Term After Entry.—Graffam *v.* Cobb, 98 Me. 200.

Submission of Interrogatories to Jury.—Gila Valley, etc., R. Co. *v.* Lyon, (Ariz. 1905) 80 Pac. Rep. 337, citing W. H. Taggart Mercantile Co. *v.* Clack, (Ariz. 1903) 71 Pac. Rep. 925.

Summoning Jurors.—State *v.* Lehman, 182 Mo. 424.

Selection of Jurors.—U. S. *v.* Mitchell, 136 Fed. Rep. 896.

Statute Relating to Drawing and Impaneling of Grand Jurors.—Sharp *v.* U. S., 13 Okla. 522. *Contra*, Sharp *v.* U. S., (C. C. A.) 138 Fed. Rep. 878; Scott *v.* State, 141 Ala. 39, Tyson, J., dissenting.

691. 1. Statute Concerning Taxes and Assessments—*United States*.—Allen *v.* Davenport, (C. C. A.) 132 Fed. Rep. 209.

Illinois.—Lyman *v.* Chicago, 211 Ill. 209; Chicago, etc., R. Co. *v.* People, 213 Ill. 458.

Minnesota.—State *v.* Scott, 92 Minn. 210; Corbett *v.* Rocksbury, 94 Minn. 307.

Missouri.—State *v.* Carr, 178 Mo. 229.

New York.—Rochester *v.* Farrar, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 304.

West Virginia.—Clark *v.* Mercer County Ct., 55 W. Va. 278.

Wisconsin.—Chicago Title, etc., Co. *v.* Bashford, 120 Wis. 281.

2. Elections—*Arizona*.—Averyt *v.* Williams, (Ariz. 1904) 76 Pac. Rep. 463; Johnstone *v.* Robertson, (Ariz. 1904) 76 Pac. Rep. 465.

California.—Freshour *v.* Howard, 142 Cal. 501; Kenworthy *v.* Mast, 141 Cal. 268.

Illinois.—Choisser *v.* York, 211 Ill. 56.

Indiana.—Current *v.* Luther, 164 Ind. 522.

Kentucky.—See Preston *v.* Price, 85 S. W. Rep. 1183, 27 Ky. L. Rep. 588.

Nebraska.—State *v.* Dewey, (Neb. 1905) 102 N. W. Rep. 1015.

New Mexico.—Esquibel *v.* Chaves, (N. Mex. 1904) 78 Pac. Rep. 505.

New York.—Matter of Smith, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 384.

Ohio.—State *v.* Stewart, 71 Ohio St. 55.

Texas.—Hoover *v.* Thomas, 35 Tex. Civ. App. 535.

Utah.—Earl *v.* Lewis, 28 Utah 116.

West Virginia.—Doll *v.* Bender, 55 W. Va. 404.

Posting Election Notices.—Brown *v.* Woodbridge Tp., 70 N. J. L. 762, affirming 69 N. J. L. 485.

3. Instructions—Statute Mandatory.—State *v.* Armstrong, 43 Oregon 207; San Antonio, etc., R. Co. *v.* Votaw, (Tex. Civ. App. 1904) 81 S. W. Rep. 130.

5. Statutes Conferring Privileges.—Taylor *v.* School Town, 33 Ind. App. 675; Sexton *v.* Coahoma County, 86 Miss. 380; Levara *v.* McNeny, (Neb. 1904) 98 N. W. Rep. 679; Doughty *v.* Atlantic City, etc., Traction Co., 71 N. J. L. 131; State *v.* Roselot, 69 Ohio St. 91; Swift *v.* Wood, 103 Va. 404; Wellsburg, etc., R. Co. *v.* Pan Handle Traction Co., 56 W. Va. 18; Welsh *v.* Manwaring, 120 Wis. 377; Birdsall *v.* Kewaunee County, 124 Wis. 576.

Formalities Prescribed for Execution of Wills.—Matter of Seaman, 146 Cal. 455, 106 Am. St. Rep. 53.

Organization of Corporations.—Collier *v.* Union R. Co., 113 Tenn. 96. And see the title CORPORATIONS (PRIVATE), **655.** 2, 3.

692. 1. Judicial Procedure—*United States*.—Smith *v.* U. S., 38 Ct. Cl. 257.

Arkansas.—Improvement Dist. No. 60 *v.* Cotter, 71 Ark. 556; Anglin *v.* Cravens, (Ark. 1905) 88 S. W. Rep. 833.

Colorado.—Needle Rock Ditch Co. *v.* Crawford-Clipper Ditch Co., 32 Colo. 209; Baer Bros. Land, etc., Co. *v.* Wilson, 32 Colo. 500.

Illinois.—Troxell *v.* Dick, 216 Ill. 98.

Kentucky.—Kelley *v.* Gardner, (Ky. 1903) 76 S. W. Rep. 531.

Montana.—State *v.* Stickney, 29 Mont. 523; State *v.* Hays, 31 Mont. 233.

Nebraska.—Melcher *v.* Schluter, (Neb. 1904) 98 N. W. Rep. 1082.

692. 5. Retrospective Laws — *a.* DEFINITION. — See note 4.

693. *c.* GENERAL RULE OF CONSTRUCTION. — See note 1.

694. See note 1.

695. See note 2.

North Dakota. — *Simensen v. Simensen*, 13 N. Dak. 305.

Tennessee. — *Harmon v. Tyler*, 112 Tenn. 8.

Texas. — *Delaware Western Constr. Co. v. Farmers, etc.*, Nat. Bank, 33 Tex. Civ. App. 658, citing *Pruitt v. State*, 92 Tex. 435; *Martin v. Berry*, (Tex. Civ. App. 1905) 87 S. W. Rep. 712.

Washington. — *Jones v. Herrick*, 33 Wash. 197; *Ball v. Clothier*, 34 Wash. 299.

Wisconsin. — *German American Bank v. Powell*, 121 Wis. 575.

Wyoming. — *Todd v. Peterson*, 13 Wyo. 513.

Motions for New Trials. — *James v. Appel*, 192 U. S. 129.

Settlement of Case on Appeal. — See *Hughes v. Love*, 136 Mich. 169, 10 Detroit Leg. N. 990; *Cameron-Barkley Co. v. Thornton Light, etc.*, Co., 137 N. Car. 99.

692. 4. See *Investment Co. v. Hambach*, 37 Wash. 629. And see the title CONSTITUTIONAL LAW, **938.** 7.

Not Retrospective Because Operation Depends on Prior Matters. — *In re Scott*, 126 Fed. Rep. 981.

Not Retrospective Because Applicable to Existing Corporation. — *Bay State Gas Co. v. State*, 4 Penn. (Del.) 497.

693. 1. General Rule of Construction — *England.* — *Colonial Sugar Refining Co. v. Irving*, (1905) A. C. 369, affirming 14 Queensland L. J. 18.

United States. — *Henderson County v. Travelers' Ins. Co.*, (C. C. A.) 128 Fed. Rep. 817; *McBride v. Farrington*, 131 Fed. Rep. 797; *Sawyer Spindle Co. v. Carpenter*, 133 Fed. Rep. 238; *St. Louis Southwestern R. Co. v. Purcell*, (C. C. A.) 135 Fed. Rep. 499.

California. — *San Francisco Sav. Union v. Reclamation Dist. No. 124*, 144 Cal. 639.

Idaho. — *Boise City Irrigation, etc., Co. v. Stewart*, 10 Idaho 38, 62.

Illinois. — *Cleary v. Hoobler*, 207 Ill. 97; *Halpin v. Prosperity Loan, etc., Assoc.*, 108 Ill. App. 316.

Iowa. — *Martin v. Oskaloosa*, (Iowa 1904) 99 N. W. Rep. 557; *Gilbertson v. Ballard*, 125 Iowa 420; *Citizens' State Bank v. Jess*, 127 Iowa 450.

Louisiana. — See *State v. Morgan's Louisiana, etc., R., etc., Co.*, 111 La. 120.

Maryland. — *Harris v. Whiteley*, 98 Md. 430; *Slingluff v. Hubner*, 101 Md. 652.

Massachusetts. — *Haverhill v. Marlborough*, 187 Mass. 150. See also *Lawrence v. Methuen*, 187 Mass. 592.

Minnesota. — *Lake Crystal v. Blue Earth County*, 91 Minn. 247.

Missouri. — *Phillips v. Butler County*, 187 Mo. 698; *Petting v. Current River Land, etc., Co.*, 111 Mo. App. 373.

Montana. — *In re Pomeroy*, (Mont. 1905) 81 Pac. Rep. 629 (by express provision in the codes).

New Mexico. — *Grunsfeld v. Brownell*, (N. Mex. 1904) 76 Pac. Rep. 310.

New York. — *Matter of Andersen*, 178 N. Y. 416, reversing on other grounds 91 N. Y. App.

Div. 563; *People v. Miller*, 179 N. Y. 227, reversing 88 N. Y. App. Div. 218; *Matter of Hoople*, 93 N. Y. App. Div. 486, reversed on other grounds 179 N. Y. 308. See also *Jefferson County Nat. Bank v. Dewey*, 181 N. Y. 98, reversing 90 N. Y. App. Div. 443.

Ohio. — *Eury v. State*, 72 Ohio St. 448.

Pennsylvania. — *Schoales v. Order of Sparta*, 206 Pa. St. 11; *Com. v. Danville Bessemer Co.*, 207 Pa. St. 302, affirming 6 Dauphin Co. Rep. (Pa.) 65; *Tarentum v. Moorhead*, 26 Pa. Super. Ct. 273.

South Dakota. — *Hulin v. Butte County*, (S. Dak. 1904) 100 N. W. Rep. 739.

Washington. — *Rogers v. Trumbull*, 32 Wash. 211.

West Virginia. — *State v. Harman*, 57 W. Va. 447.

Wisconsin. — *Winneconne v. Winneconne*, 122 Wis. 348.

Canada. — *Massey v. McClelland*, 2 N. W. Ter. 179.

And see the title CONSTITUTIONAL LAW, **939.** 2.

Constitutional Provision Not Retroactive. — *McCullough v. Graham*, 70 S. Car. 63. And see the title CONSTITUTIONAL LAW, **917.** 11.

Rule Applied to Tax Laws. — *London v. Hope*, 80 S. W. Rep. 817, 26 Ky. L. Rep. 112. And see the title TAXATION, **617.** 5 *et seq.*

694. 1. Construction Rendering Statute Unconstitutional. — *In re Lambrecht*, 137 Mich. 450, 11 Detroit Leg. N. 289; *King v. Irving*, 103 N. Y. App. Div. 420; *Martin v. Greenwood*, 27 Pa. Super. Ct. 245, reversing 14 Pa. Dist. 23, 30 Pa. Co. Ct. 573; *Old Forge School Dist.*, 27 Pa. Super. Ct. 586, affirming 4 Lack. Jur. (Pa.) 362; *Smith's Estate*, 13 Pa. Dist. 80; *Investment Co. v. Hambach*, 37 Wash. 629; *Chicago Title, etc., Co. v. Bashford*, 120 Wis. 281.

Rule Especially Applicable to Avoid Interference with Antecedent and Vested Rights. — *Harris v. Whiteley*, 98 Md. 430; *Jersey City v. North Jersey St. R. Co.*, (N. J. 1905) 61 Atl. Rep. 95. See also *Colonial Sugar Refining Co. v. Irving*, (1905) A. C. 369, affirming 14 Queensland L. J. 18 (statute affecting right of appeal not construed retrospectively).

695. 2. Legislative Intent to Make Statute Retrospective. — *Ross v. Beaudry*, (1905) A. C. 570; *Lamb v. Powder River Livestock Co.*, (C. C. A.) 132 Fed. Rep. 434; *Schauble v. Schulz*, (C. C. A.) 137 Fed. Rep. 389; *Irwin v. U. S.*, 38 Ct. Cl. 87; *Towson v. Denson*, (Ark. 1905) 86 S. W. Rep. 661; *London v. Hope*, 80 S. W. Rep. 817, 26 Ky. L. Rep. 112; *Stevens v. Bradford*, 185 Mass. 439; *Orman v. Van Arsdell*, (N. Mex. 1904) 78 Pac. Rep. 48; *Matter of Andersen*, 178 N. Y. 416, reversing 91 N. Y. App. Div. 563; *Davidson v. Witthaus*, 106 N. Y. App. Div. 182.

Retrospective Provisions Not Extended by Construction So as to Make Statute Unconstitutional. — *Lake Crystal v. Blue Earth County*, 91 Minn. 247.

- 695.** *d.* STATUTES AFFECTING JUDICIAL PROCEDURE. — See note 5.
696. See note 1.
697. *e.* DECLARATORY STATUTES. — See note 7.
698. *f.* REMEDIAL STATUTES. — See notes 2, 3, 4.
g. CURATIVE STATUTES. — See note 5. See generally the title CONSTITUTIONAL LAW, **940**. 2 *et seq.*
699. See notes 1, 2.
Application to Pending Suits. — See note 3.
700. *h.* STATUTES OF LIMITATIONS. — See note 1.
i. MECHANICS' LIEN STATUTES. — See note 3.

Statute Enlarging Rights of Adopted Children Held to Operate on Children Adopted Prior to Enactment. — Theobald *v.* Smith, 103 N. Y. App. Div. 200, Van Brunt, P. J., *dissenting*.

695. 5. Statute Affecting Remedy. — Rex *v.* Chandra Dharma, (1905) 2 K. B. 335; Pond *v.* New York Nat. Exch. Bank, 124 Fed. Rep. 992; Matter of Hoople, 93 N. Y. App. Div. 486, *reversed* on other grounds 179 N. Y. 308. See also Winneconne *v.* Winneconne, 122 Wis. 348. And see the title CONSTITUTIONAL LAW, **947**. 2 *et seq.*

As to Discharge in Bankruptcy see *In re* Neely, 134 Fed. Rep. 667; *In re* Scott, 126 Fed. Rep. 981.

696. 1. Pending Actions. — Rogers *v.* Trumbull, 32 Wash. 211.

Steps Taken Before Enactment Governed by Old Law. — Taylor *v.* Huntington, 34 Wash. 455; Woodham *v.* Anderson, 32 Wash. 500.

697. 7. Statute Cannot Reverse or Vacate Judicial Decisions. — See State *v.* Gibson, 26 Ohio Cir. Ct. 784. And see the title CONSTITUTIONAL LAW, **1033**. 2 *et seq.*

698. 2. Remedial Statutes. — Edelstein *v.* Carlile, 33 Colo. 54.

Statutes Conferring Right of Appeal. — Kepler *v.* Rinehart, 162 Ind. 504.

3. Relaxation of Rule. — London *v.* Hope, 80 S. W. Rep. 817, 26 Ky. L. Rep. 112. See also White *v.* U. S., 191 U. S. 545; Parker *v.* Parker, 80 S. W. Rep. 209, 25 Ky. L. Rep. 2193.

4. Intent. — Haubner *v.* Milwaukee, 124 Wis. 153.

Statute May Invalidate Wills Theretofore Executed. — Colonna *v.* Alton, 23 App. Cas. (D. C.) 926. And see the titles CONSTITUTIONAL LAW, **943**. 4; WILLS, **548**. 2 *et seq.*

5. Authorizing Taxation to Meet Expenses Unauthorized When Incurred. — State *v.* Gunn, 92 Minn. 436; Merchants' Nat. Bank *v.* East Grand Forks, 94 Minn. 246. See also Matter of Borup, 182 N. Y. 222, *affirming* 102 N. Y. App. Div. 262; State *v.* Aberdeen, 34 Wash. 61.

Curing Irregularities in Exercise of the Power of Taxation. — Allen *v.* Davenport, (C. C. A.) 132 Fed. Rep. 209; Chase *v.* Trout, 146 Cal. 350; Steger *v.* Traveling Men's Bldg., etc., Assoc., 208 Ill. 236, 100 Am. St. Rep. 225; Martin *v.* Oskaloosa, (Iowa 1904) 99 N. W. Rep. 557; Warren *v.* Street Com'rs, 187 Mass. 290; Newaygo Portland Cement Co. *v.* Sheridan Tp., 137 Mich. 475, 11 Detroit Leg. N. 357; State *v.* District Ct., (Minn. 1905) 103 N. W. Rep. 881; Matter of Rochester Trust, etc., Co., (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 581; Rochester *v.* Farrar, (Supm. Ct. Spec. T.) 44 Misc. (N.

Y.) 394; State *v.* McDowd, 54 W. Va. 695, 55 W. Va. 1; Starr *v.* Sampselle, 55 W. Va. 442; Mosser *v.* Moore, 56 W. Va. 478. And see the titles CONSTITUTIONAL LAW, **945**. 9, **946**. 1; TAXATION, **618**. 3, 4.

Curing Defective Acknowledgments. — Costello *v.* Graham, (Ariz. 1905) 80 Pac. Rep. 336; Kunkle *v.* Davidson, 31 Pa. Co. Ct. 298. And see the titles ACKNOWLEDGMENTS, **564**. 2 *et seq.*; CONSTITUTIONAL LAW, **943**. 3.

Curing Irregularities in Incorporation of Municipalities. — Stembel *v.* Bell, 161 Ind. 323; Muse *v.* Lexington, 110 Tenn. 655; State *v.* Vanhuse, 120 Wis. 15. See also the title MUNICIPAL CORPORATIONS, **1135**. 6.

Validating Illegally Organized Private Corporations. — Smith *v.* Havens Relief Fund Soc., (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 594.

Validating Municipal Bonds. — Givens *v.* Hillsborough County, (Fla. 1903) 35 So. Rep. 88.

Validating Municipal Ordinances. — Leavenworth *v.* Leavenworth City, etc., Water Co., 69 Kan. 82.

699. 1. Statutes Valid. — Steger *v.* Traveling Men's Bldg., etc., Assoc., 208 Ill. 236, 100 Am. St. Rep. 225; Ross *v.* Wright County, (Iowa 1905) 104 N. W. Rep. 506, *following* Ferry *v.* Campbell, 110 Iowa 290; State *v.* Gibson, 26 Ohio Cir. Ct. 784; Kunkle *v.* Davidson, 31 Pa. Co. Ct. 298.

2. Monterey *v.* Jacks, 139 Cal. 542; Chase *v.* Trout, 146 Cal. 350; Steger *v.* Traveling Men's Bldg., etc., Assoc., 208 Ill. 236, 100 Am. St. Rep. 225; Stembel *v.* Bell, 161 Ind. 323; Warren *v.* Street Com'rs, 187 Mass. 290; Muse *v.* Lexington, 110 Tenn. 655; State *v.* Harman, 57 W. Va. 447. See also Red River Furnace Co. *v.* Tennessee Cent. R. Co., 113 Tenn. 697. And see the title CONSTITUTIONAL LAW, **940**. 2.

3. State *v.* Vanhuse, 120 Wis. 15.

Final Judgments and Decrees. — The legislature has no power by a curative statute to give new life to a cause of action or defense which has been finally adjudicated by a court of competent jurisdiction. McManus *v.* Hornaday, 124 Iowa 267, 104 Am. St. Rep. 316; Lohrstorfer *v.* Lohrstorfer, (Mich. 1905) 104 N. W. Rep. 142; Old Forge School Dist., 27 Pa. Super. Ct. 586.

700. 1. Statutes of Limitations. — See the titles CONSTITUTIONAL LAW, **951**. 1 *et seq.*; LIMITATION OF ACTIONS, **168**. 7 *et seq.*, **174**. 3 *et seq.*; and see Rex *v.* Chandra Dharma, (1905) 2 K. B. 335. Compare Matter of Hoople, 93 N. Y. App. Div. 486, *reversed* on other grounds 179 N. Y. 308.

3. Mechanics' Lien Statutes. — Orman *v.* Van Arsdell, (N. Mex. 1904) 78 Pac. Rep. 48.

700. 6. Adopted Statutes — *a.* IN GENERAL. — See note 7.

701. Adoption by One State from Another. — See note 1.

702. *b.* LIMITATION OF RULE. — See notes 2, 3, 4, 5, 6.

703. See notes 1, 2, 3.

VIII. AMENDMENT — 1. Definition. — See note 6.

3. Existence of Act Amended — *a.* IN GENERAL. — See note 9.

704. *b.* ACTS PREVIOUSLY AMENDED. — See note 2.

c. ACTS WHOLLY UNCONSTITUTIONAL. — See note 3.

705. 4. Identification of Act Amended — *a.* IN GENERAL. — See notes 3, 4.

706. *b.* ERRORS IN REFERENCE. — See notes 3, 4.

700. 7. Adopting Construction of English Statutes.— Cleveland, etc., *R. Co. v. Osgood*, (Ind. App. 1904) 70 N. E. Rep. 839; *Myers v. Fultz*, 124 Iowa 437; *De Raismes v. De Raismes*, 70 N. J. L. 15. See also *State v. Boies*, 68 Kan. 167.

701. 1. Adoption of Construction of Another State — *United States*. — *James v. Appel*, 192 U. S. 129.

Arizona. — *Elias v. Territory*, (Ariz. 1904) 76 Pac. Rep. 605; *Santa Cruz County v. Barnes*, (Ariz. 1904) 76 Pac. Rep. 621; *Anderson v. Territory*, (Ariz. 1904) 76 Pac. Rep. 636.

California. — *Matter of Seaman*, 146 Cal. 455, 106 Am. St. Rep. 53.

Colorado. — *Cripple Creek v. Hanley*, 19 Colo. App. 390; *Gilman v. Matthews*, (Colo. App. 1904) 77 Pac. Rep. 366.

Idaho. — *Stein v. Morrison*, 9 Idaho 426, overruling *Williams v. Lewis*, 6 Idaho 184.

Indiana. — *In re Taylor*, 5 Indian Ter. 219.

Kansas. — *Missouri Pac. R. Co. v. State*, 69 Kan. 552.

Michigan. — *Casgrain v. Hammond*, 134 Mich. 479, 104 Am. St. Rep. 610.

Montana. — *Hamilton v. Murray*, 29 Mont. 80.

Nevada. — *Ex p. Boyce*, 27 Nev. 299.

Oklahoma. — *Randolph v. Hudson*, 12 Okla. 516; *Territory v. Logan County High School*, 13 Okla. 605; *Tucker v. Bennett*, (Okla. 1905) 81 Pac. Rep. 423.

South Dakota. — *Murphy v. Plankinton Bank*, (S. Dak. 1904) 100 N. W. Rep. 614; *Murphy v. Nelson*, (S. Dak. 1905) 102 N. W. Rep. 691.

Texas. — *Supreme Council, etc., v. Anderson*, 35 Tex. Civ. App. 615.

Washington. — *McLean v. Roller*, 33 Wash. 166.

West Virginia. — *State v. Gaughan*, 55 W. Va. 692, *per Brannon, J., concurring*.

702. 2. Ancient Order of Hibernians *v.* Sparrow, 29 Mont. 132; *State v. Mortensen*, 26 Utah 312.

3. Rule Inapplicable to Construction Subsequent to Adoption.—*Elias v. Territory*, (Ariz. 1904) 76 Pac. Rep. 605; *Scruggs v. Scruggs*, 69 Kan. 487; *Snell v. Rue*, (Neb. 1904) 101 N. W. Rep. 101; *Colonial, etc., Mortg. Co. v. Northwest Thresher Co.*, (N. Dak. 1905) 103 N. W. Rep. 915; *Cupps v. State*, 120 Wis. 532.

4. Construction by Highest Judicial Authority Held Necessary. — See *McKee v. City Garbage Co.*, (Mich. 1905) 103 N. W. Rep. 906, 12 Detroit Leg. N. 227. Compare *Murphy v. Plankinton Bank*, (S. Dak. 1904) 100 N. W. Rep. 614.

Effect of Conflicting Decisions. — See *Anderson v. Territory*, (Ariz. 1904) 76 Pac. Rep. 636.

5. Matter of Seaman, 146 Cal. 455, 106 Am. St. Rep. 53; *Missouri Pac. R. Co. v. State*, 69 Kan. 552.

6. Rule Inapplicable Where Statutes Are Materially Different. — *Scruggs v. Scruggs*, 69 Kan. 487; *Atty.-Gen. v. Atty.-Gen.*, 8 Can. Exch. 337, affirmed 34 Can. Sup. Ct. 287, which was affirmed (1904) A. C. 799, 91 L. T. N. S. 300.

703. 1. Decision Adverse to Constitutional Provisions.—*Matter of Seaman*, 146 Cal. 455, 106 Am. St. Rep. 53.

2. See *Bankers' L. Ins. Co. v. Fleetwood*, 76 Vt. 297.

3. *Bremen Min., etc., Co. v. Bremen*, (N. Mex. 1905) 79 Pac. Rep. 806; *State v. Mortensen*, 26 Utah 312. See also *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201.

6. Amendment Defined. — *Little v. State*, 137 Ala. 659.

Amendment Implies Merely Change of Provisions on Same Subject. — *Lang v. Friesenecker*, 213 Ill. 598.

Little Distinction Between Amendment and Revision. — *Cummings v. People*, 213 Ill. 443.

9. Void and Unconstitutional Acts. — A statute which is inoperative because so incomplete, equivocal, or indefinite as to be incapable of enforcement, and void in that sense only, is not within the rule, and may be made operative by amendment. *Mariposa County v. Madera County*, 142 Cal. 50.

704. 2. Amendments of Amended Statutes Valid. — *Melrose Park v. Dunnebecke*, 210 Ill. 422, quoting 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 704; *Bent v. Stone*, 184 Mass. 92; *Goodbar v. Memphis*, 113 Tenn. 20. See also *Ex p. Keith*, (Tex. Crim. 1904) 83 S. W. Rep. 683.

3. Amendment of Act Wholly Unconstitutional. — *Rutgers College v. Morgan*, 70 N. J. L. 460. Compare the doctrine of total invalidity stated *supra*, this title, 571. 2 *et seq.*

Amendment Removing Constitutional Objections Not Retroactive. — *Riccio v. Hoboken*, 69 N. J. L. 649, reversing 69 N. J. L. 104. But see *Ross v. Wright County*, (Iowa 1905) 104 N. W. Rep. 506, following *Ferry v. Campbell*, 110 Iowa 290.

705. 3. Identification of Amended Act. — *Chicago, etc., R. Co. v. Sporer*, (Neb. 1904) 100 N. W. Rep. 813.

4. The Constitutional Provisions of Georgia and Tennessee. — See *Goodbar v. Memphis*, 113 Tenn. 20; *Southern R. Co. v. Maxwell*, 113 Tenn. 464.

706. 3. Trivial Errors in Reference. — Mat-

706. 6. Form and Contents of Amendatory Act — *a.* IN GENERAL — Amendment "So as to Read as Follows." — See note 7.

707. *b.* CONSTITUTIONAL REQUIREMENT OF RECITAL OF ACT — (1) *In General.* — See note 2.

Construction in Favor of Validity. — See note 3.

(2) *To What Legislation Applicable* — (a) Independent and Dependent Legislation. — See notes 5, 6.

708. (c) Supplements and Additions. — See notes 2, 3.

(d) Amendments by Implication. — See notes 4, 5.

709. (3) *What Is Sufficient Recital* — Only the Act as Amended and Not the Old Law. — See note 1.

710. *c.* EXTENDING APPLICATION OF EXISTING LAW — (1) *Constitutional Provision.* — See note 4.

711. How Construed. — See note 2.

(2) *Reference Statutes.* — See note 3.

712. 7. Effect and Operation of Amendatory Acts — *a.* NOT USUALLY RETROACTIVE. — See note 2.

b. INVALIDITY. — See note 4.

ter of Campbell, 143 Cal. 623; Melrose Park v. Dunnebecke, 210 Ill. 422; Hollibaugh v. Hehn, 13 Wyo. 269, quoting 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 706.

706. 4. Amendatory Act Void for Uncertainty in Reference. — Com. v. Schulte, 26 Pa. Super. Ct. 95, affirming 13 Pa. Dist. 294.

7. Amendments "So as to Read as Follows." — Flanders v. Multnomah County, 43 Oregon 583; Allison v. Hatton, (Oregon 1905) 80 Pac. Rep. 101.

707. 2. Purpose of Constitutional Provision. — Com. v. Schulte, 13 Pa. Dist. 294, affirmed 26 Pa. Super. Ct. 95.

Intended as Guide for Legislature — No Obstacle to Elimination of Unconstitutional Matters. — People v. De Blaay, 137 Mich. 402, 11 Detroit Leg. N. 323.

Further Requirement that Title of Act Amended Must Be Set Out. — Hendershot v. State, 162 Ind. 69.

3. Ambiguities Resolved in Favor of Constitutionality. — Oak Cliff v. State, 97 Tex. 383, affirming (Tex. Civ. App. 1903) 77 S. W. Rep. 24.

5. Independent Acts. — Little v. State, 137 Ala. 659; Pittsburgh, etc., R. Co. v. Lighthouse, 163 Ind. 247; Perry County v. Lindemann, (Ind. 1905) 73 N. E. Rep. 912; Wichita v. Missouri, etc., Telephone Co., 70 Kan. 441; Fornia v. Frazer, (Mich. 1905) 104 N. W. Rep. 147, 12 Detroit Leg. N. 259; Weston v. Ryan, (Neb. 1903) 97 N. W. Rep. 347; Matter of Dietrick, 32 Wash. 471.

6. Independent Acts Insufficient as Amendments. — Oak Cliff v. State, 97 Tex. 383, affirming (Tex. Civ. App. 1903) 77 S. W. Rep. 24.

708. 2. Supplemental Acts. — Sisk v. Cargile, 138 Ala. 164; Hopper v. Stack, 69 N. J. L. 562; State v. Cooney, (N. J. 1905) 60 Atl. Rep. 60; Oak Cliff v. State, 97 Tex. 383, affirming (Tex. Civ. App. 1903) 77 S. W. Rep. 24. See further *supra*, this title, 591. 5 *et seq.*

3. Addition of New Sections. — Com. v. Webster, 13 Pa. Dist. 199.

4. State v. Callvert, 37 Wash. 124.

5. Amendments by Implication. — Pittsburgh,

etc., R. Co. v. Lighthouse, 163 Ind. 247; Fornia v. Frazer, (Mich. 1905) 104 N. W. Rep. 147, 12 Detroit Leg. N. 259; Com. v. Cannon, 30 Pa. Co. Ct. 637; Southern R. Co. v. Maxwell, 113 Tenn. 464; Oak Cliff v. State, 97 Tex. 383, affirming (Tex. Civ. App. 1903) 77 S. W. Rep. 24; Matter of Dietrick, 32 Wash. 471.

No Objection that Statute Incidentally Operates to Modify Other Statutes than That Specifically Amended. — Manley v. Mayer, 68 Kan. 377.

709. 1. Bray v. State, 140 Ala. 172; Com. v. Reinecke Coal Mining Co., 117 Ky. 885.

Only Sections Amended Need Not Be Set Out. — Ross v. Aguirre, 191 U. S. 60; People v. Oates, 142 Cal. 12 (amendment of code sections); Sanchez v. Fordyce, 141 Cal. 427; Matter of Campbell, 143 Cal. 623; State v. Jones, 9 Idaho 693; People v. Shuler, 136 Mich. 161, 10 Detroit Leg. N. 1004.

710. 4. Prohibition Against Extending Application of Statute. — Com. v. Webster, 13 Pa. Dist. 199.

Established Procedure May Be Applied to New Class of Cases by General Reference. — James Smith Woolen Machinery Co. v. Browne, 206 Pa. St. 543.

711. 2. Inapplicable to Complete and Perfect Act. — Getz v. Brubaker, 25 Pa. Super. Ct. 303, affirming 17 York Leg. Rec. (Pa.) 81.

3. Adoption by Reference. — Hopper v. Stack, 69 N. J. L. 562; State v. Cooney, (N. J. 1905) 60 Atl. Rep. 60; Matter of Riverside Park, 95 N. Y. App. Div. 552; Com. v. Cannon, 30 Pa. Co. Ct. 637, citing Gallagher v. MacLean, 193 Pa. St. 583, and James Smith Woolen Machinery Co. v. Browne, 206 Pa. St. 543. See also Atty.-Gen. v. Smyth, (1905) 2 Ir. R. 553; Westminster v. Watson, (1902) 2 K. B. 717, 87 L. T. N. S. 326.

Such Legislation Not to Be Commended. — Wichita v. Missouri, etc., Telephone Co., 70 Kan. 441.

712. 2. Amendments Not Retroactive. — Webster v. State, 110 Tenn. 491; Dominion Iron, etc., Co. v. McDonald, 37 Nova Scotia 1.

4. Amendatory Act Void. — Georgia Empire Mut. Ins. Co. v. Wright, 118 Ga. 796.

712. 8. Construction — *a.* IN GENERAL — An Amendment Is to Be Construed as Incorporated in the Original Act. — See note 8.

713. See note 1.

b. AMENDMENT AS REPEAL OR CONTINUATION — Where Constitution Declares Act Amended Shall Be Repealed. — See note 6.

Without Such Constitutional Provision. — See note 8.

714. *c.* REFERENCE STATUTES. — See note 4.

715. Whether Future Changes in Acts Referred to Are Adopted. — See note 1.

IX. REPEAL — 1. General Principles — *a.* DURATION OF STATUTES IN GENERAL. — See note 2.

Suspension of Operation. — See note 9.

b. POWER TO REPEAL STATUTES. — See note 10.

716. Legislature Cannot Limit or Take Away Power of Repeal. — See note 4.

717. *d.* VALIDITY OF REPEALING ACT. — See notes 2, 4.

2. Modes of Repealing Statutes — *a* EXPRESS REPEAL — (1) *Repealing Clause.* — See note 6.

712. 8. Statute and Amendment Treated as One Act. — *Hempstead County v. Harkness*, 73 Ark. 600; *Atlantic Coast Line R. Co. v. Postal Tel. Cable Co.*, 120 Ga. 268; *Melrose Park v. Dunnebecke*, 210 Ill. 422; *Russell v. State*, 161 Ind. 481; *Cherokee, etc., Coal, etc., Co. v. Crawford County*, (Kan. 1905) 80 Pac. Rep. 601; *Walker v. Hyland*, 70 N. J. L. 69; *Gilfeather v. Grout*, 101 N. Y. App. Div. 150, *appeal dismissed* 182 N. Y. 522; *Flanders v. Multnomah County*, 43 Oregon 583; *Kitchen v. Southern R. Co.*, 68 S. Car. 554; *Webster v. State*, 110 Tenn. 491; *Goodbar v. Memphis*, 113 Tenn. 20; *State v. Callvert*, 37 Wash. 124.

Supplemental Act to Be Read as Part of Original Act. — *Com. v. Webster*, 13 Pa. Dist. 199; *Protected Home Circle v. Stuntz*, 14 Pa. Dist. 128, 30 Pa. Co. Ct. 323.

713. 1. Provisions Harmonized. — *Ex p. Bunkers*, (Cal. 1905) 81 Pac. Rep. 748; *Kitchen v. Southern R. Co.*, 68 S. Car. 554.

Of Two Constructions Equally Warranted by the Language. — *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101.

Inconsistent Provisions of Original Statute Alone Repealed. — *Wilson v. Head*, 184 Mass. 515.

Amending Act Does Not Revive Expired Provisions of Original Act. — *Webster v. State*, 110 Tenn. 491.

6. *Godwin v. Harris*, (Neb. 1904) 98 N. W. Rep. 439.

Provision Does Not Apply to Act Complete in Itself. — *Weston v. Ryan*, (Neb. 1903) 97 N. W. Rep. 347.

8. Former Act Continued in Part, Repealed in Part. — *Matter of Cullinan*, 97 N. Y. App. Div. 122, *affirmed* without opinion 181 N. Y. 527; *Allison v. Hatton*, (Oregon 1905) 80 Pac. Rep. 101.

Provisions Re-enacted Speak from Date of Original Enactment. — *Lamb v. Powder River Live Stock Co.*, (C. C. A.) 132 Fed. Rep. 434.

714. 4. *Gorham Mfg. Co. v. New York, etc., R. Co.*, 27 R. I. 35.

References to Ordinances in Municipal Charter. — A provision in a municipal charter continuing in force ordinances not inconsistent with the charter does not give to ordinances continued in force any higher sanction or greater dignity than they had previously. They are

simply continued in force as ordinances. *New York v. Knickerbocker Trust Co.*, 104 N. Y. App. Div. 223. See also *Wright v. Overstreet*, 122 Ga. 633.

715. 1. *Chelan County v. Navarre*, 38 Wash. 684, stating the rule fully and supporting the whole text paragraph.

2. **Statutes Presumed to Be Perpetual in Absence of Time Limitation.** — *Com. v. Brown*, 25 Pa. Super. Ct. 269, *affirmed* 210 Pa. St. 29.

9. **Suspension Not Repeal.** — See *Matter of Cullinan*, 97 N. Y. App. Div. 122, *affirmed* 181 N. Y. 527.

10. **Power to Repeal Statutes.** — *Ulster County v. State*, 177 N. Y. 189, *affirming* 79 N. Y. App. Div. 277; *Jones v. Franklin County*, 25 Ohio Cir. Ct. 510.

716. 4. **Legislature Cannot Take Away Power of Future Legislature.** — See *Saginaw County v. Hubinger*, 137 Mich. 72, 11 Detroit Leg. N. 215; *Lang v. Lutz*, 180 N. Y. 254, *affirming* 83 N. Y. App. Div. 534.

Legislature Cannot Prescribe Provisions of Subsequent Statutes. — *Walker v. McNelly*, 121 Ga. 114.

717. 2. **Repealing Act Substituted for Act Repealed.** — *People v. De Blaay*, 137 Mich. 402, 11 Detroit Leg. N. 323; *Cleveland, etc., R. Co. v. Urbana, etc., R. Co.*, 26 Ohio Cir. Ct. 180.

As to State Insolvency Acts During Pendency of Federal Bankruptcy Act see *Climax Road Mach. Co. v. Sheesley*, 13 Pa. Dist. 649, 30 Pa. Co. Ct. 201; *Emerick's Petition*, 30 Pa. Co. Ct. 289; *Cassel's Estate*, 13 Pa. Dist. 637, 30 Pa. Co. Ct. 238; *Ranck's Estate*, 30 Pa. Co. Ct. 513. Compare *Nehf's Estate*, 14 Pa. Dist. 343.

4. **Void Inconsistent Statute.** — *State v. Dalcourt*, 112 La. 420; *State v. Insurance Co. of North America*, (Neb. 1904) 100 N. W. Rep. 405, *reversing* on rehearing (Neb. 1904) 99 N. W. Rep. 36; *Wheeler v. State*, (Neb. 1905) 102 N. W. Rep. 773; *Matter of Cullinan*, 97 N. Y. App. Div. 122, *affirmed* 181 N. Y. 527; *St. Louis Southwestern R. Co. v. Hall*, 98 Tex. 480. See also *Harris v. Stearns*, 17 S. Dak. 439.

6. **Express Appeal Occurs Where Repealed Act Designated.** — *Lincoln School Tp. v. American School Furniture Co.*, 31 Ind. App. 405.

- 718.** (2) *Identification of Act Repealed.* — See note 5.
719. (3) *Repeal of Inconsistent Acts.* — See notes 2, 3, 4.
720. (4) *Repeal of Acts Within Purview.* — See notes 2, 3.
 (5) *Construction of Repealing Clause.* — See notes 4, 5.
b. IMPLIED REPEAL—(1) In General. — See notes 6, 9.
 Title and Subject of Repealing Act. — See note 11.
721. Express Prohibition of Implied Repeals. — See note 1.
 (2) *Repeals by Implication Not Favored.* — See note 3.

718. 5. Repeals by Implication Not Within Constitutional Provisions. — *Southern R. Co. v. Maxwell*, 113 Tenn. 464.

719. 2. Repeal of Inconsistent Enactments — United States. — *Gibson v. U. S.*, 194 U. S. 182, affirming 38 Ct. Cl. 752; *Baker v. Kaiser*, (C. C. A.) 126 Fed. Rep. 317; *Thomas v. U. S.*, 38 Ct. Cl. 113, 719, reversed on other grounds 195 U. S. 418.

California. — *San Diego County v. Schwartz*, 145 Cal. 49.

Idaho. — *Idaho Mut. Co-operative Ins. Co. v. Myer*, 10 Idaho 294.

Illinois. — *Melrose Park v. Dunnebecke*, 210 Ill. 422, quoting 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 719.

Indiana. — *Townsend v. Meneley*, (Ind. App. 1905) 74 N. E. Rep. 274.

Kansas. — *State v. Stevens*, 68 Kan. 576.

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Inconsistent Local or Special Laws Repealed. — *In re Appointment of Assistant Dist. Atty.*, 14 Pa. Dist. 635.

3. Constitutional Provisions. — *Melrose Park v. Dunnebecke*, 210 Ill. 422, quoting 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 719.

4. Statutes Affected by Repealing Clause — Alabama. — *Jefferson County v. Abernathy*, 139 Ala. 264.

Arkansas. — *Pratt v. Dudley*, 73 Ark. 536.

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Idaho. — *Jack v. Grangeville*, 9 Idaho 291.

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Louisiana. — *State v. Gray*, 111 La. 853.

Michigan. — *Woodworth v. Kalamazoo*, 135 Mich. 233, 10 Detroit Leg. N. 761; *In re Lambrecht*, 137 Mich. 450, 11 Detroit Leg. N. 289.

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Effect of Repealing Clause. — *Wichita v. Missouri, etc., Telephone Co.*, 70 Kan. 441.

720. 2. Repeal of Acts Within Purview. — *Hargis v. Parker*, (Ky. 1905) 85 S. W. Rep. 704.

3. Cases Not Provided for by Repealing Act. — *Com. v. Rothermal*, 30 Pa. Co. Ct. 145.

4. Construction of Repealing Clause. — *Ex p. Keith*, (Tex. Crim. 1904) 83 S. W. Rep. 683. See also *Haverhill v. Marlborough*, 187 Mass. 150.

No Reason for Repeal Need Be Given. — *Jones v. Franklin County*, 25 Ohio Cir. Ct. 510.

5. Words of Repeal in Conflict with Intent. — *Lux v. New York City R. Co.*, (Municipal Ct.) 45 Misc. (N. Y.) 222; *Emerick's Petition*, 30 Pa. Co. Ct. 289.

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6. Clause Held to Have Been Left Remaining Through Inadvertence. — See *Jefferson County v. Oswego County*, 102 N. Y. App. Div. 232.

9. Repeal by Implication Not Affected by Constitutional Provision Relating to Amendments. — *Pittsburgh, etc., R. Co. v. Lighthouse*, 163 Ind. 247; *Fornia v. Frazer*, (Mich. 1905) 104 N. W. Rep. 147, 12 Detroit Leg. N. 259; *Com. v. Cannon*, 30 Pa. Co. Ct. 637; *Southern R. Co. v. Maxwell*, 113 Tenn. 464; *Matter of Deitrick*, 32 Wash. 471.

11. Title and Subject of Act Repealing Previous Act by Implication. — *Deyoe v. Superior Ct.*, 140 Cal. 476, 98 Am. St. Rep. 73; *Lang v. Friese-necker*, 213 Ill. 508; *Woodrough v. Douglas County*, (Neb. 1904) 98 N. W. Rep. 1092.

721. 1. Implied Repeal Expressly Prohibited. — See *People v. Jensen*, 99 N. Y. App. Div. 355, affirmed 181 N. Y. 571 (Pen. Code N. Y., § 728); *People v. Potter*, 88 N. Y. App. Div. 239, affirming (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 485 (Statutory Construction Law).

3. Repeals by Implication Not Favored — Intent Must Be Plain — *United States.* — *Bealmear v. Hutchins*, 134 Fed. Rep. 257, citing 26 AM. AND

723. See note 1.

(3) *How Implied Repeal Is Effected*—(a) **Constitutional Provisions.**—
See notes 3, 4, 5.

(b) **Repugnant Acts**—*aa.* **IN GENERAL.**—See note 7.

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versed on other grounds 195 U. S. 418.

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troit Leg. N. 356, *affirming* on rehearing 138
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1905) 80 Pac. Rep. 642.

Texas.—*Ex p.* Kimbrell, (Tex. Crim. 1904)
83 S. W. Rep. 382; *Ex p.* Neal, (Tex. Crim.
1904) 83 S. W. Rep. 831.

Repeal of Common Law.—See Chicago, etc.,
Coal Co. *v.* People, 214 Ill. 421, *affirming* 114
Ill. App. 75, and see *supra*, this title, 665. 4.

**723. 1. Conditions of Implied Repeal in
General.**—Calbreath *v.* Dunbar, (Oregon 1905)
81 Pac. Rep. 366; York Gazette Co. *v.* York
County, 25 Pa. Super. Ct. 517; *Ex p.* Keith,
(Tex. Crim. 1904) 83 S. W. Rep. 683.

The Legal Presumption is that the legislature
did not intend to keep really contradictory
enactments in the statute book, or to effect so
important a measure as the repeal of a law with-
out expressing an intention to do so. State *v.*
Givens, (Fla. 1904) 37 So. Rep. 308.

**Absence of Repealing Clause Significant Though
Not Conclusive.**—Loyalsock Tp. Road, 26 Pa.
Super. Ct. 219, 230, *affirming* 9 Del. Co. Rep.
(Pa.) 117.

3. Implied Repeal of Statute by Constitution.—
Monaghan *v.* Lewis, (Del. 1905) 59 Atl. Rep.
948; Robertson *v.* Staunton, (Va. 1905) 51 S.
W. Rep. 178; State *v.* Maynard, 35 Wash. 168;
Smith *v.* Healy, 12 Wyo. 218. See also Hotel
Registry Realty Corp. *v.* Stafford, 70 N. J. L.
528; Smith *v.* Collyty, 69 N. J. L. 365.

Repugnance Must Be Irreconcilable.—Fischer
v. Moore, 69 Kan. 191.

**Fourteenth Amendment Does Not Nullify Effect
of Former Valid Statute.**—King *v.* Hatfield, 130
Fed. Rep. 564.

4. See Guthrie *v.* Sparks, (C. C. A.) 131 Fed.
Rep. 443.

Constitutional Provision Not Self-Executing.
—*Ex p.* Bunkers, (Cal. 1905) 81 Pac. Rep.
748; Newport News *v.* Woodward, (Va. 1905)
51 S. E. Rep. 193.

**5. Constitutional Provision Relating to Future
Legislation Only.**—Henderson County *v.* Trav-
elers' Ins. Co., (C. C. A.) 128 Fed. Rep. 817;
Guthrie *v.* Sparks, (C. C. A.) 131 Fed. Rep.
443; Ulbrecht *v.* Keokuk, 124 Iowa 1; Kirk *v.*
Roberson, 76 S. W. Rep. 183, 25 Ky. L. Rep.
633; Carpenter *v.* Central Covington, 81 S. E.
Rep. 919, 26 Ky. L. Rep. 430; Com. *v.* Brown,
210 Pa. St. 29, *affirming* 25 Pa. Super. Ct. 269;
Arey *v.* Lindsey, 103 Va. 250; Mestas *v.* Dia-
mond Coal, etc., Co., 12 Wyo. 414. See also
Weigold *v.* Pittsburg, etc., R. Co., 208 Pa. St.
81, *following* Pittsburg *v.* Pittsburg, etc., R. Co.,
205 Pa. St. 13. Compare Monaghan *v.* Lewis,
(Del. 1905) 59 Atl. Rep. 048.

**7. Repeal Implied from Repugnancy of Acts—
United States.**—McBride *v.* Farrington, 131

725. See note 1.

Nature and Extent of Repugnancy. — See note 2.

726. See note 1.

Acts Reconciled if Possible. — See note 3.

Fed. Rep. 797; *Haymes v. Brown*, 132 Fed. Rep. 525; *Thomas v. U. S.*, 38 Ct. Cl. 113, 719, reversed on other grounds 195 U. S. 418; *Giachetti v. U. S.*, 39 Ct. Cl. 381.

Alabama. — *Jefferson County v. Abernathy*, 139 Ala. 264.

California. — *Ex p. Jackson*, 143 Cal. 564.

Delaware. — *Monaghan v. Lewis*, (Del. 1905) 59 Atl. Rep. 948.

District of Columbia. — *Weigand v. District of Columbia*, 22 App. Cas. (D. C.) 559.

Georgia. — See *Wright v. Overstreet*, 122 Ga. 633.

Illinois. — *Chicago, etc., Coal Co. v. People*, 114 Ill. App. 75, affirmed 214 Ill. 421.

Iowa. — *Cedar Rapids, etc., R. Co. v. Cummins*, 125 Iowa 430.

Kentucky. — *Hargis v. Parker*, (Ky. 1905) 85 S. W. Rep. 704.

Louisiana. — *Louisiana Imp. Co. v. Baton Rouge Electric, etc., Co.*, 114 La. 534.

Maryland. — *Price v. Liquor License Com'rs*, 98 Md. 346.

Michigan. — *Chamberlain v. Saginaw*, 135 Mich. 61, 10 Detroit Leg. N. 702; *Saginaw County v. Hubinger*, 137 Mich. 12, 11 Detroit Leg. N. 215.

Missouri. — *Yall v. Gillham*, 187 Mo. 393; *Cunningham v. Elm Grove Zinc, etc., Min. Co.*, 103 Mo. App. 398.

Nebraska. — *State v. Insurance Co. of North America*, (Neb. 1904) 99 N. W. Rep. 36, reversed on rehearing on other grounds (Neb. 1904) 100 N. W. Rep. 405.

New Jersey. — *Hopper v. Stack*, 69 N. J. L. 562; *Paterson, etc., Traction Co. v. De Gray*, 70 N. J. L. 59; *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 574, reversing on other grounds 71 N. J. L. 183.

New York. — *Tiffany v. Jamestown*, 179 N. Y. 455, affirming 88 N. Y. App. Div. 620.

North Carolina. — *In re Burgwyn*, 133 N. Car. 115; *McCall v. Webb*, 135 N. Car. 356.

Oregon. — *Sandys v. Williams*, (Oregon 1905) 80 Pac. Rep. 642.

Pennsylvania. — *Jermyn v. Scranton*, 212 Pa. St. 598, affirming 5 Lack. Jur. (Pa.) 293; *York Gazette Co. v. York County*, 25 Pa. Super. Ct. 517.

South Carolina. — *State v. State Treasurer*, 68 S. Car. 411; *Gilreath v. Greenville County*, 70 S. Car. 389.

Texas. — *Ragazine v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 832.

Wisconsin. — *Birdsall v. Kewaunee County*, 124 Wis. 576.

Liquor Laws. — A municipal charter granting the municipality the power to license and regulate the use of liquors operates as a repeal of a general local option law then in force in the municipality. *Com. v. Lemon*, 76 S. W. Rep. 40, 25 Ky. L. Rep. 522, following *Tabor v. Lander*, 94 Ky. 237, and *Gifford v. Com.*, 2 Ky. L. Rep. 437. Compare *State v. Rushing*, 140 Ala. 187; *Elba v. Rhodes*, 142 Ala. 689. See

generally the title **LOCAL OPTION**, 512. 2 et seq.

General Corporation Acts and Other General Statutes. — See *In re O'Brien*, 29 Mont. 530; *State v. Red Lodge*, 30 Mont. 338.

Treaties and Federal Statutes. — See *Hijo v. U. S.*, 194 U. S. 315. And see the title **TREATIES**, 480. 9 et seq.

725. 1. Theory of Implied Repeal. — *Tiffany v. Jamestown*, 179 N. Y. 455, affirming 88 N. Y. App. Div. 620.

2. Repugnancy Must Be Irreconcilable — *Alabama.* — *Jefferson County v. Abernathy*, 139 Ala. 264.

Florida. — *Hartford F. Ins. Co. v. Redding*, (Fla. 1904) 37 So. Rep. 62, citing *Florida East Coast R. Co. v. Hazel*, 43 Fla. 263, 99 Am. St. Rep. 114.

Iowa. — *Diver v. Keokuk Sav. Bank*, 126 Iowa 691.

Kentucky. — *Louisville, etc., R. Co. v. Jarvis*, 87 S. W. Rep. 759, 27 Ky. L. Rep. 986.

Missouri. — *McGrew v. Missouri Pac. R. Co.*, 177 Mo. 533.

New York. — *Tiffany v. Jamestown*, 179 N. Y. 455, affirming 88 N. Y. App. Div. 620.

Oklahoma. — *Carpenter v. Russell*, 13 Okla. 277; *Giles v. Dennison*, (Okla. 1904) 78 Pac. Rep. 174; *McMillan v. Payne County*, 14 Okla. 659.

Pennsylvania. — *Com. v. Buffalo, etc., R. Co.*, 207 Pa. St. 154, affirming 6 Dauphin Co. Rep. (Pa.) 76, followed in *Com. v. Buffalo, etc., R. Co.*, 207 Pa. St. 160, affirming 6 Dauphin Co. Rep. (Pa.) 94; *Walker v. Bergbigler*, 207 Pa. St. 427; *South Brady Street*, 29 Pa. Co. Ct. 85.

Rhode Island. — *Masterson v. Whipple*, 27 R. I. 192.

Texas. — *Ex p. Kimbrell*, (Tex. Crim. 1904) 83 S. W. Rep. 382; *Ex p. Keith*, (Tex. Crim. 1904) 83 S. W. Rep. 683; *Ex p. Neal*, (Tex. Crim. 1904) 83 S. W. Rep. 831.

726. 1. Repugnancy Must Be Clear. — *Morris v. Hitchcock*, 21 App. Cas. (D. C.) 565, affirmed 194 U. S. 384; *Lang v. Friesenecker*, 213 Ill. 598; *Diver v. Keokuk Sav. Bank*, 126 Iowa 691; *In re Lambrecht*, 137 Mich. 450, 11 Detroit Leg. N. 289; *Waynesville v. Satterthwait*, 136 N. Car. 226; *Bannatyne v. Suburban Rapid Transit Co.*, 24 Can. L. T. 380.

3. Acts Must Be Reconciled if Possible — *Alabama.* — *State v. Houghton*, 142 Ala. 90.

Illinois. — *People v. Hummel*, 215 Ill. 71, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 723-727; *Boyer v. Onion*, 108 Ill. App. 612.

Indiana. — *Whitley County v. Garty*, 161 Ind. 464; *Lincoln School Tp. v. American School Furniture Co.*, 31 Ind. App. 495.

Indian Territory. — *Zevely v. Weimer*, 5 Indian Ter. 646.

Iowa. — *State v. Mosher*, (Iowa 1905) 103 N. W. Rep. 105.

Kansas. — *Newman v. Lake*, 70 Kan. 848.

Kentucky. — *Taylor v. Russell*, 117 Ky. 539.

727. Partial Repugnancy. — See note 1.

Identity of Object and Subject. — See note 2.

728. See note 1.

729. Modification of or Exceptions to Earlier Statute. — See note 1.

State Laws Repugnant to Acts of Congress. — See note 3.

bb. NEGATIVE AND AFFIRMATIVE TERMS — (*aa.*) *In General.* — See notes 5, 6.

Negative Act in Affirmative Form. — See note 7.

730. (*bb.*) *Prescribing Different Powers, Privileges, or Duties.* — See note 3.

Michigan. — *In re Lambrecht*, 137 Mich. 450,
11 Detroit Leg. N. 289.

Missouri. — *Yall v. Gillham*, 187 Mo. 393.

Nebraska. — *State v. Insurance Co. of North America*, (Neb. 1904) 99 N. W. Rep. 36, *reversed* on rehearing on other grounds (Neb. 1904) 100 N. W. Rep. 405.

North Carolina. — *Waynesville v. Satterthwait*, 136 N. Car. 226.

Oregon. — *Sandys v. Williams*, (Oregon 1905) 80 Pac. Rep. 642; *Calbreath v. Dunbar*, (Oregon 1905) 81 Pac. Rep. 366.

Pennsylvania. — *Warden's License*, 24 Pa. Super. Ct. 75.

South Carolina. — *State v. State Treasurer*, 68 S. Car. 411.

Wisconsin. — *Birdsall v. Kewaunee County*, 124 Wis. 576.

Court Should Ascertain Whether Conflict Real or Merely Apparent. — *York Gazette Co. v. York County*, 25 Pa. Super. Ct. 517, *citing* *Spees v. Boggs*, 204 Pa. St. 504.

As to Statutes in *Pari Materia* see *supra*, this title, 620, 5 *et seq.*

727. 1. Implied Repeal Only to Extent of Repugnancy. — *Jefferson County v. Abernathy*, 139 Ala. 264; *Weigand v. District of Columbia*, 22 App. Cas. (D. C.) 559; *Wilson v. Head*, 184 Mass. 515; *Moore v. Kelley*, 136 Mich. 139, 10 Detroit Leg. N. 1002; *In re Lambrecht*, 137 Mich. 450, 11 Detroit Leg. N. 289; *State v. Woodruff*, 83 Miss. 111; *McGrew v. Missouri Pac. R. Co.*, 177 Mo. 533; *State v. Insurance Co. of North America*, (Neb. 1904) 99 N. W. Rep. 36, *reversed* on rehearing on other grounds (Neb. 1904) 100 N. W. Rep. 405; *State v. Chapman*, 69 N. J. L. 464, *affirmed* 70 N. J. L. 339; *Giles v. Dennison*, (Okla. 1904) 78 Pac. Rep. 174; *Com. v. Couch*, 209 Pa. St. 354; *Com. v. Webster*, 13 Pa. Dist. 199. See also *Lang v. U. S.*, (C. C. A.) 133 Fed. Rep. 201.

Entire Section Repealed by Repeal of Part Where Provisions Interdependent. — *Johnson v. Southern R. Co.*, 69 S. Car. 322.

2. Identity of Object and Subject. — *Furth v. State*, 72 Ark. 161; *St. Louis Southwestern R. Co. v. Grayson*, 72 Ark. 119; *Mill Valley v. House*, 142 Cal. 698; *Jack v. Grangeville*, 9 Idaho 291; *Shindler v. Floyd*, 81 S. W. Rep. 668, 26 Ky. L. Rep. 332, *followed* *Erwin v. Benton*, 84 S. W. Rep. 533, 27 Ky. L. Rep. 108; *State v. Gray*, 111 La. 853; *Tate v. Levee Com'rs*, 84 Miss. 388.

728. 1. Merely Apparent Conflict — Identity of Object. — *U. S. v. Cadarr*, 197 U. S. 475; *George v. Wallace*, (C. C. A.) 135 Fed. Rep. 286; *Lang v. Friesenecker*, 213 Ill. 598; *Madison County v. Moore*, 161 Ind. 426; *Orange County v. Ellsworth*, 98 N. Y. App. Div. 275; *Carpenter v. Russell*, 13 Okla. 277; *Giles v.*

Dennison, (Okla. 1904) 78 Pac. Rep. 174; *McMillan v. Payne County*, 14 Okla. 659; *York Gazette Co. v. York County*, 25 Pa. Super. Ct. 517; *Allentown v. Wagner*, 27 Pa. Super. Ct. 485; *Manufacturers' Light, etc., Co. v. Rentz*, 13 Pa. Dist. 609, 29 Pa. Co. Ct. 78.

For Various Applications of the Principle see *Parsons v. People*, 32 Colo. 221; *Chicago v. Hanreddy*, 211 Ill. 24, *affirming* 102 Ill. App. 1; *Chicago, etc., Coal Co. v. People*, 214 Ill. 421, *affirming* 114 Ill. App. 75; *Chicago v. People*, 114 Ill. App. 145; *State v. Soale*, (Ind. App. 1905) 74 N. E. Rep. 1111; *Sturgill v. Chesapeake, etc., R. Co.*, 116 Ky. 659; *Higgins v. Stokes*, 116 Ky. 664; *Schmitz v. Zeh*, 91 Minn. 290; *Growney v. Wabash R. Co.*, 102 Mo. App. 442; *Roth v. Forsee*, 107 Mo. App. 471; *Mendoza v. Levy*, 98 N. Y. App. Div. 326; *Goodbar v. Memphis*, 113 Tenn. 20; *McGrady v. Terrell*, 98 Tex. 427; *Whisler v. Cornelius*, 34 Tex. Civ. App. 511; *McKnight v. McDonald*, 34 Wash. 98.

729. 1. Later Act Mere Modification of or Exception to Earlier One. — *Lang v. Friesenecker*, 213 Ill. 598, *quoting* 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 729; *Sandys v. Williams*, (Oregon 1905) 80 Pac. Rep. 642; *Hughes v. Palmgren*, 14 Pa. Dist. 503, 31 Pa. Co. Ct. 355.

3. State Laws Repugnant to Act of Congress. — *Spratlin v. St. Louis Southwestern R. Co.*, (Ark. 1905) 88 S. W. Rep. 836; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 123 Iowa 432; *Potts v. Smith Mfg. Co.*, 25 Pa. Super. Ct. 206; *Smith's Estate*, 13 Pa. Dist. 80; *Cassel's Estate*, 13 Pa. Dist. 637, 30 Pa. Co. Ct. 238.

State Insolvency Laws Remain in Force as to Cases Not Within Scope of Federal Act. — *Boston Mercantile Co. v. Ould-Carter Co.*, 123 Ga. 458; *Climax Road Mach. Co. v. Sheesley*, 13 Pa. Dist. 649, 30 Pa. Co. Ct. 201; *Norristown Trust, etc., Co. v. Larzelere*, 29 Pa. Co. Ct. 12; *Ranck's Estate*, 30 Pa. Co. Ct. 513; *Jensen-King-Byrd Co. v. Williams*, 35 Wash. 161.

5. Effect of Subsequent Affirmative Statute. — *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1, *reversing* (C. C. A.) 117 Fed. Rep. 462; *Moore v. Kelley*, 136 Mich. 139, 10 Detroit Leg. N. 1002; *Evans v. McFarland*, 186 Mo. 703; *Loyalsock Tp. Road*, 26 Pa. Super. Ct. 219, 230, *affirming* 9 Del. Co. Rep. (Pa.) 117; *Nissley v. Lancaster County*, 27 Pa. Super. Ct. 405.

Principles Applicable — Special and General Laws. — See *Waynesville v. Scatterthwait*, 136 N. Car. 226.

6. Cumulative Statute. — *Hotel Registry Realty Corp. v. Stafford*, 70 N. J. L. 528.

7. Negative Act in Affirmative Form. — See *Chew v. Philadelphia*, 14 Pa. Dist. 168.

730. 3. Acts Which, Although in *Pari Materia*, Grant a Right Conditioned on Different Things

- 731.** (cc) *Prescribing Exclusive Rule — Conflicting Rights.* — See note 2.
 (e) *Acts Covering Same Subject* — aa. RULE STATED. — See note 4.
- 732.** See note 1.
 Intent to Substitute New Act for Old. — See note 2.
- 733.** *Express Declaration Against Repeal.* — See notes 3, 5.
 bb. REVISIONS, COMPILATIONS, AND RE-ENACTMENTS. — See note 6.
- 734.** See note 1.

are inconsistent, and the inconsistency operates as a repeal. *Com. v. McCaffrey*, 30 Pa. Co. Ct. 526.

731. 2. *Exclusive Rule Prescribed by Later Statute.* — *Weigand v. District of Columbia*, 22 App. Cas. (D. C.) 559.

4. *Repealed by Act Covering Same Subject — England.* — *In re Douglas*, (1905) 1 Ch. 279.

United States. — *Gibson v. U. S.*, 194 U. S. 182, *affirming* 38 Ct. Cl. 752; *Thomas v. U. S.*, 38 Ct. Cl. 113, 719, *reversed* on other grounds 195 U. S. 418.

Alabama. — *Southern R. Co. v. Mitchell*, 139 Ala. 629.

Arkansas. — *Pratt v. Dudley*, 73 Ark. 536.

Idaho. — *Idaho Mut. Co-operative Ins. Co. v. Myer*, 10 Idaho 294.

Illinois. — *Mt. Vernon v. Evens, etc.*, *Fire Brick Co.*, 204 Ill. 32; *Chicago, etc., Coal Co. v. People*, 114 Ill. App. 75, *affirmed* 214 Ill. 421.

Indiana. — *Pittsburgh, etc., R. Co. v. Light-heiser*, 163 Ind. 247.

Kansas. — *State v. Wilson*, (Kan. 1905) 80 Pac. Rep. 639.

Kentucky. — *Fidelity, etc., Co. v. Logan County*, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66; *Hargis v. Parker*, (Ky. 1905) 85 S. W. Rep. 704.

Massachusetts. — *Doyle v. Kirby*, 184 Mass. 409; *Smith v. Haverhill*, 187 Mass. 323.

Missouri. — *Yall v. Gillham*, 187 Mo. 393.

New Jersey. — *State v. Chapman*, 69 N. J. L. 464, *affirmed* 70 N. J. L. 339.

New York. — *People v. Thames, etc.*, *Marine Ins. Co.*, 176 N. Y. 531, *affirming* 85 N. Y. App. Div. 623; *Tiffany v. Jamestown*, 179 N. Y. 455, *affirming* 88 N. Y. App. Div. 620; *Troy Press Co. v. Clerk, etc.*, 94 N. Y. App. Div. 514, *affirmed* 179 N. Y. 529; *Cahill v. Rochester*, 96 N. Y. App. Div. 557; *Pratt Institute v. New York*, 99 N. Y. App. Div. 525; *People v. Steuben County*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 590, *affirmed* 93 N. Y. App. Div. 604.

Oregon. — *Flanders v. Multnomah County*, 43 Oregon 583; *Sandys v. Williams*, (Oregon 1905) 80 Pac. Rep. 642.

Pennsylvania. — *Pennsylvania R. Co. v. Bogert*, 209 Pa. St. 589; *Phillips v. Barnhart*, 27 Pa. Super. Ct. 26; *Weeks v. Franklin*, 13 Pa. Dist. 286, 29 Pa. Co. Ct. 47; *Lenhart v. Cambria County*, 30 Pa. Co. Ct. 241; *Holtzman v. Braddock*, 30 Pa. Co. Ct. 267; *Com. v. Cannon*, 30 Pa. Co. Ct. 637.

South Carolina. — *Johnson v. Southern R. Co.*, 69 S. Car. 322.

South Dakota. — *Thomas v. State*, 17 S. Dak. 579.

Tennessee. — *Ehrlich v. Weber*, 114 Tenn. 711.

Texas. — *Plowman v. Dallas County*, (Tex. Civ. App. 1905) 88 S. W. Rep. 252.

Washington. — *Matter of Dietrick*, 32 Wash. 471; *State v. Ross*, 39 Wash. 233.

Wisconsin. — *State v. Policemen's Pension Fund*, 121 Wis. 44.

New Legislation Must Cover Whole Subject of Old. — *Lang v. U. S.*, (C. C. A.) 133 Fed. Rep. 201.

Two Statutes on Same Subject — Referendum. — See Maxwell v. Willis, 123 Ga. 319.

732. 1. *Repugnancy Not Essential.* — *Matter of Troy Press Co. v. Clerk, etc.*, 94 N. Y. App. Div. 514, *affirmed* 179 N. Y. 529; *Barringer v. Loder*, (Oregon 1905) 81 Pac. Rep. 778.

2. *Intent to Substitute Must Be Clear.* — *Lincoln School Tp. v. American School Furniture Co.*, 31 Ind. App. 405; *State v. Wilson*, (Kan. 1905) 80 Pac. Rep. 639; *Sandys v. Williams*, (Oregon 1905) 80 Pac. Rep. 642; *Loyalsock Tp. Road*, 26 Pa. Super. Ct. 219, 230, *affirming* 9 Del. Co. Rep. (Pa.) 117; *Ex p. Keith*, (Tex. Crim. 1904) 83 S. W. Rep. 683.

733. 3. *Express Declaration Against Repeal.* — *Kirk v. Roberson*, 76 S. W. Rep. 183, 25 Ky. L. Rep. 633; *Carpenter v. Central Covington*, 81 S. E. Rep. 919, 26 Ky. L. Rep. 430; *McGrew v. Missouri Pac. R. Co.*, 177 Mo. 533; *Growney v. Wabash R. Co.*, 102 Mo. App. 442; *Stowe Tp. Division*, 23 Pa. Super. Ct. 285; *Com. v. Hawkins*, 14 Pa. Dist. 592; *Everson Borough*, 31 Pa. Co. Ct. 321. See also *Leavenworth v. Jones*, 69 Kan. 857.

5. *State v. Rushing*, 140 Ala. 187; *Stahl v. Lee*, (Kan. 1905) 80 Pac. Rep. 983; *Lux v. New York City R. Co.*, (Municipal Ct.) 45 Misc. (N. Y.) 222; *Twiggs v. Land Com'rs*, 27 Utah 241.

6. *Previous Statutes Repealed by Revision.* — *Colonna v. Alton*, 23 App. Cas. (D. C.) 296; *Barnes v. Carter*, 120 Ga. 895; *Louisville Public Warehouse Co. v. Miller*, 81 S. W. Rep. 275, 26 Ky. L. Rep. 351; *Bevins v. Com.*, 86 S. W. Rep. 544, 27 Ky. L. Rep. 735; *Burt v. State*, 86 Miss. 280; *McGonnell's License*, 24 Pa. Super. Ct. 642, *reversed* on other grounds 209 Pa. St. 327; *Box v. Lanier*, 112 Tenn. 393; *Rice v. Kennedy*, 76 Vt. 380.

Position in Code as Affecting Application. — Where the provisions of a statute are re-enacted as a codification of the laws, the fact that one of the provisions was severed from the others, and placed in a different article of the code, is not sufficient to operate as a repeal of that provision in its application to the subject covered by the statute. *La Grange Mills v. Kener*, 121 Ga. 429.

734. 1. See *Mariposa County v. Madera County*, 142 Cal. 50; *Mesnager v. De Leonis*, 140 Cal. 402; *State v. Wills*, (Fla. 1905) 38 So. Rep. 289; *People v. Jensen*, 99 N. Y. App. Div. 355, *affirmed* 181 N. Y. 571; *Matter of Troy Press Co. v. Clerk, etc.*, 94 N. Y. App. Div. 514, *affirmed* 179 N. Y. 529.

- 735.** Conflicting Sections in Revision. — See note 2.
 Repealing Clause. — See note 3.
 Re-enactments. — See note 7.

cc. AMENDMENTS "SO AS TO READ." — See note 8.

- 736.** See note 1.
 dd. SUPPLEMENTAL ACTS. — See note 3.
 cc. ACTS PASSED AT SAME SESSION. — See notes 4, 5.
 (d) Removing Reason of Law. — See note 6.

- 737.** (e) Disuse of Law. — See note 6.
 (4) Penal Acts — (a) In General. — See notes 7, 8.

- 738.** See notes 1, 2.
 (b) Change in Nature of Offense. — See note 3.
 (c) Change in Degree of Punishment. — See note 4.

- 739.** See notes 1, 2.

735. 2. Conflicting Sections in Code. — State *v. Nolan*, (Neb. 1904) 98 N. W. Rep. 657. See further *infra*, this title, **736. 4.**

Statutory Provisions. — In some states the codes provide that if the provisions of any title conflict with or contravene the provisions of another title, the provisions of each title must prevail as to all matters and questions arising out of the subject-matter of such title. State *v. Landry*, 29 Mont. 218; *In re O'Brien*, 29 Mont. 530; *Flowerree Cattle Co. v. Lewis and Clarke County*, (Mont. 1905) 81 Pac. Rep. 398; *Gibson v. Allen*, (S. Dak. 1905) 104 N. W. Rep. 275. See also *In re O'Brien*, 29 Mont. 530.

3. Repealing Clause in Revision. — *Scott v. Jenkins*, (Fla. 1902) 35 So. Rep. 101.

7. Re-enactment After Amendment. — *Montreal v. Poulin*, 25 Quebec Super. Ct. 364, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 735.

8. Effect of Amendment "So as to Read." — *Davidson v. Witthaus*, 106 N. Y. App. Div. 182, citing *Bank of Metropolis v. Faber*, 150 N. Y. 200; *Matter of Rochester Trust, etc., Co.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 581; *Flanders v. Multnomah County*, 43 Oregon 583; *In re Martin*, 209 Pa. St. 266.

736. 1. Unchanged Portions of Original Act. — *Allison v. Hatton*, (Oregon 1905) 80 Pac. Rep. 101.

3. Supplemental Acts. — *Kemp v. State*, 120 Ga. 157; *In re Lambrecht*, 137 Mich. 450, 11 Detroit Leg. N. 289; *Hotel Registry Realty Corp. v. Stafford*, 70 N. J. L. 528; *Saves v. Trall*, 71 N. J. L. 91; *Jones v. Franklin County*, 25 Ohio Cir. Ct. 510; *Com. v. Conroy*, 207 Pa. St. 212; *Com. v. Couch*, 209 Pa. St. 354; *Protected Home Circle v. Stuntz*, 14 Pa. Dist. 128, 30 Pa. Co. Ct. 323.

Statutory Interpretation of Previously Enacted Resolution. — See *Fischer v. Moore*, 69 Kan. 191.

4. Acts Passed at Same Session. — *Lincoln School Tp. v. American School Furniture Co.*, 31 Ind. App. 405; *State v. Gray*, 111 La. 853; *Whisler v. Cornelius*, 34 Tex. Civ. App. 511; *Twiggs v. Land Com'rs*, 27 Utah 241. See also *Rosasco v. Tuolumne County*, 143 Cal. 430.

Sections of Code Simultaneously Enacted. — *Chatham County v. Gaudry*, 120 Ga. 121. See further *supra*, this title, **735. 2.**

Contemporaneous Statute and Resolution. — *Fischer v. Moore*, 69 Kan. 191.

Where Repugnant Statutes Were Enacted on

the Same Day to Take Effect at Different Times, it was held that the one was effective until the day set for the taking effect of the other, and on that day the first ceased to be effective, the other taking its place. State *v. Sawyer*, 139 Ala. 138.

5. Act Last Approved. — *Mariposa County v. Madera County*, 142 Cal. 50. See also *Atty.-Gen. v. Bridgman*, 134 Mich. 379.

6. Repeal by Removing Reason of Law. — See *Southworth v. Brownlow*, 84 Miss. 405 (implied repeal by Married Women's Act); *York Gazette Co. v. York County*, 25 Pa. Super. Ct. 517.

737. 6. Doctrine of Repeal by Nonuser Denied. — State *v. Nease*, (Oregon 1905) 80 Pac. Rep. 897.

Custom or Usage Cannot Vary or Repeal Statute. — *Ettien v. Drum*, 32 Mont. 311. See the title USAGES AND CUSTOMS, **376. 1, 382. 1 et seq.**, and see *supra*, this title, **636. 3.**

7. Implied Repeal of Penal Acts. — State *v. Knoll*, 69 Kan. 767; *Burkhart v. Com.*, 83 S. W. Rep. 633, 26 Ky. L. Rep. 1245; *State v. Taylor*, 186 Mo. 608; *Ragazine v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 832.

8. New Statute Covering Whole Subject-matter of Earlier Statute. — *Baker v. Kaiser*, (C. C. A.) 126 Fed. Rep. 317; *Fleeks v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 381.

738. 1. Implied Repeal of Penal Statutes Not Favored. — *Pooler v. U. S.*, (C. C. A.) 127 Fed. Rep. 509; *In re Lambrecht*, 137 Mich. 450, 11 Detroit Leg. N. 289; *State v. Taylor*, 186 Mo. 608. See also *Matter of Smith*, 4 Ariz. 95; *State v. Klein*, 38 Wash. 475.

2. Different Remedies with Different Penalties. — *U. S. v. One Bay Horse, etc.*, 128 Fed. Rep. 207; *State v. Neilon*, 43 Oregon 168; *Com. v. Teel*, 30 Pa. Co. Ct. 566, citing *Com. v. Mills*, 26 Pa. Super. Ct. 549; *Com. v. McCaffrey*, 30 Pa. Co. Ct. 526.

3. Changing Nature of Offense. — State *v. Stevens*, 68 Kan. 576; *State v. Taylor*, 186 Mo. 608.

4. Reducing Punishment. — *Pooler v. U. S.*, (C. C. A.) 127 Fed. Rep. 509; *State v. Neilon*, 43 Oregon 168.

739. 1. Increasing Punishment. — State *v. Stevens*, 68 Kan. 576; *Fleeks v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 381.

2. Change Not Affecting Degree of Punishment. — *In re Lambrecht*, 137 Mich. 450, 11 Detroit Leg. N. 289.

739. (5) *General and Special Laws* — (a) *Later General Act.* — See note 3.

741. See note 1.

The Reason. — See note 2.

742. Inconsistency of Provisions. — See note 1.

When the Later Act Is Exclusive. — See note 2.

743. See note 2.

(b) *Later Special Act.* — See notes 5, 6.

744. Where a Special Act Refers to or Incorporates a General One. — See note 1.

739. 3. Special Act Not Generally Repealed by Later General Act — *United States.* — Guthrie v. Sparks, (C. C. A.) 131 Fed. Rep. 443; Bealmear v. Hutchins, 134 Fed. Rep. 257; George v. Wallace, (C. C. A.) 135 Fed. Rep. 286; Christie-St. Commission Co. v. U. S., (C. C. A.) 136 Fed. Rep. 326, affirming 129 Fed. Rep. 506. *Alabama.* — State v. Houghton, 142 Ala. 90. *Arkansas.* — St. Louis Southwestern R. Co. v. Grayson, 72 Ark. 119.

Illinois. — People v. Mottinger, 215 Ill. 256. *Kentucky.* — Covington v. Kenton County, 82 S. W. Rep. 392, 26 Ky. L. Rep. 677; Louisville, etc., R. Co. v. Jarvis, 87 S. W. Rep. 759, 27 Ky. L. Rep. 986. See also Galloway v. Bradburn, 82 S. W. Rep. 1013, 26 Ky. L. Rep. 977.

Louisiana. — Cumberland Telephone, etc., Co. v. Morgan's Louisiana, etc., R., etc., Co., 112 La. 287.

Minnesota. — State v. Bailer, 91 Minn. 186. *New York.* — Tiffany v. Jamestown, 179 N. Y. 455, affirming 88 N. Y. App. Div. 620, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 715; People v. Monroe County Ct., 105 N. Y. App. Div. 1; People v. Wells, 94 N. Y. App. Div. 271; People v. Jensen, 99 N. Y. App. Div. 355, affirmed 181 N. Y. 571; Welstead v. Jennings, 104 N. Y. App. Div. 179.

Oklahoma. — Carpenter v. Russell, 13 Okla. 277; Showers v. Caddo County, 14 Okla. 157.

Pennsylvania. — Com. v. Brown, 210 Pa. St. 29, affirming 25 Pa. Super. Ct. 269; Loyalsock Tp. Road, 26 Pa. Super. Ct. 219, 230, affirming 9 Del. Co. Rep. (Pa.) 117; Nissley v. Lancaster County, 27 Pa. Super. Ct. 405; Chew v. Philadelphia, 14 Pa. Dist. 168.

Tennessee. — Goodbar v. Memphis, 113 Tenn. 20.

Texas. — *Ex p. Neal*, (Tex. Crim. 1904) 83 S. W. Rep. 831, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 739, note 3; *Ex p. Kimbrell*, (Tex. Crim. 1904) 83 S. W. Rep. 382; *Ex p. Keith*, (Tex. Crim. 1904) 83 S. W. Rep. 683; *McHam v. Love*, (Tex. Civ. App. 1905) 87 S. W. Rep. 875. See also *Little v. Griffin*, 33 Tex. Civ. App. 515.

Washington. — Richards v. Redelsheimer, 36 Wash. 325.

Canada. — Gagnon v. The Savoy, 25 Can. L. T. 87. See also *Bell v. Parent*, 23 Quebec Super. Ct. 235; *Coaticook v. Lothrop*, 22 Quebec Super. Ct. 225.

Express Provision for Repeal. — *In re Appointment of Assistant Dist. Atty.*, 14 Pa. Dist. 635.

Rule Especially Applicable to General Law and Prior Special Charter. — *Waynesville v. Satterthwait*, 136 N. Car. 226.

741. 1. Rule of Construction. — Sun, etc., Pub. Co. v. Bennett, 26 Pa. Super. Ct. 243.

Rule Gives Way to Plain Legislative Intent. —

See *Fidelity, etc., Co. v. Logan County*, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66; *Ex p. Loving*, 178 Mo. 194; *Smith v. Hightstown*, 71 N. J. L. 536, affirming 71 N. J. L. 276; *Vreeland v. Pierson*, 70 N. J. L. 508; *Com. v. Brown*, 210 Pa. St. 29, affirming 25 Pa. Super. Ct. 269; *Nissley v. Lancaster County*, 27 Pa. Super. Ct. 405; *In re Appointment of Assistant Dist. Atty.*, 14 Pa. Dist. 635.

2. Reason of Rule. — *State v. Houghton*, 142 Ala. 90; *Com. v. Brown*, 210 Pa. St. 29, affirming 25 Pa. Super. Ct. 269; *Ex p. Neal*, (Tex. Crim. 1904) 83 S. W. Rep. 831, quoting 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 741.

742. 1. General Act Inconsistent with Prior Special Act. — *Smith v. Hightstown*, 71 N. J. L. 536; *Chew v. Philadelphia*, 14 Pa. Dist. 168.

2. Later Statute Exclusive. — Guthrie v. Sparks, (C. C. A.) 131 Fed. Rep. 443; *State v. Bailer*, 91 Minn. 186; *Smith v. Hightstown*, 71 N. J. L. 536; *People v. Jensen*, 99 N. Y. App. Div. 355, affirmed 181 N. Y. 571; *Pratt Institute v. New York*, 99 N. Y. App. Div. 525; *Friel v. McAdoo*, 101 N. Y. App. Div. 155, affirmed 181 N. Y. 558; *Sun, etc., Pub. Co. v. Bennett*, 26 Pa. Super. Ct. 243; *Nissley v. Lancaster County*, 27 Pa. Super. Ct. 405; *Hamill v. Andresak*, 13 Pa. Dist. 316; *In re Appointment of Assistant Dist. Atty.*, 14 Pa. Dist. 635. See also *State v. Ames*, 91 Minn. 365.

Modification of Rule Must Not Be Pushed Too Far. — *Com. v. Brown*, 210 Pa. St. 29, affirming 25 Pa. Super. Ct. 269.

743. 2. Express Saving of Prior Special Acts. — *The Hartford*, 125 Fed. Rep. 559, affirmed (C. C. A.) 135 Fed. Rep. 1021; *School Trustees v. School Inspectors*, 115 Ill. App. 479, affirmed 214 Ill. 30; *Com. v. Couch*, 209 Pa. St. 354.

5. General Act Repealed by Later Special Act. — *Los Angeles County v. Kellogg*, 146 Cal. 590; *Lang v. Friesenecker*, 213 Ill. 598, quoting 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 743; *Louisiana Imp. Co. v. Baton Rouge Electric, etc., Co.*, 114 La. 534; *Woodrough v. Douglas County*, (Neb. 1904) 98 N. W. Rep. 1092; *Ulster County v. State*, 177 N. Y. 189, affirming 79 N. Y. App. Div. 277; *Plowman v. Dallas County*, (Tex. Civ. App. 1905) 88 S. W. Rep. 252; *Montreal Park, etc., R. Co. v. Chateaugay, etc., R. Co.*, 13 Quebec K. B. 256, reversed on other grounds 35 Can. Sup. Ct. 48.

6. Consistency Between General and Special Acts. — *Kemp v. State*, 120 Ga. 157. See also *Jefferson County v. Watertown*, 98 N. Y. App. Div. 494.

744. 1. Reference to or Incorporation of General Act. — *Lang v. Friesenecker*, 213 Ill. 598, quoting 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744.

744. (c) Contemporaneous General and Special Acts. — See note 4.

3. Effect of Repeal — *a. GENERAL RULES* — **Repeal of Amended Act.** —

See note 9.

745. *b. MATTERS AFFECTED BY REPEAL* — (1) *In General.* — See note 6.

746. (2) *Interests Past and Closed* — (a) *In General.* — See notes 2, 3, 5.

747. See note 1.

(3) *Interests Pending* — (a) *Dependent on Repealed Statute* — *aa. IN GENERAL.*

— See note 5.

748. *A Saving Clause.* — See notes 3, 4, 5.

744. 4. Contemporaneous General and Special Acts. — *Woodworth v. Kalamazoo*, 135 Mich. 233, 10 Detroit Leg. N. 761; *State v. Dabbs*, 182 Mo. 359.

9. Effect on Amendment of Repealing Amended Act. — *State v. Sawyer*, 139 Ala. 138; *Winstead v. Jennings*, 104 N. Y. App. Div. 179, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 744.

An amendment to a section of an act which merely substitutes one word for another to make the language conform to correct grammatical expression does not have the effect of retaining the section in existence on a subsequent repeal of the original act. *Jermyn v. Scranton*, 212 Pa. St. 598, affirming 5 Lack. Jur. (Pa.) 293.

745. 6. Matters Affected by Repeal in General. — *Lexington Grocery Co. v. Southern R. Co.*, 136 N. Car. 396; *Washington Borough*, 26 Pa. Super. Ct. 296.

746. 2. Vested Rights and Completed Transactions Generally. — *Harris v. Whiteley*, 98 Md. 430; *Jersey City v. Hamilton*, 70 N. J. L. 48; *Lexington Grocery Co. v. Southern R. Co.*, 136 N. Car. 396; *Washington Borough*, 26 Pa. Super. Ct. 296.

Final Judgments. — *Union Sav. Bank v. Leiter*, 145 Cal. 696; *Chiles v. School Dist.*, 103 Mo. App. 240; *In re Kline*, 70 Ohio St. 25; *Old Forge School Dist.*, 27 Pa. Super. Ct. 586, affirming 4 Lack Jur. (Pa.) 362.

3. Effect of Repeal as to Liabilities Theretofore Incurred. — *Eidman v. Tilghman*, (C. C. A.) 136 Fed. Rep. 141, affirming 131 Fed. Rep. 651.

Repealing Clause Construed Prospectively. — *Reading v. Jones*, 14 Pa. Dist. 66.

5. Express Saving of Rights Accrued — *England.* — *Hodson v. Railway Pass. Assur. Co.*, (1904) 2 K. B. 833, 91 L. T. N. S. 648.

Canada. — *Stark v. Schuster*, 14 Manitoba 672.

United States. — *Henderson County v. Travelers' Ins. Co.*, (C. C. A.) 128 Fed. Rep. 817; *Galm v. U. S.*, 39 Ct. Cl. 55.

California. — *Central Eureka Min. Co. v. East Cent. Eureka Min. Co.*, 146 Cal. 147.

District of Columbia. — *Gwin v. Brown*, 21 App. Cas. (D. C.) 295.

Florida. — *Scott v. Jenkins*, (Fla. 1902) 35 So. Rep. 101.

Michigan. — *Harding v. Auditor Gen.*, 136 Mich. 358, 11 Detroit Leg. N. 33; *Hoffman v. H. M. Loud, etc.*, *Lumber Co.*, 138 Mich. 5, 11 Detroit Leg. N. 462.

New Jersey. — *Dickinson v. Chosen Freeholders*, 71 N. J. L. 589, affirming 71 N. J. L. 159, followed in *Dickinson v. Rippe*, 71 N. J. L. 596.

Utah. — *Twiggs v. Land Com'rs*, 27 Utah 241.

Washington. — *Woodward v. Taylor*, 33 Wash. 1.

747. 1. Statutory Declaration as to Effect of Repeal. — *Consolidated Barb Wire Co. v. Stevenson*, (Kan. 1905) 79 Pac. Rep. 1085; *Connell v. Crosby*, 210 Ill. 380; *Com. v. Anselvich*, 186 Mass. 376, 104 Am. St. Rep. 590; *Hunter v. Lang*, (Neb. 1904) 98 N. W. Rep. 690; *Wolcott v. Henninger*, 1 Neb. (unofficial) 552, 96 N. W. Rep. 612, citing *Hanscom v. Meyer*, 61 Neb. 798; *Dickinson v. Chosen Freeholders*, 71 N. J. L. 589, affirming 71 N. J. L. 159, followed in *Dickinson v. Rippe*, 71 N. J. L. 596; *Charles v. Fawley*, 71 Ohio St. 50; *Blumle v. Kramer*, 14 Okla. 366, 373.

Pending Matters Not Affected by Adoption of Code. — *Hagler v. Kelly*, (N. Dak. 1905) 103 N. W. Rep. 629.

5. Inchoate Interests Destroyed by Repeal Without Saving Clause. — *Flanigan v. Sierra County*, 196 U. S. 553, reversing (C. C. A.) 122 Fed. Rep. 24. See also *Miners'*, etc., *Bank v. Snyder*, 100 Md. 57.

Contrary Intent — Construction of Repealing Clause. — See *supra*, this title, **720. 4.**

748. 3. Effect of Saving Clause — *England.* *Hodson v. Railway Pass. Assur. Co.*, (1904) 2 K. B. 833, 91 L. T. N. S. 648.

United States. — *Henderson County v. Travelers' Ins. Co.*, (C. C. A.) 128 Fed. Rep. 817; *Knickerbocker Trust Co. v. Myers*, 133 Fed. Rep. 764; *U. S. v. Wishkah Boom Co.*, (C. C. A.) 136 Fed. Rep. 42; *Eidman v. Tilghman*, (C. C. A.) 136 Fed. Rep. 141, affirming 131 Fed. Rep. 651.

California. — *Central Eureka Min. Co. v. East Cent. Eureka Min. Co.*, 146 Cal. 147.

District of Columbia. — *Gwin v. Brown*, 21 App. Cas. (D. C.) 295; *Shelley v. Wescott*, 23 App. Cas. (D. C.) 135.

Illinois. — *Connell v. Crosby*, 210 Ill. 380.

Kansas. — *Consolidated Barb Wire Co. v. Stevenson*, (Kan. 1905) 79 Pac. Rep. 1085.

Massachusetts. — *Com. v. Anselvich*, 186 Mass. 376, 104 Am. St. Rep. 590.

Michigan. — *Hoffman v. H. M. Loud, etc.*, *Lumber Co.*, 138 Mich. 10, 12 Detroit Leg. N. 356, affirming on rehearing 138 Mich. 5.

Nebraska. — *Hunter v. Lang*, (Neb. 1904) 98 N. W. Rep. 690; *Wolcott v. Henninger*, 1 Neb. (unofficial) 552, 96 N. W. Rep. 612.

New Jersey. — *Hoyt v. Hancock*, 65 N. J. Eq. 688.

New York. — *Lang v. Lutz*, 83 N. Y. App. Div. 534, affirmed 180 N. Y. 254.

North Carolina. — *Lexington Grocery Co. v. Southern R. Co.*, 136 N. Car. 396.

- 748.** Appeals. — See note 6.
749. *bb.* REMEDIES. — See notes 1, 2.
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750. Liens of Mechanics and Others. — See note 2.
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751. *cc.* CONTRACTS. — See note 1.
752. *dd.* JURISDICTION, POWERS, AND PRIVILEGES — Statutes Conferring Powers or Privileges. — See note 2.

North Dakota. — Hagler *v.* Kelly, (N. Dak. 1905) 103 N. W. Rep. 629.

Ohio. — Charles *v.* Fawley, 71 Ohio St. 50.

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Proceedings Begun After Passage of Act Saved. — Lang *v.* U. S., (C. C. A.) 133 Fed. Rep. 201, Jenkins, Cir. J., dissenting.

Saving Clause Not Applicable to Independent Legislation. — Wheeling, etc., R. Co. *v.* Toledo R., etc., Co., 72 Ohio St. 368, 106 Am. St. Rep. 622.

748. 4. Meaning of "Suits" and "Civil Causes" Within Saving Clause. — Wilson *v.* Head, 184 Mass. 515. Compare State *v.* Topeka, 68 Kan. 177; Smith *v.* Healy, 12 Wyo. 218.

5. Matters of Mere Practice Not Affected by Clause Saving Pending Actions. — Webster *v.* White Plains, 93 N. Y. App. Div. 398. See also State *v.* Barlow, 70 Ohio St. 363.

6. Washington Borough, 26 Pa. Super. Ct. 296; State *v.* Vanhuse, 120 Wis. 15.

749. 1. Remedy as Part of Right. — Colonial Sugar Refining Co. *v.* Irving, (1905) A. C. 369, affirming 14 Queensland L. J. 18; Ft. Madison *v.* Ft. Madison Water Co., (C. C. A.) 134 Fed. Rep. 214; Condon *v.* Eureka Springs, 135 Fed. Rep. 566; Hellen *v.* Medford, 188 Mass. 42; State *v.* Woodruff, 83 Miss. 111; Lang *v.* Lutz, 83 N. Y. App. Div. 534, affirmed 180 N. Y. 254; Weist *v.* Waller, 210 Pa. St. 143; Howard *v.* Ross, 38 Wash. 627; Fischer *v.* Kittinger, 39 Wash. 174.

New Remedy Must Not Materially Abridge Rights of Party Affected. — Knickerbocker Trust Co. *v.* Myers, 133 Fed. Rep. 764, affirmed (C. C. A.) 139 Fed. Rep. 111, which disapproved Miners, etc., Bank *v.* Snyder, 100 Md. 57.

Every Case to Be Determined on Its Own Circumstances. — Miners, etc., Bank *v.* Snyder, 100 Md. 57.

2. No Vested Right in Remedy as General Rule — United States. — *In re* Neely, 134 Fed. Rep. 667.

District of Columbia. — Shelley *v.* Wescott, 23 App. Cas. (D. C.) 135.

Georgia. — Walton County *v.* Morgan County, 120 Ga. 548.

Illinois. — Sharp *v.* Sharp, 213 Ill. 332.

Maryland. — Miners, etc., Bank *v.* Snyder, 100 Md. 57. See also Murphy *v.* Wheatley, 100 Md. 358.

Massachusetts. — Wilson *v.* Head, 184 Mass. 515.

Minnesota. — See Folsom *v.* Whitney, (Minn. 1905) 104 N. W. Rep. 140.

New York. — Webster *v.* White Plains, 93 N. Y. App. Div. 398.

North Carolina. — McCall *v.* Webb, 135 N. Car. 356.

Ohio. — State *v.* Barlow, 70 Ohio St. 363.

Pennsylvania. — Washington Borough, 26 Pa. Super. Ct. 296.

South Carolina. — Smith *v.* Jennings, 67 S. Car. 324.

Virginia. — Harrison *v.* Thomas, 103 Va. 333.

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Legislature May Change Statutes of Limitation. — See the title LIMITATION OF ACTIONS, 168. 7 *et seq.* And see Condon *v.* Eureka Springs, 135 Fed. Rep. 566; Fitzgerald *v.* Scovil Mfg. Co., 77 Conn. 528; Baumeister *v.* Silver, 93 Md. 418; Soper *v.* Lawrence Bros. Co., 98 Me. 268, 99 Am. St. Rep. 397; Davidson *v.* Witthaus, 106 N. Y. App. Div. 182; Clark *v.* Beck, (N. Dak. 1905) 103 N. W. Rep. 755.

3. Changing Rules of Evidence. — Tift *v.* Southern R. Co., 138 Fed. Rep. 753; People *v.* Rose, 207 Ill. 352; State *v.* Barrett, 138 N. Car. 630. See also *supra*, this title, 697, 3.

750. 2. Perfected Lien Not Divested by Repeal of Statute. — Williams *v.* Packard, 39 Wash. 217.

3. Rule as to Costs. — See Boise City Irrigation, etc., Co. *v.* Stewart, 10 Idaho 38, 62.

6. Modification of Remedy. — Miners', etc., Bank *v.* Snyder, 100 Md. 57; Kloeppinger *v.* Grasser, 25 Ohio Cir. Ct. 90; Washington Borough, 26 Pa. Super. Ct. 296.

Act Enlarging Existing Remedy Valid Though Made Applicable to Pending Suits. — Rogers *v.* Nichols, 186 Mass. 440.

7. Effect on Pending Suits of Taking Away Alternative Remedy. — Miners, etc., Bank *v.* Snyder, 100 Md. 57; State *v.* Stuart, 111 Mo. App. 478; Pennsylvania R. Co. *v.* Bogert, 209 Pa. St. 589.

8. Enforcement of Right by Means of Remaining Remedy. — Miners, etc., Bank *v.* Snyder, 100 Md. 57.

751. 1. Statute Becoming Part of Contract — Effect of Repeal. — Cochise County *v.* Ritter, 3 Ariz. 208; State *v.* Nebraska Telephone Co., 127 Iowa 194; Comstock *v.* Le Sueur County, 92 Minn. 88; Ball *v.* Teacher's Retirement Fund, 71 N. J. L. 64; Hughes *v.* Palmgren, 14 Pa. Dist. 503, 31 Pa. Co. Ct. 355.

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Presumption Is Against Making Statute Irrepealable. — Saginaw County *v.* Hubinger, 137 Mich. 72, 11 Detroit Leg. N. 215.

752. 2. Statutes Conferring Powers or Privi-

753. Authority to Collect Taxes and Assessments. — See note 1.

cc. PENALTIES AND FORFEITURES. — See note 3.

754. See note 2.

Saving Clause. — See note 5.

755. See note 1.

757. *ff.* CRIMES AND PUNISHMENTS — (*cc*) General Statutes Limiting Effect of Repealing Laws. — See note 4.

758. Power to Enact General Saving Law Doubted. — See note 2.

c. REPEAL AND RE-ENACTMENT — (1) *Re-enactment Without Express Repeal.* — See note 4.

759. (2) *Simultaneous Repeal and Re-enactment* — (a) *Majority Rule.* — See notes 1, 2, 3.

Re-enactment and Repeal by Successive Acts. — See note 4.

760. *d.* REPEAL OF REPEALING ACT — (1) *Rule at Common Law.* — See note 1.

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761. See note 1.

(2) *Statutory Rule.* — See notes 5, 6.

leges. — *Flanigan v. Sierra County*, 196 U. S. 553, reversing (C. C. A.) 122 Fed. Rep. 24; *Scott v. Jenkins*, (Fla. 1902) 35 So. Rep. 101.

A Gratuitous Pension. — *Friel v. McAdoo*, 101 N. Y. App. Div. 155, affirmed 181 N. Y. 558.

Authority to Sue State. — *Matter of Hoopie*, 179 N. Y. 308, reversing 93 N. Y. App. Div. 486.

Powers and Privileges of Public Officers. — *State v. Policemen's Pension Fund*, 121 Wis. 44.

753. 1. Repeal of Tax Law as Revoking Authority to Collect Tax Previously Levied. — *Hoyt v. Hancock*, 65 N. J. Eq. 688.

Remedy Preserved by Repealing Act. — See *Eidman v. Tilghman*, (C. C. A.) 136 Fed. Rep. 141, affirming 131 Fed. Rep. 651.

A Revision of the Tax Laws, with a repeal of the former statutes, is generally to be construed as prospective in operation, and as not disturbing existing valid assessments. *Hooper v. State*, 141 Ala. 111.

3. Repeal of Statute Imposing Penalty or Forfeiture. — *Petterson v. Berry*, (C. C. A.) 125 Fed. Rep. 902; *Lexington Grocery Co. v. Southern R. Co.*, 136 N. Car. 396.

754. 2. No Vested Right in Penalty Before Judgment. — *Davidson v. Witthaus*, 106 N. Y. App. Div. 182.

5. Saving Clause. — *Galm v. U. S.*, 39 Ct. Cl. 55; *Wilman v. Head*, 184 Mass. 515.

755. 1. General Statute Saving Previously Incurred Forfeitures. — *Sackett v. McCaffrey*, (C. C. A.) 131 Fed. Rep. 219.

757. 4. General Statutes Limiting Effect of Repealing Laws. — *Lang v. U. S.*, (C. C. A.) 133 Fed. Rep. 201. See also *State v. Stevens*, 68 Kan. 576. And see *supra*, this title, **681. 7.**

Constitutional Provision Limiting Effect of Repealing Laws. — See *Whatley v. State*, (Fla. 1903) 35 So. Rep. 80.

758. 2. Lang v. U. S., (C. C. A.) 133 Fed. Rep. 201.

4. Re-enactment of Existing Statute. — *Eidman v. Tilghman*, (C. C. A.) 136 Fed. Rep. 141, affirming 131 Fed. Rep. 651; *Pratt v. Dudley*, 73 Ark. 536; *O'Brien County v. Mahon*, 126 Iowa 539; *People v. Wells*, 94 N. Y. App. Div. 271; *Allison v. Hatton*, (Oregon 1905) 80 Pac. Rep. 101; *Kittanning v. Western Union Tel. Co.*, 26

Pa. Super. Ct. 346, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 758; *Hughes v. Palmgren*, 14 Pa. Dist. 503, 31 Pa. Co. Ct. 355. See also *Smith v. Colloty*, 69 N. J. L. 365; *Lux v. New York City R. Co.*, (Municipal Ct.) 45 Misc. (N. Y.) 222.

759. 1. Simultaneous Repeal and Re-enactment. — *Lamb v. Powder River Live Stock Co.*, (C. C. A.) 132 Fed. Rep. 434; *Sayer v. Brown*, 119 Ga. 539; *Brown v. Pinkerton*, (Minn. 1905) 103 N. W. Rep. 897; *Abbay v. Levee Com'rs*, 83 Miss. 102; *Reading v. Jones*, 14 Pa. Dist. 66; *Pringle v. Canfield*, (S. Dak. 1905) 104 N. W. Rep. 223.

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2. General and Particular Statutory Rules. — See *Com. v. Anselvich*, 186 Mass. 376, 104 Am. St. Rep. 590; *Hoyt v. Hancock*, 65 N. J. Eq. 688; *People v. Jensen*, 99 N. Y. App. Div. 355, affirmed 181 N. Y. 571; *People v. Steuben County*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 590, affirmed 93 N. Y. App. Div. 604.

3. Re-enactment of a Statute Not in Force. — *Tyee Consol. Min. Co. v. Jennings*, (C. C. A.) 137 Fed. Rep. 863.

4. Re-enactment and Repeal by Successive Acts. — The same rule applies where the acts of re-enactment and repeal were passed on different days if they go into effect at the same time. *Pringle v. Canfield*, (S. Dak. 1905) 104 N. W. Rep. 223.

760. 1. Repeal of Repealing Act Revives Original Law. — *Harper v. Middle States Loan, etc., Co.*, 55 W. Va. 149.

Repeal of Special Law Revives Prior General Law. — *Omaha v. Hodgskins*, (Neb. 1903) 97 N. W. Rep. 346.

The Effect of a Repeal Cannot Relate Back so as to make valid a contract which was prohibited by the act in force at the time of its execution. *Ruttan v. Burk*, 7 Ont. L. Rep. 56.

6. Intent Against Revival. — *State v. Edward*, 134 N. Car. 636.

761. 1. Amendment "So as to Read." — *Omaha v. Hodgskins*, (Neb. 1903) 97 N. W. Rep. 346.

5. Statutory Rule. — *Pepin Tp. v. Sage*, (C. C. A.) 129 Fed. Rep. 659.

761. Extent of Statutory Rule — Suspension as Distinguished from Repeal of Repealing Act. — See note 7.

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762. Repeal of Amendatory Act. — See note 2.

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763. 2. Statutes as Evidence — Recitals in a Public Statute. — See notes 2, 3. Recitals in Private Statutes. — See note 5.

763. [STEADYING BOARD. — See note 4a.]

769. STEAL. — See note 1.

770. STEAM. — See note 4.

761. 6. Statutory Rule Applicable to Repeal by Repugnant Act. — *People v. Steuben County*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 590, affirmed 93 N. Y. App. Div. 604.

7. Statutory Rule Not Applicable to Suspension of Repealing Act. — *Pepin Tp. v. Sage*, (C. C. A.) 129 Fed. Rep. 659.

8. Repeal of Modifying Act. — *Pepin Tp. v. Sage*, (C. C. A.) 129 Fed. Rep. 659.

762. 2. Repeal of Amendment. — See *Melrose Park v. Dunnebecke*, 210 Ill. 422.

5. A Statute Which, Though Local in Its Nature, Extends to All Persons who may come within the territory described is a statute of which the courts take judicial notice. *Davis v. State*, 141 Ala. 84.

9. Statutory Mode of Proof — Printed Copies. — See *Henry v. State*, 71 Ark. 574.

10. Private Acts Made Subjects of Judicial Notice. — *Ex p. Childs*, (Cal. 1905) 81 Pac. Rep. 667; *New York, etc., R. Co. v. Offield*, 78

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763. 2. Recitals. — *Davis v. Moyles*, 76 Vt. 25.

3. Not Conclusive — General Rule. — *White v. State*, 121 Ga. 592.

5. Private Statutes. — *Davis v. Moyles*, 76 Vt. 25, intimating, however, that recitals in a private statute may be evidence against the state.

768. 4a. A Steadying Board is an appliance used in packing houses to hold hogs in position while the splitter cleaves them in two. *Rendlich v. Hammond Packing Co.*, 106 Mo. App. 717.

769. 1. Steal. — *Baldwin v. State*, 46 Fla. 115.

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770. 4. Steam Boilers and Machinery — License Laws. — See *State v. Justus*, 94 Minn. 207

STENOGRAPHERS.

BY BASIL JONES.

774. III. WHO MAY APPOINT — 1. Courts — a. IN GENERAL. — See notes 1, 2.

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784. XI. REMOVAL. — See note 1.

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786. STOCK, STOCK IN TRADE, ETC. — See note 1.

774. 1. Court May Appoint. — *Rogers v. Brown*, 136 Fed. Rep. 813, holding that a court of admiralty has power to appoint. See also *Andel v. People*, 106 Ill. App. 558; *Ferguson v. Pottawattamie County*, 126 Iowa 108.

California Statute Authorizing Appointment by Police Judge Unconstitutional. — *Elder v. McDougald*, 145 Cal. 740.

2. Request for Appointment of Stenographer Presumed. — *Polsgrove v. Walker*, (Ky. 1904) 82 S. W. Rep. 979.

4. Refusal to Appoint. — See *Andrews v. State*, (Tex. Crim. 1903) 76 S. W. Rep. 918.

777. 2. Manner of Compensation under Illinois Statute. — See *Andel v. People*, 106 Ill. App. 558.

Compensation Payable During Attendance and Readiness to Work. — *Ferguson v. Pottawattamie County*, 126 Iowa 108; *Wood v. Chickasaw County*, 85 Miss. 120.

Reimbursement for Traveling Expenses — No Allowance Where No Expense Incurred. — *State v. Woodside*, 112 Mo. App. 451.

Taxation with Referee's Fees — Evidence as to Amount. — See *Poucher v. Faber*, (Supm. Ct. App. T.) 90 N. Y. Supp. 383, 46 Misc. (N. Y.) 596.

7. Mode of Payment under Texas Act of 1903. — See *Robertson v. Ellis County*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1097.

778. 4. Stenographer Employed Before Referee by Parties. — *Bottom v. Alberst*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 665.

779. 5. Punctuation Marks Not Included. — *Walsh v. Jackson*, 33 Colo. 454.

Compensation by Page. — See *Polsgrove v. Walker*, (Ky. 1904) 82 S. W. Rep. 979.

7. Fees Taxable as Costs or Disbursements. — *Rogers v. Brown*, 136 Fed. Rep. 813 (fees of stenographer employed before commissioner).

8. Fees Not Taxable as Costs or Disbursements. — See *Elfring v. New Birdsall Co.*, 17 S. Dak. 350.

780. 6. Under the Massachusetts Statute (Rev. Laws, c. 165, § 85) the testimony taken by the official stenographer of the Superior Court has no place in the Supreme Judicial Court upon a hearing of facts before a justice there. *Crocker v. Crocker*, 188 Mass. 16.

781. 1. Notes of Testimony Taken on Preliminary Hearing. — See *Beavers v. Bowen*, (Ky. 1904) 80 S. W. Rep. 1165.

7. Notes Taken on Former Trial May Be Read. — See *Barksdale v. Security Invest. Co.*, 120 Ga. 388, holding that proof of genuineness and correctness is essential.

784. 1. Stenographer Not Officer Within Statute Fixing Duration of Terms of Office. — *Robertson v. Ellis County*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1097.

5. Step in the Proceedings. — See *County Theatres, etc., v. Knowles*, (1902) 1 K. B. 480; *Richardson v. Le Maitre*, (1903) 2 Ch. 222.

786. 1. Stock of Goods. — The term *stock* when applied to goods in a mercantile house refers commonly to those which are kept for sale, and does not include a cash register. *Albrecht v. Cudihee*, 37 Wash. 206.

A statute regulating the sale of "any *stock* of goods, wares, or merchandise in bulk" applies to a sale of all the goods, wares, and merchandise of a person engaged in conducting a boarding house and restaurant. *Plass v. Morgan*, 36 Wash. 160.

STOCK AND PRODUCE EXCHANGES.

BY E. C. ELLSBREE.

794. VII. SEATS IN STOCK AND PRODUCE EXCHANGES — 1. Legal Character and Status — A Bankrupt Member May Be Compelled to Perform Such Acts and Execute Such Instruments. — See note 8.

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803. XI. RULES AND REGULATIONS — 1. Right to Adopt — Incorporated Exchanges. — See note 2.

794. 8. *In re Hurlbutt*, (C. C. A.) 135 Fed. Rep. 504.

795. 2. *In re Hurlbutt*, (C. C. A.) 135 Fed. Rep. 504.

799. 4. *Young v. Eames*, 181 N. Y. 542, affirming without opinion 78 N. Y. App. Div. 229, cited in the original note.

800. 3. Proceedings Contrary to Natural Justice. — *Young v. Eames*, 181 N. Y. 542, affirming without opinion 78 N. Y. App. Div. 229, cited in the original note.

801. 7. No Liability When Member Is Suspended in Good Faith and Without Malice. — *Lurman v. Jarvie*, 178 N. Y. 559, affirming without opinion 82 N. Y. App. Div. 37, cited in the original note.

802. 1. Property Right in Quotations Not Dependent on Use Made Thereof. — *Board of Trade v. L. A. Kinsey Co.*, (C. C. A.) 130 Fed. Rep. 507.

2. A Board of Trade Has Such a Property Interest in Its Quotations. — See *Christie Grain, etc., Co. v. Board of Trade*, (C. C. A.) 125 Fed. Rep. 161, reversing 116 Fed. Rep. 944, cited in the original note.

Injunction Refused to Protect Quotations Resulting from Gambling Transaction. — *Contra*, *Board of Trade v. L. A. Kinsey Co.*, (C. C. A.) 130 Fed. Rep. 507, reversing 125 Fed. Rep. 72.

803. 2. *Dickinson v. Board of Trade*, 114 Ill. App. 295.

STOCK AND STOCKHOLDERS.

By M. G. BEAMAN.

825. I. DEFINITION AND NATURE OF CORPORATE STOCK — 3. Shares of Stock — *a.* GENERAL NATURE. — See note 3.

826. *c.* PERSONALTY OR REALTY. — See note 11.

829. *g.* SITUS. — See note 3.

4. Certificates of Stock — *a.* GENERAL NATURE. — See note 12.

830. *b.* NEGOTIABILITY. — See note 7.

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837. III. ISSUE OF STOCK — 2. Power to Issue — *b.* PREFERRED STOCK. — See note 4.

839. *e.* REISSUE OF SURRENDERED OR PURCHASED SHARES. — See note 1.

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841. (6) *Satisfaction of Debts.* — See note 8.

843. *b.* SUFFICIENCY OF CONSIDERATION — (1) *Issue for Less than Par.* — See note 8.

(2) *Issue for Property or Services.* — See note 10.

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825. 3. Shares of Stock Defined. — *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832.

826. 11. Stock Is Personal Property. — *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483. See also *Cummings v. People*, 211 Ill. 392.

Personalty by Statute. — *Talcott v. Mastin*, (Colo. App. 1905) 79 Pac. Rep. 973; *Watson v. Molden*, 10 Idaho 570; *Boone v. Van Gorder*, 164 Ind. 499; *Crenshaw v. Columbia Min. Co.*, 110 Mo. App. 355; *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832.

829. 3. Situs in State of Incorporation. — *Fahrig v. Milwaukee, etc., Breweries*, 113 Ill. App. 525; *Andrews v. Guayaquil, etc., R. Co.*, (N. J. 1905) 60 Atl. Rep. 568.

12. Certificate Merely Evidence of Ownership. — *Longman v. Bath Electric Tramways*, (1905) 1 Ch. 646; *Allen-West Commission Co. v. Gumbles*, (C. C. A.) 129 Fed. Rep. 287; *Williams v. Ashurst Oil, etc., Co.*, 144 Cal. 619; *Osgood v. Skinner*, 211 Ill. 229; *Cotter v. Butte, etc., Smelting Co.*, 31 Mont. 129; *Cleverger v. Moore*, 71 N. J. L. 148; *Flour City Nat. Bank v. Shire*, 88 N. Y. App. Div. 401, *affirmed* 179 N. Y. 587; *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832.

830. 7. Certificates Not Negotiable. — *Longman v. Bath Electric Tramways*, (1905) 1 Ch. 646.

831. 1. Purchaser Takes Subject to Equities. — See *Thaxter v. Thain*, 100 N. Y. App. Div. 488, appeal dismissed 182 N. Y. 512.

8. *Culloden Bank v. Forsyth Bank*, 120 Ga. 575, 102 Am. St. Rep. 115.

837. 4. Stockholder Take Stock Subject to Reserved Power to Amend. — *Hinkley v. Schwarzschild, etc., Co.*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 176, *affirmed* 107 N. Y. App. Div. 470.

839. 1. Stock Purchased by Corporation and Held for Sale Is Not Unissued Stock. — *Hartley v. Pioneer Iron Works*, 181 N. Y. 73, *reversing* 87 N. Y. App. Div. 107.

10. Cash Required by Statute. — *Turner v. Cowan*, 34 Can. Sup. Ct. 160.

840. 1. Payment in Property. — See *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184.

5. Patent Rights. — See *American Mutoscope Co. v. State Board of Assessors*, 70 N. J. L. 172.

841. 8. No Right to Enforce Issue in Payment of Debt. — Where the stockholder pledges his stock for the benefit of the corporation, and it is lost by the failure of the corporation to pay, the stockholder cannot compel the issue to him of new stock. *Dempster v. Rosehill Cemetery Co.*, 206 Ill. 261.

843. 8. New Stock. — *Speer v. Bordeleau*, (Colo. App. 1905) 79 Pac. Rep. 332, holding directly in accordance with the prior dicta mentioned in the original text.

10. Agreed Valuation Binding Between Parties. — *Parmelee v. Price*, 208 Ill. 544; *Easton Nat. Bank v. American Brick, etc., Co.*, (N. J. 1905) 60 Atl. Rep. 54.

844. 8. *Macbeth v. Banfield*, 45 Oregon 553, 106 Am. St. Rep. 670.

845. 6. Remedies in Respect to Invalid or Irregular Stock — *a.* IN GENERAL. — See note 10.

846. *c.* STOCK ISSUED FOR LESS THAN PAR. — See note 14.

847. 7. Acquiescence, Laches, and Estoppel as Bar to Relief — *a.* GENERAL RULE. — See note 11.

850. IV. INCREASE AND REDUCTION OF STOCK — 1. Power to Increase or Reduce Stock — *a.* EXPRESS AUTHORITY NECESSARY. — See note 2.

851. *d.* PREFERRED OR COMMON STOCK. — See note 5.

852. 3. Mode of Exercising Power — *a.* INCREASE OF STOCK. — See note 6.

853. *b.* REDUCTION OF STOCK. — See note 4.

854. 5. Distribution of Surplus After Reduction. — See note 8.

855. V. SALES AND CONVEYANCES — 1. Sales — *a.* RIGHT OF ALIENATION — (3) *Agreement Between Stockholders* — Agreement to Offer to Particular Party. — See note 9.

857. *c.* PERFORMANCE — (1) *Tender of Stock*. — See note 9.

858. *e.* RESCISSION. — See note 11.

860. *i.* BONA FIDE PURCHASERS. — See note 8.

861. Purchaser from Agent. — See note 1.

Purchaser from Trustee. — See note 7.

2. Gifts — *a.* INTER VIVOS — (2) *Delivery* — (a) In General. — See note 11.

862. (b) *Delivery of Certificate*. — See note 5.

(c) *Written Assignment*. — See note 7.

863. *b.* CAUSA MORTIS. — See note 12.

864. VI. EXECUTION, ATTACHMENT, AND GARNISHMENT — 1. Execution — *a.* AT COMMON LAW. — See note 9.

866. VII. LIEN OF CORPORATION ON SHARES — 1. Right to Lien — *a.* AT COMMON LAW. — See note 14.

867. *b.* UNDER STATUTES AND CHARTERS — (2) *What Language Sufficient to Create Lien*. — See note 6.

845. 10. Removal of Cloud. — *Contra*, Yetter *v.* Delaware Valley R. Co., 206 Pa. St. 485, holding that only the attorney-general can sue.

846. 14. Stockholders' Suit for Cancellation. — See *Insurance Press v. Montauk Fire Detecting Wire Co.*, 103 N. Y. App. Div. 472, holding that a transfer of stock in exchange for patents of inferior value would not be set aside without an offer to retransfer the patents.

847. 11. Voidable but Not Void Stock. — *Southern Trust, etc., Co. v. Yeatman*, 130 Fed. Rep. 798.

850. 2. General Statutory Provisions. — *In re Hoare*, (1904) 2 Ch. 208; *Martin v. Remington-Martin Co.*, 95 N. Y. App. Div. 18.

851. 5. Reduction of Preferred Stock. — See *Roberts v. Roberts-Wicks Co.*, 102 N. Y. App. Div. 118.

852. 6. *Contra* Where Unanimous Consent of Stockholders Obtained. — *State v. Cook*, 178 Mo. 189.

853. 4. *Leonard v. Draper*, 187 Mass. 536; *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347.

The Issuance of Certificates of Indebtedness in Exchange for Preferred Stock and the immediate conversion of such certificates into common stock is neither an increase nor a reduction of the capital stock. *Weidenfeld v. Northern Pac. R. Co.*, (C. C. A.) 129 Fed. Rep. 305.

854. 8. Distribution of Surplus After Reduction. — *Continental Securities Co. v. Northern Securities Co.*, 66 N. J. Eq. 274; *Roberts v. Roberts-Wicks Co.*, 102 N. Y. App. Div. 118.

855. 9. Agreement that Surviving Stockholders Shall Have Option to Buy Shares of Deceased Stockholder Valid. — *Fitzsimmons v. Lindsay*, 205 Pa. St. 79. See also *Lindsay's Estate*, 210 Pa. St. 224.

857. 9. See *Osgood v. Skinner*, 211 Ill. 229.

858. 11. See *Gause v. Commonwealth Trust Co.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 46, reversed 100 N. Y. App. Div. 427.

860. 8. *New Jersey Trust, etc., Co. v. Bodine*, (N. J. 1905) 60 Atl. Rep. 387; *Grafner v. Pittsburgh, etc., St. R. Co.*, 207 Pa. St. 217.

861. 1. *Maxwell v. Foster*, 67 S. Car. 377.

7. Word "Trustee" Notice to Purchaser. — *Johnson v. Amberson*, 140 Ala. 342.

11. *Crouse v. Judson*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 338.

862. 5. See *Bond v. Bean*, 72 N. H. 444.

7. Assignment Without Delivery Insufficient. — *Allen-West Commission Co. v. Grumbles*, (C. C. A.) 129 Fed. Rep. 287.

863. 12. *Noble v. Garden*, 146 Cal. 225.

864. 9. Execution — Common Law. — *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832.

866. 14. Right to Lien Dependent on Statute, Charter, or Contract. — *Dempster Mfg. Co. v. Downs*, 126 Iowa 80, 106 Am. St. Rep. 340.

867. 6. Prohibition of Transfer While Indebted Creates Lien. — *White River Sav. Bank v. Capital Sav. Bank, etc., Co.*, 77 Vt. 123, 107 Am. St. Rep. 658.

868. (5) *Notice to Third Persons.* — See note 3.

869. *c.* UNDER CONTRACTS — (3) *By-laws* — (b) *Effect of Valid By-law* — As to *Bona Fide Transferee.* — See note 6.

872. 3. For What Debts Lien Enforceable — *b.* AS DEPENDENT ON TIME OF CONTRACTING — (2) *Debts Contracted Subsequent to Transfer but Before Notice.* — See note 7.

876. VIII. ISSUANCE OF CERTIFICATE, TRANSFER, AND REGISTRATION — 1. Issuance of Certificate — *d.* FORGED OR SPURIOUS CERTIFICATES — Where Officer Has No Real or Ostensible Authority. — See note 2.

877. *f.* RIGHT OF OWNER OF LOST CERTIFICATE TO NEW CERTIFICATE. — See note 3.

878. 2. Transfer and Registration — *b.* FORMALITIES OF TRANSFER AND REGISTRATION — (1) *Assignment of Certificate* — (a) *In General.* — See note 6.

879. (b) *Assignment in Blank* — Rights of *Bona Fide Purchaser of Certificate Assigned in Blank.* — See note 5.

880. (2) *Transfer on Books of Corporation or Registration* — (a) *Necessity* — *bb.* UNDER STATUTE, CHARTER PROVISION, OR BY-LAW REQUIRING REGISTRATION — (*aa*) *As Between Parties to Assignment.* — See notes 4, 5.

881. (*bb*) *As Between Corporation and Assignor.* — See note 1.

882. (*dd*) *As Affecting Rights of Assignor's Creditors* — Registration Not Necessary as to Assignor's Creditors. — See note 1.

Registration Necessary as to Assignor's Creditors. — See note 2.

883. Effect of Diligence in Attempting to Procure Registration. — See note 4.

885. (3) *Deposit of Certificate of Transfer in Public Office.* — See note 2.

(4) *Surrender of Old and Issuance of New Certificate* — (a) *Necessity of Surrender of Old Certificate as Between Parties.* — See note 5.

(b) *Issuance of New Certificate to Assignee.* — See note 6.

886. (c) *Liability of Corporation for Issuance of New Without Surrender of Assigned Certificate.* — See notes 2, 3.

868. 3. Statute or Charter Provision Notice to All Persons. — *Dempster Mfg. Co. v. Downs*, 126 Iowa 80, 106 Am. St. Rep. 340.

869. 6. Lien Cannot Be Asserted Against *Bona Fide Transferee.* — *Culloden Bank v. Forsyth Bank*, 120 Ga. 575, 102 Am. St. Rep. 115; *In re McKain, etc., Invest, etc., Co.*, 7 Ont. L. Rep. 241.

872. 7. Corporation May Assert Lien on General Interest of Pledgor. — *White River Sav. Bank v. Capital Sav. Bank, etc., Co.*, 77 Vt. 123, 107 Am. St. Rep. 658.

876. 2. Where Officer Has Neither Real Nor Ostensible Authority. — *Ruben v. Great Fingall Consol.*, (1904) 2 K. B. 712.

877. 3. Statutes Requiring Issuance of New Certificate. — *Travers v. North Carolina R. Co.*, 133 N. Car. 322. See also *Downing v. Thompson*, 103 Va. 58.

Issuance of New Certificate under By-law. — See *Isbell v. Graybill*, 19 Colo. App. 508.

Indemnity Required by Court. — *State v. New Orleans Cotton Exch.*, 114 La. 324.

878. 6. Assignment Need Not Be in Writing. — *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832.

879. 5. *Bona Fide Purchaser of Certificate Assigned in Blank.* — See *Maxwell v. Foster*, 67 S. Car. 377.

880. 4. Unrecorded Transfer Good Between Parties. — *Johnson v. Hume*, 138 Ala. 564; *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483; *Culloden Bank v. Forsyth Bank*, 120 Ga. 575, 102 Am. St. Rep. 115;

Mapleton Bank v. Standrod, 8 Idaho 740; *State v. New Orleans Cotton Exch.*, 114 La. 324; *Crenshaw v. Columbian Min. Co.*, 110 Mo. App. 355; *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832. See also *Allen-West Commission Co. v. Grumbles*, (C. C. A.) 129 Fed. Rep. 287; *Maxwell v. Foster*, 67 S. Car. 377.

5. *Equitable Title Only.* — *Boone v. Van Gorder*, 164 Ind. 499.

881. 1. Unregistered Transfer Invalid as to Corporation. — *Brown v. Morton*, 71 N. J. L. 26.

882. 1. Registration Not Necessary to Pass Assignor's Title as to His Creditors. — *Mapleton Bank v. Standrod*, 8 Idaho 740; *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832.

2. Attachment of Levy Without Notice Takes Precedence over Unrecorded Assignment. — *Isbell Graybill*, 19 Colo. App. 508; *Boone v. Van Gorder*, 164 Ind. 499.

883. 4. Burden on Assignee to Show Diligence. — *Isbell v. Graybill*, 19 Colo. App. 508.

885. 2. Attaching Creditor with Notice Takes as Against Assignment. — *Scott v. Houpt*, 73 Ark. 78.

5. *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483.

6. Issuance of New Certificate Not Essential. — *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832.

886. 2. Permitting Transfer Without Surrender of Certificate. — See *Rainford v. James Keith, etc., Co.*, (1905) 2 Ch. 147.

3. Compare *Longman v. Bath Electric Tramways*, (1905) 1 Ch. 646.

886. *c.* OBLIGATION OF CORPORATION TO TRANSFER AND ISSUE NEW CERTIFICATE — (1) *In General.* — See note 5.

(2) *Compelling Transfer by Corporation* — (a) *By Bill in Equity.* — See note 8.

887. (b) *By Writ of Mandamus* — See note 2.

(3) *Recovery of Damages for Wrongful Refusal to Transfer* — The Measure of Damages. — See note 6.

890. *d.* WRONGFUL TRANSFER BY CORPORATION — (2) *Transfer Pursuant to Forged Assignment or Power of Attorney* — (c) *Remedy of Corporation.* — See note 7

893. IX. WHO ARE STOCKHOLDERS — 2. *Necessity of Certificate and Registration.* — See note 4.

3. *Irregularities in Transfer.* — See note 8.

895. 11. *Subscribers for Shares.* — See note 3.

899. X. STATUS AND RELATION OF STOCKHOLDERS INTER SE AND AS TO CORPORATION — 2. *Contractual Relation.* — See note 10.

3. *Relation to Corporate Property.* — See note 11.

900. See notes 2, 3.

5. *Fiduciary or Trust Relation.* — See notes 7, 8.

No Fiduciary Relation Exists. — See note 9.

901. 6. *Corporation as Separate Entity.* — See notes 1, 4, 5.

7. *Representation of Stockholders by Corporation.* — See note 7.

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886. 5. *No Right to Compel Transfer Without Surrender of Old Certificate.* — *Isbell v. Graybill*, 19 Colo. App. 508.

Refusal to Register Is Waiver of Right to Take Advantage of Failure to Conform to Technicalities. — *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483.

Promisee Without Consideration Cannot Compel Transfer. — *Griffin v. Knoblock*, (Colo. App. 1904) 77 Pac. Rep. 370.

8. *Bill in Equity to Compel Registration.* — *Johnson v. Hume*, 138 Ala. 564. See also *In re Letheby*, (1904) 1 Ch. 815.

887. 2. *Mandamus Allowed.* — *In re Pantan*, etc., *Steel Co.*, 25 Can. L. T. 42.

6. *Value at Time of Refusal to Register.* — *Culoden Bank v. Forsyth Bank*, 120 Ga. 575, 102 Am. St. Rep. 115.

890. 7. *Transfer under Statutory Duty.* — Where the corporation was forced to indemnify the true owner it was held that there was no remedy against the transferee, since the transfer was made because of a statutory duty, and not at the request of the transferee. *Sheffield v. Barclay*, (1903) 2 K. B. 580.

893. 4. *Certificate Unnecessary.* — *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184; *Cotter v. Butte*, etc., *Smelting Co.*, 31 Mont. 129; *Clevenger v. Moore*, 71 N. J. L. 148; *Flour City Nat. Bank v. Shire*, 88 N. Y. App. Div. 401, affirmed 179 N. Y. 587; *Reed v. Gold*, 102 Va. 37; *Lipscomb v. Condon*, 56 W. Va. 416, 107 Am. St. Rep. 832.

8. *Irregularity in Transfer.* — *People's Home Sav. Bank v. Rickard*, 139 Cal. 285.

895. 3. *Subscribers Not Ipso Facto Stockholders.* — *Heinberg v. Thompson*, (Fla. 1904) 37 So. Rep. 71.

899. 10. *Vested Rights of Stockholder.* — See *In re Welsbach Incandescent Gas Light Co.*, (1904) 1 Ch. 87.

11. *Title in Corporation and Not in Stockholders* — *Cummings v. People*, 211 Ill. 392; *De Koven v. Alsop*, 205 Ill. 309.

Owner of All Stock Not Owner of Corporate Property. — *Louisville v. McArteer*, (Ky. 1904) 81 S. W. Rep. 698.

Stockholder Has No Right to Possession as Against President. — *Oudin*, etc., *Fire Clay Min.*, etc., *Co. v. Conlan*, 34 Wash. 216.

900. 2. *Robertson v. Bucklen*, 107 Ill. App. 369.

3. *Profits.* — *Knapp v. S. Jarvis Adams Co.*, (C. C. A.) 135 Fed. Rep. 1008; *Stevens v. U. S. Steel Corp.*, (N. J. 1905) 59 Atl. Rep. 905.

7. *No Fiduciary Relation Between Stockholders Inter Se.* — *Middleton v. Arasterville Min. Co.*, 146 Cal. 219; *Bramblet v. Commonwealth Land*, etc., *Co.*, (Ky. 1904) 83 S. W. Rep. 599.

8. *Relation Between Majority and Minority.* — *Robertson v. Bucklen*, 107 Ill. App. 369; *Crichton v. Webb Press Co.*, 113 La. 167, 104 Am. St. Rep. 500; *O'Connor v. Virginia Pass*, etc., *Co.*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 530.

9. *No Fiduciary Relation Between Corporation and Stockholder.* — *Stratton's Independence v. Dines*, (C. C. A.) 135 Fed. Rep. 449.

901. 1. *Corporation Distinct Legal Entity.* — *Mandeville v. Courtwright*, 126 Fed. Rep. 1007; *Ulmer v. Lime Rock R. Co.*, 98 Me. 579.

4. *Stockholders Cannot Act for Corporation.* — *Kennedy v. Monarch Mfg. Co.*, 123 Iowa 344; *Breathitt Coal*, etc., *Co. v. Gregory*, (Ky. 1904) 78 S. W. Rep. 148; *Crichton v. Webb Press Co.*, 113 La. 167, 104 Am. St. Rep. 500; *Ulmer v. Lime Rock R. Co.*, 98 Me. 579.

5. *Disregarding Fiction of Corporate Entity.* — *Breslin v. Fries-Breslin Co.*, 70 N. J. L. 274. 7. *Willius v. Mann*, 91 Minn. 494.

902. 1. *Verner v. Simpson*, 68 S. Car. 459, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 902.

904. XI. SUBSCRIPTION TO STOCK — 2. Creation of Contract — a. FORM OF SUBSCRIPTION — (1) Any Form Showing Intent to Subscribe Sufficient — (g) Authority to Agent to Subscribe. — See note 4.

(i) Inference from Acquiescence. — See note 6.

905. (k) Indefinite Agreement. — See note 2.

b. NECESSITY OF WRITING. — See note 9.

908. g. WITHDRAWAL OF SUBSCRIPTION — In the United States. — See note 4.

910. 4. Consideration — b. WHAT CONSTITUTES VALID AND SUFFICIENT CONSIDERATION — (1) Mutual Promises of Subscribers. — See note 2.

912. 5. Conditional Subscriptions — c. PERFORMANCE — (2) When Performance Excused. — See note 3.

7. Liability of Subscriber — a. IN GENERAL. — See note 11.

914. e. AGREEMENT THAT ONLY PORTION SHALL BE PAID IN. — See notes 1, 2.

i. WHAT LAW GOVERNS LIABILITY. — See note 7.

8. Calls — a. DEFINITIONS AND DISTINCTIONS. — See note 8.

915. See note 2.

b. NECESSITY FOR CALLS — (1) In General. — See note 3.

c. WHO MAY LEVY CALLS — (1) Directors — (a) Power in General. —

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916. (e) Extent of Power. — See note 9.

920. e. REQUISITES AND VALIDITY — (7) Waiver of Irregularities. — See note 2.

921. g. MATURITY. — See note 12.

922. j. EFFECT OF TRANSFER OF STOCK ON LIABILITY FOR CALL — (1) As Between Corporation and Stockholder. — See notes 11, 14.

923. Reliance upon Information from Corporation that Stock Paid Up. — See note 1.

904. 4. Subscription beyond Power of Agent Not Binding. — Ottawa Dairy Co. v. Sorley, 34 Can. Sup. Ct. 508.

6. Inference from Acquiescence. — Clevenger v. Moore, 71 N. J. L. 148, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 904.

905. 2. Indefinite Agreement. — Woods Motor Vehicle Co. v. Brady, 181 N. Y. 145, reversing 90 N. Y. App. Div. 610.

9. Signature Not Necessary. — Kentucky Mut. Invest. Co. v. Schaefer, (Ky. 1905) 85 S. W. Rep. 1098.

908. 4. No Withdrawal After Acceptance. — Cotter v. Butte, etc., Smelting Co., 31 Mont. 129.

910. 2. Mutual Promises of Subscribers. — See Curry v. Kentucky Western R. Co., (Ky. 1904) 78 S. W. Rep. 435.

912. 3. Performance May Be Waived by Subscriber. — Wyman v. Bowman, (C. C. A.) 127 Fed. Rep. 257.

11. Burden of Proof on Corporation to Show Amount Subscribed. — Ables v. Terrell University School, (Tex. Civ. App. 1905) 85 S. W. Rep. 1010.

914. 1. Agreement that Only Portion Shall Be Paid In. — See Union Sav. Bank v. Leiter, 145 Cal. 696.

2. Great Western Min., etc., Co. v. Harris, (C. C. A.) 128 Fed. Rep. 321.

7. Law of Corporation's Domicil Governs. — Gause v. Commonwealth Trust Co., (Supm. Ct. Spec. T.) 44. Misc. (N. Y.) 46, reversed on other points 100 N. Y. App. Div. 427; Pittsburgh First Nat. Bank v. Darlington, 25 Pa. Super. Ct. 438.

8. See Risdon Iron, etc., Works v. Furness, (1905) 1 K. B. 304.

915. 2. Meaning of Term "Call." — Campbell v. American Alkali Co., (C. C. A.) 125 Fed. Rep. 207.

3. Calls Necessary. — See Bennett v. Thorne, 36 Wash. 253.

13. Statutory Power of Directors of Insolvent Corporation Prevails Against By-law Confining Power to Stockholders. — Union Sav. Bank v. Leiter, 145 Cal. 696.

916. 9. Validity of Assessment Cannot Be Questioned Collaterally. — Clevenger v. Moore, 71 N. J. L. 148.

920. 2. Irregularities May Be Waived. — Graebner v. Post, 119 Wis. 392, 100 Am. St. Rep. 890.

921. 12. Maturity. — See Campbell v. American Alkali Co., (C. C. A.) 125 Fed. Rep. 207, holding that where a resolution was passed to take effect at a subsequent date the later date was that of the call.

922. 11. Original Subscriber Liable. — Brown v. Morton, 71 N. J. L. 26.

Transferrer Liable for Calls Made Before but Payable After Assignment. — Campbell v. American Alkali Co., (C. C. A.) 125 Fed. Rep. 207.

A Transfer to an Insolvent Person, for the purpose of escaping liability, does not relieve the stockholder. Peoples' Home Sav. Bank v. Rickard, 130 Cal. 285.

14. Issuance of Stock. — See Bean v. American Alkali Co., (C. C. A.) 134 Fed. Rep. 57; American Alkali Co. v. Kurtz, 134 Fed. Rep. 663.

923. 1. Transferee Liable if He Has Knowl-

925. 10. *Payment.* — *a.* MUST BE IN MONEY OR EQUIVALENT. — See note 8.

926. *d.* PRESUMPTION OF PAYMENT. — See note 2.

11. *Actions and Remedies* — *a.* ACTION FOR AMOUNT DUE — (1) *Right of Action.* — See note 3.

(3) *By Whom Action Brought* — (b) *Receivers, Assignees, or Trustees.* — See note 14.

927. See note 2.

(4) *Separate Actions Against Subscribers.* — See note 5.

928. *b.* FORFEITURE — (1) *Nature, Origin, and Authority* — (c) *Remedy Cumulative.* — See note 3.

929. (2) *How Power to Forfeit Stock Exercised* — (a) *Compliance with Statutory Requirements.* — See note 1.

933. 12. *Defenses in Actions on Subscriptions* — *b.* PARTICULAR DEFENSES CONSIDERED — (5) *Change in Corporate Design.* — See note 8.

934. (6) *Nonperformance of Conditions.* — See note 1.

(7) *Capital Stock Not Fully Subscribed* — (a) *General Rule.* — See note 2.

935. (b) *Modification or Abrogation of Rule.* — See note 4.

936. (c) *What Subscriptions May Be Counted.* — See note 2.

938. (9) *Fraud in Procuring Subscription.* — See note 1.

(12) *Mismanagement.* — See note 10.

939. (13) *Release* — (b) *What Amounts to Release* — *Validity.* — See note 2.

940. (14) *Set-off and Counterclaim.* — See note 1.

(16) *Payment.* — See note 6.

941. (30) *Statute of Limitations* — (b) *Time from Which Statute Runs* — *In the Case of a Call by Directors.* — See note 10.

edge that Stock Not Paid Up. — *Campbell v. McPhee*, 36 Wash. 593.

925. 8. *Payment Must Be in Money or Equivalent.* — *Turner v. Cowan*, 34 Can. Sup. Ct. 160.

Promissory Note Secured by Paid-up Policy Sufficient. — *Clarke v. Lexington Stove Works*, (Ky. 1903) 72 S. W. Rep. 286.

926. 2. *Presumption of Payment.* — *Merrill v. Timbrell*, 123 Iowa 375.

3. *Right of Action.* — See *Carter v. Samuel Hano Co.*, 72 N. H. 549.

14. *Receivers.* — *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257.

927. 2. *Trustees.* — *Commercial Bank v. Warthen*, 119 Ga. 990; *Allen v. Grant*, 122 Ga. 552.

Trustee May Bring Action at Law on Call Made by Court. — *Clevenger v. Moore*, 71 N. J. L. 148.

5. *Separate Actions.* — *People's Nat. Bank v. Saville*, 25 App. Cas. (D. C.) 139.

Bill in Equity to Avoid Multiplicity of Suits. — *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257.

928. 3. *Remedy Cumulative.* — *Campbell v. American Alkali Co.*, (C. C. A.) 125 Fed. Rep. 207.

929. 1. *Statutory Requirements Must Be Complied With.* — *Corcoran v. Sonora Min.*, etc., Co., 8 Idaho 651.

933. 8. *Material Changes Release Subscriber.* — *Woods Motor Vehicle Co. v. Brady*, 181 N. Y. 145.

934. 1. *Failure to Perform Collateral Condition No Defense.* — *Pacific Mill Co. v. Inman*, (Oregon 1905) 80 Pac. Rep. 424.

2. *Full Capital Stock Must Be Subscribed.* — See

Audenried v. East Coast Milling Co., (N. J. 1904) 59 Atl. Rep. 577.

Express Agreement. — *Indiana State Bank v. Cook*, 125 Iowa 111.

935. 4. *Subscription to Limit Fixed Necessary.* — *Finance, etc., v. Canadian Produce Corp.*, (1905) 1 Ch. 37.

936. 2. *Waiver of Defense by Failure to Object to Subscription.* — *Pacific Mill Co. v. Inman*, (Oregon 1905) 80 Pac. Rep. 424.

938. 1. *Fraud or False Representations Good Defense.* — *American Alkali Co. v. Salom*, (C. C. A.) 131 Fed. Rep. 46; *Indiana State Bank v. Cook*, 125 Iowa 111; *Indiana State Bank v. Mentzer*, 125 Iowa 101.

False Representations After Subscription Made No Defense. — *Reed v. Gold*, 102 Va. 37.

No Obligation on Subscriber to Inquire as to Falsity of Representations. — *American Alkali Co. v. Salom*, (C. C. A.) 131 Fed. Rep. 46.

10. *Mismanagement.* — *Pacific Mill Co. v. Inman*, (Oregon 1905) 80 Pac. Rep. 424.

939. 2. *Cancellation by Unanimous Consent of Stockholders Valid if No Corporate Debts.* — *Scottish Security Co. v. Starks*, 117 Ky. 609.

940. 1. *Set-off Allowed in Action by Receiver.* — *Graebner v. Post*, 119 Wis. 392, 100 Am. St. Rep. 890.

6. *Payment to Creditors under a judgment obtained against the stockholder under a statute imposing liability for corporate debts is not a payment on the capital stock.* *Union Sav. Bank v. Leiter*, 145 Cal. 696.

941. 10. *Time When Payment Due.* — *Union Sav. Bank v. Leiter*, 145 Cal. 696. See also *Weed v. Gainesville, etc.*, R. Co., 119 Ga. 576. *Statute Runs from Time When Payment Due*

943. 13. Rescission of Contract — *a.* FOR FRAUD OR FALSE REPRESENTATIONS. — See note 11.

944. *b.* FRAUDULENT INTENT. — See note 2.

d. DAMAGE. — See note 4.

e. SUBSCRIBER MUST ACT PROMPTLY. — See note 6.

945. *h.* INSOLVENCY OF CORPORATION. — See note 1.

946. XII. RIGHTS, POWERS, AND PREROGATIVES OF STOCKHOLDERS IN GENERAL — 1. General Rights — Rights of Preferred Stockholders. — See note 6.

2. Rights as Regards Corporate Property. — See notes 7, 8.

947. 4. Rights as Creditors of Corporation. — See note 4.

5. Sharing in Distribution of New Stock — *a.* IN GENERAL. — See note 7.

949. *c.* WHO MAY EXERCISE RIGHT — Right as Between Life-tenant and Remainderman. — See note 5.

d. WAIVER OF RIGHT. — See note 6.

951. 8. Right to Inspect Corporate Books and Records — *a.* INSPECTION COMMON-LAW AND STATUTORY RIGHT. — See note 4.

955. *h.* REMEDIES FOR DENIAL OF RIGHT — (1) *Mandamus* — (a) In General. — See note 3.

956. (c) Conditions Precedent. — See note 4.

(3) *Remedies in Equity.* — See note 10.

957. 10. Right to Contract with Corporation. — See note 8.

958. 11. Right to Enter into Business Competition with Corporation. — See note 1.

13. No Right to Deny Existence of Corporation. — See note 4.

by Terms of Contract. — *Williams v. Taylor*, 99 Md. 306; *Williams v. Matthews*, 103 Va. 180.

943. 11. Right to Rescind. — *Manning v. Berdan*, 135 Fed. Rep. 159; *Hubbard v. International Mercantile Agency*, (N. J. 1904) 59 Atl. Rep. 24; *Mack v. Latta*, 178 N. Y. 525; *Mulholland v. Washington Match Co.*, 35 Wash. 315.

944. 2. Finance, etc., *v.* Canadian Produce Corp., (1905) 1 Ch. 37 (under the English Corporations Act, 1900).

Mere Puffer's Talk Not Sufficient. — *Smith v. Lewisport Bank*, (Ky. 1905) 85 S. W. Rep. 219; *German Nat. Bank v. Nagel*, (Ky. 1904) 82 S. W. Rep. 433.

4. Damage. — *Contra*, *Stern v. Kirby Lumber Co.*, 134 Fed. Rep. 509.

6. Subscriber Must Act Promptly. — See *Smith v. Lewisport Bank*, (Ky. 1905) 85 S. W. Rep. 219.

Reasonable Time Allowed After Discovery of Fraud. — *Mulholland v. Washington Match Co.*, 35 Wash. 315.

945. 1. Insolvency of Corporation. — *Kentucky Mut. Invest. Co. v. Schaefer*, (Ky. 1905) 85 S. W. Rep. 1098.

946. 6. Preferred Stockholder May Waive Rights and Make His Stock Common Stock. — *Pendleton v. Harris-Emery Co.*, 124 Iowa 361.

7. Corporate Property Not Property of Stockholders. — *Cummings v. People*, 211 Ill. 392, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 946; *De Koven v. Alsop*, 205 Ill. 309.

8. No Right to Take Corporate Property for Private Purposes. — *Cummings v. People*, 211 Ill. 392, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 946.

947. 4. Stockholders May Become Creditors of Corporation. — *Bramblet v. Commonwealth Land, etc., Co.*, (Ky. 1904) 83 S. W. Rep. 599.

Stockholders of Insolvent Corporation May Bring in Claims. — *Covington Stone, etc., Co. v. Rosedale Electric Light Jockey Club*, (Ky. 1903) 76 S. W. Rep. 506.

7. Limitation of Doctrine. — The stockholder has no pre-emptive right to take at par new stock which the corporation has voted to sell to an outsider at a price four and one-half times the par value. *Stokes v. Continental Trust Co.*, 99 N. Y. App. Div. 377.

Stockholders Having Right Cannot Raise Objection that Some One Else Has Not Such Right. — *Weidenfeld v. Northern Pac. R. Co.*, (C. C. A.) 129 Fed. Rep. 305.

949. 5. Proceeds of Sale of Right Treated as Capital. — *De Koven v. Alsop*, 205 Ill. 309. And see the title **DIVIDENDS**, 718. 1 *et seq.*

6. Stockholder May Waive Right. — *Hoyt v. Shenango Valley Steel Co.*, 207 Pa. St. 208.

951. 4. Right Further Secured by Statute. — *Bay State Gas Co. v. State*, 4 Penn. (Del.) 238.

955. 3. Right of Inspection Enforceable by Mandamus. — See *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. Rep. 280.

956. 4. Long Continued Closure of Office Excuses Demand. — *Bay State Gas Co. v. State*, 4 Penn. (Del.) 238.

10. Statutory Jurisdiction of Court of Chancery in New Jersey. — *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. Rep. 280.

957. 8. Stockholder May Contract with Corporation. — *Bramblet v. Commonwealth Land, etc., Co.*, (Ky. 1904) 83 S. W. Rep. 599.

958. 1. Rights after Severance of Connection with Corporation. — See *Dodge Stationery Co. v. Dodge*, 145 Cal. 380.

4. No Right to Deny Existence of Corporation. — *Tanner v. Nichols*, (Ky. 1904) 80 S. W. Rep.

959. XIII. RIGHTS AND REMEDIES OF MINORITY STOCKHOLDERS — 1. In General — *a.* NO GROUND FOR COMPLAINT WHERE ACT NOT ULTRA VIRES, ILLEGAL, OR FRAUDULENT. — See note 4.

960. *b.* MAJORITY ENTITLED TO CONTROL AS AGAINST MINORITY. — See note 4.

961. *c.* DUTY OF MAJORITY TOWARDS MINORITY. — See notes 2, 4.

2. Rights as Regards Ultra Vires or Illegal Acts — *a.* IN GENERAL. — See note 6.

963. 3. Right to Relief Against Fraud — *a.* IN GENERAL. — See note 5.

c. EXCESSIVE SALARIES VOTED OR PAID. — See note 8.

964. *d.* ONE CORPORATION WRECKED IN INTERESTS OF ANOTHER. — See note 1.

4. Right to Disaffirm Voidable Contracts — Contracts with Directors. — See note 5.

965. 5. Rights as Regards Purchase or Sale of Property by Corporation — *b.* PURCHASE FROM STOCKHOLDERS OR DIRECTORS. — See note 5.

d. SALE OF ALL CORPORATE PROPERTY AND ASSETS. — See notes 8, 9.

966. *e.* SALE TO MAJORITY STOCKHOLDERS OR DIRECTORS. — See notes 5, 6.

968. 10. Right to Compel or Restrain Declaration of Dividends. — See notes 6, 8.

969. 14. Right to Accounting. — See note 5.

15. Right to Have Receiver Appointed. — See note 7.

970. 16. Right to Have Corporation Dissolved and Business Wound Up. — See note 1.

18. No Right to Sue in Own Behalf on Corporate Cause of Action. — See note 4.

225. See also the title DE FACTO CORPORATIONS, **764. 1 et seq.**

959. 4. Courts Not Inclined to Interfere at Suit of Minority. — Ainsworth *v.* Evans, (Ariz. 1905) 80 Pac. Rep. 344; Robertson *v.* Bucklen, 107 Ill. App. 369.

960. 4. Implied Contract to Submit to Will of Majority. — Hinckley *v.* Schwarzschild, etc., Co., (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 176, affirmed 107 N. Y. App. Div. 470.

961. 2. Majority Owe Duty of Good Faith to Minority. — O'Connor *v.* Virginia Pass., etc., Co., (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 530.

4. Robertson *v.* Bucklen, 107 Ill. App. 369.

6. Minority Entitled to Restrain Ultra Vires Acts in General. — See Fletcher *v.* Alpena Circuit Judge, 136 Mich. 511.

963. 5. Fraud by Majority Stockholders. — See Robertson *v.* Bucklen, 107 Ill. App. 369.

8. Excessive Salaries. — Crichton *v.* Webb Press Co., 113 La. 167, 104 Am. St. Rep. 500. See also Hayes *v.* Pierson, 65 N. J. Eq. 353.

964. 1. Corporation Wrecked by Majority Stockholders. — O'Connor *v.* Virginia Pass., etc., Co., (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 530.

5. Contracts Between Corporations Having Common Directors. — Continental Ins. Co. *v.* New York, etc., R. Co., 103 N. Y. App. Div. 282. See also Pierce *v.* Old Dominion Copper Min., etc., Co., 67 N. J. Eq. 399.

Fraudulent Contract Avoided. — Jacobs *v.* Mexican Sugar Refining Co., 104 N. Y. App. Div. 242.

965. 5. Sale Not Set Aside in Absence of

Fraud. — Garretson *v.* Pacific Crude Oil Co., 146 Cal. 184; Polhemus *v.* Polhemus, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 141.

8. Minority Entitled to Prevent Ultra Vires Sale of All Corporate Property. — McLeod *v.* Lincoln Medical College, (Neb. 1904) 98 N. W. Rep. 672.

9. Corporation Insolvent or in Failing Circumstances. — Hinds County *v.* Natchez, etc., R. Co., 85 Miss. 599, 107 Am. St. Rep. 258.

966. 5. Fraudulent Sale to Majority Set Aside. — See Robertson *v.* Bucklen, 107 Ill. App. 369.

6. Fraudulent Sale to Director. — Hinds *v.* Fishkill, etc., Equitable Gas Co., 96 N. Y. App. Div. 14.

968. 6. When Declaration of Dividend Will Not Be Ordered. — Knapp *v.* S. Jarvis Adams Co., (C. C. A.) 135 Fed. Rep. 1008; Robertson *v.* Bucklen, 107 Ill. App. 369; Stevens *v.* U. S. Steel Corp., (N. J. 1905) 59 Atl. Rep. 905.

8. When Declaration of Dividend Will Be Ordered. — Crichton *v.* Webb Press Co., 113 La. 167, 104 Am. St. Rep. 500.

969. 5. Right to Accounting from Another Corporation Holding Position of Majority Stockholder. — Anderson *v.* Dyer, 94 Minn. 30.

7. When Receiver Will Be Appointed at Suit of Minority Stockholder. — Chandler Mortg. Co. *v.* Loring, 113 Ill. App. 423.

970. 1. No Right to Dissolution if Corporation Benefits from Alleged Mismanagement. — Bixler *v.* Summerfield, 210 Ill. 66.

4. Not Entitled to Sue in Own Behalf on Corporate Cause of Action. — Converse *v.* United Shoe Machinery Co., 185 Mass. 422.

971. 19. Right to Sue or Defend on Behalf of Corporation — *a.* IN GENERAL. — See note 3.

972. Where Corporation Itself Has No Cause of Action. — See note 3.

b. NATURE OF STOCKHOLDERS' SUITS. — See notes 5, 6.

973. Necessity to Sue on Behalf of All Stockholders. — See note 2.

d. WHEN STOCKHOLDER MAY SUE — (1) *General Grounds of Action.* — See notes 6, 7.

974. See note 1.

Injury to Corporation or Stockholders. — See note 4.

975. (2) *Specific Grounds of Action.* — See note 6.

976. *e.* WHEN ALLOWED TO DEFEND. — See note 1.

f. DEMAND AND REFUSAL OF CORPORATE ACTION AS CONDITION

PRECEDENT — (1) *In General.* — See note 5.

977. See note 1.

978. (3) *Excuses for Failure to Make Demand.* — See notes 8, 9.

980. (4) *Suits in Federal Courts under Ninety-fourth Equity Rule* — (b) *When Rule Does Not Apply.* — See note 2.

(c) *Stockholder Required to Show Merits in Addition to Compliance with Rule.* — See note 6.

971. 3. Stockholder Entitled to Sue in Exceptional Cases When Corporation Has Refused. — *Whitney v. Hazzard*, (S. Dak. 1904) 101 N. W. Rep. 346; *McCampbell v. Fountain Head R. Co.*, 111 Tenn. 55, 102 Am. St. Rep. 731. See also *Kavanaugh v. Commonwealth Trust Co.*, 181 N. Y. 121, *affirming* 99 N. Y. App. Div. 620, 103 N. Y. App. Div. 95, which *affirmed* (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 295.

Counsel Fees Allowed to Successful Minority Stockholder. — *Louisville Bridge Co. v. Dodd*, (Ky. 1905) 85 S. W. Rep. 683; *Forrester v. Boston, etc., Consol. Copper, etc., Min. Co.*, 29 Mont. 397.

972. 3. Where Corporation Itself Has No Cause of Action. — *Hutchinson v. Simpson*, 92 N. Y. App. Div. 382.

Suit Not Allowed in Name of Corporation if Remedily Personal to Stockholder. — *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184.

5. Corporation Beneficial Plaintiff though Joined as Defendant. — *McConnell v. Combination Min., etc., Co.*, 30 Mont. 239, 104 Am. St. Rep. 703; *Forrester v. Boston, etc., Consol. Copper, etc., Min. Co.*, 29 Mont. 397.

6. Corporation Entitled to Benefit of Relief Granted. — *Barry v. Moeller*, (N. J. 1904) 59 Atl. Rep. 97.

973. 2. When Necessary to Sue on Behalf of All Stockholders. — *Louisville Bridge Co. v. Dodd*, (Ky. 1905) 85 S. W. Rep. 683.

6. Ultra Vires Acts. — See *Fletcher v. Alpena Circuit Judge*, 136 Mich. 511.

7. Fraud of Directors Injurious to Corporation and Shareholders. — See *Ainsworth v. Evans*, (Ariz. 1905) 80 Pac. Rep. 344.

974. 1. Directors Acting in Own Interests to Prejudice of Corporation. — *Louisville Bridge Co. v. Dodd*, (Ky. 1905) 85 S. W. Rep. 683. See also *Punt v. Symons*, (1903) 2 Ch. 506.

4. Injury to Corporation or Stockholders Must Be Shown. — *Fletcher v. Alpena Circuit Judge*, 136 Mich. 511; *MacGinniss v. Boston, etc., Consol. Copper, etc., Min. Co.*, 29 Mont. 428.

975. 6. One Corporation Wrecked in Interest of Another. — *O'Connor v. Virginia Pass., etc.,*

Co., (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 530; *Jacobs v. Mexican Sugar Refining Co.*, 104 N. Y. App. Div. 242.

976. 1. When Allowed to Defend. — *Dimock v. Central Rawdon Min. Co.*, 36 Nova Scotia 337.

5. Demand for Corporate Action Condition Precedent. — *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. Rep. 280; *O'Connor v. Virginia Pass., etc., Co.*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 228, *affirmed* 107 N. Y. App. Div. 630.

977. 1. Refusal of Corporate Action Condition Precedent. — *Doherty v. Mercantile Trust Co.*, 184 Mass. 590; *O'Connor v. Virginia Pass., etc., Co.*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 228, *affirmed* 107 N. Y. App. Div. 630; *Bowne v. Smith*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 575.

Mere Neglect Not Sufficient. — *Kavanaugh v. Commonwealth Trust Co.*, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 295, *affirmed* 103 N. Y. App. Div. 95, 181 N. Y. 121.

978. 8. Demand Excused Where Wrongdoers Are Still in Control of Corporation. — *Kern v. Arbeiter Unterstuetzungs Verein*, (Mich. 1905) 102 N. W. Rep. 746; *McConnell v. Combination Min., etc., Co.*, 30 Mont. 239, 104 Am. St. Rep. 703; *Barry v. Moeller*, (N. J. 1904) 59 Atl. Rep. 97; *Polhemus v. Polhemus*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 141; *Loewenstein v. Diamond Soda Water Mfg. Co.*, 94 N. Y. App. Div. 383; *McCampbell v. Fountain Head R. Co.*, 111 Tenn. 55, 102 Am. St. Rep. 731.

9. Directors under Control of Wrongdoers. — *Montgomery Traction Co. v. Harmon*, 140 Ala. 505; *O'Connor v. Virginia Pass., etc., Co.*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 530.

Not Sufficient Merely that Defendant Elected Directors. — *Bowne v. Smith*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 575.

980. 2. Rule Not Applicable to Suit Removed to Federal Court. — *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. Rep. 280.

6. Stockholder Required to Show Merits. — *Groel v. United Electric Co.*, 132 Fed. Rep. 252.

- 981.** (5) *What Demand Sufficient* — (a) *In General*. — See note 1.
 (b) *To Whom Addressed*. — See note 4.
 (6) *What Refusal Sufficient*. — See note 9.
- 982.** *g. WHO MAY SUE OR DEFEND* — (2) *Ownership of Stock at Time of Transaction Complained Of*. — See note 5.
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- 982.** 5. *Subsequent Stockholders Allowed to Sue or Defend*. — *O'Connor v. Virginia Pass.*, etc., Co., (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 530.
- 983.** 2. *Kessler v. Ensley Land Co.*, 129 Fed. Rep. 397.
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- 984.** 2. *Injury Must Be Shown*. — *Fletcher v. Alpena Circuit Judge*, 136 Mich. 511; *MacGinniss v. Boston*, etc., Consol. Copper, etc., Min. Co., 29 Mont. 428.
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- 985.** 2. *Waiver of Rights by Laches*. — *Edwards v. Mercantile Trust Co.*, 124 Fed. Rep. 381.
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- 988.** 10. *After Failure of Stated Meeting Minority Cannot Call New Meeting and Hold Election*. — *Haskell v. Read*, 68 Neb. 115.
- 993.** 6. *A Notice of Two Meetings*, the holding of the second to be contingent on a particular action at the first, has been held to be valid. *In re North of England Steamship Co.*, (1905) 2 Ch. 15.
- 996.** 1. *Business at Special Meetings*. — *United Gold, etc., Mines Co. v. Smith*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 567.
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- 997.** 4. *Transferee May Vote if Company Wrongfully Refuses to Make Transfer*. — *Noller v. Wright*, 138 Mich. 416.
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- 1003.** (2) *Manner of Voting*—(c) *By Heads or by Shares*.—See note 9.
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- 1008.** XV. *LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS*—1. *Nature and Extent*—a. *EQUITABLE LIABILITY*—(2) *Application of Doctrine*—(a) *Liability of Stockholders for Unpaid Subscription*—aa. *IN GENERAL*.—See note 1.
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1003. 9. The Iowa Statute (Code Iowa, § 1900) provides that no person shall vote more than ten per cent. of the outstanding shares. *McKee v. Home Sav., etc., Co.*, 122 Iowa 731.

1004. 7. Acts of Majority of Quorum Binding on Corporation.—*Darrin v. Hoff*, 99 Md. 491.

1006. 7. Contra if Corporate Meetings and Defendant Within Jurisdiction.—*Harper v. Smith*, 93 N. Y. App. Div. 608.

1007. 3. No Power to Appoint Master unless Decree Exists Ordering Election.—*Yetter v. Delaware Valley R. Co.*, 206 Pa. St. 485.

1008. 1. Liability for Unpaid Subscriptions.—*Union Sav. Bank v. Leiter*, 145 Cal. 696; *Allen v. Grant*, 122 Ga. 552; *Calef v. Wyandotte Realty Co.*, 70 Kan. 318; *Eastern Nat. Bank v. American Brick, etc., Co.*, (N. J. 1905) 60 Atl. Rep. 54. See also *Smathers v. Western Carolina Bank*, 135 N. Car. 410; *Macbeth v. Banfield*, 45 Oregon 553, 106 Am. St. Rep. 670.

Stockholder Is Merely Debtor and Not Trustee.—*Parmelee v. Price*, 208 Ill. 544.

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1011. 1. Validity as to Subsequent Creditors.—See *Scottish Security Co. v. Starks*, 117 Ky. 609.

7. *Defenses—Fraudulent Representations*.—*Tanner v. Nichols*, (Ky. 1904) 80 S. W. Rep. 225.

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1012. 5. *Anglo-American Land, etc., Co. v. Lombard*, (C. C. A.) 132 Fed. Rep. 721.

1013. 1. *Valuation Made in Good Faith*.—*McBride v. Farrington*, 131 Fed. Rep. 797; *Taylor v. Cummings*, (C. C. A.) 127 Fed. Rep. 108;

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2. *Property Knowingly Overvalued*.—*Allen v. Grant*, 122 Ga. 552; *Garden City Sand Co. v. American Refuse Crematory Co.*, 205 Ill. 42; *Easton Nat. Bank v. American Brick, etc., Co.*, (N. J. 1905) 60 Atl. Rep. 54; *Flour City Nat. Bank v. Shire*, 88 N. Y. App. Div. 401, *affirmed* 179 N. Y. 587.

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1014. 3. *Overvaluation of Services Rendered*.—*Clevenger v. Moore*, 71 N. J. L. 148.

1015. 3. *Payment of Cash Dividends Out of Capital*.—See *Great Western Min., etc., Co. v. Harris*, (C. C. A.) 128 Fed. Rep. 321, and see the title *DIVIDENDS*, 701, 5 *et seq.*

4. *Liability Measured by Unpaid Subscriptions*.—*Garden City Sand Co. v. American Refuse Crematory Co.*, 205 Ill. 42 (by statute); *Macbeth v. Banfield*, 45 Oregon 553, 106 Am. St. Rep. 670.

5. *Liability Several*.—*Garden City Sand Co. v. American Refuse Crematory Co.*, 205 Ill. 42.

1016. 3. *Knowledge that Stock Is Paid for in Property*.—*Easton Nat. Bank v. American Brick, etc., Co.*, (N. J. 1905) 60 Atl. Rep. 54.

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1017. 2. *Statutory Liability*.—*Brunswick Terminal Co. v. National Bank*, 192 U. S. 386; *Jones v. Goldtree Bros. Co.*, 142 Cal. 383; *Parmelee v. Price*, 208 Ill. 544; *Covington Stone, etc., Co. v. Rosedale Electric Light Jockey Club*, (Ky. 1903) 76 S. W. Rep. 506; *Hunt v. Whewell*, 122 Wis. 33.

1018. 5. *Statutory Provisions*.—*Heinberg v. Thompson*, (Fla. 1904) 37 So. Rep. 71.

1019. (c) Effect on Existing Relations — *aa.* IN GENERAL. — When Void as to Corporate Creditors. — See note 4.

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(3) Construction. — See note 11.

1020. (4) Nature of Statutory Liability — (a) Contractual or Penal. — See note 2.

(b) Joint or Several. — See note 3.

1021. (c) Primary or Secondary. — See notes 1, 2.

1022. (5) Extent of Liability — (b) Liability for Amount Equal to Subscription. — See note 1.

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1025. (d) Debts and Demands to Which Liability Extends — *bb.* CLAIMS EX DELICTO. — See note 1.

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1029. *cc.* PUBLISHING STATEMENT OF LIABILITIES. — See note 7.

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1032. 2. Who Are Liable — *a.* IN GENERAL. — See notes 1, 3.

c. PLEDGEE HOLDING STOCK AS COLLATERAL. — See note 10.

1033. See note 2.

1019. 4. Creditor's Rights Not Impaired by Repeal and Re-enactment — Knickerbocker Trust Co. v. Myers, 133 Fed. Rep. 764.

Rights of Creditors Not Affected by Amendment of General Law. — Lang v. Lutz, 180 N. Y. 254.

10. Statutes Affecting Remedy. — Robinson v. Brown, 126 Fed. Rep. 429.

11. Construction — Strict. — Brunswick Terminal Co. v. National Bank, 192 U. S. 386; Smathers v. Western Carolina Bank, 135 N. Car. 410.

1020. 2. Statutory Liability Contractual in Its Nature. — Knickerbocker Trust Co. v. Myers, 133 Fed. Rep. 764, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1020; Wyman v. Bowman, (C. C. A.) 127 Fed. Rep. 257; Heinberg v. Thompson, (Fla. 1904) 37 So. Rep. 71; Coulbourn v. Boulton, 100 Md. 350; Emanuel v. Barnard, (Neb. 1904) 99 N. W. Rep. 666; Smathers v. Western Carolina Bank, 135 N. Car. 410; King v. Cochran, 76 Vt. 141.

Liability to Creditors, Not to Corporation. — Anglo-American Land, etc., Co. v. Lombard, (C. C. A.) 132 Fed. Rep. 721.

3. Nature of Liability — Liability Held to Be Several. — Knickerbocker Trust Co. v. Myers, 133 Fed. Rep. 764; Anglo-American Land, etc., Co. v. Lombard, (C. C. A.) 132 Fed. Rep. 721; People's Nat. Bank v. Saville, 25 App. Cas. (D. C.) 139; Gamewell Fire Alarm Tel. Co. v. Fire, etc., Tel. Co., 116 Ky. 759; Lang v. Lutz, 180 N. Y. 254.

1021. 1. Liability Primary and Principal. — Knickerbocker Trust Co. v. Myers, 133 Fed. Rep. 764, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1021; Heinberg v. Thompson, (Fla. 1904) 37 So. Rep. 71; Parmelee v. Price, 208 Ill. 544; Stanwood v. Sterling Metal Co., 107 Ill. App. 569; Marshall-Wells Hardware Co. v. New Era Coal Co., 13 N. Dak. 396.

2. Liability Secondary and Collateral. — Miller v. Smith, 26 R. I. 146, 106 Am. St. Rep. 699.

1022. 1. Liable for Amount Equal to Subscription. — Gamewell Fire Alarm Tel. Co. v. Fire, etc., Tel. Co., 116 Ky. 759; Emanuel v. Barnard, (Neb. 1904) 99 N. W. Rep. 666.

3. Maryland Statute Providing for Double Liability. — See Murphy v. Wheatley, 100 Md. 358.

1025. 1. Stockholders Not Liable After Dis-solution for Prior Torts of Corporation. — Hudson v. Limestone Natural Gas Co., 132 Fed. Rep. 410.

1028. 1. Compare Hyatt v. Van Riper, 105 Mo. App. 664, as to the effect or failure to pay in the capital stock. See also *infra*, this title, **1029.** 11 *et seq.*

4. Effect Must Be Given to Clear and Unambiguous Term. — Heinberg v. Thompson, (Fla. 1904) 37 So. Rep. 71.

1029. 7. Failure to Publish Statement of Liabilities. — Emanuel v. Barnard, (Neb. 1904) 99 N. W. Rep. 666.

1030. 12. Failure to File Certificate of Pay-ment of Capital Stock. — Heinberg v. Thompson, (Fla. 1904) 37 So. Rep. 71.

Burden of Proof on Stockholder. — Lazard v. Phetteplace, 26 R. I. 568.

1031. 3. Stockholders Not Liable for Torts of Corporation Engaged in Unlawful Business. — Mandeville v. Courtwright, 126 Fed. Rep. 1007.

1032. 1. Corporate Stockholder Included. — Gamewell Fire Alarm Tel. Co. v. Fire, etc., Tel. Co., 116 Ky. 759.

3 Christopher v. Norwell, 201 U. S. 216, affirming 134 Fed. Rep. 842.

10. Pledgee Liable. — Hurlburt v. Arthur, 140 Cal. 103, 98 Am. St. Rep. 17.

1033. 2. Not Liable if Character Shown by Books. — See Hurlburt v. Arthur, 140 Cal. 103, 98 Am. St. Rep. 17.

1033. *d.* STOCK HELD IN FIDUCIARY CAPACITY — Equitable Owner Held Liable. — See note 8.

1034. *e.* SHOWING CHARACTER AS STOCKHOLDER — (2) *Sufficiency of Proof.* — See notes 3, 4.

1036. *f.* EFFECT OF TRANSFER — (1) *Liability of Transferrer* — (a) In General — Transfer to Escape Liability. — See note 1.

1037. (b) As Affected by Statute. — See notes 2, 3.

(2) *Liability of Transferee* — (a) In General. — See note 5.

1038. See note 1.

1039. (3) *Sufficiency of Transfer to Shift Liability.* — See notes 3, 4.

1040. See note 2.

1041. *g.* CORPORATIONS EXEMPTED FROM OPERATION OF STATUTE — Manufacturing Corporations. — See note 2.

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1044. **4. Mode of Enforcement** — *a.* ENFORCEMENT BY ACTION — (1) *In General* — Subscription Liability. — See notes 7, 8.

1045. Statutory Liability. — See note 1.

Where the Statute Prescribes the Remedy. — See note 2.

(2) *Necessity of Exhausting Remedy Against Corporation.* — See note 3.

1033. **8. Broker Purchasing Stock for Another Not Equitable Owner.** — Joecken *v.* Cuyahoga Sav., etc., Co., 24 Ohio Cir. Ct. 605.

1034. **3.** Clevenger *v.* Moore, 71 N. J. L. 148; Flour City Nat. Bank *v.* Shire, 88 N. Y. App. Div. 401, affirmed 179 N. Y. 587.

4. Payments on Stock Not Essential. — Reed *v.* Gold, 102 Va. 37.

1036. **1. Transfer to Escape Liability Voidable by Creditors.** — Anglo-American Land, etc., Co. *v.* Lombard, (C. C. A.) 132 Fed. Rep. 721.

Burden on Stockholder to Prove Second Transfer to Solvent Person. — People's Home Sav. Bank *v.* Rickard, 139 Cal. 285.

1037. **2. One Year Limitation After Transfer** — Minnesota Statute. — Hunt *v.* Doran, 92 Minn. 423.

3. Debts Incurred After Transfer. — Brunswick Terminal Co. *v.* National Bank, 192 U. S. 386.

5. Transferee Liable for Unpaid Amount. — Allen *v.* Grant, 122 Ga. 552.

1038. **1. Innocent Transferee Not Liable.** — Hess *v.* Trumbo, (Ky. 1905) 84 S. W. Rep. 1153; Easton Nat. Bank *v.* American Brick, etc., Co., (N. J. 1905) 60 Atl. Rep. 54.

1039. **3. Georgia Statute — Transfer Without Notice Does Not Release Liability.** — The statute does not apply to a case where the stock has been transferred before the creation of the debt. Brunswick Terminal Co. *v.* National Bank, 192 U. S. 386.

4. Registration Necessary to Release Liability. — Knickerbocker Trust Co. *v.* Myers, 133 Fed. Rep. 764, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1039.

1040. **2. When Failure to Register Excused.** — Hunt *v.* Seeger, 91 Minn. 264. And see *supra*, this title, 881. 7, 883. 4 *et seq.*

1041. **2. Similar Decision under Kentucky**

Statute. — Gamewell Fire Alarm Tel. Co. *v.* Fire, etc., Tel. Co., 116 Ky. 759.

True Test Is Whether Charter Could Be Fortified for Engaging in Unlawful Business. — Meen *v.* Pioneer, Pasteurizing Co., 90 Minn. 501.

7. Suit by Single Creditor. — Knickerbocker Trust Co. *v.* Myers, 133 Fed. Rep. 764, citing 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1041.

1042. **1. Suit for Benefit of All Creditors.** — Clark *v.* Knowles, 187 Mass. 35, 105 Am. St. Rep. 376; Emanuel *v.* Barnard, (Neb. 1904) 99 N. W. Rep. 666; Reed *v.* Burg, (Neb. 1901) 96 N. W. Rep. 414; Fremont Package Mfg. Co. *v.* Storey, (Neb. 1902) 96 N. W. Rep. 416; Matter of Ziegler, 98 N. Y. App. Div. 117; Miller *v.* Smith, 26 R. I. 146, 106 Am. St. Rep. 699. See also Marshall-Wells Hardware Co. *v.* New Era Coal Co., 13 N. Dak. 396.

5. After Appointment of Receiver. — See Smathers *v.* Western Carolina Bank, 135 N. Car. 410.

1043. **7. Claims of Stockholders Postponed to Claims of Other Creditors Where Fraud in Management Appears.** — Covington Stone, etc., Co. *v.* Rosedale Electric Light Jockey Club, (Ky. 1903) 76 S. W. Rep. 506.

1044. **7. Subscription Liability — Action at Law.** — Knickerbocker Trust Co. *v.* Myers, 133 Fed. Rep. 764.

8. Suit in Equity. — Reed *v.* Burg, (Neb. 1901) 96 N. W. Rep. 414.

1045. **1. Suit in Equity.** — Parmelee *v.* Price, 208 Ill. 544; Carter *v.* Samuel Hano Co., 72 N. H. 549.

2. Statutory Remedy Exclusive. — Murphy *v.* Wheatley, 100 Md. 358. See also Middleton Nat. Bank *v.* Toledo, etc., R. Co., 197 U. S. 394.

3. Remedy Against Corporation Must Be First Exhausted. — Emanuel *v.* Barnard, (Neb. 1904)

1047. See note 1.

(3) *Effect of Judgment Against Corporation on Stockholders.* — See notes 2, 3.

1048. 5. Limitations and Laches — *a.* WHEN STATUTE BEGINS — (1) *Necessity for Exhausting Remedy Against Corporation.* — See note 5.

1049. (2) *Circumstances Rendering Judgment and Execution Against Corporation Unnecessary.* — See note 4.

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(3) *Where Stockholder's Liability Is Primary.* — See note 10.

1050. *b.* PERIOD OF LIMITATION — (2) *What General Statute Applicable.* — See note 8.

1051. 6. Set-off of Debt of Corporation — *b.* AGAINST ADDITIONAL STATUTORY LIABILITY. — See note 5.

1052. 7. Contribution Between Stockholders. — See note 2.

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1047. 1. Stockholders Primarily Liable. — *Knickerbocker Trust Co. v. Myers*, 133 Fed. Rep. 764; *Parmelee v. Price*, 208 Ill. 544; *Marshall-Wells Hardware Co. v. New Era Coal Co.*, 13 N. Dak. 396.

2. Judgment Conclusive Against Stockholders. — *Robinson v. Brown*, 126 Fed. Rep. 429; *King v. Cochran*, 76 Vt. 141.

3. Stockholder Must Prove that Contract Was Ultra Vires to Escape Liability. — *Pittsburg First Nat. Bank v. Darlington*, 25 Pa. Super. Ct. 438.

1048. 5. Statute Begins from Return of Execution Against Corporation. — *Wyman v. Bowman*, (C. C. A.) 127 Fed. Rep. 257.

1049. 4. Insolvency of Corporation. — *Bennett v. Thorne*, 36 Wash. 253. See also *Anglo-American Land, etc., Co. v. Lombard*, (C. C. A.) 132 Fed. Rep. 721.

7. When Corporation Deemed Dissolved —

Kansas Statute. — *Jones v. Slonecker*, 66 Kan. 286; *McHale v. Moore*, 66 Kan. 267.

Indebtedness Must Be Absolute. — *Crissey v. Morrill*, (C. C. A.) 125 Fed. Rep. 878.

10. Stockholder's Liability Primary. — *Parmelee v. Price*, 208 Ill. 544. See also *Boor v. Tolman*, 113 Ill. App. 322.

1050. 8. Liabilities Created by Statute. — *Platt v. Wilmot*, 193 U. S. 602; *Jones v. Goldtree Bros. Co.*, 142 Cal. 383.

Creditor's Action Held to Be "Civil Action Not Otherwise Provided For." — *Parmelee v. Price*, 208 Ill. 544.

1051. 5. Stockholder May Not Set Off Debt. — *Robinson v. Brown*, 126 Fed. Rep. 429.

Equitable Set-off Not Allowed in Action at Law in Federal Court. — *Crissey v. Morrill*, (C. C. A.) 125 Fed. Rep. 878.

1052. 2. Contribution Between Stockholders. — *Hart v. Sickles*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 174. See also *Merrill v. Prescott*, 67 Kan. 767.

STOCKBROKERS.

By O. D. ESTEE.

1055. II. RELATION BETWEEN CLIENT AND BROKER — 2. Pledgor and Pledgee. — See note 8.

1057. V. PARTICULAR TRANSACTIONS CONSIDERED — 1. Purchases on Margin — *b.* OWNERSHIP OF STOCK. — See note 3.

1058. *c.* CUSTODY AND CONTROL OF STOCK. — See notes 4, 7, 8.

1059. *d.* CLOSING TRANSACTION — (3) *On Failure of Client to Furnish Margins.* — See notes 2, 5.

1055. 8. Pledgor and Pledgee. — *Rothschild v. Allen*, 90 N. Y. App. Div. 233, *affirmed* 180 N. Y. 561.

1057. 3. Client Is Owner of Stock Purchased on Margin. — *Rothschild v. Allen*, 90 N. Y. App. Div. 233, *affirmed* 180 N. Y. 561.

1058. 4. Broker May Pledge Shares Purchased. — *Rothschild v. Allen*, 90 N. Y. App. Div. 233, *affirmed* 180 N. Y. 561.

7. Broker May Not Pledge Stock for Amount Greater than His Lien. — *Rothschild v. Allen*, 90 N. Y. App. Div. 233, *affirmed* 180 N. Y. 561.

8. Conversion. — *Rothschild v. Allen*, 90 N. Y. App. Div. 233, *affirmed* 180 N. Y. 561.

1059. 2. Failure to Furnish Margin. — Where the margin deposited by a customer is exhausted the broker has the right to close the operation, and if he continues the transaction he acts at his own risk. *Morris v. Brault*, 23 Quebec Super. Ct. 190.

5. Notice of Time and Place of Sale Necessary. — *Rothschild v. Allen*, 90 N. Y. App. Div. 233, *affirmed* 180 N. Y. 561; *Blaine v. Thomas*, 193 N. Y. App. Div. 600.

- 1060.** *c.* LEGALITY OF TRANSACTION. — See note 1.
- 1061.** 3. Short Sales — *c.* CLOSING TRANSACTION — (2) *Right of Broker to Close Transaction* — (b) *On Failure of Margins.* — See note 4.
- 1062.** 4. Options — *b.* LEGALITY OF TRANSACTION. — See note 4.
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- 1066.** IX. RIGHTS AND LIABILITIES OF CLIENT — 3. Right Where Transactions Reported by Broker Are Fictitious. — See note 2.
- 1067.** X. USAGES AND CUSTOMS — 1. General Rule. — See note 2.
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- 1072.** XIII. BREACH OF CONTRACT AND MEASURE OF DAMAGES — 2. In Cases of Conversion. — See note 1.
- 1060.** 1. Purchase on Margin Not Gambling Contracts. — *Ling v. Malcom*, 77 Conn. 517.
- 1061.** 4. Reasonable Notice to Furnish Margins. — *Blaine v. Thomas*, 103 N. Y. App. Div. 600.
- 1062.** 4. Option Contracts Presumed to Be Valid. — *Wiggin v. Federal Stock, etc., Co.*, 77 Conn. 507.
- 1063.** 10. Broker May Not Act as Both Principal and Agent in Same Transaction. — *Evans v. Wrenn*, 93 N. Y. App. Div. 346, *affirmed* 181 N. Y. 566.
- 1066.** 2. Margins and Payments on Fictitious Transactions. — *Haight v. Haight, etc., Co.*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 501.
- 1067.** 2. Broker May Deal According to Usages and Customs of Exchange. — *Ling v. Malcom*, 77 Conn. 517.
5. A Custom to Accept Certain Stocks as Collateral Security, to meet a call for additional margin, has been held to be valid and to impose on the broker the duty of accepting them. *Ling v. Malcom*, 77 Conn. 517.
- 1072.** 1. Highest Value Within Reasonable Time After Conversion. — *Wiggin v. Federal Stock, etc., Co.*, 77 Conn. 507; *Ling v. Malcom*, 77 Conn. 517. See further the title TROVER AND CONVERSION, 719. 4 *et seq.*

STOPPAGE IN TRANSITU.

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- 1089.** III. ACCRUAL OF RIGHT — 4. Buyer Must Be Insolvent — *a.* IN GENERAL — Insolvency Basis of Right. — See note 3.
- 1091.** IV. TERMINATION OF RIGHT — 1. Delivery — *b.* NECESSITY OF DELIVERY — Mere Arrival at Destination. — See note 8.
- 1102.** *c.* SUFFICIENCY OF DELIVERY — (4) *Delivery to Persons Other than Buyer* — (b) *To Carrier or Middleman* — In General. — See note 5.
- 1108.** (g) *To Subpurchaser.* — See note 3.
2. *Subsale.* — See note 8.
- 1109.** 3. Transfer of Bill of Lading — *a.* IN GENERAL — Right of Stoppage Terminated. — See note 1.
- Necessity of Good Faith. — See note 6.
- 1111.** *b.* WHO ARE TRANSFEREES FOR VALUE WITHOUT NOTICE — (1) *For Value* — One to Whom the Bill Is Pledged. — See note 1.
4. Assignment by Buyer. — See note 11.
- 1113.** 6. Waiver — Attachment by Seller. — See note 11.
- 1089.** 3. Right of Stoppage Based on Insolvency of Buyer. — *Delta Bag Co. v. Kearns*, 112 Ill. App. 269.
- 1091.** 8. Right Not Terminated by Arrival of Goods at Destination. — *Delta Bag Co. v. Kearns*, 112 Ill. App. 269.
- 1102.** 5. Right Not Terminated by Delivery to Carrier. — *Delta Bag Co. v. Kearns*, 112 Ill. App. 269.
- 1108.** 3. *Williams v. Dotterer*, 111 La. 822.
8. *Subsale Without Indorsement and Delivery of Bill of Lading.* — *Delta Bag Co. v. Kearns*, 112 Ill. App. 269.
- 1109.** 1. Pledge of Bill of Lading. — *National Bank v. Baltimore, etc., R. Co.*, 99 Md. 661, 105 Am. St. Rep. 321.
6. *Fraudulent Transfer of Bill.* — *McGill v. Chilhowee Lumber Co.*, 111 Tenn. 552.
- 1111.** 1. Pledge of Bill as Security for Advancements — Transfer for Value. — *National Bank v. Baltimore, etc., R. Co.*, 99 Md. 661, 105 Am. St. Rep. 321.
11. *Buyer's Assignment for Creditors.* — *Delta Bag Co. v. Kearns*, 112 Ill. App. 269.
- 1113.** 11. Waiver by Attachment of Goods. — It has been held that the right of stoppage

1117. VI. EFFECT OF STOPPAGE — 1. Upon Rights of Parties — Sale Not Rescinded. — See note 17.

1120. STORE, STORING, STOREHOUSE, ETC. — See note 5.

1122. See note 2.

is not waived where the seller, in ignorance of an attempted resale of the goods by the buyer before delivery, has instituted an attachment suit against the buyer for the purchase price, without full knowledge of the fact that the buyer had refused to receive the goods and had not indorsed the bill of lading to the purchaser. *Delta Bag Co. v. Kearns*, 112 Ill. App. 269.

1117. 17. Sale Not Rescinded. — *McGill v. Chilhowee Lumber Co.*, 111 Tenn. 552.

1120. 5. Store and Storehouse Not Necessarily Synonymous. — *New Limerick v. Watson*, 98 Me. 379.

1122. 2. An Elevator may be a storehouse. *Adams County v. Kansas City, etc., R. Co.*, (Neb. 1904) 99 N. W. Rep. 245.

STORE ORDER ACTS.

1123. II. ENGLISH ACTS — Deductions Allowed. — See note 6.

1124. III. AMERICAN ACTS — 2. Such Acts Held Unconstitutional. — See note 8.

1126. 3. Such Acts Held Not Unconstitutional. — [The *South Carolina* statute prohibiting payment in anything other than lawful money or orders, etc., negotiable either for cash or goods, at the option of the holder, and excepting from its operation agricultural contracts, has been held not to be unconstitutional as denying the equal protection of laws.^{5a}]

1123. 6. Deduction of Lawful Debt Not Illegal. — *Williams v. North's Nav. Collieries*, (1904) 2 K. B. 44.

Repayment by the Workman to the Employer to Cover Insurance Premiums which the employer himself paid to cover his own liability in respect of accidents under the Workmen's Compensation Act has been held not to constitute

an offense against the Truck Act, 1831, § 3. *Owner v. Hooper*, 89 L. T. N. S. 130.

1124. 8. Such Acts Unconstitutional. — *Kellyville Coal Co. v. Harrier*, 207 Ill. 624; *State v. Missouri Tie, etc., Co.*, 181 Mo. 536; *Leach v. Missouri Tie, etc., Co.*, 111 Mo. App. 650.

1126. 5a. Johnson v. Spartan Mills, 68 S. Car. 339.

1. STREAM. — See note 2.

1. 2. Stream Includes Rivers and Smaller Watercourses. — Dodge County v. Saunders County, 70 Neb. 451.

STREET RAILWAYS.

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6. I. DEFINITION. — See notes 1, 5, 6, 7.

Whether Included in Term "Railroad" or "Railway." — See notes 13, 17.

7. See notes 2, 9a.

8. III. ACQUISITION OF FRANCHISE — 1. Necessity for Legislative Authorization. — See notes 3, 5, 9.

9. 2. Power of Government to Grant — a. IN GENERAL. — See notes 3, 4, 5.

11. b. CONSTITUTIONAL RESTRICTIONS — (2) *Consent of Corporate Authorities.* — See note 4.

12. (3) Consent of Abutting Owners. — See note 1.

13. c. IMPOSING CONDITIONS. — See note 2.

14. See notes 1, 6.

6. 1. Motive Power. — Mordhurst v. Ft. Wayne, etc., Traction Co., 163 Ind. 268, 106 Am. St. Rep. 222.

5. Rails. — Mordhurst v. Ft. Wayne, etc., Traction Co., 163 Ind. 268, 106 Am. St. Rep. 222.

6. An Interurban Electric Railroad is classed as a street railway by the statutes of Ohio. Cincinnati, etc., Electric St. R. Co. v. Lohe, 68 Ohio St. 101.

Interurban Railway and Street Railway Distinguished. — Cedar Rapids, etc., R. Co. v. Cummins, 125 Iowa 430.

7. Right of Railway to Deflect from Streets and Highways. — See Hartshorn v. Illinois Valley Traction Co., 210 Ill. 609.

13. Cordray v. Savannah, etc., R. Co., 117 Ga. 464; Georgia R., etc., Co. v. Joiner, 120 Ga. 905.

Trunk Railway and Street Railway Distinguished. — Diebold v. Kentucky Traction Co., 117 Ky. 146.

17. Philadelphia v. Philadelphia Traction Co., 206 Pa. St. 35.

7. 2. Daly Bank, etc., Co. v. Great Falls St. R. Co., 32 Mont. 298; Central Trust Co. v. Warren, (C. C. A.) 121 Fed. Rep. 323.

9a. Wilful Breaking of Car Window. — A street car is not within the Kansas statute (Gen. Stat. Kan. 1901, § 2098) punishing every person who shall injure any "car * * * which now is or which may hereafter be in use upon any railroad." State v. Cain, 69 Kan. 186.

8. 3. Goddard v. Chicago, etc., R. Co., 202 Ill. 362; Paige v. Schenectady R. Co., 178 N. Y. 102, modifying 84 N. Y. App. Div. 91; Daly v. Milwaukee Electric R., etc., Co., 119 Wis. 398, 100 Am. St. Rep. 893.

5. Injunction Against Unauthorized Street Railway. — State v. Milwaukee, etc., R. Co., 116 Wis. 142.

9. Right of Rival Company. — Compare Hamilton, etc., Traction Co. v. Hamilton, etc., Electric Transit Co., 69 Ohio St. 402.

9. 3. Control of Streets. — Govin v. Chicago, 132 Fed. Rep. 848; Smith v. Jackson, etc., Traction Co., 137 Mich. 20; Camden, etc., R. Co. v. U. S. Cast Iron Pipe, etc., Co., (N. J. 1904) 59 Atl. Rep. 523.

4. Minersville v. Schuylkill Electric R. Co., 205 Pa. St. 402.

5. Paterson, etc., Traction Co. v. Wostbrock, (N. J. 1903) 56 Atl. Rep. 698.

11. 4. Consent of Corporate Authorities. — Pennsylvania R. Co. v. Parkesburg, etc., St. R. Co., 26 Pa. Super. Ct. 159.

12. 1. Confirmation of Report Conditioned on Payment of Damages to Property Owners. — Matter of Rapid Transit R. Com'rs, 104 N. Y. App. Div. 468.

13. 2. Consent of Municipal Authorities Required. — Hartshorn v. Illinois Valley Traction Co., 210 Ill. 609; Lenoix v. Dover, etc., St. R. Co., 72 N. H. 58; People's Traction Co. v. Atlantic City, etc., R. Co., 71 N. J. L. 134; Cincinnati, etc., Electric St. R. Co. v. North Bend, 70 Ohio St. 46; Coatesville, etc., St. R. Co. v. West Chester R. Co., 206 Pa. St. 40.

Who Are Authorities Whose Consent Is Necessary. — Smith v. Jackson, etc., Traction Co., 137 Mich. 20.

14. 1. Consent of Abutting Owners. — Underground R. Co. v. New York, 116 Fed. Rep. 952, affirmed 193 U. S. 416; Paterson, etc., Traction Co. v. Wostbrock, (N. J. 1903) 56 Atl. Rep. 698; Matter of New York, etc., Bridge, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 184.

Presumption as to Consent — Sealing and Acknowledgment of Instrument. — See Mercer County Traction Co. v. United New Jersey R., etc., Co., 64 N. J. Eq. 588.

Right of Roman Catholic Bishop to Sign as to Church Property Denied. — Shepard v. East Orange, 70 N. J. L. 203, reversing 69 N. J. L. 133.

Conditional Consent Upheld. — Shepard v. East Orange, 69 N. J. L. 133, following State v. Belmar, 61 N. J. L. 443.

15. 3. Delegation of Power to Subordinate Bodies — a. IN GENERAL. — See notes 1, 4.

16. b. EXTENT OF DELEGATED POWER — (1) In General. — See notes 1, 2.

17. See notes 4, 5.

(3) *Grant of Exclusive Franchise.* — See note 11.

18. c. EXECUTION OF DELEGATED POWER — (1) In General. — See note 6.

19. See notes 2, 3.

21. (2) Imposing Conditions. — See notes 2, 3, 10, 11.

14. 6. Certificate of Railroad Commissioners as to Public Necessity. — See New York Cent., etc., R. Co. v. Buffalo, etc., Electric R. Co., 96 N. Y. App. Div. 471; Matter of Wood, 181 N. Y. 93, 34 Civ. Pro. (N. Y.) 127, affirming 99 N. Y. App. Div. 334; New York Cent., etc., R. Co. v. Auburn Interurban Electric R. Co., 178 N. Y. 75, affirming 79 N. Y. App. Div. 645.

15. 1. Delegation of Power to Grant Franchises. — Hamilton, etc., Traction Co. v. Hamilton, etc., Electric Transit Co., 69 Ohio St. 402.

4. Pennsylvania R. Co. v. Hamilton Tp., 68 N. J. L. 414, affirming 67 N. J. L. 477.

16. 1. Power of Municipality to Grant Franchises. — Humphreys v. Ft. Smith Traction, etc., Co., 71 Ark. 152; Goddard v. Chicago, etc., R. Co., 202 Ill. 362; Lincoln v. Lincoln St. R. Co., 67 Neb. 469; Atty.-Gen. v. Derry, etc., Electric R. Co., 71 N. H. 513; Pennsylvania R. Co. v. Hamilton Tp., 68 N. J. L. 414, affirming 67 N. J. L. 477; Com. v. Uwchlan St. R. Co., 203 Pa. St. 608; Dempster v. United Traction Co., 205 Pa. St. 70.

2. Cleveland Electric R. Co. v. Cleveland, 137 Fed. Rep. 111. See also Goddard v. Chicago, etc., R. Co., 104 Ill. App. 533, affirming 202 Ill. 452.

Power of Bridge Commissioners to Authorize Operation of Cars over Williamsburg Bridge. — Schinzel v. Best, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 455.

Power to Authorize Location of Tracks on Margin of Highway. — Freud v. Detroit, etc., R. Co., 133 Mich. 413.

17. 4. Cleveland Electric R. Co. v. Cleveland, 137 Fed. Rep. 111.

5. Russell v. Chicago, etc., Electric R. Co., 205 Ill. 155, modifying 98 Ill. App. 347.

11. Town May Grant Exclusive Franchise. — Bell v. Westmount, 9 Quebec Q. B. 34, affirming 15 Quebec Super. Ct. 580.

18. 6. Municipal Grants Must Conform to Statute Conferring Power. — Holst v. Savannah Electric Co., 131 Fed. Rep. 931, reversed on another point (C. C. A.) 132 Fed. Rep. 901; Thurston v. Huston, 123 Iowa 157; Jordan v. Washington, etc., R. Co., 25 Pa. Super. Ct. 564.

Giving Consent by "Resolution." — See Mannel v. Detroit, etc., R. Co., (Mich. 1905) 102 N. W. Rep. 633; Shepard v. East Orange, 69 N. J. L. 133.

Submission of Question to Vote of Electors. — See State v. Wauwatosa, 124 Wis. 451.

19. 2. Pacific Electric R. Co. v. Los Angeles, 104 U. S. 112.

3. Collins v. Amsterdam St. R. Co., 76 N. Y. App. Div. 249.

Effect of Subsequent Conveyance by Consenting

Owner. — Ade v. Nassau Electric R. Co., 173 N. Y. 580, affirming 65 N. Y. App. Div. 529.

Recording Consents. — Ade v. Nassau Electric R. Co., 173 N. Y. 580, affirming 65 N. Y. App. Div. 529.

Revocation of Consents. — For cases upholding revocation, see Paterson, etc., Traction Co. v. Wostbrock, (N. J. 1903) 56 Atl. Rep. 698; Parish v. Hamilton, etc., Traction Co., 23 Ohio Cir. Ct. 527. *Contra*, Ade v. Nassau Electric R. Co., 173 N. Y. 580, affirming 65 N. Y. App. Div. 529; Paige v. Schenectady R. Co., 178 N. Y. 102, modifying 84 N. Y. App. Div. 91.

Burden of Proving Invalidity of Consent. — Ade v. Nassau Electric R. Co., 173 N. Y. 580, affirming 65 N. Y. App. Div. 529.

For Whose Benefit Consents Inure. — Ade v. Nassau Electric R. Co., 173 N. Y. 580, affirming 65 N. Y. App. Div. 529 (consolidation of corporations).

Legality of Contract in Consideration of Consent. — Paterson, etc., Traction Co. v. Wostbrock, (N. J. 1903) 56 Atl. Rep. 698; Montclair Military Academy v. North Jersey St. R. Co., 70 N. J. L. 229. See also Hamilton, etc., Traction Co. v. Parish, 67 Ohio St. 181.

Rival Incurs No Liability by Purchasing Withholding of Consent. — Cleveland v. Cleveland City R. Co., 23 Ohio Cir. Ct. 373.

Purchased Consent Held to Be Invalid. — Parish v. Hamilton, etc., Traction Co., 23 Ohio Cir. Ct. 527.

In Estimating the Number of Linear Feet of Property Necessary to authorize the consent of a municipality to the construction of a railway, cross streets are to be omitted. People's Traction Co. v. Atlantic City, etc., R. Co., 71 N. J. L. 134.

Municipal Consent and Property Owners' Consents Are Distinct. — Shepard v. East Orange, 69 N. J. L. 133.

Consent of Grantor Not Binding on Subsequent Grantees as to Future Applications. — Paterson, etc., Traction Co. v. Wostbrock, (N. J. 1903) 56 Atl. Rep. 608.

21. 2. Imposing Conditions. — Gardner v. Templeton St. R. Co., 184 Mass. 204; Kansas City v. Kansas City Belt R. Co., 187 Mo. 146.

Company Required to Light Street. — Wellesley v. Boston, etc., St. R. Co., 188 Mass. 250.

3. Carlstadt v. City Trust, etc., Co., 69 N. J. L. 44.

Mandamus to Compel Performance of Agreement to Construct Line. — State v. Duluth St. R. Co., 88 Minn. 158.

Liability of Railroad Company for Failure to Build Road. — See Montooth v. Brownsville Ave. St. R. Co., 206 Pa. St. 338.

- 22.** See notes 5, 7, 8.
Conditions Which Are in Conflict with General Laws. — See notes 10, 11.
- 4. Who May Acquire Franchise** — *a.* IN GENERAL. — See notes 14, 15.
- 23.** See notes 1, 2.
b. ORGANIZATION AND INCORPORATION OF STREET-RAILWAY CORPORATIONS. — See note 5.
- 24.** IV. CROSSING OTHER RAILROADS — 1. In General. — See note 3.
- 25.** 3. Expense of Making and Maintaining Crossing. — See note 3.
 4. Statutory Regulations. — See notes 4, 8.
- 26.** V. JOINT USE OF TRACKS. — See note 3.
 Compulsory Acquisition of Right. — See note 6.
- 27.** VI. ABUTTING OWNERS — 1. Right to Compensation. — See note 10.
- 28.** See note 1.
- 29.** See notes 1, 6.
- 21.** 10. Change of Character of Rail Used.
 — *Hyde Park v. Old Colony St. R. Co.*, 188 Mass. 180.
 11. Chicago Union Traction Co. *v.* Chicago, 199 Ill. 484.
Abutting Owners Cannot Sue to Enforce Provision Fixing Fare. — *Mill Creek Tp. v. Erie Rapid Transit St. R. Co.*, 209 Pa. St. 300.
- 22.** 5. *Hyde Park v. Old Colony St. R. Co.*, 188 Mass. 180; *Kansas City v. Kansas City Belt R. Co.*, 187 Mo. 146.
 7. *Jersey City v. North Jersey St. R. Co.*, (N. J. 1905) 61 Atl. Rep. 95; *New York v. Third Ave. R. Co.*, (Supm. Ct. Tr. T.) 42 Misc. (N. Y.) 599 (license fee for each car run). See also *Shepard v. East Orange*, 69 N. J. L. 133.
Annual Fee for Each Car Run. — *Jersey City v. Jersey City, etc., R. Co.*, 70 N. J. L. 360. See also *Jersey City v. Consolidated Traction Co.*, 70 N. J. L. 364.
- 8.** *Hamilton v. Hamilton St. R. Co.*, 8 Ont. L. Rep. 460, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 22.
- 10. Conditions in Conflict with General Laws.** — *People v. Kennedy*, 97 N. Y. App. Div. 103.
- 11.** *Wellesley v. Boston, etc., St. R. Co.*, 188 Mass. 250, following *Keefe v. Lexington, etc., St. R. Co.*, 185 Mass. 183.
- 14. Legislature May Restrict Right to Corporations.** — *Goddard v. Chicago, etc., R. Co.*, 202 Ill. 362, affirming 104 Ill. App. 526.
- 15. Franchise in Municipality.** — *Matter of McDonald*, 175 N. Y. 470, affirming 80 N. Y. App. Div. 210.
- 23.** 1. *Detroit v. Detroit United R. Co.*, 133 Mich. 608, holding, however, that a municipality may agree to keep in repair the portion of the street occupied by the tracks of a street railway company, including the foundation necessary for the support of the track.
- 2. Ordinary Steam Railroad Company Cannot Acquire Street-railway Franchise.** — *State v. Milwaukee, etc., R. Co.*, 116 Wis. 142.
- Lessor of Railway May Receive Further Privileges, Inuring to Benefit of Lessee.** — *Shepard v. East Orange*, 69 N. J. L. 133.
- 5.** See *Matter of Wood*, 181 N. Y. 93, 34 Civ. Pro. (N. Y.) 127, affirmed 99 N. Y. App. Div. 334.
- 24.** 3. Street Railway Crossing Railroad. — *Pennsylvania R. Co. v. Inland Traction Co.*, 25 Pa. Super. Ct. 115.
- 25.** 3. On Whom Contract to Pay for Maintenance of Flagmen Is Binding. — See *Chicago, etc., R. Co. v. Fox River Electric R., etc., Co.*, 119 Wis. 181.
- 4. Statutes Regulating Construction of Crossings.** — *Chicago, etc., R. Co. v. Indianapolis, etc., Traction Co.*, (Ind. 1905) 74 N. E. Rep. 513.
- 8.** *Delaware, etc., R. Co. v. Danville, etc., St. R. Co.*, 211 Pa. St. 591.
- 26.** 3. *Schenectady R. Co. v. United Traction Co.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 282, 101 N. Y. App. Div. 277.
- 6.** *Contra*, *Philadelphia, etc., St. R. Co.'s Petition*, 203 Pa. St. 354; *Com. v. Uwchlan St. R. Co.*, 203 Pa. St. 608; *Altoona Belt Line St. R. Co. v. City Pass. R. Co.*, 209 Pa. St. 280.
- 27.** 10. Right to Compensation of Abutting Owners. — *Humphreys v. Ft. Smith Traction, etc., Co.*, 71 Ark. 152; *State v. Hartford St. R. Co.*, 76 Conn. 174; *Winnetka v. Chicago, etc., Electric R. Co.*, 107 Ill. App. 117, affirmed 204 Ill. 297; *Rosenbaum v. Meridian Light, etc., Co.*, (Miss. 1905) 38 So. Rep. 321; *Montclair Military Academy v. North Jersey St. R. Co.*, 70 N. J. L. 229; *Hester v. Durham Traction Co.*, 138 N. Car. 288, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 27-29; *Parrish v. Hamilton, etc., Traction Co.*, 23 Ohio Cir. Ct. 527; *Younkin v. Milwaukee Light, etc., Co.*, 120 Wis. 477.
- Carriage of Light Express Matter in Addition to Passengers Immaterial.** — *Mordhurst v. Ft. Wayne, etc., Traction Co.*, 163 Ind. 268, 106 Am. St. Rep. 222.
- Underground Railway Not Additional Burden.** — *Sears v. Crocker*, 184 Mass. 586, 100 Am. St. Rep. 577.
- Interurban Railway Held to Be Burden on Streets of Intermediate Village.** — *Younkin v. Milwaukee Light, etc., Co.*, 120 Wis. 477.
- 28.** 1. *Georgetown, etc., Traction Co. v. Mulholland*, (Ky. 1903) 76 S. W. Rep. 148; *Austin v. Detroit, etc., R. Co.*, 134 Mich. 149. See, however, *Dempster v. United Traction Co.*, 205 Pa. St. 70, following *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.*, 167 Pa. St. 62, 46 Am. St. Rep. 659; *Younkin v. Milwaukee Light, etc., Co.*, 120 Wis. 477.
- 29.** 1. **Motive Power.** — *Mordhurst v. Ft. Wayne, etc., Traction Co.*, 163 Ind. 268, 106 Am. St. Rep. 222.
- 6. Trolleys.** — *Georgetown, etc., Traction Co. v. Mulholland*, (Ky. 1903) 76 S. W. Rep. 148.

- 30.** New York Rule. — See notes 1, 2.
Qualifications. — See notes 4, 5.
Statutory Provisions. — See note 7.
- 31.** 2. Right to Prevent Unauthorized Construction or Operation. — See notes 1, 2.

VII. NATURE AND EXTENT OF FRANCHISE — 1. In General. — See note 7.

- 32.** See note 1.
Route as Entirety. — See note 6.
2. Construction of Grant. — See note 8.
- 34.** 4. What Streets May Be Occupied. — See note 8.
- 35.** Private Property. — See note 10.
5. What Tracks May Be Laid. — See note 12.
- 36.** See note 4.
Location of Tracks. — See note 10.
- 37.** 7. Power of Eminent Domain. — See note 6.
8. Exclusiveness of Franchise. — See note 8.
- 38.** See notes 3, 5, 10.

30. 1. New York. — *Kennedy v. Mineola*, etc., Traction Co., 77 N. Y. App. Div. 484, 12 N. Y. Annot. Cas. 189, *affirmed* 178 N. Y. 508.
2. *Paige v. Schenectady R. Co.*, 178 N. Y. 102, *modifying* 84 N. Y. App. Div. 91, and *following* *Peck v. Schenectady R. Co.*, 170 N. Y. 298 (electric railway).

4. Special Injury. — *Cleveland Burial Case Co. v. Erie R. Co.*, 24 Ohio Cir. Ct. 107.

5. See *Humphreys v. Ft. Smith Traction*, etc., Co., 71 Ark. 152.

7. *Goddard v. Chicago*, etc., R. Co., 104 Ill. App. 533, *affirmed* 202 Ill. 452; *Strickford v. Boston*, etc., R. Co., (N. H. 1904) 59 Atl. Rep. 367.

31. 1. Preventing Unauthorized Construction or Operation. — *Thompson v. Schenectady R. Co.*, 124 Fed. Rep. 274; *Henning v. Hudson Valley R. Co.*, 90 N. Y. App. Div. 492; *Pennsylvania R. Co. v. Parkesburg*, etc., St. R. Co., 26 Pa. Super. Ct. 159. See also *Kennedy v. Mineola*, etc., Traction Co., 178 N. Y. 508, *affirming* 77 N. Y. App. Div. 484.

2. *Baker v. Selma St.*, etc., R. Co., 135 Ala. 552.

7. No Right in Soil of Street. — *Interborough Rapid Transit Co. v. Gallagher*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 536, *affirmed* 96 N. Y. App. Div. 632; *Hamilton*, etc., Traction Co. v. *Hamilton*, etc., Electric Transit Co., 69 Ohio St. 402.

Franchise Held to Be Realty. — *Thompson v. Schenectady R. Co.*, 124 Fed. Rep. 274.

32. 1. Has Paramount Right. — See *Georgetown*, etc., Traction Co. v. *Mulholland*, (Ky. 1903) 76 S. W. Rep. 148, holding that a company having a franchise to construct a street railway along a highway may remove encroaching fences without liability to the abutting owners.

6. *Collins v. Amsterdam St. R. Co.*, 76 N. Y. App. Div. 249. See also *Altoona Belt Line St. R. Co. v. City Pass. R. Co.*, 209 Pa. St. 280.

8. Agreement to Run Cars to City Limits — Company Not Bound to Extend Tracks on Extension of City Limits. — *Yates v. B. C. Electric R. Co.*, 7 British Columbia 323.

34. 8. Streets to Be Occupied. — Atty.-Gen.

v. Derry, etc., Electric R. Co., 71 N. H. 513; *Jordan v. Washington*, etc., R. Co., 25 Pa. Super. Ct. 564.

35. 10. Construction over Private Property. — See *Newport News*, etc., R., etc., Co. v. *Lake*, 101 Va. 334.

Construction of Contract for Right of Way over Tollroad. — See *Detroit*, etc., Plank-Road Co. v. *Oakland R. Co.*, 131 Mich. 663.

12. *Houghton County St. R. Co. v. Laurium*, 135 Mich. 614.

Right to Use T-Rail Affirmed. — *Mordhurst v. Ft. Wayne*, etc., Traction Co., 163 Ind. 268, 106 Am. St. Rep. 222.

36. 4. Implied Powers to Construct Turnouts, Etc. — *State v. Hartford St. R. Co.*, 76 Conn. 174.

10. Location of Tracks. — See *Hayden v. Fair Haven*, etc., R. Co., 76 Conn. 355; *Budd v. Camden Horse R. Co.*, 63 N. J. Eq. 804, *affirming* 61 N. J. Eq. 543.

37. 6. *Younkin v. Milwaukee Light*, etc., Co., 120 Wis. 477.

Power to Condemn Right of Way Across Private Land. — See *Hartshorn v. Illinois Valley Traction Co.*, 210 Ill. 609.

Street Railway Cannot Appropriate Private Property Without Condemnation. — *Freud v. Detroit*, etc., R. Co., 133 Mich. 413.

8. *Compare* *Com. v. Uwchlan St. R. Co.*, 203 Pa. St. 608.

Second Road Cannot Straddle Tracks of First. — *Parrish v. Hamilton*, etc., Traction Co., 23 Ohio Cir. Ct. 527.

A Second Grant of the Same Right of Way will not of itself confer upon the second grantee the right to enter upon and take possession of the right of way so granted, where such entry and possession will materially and injuriously interfere with the first grantee's use and enjoyment. *Hamilton*, etc., Traction Co. v. *Hamilton*, etc., Electric Transit Co., 69 Ohio St. 402.

38. 3. *Coatesville*, etc., St. R. Co. v. *West Chester R. Co.*, 206 Pa. St. 40.

5. Construction of Exclusive Grants. — *Thurston v. Huston*, 123 Iowa 157.

10. Conflicting Grants. — *Hamilton*, etc., Trac-

39. 9. Protection of Franchise as Contract Obligation. — See notes 1, 2.

VIII. IMPROVEMENT, PAVING, AND REPAIR OF STREETS — 1. In General.

— See note 3.

40. See notes 1, 3, 5.

41. See notes 2, 5.

2. Extent of Obligation or Duty. — See note 6.

42. "Repair" as Including Paving. — See notes 1, 2.

43. Streets and Portions Thereof to Be Paved, Etc. — See note 2.

44. 3. Release and Discharge of Liability. — See notes 1, 2.

4. Enforcement of Liability — Improvement at Expense of Street-railway Company

— See note 4.

Indemnifying Municipality for Recovery on Default. — See note 7.

45. IX. SALES, LEASES, AND CONSOLIDATION — 2. Sales. — See note 9.

46. Mortgages. — See note 4.

Rights and Liabilities of Purchasers. — See note 5.

47. 3. Leases. — See note 7.

tion Co. v. Hamilton, etc., Electric Transit Co., 69 Ohio St. 402.

39. 1. Legislative Franchise Contract Obligation. — Cleveland v. Cleveland City R. Co., 194 U. S. 517; Underground R. Co. v. New York, 116 Fed. Rep. 952; affirmed 193 U. S. 416; State v. Columbus R. Co., 24 Ohio Cir. Ct. 609; Hamilton, etc., Traction Co. v. Hamilton, etc., Electric Transit Co., 69 Ohio St. 402.

2. Reservation of Power to Alter. — Marshalltown Light, etc., Co. v. Marshalltown, 127 Iowa 637.

Extension of Tracks Required under Power to Alter or Amend. — Metropolitan R. Co. v. Macfarland, 20 App. Cas. (D. C.) 421, affirmed 195 U. S. 322.

3. Construction and Maintenance of Roadbed. — Citizens St. R. Co. v. Marvil, 161 Ind. 506; Kaiser v. Detroit, etc., R. Co., 136 Mich. 541; Fielders v. North Jersey St. R. Co., 68 N. J. L. 343, 96 Am. St. Rep. 552; Morrow v. Westchester Electric R. Co., 172 N. Y. 638, affirming 54 N. Y. App. Div. 592; Shelton v. Northern Texas Traction Co., 32 Tex. Civ. App. 507; Gray v. Washington Water Power Co., 30 Wash. 665.

Duty Properly to Restore Paving After Laying Tracks. — Union Traction Co. v. Barnett, 31 Ind. App. 467.

Injury to Bicyclist — Excessive Width of Cable Slot. — See Brown v. Metropolitan St. R. Co., 171 N. Y. 699, affirming 60 N. Y. App. Div. 184.

40. 1. Fielders v. North Jersey St. R. Co., 68 N. J. L. 343, 96 Am. St. Rep. 552.

3. Duty to Pave, etc., Imposed Specially. — Binninger v. New York, 80 N. Y. App. Div. 438, modified 177 N. Y. 199.

5. Imposing Duties Additional to Franchise Requirements. — Fielders v. North Jersey St. R. Co., 68 N. J. L. 343, 96 Am. St. Rep. 552, explaining State v. Hoboken, 41 N. J. L. 71; Williamsport v. Williamsport Pass. R. Co., 206 Pa. St. 65.

41. 2. Power to Amend Charter — Duty of Paving Properly Imposed. — Fair Haven, etc., R. Co. v. New Haven, 75 Conn. 432.

5. See Kettle v. Dallas, 35 Tex. Civ. App. 632.

6. Charter Construed as to Obligation to Pave, Etc. — Dublin United Tramways Co. v. Fitzgerald, (1903) A. C. 99; Norwich v. Norwich

Electric Tramways Co., 91 L. T. N. S. 558; Mobile v. Mobile Light, etc., Co., 141 Ala. 442; Fair Haven, etc., R. Co. v. New Haven, 75 Conn. 442; Hartford v. Hartford St. R. Co., 75 Conn. 471; Marshalltown Light, etc., Co. v. Marshalltown, 127 Iowa 637; Hyde v. Boston, 186 Mass. 115; Rochester v. Rochester R. Co., 182 N. Y. 99, reversing 98 N. Y. App. Div. 521; New York v. Harlem Bridge, etc., R. Co., 100 N. Y. App. Div. 257; Ross v. Metropolitan St. R. Co., 104 N. Y. App. Div. 378; Shamokin v. Shamokin, etc., Electric R. Co., 206 Pa. St. 625.

Right of Company to Old Material Removed from Street in Repaving. — Detroit v. Detroit R. Co., 134 Mich. 11, 104 Am. St. Rep. 600.

42. 1. Repair. — Williamsport v. Williamsport Pass. R. Co., 206 Pa. St. 65.

2. Compare Williamsport v. Williamsport Pass. R. Co., 206 Pa. St. 65.

43. 2. "Occupied by Its Tracks" — Portions Outside of Rails Not Included. — Boston v. Boston El. R. Co., 186 Mass. 274.

44. 1. Liability to Pave, etc., Modified or Released. — Detroit v. Detroit United R. Co., 133 Mich. 608; Kent v. Binghamton, 94 N. Y. App. Div. 522; Binninger v. New York, 177 N. Y. 199, modifying 80 N. Y. App. Div. 438. 2. Kent v. Binghamton, 88 N. Y. App. Div. 617, affirming (Supm. Ct. Spec. T., 40 Misc. (N. Y.) 1.

4. Enforcing Liability. — New York v. Harlem Bridge, etc., R. Co., 100 N. Y. App. Div. 257.

7. Indemnifying Municipality. — See Boston v. Boston El. R. Co., 186 Mass. 274.

Municipality Empowered to Repair and Recover Cost — Company Not Liable to Third Person. — Fielders v. North Jersey St. R. Co., 68 N. J. L. 343, 96 Am. St. Rep. 552.

45. 9. Lincoln v. Lincoln St. R. Co., 67 Neb. 469.

46. 4. Lincoln v. Lincoln St. R. Co., 67 Neb. 469.

5. Purchaser Takes Cum Onere. — Reynolds v. Pacific Electric R. Co., 146 Cal. 261.

Obligation to Repair and Pave Streets. — See Kent v. Binghamton, 90 N. Y. App. Div. 553, reversing (Supm. Ct. Spec. T.) 49 Misc. (N. Y.) 1.

47. 7. Leases. — Conshohocken v. Conshohocken R. Co., 206 Pa. St. 75.

- 47.** Rights and Liabilities of Lessee. — See notes 9, 10.
 Liability of Lessor. — See note 11.
4. Consolidation. — See note 14.
48. X. REGULATION AND CONTROL — 1. In General. — See notes 1, 3.
 2. Precautions in Operation of Cars — *a.* IN GENERAL. — See note 6.
49. See notes 1, 2.
b. FENDERS ON CARS. — See note 8.
d. NUMBER OF OPERATORS ON CARS. — See note 10.
e. RATE OF SPEED. — See note 13.
50. See note 4.
4. Removal of Snow and Ice from Tracks. — See note 9.
51. 7. Interference with Railway in Making Street Improvements. — See note 4.
52. 9. Accommodation of Public — [Other Regulations. — See note 6*a.*]

Lease Must Comply with Statutory Conditions. — *O'Reilly v. Brooklyn Heights R. Co.*, 95 N. Y. App. Div. 253, *affirmed* 175 N. Y. 450.

Commonwealth Alone May Question Right to Lease. — *Minersville v. Schuylkill Electric R. Co.*, 205 Pa. St. 402.

47. 9. Lessee's Rights and Liabilities. — *Jersey City v. Consolidated Traction Co.*, 70 N. J. L. 364.

Lessee Not Liable for Prior License Fees. — *New York v. Third Ave. R. Co.*, 77 N. Y. App. Div. 379.

10. Conshohocken v. Conshohocken R. Co., 206 Pa. St. 75. *Compare* *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484 (regulation of fares).

11. Lessor Still Liable — Louisiana. — *Muntz v. Algiers, etc.*, St. R. Co., 111 La. 423, 100 Am. St. Rep. 495.

14. Liability for Obligations of Constituent Companies. — See *Birmingham R., etc., Co. v. Cunningham*, 141 Ala. 470.

48. 1. Control. — *Snouffer v. Cedar Rapids, etc.*, R. Co., 118 Iowa 287; *People v. Detroit United R. Co.*, 134 Mich. 682, 104 Am. St. Rep. 626.

Municipality May Require Company to Clean Street Between Its Tracks. — *Chicago v. Chicago Union Traction Co.*, 199 Ill. 259, *approving* *City, etc., R. Co. v. Savannah*, 77 Ga. 731, 4 Am. St. Rep. 106.

3. Chicago v. Chicago Union Traction Co., 199 Ill. 259; *Snouffer v. Cedar Rapids, etc.*, R. Co., 118 Iowa 287.

6. Regulating Operation of Cars. — *Sepetowski v. St. Louis Transit Co.*, 102 Mo. App. 110; *New York v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 29.

Equipment of Cars with Brakes May Be Required. — *People v. Detroit United R. Co.*, 134 Mich. 682, 104 Am. St. Rep. 626.

Ordinance Requiring Vigilant Watch for Obstructions Valid. — *Nagel v. St. Louis Transit Co.*, 104 Mo. App. 438; *Riska v. Union Depot R. Co.*, 180 Mo. 168; *Meyers v. St. Louis Transit Co.*, 99 Mo. App. 363.

Statute Limiting Hours of Employment Valid. — *Opinion of Governor*, 24 R. I. 603. See generally the titles EIGHT-HOUR LAWS, 462. 2; POLICE POWER, 934. 9.

49. 1. Gray v. St. Paul City R. Co., 87 Minn. 280; *Gebhardt v. St. Louis Transit Co.*, 97

Mo. App. 373; *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712.

2. Gulf, etc., R. Co. v. Holt, 30 Tex. Civ. App. 330.

8. Chicago City R. Co. v. O'Donnell, 114 Ill. App. 359. See also *Von Diest v. San Antonio Traction Co.*, 33 Tex. Civ. App. 577.

Power of Commission to Suspend Requirement as to Fenders. — See *Henderson v. Durham Traction Co.*, 132 N. Car. 779.

10. Motor Car and Trailer — Two Operators Sufficient. — *Von Diest v. San Antonio Traction Co.*, 33 Tex. Civ. App. 577.

13. Regulating Rate of Speed. — *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524.

Ordinance Restricting Speed of "Cart, Wagon, or Other Vehicle" Held Not to Apply to Street Cars. — *Robinson v. Metropolitan St. R. Co.*, 103 N. Y. App. Div. 243.

Ordinance Regulating Speed Held to Be Applicable to Ordinary Railroads Alone. — *Columbus R. Co. v. Peddy*, 120 Ga. 589.

50. 4. Camden, etc., R. Co. v. U. S. Cast Iron Pipe, etc., Co., (N. J. 1904) 59 Atl. Rep. 523.

9. Rule Not Applicable to Removal of Obstruction from Track. — *Howard v. Union R. Co.*, 25 R. I. 652. See further *infra*, this title, 93. 6 *et seq.*

Electric Sweeper May Be Used to Remove Snow from Track. — *Montreal v. Montreal St. R. Co.*, (1903) A. C. 482, *affirming* 11 Quebec K. B. 458.

51. 4. Obstruction to Railway in Making Municipal Improvements. — *Interborough Rapid Transit Co. v. Gallagher*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 536, *affirmed* 96 N. Y. App. Div. 632.

Reservation of Right to Take Possession of Streets for Municipal Improvements. — See *Montreal Park, etc.*, R. Co. v. St. Louis, 17 Quebec Super. Ct. 545.

52. 6*a.* Requiring Passenger to Be Carried Through Without Change of Cars. — *New York v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 29.

Requiring Cars to Carry Destination Signs. — *New York v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 29; *New York v. New York, etc., R. Co.*, 89 N. Y. App. Div. 442.

An Ordinance Making It Unlawful to Refuse to Stop at Street Crossings when signalled by intending passengers is valid. *Lockyear v. Covert*, 25 Ohio Cir. Ct. 486.

- 52.** 11. License Fees. — See note 9.
- 54.** XI. TERMINATION OF STREET FRANCHISE — 2. Expiration by Lapse of Time. — See notes 5, 6.
3. Surrender. — See note 10.
- Abandonment. — See note 14.
- 55.** 5. Nonuser. — See note 1.
6. Forfeiture for Breach of Conditions Prescribed in Grant of Franchise — *a.* IN GENERAL. — See note 5.
- Conditions Limiting Time of Construction. — See note 6.
- 56.** *b.* WAIVER OF FORFEITURE. — See note 2.
- c.* NECESSITY FOR JUDICIAL DETERMINATION OF FORFEITURE. — See note 4.
- d.* WHO MAY ENFORCE FORFEITURE. — See note 7.
- 57.** XII. LIABILITY FOR INJURIES FROM NEGLIGENCE — 1. Operation of Cars — *a.* GENERAL RIGHTS AND DUTIES — (1) *Right of Way.* — See note 8.

52. 9. License Tax Upheld under Police Power — Construction of Ordinance. — See *Erie v. Erie Electric Motor Co.*, 24 Pa. Super. Ct. 77.

54. 5. Life of Franchise Depends on Construction of Grant. — *Govin v. Chicago*, 132 Fed. Rep. 848; *Cleveland Electric R. Co. v. Cleveland*, 137 Fed. Rep. 111.

6. Suburban R. Co. *v. Chicago*, 204 Ill. 306.

10. Franchise Lost by Surrender. — *Cleveland Electric R. Co. v. Cleveland*, 137 Fed. Rep. 111.

Necessity for Consent of State to Surrender. — *Thompson v. Schenectady R. Co.*, 124 Fed. Rep. 274 (consent not necessary); *Paige v. Schenectady R. Co.*, 178 N. Y. 102.

Receiver of Railway Company Has No Power to Surrender. — *Paige v. Schenectady R. Co.*, 178 N. Y. 102, *modifying* 84 N. Y. App. Div. 91.

14. Forty-second St., etc., *R. Co. v. Cantor*, 104 N. Y. App. Div. 476.

55. 1. Forfeiture for Nonuser. — *Snouffer v. Cedar Rapids, etc., R. Co.*, 118 Iowa 287.

Nonuser Does Not Ipso Facto Work Forfeiture. — *Paige v. Schenectady R. Co.*, 178 N. Y. 102. See generally *infra*, this title, **56.** 4 *et seq.*

5. Failure to Build Double Track as Required by Franchise Ground for Forfeiture. — *Newport News, etc., R., etc., Co. v. Hampton Roads R., etc., Co.*, 102 Va. 795.

Provisions for Forfeiture to Be Strictly Construed. — *Toledo v. Toledo R., etc., Co.*, 25 Ohio Cir. Ct. 441.

6. Time of Construction Limited. — *Houghton County St. R. Co. v. Laurium*, 135 Mich. 614; *Matter of Brooklyn, etc., R. Co.*, 106 N. Y. App. Div. 240; *Millcreek Tp. v. Erie Rapid Transit St. R. Co.*, 209 Pa. St. 300.

That the Work Was Stopped by an Injunction is an excuse for noncompletion in the required time. *Newport News, etc., R., etc., Co. v. Hampton Roads R., etc., Co.*, 102 Va. 795.

56. 2. Conshohocken *v. Conshohocken R. Co.*, 206 Pa. St. 75.

Waiver of Forfeiture Is Not Grant of New Franchise. — *Newport News, etc., R., etc., Co. v. Hampton Roads R., etc., Co.*, 102 Va. 795.

4. Provision for Forfeiture Self-executing. — *Matter of Brooklyn, etc., R. Co.*, 106 N. Y. App. Div. 240; *Millcreek Tp. v. Erie Rapid Transit St. R. Co.*, 209 Pa. St. 300. See further *supra*, this title, **55.** 1.

7. Private Individual Cannot Enforce Forfeiture. — *Paige v. Schenectady R. Co.*, 178 N. Y. 102, *modifying* 84 N. Y. App. Div. 91; *Kent v. Binghamton*, 94 N. Y. App. Div. 522.

Railway Company Claiming Rival Franchise. — *Newport News, etc., R., etc., Co. v. Hampton Roads R., etc., Co.*, 102 Va. 795.

57. 8. No Exclusive Right of Way — *England.* — *Hartley v. Chadwick*, 68 J. P. 512.

United States. — *Southern Electric R. Co. v. Hageman*, 121 Fed. Rep. 262, 57 C. C. A. 348.

Delaware. — *Snyder v. People's R. Co.*, 4 Penn. (Del.) 145; *Wilman v. People's R. Co.*, 4 Penn. (Del.) 260; *Dungan v. Wilmington City R. Co.*, 4 Penn. (Del.) 458.

Georgia. — *Macon R., etc., Co. v. Barnes*, 121 Ga. 445, *citing* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 57.

Illinois. — *North Chicago St. R. Co. v. Roderdt*, 203 Ill. 413, *affirming* 105 Ill. App. 314; *Fisher v. Chicago City R. Co.*, 114 Ill. App. 217.

Indiana. — *Indianapolis St. R. Co. v. Darnell*, 32 Ind. App. 687; *Indianapolis St. R. Co. v. Schmidt*, 35 Ind. App. 202, rehearing denied 35 Ind. App. 214; *Howard v. Indianapolis St. R. Co.*, 29 Ind. App. 514.

Iowa. — *Stanley v. Cedar Rapids, etc., R. Co.*, 119 Iowa 526.

Kentucky. — *South Covington, etc., St. R. Co. v. McHugh*, (Ky. 1903) 77 S. W. Rep. 202; *Thiel v. South Covington, etc., St. R. Co.*, (Ky. 1904) 78 S. W. Rep. 206; *Greene v. Louisville R. Co.*, (Ky. 1905) 84 S. W. Rep. 1154.

Louisiana. — *Haas v. New Orleans R. Co.*, 112 La. 747; *Riley v. Shreveport Traction Co.*, 114 La. 135.

Maine. — *Butler v. Rockland, etc., St. R. Co.*, 99 Me. 149, 105 Am. St. Rep. 267; *Marden v. Portsmouth, etc., St. R. Co.*, 100 Me. 41.

Massachusetts. — *O'Brien v. Blue Hill St. R. Co.*, 186 Mass. 446; *Kerr v. Boston El. R. Co.*, 188 Mass. 434.

Michigan. — *Bedell v. Detroit, etc., R. Co.*, 131 Mich. 668; *Chauvin v. Detroit United R. Co.*, 135 Mich. 85; *Rouse v. Detroit Electric R. Co.*, 135 Mich. 545; *Ablard v. Detroit United R. Co.*, (Mich. 1905) 102 N. W. Rep. 741.

Minnesota. — *Smith v. Minneapolis St. R. Co.*, (Minn. 1905) 104 N. W. Rep. 16.

Missouri. — *Klockenbrink v. St. Louis, etc., R. Co.*, 172 Mo. 678; *Schafstette v. St. Louis,*

58. See notes 1, 2, 3, 4, 5, 6

59. (2) *General Degree of Care Required.* — See notes 5, 6, 7.

etc., R. Co., 175 Mo. 142; *Linder v. St. Louis Transit Co.*, 103 Mo. App. 574; *Buren v. St. Louis Transit Co.*, 104 Mo. App. 224; *Hanheide v. St. Louis Transit Co.*, 104 Mo. App. 323; *Kolb v. St. Louis Transit Co.*, 102 Mo. App. 143; *Brown v. St. Louis Transit Co.*, 108 Mo. App. 310; *Strode v. St. Louis Transit Co.*, (Mo. 1905) 87 S. W. Rep. 976.

Nebraska. — *Mathiesen v. Omaha St. R. Co.*, (Neb. 1903) 97 N. W. Rep. 243, *reversing* (Neb. 1903) 92 N. W. Rep. 639; *Omaha St. R. Co. v. Mathiesen*, (Neb. 1905) 103 N. W. Rep. 666.

New Hampshire. — *Little v. Boston, etc., R. Co.*, 72 N. H. 502.

New Jersey. — *Zolpher v. Camden, etc., R. Co.*, 69 N. J. L. 417; *Adams v. Camden, etc., R. Co.*, 69 N. J. L. 424; *Searles v. Elizabeth, etc., R. Co.*, 70 N. J. L. 388; *Camden, etc., R. Co. v. U. S. Cast Iron Pipe, etc., Co.*, (N. J. 1904) 59 Atl. Rep. 523.

New York. — *Sophian v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 787; *Venuta v. New York, etc., Traction Co.*, 87 N. Y. App. Div. 561; *Rosenstock v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 114; *Robinson v. Metropolitan St. R. Co.*, 91 N. Y. App. Div. 158, *affirmed* 179 N. Y. 593; *Frank v. Metropolitan St. R. Co.*, 91 N. Y. App. Div. 485; *Koehler v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 904; *Demarest v. Forty-second St., etc., R. Co.*, 104 N. Y. App. Div. 503; *Goodson v. New York City R. Co.*, (Supm. Ct. App. T.) 94 N. Y. Supp. 10.

Ohio. — *Toledo, etc., R. Co. v. Gilbert*, 24 Ohio Cir. Ct. 181; *Lake Shore Electric R. Co. v. Majewski*, 25 Ohio Cir. Ct. 55.

Oregon. — *Wolf v. City R. Co.*, 45 Oregon 446.

Pennsylvania. — *Hellriegel v. Southern Traction Co.*, 23 Pa. Super. Ct. 392; *McFarland v. Consolidated Traction Co.*, 204 Pa. St. 423; *Davis v. Media, etc., Electric R. Co.*, 25 Pa. Super. Ct. 444; *Barnes v. Pittsburg R. Co.*, 26 Pa. Super. Ct. 36.

Rhode Island. — *Beerman v. Union R. Co.*, 24 R. I. 275.

Texas. — *San Antonio Traction Co. v. Upson*, 31 Tex. Civ. App. 50; *San Antonio Traction Co. v. Court*, 31 Tex. Civ. App. 146; *Citizens' R. Co. v. Gossett*, (Tex. Civ. App. 1905) 85 S. W. Rep. 35.

Virginia. — *Richmond Traction Co. v. Clarke*, 101 Va. 382.

Right of Way at Street Crossing Between Car and Fire Truck. — See *Knox v. North Jersey St. R. Co.*, 70 N. J. L. 347; *Geary v. Metropolitan St. R. Co.*, 177 N. Y. 535, *affirming* 84 N. Y. App. Div. 514.

New York City Right-of-way Ordinance. — See *Kroder v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 118.

A Funeral Procession Does Not Have Right of Way. — *Foulk v. Wilmington City R. Co.*, (Del. 1905) 60 Atl. Rep. 973.

59. 1. *Birmingham R., etc., Co. v. Oldham*, 141 Ala. 195; *Consumers' Electric Light, etc., R. Co. v. Pryor*, 44 Fla. 354; *Barry v. Burling-*

ton R., etc., Co., 119 Iowa 62, rehearing denied 119 Iowa 66; *Metropolitan St. R. Co. v. Arnold*, 67 Kan. 260; *McDermott v. Boston El. R. Co.*, 184 Mass. 126, 100 Am. St. Rep. 548; *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524; *Riska v. Union Depot R. Co.*, 180 Mo. 168; *Du Frane v. Metropolitan St. R. Co.*, 83 N. Y. App. Div. 298; *Beers v. Metropolitan St. R. Co.*, 104 N. Y. App. Div. 96. See, however, *Lejouné v. Dry Dock, etc., R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 749 (between street blocks); *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527.

2. Duty to Give Way to Passage of Street Cars. — *Cox v. Wilmington City R. Co.*, 4 Penn. (Del.) 162; *Chicago City R. Co. v. Mauger*, 105 Ill. App. 579; *Chicago City R. Co. v. Ahler*, 107 Ill. App. 397; *Chicago City R. Co. v. Meinheit*, 114 Ill. App. 497; *Metropolitan St. R. Co. v. Rouch*, 66 Kan. 195; *Marden v. Portsmouth, etc., St. R. Co.*, 100 Me. 41; *Belford v. Brooklyn Heights R. Co.*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 148.

3. *Louisville R. Co. v. Colston*, 117 Ky. 804; *Barney v. Metropolitan St. R. Co.*, 94 N. Y. App. Div. 388.

4. *Little v. Boston, etc., R. Co.*, 72 N. H. 502. See, however, *Schmedding v. New York, etc., R. Co.*, 85 N. Y. App. Div. 24.

5. Street Intersections. — *Cole v. Central R. Co.*, 103 Ill. App. 160; *Chicago City R. Co. v. Iverson*, 108 Ill. App. 433; *Union Traction Co. v. Vandercook*, 32 Ind. App. 621; *Freeman v. Brooklyn Heights R. Co.*, 87 N. Y. App. Div. 127; *Muller v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 234; *Prince v. Third Ave. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 542; *Solomon v. Buffalo R. Co.*, 96 N. Y. App. Div. 487.

Ordinance Fixing Right of Way. — See *Cushing v. Metropolitan St. R. Co.*, 92 N. Y. App. Div. 510.

6. *Smith v. Minneapolis St. R. Co.*, (Minn. 1905) 104 N. W. Rep. 16; *Demarest v. Forty-second St., etc., R. Co.*, 104 N. Y. App. Div. 503; *Beerman v. Union R. Co.*, 24 R. I. 275.

Converse of Rule — Car First Reaching Point of Intersection Has Right of Way. — *Knickerbocker Ice Co. v. Benedix*, 206 Ill. 362.

59. 5. Reasonable or Ordinary Care — *United States.* — *Southern Electric R. Co. v. Hageman*, 121 Fed. Rep. 262, 57 C. C. A. 348.

Alabama. — *Birmingham R., etc., Co. v. Jackson*, 136 Ala. 279.

Arkansas. — *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 578, *citing* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 59.

Delaware. — *Snyder v. People's R. Co.*, 4 Penn. (Del.) 145; *Cox v. Wilmington City R. Co.*, 4 Penn. (Del.) 162; *Wilman v. People's R. Co.*, 4 Penn. (Del.) 260; *Donohoe v. Wilmington City R. Co.*, 4 Penn. (Del.) 55; *Boudwin v. Wilmington City R. Co.*, 4 Penn. (Del.) 381.

Florida. — *Consumers Electric Light, etc., Co. v. Pryor*, 44 Fla. 354.

Illinois. — *Chicago City R. Co. v. Fennimore*, 109 Ill. 9; *Chicago Union Traction Co. v. Nuetzel*, 114 Ill. App. 466.

60. See notes 1, 2, 3, 4.

Instructions. — See note 5.

A Rule of the Street-railway Company. — See note 8.(3) *Employment of Servants.* — See note 9.**61.** See note 3.(4) *Character and Condition of Cars.* — See notes 6, 7, 8.*Indiana.* — Howard *v.* Indianapolis St. R. Co., 29 Ind. App. 514.*Kentucky.* — Thiel *v.* South Covington, etc., St. R. Co., (Ky. 1904) 78 S. W. Rep. 206; Gorman *v.* Louisville R. Co., (Ky. 1903) 72 S. W. Rep. 760.*Louisiana.* — Muntz *v.* Algiers, etc., St. R. Co., 111 La. 423, 100 Am. St. Rep. 495.*Maine.* — Butler *v.* Rockland, etc., St. R. Co., 99 Me. 149, 105 Am. St. Rep. 267.*Missouri.* — Schafstette *v.* St. Louis, etc., R. Co., 175 Mo. 142; Meng *v.* St. Louis, etc., R. Co., 108 Mo. App. 553; Kube *v.* St. Louis Transit Co., 103 Mo. App. 582.*New Hampshire.* — Carney *v.* Concord St. R. Co., 72 N. H. 364.*New York.* — Adsit *v.* Catskill Electric R. Co., 88 N. Y. App. Div. 167.*Ohio.* — Toledo, etc., R. Co. *v.* Gilbert, 24 Ohio Cir. Ct. 181.*Oregon.* — Dubiver *v.* City R. Co., 44 Oregon 227, rehearing denied 44 Oregon 239.*Pennsylvania.* — Hellriegel *v.* Southern Traction Co., 23 Pa. Super. Ct. 392; Jensen *v.* Philadelphia, etc., St. R. Co., 24 Pa. Super. Ct. 4.*Virginia.* — Danville R., etc., Co. *v.* Hodnett, 101 Va. 361.**Running Cars on Curve in Opposite Directions Held to Be Negligence.** — Schwartz *v.* New Orleans, etc., R. Co., 110 La. 534.**Company Illegally Operating Freight Cars Absolutely Liable.** — Daly *v.* Milwaukee Electric R., etc., Co., 119 Wis. 398, 100 Am. St. Rep. 893.**Accident Caused by Derailment of Car.** — See Chicago City R. Co. *v.* Bruley, 215 Ill. 464.**59. 6.** Di Prisco *v.* Wilmington City R. Co., 4 Penn. (Del.) 527; Chicago City R. Co. *v.* O'Donnell, 114 Ill. App. 359; Greene *v.* Louisville R. Co., (Ky. 1905) 84 S. W. Rep. 1154; Smith *v.* Minneapolis St. R. Co., (Minn. 1905) 104 N. W. Rep. 16; Rhymes *v.* Jackson Electric R., etc., Co., 85 Miss. 140. See also Zolpher *v.* Camden, etc., R. Co., 69 N. J. L. 417.**Error of Judgment in Emergency Not Necessarily Negligence.** — Adsit *v.* Catskill Electric R. Co., 88 N. Y. App. Div. 167; Ackerman *v.* Union Traction Co., 205 Pa. St. 477. See also *infra*, this title, **79. 6.****Degree of Care Required Where Running Board of Car Overlaps Sidewalk.** — See Hayden *v.* Fair Haven, etc., R. Co., 76 Conn. 355.**Duty to Trespasser.** — A policeman who wrongfully and without authority compels those in charge of an electric car to use the car for the purpose of removing a stalled vehicle from the tracks has no right of recovery against the company for injuries received through the negligence of the motorman in so using the car. Connelly *v.* Metropolitan St. R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 305.**Ordinary Care to Avoid Injury to Trespassers Required.** — Carney *v.* Concord St. R. Co., 72 N. H. 364.**7.** San Antonio Traction Co. *v.* Court, 31 Tex. Civ. App. 146.**Increase of Speed Requires Increase of Care.** — San Antonio Traction Co. *v.* Upson, 31 Tex. Civ. App. 50.**60. 1.** Di Prisco *v.* Wilmington City R. Co., 4 Penn. (Del.) 527; Chicago City R. Co. *v.* Fennimore, 199 Ill. 9; Indianapolis St. R. Co. *v.* Taylor, 164 Ind. 155; Gorman *v.* Louisville R. Co., (Ky. 1903) 72 S. W. Rep. 760; Haas *v.* New Orleans R. Co., 112 La. 747; Butler *v.* Rockland, etc., St. R. Co., 99 Me. 149, 105 Am. St. Rep. 267; Kube *v.* St. Louis Transit Co., 103 Mo. App. 582; McLeland *v.* St. Louis Transit Co., 105 Mo. App. 473; Ross *v.* Metropolitan St. R. Co., 113 Mo. App. 600.**Vehicles Crossing Track.** — See Summerman *v.* Interurban St. R. Co., (Supm. Ct. App. T.) 87 N. Y. Supp. 427.**2. Where Vehicles and Pedestrians May Be Expected.** — Snyder *v.* People's R. Co., 4 Penn. (Del.) 145; Dungan *v.* Wilmington City R. Co., 4 Penn. (Del.) 458; Foulk *v.* Wilmington City R. Co., (Del. 1905) 60 Atl. Rep. 973; Chicago City R. Co. *v.* Biederman, 102 Ill. App. 617; Fisher *v.* Chicago City R. Co., 114 Ill. App. 217; Marden *v.* Portsmouth, etc., St. R. Co., 100 Me. 41; Holden *v.* Missouri R. Co., 177 Mo. 456; Kolb *v.* St. Louis Transit Co., 102 Mo. App. 143; Forrestal *v.* Milwaukee Electric R., etc., Co., 119 Wis. 495.**Crossing Habitually Thronged with School Children at Certain Hour.** — See Kube *v.* St. Louis Transit Co., 103 Mo. App. 582.**3.** Hoon *v.* Beaver Valley Traction Co., 204 Pa. St. 369.**4.** Atlanta R., etc., Co. *v.* Monk, 118 Ga. 449; Fearons *v.* Kansas City El. R. Co., 180 Mo. 208; Richmond Pass., etc., Co. *v.* Racks, 101 Va. 487.**5. Instructions.** — Indianapolis St. R. Co. *v.* Schomberg, 164 Ind. 111; Koenig *v.* Union Depot R. Co., 173 Mo. 698; Hollingshead *v.* Camden, etc., R. Co., (N. J. 1905) 60 Atl. Rep. 514; Perras *v.* United Traction Co., 88 N. Y. App. Div. 260; Klimpl *v.* Metropolitan St. R. Co., 92 N. Y. App. Div. 291; Lockwood *v.* Troy City R. Co., 92 N. Y. App. Div. 112; Quinn *v.* New York City R. Co., (Supm. Ct. App. T.) 94 N. Y. Supp. 560.**8.** O'Reilly *v.* Brooklyn Heights R. Co., 82 N. Y. App. Div. 492. See also McKernan *v.* Detroit Citizens' St. R. Co., 138 Mich. 519.**9. Employment of Competent Servants.** — Di Prisco *v.* Wilmington City R. Co., 4 Penn. (Del.) 527; Boudwin *v.* Wilmington City R. Co., 4 Penn. (Del.) 381; Crisman *v.* Shreveport Belt R. Co., 110 La. 640.**61. 3. Not Necessarily Negligence to Run Electric Car Without Conductor.** — Di Prisco *v.* Wilmington City R. Co., 4 Penn. (Del.) 527.**6.** Character and Condition of Cars. — Mock *v.*

61. (5) *Speed and Control of Cars.* — See note 11.

62. *What Constitutes an Improper Rate of Speed.* — See notes 1, 2.

Los Angeles Traction Co., 139 Cal. 616; Silva v. Boston El. R. Co.; 183 Mass. 249.

Running Board Overlapping Sidewalk Not Necessarily Improper. — Hayden v. Fair Haven, etc., R. Co., 76 Conn. 355.

61. 7. Indianapolis St. R. Co. v. Schomberg, (Ind. App. 1904) 71 N. E. Rep. 237; Fritsch v. New York, etc., R. Co., 93 N. Y. App. Div. 554 (fenders).

8. Duty to Adopt New Inventions. — Zimmerman v. Denver Consol. Tramway Co., 18 Colo. App. 480; McGauley v. St. Louis Transit Co., 179 Mo. 583.

Absence of Fenders Not Necessarily Negligence. — Carney v. Concord St. R. Co., 72 N. H. 374.

Failure to Comply with Statute Requiring Fenders — Question of Negligence for Jury. — Henderson v. Durham Traction Co., 132 N. Car. 779.

Absence of Fenders Prima Facie Negligence. — Chicago City R. Co. v. O'Donnell, 114 Ill. App. 359.

11. Speed of Cars — United States. — Toledo Traction Co. v. Cameron, (C. C. A.) 137 Fed. Rep. 48.

Alabama. — See Aniston Electric, etc., Co. v. Hewitt, 139 Ala. 442 (collision with cow on track).

Arkansas. — Hot Springs St. R. Co. v. Hildreth, 72 Ark. 572.

California. — Kernan v. Market St. R. Co., 137 Cal. 326; Paine v. San Bernardino Valley Traction Co., 143 Cal. 654.

Delaware. — Boudwin v. Wilmington City R. Co., 4 Penn. (Del.) 381; Foulk v. Wilmington City R. Co., (Del. 1905) 60 Atl. Rep. 973.

District of Columbia. — Metropolitan R. Co. v. Blick, 22 App. Cas. (D. C.) 194.

Illinois. — Chicago City R. Co. v. Gemmill, 209 Ill. 638; Chicago City R. Co. v. Iverson, 108 Ill. App. 433; Chicago Union Traction Co. v. O'Donnell, 211 Ill. 349, affirming 113 Ill. App. 259; Chicago Union Traction Co. v. Nuetzel, 111 Ill. App. 466.

Indiana. — Union Traction Co. v. Vandercook, 32 Ind. App. 621; Moran v. Leslie, 33 Ind. App. 80; Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138; Indianapolis St. R. Co. v. Zaring, 33 Ind. App. 297; Indianapolis St. R. Co. v. Slifer, 35 Ind. App. 700, reversing (Ind. App. 1905) 72 N. E. Rep. 1055.

Iowa. — Stanley v. Cedar Rapids, etc., R. Co., 119 Iowa 526.

Kansas. — Kansas City-Leavenworth R. Co. v. Gallagher, 68 Kan. 424.

Kentucky. — Louisville R. Co. v. French, (Ky. 1903) 71 S. W. Rep. 486; South Covington, etc., St. R. Co. v. McHugh, (Ky. 1903) 77 S. W. Rep. 202; Louisville R. Co. v. Teekin, (Ky. 1904) 78 S. W. Rep. 470.

Louisiana. — Welty v. St. Charles St. R. Co., 109 La. 733.

Maine. — Butler v. Rockland, etc., St. R. Co., 99 Me. 149, 105 Am. St. Rep. 267; Marden v. Portsmouth, etc., St. R. Co., 100 Me. 41.

Massachusetts. — Silva v. Boston El. R. Co., 183 Mass. 249; Orth v. Boston El. R. Co., 188 Mass. 427.

Michigan. — Westphal v. St. Joseph, etc., St. R. Co., 134 Mich. 239; Rouse v. Detroit Electric R. Co., 135 Mich. 545; Ablard v. Detroit United R. Co., (Mich. 1905) 102 N. W. Rep. 741.

Minnesota. — Gray v. St. Paul City R. Co., 87 Minn. 280; Peterson v. Minneapolis St. R. Co., 90 Minn. 52; Smith v. Minneapolis St. R. Co., (Minn. 1905) 104 N. W. Rep. 16.

Mississippi. — Rhymes v. Jackson Electric R., etc., Co., 85 Miss. 140.

Missouri. — Klockenbrink v. St. Louis, etc., R. Co., 172 Mo. 678; Heinze v. Metropolitan St. R. Co., 182 Mo. 528; Story v. St. Louis Transit Co., 108 Mo. App. 424; Murray v. St. Louis Transit Co., 108 Mo. App. 501.

New Jersey. — Zolpher v. Camden, etc., R. Co., 69 N. J. L. 417; Adams v. Camden, etc., R. Co., 69 N. J. L. 424; Searles v. Elizabeth, etc., R. Co., 70 N. J. L. 388; Conrad v. Elizabeth, etc., R. Co., 70 N. J. L. 676; Camden, etc., R. Co. v. U. S. Cast Iron Pipe, etc., Co., (N. J. 1904) 59 Atl. Rep. 523; Vrooman v. North Jersey St. R. Co., 70 N. J. L. 818.

New York. — Levine v. Metropolitan St. R. Co., 78 N. Y. App. Div. 426, affirming 177 N. Y. 523; Strauss v. Brooklyn Heights R. Co., 85 N. Y. App. Div. 613; Lane v. Brooklyn Heights R. Co., 85 N. Y. App. Div. 85, appeal dismissed 176 N. Y. 557; New York v. Metropolitan St. R. Co., 90 N. Y. App. Div. 66, affirming 182 N. Y. 536; McDermott v. Brooklyn Heights R. Co., 89 N. Y. App. Div. 214; Binns v. Brooklyn Heights R. Co., 89 N. Y. App. Div. 359; Cosgrove v. Metropolitan St. R. Co., 173 N. Y. 628, affirming 74 N. Y. App. Div. 166; Bertsch v. Metropolitan St. R. Co., 173 N. Y. 634, affirming 68 N. Y. App. Div. 228; Hoyt v. Metropolitan St. R. Co., 175 N. Y. 502, affirming 73 N. Y. App. Div. 249; Stillings v. Metropolitan St. R. Co., 177 N. Y. 344, affirming 84 N. Y. App. Div. 201.

Pennsylvania. — Boyles v. Monongahela St. R. Co., 20 Pa. Super. Ct. 443; Davis v. Media, etc., Electric R. Co., 25 Pa. Super. Ct. 444; Oehmler v. Pittsburgh R. Co., 25 Pa. Super. Ct. 617; Fellers v. Warren St. R. Co., 26 Pa. Super. Ct. 31.

Rhode Island. — Dyer v. Union R. Co., 25 R. I. 221.

Texas. — Dallas Consol. Electric St. R. Co. v. Illo, 32 Tex. Civ. App. 290.

Wisconsin. — Hanlon v. Milwaukee Electric R., etc., Co., 118 Wis. 210.

Public Demand for High Speed No Justification. — Schafstette v. St. Louis, etc., R. Co., 175 Mo. 142.

62. 1. *What Is Improper Speed.* — Chicago City R. Co. v. Sandusky, 198 Ill. 400, affirming 99 Ill. App. 164; Chicago City R. Co. v. Fennimore, 199 Ill. 9; West Chicago St. R. Co. v. Callow, 102 Ill. App. 323; Chicago City R. Co. v. Loomis, 102 Ill. App. 326, affirmed 201 Ill. 118; Stanley v. Cedar Rapids, etc., R. Co., 119 Iowa 526; Petty v. St. Louis, etc., R. Co., 179 Mo. 666; Fry v. St. Louis Transit Co., 111 Mo. App. 324; Mauer v. Brooklyn Heights R. Co., 87 N. Y. App. Div. 119; Gildea v. Metropolitan

62. Where the Statutes or Valid Municipal Ordinances Impose Speed Restrictions. — See note 5.

63. Proximate Cause. — See note 2.

Control of Car. — See notes 3, 4.

Proof of Speed. — See notes 5, 6, 7.

(6) Lookout. — See note 8.

St. R. Co., 171 N. Y. 660, affirming 58 N. Y. App. Div. 528; Reid Ice Cream Co. v. New York City R. Co., 97 N. Y. App. Div. 303; Jensen v. Philadelphia, etc., St. R. Co., 24 Pa. Super. Ct. 4; Hoon v. Beaver Valley Traction Co., 204 Pa. St. 369; McFarland v. Consolidated Traction Co., 204 Pa. St. 423; McKee v. Harrisburg Traction Co., 211 Pa. St. 47.

Running in Fog. — See Fisher v. Union R. Co., 86 N. Y. App. Div. 365.

Maximum Speed Authorized by Franchise May Be Improper under Circumstances. — Holden v. Missouri R. Co., 177 Mo. 456; Atherton v. Tacoma R., etc., Co., 30 Wash. 395.

62. 2. Warner v. St. Louis, etc., R. Co., 178 Mo. 125.

5. Violation of Speed Ordinance as Negligence — Alabama. — Anniston Electric, etc., Co. v. Hewitt, 139 Ala. 442.

Kansas. — Kansas City-Leavenworth R. Co. v. Gallagher, 68 Kan. 424.

Missouri. — Holden v. Missouri R. Co., 177 Mo. 456, 108 Mo. App. 665; Meyers v. St. Louis Transit Co., 99 Mo. App. 363; Riska v. Union Depot R. Co., 180 Mo. 168; Moore v. St. Louis Transit Co., 95 Mo. App. 728; Kolb v. St. Louis Transit Co., 102 Mo. App. 143; Story v. St. Louis Transit Co., 108 Mo. App. 424; Deitring v. St. Louis Transit Co., 109 Mo. App. 524.

Nebraska. — Mathiesen v. Omaha St. R. Co., (Neb. 1903) 97 N. W. Rep. 243, reversing (Neb. 1902) 92 N. W. Rep. 639; Omaha St. R. Co. v. Larson, (Neb. 1903) 97 N. W. Rep. 824.

Texas. — San Antonio Traction Co. v. Upson, 31 Tex. Civ. App. 50.

63. 2. Heebe v. New Orleans, etc., R., etc., Co., 110 La. 970.

3. Control of Car. — Schroeder v. St. Louis Transit Co., 111 Mo. App. 67.

Runaway Car — Presumption of Negligence from Absence of Motorman. — Chicago City R. Co. v. Eick, 111 Ill. App. 452, affirmed 209 Ill. 321.

Motorman Falling from Car. — See Chicago City R. Co. v. Barker, 209 Ill. 321.

4. Reasonable Diligence to Slacken or Stop — Illinois. — Springfield Consol. R. Co. v. Puntenney, 200 Ill. 9, affirming 101 Ill. App. 95; Fisher v. Chicago City R. Co., 114 Ill. App. 217.

Indiana. — Indianapolis St. R. Co., v. Darnell, 32 Ind. App. 687.

Louisiana. — Crisman v. Shreveport Belt R. Co., 110 La. 640; Haas v. New Orleans R. Co., 112 La. 747.

Michigan. — McVean v. Detroit United R. Co., 138 Mich. 263.

Mississippi. — Rhymes v. Jackson Electric R., etc., Co., 85 Miss. 140.

Missouri. — Hanheide v. St. Louis Transit Co., 104 Mo. App. 323; Reno v. St. Louis, etc., R. Co., 180 Mo. 469; Moritz v. St. Louis Transit Co., 102 Mo. App. 657; Murray v. St. Louis Transit Co., 108 Mo. App. 501; Meng v. St.

Louis, etc., R. Co., 108 Mo. App. 553; Schroeder v. St. Louis Transit Co., 111 Mo. App. 67.

New Jersey. — Cameron v. Jersey City, etc., St. R. Co., 70 N. J. L. 633.

Texas. — Galveston City R. Co. v. Hanna, 34 Tex. Civ. App. 608.

Virginia. — Danville R., etc., Co. v. Hodnett, 101 Va. 361.

Control of Car at Street Crossing. — See Sesselmann v. Metropolitan St. R. Co., 76 N. Y. App. Div. 336; Sophian v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 38 Misc. (N. Y.) 787; Andres v. Brooklyn Heights R. Co., 84 N. Y. App. Div. 596; Binns v. Brooklyn Heights R. Co., 89 N. Y. App. Div. 359.

5. Speed of Other Cars. — Union Traction Co. v. Vandercook, 32 Ind. App. 621, following Chicago, etc., R. Co. v. Spilker, 134 Ind. 380; Atherton v. Tacoma R., etc., Co., 30 Wash. 395.

Condition of Pedestrian After Collision Admissible. — Greenbaum v. Interurban St. R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 588.

6. Opinion Evidence. — Montgomery St. R. Co. v. Shanks, 139 Ala. 489; Metropolitan R. Co. v. Blick, 22 App. Cas. (D. C.) 194; Honick v. Metropolitan St. R. Co., 66 Kan. 124; Campbell v. St. Louis, etc., R. Co., 175 Mo. 161; Mathiesen v. Omaha St. R. Co., (Neb. 1903) 97 N. W. Rep. 243, reversing (Neb. 1902) 92 N. W. Rep. 639; Omaha St. R. Co. v. Larson, (Neb. 1903) 97 N. W. Rep. 824; Fisher v. Union R. Co., 86 N. Y. App. Div. 365; Portsmouth St. R. Co. v. Peed, 102 Va. 662.

7. Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138; Gray v. St. Paul City R. Co., 87 Minn. 280.

Evidence Not Conclusive. — Riley v. Shreveport Traction Co., 114 La. 135.

8. Lookout Ahead — United States. — Toledo Traction Co. v. Cameron, (C. C. A.) 137 Fed. Rep. 48.

Alabama. — Anniston Electric, etc., Co. v. Hewitt, 139 Ala. 442; Birmingham R., etc., Co. v. Brantley, 141 Ala. 614.

Arkansas. — Hot Springs St. R. Co. v. Hildreth, 72 Ark. 579, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 63.

Delaware. — Di Prisco v. Wilmington City R. Co., 4 Penn. (Del.) 527.

Florida. — Consumers' Electric Light, etc., Co. v. Pryor, 44 Fla. 354.

Illinois. — Fisher v. Chicago City R. Co., 114 Ill. App. 217.

Indiana. — Moran v. Leslie, 33 Ind. App. 80; Indianapolis St. R. Co. v. Schmidt, 35 Ind. App. 214; Indianapolis St. R. Co. v. Seerley, 35 Ind. App. 477.

Iowa. — Barry v. Burlington R., etc., Co., 119 Iowa 62, rehearing denied 119 Iowa 66.

Kentucky. — Louisville R. Co. v. French, (Ky. 1903) 71 S. W. Rep. 486; Floyd v. Paducah R., etc., Co., (Ky. 1903) 73 S. W. Rep. 1122; South Covington, etc., St. R. Co. v. McHugh,

- 64.** (7) *Signals and Warnings* — (a) *Lights*. — See notes 6, 7.
65. (b) *Sounding Gong or Bell*. — See notes 1, 2.

(Ky. 1903) 77 S. W. Rep. 202; *Thiel v. South Covington, etc., St. R. Co.*, (Ky. 1904) 78 S. W. 206; *Louisville R. Co. v. Teekin*, (Ky. 1904) 78 S. W. Rep. 470; *Greene v. Louisville R. Co.*, (Ky. 1905) 84 S. W. Rep. 1154.

Louisiana. — *Haas v. New Orleans R. Co.*, 112 La. 747.

Maine. — *Butler v. Rockland, etc., St. R. Co.*, 99 Me. 149, 105 Am. St. Rep. 267.

Minnesota. — *Gray v. St. Paul City R. Co.*, 87 Minn. 280.

Missouri. — *Gebhardt v. St. Louis Transit Co.*, 97 Mo. App. 373; *Meyers v. St. Louis Transit Co.*, 99 Mo. App. 363; *Noll v. St. Louis Transit Co.*, 100 Mo. App. 367; *Klockenbrink v. St. Louis, etc., R. Co.*, 172 Mo. 678; *Koenig v. Union Depot R. Co.*, 173 Mo. 698; *Schafstette v. St. Louis, etc., R. Co.*, 175 Mo. 142; *Meeker v. Metropolitan St. R. Co.*, 178 Mo. 173; *Jett v. Central Electric R. Co.*, 178 Mo. 664; *Barrie v. St. Louis Transit Co.*, 102 Mo. App. 87; *Sepetowski v. St. Louis Transit Co.*, 102 Mo. App. 110; *Kolb v. St. Louis Transit Co.*, 102 Mo. App. 143; *Priesmeyer v. St. Louis Transit Co.*, 102 Mo. App. 518; *McLeland v. St. Louis Transit Co.*, 105 Mo. App. 473; *Heinzle v. Metropolitan St. R. Co.*, 182 Mo. 528; *Kimble v. St. Louis, etc., R. Co.*, 108 Mo. App. 78; *Murray v. St. Louis Transit Co.*, 108 Mo. App. 501; *Ross v. Metropolitan St. R. Co.*, 113 Mo. App. 600.

New Hampshire. — *Carney v. Concord St. R. Co.*, 72 N. H. 364; *Larode v. Boston, etc., R. Co.*, (N. H. 1905) 60 Atl. Rep. 684.

New Jersey. — *Zolpher v. Camden, etc., R. Co.*, 69 N. J. L. 417.

New York. — *Andres v. Brooklyn Heights R. Co.*, 84 N. Y. App. Div. 596; *Lafferty v. Third Ave. R. Co.*, 85 N. Y. App. Div. 592, *affirmed* 176 N. Y. 594; *Greenbaum v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 588; *New York v. Metropolitan St. R. Co.*, 90 N. Y. App. Div. 66, *affirmed* 182 N. Y. 536; *McDermott v. Brooklyn Heights R. Co.*, 89 N. Y. App. Div. 214; *Kaplan v. Metropolitan St. R. Co.*, 98 N. Y. App. Div. 133.

Pennsylvania. — *Boyles v. Monongahela St. R. Co.*, 20 Pa. Super. Ct. 443; *Hellriegel v. Southern Traction Co.*, 23 Pa. Super. Ct. 392; *McFarland v. Consolidated Traction Co.*, 204 Pa. St. 423.

Texas. — *San Antonio Traction Co. v. Court*, 31 Tex. Civ. App. 146.

Virginia. — *Richmond Pass., etc., Co. v. Gordon*, 102 Va. 498; *Richmond Pass., etc., Co. v. Allen*, 103 Va. 532.

Wisconsin. — *Hanlon v. Milwaukee Electric R., etc., Co.*, 118 Wis. 210; *Forrestal v. Milwaukee Electric R., etc., Co.*, 119 Wis. 495.

Where the Accident Is Not Attributable to Failure to Keep a Lookout, as where, even if such lookout had been kept, the motorman would not, under the circumstances, have been required to stop the car, the company is not liable because of such failure. *Barney v. Metropolitan St. R. Co.*, 94 N. Y. App. Div. 388.

Conductor Not Required to Keep Lookout Ahead.

— *Palmer v. Larchmont Horse R. Co.*, 95 N. Y. App. Div. 106.

64. 6. Lights on Cars. — *Chicago City R. Co. v. Fennimore*, 199 Ill. 9; *Indianapolis St. R. Co. v. Slifer*, 35 Ind. App. 700, *reversing* (Ind. App. 1905) 72 N. E. Rep. 1055; *Ensley v. Detroit United R. Co.*, 134 Mich. 195; *Campbell v. St. Louis, etc., R. Co.*, 175 Mo. 161; *Frank v. St. Louis Transit Co.*, 99 Mo. App. 323; *Buren v. St. Louis Transit Co.*, 104 Mo. App. 224; *Gildea v. Metropolitan St. R. Co.*, 171 N. Y. 660, *affirming* 58 N. Y. App. Div. 528.

7. See *Richmond Pass., etc., Co. v. Racks*, 101 Va. 487.

65. 1. Sounding Gong or Bell — *United States*. — *Toledo Traction Co. v. Cameron*, (C. C. A.) 137 Fed. Rep. 48.

Arkansas. — *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 579, *quoting* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 65.

California. — *Kernan v. Market St. R. Co.*, 137 Cal. 326.

Delaware. — *Boudwin v. Wilmington City R. Co.*, 4 Penn. (Del.) 381.

Illinois. — *Chicago City R. Co. v. Iverson*, 108 Ill. App. 433; *Chicago Union Traction Co. v. O'Donnell*, 211 Ill. 349, *affirming* 113 Ill. App. 259.

Indiana. — *Indianapolis St. R. Co. v. Bordenchecker*, 33 Ind. App. 138.

Massachusetts. — *Kerr v. Boston El. R. Co.*, 188 Mass. 434; *Orth v. Boston El. R. Co.*, 188 Mass. 427.

Minnesota. — *Gray v. St. Paul City R. Co.*, 87 Minn. 280; *Peterson v. Minneapolis St. R. Co.*, 90 Minn. 52.

Mississippi. — *Rhymes v. Jackson Electric R., etc., Co.*, 85 Miss. 140.

Missouri. — *Klockenbrink v. St. Louis, etc., R. Co.*, 172 Mo. 678; *Noll v. St. Louis Transit Co.*, 100 Mo. App. 367; *Baxter v. St. Louis Transit Co.*, 103 Mo. App. 597; *Buren v. St. Louis Transit Co.*, 104 Mo. App. 224; *Brown v. St. Louis Transit Co.*, 108 Mo. App. 310; *Story v. St. Louis Transit Co.*, 108 Mo. App. 424.

New Hampshire. — *Carney v. Concord St. R. Co.*, 72 N. H. 364.

New Jersey. — *Zolpher v. Camden, etc., R. Co.*, 69 N. J. L. 417; *Adams v. Camden, etc., R. Co.*, 69 N. J. L. 424. See also *Daum v. North Jersey St. R. Co.*, 69 N. J. L. 1.

New York. — *Pelletreau v. Metropolitan St. R. Co.*, 174 N. Y. 503, *affirming* 74 N. Y. App. Div. 192; *Hennessey v. Forty-second St., etc., R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 158; *Gildea v. Metropolitan St. R. Co.*, 171 N. Y. 660, *affirming* 58 N. Y. App. Div. 528; *New York Bread Co. v. New York City R. Co.*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 89.

Pennsylvania. — *Hoon v. Beaver Valley Traction Co.*, 204 Pa. St. 369.

Weight of Positive and Negative Evidence of Sounding Bell. — *Stanley v. Cedar Rapids, etc., R. Co.*, 119 Iowa 526; *Murray v. St. Louis Transit Co.*, 176 Mo. 183.

2. *Chicago City R. Co. v. Fennimore*, 199 Ill. 9; *Chicago City R. Co. v. Loomis*, 201 Ill. 118,

65. Municipal Ordinances. — See note 5.

Proximate Cause. — See note 6.

66. (8) Violation of Ordinances. — See note 2.(9) *Contributory Negligence* — (a) *In General.* — See notes 3, 4, 5, 7.

affirming 102 Ill. App. 326; *Louisville R. Co. v. French*, (Ky. 1903) 71 S. W. Rep. 486; *South Covington, etc., St. R. Co. v. McHugh*, (Ky. 1903) 77 S. W. Rep. 202; *Louisville R. Co. v. Teekin*, (Ky. 1904) 78 S. W. Rep. 470; *Frank v. St. Louis Transit Co.*, 99 Mo. App. 323; *Koenig v. Union Depot R. Co.*, 173 Mo. 698; *Meng v. St. Louis, etc., R. Co.*, 108 Mo. App. 553; *Cosgrove v. Metropolitan St. R. Co.*, 173 N. Y. 628, *affirming* 74 N. Y. App. Div. 166; *Levine v. Metropolitan St. R. Co.*, 177 N. Y. 523, *affirming* 78 N. Y. App. Div. 426; *Hellriegel v. Southern Traction Co.*, 23 Pa. Super. Ct. 392. See, however, *Barrett v. Columbia R. Co.*, 20 App. Cas. (D. C.) 381.

65. 5. Plant v. Heraty, 131 Mich. 619.

6. Hot Springs St. R. Co. v. Hildreth, 72 Ark. 579, *quoting* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 65; *Louisville R. Co. v. Colston*, 117 Ky. 804; *Garvick v. United R., etc., Co.*, 101 Md. 239; *Murray v. St. Louis Transit Co.*, 176 Mo. 183; *Heinzle v. Metropolitan St. R. Co.*, 182 Mo. 528; *Fry v. St. Louis Transit Co.*, 111 Mo. App. 324; *Thompson v. Metropolitan St. R. Co.*, 89 N. Y. App. Div. 10; *Reid Ice Cream Co. v. New York City R. Co.*, 97 N. Y. App. Div. 303; *Sullivan v. New York City R. Co.*, (Supm. Ct. App. T.) 91 N. Y. Supp. 325.

66. 2. Memphis St. R. Co. v. Haynes, 112 Tenn. 712.

3. Contributory Negligence — *Delaware.* — *Cox v. Wilmington City R. Co.*, 4 Penn. (Del.) 162; *Wilman v. People's R. Co.*, 4 Penn. (Del.) 260; *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527; *Boudwin v. Wilmington City R. Co.*, 4 Penn. (Del.) 381; *Fouk v. Wilmington City R. Co.*, (Del. 1905) 60 Atl. Rep. 973.

District of Columbia. — *Barrett v. Columbia R. Co.*, 20 App. Cas. (D. C.) 381.

Illinois. — *West Chicago St. R. Co. v. Callow*, 102 Ill. App. 323; *Chicago City R. Co. v. Mauger*, 105 Ill. App. 579; *Chicago Union Traction Co. v. Chugren*, 110 Ill. App. 545, *affirmed* 209 Ill. 429; *Feitl v. Chicago City R. Co.*, 211 Ill. 279; *Chicago City R. Co. v. Barnes*, 114 Ill. App. 495.

Indiana. — *Indianapolis St. R. Co. v. Zaring*, 33 Ind. App. 297.

Kentucky. — *Lexington R. Co. v. Fain*, (Ky. 1904) 80 S. W. Rep. 463.

Louisiana. — *Heebe v. New Orleans, etc., R., etc., Co.*, 110 La. 970.

Maine. — *Moulton v. Sanford, etc., R. Co.*, 99 Me. 508.

Maryland. — *State v. United R., etc., Co.*, 97 Md. 73.

Massachusetts. — *Judge v. Elkins*, 183 Mass. 229.

Minnesota. — *Rawitzer v. St. Paul City R. Co.*, 93 Minn. 84; *Alger v. Duluth-Superior Traction Co.*, 93 Minn. 314.

Missouri. — *Sepetowski v. St. Louis Transit Co.*, 102 Mo. App. 110; *Asphalt, etc., Constr. Co. v. St. Louis Transit Co.*, 102 Mo. App. 469; *Ries v. St. Louis Transit Co.*, 179 Mo. 1; *Mc-*

Gauley v. St. Louis Transit Co., 179 Mo. 583; *McLeland v. St. Louis Transit Co.*, 105 Mo. App. 473; *Fellenz v. St. Louis, etc., R. Co.*, 106 Mo. App. 154; *Impkamp v. St. Louis Transit Co.*, 108 Mo. App. 655; *Girardina v. St. Louis, etc., R. Co.*, 185 Mo. 330.

New York. — *Bortz v. Dry Dock, etc., R. Co.*, 78 N. Y. App. Div. 386; *Trauber v. Third Ave. R. Co.*, 80 N. Y. App. Div. 37; *Phelan v. Forty-second St., etc., R. Co.*, 79 N. Y. App. Div. 548; *Little v. Third Ave. R. Co.*, 83 N. Y. App. Div. 330, *affirmed* 178 N. Y. 591; *Poole v. Metropolitan St. R. Co.*, 83 N. Y. App. Div. 235; *Steinman v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 231; *O'Neill v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 208.

Oregon. — *Wolf v. City, etc., R. Co.*, 45 Oregon 446.

Pennsylvania. — *Boring v. Union Traction Co.*, 211 Pa. St. 594.

Tennessee. — *Memphis St. R. Co. v. Haynes*, 112 Tenn. 712.

Virginia. — *Richmond Traction Co. v. Martin*, 102 Va. 209.

Burden to Show Contributory Negligence. — *Cox v. Wilmington City R. Co.*, 4 Penn. (Del.) 162; *Cox v. South Shore, etc., St. R. Co.*, 182 Mass. 497; *Gleason v. Worcester Consol. St. R. Co.*, 184 Mass. 290; *Riska v. Union Depot R. Co.*, 180 Mo. 168; *Belford v. Brooklyn Heights R. Co.*, 86 N. Y. App. Div. 388; *Mauer v. Brooklyn Heights R. Co.*, 87 N. Y. App. Div. 119; *Lynch v. Third Ave. R. Co.*, 88 N. Y. App. Div. 604; *Thompson v. Metropolitan St. R. Co.*, 89 N. Y. App. Div. 10; *Lejonne v. Dry Dock, etc., R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 749; *Denison, etc., R. Co. v. Carter*, (Tex. Civ. App. 1902) 70 S. W. Rep. 322; *Marshall v. Dallas Consol. Electric St. R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 63; *Richmond Pass, etc., Co. v. Gordon*, 102 Va. 498. And see generally the title CONTRIBUTORY NEGLIGENCE, 453. *1 et seq.*

Contributory Negligence, to Preclude Recovery, Must Have Been Proximate Cause of Injuries. — *Schwartz v. New Orleans, etc., R. Co.*, 110 La. 534.

Negligence of Third Person Contributing to Injury Does Not Relieve Company. — *Springfield Consol. R. Co. v. Puntenney*, 200 Ill. 9, *affirming* 101 Ill. App. 95.

4. Atlanta R., etc., Co. v. Owens, 119 Ga. 833; *Moore v. Lindell R. Co.*, 176 Mo. 528; *Ledwidge v. St. Louis Transit Co.*, (Mo. App. 1903) 73 S. W. Rep. 1008; *Fanning v. St. Louis Transit Co.*, 103 Mo. App. 151; *Gettys v. St. Louis Transit Co.*, 103 Mo. App. 564; *Riska v. Union Depot R. Co.*, 180 Mo. 168. *Compare Moore v. St. Louis Transit Co.*, 95 Mo. App. 728.

5. Care Required to Keep Out of Cars' Way. — *Campbell v. Los Angeles Traction Co.*, 137 Cal. 565; *Richmond Traction Co. v. Clarke*, 101 Va. 382.

Error of Judgment Not Necessarily Contributory

67. See notes 1, 2.**(b) Injuries Avoidable Notwithstanding Contributory Negligence.** — See note 3.

Negligence.—San Antonio Traction Co. *v.* Upson, 31 Tex. Civ. App. 50.

66. 7. Imputing Negligence of Driver of Wagon to Passenger.—Hayden *v.* Fair Haven, etc., R. Co., 76 Conn. 355; Dungan *v.* Wilmington City R. Co., 4 Penn. (Del.) 458; Chicago Union Traction Co. *v.* Leach, 215 Ill. 184; Sullivan *v.* Boston El. R. Co., 185 Mass. 602; Dunn *v.* Old Colony St. R. Co., 186 Mass. 316; Seele *v.* Boston, etc., St. R. Co., 187 Mass. 248; Joyce *v.* St. Louis Transit Co., 111 Mo. App. 565; Searles *v.* Elizabeth, etc., R. Co., 70 N. J. L. 388; Andres *v.* Brooklyn Heights R. Co., 84 N. Y. App. Div. 596; Krintzman *v.* Interurban St. R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 243; Westerman *v.* Metropolitan St. R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 501; Hogan *v.* Winnebago Traction Co., 121 Wis. 123. And see the title CONTRIBUTORY NEGLIGENCE, **445. 2 et seq.**

67. 1. Demarest *v.* Forty-second St., etc., R. Co., 104 N. Y. App. Div. 503.

Principle Applied to Injury to Bicyclist.—Palmer *v.* Cedar Rapids, etc., R. Co., 124 Iowa 424.

2. Generally Question for Jury—*Delaware.*—Foulk *v.* Wilmington City R. Co., (Del. 1905) 60 Atl. Rep. 973.

Georgia.—Macon R., etc., Co. *v.* Streyer, 123 Ga. 279.

Illinois.—Chicago Union Traction Co. *v.* O'Donnell, 211 Ill. 349, *affirming* 113 Ill. App. 259; Chicago North Shore St. R. Co. *v.* Strathmann, 213 Ill. 252; Chicago City R. Co. *v.* Nelson, 215 Ill. 436.

Indiana.—Indianapolis St. R. Co. *v.* Johnson, 163 Ind. 518; Indianapolis St. R. Co. *v.* O'Donnell, 35 Ind. App. 312, rehearing denied 35 Ind. App. 329.

Massachusetts.—Evensen *v.* Lexington, etc., St. R. Co., 187 Mass. 77; Kerr *v.* Boston El. R. Co., 188 Mass. 434; Shea *v.* Lexington, etc., St. R. Co., 188 Mass. 425.

Michigan.—McVean *v.* Detroit United R. Co., 138 Mich. 263; Ablard *v.* Detroit United R. Co., (Mich. 1905) 102 N. W. Rep. 741.

Missouri.—Freyark *v.* St. Louis Transit Co., 111 Mo. App. 208; Schroeder *v.* St. Louis Transit Co., 111 Mo. App. 67; Frank *v.* St. Louis Transit Co., 112 Mo. App. 496; Waechter *v.* St. Louis, etc., R. Co., 113 Mo. App. 270.

Nebraska.—McLean *v.* Omaha, etc., R., etc., Co., (Neb. 1905) 103 N. W. Rep. 285, *affirming* (Neb. 1904) 100 N. W. Rep. 935.

New York.—Fiori *v.* Metropolitan St. R. Co., 98 N. Y. App. Div. 49; Scarangelo *v.* Interurban St. R. Co., (Supm. Ct. App. T.) 90 N. Y. Supp. 430; Robinson *v.* Metropolitan St. R. Co., 179 N. Y. App. Div. 593, *affirming* 91 N. Y. App. Div. 158. See, however, Orchard Stables *v.* Interurban St. R. Co., (Supm. Ct. App. T.) 91 N. Y. Supp. 330.

Ohio.—Lake Shore Electric R. Co. *v.* Majewski, 25 Ohio Cir. Ct. 55.

Pennsylvania.—Haughey *v.* Pittsburg R. Co., 210 Pa. St. 363.

Wisconsin.—Lightfoot *v.* Winnebago Traction Co., 123 Wis. 479.

3. Injuries Avoidable Notwithstanding Contributory Negligence—*Florida.*—Consumers' Electric Light, etc., Co. *v.* Pryor, 44 Fla. 354.

Georgia.—Columbus R. Co. *v.* Peddy, 120 Ga. 589.

Illinois.—Chicago Union Traction Co. *v.* McGinnis, 112 Ill. App. 177.

Indiana.—Union Traction Co. *v.* Vandercook, 32 Ind. App. 621; Indianapolis St. R. Co. *v.* Schomberg, (Ind. App. 1904) 71 N. E. Rep. 237; Indianapolis St. R. Co. *v.* Seerley, 35 Ind. App. 467, rehearing denied 35 Ind. App. 477.

Kansas.—Metropolitan St. R. Co. *v.* Arnold, 67 Kan. 260.

Kentucky.—Louisville R. Co. *v.* Colston, 117 Ky. 804; Lexington R. Co. *v.* Fain, (Ky. 1904) 80 S. W. Rep. 463; Shaw *v.* Louisville R. Co., (Ky. 1904) 81 S. W. Rep. 268.

Maine.—Butler *v.* Rockland, etc., St. R. Co., 99 Me. 149, 105 Am. St. Rep. 267.

Michigan.—Kotila *v.* Houghton County St. R. Co., 134 Mich. 314.

Mississippi.—Rhymes *v.* Jackson Electric R., etc., Co., 85 Miss. 140.

Missouri.—Cogan *v.* Cass Ave., etc., R. Co., 101 Mo. App. 179; Aldrich *v.* St. Louis Transit Co., 101 Mo. App. 77; Degel *v.* St. Louis Transit Co., 101 Mo. App. 56; Barrie *v.* St. Louis Transit Co., 102 Mo. App. 87; Moritz *v.* St. Louis Transit Co., 102 Mo. App. 657; Kube *v.* St. Louis Transit Co., 103 Mo. App. 582; Holden *v.* Missouri R. Co., 177 Mo. 456; Riska *v.* Union Depot R. Co., 180 Mo. 168; Reno *v.* St. Louis, etc., R. Co., 180 Mo. 469; Roenfeldt *v.* St. Louis, etc., R. Co., 180 Mo. 554; Fellenz *v.* St. Louis, etc., R. Co., 106 Mo. App. 154; Asphalt, etc., Constr. Co. *v.* St. Louis Transit Co., 102 Mo. App. 469; Murphy *v.* St. Louis Transit Co., 189 Mo. 42; Strode *v.* St. Louis Transit Co., (Mo. 1905) 87 S. W. Rep. 976; Hyman *v.* St. Louis Transit Co., 108 Mo. App. 458; Hartman *v.* St. Louis Transit Co., 112 Mo. App. 439; Frank *v.* St. Louis Transit Co., 112 Mo. App. 496; Ross *v.* Metropolitan St. R. Co., 113 Mo. App. 600; Union Biscuit Co. *v.* St. Louis Transit Co., 108 Mo. App. 297; Murray *v.* St. Louis Transit Co., 108 Mo. App. 501; Meng *v.* St. Louis, etc., R. Co., 108 Mo. App. 553.

Nebraska.—McLean *v.* Omaha, etc., R., etc., Co., (Neb. 1905) 103 N. W. Rep. 285, *affirming* (Neb. 1904) 100 N. W. Rep. 935.

New Hampshire.—Little *v.* Boston, etc., R. Co., 72 N. H. 61, 502. See also Laronde *v.* Boston, etc., R. Co., (N. H. 1905) 60 Atl. Rep. 684.

New Jersey.—Zolpher *v.* Camden, etc., R. Co., 69 N. J. L. 417.

New York.—Wagner *v.* Metropolitan St. R. Co., 70 N. Y. App. Div. 591, *affirmed* 176 N. Y. 610; Phelan *v.* Forty-second St., etc., R. Co., 79 N. Y. App. Div. 548; Poole *v.* Metropolitan St. R. Co., 83 N. Y. App. Div. 235; Andres *v.* Brooklyn Heights R. Co., 84 N. Y. App. Div. 596; Wagner *v.* Metropolitan St. R. Co., 176 N. Y. 610, *affirming* 79 N. Y. App. Div. 591; McDonald *v.* Metropolitan St. R. Co., 93 N. Y. App. Div. 238.

67. (10) *Proof of Negligence* — Burden of Proof. — See note 5.

68. *Admissibility of Evidence.* — See note 1.

Question for Jury. — See notes 3, 4.

b. COLLISION WITH VEHICLES AND HORSES — (1) *In General.* —

See note 5.

Texas. — El Paso Electric R. Co. v. Ballinger, (Tex. Civ. App. 1903) 72 S. W. Rep. 612; Marshall v. Dallas Consol. Electric St. R. Co., (Tex. Civ. App. 1903) 73 S. W. Rep. 63; Galton City R. Co. v. Hanna, 34 Tex. Civ. App. 608. *Virginia.* — Richmond Pass., etc., Co. v. Steger, 101 Va. 319; Richmond Pass., etc., Co. v. Gordon, 102 Va. 498. And see the title CONTRIBUTORY NEGLIGENCE, 381. *i et seq.*

Motorman Spellbound with Fear — No Negligence. — Barry v. Burlington R., etc., Co., 119 Iowa 66, denying rehearing 119 Iowa 62.

Rule Not Applicable When Negligence of Parties Concurrent. — Robards v. Indianapolis St. R. Co., 32 Ind. App. 301, denying rehearing 32 Ind. App. 297; Ries v. St. Louis Transit Co., 179 Mo. 1.

67. 5. Burden of Proving Negligence — *Arkansas.* — Hot Springs St. R. Co. v. Hildreth, 72 Ark. 572.

Delaware. — Wilman v. People's R. Co., 4 Penn. (Del.) 260; Di Prisco v. Wilmington City R. Co., 4 Penn. (Del.) 527; Boudwin v. Wilmington City R. Co., 4 Penn. (Del.) 381; Foulk v. Wilmington City R. Co., (Del. 1905) 60 Atl. Rep. 973; Goldstein v. People's R. Co., (Del. 1905) 60 Atl. Rep. 975.

Indiana. — Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687; Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138.

Maine. — Butler v. Rockland, etc., St. R. Co., 99 Me. 149, 105 Am. St. Rep. 267.

Maryland. — Garvick v. United R., etc., Co., 101 Md. 239.

Missouri. — Warner v. St. Louis, etc., R. Co., 178 Mo. 125; Spiro v. St. Louis Transit Co., 102 Mo. App. 250; Holden v. Missouri R. Co., 108 Mo. App. 665.

New Jersey. — Solatinow v. Jersey City, etc., R. Co., 70 N. J. L. 154.

New York. — Welsh v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 166; Klyachko v. Central Crosstown R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 1073; Gentile v. New York City R. Co., (Supm. Ct. App. T.) 92 N. Y. Supp. 264; Lehn v. Central Crosstown R. Co., (Supm. Ct. App. T.) 92 N. Y. Supp. 301; Lamm v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 47 Misc. (N. Y.) 625.

Virginia. — Richmond Pass., etc., Co. v. Gordon, 102 Va. 498.

Statutory Presumption Against Company. — Cordray v. Savannah, etc., R. Co., 117 Ga. 464.

Rebutting Statutory Presumption. — Atlanta R., etc., Co. v. Gaston, 118 Ga. 418.

68. 1. Admissibility of Evidence. — Stiasny v. Metropolitan St. R. Co., 172 N. Y. 656, affirming 58 N. Y. App. Div. 172.

Declarations of Motorman or Conductor Res Gestæ. — Ensley v. Detroit United R. Co., 134 Mich. 195; Koenig v. Union Depot R. Co., 173 Mo. 698. See also Columbus R. Co. v. Peddy, 120 Ga. 589.

Conduct of Motorman Prior to Accident. — Mon-

roe v. Hartford St. R. Co., 76 Conn. 201; Dyer v. Union R. Co., 25 R. I. 221.

Evidence of Distance in Which Car Could Be Stopped. — Indianapolis St. R. Co. v. Seerley, 35 Ind. App. 467.

Evidence of Distance in Which Car Stopped After Collision. — Zolpher v. Camden, etc., R. Co., 69 N. J. L. 417.

Evidence of Arrest of Operators of Car Inadmissible. — Chicago City R. Co. v. Uhter, 212 Ill. 174, approving Luby v. Hudson River R. Co., 17 N. Y. 131.

Declarations of Person Injured as Res Gestæ. — Di Prisco v. Wilmington City R. Co., 4 Penn. (Del.) 527.

3. Delaware. — Goldstein v. People's R. Co., (Del. 1905) 60 Atl. Rep. 975; Di Prisco v. Wilmington City R. Co., 4 Penn. (Del.) 527.

Georgia. — Columbus R. Co. v. Peddy, 120 Ga. 589; Macon R., etc., Co. v. Streyer, 123 Ga. 279.

Minnesota. — Rawitzer v. St. Paul City R. Co., 94 Minn. 494.

Missouri. — Meng v. St. Louis, etc., R. Co., 108 Mo. App. 553; Holden v. Missouri R. Co., 108 Mo. App. 665; Deitring v. St. Louis Transit Co., 109 Mo. App. 524; Freymark v. St. Louis Transit Co., 111 Mo. App. 208; Fry v. St. Louis Transit Co., 111 Mo. App. 324; Schaub v. St. Louis Transit Co., 112 Mo. App. 529; Frank v. St. Louis Transit Co., 112 Mo. App. 496.

New Jersey. — Zolpher v. Camden, etc., R. Co., 69 N. J. L. 417; Daum v. North Jersey St. R. Co., 70 N. J. L. 338, affirming 69 N. J. L. 1; Vrooman v. North Jersey St. R. Co., 70 N. J. L. 818.

New York. — Larkin v. United Traction Co., 76 N. Y. App. Div. 238; Connor v. Metropolitan St. R. Co., 77 N. Y. App. Div. 384; Polacci v. Interurban St. R. Co., (Supm. Ct. App. T.) 90 N. Y. Supp. 341; Scarangelo v. Interurban St. R. Co., (Supm. Ct. App. T.) 90 N. Y. Supp. 430; Fiori v. Metropolitan St. R. Co., 98 N. Y. App. Div. 49; Muriano v. Interurban St. R. Co., (Supm. Ct. App. T.) 92 N. Y. Supp. 262.

Running Cars upon Down Track Not Negligence per Se. — Baldwin v. Heraty, 136 Mich. 15.

4. Sealey v. Metropolitan St. R. Co., 97 N. Y. App. Div. 399; Lamm v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 90 N. Y. Supp. 390.

5. Collision with Vehicles or Horses. — Hot Springs St. R. Co. v. Hildreth, 72 Ark. 572; Metropolitan R. Co. v. Blick, 22 App. Cas. (D. C.) 194; Chicago City R. Co. v. Sandusky, 198 Ill. 400, affirming 99 Ill. App. 164; Springfield Consol. R. Co. v. Puntenney, 200 Ill. 9, affirming 101 Ill. App. 95; Chicago City R. Co. v. Gemmill, 209 Ill. 638; Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687; Quinn v. Dubuque St. R. Co., (Iowa 1903) 94 N. W. Rep. 476; Lexington R. Co. v. Fain, (Ky. 1904) 80 S. W. Rep. 463; Wood v. Boston El. R. Co., 188 Mass. 161; Giese v. Milwaukee Electric R., etc., Co., 116 Wis. 66; Wilson v. Chippewa Val-

69. See notes 1, 3.

70. See notes 1, 2, 3.

(2) *Vehicles Moving Along Track.* — See notes 4, 5, 6.

71. See notes 2, 3, 7.

ley Electric R. Co., 120 Wis. 636 (runaway horse); *Balfour v. Toronto R. Co.*, 5 Ont. L. Rep. 735, *affirmed* 32 Can. Sup. Ct. 239.

Vehicles Crossing Track. — *Cole v. Central R. Co.*, 103 Ill. App. 160; *Smith v. Chicago City R. Co.*, 107 Ill. App. 177; *Chicago City R. Co. v. Benson*, 108 Ill. App. 193; *Sophian v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 787; *Cronin v. Metropolitan St. R. Co.*, 82 N. Y. App. Div. 227; *Freeman v. Brooklyn Heights R. Co.*, 87 N. Y. App. Div. 127; *Carter v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 134; *Bullman v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 325; *Pritchard v. Brooklyn Heights R. Co.*, 89 N. Y. App. Div. 269; *Rosenstock v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 114; *Klimpl v. Metropolitan St. R. Co.*, 92 N. Y. App. Div. 291; *Andres v. Brooklyn Heights R. Co.*, 84 N. Y. App. Div. 596.

Starting Car While Vehicle Is Crossing Track. — *Walker v. St. Louis, etc., R. Co.*, 106 Mo. App. 321.

Car Jumping Track. — See *Perras v. United Traction Co.*, 88 N. Y. App. Div. 260.

69. 1. *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 572; *Schutt v. Shreveport Belt R. Co.*, 109 La. 500; *Spiro v. St. Louis Transit Co.*, 102 Mo. App. 250; *Ellerman v. St. Louis Transit Co.*, 102 Mo. App. 295; *Mathieson v. Omaha St. R. Co.*, (Neb. 1902) 92 N. W. Rep. 639; *Lindgren v. Omaha St. R. Co.*, (Neb. 1905) 103 N. W. Rep. 307; *Herbst v. New York City R. Co.*, (Supm. Ct. App. T.) 93 N. Y. Supp. 1109.

Vehicles Crossing Track. — *Goldkranz v. Metropolitan St. R. Co.*, 89 N. Y. App. Div. 590; *McKinley v. Metropolitan St. R. Co.*, 91 N. Y. App. Div. 153; *Persico v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 233; *Cushing v. Metropolitan St. R. Co.*, 92 N. Y. App. Div. 510; *Schneiders v. Central Crosstown R. Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 453; *Wilson v. United Traction Co.*, 94 N. Y. App. Div. 539; *Koehler v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 904; *Foley v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 932.

Automobile Crossing Track. — *Hirsch v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 94 N. Y. Supp. 330.

Collision with Fire Truck. — See *Knox v. North Jersey St. R. Co.*, 70 N. J. L. 347; *New York v. Metropolitan St. R. Co.*, 90 N. Y. App. Div. 66, *affirmed* 182 N. Y. 536.

Vehicle Turning Back to Track After Turning Out. — See *Reichenberg v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 523.

3. Danger of Collision Imminent. — *Conrad v. Elizabeth, etc., R. Co.*, 70 N. J. L. 676.

70. 1. *Heying v. United R., etc., Co.*, 100 Md. 281; *Petty v. St. Louis, etc., R. Co.*, 179 Mo. 666; *Frank v. St. Louis Transit Co.*, 112 Mo. App. 496; *Markowitz v. Metropolitan St. R. Co.*, 186 Mo. 350; *Hollingshead v. Camden, etc., R. Co.*, (N. J. 1905) 60 Atl. Rep. 514; *McKinley v. Metropolitan St. R. Co.*, 91 N. Y.

App. Div. 153. See, however, *Cole v. Central R. Co.*, 103 Ill. App. 160.

This Rule Does Not Apply, however, where the motorman perceives that the driver of the vehicle is giving no heed to the sounding of the bell or the approach of the car. *Holden v. Missouri R. Co.*, 177 Mo. 456.

2. *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 579, *quoting* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 70.

3. *Hot Springs St. R. Co. v. Hildreth*, 72 Ark. 579, *quoting* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 70.

4. Vehicles on Track. — *Indianapolis St. R. Co. v. Darnell*, 32 Ind. App. 687.

A Person Who Drives on the Track to Avoid an Obstruction in the Street is not under a duty to turn off the track until he has passed the obstruction and become aware of the approach of a car from the rear. *Sullivan v. Boston El. R. Co.*, 185 Mass. 602.

5. Illinois. — *North Chicago St. R. Co. v. Rodert*, 203 Ill. 413, *affirming* 105 Ill. App. 314. *Indiana.* — *Indianapolis St. R. Co. v. Darnell*, 32 Ind. App. 687.

Kentucky. — *Greene v. Louisville R. Co.*, (Ky. 1905) 84 S. W. Rep. 1154, *quoting* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 70.

Massachusetts. — *Sexton v. West Roxbury, etc., St. R. Co.*, 188 Mass. 139.

Missouri. — *Schafstette v. St. Louis, etc., R. Co.*, 175 Mo. 142; *Twelkemeyer v. St. Louis Transit Co.*, 102 Mo. App. 190; *Degel v. St. Louis Transit Co.*, 101 Mo. App. 56; *Strode v. St. Louis Transit Co.*, (Mo. 1905) 87 S. W. Rep. 976; *Brown v. St. Louis Transit Co.*, 108 Mo. App. 310.

New Jersey. — *Adams v. Camden, etc., R. Co.*, 69 N. J. L. 424.

New York. — *Connor v. Metropolitan St. R. Co.*, 77 N. Y. App. Div. 384; *Blum v. Metropolitan St. R. Co.*, 79 N. Y. App. Div. 611; *Seletsky v. Third Ave. R. Co.*, 173 N. Y. 645, *affirming* 69 N. Y. App. Div. 27; *Moore v. Metropolitan St. R. Co.*, 84 N. Y. App. Div. 613; *Benjamin v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 1052; *New York Bread Co. v. New York City R. Co.*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 89.

Ohio. — *Toledo, etc., R. Co. v. Gilbert*, 24 Ohio Cir. Ct. 181.

Pennsylvania. — *Hellriegel v. Southern Traction Co.*, 23 Pa. Super. Ct. 392.

Rhode Island. — *Dyer v. Union R. Co.*, 25 R. I. 221.

Virginia. — *Richmond Pass, etc., Co. v. Allen*, 103 Va. 532.

6. *Greene v. Louisville R. Co.*, (Ky. 1905) 84 S. W. Rep. 1154, *quoting* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 70; *Sullivan v. Boston El. R. Co.*, 185 Mass. 602; *Jersey Farm Dairy Co. v. St. Louis Transit Co.*, 103 Mo. App. 90; *Kennedy v. Consolidated Traction Co.*, 210 Pa. St. 215.

71. 2. *Schafstette v. St. Louis, etc., R. Co.*, 175 Mo. 142; *Richmond Pass, etc., Co. v. Allen*, 103

- 71.** (3) *Vehicles Moving Beside Track.* — See notes 8, 9, 10.
72. (4) *Vehicles Standing on Street.* — See note 1.
 An Error of Judgment. — See note 3.
 (5) *Contributory Negligence* — (a) In General. — See notes 4, 5, 7.
73. (b) *Driving on Street on Which Street Cars Are Operated.* — See note 2.
 (c) *Standing Vehicles On or Near Track.* — See notes 3, 4, 6.
 (d) *Driving on Track.* — See note 7.

Va. 532. See also Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687. See, however, McGauley v. St. Louis Transit Co., 179 Mo. 583; Belford v. Brooklyn Heights R. Co., (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 148.

71. 3. Greene v. Louisville R. Co., (Ky. 1905) 84 S. W. Rep. 1154, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 71.

7. McGauley v. St. Louis Transit Co., 179 Mo. 583; U. P. Steam Baking Co. v. Omaha St. R. Co., (Neb. 1903) 94 N. W. Rep. 533; Alexander v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 86 N. Y. Supp. 212; Randall v. Union R. Co., (R. I. 1898) 59 Atl. Rep. 165.

8. Vehicles Moving Beside Track. — Hot Springs St. R. Co. v. Hildreth, 72 Ark. 579, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 71; Chicago Union Traction Co. v. Browdy, 206 Ill. 615, reversing 108 Ill. App. 177; Cole v. Central R. Co., 103 Ill. App. 160; Chicago City R. Co. v. Ahler, 107 Ill. App. 397; Crisman v. Shreveport Belt R. Co., 110 La. 640; Solatinow v. Jersey City, etc., R. Co., 70 N. J. L. 154.

9. Hot Springs St. R. Co. v. Hildreth, 72 Ark. 579, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 71.

10. Hot Springs St. R. Co. v. Hildreth, 72 Ark. 579, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 71; Crisman v. Shreveport Belt R. Co., 110 La. 640; Baxter v. St. Louis Transit Co., 103 Mo. App. 597; Lake Shore Electric R. Co. v. Majewski, 25 Ohio Cir. Ct. 55; Memphis St. R. Co. v. Haynes, 112 Tenn. 712.

72. 1. Montgomery St. R. Co. v. Shanks, 139 Ala. 489; Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602; Kennedy v. Lowell, etc., St. R. Co., 184 Mass. 31; Meyers v. St. Louis Transit Co., 99 Mo. App. 363; Schaub v. St. Louis Transit Co., 112 Mo. App. 529; Murphy v. St. Louis Transit Co., 189 Mo. 42; Martin v. Interurban St. R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 921; McFarland v. Consolidated Traction Co., 204 Pa. St. 423; Barnes v. Pittsburg R. Co., 26 Pa. Super. Ct., 36; El Paso Electric St. R. Co. v. Ballinger, (Tex. Civ. App. 1903) 72 S. W. Rep. 612.

3. Gass v. New York City R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 950.

4. Contributory Negligence. — Hot Springs St. R. Co. v. Hildreth, 72 Ark. 572; Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687; Richmond Pass., etc., Co. v. Steger, 101 Va. 319; Richmond Pass., etc., Co. v. Gordon, 102 Va. 498; Atherton v. Tacoma R., etc., Co., 30 Wash. 305.

Driving on Left Side of Street — Not Negligence per Se. — Wood v. Boston El. R. Co., 188 Mass. 161.

Failure of Driver of Vehicle to Carry Lights at Night. — See Koehler v. Interurban St. R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 904.

Failure of Driver to Observe Rules of Road to

Be Considered. — Taylor v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 282.

Riding Bicycle in Excess of Legal Speed Contributory Negligence. — Harrington v. Los Angeles R. Co., 140 Cal. 514, 98 Am. St. Rep. 85.

Driving Horse Afraid of Cars Not Negligence per Se. — Montgomery St. R. Co. v. Hastings, 138 Ala. 432. See also Montgomery St. R. Co. v. Shanks, 139 Ala. 489.

Riding Young and Skittish Horse Not Negligence per Se. — Knoxville Traction Co. v. Mullins, 111 Tenn. 329.

5. Holden v. Missouri R. Co., 177 Mo. 456; Krintzman v. Interurban St. R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 243.

Duty to Jump from Wagon Before Collision. — Robinson v. Metropolitan St. R. Co., 91 N. Y. App. Div. 158, affirmed 179 N. Y. 593.

Failure to Jump from Wagon Before Collision — Question for Jury. — Meyers v. St. Louis Transit Co., 99 Mo. App. 363. See also Murphy v. St. Louis Transit Co., 189 Mo. 42; Waters v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 85 N. Y. Supp. 1120.

7. Contributory Negligence for Jury. — Kane v. Worcester Consol. St. R. Co., 182 Mass. 201; Smith v. Minneapolis St. R. Co., (Minn. 1905) 104 N. W. Rep. 16; Omaha St. R. Co. v. Mathiesen, (Neb. 1905) 103 N. W. Rep. 666.

Firemen Responding to Fire Alarm Not Expected to Use Care of Ordinary Individuals. — Hanlon v. Milwaukee Electric R., etc., Co., 118 Wis. 210.

Duty of Firemen Riding on Truck to Watch for Cars. — See Quinn v. Dubuque St. R. Co., (Iowa 1903) 94 N. W. Rep. 476.

73. 2. Metropolitan R. Co. v. Blick, 22 App. Cas. (D. C.) 194; Metropolitan St. R. Co. v. Rouch, 66 Kan. 195; Rouse v. Detroit Electric R. Co., 135 Mich. 547, denying rehearing 135 Mich. 545, and approving Tunison v. Weadock, 130 Mich. 141; Memphis St. R. Co. v. Haynes, 112 Tenn. 712.

3. Standing Vehicles On or Near Track. — Montgomery St. R. Co. v. Hastings, 138 Ala. 432; Montgomery St. R. Co. v. Shanks, 139 Ala. 489; Watson v. Interurban St. R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 556; Gass v. New York City R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 950.

Remaining on Track Necessitated by Street Traffic. — See Kennedy v. Lowell, etc., St. R. Co., 184 Mass. 31.

4. Leaving Horse Unhitched. — See Monroe v. Hartford St. R. Co., 76 Conn. 201 (violation of ordinance).

6. Barnes v. Pittsburg R. Co., 26 Pa. Super. Ct. 36. See, however, Silz v. Interurban St. R. Co., (Supm. Ct. App. T.) 92 N. Y. Supp. 302.

7. Driving on Track — Arkansas. — Hot Springs St. R. Co. v. Hildreth, 72 Ark. 572,

74. See notes 3, 4, 5, 6, 8.

(e) **Crossing Track** — *aa.* IN GENERAL. — See notes 9, 10, 12.

75. See notes 1, 2, 3.

quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 74.

Illinois. — North Chicago St. R. Co. v. Rodert, 203 Ill. 413, affirming 105 Ill. App. 314.

Indiana. — Indianapolis St. R. Co. v. Slifer, 35 Ind. App. 700, reversing (Ind. App. 1905) 72 N. E. Rep. 1055.

Kentucky. — Greene v. Louisville R. Co., (Ky. 1905) 84 S. W. Rep. 1154.

Massachusetts. — Sexton v. West Roxbury, etc., St. R. Co., 188 Mass. 139.

Michigan. — Ablard v. Detroit United R. Co., (Mich. 1905) 102 N. W. Rep. 741.

Missouri. — Degel v. St. Louis Transit Co., 101 Mo. App. 56; Schafstette v. St. Louis, etc., R. Co., 175 Mo. 142; Twelkemeyer v. St. Louis Transit Co., 102 Mo. App. 190; Brown v. St. Louis Transit Co., 108 Mo. App. 310; Strode v. St. Louis Transit Co., (Mo. 1905) 87 S. W. Rep. 976.

New York. — Connor v. Metropolitan St. R. Co., 77 N. Y. App. Div. 384; Moore v. Metropolitan St. R. Co., 84 N. Y. App. Div. 613; Venuta v. New York, etc., Traction Co., 87 N. Y. App. Div. 561; Dages v. New York City R. Co., (Supm. Ct. App. T.) 91 N. Y. Supp. 29; Barringer v. United Traction Co., 101 N. Y. App. Div. 330.

Pennsylvania. — Davis v. Media, etc., Electric R. Co., 25 Pa. Super. Ct. 444.

Virginia. — Richmond Pass., etc., Co. v. Allen, 103 Va. 532.

Driving onto Track Ahead of Approaching Car. — See Blum v. Metropolitan St. R. Co., 79 N. Y. App. Div. 611.

74. 3. Hot Springs St. R. Co. v. Hildreth, 72 Ark. 579, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 74; Chicago City R. Co. v. Eick, 111 Ill. App. 452, affirmed 209 Ill. 321; Kimble v. St. Louis, etc., R. Co., 108 Mo. App. 78; Buren v. St. Louis Transit Co., 104 Mo. App. 224; Benjamin v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 85 N. Y. Supp. 1052; Hellriegel v. Southern Traction Co., 23 Pa. Super. Ct. 392.

4. Hot Springs St. R. Co. v. Hildreth, 72 Ark. 579, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 74; Degel v. St. Louis Transit Co., 101 Mo. App. 56; Markowitz v. Metropolitan St. R. Co., 186 Mo. 350.

Turning from Left-hand to Right-hand Track Not Negligence per Se. — Adams v. Camden, etc., R. Co., 69 N. J. L. 424, approving Hughes v. Camden, etc., R. Co., 65 N. J. L. 203.

5. Hot Springs St. R. Co. v. Hildreth, 72 Ark. 579, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 74; Chicago City R. Co. v. Mauger, 105 Ill. App. 579; Chicago Union Traction Co. v. Dybvig, 107 Ill. App. 644; Union Biscuit Co. v. St. Louis Transit Co., 108 Mo. App. 207; Geleta v. Buffalo, etc., Electric R. Co., 88 N. Y. App. Div. 372, affirmed 181 N. Y. 524; Belford v. Brooklyn Heights R. Co., (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 148; Sauer v. Interurban St. R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 865; Geleta v. Buffalo, etc., Electric R. Co., 181 N. Y. 524, affirming 88 N.

Y. App. Div. 372; Schleicher v. Interurban St. R. Co., (Supm. Ct. App. T.) 91 N. Y. Supp. 356.

Driver Should Listen for Approaching Cars. — Belford v. Brooklyn Heights R. Co., 86 N. Y. App. Div. 388.

6. Hot Springs St. R. Co. v. Hildreth, 72 Ark. 579, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 74; Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687; Rouse v. Detroit Electric R. Co., 135 Mich. 545; Ablard v. Detroit United R. Co., (Mich. 1905) 102 N. W. Rep. 741; Noll v. St. Louis Transit Co., 100 Mo. App. 367; Twelkemeyer v. St. Louis Transit Co., 102 Mo. App. 190; Memphis St. R. Co. v. Riddick, 110 Tenn. 227; Nashville R. Co. v. Norman, 108 Tenn. 324; Richmond Pass., etc., Co. v. Allen, 103 Va. 532. See also Belford v. Brooklyn Heights R. Co., 86 N. Y. App. Div. 388. But see McGauley v. St. Louis Transit Co., 179 Mo. 583; Reynolds v. Larchmont Horse R. Co., 83 N. Y. App. Div. 189; Sauer v. Interurban St. R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 865.

Agreement of Driver's Companion to Keep Look-out Sufficient. — Indianapolis St. R. Co. v. Slifer, 35 Ind. App. 700, reversing (Ind. App. 1905) 72 N. E. Rep. 1055.

8. Hot Springs St. R. Co. v. Hildreth, 72 Ark. 579, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 74.

9. Driving Across Tracks. — Kennedy v. Consolidated Traction Co., 210 Pa. St. 215.

10. Los Angeles Traction Co. v. Conneally, (C. C. A.) 136 Fed. Rep. 104; Post v. New York City R. Co., (Supm. Ct. App. T.) 93 N. Y. Supp. 1109.

12. Negligence Depends on Circumstances. — Dungan v. Wilmington City R. Co., 4 Penn. (Del.) 458; Seales v. Elizabeth, etc., R. Co., 70 N. J. L. 388; Binsell v. Interurban St. R. Co., 91 N. Y. App. Div. 402.

Stopping a Vehicle on the Track Ahead of an Approaching Car. in order to give the right of way to another vehicle, has been held to be contributory negligence. Heinz v. Union R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 392.

Driving Fire Truck Across Track — Paramount Right of Truck to Be Considered. — Geary v. Metropolitan St. R. Co., 84 N. Y. App. Div. 514, affirmed 177 N. Y. 535. See also New York v. Metropolitan St. R. Co., 90 N. Y. App. Div. 66, affirmed 182 N. Y. 536; Toledo R., etc., Co. v. Ward, 25 Ohio Cir. Ct. 399.

75. 1. Proper Rate of Speed May Be Presumed — *Indiana.* — Union Traction Co. v. Vandercook, 32 Ind. App. 621.

Kansas. — Kansas City-Leavenworth R. Co. v. Gallagher, 68 Kan. 424.

Louisiana. — Welty v. St. Charles St. R. Co., 109 La. 733.

Missouri. — Murray v. St. Louis Transit Co., 108 Mo. App. 501; Meng v. St. Louis, etc., R. Co., 108 Mo. App. 553; Deitring v. St. Louis Transit Co., 109 Mo. App. 524.

New Jersey. — Vrooman v. North Jersey St. R. Co., 70 N. J. L. 818.

New York. — Bertsch v. Metropolitan St. R.

Co., 173 N. Y. 634, *affirming* 68 N. Y. App. Div. 228; *O'Callaghan v. Metropolitan St. R. Co.*, 174 N. Y. 521, *affirming* 69 N. Y. App. Div. 574; *Robinson v. New York City R. Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 368.

Texas.—*San Antonio Traction Co. v. Upson*, 31 Tex. Civ. App. 50.

Wisconsin.—See *Hanlon v. Milwaukee Electric R., etc., Co.*, 118 Wis. 210.

See further *infra*, this title, **83**, 3.

Where the Driver Sees that a Car Is Approaching at an Excessive Speed, he is not justified in presuming that the speed will be decreased. *Ledwidge v. St. Louis Transit Co.*, (Mo. App. 1903) 73 S. W. Rep. 1008.

75. 2. Crossing Track under Circumstances Held Negligence—*Georgia*.—*Atlanta R., etc., Co. v. Owens*, 119 Ga. 833.

Illinois.—*Chicago City R. Co. v. Strampel*, 110 Ill. App. 482.

Indiana.—*Moran v. Leslie*, 33 Ind. App. 80.

Maine.—*Butler v. Rockland, etc., St. R. Co.*, 99 Me. 149, 105 Am. St. Rep. 267.

Maryland.—*State v. United R., etc., Co.*, 97 Md. 73; *Heying v. United R., etc., Co.*, 100 Md. 281.

Missouri.—*Cogan v. Cass Ave., etc., R. Co.*, 101 Mo. App. 179; *Ledwidge v. St. Louis Transit Co.*, (Mo. App. 1903) 73 S. W. Rep. 1008; *Barrie v. St. Louis Transit Co.*, 102 Mo. App. 87; *Gettys v. St. Louis Transit Co.*, 103 Mo. App. 564; *Petty v. St. Louis, etc., R. Co.*, 179 Mo. 666; *Roefeldt v. St. Louis, etc., R. Co.*, 180 Mo. 554; *Fellenz v. St. Louis, etc., R. Co.*, 106 Mo. App. 154; *Markowitz v. Metropolitan St. R. Co.*, 186 Mo. 350.

New York.—*Sophian v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 787; *Montenes v. Metropolitan St. R. Co.*, 77 N. Y. App. Div. 493; *Seggermann v. Metropolitan St. R. Co.*, 82 N. Y. App. Div. 637, *affirming* (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 374; *Steinman v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 231; *Krintzman v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 243; *Carvanio v. Union R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 246; *Cosgrove v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 885; *Goldkranz v. Metropolitan St. R. Co.*, 89 N. Y. App. Div. 590; *Levy v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 102; *Monahan v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 87 N. Y. Supp. 537; *Zerr v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 353; *Groening v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 355; *New York Bread Co. v. New York City R. Co.*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 89; *Bernstein v. New York City R. Co.*, (Supm. Ct. App. T.) 92 N. Y. Supp. 228; *Daly v. New York City R. Co.*, (Supm. Ct. App. T.) 92 N. Y. Supp. 245; *Northrop v. Poughkeepsie City, etc., Electric R. Co.*, 104 N. Y. App. Div. 615; *Lazar v. New York City R. Co.*, (Supm. Ct. App. T.) 94 N. Y. Supp. 9; *Hebron v. New York City R. Co.*, (Supm. Ct. App. T.) 94 N. Y. Supp. 341; *Couch v. New York City R. Co.*, (Supm. Ct. App. T.) 94 N. Y. Supp. 393.

Pennsylvania.—*Mease v. United Traction Co.*, 208 Pa. St. 434; *March v. Union Traction Co.*, 209 Pa. St. 46; *Lyons v. Union Traction*

Co., 209 Pa. St. 72; *Walsh v. Philadelphia Rapid Transit Co.*, 27 Pa. Super. Ct. 89; *McCartney v. Union Traction Co.*, 27 Pa. Super. Ct. 222.

Washington.—*Criss v. Seattle Electric Co.*, 38 Wash. 320.

Wisconsin.—*Hogan v. Winnebago Traction Co.*, 121 Wis. 123; *Goldmann v. Milwaukee Electric R., etc., Co.*, 123 Wis. 168.

3. Not Negligence per Se—*California*.—*Campbell v. Los Angeles Traction Co.*, 137 Cal. 565.

Illinois.—*Chicago City R. Co. v. Sandusky*, 198 Ill. 400, *affirming* 99 Ill. App. 164; *Chicago City R. Co. v. O'Donnell*, 208 Ill. 267, rehearing denied 208 Ill. 281, *reversing* 108 Ill. App. 385; *Chicago City R. Co. v. Gemmill*, 209 Ill. 638; *Cole v. Central R. Co.*, 103 Ill. App. 160; *Smith v. Chicago City R. Co.*, 107 Ill. App. 177; *Chicago City R. Co. v. Benson*, 108 Ill. App. 193; *Fisher v. Chicago City R. Co.*, 114 Ill. App. 217.

Indiana.—*Howard v. Indianapolis St. R. Co.*, 29 Ind. App. 514; *Union Traction Co. v. Vandercook*, 32 Ind. App. 621; *Indianapolis St. R. Co. v. Schmidt*, 35 Ind. App. 202, rehearing denied 35 Ind. App. 214; *Indianapolis St. R. Co. v. O'Donnell*, 35 Ind. App. 312, rehearing denied 35 Ind. App. 329.

Massachusetts.—*Wood v. Boston El. R. Co.*, 188 Mass. 161.

Michigan.—*Chauvin v. Detroit United R. Co.*, 135 Mich. 85.

Minnesota.—*Smith v. Minneapolis St. R. Co.*, (Minn. 1905) 104 N. W. Rep. 16.

Missouri.—*Gebhardt v. St. Louis Transit Co.*, 97 Mo. App. 373; *Sanitary Dairy Co. v. St. Louis Transit Co.*, 98 Mo. App. 20; *Frank v. St. Louis Transit Co.*, 99 Mo. App. 323; *Linder v. St. Louis Transit Co.*, 103 Mo. App. 574; *Hanheide v. St. Louis Transit Co.*, 104 Mo. App. 323; *Campbell v. St. Louis, etc., R. Co.*, 175 Mo. 161; *Kolb v. St. Louis Transit Co.*, 102 Mo. App. 143; *Story v. St. Louis Transit Co.*, 108 Mo. App. 424; *O'Neill v. St. Louis Transit Co.*, 108 Mo. App. 453; *Murray v. St. Louis Transit Co.*, 108 Mo. App. 501; *Freyemark v. St. Louis Transit Co.*, 111 Mo. App. 208; *Joyce v. St. Louis Transit Co.*, 111 Mo. App. 565.

Nebraska.—*Omaha St. R. Co. v. Mathiesen*, (Neb. 1905) 103 N. W. Rep. 666.

New Jersey.—*Searles v. Elizabeth, etc., R. Co.*, 70 N. J. L. 388; *Conrad v. Elizabeth, etc., R. Co.*, 70 N. J. L. 676; *Vrooman v. North Jersey St. R. Co.*, 70 N. J. L. 818.

New York.—*Wagner v. Metropolitan St. R. Co.*, 79 N. Y. App. Div. 591, *affirmed* 176 N. Y. 610; *Cronin v. Metropolitan St. R. Co.*, 82 N. Y. App. Div. 227; *Andres v. Brooklyn Heights R. Co.*, 84 N. Y. App. Div. 596; *Carter v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 134; *Muller v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 234; *Bullman v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 325; *Prince v. Third Ave. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 542; *Pritchard v. Brooklyn Heights R. Co.*, 89 N. Y. App. Div. 269; *Rosenstock v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 114; *Klimpl v. Metropolitan St. R. Co.*, 92 N. Y. App. Div. 291; *Bertsch v. Metropolitan St. R. Co.*, 173 N. Y. 634, *affirming* 68 N. Y. App. Div. 228; *Lane v. Brooklyn*

76. bb. DUTY TO STOP, LOOK, AND LISTEN. — See notes 2, 3.**Duty to Look. — See note 4.****77. See notes 1, 2.**

Heights R. Co., 178 N. Y. 623, *affirming* 85 N. Y. App. Div. 85, appeal dismissed 176 N. Y. 557; Robinson v. New York City R. Co., (Supm. Ct. App. T.) 90 N. Y. Supp. 368.

Pennsylvania. — Boyles v. Monongahela St. R. Co., 20 Pa. Super. Ct. 443; Heuber v. Consolidated Traction Co., 210 Pa. St. 70.

Texas. — San Antonio Traction Co. v. Upson, 31 Tex. Civ. App. 50; Dallas Consol. Electric St. R. Co. v. Ilo, 32 Tex. Civ. App. 290; El Paso Electric R. Co. v. Kendall, (Tex. Civ. App. 1904) 78 S. W. Rep. 1081.

Virginia. — Richmond Traction Co. v. Clarke, 101 Va. 382.

Fire Truck Responding to Alarm. — See Quinn v. Dubuque St. R. Co., (Iowa 1903) 94 N. W. Rep. 476; Hanlon v. Milwaukee Electric R., etc., Co., 118 Wis. 210.

Driving Between Blocked and Stationary Cars Not Negligence per Se. — Walker v. St. Louis, etc., R. Co., 106 Mo. App. 321.

76. 2. Failure to Stop Not Negligence per Se. — Los Angeles Traction Co. v. Conneally, (C. C. A.) 136 Fed. Rep. 104; Union Traction Co. v. Vandercook, 32 Ind. App. 621; Marden v. Portsmouth, etc., St. R. Co., 100 Me. 41; Orth v. Boston El. R. Co., 188 Mass. 427; Smith v. Minneapolis St. R. Co., (Minn. 1905) 104 N. W. Rep. 16; Frank v. St. Louis Transit Co., 99 Mo. App. 323; Campbell v. St. Louis, etc., R. Co., 175 Mo. 161; Omaha St. R. Co. v. Mathiesen, (Neb. 1905) 103 N. W. Rep. 666. See, however, Burns v. Metropolitan St. R. Co., 66 Kan. 188; Heebe v. New Orleans, etc., R., etc., Co., 110 La. 970. *Compare* Beerman v. Union R. Co., 24 R. I. 275.

3. March v. Union Traction Co., 209 Pa. St. 46.

Fire Truck Not Required to Be under Same Control as Other Vehicles. — New York v. Metropolitan St. R. Co., 90 N. Y. App. Div. 66, *affirmed* 182 N. Y. 536. See also Hanlon v. Milwaukee Electric R., etc., Co., 118 Wis. 210. *Compare* Toledo R., etc., Co. v. Ward, 25 Ohio Cir. Ct. 399.

4. Duty to Look — Delaware. — Snyder v. People's R. Co., 4 Penn. (Del.) 145; Wilman v. People's R. Co., 4 Penn. (Del.) 260; Boudwin v. Wilmington City R. Co., 4 Penn. (Del.) 381; Dungan v. Wilmington City R. Co., 4 Penn. (Del.) 458.

Georgia. — Atlanta R., etc., Co. v. Owens, 119 Ga. 833.

Indiana. — Union Traction Co. v. Vandercook, 32 Ind. App. 621; Indianapolis St. R. Co. v. Marschke, (Ind. App. 1904) 70 N. E. Rep. 404; Indianapolis St. R. Co. v. Zaring, 33 Ind. App. 297.

Kansas. — Metropolitan St. R. Co. v. Agnew, 65 Kan. 478; Burns v. Metropolitan St. R. Co., 66 Kan. 188; Honick v. Metropolitan St. R. Co., 66 Kan. 124.

Louisiana. — Schutt v. Shreveport Belt R. Co., 109 La. 500.

Maine. — Butler v. Rockland, etc., St. R. Co., 99 Me. 140, 105 Am. St. Rep. 267.

Massachusetts. — Sullivan v. Boston El. R. Co., 185 Mass. 602; Dunn v. Old Colony St. R.

Co., 186 Mass. 316, *following* Hurley v. West End St. R. Co., 180 Mass. 370; Kelly v. Wakefield, etc., St. R. Co., 175 Mass. 331; Saltman v. Boston El. R. Co., 187 Mass. 243; Seale v. Boston, etc., St. R. Co., 187 Mass. 248.

Missouri. — Sanitary Dairy Co. v. St. Louis Transit Co., 98 Mo. App. 20; Cogan v. Cass Ave., etc., R. Co., 101 Mo. App. 179; Fellenz v. St. Louis, etc., R. Co., 106 Mo. App. 154; Campbell v. St. Louis, etc., R. Co., 175 Mo. 161; Holden v. Missouri R. Co., 177 Mo. 456; Barrie v. St. Louis Transit Co., 102 Mo. App. 87; Asphalt, etc., Constr. Co. v. St. Louis Transit Co., 102 Mo. App. 469; Cicardi v. St. Louis Transit Co., 108 Mo. App. 462; Hartman v. St. Louis Transit Co., 112 Mo. App. 439.

New Jersey. — Solatinow v. Jersey City, etc., R. Co., 70 N. J. L. 154.

New York. — Montenes v. Metropolitan St. R. Co., 77 N. Y. App. Div. 493; Carvanio v. Union R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 246; McKinley v. Metropolitan St. R. Co., 91 N. Y. App. Div. 153.

Pennsylvania. — Moser v. Union Traction Co., 205 Pa. St. 481; March v. Union Traction Co., 209 Pa. St. 46; Gilmore v. United Traction Co., 26 Pa. Super. Ct. 97; Walsh v. Philadelphia Rapid Transit Co., 27 Pa. Super. Ct. 89; McCartney v. Union Traction Co., 27 Pa. Super. Ct. 222.

Rhode Island. — Beerman v. Union R. Co., 24 R. I. 275.

Wisconsin. — Hanlon v. Milwaukee Electric R., etc., Co., 118 Wis. 210; Lightfoot v. Winnebago Traction Co., 123 Wis. 479.

Compare Plant v. Heraty, 131 Mich. 619; Memphis St. R. Co. v. Riddick, 110 Tenn. 227, *explaining* Nashville R. Co. v. Norman, 108 Tenn. 324.

Ordinary Care in Looking and Listening Sufficient. — Stanley v. Cedar Rapids, etc., R. Co., 119 Iowa 526.

Duty of Companion of Driver. — Where the driver of a vehicle looks for approaching cars before crossing the track, a person riding in the vehicle is not guilty of contributory negligence in failing to look also. United R., etc., Co. v. Biedler, 98 Md. 564.

Crossing Curve — Duty to Look to Rear. — See Schmidt v. Interurban St. R. Co., 82 N. Y. App. Div. 453.

77. 1. Failure to Look Not Negligence per Se. — Macon R., etc., Co. v. Barnes, 121 Ga. 443, *disapproving* dicta in Savannah, etc., R. Co. v. Beasley, 94 Ga. 142; Chicago City R. Co. v. O'Donnell, 208 Ill. 267, rehearing denied 208 Ill. 281, *reversing* 108 Ill. App. 385; Chicago City R. Co. v. Barker, 209 Ill. 321, *following* Chicago City R. Co. v. Fennimore, 199 Ill. 9; Indianapolis St. R. Co. v. O'Donnell, 35 Ind. App. 312, rehearing denied 35 Ind. App. 329; Marden v. Portsmouth, etc., St. R. Co., 100 Me. 41; Indianapolis St. R. Co. v. Schmidt, 35 Ind. App. 202, rehearing denied 35 Ind. App. 214; El Paso Electric R. Co. v. Kendall, (Tex. Civ. App. 1904) 78 S. W. Rep. 1081; Richmond Pass., etc., Co. v. Gordon, 102 Va. 498.

77. Time to Look. — See note 3.

78. c. INJURIES TO PEDESTRIANS — (1) In General. — See notes 1, 2.

79. See notes 1, 2, 3, 4, 5.

77. 2. *Frank v. St. Louis Transit Co.*, 112 Mo. App. 496; *Lane v. Brooklyn Heights R. Co.*, 178 N. Y. 623, *affirming* 85 N. Y. App. Div. 85; *Westerman v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 501.

3. Time to Look — Delaware. — *Snyder v. People's R. Co.*, 4 Penn. (Del.) 145.

Louisiana. — *Heebe v. New Orleans, etc., R., etc., Co.*, 110 La. 970.

Maryland. — *State v. United R., etc., Co.*, 97 Md. 73.

Missouri. — *Barrie v. St. Louis Transit Co.*, 102 Mo. App. 87.

New York. — *Carvanio v. Union R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 246; *Cosgrove v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 885; *Levy v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 102.

Pennsylvania. — *Moser v. Union Traction Co.*, 205 Pa. St. 481; *Gilmore v. United Traction Co.*, 26 Pa. Super. Ct. 97; *Walsh v. Philadelphia Rapid Transit Co.*, 27 Pa. Super. Ct. 89; *McCartney v. Union Traction Co.*, 27 Pa. Super. Ct. 222.

Rhode Island. — *Beerman v. Union R. Co.*, 24 R. I. 275.

Wisconsin. — *Goldmann v. Milwaukee Electric R., etc., Co.*, 123 Wis. 168, See, however, *Hanlon v. Milwaukee Electric R., etc., Co.*, 118 Wis. 210 (fire cart responding to fire alarm).

Not Necessary to Look Second Time Before Crossing Second Track. — *Chauvin v. Detroit United R. Co.*, 135 Mich. 85.

Where the Driver's Vision Is Temporarily Obstructed he should wait until the obstruction is removed. *Burns v. Metropolitan St. R. Co.*, 66 Kan. 188; *Saltman v. Boston El. R. Co.*, 187 Mass. 243; *Sanitary Dairy Co. v. St. Louis Transit Co.*, 98 Mo. App. 20; *Asphalt, etc., Constr. Co. v. St. Louis Transit Co.*, 102 Mo. App. 469. And see, applying the rule to pedestrians, *infra*, this title, **83. 1, 2.**

78. 1. Reasonable Care to Avoid Injury Required. — *Sesselman v. Metropolitan St. R. Co.*, (Supm. Ct. App. Div.) 80 N. Y. Supp. 1147; *Loder v. Metropolitan St. R. Co.*, 84 N. Y. App. Div. 591; *Mulligan v. Third Ave. R. Co.*, 87 N. Y. App. Div. 320, *affirmed* 180 N. Y. 552; *Greenbaum v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 588; *O'Callaghan v. Metropolitan St. R. Co.*, 174 N. Y. 521, *affirming* 69 N. Y. App. Div. 574; *Mulligan v. Third Ave. R. Co.*, 180 N. Y. 552, *affirming* 87 N. Y. App. Div. 320; *Polacci v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 341; *Manzella v. Rochester R. Co.*, 105 N. Y. App. Div. 12.

Starting Standing Car While Pedestrian Is Crossing Track. — *McLeland v. St. Louis Transit Co.*, 105 Mo. App. 473.

Passing Other Car Discharging or Receiving Passengers. — *Reed v. Metropolitan St. R. Co.*, 180 N. Y. 315, *reversing* 87 N. Y. App. Div. 427; *Pelletreau v. Metropolitan St. R. Co.*, 174 N. Y. 503, *affirming* 74 N. Y. App. Div. 192; *Stevens v. Union R. Co.*, 176 N. Y. 607, *affirm-*

ing 75 N. Y. App. Div. 602; *Stillings v. Metropolitan St. R. Co.*, 177 N. Y. 344, *affirming* 84 N. Y. App. Div. 201; *Cleveland Electric R. Co. v. Wadsworth*, 25 Ohio Cir. Ct. 376; *Craven v. International R. Co.*, 100 N. Y. App. Div. 157.

Accidental Derailment. — *Kelly v. United Traction Co.*, 88 N. Y. App. Div. 234.

2. Liability Dependent on Negligence. — *Grève v. New Orleans, etc., R., etc., Co.*, 114 La. 974; *Garvick v. United R., etc., Co.*, 101 Md. 239; *Kappus v. Metropolitan St. R. Co.*, 82 N. Y. App. Div. 13; *Welsh v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 166; *Barney v. Metropolitan St. R. Co.*, 94 N. Y. App. Div. 388; *Vought v. New York City R. Co.*, (Supm. Ct. App. T.) 92 N. Y. Supp. 235; *West v. Metropolitan St. R. Co.*, 105 N. Y. App. Div. 373; *Boring v. Union Traction Co.*, 211 Pa. St. 594; *Kelly v. Union Traction Co.*, 211 Pa. St. 456.

79. 1. *Garvick v. United R., etc., Co.*, 101 Md. 239; *Jett v. Central Electric R. Co.*, 178 Mo. 664; *Aldrich v. St. Louis Transit Co.*, 101 Mo. App. 77; *McLean v. Omaha, etc., R., etc., Co.*, (Neb. 1905) 103 N. W. Rep. 285, (Neb. 1904) 100 N. W. Rep. 935; *Jackson v. Union R. Co.*, 77 N. Y. App. Div. 161; *Trauber v. Third Ave. R. Co.*, 80 N. Y. App. Div. 37.

Rule Applied Where Running Board of Car Overlapped Sidewalk. — *Hayden v. Fair Haven, etc., R. Co.*, 76 Conn. 355.

Error of Judgment as to Position of Pedestrian Not Necessarily Negligence. — *Kaufman v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 634.

Rule Applicable though Pedestrian Insane Where Not Known So to Be. — *Simpson v. Rhode Island R. Co.*, 26 R. I. 200.

No Presumption that Cow Standing on Track Will Get Off. — *Kotila v. Houghton County St. R. Co.*, 134 Mich. 314.

2. Consumers' Electric Light, etc., Co. v. Pryor, 44 Fla. 354; *Louisville R. Co. v. Colston*, 117 Ky. 804; *Greve v. New Orleans, etc., R., etc., Co.*, 114 La. 974; *Butler v. Rockland, etc., St. R. Co.*, 99 Me. 149, 105 Am. St. Rep. 267; *Baly v. St. Paul City R. Co.*, 90 Minn. 39; *Rissler v. St. Louis Transit Co.*, 113 Mo. App. 120; *Ross v. Metropolitan St. R. Co.*, 113 Mo. App. 600; *Ries v. St. Louis Transit Co.*, 179 Mo. 1; *Barney v. Metropolitan St. R. Co.*, 94 N. Y. App. Div. 388; *Greene v. Metropolitan St. R. Co.*, 100 N. Y. App. Div. 303; *Wolf v. City, etc., R. Co.*, 45 Oregon 446.

3. Shanks v. Springfield Traction Co., 101 Mo. App. 702; *Priesmeyer v. St. Louis Transit Co.*, 102 Mo. App. 518.

4. Running over Drunken Man on Track. — *Johnson v. Chester Traction Co.*, 209 Pa. St. 189 (not liable); *Taylor v. Houston Electric Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1019.

5. Duty When Danger Becomes Imminent. — *Aldrich v. St. Louis Transit Co.*, 101 Mo. App. 77; *Peterson v. New York City R. Co.*, (Supm. Ct. App. T.) 94 N. Y. Supp. 22.

80. (2) *Contributory Negligence* — (a) *Crossing Track*. — See notes 2, 3, 5, 6.

81. See note 1.

Duty to Stop, Look, and Listen. — See notes 4, 5.

80. 2. Contributory Negligence — Crossing Tracks. — *Kernan v. Market St. R. Co.*, 137 Cal. 326.

Attempt of Girl to Rescue Child Not Contributory Negligence as Matter of Law. — *Manzella v. Rochester R. Co.*, 105 N. Y. App. Div. 12.

Standing Between Tracks on Curve Not Negligence per Se. — *Schwartz v. New Orleans, etc.*, R. Co., 110 La. 534.

Crossing Track Between Two Stationary Cars Not Negligence per Se. — *Fitzgerald v. New York City R. Co.*, (Supm. Ct. App. T.) 92 N. Y. Supp. 732.

3. *Cox v. South Shore, etc.*, St. R. Co., 182 Mass. 497; *Metz v. St. Paul City R. Co.*, 88 Minn. 48; *Baly v. St. Paul City R. Co.*, 90 Minn. 39; *Barney v. Metropolitan St. R. Co.*, 94 N. Y. App. Div. 388; *Kaufman v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 634; *Toohey v. Interurban St. R. Co.*, 102 N. Y. App. Div. 296; *Portsmouth St. R. Co. v. Peed*, 102 Va. 662.

5. Question for Jury. — *Levine v. Metropolitan St. R. Co.*, 177 N. Y. 523, *affirming* 78 N. Y. App. Div. 426.

6. Crossing in Front of Moving Cars — Kansas. — *Kansas City-Leavenworth R. Co. v. Gallagher*, 68 Kan. 424.

Massachusetts. — *McCarthy v. Boston El. R. Co.*, 187 Mass. 493; *Shea v. Lexington, etc.*, St. R. Co., 188 Mass. 425.

Michigan. — *Quirk v. Rapid R. Co.*, 137 Mich. 493.

Missouri. — *Priesmeyer v. St. Louis Transit Co.*, 102 Mo. App. 518; *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524.

New York. — *Levine v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 426, *affirmed* 177 N. Y. 523; *Du Frane v. Metropolitan St. R. Co.*, 83 N. Y. App. Div. 298; *Stillings v. Metropolitan St. R. Co.*, 84 N. Y. App. Div. 201, *affirmed* 177 N. Y. 344; *Gildea v. Metropolitan St. R. Co.*, 171 N. Y. 660, *affirming* 58 N. Y. App. Div. 528; *Hoyt v. Metropolitan St. R. Co.*, 175 N. Y. 502, *affirming* 73 N. Y. App. Div. 249; *Mulligan v. Third Ave. R. Co.*, 87 N. Y. App. Div. 320, *affirmed* 180 N. Y. 552; *Reed v. Metropolitan St. R. Co.*, 87 N. Y. App. Div. 427, *reversed* on other grounds 180 N. Y. 315; *Greenbaum v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 588; *McDermott v. Brooklyn Heights R. Co.*, 89 N. Y. App. Div. 214; *O'Callaghan v. Metropolitan St. R. Co.*, 174 N. Y. 521, *affirming* 69 N. Y. App. Div. 574; *Stillings v. Metropolitan St. R. Co.*, 177 N. Y. 344, *affirming* 84 N. Y. App. Div. 201; *Polacci v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 341; *Doherty v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 91 N. Y. Supp. 19; *Beers v. Metropolitan St. R. Co.*, 104 N. Y. App. Div. 96.

Pennsylvania. — *Haughey v. Pittsburg R. Co.*, 210 Pa. St. 363; *Oehmler v. Pittsburg R. Co.*, 25 Pa. Super. Ct. 617; *Fellers v. Warren St. R. Co.*, 26 Pa. Super. Ct. 31.

Virginia. — *Richmond Traction Co. v. Martin*, 102 Va. 209.

Misjudging Distance of Car. — See *Mauer v. Brooklyn Heights R. Co.*, 87 N. Y. App. Div. 119.

Passing in Front of Stationary Car Not Negligence. — *McLeland v. St. Louis Transit Co.*, 105 Mo. App. 473.

81. 1. Car in Close Proximity — Illinois. — *West Chicago St. R. Co. v. Callow*, 102 Ill. App. 323; *Chicago City R. Co. v. Barnes*, 114 Ill. App. 495.

Kentucky. — *Louisville R. Co. v. Colston*, 117 Ky. 804.

Louisiana. — *Schwartz v. New Orleans, etc.*, R. Co., 110 La. 534; *Riley v. Shreveport Traction Co.*, 114 La. 135.

Massachusetts. — *Donovan v. Lynn, etc.*, R. Co., 185 Mass. 533.

Missouri. — *Moore v. Lindell R. Co.*, 176 Mo. 528; *Riska v. Union Depot R. Co.*, 180 Mo. 168; *Reno v. St. Louis, etc.*, R. Co., 180 Mo. 469.

New Jersey. — *Brown v. Elizabeth, etc.*, R. Co., 68 N. J. L. 618.

New York. — *Muessman v. Metropolitan St. R. Co.*, 76 N. Y. App. Div. 1; *McKinley v. Metropolitan St. R. Co.*, 77 N. Y. App. Div. 256; *Freeman v. Brooklyn Heights R. Co.*, 82 N. Y. App. Div. 521; *Du Frane v. Metropolitan St. R. Co.*, 83 N. Y. App. Div. 298; *Little v. Third Ave. R. Co.*, 83 N. Y. App. Div. 330, *affirmed* 178 N. Y. 591; *Poole v. Metropolitan St. R. Co.*, 83 N. Y. App. Div. 235; *Schroder v. Metropolitan St. R. Co.*, 87 N. Y. App. Div. 624; *Lynch v. Third Ave. R. Co.*, 88 N. Y. App. Div. 604; *Thompson v. Metropolitan St. R. Co.*, 89 N. Y. App. Div. 10; *Barney v. Metropolitan St. R. Co.*, 94 N. Y. App. Div. 388; *Reed v. Metropolitan St. R. Co.*, 180 N. Y. 315, *reversing* 87 N. Y. App. Div. 427; *Greene v. Metropolitan St. R. Co.*, 100 N. Y. App. Div. 303; *Lehn v. Central Crosstown R. Co.*, (Supm. Ct. App. T.) 92 N. Y. Supp. 301.

Oregon. — *Wolf v. City, etc.*, R. Co., 45 Oregon 446, 454.

4. *Chicago City R. Co. v. Fennimore*, 199 Ill. 9; *Chicago City R. Co. v. Loomis*, 102 Ill. App. 326, *affirmed* 201 Ill. 118; *Chicago City R. Co. v. Barnes*, 114 Ill. App. 495; *Chicago Junction R. Co. v. McAnrow*, 114 Ill. App. 501; *Louisville R. Co. v. Poe*, (Ky. 1903) 72 S. W. Rep. 6; *Donovan v. Lynn, etc.*, R. Co., 185 Mass. 533, *approving* *Robbins v. Springfield St. R. Co.*, 165 Mass. 30; *Metz v. St. Paul City R. Co.*, 88 Minn. 48; *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524 (not required to stop); *Portsmouth St. R. Co. v. Peed*, 102 Va. 662. See, however, *Itzkowitz v. Boston El. R. Co.*, 186 Mass. 142.

5. Duty to Look and Listen — Alabama. — *Birmingham R., etc., Co. v. Oldham*, 141 Ala. 195, *quoting* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 81.

Delaware. — *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527.

Indiana. — *Indianapolis St. R. Co. v. Tenner*, 32 Ind. App. 311.

Missouri. — *Aldrich v. St. Louis Transit Co.*, 101 Mo. App. 77; *Murray v. St. Louis Transit*

82. See notes 1, 2, 3, 4, 5, 6.

Ignorance of the Existence of Tracks. — See note 8.

Time to Look. — See notes 9, 10, 11.

83. Obstructions to Vision. — See notes 1, 2.

Extent of Observation. — See note 3.

(b) Walking On Track. — See notes 4, 5, 6.

(c) Standing On or Near Track. — See notes 9, 10, 11.

Co., 176 Mo. 183; *Moore v. Lindell R. Co.*, 176 Mo. 528; *Ries v. St. Louis Transit Co.*, 179 Mo. 1; *Fanning v. St. Louis Transit Co.*, 103 Mo. App. 151; *Riska v. Union Depot R. Co.*, 180 Mo. 168; *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524; *Rissler v. St. Louis T. Co.*, 113 Mo. App. 120.

New Jersey. — *Brown v. Elizabeth, etc., R. Co.*, 68 N. J. L. 618.

New York. — *Trauber v. Third Ave. R. Co.*, 80 N. Y. App. Div. 37; *Kappus v. Metropolitan St. R. Co.*, 82 N. Y. App. Div. 13; *O'Reilly v. Brooklyn Heights R. Co.*, 82 N. Y. App. Div. 492; *Schroder v. Metropolitan St. R. Co.*, 87 N. Y. App. Div. 624; *Pinder v. Brooklyn Heights R. Co.*, 173 N. Y. 519, *reversing* 65 N. Y. App. Div. 521; *Little v. Third Ave. R. Co.*, 178 N. Y. 591, *affirming* 83 N. Y. App. Div. 330. See, however, *Lofsten v. Brooklyn Heights R. Co.*, 97 N. Y. App. Div. 395; *Monck v. Brooklyn Heights R. Co.*, 97 N. Y. App. Div. 447.

Oregon. — *Wolf v. City, etc., R. Co.*, 45 Oregon 446.

Compare Peterson v. Minneapolis St. R. Co., 90 Minn. 52 (attention diverted by another car).

Failure to Look for Car Following Another on Same Track Contributory Negligence. — *Jackson v. Union R. Co.*, 77 N. Y. App. Div. 161. *Compare Moore v. St. Louis Transit Co.*, 95 Mo. App. 728.

Question of Negligence for Jury. — *Columbus R. Co. v. Peddy*, 120 Ga. 589.

Presumption of Looking, etc., Obtains from Instinct of Self-preservation. — *Kansas City-Leavenworth R. Co. v. Gallagher*, 68 Kan. 424; *Riska v. Union Depot R. Co.*, 180 Mo. 168; *Priesmeyer v. St. Louis Transit Co.*, 102 Mo. App. 518. But see *O'Reilly v. Brooklyn Heights R. Co.*, 82 N. Y. App. Div. 492.

82. 1. *Birmingham R., etc., Co. v. Oldham*, 141 Ala. 195, *quoting* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 82; *Indianapolis St. R. Co. v. Tenner*, 32 Ind. App. 311; *Cleveland Electric R. Co. v. Wadsworth*, 25 Ohio Cir. Ct. 376. See, however, *Pelletreau v. Metropolitan St. R. Co.*, 174 N. Y. 503, *affirming* 74 N. Y. App. Div. 192; *Stevens v. Union R. Co.*, 75 N. Y. App. Div. 602, *affirmed* 176 N. Y. 607; *Beers v. Metropolitan St. R. Co.*, 88 N. Y. App. Div. 9; *Reed v. Metropolitan St. R. Co.*, 180 N. Y. 315, *reversing* 87 N. Y. App. Div. 427; *Stevens v. Union R. Co.*, 176 N. Y. 607, *affirming* 75 N. Y. App. Div. 602; *Craven v. International R. Co.*, 100 N. Y. App. Div. 157.

2. See *Scamell v. St. Louis Transit Co.*, 102 Mo. App. 198.

3. *Giardina v. St. Louis, etc., R. Co.*, 185 Mo. 330; *Little v. Third Ave. R. Co.*, 178 N. Y. 591, *affirming* 83 N. Y. App. Div. 330; *Casper v. Metropolitan St. R. Co.*, 84 N. Y. App. Div. 639.

4. *Ames v. Waterloo, etc., Rapid Transit Co.*, 120 Iowa 640; *Barney v. Metropolitan St. R. Co.*, 94 N. Y. App. Div. 388.

5. *Jackson v. Union R. Co.*, 77 N. Y. App. Div. 161.

6. *Rissler v. St. Louis Transit Co.*, 113 Mo. App. 120; *Monck v. Brooklyn Heights R. Co.*, 97 N. Y. App. Div. 447.

8. *Itzkowitz v. Boston El. R. Co.*, 186 Mass. 142.

9. **Time to Look.** — *Ross v. Metropolitan St. R. Co.*, 113 Mo. App. 600. *Compare Beers v. Metropolitan St. R. Co.*, 104 N. Y. App. Div. 96.

10. *Lynch v. Third Ave. R. Co.*, 88 N. Y. App. Div. 604; *Rissler v. St. Louis Transit Co.*, 113 Mo. App. 120; *Greene v. Metropolitan St. R. Co.*, 100 N. Y. App. Div. 303; *Keough v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 92 N. Y. Supp. 733; *Boring v. Union Traction Co.*, 211 Pa. St. 594. See, however, *Levine v. Metropolitan St. R. Co.*, 177 N. Y. 523, *affirming* 78 N. Y. App. Div. 426; *Lofsten v. Brooklyn Heights R. Co.*, 97 N. Y. App. Div. 395; *Kernan v. Market St. R. Co.*, 137 Cal. 326.

11. *Fanning v. St. Louis Transit R. Co.*, 103 Mo. App. 151; *Haughey v. Pittsburg R. Co.*, 210 Pa. St. 363. *Compare Chicago City R. Co. v. Fennimore*, 199 Ill. 9; *Gildea v. Metropolitan St. R. Co.*, 171 N. Y. 660, *affirming* 58 N. Y. App. Div. 528.

83. 1. *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527; *Indianapolis St. R. Co. v. Zaring*, 33 Ind. App. 297; *Ames v. Waterloo, etc., Rapid Transit R. Co.*, 120 Iowa 640; *Murray v. St. Louis Transit Co.*, 176 Mo. 183. *Compare Binns v. Brooklyn Heights R. Co.*, 89 N. Y. App. Div. 359. See further, for the rule as to drivers of vehicles, *supra*, this title, **77**, 3.

2. *Itzkowitz v. Boston El. R. Co.*, 186 Mass. 142; *McKinley v. Metropolitan St. R. Co.*, 77 N. Y. App. Div. 256.

3. *Marden v. Portsmouth, etc., St. R. Co.*, 100 Me. 41; *Rissler v. St. Louis Transit Co.*, 113 Mo. App. 120.

Pedestrian May Presume that Speed of Car Is Lawful. — *Riska v. Union Depot R. Co.*, 180 Mo. 168. See also *supra*, this title, **75**, 1.

4. **Walking On or Near Track.** — *Compare Dooley v. Union R. Co.*, 106 N. Y. App. Div. 397.

5. *Judge v. Elkins*, 183 Mass. 229.

Deaf Person Should Keep Diligent Watch to Rear for Cars. — *Shanks v. Springfield Traction Co.*, 101 Mo. App. 702.

6. *Garvick v. United R., etc., Co.*, 101 Md. 239; *Bugbee v. Union R. Co.*, (R. I. 1904) 59 Atl. Rep. 165.

9. **Standing On or Near Track.** — *Loder v. Metropolitan St. R. Co.*, 84 N. Y. App. Div. 591.

10. *Dooley v. Greenfield, etc., St. R. Co.*, 184 Mass. 204; *Jordan v. Old Colony St. R. Co.*, 188 Mass. 124; *Quinn v. Boston El. R. Co.*, 188

84. *d. INJURIES TO CHILDREN* — (1) *Children On or Near Track.* — See notes 1, 2, 3.

85. See note 3.

86. See note 1.

(2) *Children on Cars.* — See notes 2, 3.

87. See notes 4, 5, 8.

(3) *Contributory Negligence* — (a) *of Child.* — See notes 10, 11.

Mass. 473; *Gargano v. Forty-second St., etc.*, R. Co., (Supm. Ct. Tr. T.) 94 N. Y. Supp. 544.

The Fact that a Person Is Standing on the Sidewalk does not relieve him from all duty to exercise care to avoid being injured by a street car where at such point the running board of the car overlaps the sidewalk. *Hayden v. Fair Haven, etc.*, R. Co., 76 Conn. 355.

83. 11. *Workmen in Streets.* — *Chicago City R. Co. v. Nelson*, 215 Ill. 436; *Gleason v. Worcester Consol. St. R. Co.*, 184 Mass. 290; *Quinn v. Boston El. R. Co.*, 188 Mass. 473; *Daum v. North Jersey St. R. Co.*, 70 N. J. L. 338, affirming 69 N. J. L. 1; *Hennessey v. Forty-Second St., etc.*, R. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 158, 44 Misc. (N. Y.) 198, 103 N. Y. App. Div. 384; *Sullivan v. New York City R. Co.*, (Supm. Ct. App. T.) 91 N. Y. Supp. 325; *McGrath v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 104.

Street Sweeper. — *Beethem v. Interurban St. R. Co.*, (Supm. Ct. App. T.) 86 N. Y. Supp. 700.

84. 1. *Injuries to Children* — *Connecticut.* — *Rohloff v. Fair Haven, etc.*, R. Co., 76 Conn. 689.

Illinois. — *Potter v. Leviton*, 199 Ill. 93, affirming 101 Ill. App. 544; *North Chicago St. R. Co. v. Johnson*, 205 Ill. 32.

Indiana. — *Indianapolis St. R. Co. v. Borden-checker*, 33 Ind. App. 138; *Indianapolis St. R. Co. v. Schomberg*, (Ind. App. 1904) 71 N. E. Rep. 237.

Massachusetts. — *McDermott v. Boston El. R. Co.*, 184 Mass. 126, 100 Am. St. Rep. 548.

Minnesota. — *Gray v. St. Paul City R. Co.*, 87 Minn. 280.

Missouri. — *Heinzle v. Metropolitan St. R. Co.*, 182 Mo. 528.

New Hampshire. — *Carney v. Concord St. R. Co.*, 72 N. H. 364.

New York. — *Davidson v. Metropolitan St. R. Co.*, 75 N. Y. App. Div. 426; *Larkin v. United Traction Co.*, 76 N. Y. App. Div. 238; *Lafferty v. Third Ave. R. Co.*, 176 N. Y. 594, affirming 85 N. Y. App. Div. 592; *Levine v. Metropolitan St. R. Co.*, 177 N. Y. 523, affirming 78 N. Y. App. Div. 426; *Kaplan v. Metropolitan St. R. Co.*, 98 N. Y. App. Div. 133; *Dempsey v. Brooklyn Heights R. Co.*, 98 N. Y. App. Div. 182.

Pennsylvania. — *Hoon v. Beaver Valley Traction Co.*, 204 Pa. St. 369.

Company Not Relieved Where Injury Due in Part to Child's Stumbling. — *Kube v. St. Louis Transit Co.*, 103 Mo. App. 582. Compare *McDonald v. Metropolitan St. R. Co.*, 93 N. Y. App. Div. 238.

2. *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527; *Meeker v. Metropolitan St. R. Co.*, 178 Mo. 173; *Jett v. Central Electric R. Co.*, 178 Mo. 664.

3. *Failure to Keep Proper Lookouts.* — *Colabel*

v. Metropolitan St. R. Co., 173 N. Y. 627, affirming 74 N. Y. App. Div. 505.

85. 3. *Children Too Young to Appreciate Danger.* — *Indianapolis St. R. Co. v. Borden-checker*, 33 Ind. App. 138; *Indianapolis St. R. Co. v. Schomberg*, (Ind. App. 1904) 71 N. E. Rep. 237, 164 Ind. 111; *Cameron v. Duluth-Superior Traction Co.*, 94 Minn. 104; *Meeker v. Metropolitan St. R. Co.*, 178 Mo. 173; *San Antonio Traction Co. v. Court*, 31 Tex. Civ. App. 146; *Galveston City R. Co. v. Hanna*, 34 Tex. Civ. App. 608; *Forrestal v. Milwaukee Electric R., etc., Co.*, 119 Wis. 495. Compare *Jett v. Central Electric R. Co.*, 178 Mo. 664.

No Obligation to Slacken Speed Before Child in Street Approaches Tracks. — *Coessens v. Rapid R. Co.*, 136 Mich. 481.

86. 1. *Rohloff v. Fair Haven, etc.*, R. Co., 76 Conn. 689; *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527; *Miller v. St. Charles St. R. Co.*, 114 La. 409; *Coessens v. Rapid R. Co.*, 136 Mich. 481; *Davidson v. Metropolitan St. R. Co.*, 75 N. Y. App. Div. 426; *Sciurba v. Metropolitan St. R. Co.*, 87 N. Y. App. Div. 614; *Csatlos v. Metropolitan St. R. Co.*, 92 N. Y. App. Div. 620.

2. *Children on Cars but Not Passengers.* — *Albert v. Boston El. R. Co.*, 185 Mass. 210.

Assault by Conductor on Child. — See *Hewson v. Interurban St. R. Co.*, 95 N. Y. App. Div. 112.

3. *Goldstein v. People's R. Co.*, (Del. 1905) 60 Atl. Rep. 975; *Denison, etc., R. Co. v. Carter*, (Tex. Civ. App. 1902) 70 S. W. Rep. 322, (Tex. Civ. App. 1903) 71 S. W. Rep. 292.

87. 4. *Goldstein v. People's R. Co.*, (Del. 1905) 60 Atl. Rep. 975; *Aiken v. Holyoke St. R. Co.*, 184 Mass. 269.

No Duty to Discover Peril of Children Stealing Rides. — *Monehan v. South Covington, etc., St. R. Co.*, 117 Ky. 771.

5. *Compelling Child to Alight While Car in Motion.* — *Goldstein v. People's R. Co.*, (Del. 1905) 60 Atl. Rep. 975; *Richmond Traction Co. v. Wilkinson*, 101 Va. 394. Compare *Albert v. Boston El. R. Co.*, 185 Mass. 210.

8. *Goldstein v. People's R. Co.*, (Del. 1905) 60 Atl. Rep. 975.

10. *Contributory Negligence of Children Sui Juris* — *Connecticut.* — *Rohloff v. Fair Haven, etc.*, R. Co., 76 Conn. 689.

Delaware. — *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527; *Goldstein v. People's R. Co.*, (Del. 1905) 60 Atl. Rep. 975.

Illinois. — *Chicago Union Traction Co. v. McGinnis*, 112 Ill. App. 177.

Massachusetts. — *Murphy v. Boston El. R. Co.*, 188 Mass. 8.

Missouri. — *Jett v. Central Electric R. Co.*, 178 Mo. 664.

New York. — *Pinder v. Brooklyn Heights R. Co.*, 173 N. Y. 519, reversing 65 N. Y. App. Div. 521; *Ferri v. Union R. Co.*, 77 N. Y. App.

88. See note 1.

Particular Applications of Doctrine. — See notes 2, 3.

89. (b) Of Parents. — See notes 2, 4.

e. INJURIES TO BICYCLISTS. — See notes 6, 7, 9, 10.

90. See notes 1, 2, 3, 4.

f. INJURIES TO DOGS. — See note 6. See generally the title INJURIES TO ANIMALS BY RAILROADS.

g. COLLISION BETWEEN STREET-RAILWAY CARS. — See note 8.

Div. 301; *Bortz v. Dry Dock, etc.*, R. Co., 78 N. Y. App. Div. 386; *Delkowsky v. Dry Dock, etc.*, R. Co., 78 N. Y. App. Div. 632; *Lafferty v. Third Ave. R. Co.*, 85 N. Y. App. Div. 592, *affirmed* 176 N. Y. 594; *McDonald v. Metropolitan St. R. Co.*, 93 N. Y. App. Div. 238; *West v. Metropolitan St. R. Co.*, 105 N. Y. App. Div. 373.

Rhode Island. — *Poland v. Union R. Co.*, 26 R. I. 215.

87. 11. Children of Tender Years. — *Potter v. Leviton*, 199 Ill. 93, *affirming* 101 Ill. App. 544; *Indianapolis St. R. Co. v. Bordenchecker*, 33 Ind. App. 138; *Indianapolis St. R. Co. v. Schomberg*, (Ind. App. 1904) 71 N. E. Rep. 237; *Gray v. St. Paul City R. Co.*, 87 Minn. 280; *Carney v. Concord St. R. Co.*, 72 N. H. 364; *Vogel v. North Jersey St. R. Co.*, 69 N. J. L. 219; *Fritsch v. New York, etc.*, R. Co., 93 N. Y. App. Div. 554; *Kaplan v. Metropolitan St. R. Co.*, 98 N. Y. App. Div. 133; *San Antonio Traction Co. v. Court*, 31 Tex. Civ. App. 146.

88. 1. Degree of Care — *Connecticut*. — *Rohloff v. Fair Haven, etc.*, R. Co., 76 Conn. 689.

Delaware. — *Di Prisco v. Wilmington City R. Co.*, 4 Penn. (Del.) 527.

Illinois. — *Chicago City R. Co. v. Biederman*, 102 Ill. App. 617.

Indiana. — *Indianapolis St. R. Co. v. Schomberg*, 164 Ind. 111.

Massachusetts. — *McDermott v. Boston El. R. Co.*, 184 Mass. 126, 100 Am. St. Rep. 548.

Minnesota. — *Cameron v. Duluth-Superior Traction Co.*, 94 Minn. 104.

Missouri. — *Campbell v. St. Louis, etc.*, R. Co., 175 Mo. 161; *Heinze v. Metropolitan St. R. Co.*, 182 Mo. 528; *Kube v. St. Louis Transit Co.*, 103 Mo. App. 582; *Fry v. St. Louis Transit Co.*, 111 Mo. App. 324.

New York. — *Levine v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 426, *affirmed* 177 N. Y. 523; *Sullivan v. Union R. Co.*, 81 N. Y. App. Div. 596, *affirmed* 177 N. Y. 525; *Lafferty v. Third Ave. R. Co.*, 85 N. Y. App. Div. 592, *affirmed* 176 N. Y. 594; *Robinson v. Metropolitan St. R. Co.*, 91 N. Y. App. Div. 158, *affirmed* 179 N. Y. 593; *Dempsey v. Brooklyn Heights R. Co.*, 98 N. Y. App. Div. 182; *West v. Metropolitan St. R. Co.*, 105 N. Y. App. Div. 273.

Oregon. — *Dubiver v. City R. Co.*, 44 Oregon 227, *rehearing denied* 44 Oregon 239.

Texas. — *El Paso Electric R. Co. v. Kendall*, (Tex. Civ. App. 1904) 78 S. W. Rep. 1081.

2. Child Crossing Track Without Looking for Cars. — *Sullivan v. Union R. Co.*, 177 N. Y. 525, *affirming* 81 N. Y. App. Div. 596.

3. Passing in Front of Moving Car. — *Fry v. St. Louis Transit Co.*, 111 Mo. App. 324.

89. 2. *Indianapolis St. R. Co. v. Bordenchecker*, 33 Ind. App. 138; *Carney v. Concord St. R. Co.*, 72 N. H. 364; *Bortz v. Dry Dock, etc.*, R. Co., 78 N. Y. App. Div. 386; *Levine v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 426, *affirmed* 177 N. Y. 523; *Lafferty v. Third Ave. R. Co.*, 176 N. Y. 594, *affirming* 85 N. Y. App. Div. 592.

4. Question for Jury. — *Cameron v. Duluth-Superior Traction Co.*, 94 Minn. 104; *Levine v. Metropolitan St. R. Co.*, 78 N. Y. App. Div. 426, *affirmed* 177 N. Y. 523; *Sullivan v. Union R. Co.*, 81 N. Y. App. Div. 596, *affirmed* 177 N. Y. 525, *distinguishing* *Weiss v. Metropolitan St. R. Co.*, 33 N. Y. App. Div. 221, *affirmed* 165 N. Y. 665; *Kaplan v. Metropolitan St. R. Co.*, 98 N. Y. App. Div. 133.

6. Injuries to Bicyclists. — *Harrington v. Los Angeles R. Co.*, 140 Cal. 514, 98 Am. St. Rep. 85; *North Chicago St. R. Co. v. Irwin*, 202 Ill. 345, *reversing* 104 Ill. App. 150; *Palmer v. Cedar Rapids, etc.*, R. Co., 124 Iowa 424; *Bedell v. Detroit, etc.*, R. Co., 131 Mich. 668; *Rawitzer v. St. Paul City R. Co.*, 93 Minn. 84; *McKee v. Harrisburgh Traction Co.*, 211 Pa. St. 47; *Reid v. United Traction Co.*, 26 Pa. Super. Ct. 55.

7. Inability of Rider to Manage Bicycle. — *Shaw v. Louisville R. Co.*, (Ky. 1904) 81 S. W. Rep. 268.

9. *North Chicago St. R. Co. v. Irwin*, 202 Ill. 345, *reversing* 104 Ill. App. 150; *Kerr v. Boston El. R. Co.*, 188 Mass. 434; *Zolpher v. Camden, etc.*, R. Co., 69 N. J. L. 417; *Reid v. United Traction Co.*, 26 Pa. Super. Ct. 55.

10. Bicyclist Must Use Due Care. — *Robards v. Indianapolis St. R. Co.*, 32 Ind. App. 297, *rehearing denied* 32 Ind. App. 301; *Dechene v. Greenfield, etc.*, St. R. Co., 188 Mass. 423.

90. 1. *Baldwin v. Heraty*, 136 Mich. 15. Bicyclist Stopping on Track Without Giving Signals Not Necessarily Negligent. — *Zolpher v. Camden, etc.*, R. Co., 69 N. J. L. 417.

2. No Duty to Look Behind. — *Zolpher v. Camden, etc.*, R. Co., 69 N. J. L. 417.

3. Crossing in Front of Cars. — *Furlong v. Metropolitan St. R. Co.*, 103 N. Y. App. Div. 215.

4. *Barrett v. Columbia R. Co.*, 20 App. Cas. (D. C.) 381; *Indianapolis St. R. Co. v. Zaring*, 33 Ind. App. 297; *Knapp v. Metropolitan St. R. Co.*, 103 N. Y. App. Div. 252.

6. *Russell v. Huntsville R., etc., Co.*, 137 Ala. 627; *Marshall v. Dallas Consol. Electric St. R. Co.*, (Tex. Civ. App. 1903) 73 S. W. Rep. 63.

Presumption Obtains that Dog Will Get Out of Way. — *Moore v. Charlotte Electric R., etc., Co.*, 136 N. Car. 554.

8. Charter Giving Precedence — Violation Negligence per Se. — *McLain v. St. Louis, etc., R. Co.*, 100 Mo. App. 374.

91. See note 1.

h. COLLISION BETWEEN STREET CARS AND RAILROAD TRAINS. — See note 5.

i. FRIGHTENING HORSES. — See note 6.

92. See notes 3, 4, 6.

The Use of a Car Which in Running Produces Great, Unusual, and Unnecessary Noises. — See note 8.

93. Contributory Negligence. — See note 1.

2. Injuries from Defects in Tracks or Obstructions in Street. — See notes 3, 5, 6.

94. See notes 1, 2.

Particular Defects. — See note 3.

95. Defective Electric Wires. — See note 5.**96.** Proof of Defects. — See note 5.**97.** Contributory Negligence. — See note 4.

91. 1. Persons Injured by Collision. — *Klinger v. United Traction Co.*, 92 N. Y. App. Div. 100, modified 181 N. Y. 521.

5. *Philip v. Heraty*, 135 Mich. 446.

Ordinance Requiring Street Cars to Stop — Violation Negligence per Se. — *Gulf, etc., R. Co. v. Holt*, 30 Tex. Civ. App. 330.

Georgia Statute Requiring Trains to Stop Not Applicable to Street Railways. — *Georgia R., etc., Co. v. Joiner*, 120 Ga. 905.

6. Frightening Horses. — *Lincoln Traction Co. v. Moore*, (Neb. 1903) 97 N. W. Rep. 605; *Adsit v. Catskill Electric R. Co.*, 88 N. Y. App. Div. 167; *Dunkle v. City Pass. R. Co.*, 209 Pa. St. 125 (frightened horse backing in front of car); *Knoxville Traction Co. v. Mullins*, 111 Tenn. 329.

92. 3. Duty to Avoid Imminent Danger. — *Montgomery St. R. Co. v. Shanks*, 139 Ala. 489; *Atlanta R., etc., Co. v. Johnson*, 120 Ga. 908; *O'Brien v. Blue Hill St. R. Co.*, 186 Mass. 446; *Cameron v. Jersey City, etc., St. R. Co.*, 70 N. J. L. 633; *Adsit v. Catskill Electric R. Co.*, 88 N. Y. App. Div. 167; *Danville R., etc., Co. v. Hodnett*, 101 Va. 361.

4. *Hammond, etc., Electric R. Co. v. Eads*, 32 Ind. App. 249; *Christy v. Des Moines City R. Co.*, 126 Iowa 428; *Thiel v. South Covington, etc., St. R. Co.*, (Ky. 1904) 78 S. W. Rep. 206; *Knoxville Traction Co. v. Mullins*, 111 Tenn. 329.

6. *Knoxville Traction Co. v. Mullins*, 111 Tenn. 329; *Denison, etc., R. Co. v. Powell*, 35 Tex. Civ. App. 454.

8. Use of Car Making Unusual Noise. — *Georgia R., etc., Co. v. Joiner*, 120 Ga. 905; *Georgia R., etc., Co. v. Blacknall*, 122 Ga. 310.

Carrying on Car Banner Calculated to Frighten Horses May Be Negligence. — *Indianapolis, etc., Rapid Transit Co. v. Haines*, 33 Ind. App. 63.

Frightening Horse by Excessive Speed May Impose Liability. — *Denison, etc., R. Co. v. Powell*, 35 Tex. Civ. App. 454.

93. 1. Using Horse Liable to Take Fright. — *Moulton v. Sanford, etc., R. Co.*, 99 Me. 508. See, however, *Montgomery St. R. Co. v. Hastings*, 138 Ala. 432; *Knoxville Traction Co. v. Mullins*, 111 Tenn. 329.

3. Defects and Obstructions. — *Kaiser v. Detroit, etc., R. Co.*, 131 Mich. 506.

5. Maintaining Road in Safe Condition. — *Williams v. Minneapolis St. R. Co.*, 88 Minn. 79; *Bolster v. Ithaca St. R. Co.*, 178 N. Y. 554, affirming 79 N. Y. App. Div. 239; *Citizens' R. Co. v. Gossett*, (Tex. Civ. App. 1905) 85 S. W. Rep. 35.

6. Leaving Unlighted and Unguarded Car in Street at Night Not of Itself Negligence. — *Adams v. Metropolitan St. R. Co.*, 82 N. Y. App. Div. 354.

Where an Obstruction Is Unlawfully Placed on the Tracks of a street-railway company, the fact that the company in removing such obstacle leaves it in the street does not render it liable to a third person who is injured by reason of such obstacle remaining in the street. *Howard v. Union R. Co.*, 25 R. I. 652.

94. 1. Statutory Duty to Repair Street. — *Dublin United Tramways Co. v. Fitzgerald*, (1903) A. C. 99; *Hyde v. Boston*, 186 Mass. 115; *Williams v. Minneapolis St. R. Co.*, 88 Minn. 79; *Bolster v. Ithaca St. R. Co.*, 79 N. Y. App. Div. 239, affirmed 178 N. Y. 554.

2. Extent of Duty. — *Hedenberg v. Manhattan R. Co.*, (Supm. Ct. App. T.) 91 N. Y. Supp. 68 (leaving plank with nail in it on sidewalk); *Keating v. Metropolitan St. R. Co.*, 105 N. Y. App. Div. 362.

3. Keeping Tracks Level with Surface of Street. — *Kaiser v. Detroit, etc., R. Co.*, 136 Mich. 541; *Gregory v. Detroit United R. Co.*, 138 Mich. 368; *Shelton v. Northern Texas Traction Co.*, 32 Tex. Civ. App. 507; *El Paso Electric R. Co. v. Davis*, (Tex. Civ. App. 1904) 83 S. W. Rep. 718; *Gray v. Washington Water Power Co.*, 30 Wash. 665.

95. 5. Highest Degree of Care Required in Maintenance of Electric Wires. — *Memphis St. R. Co. v. Kartright*, 110 Tenn. 277, 100 Am. St. Rep. 807.

96. 5. Evidence of Similar Accidents. — *Gregory v. Detroit United R. Co.*, 138 Mich. 368.

97. 4. *Keating v. Metropolitan St. R. Co.*, 105 N. Y. App. Div. 362; *Citizens' R. Co. v. Gossett*, (Tex. Civ. App. 1905) 85 S. W. Rep. 35; *Kalberg v. Seattle Electric Co.*, 37 Wash. 612.

STREETS AND SIDEWALKS.

By B. B. CLARK.

- 102.** I. WHAT CONSTITUTES STREET OR SIDEWALK. — See notes 1, 8.
103. Street and Sidewalk Distinguished. — See notes 6, 8.
104. II. ESTABLISHMENT OF STREETS — 3. Incorporation or Annexation of Territory to Municipality. — See notes 1, 2.
 4. Statutory Proceedings for Establishment of Streets — *a.* IN GENERAL. — See note 9.
105. *b.* EXERCISE OF POWER — (1) *In General.* — See note 3.
106. (3) *Petition or Consent of Property Owners.* — See note 3.
107. (4) *Where Street May Be Located* — Railroad Property. — See note 2.
 Over Existing Highways. — See note 7.
110. (9) *Locating and Opening.* — See notes 3, 4.
 (10) *Compensation for Land Taken.* — See note 7.
111. Determination of Compensation. — See note 3.
112. Measure of Compensation. — See notes 5, 6.
 Deduction for Benefits. — See note 8.
113. (11) *Discontinuance of Proceedings.* — See note 2.
 III. VACATION OF STREETS — 1. Power to Vacate. — See notes 3, 4, 5, 6, 7.

102. 1. Definition. — *Chrisman v. Omaha, etc., R., etc., Co.*, 125 Iowa 133; *Waynesville v. Satterthwait*, 136 N. Car. 226.

"It is not every strip of land over which certain individuals and the public have a right to travel, even if the strip is laid out for travel and wrought and kept in repair by public officials, that in any sense fairly can be called a street, even if the strip serves as a means of communication between public highways." *Perry v. Com.*, 188 Mass. 457.

Alley Not Necessarily Street. — *Milliken v. Denny*, 135 N. Car. 19.

8. *Waynesville v. Satterthwait*, 136 N. Car. 226.

103. 6. Street as Including Sidewalk. — *Gallagher v. Jefferson*, 125 Iowa 324, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 103; *Hester v. Durham Traction Co.*, 138 N. Car. 288, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 103.

8. Sidewalk. — Asphalt, etc., Constr. Co. v. Haessler, (Mo. App. 1904) 80 S. W. Rep. 5.

104. 1. Incorporation of Municipality. — *Owen v. Brookport*, 208 Ill. 35; *Lake Shore, etc., R. Co. v. Whiting*, 161 Ind. 76; *Raymond v. Wichita*, 70 Kan. 523; *Great Northern R. Co. v. Viborg*, 17 S. Dak. 374.

2. Extension of Corporate Limits. — *Park v. Orth*, (Ky. 1903) 73 S. W. Rep. 1015.

9. Statute Determines Existence of Power. — *Pittsburgh, etc., R. Co. v. Wolcott*, 162 Ind. 399; *Rowe v. East Orange*, 69 N. J. L. 600.

105. 3. Exercise of Power — Following Statutory Requirements. — *Pittsburgh, etc., R. Co. v. Wolcott*, 162 Ind. 399; *Stowell v. Board of Public Works*, 184 Mass. 416; *Baker v. Fall River*, 187 Mass. 53; *Paterson, etc., R. Co. v.*

Nutley, (N. J. 1905) 59 Atl. Rep. 1032; *Quarles v. Sparta*, 2 Tenn. Ch. App. 714.

106. 3. Who May Petition. — See *New Jersey Junction R. Co. v. Jersey City*, 70 N. J. L. 826, affirming 68 N. J. L. 108.

107. 2. Railroad Property. — *Pittsburgh, etc., R. Co. v. Wolcott*, 162 Ind. 399.

7. *New York City — No Power to Lay Out New Street over Old Where Fee in Private Persons.* — *Matter of Opening Eighty-fifth St.*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 162.

110. 3. Location and Opening. — *Norton v. Truitt*, 70 N. J. L. 611.

4. *McCarthy v. Street Com'rs*, 188 Mass. 338; *Oakley v. Luzerne*, 25 Pa. Super. Ct. 425.

Mandamus Lies to Compel Construction. — *McCarthy v. Street Com'rs*, 188 Mass. 338.

7. Waiver of Right to Compensation. — See *Lake Shore, etc., R. Co. v. Whiting*, 161 Ind. 76; *Paterson, etc., R. Co. v. Nutley*, (N. J. 1905) 59 Atl. Rep. 1032.

111. 3. Determination of Compensation. — *Stowell v. Board of Public Works*, 184 Mass. 416.

112. 5. Measure of Compensation. — *Tenney v. Cincinnati*, 24 Ohio Cir. Ct. 237.

Interest on Award. — See *Matter of Acquiring Title to Church Ave.*, 91 N. Y. App. Div. 553.

6. Railroad's Expense in Maintaining Crossing to Be Considered. — *Baltimore, etc., R. Co. v. Baltimore*, 98 Md. 535.

8. Deduction of Benefits. — *Pittsburgh, etc., R. Co. v. Wolcott*, 162 Ind. 399; *Matter of Acquiring Title to Church Ave.*, 91 N. Y. App. Div. 553.

113. 2. Discontinuance of Proceedings. — *Sowers v. Cincinnati, etc., R. Co.*, 162 Ind. 676; *In re Seventeenth St.*, 189 Mo. 245.

3. Power of Legislature to Vacate Streets. —

- 114.** Consent of the Abutting Property Owners. — See note 6.
 2. Exercise of Power. — See notes 7, 11.
- 115.** See notes 1, 2.
 3. Compensation for Vacation. — See note 7.
- 116.** See notes 1, 2, 3.
 The Measure of Damages. — See note 5.
 The Prepayment of Compensation. — See note 6.
 The Manner of Determining the Damages. — See note 7.
- 117.** 4. Effect of Vacation. — See notes 1, 2.
 IV. ABANDONMENT AND NONUSER. — See notes 6, 8.
- 118.** See notes 2, 4, 5.
 Adverse Possession. — See note 8.

V. IMPROVEMENT OF STREETS — 1. Power to Improve — a. IN GENERAL — Relinquishment of Power. — See note 13.

Columbus *v.* Union Pac. R. Co., (C. C. A.) 137 Fed. Rep. 869; Marietta Chair Co. *v.* Henderson, 121 Ga. 399, 104 Am. St. Rep. 156; Highbarger *v.* Milford, (Kan. 1905) 80 Pac. Rep. 633.

113. 4. Pence *v.* Bryant, 54 W. Va. 263.

5. Municipal Power to Vacate. — Macintosh *v.* Nome, 1 Alaska 492; Marietta Chair Co. *v.* Henderson, 121 Ga. 403, 104 Am. St. Rep. 156, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 113; Dean *v.* Ann Arbor R. Co., 137 Mich. 459.

6. Sale of Streets. — Ackerman *v.* True, 175 N. Y. 353, 13 N. Y. Annot. Cas. 206, reversing 71 N. Y. App. Div. 143.

7. Grant of Power to Municipality to Vacate. — Columbus *v.* Union Pac. R. Co., (C. C. A.) 137 Fed. Rep. 869; Marietta Chair Co. *v.* Henderson, 121 Ga. 399, 104 Am. St. Rep. 156; Hall *v.* Lebanon, 31 Ind. App. 265; Borghart *v.* Cedar Rapids, 126 Iowa 313; Harrington *v.* Iowa Cent. R. Co., 126 Iowa 388; Eudora *v.* Hartig, 68 Kan. 742; Townsend *v.* Underwood's Second Addition, 91 Minn. 242; Matter of Opening Vanderbilt Ave., 95 N. Y. App. Div. 533; Pence *v.* Bryant, 54 W. Va. 263; Tilly *v.* Mitchell, etc., Co., 121 Wis. 1, 105 Am. St. Rep. 1007.

114. 6. Consent of "Adjacent" Property Owners Required — Injunction. — Low *v.* Lawrenceburg Roller Mills Co., 161 Ind. 495.

7. Discretionary Exercise of Power. — Marietta Chair Co. *v.* Henderson, 121 Ga. 399, 104 Am. St. Rep. 156; Detroit Real Estate Invest. Co. *v.* Wayne Circuit Judge, 137 Mich. 108, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 114; Pence *v.* Bryant, 54 W. Va. 263; Kakeldy *v.* Columbia, etc., R. Co., 37 Wash. 675; Tilly *v.* Mitchell, etc., Co., 121 Wis. 1, 105 Am. St. Rep. 1007.

11. Tilly *v.* Mitchell, etc., Co., 121 Wis. 1, 105 Am. St. Rep. 1007.

No Right to Vacate Street for Sole Benefit of Abutting Owner. — Pence *v.* Bryant, 54 W. Va. 263.

115. 1. Nonabutting Owners Cannot Complain. — Hall *v.* Lebanon, 31 Ind. App. 265, following House *v.* Greensburg, 93 Ind. 533. See, however, Lambert *v.* Paterson, (N. J. 1905) 60 Atl. Rep. 1131.

2. Compliance with Statutory Requirements. — Harrington *v.* Iowa Cent. R. Co., 126 Iowa 388; Jones *v.* Collins, 188 Mass. 53; Butler Street, 25 Pa. Super. Ct. 357.

7. Compensation for Vacation. — Marietta Chair Co. *v.* Henderson, 121 Ga. 405, 104 Am. St. Rep. 156, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 115; Borghart *v.* Cedar Rapids, 126 Iowa 313; Highbarger *v.* Milford, (Kan. 1905) 80 Pac. Rep. 633; Dean *v.* Ann Arbor R. Co., 137 Mich. 459; Peace *v.* McAdoo, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 295; Pence *v.* Bryant, 54 W. Va. 263. See, however, Butler Street, 25 Pa. Super. Ct. 357.

116. 1. Statutes. — Macarthur *v.* Rex, 8 Can. Exch. 245.

2. Nonabutting Owners. — Hall *v.* Lebanon, 31 Ind. App. 265; Borghart *v.* Cedar Rapids, 126 Iowa 313; Harrington *v.* Iowa Cent. R. Co., 126 Iowa 388; Beutel *v.* West Bay City Sugar Co., 132 Mich. 587.

3. Macarthur *v.* Rex, 8 Can. Exch. 245.

5. Macarthur *v.* Rex, 8 Can. Exch. 245.

6. Prepayment. — Marietta Chair Co. *v.* Henderson, 121 Ga. 399, 104 Am. St. Rep. 156.

7. Tabor Street, 25 Pa. Super. Ct. 355; Butler Street, 25 Pa. Super. Ct. 357.

Limitation of Action. — See Matter of Opening Vanderbilt Ave., 95 N. Y. App. Div. 533.

117. 1. Title to Fee in Vacated Streets. — Harrington *v.* Iowa Cent. R. Co., 126 Iowa 388; Watson *v.* New York, 175 N. Y. 475, affirming 67 N. Y. App. Div. 573.

2. Marietta Chair Co. *v.* Henderson, 121 Ga. 399, 104 Am. St. Rep. 156; Price *v.* Toledo, 25 Ohio Cir. Ct. 617; Tabor Street, 25 Pa. Super. Ct. 355; Barnes *v.* Philadelphia, etc., R. Co., 27 Pa. Super. Ct. 84.

6. Abandonment and Nonuser. — People *v.* Rock Island, 215 Ill. 488, 106 Am. St. Rep. 179.

8. Nonuser. — Lee *v.* Harris, 206 Ill. 428, 99 Am. St. Rep. 176; Arnold *v.* Volkman, 123 Wis. 54.

118. 2. Inclosure. — Chrisman *v.* Omaha, etc., R., etc., Co., 125 Iowa 133.

4. Delay in Opening. — Hall *v.* Breyfogle, 162 Ind. 494.

5. Delay in Improving. — Lee *v.* Harris, 206 Ill. 428, 99 Am. St. Rep. 176.

8. Lee *v.* Harris, 206 Ill. 428, 99 Am. St. Rep. 176, following De Kalb *v.* Luney, 193 Ill. 185; Owen *v.* Brookport, 208 Ill. 35; Hall *v.* Breyfogle, 162 Ind. 494. See, however, Haramon *v.* Krause, 93 Minn. 455.

13. Cannot Be Abrogated by Contract. — South Highland Land, etc., Co. *v.* Kansas City, 109 Mo. App. 518.

- 119.** Sodding Portion of Street. — See note 1.
120. *c.* SIDEWALKS. — See notes 8, 9, 10, 11.
121. Privilege of Property Owner to Construct. — See note 4.
 Necessity and Character of Sidewalk. — See note 5.
122. *d.* GRADING. — See notes 2, 5, 6.
e. WIDENING AND ALTERING. — See notes 8, 9.
123. 2. Exercise of Power — *a.* IN GENERAL. — See note 6.
b. DISCRETION IN EXERCISE OF POWER. — See note 7.
127. *g.* PETITION OR CONSENT OF PROPERTY OWNERS. — See note 1.
129. *i.* NOTICES OF PROPOSED IMPROVEMENT. — See note 14.
130. Service of Notice. — See note 4.
131. *j.* PROTESTS OR REMONSTRANCES AGAINST IMPROVEMENT. — See note 1.
132. *l.* ORDINANCES DIRECTING OR ORDERING IMPROVEMENT — (1) *In General.* — See note 1.
 (2) *Enactment.* — See note 4.
133. (3) *Requisites as to Form and Sufficiency* — Description of Improvements. — See note 5.

119. 1. Sodding. — *Martin v. Williamsport*, 208 Pa. St. 590.

Parking Centre of Street. — *Downing v. Des Moines*, 124 Iowa 289.

120. 8. Sidewalks. — *Redersheimer v. Bruning*, 113 La. 343.

Removal by Municipality of Sidewalks Laid. — See *Platt v. Oneonta*, 88 N. Y. App. Div. 192, reversing (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 42, 12 N. Y. Annot. Cas. 378.

Title of Property Owner to Material of Sidewalk. — See *Platt v. Oneonta*, 88 N. Y. App. Div. 192, reversing (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 42.

9. Asphalt, etc., Constr. Co. *v.* Haeussler, (Mo. App. 1904) 80 S. W. Rep. 5; *Cox v. Lancaster*, 24 Ohio Cir. Ct. 265; *Hester v. Durham Traction Co.*, 138 N. Car. 288.

Curbing Included in Power to Construct Sidewalks. — *Draper v. Fall River*, 185 Mass. 142.

10. *Scott v. Marshall*, 110 Mo. App. 178.

11. Compelling Property Owners to Construct Sidewalk. — *Denver v. Dunning*, 33 Colo. 487; *Pierson v. People*, 204 Ill. 456; *Burget v. Greenfield*, 120 Iowa 432; *McGuire v. East Cleveland*, 25 Ohio Cir. Ct. 497. See *Sanford v. Warwick*, 181 N. Y. 20, reversing 83 N. Y. App. Div. 120.

Right of Property Owners under New York Statute to Reimbursement for Construction of Sidewalk. — See *Sanford v. Warwick*, 181 N. Y. 20, reversing 83 N. Y. App. Div. 120.

121. 4. Owner Allowed Certain Time to Construct. — *Burget v. Greenfield*, 120 Iowa 432.

5. Necessity and Character. — *Scott v. Marshall*, 110 Mo. App. 178.

122. 2. Grading Streets. — *Duncan v. Ramish*, 142 Cal. 686; *McDowell v. People*, 204 Ill. 499; *Kelley v. Cedar Falls*, 123 Iowa 660; *Kemp v. Des Moines*, 125 Iowa 640; *South Highland, etc., Co. v. Kansas City*, 100 Mo. App. 518; *Torge v. Salamanca*, 86 N. Y. App. Div. 211, reversed on other grounds 176 N. Y. 324.

Grading Sidewalk Authorized under General Power to Grade Streets. — *Gallagher v. Jefferson*, 125 Iowa 324.

Property Owner Has No Right to Grade. — *Kittanning v. Thompson*, 211 Pa. St. 169.

5. *South Highland, etc., Co. v. Kansas City*, 100 Mo. App. 518. See, however, *McGuire v. East Cleveland*, 25 Ohio Cir. Ct. 497.

6. *Gallagher v. Jefferson*, 125 Iowa 324; *Kemp v. Des Moines*, 125 Iowa 640.

8. Widening Streets. — *Chicago v. Larned*, 203 Ill. 290; *Matter of Opening Clinton Ave.*, 106 N. Y. App. Div. 31.

Altering Course of Street Across Railway Tracks. — See *Buchholz v. New York, etc., R. Co.*, 177 N. Y. 550, affirming 71 N. Y. App. Div. 452.

9. Narrowing Streets. — *Pence v. Bryant*, 54 W. Va. 263.

123. 6. Compliance with Statutory Requirements. — *Washington v. Steiner*, 25 Pa. Super. Ct. 392.

7. Discretion in Exercise of Power. — *Downing v. Des Moines*, 124 Iowa 289; *Kemp v. Des Moines*, 125 Iowa 640, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 123; *Frostburg v. Wineland*, 98 Md. 239, following *Alberger v. Baltimore*, 64 Md. 7; *Draper v. Fall River*, 185 Mass. 142; *Fyfe v. Turtle Creek*, 22 Pa. Super. Ct. 292.

Right to Close Street While Improvement Is Being Made. — See *Haller v. St. Louis*, 176 Mo. 606.

127. 1. Petition or Consent of Property Owners. — *Norton v. Truitt*, 70 N. J. L. 611 (widening street); *Borgman v. Antigo*, 120 Wis. 296.

129. 14. Notices. — *Ackerman v. Nutley*, 70 N. J. L. 438; *Lambert v. Paterson*, (N. J. 1905) 60 Atl. Rep. 1131.

130. 4. Service of Notice. — *Whitby Avenue*, 22 Pa. Super. Ct. 526.

131. 1. *Lambert v. Paterson*, (N. J. 1905) 60 Atl. Rep. 1131.

132. 1. Ordinances. — *Bourgeois v. Ocean City*, 70 N. J. L. 622, holding that a resolution is insufficient.

4. Necessary Vote. — *Crickenberger v. Westfield*, 71 N. J. L. 467 (unanimous vote of all members of council).

133. 5. Description of Improvement. — *Swift v. St. Louis*, 180 Mo. 80.

- 135.** *a.* DEFRAIVING COST OF IMPROVEMENT. — See note 7.
- 136.** See notes 1, 4.
q. RESTRAINING STREET IMPROVEMENT. — See notes 7, 9.
3. Damages for Street Improvement — *a.* IN GENERAL. — See note 10.
- 137.** See note 2.
- 138.** Diversion of Surface Waters. — See notes 1, 2.
b. DAMAGES FOR CHANGE OF STREET GRADE — (1) *General Right to Damages.* — See note 7.
- 139.** See notes 1, 5.
- 140.** See notes 1, 2, 3.
 Lateral Support. — See notes 5, 6.
 Where an Unauthorized Change of Grade Is Made. — See note 8.
 A Municipality Is Liable for Negligence. — See note 10.
- 141.** Statutory Provisions. — See note 1.
- 135.** 7. *Shelby v. Burlington*, 125 Iowa 343.
- 136.** 1. See *Shelby v. Burlington*, 125 Iowa 343.
 4. See *Dixey v. Atlantic City, etc., Quarry, etc., Co.*, 71 N. J. L. 120.
 7. *Restraining Street Improvements.* — *Burget v. Greenfield*, 120 Iowa 432.
 9. *Ground for Denial of Injunction.* — *Mitchell v. Peru*, 163 Ind. 17.
 10. *Damages for Street Improvements.* — *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133.
Position of Curb Line. — The fact that the municipality fixes the curb line of the street nearer to one side of the street than to the other does not entitle the abutting property owner to damages. *McGrew v. Kansas City*, 69 Kan. 606.
- 137.** 2. *Thompson v. Macon*, 106 Mo. App. 84.
- 138.** 1. *Diversion of Surface Waters.* — *Taylor v. Houston, etc., R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 260.
Injunction Denied. — *Hall v. Breyfogle*, 162 Ind. 494.
 2. *Taylor v. Houston, etc., R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 260. Compare *Wilber v. Ft. Dodge*, 120 Iowa 555.
 7. *Change of Grade — Right to Damages Denied — England.* — *East Fremantle Corp. v. Annois*, (1902) App. Cas. 213, 71 L. J. P. C. 39, 85 L. T. N. S. 732.
Iowa. — *Kelley v. Cedar Falls*, 123 Iowa 660; *Wilber v. Ft. Dodge*, 120 Iowa 555.
Michigan. — *Cummings v. Dixon*, (Mich. 1905) 102 N. W. Rep. 751.
New Jersey. — *Bellis v. Flemington*, 69 N. J. L. 349; *Newark v. Weeks*, 71 N. J. L. 448.
New York. — *Matter of Andersen*, 178 N. Y. 416, 91 N. Y. App. Div. 563; *Sauer v. New York*, 90 N. Y. App. Div. 36, affirmed 180 N. Y. 27; *Comesky v. Suffern*, 179 N. Y. 393; *Smith v. Boston, etc., R. Co.*, 99 N. Y. App. Div. 94, affirmed 181 N. Y. 132.
Pennsylvania. — *Devlin v. Philadelphia*, 206 Pa. St. 518.
Wisconsin. — *Damkoehler v. Milwaukee*, 124 Wis. 144; *McCullough v. Campbellsport*, 123 Wis. 334.
Established Grades. — *Ross v. Cincinnati*, 24 Ohio Cir. Ct. 43.
- 139.** 1. *Effect of Provision for Damage to Property.* — *Columbus v. McDaniel*, 117 Ga. 823; *Houston v. Bartels*, 36 Tex. Civ. App. 498, rehearing denied 36 Tex. Civ. App. 500.
- Grading Dedicated Street.* — *Bartels v. Houston*, 32 Tex. Civ. App. 389.
- 5.** *Actual Change of Grade Necessary.* — *York v. Cedar Rapids*, (Iowa 1905) 103 N. W. Rep. 790; *Comesky v. Suffern*, 179 N. Y. 393; *Devlin v. Philadelphia*, 206 Pa. St. 518; *Moore v. Lancaster*, (Pa. 1904) 58 Atl. Rep. 890.
- 140.** 1. *Where a Municipality Obstructed the Entrance to an Alley* by raising the grade of the street upon which the alley opened, persons whose property abutted on the alley were held to be entitled to recover damages therefor. *Dries v. St. Joseph*, 98 Mo. App. 611.
2. *McCullough v. Campbellsport*, 123 Wis. 334.
3. *McCullough v. Campbellsport*, 123 Wis. 334.
- 5.** *Lateral Support.* — *Ross v. Cincinnati*, 24 Ohio Cir. Ct. 43.
- 6.** *Damkoehler v. Milwaukee*, 124 Wis. 144, *disapproving Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *McCullough v. Campbellsport*, 123 Wis. 334.
- 8.** *Unauthorized Change of Grade.* — *Wilber v. Ft. Dodge*, 120 Iowa 555; *Caldwell v. Nashua*, 122 Iowa 179; *Friedrich v. Milwaukee*, 118 Wis. 254; *Damkoehler v. Milwaukee*, 124 Wis. 144.
- Private Person Wrongfully Changing Grade Liable to Abutting Owners.* — *Peabody v. New York, etc., R. Co.*, 187 Mass. 489.
- 10.** *Negligence.* — *Beach v. Scranton*, 25 Pa. Super. Ct. 430; *Damkoehler v. Milwaukee*, 124 Wis. 144.
- 141.** 1. *Statutory Provisions — Connecticut.* — *Pickles v. Ansonia*, 76 Conn. 278.
Iowa. — *Markham v. Anamosa*, 122 Iowa 689; *Howard v. Lamoni*, 124 Iowa 348; *Stevens v. Cedar Rapids*, (Iowa 1905) 103 N. W. Rep. 363; *York v. Cedar Rapids*, (Iowa 1905) 103 N. W. Rep. 790.
Massachusetts. — *Sheehan v. Fall River*, 187 Mass. 356; *Garvey v. Revere*, 187 Mass. 545.
Missouri. — *Fairbanks v. St. Joseph*, 102 Mo. App. 425; *Schrodt v. St. Joseph*, 109 Mo. App. 627.
Nebraska. — *South Omaha v. Ruthjen*, (Neb. 1904) 99 N. W. Rep. 240.
New Jersey. — *Klaus v. Jersey City*, 69 N. J. L. 127; *Manufacturers' Land, etc., Co. v. Camden*, 71 N. J. L. 490; *Newark v. Weeks*, 71 N.

142. See notes 1, 3.

Necessity for Prior Establishment of Grade. — See note 4.

Necessity for Improvement of Property. — See note 6.

(2) *Measure of Damages.* — See note 8.**143.** In Estimating the Diminution in the Value. — See notes 4, 5.**144.** See notes 3, 4.

Benefits. — See notes 6, 7, 8, 10.

145. (3) *Who Entitled to Compensation.* — See notes 1, 2, 4.(4) *Determination of Compensation.* — See note 5.**146.** Notice of Proceedings to Assess Damages. — See note 2.(5) *Time of Paying Compensation.* — See note 4.J. L. 448; *Bellis v. Flemington*, 69 N. J. L. 349 (statute not applicable to change by village).*New York.* — *Torge v. Salamanca*, 176 N. Y. 324; *Matter of Comesky*, 83 N. Y. App. Div. 137, reversed on other grounds 179 N. Y. 393; *Matter of Opening Tiffany St.*, 84 N. Y. App. Div. 525; *People v. Leonard*, 87 N. Y. App. Div. 269; *Matter of Andersen*, 178 N. Y. 416; *Goetz v. State*, 90 N. Y. App. Div. 616, affirmed 182 N. Y. 547; *Matter of Opening White Plains Road*, 106 N. Y. App. Div. 133.*Pennsylvania.* — *Walsh v. Scranton*, 23 Pa. Super. Ct. 276; *Whitehead v. Manor*, 23 Pa. Super. Ct. 314; *Winter Avenue*, 23 Pa. Super. Ct. 353; *Moore v. Lancaster*, (Pa. 1904) 58 Atl. Rep. 890.*Wisconsin.* — *Haubner v. Milwaukee*, 124 Wis. 153, 124 Wis. 167.**Leveling Surface Distinguished from Change of Grade.** — *Stenson v. Mt. Vernon*, 104 N. Y. App. Div. 17.**142. 1. Statutes Liberally Construed.** — *Compare Smith v. Boston*, etc., R. Co., 99 N. Y. App. Div. 94, affirmed 181 N. Y. 132.3. For a Statute Held to Be Retroactive, see *Matter of Andersen*, 178 N. Y. 416, reversing 91 N. Y. App. Div. 563.4. **Necessity for Prior Established Grade.** — *Kelley v. Cedar Falls*, 123 Iowa 660; *Wilber v. Ft. Dodge*, 120 Iowa 555; *Cummings v. Dixon*, (Mich. 1905) 102 N. W. Rep. 751.**What Constitutes Established Grade.** — *Cummings v. Dixon*, (Mich. 1905) 102 N. W. Rep. 751.6. *People v. Muh*, 101 N. Y. App. Div. 423.**Compensation Allowed for New Improvements to Conform to New Grade.** — *York v. Cedar Rapids*, (Iowa 1905) 103 N. W. Rep. 790.**Improvement "According to Grade" Merely Requires Improvement with Reference to Grade.** — *Stevens v. Cedar Rapids*, (Iowa 1905) 103 N. W. Rep. 363.8. **Measure of Damages — Depreciation in Market Value.** — *Columbus v. McDaniel*, 117 Ga. 823; *Wheeler v. Bloomington*, 105 Ill. App. 97; *Peabody v. New York*, etc., R. Co., 187 Mass. 489; *Garvey v. Revere*, 187 Mass. 545; *Murray v. Newark*, (N. J. 1905) 60 Atl. Rep. 38; *Goetz v. State*, 90 N. Y. App. Div. 616, affirmed 182 N. Y. 547; *Whitehead v. Manor*, 23 Pa. Super. Ct. 314; *Swope v. Seattle*, 36 Wash. 113.**Loss of Rentals Recoverable.** — *Newark v. Weeks*, 71 N. J. L. 448.**143. 4. Injury to Improvements.** — *Matter of Opening Briggs Ave.*, 84 N. Y. App. Div. 312; *Fyfe v. Turtle Creek*, 22 Pa. Super. Ct.292; *Whitehead v. Manor*, 23 Pa. Super. Ct. 314.5. **No Compensation for Improvements After Notice Notwithstanding Long Delay in Changing Grade.** — *Matter of Opening Tiffany St.*, 84 N. Y. App. Div. 525, explaining *Matter of Opening Rogers Place*, 65 N. Y. App. Div. 1.**144. 3. Statute Giving Special Damages — Expense of Regrading Yard Recoverable.** — *Pickles v. Ansonia*, 76 Conn. 278.4. *Schrodt v. St. Joseph*, 109 Mo. App. 627.6. **Benefits.** — *Pickles v. Ansonia*, 76 Conn. 278; *Garvey v. Revere*, 187 Mass. 545; *Carroll v. Marshall*, 99 Mo. App. 464; *Winter Avenue*, 23 Pa. Super. Ct. 353.7. *Garvey v. Revere*, 187 Mass. 545; *Carroll v. Marshall*, 99 Mo. App. 464.8. *South Omaha v. Ruthjen*, (Neb. 1904) 99 N. W. Rep. 240.10. **General Benefits.** — *Houston v. Bartels*, 36 Tex. Civ. App. 498, rehearing denied 36 Tex. Civ. App. 500.**145. 1. Vendee under Executory Contract Not Entitled to Compensation.** — *Fifth Street*, 22 Pa. Super. Ct. 214.**Who Are Abutting Property Owners.** — See *Beutel v. West Bay City Sugar Co.*, 132 Mich. 587.2. *Moore v. Lancaster*, (Pa. 1904) 58 Atl. Rep. 890.4. **Tenant at Will Entitled to Compensation.** — *Sheehan v. Fall River*, 187 Mass. 356.5. **Determination of Compensation.** — *Newark v. Weeks*, 70 N. J. L. 166; *People v. Adam*, 83 N. Y. App. Div. 620; *People v. Leonard*, 87 N. Y. App. Div. 269; *Matter of Borup*, 89 N. Y. App. Div. 183; *Fyfe v. Turtle Creek*, 22 Pa. Super. Ct. 292; *Walsh v. Scranton*, 23 Pa. Super. Ct. 276; *Winter Avenue*, 23 Pa. Super. Ct. 353.**Jury.** — *Frankfort v. Howard*, (Ky. 1903) 74 S. W. Rep. 703.**Review of Award.** — *Matter of Comesky*, 179 N. Y. 393, reversing 83 N. Y. App. Div. 137; *People v. Phillips*, 88 N. Y. App. Div. 560.**Confirmation of Award.** — *Matter of Opening Tiffany St.*, 84 N. Y. App. Div. 525.**Statutory Remedy Exclusive.** — *Sauer v. New York*, 90 N. Y. App. Div. 36, affirmed 180 N. Y. 27.**146. 2. One Property Owner Cannot Object that Notice Not Given to Others.** — *Kansas City v. Block*, 175 Mo. 433.4. **Time of Payment — Prepayment.** — *Duncan v. Ramish*, 142 Cal. 686, holding further that a provision for prepayment is waived by failure to sue to enjoin the work.

- 146.** (6) *Waiver of Claim for Compensation.* — See note 6.
147. *Claim for Damages.* — See note 3.
 (7) *Remedy of Landowners.* — See notes 4, 6.
148. VI. CONTROL, REGULATION, AND USE OF STREETS — 1. General Control of Streets — *a.* IN GENERAL. — See notes 2, 3.
b. OWNERSHIP OF FEE. — See note 8.
149. *c.* TREES — Removal of Trees. — See note 11.
150. Discretion of Municipality. — See note 2.
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151. *f.* GRANTS OF PRIVILEGES OR FRANCHISES IN STREETS — (1) *In General.* — See note 5.
152. Delegation of Power by Legislature. — See note 2.
153. (2) *Exercise of Power.* — See notes 8, 9.
154. Discretion of Municipality. — See note 1.
The Power Cannot Be Delegated. — See note 4.
 (3) *Construction and Extent of Privilege or Franchise.* — See note 5.
Exclusiveness of Privilege or Franchise. — See note 6.

146. 6. Signing Petition for Change of Grade. — Compare *Dunn v. Tarentum*, 23 Pa. Super. Ct. 332.

Securing Modification of Proposed Change Does Not Waive Claim for Actual Injury. — *Klaus v. Jersey City*, 69 N. J. L. 127. See also *Fairbanks v. St. Joseph*, 102 Mo. App. 425.

Burden of Proving Release of Claim Is on Municipality. — *Dunn v. Tarentum*, 23 Pa. Super. Ct. 332.

147. 3. *Duncan v. Ramish*, 142 Cal. 686.

4. *Remedy of Landowner.* — *Garvey v. Revere*, 187 Mass. 545; *Manufacturers Land, etc., Co. v. Camden*, 71 N. J. L. 490; *Comesky v. Sufferin*, 179 N. Y. 393, reversing 83 N. Y. App. Div. 137; *Swope v. Seattle*, 36 Wash. 113.

6. *Action Where Municipality Fails to Have Damages Assessed.* — *Schrodt v. St. Joseph*, 109 Mo. App. 627.

148. 2. *Legislative Control.* — *State v. Red Lodge*, 30 Mont. 338; *United R., etc., Co. v. Jersey City*, 71 N. J. L. 80.

3. *Delegation of Control to Municipalities.* — *Kittanning v. Kittanning Consol. Natural Gas Co.*, 26 Pa. Super. Ct. 355.

8. *Ownership of Fee.* — *Marietta Chair Co. v. Henderson*, 121 Ga. 399, 104 Am. St. Rep. 156; *Mott v. Eno*, 97 N. Y. App. Div. 580, reversed on other grounds 181 N. Y. 346.

149. 11. *Removal of Trees.* — *Gallaher v. Jefferson*, 125 Iowa 324; *Kemp v. Des Moines*, 125 Iowa 640; *Scott v. Marshall*, 110 Mo. App. 178.

No Damages Allowed. — *Colston v. St. Joseph*, 106 Mo. App. 714.

150. 2. *Kemp v. Des Moines*, 125 Iowa 640; *Gallaher v. Jefferson*, 125 Iowa 324; *Frostburg v. Wineland*, 98 Md. 239.

4. *Donahue v. Keystone Gas Co.*, 90 N. Y. App. Div. 386, affirmed 181 N. Y. 313, 106 Am. St. Rep. 549 (injury through escape of gas from mains).

151. 5. *Grants of Privileges in Streets* — *Georgia.* — *Marietta Chair Co. v. Henderson*, 121 Ga. 403, 104 Am. St. Rep. 156; *Augusta v. Reynolds*, 122 Ga. 754, 106 Am. St. Rep. 147.

Illinois. — *People v. Harris*, 203 Ill. 272, 96 Am. St. Rep. 304; *Winnetka v. Chicago, etc., Electric R. Co.*, 107 Ill. App. 117, affirmed 204

Ill. 297; *Pagames v. Chicago*, 111 Ill. App. 590; *Chicago v. Pooley*, 112 Ill. App. 343.

Iowa. — *Young v. Rothrock*, 121 Iowa 588; *Bennett v. Mt. Vernon*, 124 Iowa 537.

New York. — *Ackerman v. True*, 175 N. Y. 353, 13 N. Y. Annot. Cas. 206, reversing 71 N. Y. App. Div. 143; *Rhinehart v. Redfield*, 179 N. Y. 569, affirming 93 N. Y. App. Div. 410.

Ohio. — *Lake Shore, etc., R. Co. v. Elyria*, 69 Ohio St. 414.

Wisconsin. — *Tilly v. Mitchell, etc., Co.*, 121 Wis. 1, 105 Am. St. Rep. 1007.

Platform. — See *Brauer v. Baltimore Refrigerating, etc., Co.*, 99 Md. 367, 105 Am. St. Rep. 304.

152. 2. *Delegation of Power by Legislature.* — *McWethy v. Aurora Electric Light, etc., Co.*, 202 Ill. 218, affirming 104 Ill. App. 479; *Strohmeyer v. Consumers' Electric Co.*, 111 La. 506; *Wichita v. Missouri, etc., Telephone Co.*, 70 Kan. 441; *St. Louis, etc., R. Co. v. Lindell R. Co.*, 190 Mo. 246; *Turl v. New York Contracting Co.*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 164.

153. 8. *Exercise of Power — Following Statutory Requirements.* — *Meyer v. Boonville*, 162 Ind. 165; *Brauer v. Baltimore Refrigerating, etc., Co.*, 99 Md. 367, 105 Am. St. Rep. 304; *Rough River Telephone Co. v. Cumberland Telephone, etc., Co.*, (Ky. 1905) 84 S. W. Rep. 517.

9. *People's Electric Light, etc., Co. v. Capital Gas, etc., Co.*, 116 Ky. 76.

154. 1. *Lange v. La Crosse, etc., R. Co.*, 118 Wis. 558.

4. *Clothier v. Philadelphia*, 22 Pa. Super. Ct. 608.

5. *Grants Strictly Construed.* — *Western Union Tel. Co. v. Electric Light, etc., Co.*, 178 N. Y. 325, reversing 81 N. Y. App. Div. 655; *Interborough Rapid Transit Co. v. Gallagher*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 536, affirmed 96 N. Y. App. Div. 632.

Franchise Subject to Reasonable Regulations by Municipality. — *New Castle v. Central Dist., etc., Co.*, 207 Pa. St. 371.

6. *Exclusiveness of Privilege.* — *Northwestern Telephone Exch. Co. v. Twin City Telephone Co.*, 89 Minn. 495.

154. (4) *Termination of Privilege—Revocation.* — See note 8.

155. See note 2.

g. REMOVAL OF SNOW AND ICE FROM SIDEWALKS. — See notes 6, 8.

156. 2. *Obstruction of Streets—a. IN GENERAL.* — See notes 2, 3, 4.

b. PARTICULAR OBSTRUCTIONS—(1) Deposit of Building Materials. — See note 7.

157. (2) *Removal of Merchandise or Other Property from and to Buildings.* — See notes 1, 3.

(3) *Deposit or Display of Merchandise, etc., on Sidewalks.* — See note 7.

(4) *Booths and Stands on Sidewalks.* — See note 11.

158. (5) *Projection from Buildings—Bay Windows, Awnings, Etc.* — See notes 2, 3, 5, 6, 7, 9, 10, 11, 12.

159. (6) *Cellar Ways, Vaults, Etc.* — See notes 1, 2, 5, 6.

(7) *Excavations in Streets—Restriction and Regulation of Right.* — See note 10.

154. 8. *Revocation.* — *Wichita v. Old Colony Trust Co.*, (C. C. A.) 132 Fed. Rep. 641; *London Mills v. Fairview-London Telephone Circuit*, 105 Ill. App. 146, *affirmed* 208 Ill. 289.

155. 2. *License to Maintain Obstruction Revocable.* — *Forbes v. Detroit*, (Mich. 1905) 102 N. W. Rep. 740.

6. *Removal of Snow and Ice.* — *Chicago v. McDonald*, 111 Ill. App. 436.

8. *State v. McMahon*, 76 Conn. 97, *disapproving* *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640; *State v. Jackman*, 69 N. H. 318; *Helena v. Kent*, 32 Mont. 279.

Ordinance Not Applicable to Crossing of Alleyway. — See *Moran v. New York*, 98 N. Y. App. Div. 301.

156. 2. *Obstruction of Streets.* — *Pagames v. Chicago*, 111 Ill. App. 590.

Individuals Have No Inherent Right to Use Streets for Electric Wires. — *Purnell v. McLane*, 98 Md. 589. *Contra* as to the right of the owner of the fee to string an overhead wire across the street, *Henry v. Cincinnati*, 25 Ohio Cir. Ct. 178.

Carriage Block on Sidewalk Not Necessarily Unauthorized Obstruction. — *Wolf v. District of Columbia*, 21 App. Cas. (D. C.) 464, *affirmed* 196 U. S. 152.

3. *Wakeling v. Cocker*, 23 Pa. Super. Ct. 196.

4. *Augusta v. Reynolds*, 122 Ga. 754, 106 Am. St. Rep. 147.

7. *Deposit of Building Materials.* — *Hesselbach v. St. Louis*, 179 Mo. 505; *Malkan v. Carlin*, (Supm. Ct. App. T.) 93 N. Y. Supp. 378.

157. 1. *Removal of Property to and from Abutting Building.* — *Schindler v. Schroth*, 146 Cal. 433; *Willard Hotel Co. v. District of Columbia*, 23 App. Cas. (D. C.) 272; *Augusta v. Reynolds*, 122 Ga. 754, 106 Am. St. Rep. 147; *Brauer v. Baltimore Refrigerating, etc., Co.*, 99 Md. 367, 105 Am. St. Rep. 304.

3. *Unreasonable Use.* — *Brauer v. Baltimore Refrigerating, etc., Co.*, 99 Md. 367, 105 Am. St. Rep. 304; *McCormack v. Boston El. R. Co.*, 188 Mass. 342. See also *Young v. Rothrock*, 121 Iowa 588.

7. *Deposit and Display of Merchandise on Sidewalk.* — See *Williams v. District of Columbia*, 22 App. Cas. (D. C.) 471.

11. *Booths and Stands on Sidewalks.* — *Pagames v. Chicago*, 111 Ill. App. 590; *Chicago v. Pooley*, 112 Ill. App. 343; *Hontros v. Chicago*, 113 Ill. App. 318.

158. 2. *Encroachments by Buildings.* — *New York v. Knickerbocker Trust Co.*, 104 N. Y. App. Div. 223.

3. *People v. Harris*, 203 Ill. 272, 96 Am. St. Rep. 304.

5. *Wakeling v. Cocker*, 23 Pa. Super. Ct. 196.

6. *Brauer v. Baltimore Refrigerating, etc., Co.*, 99 Md. 367, 105 Am. St. Rep. 304.

7. *People v. Harris*, 203 Ill. 272, 96 Am. St. Rep. 304; *Forbes v. Detroit*, (Mich. 1905) 102 N. W. Rep. 740.

9. *Ivins v. Trenton*, 69 N. J. L. 451, *affirming* 68 N. J. L. 501.

10. *Compare* *Com. v. West Newton First Nat. Bank*, 207 Pa. St. 255.

11. *Compare* *Frostburg v. Hitchins*, 99 Md. 617.

12. *Power May Be Delegated to Municipalities.* — *Sautter v. Utica City Nat. Bank*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 15.

159. 1. *Cellar Way.* — *Com. v. West Newton First Nat. Bank*, 207 Pa. St. 255.

2. *As to What Constitutes a Vault* within the New York city ordinances, see *New York v. Beuk*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 663.

5. *Ordinance Impliedly Authorizing Areaway of Particular Kind.* — *Devine v. National Wall Paper Co.*, 95 N. Y. App. Div. 194, *affirmed* 182 N. Y. 565.

Presumption of Municipal Consent from Maintenance for Twenty Years. — *Deshong v. New York*, 176 N. Y. 475, *affirming* 74 N. Y. App. Div. 234.

Property Owner's Right to Repair Vault. — See *Deshong v. New York*, 176 N. Y. 475, *affirming* 74 N. Y. App. Div. 234.

Revocation of Vault Privileges. — See *Lincoln Safe Deposit Co. v. New York*, 96 N. Y. App. Div. 624.

6. *Liability for Failure to Maintain Sufficient Railing.* — See *Devine v. National Wall Paper Co.*, 95 N. Y. App. Div. 194, *affirmed* 182 N. Y. 565.

10. *Restrictions and Regulations.* — *Therrien*

159. *c. REMEDIES FOR OBSTRUCTION OF STREETS — (1) Remedies on Behalf of State or Municipality — (a) Injunction.* — See note 12.

160. See note 2.

(b) *Ejectment.* — See note 4.

(c) *Summary Removal.* — See note 6.

161. (d) *Criminal Prosecution — Ordinances Imposing Penalties.* — See note 10.

162. (2) *Remedies of Individuals — (a) Injunction.* — See notes 1, 4.

163. See note 2.

(b) *Action for Damages.* — See note 4.

164. 3. *Regulation of Uses of Streets — a. IN GENERAL.* — See note 9a.

b. MOVING BUILDINGS ON STREETS. — See notes 10, 11, 13.

165. *e. RESTRICTIONS AS TO VEHICLES AND LOADS.* — See note 11.

v. La Ville de St. Paul, 23 Quebec Super. Ct. 248.

Permits to Excavate Streets — Security May Be Required. — *Cook v. North Bergen Tp.*, (N. J. 1905) 59 Atl. Rep. 1035. See also *Stowe v. Kearney*, (N. J. 1905) 59 Atl. Rep. 1058.

159. 12. Injunction on Behalf of State. — *Augusta v. Reynolds*, 122 Ga. 754, 106 Am. St. Rep. 147; *New York v. Knickerbocker Trust Co.*, 104 N. Y. App. Div. 223.

160. 2. Injunction on Behalf of Municipality. — *Ray v. Colby*, (Neb. 1903) 97 N. W. Rep. 591; *Lake Shore, etc., R. Co. v. Elyria*, 69 Ohio St. 414; *Oxford v. Willoughby*, 181 N. Y. 155, *affirming* (Supm. Ct. App. Div.) 83 N. Y. Supp. 1118; *Kittanning v. Thompson*, 211 Pa. St. 169; *West Seattle v. West Seattle Land, etc., Co.*, 38 Wash. 359. See also *New York v. Knickerbocker Trust Co.*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 17, wherein, however, the circumstances were held not to warrant an injunction.

4. *Ejectment.* — *Lee v. Harris*, 206 Ill. 428, 99 Am. St. Rep. 176; *Hawkshurst v. Asbury Park*, 65 N. J. Eq. 496.

6. *Summary Removal Enjoined Where Obstruction Not in Fact Unlawful.* — *Frostburg v. Wine-land*, 98 Md. 239.

161. 10. Ordinances Imposing Penalties. — *New York v. Childs*, (Supm. Ct. App. T.) 84 N. Y. Supp. 164; *Gates, etc., Co. v. Richmond*, 103 Va. 702.

162. 1. Remedies of Individuals — Injunction — Alabama. — *Roberts v. Mathews*, 137 Ala. 523, 97 Am. St. Rep. 56.

Iowa. — *Young v. Rothrock*, 121 Iowa 588.

Kentucky. — *Bourbon Stockyard Co. v. Woolley*, (Ky. 1903) 76 S. W. Rep. 28.

Massachusetts. — *Driscoll v. Smith*, 184 Mass. 221.

Maryland. — *Brauer v. Baltimore Refrigerating, etc., Co.*, 99 Md. 367, 105 Am. St. Rep. 304.

Michigan. — *Dean v. Ann Arbor R. Co.*, 137 Mich. 459; *Forbes v. Detroit*, (Mich. 1905) 102 N. W. Rep. 740; *Wilkinson v. Dunkley-Williams Co.*, (Mich. 1905) 103 N. W. Rep. 170.

New York. — *Ackerman v. True*, 175 N. Y. 353, 13 N. Y. Annot. Cas. 206, *reversing* 71 N. Y. App. Div. 143; *Paige v. Schenectady R. Co.*, 178 N. Y. 102; *Odell v. Bretney*, 93 N. Y. App. Div. 607.

Pennsylvania. — *Coward v. Llewellyn*, 209 Pa. St. 582.

Rhode Island. — *Healey v. Kelly*, 24 R. I. 581.

Texas. — *Heard v. Connor*, (Tex. Civ. App. 1905) 84 S. W. Rep. 605.

West Virginia. — *Pence v. Bryant*, 54 W. Va. 263.

Suit Not Abated by Pending Suit by Municipality. — *Bourbon Stockyard Co. v. Woolley*, (Ky. 1903) 76 S. W. Rep. 28.

4. *McWethy v. Aurora Electric Light, etc., Co.*, 202 Ill. 218, *affirming* 104 Ill. App. 479; *Atchison, etc., R. Co. v. Maegerlein*, 114 Ill. App. 222; *Washington Lodge No. 54 v. Frelinghuysen*, 138 Mich. 350; *Guilford v. Minneapolis, etc., R. Co.*, 94 Minn. 108; *Ray v. Colby*, (Neb. 1903) 97 N. W. Rep. 591; *Clark v. Interstate Independent Telephone Co.*, (Neb. 1904) 101 N. W. Rep. 977; *Sautter v. Utica City Nat. Bank*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 15; *Tilly v. Mitchell, etc., Co.*, 121 Wis. 1, 105 Am. St. Rep. 1007.

163. 2. Washington Lodge No. 54 v. Frelinghuysen 138 Mich. 350.

4. *Action for Damages.* — *Atchison, etc., R. Co. v. Maegerlein*, 114 Ill. App. 222; *Harrington v. Iowa Cent. R. Co.*, 126 Iowa 388; *Dries v. St. Joseph*, 98 Mo. App. 611 (obstruction of entrance to alley); *Heard v. Connor*, (Tex. Civ. App. 1905) 84 S. W. Rep. 605.

Measure of Damages. — *Ackerman v. True*, 175 N. Y. 353.

164. 9a. An Ordinance Requiring Vehicles to Be Driven on the Right Side of the Street does not prohibit one from crossing the street to avoid danger from a hose cart rapidly approaching on the right side. *Streeter v. Marshalltown*, 123 Iowa 449. See generally the title LAW OF THE ROAD.

Right to Lead Bear Along Street Upheld. — *Bostock-Ferari Amusement Co. v. Brocksmit*, 34 Ind. App. 566, 107 Am. St. Rep. 213.

10. **Moving Buildings.** — *A. M. Richards Bldg. Moving Co. v. Boston Electric Light Co.*, 188 Mass. 265.

11. *Northwestern Telephone Exch. Co. v. Anderson*, 12 N. Dak. 585, 102 Am. St. Rep. 580 (telephone company entitled to recover damages).

13. *Northwestern Telephone Exch. Co. v. Anderson*, 12 N. Dak. 585, 102 Am. St. Rep. 580, *approving* *Woodward v. Boston*, 115 Mass. 81; *Eureka City v. Wilson*, 15 Utah 53, *affirmed* 173 U. S. 32.

Permit Does Not Impliedly Authorize Cutting Trees. — *State v. Pratt*, 90 Minn. 66.

165. 11. No Right in Absence of Statute to Prohibit Use of Part of Street. — *Peace v. McAdoo*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 295.

- 166.** *f.* REGULATIONS AS TO SPEED. — See notes 3, 4.
g. BICYCLES. — See note 8.
- 167.** *i.* STANDING WAGONS ON STREETS. — See note 6.
j. HACK STANDS. — See notes 15, 16.
- 168.** VII. CARE AND REPAIR OF STREETS — 1. In General. — See note 3.
 VIII. ACTIONS FOR INJURIES TO STREETS. — See note 6.
 IX. RAILROADS IN STREETS — 2. Right to Use Streets for Railroad Purposes — *a.* LEGISLATIVE AUTHORITY — (1) *Necessity For.* — See note 10.
169. (2) *Power of Legislature to Give.* — See notes 1, 2, 3.
b. MUNICIPAL CONSENT — (1) *Necessity For.* — See note 4.
170. (2) *Power of City to Give.* — See notes 2, 4.
171. Limitations upon Power. — See note 6.
 Manner of Giving Consent. — See note 11.
- 173.** *e.* HOW AND BY WHOM RIGHT MAY BE QUESTIONED. — See note 1.
f. POWER OF CITY TO IMPOSE CONDITIONS AND REGULATE USE. — See note 3.
- 174.** *g.* NATURE AND EXTENT OF RIGHTS ACQUIRED — (1) *Construction of Statutes and Ordinances Granting Right.* — See notes 5, 6.

Regulation of Automobiles. — See *Chicago v. Banker*, 112 Ill. App. 94.

May Require Automobiles to Be Registered and Carry a Number. — *People v. Schneider*, (Mich. 1905) 103 N. W. Rep. 172.

166. 3. Speed Regulations. — *U. S. Brewing Co. v. Stoltenberg*, 113 Ill. App. 435, *affirmed* 211 Ill. 531; *Com. v. Crowninshield*, 187 Mass. 221.

Automobiles. — *People v. Ellis*, 88 N. Y. App. Div. 471.

4. Fire Department. — See *Muhs v. Fire Ins. Salvage Corps*, 89 N. Y. App. Div. 389.

8. Bicycles. — See *Rogers v. Binghamton*, 101 N. Y. App. Div. 352.

167. 6. *Brand v. Borden's Condensed Milk Co.*, 89 N. Y. App. Div. 188.

15. The Abutting Owner May Sue to enjoin the illegal use of the street in front of his property as a public hack stand. *Odell v. Bretney*, 93 N. Y. App. Div. 607.

16. The Proprietor of a Hotel has the right to keep carriages, for the use of his guests only, in the adjoining street in a reasonable number and in a reasonable manner subject to immediate call. *Willard Hotel Co. v. District of Columbia*, 23 App. Cas. (D. C.) 272.

168. 3. Lessee Cannot Be Compelled to Repair Sidewalk. — *Ford v. Kansas City*, 181 Mo. 137.

6. Right of Property Owner to Recover for Injury to Sidewalk. — See *Schan v. Uvalde Asphalt Paving Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 1045.

10. No Right in Absence of Clear Legislative Authority. — *Klosterman v. Chesapeake, etc.*, R. Co., 114 Ky. 426; *Stephens v. New York, etc.*, R. Co., 175 N. Y. 72.

169. 1. Legislature May Authorize Use of Streets by Railroads. — *Pepper v. Union R. Co.*, 113 Tenn. 53.

2. Legislature May Authorize Without Consent of Municipality. — *United R., etc., Co. v. Jersey City*, 71 N. J. L. 80.

3. Power May Be Exercised Directly or Delegated to Municipal Authorities. — *Capdevielle v. New Orleans, etc.*, R. Co., 110 La. 904.

4. Consent of Municipality Required by Statute. — *Klosterman v. Chesapeake, etc.*, R. Co., 114 Ky. 426; *Pittsburg v. Pittsburg, etc.*, R. Co., 205 Pa. St. 13.

What Constitutes Acceptance of Grant. — See *Denison, etc.*, R. Co. *v. St. Louis Southwestern R. Co.*, 96 Tex. 233.

170. 2. City May Grant Use of Streets When Empowered by Statute. — *Pepper v. Union R. Co.*, 113 Tenn. 53; *Stockdale v. Rio Grande Western R. Co.*, 28 Utah 201; *Belington, etc.*, R. Co. *v. Alston*, 54 W. Va. 597.

4. Power Not Implied. — *Lake Shore, etc.*, R. Co. *v. Elyria*, 69 Ohio St. 414.

171. 6. Petition of Property Owners, a Condition Precedent. — *Mercer County Traction Co. v. United New Jersey R., etc., Co.*, 65 N. J. Eq. 574.

11. Manner of Giving Consent. — *Essen v. Cape May*, (N. J. 1905) 60 Atl. Rep. 1131.

173. 1. Right of One Railway Company to Question Right of Another Company. — See *Denison, etc.*, R. Co. *v. St. Louis Southwestern R. Co.*, 96 Tex. 233.

3. Municipal Regulation of Speed. — *Louisville, etc.*, R. Co. *v. Sullivan Timber Co.*, 138 Ala. 379; *Chicago, etc.*, R. Co. *v. Carlinville*, 200 Ill. 314, 93 Am. St. Rep. 190; *Baltimore, etc.*, R. Co. *v. Whiting*, 161 Ind. 228; *Southern R. Co. v. Jones*, 33 Ind. App. 333; *Martin v. Chicago, etc.*, R. Co., 118 Iowa 148, 96 Am. St. Rep. 371; *Plattsburg v. Hagenbush*, 98 Mo. App. 669; *Missouri, etc.*, R. Co. *v. Owens*, (Tex. Civ. App. 1903) 75 S. W. Rep. 579; *St. Louis Southwestern R. Co. v. Bolton*, 36 Tex. Civ. App. 87; *O'Brien v. Wisconsin Cent. R. Co.*, 119 Wis. 7.

Statutory Regulation of Speed. — *Schroeder v. Wisconsin Cent. R. Co.*, 117 Wis. 33.

174. 5. Grants of Authority Construed Strictly Against Trustees. — *Chicago Terminal Transfer R. Co. v. Chicago*, 203 Ill. 576.

Duration of Privilege. — See *Chicago Terminal Transfer R. Co. v. Chicago*, 203 Ill. 576.

6. *Stephens v. New York, etc.*, R. Co., 175 N. Y. 72.

- 174.** (4) *Exclusive Use*. — See notes 9, 10.
175. *h.* REVOCATION OF LICENSE. — See note 3.
176. *i.* ACQUIREMENT OF RIGHT BY PRESCRIPTION. — See note 2.
j. TRANSFER OF RIGHT. — See note 5.
177. *l.* PRIVATE RAILROADS. — See notes 3, 4.
3. Construction and Operation of Road — *a.* IN GENERAL. — See note 5.
180. **4.** Rights and Remedies of Property Owners — *a.* RIGHT OF ABUTTING OWNERS TO COMPENSATION OR DAMAGES — (1) *Rule Where Abutter Owns Fee in Street*. — See note 2.
(2) *Rule Where Fee Is in City or Public*. — See note 3.
182. (4) *Consequential and Special Injuries*. — See note 3.
187. *c.* REMEDIES OF ABUTTING OWNERS — (4) *Action for Damages* — (b) What Injuries Actionable — *dd.* OBSTRUCTION OF STREET. — See note 4.
189. STREET WORK. — See note 2.
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191. STRUCTURE. — See note 4.
193. SUBCONTRACT — SUBCONTRACTOR. — See note 4.
SUBDIVISION. — See note 6.
194. SUBJECT — SUBJECT-MATTER. — See note 2.
196. See note 2.

174. 9. No Right to Exclusive Use of Street in Absence of Statutory Authority. — Chicago Terminal Transfer R. Co. v. Chicago, 203 Ill. 576.

10. Turney v. Southern Pac. R. Co., 44 Oregon 280.

175. 3. Permission to Use Streets Not a Mere Revocable License. — Koch v. Kentucky, etc., R., etc., Co., (Ky. 1904) 80 S. W. Rep. 1133; Belington, etc., R. Co. v. Alston, 54 W. Va. 597.

Privilege May Be Revoked under Express Reservation of Right. — Delaware, etc., R. Co. v. Oswego, 92 N. Y. App. Div. 551.

176. 2. Grant of Right Presumed from Long Exercise. — Turney v. Southern Pac. R. Co., 44 Oregon 280.

5. Denison, etc., R. Co. v. St. Louis Southwestern R. Co., 96 Tex. 233.

177. 3. Private Railroads — Streets Cannot Be Used For. — Swift v. Delaware, etc., R. Co., 66 N. J. Eq. 34, following Beecher v. Street, etc., Com'rs, 64 N. J. L. 475, 65 N. J. L. 307; Cereghino v. Oregon Short Line R. Co., 26 Utah 467.

4. Branches and Switches to Private Property. — People v. Blocki, 203 Ill. 363.

5. No Liability for Obstruction Where Due Diligence Exercised in Construction of Road. — Lund v. St. Paul, etc., R. Co., 31 Wash. 286, 96 Am. St. Rep. 906.

180. 2. Abutting Owner of Fee Entitled to Compensation. — Rock Island, etc., R. Co. v. Johnson, 204 Ill. 488; Mordhurst v. Ft. Wayne, etc., Traction Co., 163 Ind. 268, 106 Am. St. Rep. 222; Pepper v. Union R. Co., 113 Tenn. 53.

3. Abutter Who Does Not Own Fee Entitled to Compensation. — South Bound R. Co. v. Burton, 67 S. Car. 515.

182. 3. Property Damaged. — Aldis v. Union El. R. Co., 203 Ill. 567.

187. 4. Obstruction of Street. — International, etc., R. Co. v. Capers, 33 Tex. Civ. App. 283.

Temporary Obstruction of the Street in the Construction of the Road is not an element for which property owners can claim compensation. McKeon v. New York, etc., R. Co., 75 Conn. 343.

189. 2. Street Work. — Mill Valley v. House, 142 Cal. 700.

5. Strict Compliance. — Bowman v. Little, 101 Md. 299, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 189.

8. "Strictly Choice" Potatoes Construed to Mean Same as "Choice" Potatoes. — Ennis Brown Co. v. Hurst, 1 Cal. App. 752.

191. 4. Conley v. Lackawanna Iron, etc., Co., 94 N. Y. App. Div. 152.

Advertising Signs Not Structures. — London County Council v. Illuminated Advertisements Co., (1904) 2 K. B. 886.

193. 4. Subcontractor. — Smith v. Wilcox, 44 Oregon 325.

6. Political Subdivision. — A school district has been held not to be such a political subdivision of the state as is contemplated by the provision of the Missouri constitution that in cases where a county or other political subdivision of the state is a party writs of error shall run from, and appeals be taken directly to, the Supreme Court from the trial courts. School Dist. v. Boyle, 182 Mo. 347.

194. 2. "Subject" and "Object" Distinguished. — See *Ex p. Hernan*, 45 Tex. Crim. 343. Subject of Action. — Potter v. Lohse, 31 Mont. 91; Steinmetz v. Cosmopolitan Range Co., (Supm. Ct. App. T.) 47 Misc. (N. Y.) 611.

Subject of Action and Cause of Action Distinguished. — McCormick Harvesting Mach. Co. v. Hill, 104 Mo. App. 544.

Subject of Action and Object of Action Distinguished. — Lassiter v. Norfolk, etc., R. Co., 136 N. Car. 89.

196. 2. Subject-Matter Not Equivalent to Cause of Action. — See Rogers v. Wheeler, 89 N. Y. App. Div. 441.

SUBROGATION.

By A. A. WADSWORTH.

202. I. DEFINITION AND GENERAL PRINCIPLES—1. Definition.—See note 1.

2. Legal and Conventional Subrogation Distinguished.—See note 2.

203. 3. Subrogation an Equitable Doctrine Not Dependent on Contract or Privity.—See notes 1, 2, 3.

204. 4. When Subrogation Will Be Allowed in General.—See notes 1, 2.

5. When Not Allowed—*a.* IN GENERAL—WHERE INJUSTICE WOULD RESULT.—See note 3.

205. 6. When Right to Subrogation Becomes Complete.—See note 6.

206. 7. Nature and Extent of Rights Acquired—*a.* PARTY SUBROGATED ENTITLED TO ALL RIGHTS OF ORIGINAL CREDITOR.—See note 1.

207. II. SURETIES, GUARANTORS, AND PARTIES TO NEGOTIABLE INSTRUMENTS—1. Subrogation of Sureties—*a.* GENERAL PRINCIPLES—(1) *Surety Paying Debt Entitled to Subrogation.*—See note 6.

208. See note 1.

209. *b.* SURETY ENTITLED TO ALL SECURITIES APPLICABLE TO DEBT.—See note 9.

202. 1. For Other Definitions of the Term.—Fidelity, etc., *Co. v. Bowen*, 123 Iowa 356; Fidelity, etc., *Co. v. Jordan*, 134 N. Car. 236; *Ex p. Reynolds*, 68 S. Car. 436.

2. Legal and Conventional Subrogation Distinguished.—*Crane v. Noel*, 103 Mo. App. 122; *Gordon v. Stewart*, (Neb. 1903) 96 N. W. Rep. 624.

203. 1. Subrogation an Equitable Doctrine Not Dependent on Contract or Privity.—*Wilks v. Vaughan*, 73 Ark. 174; *Northern Invest. Co. v. Frey Real Estate, etc.*, Co., 33 Colo. 480; *Stewart v. Parcher*, 91 Minn. 517; *Crane v. Noel*, 103 Mo. App. 122; Fidelity, etc., *Co. v. Jordan*, 134 N. Car. 236; *Charmley v. Charmley*, 125 Wis. 297. Subrogation Merely Equitable Assignment.—*Caledonia Ins. Co. v. Northern Pac. R. Co.*, 32 Mont. 46.

2. Dependent on Circumstances of Particular Case.—*German Sav., etc., Soc. v. Tull*, (C. C. A.) 136 Fed. Rep. 1, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 203; *Northern Invest. Co. v. Frey Real Estate, etc.*, Co., 33 Colo. 480; Fidelity, etc., *Co. v. Bowen*, 123 Iowa 356; *Potter v. Lohse*, 31 Mont. 91; *Kolb v. National Surety Co.*, 176 N. Y. 233, affirming 73 N. Y. App. Div. 619; *Ex p. Reynolds*, 68 S. Car. 436.

3. Right May Be Modified or Extinguished by Contract.—*Wilks v. Vaughan*, 73 Ark. 174.

204. 1. Person Paying Debt of Another for His Own Protection.—*Bowen v. Gilbert*, 122 Iowa 448; *Bennett v. First Nat. Bank*, (Iowa 1905) 102 N. W. Rep. 129; *Riddle v. Riddle*, (Ky. 1904) 80 S. W. Rep. 1129; *Cambridge v. Hanscom*, 186 Mass. 54.

2. Where Denial of Right Would Be Contrary to Equity.—*German Sav., etc., Soc. v. Tull*, (C. C. A.) 136 Fed. Rep. 1, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 204,

3. Where Injustice Would Result.—*German Sav., etc., Soc. v. Tull*, (C. C. A.) 136 Fed. Rep. 1, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 204; *State v. Perkins*, 114 La. 301, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 204; *Boice v. Conover*, (N. J. 1905) 61 Atl. Rep. 159.

205. 6. No Subrogation until Creditor Is Fully Satisfied.—*Bennett v. First Nat. Bank*, (Iowa 1905) 102 N. W. Rep. 129; *State v. Perkins*, 114 La. 301, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 205; *Schneider v. Sellers*, (Tex. Civ. App. 1904) 81 S. W. Rep. 126.

206. 1. Party Subrogated Takes All Rights of Original Creditor.—*Mankey v. Willoughby*, 21 App. Cas. (D. C.) 314.

Rights Neither Enlarged Nor Diminished by Devolution.—*Charmley v. Charmley*, 125 Wis. 297.

207. 6. Surety Paying Debt of Principal.—Fidelity, etc., *Co. v. Bowen*, 123 Iowa 356; *Ferd Heim Brewing Co. v. Jordan*, 10 Mo. App. 286; *Nelson v. Webster*, (Neb. 1904) 100 N. W. Rep. 411; Fidelity, etc., *Co. v. Jordan*, 134 N. Car. 236; *Thurston v. Osborne-McMillan Elevator Co.*, 13 N. Dak. 508; *Rickards v. Bemis*, (Tex. Civ. App. 1903) 78 S. W. Rep. 239.

208. 1. Absence of Agreement and Ignorance of Right Immaterial.—*North Ave. Sav. Bank v. Hayes*, 188 Mass. 135.

209. 9. Right to All Securities.—*Mankey v. Willoughby*, 21 App. Cas. (D. C.) 314; *North Ave. Sav. Bank v. Hayes*, 188 Mass. 135; *Nelson v. Webster*, (Neb. 1904) 100 N. W. Rep. 411; Fidelity, etc., *Co. v. Jordan*, 134 N. Car. 236; *Thurston v. Osborne-McMillan Elevator Co.*, 13 N. Dak. 508; *Lawrence County Nat. Bank v. Gray*, 23 Pa. Super. Ct. 62; *Ex p. Reynolds*, 68 S. Car. 436.

- 210.** See note 1.
- 212.** *d.* HOW FAR SUBROGATION WILL BE CARRIED — (1) *Rights of Surety Measured by Right of Creditor.* — See note 10.
- 213.** (2) *Debt Compromised or Paid in Depreciated Currency.* — See note 2.
- e.* WHETHER PAYMENT BY SURETY EXTINGUISHES SPECIALTY — (2) *Civil-law Rule.* — See note 9.
- (3) *Rule in United States.* — See note 10.
- 215.** Various Views as to Assignment of Judgment. — See note 4.
- 216.** See note 1.
- 219.** *h.* VARIOUS INSTANCES OF SURETYSHIP — (2) *Sureties of Fiduciaries.* — See notes 2, 4.
- 221.** (4) *Sureties of Vendee and Vendor of Lands or Chattels* — (a) *Sureties of Vendee.* — See note 10.
- 223.** (5) *Surety of Surety.* — See note 2.
- (6) *Cosureties.* — See note 4.
- 224.** (9) *Sureties in Judicial Proceedings* — (a) *In General.* — See note 5.
- 225.** (b) *Subrogation as Between Successive Sureties.* — See note 3.
- 227.** (10) *Codebtors, Tenants in Common, and Partners* — (b) *Tenants in Common.* — See note 3.
- 229.** 2. *Subrogation of Guarantors.* — See note 7.
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- 230.** See note 1.
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- 233.** III. *SUBROGATION OF CREDITORS* — 1. *Subrogation to Securities Given to Surety.* — See note 7.

210. 1. *Securities Held by Cosureties.* — North Ave. Sav. Bank *v.* Hayes, 188 Mass. 135.

212. 10. *Surety Not Entitled to Full Reimbursement to Prejudice of Balance Due to Creditors.* — State *v.* Perkins, 114 La. 301 (surety of tax collector who defaulted to amount greater than penalty of bond).

213. 2. *Debt Compromised or Settled by Part Payment.* — City Trust, etc., Co. *v.* Haaslocher, 101 N. Y. App. Div. 415.

9. *Civil-law Rule — Debt Not Extinguished.* — Nelson *v.* Webster, (Neb. 1904) 100 N. W. Rep. 411.

10. *Specialty or Judgment Not Extinguished by Payment.* — Ferd Heim Brewing Co. *v.* Jordan, 110 Mo. App. 286; Fidelity, etc., Co. *v.* Jordan, 134 N. Car. 236; Lawrence County Nat. Bank *v.* Gray, 23 Pa. Super. Ct. 62.

215. 4. *Enforcement Against Principal.* — Nelson *v.* Webster, (Neb. 1904) 100 N. W. Rep. 411; Rickards *v.* Bemis, (Tex. Civ. App. 1903) 78 S. W. Rep. 239.

216. 1. *Actual Assignment Unnecessary.* — Ferd Heim Brewing Co. *v.* Jordan, 110 Mo. App. 286; Fidelity, etc., Co. *v.* Jordan, 134 N. Car. 236; Lawrence County Nat. Bank *v.* Gray, 23 Pa. Super. Ct. 62.

219. 2. *Where an Agent Defrauded His Principal by Means of Raised Checks* it was held that the agent's surety, on reimbursing the principal, was not entitled to be subrogated to the rights of such principal against the bank that had paid the checks. American Bonding Co. *v.* Covington First Nat. Bank, (Ky. 1905) 85 S. W. Rep. 190, following Stewart *v.* Com., 104 Ky. 489, stated in the original title at page 220, note 3.

4. *Sureties of Guardians.* — Browne *v.* Fidelity, etc., Co., 98 Tex. 55.

221. 10. *Surety of Vendee Subrogated to Vendor's Lien.* — Griffith *v.* Lehman, (Neb. 1903) 96 N. W. Rep. 991.

223. 2. *Surety or Assignee of Surety Entitled to Subrogation.* — Weimer *v.* Talbot, 56 W. Va. 257.

4. *Surety Subrogated Against Cosureties.* — Wilks *v.* Vaughan, 73 Ark. 174; Cureton *v.* Cureton, 120 Ga. 559; Strickler *v.* Gitchel, 14 Okla. 523; *Ex p.* Reynolds, 68 S. Car. 436; Weimer *v.* Talbot, 56 W. Va. 257.

224. 5. *Sureties on Appeal Bonds.* — Kolb *v.* National Surety Co., 176 N. Y. 233, affirming 73 N. Y. App. Div. 619; City Trust, etc., Co. *v.* Haaslocher, 101 N. Y. App. Div. 415.

225. 3. *Successive Sureties in Judicial Proceedings.* — Fidelity, etc., Co. *v.* Bowen, 123 Iowa 356.

227. 3. *Subrogation Between Tenants in Common.* — See Kinkead *v.* Ryan, 65 N. J. Eq. 726.

229. 7. *Subrogation of Guarantor to Rights of Creditor.* — See Dickson *v.* Sledge, (Miss. 1905) 38 So. Rep. 673.

10. *Guarantor of Promissory Note.* — Mankey *v.* Willoughby, 21 App. Cas. (D. C.) 314.

230. 1. *Guarantor Subrogated to Mortgage Securing Note.* — Dickson *v.* Sledge, (Miss. 1905) 38 So. Rep. 673.

3. *Indorser Entitled to Benefit of Securities.* — Mankey *v.* Willoughby, 21 App. Cas. (D. C.) 314.

233. 7. *Creditor Subrogated to Securities Given to Surety.* — State *v.* Bergfeld, 108 Mo. App. 630.

234. See note 1.

235. Right of Surety to Release Securities. — See note 2.

IV. PERSONS INTERESTED IN ENCUMBERED ESTATES — 1. In General.

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237. See note 2.

Volunteer Not Entitled to Subrogation. — See note 7.

238. 2. Purchasers — *a.* IN GENERAL. — See notes 1, 2.

239. *c.* PURCHASER WHOSE TITLE HAS FAILED — (3) *Purchasers at Foreclosure, Judicial, and Quasi-judicial Sales.* — See note 6.

240. See note 1.

241. (4) *When Purchaser Will Not Be Subrogated.* — See note 5.

242. *e.* INCUMBRANCE PAID AS PART OF PURCHASE PRICE. — See note 2.

243. 3. Junior Mortgagees, Judgment Creditors, Etc. — *a.* IN GENERAL. —

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244. See note 1.

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b. EXTENT OF RIGHTS ACQUIRED. — See note 6.

c. WHAT PAYMENT SUFFICIENT. — See note 10.

246. 4. Mortgagees. — See note 10.

248. 5. Persons Advancing Money to Pay Off Incumbrances — *a.* WHEN ENTITLED TO SUBROGATION IN GENERAL. — See note 1.

Subrogation of County Creditors to Security Given to Indemnify Treasurer's Bondsmen. — *Jennings v. Taylor*, 102 Va. 191.

234. 1. *Dyer v. Jacoway*, 76 Ark. 171.

235. 2. Where the Security Is Given as Indemnity Only it has been held that the equity of subrogation does not arise in the first instance, but only in consequence of the insolvency of the parties principally liable for the debt, and that until this equity arises the surety has a right in equity as well as at law to release the security. *Dyer v. Jacoway*, 76 Ark. 171.

17. Persons Interested in Encumbered Estates in General. — *Henry v. Garden City Bank, etc., Co.*, 145 Cal. 54, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 235; *Northern Invest. Co. v. Frey Real Estate, etc., Co.*, 33 Colo. 480; *Lilianthal v. Lesser*, 102 N. Y. App. Div. 500; *Charmley v. Charmley*, 125 Wis. 297.

236. 2. Married Woman Paying Off Mortgage Subrogated Thereto. — *Charmley v. Charmley*, 125 Wis. 297.

237. 2. Tenant in Common Removing Incumbrance. — *Kinhead v. Ryan*, 65 N. J. Eq. 726.

7. Volunteer Not Entitled to Subrogation. — *Schneider v. Sellers*, (Tex. Civ. App. 1904) 81 S. W. Rep. 126.

238. 1. Purchaser Paying Off Incumbrance Entitled to Subrogation in General. — *Woodland Cemetery Co. v. Ellison*, (Ky. 1904) 80 S. W. Rep. 169; *Potter v. Lohse*, 31 Mont. 91; *Cape Fear Lumber Co. v. Evans*, 69 S. Car. 93.

2. Purchaser of Encumbered Chattel. — *Potter v. Lohse*, 31 Mont. 91.

A Mortgagee of Chattels Who Has Failed to Comply with the Recording Acts is entitled to be subrogated to the lien of a judgment which is paid out of the proceeds of the sale of such chattels because of such failure to record. *Boice v. Conover*, (N. J. 1905) 61 Atl. Rep. 159.

239. 6. Purchaser at Foreclosure Sale. — *Equitable Mortg. Co. v. Gray*, 68 Kan. 100;

Lincoln v. Lincoln St. R. Co., (Neb. 1903) 97 N. W. Rep. 255.

Purchaser at Foreclosure Sale Redeeming Land from Tax Sales. — A purchaser at a mortgage foreclosure sale is entitled to be subrogated to the rights of the state when he has redeemed the land purchased by him from tax sales. *Northern Invest. Co. v. Frey Real Estate, etc., Co.*, 33 Colo. 480.

240. 1. Purchaser at Judicial Sale. — *Liverman v. Lee*, 86 Miss. 370.

241. 5. Sale Void for Fraud of Purchaser. — *King v. Huni*, (Ky. 1904) 81 S. W. Rep. 254.

242. 2. Payment of Incumbrance as Part of Purchase Price. — *Gunby v. Armstrong*, (C. C. A.) 133 Fed. Rep. 417; *Stastny v. Pease*, 124 Iowa 587.

243. 7. Subrogation of Junior Mortgagee Paying Off Prior Incumbrance. — *Illinois Nat. Bank v. School Trustees*, 211 Ill. 500, affirming 111 Ill. App. 189; *Bowen v. Gilbert*, 122 Iowa 448; *Lincoln v. Lincoln St. R. Co.*, (Neb. 1903) 97 N. W. Rep. 255.

Lien Must Be Prior to Entitle Mortgagee to Subrogation. — *Anthes v. Schroeder*, (Neb. 1905) 103 N. W. Rep. 1072.

244. 1. Judgment Creditor, etc., Subrogated on Payment of Prior Incumbrance. — *Bennett v. First Nat. Bank*, (Iowa 1905) 102 N. W. Rep. 129.

Entitled to Assignment of Security. — *Lincoln v. Lincoln St. R. Co.*, (Neb. 1903) 97 N. W. Rep. 255.

245. 1. Formal Assignment Unnecessary. — *Bennett v. First Nat. Bank*, (Iowa 1905) 102 N. W. Rep. 129.

6. Rate of Interest Allowed. — *Bennett v. First Nat. Bank*, (Iowa 1905) 102 N. W. Rep. 129.

10. Full Payment of Senior Mortgagee. — *Chapman v. Cooney*, 25 R. I. 657.

246. 10. Land Conveyed Subject to Mortgage — Mortgagee Subrogated on Payment. — *Warner v. York*, 25 Ohio Cir. Ct. 310.

248. 1. Person Advancing Money to Pay Off

- 250.** *d.* WHEN NOT ENTITLED TO SUBROGATION. — See note 3.
- 251.** V. BENEFICIARIES, HEIRS, DEVISEES, LEGATEES, AND WIDOWS — 2. Heirs and Next of Kin. — See note 6.
- 254.** VI. PERSONAL REPRESENTATIVES, FIDUCIARIES, AND OFFICERS — 2. Fiduciaries in General — Trustees and Guardians — *b.* TRUSTEES. — See note 2.
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- 260.** VIII. INSURANCE COMPANIES — 2. Subrogation Against Tortfeasors — *a.* IN GENERAL. — See notes 4, 5.
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- 263.** *c.* EXTENT OF RIGHT. — See note 6.
- 264.** 7. In Whose Name Action Should Be Brought. — See note 8.
- 265.** See note 1.

Incumbrance. — *Coulter v. Minion*, (Mich. 1905) 102 N. W. Rep. 660; *Sproal v. Larsen*, 138 Mich. 142; *Gordon v. Stewart*, (Neb. 1903) 96 N. W. Rep. 624.

Rule Applies to Real or Personal Property Exempt or Otherwise. — *Warne v. Morgan*, 68 Kan. 450.

Fact that Property Is Homestead Does Not Render Doctrine Inapplicable. — *Sproal v. Larsen*, 138 Mich. 142.

250. 3. Volunteer Paying Off Incumbrance Not Subrogated. — *Doxey v. Western State Bank*, 113 Ill. App. 442; *Alvis v. Alvis*, 123 Iowa 546.

251. 6. Nicholson v. Aney, 127 Iowa 278.

254. 2. Trustee of Bankrupt Subrogated to Rights of Attaching Creditors. — *In re Merrow*, 131 Fed. Rep. 993.

255. 7. Volunteers Not Entitled to Subrogation. — *Browder v. Hill*, (C. C. A.) 136 Fed. Rep. 821; *In re General Automobile, etc., Co.*, (C. C. A.) 133 Fed. Rep. 525; *Equitable L. Assur. Soc. v. Wetherill*, (C. C. A.) 127 Fed. Rep. 947; *Bouton v. Cameron*, 205 Ill. 50, *affirming* 99 Ill. App. 600; *Crane v. Noel*, 103 Mo. App. 122; *Blydenburgh v. Seabury*, 104 N. Y. App. Div. 141; *Lilianthal v. Lesser*, 102 N. Y. App. Div. 500; *Schneider v. Sellers*, (Tex. Civ. App. 1904) 81 S. W. Rep. 126.

Good Motive Will Not Entitle Volunteer to Subrogation. — *Crane v. Noel*, 103 Mo. App. 122.

256. 1. Who Not Volunteers. — *Bowen v. Gilbert*, 122 Iowa 448; *Riddle v. Riddle*, (Ky. 1904) 80 S. W. Rep. 1129; *Charmley v. Charmley*, 125 Wis. 297.

3. Conventional Subrogation — Agreement Essential. — *Browder v. Hill*, (C. C. A.) 136 Fed. Rep. 821, *citing* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 257 [256] and holding that a mere understanding is not enough; *In re General Automobile, etc., Co.*, (C. C. A.) 133 Fed. Rep. 525; *Crane v. Noel*, 103 Mo. App. 122; *Gordon v. Stewart*, (Neb. 1903) 96 N. W. Rep. 624; *Blydenburgh v. Seabury*, 104 N. Y. App. Div. 141.

257. 1. Agreement with Either Debtor or

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3. No Subrogation to Prejudice of Third Parties. — *Browder v. Hill*, (C. C. A.) 136 Fed. Rep. 821, *citing* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 257; *Crane v. Noel*, 103 Mo. App. 122.

258. 3. Void Securities. — *Taliaferro v. Thornton*, (Ky. 1904) 80 S. W. Rep. 1097; *Connor v. Home, etc., Bldg. Assoc.*, (Ky. 1904) 80 S. W. Rep. 797.

Loan on Void Mortgage. — It has been held that one who has lent money to an administrator on a void mortgage, a part of which was used to pay a previously executed void mortgage, is not entitled to subrogation to a lien discharged with the proceeds of the prior mortgage. *Henry v. Henry*, (Neb. 1905) 103 N. W. Rep. 441.

260. 4. Insurer Subrogated Against Tortfeasors in General. — *Dyer v. Maine Cent. R. Co.*, 99 Me. 195.

5. Fires Set by Locomotives. — *Caledonia Ins. Co. v. Northern Pac. R. Co.*, 32 Mont. 46, *quoting* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 260.

261. 3. Recovery Limited to Amount Paid on Loss. — *Dyer v. Maine Cent. R. Co.*, 99 Me. 195; *Caledonia Ins. Co. v. Northern Pac. R. Co.*, 32 Mont. 46, *quoting* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 261.

262. 10. Marine Insurers Entitled to Subrogation in General. — *The Livingstone*, (C. C. A.) 130 Fed. Rep. 746.

263. 6. Measure of Recovery by Underwriter in Ordinary Policy. — *The Livingstone*, (C. C. A.) 130 Fed. Rep. 746.

264. 8. Suit to Be in Name of Insured. — *Judd v. New York, etc., Steamship Co.*, 130 Fed. Rep. 991; *The Livingstone*, (C. C. A.) 130 Fed. Rep. 746; *Dyer v. Maine Cent. R. Co.*, 99 Me. 195.

265. 1. Suit in Name of Insured under Code Practice. — *Caledonia Ins. Co. v. Northern Pac. R. Co.*, 32 Mont. 46.

265. IX. SUBROGATION ARISING FROM PAYMENT OF TAXES AND DUTIES —

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268. XI. VARIOUS OTHER INSTANCES OF SUBROGATION — 3. Subrogation of Agents and Attorneys — a. IN GENERAL. — See note 6.

269. b. INSURANCE AGENT ADVANCING PREMIUMS. — See note 1.

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270. XII. WAIVER OF RIGHT — Negligence and Laches. — See note 9.

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265. 4. Henry v. Garden City Bank, etc., Co., 145 Cal. 54.

5. Subrogation to Lien of Taxes. — Northern Invest. Co. v. Frey Real Estate, etc., Co., 33 Colo. 480.

266. 4. Personal Representative. — Hughes v. Golden, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 128.

5. Volunteers. — *In re Brinker*, 128 Fed. Rep. 634; *Stewart v. Parcher*, 91 Minn. 517; *Griffith v. Lehman*, (Neb. 1903) 96 N. W. Rep. 991.

268. 6. An Agent Who Has Been Held Liable by His Principal for a Loan to a Third Party, which he induced the principal to make, is entitled to be subrogated to the rights of the principal against the debtor. *Freeburg v. Ek-sell*, 123 Iowa 464.

269. 1. An Agent Paying the First Year's Premium as an Inducement to Insure, thus occupying the position of a mere volunteer, is not entitled to subrogation to the rights of the creditor against the primary debtor. *Equitable L. Assur. Soc. v. Wetherill*, (C. C. A.) 127 Fed. Rep. 947.

6. Bona Fide Purchasers of Void County Bonds Issued in Exchange for Valid Warrants which were surrendered by the holders and canceled by the county will be subrogated to the rights of the original warrant holders. *Kearny County v. Irvine*, (C. C. A.) 126 Fed. Rep. 689, *affirming* 114 Fed. Rep. 518.

From a Purchase of Municipal Bonds in Open Market No Subrogation Follows, whatever may have been the equities existing in favor of the original purchasers. *Beardsley v. Lampasas*, (C. C. A.) 127 Fed. Rep. 819.

270. 9. Right Waived by Negligence and Laches. — See *Anthes v. Schroeder*, (Neb. 1905) 103 N. W. Rep. 1072, wherein, however, the facts were held not to establish laches.

271. 8. Right of Subrogation Assignable. — *Weimer v. Talbot*, 56 W. Va. 257, *citing* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 271.

9. Subrogation Not Enforceable in Court of Justice of Peace. — *Fidelity, etc., Co. v. Jordan*, 134 N. Car. 236.

272. 1. Subrogation Available as Equitable Defense in Action of Conversion under Code. — *Potter v. Lohse*, 31 Mont. 91.

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273. 3. To Write Under. — *Atty.-Gen. v. Clarke*, 26 R. I. 470.

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277. 4. Delivery. — Merchants Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 210 Ill. 26, 102 Am. St. Rep. 145.

9. Expenditures on Faith of Subscription. — Horton v. Erie Preserving Co., 90 N. Y. App. Div. 255, affirmed 181 N. Y. 535; Baptist Female University v. Borden, 132 N. Car. 476; Presbyterian Board of Foreign Missions v. Smith, 209 Pa. St. 361.

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278. 1. Compliance with Terms of Subscription. — Woodworth v. Veitch, 29 Ind. App. 589; Doherty v. Arkansas, etc., R. Co., 5 Indian Ter. 537; Robinson v. Nutt, 185 Mass. 345.

279. 2. Mutual Promises Good Consideration. — Curry v. Kentucky Western R. Co., 78 S. W. Rep. 435, 25 Ky. L. Rep. 1372; Baptist Female University v. Borden, 132 N. Car. 476.

280. 1. Acceptance of Subscription Good Consideration. — Robinson v. Nutt, 185 Mass. 345; Baptist Female University v. Borden, 132 N. Car. 476; Presbyterian Board of Foreign Missions v. Smith, 209 Pa. St. 361.

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281. 1. Conditions Must Be Performed. — Leland Norwegian Lutheran Congregation v. Larson, 121 Iowa 151.

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282. 2. Time Essential. — Garrison v. Cooke, 96 Tex. 228, 97 Am. St. Rep. 906.

7. Waiver of Conditions. — Horton v. Erie Preserving Co., 181 N. Y. 535, affirming 90 N. Y. App. Div. 255.

283. 2. Existence of Payee. — Merchants Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 210 Ill. 26, 102 Am. St. Rep. 145; Curry v. Kentucky Western R. Co., 78 S. W. Rep. 435, 25 Ky. L. Rep. 1372.

284. 3. Money or Labor Expended. — Heinrich v. Missouri, etc., Coal Co., 102 Mo. App. 229.

285. 4. Parol Evidence is not admissible, in the absence of fraud, to alter the terms of the subscription contract. Mefford v. Sell, (Neb. 1902) 92 N. W. Rep. 148.

286. 1. Subscription Supported by Consideration. — Albert Lea College v. Brown, 88 Minn. 524.

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287. 3. Substance. — Wallace v. Board of Revenue, 140 Ala. 491.

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288. 2. Substantially Commenced. — See Atty.-Gen. v. Bournemouth, (1902) 2 Ch. 714.

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306. V. ANCESTOR OR PROPOSITUS — 3. Statutory Rules Determining Ancestor — b. IN UNITED STATES — (5) *Estates of Unmarried Infants* — (a) Statutory Provisions. — See note 1.

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315. 1. Preference of Whole Blood in Succession Between Brothers and Sisters. — See Tays *v.* Robinson, 68 Kan. 53.

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316. 1. Succession by Posthumous Children. — Walker *v.* Hyland, 70 N. J. L. 69.

317. 2. Succession by Specially Designated Ascendants and Collaterals. — See Raburn *v.* Bradshaw, 124 Ga. 552; Berger *v.* Waldbaum, (Supm. Ct. Tr. T.) 46 Misc. (N. Y.) 4.

319. 3. Status of the Rule in the United States. — Smith *v.* McDonald, (N. J. 1905) 61 Atl. Rep. 453.

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330. 8. Statutes Making Illegitimate Brothers and Sisters Heirs to Each Other. — Overton *v.* Overton, (Ky. 1906) 96 S. W. Rep. 469.

331. 4. Statutory Modifications of Common-law Rule. — Miller *v.* Pennington, 218 Ill. 220; Brisbin *v.* Huntington, 128 Iowa 166; *In re* Garr, (Utah 1906) 86 Pac. Rep. 757.

5. Townsend *v.* Meneley, (Ind. App. 1905) 76 N. E. Rep. 321, 74 N. E. Rep. 274.

333. 8. Morin *v.* Holliday, (Ind. App. 1906) 77 N. E. Rep. 861; *In re* Garr, (Utah 1906) 86 Pac. Rep. 757.

334. 1. Succession to Estate of Adopting Parent. — Theobald *v.* Smith, 103 N. Y. App. Div. 200, holding that a statute giving the right of succession operated in favor of one adopted under prior statutes not giving the right.

334. (2) *Succession Limited to Estate of Adopting Parent.* — See note 6.

335. *b. SUCCESSION FROM ADOPTED CHILD — Succession by Ascendants and Collaterals.* — See note 11.

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335. 11. In Illinois the heirs of an adoptive parent take to the exclusion of the natural mother. *Swick v. Coleman*, 218 Ill. 33.

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2. History of Tax. — *Nettleton's Appeal*, 76 Conn. 235.

3. Tax Approved by Political Economists. — *Bridgeport Trust Co.'s Appeal*, 77 Conn. 657; *In re Morris*, 138 N. Car. 259.

4. Tax Not Oppressive. — *In re Morris* 138 N. Car. 259.

5. Tax Is on Succession, Not on Property. — *Nettleton's Appeal*, 76 Conn. 235; *Merrifield v. People*, 212 Ill. 400; *People v. McCormick*, 208 Ill. 437; *Kohn's Succession*, (La. 1905) 38 So. Rep. 898; *Levy's Succession*, (La. 1905) 39 So. Rep. 37; *Salem First Universalist Soc. v. Bradford*, 185 Mass. 310; *Matter of Delano*, 176 N. Y. 486, reversing 82 N. Y. App. Div. 147; *Matter of Wolfe*, 89 N. Y. App. Div. 349, affirmed 179 N. Y. 599; *Jackson v. Tailer*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 36, affirmed 96 N. Y. App. Div. 625; *Matter of Hitchins*, (Surrogate Ct.) 43 Misc. (N. Y.) 485, affirmed 101 N. Y. App. Div. 612; *In re Morris*, 138 N. Car. 259; *State v. Gilbert*, 70 Ohio St. 229. Compare *Lovitt v. Atty.-Gen.*, 33 Can. Sup. Ct. 350, per Mills, J.

339. 1. Tax Is Valid Exercise of Sovereign Power. — *Matter of Delano*, 176 N. Y. 486, reversing 82 N. Y. App. Div. 147; *In re Morris*, 138 N. Car. 259; *State v. Gilbert*, 70 Ohio St. 229.

2. Statutes Imposing Tax Constitutional. — *Matter of Campbell*, 143 Cal. 623; *In re Magnes*, 32 Colo. 527; *Nettleton's Appeal*, 76 Conn. 235; *Levy's Succession*, (La. 1905) 39 So. Rep. 37; *Matter of Delano*, 176 N. Y. 486, reversing 82 N. Y. App. Div. 147; *In re Morris*, 138 N. Car. 259, citing 27 AM. AND ENG.

ENCYC. OF LAW (2d ed.) 338 [339]; *State v. Gilbert*, 70 Ohio St. 229; *Humphreys v. State*, 70 Ohio St. 67, 101 Am. St. Rep. 888.

340. 1. Absence of Specific Power to Tax Successions Immaterial. — *In re Morris*, 138 N. Car. 259.

341. 2. Acts Not Retroactive in Effect. — *Connell v. Crosby*, 210 Ill. 380; *Gilbertson v. Ballard*, 125 Iowa 420, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 341; *Levy's Succession*, (La. 1905) 39 So. Rep. 37; *Matter of Hitchins*, 101 N. Y. App. Div. 612, affirming (Surrogate Ct.) 43 Misc. (N. Y.) 485; *Matter of Craig*, 97 N. Y. App. Div. 289, affirmed 181 N. Y. 551.

Act Does Not Apply to Reversion Taking Effect After Passage. — *Gilbertson v. Ballard*, 125 Iowa 420; *Matter of Craig*, 97 N. Y. App. Div. 289, affirmed 181 N. Y. 551; *Matter of Hitchins*, (Surrogate Ct.) 43 Misc. (N. Y.) 485, affirmed 101 N. Y. App. Div. 612; *Eury v. State*, 72 Ohio St. 448.

342. 1. Retrospective Laws. — *Stevens v. Bradford*, 185 Mass. 439.

4. *Levy's Succession*, (La. 1905) 39 So. Rep. 37.

343. 7. Right Not Dependent on Nature of Property Transferred. — *In re Morris*, 138 N. Car. 259, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 343.

344. 2. Government Bonds. — *Levy's Succession*, (La. 1905) 39 So. Rep. 37.

3. State and Municipal Bonds, though exempt from taxation, are subject to the inheritance tax. *Kohn's Succession*, (La. 1905) 38 So. Rep. 898.

5. *Gifts Causa Mortis.* — *Merrifield v. People*, 212 Ill. 400; *Rosenthal v. People*, 211 Ill. 306.

A Transfer in the Nature of a Gift *Causa Mortis*, but Made for a Substantial Consideration, and by

- 345.** Power of Appointment. — See note 1.
4. Nature of Estate Created. — See note 2.
346. **6.** Situs of Property Transferred — *a.* REAL PROPERTY. — See note 2.
347. *b.* PERSONAL PROPERTY. — See notes 3, 4.
348. Debts. — See note 2.
 Deposits. — See note 4.
349. **7.** Exempt Successions — *a.* RELATIVES AND CONNECTIONS. — See note 1.
 Wife. — See notes 2, 3.
350. Adopted Child. — See note 1.
 "Acknowledged" Child. — See note 8.
b. CORPORATIONS. — See note 12.
351. See note 1.
352. **V. WHEN TAX ACCRUES** — **1.** Present Estates. — See notes 1, 2.
2. Future Estates. — See notes 3, 4, 5.

virtue of a contractual obligation, is not taxable under the *Ontario Succession Duty Act*. *Atty.-Gen. v. Brown*, 5 Ont. L. Rep. 167.

345. 1. Power of Appointment. — *Hoyt v. Hancock*, 65 N. J. Eq. 688; *Matter of Delano*, 176 N. Y. 486, reversing 82 N. Y. App. Div. 147; *Matter of Howe*, 86 N. Y. App. Div. 286, affirmed 176 N. Y. 570.

2. Nature of Estate Created Immaterial. — *Matter of Skinner*, (Surrogate Ct.) 45 Misc. (N. Y.) 559, modified and affirmed 106 N. Y. App. Div. 217.

346. 2. Realty Must Be Within Taxing State. — *Connell v. Crosby*, 210 Ill. 380.

347. 3. Personalty of Resident Decedent Without State. — *Gallup's Appeal*, 76 Conn. 617; *Bridgeport Trust Co.'s Appeal*, 77 Conn. 657; *Hopkins's Appeal*, 77 Conn. 644; *Milliken's Estate*, 206 Pa. St. 149.

4. Property "Within" the State. — *People v. Moir*, 207 Ill. 180, 99 Am. St. Rep. 205; *Matter of Daly*, 100 N. Y. App. Div. 373, affirmed 182 N. Y. 524; *Matter of Clinch*, (Surrogate Ct.) 44 Misc. (N. Y.) 190, affirmed 180 N. Y. 300; *Singer v. Guarantee Trust, etc., Co.*, 24 Pa. Super. Ct. 270.

348. 2. Debts Due from Nonresident Decedent. — *Contra*, *In re Joyslin*, 76 Vt. 88.

4. Situs of Deposits. — *Matter of Daly*, 100 N. Y. App. Div. 373, affirmed 182 N. Y. 524.

349. 1. See *Matter of Campbell*, 143 Cal. 623.

A Legacy to a Son-in-law was taxable under the War Revenue Act of June 13, 1898, repealed April 12, 1902. *King v. Eidman*, 128 Fed. Rep. 815.

A Devise to the Testator's Mother is subject in Iowa to the tax on its devolution by reason of the mother's death before that of the testator. *In re Hulett*, 121 Iowa 423.

2. Bequest in Lieu of Dower. — *Contra*, *Matter of Riemann*, (Surrogate Ct.) 42 Misc. (N. Y.) 648, wherein an acceptance by the widow of the legacy in lieu of dower was construed as an election to take under the will, and therefore to render the legacy taxable.

3 Compare *Connell v. Crosby*, 210 Ill. 380.

Where a Widow Elects to Take in Kind the half of an estate bequeathed to her, such half is not taxable under the *Tennessee* statute. *Memphis Trust Co. v. Speed*, (Tenn. 1905) 88 S. W. Rep. 321.

350. 1. Contra. — *Matter of Winchester*, 140 Cal. 468.

8. Existence of Relation Depends upon Circumstances. — *Matter of Davis*, 98 N. Y. App. Div. 546.

12. Express Statutory Exemptions. — *Salem First Universalist Soc. v. Bradford*, 185 Mass. 310, holding that the test is to inquire whether the property of the legatee or devisee is generally exempt from taxation, and that it is immaterial that the particular property transferred would be subject to annual taxation in the hands of the society.

Charitable Purpose Must Appear by Proof. — *In re Vineland Historical, etc., Soc.*, 66 N. J. Eq. 291.

351. 1. Foreign Corporations Not Within Exemption. — *In re Speed*, 216 Ill. 23; *Humphreys v. State*, 70 Ohio St. 67, 101 Am. St. Rep. 888.

352. 1. Tax Accrues upon Death of Decedent. — *Rosenthal v. People*, 211 Ill. 306; *Eury v. State*, 72 Ohio St. 448.

2. Atty.-Gen. v. Northumberland, (1904) 1 K. B. 762, 90 L. T. N. S. 630.

Where the Legatee Renounces His Legacy, no tax can be collected with respect to him, because there has been no transfer to him. *Matter of Wolfe*, 89 N. Y. App. Div. 349, affirmed 179 N. Y. 599.

3. Tax Due When Property Bequeathed or Devised Vests. — *Peck v. Kinney*, 128 Fed. Rep. 313; *Brown v. Kinney*, 128 Fed. Rep. 310; *Matter of Tracy*, 179 N. Y. 501, reversing 87 N. Y. App. Div. 215; *Matter of Cooksey*, 182 N. Y. 92 (vesting under power of appointment); *Matter of Kennedy*, 93 N. Y. App. Div. 27; *Matter of Hoyt*, (Surrogate Ct.) 44 Misc. (N. Y.) 76.

4. Vested Remainder Presently Taxable. — *Peck v. Kinney*, 128 Fed. Rep. 313; *Brown v. Kinney*, 128 Fed. Rep. 310; *People v. McCormick*, 208 Ill. 437.

Payment Postponed to Vesting in Possession. — *Stevens v. Bradford*, 185 Mass. 439, holding further that the statute is retrospective.

Where the Executor Pays the Tax on the Entire Estate at the time of its valuation, pursuant to the express direction of the will, no further tax is collectible on the termination of a life estate under the *Pennsylvania* statute postponing payment until actual vesting in possession. *De Borbon's Estate*, 211 Pa. St. 623.

- 353. VI. LIABILITY FOR TAX — 1. Transfers of Personalty.** — See note 3.
- 354. Life Estates and Remainders.** — See notes 1, 3.
- 2. Transfers of Realty — Lien of Tax.** — See note 5.
- 356. VII. APPRAISAL AND ASSESSMENT — 1. Appraisal — c. ASCERTAINING VALUE OF ESTATE — (3) Market Value of Property.** — See note 2.
- (4) Annuities, Life Estates, and Remainders.** — See note 5.
- (5) Deduction of Debts.** — See note 7.
- 357. Expenses of Administration.** — See note 2.
- Costs of Litigation.** — See notes 3, 4.
- Taxes.** — See note 6.
- e. REAPPRAISAL.** — See note 14.
- 358. 2. Assessment — a. DETERMINATION OF LIABILITY TO TAX.** — See notes 3, 4, 5.
- b. CORRECTION OF DECREE.** — See note 7.
- c. APPEAL FROM DECREE.** — See note 9.
- 359. IX. PENALTY FOR NONPAYMENT.** — See note 5.
- 360. X. REFUNDING TAX.** — See note 1.

SUCCESSIVELY. — See note 2.

SUCCESSOR. — See note 3.

361. SUCH. — See note 2.

352. 5. Contingent Remainder Not Presently Taxable. — *People v. McCormick*, 208 Ill. 437.

Not Subject to Legacy Tax under War Revenue Act of 1898. — Land Title, etc., *Co. v. McCoach*, (C. C. A.) 129 Fed. Rep. 901. See also *Philadelphia Trust, etc., Co. v. McCoach*, (C. C. A.) 129 Fed. Rep. 906.

353. 3. Duty of Executor to Deduct Tax. — *Bridgeport Trust Co.'s Appeal*, 77 Conn. 657; *Hopkins's Appeal*, 77 Conn. 644; *Matter of Tracy*, 87 N. Y. App. Div. 215, *reversed* 179 N. Y. 501; *Lovitt v. Atty.-Gen.*, 33 Can. Sup. Ct. 350.

354. 1. Matter of Tracy, 87 N. Y. App. Div. 215, *reversed* on other grounds 179 N. Y. 501; *Brown's Estate*, 208 Pa. St. 161.

3. Tax on Remainder Borne by Beneficiary. — *Matter of Tracy*, 179 N. Y. 501, *reversing* 87 N. Y. App. Div. 215; *Matter of Hoyt*, (Surrogate Ct.) 44 Misc. (N. Y.) 76; *Matter of Clark*, 37 Wash. 671.

5. Tax a Lien upon Realty. — *Gilbertson v. Ballard*, 125 Iowa 420; *Matter of Tracy*, 87 N. Y. App. Div. 215, *reversed* on other grounds 179 N. Y. 501; *Eury v. State*, 72 Ohio St. 448.

356. 2. Market Value of Property. — *Matter of Tracy*, 179 N. Y. 501, *reversing* 87 N. Y. App. Div. 215.

Net Value Only Subject to Tax. — *Memphis Trust Co. v. Speed*, (Tenn. 1905) 88 S. W. Rep. 321.

5. Annuity Tables to Be Used. — *Burkhart's Estate*, 25 Pa. Super. Ct. 514.

7. Debts to Be Deducted. — *Brown v. Kinney*, 128 Fed. Rep. 310; *Bridgeport Trust Co.'s Appeal*, 77 Conn. 657; *Hopkins's Appeal*, 77 Conn. 644; *Levy's Succession*, (La. 1905) 39 So. Rep. 37; *Memphis Trust Co. v. Speed*, (Tenn. 1905) 88 S. W. Rep. 321; *Receiver Gen. v. Hayward*, 35 N. Bruns. 453.

357. 2. Expenses of Administration. — *Bridgeport Trust Co.'s Appeal*, 77 Conn. 657; *Hopkins's Appeal*, 77 Conn. 644.

3. Costs of Litigation. — *Atty.-Gen. v. Toronto Gen. Trusts Corp.*, 5 Ont. L. Rep. 607.

4. Connell v. Crosby, 210 Ill. 380.

6. Taxes. — *Matter of Hoffman*, (Surrogate Ct.) 42 Misc. (N. Y.) 90; *Matter of Tracy*, 87 N. Y. App. Div. 215, *reversed* on other grounds 179 N. Y. 501.

14. No Reappraisal of Matters Passed Upon. — *Matter of Lawrence*, 96 N. Y. App. Div. 29. See also *Matter of Lowry*, 89 N. Y. App. Div. 226.

358. 3. Determination of Liability to Tax. — *Bridgeport Trust Co.'s Appeal*, 77 Conn. 657; *Hopkins's Appeal*, 77 Conn. 644.

4. Court May Determine Whether Legatee Exempt. — *Matter of Cameron*, 97 N. Y. App. Div. 436, *affirmed* 181 N. Y. 560.

5. Compare In re Vineland Historical, etc., Soc., 66 N. J. Eq. 291, *distinguishing* *Matter of Wolfe*, 137 N. Y. 205.

7. Correction of Decree. — *Matter of Hamilton*, (Surrogate Ct.) 41 Misc. (N. Y.) 268.

No Power to Modify Decree of Appraisal Because of Sale of Property for Low Price. — *Matter of Lowry*, 89 N. Y. App. Div. 226.

9. When Limitation of Time to Appeal Begins to Run. — See *Belcher's Estate*, 211 Pa. St. 615.

359. 5. Penalty for Nonpayment of Tax. — *Eury v. State*, 72 Ohio St. 448.

360. 1. Claim for Refund Barred by Limitation. — *Matter of Hoople*, 179 N. Y. 308, *reversing* 93 N. Y. App. Div. 486.

Interest Allowed When Tax Refunded. — *Matter of O'Berry*, 179 N. Y. 285.

Direction to Refund Tax Unnecessary in Decree Setting Aside Prior Order for Payment of Tax. — *In re Cameron*, 97 N. Y. App. Div. 436, *affirmed* 181 N. Y. 560.

2. Successively means by succession; in a series; one after another; consecutively. *Derby v. Dancy*, 112 La. 891.

3. Successor. — *American Surety Co. v. Campbell, etc., Co.*, (C. C. A.) 138 Fed. Rep. 531.

Successors, Bound by Covenant in Lease, Held to Include Executors. — *West Shore R. Co. v. Wenner*, 70 N. J. L. 233.

361. 2. Such Refers to Something Previously

- 362.** See note 1.
363. SUFFER.—See note 4.
364. SUFFICIENT.—See note 2.
365. SUFFICIENT EVIDENCE.—See note 1.
366. SUIT.—See note 5.
368. Illustrations.—See note 1.

Mentioned.—Cochran *v.* Vermilion County, 113 Ill. App. 140; Fitch *v.* Mason City, etc., Traction Co., 124 Iowa 665; Benoit *v.* New York Cent., etc., R. Co., 94 N. Y. App. Div. 24.

"Such" Construed as Equivalent to "Any."—Struthers *v.* People, 116 Ill. App. 481.

362. 1. Of That Kind—of Like Kind.—*Ex p.* Heyman, 45 Tex. Crim. 542.

363. 4. Suffer to Be Done.—See Wilson *v.* Twamley, (1904) 2 K. B. 99.

Suffer Preference—Involuntary Act.—See Bogen *v.* Protter, (C. C. A.) 129 Fed. Rep. 533.

364. 2. Sufficient Distinguished from Con-

clusive.—Campbell *v.* Iowa Cent. R. Co., 124 Iowa 248.

365. 1. Sufficient Evidence Construed to Mean Conclusive Evidence.—Board of Trade *v.* The Sailing Ship Glenpark, (1903) 2 K. B. 324; Garbutt *v.* Dunham Joint Committee, (1904) 2 K. B. 514.

366. 5. Term of Very Broad Signification.—L. Bucki, etc., Lumber Co. *v.* Atlanta Lumber Co., (C. C. A.) 128 Fed. Rep. 332. See also Eckerle *v.* Wood, 95 Mo. App. 378.

368. 1. Mandamus.—State *v.* Policemen's Pension Fund, 121 Wis. 44.

SUMMARY PROCEEDINGS.

373. I. DEFINITION AND SCOPE OF TITLE—Definition.—See note 1.

375. III. CONSTITUTIONALITY OF SUMMARY PROCEEDINGS—4. Proceedings to Punish for Contempt.—See note 15.

377. 7. Statutory Civil Proceedings—*a.* IN GENERAL.—See note 2.

384. SUMMONS.—See note 6.

373. 1. Proceedings Are Summary when they are without the right to a trial by jury or an appeal. Orange *v.* McGonnell, 71 N. J. L. 418.

375. 15. Burdett v. Com., 103 Va. 838.

377. 2. Proceeding to Condemn Liquor.—In Kirkland *v.* State, 72 Ark. 171, it was held that the constitutional guaranties of trial by jury and of due process of law did not prevent the legislature from dispensing with a trial by

jury in a summary proceeding to search for and destroy intoxicating liquors kept in a prohibited district to be sold contrary to law. See generally the title SEARCHES AND SEIZURES, 151. *9 et seq.*

384. 6. The Sheriff's Return, being a part of the *summons*, is sufficiently described by the word *summons*. Casety *v.* Jamison, 35 Wash. 478.

SUNDAYS AND HOLIDAYS.

389. II. DURATION OF SUNDAY.—See note 1.

III. SUNDAY AT COMMON LAW.—See notes 3, 5.

390. V. CONSTITUTIONALITY OF SUNDAY LAWS—1. Generally Valid as Police Regulations.—See note 11.

392. 4. Act Embracing More than One Subject.—See note 4.

VI. MUNICIPAL ORDINANCES—In General.—See note 5.

389. 1. Ordinary Day Meant.—Harrison *v.* Wallis, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 498, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 388 [389].

3. Judicial Proceedings Only Prohibited.—Harrison *v.* Wallis, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 498, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 389.

Dies Non Juridicus.—See Valentine *v.* Roberts, 1 Alaska 536.

5. Making of Contract Not Prohibited.—Rodman *v.* Robinson, 134 N. Car. 503.

390. 11. Within Domain of Police Power.—Rodman *v.* Robinson, 134 N. Car. 503.

392. 4. Statutes Must Not Embrace More than One Subject.—Lovilia *v.* Cobb, 126 Iowa 557.

5. Sunday Ordinance Within Scope of Delegated Power Valid.—Lovilia *v.* Cobb, 126 Iowa 557.

393. Must Not Conflict with Statutes. — See note 1.

VII. RULES OF CONSTRUCTION OF SUNDAY LAWS — 1. In General —
Statutes Penal. — See note 3.

395. VIII. INTERPRETATION OF STATUTORY PROHIBITIONS AND EXCEPTIONS — 2. Acts Prohibited — a. LABOR, BUSINESS, WORK, OR EMPLOYMENT —
(1) *In General* — "Labor" and "Work." — See note 2.

"Business." — See note 10.

The Words "Worldly Employment or Business." — See note 12.

396. (2) *Within Ordinary Calling* — (a) *In General*. — See note 1.
Contracts. — See note 5.

398. b. *KEEPING SHOP OPEN — Open for Purpose of Doing Business.* — See note 1.

e. *EXHIBITIONS AND SPORTS — Public Exhibitions.* — See note 10.

399. Baseball Playing. — See note 4.

400. 3. *Exceptions — a. WORKS OF NECESSITY OR CHARITY — (4) Enumeration of Works — (a) In General — Work Incident to Particular Trade or Calling.* — See note 9.

402. b. *PARTICULAR OCCUPATIONS.* — See note 7.

403. IX. CONTRACTS AS AFFECTED BY SUNDAY LAWS — 1. Prohibited by Sunday Statutes — a. AS TO CONTRACTS GENERALLY — (1) Contracts Void —
(a) *In General.* — See note 4.

404. See note 1.

406. (2) *Ratification of Contracts.* — See note 4.

414. XII. STATUTES CONCERNING HOLIDAYS. — See notes 11, 13.

417. SUPERSEDEAS. — See note 1.

393. 1. *Ordinances Must Not Conflict with State Statutes.* — *Penniston v. Newman*, 117 Ga. 700.

3. *Statutes Penal and Strictly Construed.* — *Com. v. Alexander*, 185 Mass. 551.

395. 2. *Evidence Insufficient to Show Doing of Labor on Sunday.* — See *Moss v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 1065.

10. *Making of Contracts Is "Business."* — *Pearson v. Kelly*, 122 Wis. 660.

12. *Purchase of Cigar on Sunday Not "Worldly Employment or Business."* — *Com. v. Hoover*, 25 Pa. Super. Ct. 133.

396. 1. *Where a Person Having Several Occupations Works at One on Sunday he is engaged in his "ordinary calling."* — *Reed v. State*, 119 Ga. 562.

5. *Contract Not Within Maker's Ordinary Calling Valid.* — *Rodman v. Robinson*, 134 N. Car. 503.

398. 1. *Sale Not Necessary to Constitute Offense of Opening Shop for Purpose of Business.* — *Armstrong v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 827.

10. *Vaudeville Entertainment by and for Benefit of Religious or Charitable Society Not Prohibited by Massachusetts Statute.* — *Com. v. Alexander*, 185 Mass. 551.

399. 4. *"Playing."* — The public playing of baseball is within the inhibition of the *New York Sunday statute*. *People v. Poole*, (Supm. Ct.) 44 Misc. (N. Y.) 118. See also *Dunham v. Binghamton, etc., Baseball Assoc.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 112. Private playing may be indulged in, however, if it does not interrupt the repose and religious liberty of the people. *People v. Hesterberg*, (Supm. Ct.) 43 Misc. (N. Y.) 510.

400. 9. *Work Held Within Exception.* — Repairing belt in mill. *State v. Collett*, 72 Ark. 167.

402. 7. *Druggists.* — Neither tobacco nor bromo-cocoa is a drug within the meaning of the *Georgia statute* allowing the sale of "drugs" on Sunday. *Penniston v. Newman*, 117 Ga. 700.

Common Carriers — Georgia Statute — "Destination" Means Point of Final Stoppage. — *Seale v. State*, 121 Ga. 741.

403. 4. *Sunday Contracts Void.* — *Pearson v. Kelly*, 122 Wis. 660.

A Tender under a Contract if Made on Sunday Need Not Be Received, that day being dies non in legal contemplation. — *Cusack v. The Gunning System*, 109 Ill. App. 588.

404. 1. *Notes Executed on Sunday.* — *Brown v. Gates*, 120 Wis. 353 (construing a *Massachusetts contract*).

A Contract of Guaranty, signed on Sunday, but dated and delivered to the plaintiff, who was not a party to the signing, on a secular day, is valid. — *Diamond Glass Co. v. Gould*, (N. J. 1905) 61 Atl. Rep. 12.

406. 4. *Void Sunday Contracts Cannot Be Ratified.* — *Sherry v. Madler*, 123 Wis. 621.

414. 11. *Judicial Proceedings Suspended.* — *McCoy v. Jordan*, 184 Mass. 575; *Davidson v. Munsey*, 27 Utah 87.

13. *A Session of Court on a Holiday Is Not Prohibited under a statute prohibiting the transaction of "business" in the public offices of the state or counties of the state.* — *Atlantic City v. Feretti*, 70 N. J. L. 480.

417. 1. *Supersedeas.* — *Whitaker v. McBride*, (Neb. 1904) 98 N. W. Rep. 877.

SUPPORT AND MAINTENANCE.

420. II. BETWEEN PARENT AND CHILD — 1. In General — See note 2.

423. VII. RIGHTS OF CREDITORS. — See note 6.

VIII. SETTING ASIDE CONVEYANCE. — See note 7.

424. SUPPOSE. — See note 5.

420. 2. Between Parent and Child. — Terry v. Warder, (Ky. 1904) 78 S. W. Rep. 154, applying the rule as between mother and daughter and holding it to be immaterial whether the daughter is married or single; Falls v. Jones, 107 Mo. App. 357, holding that the presumption may be overcome by evidence of an express agreement to pay, or by clear implication from facts and circumstances.

423. 6. Rights of Creditors. — See Flaherty v. Stephenson, 56 W. Va. 192.

Deed Void unless Grantor Retains Sufficient Property to Pay Existing Debts. — Spear v. Spear, 97 Me. 498; Hanna v. Charleston Nat. Bank, 55 W. Va. 185.

7. See Woolcott v. Woolcott, 133 Mich. 643.

424. 5. *Supposed* as used in a pleading has been held to be equivalent to "alleged," and a sufficient admission of a cause of action. Mossman v. Bostridge, 76 Vt. 409.

SURETYSHIP.

By E. C. ELLSBREE.

431. I. DEFINITION AND NATURE — A Surety. — See note 2.

432. Distinguished from Guaranty. — See note 2.

433. II. CONTRACT OF SURETYSHIP AND ITS ELEMENTS — 1. Creation —
c. BY PARTNER'S RETIREMENT FROM FIRM. — See note 3.

d. BY ASSUMPTION OF MORTGAGE. — See note 4.

434. *e.* BY MORTGAGE OR PLEDGE TO SECURE ANOTHER'S DEBT —
(2) *Wife's Separate Property for Husband's Debt.* — See note 2.

2. Relationship May Be Shown by Parol. — See note 3.

435. See note 5.

439. 6. Execution — *b.* SIGNATURE — (2) *Failure of Principal to Sign* —
Where Principal Named in Instrument Fails to Sign. — See note 12.

440. See note 1.

441. 7. Construction — *a.* GENERALLY. — See note 2.

431. 2. Surety Defined. — Deering v. Veal, (Ky. 1904) 78 S. W. Rep. 886.

432. 2. Surety's and Guarantor's Contracts Distinguished. — Closson v. Billman, 161 Ind. 610; Indiana, etc., Live Stock Ins. Co. v. Bender, 32 Ind. App. 287; Rouss v. King, 69 S. Car. 168.

433. 3. Preston v. Garrard, 120 Ga. 689, 102 Am. St. Rep. 124.

4. Assumption of Mortgage. — Malanaphy v. Fuller, etc., Mfg. Co., 125 Iowa 719, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 433. And see generally the title MORTGAGES, 997. 3 *et seq.*

434. 2. Mortgage of Wife's Separate Property. — See McGowan v. Davenport, 134 N. Car. 526.

3. Parol Evidence Held Incompetent. — Barringer v. Wilson, (Tex. Civ. App. 1904) 81 S. W. Rep. 533 (as to an indorser of a note).

435. 5. Parol Evidence to Show Suretyship. — Trammell v. Swift Fertilizer Works, 121 Ga. 778; Iowa Nat. Bank v. Cooper, (Iowa 1904) 101 N. W. Rep. 459; Marshall Nat. Bank v. Smith, 33 Tex. Civ. App. 555.

439. 12. Surety Not Bound Where Principal Fails to Sign. — American Radiator Co. v. American Bonding, etc., Co., (Neb. 1904) 100 N. W. Rep. 138.

440. 1. Surety Bound Though Principal Fails to Sign. — Clark v. Hennessey Bank, 14 Okla. 572; Baker County v. Huntington, (Oregon 1905) 79 Pac. Rep. 187.

441. 2. Construction. — Glenn County v. Jones, 146 Cal. 518; Price v. Carlton, 121 Ga. 12; Stevens v. Partridge, 109 Ill. App. 486; Indiana, etc., Live Stock Ins. Co. v. Bender, 32 Ind. App. 287; Ida County Sav. Bank v. Seidensticker, (Iowa 1905) 102 N. W. Rep. 821; Police Jury v. Johnson, 111 La. 279.

- 442.** *b.* NOT RETROACTIVE — Past Defaults. — See note 3.
- 443.** 9. Facts Negating Consent — *a.* FRAUD ON SURETY — (1) *Misrepresentation and Concealment* — (a) Generally. — See notes 2, 3, 4.
- 444.** (b) Ignorance of Creditor or Obligor. — See note 2.
- 445.** (3) *Disregarding Conditions Imposed by Surety* — Signing on Specified Conditions. — See note 4.
10. Consideration. — See note 8.
- 447.** See notes 1, 3.
- 451.** III. RIGHTS AND REMEDIES AS BETWEEN SURETY AND CREDITOR OR THIRD PERSON — 1. Liabilities of Surety — *a.* AS DEPENDENT ON CONSTRUCTION OF CONTRACT — (2) *Rules of Application*. — See note 5.
- 452.** (3) *Contracts of Surety Companies*. — See note 1.
- c.* EXTENT AND NATURE OF LIABILITY — (1) *Joint and Several* — The Principles of Law and Statutory Provisions. — See note 10.
- 453.** (3) *Interest* — Beyond Penal Sum of Bond. — See notes 7, 8.
- 455.** *e.* EFFECT OF JUDGMENT AGAINST PRINCIPAL. — See notes 8, 9.
- 456.** *f.* EFFECT OF ADMISSIONS BY PRINCIPAL. — See note 2.
- 460.** 2. Rights of Surety — *a.* RIGHT TO FULL DISCLOSURE — (1) *Before Contract*. — See note 11.
- 461.** See notes 1, 2.
- 462.** *b.* RIGHT TO REVOKE OR TERMINATE CONTRACT. — See note 8.
- 463.** *c.* ENFORCEMENT OF CONTRACT AGAINST, AND SECURITIES GIVEN BY, PRINCIPAL — (1) *Before Action Against Surety* — (a) *At Law*. — See note 1.
- 467.** 5. Estoppel of Surety — *b.* BY SIGNING AS PRINCIPAL. — See note 1.
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- 442.** 3. Contract Not Retroactive. — *Howe v. White*, 162 Ind. 74.
- 443.** 2. Contract of Suretyship Imports Good Faith. — *Glenn County v. Jones*, 146 Cal. 518.
- 43.** Fraudulent Misrepresentation and Concealment. — *Baltimore First Nat. Bank v. Terry*, 135 Fed. Rep. 621.
- 4.** Surety Not Bound. — *Anderson v. Blair*, 121 Ga. 120.
- 444.** 2. Fraud of Principal. — *Bromberg v. Fidelity, etc., Co.*, 139 Ala. 338; *Wilkinson v. U. S. Fidelity, etc., Co.*, 119 Wis. 226.
- 445.** 4. Iowa Nat. Bank *v. Cooper*, (Iowa 1904) 101 N. W. Rep. 459.
- 8.** Necessity of Consideration. — *Kellogg v. Lopez*, 145 Cal. 497.
- 447.** 1. Extension of Time of Payment. — *White Sewing-Mach. Co. v. Fowler*, (Nev. 1904) 78 Pac. Rep. 1034.
- 3** Forbearance to Sue. — *Wash v. Sullivan*, (Tex. Civ. App. 1904) 84 S. W. Rep. 368.
- 451.** 5. Rules of Application. — *Price v. Carlton*, 121 Ga. 12; *Stevens v. Partridge*, 109 Ill. App. 486; *Ida County Sav. Bank v. Seidensticker*, (Iowa 1905) 102 N. W. Rep. 821; *U. S. Fidelity, etc., Co. v. Overstreet*, (Ky. 1905) 84 S. W. Rep. 764.
- 452.** 1. Contracts of Surety Companies. — *U. S. Fidelity, etc., Co. v. U. S.*, 191 U. S. 416.
10. Joint and Several Bond. — Where by the terms of the bond the principal and each of the sureties is bound in a certain sum, the bond is joint and several for that amount. *Mariposa County v. Knowles*, 146 Cal. 1.
- Liability on Several Bond. — The sureties on the several bond of one of several trustees may be held for the personal default of their principal. *Coombs v. Harford*, 99 Me. 426.
- 452.** 7. No Interest When Judgment Is for Full Amount of Penalty. — *Westcott v. Fidelity, etc., Co.*, 87 N. Y. App. Div. 497.
- 8.** Unless Recovery Obstructed. — *Goff v. U. S.*, 22 App. Cas. (D. C.) 512.
- 455.** 8. Judgment Not Conclusive Against Surety. — *Morgan v. Western Assur. Co.*, 13 Quebec K. B. 49.
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- 9.** Condition of Bond Making Judgment Conclusive. — *Price v. Carlton*, 121 Ga. 12, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 455.
- 456.** 2. Admissions and Declarations Made by Principal. — *Thompson v. Commercial Union Assur. Co.*, (Colo. App. 1904) 78 Pac. Rep. 1073; *Bailey v. McAlpin*, 122 Ga. 616.
- 460.** 11. Right to Disclosure Before Contract. — *Sherman v. Harbin*, 125 Iowa 174.
- 461.** 1. Failure to Disclose Need Not Be Wilful. — See *Sherman v. Harbin*, 125 Iowa 174.
- 2.** Concealment of Known Prior Default. — *Hudson v. Miles*, 185 Mass. 582, 102 Am. St. Rep. 370.
- 462.** 8. A Surety for Future Successive Transactions may revoke at any time as to any transaction not begun. *White Sewing Mach. Co. v. Courtney*, 141 Cal. 674.
- 463.** 1. At Law, Obligor May First Sue Surety. — *Olds v. City Trust, etc., Co.*, 185 Mass. 500, 102 Am. St. Rep. 356.
- 467.** 1. By Signing as Principal. — Merchants' Nat. Bank *v. Murphy*, 125 Iowa 607.
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- 468. IV. RIGHTS AND REMEDIES AS BETWEEN SURETY AND PRINCIPAL —**
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- 470. b. AS DEPENDENT UPON PAYMENT BY SURETY — (1) Necessity of Payment. —** See note 13.
- 471. See note 1.**
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- c. AS AFFECTED BY INSOLVENCY OF PRINCIPAL. —** See note 14.
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- 474. 2. Remedies of Surety — a. AT LAW. —** See note 12.
- 479. 3. Extent of Principal's Liability — a. IN GENERAL. —** See note 13.
- 482. V. RIGHTS AND REMEDIES AS BETWEEN COSURETIES — 1. Contribution Between Sureties — a. IN GENERAL. —** See note 6.
- 483. b. NATURE AND ORIGIN OF RIGHT — (2) Origin. —** See note 2.
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- 468. 8. When Surety Becomes Creditor of Principal. —** *Christian v. Highlands*, 32 Ind. App. 104.
- 470. 13. Surety Must Have Paid Whole or Part of Debt. —** *Christian v. Highlands*, 32 Ind. App. 104; *Citizens Bank v. Burrus*, 178 Mo. 716.
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- 471. 1. Surety Must Have Been Actually Damified. —** *Christian v. Highlands*, 32 Ind. App. 104.
- 472. 10. Howe v. White, 162 Ind. 74.**
- 14. Insolvency of Principal. —** See *Christian v. Highlands*, 32 Ind. App. 104.
- 16. Judgment Against Surety. —** *Reed v. Humphrey*, 69 Kan. 155, holding that dormancy of the judgment as to the principal is no defense.
- 474. 12. Action upon Implied Contract for Money Paid. —** *Christian v. Highlands*, 32 Ind. App. 104.
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- 482. 6. Right of Cosurety to Contribution. —** *Kellogg v. Lopez*, 145 Cal. 497; *Wash v. Sullivan*, (Tex. Civ. App. 1904) 84 S. W. Rep. 368.
- 483. 2. Origin and Jurisdiction. —** *Weston v. Elliott*, 72 N. H. 433; *Weimer v. Talbot*, 56 W. Va. 257.
- 3. Only Cosureties Liable. —** *In re Denton*, (1904) 2 Ch. 178, 90 L. T. N. S. 698; *Wanack v. Michels*, 215 Ill. 87.
- 484. 4. Mere Request to Sign Does Not Relieve from Liability. —** *Bishop v. Smith*, (N. J. 1904) 57 Atl. Rep. 874.
- 485. 2. Effect of Insolvency in Equity. —** *Thompson v. Hibbs*, 45 Oregon 141; *Weimer v. Talbot*, 56 W. Va. 257.
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- 486. 7. Extent of Recovery. —** *Weimer v. Talbot*, 56 W. Va. 257.
- 10. Interest Recoverable. —** *Weimer v. Talbot*, 56 W. Va. 257.
- 488. 3. Indemnity After Payment of Debt. —** *Campau v. Detroit Driving Club*, 135 Mich. 575.
- 492. 12. Rule Not Applicable Where Obligee Ignorant of Relations Between Debtors. —** *Harrier v. Bassford*, 145 Cal. 529. See generally *infra*, this title, 505. 4.
- 493. 4. Bankruptcy of Principal or of Cosurety. —** *Leader v. Mattingly*, 140 Ala. 444; *St. Louis World Pub. Co. v. Rialto Grain, etc., Co.*, 108 Mo. App. 479.
- 6. Bar of Principal Debt Does Not Discharge Surety. —** *Charbonneau v. Bouvet*, 98 Tex. 167.
- 494. 4. Alteration in or Deviation from Contract — United States. —** *U. S. Fidelity, etc., Co. v. U. S.*, 191 U. S. 416; *Ziegler v. Hallahan*, 126 Fed. Rep. 788, *affirmed* (C. C. A.) 131 Fed. Rep. 205; *Shelton v. American Surety Co.*, 127 Fed. Rep. 736, *affirmed* (C. C. A.) 131 Fed. Rep. 210.
- Arkansas. —** *Singer Mfg. Co. v. Boyette*, (Ark. 1905) 86 S. W. Rep. 673.
- California. —** *Glenn County v. Jones*, 146 Cal. 518.
- Indiana. —** *Indiana, etc., Live Stock Ins. Co. v. Bender*, 32 Ind. App. 287; *Guthrie v. Carpenter*, 162 Ind. 417.

- 495.** *b.* LIMITATIONS. — See note 6.
- 496.** *c.* BUILDING CONTRACTS. — See note 1.
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- 501.** *b.* CONSIDERATION — (1) *General Rule.* — See note 1.
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- 505.** *d.* EXTENSION MUST BE FOR DEFINITE TIME. — See note 3.
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- 508.** 5. Indulgence to Principal Debtor — *a.* IN GENERAL. — See note 4.
- 514.** 6. Refusal to Sue upon Request by Surety — *c.* STATUTORY NOTICE TO SUE — (2) *Requisites of Statutory Demand.* — See note 9.
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- 516.** (5) *Effect of Failure to Sue.* — See note 1.
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- 517.** *b.* RELEASE OR IMPAIRMENT OF SECURITY. — See notes 1, 2.

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495. 6. Immaterial Alteration. — Guilford Granite Co. *v.* Harrison Granite Co., 23 App. Cas. (D. C.) 1; Heddrick *v.* Huffaker, (Ky. 1904) 80 S. W. Rep. 1130; Beebe *v.* Redward, 35 Wash. 615.

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496. 1. Alterations Slight or Allowable. — Getchell, etc., Lumber, etc., Co. *v.* National Surety Co., 124 Iowa 617; Bagwell *v.* American Surety Co., 102 Mo. App. 707; Snoqualmi Realty Co. *v.* Moynihan, 179 Mo. 629; Commonwealth Bldg., etc., Assoc. *v.* Steele, 23 Pa. Super. Ct. 19; Cowles *v.* U. S. Fidelity, etc., Co., 32 Wash. 120, 98 Am. St. Rep. 838; Pacific Bridge Co. *v.* U. S. Fidelity, etc., Co., 33 Wash. 47; Henry *v.* Aetna Indemnity Co., 36 Wash. 553.

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2. Retaining Part of Contract Price. — Lawhon *v.* Toors, 73 Ark. 473; Glenn County *v.* Jones, 146 Cal. 518.

409. 1. Change in Occupation of Principal. — Rex *v.* Herron, (1903) 2 Ir. R. 474; La Société des Artisans, etc., *v.* Trudel, 26 Quebec Super. Ct. 118. Compare Stevens *v.* Partridge, 109 Ill. App. 486.

4. Extension of Time. — Preston *v.* Garrard, 120 Ga. 680, 102 Am. St. Rep. 124; Wyatt *v.* Dufrene, 106 Ill. App. 214; Brannum Lumber Co. *v.* Pickard, 33 Ind. App. 484; Marshall Nat.

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501. 1. Consideration. — Lehnert *v.* Lewey, 142 Ala. 149; Bowling *v.* Chambers, (Colo. App. 1904) 77 Pac. Rep. 16; Durbin *v.* Northwestern Scraper Co., (Ind. App. 1905) 73 N. E. Rep. 297; Regan *v.* Williams, 185 Mo. 620, 105 Am. St. Rep. 600; National Citizens' Bank *v.* Toplitz, 178 N. Y. 464.

503. 2. Promise to Pay Interest. — Casey-Swasey Co. *v.* Anderson, (Tex. Civ. App. 1904) 83 S. W. Rep. 840.

505. 3. Extension Must Be for Definite Time. — Durbin *v.* Northwestern Scraper Co., (Ind. App. 1905) 73 N. E. Rep. 297.

4. Surety Must Be Known as Such. — Durbin *v.* Northwestern Scraper Co., (Ind. App. 1905) 73 N. E. Rep. 297.

506. 1. Extension by Note. — People *v.* Grant, (Mich. 1904) 100 N. W. Rep. 1006.

Taking a Note Maturing at the Same Time as the Debt does not operate as an extension by reason of the fact that the law allows days of grace on the note. McDonald *v.* Bucholtz, 2 West. L. Rep. (Can.) 10.

508. 4. Passive Indulgence of the Principal Debtor by the Creditor. — Burge *v.* Duden, 105 Mo. App. 8; Guerguin *v.* Boone, 33 Tex. Civ. App. 622. See also Indiana, etc., Live Stock Ins. Co. *v.* Bender, 32 Ind. App. 287.

514. 9. Demand Must Be Clear and Explicit. — Bowling *v.* Chambers, (Colo. App. 1904) 77 Pac. Rep. 16.

515. 13. Debtor Insolvent. — Robertson *v.* Angle, (Tex. Civ. App. 1903) 76 S. W. Rep. 317.

516. 1. See Burge *v.* Duden, 105 Mo. App. 8.

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517. 1. Discharge of Surety Where Creditor Parts with Security or Renders It Unavailable. — Brown *v.* Newton First Nat. Bank, (C. C. A.) 132 Fed. Rep. 450; Farmers' Loan, etc., Co. *v.* Patchett, 6 Ont. L. Rep. 255; Wurtele *v.* Trust,

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524. 1. Negligence in Supervising Employees or in Detecting Irregularities.— Hudson *v.* Miles, 185 Mass. 582, 102 Am. St. Rep. 370.

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525. 2. Failure to Inform Surety of Shortage.— Boyd *v.* Agricultural Ins. Co., (Colo. App. 1904) 76 Pac. Rep. 986. But see Sherman *v.* Harbin, 125 Iowa 174.

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530. 1. Surety Waiving Ground of Discharge.— Stanley *v.* Evans, 33 Tex. Civ. App. 535.

533. 10. Provisions of the Bond Executed After the Term of Office Began.— Hudson *v.* Miles, 185 Mass. 582, 102 Am. St. Rep. 370.

534. 2. Surety Liable Only for Term of Office.— Ida County Sav. Bank *v.* Seidensticker, (Iowa 1905) 102 N. W. Rep. 821; Blades *v.* Dewey, 136 N. Car. 176.

535. 1. When the Bond Is Conditioned for the Discharge of Duties Till a Successor.— Danvers Farmers' Elevator Co. *v.* Johnson, 93 Minn. 323.

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538. 3. Sureties for Subsequent Term Liable.— Hudson *v.* Miles, 185 Mass. 582, 102 Am. St. Rep. 370.

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544. 3. Government Not Responsible for Conduct of Officers.— Anderson *v.* Blair, 121 Ga. 120, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 544, and supporting the whole text paragraph.

546. 3. Surplus Assets.— See *In re Crichton's Oil Co.*, (1902) 2 Ch. 86.

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547. 1. Surplusage in Pleading.— State *v.* Murphy, 102 Mo. App. 680.

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556. To What Time Words Refer. — See note 1.

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3. Equity Principles and Practice Followed. — *Wheeler v. Wheeler*, 105 Ill. App. 48.

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556. 1. Refer to Death of Testator. — *Ball v. Holland*, 189 Mass. 369; *Renner v. Williams*, 71 Ohio St. 340.

558. 1. "Survivor" Not Read "Other." — *Hill v. Safe Deposit, etc., Co.*, 101 Md. 67, *citing* 27 AM. AND ENG. ENCYC. OF LAW (2d ed. 558).

562. 3. A derail switch is a device to cause a car running loose on a side track to run off its rails to the ground before reaching the main track. *Jones v. Kansas City, etc., R. Co.*, 178 Mo. 537.

563. 2. Syrup, as defined by the United States Department of Agriculture, "is a product obtained by purifying and evaporating the juice of a sugar-producing plant without removing any of the sugar." *People v. Harris*, 135 Mich. 141.

564. 2. "Taking" and "Soliciting" Not Convertible Terms. — *Sandefur-Julian Co. v. State*, 72 Ark. 11.

TAXATION.

By P. B. MCKENZIE.

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4. **Taxing Power Not Extraterritorial.** — *Carstairs v. Cochran*, 193 U. S. 10; *Scottish Union, etc., Ins. Co. v. Bowland*, 196 U. S. 611; *Western Assur. Co. v. Halliday*, (C. C. A.) 126 Fed. Rep. 257.

590. 3. Equal Privileges, Immunities, Etc. — *Michigan R. Tax Cases*, 138 Fed. Rep. 223.

4. **Effect of Fourteenth Amendment as to Unequal Taxation.** — *Missouri v. Dockery*, 191 U. S. 165; *Coulter v. Louisville, etc., R. Co.*, 196 U. S. 599; *St. Louis, etc., R. Co. v. Davis*, 132 Fed. Rep. 629; *Michigan R. Tax Cases*, 138 Fed. Rep. 223.

5. **Discrimination in Favor of Citizens of Other States Not Prohibited.** — *German Trust Co. v. Board of Equalization*, 121 Iowa 325; *Heinz v. Board of Equalization*, 121 Iowa 445; *Kingsley v. Merrill*, 122 Wis. 185.

592. 2. Rule of Taxation Prescribed by Char-

- 592.** But a Mere Change in the Method of Taxation. — See note 4.
- 594.** (e) Due Process of Law. — See note 1.
 (3) *Restrictions in State Constitutions* — (a) Equality and Uniformity —
- aa. NATURE AND OBJECT OF CONSTITUTIONAL PROVISIONS. — See notes 3, 4.
- 595.** See notes 1, 3.
 Local Variations. — See note 5.
- 596.** See notes 1, 2.
- 597.** Different Rates in Different Districts. — See notes 1, 2, 3.
 Conformity to Constitutional Requirements. — See note 5.
- 598.** See notes 1, 2.
 Practical Equality Sufficient. — See note 3.
- 599.** Maladministration in the Enforcement of a Tax. — See note 3.
 Application of Rule to Municipal Taxation. — See note 4.
- 600.** bb. EQUALITY AND UNIFORMITY DISTINGUISHED — (aa) *In General*. — See note 2.
 (bb) *Uniformity Clause Construed*. — See note 4.
- 601.** See notes 1, 3.

ter. — *Georgia R., etc., Co. v. Wright*, 132 Fed. Rep. 912; *Detroit, etc., R. Co. v. Powers*, 138 Fed. Rep. 264.

592. 3. Charter Exemption from Taxation. — *Wicomico County v. Bancroft*, (C. C. A.) 135 Fed. Rep. 977, holding further that reorganization will not defeat the corporation's right to exemption from taxation.

4. Change in Method of Taxation. — *Fidelity, etc., Co. v. Logan County*, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66.

594. 1. "Taxation Levied and Enforced in the Ordinary Manner is due process of law." *German Trust Co. v. Board of Equalization*, 121 Iowa 325; *Heinz v. Board of Equalization*, 121 Iowa 445.

3. Provisions for Equality of Burden in General. — *Kerr v. Perry School Tp.*, 162 Ind. 310; *Harper v. New Hanover County*, 133 N. Car. 106.

4. Requirement of Uniformity. — *Teagan Transp. Co. v. Assessors*, (Mich. 1905) 102 N. W. Rep. 273, 11 Detroit Leg. N. 731; *Detroit v. Mackinaw Transp. Co.*, (Mich. 1905) 103 N. W. Rep. 557.

595. 1. Equality and Uniformity. — *Clark v. Mercer County Ct.*, 55 W. Va. 278.

3. Uniform and Equal Rate. — *Kerr v. Perry School Tp.*, 162 Ind. 310.

5. Local Variations. — *Carpenter v. Central Covington*, 81 S. W. Rep. 919, 26 Ky. L. Rep. 430; *State v. Back*, (Neb. 1904) 100 N. W. Rep. 952. See also *Pump v. Lucas County*, 69 Ohio St. 448.

596. 1. Must Be Uniform over Territory Affected. — *Monaghan v. Lewis*, (Del. 1905) 59 Atl. Rep. 948; *Kerr v. Perry School Tp.*, 162 Ind. 310; *Carpenter v. Central Covington*, 81 S. W. Rep. 919, 26 Ky. L. Rep. 430; *Opinion of Justices*, 97 Me. 595; *Adams v. Kuykendall*, 83 Miss. 571; *Aachen, etc., F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3; *State v. Back*, (Neb. 1904) 100 N. W. Rep. 952; *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 183.

2. *Adams v. Kuykendall*, 83 Miss. 571; *Harper v. New Hanover County*, 133 N. Car. 106.

School Taxes a Public Burden. — See *Kerr v. Perry School Tp.*, 162 Ind. 310.

597. 1. Power to Establish Taxing Districts. — *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 183, 71 N. J. L. 574.

2. Existing Lines Need Not Be Followed. — *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 183, 58 Atl. Rep. 571, 71 N. J. L. 574.

3. Different Rates in Different Districts. — *Carpenter v. Central Covington*, 81 S. W. Rep. 919, 26 Ky. L. Rep. 430.

5. Conformity to Constitutional Requirements. — *Teagan Transp. Co. v. Assessors*, (Mich. 1905) 102 N. W. Rep. 273, 11 Detroit Leg. N. 731.

598. 1. Absolute Equality Not Required. — *Teagan Transp. Co. v. Assessors*, (Mich. 1904) 102 N. W. Rep. 273, 11 Detroit Leg. N. 731; *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888.

Unequal Results Are Inevitable. — *Michigan R. Tax Cases*, 138 Fed. Rep. 223.

2. *Teagan Transp. Co. v. Assessors*, (Mich. 1905) 102 N. W. Rep. 273, 11 Detroit Leg. N. 731; *Adams v. Kuykendall*, 83 Miss. 571; *Harper v. New Hanover County*, 133 N. Car. 106; *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888.

3. Practical Equality Sufficient. — *Michigan R. Tax Cases*, 138 Fed. Rep. 223; *Crozer v. People*, 206 Ill. 464.

599. 3. Inequality in Enforcement of Tax Laws. — *Michigan R. Tax Cases*, 138 Fed. Rep. 223. See also *St. Louis, etc., R. Co. v. Davis*, 132 Fed. Rep. 629.

4. *Adams v. Kuykendall*, 83 Miss. 571. See also *State v. Ide*, 35 Wash. 576, 102 Am. St. Rep. 914, wherein it was held that a statute authorizing a city to levy a street tax on all male inhabitants over twenty-one and under fifty years of age was a violation of the uniformity clause of the constitution.

600. 2. Uniformity. — *State v. Case*, (Wash. 1905) 81 Pac. Rep. 554.

4. Uniformity Clause Construed. — *State v. Ide*, 35 Wash. 576, 102 Am. St. Rep. 914; *State v. Case*, (Wash. 1905) 81 Pac. Rep. 554; *Kingsley v. Merrill*, 122 Wis. 185. See also *Adams v. Kuykendall*, 83 Miss. 571.

601. 1. Uniformity Clause — Taxation by Uniform Rules. — *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 183, 574.

- 601.** *cc.* REQUIREMENT OF EQUALITY AND UNIFORMITY. — See note 4.
602. See notes 1, 2, 3.
603. *dd.* POWER OF LEGISLATURE TO CLASSIFY PROPERTY. — See notes 2, 3.
604. Proper Bases of Classification. — See notes 1, 2, 3, 4.
ee. TAXATION OF DIFFERENT CLASSES BY DIFFERENT MODES. — See note 5.
605. (b) Taxation by Valuation — In General. — See note 2.
606. Valuation Cannot Be Arbitrary. — See note 9.
608. (c) Double Taxation — *aa.* POWER TO IMPOSE. — See note 1.
bb. CONSTRUCTION OF STATUTES IMPOSING DOUBLE TAXATION. — See note 4.
609. *cc.* WHAT DOUBLE TAXATION INVALID — (*aa.*) In General — Imposing Unequal Burdens. — See notes 1, 2.

Different Interests in Same Thing. — See notes 3, 4.

601. 3. Uniformity as to Class. — *Hooper v. State*, 141 Ala. 111; *Adams v. Kuykendall*, 83 Miss. 571; *Chicago, etc., R. Co. v. Richardson County*, (Neb. 1904) 100 N. W. Rep. 950.

4. Meaning of Uniformity and Equality. — *St. Louis, etc., R. Co. v. Davis*, 132 Fed. Rep. 629; *Michigan R. Tax Cases*, 138 Fed. Rep. 223; *Hooper v. State*, 141 Ala. 111; *Aachen, etc., F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3; *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 183; *Tippett v. McGrath*, 70 N. J. L. 110; *Kingsley v. Merrill*, 122 Wis. 185.

602. 1. *Hooper v. State*, 141 Ala. 111; *Adams v. Kuykendall*, 83 Miss. 571; *Chicago, etc., R. Co. v. Richardson County*, (Neb. 1904) 100 N. W. Rep. 950; *Tippett v. McGrath*, 70 N. J. L. 110; *Kingsley v. Merrill*, 122 Wis. 185. See also *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888.

2. *Com. v. Citizens' Nat. Bank*, 117 Ky. 946; *Citizens' Nat. Bank v. Com.*, (Ky. 1904) 80 S. W. Rep. 479; *Opinion of Justices*, 97 Me. 595; *Adams v. Kuykendall*, 83 Miss. 571; *State v. Fleming*, (Neb. 1903) 97 N. W. Rep. 1063; *Aachen, etc., F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3.

3. *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888.

603. 2. Arbitrary Classification Not Permissible. — *Opinion of Justices*, 97 Me. 595; *Adams v. Kuykendall*, 83 Miss. 571; *Teagan Transp. Co. v. Assessors*, (Mich. 1905) 102 N. W. Rep. 273, 11 Detroit Leg. N. 731; *Aachen, etc., F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3; *Tippett v. McGrath*, 70 N. J. L. 110; *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888; *State v. Ide*, 35 Wash. 576, 102 Am. St. Rep. 914; *State v. Case*, (Wash. 1905) 81 Pac. Rep. 554; *Kingsley v. Merrill*, 122 Wis. 185.

3. Property Naturally Falling in Same Class. — *Com. v. Citizens' Nat. Bank*, 117 Ky. 946; *Citizens' Nat. Bank v. Com.*, (Ky. 1904) 80 S. W. Rep. 479; *Adams v. Kuykendall*, 83 Miss. 571; *Tippett v. McGrath*, 70 N. J. L. 110.

604. 1. Based on Difference in Nature. — *Michigan R. Tax Cases*, 138 Fed. Rep. 223; *Hooper v. State*, 141 Ala. 111, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 604; *Chicago, etc., R. Co. v. Richardson County*, (Neb. 1904) 100 N. W. Rep. 950; *Tippett v. McGrath*, 70 N. J. L. 110; *Kingsley v. Merrill*, 122 Wis. 185.

Railroad Property May Be Separately Classified.

— *Com. v. Union Refrigerator Transit Co.*, 80 S. W. Rep. 490, 26 Ky. L. Rep. 397.

2. Want of Adaptability to Same Methods. — *Hooper v. State*, 141 Ala. 111, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 604.

Nonresidents May Be Classed by Themselves. — *Aachen, etc., F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3.

3. Based on Public Policy. — *Hooper v. State*, 141 Ala. 111, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 604.

4. Courts Will Not Interfere. — *Hooper v. State*, 141 Ala. 111, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 604; *Adams v. Kuykendall*, 83 Miss. 571.

5. Classes May Be Taxed by Different Modes. — *St. Louis, etc., R. Co. v. Davis*, 132 Fed. Rep. 629; *Michigan R. Tax Cases*, 138 Fed. Rep. 223; *German Washington Mut. F. Ins. Co. v. Louisville*, 117 Ky. 603; *Chicago, etc., R. Co. v. Richardson County*, (Neb. 1904) 100 N. W. Rep. 950; *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888.

605. 2. Provisions Requiring Taxation by Valuation. — *Hooper v. State*, 141 Ala. 111; *State v. Fleming*, (Neb. 1903) 97 N. W. Rep. 1063; *Aachen, etc., F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3; *Harper v. New Hanover County*, 133 N. Car. 106.

606. 9. Valuation Cannot Be Arbitrary. — *State v. Fleming*, (Neb. 1903) 97 N. W. Rep. 1063.

608. 1. Double Taxation Not Forbidden. — *Humbird Lumber Co. v. Kootenai County*, 10 Idaho 490; *Woodruff v. Oswego Starch Factory*, 177 N. Y. 23; *Kingsley v. Merrill*, 122 Wis. 185.

4. Statutes Construed Against Double Taxation. — *Pardee v. Com.*, 102 Va. 905; *Kingsley v. Merrill*, 122 Wis. 185.

609. 1. Must Preserve Equality of Burden. — *Hempstead County v. Hempstead County Bank*, 73 Ark. 515; *Humbird Lumber Co. v. Kootenai County*, 10 Idaho 490, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 607 [609]; *Kingsley v. Merrill*, 122 Wis. 185.

2. Trust Property Not Taxable Twice. — *Spalding v. O'Callaghan*, 76 S. W. Rep. 189, 25 Ky. L. Rep. 629.

3. Not Double Taxation When Property Held by Different Titles. — *In re Maplewood Coal Co.*, 213 Ill. 283.

4. Both Debtor and Creditor May Be Taxed. — *Cooper v. Board of Review*, 207 Ill. 472; *Adams v. Kuykendall*, 83 Miss. 571; *Gerard v. Duncan*, 84 Miss. 731.

610. Rule Applies to Property Taxes Only. — See note 7.

(bb) *Taxation in Different States.* — See note 11.

611. (d) *Restrictions on Rate* — *aa.* IN GENERAL. — See notes 1, 2.

612. *dd.* EFFECT OF TAXATION IN EXCESS OF LIMIT. — See note 4.

How Far Excessive Tax Void. — See note 5.

613. 4. *Exercise of Power* — *a.* LEGISLATIVE FUNCTION. — See note 5.

614. See notes 1, 2, 3.

615. See note 2.

Judicial Functions Respecting Taxation. — See notes 4, 5.

617. *b.* MODE OF EXERCISE. — See note 2.

Retrospective Legislation. — See note 6.

618. See notes 1, 4.

Strict Construction of Tax Laws. — See note 5.

619. See note 1.

5. *Delegation of Power* — *a.* GENERAL RULE. — See note 4.

610. 7. *Privilege Taxes.* — *Western Assur. Co. v. Halliday*, 127 Fed. Rep. 830; *State v. Jones*, 9 Idaho 693; *German Washington Mut. F. Ins. Co. v. Louisville*, 117 Ky. 593, *affirmed* on rehearing 117 Ky. 603.

11. *Taxation by Different States.* — *Buck v. Beach*, 164 Ind. 37; *Com. v. Union Refrigerator Transit Co.*, 80 S. W. Rep. 490, 26 Ky. L. Rep. 397; *Johnson v. Bradley-Watkins Tie Co.*, 85 S. W. Rep. 726, 27 Ky. L. Rep. 540; *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214; *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888.

611. 1. *Constitutional Limitations on Rate of Taxation.* — *Parsons v. People*, 32 Colo. 221; *Bardwell v. Harlin*, 80 S. W. Rep. 773, 26 Ky. L. Rep. 101; *Crowley v. Fulton*, 112 La. 234; *Brooks v. Schultz*, 178 Mo. 222; *Union Pac. R. Co. v. Howard County*, 66 Neb. 663.

2. *Tax Valid Though Debt Limit Reached, Where Rate Limit Not Exceeded.* — *Cincinnati, etc., R. Co. v. People*, 206 Ill. 387.

612. 4. *Tax in Excess of Limit Void.* — *Cincinnati, etc., R. Co. v. People*, 205 Ill. 538; *Brooks v. Schultz*, 178 Mo. 222; *Clark v. Colfax County*, (Neb. 1901) 96 N. W. Rep. 607; *Union Pac. R. Co. v. Howard County*, 66 Neb. 663.

Levy for Purpose of Meeting Pre-existing Liabilities Presumed. — *State v. Nevada Cent. R. Co.*, (Nev. 1905) 81 Pac. Rep. 99.

5. *Void as to Excess Only When Separable.* — *Cleveland, etc., R. Co. v. People*, 205 Ill. 582; *Chicago, etc., R. Co. v. People*, 213 Ill. 458; *Chicago, etc., R. Co. v. People*, 213 Ill. 497; *People v. Cincinnati, etc., R. Co.*, 213 Ill. 503; *Wabash R. Co. v. People*, 213 Ill. 522; *Clark v. Colfax County*, (Neb. 1901) 96 N. W. Rep. 607; *Union Pac. R. Co. v. Howard County*, 66 Neb. 663.

613. 5. *Taxation Exclusively a Legislative Power.* — *Com. v. Kenneday*, 82 S. W. Rep. 237, 26 Ky. L. Rep. 504; *State v. Guilbert*, 70 Ohio St. 229; *State v. Ide*, 35 Wash. 576, 102 Am. St. Rep. 914.

614. 1. *Grant of Legislative Power Includes Taxation.* — *Aachen, etc., F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3; *State v. Guilbert*, 70 Ohio St. 229; *State v. Ide*, 35 Wash. 576, 102 Am. St. Rep. 914.

2. *Determination as to Time, Occasion, and Extent.* — *Fidelity, etc., Co. v. Logan County*,

84 S. W. Rep. 341, 27 Ky. L. Rep. 66; *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888.

3. *Determination as to Subjects of Taxation.* — *Parsons v. People*, 32 Colo. 221.

615. 2. *Security Against Abuse of Power.* — *Parsons v. People*, 32 Colo. 221; *Com. v. Kenneday*, 82 S. W. Rep. 237, 26 Ky. L. Rep. 504; *Adams v. Kuykendall*, 83 Miss. 571; *Aachen, etc., F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3; *Woodruff v. Oswego Starch Factory*, 177 N. Y. 23; *Purnell v. Page*, 133 N. Car. 125; *State v. Guilbert*, 70 Ohio St. 229; *State v. Eldredge*, 27 Utah 477; *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888; *State v. Ide*, 35 Wash. 576, 102 Am. St. Rep. 914.

4. *Judicial Functions Respecting Taxation.* — *Com. v. Kenneday*, 82 S. W. Rep. 237, 26 Ky. L. Rep. 504.

5. *Courts Cannot Interfere with Legislature Acting Within Constitutional Limits.* — *Michigan R. Tax Cases*, 138 Fed. Rep. 223; *Chicago, etc., R. Co. v. People*, 213 Ill. 458; *Chicago, etc., R. Co. v. People*, 213 Ill. 497; *Wabash R. Co. v. People*, 213 Ill. 522.

617. 2. *Change of Mode.* — *Saginaw County v. Hubinger*, 137 Mich. 72, 11 Detroit Leg. N. 215.

6. *Prospective Construction Favored.* — *Hooper v. State*, 141 Ala. 111.

618. 1. *Validity of Retrospective Laws.* — *Kehe v. Blackhawk County*, 125 Iowa 549.

4. *Curing Defects in Levy.* — See the title STATUTES, 698. 5.

5. *Tax Laws Strictly Construed.* — *Chicago, etc., R. Co. v. People*, 213 Ill. 458; *Chicago, etc., R. Co. v. People*, 213 Ill. 497; *Wabash R. Co. v. People*, 213 Ill. 522; *Aachen, etc., F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3. And see the title STATUTES, 669. 2, 3.

Liberal Construction Favored in Indiana. — *Fell v. West*, 35 Ind. App. 20.

619. 1. *Law Open to More than One Construction.* — *Aachen, etc., F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3.

4. *Ministerial and Administrative Officers.* — *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 574, *reversing* 71 N. J. L. 183, wherein Fort, J., *dissenting*, quoted 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 619.

619. What Constitutes Delegation of Taxing Power. — See note 6.

620. *b.* POLITICAL DIVISIONS OF STATE. — See note 1.

621. Creation of Political Divisions. — See note 8.

622. See note 1.

Legislature Forbidden to Impose Municipal Taxes. — See note 3.

623. 6. Waiver or Relinquishment — Expression of Legislative Intent. — See note 1.

No Presumption of Relinquishment. — See note 3.

624. V. PURPOSE OF TAXATION — 2. For Public Purposes — *a.* NECESSITY OF PUBLIC PURPOSE. — See note 5.

625. See note 1.

627. *c.* PURPOSES HELD TO BE PUBLIC OR OTHERWISE. — See note 6.

628. See note 1.

631. *d.* LOCAL BURDENS REQUIRE LOCAL BENEFITS — (1) *In General.* — See note 1.

(2) *Benefits Need Not Be Entirely Local.* — See note 3.

632. (3) *Functions of Legislature and Courts.* — See note 1.

VI. PERSONS AND THINGS TAXABLE — 1. In General — The Taxing Power of a State Extends to All Persons and Property. — See note 5.

633. See note 2.

The Right to Tax a Person. — See note 4.

634. 2. Polls. — See note 6.

635. 3. Property in General — *a.* MEANING AND CONSTRUCTION OF "PROPERTY." — See note 1.

b. PROPERTY WITHIN JURISDICTION OF STATE. — See note 8.

619. 6. Conferring Administrative Functions Not Delegation of Power. — *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 183, 574.

620. 1. Delegation to Municipalities. — *Philadelphia v. Philadelphia Traction Co.*, 206 Pa. St. 35; *State v. Ide*, 35 Wash. 576, 102 Am. St. Rep. 914.

621. 8. Power to Create Taxing Districts. — *Saginaw County v. Hubinger*, 137 Mich. 72, 11 Detroit Leg. N. 215; *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 574, reversing 71 N. J. L. 183, wherein Fort, J., dissenting, quoted 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 621.

622. 1. *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 574, reversing 71 N. J. L. 183.

3. Legislature Forbidden to Impose Municipal Taxes. — *Aachen, etc., F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3.

623. 1. Expression of Legislative Intent. — *Adams v. Kuykendall*, 83 Miss. 571.

3. No Presumption of Relinquishment. — *Territory v. Persons, etc.*, (N. Mex. 1904) 76 Pac. Rep. 307.

624. 5. Purpose Must Be Public. — Opinion of Justices, 186 Mass. 603.

625. 1. Inherent in Definition of Tax. — Opinion of Justices, 186 Mass. 603.

627. 6. Bounties to Veterans of Civil War. — Opinion of Justices, 186 Mass. 603.

628. 1. Charities. — *Hager v. Kentucky Children's Home Soc.*, 83 S. W. Rep. 605, 26 Ky. L. Rep. 1133.

Public Education — Schools, Etc. — A tax for the support of a public library cannot be levied under authority to maintain public schools. *Brooks v. Schultz*, 178 Mo. 222.

Public Health — Street Sprinkling. — *Maydwell*

v. Louisville, 116 Ky. 885, 105 Am. St. Rep. 245.

631. 1. Inequality of Benefits. — *Kerr v. Perry School Tp.*, 162 Ind. 310.

3. Expenditure May Be Without Community. — *Kerr v. Perry School Tp.*, 162 Ind. 310.

632. 1. Legislature and Courts. — *Kerr v. Perry School Tp.*, 162 Ind. 310.

5. Taxing Power Includes All Persons and Property in State. — *Weston Assur. Co. v. Halliday*, (C. C. A.) 126 Fed. Rep. 259; *Buck v. Beach*, 164 Ind. 37; *Heinz v. Board of Equalization*, 121 Iowa 445; *Johnson v. Bradley-Watkins Tie Co.*, 85 S. W. Rep. 726, 27 Ky. L. Rep. 540; *Aachen, etc., F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3; *Central R. Co. v. Jersey City*, 70 N. J. L. 81; *Armstrong v. Nassau County*, 101 N. Y. App. Div. 116; *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214. See also *Territory v. Persons, etc.*, (N. Mex. 1904) 76 Pac. Rep. 307.

Property in the Hands of a Trustee in Bankruptcy is subject to state taxation. *Swarts v. Hammer*, 194 U. S. 441.

633. 2. Tax Leviable on One Who Has Charge in State of Personalty of Nonresident. — *Buck v. Beach*, 164 Ind. 37.

4. Right to Vote. — *Territory v. Persons, etc.*, (N. Mex. 1904) 76 Pac. Rep. 307.

634. 6. Constitutional Provisions Not Applicable to Municipal Poll Taxes. — *Wingate v. Parker*, 136 N. Car. 369.

635. 1. What Property Includes. — *Buck v. Beach*, 164 Ind. 37; *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214; *Kingsley v. Merrill*, 122 Wis. 185.

8. *Buck v. Beach*, 164 Ind. 37; *German Trust Co. v. Board of Equalization*, 121 Iowa 325; *Heinz v. Board of Equalization*, 121 Iowa 445;

- 636.** *c.* REAL OR PERSONAL PROPERTY. — See note 1.
- 637.** 4. Personal Property — *a.* IN GENERAL — Visible Property Only Held to Be Taxable. — See note 2.
- c.* CREDITS, DEBTS, AND SECURITIES. — See note 5.
- 638.** Property Only as to Creditors. — See note 1.
- Security Given for Debts and Credits. — See note 2.
- Debts Secured by Nontaxable Property. — See note 5.
- 639.** *e.* MORTGAGES. — See note 6.
- 640.** 5. Real Property — *a.* DEFINITION. — See note 6.
- The Term "Property in Lands." — See note 7.
- 641.** *b.* BUILDINGS, STRUCTURES, AND IMPROVEMENTS. — See note 4.
- Title to Structure Severed from Soil. — See note 5.
- 642.** See note 1.
- d.* EASEMENTS. — See note 2.
- d.* FIXTURES — In Determining Whether an Article Is a Fixture. — See notes 3, 4.
- e.* LEASEHOLDS. — See note 5.
- f.* LICENSE TO USE LAND — A License to Go on Land and Sever and Remove the Products Thereof. — See note 6.

State *v.* Northern Pac. R. Co., (Minn. 1905) 103 N. W. Rep. 731.

Evidences of Debt. — State *v.* Fidelity, etc., Co., 35 Tex. Civ. App. 214.

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636. 1. Whether Realty or Personalty. — Walton County *v.* Morgan County, 120 Ga. 548, 121 Ga. 659; Woodruff *v.* Oswego Starch Factory, 177 N. Y. 23.

637. 2. Rent Reserved in Perpetual Lease Taxable as Personalty to Lessor. — Woodruff *v.* Oswego Starch Factory, 177 N. Y. 23.

5. Credits. — Wright *v.* Louisville, etc., R. Co., 195 U. S. 219; Scottish Union, etc., Ins. Co. *v.* Bowland, 196 U. S. 611; Western Assur. Co. *v.* Halliday, (C. C. A.) 126 Fed. Rep. 257, 127 Fed. Rep. 830; Savings, etc., Soc. *v.* San Francisco, 146 Cal. 673; *In re* Wilmerton, 206 Ill. 15; Buck *v.* Beach, 164 Ind. 37; Adams *v.* Kuykendall, 83 Miss. 571; State *v.* Fidelity, etc., Co., 35 Tex. Civ. App. 214; Kingsley *v.* Merrill, 122 Wis. 185. See also *Sweetsir v. Chandler*, 98 Me. 145.

Where the Vendor Retains the Title. — Cross *v.* Snakenberg, 126 Iowa 636; Clark *v.* Horn, 122 Iowa 375.

Life-insurance Policy after Death of Insured Taxable Credit. — Cooper *v.* Board of Review, 207 Ill. 472.

Cotton in Hands of Commission Merchant, but Not in Hands of Owner, Taxable as Credit. — Murdock *v.* Iredell County, 138 N. Car. 124.

Mere Option to Buy Not Taxable Credit. — Schoonover *v.* Petcina, 126 Iowa 261. See also Michigan R. Tax Cases, 138 Fed. Rep. 223.

Money Remitted by Central Bank to Its Branches Not Taxable as Credit. — London, etc., Bank *v.* Block, (C. C. A.) 136 Fed. Rep. 138.

638. 1. Debts Are Not Debtor's Property. — Buck *v.* Beach, 164 Ind. 37; State *v.* Assessors, 111 La. 982.

2. Security for Debts. — Buck *v.* Beach, 164 Ind. 37.

5. Secured by Exempt Collateral. — Hooper *v.* State, 141 Ala. 111.

639. 6. Mortgages. — Kingsley *v.* Merrill, 122 Wis. 185.

640. 6. Definition. — Bakersfield, etc., Oil Co. *v.* Kern County, 144 Cal. 148.

7. "Property in Lands." — A water power created by a dam, whether used or not, is assessable. Saco Water Power Co. *v.* Buxton, 98 Me. 295.

641. 4. Buildings, Structures, and Improvements. — Hamilton Mfg. Co. *v.* Lowell, 185 Mass. 114; Detroit United R. Co. *v.* State Tax Com'rs, 136 Mich. 96, 10 Detroit Leg. N. 993; People *v.* Wells, 181 N. Y. 245; Lewis *v.* State, 69 Ohio St. 473.

Bridges. — *Contra*, Middletown, etc., Bridge Co. *v.* Middletown, 77 Conn. 314.

Bridge Approach Assessable as Part of Railroad Track. — People *v.* Illinois Cent. R. Co., 215 Ill. 177.

5. Buildings and Fixtures as Realty. — People *v.* Wells, 181 N. Y. 245, affirming 99 N. Y. App. Div. 455. See also Matter of Long Beach Land Co., 106 N. Y. App. Div. 253, affirming 101 N. Y. App. Div. 159.

642. 1. An Agreement for the Removal. — *In re* Maplewood Coal Co., 213 Ill. 283.

Improvements Set Up in Public Street Taxable. — West Seattle *v.* West Seattle Land, etc., Co., 38 Wash. 359.

2. Easements. — See Hamilton Mfg. Co. *v.* Lowell, 185 Mass. 114; Matter of Albany, etc., Turnpike Road, 180 N. Y. 401, reversing 94 N. Y. App. Div. 509.

3. Fixtures. — See People *v.* Feitner, 99 N. Y. App. Div. 274, affirmed 181 N. Y. 549.

4. Hamilton Mfg. Co. *v.* Lowell, 185 Mass. 114.

Heavy Electrical Machinery Installed in Power House Held to Be Taxable as Realty. — Detroit United R. Co. *v.* State Tax Com'rs, 136 Mich. 96, 10 Detroit Leg. N. 993.

5. Lease Renewable Forever Is Realty. — Woodruff *v.* Oswego Starch Factory, 177 N. Y. 23.

6. Licenses. — Peterson *v.* Hall, 57 W. Va. 535.

643. *g.* MINING AND MINERAL RIGHTS. — See notes 2, 3, 4.

6. Public Property and Instrumentalities of Government — *a.* GENERALLY EXEMPT FROM TAXATION. — See note 6.

644. *b.* TAXATION WITH ASSENT OF GOVERNMENT. — See note 1.

c. PUBLIC LANDS — (1) *General Principles* — Public Lands of the United States. — See notes 3, 4.

645. The Taxation of State Lands Is Governed by the Same Principles. — See note 7.

646. (2) *Indian Lands* — Becoming Citizens. — See note 3.

d. AGENCIES OF GOVERNMENT. — See note 5.

647. 7. Incomes. — See note 3.

648. VII. PLACE OF TAXATION — 1. Property Must Be in Jurisdiction — *a.* IN GENERAL. — See note 3.

b. DATE WHEN PRESENCE NECESSARY. — See notes 5, 6.

2. Real Property. — See note 7.

649. Land Lying Partly in Each of Two Districts. — See note 3.

Where Land Lies in Doubtful or Disputed Territory. — See note 5.

Water Power. — See notes 6, 7.

643. 2. Mining Claims Taxable as Realty. — Bakersfield, etc., Oil Co. *v.* Kern County, 144 Cal. 148; *In re* Maplewood Coal Co., 213 Ill. 283; Cherokee, etc., Coal, etc., Co. *v.* Crawford County, (Kan. 1905) 80 Pac. Rep. 601. See also Barnes *v.* Bee, 138 Fed. Rep. 476; Murray *v.* Hinds, 30 Mont. 466.

3. The Prospective Product of Oil Wells. — Peterson *v.* Hall, 57 W. Va. 535.

4. A Mining Lease. — See Peterson *v.* Hall, 57 W. Va. 535.

6. Lands Held in Trust by the Chancellor. — The law applies only to land, and where a mortgage debt thereon is paid into court such fund is not subject to taxation. Swope *v.* Fraser, (N. J. 1904) 58 Atl. Rep. 531.

644. 1. Exemption of United States — State Tax on State Property. — People *v.* Miller, 94 N. Y. App. Div. 567.

The Expression "All Property in This State" does not include city bonds or certificates evidencing debts of the municipality. State *v.* Assessors, 111 La. 982.

Congress Has Permitted the Taxation. — Superior First Nat. Bank *v.* Douglas County, 124 Wis. 15.

3. Acquisition of Equitable Title to Public Lands Renders Persons Taxable as to Them. — De La Vergne *v.* Territory, (Ariz. 1893) 77 Pac. Rep. 617.

4. Territory *v.* Persons, etc., (N. Mex. 1904) 76 Pac. Rep. 316.

645. 7. State Lands. — State *v.* McEldowney, 54 W. Va. 695. See also Wildberger *v.* Shaw, 84 Miss. 442.

State Lands Held under a Contract of Purchase. — Taber *v.* State, (Tex. Civ. App. 1905) 85 S. W. Rep. 835. *Contra*, Corcoran *v.* Boston, 185 Mass. 325.

646. 3. Allotments in Trust. — Goudy *v.* Meath, 38 Wash. 126.

5. Agencies of Government. — See Baltimore Shipbuilding, etc., Co. *v.* Baltimore, 195 U. S. 375; South Carolina *v.* U. S., 39 Ct. Cl. 257; Purnell *v.* Page, 133 N. Car. 125.

647. 3. A State Cannot Tax the Income of a United States Official. — Purnell *v.* Page, 133 N. Car. 125.

648. 3. Property Must Be in Jurisdiction. — Western Assur. Co. *v.* Halliday, (C. C. A.) 126 Fed. Rep. 257; Buck *v.* Beach, 164 Ind. 37; Heinz *v.* Board of Equalization, 121 Iowa 445; Johnson *v.* Bradley-Watkins Tie Co., 85 S. W. Rep. 726, 27 Ky. L. Rep. 540; Aachen, etc., F. Ins. Co. *v.* Omaha, (Neb. 1904) 101 N. W. Rep. 3; Armstrong *v.* Nassau County, 101 N. Y. App. Div. 116; State *v.* Fidelity, etc., Co., 35 Tex. Civ. App. 214. See also Swarts *v.* Hammer, 194 U. S. 441 (property held by trustee in bankruptcy); Territory *v.* Persons, etc., (N. Mex. 1904) 76 Pac. Rep. 307.

Tidewater Lands Taxable in State Where Situated. — Central R. Co. *v.* Jersey City, 70 N. J. L. 81.

5. Property in the State on Such Day. — Johnson *v.* Bradley-Watkins Tie Co., 85 S. W. Rep. 726, 27 Ky. L. Rep. 540.

Temporary Removal of Property Will Not Defeat Assessment. — Buck *v.* Beach, 164 Ind. 37.

6. Residence at Listing or Assessment Decisive. — Barron *v.* Boston, 187 Mass. 168.

Statute Providing for Assessment of Property Brought in After Assessment Day Valid. — Nathan *v.* Spokane County, 35 Wash. 26, 102 Am. St. Rep. 888.

7. Real Property. — Walton County *v.* Morgan County, 120 Ga. 548; People *v.* Howell, 106 N. Y. App. Div. 140.

649. 3. Lands Lying in Two Districts. — Walton County *v.* Morgan County, 120 Ga. 548. But see People *v.* Jacobs, 106 N. Y. App. Div. 614; People *v.* Howell, 106 N. Y. App. Div. 140, holding that the owner of contiguous tracts used as a farm and extending into three taxing districts has no right to compel the assessment of the farm as one tract in the district of his residence. And see generally, as to separate assessment of parcels, *infra*, this title, **687.** 1 *et seq.*

5. Land in Doubtful Territory. — Booksh *v.* A. Wilbert Sons Lumber, etc., Co., (La. 1905) 39 So. Rep. 9.

6. Water Power. — Walton County *v.* Morgan County, 120 Ga. 548.

7. East Granby *v.* Hartford Electric Light Co., 76 Conn. 169.

- 650.** 3. **Personal Property** — *a.* GENERAL PRINCIPLES. — See notes 1, 2, 3.
- 651.** *b.* RESIDENCE OR DOMICIL FOR PURPOSES OF TAXATION — *Residence Alone Sufficient for Taxation.* — See note 2.
- Two Residences. — See notes 6, 7.
- 652.** *c.* ENUMERATION OF CLASSES OF PERSONALTY — (1) *Animals* — Cattle Owned by a Nonresident. — See note 8.
- (3) *Debts and Credits.* — See note 11.
- 653.** See notes 2, 3.
- (4) *Decedent's Estate.* — See note 5.
- 654.** See note 1.
- Where There Are Two or More Executors. — See note 5.
- (6) *Logs and Lumber* — Timber Cut. — See notes 8, 9, 11.
- 655.** See notes 1, 4, 6.

650. 1. **Domicil Determines Place of Taxation.** — *Walton County v. Morgan County*, 120 Ga. 548; *Morgan County v. Walton County*, 121 Ga. 659; *Carney v. People*, 210 Ill. 434; *Spalding v. O'Callaghan*, 76 S. W. Rep. 189, 25 Ky. L. Rep. 629; *Langdon-Creasy Co. v. Owenton Common School Dist.*, 116 Ky. 562; *London v. Boyd*, 77 S. W. Rep. 931, 25 Ky. L. Rep. 1337; *Lebanon v. Biggers*, 117 Ky. 430; *Com. v. Union Refrigerator Transit Co.*, 26 Ky. L. Rep. 397, 81 S. W. Rep. 268, 80 S. W. Rep. 490, 26 Ky. L. Rep. 23; *New Limerick v. Watson*, 98 Me. 379; *Barron v. Boston*, 187 Mass. 168; *School Dist. v. Bowman*, 178 Mo. 654; *Com. v. Williams*, 102 Va. 778.

2. **Actual Situs of Property Controls Taxation.** — *State Board of Assessors v. Comptoir Nat. d'Escompte*, 191 U. S. 388; *Carstairs v. Cochran*, 193 U. S. 10; *Scottish Union, etc., Ins. Co. v. Bowland*, 196 U. S. 611; *Western Assur. Co. v. Halliday*, (C. C. A.) 126 Fed. Rep. 257, 127 Fed. Rep. 830; *Armour Packing Co. v. Augusta*, 118 Ga. 552, 98 Am. St. Rep. 128; *Buck v. Beach*, 164 Ind. 37; *Johnson v. Bradley-Watkins Tie Co.*, 85 S. W. Rep. 726, 27 Ky. L. Rep. 540; *School Dist. v. Bowman*, 178 Mo. 654; *Jandt v. Sioux County*, (Neb. 1905) 102 N. W. Rep. 763 (livestock); *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214.

Legislature May Fix Situs for Taxation. — *Morgan County v. Walton County*, 121 Ga. 659; *Langdon-Creasy Co. v. Owenton Common School Dist.*, 116 Ky. 562; *Botto v. Louisville*, 117 Ky. 798; *London v. Hope*, (Ky. 1904) 80 S. W. Rep. 817; *School Dist. v. Bowman*, 178 Mo. 654; *State v. Back*, (Neb. 1904) 100 N. W. Rep. 960; *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214.

3. *Armour Packing Co. v. Augusta*, 118 Ga. 552, 98 Am. St. Rep. 128; *Buck v. Beach*, 164 Ind. 37; *German Trust Co. v. Board of Equalization*, 121 Iowa 325; *Heinz v. Board of Equalization*, 121 Iowa 445; *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214. See also *State Board of Assessors v. Comptoir Nat. d'Escompte*, 191 U. S. 388.

651. 2. **Domicil Is Said to Be the Test of Liability to Taxation in Massachusetts.** — *Barron v. Boston*, 187 Mass. 168.

6. **Residence at Principal Place of Business.** — *Teagan Transp. Co. v. Assessors*, (Mich. 1905) 102 N. W. Rep. 273, 11 Detroit Leg. N. 731; *Paddock v. Lewis*, 179 N. Y. 591, affirming 59 N. Y. App. Div. 430.

7. **Residence Where One Spends Most Time.** — *London v. Boyd*, 77 S. W. Rep. 931, 25 Ky. L. Rep. 1337; *People v. Feitner*, 90 N. Y. App. Div. 9; *Clarke v. Addeman*, 26 R. I. 168. See also *Barron v. Boston*, 187 Mass. 168.

652. 8. *Rosasco v. Tuolumne County*, 143 Cal. 430; *Flowerree Cattle Co. v. Lewis and Clarke County*, (Mont. 1905) 18 Pac. Rep. 398.

11. **Intangible Personal Property — Debts and Credits.** — *Woodland Bank v. Pierce*, 144 Cal. 434; *Armour Packing Co. v. Augusta*, 118 Ga. 552, 98 Am. St. Rep. 128; *In re Borden*, 208 Ill. 369; *Buck v. Beach*, 164 Ind. 37; *Snakenberg v. Stein*, 126 Iowa 650; *Sisler v. Foster*, 72 Ohio St. 437; *Com. v. Williams*, 102 Va. 778; *Hurt v. Bristol*, (Va. 1905) 51 S. E. Rep. 223; *Kingsley v. Merrill*, 122 Wis. 185.

653. 2. **Evidences of Debts Owned by Non-residents Taxable.** — *State Board of Assessors v. Comptoir Nat. d'Escompte*, 191 U. S. 388; *Western Assur. Co. v. Halliday*, (C. C. A.) 126 Fed. Rep. 257, 127 Fed. Rep. 830; *Buck v. Beach*, 164 Ind. 37; *German Trust Co. v. Board of Equalization*, 121 Iowa 325; *State v. Northern Pac. R. Co.*, (Minn. 1905) 103 N. W. Rep. 731; *Sisler v. Foster*, 72 Ohio St. 437; *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214.

3. **Resident Owner of Debts Out of Jurisdiction Not Taxable.** — *Contra*, by statute, *Armour Packing Co. v. Augusta*, 118 Ga. 552, 98 Am. St. Rep. 128. Compare *Western Assur. Co. v. Halliday*, (C. C. A.) 126 Fed. Rep. 257, a case arising in *Ohio*.

5. **Property of Decedent.** — *Com. v. Williams*, 102 Va. 778.

654. 1. See *In re Borden*, 208 Ill. 369; *Buck v. Beach*, 164 Ind. 37.

Taxable in Hands of Executor Though Exempt After Distribution. — *Com. v. Williams*, 102 Va. 778.

5. *People v. Wells*, 94 N. Y. App. Div. 463, affirmed 179 N. Y. 566.

8. **Logs and Lumber.** — *State v. Fisher*, 124 Wis. 271.

9. *Valentine-Clark Co. v. Shawano County*, 120 Wis. 310.

11. *State v. Fisher*, 124 Wis. 271.

655. 1. *State v. Meehan*, 92 Minn. 283.

4. **Lumber.** — *Valentine-Clark Co. v. Shawano County*, 120 Wis. 310.

6. *Grand Rapids Bark, etc., Co. v. Inland Tpn.*, 136 Mich. 121, 10 Detroit Leg. N. 986.

- 655.** (7) *Money*. — See note 9.
 (9) *Partnership Property*. — See note 14.
- 656.** (10) *Property Employed in Business*. — See note 1.
 (11) *Property in Hands of Agent*. — See note 4.
 (12) *Property Held in Trust*. — See note 7.
- 657.** See note 1.
 (13) *Property in Transit or Temporarily Present*. — See note 2.
 (14) *Water Craft*. — See note 4.
- 658.** *Boats Owned by a Corporation*. — See note 1.
- IX. ASSESSMENT — 1. Requisites of a Tax — Scope of Treatment — Three Things Are Essential.** — See note 6.
- 659.** 2. *Definitions* — *b. IN APPORTIONING TAX — The Technical Meaning in This Connection*. — See note 4.
- 660.** 3. *Necessity for Assessment*. — See note 1.
- 661.** See note 1.
4. *Requirements as to Time When Made* — *a. IN GENERAL*. — See notes 3, 4.
- 662.** *b. RELATION OF ASSESSMENT TO DAY CERTAIN*. — See notes 1, 2.

655. 9. *Money*. — See *Snakenberg v. Stein*, 126 Iowa 650.

14. *Partnership Property*. — *Detroit v. Lathrop Estate Co.*, 136 Mich. 265, 11 Detroit Leg. N. 6; *School Dist. v. Bowman*, 178 Mo. 654; *People v. Wells*, 177 N. Y. 586, *affirming* 85 N. Y. App. Div. 440.

656. 1. *Property Employed in Business*. — *Carney v. People*, 210 Ill. 434; *People v. Miller*, 98 N. Y. App. Div. 584, *affirmed* 181 N. Y. 328; *People v. Wells*, 92 N. Y. App. Div. 622, *affirming* (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 144; *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214. See also *People v. Wells*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 86, *affirmed* 93 N. Y. App. Div. 613; *People v. Wells*, 98 N. Y. App. Div. 82, *affirmed* 182 N. Y. 553.

4. *Property in Hands of Agent*. — *State Board of Assessors v. Comptoir Nat. d'Escompte*, 191 U. S. 388; *Carstairs v. Cochran*, 193 U. S. 10; *Scottish Union, etc., Ins. Co. v. Bowland*, 196 U. S. 611; *Western Assur. Co. v. Halliday*, (C. C. A.) 126 Fed. Rep. 257, 127 Fed. Rep. 830; *Armour Packing Co. v. Augusta*, 118 Ga. 552, 98 Am. St. Rep. 128; *Buck v. Beach*, 164 Ind. 37; *German Trust Co. v. Board of Equalization*, 121 Iowa 325; *Heinz v. Board of Equalization*, 121 Iowa 445; *Valentine-Clark Co. v. Shawano County*, 120 Wis. 310. But see *In re Borden*, 208 Ill. 369; *Snakenberg v. Stein*, 126 Iowa 650.

7. *Trust Property Taxed as Belonging to Trustee*. — *Property in the hands of the committee of a lunatic is taxable at the committee's domicile, and not at the place of his appointment.* *Hurt v. Bristol*, (Va. 1905) 51 S. E. Rep. 223.

Where There Are Two or More Trustees. — *People v. O'Donnell*, 106 N. Y. App. Div. 526.

If One of Two Trustees Is a Nonresident only one-half the trust estate can be assessed to the resident trustee. *People v. Wells*, 182 N. Y. 314, *reversing* 101 N. Y. App. Div. 600.

657. 1. *Situs That of Beneficiary*. — *Spalding v. O'Callaghan*, 76 S. W. Rep. 189, 25 Ky. L. Rep. 629; *Botto v. Louisville*, 117 Ky. 798; *Clarke v. Addeman*, 26 R. I. 168. See also *Sisler v. Foster*, 72 Ohio St. 437.

2. *Property in Transit*. — *In re Union Tank Line Co.*, 204 Ill. 347, 98 Am. St. Rep. 221.

4. *Water Craft*. — *Com. v. Ayer, etc., Tie Co.*, 77 S. W. Rep. 686, 25 Ky. L. Rep. 1068, *rehearing denied* 117 Ky. 171; *Old Dominion Steamship Co. v. Com.*, 102 Va. 576.

658. 1. *Teagan Transp. Co. v. Assessors*, (Mich. 1905) 102 N. W. Rep. 273, 11 Detroit Leg. N. 731.

6. *Requisites of a Tax*. — See *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 221, *citing arguendo* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 658, *reversed on other grounds* 71 N. J. L. 574.

659. 4. *Assessment the Listing and Valuation of Taxable Property*. — *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255.

660. 1. *Assessment Indispensable to Ad Valorem Tax*. — *Savings, etc., Soc. v. San Francisco*, 146 Cal. 673; *Thornburg v. Cardell*, 123 Iowa 313; *Posey v. New Orleans*, 113 La. 1059; *Moran v. Thomas*, (S. Dak. 1905) 104 N. W. Rep. 212.

661. 1. *Moran v. Thomas*, (S. Dak. 1905) 104 N. W. Rep. 212.

3. *When Assessment Made — In General*. — *Crozer v. People*, 206 Ill. 464; *Hancock County v. Simmons*, 86 Miss. 302; *Lewis v. State*, 69 Ohio St. 473; *Interstate Coal, etc., Co. v. Com.*, 103 Va. 586.

4. *Power of Legislature*. — *Crozer v. People*, 206 Ill. 464.

662. 1. *Relation of Assessment to Day Certain*. — *Scottish Union, etc., Ins. Co. v. Bowland*, 196 U. S. 611; *Hooper v. State*, 141 Ala. 111; *Arkansas Cypress Shingle Co. v. Lonoke County*, (Ark. 1905) 84 S. W. Rep. 1029; *Crozer v. People*, 206 Ill. 464; *Lingenfelter v. Ferguson*, (Kan. 1905) 80 Pac. Rep. 48; *Bunkie Brick Works v. Police Jury*, 113 La. 1062; *Wildberger v. Shaw*, 84 Miss. 442; *Gerard v. Duncan*, 84 Miss. 731; *Jandt v. Sioux County*, (Neb. 1905) 102 N. W. Rep. 763; *People v. Wells*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 13, *affirmed* 92 N. Y. App. Div. 622, 179 N. Y. 524; *Fulton v. Aldrich*, 76 Vt. 310; *Pardee v. Com.*, 102 Va. 905; *State v. McDeldowney*, 54 W. Va. 695. See

- 663.** 5. By Whom Assessment Made—*a.* LEGISLATIVE BODIES. — See note 2.
- b.* PUBLIC OFFICERS AND BOARDS — (1) *In General.* — See note 4.
- 664.** See note 1.
- (2) *Officers De Jure and De Facto.* — See notes 5, 6.
- 665.** See note 1.
- (4) *Delegation of Powers* — (a) *General Rules.* — See note 3.
- 666.** (b) *Action by Boards.* — See note 1.
- c.* JUDICIAL TRIBUNALS — (1) *In General.* — See note 5.
- 667.** *d.* MUNICIPAL ASSESSMENTS. — See note 3.
6. *Assessment Proceedings* — *a.* IN GENERAL. — See notes 4, 5.
- 668.** *Formal Errors and Irregularities.* — See note 1.
- b.* THE ROLL — (1) *Form and Contents Generally.* — See note 3.
- 669.** (2) *Arrangement.* — See note 1.
- c.* RETURNS BY TAXPAYERS — (1) *Statutory Provisions.* — See note 2.
- 670.** (2) *Effect of Statutes* — (a) *Upon Exercise of Power to Assess.* — See note 3.
- 671.** See note 1.
- (b) *Return as an Estoppel.* — See note 2.
- 672.** *e.* NAMING THE TAXPAYER — (1) *General Rules.* — See notes 2, 3.

also *Aztec Land, etc., Co. v. Navajo County*, (Ariz. 1905) 80 Pac. Rep. 318.

662. 2. *Bunkie Brick Works v. Police Jury*, 113 La. 1062, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 662.

663. 2. *Assessment an Executive or Judicial Function.* — *Security Sav. Bank v. Carroll*, (Iowa 1905) 103 N. W. Rep. 379; *Stockton v. Craig*, 56 W. Va. 464.

4. *Province of Legislature—In General.* — *Adams v. Kuykendall*, 83 Miss. 571; *Missouri River Power Co. v. Steele*, 32 Mont. 433.

664. 1. *Agencies for Making Assessments.* — *State v. Assessors*, 111 La. 982; *Adams v. Kuykendall*, 83 Miss. 571; *Missouri River Power Co. v. Steele*, 32 Mont. 433.

5. *Assessments by Persons Not Authorized by Law to Make Them Void.* — *Franklin v. Warwick, etc., Water Co.*, 25 R. I. 384.

6. *De Facto Officers.* — *U. S. Fidelity, etc., Co. v. Board of Education*, (Ky. 1905) 86 S. W. Rep. 1120; *South Omaha v. O'Rourke*, (Neb. 1903) 97 N. W. Rep. 608; *Manor Real Estate, etc., Co. v. Cooner*, 209 Pa. St. 531. See also *New York v. Vanderveer*, 91 N. Y. App. Div. 303. *Contra*, *Springfield v. Butterfield*, 98 Me. 155. See further the title DE FACTO OFFICERS, **819.** 2.

665. 1. *Board of Assessors.* — *Springfield v. Butterfield*, 98 Me. 155.

3. *Delegation of Powers—General Rules.* — See *Grant Land Assoc. v. People*, 213 Ill. 256; *In re Morgan*, 125 Iowa 247.

666. 1. *Action by Boards.* — *Com. v. Kenneday*, 82 S. W. Rep. 237, 26 Ky. L. Rep. 504.

5. *Original Assessments.* — *Schoonover v. Petcina*, 126 Iowa 261.

667. 3. *Municipal Assessments.* — *German Trust Co. v. Board of Equalization*, 121 Iowa 325.

4. *Authority of Legislature to Provide Method of Assessing Property.* — *U. S. Fidelity, etc., Co. v. Board of Education*, (Ky. 1905) 86 S. W. Rep. 1120.

5. *Assessment Should Comply with Statutes.* — *Waggoner v. Maumus*, 112 La. 229.

668. 1. *Formal Errors.* — *Sav., etc., Soc. v. San Francisco*, 146 Cal. 673; *Grant Land Assoc. v. People*, 213 Ill. 256; *People v. Chicago, etc., R. Co.*, 214 Ill. 190; *Fell v. West*, 35 Ind. App. 20; *U. S. Fidelity, etc., Co. v. Board of Education*, (Ky. 1905) 86 S. W. Rep. 1120; *Corbet v. Rocksbury*, 94 Minn. 397; *State v. Carr*, 178 Mo. 229; *Conklin v. Cullen*, 29 Mont. 38; *Manor Real Estate, etc., Co. v. Cooner*, 209 Pa. St. 531; *Clark v. Mercer County Ct.*, 55 W. Va. 278.

3. *Contents and Necessity of Assessment Roll or List.* — *Trumbull v. Palmer*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 628, 104 N. Y. App. Div. 51.

669. 1. *Arrangement of Roll under Statutes.* — *Weber v. Baird*, 208 Ill. 209; *Carney v. People*, 210 Ill. 434.

2. *Return Should Be Made by Agent or Trustee Having Property in Hand.* — *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214.

670. 3. *Return Not a Condition Precedent to Assessment—When Made Not Conclusive.* — *Western Assur. Co. v. Halliday*, (C. C. A.) 126 Fed. Rep. 257; *Western Assur. Co. v. Halliday*, 127 Fed. Rep. 830; *State v. Carr*, 178 Mo. 229; *State v. Birch*, 186 Mo. 205. See also *Tennessee Coal, etc., Co. v. State*, 141 Ala. 103. *Compare* *People v. Feitner*, 92 N. Y. App. Div. 518.

671. 1. *Adding Property Omitted.* — *State v. Carr*, 178 Mo. 229.

2. *Return as Estoppel—General Rule.* — *East Granby v. Hartford Electric Light Co.*, 76 Conn. 169; *Union School Dist. v. Bishop*, 76 Conn. 695; *In re Morgan*, 125 Iowa 247; *Oregon R., etc., Co. v. Umatilla County*, (Oregon 1905) 81 Pac. Rep. 352; *Galveston, etc., R. Co. v. Galveston*, 33 Tex. Civ. App. 384.

672. 2. *Waiver—Estoppel.* — *Miller v. Brooks*, 120 Ga. 232; *McWilliams v. Gulf States Land, etc., Co.*, 111 La. 194; *Waggoner v. Maumus*, 112 La. 229; *Endom v. Monroe*, 112 La. 779; *Harris v. Deblieux*, (La. 1905) 38 So. Rep. 946.

673. (2) *Owner or Occupant — Unknown Owner* — (a) *In General*. — See note 1.

674. If the Name of the Owner Was Known. — See note 1.

675. Slight Errors. — See note 1.

(b) Name Adopted and Used by Taxpayer. — See note 2.

(c) Owner Person Having Title on Assessment Date. — See note 3.

(d) Record Owners. — See note 4.

676. (e) Resident and Nonresident, Seated and Unseated Lands. — See notes 1, 2.

677. (f) Separate Estates or Interests in Same Property. — See notes 1, 2, 3.

678. See note 1.

(g) Deceased Owners. — See note 2.

679. (i) Trustees. — See note 1.

(j) Partnership Property. — See note 3.

(k) Joint Ownership. — See note 4.

680. (3) *Persons Other than Owners or Occupants* — (a) *In General*. — See note 2.

672. 3. Requirements as to Name Directory Merely. — *Palomares Land Co. v. Los Angeles County*, 146 Cal. 530; *Fell v. West*, 35 Ind. App. 20; *Joyes v. Louisville*, 82 S. W. Rep. 432, 26 Ky. L. Rep. 713; *Sanders v. Carley*, 178 N. Y. 622, affirming 83 N. Y. App. Div. 193; *Hadley v. Hadley*, (Tenn. 1905) 87 S. W. Rep. 250; *Taber v. State*, (Tex. Civ. App. 1905) 85 S. W. Rep. 835; *Woodward v. Taylor*, 33 Wash. 1, 12.

Name Need Not Be Written Opposite Each Separate Description of Property. — *Oregon R., etc., Co. v. Umatilla County*, (Oregon 1905) 81 Pac. Rep. 352.

673. 1. Owners or Occupants — Unknown Owner. — *Miller v. Brooks*, 120 Ga. 232; *German Trust Co. v. Board of Equalization*, 121 Iowa 325; *Grand Rapids Bark, etc., Co. v. Inland Tp.*, 136 Mich. 121, 10 Detroit Leg. N. 986; *State v. Meehan*, 92 Minn. 283; *Rowley v. Poughkeepsie*, 106 N. Y. App. Div. 258; *Jungk v. Snyder*, 28 Utah 1. See also *Truchon v. Chicoutim*, 25 Quebec Super. Ct. 55.

674. 1. Knowledge by Assessors of Name of Owner. — *Jungk v. Snyder*, 28 Utah 1.

675. 1. Slight Errors in Name. — *Eliot v. Prime*, 98 Me. 48; *People v. O'Donnel*, 106 N. Y. App. Div. 526.

Where the Land Is Correctly Described the assessment is not invalidated by being made to the wrong person as owner. *Joyes v. Louisville*, 82 S. W. Rep. 432, 26 Ky. L. Rep. 713.

2. Name Adopted and Used by Taxpayer. — *Tieman v. Johnston*, 114 La. 112; *Oregon R., etc., Co. v. Umatilla County*, (Oregon 1905) 81 Pac. Rep. 352.

3. Owner the Person Having Title on Assessment Date. — *Schoonover v. Petcina*, 126 Iowa 261; *McMakin v. Com.*, 80 S. W. Rep. 188, 25 Ky. L. Rep. 2195; *Sweetsir v. Chandler*, 98 Me. 145; *Lancy v. Boston*, 186 Mass. 128; *Gerard v. Duncan*, 84 Miss. 731; *Newaygo Portland Cement Co. v. Sheridan Tp.*, 137 Mich. 475, 11 Detroit Leg. N. 357. See also *N. Boyington Co. v. Southwick*, 120 Wis. 184.

4. Assessment in Name of Record Owners. — *Wagoner v. Maumus*, 112 La. 229; *Williams v. Chaplain*, 112 La. 1075. See also *Lancy v. Boston*, 186 Mass. 128.

676. 1. Resident and Nonresident Lands. — *Sanders v. Carley*, 178 N. Y. 622, affirming 83

N. Y. App. Div. 193; *Sanders v. Saxton*, 89 N. Y. App. Div. 421, affirming (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 574; *Rowley v. Poughkeepsie*, 106 N. Y. App. Div. 258.

Seated and Unseated Lands. — *Blackburn v. Lewis*, 45 Oregon 422. See also *Southern Banking, etc., Co. v. Wilcox Lumber Co.*, 119 Ga. 519.

2. Curative Acts. — *Sanders v. Saxton*, 89 N. Y. App. Div. 421, affirming (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 574; *Rowley v. Poughkeepsie*, 106 N. Y. App. Div. 258.

677. 1. Life Tenancies — Dower — Curtesy. — *Barnes v. Bee*, 138 Fed. Rep. 476.

2. Statutory Directions — In General. — *Abbott v. Frost*, 185 Mass. 398; *Murray v. Hinds*, 30 Mont. 466.

3. Severance of Ownership. — *Barnes v. Bee*, 138 Fed. Rep. 476; *Cherokee, etc., Coal, etc., Co. v. Crawford County*, (Kan. 1905) 80 Pac. Rep. 601.

678. 1. Easements. — Where portions of a lot of land were subjected to public easements which virtually deprived the owner of the use thereof, such portions were held to be exempt from taxation, or assessable to owners of the easements, and not assessable to the owner, even though he held the fee. *Lancy v. Boston*, 186 Mass. 128.

2. Deceased Owners. — *Williams v. Chaplain*, 112 La. 1075.

Assessment to "the Estate of M." Void. — *Miller v. Brooks*, 120 Ga. 232.

679. 1. Trustees. — *People v. O'Donnel*, 106 N. Y. App. Div. 526.

More than One Trustee — Assessment to One Alone Valid. — *Clarke v. Addeman*, 26 R. I. 168. Resident and Nonresident Trustees — Resident Assessable for Half Only. — *People v. Wells*, 182 N. Y. 314, reversing 101 N. Y. App. Div. 600.

3. Partnership Property. — *Carney v. People*, 210 Ill. 434; *School Dist v. Bowman*, 178 Mo. 654; *People v. Wells*, 177 N. Y. 586, affirming 85 N. Y. App. Div. 440.

4. Joint Ownership. — *McWilliams v. Gulf States Land, etc., Co.*, 111 La. 194.

Failure to Insert Name of One or More Joint Owners Not Fatal. — *Joyes v. Louisville*, 82 S. W. Rep. 432, 26 Ky. L. Rep. 713.

680. 2. Agents. — *Carstairs v. Cochran*,

- 681.** (b) *Estates of Decedents.* — See notes 1, 2.
682. (5) *Presumptions.* — See note 2.
683. *f. DESCRIPTION OF PROPERTY — (2) Description of Personalty —*
 (a) *In General.* — See note 1.
 (b) *Waiver and Estoppel.* — See note 3.
 (3) *Description of Realty — (a) General Rule.* — See note 4.
684. (b) *How Description May Be Aided — aa. IN GENERAL.* — See note 1.
685. *bb. PAROL EVIDENCE — JUDICIAL NOTICE.* — See note 1.
 (c) *Abbreviations.* — See note 2.
686. (d) *Statutory Directions.* — See notes 1, 2.
 (e) *Descriptions in Assessments and in Conveyances.* — See note 3.
687. (f) *Separate Assessment of Parcels.* — See notes 1, 2.
688. See note 2.

193 U. S. 10; *German Trust Co. v. Board of Equalization*, 121 Iowa 325; *Heinz v. Board of Equalization*, 121 Iowa 445; *State v. Fleming*, (Neb. 1903) 97 N. W. Rep. 1063.

681. 1. Assessments in Names of Successors in Title. — *Miller v. Brooks*, 120 Ga. 232; *Eliot v. Prime*, 98 Me. 48.

2. Statutory Provisions. — *Eliot v. Prime*, 98 Me. 48. See also *Brunson v. Starbuck*, 32 Ind. App. 457.

682. 2. Presumptions. — *Michigan R. Tax Cases*, 138 Fed. Rep. 223; *La Grange Hydraulic Gold Min. Co. v. Carter*, 142 Cal. 560; *Savings, etc., Soc. v. San Francisco*, 146 Cal. 673; *Com. v. Higgins*, (Ky. 1904) 82 S. W. Rep. 601; *Bell v. Lexington*, 85 S. W. Rep. 1081, 27 Ky. L. Rep. 591; *State v. Birch*, 186 Mo. 205; *People v. O'Donnell*, 106 N. Y. App. Div. 526; *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888.

683. 1. Description of Personalty. — *Carney v. People*, 210 Ill. 434; *Brunson v. Starbuck*, 32 Ind. App. 457.

3. Waiver and Estoppel. — See *Belknap v. Com.*, (Ky. 1905) 85 S. W. Rep. 693; *Sebree v. Nutter*, (Ky. 1905) 87 S. W. Rep. 1072.

4. Description of Realty — General Rule and Illustrations. — *United States.* — *Barnes v. Bee*, 138 Fed. Rep. 476; *Paine v. Germantown Trust Co.*, (C. C. A.) 136 Fed. Rep. 527.

California. — *Savings, etc., Soc. v. San Francisco*, 146 Cal. 673, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 682 [683]; *Palomares Land Co. v. Los Angeles County*, 146 Cal. 530.

Indiana. — *Brown v. Reeves*, 31 Ind. App. 517.
Kansas. — *Douglass v. Byers*, 69 Kan. 59.

Louisiana. — *Getman v. Harrison*, 112 La. 435; *Posey v. New Orleans*, 113 La. 1050.

Michigan. — *Mayot v. Auditor Gen.*, (Mich. 1905) 104 N. W. Rep. 19; *Newaygo Portland Cement Co. v. Sheridan Tp.*, 137 Mich. 475, 11 Detroit Leg. N. 357.

Mississippi. — *Crawford v. McLaurin*, 83 Miss. 265, 279; *Gibbs v. Hall*, (Miss. 1905) 38 So. Rep. 369.

New York. — *Rochester v. Farrar*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 394.

Oregon. — *Oregon R., etc., Co. v. Umatilla County*, (Oregon 1905) 81 Pac. Rep. 352.

South Dakota. — *Moran v. Thomas*, (S. Dak. 1905) 104 N. W. Rep. 212.

Utah. — *Moon v. Salt Lake County*, 27 Utah 435.

West Virginia. — *Mosser v. Moore*, 56 W.

Va. 478, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 683.

Easement, though Realty, Not Taxable under Description "Five Miles of Highway." — *People v. Albany, etc.*, Turnpike Road, 180 N. Y. 401, reversing 94 N. Y. App. Div. 509.

684. 1. How Description May Be Aided. — *Newaygo Portland Cement Co. v. Sheridan Tp.*, 137 Mich. 475, 11 Detroit Leg. N. 357; *Corbet v. Rocksbury*, 94 Minn. 397; *Washington Timber, etc., Co. v. Smith*, 34 Wash. 625; *N. Boyington Co. v. Southwick*, 120 Wis. 184.

685. 1. Parol Evidence. — *Paine v. Germantown Trust Co.*, (C. C. A.) 136 Fed. Rep. 527; *Douglass v. Byers*, 69 Kan. 59; *Crawford v. McLaurin*, 83 Miss. 265, 279; *Gibbs v. Hall*, (Miss. 1905) 38 So. Rep. 369; *Oregon R., etc., Co. v. Umatilla County*, (Oregon 1905) 81 Pac. Rep. 352.

2. Abbreviations. — *Douglass v. Byers*, 69 Kan. 59; *Newaygo Portland Cement Co. v. Sheridan Tp.*, 137 Mich. 475, 11 Detroit Leg. N. 357; *Stoddard v. Lyon*, (S. Dak. 1904) 99 N. W. Rep. 1116; *Washington Timber, etc., Co. v. Smith*, 34 Wash. 625. Compare *Moran v. Thomas*, (S. Dak. 1905) 104 N. W. Rep. 212; *Jackson v. Bailey*, (S. Dak. 1905) 104 N. W. Rep. 268.

686. 1. Statutory Directions — Different Methods of Describing Real Estate. — *Kenson v. Gage*, 34 Tex. Civ. App. 547.

2. Stoddard v. Lyon, (S. Dak. 1904) 99 N. W. Rep. 1116. See also *Mayot v. Auditor Gen.*, (Mich. 1905) 104 N. W. Rep. 19.

3. Descriptions in Assessments and in Conveyances. — *Green v. McGrew*, 35 Ind. App. 104.

A Description. — *N. Boyington Co. v. Southwick*, 120 Wis. 184.

687. 1. Separate Assessment of Parcels — General Rules. — *Barnes v. Bee*, 138 Fed. Rep. 476; *Hamilton Mfg. Co. v. Lowell*, 185 Mass. 114; *Phelps v. Brumback*, 107 Mo. App. 16; *Dickson v. Burckmeyer*, 67 S. Car. 526.

2. Assessments Grouping and Joining Land Owned by Person Assessed with That Not Owned by Him. — *Wagoner v. Maumus*, 112 La. 229; *Lancy v. Boston*, 186 Mass. 128; *Gehrhardt v. Schwartz*, 102 N. Y. App. Div. 389.

688. 2. Parcels Owned and Occupied as a Single Tract. — *Newaygo Portland Cement Co. v. Sheridan Tp.*, 137 Mich. 475, 11 Detroit Leg. N. 357.

Single Tract Extending into Separate Tax Districts. — See *supra*, this title, **649. 3.**

688. (g) *Waiver and Estoppel.* — See note 3.

689. g. *VALUATION OF PROPERTY* — (1) *In General.* — See notes 2, 3.

690. (2) *How Values Determined.* — See notes 1, 2.

(3) *Methods of Valuation* — *Elements of Value* — (a) *In General.* —

See note 3.

691. See note 2.

(b) *Statutory Directions.* — See notes 3, 4.

(4) *Separate Interests Arising Out of Same Property.* — See note 5.

(5) *Choses in Action.* — See note 6.

692. (6) *Deducting Amount of Indebtedness* — (a) *General Rule.* — See note 1.

(b) *Statutory Changes in Rule.* — See note 2.

693. See note 2.

694. (7) *Omission of Dollar Mark from Roll.* — See note 1.

695. h. *COMPLETION AND RETURN OF ASSESSMENT* — (1) *In General* — *Return.* — See note 1.

(2) *Authentication* — (a) *Mandatory Statutes.* — See note 2.

696. (b) *Directory Statutes.* — See note 5.

697. (d) *Curative Acts.* — See notes 2, 3.

688. 3. *Descriptions in Former Assessments.* — *Contra*, *Mayot v. Auditor Gen.*, (Mich. 1905) 104 N. W. Rep. 19.

689. 2. *Actual or Fair Cash Value.* — *Michigan R. Tax Cases*, 138 Fed. Rep. 223; *Tennessee Coal, etc., Co. v. State*, 141 Ala. 103; *Zeigler v. Blackford County*, 33 Ind. App. 375; *Parkinson v. Thompson*, 164 Ind. 609; *Fell v. West*, 35 Ind. App. 20; *Citizens Nat. Bank v. Com.*, (Ky. 1904) 80 S. W. Rep. 479; *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255; *Ankeny v. Blakley*, 44 Oregon 78; *Truchon v. Chicoutimi*, 25 Quebec Super. Ct. 55.

3. *Assessments at Less than Actual Value.* — See *People v. Feitner*, 96 N. Y. App. Div. 615.

690. 1. *How Values Determined.* — *State v. Carr*, 178 Mo. 229.

2. *Arbitrary Valuations.* — *Weber v. Baird*, 208 Ill. 209; *Zeigler v. Blackford County*, 33 Ind. App. 375.

3. *Methods of Valuation* — *Elements of Value.* — *Tennessee Coal, etc., R. Co. v. State*, 141 Ala. 103; *Arkansas Cypress Shingle Co. v. Lonoke County*, (Ark. 1905) 84 S. W. Rep. 1029; *Saco Water Power Co. v. Buxton*, 98 Me. 295; *Penobscot Chemical Fibre Co. v. Bradley*, 99 Me. 263; *Ankeny v. Blakley*, 44 Oregon 78; *Interstate Coal, etc., Co. v. Com.*, 103 Va. 586; *State v. Williams*, 123 Wis. 61.

691. 2. *Erroneous Method of Valuation.* — *State v. Williams*, 123 Wis. 61.

3. *Statutory Directions.* — *Arkansas Cypress Shingle Co. v. Lonoke County*, (Ark. 1905) 84 S. W. Rep. 1029; *Swift v. Assessors*, (La. 1905) 38 So. Rep. 1006; *Cudahy Packing Co. v. Assessors*, (La. 1905) 38 So. Rep. 1008; *Interstate Coal, etc., Co. v. Com.*, 103 Va. 586.

4. *Actual View.* — *Grant Land Assoc. v. People*, 213 Ill. 256.

Actual View Unnecessary Where Not Required by Statute. — *State v. Carr*, 178 Mo. 229.

5. *Surface of Mining Claim Laid Off in Town Lots* — *Separate Valuations Proper.* — *Murray v. Hinds*, 30 Mont. 466.

6. *Choses in Action.* — *Cooper v. Board of Review*, 207 Ill. 472.

692. 1. *Deducting Amount of Indebtedness* — *General Rule.* — *In re Bailies*, 127 Iowa 124; *People v. O'Donnell*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 521.

2. *Statutes Authorizing Deduction for Indebtedness.* — *Palomares Land Co. v. Los Angeles County*, 146 Cal. 530; *Skilton v. Colebrook*, 76 Conn. 666; *Barkley v. Dale*, 213 Ill. 614; *McCrorry v. O'Keefe*, 162 Ind. 534; *State v. Northern Pac. R. Co.*, (Minn. 1905) 103 N. W. Rep. 731; *Lancaster County v. McDonald*, (Neb. 1905) 103 N. W. Rep. 78; *State v. Fleming*, (Neb. 1903) 97 N. W. Rep. 1063; *People v. Miller*, 90 N. Y. App. Div. 599, *affirmed* 179 N. Y. 564; *People v. Wells*, 94 N. Y. App. Div. 463, *affirmed* 179 N. Y. 566.

Bank Stock. — *Hull v. Alexander*, 69 Ohio St. 75.

Taxpayer Cannot Deduct Amount of Prior Taxes Owned by Him. — *In re Bailies*, 127 Iowa 124.

693. 2. *Corporations.* — *State v. Northern Pac. R. Co.*, (Minn. 1905) 103 N. W. Rep. 731; *People v. Feitner*, 92 N. Y. App. Div. 518. See also *People v. Miller*, 90 N. Y. App. Div. 599, *affirmed* 179 N. Y. 564.

694. 1. *Omission of Dollar Mark.* — *Washington Timber, etc., Co. v. Smith*, 34 Wash. 625.

695. 1. *New York v. Ferris*, 91 N. Y. App. Div. 223.

2. *Authentication* — *Mandatory Statutes.* — *Lowe v. Detroit*, 138 Mich. 541, 11 Detroit Leg. N. 666; *Raquette Falls Land Co. v. International Paper Co.*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 357, *affirmed* 94 N. Y. App. Div. 609; *Douglas v. Fargo*, 13 N. Dak. 467; *Horton v. Driskell*, 13 Wyo. 66.

No Authentication Required in Oregon. — *Oregon R., etc., Co. v. Umatilla County*, (Oregon 1905) 81 Pac. Rep. 352.

696. 5. *Statutes Construed or Declared to Be Directory.* — *Corbet v. Rocksbury*, 94 Minn. 397; *Jackson v. Rowe*, 106 N. Y. App. Div. 65.

697. 2. *Curative Acts.* — See *Rochester v. Farrar*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 394.

697. (e) *Equitable Relief*. — See note 4.

(3) *Revision and Correction of Roll*. — See notes 5, 7.

698. See notes 1, 2.

7. *Assessment of Escaped Property — Reassessment — a. IN GENERAL.*

— See note 3.

699. See notes 1, 2, 3.

700. *b. BAD FAITH AND NEGLIGENCE OF TAXPAYER.* — See note 1.

c. REASSESSMENTS. — See notes 4, 5, 6.

701. *d. TIME OF MAKING ASSESSMENT.* — See notes 1, 2.

e. RELATION BACK OF ASSESSMENT — (1) In General. — See note 3.

f. DEATH OF TAXPAYER. — See note 5.

g. REGULAR ASSESSMENT AS RES JUDICATA — (1) General Rule. — See note 6.

697. 3. *Irregular Assessment.* — Wallace v. McEchron, 176 N. Y. 424.

4. *Equitable Relief Against Void Assessment.* — Douglas v. Fargo, 13 N. Dak. 467.

5. *Revision and Correction Before Completion of Roll.* — Bialy v. Bay City, (Mich. 1905) 102 N. W. Rep. 1033, 11 Detroit Leg. N. 927.

7. *Revision and Correction After Completion and Return of Roll.* — Savings, etc., Soc. v. San Francisco, 146 Cal. 673; Grant Land Assoc. v. People, 213 Ill. 256; Barkley v. Dale, 213 Ill. 614; Bialy v. Bay City, (Mich. 1905) 102 N. W. Rep. 1033, 11 Detroit Leg. N. 927.

Assessors May Correct Error Made in Transcribing to Collector's List. — Eliot v. Prime, 98 Me. 48.

698. 1. *Hancock County v. Simmons*, 86 Miss. 302.

Evidence Aliunde. — Sweetsir v. Chandler, 98 Me. 145.

2. *Hancock County v. Simmons*, 86 Miss. 302.

3. *Escaped Property.* — Western Assur. Co. v. Halliday, 127 Fed. Rep. 830; Rosasco v. Tuolumne County, 143 Cal. 430; Weber v. Baird, 208 Ill. 209; Clark v. Horn, 122 Iowa 375; Belknap v. Com., (Ky. 1905) 85 S. W. Rep. 693; Bell v. Lexington, 85 S. W. Rep. 1081, 27 Ky. L. Rep. 591; State v. Assessors, 111 La. 982; Gerard v. Duncan, 84 Miss. 731; Arbuckle v. McCutcheon, 111 Tenn. 514; State v. Fidelity, etc., Co., 35 Tex. Civ. App. 214; Phillips v. Thurston County, 35 Wash. 187; Horton v. Driskell, 13 Wyo. 66; Ricketts v. Crewdson, 13 Wyo. 284, 300. And see generally the cases cited *infra*, this subsection.

699. 1. *Power Dependent on Statutory Authority.* — Barkley v. Dale, 213 Ill. 614; McConnell v. Hampton, 164 Ind. 547; Security Sav. Bank v. Carroll, (Iowa 1905) 103 N. W. Rep. 379; Milster v. Spartanburg, 68 S. Car. 26.

2. *Purpose and Construction of Statutes — Penal Provisions.* — *In re Morgan*, 125 Iowa 247; Muir v. Bardstown, (Ky. 1905) 87 S. W. Rep. 1096; Adams v. Kuykendall, 83 Miss. 571; State v. Vogelsang, 183 Mo. 17.

Exempting Statute Unconstitutional — Property Not Assessable for Previous Years. — *In re Wilmerton*, 206 Ill. 15.

3. *Assessments Made by Unauthorized Officers or Boards.* — Chicago, etc., Electric R. Co. v. Voll-

man, 213 Ill. 609; Parkison v. Thompson, 164 Ind. 609; Hull v. Alexander, 69 Ohio St. 75.

700. 1. *Bad Faith and Negligence of Taxpayer — General Rule.* — See Adams v. Kuykendall, 83 Miss. 571.

4. *Void Assessments.* — Vanceburg, etc., Turnpike Road Co. v. Maysville, etc., R. Co., 117 Ky. 275.

Lands Assessed to One Not the Owner, but the taxes on which are paid, cannot be reassessed to the true owner. Falls Branch Jellico Land, etc., Co. v. Com., 83 S. W. Rep. 108, 26 Ky. L. Rep. 1028.

Personally Assessed and Taxes Paid in Wrong District. — See Snakenberg v. Stein, 126 Iowa 650; Jandt v. Sioux County, (Neb. 1905) 102 N. W. Rep. 763.

5. *Assessments Undervaluing Property.* — Compare German Sav. Bank v. Trowbridge, 124 Iowa 514.

After Payment of Tax. — Compare Peoples' Sav. Bank v. Layman, 134 Fed. Rep. 635.

6. *Reassessment by State Board in Compromising Litigation Proper under Laws of Arkansas.* — Railroad Tax Cases, 136 Fed. Rep. 233.

701. 1. *Time of Making Assessments — General Rule.* — Savings, etc., Soc. v. San Francisco, 146 Cal. 673; *In re Wilmerton*, 206 Ill. 15; Snakenberg v. Stein, 126 Iowa 650; Botto v. Louisville, 117 Ky. 798; London v. Hope, (Ky. 1904) 80 S. W. Rep. 817; State v. Carr, 178 Mo. 229; State v. Vogelsang, 183 Mo. 17; Milster v. Spartanburg, 68 S. Car. 26.

2. *Exceptions to Rule.* — Schoonover v. Petcina, 126 Iowa 261.

Kentucky Statute — Right Barred in Five Years. — Com. v. Citizens' Nat. Bank, 117 Ky. 946; Citizens' Nat. Bank v. Com., (Ky. 1904) 80 S. W. Rep. 479; Falls Branch Jellico Land, etc., Co. v. Com., 83 S. W. Rep. 108, 26 Ky. L. Rep. 1028; Com. v. Thomas, 83 S. W. Rep. 572, 26 Ky. L. Rep. 1128.

3. *Relation Back of Assessment.* — Eliot v. Prime, 98 Me. 48; Sweetsir v. Chandler, 98 Me. 145.

5. *Death of Taxpayer.* — Brunson v. Starbuck, 32 Ind. App. 457; Buck v. Beach, 164 Ind. 37.

Executor Not Personally Liable. — Scott v. People, 210 Ill. 594. See generally the title EXECUTORS AND ADMINISTRATORS, 947. 4, 5.

6. *Res Judicata.* — Jefferson County v. Watertown, 98 N. Y. App. Div. 494; Milster v. Spar-

- 701.** (2) *Assessments in Gross*. — See note 7.
- 702.** *h. FERRETING CONTRACTS*. — See note 1.
- 8.** *Compensation of Assessing Officers*. — See note 3.
- 704.** *9. Liability of Assessing Officers—b. CRIMINAL AND PENAL LIABILITY*. — See note 2.
- 10.** *Notice and Opportunity to Be Heard—a. BY ASSESSORS*. — See notes 3, 5.
- b. NOTICE OF MEETINGS OF BOARDS OF REVIEW*. — See note 6.
- 705.** See notes 1, 2.
- 706.** See note 1.
- 707.** *c. MANNER OF GIVING NOTICE—(1) By Publication*. — See note 1.
- (2) By Statutory Provisions*. — See note 2.
- 708.** See note 1.
- d. WAIVER OF NOTICE*. — See note 3.
- 709.** *11. Appeal and Review—b. BOARDS OF EQUALIZATION AND REVIEW—(1) In General—Statutory Provisions*. — See note 3.

tanburg, 68 S. Car. 26. But see *In re Wilmer-ton*, 206 Ill. 15.

701. *7. Assessments in Gross*. — Carney *v. People*, 210 Ill. 434. But see *Bell v. Lexington*, 85 S. W. Rep. 1081, 27 Ky. L. Rep. 591; *Sweetsir v. Chandler*, 98 Me. 145.

702. *1. Ferreting Contracts—Express Statutes*. — Reed *v. Cunningham*, 121 Iowa 555. See also *Gannaway v. McFall*, 109 Ill. App. 23.

3. *Compensation*. — *Whitley County v. Garty*, 161 Ind. 464; *Daily v. Daviess County*, (Ind. 1905) 74 N. E. Rep. 977; *Powers v. Osbon*, 82 S. W. Rep. 419, 26 Ky. L. Rep. 744.

704. *2. Criminal and Penal Liability*. — State *v. Zillmann*, 121 Wis. 472.

3. *Thornburg v. Cardell*, 123 Iowa 313; *Fennimore v. Boatner*, 112 La. 1080; *Hurt v. Bristol*, (Va. 1905) 51 S. E. Rep. 223.

5. *Where Assessor Accepts List Without Question Notice Must Be Given Before Alteration*. — *People v. Feitner*, 92 N. Y. App. Div. 518. See also *East Granby v. Hartford Electric Light Co.*, 76 Conn. 169.

6. *Notice Necessary Before Proceedings Become Final*. — *Bialy v. Bay City*, (Mich. 1905) 102 N. W. Rep. 1033, 11 Detroit Leg. N. 927; *Montana Ore Purchasing Co. v. Maher*, 32 Mont. 480, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 704, 705; *New Jersey Zinc Co. v. Board of Equalization*, 70 N. J. L. 186; *People v. Wells*, 181 N. Y. 252, affirming 99 N. Y. App. Div. 364; *People v. Wells*, 182 N. Y. 314, reversing 101 N. Y. App. Div. 600; *People v. Wells*, 91 N. Y. App. Div. 172; *People v. Feitner*, 92 N. Y. App. Div. 518. See also *Fell v. West*, 35 Ind. App. 20; *U. S. Fidelity, etc., Co. v. Board of Education*, (Ky. 1905) 86 S. W. Rep. 1120.

Notice of Increase Unnecessary After Hearing Application for Reduction. — *Lake Shore, etc., R. Co. v. Powers*, 138 Fed. Rep. 257.

705. *1. Opportunity to Be Heard Before Legal Proceedings Become Effectual*. — *Montana Ore Purchasing Co. v. Maher*, 32 Mont. 480.

Meeting of Board as Affecting Opportunity to Be Heard. — *Trumbull v. Palmer*, 104 N. Y. App. Div. 51, modifying (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 628.

Objections Must Be Made Within Statutory

Period. — *Jersey City v. State Board of Taxation*, 70 N. J. L. 159. See also *Matter of Cathedral of the Incarnation*, 91 N. Y. App. Div. 543.

Due Process of Law. — *St. Louis, etc., R. Co. v. Davis*, 132 Fed. Rep. 629; *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255.

2. *Notice of Addition of Omitted Property*. — *Carney v. People*, 210 Ill. 434.

If the Taxpayer Is Required to List His Property. — *Lewis v. State*, 69 Ohio St. 473. See also *Rosasco v. Tuolumne County*, 143 Cal. 430.

706. *1. Compliance with Statutory Requirements Essential*. — *Bialy v. Bay City*, (Mich. 1905) 102 N. W. Rep. 1033, 11 Detroit Leg. N. 927; *New Jersey Zinc Co. v. Board of Equalization*, 70 N. J. L. 186.

Notice to Resident Agent of Unknown Taxpayer Sufficient. — *Com. v. Citizens' Nat. Bank*, 117 Ky. 946.

707. *1. Notice by Publication in Newspaper*. — *Bialy v. Bay City*, (Mich. 1905) 102 N. W. Rep. 1033, 11 Detroit Leg. N. 927; *Trumbull v. Palmer*, 104 N. Y. App. Div. 51, modifying (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 628. See also *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255.

2. *Carney v. People*, 210 Ill. 434; *Fell v. West*, 35 Ind. App. 20; *Chicago, etc., R. Co. v. Richardson County*, (Neb. 1904) 100 N. W. Rep. 950; *State v. Back*, (Neb. 1904) 100 N. W. Rep. 952; *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255; *Ankeny v. Blakley*, 44 Oregon 78.

708. *1. Where Board Is Authorized to Raise, Lower, or Alter Assessments Without Notice*. — *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255. Compare *Carney v. People*, 210 Ill. 434.

3. *Waiver of Notice*. — *Savings, etc., Soc. v. San Francisco*, 146 Cal. 673.

No Waiver Where Board Wholly Without Jurisdiction. — *Montana Ore Purchasing Co. v. Maher*, 32 Mont. 480.

Payment of Tax Is Waiver of Notice. — *U. S. Fidelity, etc., Co. v. Board of Education*, (Ky. 1905) 86 S. W. Rep. 1120.

709. *3. In General—Statutory Provisions*. — *Tennessee Coal, etc., Co. v. State*, 141 Ala. 103; *Feltham v. Washington County*, 10 Idaho 182; *Detroit United R. Co. v. State Tax Com'rs*,

710. See notes 1, 2.

711. See note 1.

(2) *Powers and Duties* — (a) *In General*. — See note 2.

712. See note 1.

713. (b) *Original and Appellate Jurisdiction*. — See notes 1, 2.

714. (c) *Equalization*. — See note 1.

(3) *Proceedings of Board*. — See notes 3, 4.

715. *Procedure*. — See notes 5, 6, 7.

716. See notes 1, 2, 3, 4, 5, 6, 7.

136 Mich. 96, 10 Detroit Leg. N. 993; Hacker v. Howe, (Neb. 1904) 101 N. W. Rep. 255; State v. Eldredge, 27 Utah 477.

Board Not Legislative Court. — Albin Co. v. Louisville, 117 Ky. 895.

710. 1. Hacker v. Howe, (Neb. 1904) 101 N. W. Rep. 255.

2. *Application to Assessors*. — See Nathan v. Spokane County, 35 Wash. 26, 102 Am. St. Rep. 888.

711. 1. *New York — Form and Contents of Application, Hearing, and Determination*. — People v. Feitner, 90 N. Y. App. Div. 9; Matter of Cathedral of the Incarnation, 91 N. Y. App. Div. 543; People v. Wells, 93 N. Y. App. Div. 212, affirmed 179 N. Y. 529; People v. Wells, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 606; People v. Feitner, 95 N. Y. App. Div. 481; People v. Wells, (Supm. Ct. Spec. T.) 92 N. Y. Supp. 769; People v. O'Donnell, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 519, 521; People v. Feitner, 107 N. Y. App. Div. 267.

2. *Boards of Equalization and Review Statutory and Inferior Tribunals*. — Arapahoe County v. Denver Union Water Co., 32 Colo. 382; Woodstown v. Salem County, (N. J. 1903) 56 Atl. Rep. 124; State v. Hobe, 124 Wis. 8; Horton v. Driskell, 13 Wyo. 66.

712. 1. *Powers and Duties — In General — Alabama*. — Tennessee Coal, etc., Co. v. State, 141 Ala. 103.

Colorado. — Arapahoe County v. Denver Union Water Co., 32 Colo. 382.

Illinois. — Weber v. Baird, 208 Ill. 209; Carney v. People, 210 Ill. 434; Barkley v. Dale, 213 Ill. 614.

Indiana. — Brunson v. Starbuck, 32 Ind. App. 457.

Iowa. — Wahkonsa Invest. Co. v. Ft. Dodge, 125 Iowa 148.

Kentucky. — Albin Co. v. Louisville, 117 Ky. 895.

Michigan. — Bialy v. Bay City, (Mich. 1905) 102 N. W. Rep. 1033, 11 Detroit Leg. N. 927.

Mississippi. — Hancock County v. Simmons, 86 Miss. 302.

Nebraska. — State v. Back, (Neb. 1904) 100 N. W. Rep. 952; Hacker v. Howe, (Neb. 1904) 101 N. W. Rep. 255.

New Jersey. — Woodstown v. Salem County, (N. J. 1903) 56 Atl. Rep. 124; New Jersey Zinc Co. v. Board of Equalization, 70 N. J. L. 186; Cregar v. Lebanon Tp., 70 N. J. L. 598; Englewood v. Board of Equalization, 71 N. J. L. 423.

New York. — People v. Priest, 180 N. Y. 532, affirming 90 N. Y. App. Div. 520.

North Carolina. — Wilson v. Green, 135 N. Car. 343.

Oregon. — Ankeny v. Blakley, 44 Oregon 78.

Utah. — State v. Eldredge, 27 Utah 477.

Wisconsin. — State v. Hobe, 124 Wis. 8.

Wyoming. — Horton v. Driskell, 13 Wyo. 66; Ricketts v. Crewdson, 13 Wyo. 284, 300.

713. 1. *Original and Appellate Jurisdiction*. — Chicago, etc., R. Co. v. People, 213 Ill. 458; Chicago, etc., R. Co. v. People, 213 Ill. 497; Wabash R. Co. v. People, 213 Ill. 522; Wilson v. Green, 135 N. Car. 343; Ankeny v. Blakley, 44 Oregon 78; Ricketts v. Crewdson, 13 Wyo. 300.

2. *Review and Approval as Condition Precedent to Finality of Assessment*. — Hacker v. Howe, (Neb. 1904) 101 N. W. Rep. 255.

714. 1. *Broad Construction of Equalization Statutes*. — See Hacker v. Howe, (Neb. 1904) 101 N. W. Rep. 255, distinguishing between the powers of state and local boards of equalization.

3. *Statutes Mandatory as to Time and Place of Meeting*. — New Jersey Zinc Co. v. Board of Equalization, 70 N. J. L. 186; People v. Wells, 91 N. Y. App. Div. 172.

4. *Statutes Directory Merely*. — Auditor Gen. v. Griffin, (Mich. 1905) 103 N. W. Rep. 854; State v. Zillmann, 121 Wis. 472.

Person Aggrieved May Complain at Any Regular or Special Session of Board. — Nathan v. Spokane County, 35 Wash. 26, 102 Am. St. Rep. 888.

715. 5. Fell v. West, 35 Ind. App. 20; Schoonover v. Petcina, 126 Iowa 261; People v. Priest, 180 N. Y. 532, affirming 90 N. Y. App. Div. 520.

6. *Complaint Unnecessary*. — Tennessee Coal, etc., Co. v. State, 141 Ala. 103; Page v. Melrose, 186 Mass. 361.

7. *Complaint Necessary*. — Arapahoe County v. Denver Union Water Co., 32 Colo. 382.

716. 1. *Amendment of Complaint*. — See Arapahoe County v. Denver Union Water Co., 32 Colo. 382.

2. *Ex Parte Affidavits May Be Received as Evidence*. — People v. Priest, 180 N. Y. 532, affirming 90 N. Y. App. Div. 520.

3. *Board Not Concluded by Evidence*. — In re Maplewood Coal Co., 213 Ill. 283; State v. Williams, 123 Wis. 61.

4. *Board Can Act Only upon Evidence*. — Tennessee Coal, etc., Co. v. State, 141 Ala. 103; State v. Williams, 123 Wis. 61; State v. Fisher, 124 Wis. 271.

Wisconsin — Letters and Affidavits Excluded. — State v. Hobe, 124 Wis. 8.

5. *Hearing of Evidence Not Obligatory*. — In re Maplewood Coal Co., 213 Ill. 283; Hacker v. Howe, (Neb. 1904) 101 N. W. Rep. 255; State v. Williams, 123 Wis. 61; Ricketts v. Crewdson, 13 Wyo. 300.

717. (4) *Record of Proceedings*. — See notes 1, 2, 3.

Conclusiveness of Record. — See note 6.

718. *Statutes Mandatory*. — See note 3.

c. JUDICIAL TRIBUNALS — (1) *No Inherent Right of Appeal*. —

See notes 8, 9.

719. (2) *Review upon Merits under Statutory Provisions*. — See notes 1, 2.

720. See note 1.

(3) *Assessment-Ordinarily Conclusive*. — See note 8.

721. See notes 1, 3.

722. See notes 1, 2, 3.

716. 6. *Action Must Be Reasonable*. — *People v. Wells*, 93 N. Y. App. Div. 212, *affirmed* 179 N. Y. 529; *State v. Williams*, 123 Wis. 61.

7. *Burden of Proof upon Applicant*. — *In re Maplewood Coal Co.*, 213 Ill. 283; *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255. See also *Tennessee Coal, etc., Co. v. State*, 141 Ala. 103.

717. 1. *Record Must Be Kept*. — *Seymour First Nat. Bank v. Isaacs*, 161 Ind. 278.

2. *Jurisdictional Facts Must Appear*. — *Bialy v. Bay City*, (Mich. 1905) 102 N. W. Rep. 1033, 11 Detroit Leg. N. 927; *Montana Ore Purchasing Co. v. Maher*, 32 Mont. 480, *citing* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 717.

3. *Changes in Valuation Must Appear*. — *Weber v. Baird*, 208 Ill. 209.

6. *Varying Record by Proof Aliunde*. — *La Grange Hydraulic Gold Min. Co. v. Carter*, 142 Cal. 560; *Montana Ore Purchasing Co. v. Maher*, 32 Mont. 480, *citing* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 717.

718. 3. *Mere Irregularities Immaterial*. — *Auditor Gen. v. Griffin*, (Mich. 1905) 103 N. W. Rep. 854.

8. *No Inherent Right of Appeal*. — *Arapahoe County v. Denver Union Water Co.*, 32 Colo. 382; *Pilgrim Consol. Min. Co. v. Teller County*, (Colo. App. 1904) 78 Pac. Rep. 617; *Teller County v. Independence Consol. Gold Min. Co.*, 33 Colo. 205; *In re Wilmerton*, 206 Ill. 15; *Muir v. Bardstown*, (Ky. 1905) 87 S. W. Rep. 1096; *State v. Fleming*, (Neb. 1903) 97 N. W. Rep. 1063; *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255; *Wilson v. Green*, 135 N. Car. 343; *Philadelphia Co.'s Petition*, 210 Pa. St. 490; *Phillips v. Bancroft*, 75 Vt. 357; *Clark v. Mercer County Ct.*, 55 W. Va. 278.

9. *Assessments Not Necessarily Appealable Adjudications*. — *Wilson v. Green*, 135 N. Car. 343.

719. 1. *Review on Merits*. — *Tennessee Coal, etc., Co. v. State*, 141 Ala. 103; *Morris v. New Haven*, 77 Conn. 108; *Wakhonsa Invest. Co. v. Ft. Dodge*, 125 Iowa 148; *New York v. Matthews*, 180 N. Y. 41; *People v. Wells*, 182 N. Y. 314, *reversing* 101 N. Y. App. Div. 600; *People v. Wells*, 87 N. Y. App. Div. 284; *People v. Feitner*, 92 N. Y. App. Div. 518; *People v. Wells*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 606; *People v. Wells*, (Supm. Ct. Spec. T.) 92 N. Y. Supp. 769; *People v. O'Donnell*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 519; *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888. See also *People v. Wells*, 93 N. Y. App. Div. 212, *affirmed* 179 N. Y. 529.

2. *Right of Appeal*. — *Humbird Lumber Co. v. Morgan*, 10 Idaho 327; *Feltham v. Washington*

County, 10 Idaho 182; *Clark v. Mercer County Ct.*, 55 W. Va. 278.

Right Determined by Amount in Controversy. — *Contra*, *Bunkie Brick Works v. Police Jury*, 113 La. 1062.

Illinois — *Right Restricted to Claims of Exemption*. — *In re Maplewood Coal Co.*, 213 Ill. 283; *In re Wilmerton*, 206 Ill. 15.

Who May Appeal — *County Court as Representative of State*. — *Clark v. Mercer County Ct.*, 55 W. Va. 278.

Evidence Outside the Record. — *Schoonover v. Petcina*, 126 Iowa 261.

Must Be Substantial Grievance. — *People v. Feitner*, 95 N. Y. App. Div. 217, *affirmed* 180 N. Y. 536; *People v. Feitner*, 95 N. Y. App. Div. 481.

720. 1. *Reduction of Excessive Assessment*. — See *Weber v. Baird*, 208 Ill. 209; *Schoonover v. Petcina*, 126 Iowa 261; *People v. Feitner*, 107 N. Y. App. Div. 267.

8. *Assessment Ordinarily Conclusive* — *United States*. — *Missouri v. Dockery*, 191 U. S. 165; *Railroad Tax Cases*, 136 Fed. Rep. 233.

Indiana. — *Seymour First Nat. Bank v. Isaacs*, 161 Ind. 278.

Iowa. — *Security Sav. Bank v. Carroll*, (Iowa 1905) 103 N. W. Rep. 379.

Kentucky. — *Odd Fellows' Hall Assoc. v. Dayton*, 76 S. W. Rep. 181, 25 Ky. L. Rep. 665; *Citizens' Nat. Bank v. Com.*, (Ky. 1904) 80 S. W. Rep. 479; *Muir v. Bardstown*, (Ky. 1905) 87 S. W. Rep. 1096.

Nebraska. — *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255.

New York. — *People v. Priest*, 180 N. Y. 532, *affirming* 90 N. Y. App. Div. 520.

Vermont. — *Phillips v. Bancroft*, 75 Vt. 357. *West Virginia*. — *Clark v. Mercer County Ct.*, 55 W. Va. 278.

Wisconsin. — *State v. Williams*, 123 Wis. 61; *State v. Fisher*, 124 Wis. 271.

Wyoming. — *Ricketts v. Crewdson*, 13 Wyo. 284, 300.

721. 1. *Irregularities*. — *Brunson v. Starbuck*, 32 Ind. App. 457; *Auditor Gen. v. Griffin*, (Mich. 1905) 103 N. W. Rep. 854.

3. *Accidental Omission of Property*. — *Corbet v. Rocksbury*, 94 Minn. 397; *New York v. Tucker*, 91 N. Y. App. Div. 214, *affirmed* 182 N. Y. 535; *Trumbull v. Palmer*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 628, 104 N. Y. App. Div. 51.

722. 1. *Judgment of Court Not to Be Substituted for That of Assessors*. — *State v. Fisher*, 124 Wis. 271; *Ricketts v. Crewdson*, 13 Wyo. 284.

722. (4) *Proper Subjects for Judicial Inquiry*—(a) **Constitutional Questions.**
— See note 6.

(b) **Jurisdictional Questions.**— See note 7.

723. See notes 1, 2, 3, 4, 5.

(c) **Fraud.**— See note 6.

(5) *Equitable Relief.*— See notes 7, 8.

724. See notes 1, 2, 3, 4, 5, 6.

725. See note 1.

(6) *Mandamus.*— See note 2.

722. 2. Erroneous Exercise of Judgment Not Reviewable.— *United States.*— *Coulter v. Louisville, etc., R. Co.*, 196 U. S. 599; *Michigan R. Tax Cases*, 138 Fed. Rep. 223; *Weber v. Baird*, 208 Ill. 209; *Odd Fellows' Hall Assoc. v. Dayton*, 76 S. W. Rep. 181, 25 Ky. L. Rep. 665; *Citizens' Nat. Bank v. Com.*, (Ky. 1904) 80 S. W. Rep. 479; *Muir v. Bardstown*, (Ky. 1905) 87 S. W. Rep. 1096; *Auditor Gen. v. Griffin*, (Mich. 1905) 103 N. W. Rep. 854; *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255; *State v. Williams*, 123 Wis. 61; *State v. Fisher*, 124 Wis. 271.

3. Excessiveness of Assessment Not Reviewable.— *Weber v. Baird*, 208 Ill. 209; *in re Maplewood Coal Co.*, 213 Ill. 283; *Albin Co. v. Louisville*, 117 Ky. 895.

6. General Undervaluation Not Fundamentally Illegal.— *Penobscot Chemical Fibre Co. v. Bradley*, 99 Me. 263; *People v. Feitner*, 95 N. Y. App. Div. 217, *affirmed* 180 N. Y. 536; *People v. Feitner*, 95 N. Y. App. Div. 481.

7. Jurisdictional Questions Open to the Courts.— *Muir v. Bardstown*, (Ky. 1905) 87 S. W. Rep. 1096.

723. 1. Validity of Tax.— *Chicago, etc., Electric R. Co. v. Vollman*, 213 Ill. 609.

2. Whether Property Assessable.— *McCrory v. O'Keefe*, 162 Ind. 534; *Com. v. Morehead*, 78 S. W. Rep. 1105, 25 Ky. L. Rep. 1927.

3. Property Within Assessor's District.— *Phillips v. Thurston County*, 35 Wash. 187; *Horton v. Driskell*, 13 Wyo. 66.

4. Jurisdiction of Person Assessed.— *People v. Wells*, 182 N. Y. 314, *reversing* 101 N. Y. App. Div. 600.

5. All Clear Violations of Law Jurisdictional.— *State v. Williams*, 123 Wis. 61.

6. Fraud.— *Michigan R. Tax Cases*, 138 Fed. Rep. 223; *Henderson v. Pierce County*, 37 Wash. 201.

7. Want of Remedy at Law.— *Douglas Co. v. Stone*, 110 Fed. Rep. 812, *affirmed* 191 U. S. 557; *Nye v. Washburn*, 125 Fed. Rep. 817; *Jacksonville v. Massey Business College*, (Fla. 1904) 36 So. Rep. 432; *Weber v. Baird*, 208 Ill. 209; *Fell v. West*, 35 Ind. App. 20; *McConnell v. Hampton*, 164 Ind. 547; *Security Sav. Bank v. Carroll*, (Iowa 1905) 103 N. W. Rep. 379; *Wilson v. Green*, 135 N. Car. 343; *Douglas v. Fargo*, 13 N. Dak. 467; *Oregon R., etc., Co. v. Umatilla County*, (Oregon 1905) 81 Pac. Rep. 352; *Ricketts v. Crewdson*, 13 Wyo. 284. See also *Sisler v. Foster*, 72 Ohio St. 437.

8. Relief Against Want of Jurisdiction.— *Chicago, etc., Electric R. Co. v. Vollman*, 213 Ill. 609; *Smith v. Peterson*, 123 Iowa 672; *Muir v. Bardstown*, (Ky. 1905) 87 S. W. Rep. 1096;

Montana Ore Purchasing Co. v. Maher, 32 Mont. 480; *New York v. Vanderveer*, 91 N. Y. App. Div. 303; *Douglas v. Fargo*, 13 N. Dak. 467; *Horton v. Driskell*, 13 Wyo. 66.

724. 1. Fraud.— *Michigan R. Tax Cases*, 138 Fed. Rep. 223; *Weber v. Baird*, 208 Ill. 209; *Odd Fellows' Hall Assoc. v. Dayton*, 76 S. W. Rep. 181, 25 Ky. L. Rep. 665; *Albin Co. v. Louisville*, 117 Ky. 895; *Douglas v. Fargo*, 13 N. Dak. 467; *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888; *Henderson v. Pierce County*, 37 Wash. 201; *Ricketts v. Crewdson*, 13 Wyo. 284.

2. Payment of Lawful Tax Required.— *People's Nat. Bank v. Marye*, 191 U. S. 272; *Bell v. Lexington*, 85 S. W. Rep. 1081, 27 Ky. L. Rep. 591; *Auditor Gen. v. Griffin*, (Mich. 1905) 103 N. W. Rep. 854; *Montana Ore Purchasing Co. v. Maher*, 32 Mont. 480; *Mead v. Omaha*, (Neb. 1905) 102 N. W. Rep. 675; *Wilson v. Green*, 135 N. Car. 343; *Douglas v. Fargo*, 13 N. Dak. 467.

3. Injunction Authorized by Statute.— *Phillips v. Thurston County*, 35 Wash. 187; *Horton v. Driskell*, 13 Wyo. 66.

4. Irregularities.— *McCrory v. O'Keefe*, 162 Ind. 534; *Fell v. West*, 35 Ind. App. 20; *McConnell v. Hampton*, 164 Ind. 547; *Auditor Gen. v. Griffin*, (Mich. 1905) 103 N. W. Rep. 854; *Horton v. Driskell*, 13 Wyo. 66.

5. Questions of Valuation.— *Coulter v. Louisville, etc., R. Co.*, 196 U. S. 599; *Lake Shore, etc., R. Co. v. Powers*, 138 Fed. Rep. 257; *Weber v. Baird*, 208 Ill. 209; *Johnson v. Bradley-Watkins Tie Co.*, 85 S. W. Rep. 726, 27 Ky. L. Rep. 540; *People v. Priest*, 180 N. Y. 532, *affirming* 90 N. Y. App. Div. 520; *Wilson v. Green*, 135 N. Car. 343.

6. Grossly Excessive Valuation.— *Fell v. West*, 35 Ind. App. 20; *Odd Fellows' Hall Assoc. v. Dayton*, 76 S. W. Rep. 181, 25 Ky. L. Rep. 665; *Ankeny v. Blakley*, 44 Oregon 78; *Phillips v. Thurston County*, 35 Wash. 187; *Henderson v. Pierce County*, 37 Wash. 201.

725. 1. Gross Inequalities in Valuation.— *Pilgrim Consol. Min. Co. v. Teller County*, 32 Colo. 334; *Wead v. Omaha*, (Neb. 1905) 102 N. W. Rep. 675; *Horton v. Driskell*, 13 Wyo. 66.

2. Mandamus.— *Canal Constr. Co. v. Schlickum*, (Mich. 1905) 102 N. W. Rep. 737, 11 Detroit Leg. N. 835; *Milster v. Spartanburg*, 68 S. Car. 26. See also *Lewis v. State*, 69 Ohio St. 473.

Judicial Act Not Compelled by Mandamus.— *State v. Assessors*, 113 La. 925; *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255.

An Officer Charged with the Duty of Extending the Tax will not be compelled by mandamus

725. *d.* COLLATERAL ATTACK. — See notes 3, 4.

726. See notes 1, 2

e. EXCLUSIVENESS OF STATUTORY REMEDIES. — See note 3.

727. See note 1.

728. See note 1.

f. PRESUMPTIONS AND BURDEN OF PROOF. — See note 2.

729. See notes 1, 5.

to make corrections of the assessment roll.
People v. Opel, 207 Ill. 469.

725. 3. Assessments Made Judicially. — *People's Sav. Bank v. Layman*, 134 Fed. Rep. 635; *Security Sav. Bank v. Carroll*, (Iowa 1905) 103 N. W. Rep. 379; *Penobscot Chemical Fibre Co. v. Bradley*, 99 Me. 263; *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255; *Wead v. Omaha*, (Neb. 1905) 102 N. W. Rep. 675; *New York v. Matthews*, 180 N. Y. 41; *New York v. Vanderveer*, 91 N. Y. App. Div. 303; *Ankeny v. Blakley*, 44 Oregon 78; *Phillips v. Bancroft*, 75 Vt. 357; *Nathan v. Spokane County*, 35 Wash. 26, 102 Am. St. Rep. 888; *Ricketts v. Crewdson*, 13 Wyo. 284; *Ricketts v. Crewdson*, 13 Wyo. 300. See also *Muir v. Bardstown*, (Ky. 1905) 87 S. W. Rep. 1096.

4. Security from Collateral Attack. — *People's Sav. Bank v. Layman*, 134 Fed. Rep. 635; *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255; *Wead v. Omaha*, (Neb. 1905) 102 N. W. Rep. 675; *New York v. Tucker*, 91 N. Y. App. Div. 214, *affirmed* 182 N. Y. 535; *New York v. Vanderveer*, 91 N. Y. App. Div. 303; *Ankeny v. Blakley*, 44 Oregon 78; *Phillips v. Bancroft*, 75 Vt. 357; *Ricketts v. Crewdson*, 13 Wyo. 284. But see *Muir v. Bardstown*, (Ky. 1905) 87 S. W. Rep. 1096.

726. 1. Void Assessments Collaterally Attacked. — *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255; *Wead v. Omaha*, (Neb. 1905) 102 N. W. Rep. 675.

2. Irregularities Not Fatal. — *Savings, etc., Soc. v. San Francisco*, 146 Cal. 673; *Odd Fellows' Hall Assoc. v. Dayton*, 76 S. W. Rep. 181, 25 K. L. Rep. 665; *Flint Land Co. v. Godkin*, 136 Mich. 668, 11 Detroit Leg. N. 146; *New York v. Tucker*, 91 N. Y. App. Div. 214, *affirmed* 182 N. Y. 535; *Ankeny v. Blakley*, 44 Oregon 78; *Manor Real Estate, etc., Co. v. Cooner*, 209 Pa. St. 531; *Ricketts v. Crewdson*, 13 Wyo. 300.

3. Assessment Erroneous but Not Void — *United States*. — *Douglas Co. v. Stone*, 110 Fed. Rep. 812, *affirmed* 191 U. S. 557; *Nye v. Washburn*, 125 Fed. Rep. 817.

Colorado. — *Pilgrim Consol. Min. Co. v. Teller County*, 32 Colo. 334 (Colo. App. 1904) 78 Pac. Rep. 617; *Teller County v. Independence Consol. Gold Min. Co.*, 33 Colo. 205.

Florida. — *Jacksonville v. Massey Business College*, (Fla. 1904) 36 So. Rep. 432.

Illinois. — *Grant Land Assoc. v. People*, 213 Ill. 256.

Kentucky. — *Joyes v. Louisville*, 82 S. W. Rep. 432, 26 Ky. L. Rep. 713.

Massachusetts. — *Lancy v. Boston*, 186 Mass. 128.

Nebraska. — *Hacker v. Howe*, (Neb. 1904) 101 N. W. Rep. 255.

North Carolina. — *Wilson v. Green*, 135 N. Car. 343.

Oregon. — *Ankeny v. Blakley*, 44 Oregon 78.

Pennsylvania. — *Philadelphia Co.'s Petition*, 210 Pa. St. 490.

West Virginia. — *Clark v. Mercer County Ct.*, 55 W. Va. 278.

Wyoming. — *Ricketts v. Crewdson*, 13 Wyo. 284.

Procedure Not Available to One Claiming that Property Not Assessable. — See *Arapahoe County v. Denver Union Water Co.*, 32 Colo. 382.

727. 1. Jurisdictional Defects — Equitable Relief. — *Weber v. Baird*, 208 Ill. 209; *Carney v. People*, 210 Ill. 434; *Montana Ore Purchasing Co. v. Maher*, 32 Mont. 480; *Wead v. Omaha*, (Neb. 1905) 102 N. W. Rep. 675; *People v. Wells*, 91 N. Y. App. Div. 172; *People v. Feitner*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 12, *affirmed* 99 N. Y. App. Div. 274; *Trumbull v. Palmer*, 104 N. Y. App. Div. 51, *modifying* (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 628; *Phillips v. Thurston County*, 35 Wash. 187; *Henderson v. Pierce County*, 37 Wash. 201; *Horton v. Driskell*, 13 Wyo. 66.

728. 1. Relief on Equitable Grounds in Statutory Tribunals. — *New York v. Tucker*, 91 N. Y. App. Div. 214, *affirmed* 182 N. Y. 535.

2. Presumptions and Burden of Proof — *California*. — *Savings, etc., Soc. v. San Francisco*, 146 Cal. 673.

Illinois. — *Weber v. Baird*, 208 Ill. 209; *In re Maplewood Coal Co.*, 213 Ill. 283; *Cleveland, etc., R. Co. v. People*, 212 Ill. 551.

Indiana. — *Brunson v. Starbuck*, 32 Ind. App. 457; *McCrary v. O'Keefe*, 162 Ind. 534; *Buck v. Beach*, 164 Ind. 37; *Parkison v. Thompson*, 164 Ind. 609; *Fell v. West*, 35 Ind. App. 20.

Kentucky. — *Com. v. Higgins*, (Ky. 1904) 82 S. W. Rep. 601; *Bell v. Lexington*, 85 S. W. Rep. 1081, 27 Ky. L. Rep. 591.

Maine. — *Penobscot Chemical Fibre Co. v. Bradley*, 99 Me. 263.

Minnesota. — *Corbet v. Rocksbury*, 94 Minn. 39.

Missouri. — *State v. Vogelsang*, 183 Mo. 17; *State v. Birch*, 186 Mo. 205.

New York. — *New York v. Matthews*, 180 N. Y. 41; *New York v. Streeter*, 180 N. Y. 507; *New York v. Vanderveer*, 91 N. Y. App. Div. 303; *People v. O'Donnel*, 106 N. Y. App. Div. 526.

Vermont. — *Phillips v. Bancroft*, 75 Vt. 357.

Wisconsin. — *State v. Williams*, 123 Wis. 61; *State v. Fisher*, 124 Wis. 271.

Canada. — *Re Heiminnck*, 5 N. W. Ter. 462; *Re McDougall*, 5 N. W. Ter. 465.

729. 1. Notice of Assessment. — *Brunson v. Starbuck*, 32 Ind. App. 457; *Fell v. West*, 35 Ind. App. 20; *Bell v. Lexington*, 85 S. W. Rep. 1081, 27 Ky. L. Rep. 591; *State v. Vogelsang*, 183 Mo. 17.

5. Good Faith Presumed. — *Brunson v. Starbuck*, 32 Ind. App. 457; *State v. Williams*, 123 Wis. 61.

- 729.** X. LEVY — 1. In General — Meaning of Term. — See notes 8, 9.
- 730.** 2. Legislative Levy — *a.* NECESSITY OF. — See note 1.
b. PROPERTY NOT TAXABLE IN ABSENCE OF LEVY. — See note 2.
d. LEVY, HOW MADE. — See notes 4, 5.
- 731.** See notes 1, 2.
 Designating Purpose of Tax. — See note 4.
e. CONCLUSIVENESS AND EFFECT OF LEVY. — See note 5.
- 732.** See note 1.
f. EXHAUSTION OF POWER. — See notes 3, 4.
g. RECORD OF LEVY. — See notes 7, 8.
- 733.** See notes 1, 4, 7.

729. 8. Various Meanings of Word "Levy." — Van Cleve *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 183, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 729, reversed on other grounds 71 N. J. L. 574; Dickson *v.* Burckmyer, 67 S. Car. 526.

9. "Levy" as Meaning Collection of Tax. — Parsons *v.* People, 32 Colo. 221.

730. 1. Levy First Step in Taxation. — Boston, etc., Smelting Co. *v.* Elder, (Colo. App. 1904) 77 Pac. Rep. 258; U. S. Fidelity, etc., Co. *v.* Board of Education, 80 S. W. Rep. 1191, 26 Ky. L. Rep. 246.

Levy by Legislature Dispenses with Necessity of Levy by Subordinate Officers. — Dickson *v.* Burckmyer, 67 S. Car. 526.

2. Property Not Taxable in Absence of Levy. — Russellville *v.* Purdy, 206 Ill. 142.

As the Taxing Power Is Vested in the Legislature. — Scottish Union, etc., Ins. Co. *v.* Bowland, 196 U. S. 611.

4. Levy of Taxes Embodied in Constitutional Provisions. — Dickson *v.* Burckmyer, 67 S. Car. 526.

5. Levy Can Only Be Made by Legislative Authority. — Com. *v.* Kenneday, 82 S. W. Rep. 237, 26 Ky. L. Rep. 504; Van Cleve *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 183, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 730, reversed on other grounds 71 N. J. L. 574.

731. 1. Legislative Enactment Must Comply with Organic Law. — Chicago, etc., R. Co. *v.* People, 213 Ill. 458; Chicago, etc., R. Co. *v.* People, 213 Ill. 497; Wabash R. Co. *v.* People, 213 Ill. 522.

Validity of Levy by Percentages in North Dakota. — See Paine *v.* Germantown Trust Co., (C. C. A.) 136 Fed. Rep. 527; Douglas *v.* Fargo, 13 N. Dak. 467.

Validity of Levy by Percentages in Illinois. — See Chicago, etc., R. Co. *v.* People, 205 Ill. 625; Chicago, etc., R. Co. *v.* People, 214 Ill. 471; People *v.* Cincinnati, etc., R. Co., 213 Ill. 503.

Validity of Levy by Percentages in Oregon. — See Oregon R., etc., Co. *v.* Umatilla County, (Oregon 1905) 81 Pac. Rep. 352.

2. Body Imposing Tax Must Possess Authority and Be Properly Constituted. — Cincinnati, etc., R. Co. *v.* People, 206 Ill. 387.

4. Specifying Purpose of Levy — Illinois. — Chicago, etc., R. Co. *v.* People, 205 Ill. 625; Cleveland, etc., R. Co. *v.* People, 205 Ill. 582; Chicago, etc., R. Co. *v.* People, 206 Ill. 296; People *v.* Indiana, etc., R. Co., 206 Ill. 612; Cincinnati, etc., R. Co. *v.* People, 206 Ill. 565; Cincinnati, etc., R. Co. *v.* People, 207 Ill. 566;

Cincinnati, etc., R. Co. *v.* People, 213 Ill. 197; People *v.* Chicago, etc., R. Co., 213 Ill. 225; Illinois Cent. R. Co. *v.* People, 213 Ill. 174; Chicago, etc., R. Co. *v.* People, 213 Ill. 458; Chicago, etc., R. Co. *v.* People, 213 Ill. 497; People *v.* Cincinnati, etc., R. Co., 213 Ill. 503; Wabash R. Co. *v.* People, 213 Ill. 522; Cincinnati, etc., R. Co. *v.* People, 213 Ill. 558; Chicago, etc., R. Co. *v.* People, 214 Ill. 23; Chicago, etc., R. Co. *v.* People, 214 Ill. 302; People *v.* Chicago, etc., R. Co., 214 Ill. 190.

Kentucky. — U. S. Fidelity, etc., Co. *v.* Board of Education, 80 S. W. Rep. 1191, 26 Ky. L. Rep. 246; Carpenter *v.* Central Covington, 81 S. W. Rep. 919, 26 Ky. L. Rep. 430; Louisville *v.* Button, 82 S. W. Rep. 293, 26 Ky. L. Rep. 606.

Wisconsin. — State *v.* Hunter, 119 Wis. 450.

Specification of Purpose in State Constitution Sufficient. — Michigan R. Tax Cases, 138 Fed. Rep. 223.

Requirement that Police Juries Publish Estimate of Expenditures. — Waggoner *v.* Maumus, 112 La. 229.

5. Determination of Legislative Body Conclusive. — See Michigan R. Tax Cases, 138 Fed. Rep. 223; Ward *v.* Piper, 69 Kan. 773. See also State *v.* Nevada Cent. R. Co., (Nev. 1905) 81 Pac. Rep. 99.

Determination of Local Bodies Conclusive. — Cincinnati, etc., R. Co. *v.* People, 206 Ill. 565.

732. 1. Repeal of Statute Held Not to Affect Tax. — Hooper *v.* State, 141 Ala. 111.

Repeal After Payment Gives No Right to Recover Taxes Paid. — Collier *v.* Campbell Lumber Co., (Ark. 1905) 86 S. W. Rep. 295.

3. That the Taxing Power Is Continuing. — Ft. Madison *v.* Ft. Madison Water Co., (C. C. A.) 134 Fed. Rep. 214; Denver *v.* Adams County, 33 Colo. 1.

4. Bodies Held to Have Exhausted Power in Making Levies. — Boston, etc., Smelting Co. *v.* Elder, (Colo. App. 1904) 77 Pac. Rep. 258.

Making Two Series in One Year. — See Burkhart *v.* Vine Grove Common School Dist., 80 S. W. Rep. 1128, 26 Ky. L. Rep. 262.

7. Necessity of Record. — Cincinnati, etc., R. Co. *v.* People, 205 Ill. 538; Cincinnati, etc., R. Co. *v.* People, 206 Ill. 387.

8. Record as Evidence. — Cincinnati, etc., R. Co. *v.* People, 205 Ill. 538; U. S. Fidelity, etc., Co. *v.* Board of Education, (Ky. 1905) 86 S. W. Rep. 1120.

733. 1. Record Conclusive Evidence. — Douglass *v.* Byers, 69 Kan. 59.

4. Amendment of Record. — See Cleveland, etc., R. Co. *v.* People, 205 Ill. 582; Chicago, etc., R.

734. 3. Ministerial Levy — *a.* IN GENERAL. — See notes 1, 3.

b. NECESSITY OF EXTENDING TAX. — See notes 4, 5.

735. XI. TAX LIEN — 1. Nature and Creation. — See note 1.

Construction of Statute. — See notes 5, 6.

736. Retrospective Construction. — See note 1.

737. 3. Essentials to Validity — Proceedings for Sale. — See note 5.

4. When Lien Attaches. — See note 6.

738. See note 2.

739. 5. To What Property Lien Attaches. — See notes 2, 3, 4.

740. See notes 1, 2.

Land, Not Interest in Land. — See note 5.

741. Assessment to Wrong Person. — See note 1.

6. Priority of Lien. — See note 2.

Co. *v.* People, 206 Ill. 296; Cincinnati, etc., R. Co. *v.* People, 206 Ill. 565; Cincinnati, etc., R. Co. *v.* People, 207 Ill. 566; Illinois Cent. R. Co. *v.* People, 213 Ill. 174; Cincinnati, etc., R. Co. *v.* People, 213 Ill. 558; People *v.* Chicago, etc., R. Co., 214 Ill. 190; Schmohl *v.* Williams, 215 Ill. 63; Illinois Southern R. Co. *v.* People, 215 Ill. 123.

733. 7. Necessity of Signing by Proper Officers. — Oregon R., etc., Co. *v.* Umatilla County, (Oregon 1905) 81 Pac. Rep. 352.

734. 1. Extending Taxes under State Statutes. — Upper Nyack *v.* Jewett, 181 N. Y. 514, affirming 86 N. Y. App. Div. 254; State *v.* Hunter, 119 Wis. 450.

Taxes Must Be Extended on the Valuation of the State Board, rather than on that of any inferior office or board. Chicago, etc., R. Co. *v.* People, 213 Ill. 458; Chicago, etc., R. Co. *v.* People, 213 Ill. 497; Wabash R. Co. *v.* People, 213 Ill. 522; Wabash R. Co. *v.* People, 214 Ill. 568.

3. Authority of Officers to Fix Rate in Illinois. — Chicago, etc., R. Co. *v.* People, 214 Ill. 302.

4. Effect of Failure to Extend Tax. — Arbuckle *v.* McCutcheon, 111 Tenn. 514.

5. Delinquent Taxes Not Carried Forward. — Rose *v.* Northrup, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 238, affirmed 88 N. Y. App. Div. 621, 90 N. Y. App. Div. 611.

Not Recoverable in Suit for Taxes. — Hull *v.* Alexander, 69 Ohio St. 75.

735. 1. Tax Liens Wholly Statutory. — Com. *v.* Walker, 80 S. W. Rep. 185, 25 Ky. L. Rep. 2122; Everett *v.* Marston, 186 Mo. 587, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 735; Dickson *v.* Burckmyer, 67 S. Car. 526; Natrona County *v.* Shaffner, 12 Wyo. 177, 107 Am. St. Rep. 932.

5. Not Enlarged by Construction. — Everett *v.* Marston, 186 Mo. 587, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 735.

6. Strict Construction. — Everett *v.* Marston, 186 Mo. 587, quoting 26 AM. AND ENG. ENCYC. OF LAW (2d ed.) 735.

736. 1. Prospective Construction. — *In re* Prince, 131 Fed. Rep. 546; Hulin *v.* Butte County, (S. Dak. 1904) 100 N. W. Rep. 739.

737. 5. Auditor Gen. *v.* Newman, 135 Mich. 288, 10 Detroit Leg. N. 721.

6. In Absence of Statutory Provision — Realty. — Hooper *v.* State, 141 Ala. 111.

Amount Must Be Fixed. — Gillmor *v.* Dale, 27 Utah 372.

738. 2. Various Statutes — California. —

Bakersfield, etc., Oil Co. *v.* Kern County, 144 Cal. 148.

Iowa — *As to Taxes on a Stock of Goods.* — Iowa Mercantile Co. *v.* Blair, 123 Iowa 290; Larson *v.* Hamilton County, 123 Iowa 485; Shanafelt *v.* Chandler, (Iowa 1905) 103 N. W. Rep. 976.

Nebraska. — Woolsey *v.* Chamberlain Banking House, (Neb. 1903) 97 N. W. Rep. 241.

New Jersey. — Hallinger *v.* Zimmerman, (N. J. 1903) 55 Atl. Rep. 1132, affirming 63 N. J. Eq. 100, cited in the original note.

New York. — Buckhout *v.* New York, 176 N. Y. 363.

North Dakota. — Hagler *v.* Kelly, (N. Dak. 1905) 103 N. W. Rep. 629.

Texas. — Taxes become a lien from the date when liability is fixed on the owner, even before assessment. Carswell *v.* Habberzettle, (Tex. Civ. App. 1905) 87 S. W. Rep. 911.

Utah. — Gillmor *v.* Dale, 27 Utah 372.

Vermont. — Taxes are not a lien on real estate until the collector evidences an intention to subject it. Fulton *v.* Aldrich, 76 Vt. 310.

739. 2. Statute Creating Lien. — Com. *v.* Walker, 80 S. W. Rep. 185, 25 Ky. L. Rep. 2122; Ricketts *v.* Crewdson, 13 Wyo. 284.

3. Real Estate — Each Particular Tract. — Hamilton Mfg. Co. *v.* Lowell, 185 Mass. 114; Lancy *v.* Boston, 186 Mass. 128.

4. Personalty — Lien Not Confined to Specific Articles. — But see Waco *v.* Bryan, (C. C. A.) 127 Fed. Rep. 79.

740. 1. Taxes on Personalty Lien on Realty. — Iowa Mercantile Co. *v.* Blair, 123 Iowa 290; Ricketts *v.* Crewdson, 13 Wyo. 284, 300.

All Property, Both Real and Personal. — Com. *v.* Walker, 80 S. W. Rep. 185, 25 Ky. L. Rep. 2122.

2. Union School Dist. *v.* Bishop, 76 Conn. 695.

Lien for Personalty Tax Does Not Attach to Subsequently Acquired Realty. — Natrona County *v.* Shaffner, 12 Wyo. 177, 107 Am. St. Rep. 932.

5. Land, Not Interest, Subject of Lien. — Joyes *v.* Louisville, 82 S. W. Rep. 432, 26 Ky. L. Rep. 713.

Lien Attaches to Remainder as Well as to Life Tenant's Interest. — Hadley *v.* Hadley, (Tenn. 1905) 87 S. W. Rep. 250.

741. 1. To Whom Assessed. — N. Boyington Co. *v.* Southwick, 120 Wis. 184.

2. Priority of Lien. — Patton *v.* Camp, 120

- 742.** 7. Termination of Lien — *a.* IN GENERAL. — See notes 6, 9.
743. *b.* STATUTORY LIMITATION. — See notes 3, 4, 6.
744. *c.* EFFECT OF ALIENATION, JUDICIAL SALE, ETC. — See note 1.
745. Effect of Judicial Sale. — See notes 2, 3, 4.
 8. Personal Liability Independent of Lien. — See notes 5, 6.
746. XII. PAYMENT AND TENDER — 1. Opportunity to Pay. — See note 2.
 2. Time and Place. — See note 3.
747. 3. By Whom Made — *a.* BY WHOM PAYMENT MAY BE MADE —
 Payment of Taxes by One Joint Tenant. — See note 1.
 Any Person Having an Interest in the Property. — See note 3.
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 Mandamus to Compel Receipt of Taxes. — See note 6.
b. PRIMARY LIABILITY AS BETWEEN OWNERS OF DIFFERENT
 ESTATES — Tenant for Life. — See note 8.
748. A Mortgagor. — See note 3.
 A Vendee. — See note 4.
 The Trustee. — See note 5.
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Ga. 936; *White v. Thomas*, 91 Minn. 395; *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 183, 574; *Security Trust Co. v. Root*, 72 Ohio St. 535; *Ballard v. Ross*, 38 Wash. 700; *Ballard v. McFarlane*, 38 Wash. 239.

Nebraska — Distinction Between Realty and Personalty. — *Woolsey v. Chamberlain Banking House*, (Neb. 1903) 97 N. W. Rep. 241.

742. 6. Payment or Tender. — *Bakersfield, etc., Oil Co. v. Kern County*, 144 Cal. 148.

9. Remedy Not Destroyed with Respect to Existing Taxes. — *Hagler v. Kelly*, (N. Dak. 1905) 103 N. W. Rep. 629.

743. 3. Perpetual Lien. — *Mutual Ben. L. Ins. Co. v. Siefken*, (Neb. 1901) 96 N. W. Rep. 603. *Compare Valley County v. Milford*, (Neb. 1903) 97 N. W. Rep. 310.

Subsequent Constitutional Limitation Held Not to Divest Lien. — *State v. Recorder of Mortgages*, 111 La. 236.

4. Time Fixed by Statute. — *Louisville v. Burke*, (Ky. 1905) 87 S. W. Rep. 269; *Rousset v. New Orleans*, 110 La. 1040; *State v. Recorder of Mortgages*, 111 La. 236; *Campion v. Raritan Tp.*, (N. J. 1903) 56 Atl. Rep. 704.

Suit to Foreclose After Expiration of Right of Redemption. — See *Valley County v. Milford*, (Neb. 1903) 97 N. W. Rep. 310; *Keith County v. Big Springs Land, etc., Co.*, (Neb. 1903) 97 N. W. Rep. 626.

6. Sale After Expiration of Statutory Term. — See *Rousset v. New Orleans*, 110 La. 1040.

744. 1. Not Discharged by Alienation. — *Com. v. Walker*, 80 S. W. Rep. 185, 25 Ky. L. Rep. 2122.

745. 2. Foreclosure Sale. — *Security Trust Co. v. Root*, 72 Ohio St. 535.

3. Sale for Taxes Discharges Lien for Previous Years. — *State v. New Orleans*, 112 La. 408.

Land Bid in by State. — See *Cheever v. Flint Land Co.*, 134 Mich. 604, 10 Detroit Leg. N. 584.

4. Contra. — *Auditor Gen. v. Newman*, 135 Mich. 288, 10 Detroit Leg. N. 721; *Rochester v. Parker*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 514.

5. Personal Liability Independent of Lien. —

Morrison v. Fletcher, 84 S. W. Rep. 548, 27 Ky. L. Rep. 124.

6. Com. v. Walker, 80 S. W. Rep. 185, 25 Ky. L. Rep. 2122; *New York v. Matthews*, 180 N. Y. 41.

746. 2. Opportunity to Pay — Notice, Demand, Etc. — *Hunt v. Holston*, 185 Mass. 137.

3. Payment Before the Collector Has Received the Tax List will not relieve the taxpayer. *Orange County v. Texas, etc., R. Co.*, 35 Tex. Civ. App. 361.

747. 1. Co-owner or Cotenant. — *Barnes v. Bee*, 138 Fed. Rep. 476; *Peterson v. Hall*, 57 W. Va. 535.

3. Mortgagor. — *Ross v. Frick Co.*, 73 Ark. 45.

4. Payment by Any Person. — *Booksh v. A. Wilbert Sons Lumber, etc., Co.*, (La. 1905) 39 So. Rep. 9.

6. Mandamus to Compel Acceptance. — *State v. Sanders*, 111 La. 188.

8. Tenant for Life. — *Blair v. Johnson*, 215 Ill. 552; *Joyes v. Louisville*, 82 S. W. Rep. 432, 26 Ky. L. Rep. 713; *Morrison v. Fletcher*, 84 S. W. Rep. 548, 27 Ky. L. Rep. 124; *Fenley v. Louisville*, 84 S. W. Rep. 582, 27 Ky. L. Rep. 204; *Hadley v. Hadley*, (Tenn. 1905) 87 S. W. Rep. 250; *Penn v. Penn*, (Ky. 1905) 87 S. W. Rep. 306.

748. 3. Mortgagor. — *Hood v. Clark*, 141 Ala. 397; *Foy v. Comanche County*, 69 Kan. 206; *Moore v. Boagni*, 111 La. 490; *Fulton v. Aldrich*, 76 Vt. 310; *N. Boyington Co. v. Southwick*, 120 Wis. 184.

Purchaser at Foreclosure of Second Mortgage Primarily Liable. — *Gibson v. Gilman*, (Kan. 1905) 80 Pac. Rep. 587.

4. Vendee in Possession. — *Taber v. State*, (Tex. Civ. App. 1905) 85 S. W. Rep. 835.

Taxes Previously Assessed. — *In re Bailies*, 127 Iowa 124; *Mallory v. Gray*, (Iowa 1905) 103 N. W. Rep. 1015. See also *Buckhout v. New York*, 176 N. Y. 363.

5. Trust Property. — *Bourquin v. Bourquin*, 120 Ga. 115; *Louisville v. Robinson*, 85 S. W. Rep. 172, 27 Ky. L. Rep. 375.

6. Personal Representatives. — *Penn v. Penn*, (Ky. 1905) 87 S. W. Rep. 306.

749. *c.* REIMBURSEMENT — Party in Interest — Payment in Good Faith. — See notes 5, 6.

750. See note 1.

But a Mere Volunteer. — See notes 2, 3.

5. How Made — *a.* IN GENERAL — Must Be Absolute. — See note 6.

751. The Payment or Tender Must Be of the Whole Amount Due. — See notes 3, 4.

b. MEDIUM OF PAYMENT. — See note 6.

Check, Draft, Note. — See note 7.

752. Scrip, Warrants, Orders, Etc. — See notes 1, 2.

753. **6.** How Established — Evidence — The Original Receipt. — See note 2. Presumptions. — See notes 9, 10, 11.

754. **7.** Effect — The Primary Effect. — See note 3.

Payment, of Course, Defeats the Right to Sell the Property. — See note 4.

The Misapplication of a Payment. — See note 6.

755. See notes 1, 2.

Tender. — See note 3.

8. Payment Frustrated by Officer. — See notes 4, 5.

756. XIII. RECOVERY AND REFUNDING OF TAXES — 1. Refunding of Taxes. — See notes 8, 9.

757. See note 1.

749. **5.** Reimbursement. — *Hutchinson v. Hutchinson*, (N. J. 1904) 58 Atl. Rep. 528.

A Mortgagee. — *Ross v. Frick Co.*, 73 Ark. 56; *Shepard v. Vincent*, 38 Wash. 493.

A Remainderman. — *Hadley v. Hadley*, (Tenn. 1905) 87 S. W. Rep. 250.

6. Payment under Claim of Ownership. — *Govern v. Russ*, 125 Iowa 188.

750. **1.** Lien for Reimbursement. — *Smith v. Thornton*, (Ark. 1905) 86 S. W. Rep. 1008; *German Trust Co. v. Board of Equalization*, 121 Iowa 325; *Douglass v. Byers*, 69 Kan. 59. And see the title SUBROGATION, **265.** *4 et seq.*

2. Mere Volunteer Not Entitled to Reimbursement. — *Paine v. Germantown Trust Co.*, (C. C. A.) 136 Fed. Rep. 527; *Janeway v. Burn*, 91 N. Y. App. Div. 165, *affirmed* 180 N. Y. 560; *Fulton v. Aldrich*, 76 Vt. 310.

3. Volunteer Not Entitled to Subrogation. — *Bryant v. Nelson-Frey Co.*, 94 Minn. 305. And see the title SUBROGATION, **266.** *5 et seq.*

6. Unconditional Payment or Tender. — See *Clark v. Colfax County*, (Neb. 1901) 96 N. W. Rep. 607.

751. **3.** Whole Amount Due Must Be Paid. — *Com. v. Rosenfield*, 80 S. W. Rep. 1178, 25 Ky. L. Rep. 2229, rehearing denied (Ky. 1904) 82 S. W. Rep. 433; *Ricketts v. Crewdson*, 13 Wyo. 300.

No Compromise with Collector Recognized. — *Citizens' Nat. Bank v. Com.*, (Ky. 1904) 80 S. W. Rep. 479.

4. May Pay Any One Separate Tax. — *Clark v. Colfax County*, (Neb. 1901) 96 N. W. Rep. 607.

6. Medium of Payment. — *Oneida County v. Tibbits*, 125 Wis. 9, *citing* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 751.

7. Check, Draft, Etc. — See *Dolman v. Pitt*, 109 Mo. App. 123.

752. **1.** Payment with Scrip Held Good. — See *Young v. East Baton Rouge*, 112 La. 511.

2. Right Not Extended by Construction. — *Oneida County v. Tibbits*, 125 Wis. 9.

Unregistered Warrants Not Receivable. — *Young v. East Baton Rouge*, 112 La. 511.

753. **2.** Statute Making Receipt Conclusive of Payment of Prior Taxes Unconstitutional. — *Harris v. Stearns*, 17 S. Dak. 439.

9. *State v. Jackson*, 56 W. Va. 558, *quoting* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753; *Mills v. Henry Oil Co.*, 57 W. Va. 255, *citing* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753.

10. *Mills v. Henry Oil Co.*, 57 W. Va. 255.

11. *State v. Jackson*, 56 W. Va. 558; *Mosser v. Moore*, 56 W. Va. 478.

754. **3.** *Barnes v. Bee*, 138 Fed. Rep. 476. See also *Huber v. Jennings-Heywood Oil Syndicate*, 111 La. 747; *Kellogg v. McFatter*, 111 La. 1037; *Booksh v. A. Wilbert Sons Lumber, etc., Co.*, (La. 1905) 39 So. Rep. 9.

4. Right to Sell Defeated. — *Huber v. Jennings-Heywood Oil Syndicate*, 111 La. 747; *Kellogg v. McFatter*, 111 La. 1037; *Harris v. Deblieux*, (La. 1905) 38 So. Rep. 946; *Booksh v. A. Wilbert Sons Lumber, etc., Co.*, (La. 1905) 39 So. Rep. 9; *Kent v. Auditor Gen.*, 138 Mich. 605.

6. Misapplication of Payment. — *Kent v. Auditor Gen.*, 138 Mich. 605.

755. **1.** Application to Taxes of Other Persons. — *Kent v. Auditor Gen.*, 138 Mich. 605.

2. See *Kent v. Auditor Gen.*, 138 Mich. 605.

3. Tender. — *Clark v. Colfax County*, (Neb. 1901) 96 N. W. Rep. 607.

Tender Avoids Penalty. — *Lampasas First Nat. Bank v. Lampasas*, 33 Tex. Civ. App. 530.

4. Payment Frustrated by Officer. — *Richcreek v. Russell*, 34 Ind. App. 217; *Brannan v. Lyon*, 86 Miss. 401; *Clark v. Colfax County*, (Neb. 1901) 96 N. W. Rep. 607; *Wallace v. McEchiron*, 176 N. Y. 424.

5. *Brannan v. Lyon*, 86 Miss. 401.

756. **8.** No Power to Refund. — See *Collier v. Campbell Lumber Co.*, (Ark. 1905) 86 S. W. Rep. 295.

9. Statutory Provision for Refunding. — *Zeigler v. Blackford County*, 33 Ind. App. 375.

757. **1.** Voluntary Payments May Be Refunded. — *Stewart Law, etc., Co. v. Alameda County*, 142 Cal. 660; *Zeigler v. Blackford County*, 33 Ind. App. 375; *Boston Manufac-*

- 757.** 2. Recovery of Taxes Paid — *a.* RIGHT TO RECOVER IN GENERAL. — See note 3.
- 758.** See note 1.
- 759.** Tax Must Be Illegal and Not Merely Irregular. — See notes 1, 2, 3.
Tax Must Have Been Received by State or Municipality. — See note 4.
- 760.** *b.* WHAT CONSTITUTES VOLUNTARY PAYMENT — In General. — See note 6.
- 762.** Redemption from a Tax Sale. — See note 4.
- 763.** *c.* PROTEST. — See notes 1, 2.
- 764.** *d.* FRAUD AND MISTAKE. — See note 4.
e. LIMITATION OF ACTIONS. — See note 5.
- 765.** XIV. COLLECTION — 1. Power to Collect. — See note 2.
2. Collector. — See note 5.
- 768.** *b.* QUALIFICATION — (2) *Giving Bond.* — See note 4.
- 769.** *c.* DE FACTO COLLECTORS. — See notes 1, 3.
- 770.** 3. Collecting Taxes — *a.* TAX LIST. — See note 4.
b. COLLECTOR'S GENERAL WARRANT — (1) *In General.* — See note 7.

turers' Mut. F. Ins. Co. v. Hendricks, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 479.

757. 3. Voluntary Payments Not Recoverable. — Monaghan v. Lewis, (Del. 1905) 59 Atl. Rep. 948; Anderson v. Cameron, 122 Iowa 183; Kehe v. Blackhawk County, 125 Iowa 549; Carpenter v. Central Covington, 81 S. W. Rep. 919, 26 Ky. L. Rep. 430; Dolman v. Pitt, 109 Mo. App. 133.

Repeal of Tax Law After Payment Gives No Right to Recover. — Collier v. Campbell Lumber Co., (Ark. 1905) 86 S. W. Rep. 295.

758. 1. Involuntary Payments May Be Recovered. — Michigan Sanitarium, etc., Assoc. v. Battle Creek, 138 Mich. 676, 11 Detroit Leg. N. 719; Laing v. Forest Tp., (Mich. 1905) 102 N. W. Rep. 664, 11 Detroit Leg. N. 765.

Levying Officers or Board Not Personally Liable for Repayment of Tax Exceeding Debt Limit. — Com. v. Kenneday, 82 S. W. Rep. 237, 26 Ky. L. Rep. 504.

759. 1. Tax Must Be Illegal and Not Merely Irregular. — Bakersfield, etc., Oil Co. v. Kern County, 144 Cal. 148; Savings, etc., Soc. v. San Francisco, 146 Cal. 673; Anderson v. Cameron, 122 Iowa 183; Kehe v. Blackhawk County, 125 Iowa 549; Whitcomb v. Ramsey County, 91 Minn. 238; South Omaha v. O'Rourke, (Neb. 1903) 97 N. W. Rep. 608.

2. Agreement to Refund Void. — Kehe v. Blackhawk County, 125 Iowa 549.

3. Tax Partly Illegal. — See Clark v. Colfax County, (Neb. 1901) 96 N. W. Rep. 607.

4. Tax Must Have Been Received. — Anderson v. Cameron, 122 Iowa 183.

760. 6. When Payment Voluntary. — Monaghan v. Lewis, (Del. 1905) 59 Atl. Rep. 948; Iowa Mercantile Co. v. Blair, 123 Iowa 290; Kehe v. Blackhawk County, 125 Iowa 549; Dolman v. Pitt, 109 Mo. App. 133; Boston Manufacturer's Mut. F. Ins. Co. v. Hendricks, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 479; Tozer v. Skagit County, 34 Wash. 147.

762. 4. Redemption Regarded as Voluntary Payment. — Palomares Land Co. v. Los Angeles County, 146 Cal. 530; Anderson v. Cameron, 122 Iowa 183.

763. 1. Protest Immaterial When Payment Voluntary. — Boston Manufacturer's Mut. F. Ins. Co. v. Hendricks, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 479.

2. Statutes Allowing Recovery When Payment Made under Protest. — Michigan Sanitarium, etc., Assoc. v. Battle Creek, 138 Mich. 676, 11 Detroit Leg. N. 719; Purnell v. Page, 133 N. Car. 125; Tozer v. Skagit County, 34 Wash. 147. Compare Stewart Law, etc., Co. v. Alameda County, 142 Cal. 660.

Michigan — Statute Applies to Excessive Taxation. — Bialy v. Bay City, (Mich. 1905) 102 N. W. Rep. 1033, 11 Detroit Leg. N. 927.

Assignee of Protesting Taxpayer May Recover. — Laing v. Forest Tp., (Mich. 1905) 102 N. W. Rep. 664, 11 Detroit Leg. N. 765.

764. 4. Money Paid under Mistake of Law Not Recoverable. — Kehe v. Blackhawk County, 125 Iowa 549.

5. Claim Not Barred While No Competent Tribunal Exists. — Ulster County v. State, 177 N. Y. 189.

765. 2. The Fact that Sufficient Revenue Has Already Been Collected from other taxpayers is not ground for an injunction to prevent the collection of a particular tax. Cincinnati, etc., R. Co. v. People, 212 Ill. 546; Milster v. Spartanburg, 68 S. Car. 26; Chicago, etc., R. Co. v. People, 214 Ill. 302. See also *In re Maplewood Coal Co.*, 213 Ill. 283.

5. Officer Acting as Collector. — Fidelity, etc., Co. v. Logan County, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66.

768. 4. See Smith v. Randlette, 98 Me. 86.

769. 1. See Shawhan v. Harrison County, 116 Ky. 490. And see generally the title DE FACTO OFFICERS, 819. 2.

3. Liability of Bondsmen. — Shawhan v. Harrison County, 116 Ky. 490. And see generally the title DE FACTO OFFICERS, 807. 5.

770. 4. Tax Roll as Authority for Collecting. — Orange County v. Texas, etc., R. Co., 35 Tex. Civ. App. 361.

7. General Warrant as Authority for Collecting. — Lake County v. Neilon, 44 Oregon 14.

771. (3) *Requisites.* — See note 5.

773. (4) *Return.* — See note 1.

774. *c. DELINQUENT LIST* — (1) *Function and Mode of Compilation.* — See notes 1, 2, 3, 4, 5.

Return of Delinquency as Declaration. — See notes 11, 12.

775. *Strict Compliance as to the Form and Contents.* — See note 7.

Return of Delinquency as Evidence. — See note 9.

776. (2) *Publication.* — See notes 4, 5, 8.

777. *d. MEANS OF INDUCING PAYMENT* — (2) *Imposition of Interest.* — See notes 4, 6.

778. (3) *Imposition of Penalties* — *Penalty as Part of Tax.* — See notes 11, 14.

781. *e. COLLECTION WITHOUT PROCESS* — (1) *Private Person as Collector.* — See note 4.

782. (2) *Property in Legal Custody* — *Retention of Tax.* — See notes 2, 3.

f. COMPULSORY COLLECTION — (1) *In General* — (a) *Legislative Regulation of Remedy.* — See notes 8, 9, 11, 12.

783. (b) *Statutory Remedy Exclusive.* — See notes 2, 3, 4, 5.

771. 5. *Presumption of Due Signature.* — *New York v. Vanderveer*, 91 N. Y. App. Div. 303.

773. 1. *Dilatory Return.* — *Campion v. Raritan Tp.*, (N. J. 1903) 56 Atl. Rep. 704. *Contra in West Virginia*, *Hornage v. Imboden*, 57 W. Va. 206.

774. 1. *Return of Delinquency as a Prerequisite to Sale of Land.* — *Mahlum v. Thayer*, 93 Minn. 471; *Mosser v. Moore*, 56 W. Va. 478.

Failure to File List Within Time Prescribed Does Not Invalidate Sale. — *Starr v. Sampsel*, 55 W. Va. 442, *overruling McGee v. Sampsel*, 47 W. Va. 352.

2. *Forfeiture.* — *Finney v. Gulf States Land, etc.*, Co., 112 La. 949.

3. *Filing Delinquent List Begins Proceeding to Subject Land.* — *Mahlum v. Thayer*, 93 Minn. 471.

4. *Action Against Taxpayer.* — *Hull v. Alexander*, 69 Ohio St. 75.

5. *Provisions Mandatory.* — *Mosser v. Moore*, 56 W. Va. 478.

Irregularity in Delinquent List Does Not Affect Deed unless Owner Misled. — *Hornage v. Imboden*, 57 W. Va. 206.

11. *Description of Property and Taxpayer.* — *Mosser v. Moore*, 56 W. Va. 478.

12. *Sufficient Description.* — *Mahlum v. Thayer*, 93 Minn. 471; *Mosser v. Moore*, 56 W. Va. 478. See also *Barnes v. Bee*, 138 Fed. Rep. 476.

775. 7. *Form and Contents.* — *Compare Hornage v. Imboden*, 57 W. Va. 206; *Mosser v. Moore*, 56 W. Va. 478.

9. *Delinquent List as Evidence.* — *Mosser v. Moore*, 56 W. Va. 478.

Rule Not Applicable to Delinquent Lists Returned by Town Collectors. — *Carney v. People*, 210 Ill. 434.

776. 4. *Publication.* — See *Woodward v. Taylor*, 33 Wash. 1, 12.

5. *Strict Conformity with Statute Required.* — *Compare Hornage v. Imboden*, 57 W. Va. 206.

8. *Order of Publication.* — *Chadbourne v. Hartz*, 93 Minn. 233.

777. 4. *Imposition of Interest.* — *Henderson Bridge Co. v. Com.*, (Ky. 1905) 87 S. W. Rep. 1088.

6. *Interest Collected as Part of Tax.* — *Com. v. Rosenfield*, 80 S. W. Rep. 1178, 25 Ky. L. Rep. 2229, rehearing denied (Ky. 1904) 82 S. W. Rep. 433; *Joyes v. Louisville*, 82 S. W. Rep. 432, 26 Ky. L. Rep. 713; *Singer Mfg. Co. v. Morrison*, 70 N. J. L. 163; *Wilmington v. McDonald*, 133 N. Car. 548.

778. 11. *Penalty Becomes Part of the Tax.* — *In re Prince*, 131 Fed. Rep. 546, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 778.

Remainderman Not Chargeable with Penalties Incurred by Life Tenant. — *Hadley v. Hadley*, (Tenn. 1905) 87 S. W. Rep. 250.

14. *Collectible with the Tax.* — *Fidelity, etc., Co. v. Logan County*, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66.

Interest on Judgment Including Penalty Chargeable Only at Ordinary Rate. — *Altoona v. Morrison*, 24 Pa. Super. Ct. 417.

781. 4. *Private Person as Collector.* — *Cullop v. Vincennes*, 34 Ind. App. 667.

782. 2. *Funds in Custodia Legis.* — *Cullop v. Vincennes*, 34 Ind. App. 667.

3. *Retention.* — See *Patton v. Camp*, 120 Ga. 936.

8. *Legislative Power over Remedy.* — *Phelps v. Brumback*, 107 Mo. App. 16; *Dawes County v. Furay*, (Neb. 1904) 99 N. W. Rep. 271.

9. *Woodrough v. Douglas County*, (Neb. 1904) 98 N. W. Rep. 1092.

11. *New Remedy Applicable to Taxes Already Accrued.* — *Baker v. Kaiser*, (C. C. A.) 126 Fed. Rep. 317.

12. *Repeal of Taxes Not Retroactive.* — *Hooper v. State*, 141 Ala. 111; *Collier v. Campbell Lumber Co.*, (Ark. 1905) 86 S. W. Rep. 295. *Contra*, *Flanders v. Multnomah County*, 43 Oregon 583.

783. 2. *Action Where No Remedy Provided.* — *Phelps v. Brumback*, 107 Mo. App. 16; *Dawes County v. Furay*, (Neb. 1904) 99 N. W. Rep. 271.

3. *Statutory Lien for Taxes Enforceable in Equity.* — *Dobbins v. Colorado, etc.*, R. Co., 19 Colo. App. 257.

4. *Statutory Remedy Exclusive.* — *White v. Thomas*, 91 Minn. 395; *Phelps v. Brumback*, 107 Mo. App. 16; *Valley County v. Milford*,

- 785.** (c) Contrary Doctrine. — See note 2.
- 786.** (d) Constitutionality of Summary Statutory Remedies. — See notes 1, 2, 3.
- 788.** (e) Construction of Statutes Authorizing Summary Proceedings. — See note 1.
- (f) Limitations. — See notes 5, 6, 9.
- 789.** (2) *Distress or Summary Seizure and Sale* — (a) In General. — See note 4.
- (b) Authority to Distrain or Seize — Special Warrant. — See notes 8, 13.
- 790.** See notes 4, 8.
- 791.** See note 1.
- (c) What Property May Be Seized. — See notes 5, 13.
- 792.** Taxes Assessed Against Agents. — See note 4.
- 793.** (d) Levy and Return. — See note 1.
- Actual Custody and Control of the Property by the Collector. — See note 9.
- Amount of Property. — See note 12.
- 794.** (3) *Arrest and Imprisonment*. — See note 3.
- The Exhaustion of Personalty. — See note 11.
- 795.** See note 1.
- 797.** 4. Liability of Collector — a. TO TAXPAYER — (1) *Protection Afforded by Regular Process* — Not Liable for Taxes Paid under Protest. — See note 6.
- (2) *Unauthorized Acts*. — See note 9.

(Neb. 1903) 97 N. W. Rep. 310; Keith County v. Big Springs Land, etc., Co., (Neb. 1903) 97 N. W. Rep. 626; Dawes County v. Furay, (Neb. 1904) 99 N. W. Rep. 271.

783. 5. Action at Law Not Permitted. — Bergerman v. Beerbohm, (Colo. 1905) 81 Pac. Rep. 701.

785. 2. Statutory Allowance of Action at Law. — Hull v. Alexander, 69 Ohio St. 75.

786. 1. Due Process of Law. — Scottish Union, etc., Ins. Co. v. Bowland, 196 U. S. 611.

2. Constitutionality — In General. — Woodrough v. Douglas County, (Neb. 1904) 98 N. W. Rep. 1092.

3. Constructive Notice by Publication Enough. — Woodrough v. Douglas County, (Neb. 1904) 98 N. W. Rep. 1092.

788. 1. Record Must Show Compliance. — Compare Brummer v. Galveston, 97 Tex. 93.

5. Taxes Not Barred. — See Wilmington v. McDonald, 133 N. Car. 548.

As to Time When Statute Begins to Run. — Louisville v. Louisville Courier Journal Co., (Ky. 1905) 84 S. W. Rep. 773; State v. Vogel-sang, 183 Mo. 17.

6. Statutory Limitations for Taxes. — Keche v. Blackhawk County, 125 Iowa 549; Louisville v. Kohnhorst, 76 S. W. Rep. 43, 25 Ky. L. Rep. 532; Citizens' Nat. Bank v. Com., 81 S. W. Rep. 686, 26 Ky. L. Rep. 62; Rousset v. New Orleans, 110 La. 1040; State v. Recorder of Mort-gages, 111 La. 236; State v. Vogelsang, 183 Mo. 17.

Lis Pendens. — See Louisville v. Kohnhorst, 76 S. W. Rep. 43, 25 Ky. L. Rep. 532.

9. Liabilities Created by Statute. — Muir v. Bardstown, (Ky. 1905) 87 S. W. Rep. 1096; Folsom v. Whitney, (Minn. 1905) 104 N. W. Rep. 140; Milster v. Spartanburg, 68 S. Car. 26.

789. 4. Distress. — See Bell v. Lexington, 85 S. W. Rep. 1081, 27 Ky. L. Rep. 591.

8. Tax Executions. — Miller v. Brooks, 120 Ga. 232.

13. Special Warrant Must Conform to Statute. — Barnes v. Carter, 120 Ga. 895; Sibley v. Carmichael, 120 Ga. 904.

790. 4. Irregularities and Accidental Defects. — Dickson v. Burckmyer, 67 S. Car. 526.

8. Correct Total. — Dickson v. Burckmyer, 67 S. Car. 526.

791. 1. Jurisdictional Facts. — Miller v. Brooks, 120 Ga. 232.

5. Exempt Property Distrainable for Taxes. — Scottish Union, etc., Ins. Co. v. Bowland, 196 U. S. 611.

13. Taxes a Lien on Personalty from Time Col-lector Receives General Warrant. — Woolsey v. Chamberlain Banking House, (Neb. 1903) 97 N. W. Rep. 241.

792. 4. Tax a Personal Charge Against Agent. — German Trust Co. v. Board of Equalization, 121 Iowa 325; Heinz v. Board of Equalization, 121 Iowa 445.

793. 1. Description of Property — Amend-ment. — An insufficient or indefinite descrip-tion of the property in the levy will avoid it and the sale made under it. The return cannot be amended when the sheriff is dead and his deputy, who made the levy, is no longer in office. Miller v. Brooks, 120 Ga. 232.

9. Taking Possession. — Dickson v. Burck-myer, 67 S. Car. 526.

12. Amount to Be Taken. — Dickson v. Burck-myer, 67 S. Car. 526.

794. 3. Judicial Commitment on Application of Collector. — See Kerr v. Atwood, 188 Mass. 506.

11. Exhaustion of Personalty. — Kerr v. At-wood, 188 Mass. 506.

Return of Nulla Bona as Evidence. — Kerr v. Atwood, 188 Mass. 506.

795. 1. Offer of Property. — Kerr v. Atwood, 188 Mass. 506.

797. 6. Taxes Paid under Protest. — Craig v. Boone, 146 Cal. 718.

9. Orange County v. Texas, etc., R. Co., 35 Tex. Civ. App. 361.

798. *b. DUTIES AND LIABILITY TO THE PUBLIC — (1) Duty to Collect — Negligence.* — See note 9.

800. *(2) Duty to Keep and Account — (b) Accounting — aa. EXTENT OF LIABILITY.* — See notes 5, 6, 7, 11, 12, 14.

801. See notes 1, 2, 4, 5.

802. See note 1.

bb. THE ACCOUNTING. — See notes 2, 3, 4, 7.

Time of Settlement. — See notes 13, 14, 15.

803. *cc. STATEMENT OF ACCOUNT.* — See notes 8, 13.

804. *dd. MEDIUM OF PAYMENT.* — See note 2.

ee. EFFECT OF SETTLEMENT. — See notes 5, 10.

805. *c. LIABILITY OF SURETIES ON BOND OF COLLECTOR — (2) Liability on General and Special Bonds.* — See note 9.

806. *(3) Liability for Funds Collected — (a) Estoppel of the Sureties.* — See notes 6, 7, 10, 12, 14, 16.

807. See note 1.

(c) Misappropriation and Conflicting Liabilities under Different Bonds. — See notes 5, 9.

798. *9. Taxes Lost Through Negligence.* — U. S. Fidelity, etc., Co. v. Board of Education, 80 S. W. Rep. 1191, 26 Ky. L. Rep. 246.

800. *5. Lake County v. Neilon, 44 Oregon 14.*

6. Duty to Pay Over. — Fidelity, etc., Co. v. Logan County, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66.

7. Time. — Fidelity, etc., Co. v. Logan County, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66.

11. Interest and Penalties. — Fidelity, etc., Co. v. Logan County, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66; Com. v. Pate, 85 S. W. Rep. 1096, 27 Ky. L. Rep. 623.

12. Liable on Bond. — Fidelity, etc., Co. v. Logan County, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66; Com. v. Pate, 85 S. W. Rep. 1096, 27 Ky. L. Rep. 623.

14. Illegal Tax. — Kuntz v. Cedarville, 109 Ill. App. 330; Reed v. Chatsworth, 109 Ill. App. 332. See also U. S. Fidelity, etc., Co. v. Board of Education, (Ky. 1905) 86 S. W. Rep. 1120.

801. *1. Irregular Assessment.* — Lake County v. Neilon, 44 Oregon 14.

2. Taxes Collected Without Warrant. — Lake County v. Neilon, 44 Oregon 14.

4. Estoppel. — U. S. Fidelity, etc., Co. v. Board of Education, (Ky. 1905) 86 S. W. Rep. 1120.

5. Though Taxpayer Not Bound to Pay. — Lake County v. Neilon, 44 Oregon 14.

802. *1. Nor Collector Bound to Proceed.* — U. S. Fidelity, etc., Co. v. Board of Education, (Ky. 1905) 86 S. W. Rep. 1120; Lake County v. Neilon, 44 Oregon 14.

2. Settlement or Refusal to Settle Prerequisite. — See Fidelity, etc., Co. v. Logan County, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66.

3. Time for Accounting. — Sayer v. Douglas County, 119 Ga. 550.

4. Mode of Accounting. — Sayer v. Brown, 119 Ga. 539.

7. Fidelity, etc., Co. v. Logan County, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66.

13. Interest on Damages. — Fidelity, etc., Co. v. Logan County, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66.

14. Penalties Imposed. — Sayer v. Brown, 119 Ga. 539; Fidelity, etc., Co. v. Logan County, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66.

15. No One to Whom Payment Should Be Made. — Fidelity, etc., Co. v. Logan County, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66.

803. *8. Prima Facie Chargeable with Entire Tax Roll.* — Fidelity, etc., Co. v. Logan County, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66.

13. Payments. — Fidelity, etc., Co. v. Logan County, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66.

804. *2. Payments by Collector.* — Oneida County v. Tibbits, 125 Wis. 9.

5. Settlement Not Conclusive. — Com. v. Pate, 85 S. W. Rep. 1096, 27 Ky. L. Rep. 623.

Ex Parte Statement by Experts, Filed as Settlement, Not Conclusive. — Fidelity, etc., Co. v. Logan County, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66.

10. No Appeal Taken. — Fidelity, etc., Co. v. Logan County, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66.

805. *9. No Liability on the General Bond Where Special Bond Required.* — Com. v. Moren, 78 S. W. Rep. 432, 25 Ky. L. Rep. 1635.

806. *6. Moneys Officially Received.* — Fidelity, etc., Co. v. State, 98 Md. 162; Oneida County v. Tibbits, 125 Wis. 9.

7. Money on Hand. — Hudson v. Miles, 185 Mass. 582, 102 Am. St. Rep. 370; Lake County v. Neilon, 44 Oregon 14.

10. Collecting Without Warrant. — Lake County v. Neilon, 44 Oregon 14.

12. Irregular Warrant or List. — Lake County v. Neilon, 44 Oregon 14.

Bond Given After Receipt of Warrant and List Good as Common-law Bond. — Hudson v. Miles, 185 Mass. 582, 102 Am. St. Rep. 370.

14. Contra Where Limit of Tax Rate Fixed by Constitution. — U. S. Fidelity, etc., Co. v. Board of Education, (Ky. 1905) 86 S. W. Rep. 1120.

16. Estoppel of Sureties. — U. S. Fidelity, etc., Co. v. Board of Education, (Ky. 1905) 86 S. W. Rep. 1120.

807. *1. Collection Wholly Without Authority.* — U. S. Fidelity, etc., Co. v. Board of Education, 80 S. W. Rep. 1191, 26 Ky. L. Rep. 246.

5. Misappropriation of Funds. — Hudson v.

- 807.** (4) *Liability for All Official Acts.* — See note 13.
- 808.** 5. Remedies Against Defaulting Collectors — *a.* SUMMARY REMEDY — (1) *In General* — Lien of Collector's Bond. — See notes 11, 12.
- 810.** *b.* REMEDY BY CIVIL ACTION — (1) *In General.* — See note 11.
- 812.** 6. Compensation of Collectors — *a.* IN GENERAL. — See note 5.
- 813.** See notes 1, 2.
- b.* COMPENSATION DEPENDENT ON MAKING THE MONEY. — See notes 4, 14.
- 814.** See note 1.
- c.* MODE OF PAYMENT. — See notes 2, 6.
- 816.** XV. TAX SALES — 2. Lands — *a.* PREREQUISITES OF RIGHT TO SELL — (1) *Grant of Authority.* — See note 5.
- Statutes Strictly Construed. — See notes 6, 7.
- 817.** (2) *Validity of Tax.* — See notes 5, 6.
- (3) *Nonpayment of Tax.* — See note 8.
- 818.** (4) *Liability of Property* — (b) Primary Liability of Personalty — *aa.* WHERE PRIMARILY LIABLE. — See note 6.
- 819.** See note 2.
- Diligence Required of Officer. — See note 4.
- Proof of Compliance with Law. — See note 6.
- 820.** (5) *Regularity of Preliminary Proceedings.* — See note 4.

Miles, 185 Mass. 582, 102 Am. St. Rep. 370.
See also *Lake County v. Neilon*, 44 Oregon 14.

807. 9. Equitable Relief. — *State v. Fidelity, etc., Co.*, 99 Md. 244.

13. Liability of Sureties for All Official Acts. — *State v. Perkins*, 114 La. 301.

808. 11. *State v. Perkins*, 114 La. 301.

12. See *State v. Perkins*, 114 La. 301.

810. 11. *Fidelity, etc., Co. v. Logan County*, 84 S. W. Rep. 341, 27 Ky. L. Rep. 66.

812. 5. Construction of Statutes. — See *Butte County v. Merrill*, 141 Cal. 396; *Board of Education v. Iredell County*, 137 N. Car. 63.

813. 1. Inadequate Compensation. — *Paoli v. Charles*, 164 Ind. 690; *Justus v. Ramsey County*, 94 Minn. 72.

2. No Compensation for Collecting School Money. — *Contra*, *Board of Education v. Iredell County*, 137 N. Car. 63.

4. Making the Money. — *Citizens' Nat. Bank v. Com.*, 81 S. W. Rep. 686, 26 Ky. L. Rep. 62; *Justus v. Ramsey County*, 94 Minn. 72.

14. Defaulters Entitled to No Compensation. — *State v. Perkins*, 114 La. 301.

814. 1. *State v. Perkins*, 114 La. 301.

2. Salary. — *Paoli v. Charles*, 164 Ind. 690.

No Commissions Where Salary Paid. — *Philadelphia v. McMichael*, 208 Pa. St. 297; *Philadelphia v. Moore*, 208 Pa. St. 327.

6. Under Maryland Statute County Must Pay Commissions on State Taxes. — *Allen v. State*, 98 Md. 697.

816. 5. No Power to Sell Without Express Grant. — *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101.

6. Strict Construction to Be Given. — *Hoskins v. Iowa Land Co.*, 121 Iowa 299; *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101.

7. Statutes to Be Strictly Followed. — *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101.

817. 5. Sale for Invalid Tax Void. — *Lancy v. Boston*, 186 Mass. 128.

Sale Invalid Without Valid Assessment. — *Barnes v. Bee*, 138 Fed. Rep. 476.

Sale Void unless Taxes for Which Sale Made Wholly Valid. — *Booksh v. A. Wilbert Sons Lumber, etc., Co.*, (La. 1905) 39 So. Rep. 9.

6. Taxes Actually Due. — *McCrory v. O'Keefe*, 162 Ind. 534.

8. Nonpayment of Tax. — *People v. Chicago, etc., R. Co.*, 214 Ill. 25; *Booksh v. A. Wilbert Sons Lumber, etc., Co.*, (La. 1905) 39 So. Rep. 9; *Moran v. Thomas*, (S. Dak. 1905) 104 N. W. Rep. 212; *Mosser v. Moore*, 56 W. Va. 478.

By Whom Taxes Paid. — *Booksh v. A. Wilbert Sons Lumber, etc., Co.*, (La. 1905) 39 So. Rep. 9.

818. 6. Personalty Primarily Liable. — *Richcreek v. Russell*, 34 Ind. App. 217; *Leszinsky v. Le Grand*, 83 S. W. Rep. 1038, 26 Ky. L. Rep. 1235.

819. 2. Sale Without Exhausting Personalty Invalid. — *Richcreek v. Russell*, 34 Ind. App. 217; *Leszinsky v. Le Grand*, 83 S. W. Rep. 1038, 26 Ky. L. Rep. 1235.

Purchaser to Be Made Whole. — *Richcreek v. Russell*, 34 Ind. App. 217.

4. Diligent Search Required. — *Richcreek v. Russell*, 34 Ind. App. 217.

6. Return Necessary. — *Richcreek v. Russell*, 34 Ind. App. 217; *Leszinsky v. Le Grand*, 83 S. W. Rep. 1038, 26 Ky. L. Rep. 1235.

820. 4. In Illinois the County Clerk Is Required to Certify on the day of sale to the correctness of the record and the judgment of sale; and a certificate at an incorrect date or in improper form will invalidate the sale. *Glos v. Gleason*, 209 Ill. 517; *Glos v. Mulcahy*, 210 Ill. 639; *Tift v. Greene*, 211 Ill. 389; *Glos v. Hanford*, 212 Ill. 261; *Glos v. McKerlie*, 212 Ill. 632; *Glos v. Dyché*, 214 Ill. 417.

Mandatory and Directory Provisions. — Requirements of the law leading up to tax sales which are for the protection of the taxpayer are mandatory, but those designed merely for

- 821.** (6) *Notice* — (a) *In General*. — See note 2.
 (b) *Notice to Delinquent*. — See note 8.
 Who a Delinquent. — See note 9.
- 822.** *Occupant of Land — Unknown Owner*. — See note 3.
- 823.** *dd. DESCRIPTION OF PROPERTY*. — See note 7.
- 825.** *What Certainty Required*. — See note 1.
 If the Notice Does Not Sufficiently Describe the Property. — See note 3.
 Name of Owner or Occupant. — See note 4.
 Abbreviations. — See note 8.
- 826.** (d) *Method of Advertisement* — *bb. ADVERTISEMENT IN NEWSPAPERS — What Papers*. — See note 2.
 Supplement. — See note 3.
 Intervals of Publication. — See note 6.
- 827.** *The Publication Must Be Continuous*. — See note 4.
- 828.** *cc. ADVERTISEMENT BY POSTING NOTICES*. — See note 3.
dd. PROOF OF PROPER NOTICE. — See notes 7, 8.
- 829.** See notes 1, 2.
 Contents of Certificate. — See notes 4, 5.
 Miscellaneous Matters of Proof. — See note 7.

the guidance of the officer are directory. *Dickson v. Burckmyer*, 67 S. Car. 526.

821. 2. *Sale Vitiated by Defective Notice*. — *Williams v. Chaplain*, 112 La. 1075; *Fennimore v. Boatner*, 112 La. 1080; *In re Lindner*, 113 La. 772.

8. *Notice to Delinquent*. — *Williams v. Chaplain*, 112 La. 1075; *Fennimore v. Boatner*, 112 La. 1080; *In re Lafferranderie*, 114 La. 6.

Where Notice Mailed, Actual Receipt Need Not Appear. — *Ross v. Drouilhet*, 34 Tex. Civ. App. 327.

9. "Delinquent" Means Legal Owner. — *Harris v. Deblieux*, (La. 1905) 38 So. Rep. 946.

Where Land Is Assessed to Another than the Owner. — *In re Lafferranderie*, 114 La. 6.

After the Death of the Owner. — *Williams v. Chaplain*, 112 La. 1075; *Fennimore v. Boatner*, 112 La. 1080.

822. 3. *When Owner Known, Proceedings Against "Unknown" Owner Invalid*. — *Williams v. Chaplain*, 112 La. 1075; *Fennimore v. Boatner*, 112 La. 1080.

823. 7. *Green v. McGrew*, 35 Ind. App. 104; *Posey v. New Orleans*, 113 La. 1059; *National Bond, etc., Co. v. Hennepin County*, 91 Minn. 63.

Lien Conveyed by Uncertain Description. — *Brown v. Reeves*, 31 Ind. App. 517; *Green v. McGrew*, 35 Ind. App. 104.

825. 1. *Description Reasonably Certain*. — *National Bond, etc., Co. v. Hennepin County*, 91 Minn. 63. See also *Cain v. Fisher*, 57 W. Va. 492, 500.

Description Not Necessarily Same as Contained in List. — *Contra*, *Brown v. Reeves*, 31 Ind. App. 517.

3. *Notice Not Describing Land Void*. — *Brown v. Reeves*, 31 Ind. App. 517; *Green v. McGrew*, 35 Ind. App. 104.

4. *Name of Owner*. — *Baines v. Alker*, 207 Pa. St. 234.

Giving Name Incorrectly Invalidates Sale. — *Spore v. Ozark Land Co.*, 186 Mo. 656; *Gillingham v. Brown*, 187 Mo. 181.

8. *Abbreviation Must Be Intelligible*. — *Brown v. Reeves*, 31 Ind. App. 517.

826. 2. *Publication in Papers Intended by Statute*. — *Conklin v. Cullen*, 29 Mont. 38.

Publication in Two Newspapers Where Only One was Required by the Statute has been held to render a sale made thereunder invalid. *Orlando v. Equitable Building, etc., Assoc.*, 45 Fla. 507.

3. *Publication in Supplement*. — *Contra*, *Morton v. Horton*, 101 N. Y. App. Div. 322.

6. *Publication at Intervals and for Period Required by Statute*. — *Conklin v. Cullen*, 29 Mont. 38.

827. 4. *Period of Publication Immediately to Precede Sale*. — *In re Lindner*, 113 La. 772.

828. 3. *Iowa — Irregularities Not Fatal*. — *Hoskins v. Iowa Land Co.*, 121 Iowa 299.

7. *Proof to Be Furnished by Officer*. — *Myrick v. Kahle*, 120 Wis. 57.

8. *Printer's Certificate*. — *Paine v. Palmberg*, (Colo. App. 1905) 79 Pac. Rep. 330.

Slight Defect in Affidavit Will Not Invalidate Sale. — *Palmer v. Ozark Land Co.*, (Ark. 1905) 85 S. W. Rep. 408.

829. 1. *Certificate Must Be Made Part of Record*. — *Hunt v. Gardner*, (Ark. 1905) 86 S. W. Rep. 426; *Myrick v. Kahle*, 120 Wis. 57.

2. *Must Be Recorded Within Prescribed Time*. — *Hunt v. Gardner*, (Ark. 1905) 86 S. W. Rep. 426.

4. *Must Show Compliance with Statute in Every Particular*. — *Paine v. Palmberg*, (Colo. App. 1905) 79 Pac. Rep. 330.

Insufficient Certificate. — See *Myrick v. Kahle*, 120 Wis. 57.

5. *Insufficiency of Record Not Curable by Parol*. — *Herr v. Graden*, 33 Colo. 527; *Myrick v. Kahle*, 120 Wis. 57.

7. *Conclusiveness of Evidence*. — See *Tieman v. Johnston*, 114 La. 112.

If the Affidavit Is Lost from the Files of the Clerk the due execution and filing of it may be established by parol testimony. *Herr v. Graden*, 33 Colo. 527.

- 831.** *b. CONDUCT OF SALE — (2) Place.* — See note 2.
(4) Quantity to Be Sold — (a) In General. — See note 7.
- 832.** See notes 1, 2.
(b) Sale in Parcels. — See note 6.
- 833.** See notes 1, 2.
 Statutes Requiring Sale of Smallest Sufficient Quantity. — See note 4.
- 834.** *(c) Sale According to Assessment.* — See notes 5, 6.
- 835.** Undivided Interest. — See note 1.
 Designation of Part Sold. — See note 3.
(5) Amount for Which Sale to Be Made — (a) In General. — See note 5.
- 836.** *(b) Excessive Amount.* — See note 5.
- 837.** See note 2.
 Even When the Excess Is a Very Insignificant Sum. — See notes 3, 4, 5.
- 838.** See notes 1, 2.
- 840.** *(7) Terms of Sale — The Sale Must Be for Cash.* — See note 9.
- 841.** *c. PROCEEDINGS AFTER SALE — (1) Disposition of Surplus.* — See note 5.
(2) Report and Record. — See note 8.
- 842.** See notes 2, 3, 9, 10.

831. 2. Place of Sale. — *Harvey v. Douglass*, 73 Ark. 221.

7. Can Sell No More than Necessary. — *Stark v. Cummings*, 119 Ga. 35; *Richcreek v. Russell*, 34 Ind. App. 217.

832. 1. Sale of Excessive Quantity. — *Stark v. Cummings*, 119 Ga. 35; *Richcreek v. Russell*, 34 Ind. App. 217. But see *Dickson v. Burckmyer*, 67 S. Car. 526.

2. Principle Generally Applicable to Judicial Sale. — *Richcreek v. Russell*, 34 Ind. App. 217.

6. Distinct Parcels Must Be Sold Separately. — *Chadbourn v. Hartz*, 93 Minn. 233; *Rohrer v. Fassler*, (Neb. 1902) 96 N. W. Rep. 523.

833. 1. Deed Void on Face. — *Chadbourn v. Hartz*, 93 Minn. 233.

2. Certain Lots Sold Together. — *National Bond, etc., Co. v. Hennepin County*, 91 Minn. 63.

4. Smallest Quantity That Will Satisfy Tax. — *Tieman v. Johnston*, 114 La. 112. Compare *Phelps v. Brumback*, 107 Mo. App. 16, holding, where the purchaser at a tax sale bought three one hundredths of an inch across a city lot, that the lien for the taxes could not be enforced in his favor, the quantity of land being too small.

834. 5. Tracts Assessed En Masse. — *Kennedy v. Auditor Gen.*, 134 Mich. 534, 10 Detroit Leg. N. 583.

Tracts of Land Containing as Much as Forty Acres. — *National Bond, etc., Co. v. Hennepin County*, 91 Minn. 63.

6. Single Tract So Assessed Not Divisible. — *National Bond, etc., Co. v. Hennepin County*, 91 Minn. 63.

835. 1. Sale of Undivided Interest Not Permitted. — Compare *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101.

3. Sale of "½ of Lot" Sufficient to Pass Undivided Half Interest. — *Old Dominion Bldg., etc., Assoc. v. Sohn*, 54 W. Va. 101.

5. Sale for Insufficient Amount Void. — *Beatrice v. Wright*, (Neb. 1904) 101 N. W. Rep. 1039.

No Bid Receivable for Less than Whole Amount. — *Manker v. Peck*, (Kan. 1905) 81 Pac. Rep. 171.

836. 5. Sale for Excessive Taxes Void. — *Baker v. Kaiser*, (C. C. A.) 126 Fed. Rep. 317; *Cowling v. Muldrow*, 71 Ark. 488; *Richcreek v. Russell*, 34 Ind. App. 217; *Gehrhardt v. Schwartz*, 102 N. Y. App. Div. 389. See also *Carraway v. Moore*, (Ark. 1905) 86 S. W. Rep. 993.

837. 2. Excessive Costs and Charges. — *Richcreek v. Russell*, 34 Ind. App. 217; *Lewis v. Cherry*, 72 Ark. 254; *Kirker v. Daniels*, 73 Ark. 263; *Harvey v. Douglass*, 73 Ark. 221; *Gabel v. Williams*, (County Ct.) 42 Misc. (N. Y.) 475; *Moon v. Salt Lake County*, 27 Utah 435.

What Are Proper Costs. — See *Trimble v. Allen-West Commission Co.*, 72 Ark. 72.

3. Sale Vitiating by Trifling Excess. — *Green v. McGrew*, 35 Ind. App. 104.

4. Maxim Not Applicable. — *Cowling v. Muldrow*, 71 Ark. 488; *Green v. McGrew*, 35 Ind. App. 104, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 837.

5. Reason for Rule. — *Green v. McGrew*, 35 Ind. App. 104.

838. 1. Immaterial Excess. — *Cowling v. Muldrow*, 71 Ark. 488; *Dickson v. Burckmyer*, 67 S. Car. 526.

2. Unexplained Costs Presumed to Be Legal. — *Dickson v. Burckmyer*, 67 S. Car. 526.

840. 9. Sale for Cash. — *Dickson v. Burckmyer*, 67 S. Car. 526.

841. 5. Assignee of Owner Proper Person to Receive Surplus. — *Gavenesch v. Jersey City*, (N. J. 1904) 59 Atl. Rep. 25.

8. What Acts Must Be Recited. — *Wagner v. Arnold*, 72 Ark. 371.

Failure to Report Avoids Sale. — *Mosser v. Moore*, 56 W. Va. 478.

842. 2. In West Virginia Report Need Not Show Date of Sale. — *Hornage v. Imboden*, 57 W. Va. 206.

3. Description of Land. — *Mosser v. Moore*, 56 W. Va. 478; *State v. Harman*, 57 W. Va. 447.

Sufficiency of Description. — See *Barnes v. Bee*, 138 Fed. Rep. 476.

843. See note 2.

(3) *Confirmation*. — See note 4.

Notice Is Required to Be Given to the Owner. — See note 5.

844. Conclusiveness of Confirmation. — See note 2.

(4) *Certificate*. — See note 7.

The Purpose and Effect of the Certificate. — See note 9.

845. See notes 1, 2.

Equitable Interference. — See note 3.

Discrepancy Between Certificate and Record of Sale. — See note 5.

Assignment of Certificate. — See notes 7, 8.

846. See notes 1, 2.

XVI. FORFEITURE FOR NONCOMPLIANCE WITH TAX LAWS — 1. In General. — See note 6.

847. 2. Nature of Title Acquired by State. — See notes 1, 2.

3. Sale of Forfeited Lands. — See note 5.

4. Constitutionality — Construction of Statutes. — See note 7.

842. 9. Official Signature. — *State v. Harman*, 57 W. Va. 447.

10. Rights of Purchaser Protected. — *Hornage v. Imboden*, 57 W. Va. 206.

Rights of Purchaser Protected — *In West Virginia*. — *State v. McEldowney*, 54 W. Va. 695, *overruling McGee v. Sampselle*, 47 W. Va. 352; *State v. Harman*, 57 W. Va. 447.

843. 2. In West Virginia. — See *State v. Harman*, 57 W. Va. 447.

Curative Statute. — See *Hornage v. Imboden*, 57 W. Va. 206; *State v. McEldowney*, 54 W. Va. 695, *overruling McGee v. Sampselle*, 47 W. Va. 352.

No Defect in Sheriff's Affidavit Will Invalidate Tax Deed. — *Starr v. Sampselle*, 55 W. Va. 442, *overruling McClain v. Batton*, 50 W. Va. 121.

4. Necessity for Confirmation. — See *Ousler v. Robinson*, 72 Ark. 339.

5. Notice Required under British Columbia Clauses Act. — *Re South Vancouver Tax Sale*, 9 British Columbia 572.

Publication of Notice, and Not Proof of It, Gives Jurisdiction to Confirm. — *Palmer v. Ozark Land Co.*, (Ark. 1905) 85 S. W. Rep. 408.

844. 2. Right of Redemption Not Affected by Confirmation. — *Smith v. Thornton*, (Ark. 1905) 86 S. W. Rep. 1008.

7. Certificate of Full Payment of Taxes — Certificate of Error — Signature by Deputy. — See *Hoffman v. Auditor Gen.*, 136 Mich. 689.

9. Purpose and Effect of Certificate. — *Moore v. Boagni*, 111 La. 490. See also *State v. Register of Conveyances*, 113 La. 93.

Holder Cannot Maintain Ejectment. — *Gabel v. Williams*, (County Ct.) 42 Misc. (N. Y.) 475.

Where Lands Are Bid in by the County, as no title passes until the right of redemption is cut off, they must still be assessed to the owners. *Armstrong v. Nassau County*, 101 N. Y. App. Div. 116.

845. 1. Certificate Prima Facie Evidence of Validity of Sale. — *Brown v. Reeves*, 31 Ind. App. 517; *Cruser v. Williams*, 13 N. Dak. 284. See also *Welstead v. Jennings*, 104 N. Y. App. Div. 179.

2. Overcoming Presumption. — See *Paine v. Germantown Trust Co.*, (C. C. A.) 136 Fed.

Rep. 527; *Brown v. Reeves*, 31 Ind. App. 517; *In re Lafferranderie*, 114 La. 6.

3. Repayment of Illegal Taxes Not Required. — *Paine v. Germantown Trust Co.*, (C. C. A.) 136 Fed. Rep. 527.

5. Discrepancy Between Certificate and Record. — *Harding v. Auditor Gen.*, (Mich. 1905) 104 N. W. Rep. 39.

7. Not Negotiable Instrument. — *Morris v. Bird*, (Kan. 1905) 81 Pac. Rep. 185.

Purchaser May Assign Bid and Vest Assignee with Right to Receive Deed. — *Dickson v. Burckmyer*, 67 S. Car. 526.

8. Statutory Manner of Assignment. — *Morris v. Bird*, (Kan. 1905) 81 Pac. Rep. 185.

Merger of Certificate in Legal Title. — See *Myrick v. Kahle*, 120 Wis. 57.

846. 1. Rights of Assignee. — *Cruser v. Williams*, 13 N. Dak. 284.

2. Infirmities in Certificate. — *McKenzie v. Beaumont*, (Neb. 1903) 97 N. W. Rep. 225.

6. Forfeitures — Statutory Provisions in General. — *King v. Hatfield*, 130 Fed. Rep. 564; *Patton v. Cass County*, 13 N. Dak. 351; *Stockton v. Craig*, 56 W. Va. 464; *State v. Jackson*, 56 W. Va. 558.

Forfeiture Against the Owner will not be prevented by the payment of taxes by the purchaser at a tax sale. *State v. Harman*, 57 W. Va. 447.

Where the Forfeiture Is Invalid a sale by the state conveys no title, but removes the lien for taxes. *Henry v. Knod*, (Ark. 1905) 85 S. W. Rep. 1130.

Forfeiture for Taxes Partly Illegal Is Void. — *Carraway v. Moore*, (Ark. 1905) 86 S. W. Rep. 993.

847. 1. State Acquires Absolute Title. — *Patton v. Cass County*, 13 N. Dak. 351; *Stockton v. Craig*, 56 W. Va. 464.

2. Sale Passes All Titles Held by State. — *State v. Jackson*, 56 W. Va. 558. See also *State v. Harman*, 57 W. Va. 447.

5. Sale of Forfeited Lands. — *State v. Harman*, 57 W. Va. 447.

7. Constitutionality of Statutes. — See *King v. Hatfield*, 130 Fed. Rep. 564; *J. L. Rober Lumber Co. v. Elizabeth City Lumber Co.*, 135 N. Car. 742; *State v. Harman*, 57 W. Va. 447.

- 848.** 7. Waiver. — See note 8.
- 849.** XVII. REDEMPTION FROM TAX SALES — 1. Definition and Distinction — *a.* DEFINITION. — See note 4.
2. Nature of Right — *a.* IN GENERAL. — See note 7.
- 850.** 3. Construction of Redemption Statutes. — See note 6.
4. Effect of Redemption — *a.* IN GENERAL. — See notes 7, 8.
- b.* REDEMPTION BY OWNER. — See note 11.
- 851.** *d.* REDEMPTION BY MORTGAGEE OR OTHER LIENHOLDER. — See note 2.
- f.* REDEMPTION BY ONE OF SEVERAL LIENHOLDERS. — See note 4.
5. Who May Redeem — *a.* IN GENERAL. — See note 6.
- 852.** Conversely. — See note 1.
- The Title. — See note 2.
- b.* OWNERS. — See note 5.
- c.* AGENT OF OWNER. — See note 7.
- 853.** *c.* PART OWNERS — (2) *Under Statutes.* — See note 1.
- (3) *Minors.* — See note 3.
- e.* MORTGAGEES — (1) *In General.* — See note 4.
6. Period for Redemption — *a.* IN GENERAL. — See note 6.
- 848.** 8. Waiver of Forfeiture. — *Booksh v. A. Wilbert Sons Lumber, etc., Co., (La. 1905) 39 So. Rep. 9.*
- 849.** 4. Redemption Defined. — Where the purchaser at tax sale, after the right of redemption had expired, purchased the land from certain claimants and was allowed the sum paid at the tax sale as a credit on the agreed price, there was held to be no redemption which could inure to the benefit of other claimants of the land. *Kenson v. Gage, 34 Tex. Civ. App. 547.*
7. Statute in Force at Time of Sale Governs. — *Rogers v. Nichols, 186 Mass. 440.*
- 850.** 6. Redemption Statutes Construed in Favor of Owner. — *Pike v. Richardson, 136 Mich. 414, 11 Detroit Leg. N. 43; Hoffman v. Auditor Gen., 136 Mich. 689, 11 Detroit Leg. N. 201; Cain v. Brown, 54 W. Va. 656; Mosser v. Moore, 56 W. Va. 478; Hoffman v. Peterson, 123 Wis. 632.*
7. Redemption Divests Outstanding Legal Title. — *Bourquin v. Bourquin, 120 Ga. 115; Rogers v. Nichols, 186 Mass. 440; Beck v. Meroney, 135 N. Car. 532; Hoffman v. Peterson, 123 Wis. 632.*
8. Deed to Purchaser After Redemption Is Invalid. — *Hoffman v. Peterson, 123 Wis. 632.*
11. Redemption by Owner. — *Bourquin v. Bourquin, 120 Ga. 115; Moore v. Boagni, 111 La. 490; Clippinger v. Auditor Gen., 135 Mich. 1; Briggs v. Boardman, 135 Mich. 329, 10 Detroit Leg. N. 792; Hoffman v. Auditor Gen., 136 Mich. 689, 11 Detroit Leg. N. 201.*
- 851.** 2. Redemption by Mortgagee or Other Lienholder. — *Lane v. Wright, 121 Iowa 376, 100 Am. St. Rep. 362; Carley v. Boner, (Neb. 1904) 97 N. W. Rep. 1014; Rapid City First Nat. Bank v. McCarthy, (S. Dak. 1904) 100 N. W. Rep. 14.*
4. Redemption by One of Several Lienholders. — *Lane v. Wright, 121 Iowa 376, 100 Am. St. Rep. 362; Carley v. Boner, (Neb. 1904) 97 N. W. Rep. 1014.*
6. Who May Redeem — General Rule. — *Hodges v. Harkleroad, (Ark. 1905) 85 S. W. Rep. 779; Smith v. Thornton, (Ark. 1905) 86 S. W. Rep. 1008; Snider v. Smith, (Ark. 1905) 87 S. W. Rep. 624; Bourquin v. Bourquin, 120 Ga. 115; Cruser v. Williams, 13 N. Dak. 284; Hoffman v. Peterson, 123 Wis. 632.*
- Judgment or Other Lien Creditor of Owner. — *Lane v. Wright, 121 Iowa 376, 100 Am. St. Rep. 362.*
- Partitioners Other than Him to Whom the Land Is Allotted have such an interest as authorizes them to redeem. *Cain v. Brown, 54 W. Va. 656.*
- 852.** 1. One Without Interest Cannot Redeem. — *State v. Jackson, 56 W. Va. 558; Hoffman v. Peterson, 123 Wis. 632.*
- If, However, the Purchaser Accepts the Money — *McKenzie v. Beaumont, (Neb. 1903) 97 N. W. Rep. 225.*
- Deposit by Stranger for Redemption May Be Ratified by Owner. — *Sloan v. Cobb, (Ark. 1905) 85 S. W. Rep. 1126.*
2. Title Need Not Be Absolute. — *Cain v. Brown, 54 W. Va. 656. But see State v. Jackson, 56 W. Va. 558.*
5. Outstanding Paramount Title Does Not Defeat Redemption. — *Cain v. Brown, 54 W. Va. 656; Hoffman v. Peterson, 123 Wis. 632.*
7. Agent of Owner May Redeem. — *State v. Register of Conveyances, 113 La. 93.*
- 853.** 1. Statute May Permit Redemption of Co-owner's Interest. — *Kennedy v. Auditor Gen., 134 Mich. 534, 10 Detroit Leg. N. 583.*
3. Where Minors are Cotenants with Adults. — *Cain v. Brown, 54 W. Va. 656.*
4. Mortgagee May Redeem. — *Lane v. Wright, 121 Iowa 376, 100 Am. St. Rep. 362; Hawks v. Davis, 185 Mass. 119.*
6. Period for Redemption. — *Hawks v. Davis, 185 Mass. 119; Monaghan v. Auditor Gen., 136 Mich. 247, 10 Detroit Leg. N. 1025; Selby v. Pucppka, (Neb. 1905) 102 N. W. Rep. 263; Beck v. Meroney, 135 N. Car. 532; Cruser v. Williams, 13 N. Dak. 284.*

855. *d.* EXTENSION OF PERIOD FOR REDEMPTION — (2) *By Statute.* — See note 1.

(3) *Court May Extend Time on Equitable Grounds.* — See note 2.

(4) *Waiver of Requirements as to Time.* — See note 4.

e. PERSONS UNDER DISABILITY — (2) *Statutory Provisions.* — See note 8.

856. 7. *Payment and Tender* — *a.* IN GENERAL. — See notes 8, 10.

857. *b.* REFUSAL TO ACCEPT. — See note 1.

c. EFFECT OF TENDER. — See note 6.

e. KIND OF MONEY REQUIRED. — See note 10.

f. TO WHOM MADE. — See note 15.

858. *g.* WHEN DISPENSED WITH — (1) *Conduct of Purchaser.* — See note 2.

(2) *When Amount Cannot Be Discovered.* — See note 5.

h. MISTAKE OR FRAUD OF OFFICER. — See notes 6, 7, 9, 10.

8. *Amount* — *a.* IN GENERAL. — See note 13.

859. See notes 1, 2, 3.

860. *e.* RENTS AND PROFITS. — See note 3.

855. 1. *Time May Be Extended by Statute.* — *Adkin v. Pillen*, 136 Mich. 682, 11 Detroit Leg. N. 163.

Statutes Extending Right Will Not Revive Right Already Barred. — *Harrison v. Thomas*, 103 Va. 333.

2. *Court May Extend Time on Equitable Grounds.* — *Paine v. Germantown Trust Co.*, (C. C. A.) 136 Fed. Rep. 527; *Swan v. Harvey*, 123 Iowa 192; *O'Callaghan v. Lancy*, 187 Mass. 474. See *Jackson v. Boyd*, (Ark. 1905) 87 S. W. Rep. 126.

4. *Purchaser May Waive Requirements as to Time.* — *Moore v. Boagni*, 111 La. 490.

A Waiver May Be Conditional. — *Moore v. Boagni*, 111 La. 490.

8. *Time Extended in Favor of Persons under Disability.* — *Hodges v. Harkleroad*, (Ark. 1905) 85 S. W. Rep. 779; *Smith v. Thornton*, (Ark. 1905) 86 S. W. Rep. 1008; *Cain v. Brown*, 54 W. Va. 656; *Hoffman v. Peterson*, 123 Wis. 632.

856. 8. *Payment and Tender Effect Redemption.* — *Bourquin v. Bourquin*, 120 Ga. 115; *Briggs v. Boardman*, 135 Mich. 329, 10 Detroit Leg. N. 792; *Beck v. Meroney*, 135 N. Car. 532.

10. *Tender Must Be of Whole Amount.* — See *infra*, this title, **859.** 2, 3.

857. 1. *Refusal to Accept on Ground that No Right to Redeem Exists.* — *Hodges v. Harkleroad*, (Ark. 1905) 85 S. W. Rep. 779; *Bourquin v. Bourquin*, 120 Ga. 115; *Cain v. Brown*, 54 W. Va. 656. See also *State v. Register of Conveyances*, 113 La. 93; *Beck v. Meroney*, 135 N. Car. 532.

6. *Deed Made After Tender or Payment Is Void.* — *Sloan v. Cobb*, (Ark. 1905) 85 S. W. Rep. 1126; *Briggs v. Boardman*, 135 Mich. 329, 10 Detroit Leg. N. 792.

10. *Payment May Be by Check.* — *Beck v. Meroney*, 135 N. Car. 532.

15. *Payment or Tender May Be Made to Public Officer.* — *Hawks v. Davis*, 185 Mass. 119; *Rogers v. Nichols*, 186 Mass. 440; *Beck v. Meroney*, 135 N. Car. 532.

858. 2. *Refusal of Purchaser to Receive Amount.* — *Cain v. Brown*, 54 W. Va. 656; *Mosser v. Moore*, 56 W. Va. 478.

5. *Inability to Discover Amount Excuses Tender and Payment.* — *Hodges v. Harkleroad*, (Ark. 1905) 85 S. W. Rep. 779 (holding that tender is excused). See also *Moran v. Thomas*, (S. Dak. 1905) 104 N. W. Rep. 212.

6. *Redemption May Rely on Statements of Officer.* — *Clippinger v. Auditor Gen.*, 135 Mich. 1, 10 Detroit Leg. N. 664; *Beck v. Meroney*, 135 N. Car. 532.

Fraud or Misconduct of Officer Does Not Prejudice Redemption. — *Hoffman v. Auditor Gen.*, 136 Mich. 689, 11 Detroit Leg. N. 201.

7. *Amount Named by Officer Must Be Tendered.* — *State v. Register of Conveyances*, 113 La. 93; *Clippinger v. Auditor Gen.*, 135 Mich. 1; *Hoffman v. Auditor Gen.*, 136 Mich. 689, 11 Detroit Leg. N. 201; *Beck v. Meroney*, 135 N. Car. 532; *State v. Jackson*, 56 W. Va. 558.

9. *Redemption May Be Made from Undisclosed Tax Sale After Statutory Period.* — *Hoffman v. Auditor Gen.*, 136 Mich. 689, 11 Detroit Leg. N. 201.

10. *Inquiry Made of Officer Must Be Specific.* — *Conklin v. Cullen*, 29 Mont. 38.

13. *Amount Necessary to Effect Redemption.* — *Palomares Land Co. v. Los Angeles County*, 146 Cal. 530; *Hawks v. Davis*, 185 Mass. 119; *Cheever v. Flint Land Co.*, 134 Mich. 604, 10 Detroit Leg. N. 584; *Jenswold v. Minnesota Canal Co.*, 93 Minn. 382; *Mills v. Henry Oil Co.*, 57 W. Va. 255.

859. 1. *Amount to Include State, County, and Municipal Taxes.* — *Palomares Land Co. v. Los Angeles County*, 146 Cal. 530.

2. *Whole Amount Must Be Paid.* — *Mills v. Henry Oil Co.*, 57 W. Va. 255.

Purchaser May Agree to Accept Less than Full Amount. — *Briggs v. Boardman*, 135 Mich. 329, 10 Detroit Leg. N. 792.

3. *Small Deficiency in Amount Immaterial.* — *Mosser v. Moore*, 56 W. Va. 478.

860. 3. *Purchaser at Tax Sale Not Entitled to Rents and Profits.* — *Hawks v. Davis*, 185 Mass. 119. But see *Hodges v. Harkleroad*, (Ark. 1905) 85 S. W. Rep. 779, where it was held that one seeking to redeem lands sold for taxes during his infancy could not charge the

- 860.** 9. Notice to Redeem — *a.* IN GENERAL. — See notes 5, 6, 7, 8.
861. *c.* GENERAL REQUISITES. — See notes 5, 6.
862. *d.* CONTENTS OF NOTICE — Description of Land in General. — See note 2.
 Names of Owner and Purchaser. — See note 5.
 Amount Due. — See notes 8, 9.
863. *e.* TO WHOM GIVEN. — See note 1.
 Where the Land Is Taxed as Unknown. — See note 4.
 A Mortgagee. — See note 6.
864. *f.* PUBLICATION. — See notes 2, 3.
g. AFFIDAVITS OF SERVICE AND PUBLICATION — (1) *In General.*
 — See note 12.
865. (2) *Contents of Affidavit.* — See note 3.
 The Day on Which Service Was Made. — See note 4.
 A Copy of the Notice Need Not Be Attached. — See notes 10, 11.
866. 10. EVIDENCE — *c.* TAX DEED. — See note 4.
f. EVIDENCE TO SHOW RIGHT TO REDEEM. — See note 7.
j. BURDEN OF PROVING PROPER NOTICE. — See note 11.

purchaser with rents accruing prior to the attempt to redeem.

Contra in Louisiana. — *Moore v. Boagni*, 111 La. 490.

Purchaser Not Chargeable with Rents Taken by Receiver Appointed in Suit Against Him. — *Bourquin v. Bourquin*, 120 Ga. 115.

860. 5. Statutes Not Applicable Where Right of Redemption Barred Before Enactment. — *Harrison v. Thomas*, 103 Va. 333.

6. Notice Necessary to Terminate Period of Redemption. — *Hawks v. Davis*, 185 Mass. 119; *State v. Scott*, 92 Minn. 210; *Cruser v. Williams*, 13 N. Dak. 284; *Darling v. Purcell*, 13 N. Dak. 288.

7. Notice Condition Precedent to Right to Deed. — *Boucher v. Trembley*, (Mich. 1905) 103 N. W. Rep. 819; *Matthews v. Nefsy*, 13 Wyo. 458.

8. Deed Issued on Insufficient Notice. — *Foy v. Houstman*, (Iowa 1905) 103 N. W. Rep. 369; *Matthews v. Nefsy*, 13 Wyo. 458.

861. 5. General Requisites of Notice. — *Shinkle v. Meek*, 69 Kan. 368; *Bradley v. Williams*, (Mich. 1905) 102 N. W. Rep. 625, 11 Detroit Leg. N. 818; *State v. Scott*, 92 Minn. 210.

Notice Must Conform to the Statute as It Stood at the Time of the Tax Sale. — *Phelps v. Powers*, 90 Minn. 440; *Roessler v. Romer*, 92 Minn. 218.

6. Notice Must Be Full. — *Hawks v. Davis*, 185 Mass. 119.

862. 2. Description Must Identify Land. — *Matthews v. Nefsy*, 13 Wyo. 458.

If the Description Is the Same as on the Tax Record. — *Flint Land Co. v. Godkin*, 136 Mich. 668, 11 Detroit Leg. N. 146.

5. Name of Owner Should Be Stated. — *Bradley v. Williams*, (Mich. 1905) 102 N. W. Rep. 625, 11 Detroit Leg. N. 818.

8. Notice Shall State Amount Required to Redeem. — *Roessler v. Romer*, 92 Minn. 218; *Jenswold v. Minnesota Canal Co.*, 93 Minn. 382.

9. Statement of Amount Must Be Correct. — *Shinkle v. Meek*, 69 Kan. 368; *State v. Scott*, 92 Minn. 210.

An Error of Three Cents in Computing Interest. — *Roessler v. Romer*, 92 Minn. 218.

Erroneous Addition of Words "and Delinquent Taxes" Will Not Invalidate. — *Phelps v. Powers*, 90 Minn. 440.

863. 1. Persons Entitled to Notice. — *Foy v. Houstman*, (Iowa 1905) 103 N. W. Rep. 369; *People v. Kelsey*, 180 N. Y. 24; *Woodward v. Taylor*, 33 Wash. 1, 12.

Acts Sufficient to Constitute Occupancy. — *Foy v. Houstman*, (Iowa 1905) 103 N. W. Rep. 369; *People v. Kelsey*, 180 N. Y. 24.

4. Land Without Occupant Taxed to Unknown. — *People v. Miller*, 90 N. Y. App. Div. 599, affirmed 179 N. Y. 564.

6. Mortgagee Not Entitled to Notice. — *Contra* in *Massachusetts* as to a mortgagee of record. *Hawks v. Davis*, 185 Mass. 119.

864. 2. Diligent Inquiry Must Precede Publication. — *Winters v. Cook*, (Mich. 1905) 103 N. W. Rep. 869.

3. Nature of Diligent Inquiry Necessary. — *Winters v. Cook*, (Mich. 1905) 103 N. W. Rep. 869.

12. Service Not Complete until Affidavit Filed. — *Barcroft v. Mann*, 125 Iowa 530; *Cruser v. Williams*, 13 N. Dak. 284.

Service Not Complete until Sheriff's Return of Notice Filed. — *Pike v. Richardson*, 136 Mich. 414, 11 Detroit Leg. N. 43.

865. 3. Affidavit Must State Everything Essential. — *Barcroft v. Mann*, 125 Iowa 530.

4. Must State on What Day Service Was Made. — *Barcroft v. Mann*, 125 Iowa 530.

10. Copy of Notice Need Not Be Attached to Affidavit Nor Filed. — *Haskins v. Iowa Land Co.*, 121 Iowa 299.

11. Omissions Cannot Be Cured Nor Defects Supplied by Parol. — *Barcroft v. Mann*, 125 Iowa 530.

866. 4. Tax Deed Presumptive Evidence of the Giving of Notice. — *Brown v. Reeves*, 31 Ind. App. 517. See also *Posey v. New Orleans*, 113 La. 1059.

7. Evidence of Right to Redeem. — *Winters v. Cook*, (Mich. 1905) 103 N. W. Rep. 869.

11. Burden of Proving Proper Notice. — *Winters v. Cook*, (Mich. 1905) 103 N. W. Rep. 869; *Cruser v. Williams*, 13 N. Dak. 284.

867. 11. Equitable Jurisdiction — a. IN GENERAL — An Injunction to Restrain the Execution of the Tax Deed. — See note 7.

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XVIII. DISTRIBUTION AND DISPOSITION OF AVAILS OF TAXATION — Each Year's Income Should Pay Each Year's Expenses. — See note 15.

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868. Taxes to Pay Interest on Railroad Bonds. — See note 2.

Power of Legislature to Apply Tax Funds. — See note 3.

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869. XIX. MUNICIPAL TAXATION — 2. Power to Tax — a. GRANT BY STATE — (1) In General. — See note 3.

872. b. POWER BY NECESSARY IMPLICATION — When Power Implied. — See note 4.

873. c. LIMITATIONS ON POWER — (1) Constitutional Restrictions. — See note 7.

874. A Limitation on the Power to Contract Indebtedness. — See note 2.

875. (2) Legislative Restrictions — (a) In General. — See note 1.

In Some States the Constitution Expressly Requires. — See note 2.

Within the Prescribed Limit. — See note 3.

876. (b) Effect of Limitation on Special Grants of Taxing Power — When Special Grant Not Controlled by Limitation. — See notes 4, 5.

867. 7. Injunction to Restrain Execution of Tax Deed. — Ward v. Piper, 69 Kan. 773.

8. Officer May Be Compelled to Accept Money. — State v. Register of Conveyances, 113 La. 93; Monaghan v. Auditor Gen., 136 Mich. 247, 10 Detroit Leg. N. 1025; Hoffman v. Auditor Gen., 136 Mich. 689, 11 Detroit Leg. N. 201.

9. Claim under Void Tax Deed May Be Removed as Cloud on Title. — Shinkle v. Meek, 69 Kan. 368.

Repayment of Purchase Money, Costs, and Subsequent Taxes Required. — Mosser v. Moore, 56 W. Va. 478.

15. Each Year's Income Should Pay Each Year's Expenses. — See Territory v. Bermalillo County, (N. Mex. 1905) 79 Pac. Rep. 709.

17. Funds Should Be Used for Specific Purposes Intended. — Ward v. Piper, 69 Kan. 773; Carpenter v. Central Covington, 81 S. W. Rep. 919, 26 Ky. L. Rep. 430; Louisville v. Button, 82 S. W. Rep. 293, 26 Ky. L. Rep. 606; Board of Education v. Iredell County, 137 N. Car. 63; Austin v. Cahill, (Tex. 1905) 88 S. W. Rep. 542, quoting 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 867.

868. 2. Taxes to Pay Interest on Railroad Bonds. — Ulster County v. State, 177 N. Y. 189, affirming 79 N. Y. App. Div. 277.

3. Power of Legislature to Apply Tax Funds. — Ulster County v. State, 177 N. Y. 189.

5. Appropriation by County and Municipal Authorities. — Magoffin County v. Owens, 82 S. W. Rep. 417, 26 Ky. L. Rep. 715; Blood v. Beal, 100 Me. 30; Taylor v. Braxton County Ct., 57 W. Va. 165.

6. Cleveland, etc., R. Co. v. People, 208 Ill. 9; Louisville v. Button, 82 S. W. Rep. 293, 26 Ky. L. Rep. 606; Austin v. Cahill, (Tex. 1905) 88 S. W. Rep. 542, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 868.

No Trust for Paying Bonds Barred by Limitation. — Wurth v. Paducah, 116 Ky. 403, 105 Am. St. Rep. 225.

7. See People v. Columbia County, 105 N. Y. App. Div. 319.

869. 3. No Taxing Power Inherent in Municipality. — Com. v. Citizens' Nat. Bank, 117 Ky. 946; Adams v. Kuykendall, 83 Miss. 571; Aachen, etc., F. Ins. Co. v. Omaha, (Neb. 1904) 101 N. W. Rep. 3; State v. Ide, 35 Wash. 576, 102 Am. St. Rep. 914.

872. 4. Implied Power to Tax. — U. S. v. Saunders, 124 Fed. Rep. 124, 59 C. C. A. 394.

873. 7. Legislature Powerless to Extend Constitutional Restrictions. — Brooks v. Schultz, 178 Mo. 222.

874. 2. Limitation on Indebtedness Limits Taxing Power. — Bardwell v. Harlin, 80 S. W. Rep. 773, 26 Ky. L. Rep. 101; Crowley v. Fulton, 112 La. 234.

But Where a City Had Failed for Several Years to Levy a Tax to pay contractual obligations, it was held that the omitted taxes might be levied en masse, though the total might exceed the constitutional limit. Austin v. Cahill, (Tex. 1905) 88 S. W. Rep. 542.

875. 1. Legislative Restrictions Must Be Observed. — State v. Royse, (Neb. 1904) 98 N. W. Rep. 459.

2. Constitutional Provision Held to Apply to Cities Incorporated by Special Law. — Adams v. Kuykendall, 83 Miss. 571.

3. Within Limit Tax Discretionary. — Diamond Match Co. v. Ontonagon, (Mich. 1905) 103 N. W. Rep. 578.

876. 4. Limitation May Be Exceeded under Special Grant of Power. — Brown v. Visalia, 141 Cal. 372; Denver v. Adams County, 33 Colo. 1; Endom v. Monroe, 112 La. 779; Diamond Match Co. v. Ontonagon, (Mich. 1905) 103 N. W. Rep. 578; St. Joseph v. Pitt, 109 Mo. App. 635; Evans v. McFarland, 186 Mo. 703.

5. Not Applicable Where Not Expressly Made So. — Brown v. Visalia, 141 Cal. 372; Denver v. Adams County, 33 Colo. 1; Endom v. Mon-

- 877.** When Limitation Controls. — See notes 2, 4.
878. (c) Effect of Taxation in Excess of Limit. — See note 2.
879. How Far Tax Void. — See notes 3, 4.
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880. Withdrawal or Alteration of the Power Will Not Be Presumed. — See note 4.
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882. 3. How Power Exercised — *b.* CONFORMITY TO STATUTORY REQUIREMENTS. — See note 2.
883. Time of Levy. — See note 3.
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885. *c.* IRREGULARITIES AND INFORMALITIES. — See note 1.
886. 4. Compelling Exercise of Taxing Power — *a.* LEGISLATIVE COMPULSION — Matters of General Public Interest. — See note 4.
888. 5. Submission to Popular Vote — *b.* NECESSITY FOR APPROVAL OF TAXPAYERS. — See note 4.
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890. *c.* NOTICE OF ELECTION — Necessity to Specify Purposes. — See note 5.
891. *d.* PROCEEDINGS — Qualification and Registration of Voters. — See notes 2, 3.

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roe, 112 La. 779; Evans v. McFarland, 186 Mo. 703.

877. 2. Special Taxes Controlled by Limitation. — *Bardwell v. Harlin*, 80 S. W. Rep. 773, 26 Ky. L. Rep. 101; *Brooks v. Schultz*, 178 Mo. 222.

4. A Statute Limiting the Rate of Taxation for the Purpose of Paying a Bonded Debt is not applicable to taxes imposed to pay a judgment on the debt. *U. S. v. Saunders*, 124 Fed. Rep. 124, 59 C. C. A. 394.

878. 2. Injunction Will Be Issued Against the Illegal Portion of the Tax Only, where it is ascertainable, and not then except the legal portion be tendered or paid. *Douglas v. Fargo*, 13 N. Dak. 467.

879. 3. Invalid as to Excess Only. — *Cincinnati, etc., R. Co. v. People*, 207 Ill. 566; *Douglas v. Fargo*, 13 N. Dak. 467.

4. Not Invalidated by Subsequent Levy. — *Cincinnati, etc., R. Co. v. People*, 207 Ill. 566.

6. Legislature May Alter Power at Will. — *Adams v. Kuykendall*, 83 Miss. 571.

880. 4. Alteration Not Presumed. — *People v. Mottinger*, 215 Ill. 256.

5. Existing Laws Enter into Contract. — *Ft. Madison v. Ft. Madison Water Co.*, (C. C. A.) 134 Fed. Rep. 214.

6. Cannot Impair Contract Obligations. — *Ex p. Folsom*, 131 Fed. Rep. 496; *Ft. Madison v. Ft. Madison Water Co.*, (C. C. A.) 134 Fed. Rep. 214; *Austin v. Cahill*, (Tex. 1905) 88 S. W. Rep. 542.

882. 2. Must Be Strictly Pursued. — *Russellville v. Purdy*, 206 Ill. 142; *Cincinnati, etc., R. Co. v. People*, 206 Ill. 387; *People v. Indiana, etc., R. Co.*, 206 Ill. 612; *People v. Florville*, 207 Ill. 79; *Cincinnati, etc., R. Co. v. People*, 207 Ill. 566; *Cincinnati, etc., R. Co. v. People*, 213 Ill. 197; *Wabash R. Co. v. People*, 213 Ill. 522; *Chicago, etc., R. Co. v. People*, 213 Ill. 458; *Chicago, etc., R. Co. v. People*, 213 Ill. 497; *Cincinnati, etc., R. Co. v. People*, 213 Ill. 558; *People v. Chicago, etc., R. Co.*, 214 Ill. 190.

Specification of Purpose. — *People v. Cincinnati, etc., R. Co.*, 213 Ill. 503.

Taxes collected under a levy for general purposes cannot be applied to a purpose which the statute required to be specified. *Louisville v. Button*, 82 S. W. Rep. 293, 26 Ky. L. Rep. 606.

Publication of Ordinance — Necessity and Sufficiency. — *Muir v. Bardstown*, (Ky. 1905) 87 S. W. Rep. 1096.

883. 3. Must Be Made at Prescribed Time. — *People v. Florville*, 207 Ill. 79.

884. 5. Appropriation Ordinance, Certificate, or Estimate. — *People v. Indiana, etc., R. Co.*, 206 Ill. 612; *People v. Florville*, 207 Ill. 79; *Cincinnati, etc., R. Co. v. People*, 207 Ill. 566; *Cincinnati, etc., R. Co. v. People*, 213 Ill. 558.

Sufficiency of Form. — *State v. Allen*, 178 Mo. 555.

885. 1. Informalities and Irregularities Do Not Invalidate. — *Cincinnati, etc., R. Co. v. People*, 206 Ill. 387; *Cincinnati, etc., R. Co. v. People*, 213 Ill. 197.

886. 4. Legislature May Compel Levy of Tax. — *Van Cleve v. Passaic Valley Sewerage Com'rs*, 71 N. J. L. 183, 574.

888. 4. Essential to Exercise of Taxing Power. — *Chipley v. Layfield*, 120 Ga. 33; *Cincinnati, etc., R. Co. v. People*, 205 Ill. 538; *Cincinnati, etc., R. Co. v. People*, 206 Ill. 387; *People v. Florville*, 207 Ill. 79. See also *State v. Allen*, 178 Mo. 555.

Not Necessary Where Taxpayers Had Previously Voted to Incur Indebtedness. — *Evans v. McFarland*, 186 Mo. 703.

889. 2. Public School Taxes. — *Chipley v. Layfield*, 120 Ga. 33.

890. 5. Sufficient if Notice Fairly Expresses Purpose. — *State v. Allen*, 178 Mo. 555.

891. 2. Those Qualified to Vote at General Elections. — *Endom v. Monroe*, 112 La. 779.

3. Opportunity to Register. — *Endom v. Monroe*, 112 La. 779.

7. Mere Irregularities Do Not Vitiolate. — *Endom v. Monroe*, 112 La. 779; *State v. Allen*, 178 Mo. 555.

- 892.** Statement of Purpose in Vote. — See note 1.
- 893.** 6. Purposes of Municipal Taxation — *a.* IN GENERAL — Must Be Municipal and Corporate. — See note 3.
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- 894.** See note 1.
- 895.** 7. Subjects of Municipal Taxation — *a.* IN GENERAL — Under a General Power to Levy Taxes. — See note 6.
- 896.** Personal Property. — See note 4.
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- 897.** *c.* PROPERTY OUTSIDE CORPORATE LIMITS. — See note 2.
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- 898.** See note 1.
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- 900.** (c) Statutes Exempting or Fixing Lower Rate — Constitutionality of Statutes. — See note 3.
- 901.** *e.* DETACHED TERRITORY. — See note 2.
- 902.** 8. Assessment — By Whom Made. — See notes 3, 4.
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- 904.** See note 1.
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892. 1. Statements "for Town Purposes" and "for Town Expenses" Too Indefinite. — *Cincinnati, etc., R. Co. v. People*, 207 Ill. 566.

893. 3. Must Be for Municipal and Corporate Purposes. — *Manning v. Devils Lake*, 13 N. Dak. 47.

6. Proper Purposes of Municipal Taxation — *To Acquire Lighting Plant.* — *State v. Allen*, 178 Mo. 555.

894. 1. Improper Purposes — *Construction of Bridge Out of Corporate Limits.* — *Manning v. Devils Lake*, 13 N. Dak. 47.

895. 6. All Property Taxable under General Laws. — *Louisville v. McAteer*, 81 S. W. Rep. 698, 26 Ky. L. Rep. 425; *Philadelphia v. Philadelphia Traction Co.*, 206 Pa. St. 35.

896. 4. Personalty Taxable if Legal Situs Within Municipality. — *Armour Packing Co. v. Augusta*, 118 Ga. 552, 96 Am. St. Rep. 128.

Personalty Temporarily in City on Assessment Day Not Taxable. — *London v. Boyd*, 77 S. W. Rep. 931, 25 Ky. L. Rep. 1337. See also *Baron v. Boston*, 187 Mass. 168.

5. Choses in Action Embraced. — *Armour Packing Co. v. Augusta*, 118 Ga. 552.

897. 2. Property Disconnected After Assessment but Before Levy Not Taxable. — *Gillmor v. Dale*, 27 Utah 372.

6. Lands Annexed After Assessment Date Not Taxable for Current Year. — *Latoria v. Meyer*, (Ky. 1905) 86 S. W. Rep. 686.

898. 1. Annexed Territory Taxable for Pre-existing Debt. — *Carpenter v. Central Covington*, 81 S. W. Rep. 919, 26 Ky. L. Rep. 430.

3. Taxes Legally Levied Before Consolidation, but not collected, inure to the benefit of the new corporation and the latter has no power to make a new or additional levy. *Boston*,

etc., *Smelting Co. v. Elder*, (Colo. App. 1904) 77 Pac. Rep. 258.

5. *Birch v. Plattsburg*, 180 Mo. 413; *State v. Birch*, 186 Mo. 205.

900. 3. Statutes Held Unconstitutional. — *Birch v. Plattsburg*, 180 Mo. 413; *State v. Birch*, 186 Mo. 205.

901. 2. Detached Territory Not Liable for Municipal Debts. — *Compare Carpenter v. Central Covington*, 81 S. W. Rep. 919, 26 Ky. L. Rep. 430.

902. 3. See *Adams v. Kuykendall*, 83 Miss. 571.

4. City Assessor Cannot Make Assessment Without Authority from Council. — *Franklin v. Warwick, etc.*, *Water Co.*, 25 R. I. 384.

6. State, County, or Town Assessment as Basis of Valuation. — *West v. Newport News*, (Va. 1905) 51 S. E. Rep. 206.

903. 1. The Municipal Authorities May Elect. — *U. S. Fidelity, etc., Co. v. Board of Education*, (Ky. 1905) 86 S. W. Rep. 1120. See also *People v. St. Lawrence County*, 101 N. Y. App. Div. 327. *Contra. Chicago, etc., R. Co. v. Cedar Rapids*, 127 Iowa 678.

4. City Taxes Made Collectible in Same Manner as State Taxes. — *State v. New Orleans*, 112 La. 408.

Statute Allowing Cities of Second Class to Distrain. — See *Bell v. Lexington*, 85 S. W. Rep. 1081, 27 Ky. L. Rep. 591.

7. Power to Sue for Taxes. — *Brummer v. Galveston*, 93 Tex. 93; *Bennison v. Galveston*, 34 Tex. Civ. App. 382.

904. 1. Special Remedy Does Not Exclude Collection by Action. — *Chelsea v. Holmes*, 137 Mich. 195, 11 Detroit Leg. N. 254.

5. Penalty Becomes Part of Taxes Due. — *Rochester v. Bloss*, 100 N. Y. App. Div. 125.

905. 10. Taxes in Particular Districts and Quasi-Municipalities — *a.* IN GENERAL. — See note 1.

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908. See notes 1, 2.

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909. *Limitations on Rate.* — See notes 1, 2.

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911. (4) *Collection and Disposition of Fund.* — See note 2.

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913. *c.* HIGHWAY DISTRICTS AND STREET AND HIGHWAY TAXES — (2) *Exercise of Power.* — See notes 2, 3, 4.

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(3) *Persons and Property Taxable.* — See note 6.

916. (4) *Collection and Disposition of Fund.* — See note 2.

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919. *d.* LEVEE DISTRICTS AND TAXES. — See note 2.

905. 1. City May Be a District. — State *v.* Hunter, 119 Wis. 450.

906. 4. Necessity for Legislative Grant. — People *v.* Mottinger, 215 Ill. 256.

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907. 1. Chicago, etc., R. Co. *v.* People, 205 Ill. 625; Cleveland, etc., R. Co. *v.* People, 208 Ill. 9; People *v.* Mottinger, 215 Ill. 256; People *v.* Peoria, etc., R. Co., 216 Ill. 221.

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4. Failure to Comply Invalidates Tax. — Illinois Southern R. Co. *v.* People, 215 Ill. 123; U. S. Fidelity, etc., Co. *v.* Board of Education, 80 S. W. Rep. 1191, 26 Ky. L. Rep. 246; Bennett *v.* Police Jury, 113 La. 68.

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908. 1. Compliance Must Appear Affirmatively. — Illinois Southern R. Co. *v.* People, 215 Ill. 123.

2. Irregularities Not Fatal. — Chicago, etc., R. Co. *v.* People, 205 Ill. 625; Schmohl *v.* Williams, 215 Ill. 63.

7. Previous Defeat No Bar to Adoption at Subsequent Meeting. — Stanton *v.* Board of Education, 70 N. J. L. 336, affirming 68 N. J. L. 496.

909. 1. Limitation of Amount. — Cleveland, etc., R. Co. *v.* People, 208 Ill. 9.

2. Tax in Excess of Limit Invalid. — Chicago, etc., R. Co. *v.* People, 205 Ill. 625.

6. Judicial Control. — Cleveland, etc., R. Co. *v.* People, 208 Ill. 9; People *v.* Peoria, etc., R. Co., 216 Ill. 221.

911. 2. Injunction to Restrain Collection. — See Cleveland, etc., R. Co. *v.* People, 208 Ill. 9.

5. Cannot Be Appropriated to Other Purposes. — People *v.* Peoria, etc., R. Co., 216 Ill. 221; Butte *v.* School Dist. No. 1, 29 Mont. 336.

913. 2. Compliance with Statute Necessary. — Cleveland, etc., R. Co. *v.* People, 205 Ill. 582; Chicago, etc., R. Co. *v.* People, 206 Ill. 296; People *v.* Cincinnati, etc., R. Co., 213 Ill. 503; People *v.* Chicago, etc., R. Co., 214 Ill. 190; Illinois Southern R. Co. *v.* People, 215 Ill. 123; Kuntz *v.* Cedarville, 109 Ill. App. 330; Reed *v.* Chatsworth, 109 Ill. App. 332; F. & F. Lumber Co. *v.* Thompson Tp., (Mich. 1905) 103 N. W. Rep. 188, 12 Detroit Leg. N. 49.

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3. Irregularities Do Not Vitiolate. — People *v.* Chicago, etc., R. Co., 214 Ill. 190.

4. Ascertainment of Amount — Levy. — See Cincinnati, etc., R. Co. *v.* People, 207 Ill. 566; Illinois Cent. R. Co. *v.* People, 213 Ill. 174; Cincinnati, etc., R. Co. *v.* People, 213 Ill. 197.

914. 1. Authentication. — Cincinnati, etc., R. Co. *v.* People, 213 Ill. 197; Illinois Southern R. Co. *v.* People, 215 Ill. 123.

2. Must Not Exceed Limitation. — People *v.* Cincinnati, etc., R. Co., 213 Ill. 503.

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6. Custer County Bank *v.* Custer County, (S. Dak. 1904) 100 N. W. Rep. 424.

916. 2. Apportionment of Fund. — See Texarkana *v.* Edwards, (Ark. 1905) 88 S. W. Rep. 862.

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919. 2. May Confer Taxing Power on Levee District. — See United R., etc., Co. *v.* Nevers, 112 La. 897.

TAXATION (CORPORATE).

BY H. O'B. COOPER.

922. II. TAXABILITY OF CORPORATIONS — 2. Taxability of National Bank's Personality. — See note 5.

923. 3. Taxability of National Bank's Realty. — See note 1.

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923. 1. Real Estate Bought with Capital Stock Exempt. — *Hempstead County v. Hempstead County Bank*, 73 Ark. 515; *Superior First Nat. Bank v. Douglas County*, 124 Wis. 15.

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3. Legislature May Properly Classify Corporations for Taxation. — *German Washington Mut. F. Ins. Co. v. Louisville*, 117 Ky. 603.

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4. Classification of Corporations for Purposes of Taxation. — *Chicago*, etc., *R. Co. v. Richardson County*, (Neb. 1904) 100 N. W. Rep. 950; *Aachen*, etc., *F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3. See also *Layman v. Iowa Telephone Co.*, 123 Iowa 591.

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5. Diversity of Legislation Not Inconsistent with Uniformity and Equality. — *Chicago*, etc., *R. Co. v. Richardson County*, (Neb. 1904) 100 N. W. Rep. 950.

925. 1. Com. v. Citizens' Nat. Bank, 117 Ky. 946; *Western Union Tel. Co. v. Omaha*, (Neb. 1904) 103 N. W. Rep. 84; *State v. El-*

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926. 1. Partnership Associations Taxable as Corporations. — See *Morgan County v. Walton County*, 121 Ga. 659.

2. Personality Taxable at Domicil of Corporation. — *Western Assur. Co. v. Halliday*, (C. C. A.) 126 Fed. Rep. 257; *In re Union Tank Line Co.*, 204 Ill. 347, 98 Am. St. Rep. 221.

Kentucky Statute — Personality of Domestic Corporation Taxable in Kentucky Though Located Elsewhere. — *Com. v. Union Refrigerator Transit Co.*, (Ky. 1904) 80 S. W. Rep. 490.

3. Personality Taxable Where Found. — *Western Assur. Co. v. Halliday*, (C. C. A.) 126 Fed. Rep. 257.

927. 2. Personality Taxable at Principal Office or Place of Business. — *Layman v. Iowa Telephone Co.*, 123 Iowa 591; *Langdon-Creasy Co. v. Owenton Common School Dist.*, 116 Ky. 562; *Teagan Transp. Co. v. Assessors*, (Mich. 1905) 102 N. W. Rep. 273; *State v. Fleming*, (Neb. 1903) 97 N. W. Rep. 1063; *Sims v. Best*, 25 Ohio Cir. Ct. 149.

3. Michigan Statute — Place of Taxation Is Where Principal Business Conducted. — *Teagan Transp. Co. v. Assessors*, (Mich. 1905) 102 N. W. Rep. 273.

6. Personality Taxed at Situs. — *Western Assur. Co. v. Halliday*, (C. C. A.) 126 Fed. Rep. 257; *Johnson v. Bradley-Watkins Tie Co.*, (Ky,

- 928!** See note 1.
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 — See note 5.
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929. Taxation of Shares Where Corporation Is Located. — See note 5.
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928. 1. Movable Property Belonging to Foreign Corporation. — *Fargo v. Hart*, 193 U. S. 490; *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214. But see *State v. Union Tank Line Co.*, 94 Minn. 320.

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6. Municipal Bonds and Securities are more than mere evidences of debt, and have a tangible *situs* for the purposes of taxation, which may be different from the domicil of their owner. *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214. See also *Scottish Union, etc., Ins. Co. v. Bowland*, 106 U. S. 611.

Bonds Deposited by Foreign Corporation Taxable. — *Sims v. Best*, 25 Ohio Cir. Ct. 149; *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214.

Bonds Deposited by Foreign Insurance Company — County Where Held. — *Western Assur. Co. v. Halliday*, 127 Fed. Rep. 830; *Western Assur. Co. v. Halliday*, (C. C. A.) 126 Fed. Rep. 257.

6. Place of Taxing Shares of Stock — General Rule. — *Com. v. Chesapeake, etc., R. Co.*, 111 Ky. 951. See also *Baltimore v. Allegany County*, 99 Md. 1.

929. 5. Maryland Statute — Shares Owned by Nonresidents. — See *Baltimore v. Allegany County*, 99 Md. 1.

931. 1. Real Estate of Corporation Assessed Where Situated. — *Security Trust Co. v. Liberty Bldg. Co.*, 96 N. Y. App. Div. 436; *State v. Fidelity, etc., Co.*, 35 Tex. Civ. App. 214.

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932. 1. Taxability of Franchises. — *State Bank v. San Francisco*, 142 Cal. 276, 100 Am. St. Rep. 130; *Hager v. Louisville Title Co.*, (Ky. 1905) 85 S. W. Rep. 182; *Chicago, etc., R. Co. v. Richardson County*, (Neb. 1904) 100 N. W. Rep. 950; *New Hanover County v. Armour Packing Co.*, 135 N. Car. 62. See also *Matter of Albany, etc., Turnpike Road*, 180 N. Y. 401, *reversing* on other grounds 94 N. Y. App. Div. 509.

Franchise Defined — Nebraska Act. — See *Western Union Tel. Co. v. Omaha*, (Neb. 1905) 103 N. W. Rep. 84. And see **FRANCHISES, 4. 1 et seq.**

Kentucky Statute — Trading Corporations Not Included. — *Standard Oil Co. v. Com.*, (Ky. 1904) 82 S. W. Rep. 1020.

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933. 1. Amount of Capital Stock. — *Rhode Island Hospital Trust Co. v. Tax Assessors*, 25 R. I. 355.

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2. Amount of Capital Stock Employed in State. *People v. Miller*, 90 N. Y. App. Div. 591; *People v. Kelsey*, 101 N. Y. App. Div. 325, *affirmed* 181 N. Y. 512.

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6. Par Value of Surplus and Undivided Earnings. — *People v. Miller*, 177 N. Y. 461.

8. Gross Receipts. — *Western Assur. Co. v. Halliday*, 127 Fed. Rep. 830; *Greenfield, etc., St. R. Co. v. Greenfield*, 187 Mass. 352; *State v. Fleming*, (Neb. 1903) 97 N. W. Rep. 1063; *Aachen, etc., F. Ins. Co. v. Omaha*, (Neb. 1904) 101 N. W. Rep. 3; *Paterson, etc., Gas, etc., Co. v. Assessors*, 69 N. J. L. 116, *affirmed* 70 N. J. L. 825; *People v. Miller*, 177 N. Y. 515; *Heerwagen v. Crosstown St. R. Co.*, 90 N. Y. App. Div. 275, *modified* 179 N. Y. 99. Compare *Western Union Tel. Co. v. Omaha*, (Neb. 1905) 103 N. W. Rep. 84.

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934. VII. CAPITAL STOCK TAX — 1. In General. — See note 2.

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936. 2. Taxation of Shares through Corporation. — See note 1.

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939. IX. INCOME TAX — NET INCOME — GROSS RECEIPTS — 3. Gross Receipts. — See note 2.

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Franchise Taxable at Different Rate from Tangible Property. — Coulter v. Louisville, etc., R. Co., 196 U. S. 599.

934. 2. Capital Stock Subject of Taxation. — German Sav. Bank v. Trowbridge, 124 Iowa 514; State v. Fleming, (Neb. 1903) 97 N. W. Rep. 1063. See also Wahkonsa Invest. Co. v. Ft. Dodge, 125 Iowa 148.

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935. 1. Real Estate Acquired by Capital Stock Exempt. — Hempstead County v. Hempstead County Bank, 73 Ark. 515; Superior First Nat. Bank v. Douglas County, 124 Wis. 15.

4. Valuation of Capital Stock by Deducting Assessed Valuation of Tangible Property. — Bulkeley's Appeal, 77 Conn. 45; German Sav. Bank v. Trowbridge, 124 Iowa 514; State v. Fleming, (Neb. 1903) 97 N. W. Rep. 1063; Security Trust Co. v. Liberty Bldg. Co., 96 N. Y. App. Div. 436. See also Wahkonsa Invest. Co. v. Ft. Dodge, 125 Iowa 148.

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5. Market Value of Shares Held Improper Basis of Assessing Capital Stock. — Compare German Sav. Bank v. Trowbridge, 124 Iowa 514.

7. Capital Stock, as Used in the New York Tax Law of 1906, does not mean shares of stock; it is limited to the actual money or property paid in and possessed by the corporation as such. People v. Morgan, 178 N. Y. 433; People v. Feitner, 92 N. Y. App. Div. 518.

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8. Shares of Stock in Foreign Corporation. — See Wright v. Louisville, etc., R. Co., 195 U. S. 219.

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5. Taxation of National Bank Shares by State. — See Com. v. Citizens' Nat. Bank, 117 Ky. 946; State v. Fleming, (Neb. 1903) 97 N. W. Rep. 1063; Ankeny v. Blakley, 44 Oregon 78.

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937. 1. Intent of Statute. — Com. v. Citizens' Nat. Bank, 117 Ky. 946; Ankeny v. Blakley, 44 Oregon 78.

5. Extent of State's Authority to Tax National Bank Shares. — San Francisco Nat. Bank v. Dodge, 197 U. S. 70. See also Covington First Nat. Bank v. Covington, 129 Fed. Rep. 792.

6. Valuation of National Bank Shares. — San Francisco Nat. Bank v. Dodge, 197 U. S. 70.

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938. 1. Taxation of National Bank Shares Through Bank as Agent of Stockholders. — Com. v. Citizens' Nat. Bank, 117 Ky. 946; State v. Fleming, (Neb. 1903) 97 N. W. Rep. 1063.

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939. 2. Power of State to Levy Franchise Tax on Gross Receipts. — Western Assur. Co. v. Halliday, 127 Fed. Rep. 830.

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941. 3. Jurisdiction to Tax Foreign Corporations under New York Statute. — People *v.* Wells, 98 N. Y. App. Div. 82, affirmed 182 N. Y. 553.

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942. 1. Property of Corporation Carrying on Interstate Commerce Taxable at Situs. — See Coulter *v.* Weir, (C. C. A.) 127 Fed. Rep. 897.

6. Assessment by Local Authorities. — Adams County *v.* Kansas City, etc., R. Co., (Neb. 1904) 99 N. W. Rep. 245.

7. State *v.* Back, (Neb. 1904) 100 N. W. Rep. 952. See also Union Pac. R. Co. *v.* Wyandotte County, 69 Kan. 572.

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943. 1. Assessment of Railroad as Entirety Taxes Apportioned Among Subdivisions of State. — People *v.* State Board of Equalization, 205 Ill. 296; Chicago, etc., R. Co. *v.* Richardson County, (Neb. 1904) 100 N. W. Rep. 950; State *v.* Back, (Neb. 1904) 100 N. W. Rep. 952.

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944. 1. See People *v.* State Board of Equalization, 205 Ill. 296.

4. Rolling Stock Taxable as Personalty. — Toronto R. Co. *v.* Toronto, (1904) A. C. 809; Com. *v.* Union Refrigerator Transit Co., (Ky. 1904) 80 S. W. Rep. 491.

945. 5. Railroads Taxable in Entirety and as Units. — State *v.* Back, (Neb. 1904) 100 N. W. Rep. 952.

6. Railroad and Sleeping-car Companies Engaged in Interstate Commerce. — See Fargo *v.* Hart, 193 U. S. 490.

946. 1. Railroad Deemed Resident of Each County through Which Road Passes. — State *v.* Back, (Neb. 1904) 100 N. W. Rep. 952.

3. Valuation of Railroads in General. — Louisville, etc., R. Co. *v.* Coulter, 131 Fed. Rep. 282.

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948. 1. See Jefferson County *v.* Board of Valuation, etc., 117 Ky. 531; Matter of Lehigh Valley R. Co., 71 N. J. L. 128.

6. Power of State to Subject Corporations to Double Taxation. — See Johnson *v.* Bradley-Watkins Tie Co., (Ky. 1905) 85 S. W. Rep. 726; State *v.* Fidelity, etc., Co., 35 Tex. Civ. App. 214.

7. Statutes Construed to Avoid Taxation. — Hempstead County *v.* Hempstead County Bank, 73 Ark. 515; Superior First Nat. Bank *v.* Douglas County, 124 Wis. 15. And see generally the title TAXATION, 608, 2 *et seq.*

949. 3. Separate Taxation of Shares and Capital Stock or Property. — See note 1.

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XIV. CORPORATION REQUIRED TO FURNISH LIST OF TAXABLE PROPERTIES. — See notes 5, 6, 7, 8, 9.

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4. Franchise, Capital Stock, Tangible Property, and Shares of Stock Taxed Simultaneously. — Western Assur. Co. v. Halliday, 127 Fed. Rep. 830; Bulkeley's Appeal, 77 Conn. 45; Security Trust Co. v. Liberty Bldg. Co., 96 N. Y. App. Div. 436. See also Rhode Island Hospital Trust Co. v. Tax Assessors, 25 R. I. 355.

950. 3. See American Can Co. v. Com., 188 Mass. 1.

5. Corporations Required to Furnish List of Taxable Properties. — Hempstead County v. Hempstead County Bank, 73 Ark. 515.

Kentucky Statute Applicable to Foreign Corporations. — Coulter v. Weir, (C. C. A.) 127 Fed. Rep. 897.

6. List of Stockholders Required to Be Furnished. — Com. v. Citizens' Nat. Bank, 117 Ky. 946; State v. Fleming, (Neb. 1903) 97 N. W. Rep.

1063. See also State v. Shryack, 179 Mo. 424.

7. Number and Market Value of Shares. — State v. Fleming, (Neb. 1903) 97 N. W. Rep. 1063. See also State v. Shryack, 179 Mo. 424.

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8. List of Capital Stock and Property Required. — State v. Fleming, (Neb. 1903) 97 N. W. Rep. 1063; Rhode Island Hospital Trust Co. v. Tax Assessors, 25 R. I. 355; Boston Safe Deposit, etc., Co. v. Tax Assessors, 25 R. I. 524. See also Security Sav. Bank v. Carroll, (Iowa 1905) 103 N. W. Rep. 379; State v. Shryack, 179 Mo. 424.

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TAX TITLES.

By H. O'B. COOPER.

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6. *Acknowledgment as in Case of Other Deeds*. — State v. Harman, 57 W. Va. 447.

8. *Acknowledgment Unnecessary*. — Morgan Park v. Knopf, 210 Ill. 453.

10. *Substantial Compliance with Statute Sufficient*. — Laughlin v. Kieper, 125 Wis. 161.

Failure of Notary's Certificate to Show County Immaterial. — Hornage v. Imboden, 57 W. Va. 206.

965. 4. *Delivery and Acceptance*. — David v. Whitehead, 13 Wyo. 189, rehearing denied 13 Wyo. 207.

7. *Not Essential to Execution*. — Rothchild v. Rollinger, 32 Wash. 307.

8. *Notice*. — Maddox v. Arthur, 122 Ga. 671. See also Rothchild v. Rollinger, 32 Wash. 307.

12. *Essential to Validity of Deed*. — Maddox v. Arthur, 122 Ga. 671.

966. 1. *Deed Must Be Witnessed or Acknowledged*. — State v. Harman, 57 W. Va. 447.

3. *Failure to State Purchaser Renders Deed Void*. — Dunbar v. Lindsay, 119 Wis. 239.

Insufficient Designation. — See Washburn Land Co. v. Chicago, etc., R. Co., 124 Wis. 305.

967. 12. *Deed Void on Its Face*. — Bower v. Chess, etc., Co., 83 Miss. 218.

968. 2. *Compliance with Law* — *For the Construction of Recitals Held to Be Insufficient*. — Brown v. Hartford, 173 Mo. 183.

4. *Omission or Misrecital*. — Seaverns v. Costello, (Ariz. 1903) 71 Pac. Rep. 930; Gibson v. Kueffer, 69 Kan. 536, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 968; Williams v. Chaplain, 112 La. 1075; Bower v. Chess, etc., Co., 83 Miss. 218; Brown v. Hartford, 173 Mo. 183; Dunbar v. Lindsay, 119 Wis. 239.

Provision of Statute Directory. — See Pattison v. Harvey, 81 Miss. 348.

969. 1. *Right of County to Purchase*. — Wade v. Crouch, 14 Okla. 593.

5. *Separate Sale of Lands*. — See Sheaffer v. Mitchell, 109 Tenn. 181.

6. *Notice or Advertisement*. — Sheaffer v. Mitchell, 109 Tenn. 181.

10. *Time and Place of Sale*. — Sheaffer v. Mitchell, 109 Tenn. 181; Washburn Land Co. v. Chicago, etc., R. Co., 124 Wis. 305.

970. 1. *Consideration Paid*. — Sheaffer v. Mitchell, 109 Tenn. 181.

Erroneous Statement of Consideration Makes Deed Void. — Manker v. Peck, (Kan. 1905) 81 Pac. Rep. 171.

Where Disconnected Tracts are covered by one tax deed, the deed must state the consideration for each separate tract. Gibson v. Kueffer, 69 Kan. 536; Manker v. Peck, (Kan. 1905) 81 Pac. Rep. 171.

4. *Rights Attach Only to Property Described*. — Massie v. Halstead, 127 Fed. Rep. 176; Matthews v. Nefsy, 13 Wyo. 458.

970. (b) *Sufficiency* — *aa. REASONABLE CERTAINTY.* — See note 5.

971. *Conformity with Description in Antecedent Proceedings.* — See notes 1, 2.

Sufficiently Certain to Permit Location. — See note 3.

bb. DESIGNATION AS PART OF LARGER TRACT. — See note 6.

cc. COMMON NAME OR ABBREVIATIONS. — See note 9.

972. *dd. PAROL EVIDENCE.* — See note 1.

Latent Ambiguities. — See note 2.

5. What Law Governs. — See note 5.

6. Effect — *a. AS COLOR OF TITLE* — (1) *In General.* — See note 6.

973. (2) *Void Deed.* — See note 8.

974. *b. AS EVIDENCE* — (1) *In General* — *In the Absence of Statute.* — See note 7.

975. See note 2.

976. (2) *Under Statutory Provisions* — (a) *Prima Facie Evidence* — *aa. IN GENERAL.* — See notes 7, 8.

977. See note 1.

978. *Quitclaim Deed from Grantee in Tax Deed.* — See note 3.

(b) *Conclusive Evidence* — *aa. IN GENERAL.* — See note 6.

970. 5. Description with Reasonable Certainty — *Sufficient Descriptions.* — *Seymour v. Deisher*, 33 Colo. 349; *Douglass v. Byers*, 69 Kan. 59. See also *Gibson v. Kueffer*, 69 Kan. 536.

Insufficient Descriptions. — *Massie v. Halstead*, 127 Fed. Rep. 176; *Alleman v. Hammond*, 209 Ill. 70; *Green v. McGrew*, 35 Ind. App. 104; *Levy v. Gause*, 112 La. 789; *Smith v. Brothers*, 86 Miss. 241; *Talley v. Schlattitz*, 180 Mo. 231; *Matthews v. Nefsy*, 13 Wyo. 458. See also *Brown v. Reeves*, 31 Ind. App. 517.

Slight Error May Be Corrected. — *Harding v. Auditor Gen.*, (Mich. 1905) 104 N. W. Rep. 39.

971. 1. Conformity with Antecedent Proceedings Necessary. — *Gibbs v. Hall*, (Miss. 1905) 38 So. Rep. 369; *O'Day v. McDaniel*, 181 Mo. 529; *Rochester v. Farrar*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 394; *Matthews v. Nefsy*, 13 Wyo. 458.

Fuller Description in Deed than in Assessment Immaterial. — *Castleman v. Phillipsburg Land Co.*, 1 Tenn. Ch. App. 9.

Variance from Description in Record of Sale Held Not to Vitiare. — *Cain v. Fisher*, 57 W. Va. 492.

2. Insufficient Description in Antecedent Proceedings. — *Green v. McGrew*, 35 Ind. App. 104; *Talley v. Schlattitz*, 180 Mo. 231; *Mosser v. Moore*, 56 W. Va. 478. See also *Moon v. Salt Lake County*, 27 Utah 435.

3. Sufficient to Permit Location. — *Alleman v. Hammond*, 209 Ill. 70. See also *Brown v. Reeves*, 31 Ind. App. 517.

6. Designation as Part of Larger Tract. — *Alleman v. Hammond*, 209 Ill. 70. See also *Moon v. Salt Lake County*, 27 Utah 435.

9. Abbreviations. — *Douglass v. Byers*, 69 Kan. 59. See also *Brown v. Reeves*, 31 Ind. App. 517.

972. 1. Parol Evidence Inadmissible. — *Smith v. Brothers*, 86 Miss. 241; *Gibbs v. Hall*, (Miss. 1905) 38 So. Rep. 369.

2. Latent Ambiguities Corrected by Evidence. — *Douglass v. Byers*, 69 Kan. 59.

5. What Law Governs. — *Fitzgerald v. Sioux City*, 125 Iowa 396; *Blackburn v. Lewis*, 45 Oregon 422 (unless later statute plainly intended to be retrospective).

6. Color of Title in General. — *State v. Harman*, 57 W. Va. 447. See also *Glos v. Mulcahy*, 210 Ill. 639.

Color of Title Defined. — See *Beasley v. Equitable Securities Co.*, (Ark. 1904) 84 S. W. Rep. 224.

973. 8. Deed Void on Face. — *Treece v. American Assoc.*, (C. C. A.) 122 Fed. Rep. 598; *Brown v. Hartford*, 173 Mo. 183; *State v. Harman*, 57 W. Va. 447.

974. 7. Absence of Statute — *Burden of Proving Regularity.* — *Skelton v. Sharp*, 161 Ind. 383.

Not Evidence of Consideration. — *Glos v. Kelly*, 212 Ill. 314.

975. 2. Inadmissible Without Evidence of Authority. — *Richards v. Beggs*, 31 Colo. 186.

976. 7. Deed Regular on Its Face. — *Jones v. Boykin*, 70 S. Car. 309.

Due Execution and Acknowledgment Necessary. — *Green v. McGrew*, 35 Ind. App. 104.

Void Deed No Evidence. — *Seaverns v. Costello*, (Ariz. 1903) 71 Pac. Rep. 930.

8. Prima Facie Evidence of Recitals and Antecedent Proceedings. — *Hill v. Denton*, (Ark. 1905) 86 S. W. Rep. 402; *Richards v. Beggs*, 31 Colo. 186; *Glos v. Mulcahy*, 210 Ill. 639; *Richcreek v. Russell*, 34 Ind. App. 217; *Green v. McGrew*, 35 Ind. App. 104; *Simoneaux v. White Castle Lumber, etc., Co.*, 112 La. 222; *Hoffman v. H. M. Loud, etc., Lumber Co.*, 138 Mich. 5; *Wallace v. Lyle*, (Miss. 1904) 37 So. Rep. 460; *Coffee v. Coleman*, 85 Miss. 14; *Fisher v. Betts*, 12 N. Dak. 197. See also *Ropes v. Minshew*, (Fla. 1904) 36 So. Rep. 579; *Hoffman v. Silverthorn*, 137 Mich. 60; *Easton v. Cranmer*, (S. Dak. 1905) 102 N. W. Rep. 944.

977. 1. See *Simoneaux v. White Castle Lumber, etc., Co.*, 112 La. 221.

978. 3. Quitclaim from Grantee. — See *Glos v. Mulcahy*, 210 Ill. 639.

6. Conclusive as to Regularity of Proceedings. — *Baer v. McCullough*, 176 N. Y. 97; *Wallace v. McEchron*, 176 N. Y. 424.

Conclusive Against Strangers as to Title of Person in Whose Name Sold. — *State v. Jackson*, 56 W. Va. 558.

979. *bb. HOW FAR ENFORCED—(aa) Irregularities and Jurisdictional Defects.* — See notes 1, 2.

981. *(c) Construction and Application of Statutes—cc. OMISSION OF RECITAL AND MISRECITAL—PAROL EVIDENCE—Void Deed.* — See note 5.

982. *IV. NATURE OF TITLE ACQUIRED—1. In General—Until Execution of Deed.* — See note 6.

Right to Possession, Rents, Etc. — See note 8.

983. See notes 1, 2.

2. After Execution of Deed or Perfection of Title—a. IN GENERAL. — See note 4.

984. *b. EFFECT AS TO PRIOR TAXES.* — See note 2.

c. INTEREST OF OWNER AT TIME OF ASSESSMENT OR SALE. — See notes 3, 4.

985. *V. LIMITATIONS—1. In General—The Owner in Possession Is Not Barred by Lapse of Time.* — See notes 3, 4.

2. Special Statutes—a. IN GENERAL. — See notes 5, 6.

986. *When Statute Begins to Run.* — See note 3.

987. *b. WHEN STATUTE DOES NOT OPERATE—(3) Void or Vitally Defective Proceedings—(a) In General.* — See notes 3, 4.

988. *(b) Deed Void on Its Face.* — See note 1.

c. STATUTES OPERATING AGAINST EITHER PARTY OUT OF POSSESSION—(2) Sufficient Occupancy—(a) In General. — See note 5.

989. *(b) Constructive Possession.* — See note 1.

979. *1. Enforced as to Irregularities.* — *Ferguson v. Kaboth*, 43 Oregon 414.

2. Not Conclusive as to Jurisdictional Defects. — *Ferguson v. Kaboth*, 43 Oregon 414.

981. *5. Parol Evidence Inadmissible.* — *Bower v. Chess, etc., Co.*, 83 Miss. 218.

982. *6. Before Deed—Purchaser Has Lien Only.* — *Millard v. Breckwoldt*, 100 N. Y. App. Div. 44; *Armstrong v. Nassau County*, 101 N. Y. App. Div. 116. See also *State v. Register of Conveyances*, 113 La. 93.

8. Not Entitled to Possession. — *Elrod v. Groves*, 116 Ga. 468; *State v. Register of Conveyances*, 113 La. 93; *Millard v. Breckwoldt*, 100 N. Y. App. Div. 44.

Texas Statute—Possession Only After Two Years from Date of Deed. — *Marlin v. Green*, (Tex. Civ. App. 1904) 79 S. W. Rep. 40.

983. *1. Not Entitled to Rents and Profits.* — *Millard v. Breckwoldt*, 100 N. Y. App. Div. 44.

2. May Prevent Depreciation of Value. — See *Millard v. Breckwoldt*, 100 N. Y. App. Div. 44.

4. Interest in Fee to Exclusion of Other Liens. — *Hunt v. Boston*, 183 Mass. 303; *Holmes v. Weinheimer*, 66 S. Car. 18. *Contra* as to the lien of previous taxes not included in the sale. *Excelsior Springs v. Henry*, 99 Mo. App. 450.

Mortgaged Land. — See *Abbott v. Frost*, 185 Mass. 398.

Mortgage Anterior to Assessment and Levy of Tax Not Cut Off—Assessment Against Person. — *Middleton v. Moore*, 43 Oregon 357; *Ferguson v. Kaboth*, 43 Oregon 414.

984. *2. Exception in Deed.* — See *Rochester v. Kapell*, 86 N. Y. App. Div. 224, *affirmed* 177 N. Y. 533.

3. Title at Time of Sale. — See *Bryant v. Kendall*, (Ky. 1904) 79 S. W. Rep. 186; *Middleton v. Moore*, 43 Oregon 357; *Ferguson v. Kaboth*, 43 Oregon 414.

Title at Time of Redemption. — *State v. Jackson*, 56 W. Va. 558.

4. Sale in Name of Owner of Surface Held to Pass Subsurface Oil Owned by Another, but Not Separately Taxed. — *Peterson v. Hall*, 57 W. Va. 535.

985. *3. Limitations—In General.* — *In re Seim*, 111 La. 554; *Koen v. Martin*, 110 La. 242. See also *Tiernan v. Johnston*, 114 La. 111.

Laches. — *Bending v. Auditor Gen.*, 137 Mich. 500.

4. See In re Seim, 111 La. 554.

5. Special Statutes—In General. — *Beck v. Meroney*, 135 N. Car. 532; *Jones v. Boykin*, 70 S. Car. 309; *Moran v. Thomas*, (S. Dak. 1905) 104 N. W. Rep. 212, *citing* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 985.

6. Statutes in Favor of Purchaser in Possession. — *Butts v. Ricks*, 82 Miss. 533; *Hoffman v. Peterson*, 123 Wis. 632. See also *Stump v. Burnett*, 67 Kan. 589.

986. *3. From Execution or from Time When Purchaser Entitled to Deed.* — *Haggart v. Ranney*, 73 Ark. 344.

987. *3. Vital Defect Not Within Statutes.* — *Caldwell v. Barrett*, 71 Ark. 310; *Moran v. Thomas*, (S. Dak. 1905) 104 N. W. Rep. 212, *citing* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987; *Hoffman v. Peterson*, 123 Wis. 632.

4. Fraud of Parties. — *Moran v. Thomas*, (S. Dak. 1905) 104 N. W. Rep. 212, *citing* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 987.

988. *1. Statute Does Not Run if Deed Void on Face.* — *Gibson v. Kueffer*, 69 Kan. 536. See also *Thompson v. Colburn*, 68 Kan. 819.

5. Possession that Will Entitle Grantee to Maintain Action Against Occupant Is Sufficient. — *Clark v. Sexton*, 122 Iowa 310.

Cutting Timber Not Possession. — *Weir v. Cordz-Fisher Lumber Co.*, 186 Mo. 388.

989. *1. Constructive Possession of Unoccupied Land.* — *Stump v. Burnett*, 67 Kan. 589; *Slattery v. Kellum*, 114 La. 282; *Cezikolski v. Frydrychowicz*, 120 Wis. 369. *Compare Mitchell v. Titus*, 33 Colo. 385.

989. *c.* PARTIES UNDER DISABILITY. — See note 8.

990. VI. RIGHTS OF PURCHASERS OF DEFECTIVE TITLES — 2. Reimbursement — *a.* IN ABSENCE OF STATUTE. — See note 5.

b. UNDER STATUTORY AUTHORITY — (1) *Purchase Price, Subsequent Taxes, Etc.* — (a) *In General.* — See note 6.

991. See notes 1, 3.

As to Personal Liability. — See note 6.

992. (b) *Refundment by Taxing Power.* — See note 1.

(2) *Application and Construction of Statutes* — (a) *Rights Confined by Terms of Statute.* — See note 4.

994. *c.* PAYMENT OR TENDER CONDITION PRECEDENT TO RELIEF. — See notes 3, 4.

995. *Removal of Cloud.* — See notes 3, 5.

3. Recovery for Improvements. — See note 7.

996. See notes 1, 3.

4. Liability for Rents and Profits. — See note 9.

Constructive Possession of All by Actual Possession of Part. — *State v. Harman*, 57 N. Va. 447.

989. 8. *Parties under Disability — Time Extended.* — *Harvey v. Douglass*, 73 Ark. 221; *Jones v. Boykin*, 70 S. Car. 309.

Saving Clause Liberally Construed. — *Cain v. Brown*, 54 W. Va. 656.

990. 5. *No Relief in Absence of Statute.* — *Maddox v. Arthur*, 122 Ga. 671; *Minnesota Loan, etc., Co. v. Beadle County*, (S. Dak. 1904) 101 N. W. Rep. 29. See also *Talley v. Schlattitz*, 180 Mo. 231.

6. Recovery under Statutory Authority — In General. — *Tradesmen's Nat. Bank v. Sheffield City Co.*, 137 Ala. 547; *Paine v. Palmborg*, (Colo. App. 1905) 79 Pac. Rep. 330; *Elder v. Chaffee County*, 33 Colo. 475; *Hole v. Van Duzer*, (Idaho 1905) 81 Pac. Rep. 109; *Glos v. Woodard*, 202 Ill. 480; *Green v. McGrew*, 35 Ind. App. 104; *Wagner v. Underhill*, (Kan. 1905) 81 Pac. Rep. 177; *Williams v. Chaplain*, 112 La. 1075; *Cheever v. Flint Land Co.*, 134 Mich. 604; *People v. Nassau County*, 104 N. Y. App. Div. 176; *McKinney v. Minnehaha County*, 17 S. Dak. 407; *Easton v. Cranmer*, (S. Dak. 1905) 102 N. W. Rep. 944; *Rothchild v. Rollinger*, 32 Wash. 307; *Chippewa River Land Co. v. J. L. Gates Land Co.*, 118 Wis. 356. See also *Pinkerton v. J. L. Gates Land Co.*, 122 Wis. 471; *Superior First Nat. Bank v. Douglas County*, 124 Wis. 15.

991. 1. *Right Extended to Occupant Only.* — *Beasley v. Equitable Securities Co.*, (Ark. 1904) 84 S. W. Rep. 224.

3. Liability Restricted. — See *Bryant v. Nelson-Frey Co.*, 94 Minn. 305.

6. Kansas City Charter — Personal Judgment. — *Phelps v. Brumback*, 107 Mo. App. 16.

992. 1. *Refundment by Taxing Power.* — *Harding v. Auditor Gen.*, 136 Mich. 358.

Duty of Officer Not Judicial. — *State v. Dunn*, 88 Minn. 444.

4. Confined by Terms of Statute. — *State v. Dunn*, 88 Minn. 444.

Time for Payment. — See *Richcreek v. Russell*, 34 Ind. App. 217.

994. 3. *Tender Condition Precedent to Attacking Title.* — *South Chicago Brewing Co. v. Taylor*, 205 Ill. 132; *Burgson v. Jacobson*, 124 Wis. 295.

When Tender Is Unnecessary. — *Longworth v.*

Johnson, 66 Kan. 193; *Kent v. Auditor Gen.*, 138 Mich. 605 (where treasurer misapplied taxes); *Ferguson v. Kaboth*, 43 Oregon 414; *Pettigrew v. Moody County*, 17 S. Dak. 275.

Sufficiency of Tender. — *Beck v. Meroney*, 135 N. Car. 532; *Cain v. Brown*, 54 W. Va. 656; *Mosser v. Moore*, 56 W. Va. 478.

Tender to Tax Collector. — *Rogers v. Nichols*, 186 Mass. 440.

Tender to Grantee of Record — No Notice of Unrecorded Deed. — *Glos v. Gleason*, 209 Ill. 517.

4. Reimbursement Condition Precedent to Setting Aside. — *Clark v. Knox*, 32 Colo. 342; *Glos v. Woodard*, 202 Ill. 480; *Glos v. Collins*, 110 Ill. App. 121; *Woodard v. Glos*, 113 Ill. App. 353; *In re Lindner*, 113 La. 772; *Mosser v. Moore*, 56 W. Va. 478.

Deposit in Court by Plaintiff. — See *Pueblo Realty Co. v. Tate*, 32 Colo. 67; *Ferguson v. Kaboth*, 43 Oregon 414.

When Deposit Unnecessary. — See *McKinney v. Minnehaha County*, 17 S. Dak. 407; *McManus v. Morgan*, 38 Wash. 528.

Tender of Sum Actually Due Unnecessary. — *Shinkle v. Meek*, 69 Kan. 368.

995. 3. *Condition to Removal of Cloud.* — *Glos v. Woodward*, 202 Ill. 480; *Glos v. Collins*, 110 Ill. App. 121; *Woodard v. Glos*, 113 Ill. App. 353.

5. Void Taxes or Assessments. — *Glos v. Collins*, 110 Ill. App. 121; *Ferguson v. Kaboth*, 43 Oregon 414; *State v. McEldowney*, 54 W. Va. 695.

7. Recovery for Improvements. — *Silver Queen Min. Co. v. Crocker*, (Ariz. 1904) 76 Pac. Rep. 479; *Beasley v. Equitable Securities Co.*, (Ark. 1904) 84 S. W. Rep. 224. See also *Platz v. Englehardt*, 138 Mich. 485.

Improvements by Unsuccessful Defendant in Possession. — See *Boucher v. Trembley*, (Mich. 1905) 103 N. W. Rep. 819.

Allowance Only to Extent of Increased Value of Property. — See *Boucher v. Trembley*, (Mich. 1905) 103 N. W. Rep. 819.

996. 1. *Possession under Color of Title.* — *Silver Queen Min. Co. v. Crocker*, (Ariz. 1904) 76 Pac. Rep. 479; *Beasley v. Equitable Securities Co.*, (Ark. 1904) 84 S. W. Rep. 224.

3. See *Silver Queen Min. Co. v. Crocker*, (Ariz. 1904) 76 Pac. Rep. 479.

9. *Gerstle v. Vandergriff*, 72 Ark. 261.

TELEGRAPHS AND TELEPHONES.

BY H. O'B. COOPER.

- 1002. I. DEFINITIONS** — The Term Telephone. — See note 4.
 "Telegraph" Includes "Telephone." — See note 5.
- 1003. II. LEGAL STATUS** — 1. As Public Use. — See note 5.
 An Individual May Own and Operate. — See note 7.
 3. Franchise Is Public and May Not Be Transferred. — See note 11.
- 1004. III. RIGHT OF WAY** — 1. Federal Grants of Right of Way — *a.* ACT OF 1866. — See note 5.
1005. *b.* SCOPE AND EFFECT OF ACT. — See notes 1, 3.
 The Act Does Not Undertake to Provide for Compulsory Proceedings. — See note 7.
- 1006.** 2. State Grants. — See note 4.
 The Term "Highways" Embraces City Streets. — See note 7.
 3. Municipal Grants — *a.* IN GENERAL. — See note 10.
- 1007.** A Provision that the Consent of the Municipality Shall Be First Obtained. — See note 4.
b. RIGHT OF MUNICIPALITY TO EXACT COMPENSATION. — See note 7.
- 1008.** Termination of Franchise to Occupy Streets. — See note 2.
 4. In Streets and Highways — *a.* IN GENERAL. — See note 7.
b. AS ADDITIONAL SERVITUDE. — See note 12.

1002. 4. Telephone Defined. — Chicago Telephone Co. *v.* Illinois Manufacturers' Assoc., 106 Ill. App. 54.

Telephone Service means a service by an organized apparatus as an entirety, and whatever change may be made therein by the addition of wires, apparatus, or appliances, for the purpose of improving or rendering it more efficient, it is still telephone service. Chicago Telephone Co. *v.* Illinois Manufacturers' Assoc., 106 Ill. App. 54.

5. "Telegraph" Includes "Telephone." — Pennsylvania Telephone Co. *v.* Hoover, 24 Pa. Super. Ct. 96. See also Pfoutz *v.* Pennsylvania Telephone Co., 24 Pa. Super. Ct. 105.

1003. 5. Green v. Western Union Tel. Co., 136 N. Car. 489.

7. Individual May Operate Telephone Line. — Lowther *v.* Bridgeman, 57 W. Va. 306.

11. Franchise Not Transferable. — Cumberland Telephone, etc., Co. *v.* Evansville, 127 Fed. Rep. 187.

Purchase Authorized by Statute. — Badger Telephone Co. *v.* Wolf River Telephone Co., 120 Wis. 169.

1004. 5. Letter-carrier and Free-delivery Routes. — Postal Tel. Cable Co. *v.* Newport, (Ky. 1903) 76 S. W. Rep. 159.

1005. 1. Construction of Statute. — Cumberland Telephone, etc., Co. *v.* Evansville, 127 Fed. Rep. 187; Postal Tel. Cable Co. *v.* Newport, (Ky. 1903) 76 S. W. Rep. 159.

3. Cumberland Telephone, etc., Co. *v.* Evansville, 127 Fed. Rep. 187; Postal Tel. Cable Co. *v.* Newport, (Ky. 1903) 76 S. W. Rep. 159; American Tel., etc., Co. *v.* Harborcreek Tp., 23 Pa. Super. Ct. 437.

7. Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 540; Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 594.

1006. 4. State Statutes. — London Mills *v.* White, 208 Ill. 289; New Union Telephone Co. *v.* Marsh, 96 N. Y. App. Div. 122.

South Dakota Statute — Telephone in Streets — Municipal Control. — See Kirby *v.* Citizens' Telephone Co., 17 S. Dak. 362.

7. "Highways" in Statutes. — State *v.* Nebraska Telephone Co., 127 Iowa 194; State *v.* Red Lodge, 30 Mont. 338.

"Public Roads" Held to Include Streets. — State *v.* Red Lodge, 30 Mont. 338. See also State *v.* Nebraska Telephone Co., 127 Iowa 194.

10. Municipal Control of Streets. — New Union Telephone Co. *v.* Marsh, 96 N. Y. App. Div. 122.

1007. 4. Rough River Telephone Co. v. Cumberland Telephone, etc., Co., (Ky. 1905) 84 S. W. Rep. 517.

Proof of Consent — Entry in Records of Council Meeting. — Nebraska Telephone Co. *v.* Fremont, (Neb. 1904) 99 N. W. Rep. 811.

7. Charge in Nature of Rent. — Postal Tel. Cable Co. *v.* Newport, (Ky. 1903) 76 S. W. Rep. 159.

1008. 2. Right by Contract to Terminate Franchise. — See London Mills *v.* White, 208 Ill. 289.

7. Lines in Streets and Highways. — Toronto *v.* Bell Telephone Co., (1905) A. C. 52, affirming 6 Ont. L. Rep. 335; Bell Telephone Co. *v.* Owen Sound, 8 Ont. L. Rep. 74.

12. Compensation to Abutting Owners. — Gray *v.* York State Telephone Co., 92 N. Y. App. Div. 89.

1009. The Ownership of the Fee Is Material. — See note 4.

1010. *c.* UNAUTHORIZED USE OF STREETS MAY BE ENJOINED. — See notes 4, 5, 6.

5. Over Private Lands — *a.* BY AGREEMENT WITH OWNER. — See note 8.

1011. *b.* BY CONDEMNATION. — See note 2.

6. On Railroad Right of Way — *a.* BY CONTRACT WITH RAILROAD COMPANY — Contract for Joint Operation — Effect — Termination. — See notes 6, 7.

1012. Telegraph Line an Additional Servitude. — See note 3.

b. BY CONDEMNATION. — See note 6.

1013. What Portion of Right of Way May Be Taken. — See note 4.

The Measure of Damages. — See note 5.

7. Exclusive Rights — The Act of Congress. — See note 7.

1014. See note 1.

In Construing Municipal Grants. — See note 5.

8. Vested Rights. — See note 8.

1015. IV. LIABILITY FOR INJURIES CAUSED BY IMPROPER LOCATION OR CONSTRUCTION — 1. Injuries to Persons Using Highway. — See note 4.

1016. Negligence on the Part of the Company Is the Basis of Such Actions. — See notes 1, 2.

A. Contrary View. — *McCann v. Johnson County Telephone Co.*, 69 Kan. 210; *Cumberland Telephone, etc., Co. v. Avritt*, (Ky. 1905) 85 S. W. Rep. 204; *Lowther v. Bridgeman*, 57 W. Va. 306.

1009. 4. Ownership of Fee. — See *Halleran v. Bell Telephone Co.*, 64 N. Y. App. Div. 41, affirmed 177 N. Y. 533.

1010. 4. Injunction Against Unauthorized Use. — See *Bradford v. New York, etc., Telephone, etc., Co.*, 206 Pa. St. 582, wherein, however, injunction was denied because of acquiescence and laches.

5. *Gray v. York State Telephone Co.*, 92 N. Y. App. Div. 89. See also *Halleran v. Bell Telephone Co.*, 64 N. Y. App. Div. 41, affirmed 177 N. Y. 533.

6. See *Rough River Telephone Co. v. Cumberland Telephone, etc., Co.*, (Ky. 1905) 84 S. W. Rep. 517.

8. *Anderson v. Mt. Sterling Telephone Co.*, (Ky. 1905) 86 S. W. Rep. 1119.

1011. 2. Condemnation — Conditions Precedent. — *Pennsylvania Telephone Co. v. Hoover*, 209 Pa. St. 555. See also *New Union Telephone Co. v. Marsh*, 96 N. Y. App. Div. 122.

6. Effect of Contract for Joint Construction and Operation. — *Contra*, *Western Union Tel. Co. v. Pennsylvania Co.*, (C. C. A.) 129 Fed. Rep. 849, reversing 125 Fed. Rep. 67, cited in the original note, and holding that the agreement conferred on the telegraph company rights of property and the user thereof, in the nature of an easement.

7. Terminable on Notice at Will. — *Contra*, *Western Union Tel. Co. v. Pennsylvania Co.*, (C. C. A.) 129 Fed. Rep. 849, reversing 125 Fed. Rep. 67, cited in the original note.

1012. 3. *Pennsylvania R. Co. v. Lilly*, 207 Pa. St. 180.

6. Condemnation of Railroad Right of Way for Telegraph Company. — *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540; *Atlantic Coast Line R. Co. v. Postal Tel. Cable Co.*, 120 Ga. 268.

1013. 4. Portion Selected. — *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.*, 120 Ga. 268.

5. Damages Practically Nominal. — *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.*, 120 Ga. 268.

7. No Exclusive Rights in Post Roads. — *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540.

1014. 1. Telephone Companies. — See *American Telephone, etc., Co. v. Morgan County Telephone Co.*, 138 Ala. 597, 100 Am. St. Rep. 53.

5. Construction of Agreement. — *American Telephone, etc., Co. v. Morgan County Telephone Co.*, 138 Ala. 597, 100 Am. St. Rep. 53.

8. Municipal Grant to Telephone or Telegraph Company a Contract. — *Northwestern Telephone Exch. Co. v. Anderson*, 12 N. Dak. 585.

1015. 4. Care in Use of Highway. — *Heidt v. Southern Telephone, etc., Co.*, 122 Ga. 474; *West Kentucky Telephone Co. v. Pharis*, (Ky. 1904) 78 S. W. Rep. 917; *Van Vechten v. New York, etc., Telephone, etc., Co.*, 71 N. J. L. 45; *Ensign v. Central New York Telephone, etc., Co.*, 79 N. Y. App. Div. 244, affirmed 179 N. Y. 539; *Alice, etc., Telephone Co. v. Billingsley*, 33 Tex. Civ. App. 452; *Texas, etc., Telephone Co. v. Prince*, 36 Tex. Civ. App. 462. See also *Adams v. Weakley*, 35 Tex. Civ. App. 371.

1016. 1. Negligence of Company Must Be Shown. — *United Electric Light, etc., Co. v. State*, 100 Md. 634.

Negligence of Employee. — *Fisher v. Texas Telephone Co.*, 34 Tex. Civ. App. 308.

Question for Jury. — *Friesenhan v. Michigan Telephone Co.*, 134 Mich. 292; *Campbell v. Delaware, etc., Tel., etc., Co.*, 70 N. J. L. 195; *Ensign v. Central New York Telephone, etc., Co.*, 79 N. Y. App. Div. 244, affirmed 179 N. Y. 539.

2. Central Union Telephone Co. v. Sokola, 34 Ind. App. 429; *West Kentucky Telephone Co. v. Pharis*, (Ky. 1904) 78 S. W. Rep. 917.

- 1016.** The Contributory Negligence of the Plaintiff. — See note 3.
- 1017.** 2. Injuries to Servants. — See note 1.
- 1018.** VI. REGULATION AND CONTROL — 1. By Federal Government —
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- 1019.** *b.* DELEGATION OF POWER — The State May Delegate to Municipalities. — See note 6.
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- 1020.** 3. Municipal Regulation. — See notes 5, 6, 8.
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- 1021.** The Municipality May Provide for an Inspection. — See note 1.
- VII. DUTY TO FURNISH EQUAL FACILITIES TO ALL — 1. Telegraph Companies. — See note 2.
2. Telephone Companies — *a.* IN GENERAL. — See notes 8, 9.
- 1022.** The Company May Refuse to Furnish Facilities. — See note 2.
- b.* REMEDIES FOR BREACH OF DUTY — Mandamus the Proper Remedy. — See note 6.
- 1023.** An Injunction. — See note 2.
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- 1016.** 3. Contributory Negligence. — *Ensign v. Central New York Telephone, etc., Co.*, 79 N. Y. App. Div. 244, *affirmed* 179 N. Y. 539. See also *West Kentucky Telephone Co. v. Pharis*, (Ky. 1904) 78 S. W. Rep. 917.
- Question of Fact for Jury. — *Central Union Tel. Co. v. Sokola*, 34 Ind. App. 429; *Friesenhan v. Michigan Telephone Co.*, 134 Mich. 292; *Campbell v. Delaware, etc., Tel., etc., Co.*, 70 N. J. L. 195; *Alice, etc., Telephone Co. v. Billingsley*, 33 Tex. Civ. App. 452.
- 1017.** 1. Servants Injured. — *Britton v. Central Union Telephone Co.*, (C. C. A.) 131 Fed. Rep. 844; *Southern Bell Telephone, etc., Co. v. Starnes*, 122 Ga. 602; *Barto v. Iowa Telephone Co.*, 126 Iowa 241, 106 Am. St. Rep. 347; *Scott v. Iowa Telephone Co.*, 126 Iowa 524; *Brabham v. American Telephone, etc., Co.*, 71 S. Car. 53; *Sandquist v. Independent Telephone Co.*, 38 Wash. 313.
- 1018.** 1. Postal Tel.-Cable Co. *v. Umstadter*, 103 Va. 742.
5. State Regulation — Police Power. — *State v. Cumberland Telephone, etc., Co.*, 114 Tenn. 194; *Postal Tel.-Cable Co. v. Umstadter*, 103 Va. 742.
- 1019.** 6. *Wichita v. Missouri, etc., Telephone Co.*, 70 Kan. 441.
9. State Regulation of Charges. — *Charles Simons Sons Co. v. Maryland Telephone, etc., Co.*, 99 Md. 141.
- 1020.** 5. Municipal Regulation. — *Wichita v. Missouri, etc., Telephone Co.*, 70 Kan. 441; *New Union Telephone Co. v. Marsh*, 96 N. Y. App. Div. 122; *New Castle v. Central Dist., etc., Tel. Co.*, 207 Pa. St. 371; *American Tel., etc., Co. v. Harborcreek Tp.*, 23 Pa. Super. Ct. 437.
- Rival Companies — Distance Separating Wires. — See *Northern Telephone Co. v. Iowa Telephone Co.*, (Iowa 1904) 98 N. W. Rep. 113.
- Good Faith Required. — *Bell Telephone Co. v. Owen Sound*, 8 Ont. L. Rep. 74.
6. Location of Poles. — *Wichita v. Missouri, etc., Telephone Co.*, 70 Kan. 441; *New Castle v. Central Dist., etc., Tel. Co.*, 207 Pa. St. 371;
- American Tel., etc., Co. v. Harborcreek Tp.*, 23 Pa. Super. Ct. 437. See also *State v. Red Lodge*, 30 Mont. 338.
8. May Require Wires to Be Placed in Conduits under Ground. — See *State v. Red Lodge*, 30 Mont. 338.
11. Regulation of Charges Not Within General Police Power. — See *State v. Toledo Home Telephone Co.*, 72 Ohio St. 60.
- 1021.** 1. May Provide for Inspection. — *Norwood v. Western Union Tel. Co.*, 25 Pa. Super. Ct. 406.
- An Unreasonable Sum Cannot Be Imposed for the purpose of raising revenue, and not to repay expenses of inspection. *Postal Tel.-Cable Co. v. Taylor*, 192 U. S. 64.
2. Equal Facilities. — *Postal Tel.-Cable Co. v. Umstadter*, 103 Va. 742.
8. Telephone Companies Must Furnish Equal Facilities. — *Williams v. Maysville Telephone Co.*, (Ky. 1904) 82 S. W. Rep. 995.
9. *Phillips v. Southwestern Tel., etc., Co.*, 72 Ark. 478; *Williams v. Maysville Telephone Co.*, (Ky. 1904) 82 S. W. Rep. 995; *Gwynn v. Citizens' Telephone Co.*, 69 S. Car. 434, 104 Am. St. Rep. 819. See also *Irvin v. Rushville Coöperative Telephone Co.*, 161 Ind. 524; *Crouch v. Arnett*, (Kan. 1905) 79 Pac. Rep. 1086.
- Bawdy House Not Entitled to Telephone. — *Godwin v. Carolina Telephone, etc., Co.*, 136 N. Car. 258.
- 1022.** 2. Refusing to Pay Proper Charges. — *Irvin v. Rushville Coöperative Telephone Co.*, 161 Ind. 524.
6. Mandamus. — *Williams v. Maysville Telephone Co.*, (Ky. 1904) 82 S. W. Rep. 995; *Godwin v. Carolina Telephone, etc., Co.*, 136 N. Car. 259, *citing* 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1022, but denying mandamus to compel the installation of a telephone in a bawdy house.
- 1023.** 2. Higher Rate Enjoined. — *Charles Simons Sons Co. v. Maryland Telephone, etc., Co.*, 99 Md. 141.
3. Breach of Contract to Supply Telephone. — See *Foster v. Leininger*, 33 Ind. App. 669.

1023. VIII. TRANSMISSION AND DELIVERY OF MESSAGES — 1. General Nature of Liability — a. TELEGRAPH COMPANIES. — See note 7.

1025. 2. Telegraph Company's Duty — b. TO ACCEPT FOR TRANSMISSION. — See note 1.

If the Company's Lines Are Down. — See note 2.

Delivery of a Message to the Company's Messenger Boy. — See note 6.

1026. c. TO TRANSMIT WITHOUT DELAY — Duty to Inform Sender When Delay Is Unavoidable. — See note 4.

d. TO TRANSMIT CORRECTLY. — See note 6.

e. TO DELIVER TO ADDRESSEE — (1) *In General.* — See note 8.

Duty to Notify Sender of Nondelivery. — See note 9.

1027. (2) To Whom Delivery Must Be Made. — See note 3.

Message Directed to Addressee "Care of" Third Party. — See note 5.

1028. Special Arrangements Between the Operator and the Third Party. — See note 3.

1029. (5) Time of Delivery — Delay — In General. — See note 1.

(6) *Free Delivery Limits.* — See notes 4, 7, 8.

When the Addressee Resides Several Miles from the Receiving Office. — See notes 9, 10.

1030. A Custom or Regulation of the Company. — See notes 3, 4.

No Delivery Limits Fixed. — See note 6.

(7) *What Constitutes Due Diligence.* — See note 7.

1031. 3. Negligence of Company — b. PRESUMPTION OF NEGLIGENCE — BURDEN OF PROOF — Proof of an Unreasonable Delay in Delivery. — See note 6.

1023. 7. View that Such Companies Are Not Insurers. — *Hurlburt v. Western Union Tel. Co.*, 123 Iowa 295.

1025. 1. Exemplary Damages. — See *Haber, etc., Hat Co. v. Southern Bell Telephone, etc.*, Co., 118 Ga. 874.

2. Ignorance that Line Was Down Good Defense. — *Faubion v. Western Union Tel. Co.*, 36 Tex. Civ. App. 98.

6. Delivery to Messenger Delivery to Company. — *Western Union Tel. Co. v. Barefoot*, 97 Tex. 159.

1026. 4. Necessity for Delay Must Be Communicated. — *Swan v. Western Union Tel. Co.*, (C. C. A.) 129 Fed. Rep. 318. See also *Jacob v. Western Union Tel. Co.*, 135 Mich. 600.

6. See Altman v. Western Union Tel. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 54.

8. Duty of Delivery. — *Hurlburt v. Western Union Tel. Co.*, 123 Iowa 295; *Postal Tel. Cable Co. v. Pratt*, (Ky. 1905) 85 S. W. Rep. 225; *Poulnot v. Western Union Tel. Co.*, 69 S. Car. 545; *Western Union Tel. Co. v. Waller*, (Tex. Civ. App. 1904) 84 S. W. Rep. 695.

No Duty to Forward Message by Telephone in Absence of Contract. — See *Hellams v. Western Union Tel. Co.*, 70 S. Car. 83.

9. Notifying Sender of Nondelivery. — *Faubion v. Western Union Tel. Co.*, 36 Tex. Civ. App. 98.

Company Held to Be under Duty to Notify Sender. — *Cogdell v. Western Union Tel. Co.*, 135 N. Car. 431. See also *Gainey v. Western Union Tel. Co.*, 136 N. Car. 261.

Refusal to Deliver — Duty to Notify. — See *Hood v. Western Union Tel. Co.*, 135 N. Car. 622.

1027. 3. Delivery to Clerk of Hotel. — See *Western Union Tel. Co. v. Barefoot*, 97 Tex. 159.

5. Message in "Care of" Third Person. — *Sweet v. Western Union Tel. Co.*, (Mich. 1905) 102 N. W. Rep. 850.

Message Care of "Some Hotel." — See *Western Union Tel. Co. v. Waller*, (Tex. Civ. App. 1904) 84 S. W. Rep. 695.

1028. 3. Admissibility of Evidence. — See *Western Union Tel. Co. v. Bryant*, 35 Tex. Civ. App. 442.

1029. 1. Duty to Deliver Without Delay. — *Poulnot v. Western Union Tel. Co.*, 69 S. Car. 545; *Western Union Tel. Co. v. Hamilton*, 36 Tex. Civ. App. 300.

4. Limits of Free Delivery. — See *Western Union Tel. Co. v. Jennings*, 98 Tex. 465, holding that "a radius of" a given distance from the office was to be measured in a straight line.

7. See Gainey v. Western Union Tel. Co., 136 N. Car. 261.

8. Hood v. Western Union Tel. Co., 135 N. Car. 622.

9. Western Union Tel. Co. v. Harvey, 67 Kan. 729. See also *Gainey v. Western Union Tel. Co.*, 136 N. Car. 261.

10. Western Union Tel. Co. v. Harvey, 67 Kan. 729.

1030. 3. See Hood v. Western Union Tel. Co., 135 N. Car. 622.

4. Western Union Tel. Co. v. Bowman, 141 Ala. 175.

6. Delivery to All Within Reasonable Distance. — See *Western Union Tel. Co. v. Harvey*, 67 Kan. 729, where the addressee did not live within the city to which the message was addressed, and it was held that the submission of the question of the duty of the company to deliver was erroneous.

7. Due Diligence. — *Hurlburt v. Western Union Tel. Co.*, 123 Iowa 295; *Thomas v. Western Union Tel. Co.*, (Ky. 1905) 85 S. W. Rep. 760; *Poulnot v. Western Union Tel. Co.*, 69 S. Car. 545.

1031. 6. Failure to Deliver or Unreasonable Delay. — *Cogdell v. Western Union Tel. Co.*,

1031. Proof of an Error in Transmission. — See note 7.

1032. 4. Contributory Negligence — *a.* IN GENERAL. — See note 5.

1033. *c.* SENDER'S FAILURE TO STAMP MESSAGE. — See note 5.

e. PLAINTIFF'S DUTY TO AVOID OR TO MINIMIZE DAMAGES. —

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1034. If There Are Other Means of Communication Available. — See note 4.

1035. 5. Proximate and Remote Cause. — See note 7.

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1036. 6. Evidence — Statements or Declarations of the Company's Agent. — See note 3.

1037. IX. COMPANY'S DUTY AND LIABILITY AS AFFECTED BY REGULATIONS — 2. Particular Regulations — *a.* AS TO OFFICE HOURS. — See note 5.

1038. Office Hours as Affecting Company's Duty — Duty of Prompt Transmission. — See note 5.

Duty of Prompt Delivery. — See note 6.

1042. X. STIPULATIONS IN CONTRACT OF SENDING — 1. General Rule as to Validity — *c.* CONFLICT OF LAWS. — See note 9.

d. STATUTORY REGULATION OF STIPULATIONS. — See note 10.

1043. 2. Stipulation as to Repeating Messages — *b.* STIPULATION REGARDING AS INVALID. — See note 2.

1045. *d.* EFFECT OF STIPULATION WHERE VALID. — See note 5.

1046. When the Error Is Due to "Gross Negligence" or Wilful Misconduct. — See note 4.

3. Requiring Claims to Be Presented Within Certain Time — *a.* VALIDITY OF LIMITATION. — See note 5.

135 N. Car. 431; *Harrison v. Western Union Tel. Co.*, 136 N. Car. 381; *Green v. Western Union Tel. Co.*, 136 N. Car. 489; *Poulnot v. Western Union Tel. Co.*, 69 S. Car. 545; *Hellams v. Western Union Tel. Co.*, 70 S. Car. 83; *Arial v. Western Union Tel. Co.*, 70 S. Car. 418.

1031. 7. Error in Transmission. — *Green v. Western Union Tel. Co.*, 136 N. Car. 489; *Western Union Tel. Co. v. Hamilton*, 36 Tex. Civ. App. 300. See also *Altman v. Western Union Tel. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 54.

1032. 5. Burden of Proof on Defendant. — *Dehounge v. Western Union Tel. Co.*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1066.

1033. 5. Stamp. — *Western Union Tel. Co. v. Young*, 138 Ala. 240; *Western Union Tel. Co. v. Waters*, 139 Ala. 652.

8. Consequences Which Might Have Been Avoided. — *Western Union Tel. Co. v. Spratley*, 84 Miss. 86; *Hilley v. Western Union Tel. Co.*, 85 Miss. 67; *Willis v. Western Union Tel. Co.*, 69 S. Car. 539, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1033; *Mitchiner v. Western Union Tel. Co.*, 70 S. Car. 522.

Rule Applied to Case of Delay in Delivery Preventing Addressee from Attending Funeral — *Facts Held Not to Show Want of Diligence on Addressee's Part After Receipt of Message.* — *Postal Tel.-Cable Co. v. Pratt*, (Ky. 1905) 85 S. W. Rep. 225.

1034. 4. *Willis v. Western Union Tel. Co.*, 69 S. Car. 539, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1033.

1035. 7. Proximate Cause. — *Arial v. Western Union Tel. Co.*, 70 S. Car. 418; *Mitchiner v. Western Union Tel. Co.*, 70 S. Car. 522; *Jones v. Western Union Tel. Co.*, 70 S. Car. 539; *Gaddis v. Western Union Tel. Co.*, 33 Tex.

Civ. App. 391; *Western Union Tel. Co. v. Shaw*, 33 Tex. Civ. App. 395; *Western Union Tel. Co. v. Campbell*, 36 Tex. Civ. App. 276.

10. *Willis v. Western Union Tel. Co.*, 69 S. Car. 539. See also *Woolf Co. v. Western Union Tel. Co.*, 24 Pa. Super. Ct. 129.

1036. 3. Statements by Agent. — See *Texas, etc., Telephone Co. v. Prince*, 36 Tex. Civ. App. 462.

1037. 5. Question for Court. — *Western Union Tel. Co. v. Love Banks Co.*, 73 Ark. 205.

1038. 5. *Western Union Tel. Co. v. Christensen*, (Tex. Civ. App. 1904) 78 S. W. Rep. 744.

6. Special Agreement. — See *Western Union Tel. Co. v. Crumpton*, 138 Ala. 632; *Western Union Tel. Co. v. Shaw*, 33 Tex. Civ. App. 395.

1042. 9. Law of Place of Contract Governs. — *Hancock v. Western Union Tel. Co.*, 137 N. Car. 497. Compare *Postal Tel., etc., Co. v. Wells*, 82 Miss. 733, distinguishing *Shaw v. Postal Tel. Cable Co.*, 79 Miss. 670, cited in the original note, and holding the rule to be inapplicable where the liability in the state of sending is governed by the common law.

10. Liability Like Common Carrier — Constitution of Mississippi. — See *Postal Tel., etc., Co. v. Wells*, 82 Miss. 733.

1043. 2. Stipulation Held Invalid. — *Postal Tel., etc., Co. v. Wells*, 82 Miss. 733.

1045. 5. Nondelivery or Unreasonable Delay. — *Beatty Lumber Co. v. Western Union Tel. Co.*, 52 W. Va. 410.

1046. 4. What Amounts to Gross Negligence. — *Altman v. Western Union Tel. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 54.

5. *Western Union Tel. Co. v. Courtney*, 113 Tenn. 482, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1046.

- 1047.** See note 2.
- 1048.** *c.* MESSAGE NOT SENT. — See note 8.
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 The Claim Presented Should Set Forth Fairly. — See note 10.
- 1049.** The Notice Must Be in Writing. — See note 3.
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- 1051.** 9. Proof of Assent to Stipulations — *a.* SENDER'S ASSENT. — See note 7.
- 1052.** *b.* ASSENT OF ADDRESSEE. — See notes 2, 3.
- 1055.** XI. LIABILITY OF COMPANY IN PARTICULAR CLASSES OF CASES —
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- 1056.** 5. Immoral or Indecent Messages. — See note 4.
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- 1059.** XII. MEASURE OF DAMAGES FOR NEGLIGENCE — 1. General Rule —
- a.* RULE OF HADLEY *v.* BAXENDALE. — See note 7.
- 1060.** It Is Not Essential that the Parties Must Have Contemplated the Actual Damages. — See note 1.
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- 1047.** 2. Sixty Days. — *Hartzog v. Western Union Tel. Co.*, 84 Miss. 448, 105 Am. St. Rep. 459; *Western Union Tel. Co. v. Courtney*, 113 Tenn. 482. See also *Whitehill v. Western Union Tel. Co.*, 136 Fed. Rep. 499.
- 1048.** 8. Message Not Sent. — *Whitehill v. Western Union Tel. Co.*, 136 Fed. Rep. 499.
10. What Claim Must Show. — *Western Union Tel. Co. v. Courtney*, 113 Tenn. 482, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1048.
- 1049.** 3. Necessity of Writing. — *Hays v. Western Union Tel. Co.*, 70 S. Car. 16, 106 Am. St. Rep. 731; *Western Union Tel. Co. v. Courtney*, 113 Tenn. 482.
5. Bringing Suit Equivalent to Presentation. — *Western Union Tel. Co. v. Courtney*, 113 Tenn. 482.
- 1051.** 7. Sender Bound by Signature to Printed Contract. — *Brooke v. Western Union Tel. Co.*, 119 Ga. 694; *Jacob v. Western Union Tel. Co.*, 135 Mich. 600; *Western Union Tel. Co. v. Courtney*, 113 Tenn. 482.
- 1052.** 2. *Whitehill v. Western Union Tel. Co.*, 136 Fed. Rep. 499, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1052.
- Company Must Have Knowledge of Interest of Addressee. — *Frazier v. Western Union Tel. Co.*, 45 Oregon 414.
- Rule Requiring Addressee to Look to Sender and Not to Company. — *Brooke v. Western Union Tel. Co.*, 119 Ga. 694.
3. *Whitehill v. Western Union Tel. Co.*, 136 Fed. Rep. 499, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1052.
- 1055.** 1. Interstate Messages. — *Louisville v. Wehmhoff*, 116 Ky. 845.
3. Liability for Fraud Effected by "Wire Tapping." — *Western Union Tel. Co. v. Uvalde Nat. Bank*, 97 Tex. 219.
- 1056.** 4. No Duty to Transmit Immoral or Indecent Message. — See *Godwin v. Carolina, etc., Tel. Co.*, 136 N. Car. 258.
5. Messages to Poolrooms May Be Prohibited under Police Power. — *Louisville v. Wehmhoff*, 116 Ky. 845.
6. Transmitting Libelous Messages. — See *Godwin v. Carolina Telephone, etc., Co.*, 136 N. Car. 259.
- 1059.** 7. *Swan v. Western Union Tel. Co.*, (C. C. A.) 129 Fed. Rep. 318; *Barnes v. Western Union Tel. Co.*, 27 Nev. 438; *Hunter v. Western Union Tel. Co.*, 135 N. Car. 458; *Williams v. Western Union Tel. Co.*, 136 N. Car. 82; *Frazier v. Western Union Tel. Co.*, 45 Oregon 414; *Jones v. Western Union Tel. Co.*, 70 S. Car. 539; *Western Union Tel. Co. v. Mellor*, 33 Tex. Civ. App. 264; *Gaddis v. Western Union Tel. Co.*, 33 Tex. Civ. App. 391; *Western Union Tel. Co. v. Christensen*, (Tex. Civ. App. 1904) 78 S. W. Rep. 744; *Western Union Tel. Co. v. Burch*, 36 Tex. Civ. App. 237; *Western Union Tel. Co. v. Campbell*, 36 Tex. Civ. App. 276; *Western Union Tel. Co. v. Siddall*, (Tex. Civ. App. 1905) 86 S. W. Rep. 343.
- Social Telegrams — No Substantial Damages. — *Western Union Tel. Co. v. Cross*, 116 Ky. 5.
- 1060.** 1. Damages Contemplated by Parties. — *Western Union Tel. Co. v. Siddall*, (Tex. Civ. App. 1905) 86 S. W. Rep. 343.
2. Proximate and Remote Cause. — *Western Union Tel. Co. v. Reid*, (Ky. 1905) 85 S. W. Rep. 1171; *Sweet v. Western Union Tel. Co.*, (Mich. 1905) 102 N. W. Rep. 850; *Barnes v. Western Union Tel. Co.*, 27 Nev. 438; *Altman v. Western Union Tel. Co.*, (Supm. Ct. App. T.) 84 N. Y. Supp. 54; *Western Union Tel. Co. v. McNairy*, 34 Tex. Civ. App. 389; *Western Union Tel. Co. v. Burch*, 36 Tex. Civ. App. 237; *Western Union Tel. Co. v. Campbell*, 36 Tex. Civ. App. 276; *Kopperl v. Western Union Tel. Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1018; *Fisher v. Western Union Tel. Co.*, 119 Wis. 146; *Western Union Tel. Co. v. Siddall*, (Tex. Civ. App. 1905) 86 S. W. Rep. 343. See also *Cowan v. Western Union Tel. Co.*, 122 Iowa 379.
5. Speculative Damages. — *Alexander v. West-*

- 1061.** *d.* EFFECT OF SPECIAL CIRCUMSTANCES. — See note 3.
- 1062.** 2. Message in Cipher or Otherwise Unintelligible — *a.* IN GENERAL. — See notes 2, 4.
- 1063.** *b.* WHEN MESSAGE AFFORDS THE ONLY EVIDENCE OF ITS IMPORTANCE. — See note 1.
- 1064.** *c.* COMPANY HAVING EXTRANEOUS EVIDENCE OF NATURE OF MESSAGE. — See note 4.
- d.* OPERATION OF RULE IN "MENTAL ANGUISH CASES" — (1) *Such Cases No Exception to General Rule.* — See note 6.
- 1066.** 3. Loss of Expected Profits in Transactions of Sale — *a.* SALE PREVENTED — PLAINTIFF THE VENDOR. — See note 5.
- 1067.** See note 1.
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- 1069.** *d.* MESSAGE DIRECTING PLAINTIFF'S AGENT TO SELL OR PURCHASE. — See note 3.
- e.* MESSAGE ANNOUNCING PRICES OR STATE OF MARKET. — See notes 5, 6.
- 1070.** If the Message Is Never Delivered. — See note 4.
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- 1071.** Where a Professional Man Loses a Fee. — See note 3.
5. Losses Which Might Have Been Prevented — *a.* IN GENERAL. — See note 6.
- 1072.** See note 1.

ern Union Tel. Co., 126 Fed. Rep. 445; Sweet v. Western Union Tel. Co., (Mich. 1905) 102 N. W. Rep. 850; Altman v. Western Union Tel. Co., (Supm. Ct. App. T.) 84 N. Y. Supp. 54; Kopperl v. Western Union Tel. Co., (Tex. Civ. App. 1905) 85 S. W. Rep. 1018.

1061. 3. Special Circumstances as Affecting Measure of Damages. — Western Union Tel. Co. v. Spratley, 84 Miss. 86; Newsome v. Western Union Tel. Co., 137 N. Car. 513; Frazier v. Western Union Tel. Co., 45 Oregon 414; Capers v. Western Union Tel. Co., 71 S. Car. 29.

1062. 2. Only Nominal Damages Recoverable in Case of Cipher Messages. — Frazier v. Western Union Tel. Co., 45 Oregon 414, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1062; Western Union Tel. Co. v. Mellor, 33 Tex. Civ. App. 264.

4. Stipulation Invalid — Company Liable. — Postal Tel., etc., Co. v. Wells, 82 Miss. 733.

1063. 1. Western Union Tel. Co. v. Mellor, 33 Tex. Civ. App. 264.

1064. 4. Extraneous Evidence of Nature of Message. — See Western Union Tel. Co. v. Mellor, 33 Tex. Civ. App. 264.

6. Rule in Mental Anguish Cases. — Western Union Tel. Co. v. Wilson, (Tex. Civ. App. 1903) 76 S. W. Rep. 600.

1066. 5. Sale Prevented — Plaintiff the Vendor. — Brooks v. Western Union Tel. Co., 28 Utah 21. See also Hays v. Western Union Tel. Co., 70 S. Car. 16, 106 Am. St. Rep. 731.

1067. 1. Harper v. Western Union Tel. Co., 111 Mo. App. 269.

Evidence to Show that Offer Could Have Been Accepted. — See Texas, etc., Tel. Co. v. Mackenzie, 36 Tex. Civ. App. 178.

3. Profits Must Not Be Conjectural or Speculative. — See Hays v. Western Union Tel. Co., 70 S. Car. 16, 106 Am. St. Rep. 731.

1069. 3. Subsequent Sale at Higher Price. — In Western Union Tel. Co. v. Nye, etc., Grain Co., (Neb. 1903) 97 N. W. Rep. 305, it is held that the measure of damages is the difference between the price offered and the market value at the time and place of delivery, unaffected by the price which the plaintiff may have subsequently obtained.

5. Seller Obtaining Decrease in Price. — Western Union Tel. Co. v. Love Banks Co., 73 Ark. 205; Fisher v. Western Union Tel. Co., (Ky. 1905) 84 S. W. Rep. 1179; Hays v. Western Union Tel. Co., 70 S. Car. 16, 106 Am. St. Rep. 731, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069.

6. Wolf Co. v. Western Union Tel. Co., 24 Pa. Super. Ct. 129; Hays v. Western Union Tel. Co., 70 S. Car. 16, 106 Am. St. Rep. 731, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1069; Western Union Tel. Co. v. Spivey, 98 Tex. 308; Western Union Tel. Co. v. Hirsch, (Tex. Civ. App. 1904) 84 S. W. Rep. 394.

Message Delayed. — Swan v. Western Union Tel. Co., (C. C. A.) 129 Fed. Rep. 318.

1070. 4. Western Union Tel. Co. v. Hirsch, (Tex. Civ. App. 1904) 84 S. W. Rep. 394.

6. Loss of Employment, Etc. — Western Union Tel. Co. v. Bowman, 141 Ala. 175.

7. Loss of Building Contracts. — Texas, etc., Tel., etc., Co. v. Mackenzie, 36 Tex. Civ. App. 178.

1071. 3. Loss of Commission on Sale of Realty. — Harper v. Western Union Tel. Co., 111 Mo. App. 269.

6. Liability for Losses. — Kopperl v. Western Union Tel. Co., (Tex. Civ. App. 1905) 85 S. W. Rep. 1018.

1072. 1. Proof of Unavoidable Loss. — Western Union Tel. Co. v. Campbell, 36 Tex. Civ. App. 276.

1073. 7. Mental Anguish — *a. RECOGNIZED IN SOME JURISDICTIONS* —
(1) *In General.* — See note 7.

1074. See note 1.

1075. (2) *Theory of Rule Allowing Such Damages.* — See note 1.

(3) *Limitations of Rule.* — See note 3.

The Injury Suffered Must Be Real. — See note 4.

The Suffering Must Result from the Wrong Complained Of. — See note 5.

A Distinction Is Made. — See note 7.

1076. *If the Prompt Delivery of the Message Would Not Have Prevented the Suffering.* — See notes 1, 2.

If the Anguish Arises from Being Kept from the Funeral of a Relative. — See note 3.

Failure or Delay in Transmitting Money Order. — See note 4.

(4) *Objections to Doctrine.* — See note 6.

1077. (5) *Evidence of Mental Suffering.* — See note 3.

(6) *Relationship of Parties Material.* — See note 7.

1073. 7. Rule in Texas. — *Western Union Tel. Co. v. Shaw*, 33 Tex. Civ. App. 395; *Western Union Tel. Co. v. Anderson*, 34 Tex. Civ. App. 14; *Western Union Tel. Co. v. Swearingin*, 97 Tex. 293, 104 Am. St. Rep. 876; *Western Union Tel. Co. v. Hamilton*, 36 Tex. Civ. App. 300; *Western Union Tel. Co. v. Siddall*, (Tex. Civ. App. 1905) 86 S. W. Rep. 343.

1074. 1. Damages for Mental Anguish Allowed in Other States. — *Western Union Tel. Co. v. Crumpton*, 138 Ala. 632; *Cowan v. Western Union Tel. Co.*, 122 Iowa 379; *Hurlburt v. Western Union Tel. Co.*, 123 Iowa 295; *Howard v. Western Union Tel. Co.*, (Ky. 1905) 84 S. W. Rep. 764; *Thomas v. Western Union Tel. Co.*, (Ky. 1905) 85 S. W. Rep. 760; *Barnes v. Western Union Tel. Co.*, 27 Nev. 438; *Bowers v. Western Union Tel. Co.*, 135 N. Car. 504; *Green v. Western Union Tel. Co.*, 136 N. Car. 489; *Hancock v. Western Union Tel. Co.*, 137 N. Car. 497; *Arial v. Western Union Tel. Co.*, 70 S. Car. 418; *Capers v. Western Union Tel. Co.*, 71 S. Car. 29.

Mental Anguish Defined. — *Hancock v. Western Union Tel. Co.*, 137 N. Car. 497; *Capers v. Western Union Tel. Co.*, 71 S. Car. 29.

No Recovery for Mental Anguish Alone When Action in Tort. — *Western Union Tel. Co. v. Blocker*, 138 Ala. 484; *Western Union Tel. Co. v. Waters*, 139 Ala. 652.

1075. 1. *Western Union Tel. Co. v. Crumpton*, 138 Ala. 632; *Western Union Tel. Co. v. Reid*, (Ky. 1905) 85 S. W. Rep. 1171; *Barnes v. Western Union Tel. Co.*, 27 Nev. 438; *Bowers v. Western Union Tel. Co.*, 135 N. Car. 504; *Williams v. Western Union Tel. Co.*, 136 N. Car. 82; *Western Union Tel. Co. v. Swearingin*, 97 Tex. 293, 104 Am. St. Rep. 876; *Western Union Tel. Co. v. Christensen*, (Tex. Civ. App. 1904) 78 S. W. Rep. 744; *Western Union Tel. Co. v. Hamilton*, 36 Tex. Civ. App. 300; *Western Union Tel. Co. v. Siddall*, (Tex. Civ. App. 1905) 86 S. W. Rep. 343. See also *Postal Tel. Cable Co. v. Pratt*, (Ky. 1905) 85 S. W. Rep. 225; *Harrison v. Western Union Tel. Co.*, 136 N. Car. 381; *Western Union Tel. Co. v. McNairy*, 34 Tex. Civ. App. 389.

3. Limitations on Doctrine. — *Western Union*

Tel. Co. v. Reed, (Tex. Civ. App. 1904) 84 S. W. Rep. 296.

4. Suffering Must Be Real. — *Cocke v. Western Union Tel. Co.*, 84 Miss. 380; *Bowers v. Western Union Tel. Co.*, 135 N. Car. 504. See also *Green v. Western Union Tel. Co.*, 136 N. Car. 489.

Anxiety Ground for Damages. — *Willis v. Western Union Tel. Co.*, 69 S. Car. 539.

5. *Western Union Tel. Co. v. Reid*, (Ky. 1905) 85 S. W. Rep. 1171; *Green v. Western Union Tel. Co.*, 136 N. Car. 489; *Hancock v. Western Union Tel. Co.*, 137 N. Car. 497.

7. Anguish from Independent Causes. — *Western Union Tel. Co. v. Taylor*, (Tex. Civ. App. 1904) 81 S. W. Rep. 69; *Western Union Tel. Co. v. Reid*, (Ky. 1905) 85 S. W. Rep. 1171.

Anguish Prolonged — No Recovery. — *Western Union Tel. Co. v. Reid*, (Ky. 1905) 85 S. W. Rep. 1171; *Kopperl v. Western Union Tel. Co.*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1018.

1076. 1. *Alexander v. Western Union Tel. Co.*, 126 Fed. Rep. 445; *Howard v. Western Union Tel. Co.*, (Ky. 1905) 84 S. W. Rep. 764; *Gaddis v. Western Union Tel. Co.*, 33 Tex. Civ. App. 391; *Western Union Tel. Co. v. Adams*, (Tex. Civ. App. 1904) 80 S. W. Rep. 93.

2. *Western Union Tel. Co. v. Adams*, (Tex. Civ. App. 1904) 80 S. W. Rep. 93; *Western Union Tel. Co. v. Ridenour*, 35 Tex. Civ. App. 574; *Howard v. Western Union Tel. Co.*, (Ky. 1905) 84 S. W. Rep. 764. See also *Hancock v. Western Union Tel. Co.*, 137 N. Car. 497.

3. Preventing Attendance at Funeral. — *Compare Postal Tel. Cable Co. v. Pratt*, (Ky. 1905) 85 S. W. Rep. 225; *Western Union Tel. Co. v. Swearingin*, 97 Tex. 293, 104 Am. St. Rep. 876; *Western Union Tel. Co. v. Reed*, (Tex. Civ. App. 1904) 84 S. W. Rep. 296.

4. Delay in Transmitting Money. — See *Capers v. Western Union Tel. Co.*, 71 S. Car. 29.

6. See *Western Union Tel. Co. v. Reed*, (Tex. Civ. App. 1904) 84 S. W. Rep. 296.

1077. 3. See *Western Union Tel. Co. v. Jackson*, 35 Tex. Civ. App. 419.

7. Mental Suffering Presumed Where Blood Relationship Exists. — *Western Union Tel. Co. v. Porterfield*, (Tex. Civ. App. 1904) 84 S. W. Rep. 850 (grandmother and grandchild).

Nearness of Relationship Material Only Where

- 1077.** But Where the Parties Are Related by Affinity Merely. — See note 9.
1078. See note 1.
b. DOCTRINE DENIED. — See note 6.
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1087. **XIV. TELEGRAMS IN EVIDENCE — 1.** Admissibility in General — Authenticity Must Be Shown. — See note 4.

Presumption Relied On.—*Hunter v. Western Union Tel. Co.*, 135 N. Car. 458, allowing recovery where the relationship was that of second cousins, actual mental suffering having been proved.

1077. 9. No Presumption of Mental Suffering in Cases of Affinity. — *Harrison v. Western Union Tel. Co.*, 136 N. Car. 381.

1078. 1. Recovery Confined to Cases Where Close Relationship by Blood Exists. — *Western Union Tel. Co. v. Crumpton*, 138 Ala. 632. But see dictum in *Hunter v. Western Union Tel. Co.*, 135 N. Car. 458.

6. Damages for Mental Anguish Denied. — *Alexander v. Western Union Tel. Co.*, 126 Fed. Rep. 445.

In Tort Action. — See *Western Union Tel. Co. v. Blocker*, 138 Ala. 484.

1079. 2. Willis v. Western Union Tel. Co., 69 S. Car. 539.

Construction of Statute. — See *Arial v. Western Union Tel. Co.*, 70 S. Car. 418; *Capers v. Western Union Tel. Co.*, 71 S. Car. 29.

4. Conflict of Laws. — *Howard v. Western Union Tel. Co.*, (Ky. 1905) 84 S. W. Rep. 764, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1079; *Howard v. Western Union Tel. Co.*, (Ky. 1905) 86 S. W. Rep. 982; *Western Union Tel. Co. v. Anderson*, 34 Tex. Civ. App. 14; *Western Union Tel. Co. v. Christensen*, (Tex. Civ. App. 1904) 78 S. W. Rep. 744; *Western Union Tel. Co. v. McNairy*, 34 Tex. Civ. App. 389. *Contra*, *Hancock v. Western Union Tel. Co.*, 137 N. Car. 497; *Western Union Tel. Co. v. Buchanan*, 35 Tex. Civ. App. 437.

5. Howard v. Western Union Tel. Co., (Ky. 1905) 84 S. W. Rep. 764, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1079; *Western Union Tel. Co. v. Shaw*, 33 Tex. Civ. App. 395; *Western Union Tel. Co. v. Anderson*, 34 Tex. Civ. App. 14.

6. Howard v. Western Union Tel. Co., (Ky. 1905) 84 S. W. Rep. 764, citing 27 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1079.

7. Rule in Federal Courts. — *Alexander v. Western Union Tel. Co.*, 126 Fed. Rep. 445.

1080. 3. Messages Summoning Physicians. — See *Williams v. Western Union Tel. Co.*, 136 N. Car. 82.

6. Exemplary Damages. — *Johns v. Cumberland Telephone, etc., Co.*, (Ky. 1904) 80 S. W. Rep. 165; *Poulnot v. Western Union Tel. Co.*, 69 S. Car. 545; *Hellams v. Western Union Tel. Co.*, 70 S. Car. 83; *Arial v. Western Union Tel. Co.*, 70 S. Car. 418. See also *Cumberland Telephone, etc., Co. v. Baker*, 85 Miss. 486.

8. Western Union Tel. Co. v. Cashman, (C. C. A.) 132 Fed. Rep. 805; *Southwestern Tel., etc., Co. v. Whiteman*, 36 Tex. Civ. App. 163; *Western Union Tel. Co. v. Spratley*, 84 Miss. 86; *Cumberland Telephone, etc., Co. v. Baker*, 85 Miss. 486.

1081. 1. Social Telegrams — No Recovery. — *Western Union Tel. Co. v. Cross*, 116 Ky. 5.

6. In Mental Anguish Cases — Verdicts Held Excessive. — *Western Union Tel. Co. v. Bowles*, (Tex. Civ. App. 1903) 76 S. W. Rep. 456 (\$1,000).

Verdicts Held Not Excessive. — *Barnes v. Western Union Tel. Co.*, 27 Nev. 438 (\$400); *Western Union Tel. Co. v. Hamilton*, 36 Tex. Civ. App. 300 (\$1,316); *Western Union Tel. Co. v. Porterfield*, (Tex. Civ. App. 1904) 84 S. W. Rep. 850 (\$500).

1082. 1. Nominal Damages. — See *Salmons v. Western Union Tel. Co.*, 133 N. Car. 541.

3. See *Irvin v. Rushville Coöperative Telephone Co.*, 161 Ind. 524.

4. Strict Construction of Statutes. — *Hilley v. Western Union Tel. Co.*, 85 Miss. 67.

1083. 2. Statutes Have No Extraterritorial Effect. — *Postal Tel.-Cable Co. v. Umstadter*, 103 Va. 742.

1085. 1. Mere Delay in Transmission. — *Hilley v. Western Union Tel. Co.*, 85 Miss. 67.

1086. 1. Unavoidable Derangement of Lines. — *Taylor v. Western Union Tel. Co.*, 107 Mo. App. 105.

1087. 4. Proof of Genuineness. — *Cobb v. Glenn Boom, etc., Co.*, 57 W. Va. 49.

1088. 2. Primary and Secondary Evidence — Nature of Inquiry. — See notes 6, 7.

1089. Secondary Evidence of the Contents of a Telegram. — See note 6.

1091. XVI. CONTRACTS BY TELEGRAPH — 1. In General. — See note 5.

1092. Within the Meaning of the Statute of Frauds. — See note 4.

1094. XVIII. COMPANIES FURNISHING "TICKERS." — See note 3.

1096. TEMPORARY — TEMPORARILY. — See note 2.

1098. TEND. — See note 2.

1088. 6. Original as Best Evidence. — Cobb v. Glenn Boom, etc., Co., 57 W. Va. 49.

7. Rule that Message Delivered at Destination Is Original. — Bond v. Hurd, 31 Mont. 314. But see Cobb v. Glenn Boom, etc., Co., 57 W. Va. 49.

1089. 6. Secondary Evidence. — Bond v. Hurd, 31 Mont. 314.

1091. 5. Contracts by Telegraph. — Cobb v. Glenn Boom, etc., Co., 57 W. Va. 49.

1092. 4. Cobb v. Glenn Boom, etc., Co.,

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57 W. Va. 49. And see the title VERBAL AGREEMENTS (STATUTE OF FRAUDS), 854. 5.

1094. 3. Contract Personal and Nonassignable. — Sullivan v. Chicago Board of Trade, 111 Ill. App. 492.

1096. 2. Temporary Insanity. — Waldron v. Angleman, 71 N. J. L. 166.

1098. 2. Evidence Tending to Prove Issue. — See Shaw v. New Year Gold Mines Co., 31 Mont. 138.

TENDER.

BY P. B. MCKENZIE.

4. **III. NECESSITY OF TENDER — 1. General Rule.** — See note 8.
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 5. **2. When Tender Waived.** — *Hagan v. Continental Nat. Bank*, 182 Mo. 319; *Memphis City Bank v. Smith*, 110 Tenn. 337.
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 8. **1. Memphis City Bank v. Smith**, 110 Tenn. 337.
 8. **Waiver by Repudiating Contract.** — *Finlen v. Heinze*, 32 Mont. 354; *Grand Lodge, etc., v. Scott*, (Neb. 1903) 97 N. W. Rep. 637; *Kicks v. State Bank*, 12 N. Dak. 576.
 12. **Waiver by Refusal to Perform.** — *Blanton v. Kentucky Distilleries, etc., Co.*, 120 Fed. Rep. 318; *Habeler v. Rogers*, (C. C. A.) 131 Fed. Rep. 43; *Fox v. Starr*, 106 Ill. App. 273; *Bonds v. Thomas J. Lipton Co.*, 85 Miss. 209; *Finlen v. Heinze*, 32 Mont. 354; *Davis v. True*, 89 N. Y. App. Div. 319; *Connely v. Haggarty*, 65 N. J. Eq. 596; *Levy v. Glassberg*, (Supm. Ct. App. T.) 92 N. Y. Supp. 50; *Hughes v. Knott*, 138 N. Car. 105; *Thurber v. Smith*, 25 R. I. 60. See also *Osgood v. Skinner*, 211 Ill. 229.
 9. **6. Waiver by Inability to Perform.** — *Morehouse v. Terrill*, 111 Ill. App. 460; *Thurber v. Smith*, 25 R. I. 60.
 9. *Connor v. Baxter*, 124 Iowa 219.
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 11. **7. Debt Not Discharged by Tender.** — *Leet v. Armbruster*, 143 Cal. 663; *Leask v. Dew*, 102 N. Y. App. Div. 529.
 12. **2. Tender with Deposit of Money in Court.** — *Bostrom v. Gibson*, 111 Ill. App. 457.
 5. **Tender Extinguishes Collateral Benefits and Securities.** — *Leet v. Armbruster*, 143 Cal. 663.
 6. **Tender Stops the Running of Interest.** — *Wood v. Howland*, 127 Iowa 394; *Clark v. Colfax County*, (Neb. 1901) 96 N. W. Rep. 607.
 15. **11. Liability Admitted by Tender.** — *Wells v. Missouri-Edison Electric Co.*, 108 Mo. App. 607; *Craw v. Abams*, (Neb. 1903) 97 N. W. Rep. 296; *Mann v. Sprout*, 102 N. Y. App. Div. 60.
 16. **9. Acceptance of Less than Amount Due.** — *Tilden v. Gordon*, 34 Wash. 92.
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- 18.** Waiver of Objection. — See note 4.
- 19.** *e.* INTEREST AND COSTS. — See note 8.
- 20.** See note 1.
- 21.** 2. Time of Tender — *a.* GENERAL RULE — By the Common Law. — See note 1.
- 22.** 3. Place of Tender — *a.* WHEN PLACE IS FIXED. — See note 7.
- 23.** *b.* WHEN NO PLACE IS FIXED — (1) *Tender of Money.* — See note 1.
- 25.** 4. Medium of Tender — *a.* GENERAL RULE. — See note 5.
- 26.** *f.* CERTIFICATES OF DEPOSIT. — See note 3.
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- 27.** See note 2.
- 28.** 5. Manner of Tender — *a.* OF MONEY — (2) *Actual Production* —
- (*a*) Necessity Of — By the Common Law. — See note 4.
- 29.** (5) *Deposit of Funds in Bank to Meet Obligation.* — See note 11.
- 30.** *b.* OF SPECIFIC ARTICLES — (1) *Offer.* — See note 1.
- (2) *Production* — (b) *Setting Apart Goods.* — See note 5.
- 31.** (c) *Opportunity to Inspect.* — See note 1.
- c.* STATUTORY OFFER IN WRITING. — See note 2.
6. Requirement that Tender Be Unconditional — *a.* GENERAL RULE. — See notes 6, 7.
- 32.** *b.* DEMANDING ACKNOWLEDGMENT OF PAYMENT IN FULL. — See note 4.
- 34.** *d.* DEMANDING PERFORMANCE OF RECIPROCAL DUTY — (5) *Demanding Conveyance.* — See notes 3, 4.
- e.* WAIVER OF OBJECTION. — See note 8.
- 36.** 8. To Whom Made — *a.* GENERAL RULE. — See note 2.

Wood *v.* Howland, 127 Iowa 394; Juckett *v.* Fargo Mercantile Co., (S. Dak. 1905) 102 N. W. Rep. 604.

Stipulation for Attorney's Fees — Tender After Placing in Attorney's Hands Must Include Fee. — Easton *v.* Woodbury, 71 S. Car. 250.

18. 4. Waiver of Insufficiency of Amount. — Zeimantz *v.* Blake, (Wash. 1905) 80 Pac. Rep. 822.

19. 8. Including Interest. — James Reilly's Sons Co. *v.* Aaron, (Supm. Ct. App. T.) 86 N. Y. Supp. 732.

20. 1. Including Costs. — James Reilly's Sons Co. *v.* Aaron, (Supm. Ct. App. T.) 86 N. Y. Supp. 732.

21. 1. Tender of Specific Articles After Day for Delivery. — Barrie *v.* King, 105 Ill. App. 426.

22. 7. Tender Must Be at Place Appointed. — Chapman *v.* Wagner, (Neb. 1901) 96 N. W. Rep. 412.

23. 1. Place of Tendering Money. — Prest *v.* Cole, 183 Mass. 283. See also Cusack *v.* The Gunning System, 109 Ill. App. 588.

25. 5. Robinson *v.* Lee, 122 Fed. Rep. 1012, 196 U. S. 64. See also Dils *v.* Hatcher, 76 S. W. Rep. 514, 25 Ky. L. Rep. 891.

26. 3. Tender in Certificates of Deposit. — Cassville Roller Milling Co. *v.* Aetna Ins. Co., 105 Mo. App. 146.

5. Stewart *v.* Freeman, 2 N. Bruns. Eq. Rep. 451.

6. Edmunds Electric Constr. Co. *v.* Mariotte, 162 Ind. 329; Bristol *v.* Mente, 178 N. Y. 599, affirming 79 N. Y. App. Div. 67.

27. 2. Waiver of Objection to Checks. — Shay *v.* Callanan, 124 Iowa 370; Kollitz *v.* Equitable

Mut. F. Ins. Co., 92 Minn. 234; Bunte *v.* Schumann, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 593.

28. 4. Actual Production Necessary. — Leask *v.* Dew, 102 N. Y. App. Div. 529.

29. 11. Tender by Depositing Money in Bank. — Chapman *v.* Wagner, (Neb. 1901) 96 N. W. Rep. 412.

Deposit in Bank with Notice to a Common Creditor only does not constitute tender. Cassville Roller Milling Co. *v.* Aetna Ins. Co., 105 Mo. App. 146.

30. 1. Offer Necessary. — Barrie *v.* King, 105 Ill. App. 426.

5. Separation Held Unnecessary. — Bonds *v.* Thomas J. Lipton Co., 85 Miss. 209.

31. 1. Thick *v.* Detroit, etc., R. Co., 137 Mich. 708, 11 Detroit Leg. N. 453.

2. Statutes Authorizing Written Tender. — Wisconsin Lumber Co. *v.* Greene, etc., Telephone Co., 127 Iowa 350; Wood *v.* Howland, 127 Iowa 394.

6. Tender Must Be Unconditional. — Harden *v.* Collins, 138 Ala. 399, 100 Am. St. Rep. 42.

7. Objectionable Conditions. — Mott *v.* Rutten, (N. J. 1904) 57 Atl. Rep. 1132, affirming (N. J. 1903) 54 Atl. Rep. 159; Condit *v.* Bigalow, 64 N. J. Eq. 504.

32. 4. Hess *v.* Peck, 111 Ill. App. 111.

34. 3. Requiring Conveyance. — Terry *v.* Keim, 122 Ga. 43.

4. Maris *v.* Masters, 31 Ind. App. 235.

8. Waiver of Objection to Improper Condition. — Rankin *v.* Rankin, 216 Ill. 132; Clark *v.* Colfax County, (Neb. 1901) 96 N. W. Rep. 607.

36. 2. Persons to Whom Tender Should Be

- 38. VIII. KEEPING TENDER GOOD — 1. Necessity of Keeping Tender Good**
 — *a.* TO STOP INTEREST AND COSTS. — See note 15.
39. *b.* TO DISCHARGE LIENS. — See note 4.
40. *d.* TO AUTHORIZE RECOVERY ON INSURANCE POLICY. — See note 2.
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2. Mode of Keeping Tender Good — *b.* USING MONEY. — See note 8.
41. 4. Subsequent Demand and Refusal — *a.* EFFECT. — See note 4.
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Made. — Cassville Roller Milling Co. *v.* Ætna Ins. Co., 105 Mo. App. 146.

Tender to One Who Is Deaf and understands only by signs and lip reading may be good. *Roberson v. Clevenger*, 111 Mo. App. 622.

38. 15. Keeping Tender Good Necessary to Stop Interest and Costs. — *Healy v. Protection Mut. F. Ins. Co.*, 213 Ill. 99; *Woodland Cemetery Co. v. Ellison*, 80 S. W. Rep. 169, 25 Ky. L. Rep. 2069; *Brown v. Smith*, 13 N. Dak. 580.

Rescission of Sale of Goods — Tender Must Be Kept Good in Order to Maintain Replevin. — *McPheters v. Kimball*, 99 Me. 505.

39. 4. Lien of Mortgages. — *Leet v. Armbruster*, 143 Cal. 663.

40. 2. Grand Lodge, etc., *v.* Scott, (Neb. 1903) 97 N. W. Rep. 637.

4. When Tender Has Been Waived. — *Wisconsin Lumber Co. v. Greene, etc.*, Telephone Co., 127 Iowa 350; *Murray v. Nickerson*, 90 Minn. 197; *Cohen v. Parnass*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 98.

8. Use of Money by Debtor Not Ready to Pay. — *Healy v. Protection Mut. F. Ins. Co.*, 213 Ill. 99.

41. 4. Demand and Refusal of Payment Subsequent to Tender. — See *Leask v. Dew*, 102 N. Y. App. Div. 529.

42. 10. Technical Sense — *Blackstone's Definition.* — *Handley's Estate*, 208 Pa. St. 388.

45. 2. Tenement House Not Synonymous with Apartment House. — *McClure v. Leaycraft*, 97 N. Y. App. Div. 518.

TERM.

49. II. TERM OF COURT. — See note 1.

51. Adjournment. — See note 4.

53. V. TERM OF OFFICE. — See note 2.

49. 1. "Next Term" Held Not to Include Special Term. — *Stultz v. Pratt*, 103 Va. 536.

51. 4. The "First Term," within the meaning of a statute requiring an election contest to be determined at the "first term" of court

held fifteen days after the official counting, has been held to include an adjourned term. *Montgomery v. Dormer*, 181 Mo. 5.

53. 2. Fixed and Definite Time. — *State v. Galusha*, (Neb. 1905) 104 N. W. Rep. 197.

TERRITORIES.

BY A. A. WADSWORTH.

57. II. ACQUISITION — 2. By the United States. — See note 4.

III. STATUS — 1. In General — The Ultimate Purpose. — See note 7.

58. IV. RIGHTS OF INHABITANTS — 1. In General. — See note 3.

V. GOVERNMENT — 1. Control by Congress. — See note 7.

59. Congress May Govern the Territories Either Mediatey or Immediately. — See note 3.

57. 4. Acquisition by the United States. — *Dorr v. U. S.*, 195 U. S. 138.

7. Territories Not Sovereign. — *Dorr v. U. S.*, 195 U. S. 138.

58. 3. Rights of Inhabitants. — *Kepner v. U. S.*, 195 U. S. 100; *Mendezona v. U. S.*, 195 U. S. 158.

No Inherent Right to Trial by Jury in Terri-

tory Not Made Part of United States. — *Dorr v. U. S.*, 195 U. S. 138. See generally the title CONSTITUTIONAL LAW, 989. 3, 4.

7. Control by Congress. — *Kepner v. U. S.*, 195 U. S. 100; *Dorr v. U. S.*, 195 U. S. 138.

59. 3. Method of Government. — *Binns v. U. S.*, 194 U. S. 486. See also *Wynn-Johnson v. Shoup*, 194 U. S. 496.

61. 2. Territorial Government — b. LEGISLATIVE DEPARTMENT — (4) Taxation. — See note 3.

64. d. JUDICIAL DEPARTMENT — (4) Jurisdiction. — See note 2.
Both Supreme and District Courts. — See note 8.

65. In a Territory the Courts Have No Final Jurisdiction. — See notes 1, 2.
(5) *Practice.* — See note 3.

61. 3. In Alaska Congress Has Not Provided for Local Legislation in Respect to Revenue, but has established a system whereby revenue is raised by means of license taxes instead of by direct taxation on property. *Binns v. U. S.*, 194 U. S. 486. See also *Wynn-Johnson v. Shoup*, 194 U. S. 496.

64. 2. Jurisdiction of Territorial Courts. — As to the United States District Court in Porto Rico, see *Amado v. U. S.*, 195 U. S. 172. As to the territorial District Courts in Oklahoma, see *Welty v. U. S.*, 14 Okla. 7. See further the title **INDIANS**, **221. 2 et seq.**

8. District Court May Invoke Common-law Method of Summoning Grand Jurors. — *Moran v. Territory*, 14 Okla. 544.

65. 1. Right of Appeal to Federal Supreme Court. — *Amado v. U. S.*, 195 U. S. 172.

2. Capital Cases in Oklahoma. — The Supreme Court of the United States has no appellate jurisdiction over the judgments of the Supreme Court of Oklahoma in capital cases. *New v. Oklahoma*, 195 U. S. 252.

3. Practice. — *James v. Appel*, 192 U. S. 129; *Welty v. U. S.*, 14 Okla. 7.

TESTAMENTARY CAPACITY.

By J. HAVILAND SMITH.

70. I. ELEMENTS OF TESTAMENTARY CAPACITY — 1. Degree of Capacity Requisite — b. SCOPE OF INQUIRY. — See note 1.

71. c. GENERALLY ACCEPTED TEST. — See note 1.

72. See note 1.

74. d. TESTS ELIMINATING ELEMENTS INCLUDED IN FOREGOING. — See note 1.

c. TEST MEASURED BY STANDARDS REQUISITE FOR OTHER PURPOSES. — See note 5.

77. 2. Relation of Incompetency to Will. — See note 1.

3. Time to Which Inquiry Relates — When Will Executed. — See note 2.
Prior or Subsequent Incompetency. — See note 3.

78. Lucid Intervals. — See note 2.

Length of Period Over Which Inquiry to Extend. — See note 3.

70. 1. Perfect Mental Soundness Not Requisite. — *Randall, Appellant*, 99 Me. 396; *Hamon v. Hamon*, 180 Mo. 685; *Stewart v. Lyons*, 54 W. Va. 665. See also *Van Riper v. Van Riper*, (N. J. 1904) 59 Atl. Rep. 244.

Dangerous Lunatic May Have Testamentary Capacity. — *Keely v. Moore*, 196 U. S. 38.

71. 1. The Accepted Test. — *Wait v. Westfall*, 161 Ind. 648; *McDonald v. McDonald*, 85 S. W. Rep. 1084, 27 Ky. L. Rep. 607; *Randall, Appellant*, 99 Me. 396; *Hughes v. Rader*, 183 Mo. 630; *Catholic University v. O'Brien*, 181 Mo. 68; *Hamon v. Hamon*, 180 Mo. 685; *Stull v. Stull*, (Neb. 1901) 96 N. W. Rep. 196; *Allison's Estate*, 210 Pa. St. 22; *Hartley v. Lord*, 38 Wash. 221; *Stewart v. Lyons*, 54 W. Va. 665. See also *Matter of Dole*, 147 Cal. 188; *Barricklow v. Stewart*, 163 Ind. 438; *Matter of Donohue*, 97 N. Y. App. Div. 205; *Gavitt v. Moulton*, 119 Wis. 35.

72. 1. A Qualification Sometimes Added. — *Roche v. Nason*, 105 N. Y. App. Div. 256; *In re Downing*, 118 Wis. 581.

One Who Is Rational and Acting Rationally is sane and sound of mind. *In re Arrowsmith*, 206 Ill. 352.

74. 1. Ability to Know Extent and Value of Property Not Indispensable. — *Barricklow v. Stewart*, 163 Ind. 438.

5. Transaction of Ordinary Business. — *Stewart v. Lyons*, 54 W. Va. 665. See also *Hess v. Killebrew*, 209 Ill. 193. *Compare Catholic University v. O'Brien*, 181 Mo. 68.

77. 1. Relation of Mental Unsoundness to Will. — *Wait v. Westfall*, 161 Ind. 648.

2. Inquiry Directed to Time of Execution of Will. — *James White Memorial Home v. Haeg*, 204 Ill. 422; *Stull v. Stull*, (Neb. 1901) 96 N. W. Rep. 196. See also *In re Knox*, 123 Iowa 24; *Stewart v. Lyons*, 54 W. Va. 665.

Testator's Conduct or Appearance at Time of Execution Not Controlling — Surrounding Circumstances to Be Considered. — *Rathjens v. Merrill*, 38 Wash. 442.

3. See In re Harvey, (Iowa 1903) 94 N. W. Rep. 559, holding that records of proceedings for the appointment of a guardian two years after the date of the will were not admissible.

78. 2. Matter of Dole, 147 Cal. 188; *Spencer v. Terry*, 133 Mich. 39.

3. Judicial Discretion. — *McCoy v. Jordan*, 184 Mass. 575.

80. 4. Particular Instances of Mental Infirmity — c. PARTIAL INSANITY: MONOMANIA, DELUSIONS, HALLUCINATIONS — A Delusion. — See note 2.

Where Will Product of the Disorder. — See note 3.

Where Will Not Product of the Disorder. — See note 4.

81. See note 1.

Illogical Reasoning. — See note 2.

82. Estrangement, Distrust, Resentment, Etc. — See note 1.

The Exclusion of Relatives. — See note 3.

83. d. ECCENTRICITY. — See note 2.

84. e. IMPAIRMENT OF MEMORY. — See note 1.

85. f. DRUNKENNESS — DRUGS. — See note 2.

86. See note 1.

87. j. OLD AGE AND FEEBLENESS. — See note 1.

89. n. RELIGIOUS BELIEFS. — See note 1.

o. SUPERSTITION. — See note 2.

90. q. PAIN. — See note 2.

II. EVIDENCE — 1. Presumptions, Burden of Proof, and Weight of Evidence — a. CONFLICT OF AUTHORITY — (1) Burden on Contestants — (a) Statement of Rule. — See note 3.

80. 2. Delusions. — Bohler v. Hicks, 120 Ga. 800; Davenport v. Davenport, 67 N. J. Eq. 320.

Fallacy of Delusion Must Be Capable of Demonstration. — Scott v. Scott, 212 Ill. 597.

3. Where Will Offspring of Delusion. — Matter of Long, (Surrogate Ct.) 43 Misc. (N. Y.) 560, holding further that probate may be refused although the object of the delusion does not contest.

4. Where Will Not Product of Delusion. — Wait v. Westfall, 161 Ind. 648; Gesell v. Baugher, 100 Md. 677, citing 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 80; Buchanan v. Pierie, 205 Pa. St. 123, 97 Am. St. Rep. 725. See also Matter of Donohue, 97 N. Y. App. Div. 205.

Question Whether Will Affected by Delusion for Jury. — Safe Deposit, etc., Co. v. Lange, 207 Pa. St. 527.

81. 1. Mistake of Fact. — Bohler v. Hicks, 120 Ga. 800. See also Matter of Long, (Surrogate Ct.) 43 Misc. (N. Y.) 560.

2. Belief Based on Facts Shown to Exist. — See Davenport v. Davenport, 67 N. J. Eq. 320; Matter of Long, (Surrogate Ct.) 43 Misc. (N. Y.) 560.

Belief Based on Evidence, However Slight. — Stull v. Stull, (Neb. 1901) 96 N. W. Rep. 196.

82. 1. Undue Prejudice. — See *In re Clapham*, (Neb. 1905) 103 N. W. Rep. 61.

3. In re Clapham, (Neb. 1905) 103 N. W. Rep. 61.

Mere Jealous Suspicion, however groundless, does not amount to delusional insanity. Bohler v. Hicks, 120 Ga. 800.

83. 2. Eccentricities. — Lancaster v. Alden, 26 R. I. 170.

84. 1. Impairment of Memory. — Matter of Donohue, 97 N. Y. App. Div. 205.

85. 2. Connection Between State of Intoxication and Will. — Tasker's Estate, 205 Pa. St. 455.

86. 1. Where Testator Shown to Be Sober and of Sound Mind When Will Executed. — Tasker's Estate, 205 Pa. St. 455.

87. 1. Extreme Old Age. — Matter of Dole, 147 Cal. 188; Woodman v. Illinois Trust, etc., Bank, 211 Ill. 578; Lingle v. Lingle, 121 Iowa 133; Hamon v. Hamon, 180 Mo. 685; Van Riper v. Van Riper, (N. J. 1904) 59 Atl. Rep. 244; Roche v. Nason, 105 N. Y. App. Div. 256; Matter of Donohue, 97 N. Y. App. Div. 205; Matter of Hawley, (Surrogate Ct.) 44 Misc. (N. Y.) 186. See also Stull v. Stull, (Neb. 1901) 96 N. W. Rep. 196.

89. 1. Religious Beliefs. — Buchanan v. Pierie, 205 Pa. St. 123, 97 Am. St. Rep. 725.

Spiritualism. — Unless the supposed communications control the disposition of property, the believer in them is not thereby rendered incompetent to make a valid will. Randall, Appellant, 99 Me. 396.

Belief in Swedenborgianism furnishes no evidence of monomania, insane delusion, or insanity. Scott v. Scott, 212 Ill. 597.

2. Superstition. — Wait v. Westfall, 161 Ind. 648.

90. 2. See Woodman v. Illinois Trust, etc., Bank, 211 Ill. 578.

3. Burden of Proof — Prevailing View. — Matter of Latour, 140 Cal. 414, rehearing denied 140 Cal. 437; Matter of Dole, 147 Cal. 188; Wait v. Westfall, 161 Ind. 648; *In re Knox*, 123 Iowa 24; Kirsher v. Kirsher, 120 Iowa 337; Henning v. Stevenson, 80 S. W. Rep. 1135, 26 Ky. L. Rep. 159; Gesell v. Baugher, 100 Md. 677; Matter of Hawley, (Surrogate Ct.) 44 Misc. (N. Y.) 186; Allison's Estate, 210 Pa. St. 22.

Evidence of Extreme Feebleness from Sickness Not Sufficient to Shift Burden. — Matter of Latour, 140 Cal. 414.

For Evidence Held Not to Show Lack of Testamentary Capacity see the following cases:

California. — Matter of Dole, 147 Cal. 188.

Illinois. — Scott v. Scott, 212 Ill. 597; Woodman v. Illinois Trust, etc., Bank, 211 Ill. 578; Spence v. Huckins, 208 Ill. 304; Graham v. Deuterman, 206 Ill. 378; Williams v. Williams, 204 Ill. 44.

Kentucky. — Morris v. Straughan, (Ky.

- 91.** (b) *Necessity of Prima Facie Showing by Proponents.* — See note 1.
- 92.** (c) *Doctrine Eliminating Necessity for Prima Facie Showing.* — See note 1.
(2) *Burden on Proponents Throughout.* — See note 2.
- 93.** b. *PRESUMPTIONS WHERE PROOF OF PRIOR INSANITY* — (1) *Permanent Insanity* — (a) *General Rule.* — See note 2.
- 94.** (c) *Prior Adjudication.* — See notes 3, 4.
- 95.** See note 1.
(2) *Temporary Insanity.* — See note 2.
- 96.** 2. *Opinion Evidence* — a. *NONEXPERT WITNESSES* — (1) *Generally Accepted Doctrine.* — See note 2.
- 98.** (2) *Exceptional Doctrine.* — See note 1.
(3) *Statement of Facts on Which Opinion Based* — (a) *General Rule.* — See note 2.
- 99.** (c) *Province of Court.* — See notes 2, 4.
(4) *Weight of Nonexpert Evidence.* — See note 5.

1905) 86 S. W. Rep. 529; *Floore v. Green*, 83 S. W. Rep. 133, 26 Ky. L. Rep. 1073; *Savage v. Bulger*, 76 S. W. Rep. 361, 25 Ky. L. Rep. 763.

Maine. — *Randall, Appellant*, 99 Me. 396.
Maryland. — *Gesell v. Baugher*, 100 Md. 677.

Minnesota. — *Clarity v. Davis*, 92 Minn. 60.
Missouri. — *Story v. Story*, 188 Mo. 110; *Hughes v. Rader*, 183 Mo. 630; *Catholic University v. O'Brien*, 181 Mo. 68; *Hamon v. Hamon*, 180 Mo. 685.

Nebraska. — *Stull v. Stull*, (Neb. 1901) 96 N. W. Rep. 196.

New Jersey. — *Grant v. Stamler*, (N. J. 1905) 59 Atl. Rep. 890; *In re Wheaton*, (N. J. 1905) 59 Atl. Rep. 886; *Van Riper v. Van Riper*, (N. J. 1904) 59 Atl. Rep. 244.

New York. — *Matter of Nelson*, 97 N. Y. App. Div. 212; *Matter of Donohue*, 97 N. Y. App. Div. 205; *Roche v. Nason*, 105 N. Y. App. Div. 256.

Pennsylvania. — *Richmond's Estate*, 206 Pa. St. 219; *Tasker's Estate*, 205 Pa. St. 455; *Buchanan v. Pierie*, 205 Pa. St. 123, 97 Am. St. Rep. 725.

West Virginia. — *Stewart v. Lyons*, 54 W. Va. 665.

For Evidence Held to Show Lack of Testamentary Capacity see *Matter of Langley*, 140 Cal. 126; *Godfrey v. Phillips*, 209 Ill. 584; *Osborne v. Osborne*, 125 Iowa 296; *McDonald v. McDonald*, 85 S. W. Rep. 1084, 27 Ky. L. Rep. 607; *Gutman v. Turner*, 85 S. W. Rep. 185, 27 Ky. L. Rep. 386; *Matter of Goodwin*, 95 N. Y. App. Div. 183; *Hartley v. Lord*, 38 Wash. 221.

91. 1. *In re Latour's Estate*, 140 Cal. 437, denying rehearing 140 Cal. 414; *Rathjens v. Merrill*, 38 Wash. 442.

92. 1. *Henning v. Stevenson*, 80 S. W. Rep. 1135, 26 Ky. L. Rep. 159.

2. View that Burden on Proponents Throughout. — *Buxton v. Emery*, (Mich. 1905) 102 N. W. Rep. 948, 11 Detroit Leg. N. 863. See also *Clarity v. Davis*, 92 Minn. 60; *Rathjens v. Merrill*, 38 Wash. 442.

93. 2. *Permanent Insanity — Presumption.* — *Keely v. Moore*, 196 U. S. 38; *James White Memorial Home v. Haeg*, 204 Ill. 422; *In re Knox*, 123 Iowa 24; *Kirsher v. Kirsher*, 120 Iowa 337; *Gesell v. Baugher*, 100 Md. 677.

And see the titles *INSANITY*, **605**. 1 *et seq.*; *PRESUMPTIONS*, **1241**. 1 *et seq.*

94. 3. *Prior Adjudication of Insanity.* — *Hoffman's Estate*, 209 Pa. St. 357; *In re Wheelock*, 76 Vt. 235.

4. Guardianship. — *Hoffman's Estate*, 209 Pa. St. 357; *In re Wheelock*, 76 Vt. 235. Compare *In re Cowdry*, 77 Vt. 359, holding that an adjudication of incapacity to take care of person and property and the appointment of a guardian thereunder do not establish *prima facie* incapacity to make a will. *In re Cowdry*, 77 Vt. 359.

95. 1. *Lucid Interval.* — *Keely v. Moore*, 196 U. S. 38; *James White Memorial Home v. Haeg*, 204 Ill. 422; *In re Coughlin*, (N. J. 1905) 59 Atl. Rep. 879.

2. Temporary Insanity — Presumption. — *Kirsher v. Kirsher*, 120 Iowa 337. And see the title *INSANITY*, **606**. 1.

96. 2. *Nonexpert Evidence.* — *Matter of McKenna*, 143 Cal. 580; *Matter of Selleck*, 125 Iowa 678; *Stutsman v. Sharpless*, 125 Iowa 335; *Kirsher v. Kirsher*, 120 Iowa 337; *Struth v. Decker*, 100 Md. 368; *Roberts v. Bidwell*, 136 Mich. 191, 10 Detroit Leg. N. 1016; *Spencer v. Spencer*, 31 Mont. 631; *Hamon v. Hamon*, 180 Mo. 685. And see the title *EXPERT AND OPINION EVIDENCE*, **492**. 1, 2.

98. 1. *Limiting Examination to Witnesses' Conclusions from Specific Acts.* — *McCoy v. Jordan*, 184 Mass. 575.

2. Facts and Circumstances Must Be First Stated. — *Stutsman v. Sharpless*, 125 Iowa 335. See also *Matter of Selleck*, 125 Iowa 678.

99. 2. *It Is for the Court to Determine Whether a Witness Was an "Intimate Acquaintance" of the testator so as to render his testimony as to mental capacity admissible under the California statute.* *Matter of McKenna*, 143 Cal. 580.

4. *Struth v. Decker*, 100 Md. 368.

5. Weight of Nonexpert Evidence. — See *Matter of Long*, (Surrogate Ct.) 43 Misc. (N. Y.) 560.

Nonexpert Testimony as to Senile Dementia Weightier than as to Delusions. — See *Matter of Wendel*, (Surrogate Ct.) 43 Misc. (N. Y.) 571.

Question of Weight Is for Jury. — *Stutsman v. Sharpless*, 125 Iowa 335.

100. *b.* EXPERT WITNESSES — (3) *Weight of Expert Evidence* — (a) General Rule. — See note 1.

(4) *Hypothetical Questions*. — See notes 3, 5.

101. *c.* SUBSCRIBING WITNESSES — (3) *Weight of Such Evidence* — (b) Where Witness Discredits Competency. — See note 4.

102. *d.* POINTS AS TO WHICH OPINION OF WITNESS MAY BE GIVEN. — See note 1.

3. Declarations — *a.* OF TESTATOR. — See note 2.

104. *b.* OF BENEFICIARIES — (1) *Sole Beneficiary*. — See note 4.

105. *c.* OF PARTIES WITHOUT INTEREST. — See note 2.

4. Character of Will as Evidence — *a.* GENERAL RULE. — See note 3.

106. *b.* FOR WHAT PURPOSE TO BE CONSIDERED. — See note 1.

107. See note 1.

109. **8.** Insanity of Relatives. — See note 2.

9. Suicide. — See note 3.

110. **10.** Admissibility of Evidence in General. — See note 1.

100. **1.** Weight of Such Evidence. — See *Grant v. Stampler*, (N. J. 1905) 59 Atl. Rep. 890; *In re Peterson*, 136 N. Car. 13; *Richmond's Estate*, 206 Pa. St. 219.

For a Case Where Nonexperts' Testimony Outweighed That of a Physician, the former testifying that the testator was competent and the latter that there was senile dementia, see *Matter of Wendel*, (Surrogate Ct.) 43 Misc. (N. Y.) 571.

3. Hypothetical Questions by Counsel. — *Kirsher v. Kirsher*, 120 Iowa 337.

5. Opinion to Be Rejected Unless Facts on Which Based Are Established. — *Kirsher v. Kirsher*, 120 Iowa 337; *Stutsman v. Sharpless*, 125 Iowa 335.

101. **4.** Where Subscribing Witness Discredits Testator's Competency. — *Hartley v. Lord*, 38 Wash. 221.

102. **1.** Nonexpert Witnesses. — *Hamon v. Hamon*, 180 Mo. 685.

2. Declarations of Testator. — *Flowers v. Flowers*, (Ark. 1905) 85 S. W. Rep. 242; *Utermehle v. Norment*, 22 App. Cas. (D. C.) 31, affirming 197 U. S. 40; *Roberts v. Bidwell*, 136 Mich. 191, 10 Detroit Leg. N. 1016; *Kuhl v. Reichert*, 25 Ohio Cir. Ct. 693.

Conversations Between a Witness and the Testator on the day of the latter's death are competent on the question of his sanity. *Pattee v. Whitcomb*, 72 N. H. 249. See also *Matter of McKenna*, 143 Cal. 580.

104. **4.** Declarations of Sole Beneficiary. — *Stull v. Stull*, (Neb. 1901) 96 N. W. Rep. 196.

105. **2.** See *Roche v. Nason*, 105 N. Y. App. Div. 256.

Declarations of an Executor who is not a sole legatee are not admissible as against the rights of other legatees. *Stull v. Stull*, (Neb. 1901) 96 N. W. Rep. 196.

3. General Rule as to Character of Will. — *Gesell v. Baugher*, 100 Md. 677, citing 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 105; *Hughes v. Rader*, 183 Mo. 630; *Catholic University v. O'Brien*, 181 Mo. 68; *Stewart v. Lyons*, 54 W. Va. 665. See also *Spencer v. Terry*, 133 Mich. 39.

Leaving Estate to Wife to Exclusion of Blood

Relatives Does Not Show Incapacity. — *In re Peterson*, 136 N. Car. 13.

Inequality in Distribution of Property Cannot of Itself Invalidate Will. — *Graham v. Deuter- man*, 206 Ill. 378.

106. **1.** As Evidence of Testamentary Capacity. — *Piper v. Andricks*, 209 Ill. 564; *Graham v. Deuter- man*, 206 Ill. 378; *Hughes v. Rader*, 183 Mo. 630. See also *In re Knox*, 123 Iowa 24; *Spencer v. Terry*, 133 Mich. 39; *Hotte v. Birabin*, 25 Quebec Super. Ct. 275, affirmed 35 Can. Sup. Ct. 477.

In Some Jurisdictions the Rule Is Announced. — *Hughes v. Rader*, 183 Mo. 630.

The Will Itself as Evidence on the Question of Testator's Capacity. — *In re Harvey*, (Iowa 1903) 94 N. W. Rep. 559.

Weight of Justice or Injustice of Provisions for Jury. — *In re Knox*, 123 Iowa 24.

107. **1.** Evidence of Financial Condition of Beneficiaries Admissible. — *Stutsman v. Sharpless*, 125 Iowa 335; *Henning v. Stevenson*, 80 S. W. Rep. 1135, 26 Ky. L. Rep. 159.

Evidence Must Relate to Condition at Time of Execution of Will. — *Henning v. Stevenson*, 80 S. W. Rep. 1135, 26 Ky. L. Rep. 159.

Proof of Mere Expectancies Not Generally Admissible. — *Stutsman v. Sharpless*, 125 Iowa 335.

109. **2.** Hereditary Insanity. — *Pringle v. Burroughs*, 100 N. Y. App. Div. 366, holding, however, that before evidence of insanity in the testator's family can be shown it must appear that the testator had suffered to some extent from a like application, and evidence of mere feebleness from disease does not afford a sufficient foundation.

Hearsay Evidence Not Admissible. — *Roche v. Nason*, 105 N. Y. App. Div. 256.

3. The Fact that the Testator Committed Suicide or Attempted to Do So. — *Roche v. Nason*, 105 N. Y. App. Div. 256.

Actual Suicide Sufficient to Raise Doubt of Decedent's Sanity. — *Rathjens v. Merrill*, 38 Wash. 442.

110. **1.** Admissibility in General. — *Matter of McKenna*, 143 Cal. 580; *Hughes v. Rader*, 183 Mo. 630.

- 110. 11. Witnesses — Competency — b. PRIVILEGED INFORMATION —**
 (1) *Attesting Witnesses.* — See note 3.
 (2) *Scriveners and Consulting Attorneys.* — See note 4.
 (3) *Other Privileged Witnesses.* — See note 5.

111. TESTATOR. — See note 2.

TESTIMONY. — See note 5.

112. Evidence and Testimony. — See note 1.

113. THAT. — See note 7.

110. 3. Privileged Communications. — See *In re Downing*, 118 Wis. 581.

4. Scriveners and Attorneys. — *In re Downing*, 118 Wis. 581.

5. Kirsher v. Kirsher, 120 Iowa 337.

Evidence of Proponent of Will, Executor, and Beneficiary Admissible. — *Grant v. Stamler*, (N. J. 1905) 59 Atl. Rep. 890.

111. 2. Testator Includes Testatrix. — *Walker v. Hyland*, 70 N. J. L. 69.

5. Testimony. — See *Sledge v. Singley*, 139 Ala. 346.

112. 1. Distinguished from Evidence. — *Crooks v. Harmon*, 29 Utah 306, citing 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 112.

Testimony Construed as Synonymous with Evidence. — *Hargrove v. State*, 117 Ga. 706.

113. 7. "That Is to Say" is intended as explanatory of what precedes it. *Brooks v. Brooks*, 187 Mo. 493.

THEATRES AND AMUSEMENTS.

By J. HAVILAND SMITH.

116. II. THEATRE FIXTURES. — See note 3.

117. III. STATUTORY REGULATION — 2. License or Tax — a. IN GENERAL. — See note 2.

118. 5. Exits and Aisles. — See note 12.

124. VIII. TICKETS OF ADMISSION — 1. Revocable License. — See note 5.
3. Wrongful Expulsion. — See note 8.

125. IX. RIGHTS, DUTIES, AND LIABILITIES OF MANAGER TOWARD PUBLIC — 1. Discrimination — a. IN GENERAL. — See note 1.

X. RIGHTS, DUTIES, AND LIABILITIES OF OWNER OF PLACE TOWARD PUBLIC — Duty to Provide Safe Place. — See note 5.

128. THEN. — See notes 1, 2.

133. THEREAT. — See note 1.

136. THINGS IN ACTION. — See note 2.

THINK. — See note 3.

138. THOROUGHFARE. — See note 2.

116. 3. Stage and Stage Fittings. — *Murray v. Bender*, (C. C. A.) 125 Fed. Rep. 705; *Security Trust Co. v. Temple Co.*, 67 N. J. Eq. 514.

Seats. — *Murray v. Bender*, (C. C. A.) 125 Fed. Rep. 705; *Security Trust Co. v. Temple Co.*, 67 N. J. Eq. 514.

Combination Fixtures for Lighting Building. — See *Security Trust Co. v. Temple Co.*, 67 N. J. Eq. 514.

Furniture Used on Stage, but Not Annexed, Not Fixtures. — *Security Trust Co. v. Temple Co.*, 67 N. J. Eq. 514.

117. 2. Public Dance or Dance Hall. — See *Ex p. Richards*, 20 Times L. Rep. 669.

118. 12. Obstruction of Part of Auditorium Set Aside for Passageway Prohibited. — *Sturgis v. Hayman*, (Supm. Ct. App. T.) 84 N. Y. Supp. 126.

124. 5. Revocable License. — See *Greenberg v. Western Turf Assoc.*, 140 Cal. 357.

8. Wrongful Ejection — Remedy by Action in

Contract. — See *Greenberg v. Western Turf Assoc.*, 140 Cal. 357.

125. 1. Discrimination — In General. — *Greenberg v. Western Turf Assoc.*, 140 Cal. 357.

5. Duty to Provide Safe Place. — *Williams v. Mineral City Park Assoc.*, (Iowa 1905) 102 N. W. Rep. 783, holding further that the question of negligence is one of fact.

128. 1. Then. — *Nelson v. Nelson*, (Ind. App. 1904) 72 N. E. Rep. 482.

2. Adverb of Time. — *McNutt v. Mutual Ben. L. Ins. Co.*, 181 Mo. 94.

133. 1. Thereat Held to Refer to Previous Phrase. — *Santa Rosa v. Bower*, 142 Cal. 299.

136. 2. Things in Action. — See *Sherman v. Hayward*, 98 N. Y. App. Div. 256.

3. "Think" Synonymous with "Believe" or "Find" — Instructions to Jury. — *Ilges v. St. Louis Transit Co.*, 102 Mo. App. 529.

138. 2. Thoroughfare. — *Gillfillan v. Shattuck*, 142 Cal. 32.

THREATS AND THREATENING LETTERS.

142. IV. ELEMENTS OF STATUTORY CRIME — 2. Threat — a. KINDS OF THREATS CONSIDERED — (1) *To Accuse of Crime.* — See note 5.

144. 3. Malice. — See note 6.

145. 4. Communication of Threat — b. TO WHOM COMMUNICATED. — See note 2.

c. LANGUAGE OF COMMUNICATION. — See note 5.

147. V. EVIDENCE — 3. Intent — b. CIRCUMSTANTIAL EVIDENCE. — See note 6.

c. PRIOR CONVERSATIONS. — See note 7.

VI. PUNISHMENT. — See note 9.

142. 5. Threat to Accuse of Arson. — See *Smith v. State*, 25 Ohio Cir. Ct. 22.

144. 6. Malice Meant by Statutes. — *Glover v. People*, 204 Ill. 170.

145. 2. Communication to Person Threatened. — See *Glover v. People*, 204 Ill. 170.

5. Threat May Appear on Face or in Connection with Extraneous Facts. — *Glover v. People*, 204 Ill. 170.

147. 6. Circumstantial Evidence to Prove

Intent. — See *People v. Loveless*, (Ct. Spec. Sess.) 84 N. Y. Supp. 1114, holding that the statutory intent to annoy must be gathered from the effect and purpose of the letter, and not from the defendant's mental operations.

7. Threats Made on Former Occasion Admissible. — *Glover v. People*, 204 Ill. 177.

9. Jury Need Fix Time of Imprisonment. — *Glover v. People*, 204 Ill. 170.

TICKETS AND FARES.

By A. A. WADSWORTH.

156. III. NATURE AND EFFECT OF TICKET — 1. Whether Voucher or Contract. — See note 1.

2. As Evidence to Conductor — According to Some Authorities. — See note 4.

157. Other Authorities, However, Declare. — See note 1.

158. IV. RATES OF FARE — 1. Power of Legislature to Regulate. — See note 2.

159. 3. Limitations upon Power of Legislature — c. RATES AND CONDITIONS MUST BE FAIR AND JUST — (1) *Generally.* — See note 2.

(2) *Test as to Fairness.* — See note 6.

f. EXTENT OF JUDICIAL INTERFERENCE. — See note 10.

160. 5. Statutory Penalty for Overcharge. — See note 5.

156. 1. Whether Voucher or Contract. — See *Ames v. Southern Pac. R. Co.*, 141 Cal. 728.

4. Defective or Invalid Ticket. — *Elliott v. Southern Pac. R. Co.*, 145 Cal. 441; *Chicago, etc., R. Co. v. Stratton*, 111 Ill. App. 142; *Brown v. Rapid R. Co.*, 134 Mich. 591; *Parish v. Ulster, etc., R. Co.*, 99 N. Y. App. Div. 10.

157. 1. Passenger on Proper Explanation Entitled to Be Carried. — *Citizens St. R. Co. v. Clark*, 33 Ind. App. 190, 104 Am. St. Rep. 249; *Illinois Cent. R. Co. v. Jackson*, 117 Ky. 900; *Marx v. Louisiana Western R. Co.*, 112 La. 1085; *Illinois Cent. R. Co. v. Harper*, 83 Miss. 560, 102 Am. St. Rep. 469.

158. 2. Regulation of Rates. — *Raritan River R. Co. v. Middlesex, etc., Traction Co.*, 70 N. J. L. 732; *Topham v. Interurban St. R.*

Co., (Supm. Ct. App. T.) 42 Misc. (N. Y.) 503, *reversed* on other grounds 96 N. Y. App. Div. 323; *San Antonio Traction Co. v. Altgelt*, (Tex. Civ. App. 1904) 81 S. W. Rep. 106.

159. 2. Rates Must Be Fair and Just. — *San Antonio Traction Co. v. Altgelt*, (Tex. Civ. App. 1904) 81 S. W. Rep. 106.

6. Cost of Construction to Be Considered in Ascertaining Reasonableness of Rates. — *State v. Seaboard Air Line R. Co.*, (Fla. 1904) 37 So. Rep. 314.

10. Judicial Interference. — *Raritan River R. Co. v. Middlesex, etc., Traction Co.*, 70 N. J. L. 732.

160. 5. Gross Negligence. — *Goodspeed v. Ithaca St. R. Co.*, 88 N. Y. App. Div. 147.

162. 8. Municipal Regulation of Street Railway Fares — *d.* CERTAIN PROVISIONS CONSTRUED — (4) *Power to Fix Rates in Grant of Franchise.* — See note 4.

164. VI. TRANSFERABILITY OF TICKETS — 3. Restriction of Use to Original Purchaser — *a.* POWER TO RESTRICT. — See note 4.

165. *g.* SPECIAL AUTHORITY TO TRANSFER. — See note 2.

h. FORFEITURE OF TICKET — Right to Take Up Ticket. — See note 6.

i. INTERFERENCE WITH CONTRACT — ACTIONABLE WRONG. —

See note 8.

166. *j.* INJUNCTION. — See note 1.

167. VII. PAYMENT OF FARE — 3. Medium of Payment — *a.* COIN OR LEGAL TENDER NOTES. — See note 3.

169. 5. Refusal to Pay — *c.* GROUNDS AND INSTANCES OF REFUSAL — (4) *Where Train Does Not Stop at Station.* — See note 7.

170. 6. Inability to Pay. — See note 1.

171. VIII. DISCRIMINATION BETWEEN CAR AND TICKET RATES — 5. Opportunity to Obtain Ticket — *a.* RULE AS TO CARRIER'S DUTY STATED. — See note 5.

174. IX. RULES AND STIPULATIONS — GENERAL PRINCIPLES — 2. Rules — *b.* VALIDITY — (2) *Reasonableness Question of Law.* — See note 4.

3. Stipulations — *a.* RULES AND STIPULATIONS DISTINGUISHED. — See note 7.

175. *c.* KNOWLEDGE OR ASSENT OF PASSENGER — (1) *Conflict of Authorities.* — See note 1.

(2) *Rule of Actual Knowledge or Assent.* — See note 2.

176. (3) *Rule of Implied Knowledge or Assent* — (a) *Acceptance and Retention Without Objection.* — See note 2.

162. 4. *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, *affirming* 94 Fed. Rep. 385, cited in the original note; *Cleveland v. Cleveland Electric R. Co.*, 194 U. S. 538.

164. 4. *May Impose Restrictions.* — *Illinois Cent. R. Co. v. Caffrey*, 128 Fed. Rep. 770 (under statute in *Missouri*); *Schubach v. McDonald*, 179 Mo. 163.

165. 2. *Special Authority to Transfer.* — A round-trip ticket, containing provisions that it shall be used only by the original holder whose signature it bears, but not in fact signed by any one, and sold with the express understanding that it shall be used by one in going to, and by another returning from, the place of destination, is not void when presented by such returning party on the return passage, after having been used by the first party for the first part of the journey. *Jevons v. Union Pac. R. Co.*, 70 Kan. 491.

6. *New York Cent., etc., R. Co. v. Reeves*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 490.

Retention of Worthless Ticket by Conductor Confers No Right to Remain on Train. — *Elliott v. Southern Pac. R. Co.*, 145 Cal. 441.

8. *Actionable Interference.* — *Schubach v. McDonald*, 179 Mo. 163.

166. 1. *Illinois Cent. R. Co. v. Caffrey*, 128 Fed. Rep. 770; *Schubach v. McDonald*, 179 Mo. 163. But see *New York Cent., etc., R. Co. v. Reeves*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 490, wherein it was held that the purchaser of a ticket nontransferable on its face has property interest therein which he can sell, and while the railroad company may lawfully refuse to transport the transferee on the

ticket, it is not entitled to an injunction to prevent a ticket broker from buying and selling the ticket.

167. 3. *After Tender of Lawful Money Passenger May Resist Expulsion.* — *Breen v. St. Louis Transit Co.*, 102 Mo. App. 479, *affirmed* 108 Mo. App. 443. See also *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1.

Conductor Not Required to Accept Pledge of Jewelry. — *Texas, etc., R. Co. v. Smith*, (Tex. Civ. App. 1905) 84 S. W. Rep. 852.

169. 7. *Flood v. Chesapeake, etc., R. Co.*, (Ky. 1904) 80 S. W. Rep. 184.

170. 1. *Randell v. Chicago, etc., R. Co.*, 102 Mo. App. 342.

171. 5. *Opportunity to Obtain Ticket.* — *Coleman v. Southern R. Co.*, 138 N. Car. 351.

174. 4. *Question for Court.* — *O'Gorman v. New York, etc., R. Co.*, 96 N. Y. App. Div. 594.

7. *Freeman v. Atchison, etc., R. Co.*, (Kan. 1905) 80 Pac. Rep. 592.

175. 1. *Ames v. Southern Pac. R. Co.*, 141 Cal. 728.

2. *Actual Knowledge Held Necessary.* — *Dagnall v. Southern R. Co.*, 69 S. Car. 110. See also *Erie R. Co. v. Littell*, (C. C. A.) 128 Fed. Rep. 546.

176. 2. In *Kansas* the fact that the purchaser did not sign the contract will not relieve him from its obligation, nor is its binding force lessened by the failure of the passenger to observe a reasonable condition as to time limit plainly printed on the face of his ticket. *Freeman v. Atchison, etc., R. Co.*, (Kan. 1905) 80 Pac. Rep. 592.

177. X. RESTRICTIONS AS TO TIME AND TRAINS — 1. Restrictions as to Time — *a.* IN ABSENCE OF RESTRICTION. — See notes 4, 5.

c. RIGHT OF CARRIER TO IMPOSE RESTRICTIONS. — See note 8.

d. TIME FIXED MUST BE REASONABLE. — See note 9.

178. *g.* CERTAIN STIPULATIONS CONSTRUED — “Good for This Day Only.” — See note 6.

2. Restrictions as to Trains. — See note 10.

179. XI. IDENTIFICATION, SIGNING, AND STAMPING — 1. In General — Reasonableness of Regulation. — See note 5.

180. 5. Reasons for and Effect of Noncompliance — *a.* FAILURE OR REFUSAL OF AGENT TO ACT. — See note 1.

c. AGENT OF CONNECTING LINE. — See note 6.

182. XII. LIMITATION OF OR EXEMPTION FROM LIABILITY — 1. In Ordinary Passes — *d.* VIEW DENYING VALIDITY OF EXEMPTION IN TOTO. — See note 3.

2. In Drovers' Passes — *a.* THE SEVERAL VIEWS STATED. — See note 7.

184. XIII. ROUTE AND ACCOMMODATIONS — 1. Route to Be Pursued — *a.* DIRECT OR CIRCUITOUS ROUTE. — See note 3.

185. 2. Accommodations — *f.* RULE AS TO DOGS. — See note 8.

188. XV. TRANSFERS — 1. Power to Require of Company. — See note 6.

189. 2. Rule of Company Requiring Transfer Checks. — See notes 1, 2.

3. Right to Impose Time Limit. — See note 3.

4. Inspection of Transfer Checks. — See note 5.

5. Delay on Account of Accident. — See note 8.

190. 7. Wrong Transfer Check — Amount of Recovery. — See note 2.

8. Duty to Awaken Passenger. — See note 3.

177. 4. Where Ticket Unlimited. — *Freeman v. Atchison, etc., R. Co., (Kan. 1905) 80 Pac. Rep. 592; Dagnall v. Southern R. Co., 69 S. Car. 110.*

5. Ticket Fourteen Years Old Held to Be Barred by Statute of Limitations. — *Cassiano v. Galveston, etc., R. Co., (Tex. Civ. App. 1904) 82 S. W. Rep. 806.*

8. Tickets with Time Limit. — *Elliott v. Southern Pac. R. Co., 145 Cal. 441; Freeman v. Atchison, etc., R. Co., (Kan. 1905) 80 Pac. Rep. 592.*

9. Time Limit Must Be Reasonable. — *Elliott v. Southern Pac. R. Co., 145 Cal. 441.*

178. 6. Where the Railroad Company Fails to Run Its Trains on Time, a ticket holder who boards the first passenger train stopping at his station after the purchase of his ticket is not to be ousted from the train on the ground that the limit of the ticket has expired. *Marx v. Louisiana Western R. Co., 112 La. 1085.*

10. Limitation as to Trains. — *Ames v. Southern Pac. R. Co., 141 Cal. 728.*

179. 5. Requirement as to Identification. — *Baltimore, etc., R. Co. v. Hudson, 117 Ky. 995.*

180. 1. Refusal of Agent. — *Ft. Worth, etc., R. Co. v. Jones, (Tex. Civ. App. 1905) 85 S. W. Rep. 37.*

6. Chase v. Atchison, etc., R. Co., 70 Kan. 546.

182. 3. Majority View. — *McNeill v. Durham, etc., R. Co., 135 N. Car. 682.* And see the title CARRIERS OF PASSENGERS, **621. 2.**

7. Weaver v. Ann Arbor R. Co., (Mich. 1905) 102 N. W. Rep. 1037. And see the title CARRIERS OF PASSENGERS, **621. 2.**

184. 3. Compare *Illinois Cent. R. Co. v. Harper, 83 Miss. 560, 102 Am. St. Rep. 469,* holding that a rule requiring a passenger to go by direct route is not binding on such passenger in the absence of such knowledge.

185. 8. Rule Excluding Dogs from Street Cars Reasonable. — *O'Gorman v. New York, etc., R. Co., 96 N. Y. App. Div. 594.*

188. 6. Statute Requiring Railroad to Transfer Between Its Own Line and Line Leased by It. — See *O'Reilly v. Brooklyn Heights R. Co., 179 N. Y. 450, affirming 95 N. Y. App. Div. 253; Griffin v. Interurban St. R. Co., 179 N. Y. 438.*

189. 1. Rule Requiring Transfer Checks. — *Hornesby v. Georgia R., etc., Co., 120 Ga. 913; Crowley v. Fitchburg, etc., St. R. Co., 185 Mass. 279.*

2. Freeman v. New York City R. Co., (Supm. Ct. App. T.) 92 N. Y. Supp. 47.

3. Right to Impose Time Limit. — See *Hornesby v. Georgia R., etc., Co., 120 Ga. 913.*

5. Passenger Has Right Without Inspection to Assume that Proper Transfer Has Been Given. — *Moon v. Interurban St. R. Co., (Supm. Ct. App. T.) 85 N. Y. Supp. 363.*

8. Delay Through Accident. — *Hornesby v. Georgia R., etc., Co., 120 Ga. 913.*

190. 2. Hoelljes v. Interurban St. R. Co., (Supm. Ct. App. T.) 43 Misc. (N. Y.) 350; Moon v. Interurban St. R. Co., (Supm. Ct. App. T.) 85 N. Y. Supp. 363.

3. No Duty to Awaken Passenger in Day Coach on Arriving at Destination. — *Seaboard Air Line R. Co. v. Rainey, 122 Ga. 307, 106 Am. St. Rep. 134.* And see the title CARRIERS OF PASSENGERS, **585. 1, 2.**

191. XVI. TICKETS OVER CONNECTING LINES — 2. Nature and Extent of Liability — a. OF INITIAL LINE — (2) Rule of No Extra-terminal Liability —

(a) Statement of Rule. — See notes 1, 2.

192. (b) Power to Assume Liability Throughout. — See notes 2, 3.

(c) When Liability Throughout Considered Assumed — *bb. PARTNERSHIP ARRANGEMENT.* — See note 8.

193. XVII. PASSENGERS ON FREIGHT TRAINS — 3. Rule Requiring Ticket or Permit. — See note 7.

194. XVIII. PASSES — 1. Assent to Conditions. — See note 2.

195. 9. Passes Forbidden by Law — b. STATUS OF PERSON TRAVELING ON PROHIBITED PASS. — See note 10.

196. XIX. REPRESENTATIONS, PROMISES, WAIVER, AND MODIFICATION — 1. Representations and Promises of Agents — d. ILLUSTRATIONS — Carrier Held Liable. — See note 7.

Carrier Held Not Liable. — See note 12.

198. 2. Waiver and Modification of Rules and Stipulations — e. CHECKING OF BAGGAGE. — See note 3.

200. XXI. REDEMPTION AND RESCISSION — 1. Redemption of Unused Tickets — b. CONTENTS OF TICKET. — See note 2.

201. XXIV. EXHIBITION AND SURRENDER OF TICKETS — 1. Rule or Stipulation Requiring. — See note 6.

202. 3. Right to Token in Exchange. — See note 9.

191. 1. View of No Extra-terminal Liability. — *Pennsylvania R. Co. v. Loftis*, 72 Ohio St. 288, 106 Am. St. Rep. 597.

2. Spiess v. Erie R. Co., 71 N. J. L. 90; *Missouri, etc., R. Co. v. Harrison*, 97 Tex. 611; *Missouri, etc., R. Co. v. Foster*, 97 Tex. 618.

192. 2. Power to Assume Unusual Liability. — *Lehigh Valley R. Co. v. Dupont*, (C. C. A.) 128 Fed. Rep. 840.

Carrier May Make Itself Responsible by Contract. — *Pennsylvania R. Co. v. Loftis*, 72 Ohio St. 288, 106 Am. St. Rep. 597.

3. Lehigh Valley R. Co. v. Dupont, (C. C. A.) 128 Fed. Rep. 840.

8. Partnership. — *Lehigh Valley R. Co. v. Dupont*, (C. C. A.) 128 Fed. Rep. 840.

193. 7. Special Permit. — Where a ticket agent, at the time of selling a ticket, promised to furnish the necessary permit, but failed to do so, and the passenger, in ignorance of a rule requiring such permit to be in writing, took passage upon the assumption that the agent had done his duty and that the ticket delivered to him was all the evidence necessary to his right of transportation, and was thereafter ejected to his injury, the company was held to be liable. *Houston, etc., R. Co. v. Berry*, (Tex. Civ. App. 1904) 84 S. W. Rep. 258.

194. 2. Boering v. Chesapeake Beach R. Co., 193 U. S. 442. See generally the title **CARRIERS OF PASSENGERS**, **508. 1 et seq.**, **621. 2.**

Conditions on the Back of a Pass Which Has Expired, or such a pass as had no legal existence before its expiration, can have no legal effect. *McNeill v. Durham, etc., R. Co.*, 135 N. Car. 682.

195. 10. McNeill v. Durham, etc., R. Co., 135 N. Car. 682. And see the title **CARRIERS OF PASSENGERS**, **508, 3.**

196. 7. Illustrations — Carrier Liable. — *Illinois Cent. R. Co. v. Harper*, 83 Miss. 560, 102 Am. St. Rep. 469; *Coleman v. Southern R. Co.*, 138 N. Car. 351.

The Statements of a Subordinate Employee other than the ticket agent at the time of the sale of the ticket will not operate against the carrier as a waiver of stipulations as to the time of trains. *Elliott v. Southern Pac. R. Co.*, 145 Cal. 441.

12. Illustrations — Carrier Not Liable. — The carrier is not bound by the statement of its ticket agent to a passenger who has lost his ticket, in effect that the conductor of the train would make it all right and that transportation would be furnished to such passenger without the ticket. *Texas, etc., R. Co. v. Smith*, (Tex. Civ. App. 1905) 84 S. W. Rep. 852.

198. 3. Baggage Checked on Lost Ticket. — The fact that a passenger's baggage was checked on a ticket which the passenger afterwards lost will not entitle him to transportation without payment of fare. *Texas, etc., R. Co. v. Smith*, (Tex. Civ. App. 1905) 84 S. W. Rep. 852.

200. 2. Statute Void as to Penalty for Selling Unused Ticket, but Valid as to Right of Redemption. — *Texas, etc., R. Co. v. Mahaffey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1047.

Demand of Person Selling Tickets at Regular Ticket Office Sufficient. — *Texas, etc., R. Co. v. Mahaffey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1047.

201. 6. Presentation and Surrender of Ticket. — *Korn v. Chesapeake, etc., R. Co.*, (C. C. A.) 125 Fed. Rep. 897; *Harp v. Southern R. Co.*, 119 Ga. 927, 100 Am. St. Rep. 212; *Nutter v. Southern R. Co.*, (Ky. 1904) 78 S. W. Rep. 470; *Galveston, etc., R. Co. v. Scott*, 34 Tex. Civ. App. 501.

202. 9. See Stewart v. Baltimore, etc., R. Co., (Supm. Ct. App. T.) 88 N. Y. Supp. 377,

204. 6. Where Ticket Lost. — See notes 1, 2, 3.

208. **TILE.** — See note 1.

TILLAGE. — See note 2.

holding that where the ticket of a passenger has been taken from him and not returned, he is entitled to buy another ticket and sue the company for its price.

204. 1. **Lost Ticket.** — *Nutter v. Southern R. Co.*, (Ky. 1904) 78 S. W. Rep. 470; *Texas, etc., R. Co. v. Smith*, (Tex. Civ. App. 1905) 84 S. W. Rep. 852; *Galveston, etc., R. Co. v. Scott*, 34 Tex. Civ. App. 501.

2. *Harp v. Southern R. Co.*, 119 Ga. 927, 100 Am. St. Rep. 212.

3. *Harp v. Southern R. Co.*, 119 Ga. 927, 100 Am. St. Rep. 212.

208. 1. "**Welsh Quarries**" Held Not to Be Tiles. — *Traitel v. U. S.*, 131 Fed. Rep. 994.

2. **Farming Not Synonymous with Tillage of Soil.** — *Dearborn Bank v. Matney*, 132 Fed. Rep. 75.

TIME (COMPUTATION OF).

BY M. G. BEAMAN.

210. III. **SOLAR AND STANDARD TIME.** — See note 5.

211. VII. **GENERAL RULES FOR COMPUTATION** — 1. **From Act Done** — *a. TERMINUS A QUO EXCLUDED* — (1) *At Common Law.* — See note 5.

212. (2) *Under Code Provisions* — (a) *Decisions under Code Provisions.* — See note 1.

216. 2. **From the Date or Day of Date** — *b. MODERN RULE* — *TERMINUS A QUO EXCLUDED* — (1) *At Common Law.* — See note 1.

220. 3. **Before an Act or Day** — *e. TERMINUS A QUO INCLUDED.* — See note 2.

222. VIII. **SUNDAYS OR HOLIDAYS IN COMPUTATION OF TIME** — 1. **Rule as to Intervening Sundays or Holidays** — *a. GENERAL RULE.* — See note 4.

224. 2. **Rule When Sunday Is Last Day** — *a. GENERAL RULE* — (1) *At Common Law.* — See note 2.

225. *b. RULE WHEN ACT IS TO BE PERFORMED UNDER REQUIREMENT OF STATUTE.* — See note 2.

210. 5. **Civic Time Always Followed as Against Time of Private Person.** — *Vermont Steamship Co. v. The Abby Palmer*, 10 British Columbia 381.

211. 5. **From an Act Done — Day Excluded.** — *Goldsmith's Co. v. West Metropolitan R. Co.*, (1904) 1 K. B. 1; *Colonial Mut. F. Ins. Co. v. Ellinger*, 112 Ill. App. 302.

212. 1. **Years.** — *Vose v. Kuhn*, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 455.

216. 1. **From the Day Is Exclusive.** — See *Tilton v. Sterling Coal, etc., Co.*, 28 Utah 173, 107 Am. St. Rep. 598.

220. 2. **Before Act — Terminus a Quo Included.** — *Swift v. Wood*, 103 Va. 494.

222. 4. **Intervening Sundays Reckoned.** — *Swift v. Wood*, 103 Va. 494.

224. 2. **Sunday Excluded and Performance Good on Monday.** — *Smith v. Russell*, (Colo. App. 1905) 80 Pac. Rep. 474, citing 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 224.

225. 2. **When Time Given by Statute.** — *Simmons v. Hanne*, (Fla. 1905) 39 So. Rep. 77. See also *Vose v. Kuhn*, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 455.

TITLE AND PROPERTY INSURANCE.

229. II. **CONSTRUCTION OF POLICY.** — See note 2.

230. III. **RIGHTS, DUTIES, AND LIABILITIES OF TITLE GUARANTEE COMPANY.** — See note 1.

229. 2. **A Condition Requiring Actual Eviction** in order to give a right of action by the insured has been held not to be fulfilled by a judgment on appeal setting aside a decree which confirmed a sale of the property by an administrator *de bonis non*. *Ocean View Land*

Co. v. West Jersey Title Guaranty Co., 71 N. J. L. 600.

230. 1. **Measure of Damages — Company Liable Only for Actual Value of Land.** — *Whitman v. Merion Title, etc., Co.*, 25 Pa. Super. Ct. 320.

TITLE, OWNERSHIP, AND POSSESSION.

- 232.** I. TITLE — 1. Definition — Personal Property. — See note 3.
- 233.** 2. What Constitutes Title. — See note 2.
- 234.** II. OWNER — OWNERSHIP — 2. Who Is an Owner — Of Real Estate. — See note 8.
- 235.** See note 7.
- 236.** See note 6.
- 237.** Of Personal Property. — See note 4.
- 238.** Owner Defined by Statute. — See note 1.
- III. POSSESSION — 1. Possession Defined. — See note 3.
2. Kinds of Possession — *a.* IN GENERAL. — See note 6.
- b.* ACTUAL POSSESSION. — See note 9.
- 239.** *c.* CONSTRUCTIVE POSSESSION. — See note 5.
- TO.** — See notes 9, 10.
- 245.** TONNAGE. — See notes 2, 3.
- 249.** TOOLS. — See notes 7, 8.
- 232.** 3. Title to Personal Property Defined. — Adams *v.* Hopkins, 144 Cal. 19.
- 233.** 2. Possession under a Claim of Ownership constitutes title in a low degree. Waller *v.* Julius, 68 Kan. 314.
- 234.** 8. Owner in Fee. — Phillips *v.* Hardenburg, 181 Mo. 476; Crary *v.* Chicago, etc., R. Co., (S. Dak. 1904) 100 N. W. Rep. 18, holding that a lessee of school lands was not the owner within the meaning of a railroad fence law.
- Mere Agent Not Owner under Statute Requiring Owner to Repair. — St. Louis *v.* Kaime, 180 Mo. 309.
- Owner Must Have Both Legal and Equitable Title. — See U. S. *v.* Hyde, 132 Fed. Rep. 548, a case involving the right to relinquish lands included within a forest reserve, as to which see the title STATE AND PUBLIC LANDS, **222.** 2.
- 235.** 7. A Creditor Secured by a Deed of Trust Is Not an Owner within the meaning of a local-assessment law requiring notice to abutting owners. Richmond *v.* Williams, 102 Va. 733.
- 236.** 6. Vendor under Contract Not "Sole and Unconditional Owner" within Meaning of Insurance Policy. — Rosenstock *v.* Mississippi Home Ins. Co., 82 Miss. 686.
- 237.** 4. A Charterer Is Not an Owner within the meaning of the Washington statute providing that vessels are liable on contracts made by their owners. Guffey *v.* Alaska, etc., Steamship Co., (C. C. A.) 130 Fed. Rep. 278.
- 238.** 1. Owner Defined by Statute. — See New Union Telephone Co. *v.* Marsh, 96 N. Y. App. Div. 122.
- 3.** Possession Defined. — McMahon *v.* State, (Neb. 1904) 97 N. W. Rep. 1035.
- Having in Power — Actual Seizure or Occupancy. — Derrett *v.* Britton, 35 Tex. Civ. App. 485.
- 6.** Possession Held to Include Constructive Possession of Cotenants. — Heinze *v.* Butte, etc., Consol. Min. Co., (C. C. A.) 126 Fed. Rep. 1.
- 9.** Agent or Tenant. — See People *v.* Kelsey, 180 N. Y. 24, reversing 96 N. Y. App. Div. 148.
- 239.** 5. Title or Ownership Necessary. — See People *v.* Kelsey, 180 N. Y. 24, reversing 96 N. Y. App. Div. 148.
- 9.** Term of Exclusion. — Maynes *v.* Gray, 69 Kan. 50, citing 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 239; Bloch Queensware Co. *v.* Smith, 107 Mo. App. 13; Moon *v.* Salt Lake County, 27 Utah 442.
- 10.** Term Construed Inclusively. — Central of Georgia R. Co. *v.* Union Springs, etc., R. Co., 144 Ala. 639; Houghton County St.-R. Co. *v.* Laurium, 135 Mich. 614.
- 245.** 2. Registered Tonnage. — Wheaton *v.* Weston, 128 Fed. Rep. 151.
- 3.** Tonnage Duties. — Way *v.* New Jersey Steamboat Co., 133 Fed. Rep. 192.
- 249.** 7. Tool. — Camardella *v.* Holmes, 97 N. Y. App. Div. 120.
- 8.** Williams *v.* Vincent, 70 Kan. 595. See also *In re* Mullen, 140 Fed. Rep. 206; Burt *v.* Stocks Coal Co., 119 Ga. 629.

TORRENS ACTS.

251. In the United States. — See notes 3, 5.

259. TOTAL. — See note 1.

251. 3. Evidence Before Examiner. — See *Glos v. Talcott*, 213 Ill. 81; *Glos v. Cessna*, 207 Ill. 69.

Applicant for Initial Registration Must Show Ownership of Title as Against Whole World. — *Glos v. Cessna*, 207 Ill. 69. See also *Glos v. Kingman*, 207 Ill. 26.

Character of Proof to Establish Title in Fee. — See *Glos v. Kingman*, 207 Ill. 26.

Proof of Actual Possession and Payment of Taxes for Ten Years Held to Authorize Registration. — *Glos v. Mickow*, 211 Ill. 117.

Applicant Not Required to Establish Invalidity of Opposing Claims. — *Glos v. Hoban*, 212 Ill. 222. See also *Glos v. Talcott*, 213 Ill. 81.

5. Purpose of Act. — See *Reed v. Siddall*, 94 Minn. 216.

The Rules and Principles of Law Applicable to Rights in Real Property, and rules of practice with reference to the trial of actions at law or in equity, in so far as clearly not inappropriate or otherwise provided for, should be applied in proceedings under the Torrens Act. *Owsley v. Johnson*, 95 Minn. 168.

Burden of Proof on Party Asserting Mechanic's Lien. — *Reed v. Siddall*, 94 Minn. 216.

259. 1. Total. — *Senor v. Western Millers' Mut. F. Ins. Co.*, 181 Mo. 104. See also *Grand Lodge, etc., v. Orrell*, 206 Ill. 211.

TOWAGE, TUGS, AND TOWS.

BY H. N. ELDRIDGE.

262. IV. DUTIES IMPOSED ON TUG — 1. Duty as to Skill and Care Generally. — See notes 4, 5, 6.

263. See note 1.

At Risk of Tow. — See note 2.

264. 2. Seaworthiness of Vessels Offered for Service — *a.* TUG. — See note 2.

b. TOW. — See note 3.

4. Making Up Tow. — See note 11.

265. Securing Tow. — See notes 1, 2.

Tow Whether Abreast or Behind Tug. — See note 4.

5. Navigating Tow — *a.* GENERAL CONSIDERATIONS — (1) *Tow in Control of Tug.* — See note 7.

262. 4. Not Liable for Mere Errors of Judgment. — *The Garden City*, (C. C. A.) 127 Fed. Rep. 298.

5. Not a Common Carrier. — *Alaska Commercial Co. v. Williams*, (C. C. A.) 128 Fed. Rep. 362; *The Edmund L. Levy*, (C. C. A.) 128 Fed. Rep. 683; *The Inca*, 130 Fed. Rep. 36; *The W. G. Mason*, 131 Fed. Rep. 632; *Rebstock v. Gilchrist Transp. Co.*, 132 Fed. Rep. 174; *Winslow v. Thompson*, (C. C. A.) 134 Fed. Rep. 546.

6. Not an Insurer. — *The Edmund L. Levy*, (C. C. A.) 128 Fed. Rep. 683; *The W. G. Mason*, 131 Fed. Rep. 632; *Rebstock v. Gilchrist Transp. Co.*, 132 Fed. Rep. 174.

263. 1. Reasonable Skill and Care Required. — *The Garden City*, (C. C. A.) 127 Fed. Rep. 298; *The Edmund L. Levy*, (C. C. A.) 128 Fed. Rep. 683; *The Joseph Peene*, 130 Fed. Rep. 489; *The W. G. Mason*, 131 Fed. Rep. 632; *Rebstock v. Gilchrist Transp. Co.*, 132 Fed. Rep. 174; *Winslow v. Thompson*, (C. C. A.) 134 Fed. Rep. 546.

When Towage Is Voluntarily Attempted in Dan-

gerous and Perilous Places the tug must exercise skill and care commensurate with peril it assumes to encounter. *The Inca*, 130 Fed. Rep. 36.

2. *Alaska Commercial Co. v. Williams*, (C. C. A.) 128 Fed. Rep. 362; *The Edmund L. Levy*, (C. C. A.) 128 Fed. Rep. 683.

264. 2. Sufficient Capacity and Power. — *The E. T. Williams*, 126 Fed. Rep. 871.

3. No Liability Where Unfitness Unknowable by Tug. — *The Edmund L. Levy*, (C. C. A.) 128 Fed. Rep. 683.

11. Properly Made Up. — *The Edmund L. Levy*, (C. C. A.) 128 Fed. Rep. 683; *The Ganoga*, 130 Fed. Rep. 399.

265. 1. Lines of Proper Length. — *The Edmund L. Levy*, (C. C. A.) 128 Fed. Rep. 683.

2. Lines of Proper Strength. — *The Edmund L. Levy*, (C. C. A.) 128 Fed. Rep. 683.

4. Taking Tow Abreast Between Piers of Bridges. — See *Stricker v. The Maurice*, 128 Fed. Rep. 652.

7. Tow under Control of Tug Ordinarily. — *The W. G. Mason*, 131 Fed. Rep. 632.

266. (3) *As to Speed.* — See note 4.

(4) *Knowledge of Waterways and Channels.* — See notes 6, 9.

267. See notes 1, 3.

(5) *Handling of Tow Such as to Avoid Unusual Contacts.* — See note 8.

268. *b. PROPER TIME FOR STARTING.* — See notes 1, 7.

269. *d. DEVIATIONS AND DELAYS* — (3) *Seeking Refuge and Anchorage.* — See note 2.

e. ABANDONMENT OF TOW — (1) *Temporary Abandonment.* — See note 4.

(2) *Permanent Abandonment.* — See note 9.

270. *f. TERMINATION OF VOYAGE.* — See note 1.

V. DUTIES IMPOSED ON TOW — 2. *Seaworthiness of Tow Offered for Service.* — See notes 3, 5, 6.

As to Misrepresentations. — See note 9.

271. 4. *During Navigation* — *Tow Propelled by Hawser.* — See notes 4, 5.

274. IX. *DAMAGES* — 1. *Resulting from Negligent Towage* — *b. AS TO DIVISION OF DAMAGES.* — See note 4.

275. X. *EVIDENCE* — 1. *Burden of Proof in Action Ex Delicto.* — See notes 1, 2.

276. TO WIT. — See note 1.

266. 4. *Proper Speed.* — The *Delta*, 125 Fed. Rep. 133.

Speed Must Depend on Seaworthiness of Tow. — *Dady v. Bacon*, 133 Fed. Rep. 986.

6. *Proper Waterways and Channels.* — *Thompson v. Winslow*, 128 Fed. Rep. 73; *The Edmund L. Levy*, (C. C. A.) 128 Fed. Rep. 683; *The W. G. Mason*, 131 Fed. Rep. 632; *Winslow v. Thompson*, (C. C. A.) 134 Fed. Rep. 546.

9. *Ascertained and Accustomed Obstructions.* — *The Inca*, 130 Fed. Rep. 36; *Rebstock v. Gilchrist Transp. Co.*, 132 Fed. Rep. 174.

Position of Unknown Log in Channel Cannot Be Known. — *The Knickerbocker*, 138 Fed. Rep. 148.

267. 1. *Must Keep Away from Bridge Piers.* — *The Cygnet*, (C. C. A.) 126 Fed. Rep. 742.

3. *Depth of Water.* — *Thompson v. Winslow*, 128 Fed. Rep. 73; *The Inca*, 130 Fed. Rep. 36.

8. *Bumping Against Piers Must Be Reasonable.* — *See Blakeslee v. New York Cent., etc., R. Co.*, 132 Fed. Rep. 153.

Pounding of Tow Against Tug in Rough Water to Be Avoided. — *The Winnie*, 137 Fed. Rep. 166.

Tug Negligent in Failing to Guide Rudderless Tow through Draw of Bridge. — *The Italian*, 127 Fed. Rep. 480.

268. 1. *Circumstances Held to Justify Starting.* — *See The Garden City*, (C. C. A.) 127 Fed. Rep. 298.

7. *Floating Ice.* — *The Edmund L. Levy*, (C. C. A.) 128 Fed. Rep. 683. See also *The Joseph Peene*, 130 Fed. Rep. 489.

269. 2. *Safe Place of Refuge and Anchorage.* — *See The Covington*, 128 Fed. Rep. 788, holding, however, that there was no liability for a *bona fide* error of judgment in proceeding instead of seeking refuge.

4. *Left in Safe Place.* — *The Media*, 132 Fed. Rep. 148.

Tow Must Be Securely Moored. — *The Flushing*, 134 Fed. Rep. 757.

9. *Where the Tow Breaks Loose.* — *See Alaska Commercial Co. v. Williams*, (C. C. A.) 128 Fed. Rep. 362, wherein it was held that on the facts shown the tug was not justified in abandoning the tow.

270. 1. *Tow Left in Care of Incompetent Person* — *Tug Liable.* — *The Thomas Quigley*, (C. C. A.) 130 Fed. Rep. 336.

Tow Must Be Moored in Safe Place. — *See The S. C. Hart*, 132 Fed. Rep. 536.

3. *Seaworthy.* — *See The Covington*, 128 Fed. Rep. 789.

5. *Sufficiently Strong to Withstand Ordinary Perils.* — *The Edmund L. Levy*, (C. C. A.) 128 Fed. Rep. 683; *Dady v. Bacon*, 133 Fed. Rep. 986.

6. *Anchor Part of Equipment.* — *The Flushing*, 134 Fed. Rep. 757.

Steering Gear Must Be in Order. — *The Alfred W. Booth*, (C. C. A.) 135 Fed. Rep. 519.

9. *Must Not Misrepresent Draught of Tow.* — *See The Royal*, 138 Fed. Rep. 416.

271. 4. *Must Obey Proper Orders.* — *The W. G. Mason*, 131 Fed. Rep. 632.

5. *Steered Properly and Kept in Wake.* — *The Garden City*, (C. C. A.) 127 Fed. Rep. 298; *Stricker v. The Maurice*, 128 Fed. Rep. 652; *The Inca*, 130 Fed. Rep. 36. See also *The Triton*, (C. C. A.) 129 Fed. Rep. 698.

274. 4. *Damages Divided.* — *Dady v. Bacon*, 133 Fed. Rep. 986.

275. 1. *Burden of Proof on Tow.* — *The Inca*, 130 Fed. Rep. 36; *The W. G. Mason*, 131 Fed. Rep. 632.

2. *Deviation from the True Course*, along with other circumstances, may cast upon the tug the burden of establishing some excuse for the deviation. *Burr v. Knickerbocker Steam Towage Co.*, (C. C. A.) 132 Fed. Rep. 248.

276. 1. *In Pleading.* — *See Sawyer v. Churchill*, 77 Vt. 273.

TOWNS AND TOWNSHIPS.

BY H. O'B. COOPER.

289. III. CREATION AND ORGANIZATION — 10. Irregularities in Organization. — See note 7.

290. V. EXTENT AND BOUNDARIES — 2. Water Boundaries. — See note 7.

3. Determination of Boundaries — b. DETERMINATION BY COMMISSIONERS. — See note 9.

291. c. PROOF OF ANCIENT BOUNDARIES. — See note 3.

292. 7. Alteration of Boundaries — a. IN GENERAL. — See note 4.

293. e. POWER TO SETTLE BOUNDARIES DISTINGUISHED FROM POWER TO ALTER. — See note 6.

8. Subdivision — a. WHO MAY MAKE — (1) Legislature. — See note 7.

294. b. PROCEEDINGS BY COMMISSIONERS — It Is the Duty of the Commissioners. — See note 3.

Drafts. — See note 4.

c. CONSENT OF INHABITANTS. — See note 6.

301. VI. POWERS — 6. Miscellaneous Powers — b. POLICE POWER. — See note 1.

c. POWER OVER INHABITANTS AND PROPERTY. — See note 3.

302. k. POWER TO BORROW MONEY. — See notes 4, 5.

303. p. POWER TO INDEMNIFY OFFICERS. — See note 2.

304. y. AID TO RAILROADS. — See note 6.

305. z. CERTAIN OTHER POWERS — Taxation. — See note 1.

289. 7. Charter May Become Legalized by Acquiescence and User for More than One Hundred Years. — *Readsboro v. Woodford*, 76 Vt. 376.

290. 7. Bank of Stream Expressly Made Boundary. — *East Fishkill v. Wappinger*, 97 N. Y. App. Div. 7.

9. Determination by Commissioners. — *Searsburg v. Woodford*, 76 Vt. 370, upholding a finding that a certain boundary line was established by prescription.

291. 3. Field Notes of Original Survey. — See *U. S. v. McKee*, 128 Fed. Rep. 1002.

292. 4. Authority of Township Officers — Franchise Question Giving Jurisdiction in Supreme Court. — *People v. Vermilion County*, 210 Ill. 209.

293. 6. Power to Settle and Power to Alter. — *Searsburg v. Woodford*, 76 Vt. 370.

7. Subdivision — By the Legislature. — *Stowe Tp. Division*, 23 Pa. Super. Ct. 285.

294. 3. Duty to View. — See *Stowe Tp. Division*, 23 Pa. Super. Ct. 285.

4. Drafts. — *Stowe Tp. Division*, 23 Pa. Super. Ct. 285.

6. Commissioners Must Give Notice and Hearing Though Not Provided by Statute. — *Stowe Tp. Division*, 23 Pa. Super. Ct. 285.

301. 1. Police Power. — See *Lower Merion Tp. v. Postal Tel. Cable Co.*, 25 Pa. Super. Ct. 306.

3. Power to Lease Land. — See *Murphy v. Com.*, 187 Mass. 361.

302. 4. Power to Borrow for Performance of

Town Duty. — See *Grosse Pointe Tp. v. Finn*, 134 Mich. 529; *Bennett v. Nebagamon*, 122 Wis. 295.

Power to Borrow and Power to Secure Payment Distinct. — *Ford v. Washington Tp.*, 71 N. J. L. 49.

5. Limitation of Power to Borrow. — *Cincinnati, etc., R. Co. v. People*, 206 Ill. 387. See also *Good Roads Machinery Co. v. Old Lycoming Tp.*, 25 Pa. Super. Ct. 156.

303. 2. Borough Not Authorized to Spend Money in Defense of Policeman Charged with Crime. — *Miller v. Hastings*, 25 Pa. Super. Ct. 569.

304. 6. Aid to Railroads. — See *Lough v. Estherville*, 122 Iowa 479.

305. 1. Taxation. — See *Cincinnati, etc., R. Co. v. People*, 206 Ill. 387; *Grosse Pointe Tp. v. Finn*, 134 Mich. 529.

The Words "for Town Purposes" do not sufficiently specify the purposes in the certificate of levy. *People v. Indiana, etc., R. Co.*, 206 Ill. 612; *Cincinnati, etc., R. Co. v. People*, 206 Ill. 565; *Cincinnati, etc., R. Co. v. People*, 213 Ill. 197; *Cincinnati, etc., R. Co. v. People*, 207 Ill. 566; *People v. Chicago, etc., R. Co.*, 213 Ill. 225.

Words "Town Expenses" Not Sufficient. — *Cincinnati, etc., R. Co. v. People*, 207 Ill. 566; *Cincinnati, etc., R. Co. v. People*, 206 Ill. 565.

Presumption in Favor of Validity of Tax. — *Cincinnati, etc., R. Co. v. People*, 206 Ill. 565.

- 305.** 8. By-laws and Ordinances — *a.* IN GENERAL. — See note 3.
- 307.** VII. TOWN MEETINGS — 2. Time of Meeting — See note 10.
- 309.** 5. Warrant or Notification — *b.* GENERAL REQUISITES. — See note 9.
- 312.** *h.* PLACE OF POSTING — Notices Need Not Be Posted at the Same Places Every Year. — See note 3.
- i.* TIME OF POSTING. — See note 5.
- 317.** VIII. ELECTION OF OFFICERS — 2. Mode of Election. — See note 7.
- When in a New Town Erected by the County Board. — See note 8.
- 318.** 5. Acceptance and Qualification — *a.* ACCEPTANCE — (2) *Refusal to Accept Office.* — See note 3.
- b.* QUALIFICATION — (1) *Oath of Office.* — See note 5.
- (2) *Bonds.* — See note 7.
- 319.** 6. Extension of Term. — See note 1.
7. Evidence of Election. — See note 2.
8. Powers of Officers — *a.* IN GENERAL — Town Officers Have No Functions Outside of Their Constitutional or Statutory Powers. — See note 8.
- 321.** 13. Various Boards and Officers — *a.* GOVERNING BOARD — (3) *Township Trustees* — (a) In General. — See note 6.
- (c) Powers. — See note 9.
- 322.** (4) *Selectmen* — (b) Effect of Invalid Election. — See note 7.
- 323.** (5) *Supervisors* — (b) Duty to Act as a Body. — See note 4.
- (c) Powers. — See note 5.
- 324.** (6) *Township Committee* — (c) Powers — In General. — See note 4.
- (7) *Town Councils* — (a) In General. — See note 6.
- 305.** 3. The Book Containing the Record of Ordinances of the township, required to be kept by statute, is *prima facie* proof of the existence of an ordinance. Ackerman v. Nutley, 70 N. J. L. 438. See generally the titles ORDINANCES, 1004. 6 *et seq.*; STATUTES, 762. 4 *et seq.*
- No Collateral Attack for Want of Notice. — Ackerman v. Nutley, 70 N. J. L. 438.
- 307.** 10. Connecticut Statute — Special Meetings. — See Benham v. Potter, 77 Conn. 186.
- 309.** 9. General Requisites — Technical Precision. — Benham v. Potter, 77 Conn. 186.
- 312.** 3. New York Statute — Four Places. — Matter of Smith, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 384.
5. New York — Ten Days. — Matter of Smith, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 384.
- 317.** 7. Where an Ordinance Requires an Officer to Be Chosen by Ballot the election must be conducted in accordance with common-law rules. Murdock v. Strange, 99 Md. 89.
8. Officers in New Town. — See People v. Potter, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 485, affirmed 88 N. Y. App. Div. 239.
- 318.** 3. Supervision — Vacancy Filled by Appointment. — See People v. Potter, (Supm. Ct. Spec. T.) 40 Misc. (N. Y.) 485, affirmed 88 N. Y. App. Div. 239.
5. Reasonable Time Allowed to Ascertain Judicially Title to Office. — Rich v. McLaurin, 83 Miss. 95.
7. Bonds — Failure to File. — See Mt. Vernon v. Kenlon, 97 N. Y. App. Div. 191.
- Excuse for Failure — Election Declared Invalid. — Murdock v. Strange, 99 Md. 89.
- Reasonable Time Allowed to Ascertain Judicially Title to Office. — Rich v. McLaurin, 83 Miss. 95.
- 319.** 1. Extension of Term. — People v. Weeks, 176 N. Y. 194; Lane v. Tilton, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 214.
2. Evidence of Election — Record. — Daniels v. Newbold, 125 Iowa 193.
- Certificates of Nomination. — See Winters v. Warmolts, 70 N. J. L. 615.
8. A Town Board Is Not Authorized to Convey the Real Estate of the town, or to contract to convey it, unless statutory authority exists or special authority has been granted by the town electors. New York v. Brooklyn, etc., R. Co., 98 N. Y. App. Div. 201.
- 321.** 6. Township Trustees. — Moss v. Sugar Ridge Tp., 161 Ind. 417.
9. Powers. — Mitchelltree School Tp. v. Hall, 163 Ind. 667.
- 322.** 7. Selectmen De Facto. — See Winters v. Warmolts, 70 N. J. L. 615.
- 323.** 4. Duty to Act as a Body. — Western Wheeled Scraper Co. v. Butler Tp., 24 Pa. Super. Ct. 477. See also F. C. Austin Mfg. Co. v. Ayr Tp., 17 Pa. Super. Ct. 419, 24 Pa. Super. Ct. 91.
5. Powers. — People v. Weeks, 176 N. Y. 194; Webster v. White Plains, 93 N. Y. App. Div. 398; Good Roads Machinery Co. v. Old Lycoming Tp., 25 Pa. Super. Ct. 156. See also Marcy v. Springville Tp., 24 Pa. Super. Ct. 521.
- A Town Supervisor Acting in His Official Capacity as a member of the county board is not the representative of his town to protect and defend its rights as to any claims it may have against the county. Spooner v. Washburn County, 124 Wis. 24.
- 324.** 4. Powers Limited to Those Expressly Granted and Necessarily Implied. — Lower Merion Tp. v. Postal Tel. Cable Co., 25 Pa. Super. Ct. 306. See also, as to implied powers, Manske v. Milwaukee, 123 Wis. 172.
6. Town Councils — In General. — State v. Grace, 113 Tenn. 9.

- 324.** (b) Appointment of Officers. — See note 9.
- 325.** And While the Court May Doubtless Interfere. — See note 1.
b. VARIOUS OFFICERS — (1) *Town and Township Clerks.* — See note 2.
- 326.** (5) *Auditors* — (a) In General. — See note 1.
 (b) Duties. — See note 2.
- 328.** X. TOWN AND TOWNSHIP PROPERTY — 1. Acquisition — *b.* MANNER OF ACQUISITION. — See note 7.
- 329.** 2. Nature of Ownership. — See note 2.
 XI. TOWN AND TOWNSHIP CONTRACTS — 1. In General. — See note 4.
- 330.** XII. DUTIES AND LIABILITIES — 1. In General. — See note 3.
 In the Absence of an Express Statute. — See note 4.
 2. Nature Of. — See note 5.
- 331.** 8. Liability for Borrowed Money. — See note 5.
- 332.** 14. Liability for Acts of Individuals — *b.* ACTS OF OFFICERS — (1) *Acts Within Scope of Authority.* — See note 2.
 (2) *Negligent and Unauthorized Acts.* — See note 3.
- 333.** See note 1.
- 334.** XIV. CLAIMS AGAINST TOWNS AND TOWNSHIPS — 1. In General. — See note 5.
- 335.** 3. Allowance by Auditors — *a.* In General. — See note 1.
b. REFUSAL OF BOARD OF AUDIT TO ACT. — See note 2.
 4. Claims Barred by Limitation. — See note 5.
 6. Collection. — See note 7.
- 324.** 9. Appointment of Officers Generally. — See *Stack v. Com.*, (Ky. 1904) 81 S. W. Rep. 917.
 Appointment to Fill Vacancy — Confirmation by Majority. — See *State v. Lyons*, 70 N. J. L. 114.
 Election by Resolution. — See *Huey v. Jones*, 140 Ala. 479; *Rich v. McLaurin*, 83 Miss. 95.
- 325.** 1. Wrongful Exclusion — Mandamus Proper Remedy. — *Com. v. Fleming*, 23 Pa. Super. Ct. 404.
2. Town and Township Clerks — Allowance for Making Tax Lists. — See *Ross v. Collins*, 106 Ill. App. 396.
- 326.** 1. Auditors. — *Wright v. Wilmurt*, (County Ct.) 44 Misc. (N. Y.) 456. See also *Goodfriend v. Lyme*, 90 N. Y. App. Div. 334.
 Rejection of Claim — Certificate Required. — *People v. Auditors*, (Supin. Ct. Spec. T.) 42 Misc. (N. Y.) 116, *affirmed* 95 N. Y. App. Div. 620.
2. Duties. — *People v. Indiana*, etc., R. Co., 206 Ill. 612.
- Powers. — See *Cleveland*, etc., R. Co. *v.* *People*, 205 Ill. 582.
- Reconsideration of Action. — See *Matter of Weeks*, 97 N. Y. App. Div. 131.
- 328.** 7. May Acquire by Adverse Possession. — *Murphy v. Com.*, 187 Mass. 361.
- 329.** 2. Ownership Not Restricted for Public Purposes. — *Murphy v. Com.*, 187 Mass. 361.
4. Town and Township Contracts — In General. — See *Murphy v. Com.*, 187 Mass. 361 (lease of land).
- 330.** 3. Towns Are Incorporated for Two Distinct Purposes — one for the particular welfare of their own inhabitants, the other for the general welfare. In pursuing the one they may be liable in contract or tort, at common law, for the acts or omissions of officers appointed by them. In pursuing the other purpose they are not so liable. *Mains v. Ft. Fairfield*, 99 Me. 177.
4. Neglect of Public Duty. — *Aschoff v. Evansville*, 34 Ind. App. 25.
5. Nature Of. — See *Aschoff v. Evansville*, 34 Ind. App. 25.
- 331.** 5. Liability for Borrowed Money. — *Ford v. Washington Tp.*, 71 N. J. L. 49.
- 332.** 2. Acts Within Scope of Authority. — *Board of Councilmen v. Allen*, (Ky. 1904) 82 S. W. Rep. 292; *Manske v. Milwaukee*, 123 Wis. 172. See also *Lough v. Estherville*, 122 Iowa 479.
3. Negligent and Unauthorized Acts. — *Smith v. Jones*, 136 Mich. 532; *Manske v. Milwaukee*, 123 Wis. 172.
- Test Held to Be Question Whether Profit or Income to Town Involved. — *Duggan v. Peabody*, 187 Mass. 349.
- 333.** 1. Subsequent Ratification. — *Cincinnati*, etc., R. Co. *v.* *People*, 206 Ill. 387.
- 334.** 5. Claims Against Towns and Townships — In General. — *Wright v. Wilmurt*, (County Ct.) 44 Misc. (N. Y.) 456.
- 335.** 1. Allowance of Claims — By Auditors. — *Bragg v. Victor*, 84 N. Y. App. Div. 83; *Goodfriend v. Lyme*, 90 N. Y. App. Div. 334; *Wright v. Wilmurt*, (County Ct.) 44 Misc. (N. Y.) 456. *Contra* where presentation not required by statute, *Ross v. Collins*, 106 Ill. App. 396.
2. Refusal of Board of Audit to Act. — *Wright v. Wilmurt*, (County Ct.) 44 Misc. (N. Y.) 456.
5. Illinois Statute — No Limitations. — *Ross v. Collins*, 106 Ill. App. 396.
7. New York Statutes — Levy of Tax — Action Against Town. — See *Goodfriend v. Lyme*, 90 N. Y. App. Div. 334.

336. XVII. DISSOLUTION — 1. In General. — See note 4.

337. TOY. — See note 1.

336. 4. Dissolution. — See *State v. Yankee*, 120 Wis. 573.

337. 1. Ping-pong Balls Not Toys Within Meaning of Revenue Law. — *U. S. v. Strauss*, (C.

A.) 136 Fed. Rep. 185; *U. S. v. Wanamaker*, 136 Fed. Rep. 266.

22-calibre Rifle Held Not to Be a Toy. — *Taylor v. Seil*, 120 Wis. 32.

TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION.

BY O. D. ESTER.

346. I. DEFINITION AND NATURE OF SUBJECT — 2. Trademarks. — See note 4.

347. See note 5.

348. 3. Trade Names. — See notes 3, 4.

351. III. WHAT PROTECTED AS TRADEMARK OR TRADE NAME — 1. Essentials of Valid Trademark — a. DISTINCTIVENESS. — See note 2.

352. a. TRUTHFULNESS — (1) Effect of Misrepresentations. — See note 10.

353. (2) Particular Misrepresentations — (a) As to Ingredients. — See note 3.

354. (c) As to Origin or Place of Manufacture. — See note 3.

355. (d) As to Maker — Assignees. — See note 1.

356. (f) Wrongful Use of Word "Patent." — See note 6.

357. (3) When Misrepresentation Not Fatal. — See notes 5, 6.

358. 2. Particular Words, Names, Marks, or Symbols — a. GENERAL RULE. — See note 6.

359. b. ARBITRARY OR FANCIFUL WORDS OR PHRASES. — See note 4.

360. See note 1.

346. 4. Trademark Defined. — *G. W. Cole Co. v. American Cement, etc., Co.*, (C. C. A.) 130 Fed. Rep. 703; *Sartor v. Schaden*, 125 Iowa 696. See also *Gaines v. E. Whyte Grocery, etc., Co.*, 107 Mo. App. 507.

347. 5. Unfair Competition Distinguished from Infringement of Trademark. — *G. W. Cole Co. v. American Cement, etc., Co.*, (C. C. A.) 130 Fed. Rep. 703; *Sartor v. Schaden*, 125 Iowa 696. See also *Dodge Stationery Co. v. J. S. Dodge Co.*, 145 Cal. 380.

348. 3. A Trademark Covers the Entire Jurisdiction of the sovereignty granting it, but a trade name is of necessity local and not based on any authority from the state, but founded on usage in the locality in which a party is doing business. *Sartor v. Schaden*, 125 Iowa 696.

4. Trade Names Protected Against Unfair Competition. — *Aerators v. Tollitt*, (1902) 2 Ch. 319; *Randall v. British, etc., Shoe Co.*, (1902) 2 Ch. 354; *Laing Packing, etc., Co. v. Laing*, 25 Quebec Super. Ct. 344; *Sartor v. Schaden*, 125 Iowa 696.

351. 2. Trademarks Must Be Distinctive. — *Louise v. Gainsborough*, 87 L. T. N. S. 591; *Spilling v. O'Kelly*, 8 Can. Exch. 426.

352. 10. Misrepresentation Bars Relief Against Judgment. — *Sartor v. Schaden*, 125 Iowa 696, citing 28 AM. AND ENG. ENCYC. OF LAW (2d

ed.) 352; *Newbro v. Undeland*, (Neb. 1903) 96 N. W. Rep. 635; *Gluckman v. Strauch*, 99 N. Y. App. Div. 361.

353. 3. Misrepresentations as to Ingredients Fatal. — *Newbro v. Undeland*, (Neb. 1903) 96 N. W. Rep. 635.

354. 3. Falsity as to Origin or Place of Manufacture Fatal. — *Newbro v. Undeland*, (Neb. 1903) 96 N. W. Rep. 635.

355. 1. Falsity as to Maker Fatal. — *Lemke v. Dietz*, 121 Wis. 102.

356. 6. Wrongful Use of Word "Patent" Fatal. — *Sartor v. Schaden*, 125 Iowa 696, citing 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 356.

357. 5. Innocent Misrepresentations. — *Sartor v. Schaden*, 125 Iowa 696, citing 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 357.

6. Immaterial and Trivial Inaccuracies. — *Gluckman v. Strauch*, 99 N. Y. App. Div. 361.

358. 6. What May Be Trademark — General Rule. — *Regis v. Jaynes*, 185 Mass. 458.

359. 4. Arbitrary or Fanciful Words and Phrases. — *Wellcome v. Thompson*, (1904) 1 Ch. 736; *Henblein v. Adams*, 125 Fed. Rep. 782.

360. 1. Other Illustrations. — *M. J. Breitenbach Co. v. Spangenberg*, 131 Fed. Rep. 160; *Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co.*, (N. J. 1905) 60 Atl. Rep. 561.

- 360.** *c.* NEWLY COINED OR INVENTED WORDS. — See note 3.
362. *f.* NUMERALS. — See note 5.
363. See note 4.
364. *h.* COLOR. — See note 6.
365. See note 1.
369. *a.* DESCRIPTIVE WORDS AND MARKS — (1) *In General.* — See note 6.
371. (2) *Quality and Character.* — See note 3.
374. (5) *Process of Manufacture.* — See note 1.
376. (8) *Generic Names.* — See note 2.
377. *q.* GEOGRAPHICAL TERMS — (1) *In General.* — See notes 2, 3.
380. *r.* NAME OF THING TO WHICH APPLIED — (2) *Name of Patented Article* — (b) *After Expiration of Patent* — *General Doctrine.* — See note 4.
383. *s.* NAME OF PUBLICATION — (1) *Books.* — See note 3.
384. (2) *Periodicals.* — See note 1.
386. *v.* NAMES OF MINERAL SPRINGS. — See note 2.
389. IV. EXTENT OF RIGHT — 2. *Limit as to Class of Goods or Business.* — See note 2.
391. 4. *Territorial Extent.* — See note 1.
393. V. ORIGINAL ACQUISITION OF RIGHT — 3. *Adoption and User* — *c.* *PRIORITY OF ADOPTION AND USER.* — See note 8.
394. See note 4.

360. 3. Words Held Not Valid Trademarks Within Rule. — "Absorbine" as applied to a veterinary preparation for absorbing and removing swellings, *Christy v. Tipper*, (1904) 1 Ch. 696, *affirmed* (1905) 1 Ch. 1, and "Hæmatogen" as applied to a preparation of a drug called hæmoglobin, *Hommel v. Bauer*, 20 Times L. Rep. 585, have been held not to be valid as trademarks.

362. 5. Numerals Primarily Used to Indicate Grade or Quality. — *Dennison Mfg. Co. v. Scharf Tag, etc., Co.*, (C. C. A.) 135 Fed. Rep. 625.

363. 4. Numerals in Combination with Other Devices. — *Dennison Mfg. Co. v. Scharf Tag, etc., Co.*, (C. C. A.) 135 Fed. Rep. 625.

364. 6. Mere Color Not a Valid Trademark. — *Ohio Baking Co. v. National Biscuit Co.*, (C. C. A.) 127 Fed. Rep. 116.

365. 1. Unfair Competition by Using Color to Deceive. — *Ohio Baking Co. v. National Biscuit Co.*, (C. C. A.) 127 Fed. Rep. 116.

369. 6. No Exclusive Right in Descriptive Words. — *Drewry v. Wood*, 127 Fed. Rep. 887; *Heide v. Wallace*, (C. C. A.) 135 Fed. Rep. 346; *Scriven v. North*, 124 Fed. Rep. 894, *modified* (C. C. A.) 134 Fed. Rep. 366; *Regis v. Jaynes*, 185 Mass. 458; *Woodcock v. Guy*, 33 Wash. 234.

Trademarks Held Not Descriptive. — See *Ludington Novelty Co. v. Leonard*, (C. C. A.) 127 Fed. Rep. 155.

Descriptive Words in Foreign Language Not Valid Trademark. — *Roncoroni v. Gross*, 92 N. Y. App. Div. 221. See also *Selchow v. Chaffee, etc., Mfg. Co.*, 132 Fed. Rep. 996.

371. 3. Terms Indicating Quality or Character Not Valid Trademarks. — *Devlin v. McLeod*, 135 Fed. Rep. 164; *Bickmore Gall Cure Co. v. Karns Mfg. Co.*, 126 Fed. Rep. 573; *Barrett Chemical Co. v. Stern*, 176 N. Y. 27.

374. 1. Process of Manufacture. — *Fels v. Hedley*, 20 Times L. Rep. 69.

376. 2. Names Become Generic. — *H. B. Chaffee Mfg. Co. v. Selchow*, 131 Fed. Rep. 543.

377. 2. Geographical Terms Not Valid Trademarks. — *Grand Hotel Co. v. Wilson*, (1904) A. C. 103; *Elgin Nat. Watch Co. v. Loveland*, 132 Fed. Rep. 41.

3. Unfair Competition — Geographical Terms Which Have Acquired Secondary Meaning. — *Elgin Nat. Watch Co. v. Loveland*, 132 Fed. Rep. 41.

380. 4. Name Becomes Publici Juris on Expiration of Patent. — *Drewry v. Wood*, 127 Fed. Rep. 887.

383. 3. Unfair Competition. — Where a publisher has imparted to his books peculiar characteristics to enable the public to distinguish them from similar books, equity will enjoin another publisher from copying such characteristics. *G. & C. Merriam Co. v. Straus*, 136 Fed. Rep. 477.

384. 1. Name of Periodical Viewed as Trademark. — *Gannett v. Rupert*, (C. C. A.) 127 Fed. Rep. 962.

386. 2. Names of Mineral Springs. — See *French Republic v. Saratoga Vichy Spring Co.*, 191 U. S. 427. Compare *Grand Hotel Co. v. Wilson*, (1904) A. C. 103.

389. 2. Right Limited to Class of Goods or Business. — *Anglo-Swiss Condensed Milk Co. v. Pearks*, 20 Times L. Rep. 238.

391. 1. Marks Belonging to Different Persons in Different Countries. — *Sartor v. Schaden*, 125 Iowa 696.

393. 8. Priority in Use Confers Superior Right. — See *Chadron Opera House Co. v. Loomer*, (Neb. 1904) 99 N. W. Rep. 649.

394. 4. Abandoned Trademarks. — *Gaines v. E. Whyte Grocery, etc., Co.*, 107 Mo. App. 507.

397. VI. LOSS OR TERMINATION OF RIGHT — 2. Acquiescence, Laches, and Delay — In the United States. — See note 6.

400. VII. ASSIGNMENT, TRANSFER, AND LICENSE — 1. Assignability — c. IMPERSONAL TRADEMARKS — (2) Not Assignable Apart from Good Will or Article. — See note 2.

401. See note 3.

404. 4. Insolvency, Bankruptcy, and Assignment for Benefit of Creditors. — See note 5.

408. IX. INFRINGEMENT AND UNFAIR COMPETITION — 1. General Principles — a. INFRINGEMENT OF TRADEMARK. — See notes 3, 4.

409. b. UNFAIR COMPETITION. — See notes 2, 3.

410. c. TEST OF INFRINGEMENT OR UNFAIR COMPETITION. — See note 3.

411. See note 2.

412. See note 4.

416. e. ACTUAL DECEPTION UNNECESSARY. — See notes 3, 4.

417. f. FRAUDULENT INTENT — Technical Trademarks. — See note 2.

418. Unfair Competition. — See notes 2, 3.

421. Proof of Fraudulent Intent. — See note 3.

422. h. DUTY TO AVOID UNNECESSARY CONFUSION. — See note 3.

426. 3. Use of Descriptive Terms or Generic Names. — See note 1.

397. 6. American Rule. — See Gaines v. E. Whyte Grocery, etc., Co., 107 Mo. App. 507.

400. 2. Not Assignable Apart from Good Will or Article. — Falk v. American West Indies Trading Co., 180 N. Y. 445, 105 Am. St. Rep. 778.

401. 3. Assignment in Gross Not Valid. — Crossman v. Griggs, 186 Mass. 275.

404. 5. Insolvency, Bankruptcy, and Assignments for Benefit of Creditors. — Melrose-Drover v. Heddle, Sc. Ct. of Sess. 4 F. 1120.

408. 3. Infringement of Trademark. — Boord v. Huddart, 89 L. T. N. S. 718; Sartor v. Schaden, 125 Iowa 696. See also Thackray v. Saxlehner, (C. C. A.) 125 Fed. Rep. 911.

4. Imitations — Test of Infringement. — See N. K. Fairbank Co. v. Cocos Butter Mfg. Co., 20 Times L. Rep. 53.

409. 2. Unfair Competition Defined. — See Scriven v. North, (C. C. A.) 134 Fed. Rep. 366.

3. Conduct Constituting Unfair Competition. — Devlin v. McLeod, 135 Fed. Rep. 164; Selchow v. Chaffee, etc., Mfg. Co., 132 Fed. Rep. 996; Victor Talking Mach. Co. v. Armstrong, 132 Fed. Rep. 711; Hygienic Fleeced Underwear Co. v. Way, 133 Fed. Rep. 245; Baker v. Slack, (C. C. A.) 130 Fed. Rep. 514; Drewry v. Wood, 127 Fed. Rep. 887; N. K. Fairbanks Co. v. Dunn, 126 Fed. Rep. 227; Scriven v. North, 124 Fed. Rep. 894, *modified* (C. C. A.) 134 Fed. Rep. 366; Swift v. Brenner, 125 Fed. Rep. 826; McFell Electric, etc., Co. v. McFell Electric Co., 110 Ill. App. 182; Job Printers Union v. Kinsley, 107 Ill. App. 654; E. H. Taylor, Jr., etc., Co. v. Taylor, (Ky. 1905) 85 S. W. Rep. 1085; Brown v. Braunstein, (Supm. Ct. Spec. T.) 83 N. Y. Supp. 1096; Manitowoc Malting Co. v. Milwaukee Malting Co., 119 Wis. 543. See also Gillett v. Lumsden, 8 Ont. L. Rep. 168.

410. 3. Probable Deception of Ordinary Purchasers. — Enterprise Mfg. Co. v. Landers, 124 Fed. Rep. 923, *affirmed* (C. C. A.) 131 Fed.

Rep. 240; Cantrell v. Butler, 124 Fed. Rep. 290; Ohio Baking Co. v. National Biscuit Co., (C. C. A.) 127 Fed. Rep. 116; Job Printers Union v. Kinsley, 107 Ill. App. 654; A. Cusimano v. Olive Oil Importing Co., 114 La. 312.

411. 2. Comparison of Marks Side by Side Not the Test. — Cantrell v. Butler, 124 Fed. Rep. 290.

412. 4. Deception Improbable or Impossible. — Weingarten v. Bayer, 89 L. T. N. S. 56.

416. 3. Actual Deception Unnecessary. — Lanahan v. Kissel, 135 Fed. Rep. 890.

4. Probable Deception Sufficient. — Job Printers Union v. Kinsley, 107 Ill. App. 654; Manitowoc Malting Co. v. Milwaukee Malting Co., 119 Wis. 543.

417. 2. Intent Immaterial in Trademark Cases. — Scriven v. North, (C. C. A.) 134 Fed. Rep. 366; Job Printers Union v. Kinsley, 107 Ill. App. 654; International Silver Co. v. Wm. H. Rogers Corp., 66 N. J. Eq. 110; Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co., (N. J. 1905) 60 Atl. Rep. 561.

Fraud Presumed in Technical Trademark Cases. — Heublein v. Adams, 125 Fed. Rep. 782.

418. 2. Unfair Competition — Fraudulent Intent Held Necessary. — Heublein v. Adams, 125 Fed. Rep. 782; N. K. Fairbank Co. v. Windsor, (C. C. A.) 124 Fed. Rep. 200; Faber v. Faber, 124 Fed. Rep. 603; Heide v. Wallace, 129 Fed. Rep. 649.

3. Intent Presumed from Similarity. — Devlin v. McLeod, 135 Fed. Rep. 164.

421. 3. Intent Inferable from Circumstances of Case. — Enterprise Mfg. Co. v. Landers, 124 Fed. Rep. 923, *affirmed* (C. C. A.) 131 Fed. Rep. 240.

422. 3. Unnecessary Adoption of Confusing Name or Dress of Goods. — Griggs v. Erie Preserving Co., 131 Fed. Rep. 359; Regis v. Jaynes, 185 Mass. 458.

426. 1. Descriptive Terms and Generic Names. — See G. W. Cole Co. v. American Cement, etc., Co., (C. C. A.) 130 Fed. Rep. 703.

427. 4. Use of Personal or Corporate Names—*a.* IN GENERAL.—See note 1.

428. *b.* DECEPTIVE ARTIFICES.—See note 1.

c. AFFIRMATIVE DUTY TO DIFFERENTIATE.—See note 3.

429. *f.* CORPORATE NAMES.—See note 6.

430. See note 3.

5. Use of Geographical Terms—*a.* IN GENERAL.—See note 7.

432. 6. Sale of Goods under Another Person's Wrappers and Labels or in Stamped Bottles.—See note 2.

7. Sale of Inferior for Superior Goods of Same Manufacturer.—See note 3.

8. Use of Mark on Different Goods or in Different Connection.—See note 4.

433. 13. Representation as "Successor," "Original," Etc.—See note 5.

435. X. STATUTORY REGULATION—1. Federal Statutes—*c.* OPERATION AND EFFECT.—See note 6.

436. 2. State Statutes.—See notes 2, 3.

437. 3. English Statutes.—See note 1.

438. XI. REMEDIES AND PROCEDURE—2. Damages and Profits.—See note 1.

439. TRADER.—See note 1.

427. 1. Unfair Competition by Use of One's Own Name.—*Coats v. John Coates Thread Co.*, 135 Fed. Rep. 177; *Faber v. Faber*, 124 Fed. Rep. 603; *Dodge Stationery Co. v. J. S. Dodge Co.*, 145 Cal. 380; *International Silver Co. v. Wm. H. Rogers Corp.*, 66 N. J. Eq. 119; *Van Stan's Stratena Co. v. Van Stan*, 209 Pa. St. 564.

428. 1. Deceptive Artifice in Connection with Name.—*Van Stan's Stratena Co. v. Van Stan*, 209 Pa. St. 564.

3. *Van Houten v. Hooton Cocoa, etc., Co.*, 130 Fed. Rep. 600.

429. 6. Unfair Competition in Use of Corporate Names.—*Ball v. Best*, 135 Fed. Rep. 434; *Koebel v. Chicago Landlord's Protective Bureau*, 210 Ill. 176, 102 Am. St. Rep. 154; *Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co.*, (N. J. 1905) 60 Atl. Rep. 561; *Pettes v. American Watchman's Clock Co.*, 89 N. Y. App. Div. 345. See also *Selchow v. Chaffee, etc., Mfg. Co.*, 132 Fed. Rep. 996; *Original La Tosca Social Club v. La Tosca Social Club*, 23 App. Cas. (D. C.) 96.

430. 3. Injunction Against Use of Conflicting Name.—*Coats v. John Coates Thread Co.*, 135 Fed. Rep. 177; *Dodge Stationery Co. v. J. S. Dodge Co.*, 145 Cal. 380.

7. Geographical Term with Secondary Meaning—Unfair Competition.—*Elgin Nat. Watch Co. v. Loveland*, 132 Fed. Rep. 41. See also *G. W. Cole Co. v. American Cement, etc., Co.*, (C. C. A.) 130 Fed. Rep. 703.

432. 2. Refilling Labeled or Stamped Bottles, Etc.—Criminal Offense by Statute.—*Com. v. Anselvich*, 186 Mass. 376, 104 Am. St. Rep. 590.

Reconstructing Wornout Articles.—*General Electric Co. v. Re-New Lamp Co.*, 128 Fed. Rep. 154.

3. Sale of Inferior for Superior Goods of Same Manufacturer.—But a party who buys an inferior grade of goods from a manufacturer may

state by whom they were made, even though the manufacturer was accustomed to use his name only upon a higher class of goods. *Russia Cement Co. v. Frauenhar*, (C. C. A.) 133 Fed. Rep. 518.

4. Use on Different Goods or in Different Connection.—*Anglo-Swiss Condensed Milk Co. v. Pearks*, 20 Times L. Rep. 238.

433. 5. Legitimate Successor—Word "Successor" Need Not Be Made Prominent in Advertising.—*Smith v. Brand*, 67 N. J. L. 529.

435. 6. Effect on Common-law Rights.—*Ohio Baking Co. v. National Biscuit Co.*, (C. C. A.) 127 Fed. Rep. 116; *Edison v. Thomas A. Edison Jr. Chemical Co.*, 128 Fed. Rep. 1013.

436. 2. State Statutes.—*Cusimano Co. v. Olive Oil Importing Co.*, 114 La. 312; *Com. v. Anselvich*, 186 Mass. 376, 104 Am. St. Rep. 590.

3. Constitutionality of State Statutes.—*Cigar Makers' International Union v. Goldberg*, 70 N. J. L. 488.

437. 1. English Statutes.—See *Bourne v. Swan*, (1903) 1 Ch. 211; *Louise v. Grainsborough*, 87 L. T. N. S. 591.

Burden of Proof Is on Party Asserting that Registration Was Improper.—*Anglo-Swiss Condensed Milk Co. v. Pearks*, 20 Times L. Rep. 238, following *In re Chesebrough*, (1902) 1 Ch. 1, 71 L. J. Ch. 427.

438. 1. American Rule—Profits.—An accounting will not be ordered where there is no rational mode of estimating the profits. *Ludington Novelty Co. v. Leonard*, (C. C. A.) 127 Fed. Rep. 155.

Expense of Making Sale Must Be Deducted.—*Baker v. Slack*, (C. C. A.) 130 Fed. Rep. 514.

439. 1. Trader.—*Wilkes Barre First Nat. Bank v. Wyoming Valley Ice Co.*, 136 Fed. Rep. 467, citing 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 438 [439]; *In re U. S. Hotel Co.*, (C. C. A.) 134 Fed. Rep. 225; *Waukon v. Fisk*, 124 Iowa 464.

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442. II. CONSTITUTIONALITY OF PROHIBITORY STATUTES. — See notes 2, 3.

443. III. TAXATION OF PRIVILEGE. — See notes 5, 6.

[IV. REISSUING TRADING STAMPS. — See note 6a.]

446. TRANSACTION. — See note 2.

448. TRANSFER. — See notes 2, 3.

451. TRANSIENT. — See note 3.

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452. TRANSMIT, TRANSMISSION, ETC. — See note 1.

TRANSPORT — TRANSPORTATION. — See note 4.

454. TRAVEL — TRAVELER — TRAVELING. — See notes 1, 2.

442. 2. Prohibitory Statutes Unconstitutional. — *People v. Zimmerman*, 102 N. Y. App. Div. 103. See also *Sperry, etc., Co. v. Temple*, 137 Fed. Rep. 992; *Hewin v. Atlanta*, 121 Ga. 723.

3. Immaterial Whether Redemption by Merchant or Third Party. — *State v. Ramseyer*, 73 N. H. 31.

443. 5. See *Ex p. Hutchinson*, 137 Fed. Rep. 950; *Humes v. Little Rock*, 138 Fed. Rep. 929; *Montgomery v. Kelly*, 142 Ala. 552.

Giving Trading Stamps Not Taxable as Separate Business. — *Hewin v. Atlanta*, 121 Ga. 723.

Municipal Ordinance Taxing "Gift Enterprises" Does Not Affect Dealers in Trading Stamps. — *Winston v. Beeson*, 135 N. Car. 271.

6. See *State v. Merchants' Trading Co.*, 114 La. 529.

6a. Reissuing Trading Stamps. — Trading stamps sold to merchants under a contract that they are to be issued to the merchants' customers for cash purchases, and are then redeemable at the stamp company's stores, are, on such issue, good only for redemption purposes, and a person collecting them from such customers with the intent to reissue them, and without having a contract with the stamp company allowing this to be done, will be restrained by injunction. *Sperry, etc., Co. v. Mechanics'*

Clothing Co., 135 Fed. Rep. 833, 128 Fed. Rep. 800. See also *Sperry, etc., Co. v. Temple*, 137 Fed. Rep. 992. But see *Sperry, etc., Co. v. Hertzberg*, (N. J. 1905) 60 Atl. Rep. 368.

446. 2. *Rogers v. Wheeler*, 89 N. Y. App. Div. 435, 440. See also *King v. Coe Commission Co.*, 93 Minn. 52.

448. 2. Transfer. — *Sawyer v. Sanderson*, 113 Mo. App. 233; *Matter of Wolfe*, 89 N. Y. App. Div. 351.

3. *In re Riggs Restaurant Co.*, (C. C. A.) 130 Fed. Rep. 691.

451. 3. Transient Merchant. — *State v. Nelson*, 128 Iowa 740.

4a. *Transit car*, in a contract for the sale and delivery of merchandise by railroad, means a car already loaded and on its way to the vendee. *Stock v. Towle*, 97 Me. 408.

452. 1. Transmission — Delivery. — *Western Union Tel. Co. v. Braxtan*, 165 Ind. 165.

4. Transport. — *Walker v. Southern R. Co.*, 137 N. Car. 163.

454. 1. In an Ordinance Requiring Area Railings for the Protection of Travelers, the term *travelers* was held to denote persons lawfully using the highway. *Devine v. National Wall Paper Co.*, 95 N. Y. App. Div. 194.

2. *Hendry v. North Hampton*, 72 N. H. 351.

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466. IV. WHAT CONSTITUTES TREASON — 3. Treasonable Acts Enumerated — c. ADHERING TO ENEMIES, ETC. — (3) *What Is Adhering. Giving Aid and Comfort* — Joining the Enemy. — See note 2.

466. 2. Naturalization in Enemy Country During War Held to Be Treason. — *Rex v. Lynch*, (1903) 1 K. B. 444.

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472. I. DEFINITION. — See note 1.

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3. Gold-bearing Quartz Rock Held Not to Be

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481. e. WHEN IN CONFLICT WITH STATE CONSTITUTIONS OR LAWS. — See note 14.

482. VI. COMMERCIAL TREATIES — **2. Special or Exclusive Privileges.** — See note 6.

484. IX. TREATIES OF CESSION — Effect upon Laws. — See note 4.

489. XII. CONSTRUCTION — **2. Rules of Construction** — *b.* **INTENTION OF PARTIES.** — See note 1.

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490. d. LIBERAL CONSTRUCTION PREFERRED — **Limitation of Rule.** — See note 11.

491. j. EFFECT SHOULD BE GIVEN TO ALL PROVISIONS. — See note 14.

479. 10. Nature of Treaties in United States. — De Camara *v.* Brooke, 135 Fed. Rep. 384.

481. 14. Statutes in Conflict with Treaties. — Ehrlich *v.* Weber, 114 Tenn. 711.

482. 6. Pilotage Regulations. — A treaty provision that no higher or other duties or charges shall be imposed in any port of the United States on British vessels than those payable in the same port by vessels of the United States is not infringed by a statute exempting coastwise steam vessels of the United States from pilotage, but imposing the same pilotage charges on British and United States vessels engaged in foreign trade. Olsen *v.* Smith, 195 U. S. 332.

484. 4. Change of Laws. — See De Camara *v.* Brooke, 135 Fed. Rep. 384.

489. 1. Intention Controlling. — See Stewart *v.* U. S., 39 Ct. Cl. 321.

2. Intention Gathered from Treaty. — The Ship Tom, 39 Ct. Cl. 321.

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5. Court Cannot Amend Treaty. — The Neck, 138 Fed. Rep. 144.

490. 11. Limitations to Liberal Construction. — See The Neck, 138 Fed. Rep. 144.

491. 14. Reasonable Interpretation. — The Neck, 138 Fed. Rep. 144, holding further that treaties should be construed so as to be harmonious with the Federal Constitution.

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495. II. EFFECT OF TRANSFER OF TERRITORIAL SOVEREIGNTY — 1. In General. — See note 4.

496. III. ACQUISITION OF PROPERTY IN LAND — 1. What Constitutes Property. — See note 4.

520. IV. CONFIRMATION OF RIGHTS AND TITLES — 1. In General — By Whom and How Confirmed — *a.* COMPLETE AND INCOMPLETE TITLES. — See note 4.

523. 2. Purposes and General Scope of Confirmatory Statutes. — See note 3.

526. 3. Spanish, French, and British Incomplete Titles — *b.* EFFECT AND CONCLUSIVENESS OF CONFIRMATION — (2) *Legal and Equitable Titles* — (a) In General. — See note 2.

533. 7. Texas Rights and Titles. — See note 2.

495. 4. Effect of Transfer of Territorial Sovereignty — In General. — *Philippine Sugar Estates Development Co. v. U. S.*, 39 Ct. Cl. 225.

496. 4. What Constitutes Property. — *Haynes v. State*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1029; *State v. Russell*, (Tex. Civ. App. 1905) 85 S. W. Rep. 288, 1167.

520. 4. In General — Incomplete Titles. — *Haynes v. State*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1029; *State v. Russell*, (Tex. Civ. App. 1905) 85 S. W. Rep. 288, 1167; *Territory v.*

Person, etc., (N. Mex. 1904) 76 Pac. Rep. 316.

523. 3. Purposes of Confirmatory Statutes. — *Haynes v. State*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1029.

526. 2. Title Held to Be Perfected by Confirmation of Survey Without Patent. — *Levy v. Gause*, 112 La. 789.

533. 2. Texas Rights and Titles. — *Haynes v. State*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1029; *State v. Russell*, (Tex. Civ. App. 1905) 85 S. W. Rep. 288, 1167.

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537. II. AS REALTY OR PERSONALTY — Sales. — See note 8.

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539. IV. LINE TREES. — See notes 3, 6.

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540. Injuries by Telephone and Telegraph Companies. — See note 3.

537. 8. As Realty or Personalty. — *Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92; *Watson v. Adams*, 32 Ind. App. 281; *Meyer v. Standard Telephone Co.*, 122 Iowa 514; *Wiggins v. Jackson*, (Ky. 1903) 73 S. W. Rep. 779; *J. Neils Lumber Co. v. Hines*, 93 Minn. 505; *Hodsdon v. Kennett*, (N. H. 1905) 60 Atl. Rep. 686; *De Camp v. Wallace*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 436; *Ward v. Gay*, 137 N. Car. 397; *Polk v. Carney*, 17 S. Dak. 436; *Brodack v. Morsbach*, 38 Wash. 72; *Van Doren v. Fenton*, 125 Wis. 147.

12. Neither Life Tenant Nor Claimant under Him May Cut Timber for Sale. — *McKee v. Dail*, 1 Tenn. Ch. App. 689.

Dowress May Cut Timber Only in Reasonable Use of Her Life Estate. — *Garnett Smelting, etc., Co. v. Watts*, 140 Ala. 449.

Timber to Pay Debts Other than to Mortgagee. — *Holbrook v. Greene*, 98 Me. 171.

15. Compare *Cotten v. Christen*, 110 La. 444.

538. 6. Trees Cut and Left on Land. — See *Polk v. Carney*, 17 S. Dak. 436.

539. 3. *Harndon v. Stultz*, 124 Iowa 440.

6. *Harndon v. Stultz*, 124 Iowa 440.

8. Trees in Highways. — *Donahue v. Keystone Gas Co.*, 90 N. Y. App. Div. 386, affirmed 181 N. Y. 313, 106 Am. St. Rep. 549. See also *Scott v. Marshall*, 110 Mo. App. 178; *Sherman v. Butcher*, (N. J. 1905) 60 Atl. Rep. 336.

540. 3. Injuries by Telephone and Telegraph Companies. — *Meyer v. Standard Telephone Co.*, 122 Iowa 514, discussing the measure of damages.

540. Liability for Necessary Injury. — See note 5.

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546. **Moreover, Where Timber Is Converted.** — See note 4.

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540. **5. Liability for Necessary Injury Denied.** — *Meyer v. Standard Telephone Co.*, 122 Iowa 514.

6. Sale of Trees Within the Statute of Frauds. — *Watson v. Adams*, 32 Ind. App. 281; *Wiggins v. Jackson*, (Ky. 1903) 73 S. W. Rep. 779; *Hodsdon v. Kennett*, (N. H. 1905) 60 Atl. Rep. 686; *Ward v. Gay*, 137 N. Car. 397. See also *Polk v. Carney*, 17 S. Dak. 436, and see the title **VERBAL AGREEMENTS (STATUTE OF FRAUDS, 891. 2 et seq.**

541. **6. J. Neils Lumber Co. v. Hines**, 93 Minn. 505; *De Camp v. Wallace*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 436.

8. Trees as Personalty — Not Within the Fourth Section. — See *Watson v. Adams*, 32 Ind. App. 281.

542. **1. Covenant to Remove.** — See *Watson v. Adams*, 32 Ind. App. 281.

Timber Cut but Not Removed Before Time Remains Property of Vendee. — *Johnson v. Truitt*, 122 Ga. 327; *Alexander v. Bauer*, 94 Minn. 174.

Timber Cut After Time Specified Belongs to Landowner. — *Alexander v. Bauer*, 94 Minn. 174.

2. Removal Within Reasonable Time. — *Allison v. Wall*, 121 Ga. 822, holding that the timber reverts to the vendor after a reasonable time has expired without its removal; *Brinson v. Kirkland*, 122 Ga. 486; *Dolan v. Baker*, 10 Ont. L. Rep. 259.

Gratuitous Parol License Must Be Acted on Within Reasonable Time. — *Snyder v. East Bay Lumber Co.*, 135 Mich. 31.

4. Sale by Dimensions. — *Hardison v. Dennis Simmons Lumber Co.*, 136 N. Car. 174, holding further that continuous prosecution of the work of cutting during the period specified was not necessary.

6. Hardison v. Dennis Simmons Lumber Co., 136 N. Car. 174, citing 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 542.

543. **4. Limitation of Time to Remove.** — *Watson v. Adams*, 32 Ind. App. 281.

5. For the General Principles. — *Dartmouth College v. International Paper Co.*, 132 Fed.

Rep. 92; *U. S. v. Bitter Root Development Co.*, (C. C. A.) 133 Fed. Rep. 274; *Eldridge v. Gorman*, 77 Conn. 699; *Jones Lumber Co. v. Gatliff*, (Ky. 1904) 82 S. W. Rep. 295; *Holt v. Hayes*, 110 Tenn. 42.

544. **1. Value of Trees as Distinct from Lands** — *U. S. v. St. Anthony R. Co.*, 192 U. S. 524; *Lewis v. Virginia-Carolina Chemical Co.*, 69 S. Car. 364, 104 Am. St. Rep. 806. See also *Meloon v. Read*, (N. H. 1905) 59 Atl. Rep. 946.

2. Injury to Land. — *Donahue v. Keystone Gas Co.*, 90 N. Y. App. Div. 386, affirmed 181 N. Y. 313, 106 Am. St. Rep. 549. See also *Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92.

Cutting by Telephone Company — Measure Is Difference Between Value After Proper Cutting and After Unauthorized Cutting. — *Meyer v. Standard Telephone Co.*, 122 Iowa 514.

4. Value of Trees Plus Injury to Land. — *Eldridge v. Gorman*, 77 Conn. 699. See also *Atchison, etc., R. Co. v. Geiser*, 68 Kan. 281.

5. How Value Is Measured. — *Eldridge v. Gorman*, 77 Conn. 699. Compare *Meyer v. Standard Telephone Co.*, 122 Iowa 514.

545. **1. Trespass by Mistake.** — *U. S. v. St. Anthony R. Co.*, 192 U. S. 524; *Lewis v. Virginia-Carolina Chemical Co.*, 69 S. Car. 364, 104 Am. St. Rep. 806.

2. Cutting Trees as Criminal Offense. — See *Rex v. Beauvais*, 7 Can. Crim. Cas. 494.

3. Damages for Conversion of Timber. — *Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92; *Jones Lumber Co. v. Gatliff*, (Ky. 1904) 82 S. W. Rep. 295.

5. Trespass Unintentional. — *Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92.

546. **4. Holt v. Hayes**, 110 Tenn. 42. See also *Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92; *U. S. v. Bitter Root Development Co.*, (C. C. A.) 133 Fed. Rep. 274.

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546. VIII. INJUNCTIONS TO PROTECT TIMBER. — See notes 14, 15.**547.** See notes 1, 3, 4.

rails on public lands acquires no title. *Raber v. Hyde*, 138 Mich. 101.

546. 14. Injunction Refused. — See *Swindell v. Saddler*, 122 Ga. 15.

15. *Kistler v. Weaver*, 135 N. Car. 388 (title to personalty sole question involved).

547. 1. *Kistler v. Weaver*, 135 N. Car. 388; *Marcum v. Marcum*, 57 W. Va. 285; *Lloyd v. Blackburn*, 57 W. Va. 217. See also *Powell v. Brinson*, 120 Ga. 36.

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and in Possession under Claim of Title. — *J. E. North Lumber Co. v. Gary*, 83 Miss. 640.

3. *Powell v. Brinson*, 120 Ga. 36. See also *Doke v. Peek*, 45 Fla. 244; *Swindell v. Saddler*, 122 Ga. 15; *Wood v. Le Blanc*, 2 N. Bruns. Eq. Rep. 427.

4. Injunction Granted. — *Sears v. Ackerman*, 138 Cal. 583; *Enterprise Lumber Co. v. Clegg*, 117 Ga. 901; *Gray Lumber Co. v. Gaskin*, 122 Ga. 342; *Cotten v. Christen*, 110 La. 444.

TRESPASS.

BY JOHN SIMPSON.

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564. 12. Legal Title — Must Connect with Outstanding Title in a Stranger. — See note 5.

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565. Limited Right of Entry. — See note 4.

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8. Any Unauthorized Entry on Land Is a Trespass. — *Slingerland v. Gillespie*, 70 N. J. L. 724, citing 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 552.

Exception. — A person who enters the car barns of a city railroad company, for the purpose of making a complaint against a conductor, is not a trespasser merely because he is there without invitation and is not in the place appointed for lodging such complaints. *Chicago City R. Co. v. Rosenberger*, 110 Ill. App. 406.

557. 2. Wilfulness as Aggravation. — *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, (C. C. A.) 129 Fed. Rep. 668; *Gerwig v. W. J. Johnston Co.*, 207 Pa. St. 585.

558. 2. Contra — Question of Due Care Immaterial. — *Sadlier v. New York*, 104 N. Y. App. Div. 82; *Wheeler v. Norton*, (Supm. Ct. App. T.) 84 N. Y. Supp. 524, affirmed 92 N. Y. App. Div. 368 (water thrown on plaintiff's land from pipe broken by blast).

3. Contractor Liable for Injury by Blast to Person Using Street. — *Turner v. Degnon-McLean Contracting Co.*, 99 N. Y. App. Div. 135.

7. Good Faith Will Not Excuse. — Compare

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560. 4. Acquiescence Will Bar Recovery. — *Hendrickson v. Dwyer*, 70 N. J. L. 223.

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564. 5. Defendant Must Connect with Outstanding Title. — *Jackson v. Gunton*, 26 Pa. Super. Ct. 203; *Beaudrot v. Southern R. Co.*, 69 S. Car. 160.

6. License from Cotenant Sufficient. — *Granger v. Postal Tel. Co.*, 70 S. Car. 528, 106 Am. St. Rep. 750.

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581. *h.* TENANT. — See note 3.

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Where Condemnation Proceedings Were Dismissed, an entry made during the pendency of the proceedings was held to have become a trespass *ab initio*. Enid, etc., R. Co. v. Wiley, 14 Okla. 310.

6. Aiding, Abetting, Inciting, Etc. — Carter v. Fulgham, 134 Ala. 238.

567. 7. Servant Acting Within Limits of Employment. — Mishler Lumber Co. v. Craig, 112 Mo. App. 454; Reed v. New York, etc., Gas Co., 93 N. Y. App. Div. 453.

570. 3. Corporation. — See Bideford Urban Council v. Bideford R. Co., 68 J. P. 123.

9. Joint Trespassers. — Fulgham v. Carter, 142 Ala. 227; Carter v. Fulgham, 134 Ala. 238.

11. May Be Sued Either Jointly or Separately. — Bright v. Bell, 113 La. 1078; Mcloon v. Read, (N. H. 1905) 59 Atl. Rep. 946.

571. 6. Entry under License by Law. — Reed v. New York, etc., Gas Co., 93 N. Y. App. Div. 453.

572. 3. Intention. — Vanderslice v. Donner, 26 Pa. Super. Ct. 319.

573. 3. Actual or Constructive Possession Necessary. — Pennington v. Lewis, 4 Penn. (Del.) 447; Davis v. Alexander, 99 Me. 40; Hayward v. School Dist. No. 9, (Mich. 1905) 102 N. W. Rep. 999; Rollins v. Atlantic City R. Co., 70 N. J. L. 664; Drake v. Howell, 133 N. Car. 162; Tustin v. Sammons, 23 Pa. Super. Ct. 175; Davis v. Moyles, 76 Vt. 25.

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4. Against True Owner Unlawfully Invading the Possession. — Dold v. Knudsen, (Neb. 1903) 97 N. W. Rep. 482.

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7. Possession under Color of Title. — Southern R. Co. v. Horne, 121 Ga. 386.

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593. 13. Where Trespass and Not Case Is the Proper Remedy. -- *Niles v. Brown*, 25 R. I. 537; *Smith v. Rhode Island Co.*, 26 R. I. 24.

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601. 10*a.* Deeds of the Locus from the Plaintiff, or from a person under whom he claims, to third parties, are admissible in evidence where the question of the plaintiff's actual possession is at issue. *Davis v. Alexander*, 99 Me. 40.

11. *Davis v. Alexander*, 99 Me. 40.

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606. 4. Encroachment on or Occupation of Land. — *Hendrickson v. Dwyer*, 70 N. J. L. 223.

For Wrongfully Stringing Telephone Wires on a Roof, the measure of damages was held to be the reasonable rental value of the roof for the purpose. *Bunke v. New York Telephone Co.*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 97.

5. Injury in a Part of Land. — *Brinkmeyer v. Bethea*, 139 Ala. 376.

607. 10. "Vexation, Humiliation, and Annoyance" Not Elements of Damage Against City. — *Ostrom v. San Antonio*, 33 Tex. Civ. App. 683.

12. No Liability for Expenses of Litigation Where Defendant Acted in Good Faith. — *Georgia R., etc., Co. v. Gardner*, 118 Ga. 723.

608. 3. Immediate Consequential Damages. — *Niles v. Brown*, 25 R. I. 537.

8. Recovery Limited to Nominal Damages. — *Murray v. Pannaci*, (C. C. A.) 130 Fed. Rep. 529; *Eldridge v. Gorman*, 77 Conn. 699; *Pennington v. Lewis*, 4 Penn. (Del.) 447; *De Camp v. Wallace*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 436.

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609. 2. Facts Must Be Expressly Pleaded under Statute. — *O'Bannon v. St. Louis, etc., R. Co.*, 106 Mo. App. 316.

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5. Probable Cause, with Honest Belief, Will Relieve from Penalty. — *Price v. Denison*, (Minn. 1905) 103 N. W. Rep. 728.

610. 4. Exemplary Damages — Trespass on the Person. — *Davis v. Bromley Urban Council*, 67 J. P. 275.

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611. 5. Judgment Proof of Possession — No Proof of Title. — *Baxter v. Brown*, 26 R. I. 381.

12. *Baxter v. Brown*, 26 R. I. 381.

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TRESPASS TO TRY TITLE.

BY JOHN SIMPSON.

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632. Where Common Source of Title Is Shown or Conceded. — See notes 2, 3.

VI. DEFENSES — 1. Superior Outstanding Title. — See notes 4, 5.

633. 3. Stale Demand. — See notes 2, 5.

4. Possession — Peaceable Possession by the Defendant. — See note 7.

634. VII. EVIDENCE — 2. Burden of Proof. — See note 1.

629. 1. Joint Ownership. — A tenant in com-
mon, on a petition to recover an entire tract
of land, can recover the part thereof to which
he is entitled according to his proof of title,
legal or equitable. *Zimpelman v. Power*, (Tex.
Civ. App. 1905) 85 S. W. Rep. 69.

2. Prior Possession Sufficient Against Wrong-
doer. — *Magerstadt v. Lambert*, (Tex. Civ. App.
1905) 87 S. W. Rep. 1068.

Presumption of Ownership Arising from Pos-
session Rebuttable. — *Lynn v. Burnett*, 34 Tex.
Civ. App. 335.

8. Action May Be Maintained upon an Equitable
Title. — *Craig v. Harless*, 33 Tex. Civ. App. 257.

Contingent Executory Contract Will Not Support
Action. — *Prusiecke v. Ramzinski*, (Tex. Civ.
App. 1904) 81 S. W. Rep. 771.

630. 6. Undivided Interest in Land Will Sup-
port Action. — *Keith v. Keith*, (Tex. Civ. App.
1905) 87 S. W. Rep. 384, holding, however,
that in an action between cotenants to secure
the right of entry, all desiring the benefit of a
recovery must be made parties.

631. 11. Must Show Absolute Ownership. —
Love v. Turner, 71 S. Car. 322.

15. Common Source of Title. — See *Jones v.*
Wright, 98 Tex. 457.

Where the Plaintiff Proves a Superior Title from
the Common Source, the burden is on the de-
fendant to show that the common source is
without title. *Ellis v. Lewis*, (Tex. Civ. App.
1904) 81 S. W. Rep. 1034.

632. 2. Defendant Not Estopped from Show-
ing Claim through Another Source. — *Gilmer v.*
Beauchamp, (Tex. Civ. App. 1905) 87 S. W.
Rep. 907.

3. Superior Outstanding Title in Stranger. —
Tiemann v. Cobb, 35 Tex. Civ. App. 289, fol-
lowing *Gann v. Roberts*, 32 Tex. Civ. App. 561,
stated in the original note.

4. Superior Outstanding Title. — *Stipe v.*
Shirley, 33 Tex. Civ. App. 223.

5. Defendant Need Not Connect with Legal Title.
— *Love v. Turner*, 71 S. Car. 322.

633. 2. Stale Demand — No Defense by Naked
Trespasser. — *Lyster v. Leighton*, 36 Tex. Civ.
App. 62; *Betzer v. Goff*, 35 Tex. Civ. App. 406.

5. *Whisler v. Cornelius*, 34 Tex. Civ. App.
511.

7. Possession by Defendant under Purchase from
State — Burden on Plaintiff to Show Purchase
Invalid. — *Jones v. Wright*, 98 Tex. 457.

634. 1. Burden of Proof. — *Bogart v. Moody*,
35 Tex. Civ. App. 1; *Catrett v. J. S. Brown*

635. VIII. MEASURE OF DAMAGES — 4. Claim for Improvements by Defendant. — See note 2.

Proof Required. — See note 4.

636. TRIAL. — See notes 1, 3.

Hardware Co., (Tex. Civ. App. 1905) 86 S. W. Rep. 1045.

635. 2. Defendant May Claim for Improvements Made in Good Faith. — O'Mahoney v. Flanagan, 34 Tex. Civ. App. 244; Kesterson v. Bailey, 35 Tex. Civ. App. 235.

4. Must Prove Value as Required by Statute. — Wilson v. Wilson, 35 Tex. Civ. App. 192.

636. 1. Broad Sense of Term. — Columbus Junction Telephone Co. v. Overholt, 126 Iowa 579; State v. District Ct., 32 Mont. 37.

3. Trial Includes All Steps Taken in Cause. — State v. Butler, 114 La. 596; Campbell v. Hallihan, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 409.

TROVER AND CONVERSION.

By B. B. CLARK.

646. I. DEFINITION, NATURE, AND ORIGIN OF ACTION. — See note 1.

Trover Is Distinguished from Replevin. — See note 11.

647. The Action of Trover Is a Transitory Action. — See notes 3, 4.

II. FOR WHAT PROPERTY TROVER MAY BE MAINTAINED — 1. In General. — See note 6.

648. Public Policy. — See note 3.

Intangible Property. — See note 8.

Change in Form of Property. — See note 10.

649. 2. Evidences of Indebtedness. — See note 2.

Insurance Policy. — See note 6.

651. 3. Stock Certificates and Shares of Stock. — See note 5.

652. 5. Money. — See note 11.

653. See note 7.

6. Real Estate and Severed Portions Thereof. — See note 8.

654. Wrongful Annexation. — See note 4.

Wrongful Severance. — See note 11.

646. 1. Definition. — Boulden v. Gough, 4 Penn. (Del.) 48.

11. Eastern Mfg. Co. v. Camden Lumber Co., 96 Me. 537; Phillipos v. Mihran, 38 Wash. 402.

647. 3. Transitory Actions. — Kryn v. Kahn, (N. J. 1903) 54 Atl. Rep. 870.

4. Peyton v. Desmond, 129 Fed. Rep. 1, 63 C. C. A. 651.

6. Trover Lies for Natural Gas Taken from Pipe Lines. — Crystal Ice, etc., Co. v. Marion Gas Co., 35 Ind. App. 295.

648. 3. See Edwards v. American Express Co., 121 Iowa 744, wherein trover was held to lie for a slot machine.

8. Good Will. — Compare Millspaugh Laundry v. Sioux City First Nat. Bank, 120 Iowa 1.

10. Dartmouth College v. International Paper Co., 132 Fed. Rep. 92 (trees made into pulp).

649. 2. Evidence of Indebtedness. — Story v. Gammell, (Neb. 1903) 94 N. W. Rep. 982; Vroom v. Sage, 100 N. Y. App. Div. 285.

6. Insurance Policy. — Fraternal Army of America v. Evans, 114 Ill. App. 578; Stafford v. Lang, 25 R. I. 488; Hubbard First Nat. Bank v. Cleland, 36 Tex. Civ. App. 478.

651. 5. Shares of Stock. — Hagar v. Norton,

188 Mass. 47; Newman v. Mercantile Trust Co., 189 Mo. 423; Herrick v. Humphrey Hardware Co., (Neb. 1905) 103 N. W. Rep. 685.

652. 11. Money. — Kelsey v. Mansfield Bank, 85 N. Y. App. Div. 334; Cohen v. Ross, 95 N. Y. App. Div. 96.

Money Received in Fiduciary Capacity. — Jackson v. Moore, 94 N. Y. App. Div. 504, following Britton v. Ferrin, 171 N. Y. 235.

653. 7. Trover Not Maintainable for General Indebtedness. — Carlson v. Jordan, (Neb. 1903) 93 N. W. Rep. 1130; Kinsey v. Meaney, 98 N. Y. App. Div. 420.

8. Trover Does Not Lie for Conversion of Leasehold Estate. — Goldschmidt v. Maier, 140 Cal. xvii, 73 Pac. Rep. 984.

Minerals Not Severed from Earth Not Recoverable in Trover. — Smoot v. Consolidated Coal Co., 114 Ill. App. 512.

654. 4. Wrongful Annexation. — Hunt v. Boston, 183 Mass. 303; Lorain Steel Co. v. Norfolk, etc., St. R. Co., 187 Mass. 500 (laying street-railway rails).

11. Ore and Minerals. — Smoot v. Consolidated Coal Co., 114 Ill. App. 512; Maloney v. King, 30 Mont. 158.

655. See notes 2, 4.

656. 7. Property in Custody of Law. — See note 3.

8. Value. — See note 4.

III. TITLE TO MAINTAIN TROVER — 1. In General. — See note 5.

Evidences of Indebtedness. — See note 6.

657. Want of Title and Right to Possession. — See note 4.

658. See note 2.

Termination of Title Before Action Brought. — See note 7.

659. Proof of Title. — See notes 1, 2.

2. Right to Possession. — See note 5.

662. 5. Principal and Agent — Servants. — See note 2.

6. Owner of Stolen Property. — See notes 3, 5.

8. Executors and Administrators. — See note 9.

663. 9. Assignees in Insolvency and Bankruptcy. — See note 2.

11. Equitable Title. — See note 8.

664. Cestui Que Trust. — See note 1.

12. Buyer and Seller — *a.* EXECUTED CONTRACTS OF SALE. — See

note 4.

665. *b.* EXECUTORY CONTRACTS OF SALE — The Buyer. — See note 2.

The Seller. — See note 3.

c. CONDITIONAL SALES. — See notes 5, 7.

655. 2. Crops. — *Mueller v. Olson*, 90 Minn. 416.

4. Trees Felled. — *U. S. v. Denver, etc.*, R. Co., 191 U. S. 84; *U. S. v. St. Anthony R. Co.*, 192 U. S. 524; *Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92; *Barclay v. Smith*, (Miss. 1904) 36 So. Rep. 449.

656. 3. A Trustee in Bankruptcy is liable to an action of trover in a state court. *Weeks v. Fowler*, 71 N. H. 518.

4. Value. — *Recht v. Glickstein*, 162 Ind. 32; *Rosen v. Voorhis*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 605.

5. Title and Right to Possession. — *Baehr v. Downey*, 133 Mich. 163; *Tillman v. International Harvester Co.*, 93 Minn. 197; *Chamberlain v. Woolsey*, 66 Neb. 149, *affirming* 66 Neb. 141.

Action for Use of Another — Name of Usee Treated as Surplusage. — *McElmurray v. Harris*, 117 Ga. 919.

6. Chose in Action. — *Haynes v. Hobbs*, 136 Mich. 117.

657. 4. Want of Title and Right to Possession. — *Thornton v. Dwight Mfg. Co.*, 137 Ala. 211; *Grier v. North, etc.*, *Macon St. R. Co.*, 120 Ga. 353; *Milligan v. MacKinlay*, 108 Ill. App. 609, *affirmed* 209 Ill. 358; *Syck v. Bossingham*, 120 Iowa 363; *Williams v. Brown*, 137 Mich. 569; *Newman v. Mercantile Trust Co.*, 189 Mo. 423; *Glass v. Basin, etc.*, Min. Co., 31 Mont. 21; *Lustbader v. George A. Fuller Co.*, (Supm. Ct. App. T.) 90 N. Y. Supp. 297; *Vinson v. Knight*, 137 N. Car. 408; *Standlick v. Downing*, 77 Vt. 382.

658. 2. *Reynolds v. Fitzpatrick*, 28 Mont. 170; *Ten Eyck v. Keller*, 99 N. Y. App. Div. 106.

7. The Sale of Property by the Plaintiff After Instituting an Action for its conversion does not defeat his right of recovery. *McElmurray v. Harris*, 117 Ga. 919.

659. 1. Burden of Proof. *Boulden v. Gough*, 4 Penn. (Del.) 48; *Syck v. Bossing-*

ham, 120 Iowa 363; *Reynolds v. Fitzpatrick*, 28 Mont. 170; *Standlick v. Downing*, 77 Vt. 382.

2. Sufficiency of Evidence. — *Seymour v. Bruske*, (Mich. 1905) 103 N. W. Rep. 613; *Flour City Nat. Bank v. Bayer*, 89 Minn. 180.

5. Right to Possession. — *Hoffman v. Wilson*, (C. C. A.) 130 Fed. Rep. 694; *Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92; *Boulden v. Gough*, 4 Penn. (Del.) 48; *Newman v. Mercantile Trust Co.*, 189 Mo. 423; *Rosen v. Voorhis*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 605.

662. 2. Servants. — *Van Lessler v. Ann Arbor R. Co.*, 133 Mich. 664.

3. Owner of Stolen Property. — *Ball-Barnhart-Putnam Co. v. Lane*, 135 Mich. 275; *Jennie Clarkson Home v. Missouri, etc.*, R. Co., 182 N. Y. 47.

5. *McNeal v. Macomber*, 25 R. I. 475.

9. Executors and Administrators — *Hagar v. Norton*, 188 Mass. 47.

663. 2. Assignees in Insolvency and Bankruptcy. — *Coolidge v. Ayers*, 77 Vt. 448.

8. Equitable Title. — *Baker v. Cotney*, 142 Ala. 566; *Alexander v. Meyenberg*, 112 Ill. App. 223.

664. 1. Cestui Que Trust. — *Goldschmidt v. Maier*, 140 Cal. xvii, 73 Pac. Rep. 984.

4. By Seller — Executed Sale. — *South Bend Ironworks v. Wagner*, (Tex. Civ. App. 1903) 74 S. W. Rep. 601.

665. 2. *O'Neill v. Everham*, 123 Iowa 709. And see the title SALES, 1149. 1, 7.

3. By Seller. — *Wesoloski v. Wysoski*, 186 Mass. 495. And see the title SALES, 1134. 13.

Consignor of Goods Sold on Approval May Maintain Trover Against Carrier. — *Louisville, etc., R. Co. v. Kauffman*, 141 Ala. 671.

5. *Moultrie Repair Co. v. Hill*, 120 Ga. 730; *Lorain Steel Co. v. Norfolk, etc.*, St. R. Co., 187 Mass. 500; *Schleicher v. Wirth*, (Supm. Ct. App. T.) 86 N. Y. Supp. 265.

7. *Bower v. Bower*, 97 Mo. App. 674.

- 665.** *d. FRAUDULENT SALES.* — See notes 8, 9.
- 666.** 14. *Mortgagor.* — See notes 10, 11.
- 667.** See notes 2, 3.
- 668.** 15. *Mortgagee.* — See notes 1, 2.
A Second Mortgagee. — See note 9.
- 669.** 17. *Tenants in Common* — *a. ACTIONS AGAINST THIRD PERSONS.*
— See note 6.
b. ACTIONS INTER SE. — See note 11.
- 670.** See note 1.
Tenants in Common of Divisible Mass. — See note 3.
- 671.** 18. *Title Dependent on Ownership of Real Estate* — *As Against a Mere Trespasser or One Not Acting under a Bona Fide Claim of Title.* — See note 4.
- 672.** *Crops.* — See note 8.
- 673.** *Sufficiency of Title to Land.* — See note 1.
19. *Purchaser of Property Held Adversely to Owner.* — See note 7.
- 674.** 20. *Possessory Title* — *General Rule.* — See notes 1, 3.
- 675.** *Minority Rule.* — See note 1.
- 676.** 22. *Bailee.* — See note 8.
- 677.** *Pledgee.* — See note 3.
- 678.** 24. *Attaching or Levying Officer.* — See note 2.
- 679.** IV. *CONVERSION* — 1. *In General.* — See note 6.
- 665.** 8. *Fraudulent Sales* — *Action by Seller.* — *Kryn v. Kahn*, (N. J. 1903) 54 Atl. Rep. 870.
9. *Ashton v. Allen*, 70 N. J. L. 117; *Ontario Wind Engine, etc., Co. v. Lockie*, 7 Ont. L. Rep. 385.
- 666.** 10. *A Common Carrier Is Not Liable to a Mortgagor* for delivery of the mortgaged chattels after condition broken to the mortgagee demanding and entitled to possession. *Johnston v. Chicago, etc., R. Co.*, (Neb. 1903) 97 N. W. Rep. 479.
11. See *Bigler v. Leonori*, 103 Mo. App. 131.
- 667.** 2. *Alexander v. Meyenberg*, 112 Ill. App. 223.
3. *Marchand v. Ronaghan*, 9 Idaho 95, 72 Pac. Rep. 731.
- 668.** 1. *Against Levying Officers.* — *Aldrich v. Higgins*, 77 Conn. 370; *Fred Krug Brewing Co. v. Healey*, (Neb. 1904) 101 N. W. Rep. 329, denying rehearing (Neb. 1904) 99 N. W. Rep. 489; *Friedman v. Phillips*, 84 N. Y. App. Div. 179; *Columbia Bank v. American Surety Co.*, 178 N. Y. 628, *affirming* 84 N. Y. App. Div. 487. See, however, *Cousins v. O'Brien*, 188 Mass. 146.
2. *Action Against Strangers.* — *Woods v. Rose*, 135 Ala. 297.
9. *Second Mortgagee in Possession May Maintain Action Against Third Person.* — *Columbia Bank v. American Surety Co.*, 84 N. Y. App. Div. 487, *affirmed* 178 N. Y. 628.
- 669.** 6. *Johnson v. St. Joseph Stock Yards Bank*, 102 Mo. App. 395.
11. *Actions Inter Se.* — *Goldschmidt v. Maier*, 140 Cal. xvii, 73 Pac. Rep. 984.
- 670.** 1. *Northness v. Hillestad*, 87 Minn. 304.
3. *Conversion of Stock Certificates.* — See *Doyle v. Burns*, 123 Iowa 488.
- 671.** 4. *Action Against Trespasser.* — *Anderson v. Besser*, 131 Mich. 481.
- 672.** 8. *Stebbins v. Demorest*, 138 Mich. 297.
- 673.** 1. *Sufficiency of Title to Land.* — U. S. *v. Losekamp*, 127 Fed. Rep. 959, 62 C. C. A. 591.
7. *Purchaser of Property Held Adversely to Owner.* — *Miller v. Hennessy*, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 403.
- 674.** 1. *Possessory Title.* — *Shoup v. Marks*, 128 Fed. Rep. 32, 62 C. C. A. 540; *Seymour v. Bruske*, (Mich. 1905) 103 N. W. Rep. 613; *Stitt v. Namakan Lumber Co.*, (Minn. 1905) 103 N. W. Rep. 707; *Rosencranz v. Swofford Bros. Dry Goods Co.*, 175 Mo. 518, 97 Am. St. Rep. 609; *Rochester Lumber Co. v. Locke*, 72 N. H. 22; *Standard Furniture Co. v. Van Alstine*, 31 Wash. 499.
3. *Stitt v. Namakan Lumber Co.*, (Minn. 1905) 103 N. W. Rep. 707.
- 675.** 1. *Vinson v. Knight*, 137 N. Car. 408.
- 676.** 8. *By Bailee.* — *Fordyce v. Dempsey*, 72 Ark. 471. And see the title *BAILEMENTS*, **761. 8.**
- 677.** 3. *By Pledgee.* — *Farmers', etc., Bank v. Bennett*, 120 Ga. 1012. And see the title *PLEDGE AND COLLATERAL SECURITY*, **866. 3.**
- 678.** 2. *By Attaching or Levying Officer.* — *Rochester Lumber Co. v. Locke*, 72 N. H. 22. And see the title *SHERIFFS AND CONSTABLES*, **713. 9.**
- 679.** 6. *What Constitutes Conversion* — *United States.* — *Clarke v. Eureka County Bank*, 123 Fed. Rep. 922, *affirmed* (C. C. A.) 130 Fed. Rep. 325; *Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92.
- Colorado.* — *Carper v. Risdon*, 19 Colo. App. 530.
- Illinois.* — *Sprague's Collecting Agency v. Spiegel*, 107 Ill. App. 508; *Fraternal Army of America v. Evans*, 114 Ill. App. 578.
- Massachusetts.* — *McGonigle v. Belleisle Co.*, 186 Mass. 310; *Lorain Steel Co. v. Norfolk, etc., St. R. Co.*, 187 Mass. 500 (laying street-railway rails).
- Michigan.* — *Great Western Smelting, etc., Co. v. Evening News Assoc.*, (Mich. 1905) 102 N. W. Rep. 286.

- 680.** See note 1.
681. See notes 3, 7.
 2. Intention. — See note 8.
682. 3. Advantage Accruing to Defendant. — See note 1.
 4. Neglect of Duty. — See notes 2, 3, 4.
683. 5. Assertion of Ownership. — See note 4.
684. 7. Effect of Return to, or Subsequent Acquisition of Possession by, Owner. — See note 1.
 Offer to Return. — See note 4.
 8. Joint and Several Tortfeasors. — See note 7.
685. Joint and Several Liability. — See note 4.
686. 9. Necessity for Demand. — See note 2.
687. See notes 1, 2.

Minnesota. — McDonald *v.* Bayha, 93 Minn. 139; Humphreys *v.* Minnesota Clay Co., 94 Minn. 469.

Nebraska. — Herrick *v.* Humphrey Hardware Co., (Neb. 1905) 103 N. W. Rep. 685.

New Jersey. — Wheeler, etc., Mfg. Co. *v.* Brookfield, 68 N. J. L. 478.

New York. — Zion *v.* De Jonge, (N. Y. City Ct. Gen. T.) 39 Misc. (N. Y.) 839; Rosenkranz *v.* Saberski, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 650; Miller *v.* Hennessy, (Supm. Ct. Tr. T.) 47 Misc. (N. Y.) 403.

Texas. — Uvalde Nat. Bank *v.* Dockery, (Tex. Civ. App. 1904) 83 S. W. Rep. 29; Logan *v.* Robertson, (Tex. Civ. App. 1904) 83 S. W. Rep. 395.

Washington. — Phillipos *v.* Mihran, 38 Wash. 402.

Collection of Draft. — Bank of America *v.* Waydell, 103 N. Y. App. Div. 25.

Collecting Municipal Warrant. — Casey *v.* Pilkington, 83 N. Y. App. Div. 91.

Conversion of Corporate Stock. — Hagar *v.* Norton, 188 Mass. 47.

Refusal of Corporation to Transfer Stock on its Books. — Humphreys *v.* Minnesota Clay Co., 94 Minn. 469. See also Herrick *v.* Humphrey, etc., Co., (Neb. 1905) 103 N. W. Rep. 685.

Canceling Registration and Making Bonds Payable to Bearer. — Jennie Clarkson Home *v.* Missouri, etc., R. Co., 182 N. Y. 47.

Conversion Must Have Been Prior to Institution of Suit. — Wallace *v.* Mallary, 117 Ga. 161.

680. 1. Not Every Tortious Act Conversion. — Niagara F. Ins. Co. *v.* Campbell Stores, 101 N. Y. App. Div. 400; Direct Nav. Co. *v.* Davidson, 32 Tex. Civ. App. 492; Browder *v.* Phinney, 37 Wash. 70.

681. 3. Necessity for Actual Possession and Control. — McDonald *v.* Bayha, 93 Minn. 139; Uvalde Nat. Bank *v.* Dockery, (Tex. Civ. App. 1904) 83 S. W. Rep. 29.

7. Jesse French Piano, etc., Co. *v.* Johnston, 142 Ala. 419; German American Bank *v.* Brunswick, 107 Mo. App. 401.

8. Intent Immaterial. — Kennesaw Guano Co. *v.* Wappoo Mills, 119 Ga. 776; Great Western Smelting, etc., Co. *v.* Evening News Assoc., (Mich. 1905) 102 N. W. Rep. 286; Frazier *v.* Atchison, etc., R. Co., 104 Mo. App. 355; Heyert *v.* Reubman, (Supm. Ct. App. T.) 86 N. Y. Supp. 797; Alexander *v.* Bowers, (Tex. Civ. App. 1904) 79 S. W. Rep. 342.

682. 1. Advantage Need Not Accrue to De-

fendant. — McDonald *v.* Bayha, 93 Minn. 139; Heyert *v.* Reubman, (Supm. Ct. App. T.) 86 N. Y. Supp. 797.

2. Neglect of Duty. — McKeesport Sawmill Co. *v.* Pennsylvania Co., 122 Fed. Rep. 184; Barrett *v.* Bruffee, 182 Mass. 229; Andrews *v.* Carl, 77 Vt. 172.

3. Port Huron Engine, etc., Co. *v.* Otto Gas Engine Works, 89 Minn. 393; Rubin *v.* Wells Fargo Express Co., (Supm. Ct. App. T.) 85 N. Y. Supp. 1108 (delay in delivery by carrier); Direct Nav. Co. *v.* Davidson, 32 Tex. Civ. App. 492.

4. Negligence of Bailee in Care of Goods. — Dailey *v.* Black, 92 Mo. App. 228. See, however, Dieterle *v.* Bekin, 143 Cal. 683; Baehr *v.* Downey, 133 Mich. 163.

Neglect of Express Company Resulting in Loss of Goods Not Conversion. — Goldbowitz *v.* Metropolitan Express Co., (Supm. Ct. App. T.) 91 N. Y. Supp. 318.

683. 4. Assertion of Ownership. — Winchester *v.* Joslyn, 31 Colo. 220, 102 Am. St. Rep. 30.

Assertion of Ownership Not Conversion Where Defendant Entitled to Possession. — Brown *v.* Leary, 101 N. Y. App. Div. 421.

684. 1. Return of Property. — Compare Neder *v.* Jennings, 28 Utah 271.

4. Offer to Return. — Lucas *v.* Sheridan, 124 Wis. 567.

7. Joint Tortfeasors. — Mashburn *v.* Dannenberg Co., 117 Ga. 567; Uvalde Nat. Bank *v.* Dockery, (Tex. Civ. App. 1904) 83 S. W. Rep. 29.

685. 4. Joint and Several Liability. — Cunningham *v.* O'Connor, 136 Mich. 293.

686. 2. No Demand Necessary in Case of Actual Conversion. — Jesse French Piano, etc., Co. *v.* Johnston, 142 Ala. 419; Carper *v.* Risdon, 19 Colo. App. 530; Wallace *v.* Mallary, 117 Ga. 161; Hunt *v.* Boston, 183 Mass. 303; Geneva Wagon Co. *v.* Smith, 188 Mass. 202; Great Western Smelting, etc., Co. *v.* Evening News Assoc., (Mich. 1905) 102 N. W. Rep. 286; Stevens *v.* Curran, 28 Mont. 366; Kryn *v.* Kahn, (N. J. 1903) 54 Atl. Rep. 870; Friedman *v.* Phillips, 84 N. Y. App. Div. 179; Heyert *v.* Reubman, (Supm. Ct. App. T.) 86 N. Y. Supp. 797; Turner *v.* Cedar, (Supm. Ct. App. T.) 91 N. Y. Supp. 758.

687. 1. When Demand Necessary. — Louisville, etc., R. Co. *v.* Kauffman, 141 Ala. 671; Scrivner *v.* Woodward, 139 Cal. 314; Temple

- 687.** 10. Conversion by Agent — Liability of Principal. — See note 4.
- 688.** 11. Liability of Agents or Servants Acting for Principal or Master —
- a.* IN GENERAL. — See note 1.
- 689.** See note 3.
- 690.** *b.* QUALIFICATIONS OF RULE. — See notes 4, 6.
- 691.** 12. Conversion by Wrongful Taking — *a.* IN GENERAL. — See note 4.
- 692.** *b.* SEIZURE UNDER JUDICIAL PROCESS. — See notes 7, 8.
- 693.** Sufficiency of Seizure. — See note 7.
- 694.** Exempt Property. — See note 5.
- Liability of Attachment or Execution Creditor. — See note 6.
- 696.** 14. Conversion by Wrongful Sale or Disposition — *a.* IN GENERAL. — See note 4.
- 698.** See note 1.
- 699.** *b.* SALE BY OWNER OF SPECIAL PROPERTY IN CHATTEL. — See notes 4, 6.
- 700.** *d.* RECEIVING PROCEEDS OF SALE. — See note 3.
- e.* SALE WITH CONSENT OF OWNER. — See notes 6, 7, 8.
- 701.** See note 4.
- f.* MISDELIVERY OF CHATTEL BY BAILEE. — See note 9.

Co. v. Penn Mut. L. Ins. Co., 69 N. J. L. 36; *Case v. Duffy*, (Supm. Ct. App. T.) 86 N. Y. Supp. 778; *Spinell v. Philipson*, (Supm. Ct. App. T.) 93 N. Y. Supp. 432; *Andrews v. Carl*, 77 Vt. 172.

687. 2. Waiver of Necessity for Demand. — *Hunt v. Hammel*, 142 Cal. 456; *Scarboro v. Goethe*, 118 Ga. 543; *Freehill v. Hueni*, 103 Ill. App. 118.

4. Liability of Principal for Conversion by Agent. — *Martin v. Barry*, 145 Cal. 540; *Hunt v. Boston*, 183 Mass. 303; *Meloon v. Read*, (N. H. 1905) 59 Atl. Rep. 946; *Jennie Clarkson Home v. Missouri*, etc., R. Co., 182 N. Y. 47; *Fierro v. Schnurmacher*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 601; *Lucas v. Sheridan*, 124 Wis. 567.

688. 1. Conversion by Agent or Servant — Agency No Defense. — *Jennie Clarkson Home v. Missouri*, etc., R. Co., 182 N. Y. 47.

689. 3. Brokers, Factors, Etc. — *Flannery v. Harley*, 117 Ga. 483.

690. 4. Bailee. — *Burke v. Holmes*, (Tex. Civ. App. 1904) 80 S. W. Rep. 564.

6. Wheeler, etc., Mfg. Co. *v. Brookfield*, 68 N. J. L. 478. See also *Edwards v. American Express Co.*, 121 Iowa 744.

691. 4. Conversion by Wrongful Taking. — *McNeal v. Macomber*, 25 R. I. 475; *Phillipos v. Mihran*, 38 Wash. 402.

692. 7. Seizure of Chattels of One on Process Against Another. — *Stevens v. Curran*, 28 Mont. 366; *Lucas v. Sheridan*, 124 Wis. 567.

8. Attachment and Execution. — *Hunt v. Hammel*, 142 Cal. 456; *Beaman v. Stewart*, 19 Colo. App. 222; *Aldrich v. Higgins*, 77 Conn. 370; *Yoder v. Reynolds*, 28 Mont. 183; *Fred Krug Brewing Co. v. Healey*, (Neb. 1904) 99 N. W. Rep. 489, rehearing denied (Neb. 1904) 101 N. W. Rep. 329.

693. 7. Removal and Sale under Levy Not Necessary to Constitute Conversion. — *Zion v. De Jonge*, (N. Y. City Ct. Gen. T.) 39 Misc. (N. Y.) 839.

694. 5. Exempt Property. — *Messenger v. Murphy*, 33 Wash. 353.

6. Liability of Attaching or Execution Creditor. — *Aldrich v. Higgins*, 77 Conn. 370; *Caldwell v. Ryan*, (Mo. App. 1904) 79 S. W. Rep. 743; *Rosencranz v. Swofford Bros. Dry Goods Co.*, 175 Mo. 518, 97 Am. St. Rep. 609.

696. 4. Wrongful Sale. — *Wallace v. Mal-lary*, 117 Ga. 161; *Smyth v. Stoddard*, 203 Ill. 424, 96 Am. St. Rep. 314; *Wesoloski v. Wy-soski*, 186 Mass. 495; *Chase v. Baskerville*, 93 Minn. 402; *Lance v. Butler*, 135 N. Car. 419; *Uvalde Nat. Bank v. Dockery*, (Tex. Civ. App. 1904) 83 S. W. Rep. 29; *Missouri*, etc., R. Co. *v. Rines*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1092.

698. 1. Lease Held to Constitute Conversion. — *Wilson v. Hoffman*, 123 Fed. Rep. 984, *re-versed* on another point (C. C. A.) 130 Fed. Rep. 694.

699. 4. Sale by Mortgagee. — *Marchand v. Ronaghan*, 9 Idaho 95; *Davis v. Bowers Granite Co.*, 75 Vt. 286.

6. Sale by Pledgee. — *Rothschild v. Allen*, 90 N. Y. App. Div. 233, *affirmed* 180 N. Y. 561; *Learock v. Paxson*, 208 Pa. St. 602.

700. 3. Receiving Proceeds of Sale. — *Walker v. Athena First Nat. Bank*, 43 Oregon 102.

6. Sale with Consent of Owner. — *Haynes v. Kettenbach Co.*, (Idaho 1905) 81 Pac. Rep. 114; *Doyle v. Burns*, 123 Iowa 488; *Port Huron Engine, etc., Co. v. Otto Gas Engine Works*, 89 Minn. 393; *Carlson v. Jordan*, (Neb. 1903) 93 N. W. Rep. 1130; *Stoneman v. Lyons*, 24 R. I. 539.

7. *Twogood v. Allee*, 125 Iowa 59.

8. Sale for Lower Price than Authorized. — *Compare Chase v. Baskerville*, 93 Minn. 402.

701. 4. See *Kennesaw Guano Co. v. Wap-poo Mills*, 119 Ga. 776 (failure of commission merchant to keep accounts or distinguish prin-cipal's goods from his own).

9. Misdelivery of Chattel by Bailee. — *Brown v. Newton First Nat. Bank*, (C. C. A.) 132 Fed. Rep. 450; *Brink's Chicago City Express Co. v. Hendricks*, 104 Ill. App. 154; *Dixon v. Owens*, 21 Pa. Super. Ct. 376; *Missouri*, etc., R. Co. *v. Seley*, 31 Tex. Civ. App. 158.

- 702.** See note 1.
15. Conversion by Purchase. — See note 2.
703. See notes 2, 3.
704. Demand. — See notes 1, 2.
 Minority Rule. — See note 5.
705. One Who Takes Merely a Bill of Sale or Paper Transfer. — See note 2.
16. Conversion by Wrongful Detention — *a.* IN GENERAL. — See note 5.
706. See notes 1, 2.
707. *b.* DEMAND. — See note 3.
708. By Whom Demand to Be Made. — See note 5.
c. REFUSAL. — See note 11.
709. See note 2.
711. Inability to Comply with Demand. — See notes 2, 5.
716. V. DAMAGES RECOVERABLE — 2. Value of Property Converted — *a.* IN GENERAL. — See note 9.

702. 1. Theft After Conversion by Bailee No Defense. — *Lopard v. Symons*, (Supm. Ct. App. T.) 85 N. Y. Supp. 1025.

2. Conversion by Purchase. — *Woods v. Rose*, 135 Ala. 297; *Milner, etc., Co. v. De Loach Mill Mfg. Co.*, 139 Ala. 645; *Gentry v. Singleton*, 4 Indian Ter. 346.

703. 2. State Nat. Bank v. Cudahy Packing Co., 126 Fed. Rep. 543, *affirmed* (C. C. A.) 134 Fed. Rep. 538; *Geneva Wagon Co. v. Smith*, 188 Mass. 202; *Great Western Smelting, etc., Co. v. Evening News Assoc.*, (Mich. 1905) 102 N. W. Rep. 286.

3. Refusal to Return. — *Fordyce v. Dempsey*, 72 Ark. 471; *Tebbetts v. Northern Commercial Co.*, 36 Wash. 599.

704. 1. Demand Not Necessary. — *Geneva Wagon Co. v. Smith*, 188 Mass. 202.

2. Purchase with Knowledge of Seller's Want of Title. — *Woods v. Rose*, 135 Ala. 297.

5. Minority Rule — *J. L. Mott Iron Works v. Reilly*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 833.

705. 2. Paper Purchaser. — *McGill v. Chilhowee Lumber Co.*, 111 Tenn. 552.

6. Conversion by Wrongful Detention. — *Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92; *Wallace v. Mallary*, 117 Ga. 161; *Chambless v. Livingston*, 123 Ga. 257; *Bartley v. Rogers*, 104 Ill. App. 164; *Lorain Steel Co. v. Norfolk, etc., St. R. Co.*, 187 Mass. 500; *Newman v. Mercantile Trust Co.*, 189 Mo. 423; *Lopard v. Symons*, (Supm. Ct. App. T.) 85 N. Y. Supp. 1025; *Rothschild v. Allen*, 90 N. Y. App. Div. 233, *affirmed* 180 N. Y. 561; *Anker v. Smith*, (Supm. Ct. App. T.) 87 N. Y. Supp. 479; *Stoneman v. Lyons*, 24 R. I. 539; *Cuero First Nat. Bank v. San Antonio, etc., R. Co.*, 97 Tex. 201; *Tebbetts v. Northern Commercial Co.*, 36 Wash. 599.

Failure to Return at Agreed Time Conversion. — *Chankalian v. Powers*, 89 N. Y. App. Div. 395.

706. 1. Demand and Refusal Only Prima Facie Evidence of Conversion. — *Sprague's Collecting Agency v. Spiegel*, 107 Ill. App. 508.

2. By Bailee. — *Alling v. Weissman*, 77 Conn. 394.

Infant Bailee. — See *Stone v. Rabinowitz*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 405.

707. 3. Place of Demand. — *Rubin v. Wells Fargo Express Co.*, (Supm. Ct. App. T.) 85 N. Y. Supp. 1108.

708. 5. Authority of Agent. — *Jesse French Piano, etc., Co. v. Johnston*, 142 Ala. 419.

11. Refusal. — *Sprague's Collecting Agency v. Spiegel*, 107 Ill. App. 508; *German American Bank v. Brunswick*, 107 Mo. App. 401; *Arsene v. La Fermina*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 776; *Krakower v. Krakower*, 79 N. Y. App. Div. 633. See also *Stroup v. Bridger*, 124 Iowa 401.

Proof of Refusal. — See *Louisville, etc., R. Co. v. Kauffman*, 141 Ala. 671.

709. 2. Refusal for Purpose of Ascertaining Ownership. — *Stroup v. Bridger*, 124 Iowa 401.

711. 2. Refusal for Want of Possession. — *Sprague's Collecting Agency v. Spiegel*, 107 Ill. App. 508.

5. Lorain Steel Co. v. Norfolk, etc., St. R. Co., 187 Mass. 500.

716. 9. Value of Property Converted — *Alabama*. — *Milner, etc., Co. v. De Loach Mill Mfg. Co.*, 139 Ala. 645.

Arkansas. — *Fordyce v. Dempsey*, 72 Ark. 471; *American Soda Fountain Co. v. Futrall*, 73 Ark. 464.

Georgia. — *Midville, etc., R. Co. v. Bruhl*, 117 Ga. 329; *Mashburn v. Dannenberg Co.*, 117 Ga. 567; *O'Neill Mfg. Co. v. Woodley*, 118 Ga. 114; *Kennesaw Guano Co. v. Wappoo Mills*, 119 Ga. 776.

Illinois. — *Reebie v. Brackett*, 109 Ill. App. 631. *Massachusetts.* — *Lorain Steel Co. v. Norfolk, etc., St. R. Co.*, 187 Mass. 500; *Hagar v. Norton*, 188 Mass. 47.

New Hampshire. — *Meloon v. Read*, (N. H. 1905) 59 Atl. Rep. 946.

Oregon. — *Durham v. Commercial Nat. Bank*, 45 Oregon 385.

Tennessee. — *McGill v. Chilhowee Lumber Co.*, 111 Tenn. 552.

Texas. — *Daugherty v. Lady*, (Tex. Civ. App. 1903) 73 S. W. Rep. 837; *Gulf, etc., R. Co. v. Cleburne Ice, etc., Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 836; *Hanaway v. Wiseman*, (Tex. Civ. App. 1905) 88 S. W. Rep. 437.

Value Recoverable Though Only Nominal Price Paid by Plaintiff. — *Beaman v. Stewart*, 19 Colo. App. 222.

- 717.** Property under Contract of Sale. — See note 3.
718. *b.* TIME OF ESTIMATING VALUE — (1) *In General.* — See note 4.
719. See note 2.
 (2) *Fluctuations in Value.* — See note 4.
720. See note 2.
 c. PLACE OF ESTIMATING VALUE. — See note 5.
721. Goods in Transit. — See note 4.
 d. MARKET VALUE. — See notes 5, 7, 8.
722. *e.* VALUE INCREASED BY LABOR OF DEFENDANT — (1) *In General.*
 — See note 8.
723. See note 1.
 (2) *Severance from Realty* — Mining Coal or Ore. — See note 5.
724. See note 1.
 Cutting Timber. — See notes 2, 3.
 f. PROOF OF VALUE — Burden of Proof. — See notes 5, 6.
725. Admissibility of Evidence. — See notes 2, 3.

The Measure of Damages for the Conversion of a House has been held to be the value of the material at the time of the conversion, and not what the house originally cost or what it would cost to rebuild it. *Lynch v. White*, (Tex. Civ. App. 1903) 73 S. W. Rep. 834.

717. 3. Property under Contract of Sale. — *Moultrie Repair Co. v. Hill*, 120 Ga. 730.

718. 4. Time of Estimating Value. — *Potter v. U. S.*, 122 Fed. Rep. 49, 58 C. C. A. 231; *Fordyce v. Dempsey*, 72 Ark. 471; *American Soda Fountain Co. v. Futrall*, 73 Ark. 464; *Aldrich v. Higgins*, 77 Conn. 370; *Smyth v. Stoddard*, 203 Ill. 424, 96 Am. St. Rep. 314; *Reebie v. Brackett*, 109 Ill. App. 631; *Gittings v. Winter*, 101 Md. 194; *Hunt v. Boston*, 183 Mass. 303; *Hagar v. Norton*, 188 Mass. 47; *Meloon v. Read*, (N. H. 1905) 59 Atl. Rep. 946; *Durham v. Commercial Nat. Bank*, 45 Oregon 385; *McGill v. Chilhowee Lumber Co.*, 111 Tenn. 552.

719. 2. Missouri, etc., R. Co. v. Seley, 31 Tex. Civ. App. 158.

4. Fluctuations in Value. — *Mashburn v. Dannenberg Co.*, 117 Ga. 567; *O'Neill Mfg. Co. v. Woodley*, 118 Ga. 114; *Doyle v. Burns*, 123 Iowa 488; *Learock v. Paxson*, 208 Pa. St. 602; *Davis v. Bowers Granite Co.*, 75 Vt. 286. See also the title STOCKBROKERS, **1071. 12 et seq.**

720. 2. Statutory Provisions. — *Thornton-Thomas Mercantile Co. v. Bretherton*, 32 Mont. 80.

5. Place at Which Value Is to Be Estimated. — *American Soda Fountain Co. v. Futrall*, 73 Ark. 464; *Gittings v. Winter*, 101 Md. 194; *United Shoe Machinery Co. v. Holt*, 185 Mass. 97; *McGill v. Chilhowee Lumber Co.*, 111 Tenn. 552; *Gulf, etc., R. Co. v. Cleburne Ice, etc., Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 836.

721. 4. Blackmer v. Cleveland, etc., R. Co., 101 Mo. App. 557.

5. Market Value. — *Humphreys v. Minnesota Clay Co.*, 94 Minn. 469; *McGill v. Chilhowee Lumber Co.*, 111 Tenn. 552; *Gulf, etc., R. Co. v. Cleburne Ice, etc., Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 836.

7. Absence of Market Value. — *Humphreys v. Minnesota Clay Co.*, 94 Minn. 469.

8. Vroom v. Sage, 100 N. Y. App. Div. 285.

722. 8. Improvement in Good Faith. — *Potter v. U. S.*, 122 Fed. Rep. 49, 58 C. C. A. 231; *Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92, holding further that the rule is applicable though the defendant is not free from negligence, where there is no wilfulness, wantonness, or recklessness.

Burden of Proving Good Faith on Defendant. — *Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92.

723. 1. Improvement in Bad Faith. — *Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92.

5. Mining Coal or Ore in Good Faith. — *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, (C. C. A.) 129 Fed. Rep. 668; *Smoot v. Consolidated Coal Co.*, 114 Ill. App. 512.

724. 1. Mining Coal or Ore in Bad Faith. — *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, (C. C. A.) 129 Fed. Rep. 668.

2. Cutting Timber in Bad Faith. — *Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92.

3. Cutting Timber in Good Faith. — *U. S. v. St. Anthony R. Co.*, 192 U. S. 524; *U. S. v. McKee*, 128 Fed. Rep. 1002; *Dartmouth College v. International Paper Co.*, 132 Fed. Rep. 92; *Texas, etc., R. Co. v. Jones*, 34 Tex. Civ. App. 94.

5. Proof of Value — Burden of Proof. — *Brooke v. Lowe*, 122 Ga. 358.

Sufficiency of Proof. — See *Cunningham v. O'Connor*, 136 Mich. 293; *Litell v. Pettit*, (Ky. 1904) 81 S. W. Rep. 237; *Willeys v. Curth*, 102 N. Y. App. Div. 616; *Arsene v. La Fermina*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 776; *Walker v. Farrell*, (Supm. Ct. App. T.) 84 N. Y. Supp. 182; *Cuero First Nat. Bank v. San Antonio, etc., R. Co.*, 97 Tex. 201; *Messenger v. Murphy*, 33 Wash. 353.

6. Oxford v. Ellis, 117 Ga. 817; *Lee v. McDonnell*, 31 Tex. Civ. App. 468.

725. 2. Admissibility of Evidence. — *Wilson v. Hoffman*, 123 Fed. Rep. 984; *Stillwell v. Paepcke-Leicht Lumber Co.*, 73 Ark. 432; *Ellis v. Thomas*, 84 N. Y. App. Div. 626.

3. Private Sale. — *Humphreys v. Minnesota Clay Co.*, 94 Minn. 469. Compare *J. L. Mott Iron Works v. Reilly*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 833, holding that evidence of the

726. See notes 2, 4, 5.

3. Choses in Action — a. IN GENERAL. — See notes 6, 7.

727. Insurance Policies. — See note 7.

729. **4. Muniments of Title — In Trover for the Conversion of Certificates of Stock.** — See note 3.

5. Where Plaintiff Has Special Interest Only — a. ACTION AGAINST STRANGER. — See note 5.

730. **b. ACTION BETWEEN GENERAL AND SPECIAL OWNERS.** — See notes 4, 5.

731. See notes 2, 6.

732. **6. Special Damages.** — See notes 1, 3.

7. Exemplary Damages. — See notes 7, 8.

733. **8. Interest.** — See note 1.

734. **9. Value of Use.** — See note 4.

10. Mitigation of Damages — a. IN GENERAL. — See note 5.

b. RETURN OF CHATTEL. — See note 6.

735. See notes 2, 5, 7.

737. **c. APPLICATION OF CHATTEL TO PLAINTIFF'S BENEFIT.** — See note 1.

price agreed to be paid on a conditional sale was not admissible in an action against a third person.

Public Sale. — *Shoup v. Marks*, 128 Fed. Rep. 32, 62 C. C. A. 540.

726. **2. Expert Testimony.** — *Reebie v. Brackets*, 109 Ill. App. 631.

Expert Cannot State How Much He Had Offered for Property. — *Simar v. Shea*, 89 N. Y. App. Div. 84, affirmed 180 N. Y. 558.

4. Evidence of What Property Cost Plaintiff Inadmissible. — *Carper v. Risdon*, 19 Colo. App. 530.

5. Oxford v. Ellis, 117 Ga. 817.

Evidence of Price Several Years After Conversion — Condition of Property Must Be Shown to Be Unchanged. — *Alling v. Weissman*, 77 Conn. 394.

6. Choses in Action. — *Vroom v. Sage*, 100 N. Y. App. Div. 285.

7. Prima Facie Face Value. — *Blumenthal v. Lewy*, 82 N. Y. App. Div. 535. Compare *Brooke v. Lowe*, 122 Ga. 358.

727. **7. Insurance Policy.** — *Stafford v. Lang*, 25 R. I. 488.

729. **3. Conversion of Certificates of Stock.** — *Hagar v. Norton*, 188 Mass. 47.

5. Action Against Stranger to Title. — *Messenger v. Murphy*, 33 Wash. 353. See, however, *Friedman v. Phillips*, 84 N. Y. App. Div. 179.

730. **4. Action Between General and Special Owners.** — *McGill v. Chilhowee Lumber Co.*, 111 Tenn. 552.

5. Gooch v. Isbell, (Tex. Civ. App. 1903) 77 S. W. Rep. 973.

731. **2. Compare Lorain Steel Co. v. Norfolk, etc., St. R. Co.**, 187 Mass. 500.

6. Frappiea v. Johnson, 75 Vt. 397.

732. **1. Special Statutory Damages.** — A carrier who converts to his own use property entrusted into his hands for carriage is not liable for the five per cent. special damages imposed by the Texas statute against a carrier for negligent detention of property shipped. *Missouri, etc., R. Co. v. Rines*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1092.

The Wisconsin statute providing for double

damages for conversion of a decedent's property before the granting of letters testamentary or of administration does not apply where the conversion was after the appointment of a special administrator, though prior to the appointment of the regular administrator. *Dixon v. Sheridan*, 125 Wis. 60.

3. Lee v. McDonnell, 31 Tex. Civ. App. 468.

7. Exemplary Damages. — *Mardis v. Sims*, 140 Ala. 388; *Blackmer v. Cleveland, etc., R. Co.*, 101 Mo. App. 557; *Gulf, etc., R. Co. v. Cleburne Ice, etc., Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 836.

8. Lee v. McDonnell, 31 Tex. Civ. App. 468; *Gulf, etc., R. Co. v. Cleburne Ice, etc., Co.*, (Tex. Civ. App. 1904) 79 S. W. Rep. 836.

733. **1. Interest from Time of Conversion.** — *Milner, etc., Co. v. De Loach Mill Mfg. Co.*, 139 Ala. 645; *Fordyce v. Dempsey*, 72 Ark. 471; *Midville, etc., R. Co. v. Bruhl*, 117 Ga. 329; *Mashburn v. Dannenberg Co.*, 117 Ga. 567; *O'Neill Mfg. Co. v. Woodley*, 118 Ga. 114; *Smyth v. Stoddard*, 203 Ill. 424, 96 Am. St. Rep. 314; *Doyle v. Burns*, 123 Iowa 488; *Hunt v. Boston*, 183 Mass. 303; *Lorain Steel Co. v. Norfolk, etc., St. R. Co.*, 187 Mass. 500; *Bigler v. Leonori*, 103 Mo. App. 131; *Lance v. Butler*, 135 N. Car. 419; *Durham v. Commercial Nat. Bank*, 45 Oregon 385; *Daugherty v. Lady*, (Tex. Civ. App. 1903) 73 S. W. Rep. 837.

734. **4. Value of Use.** — *Daugherty v. Lady*, (Tex. Civ. App. 1903) 73 S. W. Rep. 837.

5. Mitigation of Damages. — See *Wilcox v. Morton*, 132 Mich. 63.

6. Return of Chattel. — *Browder v. Phinney*, 37 Wash. 70.

735. **2. Measure of Damages in Case of Return.** — *Flagler v. Hearst*, 91 N. Y. App. Div. 12; *Eldridge v. Hoefer*, 45 Oregon 239.

5. Offer to Return. — *Hubbard First Nat. Bank v. Cleland*, 36 Tex. Civ. App. 478.

7. Power of Court to Permit Return in Mitigation of Damages. — See *Stroup v. Bridger*, 124 Iowa 401.

737. **1. Compare Thornton-Thomas Mercantile Co. v. Bretherton**, 32 Mont. 80.

737. VI. LIMITATION OF ACTIONS. — See notes 4, 11.

738. VII. EFFECT OF RECOVERY ON TITLE TO CHATTELS CONVERTED. — See note 4.

740. VIII. WAIVER OF CONVERSION. — See note 5.

737. 4. *Andrews v. Carl*, 77 Vt. 172.
11. *Scrivner v. Woodward*, 139 Cal. 314;
Eldridge v. Hoefer, 45 Oregon 239.

738. 4. Satisfaction of Judgment. — *Stafford v. Lang*, 25 R. I. 488.

740. 5. Concurrent Remedy Ex Contractu. — *Bettis v. McNider*, 137 Ala. 588, 97 Am. St.

Rep. 59; *Farmers', etc., Bank v. Bennett*, 120 Ga. 1012; *Ermeling v. Gibson Canning Co.*, 105 Ill. App. 196; *Lipscomb v. Citizens' Bank*, 66 Kan. 243; *Anderson v. Besser*, 131 Mich. 481; *Moore v. Richardson*, 68 N. J. L. 305; *Hirsch v. C. W. Leatherbee Lumber Co.*, 69 N. J. L. 509.

TRUST DEEDS AND POWER OF SALE MORTGAGES.

By H. N. ELDRIDGE.

753. II. DEFINITION AND DISTINCTIONS — 3. Similarity of Trust Deed and Power of Sale Mortgage — *b.* INTEREST REMAINING IN GRANTOR. — See notes 3, 5.

758. IV. NATURE, REQUISITES, AND INCIDENTS OF POWER — 2. Power Coupled with Interest — *a.* IN GENERAL. — See note 1.

(1) *Act of Grantor*. — See note 3.

(2) *Death or Insanity — Bankruptcy*. — See note 4.

765. V. TRUSTEE — QUALIFICATIONS AND DUTIES — 2. Duties — *c.* REPRESENTS BOTH CREDITOR AND DEBTOR. — See note 6.

767. VI. WHO MAY EXERCISE POWER OF SALE — 1. No Right to Delegate Authority — *a.* IN GENERAL. — See note 3.

769. 3. Successors and Substitute Trustees — *a.* IN GENERAL — (1) *Contingency Authorizing Appointment of Substitute*. — See note 6.

770. *b.* CONTRACT PROVISIONS FOR APPOINTMENT OF SUCCESSOR — (3) *Refusal of Trustee — Request Necessary*. — See note 2.

771. *c.* STATUTORY PROVISIONS FOR SUBSTITUTE TRUSTEE. — See note 1.

d. SHERIFF ACTING AS SUBSTITUTE OR SUCCESSOR — (1) *Private Capacity*. — See note 2.

753. 3. Trust Deed Passes Legal Title to Grantee. — *In re Jersey Island Packing Co.*, (C. C. A.) 138 Fed. Rep. 627, quoting 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753; *Collier v. Alexander*, 142 Ala. 422; *McNutt v. Mutual Ben. L. Ins. Co.*, 181 Mo. 94.

5. Legal Estate Left in Grantor. — *In re Jersey Island Packing Co.*, (C. C. A.) 138 Fed. Rep. 627, quoting 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 753.

758. 1. Power Coupled with an Interest and Irrevocable. — *Frank v. Colonial, etc., Mortg. Co.*, 86 Miss. 103, quoting 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 757 [758].

3. Act of Grantor. — *Frank v. Colonial, etc., Mortg. Co.*, 86 Miss. 103, quoting 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 758.

4. Power of Sale Unaffected by Death of the Grantor or Mortgagor. — *Frank v. Colonial, etc., Mortg. Co.*, 86 Miss. 103.

765. 6. Trustee a Representative of Both Parties. — *Marshall v. Kraak*, 23 App. Cas.

(D. C.) 129; *Davis v. Hughes*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1161.

767. 3. Trustee Cannot Delegate His Authority. — *Greenfield v. Stout*, 122 Ga. 303, wherein the words "vice-president of the National Bank of the Republic," added to the name of the trustee, were held to be mere *descriptio personae*.

769. 6. Contingencies Justifying Appointment of New Trustee. — *Allen v. Alliance Trust Co.*, 84 Miss. 319.

Power of Appointment of Substitute Is Power Coupled with Interest. — *Frank v. Colonial, etc., Mortg. Co.*, 86 Miss. 103.

770. 2. Request to Be Made upon Original Trustee. — *Davis v. Hughes*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1162.

771. 1. Statutory Proceedings for Appointment of Substitute Trustee. — See *Marshall v. Kraak*, 23 App. Cas. (D. C.) 129.

2. Sheriff Acting as Substitute or Successor. — *McNutt v. Mutual Ben. L. Ins. Co.*, 181 Mo. 94.

773. 4. Right of Assignee to Foreclose — *d.* ASSIGNMENT TO BE RECORDED — (1) *Statutory Provisions.* — See note 6.

774. 5. Right of Executors and Administrators to Sell — *b.* REPRESENTATIVE OF DECEASED TRUSTEE. — See note 7.

775. 6. Right of Corporation to Exercise Power — Maryland Rule. — See note 2.

779. VIII. DURATION OF RIGHT TO SELL — 2. Indebtedness Barred — *a.* GENERAL RULE. — See notes 4, 5.

783. X. EXERCISE OF POWER — 1. General Principles — *a.* COMPLYING WITH TERMS OF POWER. — See note 8.

785. *b.* UNAUTHORIZED, IRREGULAR, AND INVALID SALES — (3) *Irregular Sale* — (a) Rights of Purchaser at Law — *aa.* TITLE PASSES BY DEED. — See note 3.

786. *bb.* CONTRARY DOCTRINE. — See note 1.

789. 2. Proceedings Before Sale — *b.* NOTICE — (2) *By Whom Notice to Be Given* — (b) Death of Mortgagee. — See note 4.

793. (4) *Contents of Notice* — (d) Description of Property to Be Sold — *aa.* DEGREE OF CERTAINTY REQUIRED. — See note 1.

797. (5) *Mode of Giving Notice* — (c) Publication of Notice in Newspaper — *aa.* IN GENERAL — (aa) *Strict Conformity Required.* — See note 11.

800. *cc.* PUBLICATION IN WEEKLY OR DAILY PAPER — (aa) *In General.* — See note 6.

802. [*c.* BOND. — In *Maryland* it is provided by statute that the trustee must file a bond before he can make a valid sale.^{13a}]

804. 3. Proceedings Incident to Sale — *c.* PLACE OF SALE — (2) *Sale in Other County or State.* — See note 2.

805. *d.* TIME OF SALE — (3) *Discretion as to Time.* — See note 7.

806. *g.* SALE EN MASSE OR IN PARCELS — (1) *Duty and Discretion* — (a) *In General.* — See note 9.

808. (4) *Sale en Masse* — (a) *When Upheld.* — See note 3.

809. (6) *Who May Complain* — *Estoppel.* — See note 2.

h. AMOUNT OF PROPERTY TO BE SOLD — (3) *Debt Satisfied by Sale of Part.* — See note 7.

773. 6. Assignment to Be Recorded. — *Langmaack v. Keith*, (S. Dak. 1905) 103 N. W. Rep. 210.

774. 7. Representative of Trustee May Be Empowered to Sell. — In *North Carolina* by statute the representative of a deceased trustee may execute the terms of the trust deed, provided he is requested in writing so to do by any creditor secured in or by the deed of trust. *Eason v. Dortch*, 136 N. Car. 291.

775. 2. In *Georgia* a power of sale in a trust deed to a corporation may be exercised by an agent. *Long v. Powell*, 120 Ga. 621.

779. 4. Bar of Statute No Obstacle to Sale under Power. — *Stevens v. Osgood*, (S. Dak. 1904) 100 N. W. Rep. 161.

5. Power of Sale Gone When Debt Barred. — See *Ford v. Nesbitt*, 72 Ark. 267.

783. 8. Strict Conformity with Power Required. — *Moore v. Dick*, 187 Mass. 207.

785. 3. Legal Title Passes Regardless of Regularity of the Sale. — *Adams v. Carpenter*, 187 Mo. 613.

786. 1. Deed Founded on Irregular Sale Passes No Title. — *Davis v. Hughes*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1161. See also *Moore v. Dick*, 187 Mass. 207.

789. 4. Notice in Name of Deceased Person. — *Ford v. Nesbitt*, 72 Ark. 267.

793. 1. Where Description Erroneous Purchaser May Refuse to Accept Deed. — *Jackson v. Binnicker*, 106 Mo. App. 721.

797. 11. Strict Compliance with Provision Requiring Publication in Paper. — *Moore v. Dick*, 187 Mass. 207.

800. 6. Weekly Publication Sufficient. — *Vizard v. Moody*, 119 Ga. 918.

802. 13a. Bond Necessary. — *Union Trust Co. v. Ward*, 100 Md. 98, holding that strict compliance with the statute is necessary and the filing of a bond after the sale is insufficient.

804. 2. Sale in Another State. — *Vizard v. Moody*, 119 Ga. 918 (by express condition in the trust deed).

805. 7. Statute Requiring Sale on First Tuesday in Month Unless Otherwise Provided in Deed. — See *Smith v. State*, 121 Ga. 618.

806. 9. Duty and Discretion of Trustee. — See *Mays v. Lee*, 100 Md. 227.

808. 3. Sale en Masse Upheld Where No Contrary Requirement in Deed. — *Benton Land Co. v. Zeitler*, 182 Mo. 251.

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811. 10. *Resale Where First Sale Invalid*. — See *Jackson v. Binnicker*, 106 Mo. App. 721.

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813. 3. *Inadequacy of Price*. — *Hamilton v. Rhodes*, 72 Ark. 625.

816. 3. *Right of Creditor to Buy*. — *Hamilton v. Rhodes*, 72 Ark. 625.

819. 7. *Disability of Trustee to Purchase*. — See *Helena First Nat. Bank v. Waddell*, (Ark. 1905) 85 S. W. Rep. 417.

822. 13. *Innocent Subvendees*. — See *Schneider v. Sellers*, 98 Tex. 380.

825. 9. *Error in Recitals*. — *Hamilton v. Rhodes*, 72 Ark. 625 (misrecital as to consideration paid).

834. 9. *Balance to Mortgagor*. — *Berner v. German State Bank*, 125 Iowa 438, holding that the surplus could not be used to satisfy an indebtedness which arose after the execution of the deed of trust.

841. 8. *Fraud and Irregularity in Exercise of Power*. — See *Weir v. Jones*, (Miss. 1904) 36

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9. See *Hamilton v. Rhodes*, 72 Ark. 625.

12. See *Thomas v. Issenhuth*, (S. Dak. 1904) 100 N. W. Rep. 436.

842. 5. *Illustrations of Insufficient Grounds for Setting Sale Aside — Mere Inadequacy of Price*. — *Brown v. British American Mortg. Co.*, 86 Miss. 388.

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6. See *Helena First Nat. Bank v. Waddell*, (Ark. 1905) 85 S. W. Rep. 417.

843. 3. *Right to Disaffirm Voidable Sale Personal to Mortgagor*. — *Williams v. J. P. Williams Co.*, 122 Ga. 178, 106 Am. St. Rep. 100.

844. 10. *Moore v. Dick*, 187 Mass. 207.

845. 2. *Statutory Right of Redemption Recognized*. — *Sturgeon v. Mudd*, 190 Mo. 200.

846. 1. *Disaffirmance of Irregular Sale*. — *Adams v. Carpenter*, 187 Mo. 613.

TRUSTS AND TRUSTEES.

By E. G. CHILTON.

859. I. DEFINITION AND SCOPE OF TITLE — 2. Scope of Title. — See notes

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861. II. ORIGIN AND DEVELOPMENT — Trusts. — See note 11.

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865. 4. Executed and Executory. — See note 2.

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866. IV. CREATION OF TRUSTS — 2. Requisites of Creation — a. IN GENERAL. — See note 1.

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859. 2. Express Trust Defined. — *Eaton v. Barnes*, 121 Ga. 548; *Com. v. Clark*, (Ky. 1904) 83 S. W. Rep. 100; *Squires v. O'Maley*, (Ky. 1905) 84 S. W. Rep. 1172; *Jewell v. Jewell*, (Mich. 1905) 102 N. W. Rep. 1059; *Heil v. Heil*, 184 Mo. 665. See also *Goodell v. Sanford*, 31 Mont. 163.

3. Express and Implied Trusts Distinguished. — *Brenneman v. Schell*, 212 Ill. 356; *Com. v. Clark*, (Ky. 1904) 83 S. W. Rep. 100; *Heil v. Heil*, 184 Mo. 665; *Dunn v. Dunn*, 137 N. Car. 533.

861. 11. See Chicago Terminal Transfer R. Co. v. Winslow, 216 Ill. 166, supporting the text paragraph generally.

862. 3. Moll v. Gardner, 214 Ill. 248; *Chicago Terminal Transfer R. Co. v. Winslow*, 216 Ill. 166; *Coppock v. Austin*, 34 Ind. App. 319; *Tilton v. Davidson*, 98 Me. 55; *Cantwell v. Crawley*, 188 Mo. 44. See also *Uzzell v. Horn*, 71 S. Car. 426.

The Statute of Uses May Be Invoked in Construing a deed of trust, but not to annul it. *Dayton v. Stewart*, 99 Md. 643.

863. 1. Weir v. Barker, 104 N. Y. App. Div. 112. See also *Nichols v. Nichols*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 381; *Matter of De Rycke*, 99 N. Y. App. Div. 596.

864. 3. Implied Trusts Not Affected. — *Hutchinson's Succession*, 112 La. 656.

4. Simple and Special. — *Berry v. Bromberg*, 142 Ala. 339; *Bronson v. Thompson*, 77 Conn. 214; *Fink v. Metcalfe*, (Ky. 1904) 83 S. W. Rep. 644; *Louisville v. Anderson*, (Ky. 1905) 84 S. W. Rep. 573; *Carter v. Long*, 181 Mo. 701; *Fry v. Mercantile Trust Co.*, 207 Pa. St. 640; *Owens v. Naughton*, 23 Pa. Super. Ct. 639; *Patton v. Patrick*, 123 Wis. 218. See also *Matter of Bulwinkel*, (Surrogate Ct.) 42 Misc. (N. Y.) 471, reversed on other grounds 107

N. Y. App. Div. 331; *Shower's Estate*, 211 Pa. St. 297.

A Dry or Simple Trust is one as to which the trustee has no duties to perform. It is a simple separation of the equitable and legal estates, which can be united at the option of the *cestui que trust*. *Carpenter v. Carpenter*, (Ky. 1905) 84 S. W. Rep. 737.

6. Discretionary and Ministerial. — See *Owens v. Naughton*, 23 Pa. Super. Ct. 639.

9. Legal and Illegal. — *Hofsas v. Cummings*, 141 Cal. 525; *Sacramento Bank v. Montgomery*, 146 Cal. 745; *Brown v. Quintard*, 177 N. Y. 75. See also *Matter of Bogardus*, (Surrogate Ct.) 43 Misc. (N. Y.) 473.

865. 2. Executed and Executory. — See *Luquire v. Lee*, 121 Ga. 624.

3. Voluntary and for Value. — *Matter of Reith*, 144 Cal. 314.

866. 1. General Requisites of Creation. — *Matter of Reith*, 144 Cal. 314; *Orr v. Yates*, 209 Ill. 232; *Daly's Estate*, 208 Pa. St. 58.

No Express Trust Where Agreement Between Parties Is Only What Law Would Imply. — *Brenneman v. Schell*, 212 Ill. 356.

2. Trustor. — *Hofsas v. Cummings*, 141 Cal. 525; *Matter of Reith*, 144 Cal. 314.

3. Necessary Acts or Words. — *Matter of Reith*, 144 Cal. 314; *Orr v. Yates*, 209 Ill. 232; *Clark v. Clark*, 99 Md. 356; *Sawyer v. Cook*, 188 Mass. 163; *Austin v. Cahill*, (Tex. 1905) 88 S. W. Rep. 542.

Mere Directions in a Will that the Executors Shall Take Charge of the property, and the like, do not create an express trust in realty. *Matter of Pfarr*, 144 Cal. 121.

5. Lynch v. Herrig, 32 Mont. 267.

6. Must Be Lawful. — *Matter of Dixon*, 143 Cal. 511; *Loomer v. Loomer*, 76 Conn. 522; *Robinson v. Bonaparte*, (Md. 1905) 61 Atl.

866. (2) *Effect of Partial Illegality.* — See note 7.

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(3) *Statutory Limitation on Purposes.* — See note 3.

Trusts of Real Property Not Permitted by These Statutes. — See note 8.

868. Personal Property. — See note 3.

869. 3. Who May Create — *c.* BANKRUPTS. — See note 6.

870. 4. Parol Trusts and Requirement of Writing — *a.* WHEN WRITING IS ESSENTIAL — (2) *Parol Trusts of Personal Property.* — See note 3.

872. *b.* STATUTE OF FRAUDS — (1) *Provisions Applicable* — (a) Sections Regulating Conveyances and Contracts of Sale — Fraud. — See note 5.

874. (b) Sections Dealing Expressly with Trusts — *bb.* STATUS OF LEGISLATION IN VARIOUS JURISDICTIONS — (bb) *Extent and Form of Re-enactment* — Substantial Verbal Re-enactment. — See notes 4, 5.

"Created or Declared" in Writing. — See note 6.

875. Creation in Writing Required. — See note 1.

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By Writings Executed as Deeds. — See note 4.

876. (cc) *States Not Expressly Re-enacting the Seventh Section.* — See notes 3, 4.

877. (2) *Parol Trusts of Lands Merely Voidable* — (a) In General. — See note 2.

Rep. 212; Cook v. Universalist Gen. Convention, 138 Mich. 157.

866. 7. Separable Trusts. — Sacramento Bank v. Montgomery, 146 Cal. 745; Loomer v. Loomer, 76 Conn. 522; Denison v. Denison, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 295, affirmed 103 N. Y. App. Div. 523; Robb v. Washington, etc., College, 103 N. Y. App. Div. 327.

867. 1. Trusts Part of One Scheme. — Hofsas v. Cummings, 141 Cal. 525; Matter of Dixon, 143 Cal. 511; Robb v. Washington, etc., College, 103 N. Y. App. Div. 327.

3. See Patton v. Patrick, 123 Wis. 218.

8. Trusts for Purposes Not Enumerated Void. — Matter of Bogardus, (Surrogate Ct.) 43 Misc. (N. Y.) 473. See also Matter of Reith, 144 Cal. 314.

Trust to Receive and Pay Over Profits of Lands. — Nichols v. Nichols, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 381; Weir v. Barker, 104 N. Y. App. Div. 112.

A Trust to Convey Real Property. — Hofsas v. Cummings, 141 Cal. 525; Matter of Dixon, 143 Cal. 511; Sacramento Bank v. Montgomery, 146 Cal. 745.

868. 3. Personal Property. — Brown v. Spohr, 180 N. Y. 201.

869. 6. See Lurie v. Sabbath, 208 Ill. 401.

870. 3. Writing Not Necessary to Trusts of Personality. — Johnson v. Amberson, 140 Ala. 342; Maher v. Aldrich, 205 Ill. 242; Merritt-Allen Co. v. Torrence, (Iowa 1905) 102 N. W. Rep. 154, citing 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 870; *In re Fisher*, (Iowa 1905) 102 N. W. Rep. 797; Peck v. Scofield, 186 Mass. 108; Devries v. Hawkins, (Neb. 1903) 97 N. W. Rep. 792; Tucker v. Linn, (N. J. 1904) 57 Atl. Rep. 1017; Robb v. Washington, etc., College, 103 N. Y. App. Div. 327; Berry v. Evendon, (N. Dak. 1904) 103 N. W. Rep. 748; Robinson v. Powell, 210 Pa. St. 232.

872. 5. See Johnson v. Amberson, 140 Ala. 342.

874. 4. Statute Re-enacted in Substantially

Same Phraseology. — Compare Leighton v. Hale, 3 N. Bruns. Eq. Rep. 68.

5. Heil v. Heil, 184 Mo. 665. See also Ammonette v. Black, 73 Ark. 310; Marie M. E. Church v. Trinity M. E. Church, 205 Ill. 601; Markham v. Katzenstein, 209 Ill. 607; Stahl v. Stahl, 214 Ill. 131, 105 Am. St. Rep. 101; Gallagher v. Northrup, 215 Ill. 563, reversing 114 Ill. App. 368; McMurray v. McMurray, 180 Mo. 526.

6. "Created or Declared" in Writing. — Eaton v. Barnes, 121 Ga. 548; Cassels v. Finn, 122 Ga. 33, 106 Am. St. Rep. 91; Crowley v. Crowley, 72 N. H. 241; Morris v. Reigel, (S. Dak. 1904) 101 N. W. Rep. 1086. See also Borrow v. Borrow, 34 Wash. 684.

875. 1. Created in Writing. — See Long v. Mechem, 142 Ala. 405; Christian v. Highlands, 32 Ind. App. 104; Nesbitt v. Stevens, 161 Ind. 519; Mallory v. Thomas, (Kan. 1905) 81 Pac. Rep. 194.

2. By Deed or Conveyance or Instrument in Writing. — Nesmith v. Martin, 32 Colo. 77; Largey v. Leggat, 30 Mont. 148; Lynch v. Herzig, 32 Mont. 267; Dickson v. Stewart, (Neb. 1904) 98 N. W. Rep. 1085; Smullin v. Wharton, (Neb. 1905) 103 N. W. Rep. 288; Johnson v. Hayward, (Neb. 1905) 103 N. W. Rep. 1058; Hill v. Warsawski, 93 N. Y. App. Div. 108. See also Rawson v. Morris, 93 Minn. 499; Dougan v. Bemis, (M. n. 1905) 103 N. W. Rep. 882; Kroll v. Coach, 45 Oregon 459.

4. By Instruments Executed "in the Same Manner as Deeds of Conveyance." — Hoon v. Hoon, 126 Iowa 391.

876. 3. Hatfield v. Allison, 57 W. Va. 374; Pickens v. Wood, 57 W. Va. 480. See also Lucia v. Adams, 36 Tex. Civ. App. 454.

4. Wilhite v. Skelton, 5 Indian Ter. 621. See also Planter's Bank, etc., Co. v. Major, (Ky. 1904) 79 S. W. Rep. 264.

877. 2. Voluntary Execution of Parol Trust Valid. — Gallagher v. Northrup, 215 Ill. 563; Mallory v. Thomas, (Kan. 1905) 81 Pac. Rep. 194, citing 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 877.

878. (4) *Declaration or Manifestation Required under Statute* — (a) Who May Declare Trust. — See notes 3, 4.

(b) Time of Declaration — When an Antecedent Writing. — See note 7.

A Subsequent Declaration. — See note 10.

879. (c) Signing or Subscription. — See notes 1, 3.

(d) What Writing Must Show — Must Disclose Terms of Trust. — See notes 5, 6.

880. (e) Various Forms of Declaration or Manifestation — Illustrations. — See note 11.

881. See note 1.

(5) *Cases to Which Statute Does Not Apply* — (a) Implied and Constructive Trusts — *aa.* GENERAL STATEMENT. — See note 8.

882. *bb.* EXPRESS AND IMPLIED TRUSTS DISTINGUISHED. — See note 2.

cc. WHAT SUFFICIENT EVIDENCE OF FRAUD. — See note 4.

883. Something More than Breach of Contract. — See notes 1, 3.

Fraud in Original Transaction. — See note 4.

884. Elements of Equitable Estoppel — Part Performance. — See note 1.

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(b) Executed Express Trusts. — See note 5.

c. STATUTE OF WILLS — (1) *In General.* — See note 7.

885. (2) *Subsequent Declarations of Trust.* — See note 1.

878. 3. See *Gallagher v. Northrup*, 114 Ill. App. 368, reversed on other grounds 215 Ill. 563.

4. See *Rawson v. Morris*, 93 Minn. 499.

7. Antecedent Agreement. — *Nesbitt v. Stevens*, 161 Ind. 519.

10. Subsequent Declaration. — See *Gallagher v. Northrup*, 215 Ill. 563, reversing 114 Ill. App. 368.

879. 1. Signing. — *Markham v. Katzenstein*, 209 Ill. 607. See also *Gallagher v. Northrup*, 215 Ill. 563, reversing 114 Ill. App. 368.

3. Several Writings. — See *Nesbitt v. Stevens*, 161 Ind. 519.

5. Writing Must Disclose Terms of Trust. — *Lurie v. Sabbath*, 208 Ill. 401; *Orr v. Yates*, 209 Ill. 232; *Nesbitt v. Stevens*, 161 Ind. 519.

6. *Mullin v. Wharton*, (Neb. 1905) 103 N. W. Rep. 288.

880. 11. Letter or Writing Acknowledging Trust. — *Nesbitt v. Stevens*, 161 Ind. 519.

881. 1. Receipt. — *Nesbitt v. Stevens*, 161 Ind. 519.

8. Fraud Takes Case Out of Statute. — *Johnston v. Little*, 141 Ala. 382; *Ammonette v. Black*, 73 Ark. 310; *Cassels v. Finn*, 122 Ga. 33, 106 Am. St. Rep. 91; *Borrow v. Borrow*, 34 Wash. 684. See also *De Bardeleben v. Bessemer Land, etc., Co.*, 140 Ala. 621; *Prouty v. Moss*, 111 Ill. App. 536.

One Who Has No Existing Interest in the Property, who has done no act of part performance, and who has parted with nothing, has no standing to rely on fraud to take the case out of the statute. *Largey v. Leggat*, 30 Mont. 148.

882. 2. When Agreement Creates Trust It Is Express. — *Los Angeles, etc., Oil, etc., Co. v. Occidental Oil Co.*, 144 Cal. 528; *Marie M. E. Church v. Trinity M. E. Church*, 205 Ill. 601; *Skahen v. Irving*, 206 Ill. 597; *Gallagher v. Northrup*, 114 Ill. App. 368, reversed on other grounds 215 Ill. 563; *Nesbitt v. Stevens*, 161 Ind. 519; *Hays v. Marsh*, 123 Iowa 81; *Ostenson v. Severson*, 126 Iowa 197; *Marvel v. Marvel*, (Neb. 1903) 97 N. W. Rep. 640; *Fry*

v. Mercantile Trust Co., 207 Pa. St. 640; *Flippo v. Lamb*, 102 Va. 475.

4. The Statute Not to Be a Cover for Fraud. — *De Bardeleben v. Bessemer Land, etc., Co.*, 140 Ala. 621; *Ammonette v. Black*, 73 Ark. 310; *Shackleford v. Elliott*, 209 Ill. 333; *Markham v. Katzenstein*, 209 Ill. 607; *Gregory v. Bowsby*, 126 Iowa 588; *McMurray v. McMurray*, 180 Mo. 526; *Phillips v. Hardenburg*, 181 Mo. 463; *Dickson v. Stewart*, (Neb. 1904) 98 N. W. Rep. 1085; *Koefoed v. Thompson*, (Neb. 1905) 102 N. W. Rep. 268; *Morris v. Reigel*, (S. Dak. 1904) 101 N. W. Rep. 1086; *Borrow v. Borrow*, 34 Wash. 684. See also *Baldwin v. Williams*, (Ark. 1905) 86 S. W. Rep. 423; *Stahl v. Stahl*, 214 Ill. 131, 105 Am. St. Rep. 101; *Mackall v. Olcott*, 93 N. Y. App. Div. 282.

883. 1. Something More than Breach of Oral Agreement Necessary. — *Cassels v. Finn*, 122 Ga. 33, 106 Am. St. Rep. 91; *Richardson v. McConaughy*, 55 W. Va. 546.

3. Reliance on Mere Honor or Promise Insufficient. — *Cassels v. Finn*, 122 Ga. 33, 106 Am. St. Rep. 91.

4. Fraud in Original Transaction. — *Cassels v. Finn*, 122 Ga. 33, 106 Am. St. Rep. 91. See also *De Bardeleben v. Bessemer Land, etc., Co.*, 140 Ala. 621; *Richardson v. McConaughy*, 55 W. Va. 546.

884. 1. *Borrow v. Borrow*, 34 Wash. 684.

3. Express Trust Excludes Implied Trust. — *Heil v. Heil*, 184 Mo. 665; *De Hihns v. Free*, 70 S. Car. 344. See also *Largey v. Leggat*, 30 Mont. 148.

5. Executed Trusts. — *Lasley v. Delano*, (Mich. 1905) 102 N. W. Rep. 1063; *Halvorsen v. Halvorsen*, 120 Wis. 52.

7. Statute of Wills. — *Bryan v. Bigelow*, 77 Conn. 604, 107 Am. St. Rep. 66; *Montague v. Schieffelin*, (Oregon 1905) 80 Pac. Rep. 654. See also *Gordon v. McDougall*, 84 Miss. 715.

885. 1. Subsequent Declarations of Trust. — See *Montague v. Schieffelin*, (Oregon 1905) 80 Pac. Rep. 654.

885. (3) *Fraud Taking Case Out of Statute* — (a) *Fraud Inducing Direct Devise or Bequest.* — See note 3.

886. (c) *Fraud Preventing Making of Will.* — See note 1.

(4) *Whether Will or Executed Trust* — *Reserving Power of Revocation.* — See note 5.

887. *d. RULE AGAINST PAROL EVIDENCE GENERALLY* — *Consideration.* — See note 8.

Identifying Subject-matter and Showing Position of Parties. — See note 11.

888. *e. AMOUNT AND ADMISSIBILITY OF PAROL EVIDENCE TO ESTABLISH TRUST.* — See notes 3, 4.

Fastening Trust on Absolute Instrument. — See note 6.

889. *Subsequent Declarations of Grantor.* — See note 2.

Subsequent Declarations of Grantee. — See note 3.

Where Parol Trusts Are Not Prohibited by Statute. — See note 4.

890. *5. Consideration and Voluntary Trusts* — *a. PERFECTED TRUSTS ENFORCED THOUGH VOLUNTARY.* — See note 1.

891. *b. ENFORCEMENT OF INCOMPLETE TRUSTS* — (1) *General Doctrine.* — See note 4.

893. (4) *Incomplete Trusts and Gifts.* — See note 3.

6. When Trust Is Complete — *a. QUESTION OF FACT.* — See note 4.

894. *b. DECLARATION* — (1) *Must Be Unequivocal.* — See note 1.

(3) *Enjoyment Postponed till Future Event.* — See note 5.

885. *3. Fraud Inducing Will.* — *Smullin v. Wharton*, (Neb. 1905) 103 N. W. Rep. 288.

886. *1. Will Prevented.* — *Cassels v. Finn*, 122 Ga. 33, 106 Am. St. Rep. 91, holding further that the fraud must have accompanied the oral promise which prevented the making of the will, subsequent fraud by breach of such promise being insufficient.

5. Power of Revocation During Life Reserved. — *Schreyer v. Schreyer*, 101 N. Y. App. Div. 456, affirmed 182 N. Y. 555.

887. *8. Brooks v. Union Trust, etc., Co.*, 146 Cal. 134; *Ostenson v. Severson*, 126 Iowa 197.

11. Extrinsic Evidence Admissible to Identify Trustee. — *Cook v. Universalist Gen. Convention*, 138 Mich. 157.

888. *3. Evidence Must Be Clear and Explicit.* — *Tillar v. Henry*, (Ark. 1905) 88 S. W. Rep. 573; *In re Fisher*, (Iowa 1905) 102 N. W. Rep. 797; *Robinson v. Powell*, 210 Pa. St. 232; *Donithen v. Independent Order of Foresters*, 23 Pa. Super. Ct. 442; *Hatfield v. Allison*, 57 W. Va. 374.

4. Nesmith v. Martin, 32 Colo. 77; *Cunningham v. Cunningham*, 125 Iowa 681; *Robinson v. Powell*, 210 Pa. St. 232; *Gilbert v. Lawrence*, 56 W. Va. 281.

6. Fastening Trust on Absolute Instrument. — *Ammonette v. Black*, 73 Ark. 310; *McNutt v. McNutt*, (Ark. 1905) 88 S. W. Rep. 589; *De Galindo v. De Galindo*, 147 Cal. 77; *Cunningham v. Cunningham*, 125 Iowa 681; *McMurray v. McMurray*, 180 Mo. 526; *Avery v. Stewart*, 136 N. Car. 426; *Boughman v. Boughman*, 69 Ohio St. 273; *Mee v. Mee*, 113 Tenn. 453, 106 Am. St. Rep. 865; *Rogers v. Tompkins*, (Tex. Civ. App. 1905) 87 S. W. Rep. 379; *Gilbert v. Lawrence*, 56 W. Va. 281; *Hatfield v. Allison*, 57 W. Va. 374; *Pickens v. Wood*, 57 W. Va. 480. See also *Burnett v. Campbell County*, 1 Tenn. Ch. App. 18; *Levy v. Acklen*, 2 Tenn. Ch. App. 201.

889. *2. Subsequent Declarations of Grantor.* — *Rawson v. Morris*, 93 Minn. 499.

3. Prior or Contemporaneous Declarations Required. — *Compare Leslie v. Bell*, 73 Ark. 338.

4. Nesbitt v. Stevens, 161 Ind. 519.

890. *1. When Trust Is Complete Equity Aids Voluntary Beneficiary.* — *Fisher v. Hampton Transp. Co.*, 136 Mich. 218; *Poling v. Williams*, 55 W. Va. 69. See also *Markham v. Katzenstein*, 209 Ill. 607.

891. *4. Incomplete Trusts Without Consideration.* — *Mee v. Mee*, 113 Tenn. 453, 106 Am. St. Rep. 865.

893. *3. Enforcing Incomplete Gift as Trust* — *Declaration Must Be Fairly Inferable.* — *Brown v. Crafts*, 98 Me. 40.

4. Existence of Complete Trust Question of Fact. — *Kelley v. Snow*, 185 Mass. 288; *Robb v. Washington, etc., College*, 103 N. Y. App. Div. 327; *Robinson v. Powell*, 210 Pa. St. 232.

Facts Held to Establish Trust. — *Johnson v. Amberson*, 140 Ala. 342; *Sawyer v. Cook*, 188 Mass. 163; *O'Brien v. Williamsburg Sav. Bank*, 101 N. Y. App. Div. 108; *Robb v. Washington, etc., College*, 103 N. Y. App. Div. 327.

Facts Insufficient to Establish Trust. — *Ammonette v. Black*, 73 Ark. 310; *Schwingle v. Anthes*, (Neb. 1904) 98 N. W. Rep. 676; *Lattan v. Totten*, 107 N. Y. App. Div. 393, reversing (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 116.

894. *1. Unequivocal Declaration Necessary.* — *McMurray v. McMurray*, 180 Mo. 526; *Matter of Totten*, 179 N. Y. 112; *O'Brien v. Williamsburg Sav. Bank*, 101 N. Y. App. Div. 108. See also *Kelley v. Snow*, 185 Mass. 288.

Distinction Between Declaration and Will Consists of Future or Present Effect. — *Robb v. Washington, etc., College*, 103 N. Y. App. Div. 327.

5. Enjoyment Postponed until Settlor's Death. — *Kelley v. Snow*, 185 Mass. 288; *Robb v. Washington, etc., College*, 103 N. Y. App. Div. 327.

Retention of Possession by Settlor Not Incon-

895. *c.* NOTIFICATION OF AND ACCEPTANCE BY BENEFICIARY. — See notes 4, 7.

896. Acceptance by Beneficiary. — See note 1.

d. DELIVERY TO AND ACCEPTANCE BY TRUSTEE. — See note 5.
Evidence and Effect of Trustee's Acceptance. — See note 6.

e. TRANSFER OF TITLE TO PROPERTY — (1) *Naming Third Person*

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897. See note 1.

898. (2) *Settlor Assuming Character of Trustee*. — See note 11.

899. Words or Acts Sufficient. — See notes 3, 5.

f. REVOCATION — (1) *Complete Trust Irrevocable*. — See note 7.

900. (2) *Powers of Revocation* — A Power of Revocation. — See notes 4, 5.

901. The Omission of a Power of Revocation. — See note 1.

Equity May Relieve Against the Omission. — See note 2.

7. Certain Types of Trusts — *a.* TRUSTS IMPLIED FROM PROVISIONS

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903. *b.* POWERS IN TRUST OR TRUSTS IMPLIED FROM POWERS — Legislation in New York and Other States. — See note 2.

904. *c.* TRUSTS IMPLIED FROM PROVISIONS IN CONTRACTS — (2) *Contracts Creating Trust Relations* — (a) Generally. — See note 3.

sistent with Trust. — *Dayton v. Stewart*, 99 Md. 643.

895. **4.** *Kelley v. Snow*, 185 Mass. 288.

7. Notification Not Necessary. — See *Matter of Totten*, 179 N. Y. 112.

896. **1.** Acceptance Presumed. — *Libby v. Frost*, 98 Me. 288.

5. *Dayton v. Stewart*, 99 Md. 643; *Peck v. Scofield*, 186 Mass. 108; *Brown v. Spohr*, 180 N. Y. 201. See also *Collins v. Collins*, 98 Md. 473. And see *infra*, this title, **971.** **7.**

6. Proof and Effect of Acceptance. — See *Swenson v. Swenson*, 17 S. Dak. 558.

Title Vests in Trustee at Moment of His Acceptance. — *Matter of Browning*, 66 N. J. Eq. 302.

7. *Brown v. Spohr*, 180 N. Y. 201; *Schreyer v. Schreyer*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 520, *affirmed* 101 N. Y. App. Div. 456. See also *Kelley v. Snow*, 185 Mass. 288.

8. Deed of Lands. — *Peck v. Scofield*, 186 Mass. 108; *Taylor v. Coriell*, 66 N. J. Eq. 282.

What Constitutes Delivery — Presumption from Execution and Recording. — *Dayton v. Stewart*, 99 Md. 643; *Schreyer v. Schreyer*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 520, *affirmed* 101 N. Y. App. Div. 456.

897. **1.** Personal Property. — *Brown v. Spohr*, 180 N. Y. 201. See also *Kelley v. Snow*, 185 Mass. 288.

898. **11.** Settlor Becoming Trustee. — *De Camp v. Wallace*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 436, *citing* 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 898; *Matter of Bulwinkel*, (Surrogate Ct.) 42 Misc. (N. Y.) 471, *reversed* on other grounds 107 N. Y. App. Div. 331. See also *Taylor v. Coriell*, 66 N. J. Eq. 262; *Matter of Totten*, 179 N. Y. 112.

899. **3.** *Johnson v. Amberson*, 140 Ala. 342; *Taylor v. Coriell*, 66 N. J. Eq. 262. See also *Matter of Bulwinkel*, 107 N. Y. App. Div. 331, *reversing* (Surrogate Ct.) 42 Misc. (N. Y.) 471.

5. *Taylor v. Coriell*, 66 N. J. Eq. 262.

Trust in Stock Declared Perfect Without Delivery. — *Johnson v. Amberson*, 140 Ala. 342.

7. Irrevocability of Trust. — *Johnson v. Amberson*, 140 Ala. 342; *Dayton v. Stewart*, 99 Md. 643; *Matter of Browning*, 66 N. J. Eq. 302. See also *Fry v. Mercantile Trust Co.*, 207 Pa. St. 640.

Deed Declaring Its Irrevocability Construed as Power of Attorney and Revocable. — *Angle v. Marshall*, 55 W. Va. 671.

900. **4.** Powers of Revocation Reserved. — *Kelley v. Snow*, 185 Mass. 288; *Robb v. Washington*, etc., College, 103 N. Y. App. Div. 327. See also *Dayton v. Stewart*, 99 Md. 643.

5. *Schreyer v. Schreyer*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 520, *affirmed* 101 N. Y. App. Div. 456.

901. **1.** Omission of Power Only a Circumstance of Evidence. — *Carroll v. Smith*, 99 Md. 653; *Dayton v. Stewart*, 99 Md. 643.

2. Relief Against Omission of Power of Revocation. — *Raffel v. Safe Deposit*, etc., Co., 100 Md. 141. See also *Dayton v. Stewart*, 99 Md. 643.

5. Powers Inconsistent with Legal Estate in Another. — *Haggart v. Ranney*, 73 Ark. 344; *Flanner v. Fellows*, 206 Ill. 136; *Schwingel v. Anthes*, (Neb. 1904) 101 N. W. Rep. 335; *Wiess v. Goodhue*, (Tex. Civ. App. 1904) 79 S. W. Rep. 873. See also *Bean v. Com.*, 186 Mass. 348.

6. Devise or Bequest for Particular Purposes. — *Haggart v. Ranney*, 73 Ark. 344; *Bean v. Com.*, 186 Mass. 348. See also *Bloom v. Strauss*, 73 Ark. 56; *Clark v. Clark*, 99 Md. 356.

902. **1.** Inferred from Powers to Executors. — *Bean v. Com.*, 186 Mass. 348.

903. **2.** *Schreyer v. Schreyer*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 520, *affirmed* 101 N. Y. App. Div. 456. See also *Murray v. Miller*, 178 N. Y. 316.

904. **3.** Acceptance of a Transfer on Express

905. (b) Transfers as Security for or in Payment of Debts. — See note 3.

906. See notes 1, 4.

d. DEPOSITS IN SAVINGS BANKS. — See notes 9, 10, 11.

907. Inference from Form of Deposit Only. — See note 1.

908. Death of Depositor. — See note 1.

Extrinsic Evidence Admissible. — See note 3.

909. Retention of Possession by the Depositor. — See note 2.

e. GIFTS WITH ADDED WORDS OF MOTIVE. — See note 6.

910. *f.* TRUSTS ESTABLISHED IN EQUITY TO PREVENT FRAUD. — See note 3.

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8. Construction of Instruments Creating Trusts — *a.* INTENT AND SUBSTANCE CONTROL. — See note 10.

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905. 3. The Creditor Is the Cestui Que Trust, where a deed in trust is given to secure a debt, and the payment of the debt leaves him without interest in the property. *Leech v. Karthaus*, 141 Ala. 509.

906. 1. Real Property Is Subject to the Statute of Frauds. — See *McNutt v. Mutual Ben. L. Ins. Co.*, 181 Mo. 94; *Matter of Totten*, 179 N. Y. 112.

4. *Smith v. Taylor*, 34 Ind. App. 194. See also *McNutt v. Mutual Ben. L. Ins. Co.*, 181 Mo. 94.

9. Delivery Dispensed with. — *Peck v. Scofield*, 186 Mass. 108. See also *Matter of Totten*, 179 N. Y. 112.

10. See *Peck v. Scofield*, 186 Mass. 108. Compare *Taylor v. Coriell*, 66 N. J. Eq. 282.

11. Question One of Fact. — *Kelley v. Snow*, 185 Mass. 288. See also *O'Brien v. Williamsburg Sav. Bank*, 101 N. Y. App. Div. 108.

907. 1. The New York Leases. — *Matter of Totten*, 179 N. Y. 112. Compare *Matter of Bulwinkel*, 107 N. Y. App. Div. 331, reversing (*Surrogate Ct.*) 42 Misc. (N. Y.) 471; *Lattan v. Van Ness*, 107 N. Y. App. Div. 393, reversing (*Supm. Ct. Spec. T.*) 44 Misc. (N. Y.) 116.

908. 1. Death of Depositor. — *Matter of Totten*, 179 N. Y. 112. See also *O'Brien v. Williamsburg Sav. Bank*, 101 N. Y. App. Div. 108.

3. Extrinsic Evidence. — *Matter of Bulwinkel*, (*Surrogate Ct.*) 42 Misc. (N. Y.) 471, reversed on other grounds 107 N. Y. App. Div. 331.

Declarations Before Deposit Admissible. — *O'Brien v. Williamsburg Sav. Bank*, 101 N. Y. App. Div. 108.

909. 2. Retaining Pass Book. — See *Matter of Totten*, 179 N. Y. 112. Compare *Taylor v. Coriell*, 66 N. J. Eq. 282.

6. Trusts Held to Be Created. — *Montague v. Schieffelin*, (*Oregon* 1905) 80 Pac. Rep. 654; *Miskey's Estate*, 209 Pa. St. 474.

910. 3. Constructive Trusts — *Alabama*. — *De Bardeleben v. Bessemer Land, etc., Co.*, 140 Ala. 621.

Arkansas. — *Brown v. Arkansas Cent. R. Co.*, 72 Ark. 456.

California. — *Brooks v. Union Trust, etc., Co.*, 146 Cal. 134.

Florida. — *Smith v. Love*, (*Fla.* 1905) 38 So. Rep. 376.

Illinois. — *Shackleford v. Elliott*, 209 Ill. 333; *Markham v. Katzenstein*, 209 Ill. 607.

Indiana. — *Huffman v. Huffman*, 35 Ind. App. 643.

Kentucky. — *Com. v. Clark*, (*Ky.* 1904) 83 S. W. Rep. 100. See also *Planters' Bank, etc., Co. v. Major*, (*Ky.* 1904) 79 S. W. Rep. 264.

Maine. — *Herlihy v. Coney*, 99 Me. 469.

Maryland. — *Gittings v. Winter*, 101 Md. 194.

Missouri. — *McNutt v. Mutual Ben. L. Ins. Co.*, 181 Mo. 94.

Montana. — *Lynch v. Herrig*, 32 Mont. 267.

New Jersey. — *Johnston v. Reilly*, 66 N. J. Eq. 451.

New York. — *Slayback v. Raymond*, 93 N. Y. App. Div. 326.

Oregon. — *Kroll v. Coach*, 45 Oregon 459.

South Dakota. — *Morris v. Reigel*, (*S. Dak.* 1904) 101 N. W. Rep. 1086.

Tennessee. — *Walt v. Walt*, 113 Tenn. 189.

Texas. — *Schneider v. Sellers*, 98 Tex. 380.

West Virginia. — *Richardson v. McConaughy*, 55 W. Va. 546.

And see the title IMPLIED TRUSTS, 1184. 5 *et seq.*

5. See *McKenna v. Brooklyn Union El. R. Co.*, 95 N. Y. App. Div. 226.

6. *Halvorsen v. Halvorsen*, 120 Wis. 52.

10. Intent Controlling — *United States*. — *Mercer v. Buchanan*, 132 Fed. Rep. 501. See also *Russell v. U. S. Trust Co.*, (*C. C. A.*) 136 Fed. Rep. 758.

California. — *Hofsas v. Cummings*, 141 Cal. 525; *Matter of Dixon*, 143 Cal. 511; *Matter of Reith*, 144 Cal. 314; *Kidwell v. Kettler*, 146 Cal. 12.

Connecticut. — *Loomer v. Loomer*, 76 Conn. 522; *Townsend v. Wilson*, 77 Conn. 411.

Georgia. — *Luquire v. Lee*, 121 Ga. 624; *Johnson v. Cook*, 122 Ga. 524.

Illinois. — *Orr v. Yates*, 209 Ill. 232; *Olcott v. Tope*, 213 Ill. 124.

Kentucky. — *Cochran v. Lee*, (*Ky.* 1905) 84 S. W. Rep. 337; *Carpenter v. Carpenter*, (*Ky.* 1905) 84 S. W. Rep. 737.

Maine. — *Tilton v. Davidson*, 98 Me. 55.

Massachusetts. — *McCurdy v. McCallum*, 186 Mass. 464.

Michigan. — *Cook v. Universalist Gen. Convention*, 138 Mich. 157; *Skinner v. Taft*, (*Mich.* 1905) 103 N. W. Rep. 702.

Missouri. — *McNutt v. Mutual Ben. L. Ins. Co.*, 181 Mo. 94.

Nebraska. — *Schwingel v. Anthes*, (*Neb.* 1904) 101 N. W. Rep. 335.

911. See notes 1, 2.

Intent Is to Be Gathered from Whole Instrument. — See notes 3, 4.

The Burden of Proving. — See note 6.

913. *d.* CERTAINTY REQUIRED IN INSTRUMENT OF CREATION. — See notes 3, 4.**914.** *V. THE TRUST ESTATE* — 1. Of What It May Consist. — See note 4. Expectant and Contingent Interests. — See note 10.**915.** Equitable Interest. — See note 3.**2.** Nature and Comprehensiveness of Estate — *a.* PROPERTY INCLUDED IN ESTATE — (1) *In General.* — See note 10.**917.** *c.* DISTINCTION BETWEEN CORPUS AND INCOME — (1) *In General.* — See note 4.**919.** 3. Title and Estate of the Trustee — *a.* OPERATION OF STATUTE OF USES. — See note 5.**920.** Dry or Passive Trusts. — See note 1.

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922. *b.* EXCEPTIONS TO OPERATION OF STATUTE — (3) *Active or Special Trusts and How They Arise* — (a) Rules Governing the Trustee's Estate — *aa.* IN RESPECT TO TITLE. — See notes 5, 6.

New Jersey. — *In re Vreeland*, 66 N. J. Eq. 297.

New York. — *Metcalf v. Union Trust Co.*, 181 N. Y. 39; *Robb v. Washington, etc., College*, 103 N. Y. App. Div. 327.

Pennsylvania. — *Shower's Estate*, 211 Pa. St. 297.

Texas. — *Gidley v. Lovenberg*, 35 Tex. Civ. App. 203; *Wiess v. Goodhue*, (Tex. Civ. App. 1904) 79 S. W. Rep. 873.

Such Case Must Turn on Its Own Circumstances. — *Bloom v. Strauss*, 73 Ark. 56.

911. 1. Use of Words "Trust," "Confidence," Etc. — *Ukiah Bank v. Rice*, 143 Cal. 265; *Matter of Reith*, 144 Cal. 314; *Johnson v. Cook*, 122 Ga. 524; *Skinner v. Taft*, (Mich. 1905) 103 N. W. Rep. 702; *Wiess v. Goodhue*, (Tex. Civ. App. 1904) 79 S. W. Rep. 873. See also *Russell v. U. S. Trust Co., (C. C. A.)* 136 Fed. Rep. 758; *Bloom v. Strauss*, 73 Ark. 56; *Brillhart v. Mish*, 99 Md. 447; *Schwengel v. Anthes*, (Neb. 1904) 101 N. W. Rep. 335.

"Trustee" Prima Facie Implies Trust. — *Maffet v. Oregon, etc., R. Co.*, (Oregon 1905) 80 Pac. Rep. 489.

2. *Ukiah Bank v. Rice*, 143 Cal. 265; *Christian v. Highlands*, 32 Ind. App. 104; *Matter of Bulwinkel*, (Surrogate Ct.) 42 Misc. (N. Y.) 471, reversed on other grounds 107 N. Y. App. Div. 331.

3. *Bloom v. Strauss*, 73 Ark. 56; *Loomer v. Loomer*, 76 Conn. 522; *Cochran v. Lee*, (Ky. 1905) 84 S. W. Rep. 337; *Carpenter v. Carpenter*, (Ky. 1905) 84 S. W. Rep. 737; *Robb v. Washington, etc., College*, 103 N. Y. App. Div. 327; *Wiess v. Goodhue*, (Tex. Civ. App. 1904) 79 S. W. Rep. 873.

4. *Carpenter v. Carpenter*, (Ky. 1905) 84 S. W. Rep. 737.

6. Burden of Proof. — *Deuter v. Deuter*, 214 Ill. 308; *Cunningham v. Cunningham*, 125 Iowa 681; *Schwartz v. Gerhardt*, 44 Oregon 425; *Robinson v. Powell*, 210 Pa. St. 232; *Lide v. American Guild*, 69 S. Car. 275.

913. 3. Certainty Necessary. — *Ukiah Bank v. Rice*, 143 Cal. 265; *Matter of Reith*, 144 Cal. 314; *Prince v. Barrow*, 120 Ga. 810; *Flan-*

ner v. Fellows, 206 Ill. 136; *Orr v. Yates*, 209 Ill. 232; *Gidley v. Lovenberg*, 35 Tex. Civ. App. 203; *Weaver v. Spurr*, 56 W. Va. 95.

Charitable Trusts — Indefiniteness of Beneficiary. — See *Bowman v. Domestic, etc., Missionary Soc.*, 100 N. Y. App. Div. 29, reversing (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 574; *Daly's Estate*, 208 Pa. St. 58.

Certainty of Beneficiary. — *Murray v. Miller*, 178 N. Y. 316; *Mount v. Tuttle*, 99 N. Y. App. Div. 433. See also *Gidley v. Lovenberg*, 35 Tex. Civ. App. 203.

4. Vague and Indefinite Trusts Fail. — *Weaver v. Spurr*, 56 W. Va. 95.

914. 4. Trust May Be in Any Property Recognized in Equity. — *Orr v. Yates*, 209 Ill. 232; *Lynch v. Herrig*, 32 Mont. 267.

10. Equity Recognizes Expectant and Contingent Interests. — *Carroll v. Smith*, 99 Md. 653. See also *Wilson v. Langhorne*, 102 Va. 631.

915. 3. Equitable Interest. — *Lynch v. Herrig*, 32 Mont. 267.

10. Property Subsequently Acquired. — *Spencer v. Kimball*, 98 Me. 499.

917. 4. Cash Dividends Income — Stock Dividends Capital. — *Smith v. Dana*, 77 Conn. 543, 107 Am. St. Rep. 52. And see the title DIVIDENDS, **710. 2 et seq.** See also INCOME, **147. 2.**

919. 5. Trustee's Estate Destroyed by Statute. — *Carter v. Long*, 181 Mo. 701.

920. 1. Title at No Time in Trustee. — *Carter v. Long*, 181 Mo. 701. See also *Berry v. Bromberg*, 142 Ala. 339. Compare *Fink v. Metcalfe*, (Ky. 1904) 83 S. W. Rep. 643.

4. "Bare Legal Title" in Trustee. — *Brain v. Bailey*, (Ky. 1904) 82 S. W. Rep. 582; *Carpenter v. Carpenter*, (Ky. 1905) 84 S. W. Rep. 737.

922. 5. Trust Performed Only by Virtue of Trustee's Vested Estate. — *Owens v. Naughton*, 23 Pa. Super. Ct. 639.

6. Legal Title in Trustee for Performance of Trust. — *Harris v. Fergus*, 207 Ill. 534; *Olcott v. Tope*, 213 Ill. 124; *Moll v. Gardner*, 214 Ill. 248; *Kelley v. Snow*, 185 Mass. 288; *Patton v. Patrick*, 123 Wis. 218. See also *Wiess v. Goodhue*, (Tex. Civ. App. 1904) 79 S. W. Rep. 873.

- 923.** *bb.* IN RESPECT TO QUANTITY OR DURATION—(*aa*) *Estate Adequate for Trust Implied.*—See notes 4, 6.
- 924.** (*bb*) *Estate Not Unnecessarily Extended.*—See note 2.
(*cc*) *Distinction Between Deeds and Wills.*—See note 5.
- 925.** (*b*) *General Discretionary Powers.*—See note 3.
- 926.** (*a*) *Collection and Application of Rents and Profits.*—See note 3.
- 927.** (*e*) *Sale, Conveyance, or Leasing of Estate.*—See note 8.
- 928.** See note 2.
- 929.** (*f*) *Investment of Funds.*—See note 3.
- 932.** (*j*) *Conveyance to Beneficiary.*—See note 5.
- 933.** *A Contrary View.*—See note 1.
- 935.** 4. *Interest of Beneficiary*—*d.* *INTEREST VESTED OR CONTINGENT*
—(*1*) *In General.*—See note 2.
(*2*) *Ascertainment of Beneficiaries.*—See note 5.
5. *Title as Between Executor and Trustee.*—See note 8.
- 936.** 6. *Properties and Incidents*—*c.* *MERGER.*—See note 11.
- 937.** See note 1.
- 939.** *c.* *DEVOLUTION*—(*3*) *Descent*—(*a*) *To Heirs.*—See note 1.
(*b*) *To Personal Representative.*—See note 3.
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- 940.** 7. *Liability for Debts*—*a.* *OF SETTLOR*—(*2*) *Payment Not Directed.*—See note 3.
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- 941.** See note 3.

923. 4. *Estate Adequate for Trust Implied.*—*Matter of Reith*, 144 Cal. 314; *Sacramento Bank v. Montgomery*, 146 Cal. 745; *Matter of Dunphy*, 147 Cal. 95; *Smith v. McWhorter*, 123 Ga. 287, 107 Am. St. Rep. 87; *Spengler v. Kuhn*, 212 Ill. 186; *Olcott v. Tope*, 213 Ill. 124; *Metcalf v. Union Trust Co.*, 181 N. Y. 39; *Angle v. Marshall*, 55 W. Va. 671.

6. *Failure to Use Word Heirs Immaterial.*—*Olcott v. Tope*, 213 Ill. 124.

924. 2. *Estate Not Unnecessarily Extended.*—*Smith v. McWhorter*, 123 Ga. 287, 107 Am. St. Rep. 87; *Angle v. Marshall*, 55 W. Va. 671.

5. *Distinction of Limited Application.*—*Angle v. Marshall*, 55 W. Va. 671.

Same Rule Applied to Both Deeds and Wills.—*Smith v. McWhorter*, 123 Ga. 287, 107 Am. St. Rep. 87.

925. 3. *General Discretionary Powers.*—*Harris v. Ferguy*, 207 Ill. 534; *Olcott v. Tope*, 213 Ill. 124; *Owens v. Naughton*, 23 Pa. Super. Ct. 639.

926. 3. *Collection and Application of Rents and Profits.*—*Flanner v. Fellows*, 206 Ill. 136; *Moll v. Gardner*, 214 Ill. 248; *Patton v. Patrick*, 123 Wis. 218.

927. 8. *Power to Sell or Lease Estate.*—*Spengler v. Kuhn*, 212 Ill. 186; *Olcott v. Tope*, 213 Ill. 124. See also *Scottish-American Mortg. Co. v. Clowney*, 70 S. Car. 229.

928. 2. *Power of Sale Requires Fee in Trustee.*—*Spengler v. Kuhn*, 212 Ill. 186; *Olcott v. Tope*, 213 Ill. 124.

929. 3. *Investment of Proceeds of Sale.*—*Harris v. Ferguy*, 207 Ill. 534; *Penn-Gaskell's Estate*, 208 Pa. St. 346.

932. 5. *Conveyance to Beneficiary.*—*Fink v. Metcalfe*, (Ky. 1904) 83 S. W. Rep. 643. See also *Moll v. Gardner*, 214 Ill. 248.

933. 1. *Contrary View.*—*Leech v. Karthaus*, 141 Ala. 509; *Brillhart v. Mish*, 99 Md. 447; *Donaldson v. Allen*, 182 Mo. 626; *Uzzell v. Horn*, 71 S. Car. 426. See also *Loomer v. Loomer*, 76 Conn. 522; *Angle v. Marshall*, 55 W. Va. 671.

935. 2. *Impossibility of Contingency.*—See *Carroll v. Smith*, 99 Md. 653.

5. *Vested Estate Opening to After-born Beneficiaries.*—See *Stiles v. Cummings*, 122 Ga. 635; *Plant v. Plant*, 122 Ga. 763.

8. *General Rule as to When Trustee's Estate Begins.*—See *Dingman v. Beall*, 213 Ill. 238.

936. 11. *Merger.*—*Rosier v. Nichols*, 123 Ga. 20.

Merger in Trustee Only When He Is Sole Beneficiary.—*Robb v. Washington, etc., College*, 103 N. Y. App. Div. 327.

937. 1. *Rule Not Universal.*—*Luquire v. Lee*, 121 Ga. 624.

939. 1. *Trustee's Title Descends to Heir at Law.*—*McNutt v. Mutual Ben. L. Ins. Co.*, 181 Mo. 94.

Statute Cutting Off Descent.—See *Whitehead v. Whitehead*, 142 Ala. 163.

3. *Duties and Liabilities Devolving upon Personal Representatives.*—*Evans v. Evans*, (N. J. 1904) 57 Atl. Rep. 872.

Statute Abrogating Rule.—See *Whitehead v. Whitehead*, 142 Ala. 163.

7. *Trustees Hold as Joint Tenants.*—See the title *JOINT TENANTS AND TENANTS IN COMMON*, 659. 6 *et seq.*

940. 3. *Future Debts.*—*Wenzel v. Powder*, 100 Md. 36.

8. *Hussey v. Arnold*, 185 Mass. 202.

941. 3. *Beneficial Interest Liable.*—See *Hussey v. Arnold*, 185 Mass. 202.

943. *d. OF BENEFICIARY* — (1) *In General*. — See note 9.

944. (2) *Sufficiency of Beneficiary's Interest* — (b) *Income*. — See notes 6, 9.

945. See note 1.

After the Death of the Life Tenant. — See note 2.

8. Duration and Termination — *a. BY OPERATION OF LAW* —

(1) *In General*. — See notes 7, 8.

946. (2) *When Beneficiary Acquires Capacity to Receive*. — See notes 3, 8.

947. (3) *Death of Parties* — (b) *Of Beneficiary*. — See note 2.

Duration of Estate Involving Additional Duties. — See notes 4, 5.

(4) *Trusts for Married Women*. — See note 9.

948. See note 2.

949. *b. BY ITS OWN LIMITATIONS*. — See notes 4, 5.

950. *c. BY ACT OF PARTIES* — (1) *The Settlor* — (a) *Power of Revocation*.

— See notes 1, 3, 4.

Whether a Power of Revocation Exists. — See note 6.

951. (b) *No Power of Revocation*. — See note 2.

952. (2) *The Trustee* — (a) *General Rule*. — See note 2.

(b) *Estoppel*. — See notes 4, 5.

943. **9. Loomer v. Loomer**, 76 Conn. 522. See also *Brillhart v. Mish*, 99 Md. 447.

Expenses Must Be in Interest of All Cestuis Que Trustent. — *Somerset R. Co. v. Pierce*, 98 Me. 528.

Settlor May Put Estate Beyond Reach of Beneficiary's Creditors. — *Wenzel v. Powder*, 100 Md. 36. See also *Tilton v. Davidson*, 98 Me. 55. And see generally the titles *EXECUTIONS*, **632**. 5 *et seq.*; *SPENDTHRIFT TRUSTS*, **138**. 3 *et seq.*

944. **6. Income Liable**. — *Loomer v. Loomer*, 76 Conn. 522; *Wenzel v. Powder*, 100 Md. 36; *Ullman v. Cameron*, 92 N. Y. App. Div. 91.

9. Showing Income More than Sufficient. — *Ullman v. Cameron*, 92 N. Y. App. Div. 91.

945. **1. Surplus Liable**. — *Ullman v. Cameron*, 92 N. Y. App. Div. 91.

2. After Death of Life Tenant. — *Graham v. Whitridge*, 99 Md. 248.

7. Continuance Not Limited by Rule to Any Period of Time. — *Loomer v. Loomer*, 76 Conn. 522.

8. Termination and Conveyance Decreed by Court. — *Bronson v. Thompson*, 77 Conn. 214; *Carpenter v. Carpenter*, (Ky. 1905) 84 S. W. Rep. 737; *Donaldson v. Allen*, 182 Mo. 626. See also *Eakle v. Ingram*, 142 Cal. 15, 100 Am. St. Rep. 99; *Tilton v. Davidson*, 98 Me. 55; *Metcalf v. Union Trust Co.*, 181 N. Y. 39.

Conveyance Decreed Though Property in Another State. — *Donaldson v. Allen*, 182 Mo. 626.

Trust May Be Terminated as to Certain Property and Continued as to Other. — *Williams v. Thacher*, 186 Mass. 293.

946. **3. Trust for Infants**. — See *Ray v. Kelly*, 82 Miss. 597.

8. Possibility of Further Issue. — *Wenzel v. Powder*, 100 Md. 36. See further the title *PRESUMPTIONS*, **1285**. 7 *et seq.*

947. **2. Death of Life Tenant**. — *Luquire v. Lee*, 121 Ga. 624; *Smith v. McWhorter*, 123 Ga. 287, 107 Am. St. Rep. 87; *Graham v. Whitridge*, 99 Md. 248; *Dunn v. Dunn*, 137 N. Car. 533.

Alienation of Life Estate Terminates Trust. — *Brillhart v. Mish*, 99 Md. 447.

4. Duties to Remaindermen. — *Smith v. McWhorter*, 123 Ga. 287, 107 Am. St. Rep. 87.

5. Smith v. McWhorter, 123 Ga. 287, 107 Am. St. Rep. 87.

9. Death of Husband. — *Carpenter v. Carpenter*, (Ky. 1905) 84 S. W. Rep. 737; *Sharman v. Jackson*, 98 N. Y. App. Div. 187; *Walt v. Walt*, 113 Tenn. 189.

948. **2. Divorce**. — *Lee's Estate*, 207 Pa. St. 218. See also *Metcalf v. Union Trust Co.*, 181 N. Y. 39.

949. **4. Happening of Specified Event**. — *Kidwell v. Ketler*, 146 Cal. 12.

5. When Beneficiaries Become of Age. — *Williams v. Thacher*, 186 Mass. 293; *Morrow v. Morrow*, 113 Mo. App. 444.

950. **1. Kelley v. Snow**, 185 Mass. 288; *Schreyer v. Schreyer*, (Supm. Ct. Spec. T.) 43 Misc. (N. Y.) 520, *affirmed* 101 N. Y. App. Div. 456.

3. Deposits in a Trust Fund in a Bank by the Settlor After the Death of the Beneficiary, no knowledge of the fund having been communicated to the beneficiary during his life, have been held to operate as a revocation. *Matter of Bulwinkel*, 107 N. Y. App. Div. 331, *reversing* (Surrogate Ct.) 42 Misc. (N. Y.) 471.

4. Limited Purposes Satisfied. — *Sharman v. Jackson*, 98 N. Y. App. Div. 187.

6. Deed Irrevocable. — *Carroll v. Smith*, 99 Md. 53; *Dayton v. Stewart*, 99 Md. 643. See also *Baltes v. Union Trust Co.*, 180 N. Y. 183.

951. **2. No Power of Revocation**. — *Carroll v. Smith*, 99 Md. 653; *Dayton v. Stewart*, 99 Md. 643.

952. **3. No Termination by the Trustee**. — *Metcalf v. Union Trust Co.*, 181 N. Y. 39; *Felkner v. Dooley*, 27 Utah 350; *Harrigan v. Gilchrist*, 121 Wis. 127; *Patton v. Patrick*, 123 Wis. 218.

Trustee Cannot Terminate Trust by Destroying Trust Fund. — *Harrigan v. Gilchrist*, 121 Wis. 127.

Burden of Proof on Trustee Asserting Termination. — *In re Fisher*, (Iowa 1905) 102 N. W. Rep. 797.

4. Estoppel to Deny Title of Cestui. — *Cutler v. Meeker*, (Neb. 1904) 99 N. W. Rep. 514; *Petty v. Emery*, 96 N. Y. App. Div. 35.

- 952.** (c) *Exceptions to the Rule.* — See notes 8, 10.
- 953.** (3) *The Beneficiary.* — See note 4.
The Trust Is Not Terminated. — See notes 12, 13, 14.
- 954.** VI. THE TRUSTEE — 1. Who May Be Trustee — *c. SOVEREIGN* — (2) *United States.* — See note 11.
- 955.** *e. DONOR.* — See note 4.
f. CESTUI QUE TRUST. — See notes 5, 6, 7, 8.
g. CORPORATIONS. — See notes 9, 10, 11.
- 956.** *Municipal Corporations.* — See note 1.
h. UNINCORPORATED ASSOCIATIONS. — See note 4.
- 957.** 2. Appointment — *a. APPOINTMENT BY SETTLOR.* — See note 9.
Not Necessary to Name Trustee. — See notes 10, 11.
- 958.** *Intention Effectuated.* — See note 3.
- 952.** 5. *Legality or Validity.* — *Hughes v. Bent*, (Ky. 1904) 81 S. W. Rep. 931.
8. *Reconveyance to Settlor.* — *Matthews v. Thompson*, 186 Mass. 14, 104 Am. St. Rep. 550.
Terminates by Exercise of Reserved Right to Reconvey. — *Schreyer v. Schreyer*, 101 N. Y. App. Div. 456, *affirmed* 182 N. Y. 555.
10. *Termination with Consent of Beneficiaries.* — *Felkner v. Dooly*, 27 Utah 350. *Compare Patton v. Patrick*, 123 Wis. 218.
- 953.** 4. *Termination Decreed at Instance of Beneficiaries.* — *Eakle v. Ingram*, 142 Cal. 15, 100 Am. St. Rep. 99; *Tilton v. Davidson*, 98 Me. 55.
Consent of Trustee and Cestui Ineffectual Where Trustee Still Has Duties to Perform. — *Patton v. Patrick*, 123 Wis. 218.
Settlor May Expressly Prohibit Beneficiary from Terminating Trust. — See *King's Estate*, 210 Pa. St. 435.
12. *Consent of All Beneficiaries Essential.* — *Tilton v. Davidson*, 98 Me. 55; *Hoffman v. New England Trust Co.*, 187 Mass. 205; *Robbins v. Smith*, 72 Ohio St. 1. See also *Eakle v. Ingram*, 142 Cal. 15, 100 Am. St. Rep. 99; *Dayton v. Stewart*, 99 Md. 643.
- Beneficiary Must Be Sui Juris.* — See *Tilton v. Davidson*, 98 Me. 55.
- Agreement to Lend Fund Held Not to Be Consent to Termination.* — *Downer v. Squire*, 186 Mass. 189.
13. *Purposes Must Be Accomplished.* — *Hoffman v. New England Trust Co.*, 187 Mass. 205. See also *Walt v. Walt*, 113 Tenn. 189.
14. *The Consent of a Mere Bare Trustee, Without Interest except that he might become entitled to compensation for services as trustee, is not required.* *Eakle v. Ingram*, 142 Cal. 15, 100 Am. St. Rep. 99.
- 954.** 11. *State as Trustee.* — *Miller v. Batz*, 142 Cal. 447.
- 955.** 4. *Donor.* — *Squires v. O'Maley*, (Ky. 1905) 84 S. W. Rep. 1172.
Donor's Attorney May Be Trustee. — *Carroll v. Smith*, 99 Md. 653.
5. *Cestui Not Proper Trustee.* — *Nichols v. Nichols*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 381; *Sweet v. Schliemann*, 95 N. Y. App. Div. 266; *Robb v. Washington*, etc., College, 103 N. Y. App. Div. 327; *Jacoby v. Jacoby*, (Supm. Ct. Spec. T.) 47 Misc. (N. Y.) 427.
6. *Cestui Not Excluded.* — *In re Vreeland*, 66 N. J. Eq. 297; *Sweet v. Schliemann*, 95 N. Y. App. Div. 266.
- The Intent Must Be Clear to justify a court in so construing a will as to make the same person both trustee and beneficiary.* *In re Vreeland*, 66 N. J. Eq. 297.
7. *One of Several.* — *Nichols v. Nichols*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 381.
8. *Trustee for Himself and Others.* — *Sweet v. Schliemann*, 95 N. Y. App. Div. 266; *Robb v. Washington*, etc., College, 103 N. Y. App. Div. 327.
9. *Corporation May Be Trustee.* — *Cook v. Universalist Gen. Convention*, 138 Mich. 157; *Hickory v. Southern R. Co.*, 137 N. Car. 189. See also *In re Thompson*, (1905) 1 Ch. 229; *Matter of Long Island L. & T. Co.*, 92 N. Y. App. Div. 1.
10. *Purposes Foreign to Institution.* — See *Hickory v. Southern R. Co.*, 137 N. Car. 189.
11. *Hickory v. Southern R. Co.*, 137 N. Car. 189.
- 956.** 1. *Municipal Corporations.* — *Huntsville v. Smith*, 137 Ala. 382; *Riverside v. MacLain*, 210 Ill. 308, 102 Am. St. Rep. 164; *Brusoe v. The Retreat*, 25 Ohio Cir. Ct. 193; *Austin v. Cahill*, (Tex. 1905) 88 S. W. Rep. 542; *Bellows Free Academy v. Sowles*, 76 Vt. 412.
4. *Unincorporated Associations.* — *Murray v. Miller*, 178 N. Y. 116.
- 957.** 9. *Construction of Instrument.* — *Cook v. Universalist Gen. Convention*, 138 Mich. 157.
10. *Intention Sufficient.* — *Johnson v. Cook*, 122 Ga. 524; *Mullanny v. Nangle*, 212 Ill. 247; *Codman v. Brigham*, 187 Mass. 309, 105 Am. St. Rep. 394; *Schwengel v. Anthes*, (Neb. 1904) 101 N. W. Rep. 335. See also *Sells v. Delgado*, 186 Mass. 25.
11. *Executor May Be Trustee.* — *Spengler v. Kuhn*, 212 Ill. 186; *Mullanny v. Nangle*, 212 Ill. 247; *Dingman v. Beall*, 213 Ill. 238; *Bean v. Com.*, 186 Mass. 348; *Codman v. Brigham*, 187 Mass. 309, 105 Am. St. Rep. 394; *Morrow v. Morrow*, 113 Mo. 444; *Schwengel v. Anthes*, (Wis. 1904) 101 N. W. Rep. 335. See also *Sells v. Delgado*, 186 Mass. 25; *Brown v. Doherty*, 93 N. Y. App. Div. 190.
- 958.** 3. *Appointment by Court.* — *Kronshage v. Varrell*, 120 Wis. 161.
- Power May Be Vested in Court by Instrument Creating Trust.* — *Carpenter v. Carpenter*, (Ky. 1905) 84 S. W. Rep. 737.

958. *b. APPOINTMENT BY COURT — (1) Power of Court — (a) Inherent and Statutory Power.* — See note 8.

959. *(2) When Exercised — (a) Death of Trustee.* — See note 8.

960. *Death of Trustee Before He Qualifies.* — See note 1.

961. *(b) Refusal or Disclaimer.* — See note 2.

(d) Incompetency or Incapability. — See note 5.

Trust for Charity. — See note 6.

962. *(e) Vacancies Created in Various Ways.* — See note 1.

964. *c. APPOINTMENT BY DONEE OF POWER — (1) Creation of the Power — (a) By Settlor.* — See note 6.

965. *(2) Who May Be Donee — (a) Individuals.* — See note 2.

(3) Exercise of the Power — (a) How Exercised — aa. IN GENERAL. — See notes 11, 12.

966. *Appointment by Parol.* — See note 7.

bb. APPOINTMENT BY COURT WHEN POWER FAILS. — See note 10.

(b) By Whom Exercised — aa. IN GENERAL. — See note 17.

968. *(c) When Exercised — aa. IN GENERAL.* — See note 10.

969. *(d) Who May Be Appointed — aa. IN GENERAL.* — See note 16.

970. *bb. WHEN COURT IS DEALING WITH TRUST.* — See note 1.

971. *3. Acceptance — a. NECESSITY OF.* — See note 7.

b. WHAT CONSTITUTES. — See notes 12, 14.

972. *Executor as Trustee.* — See note 9.

973. *1. Disclaimer — b. WHAT CONSTITUTES.* — See note 14.

Trust Imposed on Executor. — See note 20.

974. *See note 1.*

977. *7. Removal — a. POWER OF REMOVAL — (2) Power of Court.* — See note 14.

958. *8. De Silver's Estate, 211 Pa. St. 459.*

959. *8. Vacancy Caused by Death.* — *Brigham v. Peter Bent Brigham Hospital, (C. C. A.) 134 Fed. Rep. 513; Whitehead v. Whitehead, 142 Ala. 163; Luquire v. Lee, 121 Ga. 624; Morrow v. Morrow, 113 Mo. App. 444; Force v. Force, (N. J. 1904) 57 Atl. Rep. 973; Button v. Hemmens, 92 N. Y. App. Div. 40; De Silver's Estate, 211 Pa. St. 459. See also Matter of Gensual, 97 N. Y. App. Div. 530.*

960. *1. Death Before Qualification.* — *Daly's Estate, 208 Pa. St. 58.*

961. *2. Vacancy Caused by Refusal to Act.* — *Prince v. Barrow, 120 Ga. 810; Sells v. Delgado, 186 Mass. 25.*

5. Incompetency. — *Spengler v. Kuhn, 212 Ill. 186; Force v. Force, (N. J. 1904) 57 Atl. Rep. 973 (appointment of cotrustee).*

6. Trusts for Charity. — *Daly's Estate, 208 Pa. St. 58; Gidley v. Lovenberg, 35 Tex. Civ. App. 203.*

962. *1. No Trustee Named.* — *Beardsley's Appeal, 77 Conn. 705.*

964. *6. Right of Creator to Provide for Filling Vacancies.* — *In re Thompson, (1905) 1 Ch. 229; Flanner v. Fellows, 206 Ill. 136; McNutt v. Mutual Ben. L. Ins. Co., 181 Mo. 94; Frank v. Colonial, etc., Mortg. Co., 86 Miss. 103.*

965. *2. Trustee as Donee.* — *Flanner v. Fellows, 206 Ill. 136.*

11. Method Provided Must Be Followed. — *See Orr v. Yates, 209 Ill. 232; McNutt v. Mutual Ben. L. Ins. Co., 181 Mo. 94.*

12. Terms of Instrument Govern. — *See Orr v. Yates, 209 Ill. 232; McNutt v. Mutual Ben. L. Ins. Co., 181 Mo. 94.*

966. *7. Appointment by Parol.* — *See Orr v. Yates, 209 Ill. 232.*

10. Failure of Donee to Act. — *Sells v. Delgado, 186 Mass. 25.*

17. No Power unless Expressly Given. — *See Orr v. Yates, 209 Ill. 232.*

968. *10. Appointment in Case of Incapacity.* — *Compare Orr v. Yates, 209 Ill. 232.*

969. *16. Donee Cannot Appoint Himself.* — *Compare Montefiore v. Guedalla, (1903) 2 Ch. 723.*

970. *1. Funds in Hands of Court.* — *See Orr v. Yates, 209 Ill. 232.*

971. *7. Valid as Against Creator.* — *See supra, this title, 896. 5.*

12. Execution of Deed. — *Dayton v. Stewart, 99 Md. 643.*

14. Acceptance Shown by Acts. — *Johnson v. Cook, 122 Ga. 524. See also Sells v. Delgado, 186 Mass. 25.*

972. *9. Probate of Will.* — *Spengler v. Kuhn, 212 Ill. 186; Mullanny v. Nangle, 212 Ill. 247; Rowe v. Rowe, 103 N. Y. App. Div. 100. But see Sells v. Delgado, 186 Mass. 25.*

973. *14. Refusal for Many Years.* — *Sells v. Delgado, 186 Mass. 25.*

20. Disclaimer by Acts. — *Sells v. Delgado, 186 Mass. 25.*

974. *1. The Removal of an Executor Revokes the powers and duties as trustee conferred upon him as an incident to his appointment as executor.* — *Mullanny v. Nangle, 212 Ill. 247.*

977. *14. Court May Remove for Cause.* — *Murdoch v. Elliot, 77 Conn. 247; Bailey v. Rice, 1 Tenn. Ch. App. 645. See also Jenkins*

- 978.** See note 2.
b. CAUSES OF REMOVAL — (1) *General Rules*. — See notes 5, 8.
Discretionary Powers. — See note 11.
- 979.** See note 1.
- 980.** (2) *Specific Instances* — (f) *Refusal to Carry Out Trust*. — See note 10.
- 981.** (h) *Hostility and Discord*. — See note 5.
- 983.** 8. *Powers of Trustees* — *a. GENERAL SCOPE AND LIMITATIONS* — (2) *General Powers* — (f) *Power to Do Particular Acts* — *aa. To MAKE ADMISSIONS*. — See note 12.
dd. To REPAIR TRUST PROPERTY. — See note 16.
- 984.** See note 1.
- 985.** (3) *Special Powers* — (c) *Naked or Discretionary Powers* — *Discretionary Power Annexed to Trust*. — See note 3.
Manner of Exercise. — See note 6.
- 986.** *b. POWERS OF JOINT TRUSTEES* — (1) *General Rule*. — See notes 5, 6.
- 987.** See note 3.
- 988.** *c. POWERS OF SUCCEEDING AND SURVIVING TRUSTEES*. — See note 7.
- 989.** *d. DELEGATION OF POWERS* — (1) *Discretionary Powers*. — See note 8.
- 990.** (2) *Ministerial Powers*. — See note 4.
- 991.** *e. CONTROL BY COURT OF POWERS OF TRUSTEES*. — See notes 1, 2.
- 992.** *Court May Authorize Trustees to Act in Emergency*. — See note 3.
f. POWER TO SELL, LEASE, OR MORTGAGE TRUST PROPERTY — (1) *Power to Sell* — (a) *In General*. — See note 4.
- 993.** *Unauthorized Sale Passes Legal Title*. — See note 4.
- 994.** *Power of Court to Order Sale*. — See note 4.

v. Berry, (Ky. 1904) 83 S. W. Rep. 594; *Teeter v. Veitch*, (N. J. 1905) 61 Atl. Rep. 14.

978. 2. *No Removal Before Trust Is Created*. — *Murdoch v. Elliot*, 77 Conn. 247.

5. *Discretion of Court*. — *Murdoch v. Elliot*, 77 Conn. 247.

8. *Whim of Cestuis Not Regarded*. — *Price's Estate*, 209 Pa. St. 210.

11. *Discretionary Powers*. — *Murdoch v. Elliot*, 77 Conn. 247.

979. 1. *Abuse of Discretionary Powers*. — *Jenkins v. Berry*, (Ky. 1904) 83 S. W. Rep. 594.

980. 10. *Refusal to Carry Out Trust*. — *Teeter v. Veitch*, (N. J. 1905) 61 Atl. Rep. 14.

981. 5. *Discord Not Enough if Business Can Be Transacted*. — See *Price's Estate*, 209 Pa. St. 210, holding that removal is proper where the relations between trustee and beneficiary have become such as to make personal intercourse impossible and to hinder the proper transaction of business between the parties.

983. 12. *Power to Make Admissions*. — *Kidwell v. Ketter*, 146 Cal. 12.

16. *Power to Make Repairs*. — *Whittingham v. Fidelity Trust Co.*, (Ky. 1905) 86 S. W. Rep. 680.

984. 1. *Court Will Not Authorize Improvements Not for Benefit of Estate*. — *In re Miller*, 67 N. J. Eq. 431.

985. 3. *Discretionary Power Annexed to Trust*. — *Sells v. Delgado*, 186 Mass. 25.

6. *Reasonable Exercise of Discretion*. — See *Sells v. Delgado*, 186 Mass. 25.

986. 5. *Cotrustees Must Act Jointly*. —

Hosch Lumber Co. v. Weeks, 123 Ga. 336; *Matter of Wilkin*, 90 N. Y. App. Div. 324; *Brown v. Doherty*, 93 N. Y. App. Div. 190.

6. *Power of Cotrustee to Convey*. — *Hosch Lumber Co. v. Weeks*, 123 Ga. 336; *Brown v. Doherty*, 93 N. Y. App. Div. 190; *Gibb v. McMahon*, 9 Ont. L. Rep. 522.

987. 3. *Discretionary Acts to Be Performed Jointly*. — *Matter of Wilkin*, 90 N. Y. App. Div. 324.

988. 7. *Powers Annexed to Office*. — *In re Smith*, (1904) 1 Ch. 139; *Re Perrott*, 90 L. T. N. S. 156; *Spengler v. Kuhn*, 212 Ill. 186.

989. 8. *Discretionary Powers May Not Be Delegated*. — *Spengler v. Kuhn*, 212 Ill. 186; *Pollham v. Reveley*, 181 Mo. 622.

990. 4. *Ministerial Powers May Be Delegated*. — *Spengler v. Kuhn*, 212 Ill. 186; *Donaldson v. Allen*, 182 Mo. 626.

991. 1. *Powers Purely Discretionary and Coupled with Trust*. — *Re Sergeant*, 8 Ont. L. Rep. 260.

2. *Interference by Court with Discretion of Trustee*. — *Orr v. Yates*, 209 Ill. 232. See also *Donaldson v. Allen*, 182 Mo. 626.

992. 3. See *Bourquin v. Bourquin*, 120 Ga. 115.

4. *No Power to Sell unless Given by Instrument*. — See *State v. Thresher*, 77 Conn. 70.

993. 4. *Sale Passes Legal Title*. — *Adams v. Carpenter*, 187 Mo. 613; *Scottish-American Mortg. Co. v. Clowney*, 70 S. Car. 229.

994. 4. *May Order Sale in Case of Urgent Necessity*. — *Denegre v. Walker*, 214 Ill. 113, 105 Am. St. Rep. 98.

- 995.** (b) Express Power — *aa.* IN GENERAL. — See notes 2, 3.
996. Right of Successors to Exercise Power. — See notes 3, 4.
bb. DISCRETIONARY POWER. — See notes 7, 8.
997. *cc.* LIMITED POWER — CONSENT — REQUEST. — See note 1.
 Where a Request or Consent in Writing Is Required. — See notes 4, 5.
dd. NO APPLICATION TO COURT NECESSARY. — See note 1.
998. *ee.* POWERS INCIDENT TO POWER OF SALE. — See note 6.
ff. TIME WHEN POWER MAY BE EXERCISED. — See note 7.
1000. See note 2.
1001. *hh.* WHAT PROPERTY MAY BE SOLD. — See note 5.
1002. *ii.* WHAT MAY BE RECEIVED IN CONSIDERATION FOR TRANSFER. — See note 5.
 (c) Implied Power. — See note 6.
1003. See notes 3, 4, 6, 10.
1004. (e) Manner and Terms of Sale. — See notes 6, 7.
1005. (f) Setting Sale Aside. — See notes 6, 7.
1006. See note 1.

995. 2. Express Power to Sell. — *Townsend v. Wilson*, 77 Conn. 411; *Luquire v. Lee*, 121 Ga. 624; *Spengler v. Kuhn*, 212 Ill. 186; *Olcott v. Tope*, 213 Ill. 124; *Cox v. Shelby County Trust Co.*, (Ky. 1904) 80 S. W. Rep. 789; *Hughes v. Bent*, (Ky. 1904) 81 S. W. Rep. 931; *Kennedy v. Dickey*, 99 Md. 295; *Dodson v. Ashley*, 101 Md. 513; *McNutt v. Mutual Ben. L. Ins. Co.*, 181 Mo. 94; *Pollham v. Reveley*, 181 Mo. 622; *Adams v. Carpenter*, 187 Mo. 613; *Nichols v. Nichols*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 381; *Scottish-American Mortg. Co. v. Clowney*, 70 S. Car. 229; *Wiess v. Goodhue*, (Tex. Civ. App. 1904) 79 S. W. Rep. 873; *George v. Zinn*, 57 W. Va. 15.

Concurrence of Beneficiaries Cannot Be Required by Purchaser. — *Re Perrott*, 90 L. T. N. S. 156.

Sale to Cotrustee Upheld. — *Curtis v. Brewer*, (Mich. 1905) 103 N. W. Rep. 579. See generally *infra*, this title, **1016. 4 et seq.**

3. Valid Exercise of Power Passes Title. — *Haggart v. Ranney*, 73 Ark. 344; *Dickson v. New York Biscuit Co.*, 211 Ill. 468; *Dingman v. Beall*, 213 Ill. 238; *St. Louis Land, etc., Assoc. v. Fueller*, 182 Mo. 93; *Sweet v. Schliemann*, 95 N. Y. App. Div. 266.

Dead Need Not Refer to Power. — *McCaughn v. Young*, 85 Miss. 277; *Kirkman v. Wadsworth*, 137 N. Car. 453.

996. 3. When Power Will Not Devolve upon New Trustee. — *Luquire v. Lee*, 121 Ga. 624.

4. Power Passes to Successor. — *Luquire v. Lee*, 121 Ga. 624; *Cox v. Shelby County Trust Co.*, (Ky. 1904) 80 S. W. Rep. 789; *Sweet v. Schliemann*, 95 N. Y. App. Div. 266.

Survivors May Execute Power. — *Haggart v. Ranney*, 73 Ark. 344.

7. Extent of Discretion — Not Absolute. — See *Dickson v. New York Biscuit Co.*, 211 Ill. 468.

8. Imperative Direction to Sell Must Be Followed. *Luquire v. Lee*, 121 Ga. 624.

997. 1. Request or Consent Necessary. — See *Luquire v. Lee*, 121 Ga. 624. Compare *Altschul v. Casey*, 45 Oregon 182.

4. Cannot Be Waived or Ratified. — Compare *Altschul v. Casey*, 45 Oregon 182.

Joining in Conveyance with Trustee Equivalent to Written Consent. — *Kirkman v. Wadsworth*, 137 N. Car. 453.

5. Sufficient Evidence of Consent. — See *Altschul v. Casey*, 45 Oregon 182.

998. 1. Application to Court Unnecessary. — *Goodell v. Sanford*, 31 Mont. 163. See also *George v. Zinn*, 57 W. Va. 15, holding that application to the court is improper unless circumstances make it inequitable for the trustee to proceed under the power of sale vested in him by the instrument creating the trust.

Express Authority to Sell Without Application to Court Does Not Destroy Trust. — *Hughes v. Bent*, (Ky. 1904) 81 S. W. Rep. 931.

999. 6. To Satisfy a Debt or Claim Against the Estate. — See *St. Louis Land, etc., Assoc. v. Fueller*, 182 Mo. 93.

7. Dingman v. Beall, 213 Ill. 238; *Dodson v. Ashley*, 101 Md. 513.

1000. 2. Grantor's Intention to Continue Apparent. — See *Frank v. Colonial, etc., Mortg. Co.*, 86 Miss. 103 (sale after death of settlor).

1001. 5. Instrument Furnishes Guide as to Property that May Be Sold. — *Dickson v. New York Biscuit Co.*, 211 Ill. 468.

1002. 5. Cannot Make Gift. — *Scottish-American Mortg. Co. v. Clowney*, 70 S. Car. 229.

6. Power Implied from Nature of Trustee's Duties. — *Varick v. Smith*, (N. J. 1905) 61 Atl. Rep. 151; *Foil v. Newsome*, 138 N. Car. 115; *In re Curtis*, 26 R. I. 580.

1003. 3. Examples of Implied Power. — See *Foil v. Newsome*, 138 N. Car. 115. Compare *Dickson v. New York Biscuit Co.*, 211 Ill. 468.

4. In re Curtis, 26 R. I. 580.

6. Varick v. Smith, (N. J. 1905) 61 Atl. Rep. 151.

10. "Dispose Of." — *Foil v. Newsome*, 138 N. Car. 115.

1004. 6. Must Follow Directions of Instrument. — *Pollham v. Reveley*, 181 Mo. 622.

7. Sale in Bulk Upheld. — *Benton Land Co. v. Zeitler*, 182 Mo. 251.

1005. 6. Sale in Breach of Trust Set Aside. — *Dingman v. Beall*, 213 Ill. 238; *Flitcraft v. Commonwealth Title Ins., etc., Co.*, 211 Pa. St. 114.

7. No One Except a Beneficiary. — See *Dingman v. Beall*, 213 Ill. 238.

1006. 1. Must Be Clear Showing that Trustee Has Violated Trust. — *Dickson v. New York Biscuit Co.*, 211 Ill. 468.

1006. Inadequacy of Price. — See note 3.

(2) *Power to Lease* — (a) *In General* — Express Power. — See note 5.

1007. Implied Power. — See note 4.

(b) *Length of Term*. — See note 7.

1009. (3) *Power to Mortgage* — (a) *In General*. — See note 1.

Power of Court to Authorize Mortgage. — See notes 3, 4.

1010. (b) Express Power. — See note 4.

1011. (c) Implied Power. — See note 2.

Implication from Power of Sale. — See note 3.

1012. *g. POWERS AS TO MAINTENANCE OF BENEFICIARY* — (1) *Infant Beneficiary* — When Trustees Have Discretion. — See note 6.

1014. (2) *Adult Beneficiary* — When Express Trust for Maintenance Declared. — See note 1.

h. POWER TO APPOINT SUCCESSOR. — See note 2.

j. POWER TO BRING SUIT. — See note 4.

9. Rights of Trustees — *a. RIGHT TO PROFIT FROM OFFICE* —

(1) *In General*. — See note 6.

1015. See note 1.

User of Trust Funds. — See note 2.

1016. *b. RIGHT OF TRUSTEE TO PURCHASE OR LEASE TRUST PROPERTY* — (1) *In General* — Trustee's Purchase Voidable. — See note 5.

1017. See note 1.

1018. *Rule Against Trustee's Purchase Generally Strictly Enforced*. — See notes 4, 5.

Fairness of Sale Question for Court. — Hamilton v. Rhodes, 72 Ark. 625.

1006. 3. Where the Trustees Have Failed to Use Proper Diligence to secure an adequate price the court will refuse to ratify the sale. Callaway v. Hubner, 99 Md. 529.

6. See Olcott v. Tope, 213 Ill. 124.

1007. 4. *Power to Lease Implied*. — Weir v. Barker, 104 N. Y. App. Div. 112.

7. *Term of Ten Years*. — See Weir v. Barker, 104 N. Y. App. Div. 112.

1009. 1. *Incumbrances Forbidden*. — See Gardiner v. Cord, 145 Cal. 157.

3. *Mortgage Authorized by Court*. — See Bourquin v. Bourquin, 120 Ga. 115; Neill v. Neill, (1904) 1 Ir. 513.

4. *Statute Authorizing Court to Order Mortgage*. — Townsend v. Wilson, 77 Conn. 411.

1010. 4. *Power to Mortgage for Improvement of Realty Itself*. — Townsend v. Wilson, 77 Conn. 411.

1011. 2. *Implied Power to Mortgage*. — Roberts v. Hale, 124 Iowa 296.

3. *Not Implied from Mere Power to Sell*. — Townsend v. Wilson, 77 Conn. 411. See also the title POWERS, **1156.** 3 *et seq.*, and see SELL — SOLD, **284.** 8.

1012. 6. *When Trustees Have Discretion*. — Robinson v. Bonaparte, (Md. 1905) 61 Atl. Rep. 212; Bailey's Estate, 208 Pa. St. 594.

1014. 1. *Trust to Support Trustee and Children — Child Who Has Left Home Not Entitled*. — Miskey's Estate, 209 Pa. St. 474.

2. Whitehead v. Whitehead, 142 Ala. 163.

4. Miller v. Butler, 121 Ga. 758; Scribner v. Smith, 104 Mo. App. 542; De Camp v. Wallace, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 436.

Surviving Trustees Sue in Exclusion of Personal Representatives of Deceased Cotrustee. — Maffet v. Oregon, etc., R. Co., (Oregon 1905) 80 Pac. Rep. 489.

6. *Trustees Cannot Profit from Their Office*. —

Bourquin v. Bourquin, 120 Ga. 115; Hayes v. Hall, 188 Mass. 510; Skelding v. Dean, (Mich. 1905) 104 N. W. Rep. 410; Carr's Estate, 24 Pa. Super. Ct. 369; Felkner v. Dooly, 27 Utah 350. See also Read v. Reynolds, 100 Md. 284.

1015. 1. *All Profits Made by Trustee Belong to Trust Estate*. — See Felkner v. Dooly, 27 Utah 350.

2. *Profits by Using Trust Funds*. — Skelding v. Dean, (Mich. 1905) 104 N. W. Rep. 410; Felkner v. Dooly, 27 Utah 350.

1016. 5. *Trustee Cannot Be Buyer and Seller*. — Skelding v. Dean, (Mich. 1905) 104 N. W. Rep. 410; Matter of Long Island L. & T. Co., 92 N. Y. App. Div. 1; Woolf v. Barnes, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 169; Nabours v. McCord, 97 Tex. 526. See also Bronson v. Thompson, 77 Conn. 214; Felkner v. Dooly, 27 Utah 350.

1017. 1. *Trustee Not Allowed to Purchase Trust Property*. — Bronson v. Thompson, 77 Conn. 214; Bourquin v. Bourquin, 120 Ga. 115; Skelding v. Dean, (Mich. 1905) 104 N. W. Rep. 410; Seacoast R. Co. v. Wood, 65 N. J. Eq. 530; Matter of Long Island L. & T. Co., 92 N. Y. App. Div. 1; Scottish-American Mortg. Co. v. Clowney, 70 S. Car. 229; Nabours v. McCord, 97 Tex. 526; Felkner v. Dooly, 27 Utah 350; Harrigan v. Gilchrist, 121 Wis. 127. See also Camusa v. Coigdarripe, 11 British Columbia 177.

Trust in Leasehold — Trustee May Purchase Reversion Where Lease Not Renewable. — Bevan v. Webb, (1905) 1 Ch. 620.

1018. 4. *Title Voidable Although Trustee Acted in Perfect Good Faith*. — Stewart v. Harris, 69 Kan. 498, 105 Am. St. Rep. 178; Scottish-American Mortg. Co. v. Clowney, 70 S. Car. 229; Nabours v. McCord, 97 Tex. 526. Compare Bronson v. Thompson, 77 Conn. 214.

5. *Although Trustee Paid Fair Price Sale May Be Avoided*. — Skelding v. Dean, (Mich. 1905),

- 1019.** See note 2.
- 1020.** A Trustee Who Has an Individual Interest to Preserve. — See note 1.
- 1021.** (2) *By Agreement with Beneficiaries.* — See note 1.
- 1023.** Burden of Proof on Trustee. — See note 3.
- 1024.** See note 1.
- 1025.** (4) *By Court's Consent.* — See note 1.
(5) *Rights Secured by Ratification.* — See note 3.
- 1026.** (6) *Nature of Beneficiary's Rights* — (a) In General. — See notes 3, 4, 5, 6.
- 1027.** When Beneficiary's Remedies Barred. — See note 3.
(b) Remedies of Cestui Que Trust. — See notes 5, 7.
- 1028.** See notes 1, 2, 4, 5.
- 1029.** c. RIGHT TO REIMBURSEMENT — (1) *In General.* — See note 3.
- 1030.** (2) *For Substantial Improvements.* — See notes 1, 6.
(3) *Lien for Reimbursement.* — See note 7.
- 1032.** e. RIGHT TO COMPENSATION — (1) *General Principles* — (a) In England. — See note 5.
- 1033.** (b) In Canada and United States — English Doctrine Generally Repudiated. — See note 4.
- 1034.** See note 4.
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- 1035.** (c) Court's Discretion as to Compensation. — See notes 2, 3, 4.
- 104 N. W. Rep. 410; Scottish-American Mortg. Co. v. Clowney, 70 S. Car. 229; Butnan v. Whipple, 25 R. I. 578; Nabours v. McCord, 97 Tex. 526.
- 1019.** 2. Trustee Cannot Purchase as Agent of Another. — Nabours v. McCord, 97 Tex. 526.
- 1020.** 1. Trustee Not Vendor Entitled to Purchase to Preserve Interest. — Harrigan v. Gilchrist, 121 Wis. 127.
- 1021.** 1. Trustee May Sell His Own Real Estate to Beneficiary Taking Trust Funds in Payment. — Skelding v. Dean, (Mich. 1905) 104 N. W. Rep. 410.
- 1023.** 3. Burden of Proof Rests on Trustee. — Stewart v. Harris, 69 Kan. 498, 105 Am. St. Rep. 178.
- 1024.** 1. See Felkner v. Dooley, 27 Utah 350.
- 1025.** 1. Trustee Should Ask Consent of Court. — Hayes v. Hall, 188 Mass. 510; Felkner v. Dooley, 27 Utah 350.
3. Trustee Must Impart All Information in His Power. — Matter of Long Island L. & T. Co., 92 N. Y. App. Div. 1.
- 1026.** 3. Beneficiary Only May Avoid Sale. — Bronson v. Thompson, 77 Conn. 214; Nabours v. McCord, 97 Tex. 526; Harrigan v. Gilchrist, 121 Wis. 127.
4. Title Good Against All Save Beneficiaries. — Bronson v. Thompson, 77 Conn. 214; Nabours v. McCord, 97 Tex. 526.
5. Beneficiaries' Right to Set Sale Aside Absolute. — Harrigan v. Gilchrist, 121 Wis. 127.
6. Beneficiaries Must Repudiate Sale in a Reasonable Time. — Nabours v. McCord, 97 Tex. 526.
- 1027.** 3. Beneficiary Must Have Knowledge of All Facts. — Matter of Long Island L. & T. Co., 92 N. Y. App. Div. 1.
5. Bourquin v. Bourquin, 120 Ga. 115.
7. Cestui May Hold Trustee to His Purchase. — Nabours v. McCord, 97 Tex. 526.
- 1028.** 1. Beneficiaries May Disaffirm Sale. — Nabours v. McCord, 97 Tex. 526.
2. Reconveyance Required. — Bourquin v. Bourquin, 120 Ga. 115; Nabours v. McCord, 97 Tex. 526.
4. Trustee Required to Account for Rents and Profits of Property Purchased. — Bourquin v. Bourquin, 120 Ga. 115.
5. Trustee Accountable for Profits Derived from Resale by Him of Trust Property. — Felkner v. Dooley, 27 Utah 350.
- 1029.** 3. Reimbursed for Money Advanced. — Bourquin v. Bourquin, 120 Ga. 115.
- Remainderman Not Compelled to Reimburse for Taxes Paid for Cestui. — Penn-Gaskell's Estate, 208 Pa. St. 342.
- 1030.** 1. Removal of Incumbrances. — Bourquin v. Bourquin, 120 Ga. 115.
6. Clearly Authorized by Trust Instrument. — Bourquin v. Bourquin, 120 Ga. 115.
7. Trustee Has Equitable Lien for All Proper Expenses. — Bourquin v. Bourquin, 120 Ga. 115.
- 1032.** 5. In England Trustee Not Allowed Compensation. — See Parker v. Hill, 185 Mass. 14.
- 1033.** 4. Trustee Generally Allowed a Fair Compensation for His Services. — Parker v. Hill, 185 Mass. 14; Donaldson v. Allen, 182 Mo. 626. See also Willis v. Clymer, 66 N. J. Eq. 284.
- Trustee's Compensation Must Be Sought in Equity. — Hazard v. Coyle, 26 R. I. 361.
- Double Commissions as Both Executor and Trustee Not Allowable. — Kennedy v. Dickey, 99 Md. 295.
- 1034.** 4. Within Equity of Statutes Regulating Compensation of Other Fiduciaries. — Penn-Gaskell's Estate, 208 Pa. St. 342.
6. Fanning v. Main, 77 Conn. 94; Willis v. Clymer, 66 N. J. Eq. 284; Matter of Rowe, (Surrogate Ct.) 42 Misc. (N. Y.) 172.
- 1035.** 2. Court May Refuse or Allow Commissions to Trustees. — Kennedy v. Dickey, 99 Md. 295, refusing to allow compensation for merely distributing a fund and accounting to

- 1035.** Effect of Statutory Regulations. — See note 5.
1036. In Determining the Amount of Commissions or Compensation. — See note 4.
1037. (2) *Waiver*. — See note 3.
1039. (4) *When Trustee Entitled to Extra Compensation*. — See note 3.
1041. (6) *On What Fund Charged* — (a) *On Income*. — See note 2.
 (b) *On Principal*. — See note 5.
1042. (7) *When Commissions Payable* — (a) *In General*. — See notes 4, 6.
1043. (b) *At Expiration of Trust*. — See note 1.
 Basis of Estimating Commissions. — See note 3.
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 (c) *Periodical Accountings*. — See note 8.
1044. See note 1.
 (8) *Right to Charge for Professional or Business Services* — Rendered by Trustee. — See note 8.
1045. 10. Duties of Trustees — *a. IN GENERAL*. — See note 4.
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1046. Disclosure of Facts. — See note 2.
1047. Care and Diligence. — See note 3.
1048. *b. TO EXECUTE THE TRUST*. — See note 3.
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1050. *c. APPLICATION TO COURT FOR ADVICE*. — See note 8.
1051. See notes 1, 2, 4.

the estate for it; *Penn-Gaskell's Estate*, 208 Pa. St. 342.

1035. 3. Or Court May Grade the Amount Allowed. — See *Kennedy v. Dickey*, 9 Md. 295.

4. Court's Power Unlimited. — See *Kennedy v. Dickey*, 99 Md. 295.

5. A Statutory Limit Cannot Generally Be Exceeded. — See *In re McCallum*, 211 Pa. St. 205.

1036. 4. Trustee's Ability and Reputation in Business World. — *Parker v. Hill*, 185 Mass. 14.

1037. 3. Trustee May Waive His Right to Commissions. — *Matter of Fisk*, (Surrogate Ct.) 45 Misc. (N. Y.) 298.

1039. 3. Existence of Express Agreement. — *Jarrett v. Johnson*, 216 Ill. 212, citing 28 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1039.

1041. 2. Commissions Charged on Income. — *McCallum's Estate*, 211 Pa. St. 205.

5. Liability of Principal for Commissions. — *Penn-Gaskell's Estate*, 208 Pa. St. 342.

1042. 4. If Corpus Liable Commissions Deducted when Trust Expires. — *Penn-Gaskell's Estate*, 208 Pa. St. 342.

6. When Commissions on Principal Allowed Before Termination of Trust. — *Penn-Gaskell's Estate*, 208 Pa. St. 342.

1043. 1. Commissions First Satisfied. — See *Matter of Fisk*, (Surrogate Ct.) 45 Misc. (N. Y.) 298.

3. When Percentage Allowed. — *Matter of Fisk*, (Surrogate Ct.) 45 Misc. (N. Y.) 298; *Hazard v. Coyle*, 26 R. I. 361.

6. Commissions upon Receipts. — *McCallum's Estate*, 211 Pa. St. 205.

No Commissions for Collecting Accrued Interest. — *Kennedy v. Dickey*, 99 Md. 295.

7. Commissions on Disbursements. — *Donaldson v. Allen*, 182 Mo. 626.

8. Commissions Deducted When Periodical Accountings Made. — See *Matter of Fisk*, (Surrogate Ct. 45 Misc. (N. Y.) 298.

1044. 1. New York Doctrine. — Compare *Matter of Fisk*, (Surrogate Ct.) 45 Misc. (N. Y.) 298.

8. Rule in United States. — *Willis v. Clymer*, 66 N. J. Eq. 284.

1045. 4. Duty to Preserve Estate Unimpaired. — *State v. Thresher*, 77 Conn. 70.

Duties of Trustee Limited by Instrument under Which He Acts. — *George v. Zinn*, 57 W. Va. 15.

5. Good Faith Required. — *Bourquin v. Bourquin*, 120 Ga. 115; *Sawyer v. Cook*, 188 Mass. 163; *Spier v. Hyde*, 92 N. Y. App. Div. 467.

1046. 2. *Spier v. Hyde*, 92 N. Y. App. Div. 467.

1047. 3. Ordinary Care and Diligence Required. — *Bourquin v. Bourquin*, 120 Ga. 115; *Donaldson v. Allen*, 182 Mo. 626. See also *Sawyer v. Cook*, 188 Mass. 163.

1048. 3. To Execute Trust. — *State v. Thresher*, 77 Conn. 70.

7. Where Executor Becomes Trustee. — See *Gidley v. Lovenberg*, 35 Tex. Civ. App. 203.

1050. 8. May Apply to Court for Instruction, Advice, Aid, and Direction. — *Beardsley v. Bridgeport Protestant Orphan Asylum*, 76 Conn. 560; *Orr v. Yates*, 209 Ill. 232; *Merrill v. Wooster*, 99 Me. 460; *Graham v. Whitridge*, 99 Md. 248; *Kelley v. Snow*, 185 Mass. 288; *Skinner v. Taft*, (Mich. 1905) 103 N. W. Rep. 702; *Dozier v. Dozier*, 183 Mo. 137; *Holland Trust Co. v. Sutherland*, 177 N. Y. 327; *Winn v. Itzel*, 125 Wis. 19.

Order of Court Held Not to Relieve from Liability for Disregarding Terms of Trust. — *State v. Thresher*, 77 Conn. 70.

Courts Will Not Advise as to Property in Another Jurisdiction. — *Thayer v. Fairchild*, 25 R. I. 509.

1051. 1. As to Disposition of Funds. — *Skinner v. Taft*, (Mich. 1905) 103 N. W. Rep. 702; *Holland Trust Co. v. Sutherland*, 177 N. Y. 327.

2. Conflicting Claims. — *Kelley v. Snow*, 185

- 1052.** It Is Only Where There Is Some Reasonable Question or Doubt. — See note 3.
 Future Rights — Questions of Law — Discretionary Powers. — See note 5.
- 1053.** See note 2.
d. MANAGEMENT OF PROPERTY — (1) *General Duties*. — See note 9.
- 1055.** Duty to Pay Taxes and Assessments. — See note 4.
- 1057.** (2) *Treatment of Funds* — Corpus Liable. — See note 1.
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- 1058.** When Principal May Be Invaded. — See note 7.
- 1059.** 11. Liabilities of Trustees — *a.* IN GENERAL — (1) *General Rule*. — See note 1.
- 1060.** In England and Canada. — See note 4.
- 1063.** (6) *Liability in Tort*. — See note 8.
b. FOR MISTAKES. — See note 9.
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- 1064.** (2) *Fraud, Conversion, or Misappropriation* — Conversion. — See note 6.
- 1065.** Misappropriation. — See note 1.
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- 1067.** (3) *Payment to Persons Not Entitled*. — See note 3.
- 1068.** Approval of Court. — See note 10.
 (4) *Negligence in Getting in Trust Property* — Debts. — See note 18.
- 1069.** *e.* PARTICULAR LOSSES — (1) *By Depreciation*. — See note 6.
- 1070.** *f.* FOR ACTS OF COTRUSTEES — (1) *General Rule* — In the United States. — See note 1.
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Mass. 288; *Dozier v. Dozier*, 183 Mo. 137; *Winn v. Itzel*, 125 Wis. 19.

1051. 4. Matters Arising After Creation of Trust. — *Townsend v. Wilson*, 77 Conn. 411; *Graham v. Whitridge*, 99 Md. 248; *Dozier v. Dozier*, 183 Mo. 137.

1052. 3. As to Powers and Duties. — *Holland Trust Co. v. Sutherland*, 177 N. Y. 327.

5. Not Entitled to Direction as to Future Rights. — *Varick v. Smith*, (N. J. 1905) 61 Atl. Rep. 151.

1053. 2. Or Where Trustee Required to Exercise Discretionary Power. — *Holland Trust Co. v. Sutherland*, 177 N. Y. 327.

9. Trustee Should Act for Interests of All. — *Penn-Gaskell's Estate*, 208 Pa. St. 342.

1055. 4. Duty to Pay Taxes. — *Bourquin v. Bourquin*, 120 Ga. 115, holding further that a mortgage may be authorized by the court in case of necessity to raise money to pay taxes.

1057. 1. Corpus Liable. — *Townsend v. Wilson*, 77 Conn. 411.

4. Trust Funds to Be Kept Distinct and Separate. — *Dunn v. Dunn*, 137 N. Car. 533.

1058. 7. Contrary Doctrine. — See *Townsend v. Wilson*, 77 Conn. 411.

1059. 1. General Rule as to Liability. — *Taft v. Smith*, 186 Mass. 31.

Trustee Not Liable for Acts Within Scope of His Powers. — *Miller v. Butler*, 121 Ga. 758.

1060. 4. *Cairns v. Murray*, 37 Nova Scotia 451.

1063. 8. The Trust Estate, and Not the Trustee, is liable for the negligence of the employees of a trustee who has the power to deal

with the trust estate as if he were the actual owner. *Prinz v. Lucas*, 210 Pa. St. 620.

9. Liability for Mistakes. — *Taft v. Smith*, 186 Mass. 31.

11. Liability for Transcending Powers. — *Slayback v. Raymond*, 93 N. Y. App. Div. 326.

1064. 6. Conversion. — *Dunning v. Bates*, 186 Mass. 123.

1065. 1. Misappropriation of Funds. — *Cropsey v. Johnston*, 137 Mich. 16; *Harrigan v. Gilchrist*, 121 Wis. 127.

6. Neglect of Duty. — *Bourquin v. Bourquin*, 120 Ga. 115; *Dunning v. Bates*, 186 Mass. 123.

1067. 3. Payment to Persons Not Entitled. — See *Matter of Elting*, 93 N. Y. App. Div. 516.

An Overpayment of Beneficiaries by a trustee who is himself a beneficiary does not entitle the trustee to recover the amount overpaid. *In re Horne*, (1905) 1 Ch. 76.

1068. 10. Approval of Court. — *Matter of Elting*, 93 N. Y. App. Div. 516.

18. Neglect to Collect or Secure Debt. — *Carr's Estate*, 24 Pa. Super. Ct. 369.

1069. 6. A Trustee So Investing Trust Funds as Personally to Profit Thereby is liable for any loss occurring by reason of such investment. *Carr's Estate*, 24 Pa. Super. Ct. 369.

1070. 1. Rule in United States. — *Farmers' L. & T. Co. v. Pendleton*, 179 N. Y. 486; *Matter of Mallon*, (Surrogate Ct.) 43 Misc. (N. Y.) 569.

3. Mere Passiveness Creates No Liability. — *Matter of Mallon*, (Surrogate Ct.) 43 Misc. (N. Y.) 569.

1095. (f) Proof of Disbursements — *bb.* HOW MADE. — See note 11.

1101. VII. THE CESTUI QUE TRUST — 2. Who May Be Cestui Que Trust —

a. IN GENERAL. — See note 1.

Persons Not in Existence. — See note 5.

Cestui Que Trust Must Be Ascertained. — See notes 6, 7.

b. STATE AND UNITED STATES. — See note 8.

c. CORPORATIONS. — See note 10.

1102. *d.* UNINCORPORATED SOCIETIES — Charitable and Religious Societies. — See note 4.

1105. 4. Rights of Cestui Que Trust — *b.* RIGHTS INTER SE. — See note 8.

1106. *d.* RIGHT TO POSSESSION OF PROPERTY — Real Estate. — See note 7.

1107. *e.* ALIENATING OR ENCUMBERING PROPERTY. — See notes 4, 5, 6.

1108. *g.* FOLLOWING TRUST PROPERTY — (1) *When Right to Retake Exists* — (a) Rule Stated. — See note 10.

1110. (b) Nature of Substituted Property. — See note 4.

1111. See note 2.

(c) Into Whose Hands Followed. — See notes 4, 7.

1112. Third Person with Notice. — See note 1.

1113. Third Person Without Notice. — See note 3.

1114. (d) Election to Take Trust Property or Its Substitute. — See note 2.

1095. 11. Payment Should Be Proved by Vouchers. — *Willis v. Clymer*, 66 N. J. Eq. 284.

1101. 1. Settlor Himself May Be Cestui Que Trust. — *Brillhart v. Mish*, 99 Md. 447; *Carroll v. Smith*, 99 Md. 653; *Dayton v. Stewart*, 99 Md. 643; *Angle v. Marshall*, 55 W. Va. 671.

5. Persons Not in Existence. — *Stiles v. Cummings*, 122 Ga. 635; *Plant v. Plant*, 122 Ga. 763.

6. Cestui Que Trust Must Be Ascertained. — *Filkins v. Severin*, 127 Iowa 738; *Bowman v. Domestic, etc., Missionary Soc.*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 574, reversed on other grounds 100 N. Y. App. Div. 29; *Mount v. Tuttle*, 99 N. Y. App. Div. 433; *Gidley v. Lovenberg*, 35 Tex. Civ. App. 203; *Austin v. Cahill*, (Tex. 1905) 88 S. W. Rep. 542; *Weaver v. Spurr*, 56 W. Va. 95. See also *Daly's Estate*, 208 Pa. St. 58; *Kronshage v. Varrell*, 120 Wis. 161.

7. Cestui Que Trust Need Not Be Named in Instrument. — *Gidley v. Lovenberg*, 35 Tex. Civ. App. 203.

8. State May Be Cestui Que Trust. — *Com. v. Clark*, (Ky. 1904) 83 S. W. Rep. 100.

10. Corporations as Cestuis Que Trustent of Personality. — *Merritt-Allen Co. v. Torrence*, (Iowa 1905) 102 N. W. Rep. 154.

1102. 4. Charitable and Religious Societies. — *Osgood v. Rogers*, 186 Mass. 238; *Daly's Estate*, 208 Pa. St. 58.

1105. 8. Contribution Between Cestuis Que Trustent. — *Somerset R. Co. v. Pierce*, 98 Me. 528.

1106. 7. Right to Possession of Real Estate. — See *Hughes v. Bent*, (Ky. 1904) 81 S. W. Rep. 931; *Carpenter v. Carpenter*, (Ky. 1905) 84 S. W. Rep. 737.

1107. 4. Right of Cestui to Alienate or Encumber. — *Loomer v. Loomer*, 76 Conn. 522; *Bronson v. Thompson*, 77 Conn. 214; *Brillhart v. Mish*, 99 Md. 447; *Lynch v. Herrig*, 32 Mont. 267; *Jastram v. McAuslan*, 26 R. I. 320.

5. Equitable Interest Must Be Vested One. —

Brillhart v. Mish, 99 Md. 447; *Jastram v. McAuslan*, 26 R. I. 320.

6. Consent of Trustee. — *Luquire v. Lee*, 121 Ga. 624.

1108. 10. Rule Stated. — *James v. Aller*, 66 N. J. Eq. 69.

Similar Statement of Rule. — *Bottom v. Barton*, 19 Colo. App. 319; *Metropolis First Nat. Bank v. Leech*, 207 Ill. 215; *Holderman v. Hood*, 70 Kan. 267; *Squires v. O'Maley*, (Ky. 1905) 84 S. W. Rep. 1172; *Cutler v. Meeker*, (Neb. 1904) 99 N. W. Rep. 514; *Welch v. Polley*, 177 N. Y. 117; *Brown v. Doherty*, 93 N. Y. App. Div. 190; *Berry v. Evendon*, (N. Dak. 1904) 103 N. W. Rep. 748; *Schwartz v. Gerhardt*, 44 Oregon 425; *Carr's Estate*, 24 Pa. Super. Ct. 369; *Welborn v. Dixon*, 70 S. Car. 108; *Texas Moline Plow Co. v. Kingman Texas Implement Co.*, 32 Tex. Civ. App. 343; *Sparks v. Taylor*, (Tex. Civ. App. 1905) 87 S. W. Rep. 740; *Harrigan v. Gilchrist*, 121 Wis. 127.

1110. 4. Trust Money Invested in Lands. — *Berry v. Evendon*, (N. Dak. 1904) 103 N. W. Rep. 748; *Carr's Estate*, 24 Pa. Super. Ct. 369.

1111. 2. Money Received from Sale of Land Held in Trust. — *Welborn v. Dixon*, 70 S. Car. 108.

4. Following Substituted Property into Hands of Trustee. — *Berry v. Evendon*, (N. Dak. 1904) 103 N. W. Rep. 748; *Carr's Estate*, 24 Pa. Super. Ct. 369.

7. Personal Representatives. — *In re Fisher*, (Iowa 1905) 102 N. W. Rep. 797.

1112. 1. Third Person Taking Notice of Trust. — *Holderman v. Hood*, 70 Kan. 267; *Schwartz v. Gerhardt*, 44 Oregon 425; *Sparks v. Taylor*, (Tex. Civ. App. 1905) 87 S. W. Rep. 740.

1113. 3. Bona Fide Purchaser for a Valuable Consideration and Without Notice. — *Holderman v. Hood*, 70 Kan. 267.

1114. 2. Election. — *Holderman v. Hood*, 70 Kan. 267; *Libby v. Frost*, 98 Me. 288; *Carr's Estate*, 24 Pa. Super. Ct. 369.

1117. (2) *When Right to Lien Exists* — (c) *Trust Property Entering into Trustee's General Estate* — *Doctrine Overturned*. — See note 6.

1119. *Present Doctrine*. — See note 1.

1120. (3) *Burden of Proof*. — See note 1.

5. Remedies of Cestui Que Trust — *b. DIFFERENT REMEDIES CONSIDERED* — (1) *Enforcing Personal Liability Against Trustee* — (a) *In General*. — See notes 4, 6.

1121. See note 1.

(b) *Damages* — *Value of Property Misappropriated*. — See note 2.

(2) *Enforcing Terms of Trust*. — See note 7.

(3) *Compelling an Accounting* — *By Trustee*. — See notes 9, 10, 11, 12. *By Third Person Holding Trust Property*. — See note 13.

1122. (6) *Injunction*. — See note 4.

1123. *c. LOSS OF REMEDIES* — (2) *Estoppel and Waiver*. — See notes 7, 8.

1124. See notes 1, 3, 5.

1125. *VIII. RIGHTS AND LIABILITIES OF PURCHASERS* — 1. *Duty to See Purchase Money Applied* — *a. WHEN TRUST IS DEFINITE* — (4) *Doctrine Criticised*. — See note 6.

1126. *b. NOTICE, FRAUD, AND COLLUSION* — (1) *Fraud by Trustee*. — See note 3.

1128. (5) *What Constitutes Notice*. — See note 5.

1129. *Duty to Ascertain Powers of Trustee*. — See note 1.

1117. 6. *Doctrine Overturned*. — See *Harrigan v. Gilchrist*, 121 Wis. 127.

1119. 1. *Traced into Specific Property*. — *Boyle v. Northwestern Nat. Bank*, 125 Wis. 498.

1120. 1. *Burden of Proof on Cestui*. — *Schwartz v. Gerhardt*, 44 Oregon 425; *Texas Moline Plow Co. v. Kingman Texas Implement Co.*, 32 Tex. Civ. App. 343.

4. Identity Lost. — *Holderman v. Hood*, 70 Kan. 267; *Dunn v. Dunn*, 137 N. Car. 533; *Harrigan v. Gilchrist*, 121 Wis. 127.

6. May Elect to Hold Trustee Personally Liable. — *Dickson v. New York Biscuit Co.*, 211 Ill. 468; *Lattan v. Totten*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 116, *reversed* on other grounds 107 N. Y. App. Div. 393. See also *Cunningham v. Cunningham*, 125 Iowa 681. *Compare Slayback v. Raymond*, 93 N. Y. App. Div. 326.

May Sue on Bond for Breach of Trust. — *State v. Thresher*, 77 Conn. 70.

1121. 1. *Election Binding on Cestui*. — *Dickson v. New York Biscuit Co.*, 211 Ill. 468. *Compare Slayback v. Raymond*, 93 N. Y. App. Div. 326.

2. Value of Property Misappropriated Recovered. — *Harrigan v. Gilchrist*, 121 Wis. 127.

7. Enforcing Terms of Trust. — *Metcalfe v. Union Trust Co.*, 181 N. Y. 39; *Harrigan v. Gilchrist*, 121 Wis. 127.

9. Duty of Trustees to Inform Cestui of State of Trust. — *Woolf v. Barnes*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 169. See also *Evans v. Evans*, (N. J. 1904) 57 Atl. Rep. 872.

10. Neglect to Account. — *Jarrett v. Johnson*, 216 Ill. 219; *Evans v. Evans*, (N. J. 1904) 57 Atl. Rep. 872; *Morris v. Hughes*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 278.

11. Refusal to Account. — *Merritt-Allen Co. v. Torrence*, (Iowa 1905) 102 N. W. Rep. 154;

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12. Imperfect Accounts. — *Jordan v. Underhill*, 91 N. Y. App. Div. 124.

13. Accounting by Third Person Holding Trust Property. — *Welch v. Polley*, 177 N. Y. 117. See also *Schwartz v. Gerhardt*, 44 Oregon 425.

Personal Representatives of Trustee May Be Compelled to Account. — *In re Fisher*, (Iowa 1905) 102 N. W. Rep. 797.

1122. 4. *Injunction Will Lie*. — *Coleman v. McGrew*, (Neb. 1904) 99 N. W. Rep. 663.

1123. 7. *Authorization or Concurrence*. — *Fletcher v. Collis*, (1905) 2 Ch. 24; *Libby v. Frost*, 98 Me. 288.

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1124. 1. *Ratification*. — See *Matter of Long Island L. & T. Co.*, 92 N. Y. App. Div. 1.

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5. Knowledge of Facts. — *Libby v. Frost*, 98 Me. 288.

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1125. 6. *Doctrine Criticised*. — See *Dickson v. New York Biscuit Co.*, 211 Ill. 468.

1126. 3. *Fraud by Trustee*. — *Metropolis First Nat. Bank v. Leech*, 207 Ill. 215; *Berner v. German State Bank*, 125 Iowa 438; *Jones v. Dulancy*, (Ky. 1905) 86 S. W. Rep. 547; *Schwingel v. Anthes*, (Neb. 1904) 101 N. W. Rep. 335; *Schneider v. Sellers*, 98 Tex. 380.

1128. 5. *What Constitutes Notice*. — *Ludington v. Mercantile Nat. Bank*, 102 N. Y. App. Div. 251, *affirmed* 182 N. Y. 522.

1129. 1. *Duty to Ascertain Powers of Trustee*. — *Goodell v. Sanford*, 31 Mont. 163; *Luding-*

- 1129.** Trust Apparent on Face of Instrument. — See note 3.
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- 1131.** 2. No Duty to See Purchase Money Applied — *a.* WHEN TRUST IS INDEFINITE — (4) *Trust Involving Time and Discretion.* — See notes 4, 5.
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- 1132.** *d.* PURCHASER FOR VALUE WITHOUT NOTICE. — See note 2.
- 1133.** IX. LIMITATIONS AND LACHES — 1. In General. — See note 1.
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- 1134.** See note 1.
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- 1135.** 4. As Between Trust Estate and Strangers. — See note 2.
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ton *v.* Mercantile Nat. Bank, 102 N. Y. App. Div. 251, *affirmed* 182 N. Y. 522.

1129. 3. Trust Apparent on Face of Instrument. — Johnson *v.* Amberson, 140 Ala. 342.

4. Use of the Word "Trustee." — Flitcraft *v.* Commonwealth Title Ins., etc., Co., 211 Pa. St. 114.

1131. 4. Beneficiaries Infants at Time of Sale. — Dickson *v.* New York Biscuit Co., 211 Ill. 468.

5. Trust to Invest. — Dickson *v.* New York Biscuit Co., 211 Ill. 468; Hughes *v.* Bent, (Ky. 1904) 81 S. W. Rep. 931; Louisville, etc., R. Co. *v.* Horn, (Ky. 1904) 82 S. W. Rep. 567.

6. Purchaser from Trustee Authorized to Sell. — Dickson *v.* New York Biscuit Co., 211 Ill. 468.

1132. 2. Purchaser for Value Without Notice. — Adams *v.* Carpenter, 187 Mo. 613.

1133. 1. Limitations and Laches. — Baldwin *v.* Williams, (Ark. 1905) 86 S. W. Rep. 423; Prewitt *v.* Prewitt, 188 Mo. 675; Patton *v.* Pinkston, 86 Miss. 651; Goodell *v.* Sanford, 31 Mont. 163; Dunn *v.* Dunn, 137 N. Car. 533; Richardson *v.* McConaughy, 55 W. Va. 546.

2. Express Trusts Not Within the Statutes. — Com. *v.* Clark, (Ky. 1904) 83 S. W. Rep. 100; Dunning *v.* Bates, 186 Mass. 123; Sawyer *v.* Cook, 188 Mass. 163; Lufkin *v.* Jakeman, 188 Mass. 528; Thorne *v.* Foley, 137 Mich. 649; Jewell *v.* Jewell, (Mich. 1905) 102 N. W. Rep. 1059; Barnett *v.* Barnett, (Tex. Civ. App. 1904) 80 S. W. Rep. 537. See also Downer *v.* Squire, 186 Mass. 189; Bridgens *v.* West, 35 Tex. Civ. App. 277.

1134. 1. Continuing Trusts Not Cognizable at Law. — Hitchcock *v.* Cosper, (Ind. 1904) 69

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Repudiation or Disavowal Question of Fact. — Crowley *v.* Crowley, 72 N. H. 241.

1135. 2. As Between Trust Estate and Strangers. — Miller *v.* Butler, 121 Ga. 758; McMurray *v.* McMurray, 180 Mo. 526; Brown *v.* Doherty, 93 N. Y. App. Div. 190; Schneider *v.* Sellers, 98 Tex. 380. Compare Gordon *v.* McDougall, 84 Miss. 715.

4. Laches. — Kansas City Southern R. Co. *v.* Stevenson, 135 Fed. Rep. 553; Kleinclaus *v.* Dutard, 147 Cal. 245; Sawyer *v.* Cook, 188 Mass. 163; Thorne *v.* Foley, 137 Mich. 649; Skelding *v.* Dean, (Mich. 1905) 104 N. W. Rep. 410; Bland *v.* Windsor, 187 Mo. 108; Cresap *v.* Cresap, 54 W. Va. 581; Faulkner *v.* Grantham, 55 W. Va. 317. See also Stanwood *v.* Wishard, 134 Fed. Rep. 959; Cantwell *v.* Crowley, 188 Mo. 44; Slayback *v.* Raymond, 93 N. Y. App. Div. 326; Felkner *v.* Dooly, 27 Utah 350. Compare Potter *v.* Kimball, 186 Mass. 120.

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By M. G. BEAMAN.

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24. 10. Special and General Laws. — Heath v. Manire, 114 Tenn. 105.

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31. 1. Statutes Authorizing Surrender to or Taking by Public. — Perkiomen, etc., Turnpike Road, 25 Pa. Super. Ct. 462.

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By O. D. ESTEE.

42. II. DEFINITION. — See note 3.

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48. 3. Where Plea Would Work Legal Wrong. — In re Waterloo Organ Co., 128 Fed. Rep. 517, reversed on other grounds, the principle being held to be inapplicable, (C. C. A.) 134 Fed. Rep. 341.

49. 5. Executory Contracts. — See Gause v.

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51. 1. General Rule as to Contracts Executed on One Side. — Roosevelt v. Nashville, etc., R. Co., 128 Fed. Rep. 465; U. S. Savings, etc., Co. v. St. Rode's Convent, (C. C. A.) 133 Fed. Rep. 354; Burnes v. Burnes, 132 Fed. Rep. 485; Thompson v. Commercial Union Assur. Co., (Colo. App. 1904) 78 Pac. Rep. 1073; Traer v. Lucas Prospecting Co., 124 Iowa 107; Wisconsin Lumber Co. v. Greene, etc., Tele-

53. See note 1.

60. (2) *On Both Sides.* — See note 1.

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74. XI. *WHO MAY OBJECT TO ULTRA VIRES ACTS* — 1. *Stockholders* — *a. THE RULE AND ITS LIMITATIONS.* — See note 3.

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53. 1. *York v. Farmers Bank*, 105 Mo. App. 127.

60. 1. *Contracts Fully Executed.* — *Anglo-American Land, etc., Co. v. Lombard*, (C. C. A.) 132 Fed. Rep. 721.

2. *Contracts Mala in Se.* — See *Gause v. Commonwealth Trust Co.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 46, *reversed* on questions of pleading 100 N. Y. App. Div. 427.

61. 1. *Contracts Expressly Prohibited.* — *Anglo-American Land, etc., Co. v. Lombard*, (C. C. A.) 132 Fed. Rep. 721; *In re S. P. Smith Lumber Co.*, 132 Fed. Rep. 620; *Gause v. Commonwealth Trust Co.*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 46, *reversed* on questions of pleading 100 N. Y. App. Div. 427.

65. 1. *Motive of Contract.* — *In re Payne*, (1904) 2 Ch. 608, *overruling In re Durham County Permanent Invest., etc., Soc.*, L. R. 12 Eq. 516, and applying the principle in the case of money borrowed under a general power and misapplied.

3. *Diversion of Proceeds of Transaction.* — *Traer v. Lucas Prospecting Co.*, 124 Iowa 107. See also *Roosevelt v. Nashville, etc., R. Co.*, 128 Fed. Rep. 465.

67. 3. *Money Lent.* — Where a corporation lends money without authority, the debtor is not permitted to set up the defense of *ultra vires*. *Russell v. Cassidy*, 108 Mo. App. 577.

68. 1. *Acquisition of Property.* — *Pere Marquette R. Co. v. Graham*, 136 Mich. 444.

71. 6. *General Rule as to Personal Liability of Officers.* — *Young v. Naval, etc., Co-operative Soc.*, (1905) 1 K. B. 687.

8. *Acquiescence* — See *McConnell v. Combination Min., etc., Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, holding that minority stockholders who did not acquiesce in *ultra vires* use of corporate funds might maintain an action for damages notwithstanding acquiescence by the majority. And see the titles OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, **878.** 2; STOCK AND STOCKHOLDERS, **961.** 6.

74. 3. *Stockholder's Right to Contest Transactions.* — *Pedlar v. Road Block Gold Mines*, (1905) 2 Ch. 427; *Finance, etc., v. Canadian Produce Corp.*, (1905) 1 Ch. 37, 91 L. T. N. S. 685. See also *Manners v. St. David's Gold, etc., Mines*, (1904) 2 Ch. 593; *Stroud v. Royal Aquarium, etc., Soc.*, 89 L. T. N. S. 243. And see the title STOCK AND STOCKHOLDERS, **961.** 6.

80. 5. See *Matter of New York Sabbath Committee*, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 422, wherein the defense of *ultra vires* was sustained to an application by a corporation to secure the revocation of a theatre's license.

86. 5. *Officers' Acts in Excess of Their Authority.* — See *Kansas City First Nat. Bank v. Guardian Trust Co.*, 187 Mo. 494.

91. 4. *Un* is a preposition used indiscriminately, and may mean simply "not." *State v. Savant*, 115 La. 226.

8. *Unavoidable Accidents.* — See *Tracy v. Grand Trunk R. Co.*, 76 Vt. 322.

99. 2. *Undertakers — English Workers Compensation Act 1897.* — *McCabe v. Jopling, etc., Travelling Cradle*, (1904) 1 K. B. 222; *Knight v. Cubitt*, (1902) 1 K. B. 31.

UNDUE INFLUENCE.

BY H. N. ELDRIDGE.

103. I. DEFINITION AND NATURE — 1. Definition — Common Law. — See note 1.

104. 2. Capacity Implied. — See note 2.

105. 3. What Are Proper Influences. — See notes 1, 4, 5, 6, 7, 9.

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107. 4. Relation to Fraud. — See notes 1, 3.

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2. Influence Directed to Particular Act. — See note 8.

108. 3. Existence of Influence at Time of Act. — See notes 1, 3.

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109. IV. EVIDENCE — 1. Undue Influence a Question of Fact. — See note 12.

103. 1. Undue Influence Is Defined in the Following Cases — *California.* — Matter of Donovan, 140 Cal. 390.

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Illinois. — England v. Fawbush, 204 Ill. 384;

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Pennsylvania. — Caughey v. Bridenbaugh, 208 Pa. St. 414.

Rhode Island. — Mullen v. McKeon, 25 R. I. 305.

Texas. — Wetz v. Schneider, 34 Tex. Civ. App. 201; Morrison v. Thoman, (Tex. Civ. App. 1905) 86 S. W. Rep. 1069.

West Virginia. — Stewart v. Lyons, 54 W. Va. 665.

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104. 2. Capacity Implied. — Kennedy v. Dickey, 100 Md. 152; Struth v. Decker, 100 Md. 368.

105. 1. Not All Influences Undue. — Caughey v. Bridenbaugh, 208 Pa. St. 414; Morrison v. Thoman, (Tex. Civ. App. 1905) 86 S. W. Rep. 1069; Stewart v. Lyons, 54 W. Va. 665.

Influence Exerted Merely to Induce the Making of a Will, leaving the testator free from influence as to the provisions of the will, is not undue influence in the legal sense. Struth v. Decker, 100 Md. 368.

4. Advice. — Yorty v. Webster, 205 Ill. 630.

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106. 2. Kindness. — See Lancaster v. Alden, 26 R. I. 170.

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5. Gratitude. — Drinkwine v. Gruelle, 120 Wis. 628. See also Matter of Brough, (Surrogate Ct.) 41 Misc. (N. Y.) 263.

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9. Love. — Stewart v. Lyons, 54 W. Va. 665.

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108. 1. Existence at Time of Act. — Matter of Donovan, 140 Cal. 390.

3. Existence of Undue Influence Prior or Subsequent to Act. — England v. Fawbush, 204 Ill. 384.

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- 110.** 2. Burden of Proof — Transactions Inter Vivos. — See note 1.
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110. 1. Burden in Transaction Inter Vivos. — Winn v. Itzel, 125 Wis. 19.

2. Burden in Will Generally upon Contestant. — Birdseye's Appeal, 77 Conn. 623; Weston v. Teufel, 213 Ill. 291; *In re Townsend*, 122 Iowa 246; Fischer v. Sperl, 94 Minn. 421; Hughes v. Rader, 183 Mo. 630; Dausman v. Rankin, 189 Mo. 677, 107 Am. St. Rep. 338; Matter of Nelson, 97 N. Y. App. Div. 212; Matter of Hawley, (Surrogate Ct.) 44 Misc. (N. Y.) 186; Matter of Warnock, 103 N. Y. App. Div. 61; Stewart v. Lyons, 54 W. Va. 665.

3. Burden on Claimant under Will Which Is Unreasonable and Unnatural. — Lancaster v. Alden, 26 R. I. 170; Mullen v. McKeon, 25 R. I. 305.

4. Exception to Rule. — Hughes v. Rader, 183 Mo. 630; Dausman v. Rankin, 189 Mo. 677, 107 Am. St. Rep. 338.

5. Undue Influence Inferred from Circumstantial Evidence. — Prescott v. Johnson, 91 Minn. 273; Hughes v. Rader, 183 Mo. 630.

111. 1. Satisfactory and Convincing Character. — Hook's Estate, 207 Pa. St. 203.

A Change of Testamentary Disposition is not, standing alone, evidence of undue influence. Lancaster v. Alden, 26 R. I. 170.

3. Evidence Raising Mere Suspicion Insufficient. — Kennedy v. Dickey, 100 Md. 152; Stewart v. Lyons, 54 W. Va. 665.

4. Inconsistent with Contrary Hypothesis. — Caughey v. Bridenbaugh, 208 Pa. St. 414.

5. Quality of Mind. — Kennedy v. Dickey, 100 Md. 152; Pattee v. Whitcomb, 72 N. H. 249.

6. Susceptibility to Influence. — Fischer v. Sperl, 94 Minn. 421.

7. Not Alone Sufficient Evidence. — Paulus v. Reed, 121 Iowa 224; Nowlen v. Nowlen, 122 Iowa 541; Moorhead v. Scovel, 210 Pa. St. 446.

8. Weak Intellect a Circumstance. — See England v. Fawbush, 204 Ill. 384; Lingle v. Lingle, 121 Iowa 133.

112. 3. Age. — See *In re Wiltsey*, 122 Iowa 423. But the mere age of a testator does not prove mental weakness. Caughey v. Bridenbaugh, 208 Pa. St. 414.

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8. Coupled with Inadequate Consideration. — Curtis v. Kirkpatrick, 9 Idaho 629.

113. 4. Motive Alone Not Sufficient Evidence. — Hughes v. Rader, 183 Mo. 630.

5. Opportunity Alone Not Sufficient Evidence. — Hughes v. Rader, 183 Mo. 630; Matter of Hawley, (Surrogate Ct.) 44 Misc. (N. Y.) 186. See also Grant v. Stamler, (N. J. 1905) 59 Atl. Rep. 890.

114. 7. No Presumption Exists. — See Yorty v. Webster, 205 Ill. 630.

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115. 2. Fiduciary Relation. — Weston v. Teufel, 213 Ill. 291. See also Matter of Egan, (Surrogate Ct.) 46 Misc. (N. Y.) 375.

5. Undue Influence Not Inferred from Unreasonableness of Will. — Matter of Donovan, 140 Cal. 390; Yorty v. Webster, 205 Ill. 630; *In re Townsend*, 122 Iowa 246; Hughes v. Rader, 183 Mo. 630; Matter of Warnock, 103 N. Y. App. Div. 61; Caughey v. Bridenbaugh, 208 Pa. St. 414. See also Anderson v. Laugen, 122 Wis. 57.

6. Proper Evidence to Be Considered. — Piper v. Andricks, 209 Ill. 564; Matter of Warnock, 103 N. Y. App. Div. 61. See also French v. French, 215 Ill. 470.

Inequality of Distribution to Be Considered. — England v. Fawbush, 204 Ill. 384.

116. 7. That a Testatrix Entertained Friendly Relations Towards Her Daughter, whom she partially disinherited, may be shown. Piper v. Andricks, 209 Ill. 564.

117. 1. Circumstance to Be Considered. — See Howard v. Carter, (Kan. 1905) 80 Pac. Rep. 61.

2. Gross Inadequacy of Consideration, Coupled with a Condition of Dependence, Confidence, and Trust, has been held to be sufficient evidence of undue influence. See Gatje v. Armstrong, 145 Cal. 370.

117. (4) *Declarations* — (a) Of Testator — *bb.* NOT CONTEMPORANEOUS WITH EXECUTION OF WILL. — See note 7.

118. See notes 1, 2.

Declarations in Letter and Canceled Will. — See note 4.

120. V. CONFIDENTIAL RELATIONS AS EVIDENCE OF UNDUE INFLUENCE — 2. Presumptive Undue Influence — *a.* ACTS AFFECTED — *Transactions Inter Vivos.* — See note 1.

122. *d.* HOW REBUTTED — (1) *Burden of Proof.* — See note 4.

123. (2) *Evidence Admissible* — *Independent Advice.* — See note 10.

124. 3. Different Relations Considered — *b.* ATTORNEY AND CLIENT — (1) *In General* — *Transactions Inter Vivos.* — See note 3.

125. *d.* TRUSTEE AND CESTUI QUE TRUST — *Wills.* — See note 8.

127. *f.* SPIRITUAL ADVISER AND PARISHIONER OR NUN — *Wills.* — See note 3.

128. *g.* GUARDIAN AND WARD — (1) *In General* — *Wills.* — See note 3.

129. *h.* HUSBAND AND WIFE — (1) *Transactions Inter Vivos* — *In Favor of Wife.* — See notes 7, 8.

130. (2) *Wills.* — See notes 3, 4.

Solicitations, Persuasions, and Urgings. — See note 5.

131. *i.* MAN AND MISTRESS — *Wills.* — See notes 3, 5, 6.

j. PARENT AND CHILD — (1) *From Child to Parent* — (a) *In General* — *Transactions Inter Vivos.* — See note 8.

132. See note 2.

(2) *From Parent to Child* — (a) *Transaction Inter Vivos.* — See notes 10, 12.

117. 7. Not Admissible to Prove Fact of Undue Influence. — *England v. Fawbush*, 204 Ill. 384; *Westfall v. Wait*, (Ind. 1905) 73 N. E. Rep. 1089; *In re Wiltsey*, 122 Iowa 423; *In re Townsend*, 122 Iowa 246; *In re Jones*, (Surrogate Ct.) 85 N. Y. Supp. 294. See also *Powers v. Powers*, (Ky. 1904) 78 S. W. Rep. 152.

118. 1. Hearsay Evidence. — *Matter of Donovan*, 140 Cal. 390.

2. Admissible to Show State of Mind. — *Matter of Donovan*, 140 Cal. 390; *England v. Fawbush*, 204 Ill. 384; *Westfall v. Wait*, (Ind. 1905) 73 N. E. Rep. 1089; *In re Townsend*, 122 Iowa 246; *Roberts v. Bidwell*, 136 Mich. 191.

4. Letters. — See *Matter of Selleck*, 125 Iowa 678.

120. 1. *Transactions Inter Vivos.* — *Paulus v. Reed*, 121 Iowa 224; *Slack v. Rees*, 66 N. J. Eq. 447; *Rixey v. Rixey*, 103 Va. 414. See also *Brown v. Cole*, 126 Iowa 711.

122. 4. Burden When Presumption Exists. — *Birdseye's Appeal*, 77 Conn. 623; *Fischer v. Sperl*, 94 Minn. 421; *Dausman v. Rankin*, 189 Mo. 677, 107 Am. St. Rep. 338; *Grant v. Stamler*, (N. J. 1905) 59 Atl. Rep. 890. See also *Clarity v. Davis*, 92 Minn. 60.

123. 10. Important Circumstance at Least. — *Albert v. Haeblerly*, (N. J. 1905) 61 Atl. Rep. 380.

124. 3. Presumption of Undue Influence Arises. — *Thweatt v. Freeman*, 73 Ark. 575.

125. 8. Trustee a Beneficiary in Will. — See *Matter of De Vaugrigneuse*, (Surrogate Ct.) 46 Misc. (N. Y.) 49.

127. 3. No Presumption in Wills. — *Caughey v. Bridenbaugh*, 208 Pa. St. 414.

128. 3. Presumption Exists Where Guardian a Beneficiary. — *In re Cowdry*, 77 Vt. 359.

129. 7. No Presumption of Undue Influence. — See *Nowlen v. Nowlen*, 122 Iowa 541.

8. Relation Is a Circumstance. — *Paulus v. Reed*, 121 Iowa 224, wherein it appeared that the grantor was mentally weak and there was a disposition to deprive him of the benefit of the property.

130. 3. No Presumption Where Will Made in Favor of Wife. — *Matter of Donovan*, 140 Cal. 390; *Patterson v. Ramsey*, 136 N. Car. 561.

4. No Presumption Where Will Made in Favor of Husband. — See *Morrison v. Thoman*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1069.

5. Solicitations, Persuasions, and Urgings. — *In re Townsend*, 122 Iowa 246.

131. 3. Proper Circumstance to Be Considered. — *Stant v. American Security, etc., Co.*, 23 App. Cas. (D. C.) 29.

5. No Presumption from Relation Merely. — *Stant v. American Security, etc., Co.*, 23 App. Cas. (D. C.) 29; *In re Middleton*, (N. J. 1904) 59 Atl. Rep. 454; *Lewis's Estate*, 210 Pa. St. 599; *Stewart v. Lyons*, 54 W. Va. 665. See also *In re Jones*, (Surrogate Ct.) 85 N. Y. Supp. 294.

6. *Contra*, *Lewis's Estate*, 210 Pa. St. 599, stating that the broad doctrine of *Dean v. Negley*, 41 Pa. St. 312, 80 Am. Dec. 620, has been denied by later *Pennsylvania* decisions.

8. Prima Facie Presumption. — *Ferns v. Chapman*, 211 Ill. 597.

132. 2. Step-child. — *Albert v. Haeblerly*, (N. J. 1905) 61 Atl. Rep. 380.

10. No Presumption from Relation. — *Prescott v. Johnson*, 91 Minn. 273; *Rixey v. Rixey*, 103 Va. 414.

12. Contrary Authority. — *Prescott v. Johnson*, 91 Minn. 273.

133. Some Favored to Exclusion of Others. — See note 2.

Son a Business Adviser of Father. — See note 5.

Parent Old and Feeble. — See notes 7, 9.

(b) Wills. — See note 11.

Some Children Favored. — See note 12.

134. Son Confidential Adviser. — See note 2.

k. GRANDPARENT AND GRANDCHILD. — See note 3.

l. BROTHER AND SISTER — Transactions Inter Vivos. — See notes 5, 7.

136. UNFAIR — UNFAIRLY. — See note 1.

UNIFORM. — See note 6.

133. 2. Some Favored to Exclusion of Others.
— Drinkwine v. Gruelle, 120 Wis. 628.

Deed from Mother to Certain Daughters, Others
Being Excluded. — Rixey v. Rixey, 103 Va. 414.

5. No Presumption. — See Ball v. Ball, 214 Ill.
255.

7. No Presumption. — Compare Slack v. Rees,
66 N. J. Eq. 447; Swanstrom v. Day, (Supm.
Ct. Spec. T.) 46 Misc. (N. Y.) 311, affirmed
101 N. Y. App. Div. 609.

9. Everything Conveyed to One of Several
Children. — See White v. Daly, (N. J. 1904) 58
Atl. Rep. 929.

11. No Presumption. — Fischer v. Sperl, 94
Minn. 421.

12. Some Children Favored. — Hughes v.

Rader, 183 Mo. 630. Compare Dausman v.
Rankin, 189 Mo. 677, 107 Am. St. Rep. 338.

134. 2. Testator's Business or Property Man-
aged by Son. — See Hook's Estate, 207 Pa. St.
203; Barker v. Streuli, (N. J. 1905) 61 Atl.
Rep. 408.

3. No Presumption. — See Stant v. American
Security, etc., Co., 23 App. Cas. (D. C.) 25.

5. Brothers-in-Law. — See Irwin v. Sample,
213 Ill. 160.

7. Brother and Sister. — In re McLaughlin,
(N. J. 1905) 59 Atl. Rep. 892.

136. 1. Unfair may mean dishonest. Wat-
ters v. Retail Clerks Union No. 479, 120 Ga. 424.

6. Uniform Operation. — See Com. v. Mathues,
210 Pa. St. 408.

UNITED STATES.

BY E. G. CHILTON.

159. V. OFFICERS AND OTHER AGENTS — 2. Office and Employment Distin-
guished. — See notes 2, 3.

164. 7. Responsibility for Acts of Officers and Agents — a. CONTRACTS. —
See note 1.

165. b. TORTS. — See note 1.

166. 8. Responsibility of Officers and Other Agents — b. TO INDIVIDUALS
— (2) *Torts*. — See note 2.

167. (3) *Mandamus and Injunction* — Decisions of Executive Departments. —
See note 4.

171. VII. CONTRACTS — 2. Liability — Liability for Interest. — See note 5.

VIII. SUITS BY OR AGAINST UNITED STATES — 1. Status of United
States as Plaintiff — a. GENERALLY. — See note 8.

172. See note 5.

159. 2. Duties of Office Prescribed by Law
and Not by Contract. — McGregor v. U. S., (C.
C. A.) 134 Fed. Rep. 187.

Cashier in Mint Not United States Officer. —
U. S. v. Cole, 130 Fed. Rep. 614.

3. McGregor v. U. S., (C. C. A.) 134 Fed.
Rep. 187 (to same effect as U. S. v. Hartwell,
6 Wall. (U. S.) 393).

164. 1. Liability of United States Only Con-
tractual. — Harley v. U. S., 198 U. S. 229. See
also O'Reilly de Camara v. Brooke, 135 Fed.
Rep. 384.

165. 1. United States Not Liable for Torts. —
U. S. v. Ennis, 132 Fed. Rep. 133.

166. 2. O'Reilly de Camara v. Brooke, 135
Fed. Rep. 384.

167. 4. Decisions of Executive Departments.
— Hitchcock v. U. S., 22 App. Cas. (D. C.) 275.

171. 5. Liability of United States for Interest.
— William R. Trigg Co. v. Bucyrus Co., (Va.
1905) 51 S. E. Rep. 174.

8. Right of United States to Sue. — The rights
of the United States in a governmental matter
not being affected by state enactments, it is
immaterial in an action brought by the United
States that a certain notice prescribed by a
state statute as a condition precedent to suit
has not been given. McKnight v. U. S., (C.
C. A.) 130 Fed. Rep. 659.

172. 5. No Special Privileges as Litigant. —
U. S. v. Detroit Timber, etc., Co., (C. C. A.)
131 Fed. Rep. 668.

174. 2. Status of United States as Defendant — *a. GENERALLY.* — See note 1.

180. X. ACQUISITIONS OF TERRITORY AND OTHER PROPERTY — **3. Exclusive Jurisdiction over Property Purchased Within Limits of a State.** — See note 3.

174. 1. United States May Be Sued Only with Its Consent. — *Kirk v. U. S.*, 131 Fed. Rep. 331.

180. 3. McCarthy v. R. G. Packard Co., 105 N. Y. App. Div. 436.

UNITED STATES COMMISSIONERS.

By J. SIMPSON.

202. V. COMPENSATION AND ACCOUNTS — **3. Approval and Payment.** — See note 1.

202. 1. Jurisdiction. — Under the Acts of Congress of Feb. 22, 1875 (18 U. S. Stat. at L. 333), July 31, 1894 (28 U. S. Stat. at L. 162), and June 27, 1898 (30 U. S. Stat. at L. 495), the fact that a commissioner's account has been

examined and passed upon by the attorney-general and the accounting officers does not entitle him to sue if it has not been submitted for approval to the Circuit or District Court. *Summey v. U. S.*, 39 Ct. Cl. 199.

UNITED STATES COURTS.

By F. G. BAMMAN.

207. I. UNITED STATES COURTS IN GENERAL — **1. Organization and Authority** — *a. IN GENERAL.* — See notes 2, 3, 4.

208. b. POWER TO ORDER PRODUCTION OF BOOKS AND WRITINGS. — See notes 6, 7, 8, 9.

209. See note 1.

c. POWER TO IMPOSE OATHS AND PUNISH CONTEMPTS — (2) *Power to Punish for Contempt.* — See notes 4, 5.

210. See note 2.

207. 2. Distribution of Judicial Power. — See *Stevenson v. Fain*, 195 U. S. 165.

3. Only Strictly Judicial Duties. — See *Interstate Commerce Commission v. Southern Pac. R. Co.*, 132 Fed. Rep. 829.

4. Executive Officer Cannot Exercise Judicial Power. — Congress is not prohibited from vesting judicial power, in cases other than those enumerated in Const. U. S., art. 3, § 2, in courts or magistrates of the states or in executive officers. *Levin v. U. S.*, (C. C. A.) 128 Fed. Rep. 826.

208. 6. Power to Order Production of Books and Writings. — *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. Rep. 753.

7. Suits at Law Only. — See *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. Rep. 753; *U. S. v. Bitter Root Development Co.*, (C. C. A.) 133 Fed. Rep. 274.

8. Application Denied When Affidavit Merely Avers Belief. — *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. Rep. 753.

9. Production Ordered Before Trial. — *Cameron Lumber Co. v. Droney*, 132 Fed. Rep. 304. See also *Ridgely v. Richard*, 130 Fed. Rep. 387;

Crocker-Wheeler Co. v. Bullock, 134 Fed. Rep. 241.

209. 1. In Case of Noncompliance. — See *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. Rep. 753.

4. Power of Federal Courts to Punish for Contempt. — *Cuyler v. Atlantic, etc.*, R. Co., 131 Fed. Rep. 95; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324.

Civil and Criminal Contempts Distinguished. — *Heinze v. Butte, etc.*, Consol. Min. Co., (C. C. A.) 129 Fed. Rep. 274; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324; *Matter of Christensen Engineering Co.*, 194 U. S. 458. See also *Bullock Electric, etc., Co. v. Westinghouse Electric, etc., Co.*, (C. C. A.) 129 Fed. Rep. 105.

Newspaper Criticism. — See *Cuyler v. Atlantic, etc.*, R. Co., 131 Fed. Rep. 95.

5. Court to Which Statute Applies. — See *Bessette v. W. B. Conkey Co.*, 194 U. S. 324.

210. 2. Contempt Committed in Another Court. — See *Dancel v. Goodyear Shoe Machinery Co.*, 128 Fed. Rep. 753.

210. (3) *Conduct Constituting Contempt* — (b) *Misbehavior of Officers*. — See note 15.

211. (c) *Disobedience of Any Lawful Order*. — See notes 5, 7.

212. *Instances of Disobedience*. — See note 2.

213. *d. POWER TO GRANT NEW TRIALS*. — See note 8.

214. *f. POWER TO ENFORCE AWARDS OF FOREIGN CONSULS*. — See note 4.

g. POWER TO ISSUE WRITS — (i) *Power of Courts to Issue Writs* — (a) *Writs of Scire Facias*. — See note 5.

(b) *Writs Not Specifically Provided for by Statute*. — See note 6.

215. *Under This General Provision*. — See notes 5, 6.

216. See notes 1, 3, 4, 5, 7, 9.

217. (2) *Power of Justices and Judges to Issue Writs* — (b) *Temporary Restraining Orders*. — See note 3.

218. 2. *Officers* — *b. CLERKS* — (i) *Appointment and Removal* — *Bond*. — See note 10.

210. 15. *Misbehavior of Officers*. — See *Hatfield v. King*, 131 Fed. Rep. 791.

211. 5. *Disobedience of Lawful Order, Etc.* — See *London Guarantee, etc., Co. v. Doyle*, 134 Fed. Rep. 125.

Person Not Party to Suit. — See *Bessette v. W. B. Conkey Co.*, 194 U. S. 324.

7. *Validity of Order*. — *American Lighting Co. v. Public Service Corp.*, 134 Fed. Rep. 129.

212. 2. *Disobeying Injunctions*. — *Bullock Electric, etc., Co. v. Westinghouse Electric, etc., Co.*, (C. C. A.) 129 Fed. Rep. 105; *Central Trust Co. v. Wabash, etc., R. Co.*, 132 Fed. Rep. 582; *Brookfield v. Novelty Glass Mfg. Co.*, 132 Fed. Rep. 316; *Diamond Drill, etc., Co. v. Kelly*, 132 Fed. Rep. 978; *Universal Talking Mach. Co. v. Keen*, 136 Fed. Rep. 456; *Matter of Christensen Engineering Co.*, 194 U. S. 458.

213. 8. *When New Trials May Be Granted*. — *Usher v. Scranton R. Co.*, 132 Fed. Rep. 405. See also *Dodge v. U. S.*, (C. C. A.) 131 Fed. Rep. 849; *Hellyer v. Trenton City Bridge Co.*, 133 Fed. Rep. 843; *Champagne Lumber Co. v. Nyback*, 130 Fed. Rep. 1021.

214. 4. *Does Not Oust Jurisdiction of Federal Courts*. — *In re Massachusetts*, 197 U. S. 482.

5. *Scire Facias*. — *Kirk v. U. S.*, 131 Fed. Rep. 331.

6. *Writs Not Specifically Provided For*. — *Barber Asphalt Paving Co. v. Morris*, (C. C. A.) 132 Fed. Rep. 945. See also *In re Massachusetts*, 197 U. S. 482.

215. 5. *Mandamus*. — *Barber Asphalt Paving Co. v. Morris*, (C. C. A.) 132 Fed. Rep. 945; *West Virginia Northern R. Co. v. U. S.*, (C. C. A.) 134 Fed. Rep. 198; *Edinburg Coal Co. v. Humphreys*, (C. C. A.) 134 Fed. Rep. 839.

6. *Not as Original Proceeding*. — *In re Coleman*, 131 Fed. Rep. 151; *Mystic Milling Co. v. Chicago, etc., R. Co.*, 132 Fed. Rep. 289; *Barber Asphalt Paving Co. v. Morris*, (C. C. A.) 132 Fed. Rep. 945; *Large v. Consolidated Nat. Bank*, 137 Fed. Rep. 168; *Knapp v. Lake Shore, etc., R. Co.*, 197 U. S. 536.

216. 1. *When There Is No Other Adequate Remedy*. — *Palatka Waterworks v. Palatka*, 127 Fed. Rep. 161; *Louisville, etc., R. Co. v. Smith*, (C. C. A.) 128 Fed. Rep. 1; *Railroad*

Commission v. J. Rosenbaum Grain Co., (C. C. A.) 130 Fed. Rep. 110; *Wiemer v. Louisville Water Co.*, 130 Fed. Rep. 251; *Holst v. Savannah Electric Co.*, 131 Fed. Rep. 931, *reversed* on another point (C. C. A.) 132 Fed. Rep. 901; *Illinois Cent. R. Co. v. Caffrey*, 128 Fed. Rep. 770. See also *Columbia Ave. Sav. Fund, etc., Co. v. Dawson*, 130 Fed. Rep. 152; *Mystic Milling Co. v. Chicago, etc., R. Co.*, 132 Fed. Rep. 289.

3. *Injunction Against Collection of State Taxes*. — *People's Sav. Bank v. Layman*, 134 Fed. Rep. 635; *Michigan R. Tax Cases*, 138 Fed. Rep. 223. See also *Coulter v. Weir*, (C. C. A.) 127 Fed. Rep. 897; *Treat v. Chicago*, (C. C. A.) 130 Fed. Rep. 443.

Injunctions to Stay Proceedings in State Courts. — See *Massie v. Buck*, (C. C. A.) 128 Fed. Rep. 27.

4. *To Restrain Violation of a Right*. — *Louisville, etc., R. Co. v. Smith*, (C. C. A.) 128 Fed. Rep. 1; *Hampton Roads R., etc., Co. v. Newport News, etc., R., etc., Co.*, 131 Fed. Rep. 534. See also *Columbia Ave. Sav. Fund, etc., Co. v. Dawson*, 130 Fed. Rep. 152; *Holst v. Savannah Electric Co.*, 131 Fed. Rep. 931, *reversed* on another point (C. C. A.) 132 Fed. Rep. 901; *Southern R. Co. v. Greensboro Ice, etc., Co.*, 134 Fed. Rep. 82.

5. *For Relief on Equitable Grounds*. — *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1. See also *Edison v. Thomas A. Edison Jr. Chemical Co.*, 128 Fed. Rep. 957; *Leigh v. Kewanee Mfg. Co.*, 127 Fed. Rep. 990.

7. *To Stay Carrying Out Unconstitutional State Laws*. — *Southern R. Co. v. Greensboro Ice, etc., Co.*, 134 Fed. Rep. 82. See also *Mills v. Chicago*, 127 Fed. Rep. 731; *Coulter v. Weir*, (C. C. A.) 127 Fed. Rep. 897; *Mercantile Trust, etc., Co. v. Columbus Waterworks Co.*, 130 Fed. Rep. 180; *Railroad Commission v. J. Rosenbaum Grain Co.*, (C. C. A.) 130 Fed. Rep. 110.

9. *To Enjoin Interference with Interstate Commerce or Mail Service*. — *Southern R. Co. v. Greensboro Ice, etc., Co.*, 134 Fed. Rep. 82.

217. 3. See *Massie v. Buck*, (C. C. A.) 128 Fed. Rep. 27; *Lehman v. Graham*, (C. C. A.) 135 Fed. Rep. 39.

218. 10. *U. S. v. Bell*, (C. C. A.) 135 Fed. Rep. 336.

- 219.** (4) *Compensation and Fees* — (a) *In General*. — See note 16.
- 223.** (d) *Clerks of Circuit and District Courts* — *bb. STATUTORY PROVISIONS PRESCRIBING FEES* — *Making Copies of Papers*. — See note 7.
- 225.** *Miscellaneous*. — See note 3.
- 226.** *d. CRIERS, BAILIFFS, AND MESSENGERS*. — See notes 2, 4.
- c. ATTORNEYS* — (1) *Attorneys Generally*. — See note 11.
- The Trial by Jury*. — See note 13.
- 229.** *4. Jurisdiction* — *a. IN GENERAL*. — See notes 2, 3, 4, 5.
- State Legislation*. — See note 6.
- 230.** *b. EXCLUSIVE OF STATE COURTS*. — See notes 4, 6.
- c. CONCURRENT JURISDICTION WITH STATE COURTS*. — See note 8.
- 231.** See note 3.
- Court First Having Jurisdiction Holds It*. — See notes 4, 5.

219. 16. *For Services Rendered by Order of Court*. — See *U. S. v. Mason*, (C. C. A.) 129 Fed. Rep. 742.

223. 7. *The Fact that Copies of a Restraining Order Are Printed* does not affect the statutory fee for making and certifying to such copies. *Cudahy Packing Co. v. McGuire*, 135 Fed. Rep. 891.

225. 3. *Money Must Actually Pass Through His Hands*. — *Michigan Cent. R. Co. v. Harsha*, (C. C. A.) 134 Fed. Rep. 217.

226. 2. *Provisos in Appropriation Acts*. — *Swift v. U. S.*, 128 Fed. Rep. 763.

4. Compensation for Holding Two Offices. — See *Swift v. U. S.*, 128 Fed. Rep. 763.

11. Docket Fee Is Property of Attorney. — See *The Gordon Campbell*, 131 Fed. Rep. 963.

13. See *The Gordon Campbell*, 131 Fed. Rep. 963.

229. 2. See *U. S. v. Barrett*, 135 Fed. Rep. 189.

3. Supreme Court Jurisdiction Derived from Constitution. — *Stevenson v. Fain*, 195 U. S. 165.

4. Jurisdiction of Lower Court Is Statutory. — *Yocum v. Parker*, (C. C. A.) 130 Fed. Rep. 770; *New Haven Pulp, etc., Co. v. Downingtown Mfg. Co.*, 130 Fed. Rep. 605; *Clifford v. Williams*, 131 Fed. Rep. 100; *U. S. v. Barrett*, 135 Fed. Rep. 189; *Stevenson v. Fain*, 195 U. S. 165; *Thomas v. Ohio State University*, 195 U. S. 207. See also *Knapp v. Lake Shore, etc., R. Co.*, 197 U. S. 536.

An Offense Against State Law. — See *U. S. v. Moore*, 129 Fed. Rep. 630.

Presumption Is Against Jurisdiction of Federal Court. — *Thomas v. Ohio State University*, 195 U. S. 207; *Utah-Nevada Co. v. De Lamar*, (C. C. A.) 133 Fed. Rep. 113. See also *Groel v. United Electric Co.*, 132 Fed. Rep. 252; *St. Louis, etc., R. Co. v. Davis*, 132 Fed. Rep. 629. And see the title UNITED STATES COURTS, 22 ENCYC. OF PL. AND PR. 260.

5. Power of Congress to Confer Jurisdiction Limited. — See *Yocum v. Parker*, (C. C. A.) 130 Fed. Rep. 770.

6. State Legislation. — *New Haven Pulp, etc., Co. v. Downingtown Mfg. Co.*, 130 Fed. Rep. 605; *Barber Asphalt Paving Co. v. Morris*, (C. C. A.) 132 Fed. Rep. 945; *Alice E. Min. Co. v. Blanden*, 136 Fed. Rep. 252; *Cable v. U. S. Life Ins. Co.*, 191 U. S. 288. See also *Schurmeier v. Connecticut Mut. L. Ins. Co.*, (C. C. A.) 137 Fed. Rep. 42.

230. 4. *This Exclusive Jurisdiction Was Not Repealed*. — See *United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co.*, 133 Fed. Rep. 930.

6. Actions By and Against Trustees in Bankruptcy. — *In re Spitzer*, (C. C. A.) 130 Fed. Rep. 879; *Johnston v. Forsyth Mercantile Co.*, 127 Fed. Rep. 845. See also *In re Mertens*, 131 Fed. Rep. 507; *Viquesney v. Allen*, (C. C. A.) 131 Fed. Rep. 21; *Farnham v. Friedmeyer*, 109 Ill. App. 54.

8. Concurrent Jurisdiction. — *Defiance Water Co. v. Defiance*, 191 U. S. 184. See also *Ingersoll v. Coram*, 127 Fed. Rep. 418; *U. S. v. McClellan*, 127 Fed. Rep. 971; *Straus v. American Publishers' Assoc.*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 251, *affirmed* 103 N. Y. App. Div. 277.

231. 3. *Independent Tribunals*. — See *U. S. v. Moore*, 129 Fed. Rep. 630.

4. Court First Taking Jurisdiction. — *Hennessy v. Tacoma Smelting, etc., Co.*, (C. C. A.) 129 Fed. Rep. 40; *Louisville Trust Co. v. Knott*, (C. C. A.) 130 Fed. Rep. 820; *Security Trust Co. v. Union Trust Co.*, 134 Fed. Rep. 301, holding that the jurisdiction continues until the judgment is satisfied. See also *Texas Cotton Products Co. v. Starnes*, 128 Fed. Rep. 183, *affirmed* (C. C. A.) 133 Fed. Rep. 1022; *Camden Interstate R. Co. v. Catlettsburg*, 129 Fed. Rep. 421; *Brown v. Slater*, 23 App. Cas. (D. C.) 51.

The Practice Is Not to Dismiss. — *Barber Asphalt Paving Co. v. Morris*, (C. C. A.) 132 Fed. Rep. 945; *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1.

The Pendency of a Controversy in a Suit in a State or Federal Court Is No Bar. — *Guaranty Trust Co. v. North Chicago St. R. Co.*, (C. C. A.) 130 Fed. Rep. 801; *The Gordon Campbell*, 131 Fed. Rep. 963; *Barber Asphalt Paving Co. v. Morris*, (C. C. A.) 132 Fed. Rep. 945; *German Sav., etc., Soc. v. Tull*, (C. C. A.) 136 Fed. Rep. 1; *Consumers' Gas Trust Co. v. Quinby*, (C. C. A.) 137 Fed. Rep. 882; *Patterson v. Barber Asphalt Paving Co.*, 94 Minn. 39.

5. Jurisdiction of Subject-matter by Possession. — *Guaranty Trust Co. v. North Chicago St. R. Co.*, (C. C. A.) 130 Fed. Rep. 801; *Barber Asphalt Paving Co. v. Morris*, (C. C. A.) 132 Fed. Rep. 945; *Moore v. Fidelity Trust Co.*, 134 Fed. Rep. 489; *Security Trust Co. v. Union Trust Co.*, 134 Fed. Rep. 301; *Williams v.*

- 232.** To Hold This Exclusive Jurisdiction. — See notes 1, 2.
Interference by Court of Other Jurisdiction. — See note 4.
- 233.** *d.* AT LAW AND IN EQUITY — (1) *In General.* — See note 2.
- 234.** The Equity Jurisdiction. — See notes 1, 2, 3.
(2) *Adequate Remedy at Law.* — See notes 4, 5, 6.
- 235.** The Remedy at Law, to Be Plain, Adequate, and Complete. — See note 1.
It Is a Jurisdictional Objection. — See note 3.
- 236.** See note 1.
(3) *Effect of State Statutes.* — See notes 3, 4, 5.

Neely, (C. C. A.) 134 Fed. Rep. 1. See also Copeland *v.* Bruning, (C. C. A.) 127 Fed. Rep. 550; *In re* Moench, etc., Co., (C. C. A.) 130 Fed. Rep. 685; Thiel Detective Service Co. *v.* McClure, 130 Fed. Rep. 55; Cheshire Provident Inst. *v.* Anglo-American Land Mortg., etc., Co., (C. C. A.) 132 Fed. Rep. 968; Boatmen's Bank *v.* Fritzlen, (C. C. A.) 135 Fed. Rep. 650; State *v.* New Orleans Water Supply Co., 111 La. 1049; Crosby *v.* Spear, 98 Me. 542, 99 Am. St. Rep. 424; Cobe *v.* Ricketts, 111 Mo. App. 105; Gallagher *v.* Asphalt Co. of America, 67 N. J. Eq. 441.

Actual Seizure of Property Not Necessary. — Louisville Trust Co. *v.* Knott, (C. C. A.) 130 Fed. Rep. 820.

232. 1. Identity of Parties and Subject-matter. — See Copeland *v.* Bruning, (C. C. A.) 127 Fed. Rep. 550; Guaranty Trust Co. *v.* North Chicago St. R. Co., (C. C. A.) 130 Fed. Rep. 801.

2. Jurisdiction of First Court Ended. — Louisville Trust Co. *v.* Knott, (C. C. A.) 130 Fed. Rep. 820. See also Guaranty Trust Co. *v.* North Chicago St. R. Co., (C. C. A.) 130 Fed. Rep. 801.

4. Injunctions from State Courts to Federal Courts. — Texas Cotton Products Co. *v.* Starnes, 128 Fed. Rep. 183, *affirmed* (C. C. A.) 133 Fed. Rep. 1022. See also Louisville Trust Co. *v.* Knott, (C. C. A.) 130 Fed. Rep. 820; Southern R. Co. *v.* Greensboro Ice, etc., Co., 134 Fed. Rep. 82; Glucose Refining Co. *v.* Chicago, 138 Fed. Rep. 209; Shaw *v.* Frey, (N. J. 1905) 59 Atl. Rep. 811; Johnstown Min. Co. *v.* Morse, (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 504.

Injunctions from Federal Courts to State Courts. — Copeland *v.* Bruning, (C. C. A.) 127 Fed. Rep. 550; Camden Interstate R. Co. *v.* Catlettsburg, 129 Fed. Rep. 421; Guaranty Trust Co. *v.* North Chicago St. R. Co., (C. C. A.) 130 Fed. Rep. 801; Security Trust Co. *v.* Union Trust Co., 134 Fed. Rep. 301. See also Palatka Waterworks *v.* Palatka, 127 Fed. Rep. 161; Massie *v.* Buck, (C. C. A.) 128 Fed. Rep. 27; St. Bernard Min. Co. *v.* Madisonville Traction Co., 130 Fed. Rep. 794, *affirmed* 196 U. S. 239; Bedford-Bowling Green Stone Co. *v.* Oman, 134 Fed. Rep. 441, *affirmed* (C. C. A.) 134 Fed. Rep. 64; Williams *v.* Neely, (C. C. A.) 134 Fed. Rep. 1.

Before Suits Have Actually Been Begun. — Camden Interstate R. Co. *v.* Catlettsburg, 129 Fed. Rep. 421. See also Louisville, etc., R. Co. *v.* Smith, (C. C. A.) 128 Fed. Rep. 1.

Fraudulent Judgments. — Lehman *v.* Graham, (C. C. A.) 135 Fed. Rep. 39.

233. 2. See People's Sav. Bank *v.* Layman, 134 Fed. Rep. 635.

234. 1. McMullen Lumber Co. *v.* Strother, (C. C. A.) 136 Fed. Rep. 295. See also Edison *v.* Thomas A. Edison Jr. Chemical Co., 128 Fed. Rep. 957; Schurmeier *v.* Connecticut Mut. L. Ins. Co., (C. C. A.) 137 Fed. Rep. 42.

2. State Legislation. — Land Title, etc., Co. *v.* Asphalt Co. (C. C. A.) 127 Fed. Rep. 1; Jacobs *v.* Mexican Sugar Co., 130 Fed. Rep. 589; Willitt *v.* Baker, 133 Fed. Rep. 937; U. S. Mining Co. *v.* Lawson, (C. C. A.) 134 Fed. Rep. 769. See also Purnell *v.* Page, 128 Fed. Rep. 496.

3. See U. S. Mining Co. *v.* Lawson, (C. C. A.) 134 Fed. Rep. 769.

4. Adequate Remedy at Law. — See King *v.* Davis, 137 Fed. Rep. 198.

5. Declaratory of Old Equity Rule. — U. S. Mining Co. *v.* Lawson, (C. C. A.) 134 Fed. Rep. 769.

6. Preservation of Right to Trial by Jury. — Thiel Detective Service Co. *v.* McClure, 130 Fed. Rep. 55; Cable *v.* U. S. Life Ins. Co., 191 U. S. 288.

235. 1. Sufficiency of the Legal Remedy. — London Guarantee, etc., Co. *v.* Doyle, 130 Fed. Rep. 719; Greenfield *v.* U. S. Mortgage Co., 133 Fed. Rep. 784; U. S. *v.* Northern Pac. R. Co., (C. C. A.) 134 Fed. Rep. 715; Williams *v.* Neely, (C. C. A.) 134 Fed. Rep. 1; McMullen Lumber Co. *v.* Strother, (C. C. A.) 136 Fed. Rep. 295; Glucose Refining Co. *v.* Chicago, 138 Fed. Rep. 209; Cable *v.* U. S. Life Ins. Co., 191 U. S. 288. And see Cleveland *v.* Cleveland City R. Co., 194 U. S. 517, 538; Palatka Waterworks *v.* Palatka, 127 Fed. Rep. 161; U. S. *v.* Bitter Root Development Co., (C. C. A.) 133 Fed. Rep. 274.

3. Jurisdictional Objection. — See York County Sav. Bank *v.* Abbot, 131 Fed. Rep. 980.

236. 1. To the same effect as *Reynes v. Dumont*, 130 U. S. 395, stated in the original note, see McMullen Lumber Co. *v.* Strother, (C. C. A.) 136 Fed. Rep. 295.

3. Effect of State Statutes. — Tegarden *v.* Le Marchel, 129 Fed. Rep. 487; Jacobs *v.* Mexican Sugar Co., 130 Fed. Rep. 589; York City School Dist. *v.* Aetna Indemnity Co., 131 Fed. Rep. 131; Anglo-American Land, etc., Co. *v.* Lombard, (C. C. A.) 132 Fed. Rep. 721; People's Sav. Bank *v.* Layman, 134 Fed. Rep. 635. See also State Trust Co. *v.* Kansas City, etc., R. Co., 129 Fed. Rep. 455; Hatcher *v.* Hendrie, etc., Mfg., etc., Co., (C. C. A.) 133 Fed. Rep. 267; Courtney *v.* Pradt, 196 U. S. 89.

4. Blending of Legal and Equitable Remedies. — McManus *v.* Chollar, (C. C. A.) 128 Fed. Rep. 902; Tegarden *v.* Le Marchel, 129 Fed. Rep. 487; Jacobs *v.* Mexican Sugar Co., 130 Fed. Rep. 589; York City School Dist. *v.* Aetna Indemnity Co., 131 Fed. Rep. 131; Anglo-

238. II. SUPREME COURT — 1. Organization and Authority — c. AUTHORITY — (2) Issuance of Writs — (c) Mandamus. — See notes 7, 9.

239. See note 2.

4. Jurisdiction — a. ORIGINAL — (1) In General. — See note 8.

243. b. APPELLATE — (1) Prior to Act of March 3, 1891 — (b) Writ of Error to Highest Court of a State — aa. IN GENERAL — Necessity that Decision Be Adverse to Federal Right or Authority. — See note 6.

bb. CLASSIFICATION OF REVIEWABLE CASES — (aa) Validity of Federal Statute, Treaty, or Authority Denied. — See note 7.

244. (bb) Validity of State Statute or Authority Maintained as Against Federal Authority. — See note 6.

245. See notes 1, 2, 3, 4.

Impairment of Obligation of Contracts. — See notes 5, 7.

246. Due Process of Law. — See notes 1, 2.

(cc) Federal Right or Immunity Denied. — See notes 3, 4, 5.

247. See notes 1, 4.

American Land, etc., Co. *v.* Lombard, (C. C. A.) 132 Fed. Rep. 721; Schurmeier *v.* Connecticut Mut. L. Ins. Co., (C. C. A.) 137 Fed. Rep. 42. See also Hatcher *v.* Hendrie, etc., Mfg., etc., Co., (C. C. A.) 133 Fed. Rep. 267; United Cigarette Mach. Co. *v.* Wright, 132 Fed. Rep. 195; Cheatham *v.* Edgefield Mfg. Co., 131 Fed. Rep. 118.

236. 5. York City School Dist. v. Ætna Indemnity Co., 131 Fed. Rep. 131; Anglo-American Land, etc., Co. *v.* Lombard, (C. C. A.) 132 Fed. Rep. 721; Schurmeier *v.* Connecticut Mut. L. Ins. Co., (C. C. A.) 137 Fed. Rep. 42. And see the title *EQUITABLE DEFENSES*, 7 ENCYC. OF PL. AND PR. 801.

238. 7. Not Issuable in Exercise of Original Jurisdiction. — *In re* Massachusetts, 197 U. S. 482. See also Barber Asphalt Paving Co. *v.* Morris, (C. C. A.) 132 Fed. Rep. 945.

9. Not a Substitute for Appeal or Error. — See L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 128 Fed. Rep. 332; Barber Asphalt Paving Co. *v.* Morris, (C. C. A.) 132 Fed. Rep. 945.

239. 2. To Compel Acts Not Discretionary. — *U. S. v. Allen*, 192 U. S. 543. See also Barber Asphalt Paving Co. *v.* Morris, (C. C. A.) 132 Fed. Rep. 945.

8. Jurisdiction Dependent on Parties. — *In re* Massachusetts, 197 U. S. 482. See also Stevenson *v.* Fain, 195 U. S. 165.

243. 6. Necessity that Decision Be Adverse to Federal Right or Authority. — *Iron Cliffs Co. v. Negaunee Iron Co.*, 197 U. S. 463.

7. Validity of Federal Statute, Authority, or Treaty Denied. — See *U. S. v. Allen*, 192 U. S. 543, upholding the right to revisit a judgment of the Court of Appeals of the District of Columbia.

244. 6. Validity of State Statute or Authority Maintained as Against Federal Authority. — *Grand Rapids, etc., R. Co. v. Osborn*, 193 U. S. 17. See also *Olsen v. Smith*, 195 U. S. 332; *Smiley v. Kansas*, 196 U. S. 447.

245. 1. Question of Repugnancy to United States Laws and Authority Must Be Decided. — *Winous Point Shooting Club v. Caspersen*, 193 U. S. 189; *Harding v. Illinois*, 196 U. S. 78.

2. Violation of State Constitution by State Law. — *Hodge v. Muscatine County*, 196 U. S. 276. See also *Savannah v. Holst*, (C. C. A.) 132 Fed. Rep. 901; *Kane v. Erie R. Co.*, (C. C. A.)

133 Fed. Rep. 681; *Henry F. Michell Co. v. Matthues*, 134 Fed. Rep. 493; *Cosmopolitan Min. Co. v. Walsh*, 193 U. S. 460; *Carstairs v. Cochran*, 193 U. S. 10; *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532; *Fisher v. St. Louis*, 194 U. S. 361.

3. Compliance with State Constitution or Statutes. — *Henry F. Michell Co. v. Matthues*, 134 Fed. Rep. 493.

4. Questions Purely of Construction. — See *Missouri v. Dockery*, 191 U. S. 165; *Cosmopolitan Min. Co. v. Walsh*, 193 U. S. 460.

The Misconstruction of a Valid Statute. — *Cramer v. Wilson*, 195 U. S. 408.

Question of Construction of State Statute by Court of Another State Does Not Give Jurisdiction. — *Johnson v. New York L. Ins. Co.*, 187 U. S. 491; *Finney v. Guy*, 189 U. S. 335; *Allen v. Alleghany Co.*, 196 U. S. 458.

5. Contract Must Be Impaired by Statutory Law. — See *Bradley v. Lightcap*, 195 U. S. 1, 24.

7. Existence of Contract Determined on Review. — *Grand Rapids, etc., R. Co. v. Osborn*, 193 U. S. 17.

246. 1. Due Process of Law. — See *West v. Louisiana*, 194 U. S. 258; *Iron Cliffs Co. v. Negaunee Iron Co.*, 197 U. S. 463.

Jurisdiction Sustained as Involving Due Process of Law. — *Leigh v. Green*, 193 U. S. 79; *Bradley v. Lightcap*, 195 U. S. 1, 24. See also *Fayerweather v. Ritch*, 195 U. S. 276; *Hodge v. Muscatine County*, 196 U. S. 276.

Federal Right to Due Process May Be Waived. — *Harding v. Illinois*, 196 U. S. 78.

2. Irregularities and Errors Not Reviewable as Suspending Due Process of Law. — See *West v. Louisiana*, 194 U. S. 258.

3. Federal Right or Immunity Denied. — *Mathew v. Wabash R. Co.*, 115 Mo. App. 476.

4. Federal Right Within Statute Must Be Involved. — *Southern R. Co. v. Carson*, 194 U. S. 136; *Smalley v. Laugenour*, 196 U. S. 93; *McMillen v. Ferrum Min. Co.*, 197 U. S. 343. See also *U. S. v. Moore*, 129 Fed. Rep. 630.

5. Decision of Question Must Be Essential Part of Judgment Rendered. — *Chicago, etc., R. Co. v. McGuire*, 196 U. S. 128; *Harding v. Illinois*, 196 U. S. 78. See also *American Express Co. v. Iowa*, 196 U. S. 133; *Adams Express Co. v. Iowa*, 196 U. S. 147.

247. 1. That Plaintiff's Title Is from United

247. Instances of Questions Within This Jurisdiction. — See note 5.

cc. WHETHER FEDERAL QUESTION INVOLVED. — See notes 12, 13, 14.

248. See note 6.

dd. PRESENTATION OF QUESTION. — See notes 7, 9, 10.

249. See note 1.(2) *Since Act of March 3, 1891* — (a) General Statement of Jurisdiction. —

See note 4.

250. (b) Cases Directly Appealable from District and Circuit Courts — aa. CASES IN WHICH JURISDICTION OF COURT IS IN ISSUE. — See notes 2, 3, 4.

Rules Governing the Jurisdiction. — See note 6.

251. See note 1.

Presentation of Question of Jurisdiction. — See notes 4, 6.

cc. CAPITAL CASES. — See note 9.

252. dd. CONSTITUTIONAL AND TREATY QUESTIONS — In General. — See notes 1, 2, 4.States Immaterial. — See *McMillen v. Ferrum Min. Co.*, 197 U. S. 343.**247. 4. Irregularities in Administering Law.** — *West v. Louisiana*, 194 U. S. 258.**5. Questions under Bankruptcy Laws.** — See *Cramer v. Wilson*, 195 U. S. 408.**12. Decision upon Grounds Independent of Federal Question.** — *Giles v. Teasley*, 193 U. S. 146; *Western Electrical Supply Co. v. Abbeville Electric Light, etc., Co.*, 197 U. S. 299. See also *American Express Co. v. Iowa*, 196 U. S. 133; *Adams Express Co. v. Iowa*, 196 U. S. 147; *Caro v. Davidson*, 197 U. S. 197.**13. Where Independent Ground Not Sufficient.** — *Terre Haute, etc., R. Co. v. Indiana*, 194 U. S. 579.**14. Decisions upon Question of Fact.** — *Clipper Min. Co. v. Eli Min., etc., Co.*, 194 U. S. 220; *Hill v. McCord*, 195 U. S. 395.**248. 6. Local Law.** — *Cramer v. Wilson*, 195 U. S. 408; *Hodge v. Muscatine County*, 196 U. S. 276; *McMillen v. Ferrum Min. Co.*, 197 U. S. 343.**7. Right or Immunity to Be Specially Set Up in State Court.** — *Southern R. Co. v. Carson*, 194 U. S. 136; *Harding v. Illinois*, 196 U. S. 78; *American Express Co. v. Iowa*, 196 U. S. 133; *Adams Express Co. v. Iowa*, 196 U. S. 147; *Chicago, etc., R. Co. v. McGuire*, 196 U. S. 128; *McMillen v. Ferrum Min. Co.*, 197 U. S. 343; *Western Electrical Supply Co. v. Abbeville Electric Light, etc., Co.*, 197 U. S. 299. See also *Giles v. Teasley*, 193 U. S. 146; *Fullerton v. Texas*, 196 U. S. 192.**9. Question Raised by Opinion of State Court.** — *Leigh v. Green*, 193 U. S. 79. See also *Howard v. Fleming*, 191 U. S. 126.**10. Review Although Question Not Specially Set Up.** — *Grand Rapids, etc., R. Co. v. Osborn*, 193 U. S. 17. See also *Giles v. Teasley*, 193 U. S. 146; *Chicago, etc., R. Co. v. McGuire*, 196 U. S. 128.**249. 1. Question Must Appear of Record.** — *Cosmopolitan Min. Co. v. Walsh*, 193 U. S. 460; *Harding v. Illinois*, 196 U. S. 78; *Chicago, etc., R. Co. v. McGuire*, 196 U. S. 128; *Fullerton v. Texas*, 196 U. S. 192; *Caro v. Davidson*, 197 U. S. 197.**4. Supreme Court of Porto Rico Not Within Section.** — By Act Cong. April 12, 1900, 31 U. S. Stat. at L. 85, provision was made for review by the Supreme Court of judgments of the Supreme Court of Porto Rico. *Ribas y Hijo**v. U. S.*, 194 U. S. 315. See also *Crowley v. U. S.*, 194 U. S. 461; *Amado v. U. S.*, 195 U. S. 172.**Distinction Between Appeals and Writs of Error Not Abolished.** — *Oklahoma City v. McMaster*, 196 U. S. 529. See also *Comstock v. Eagleton*, 196 U. S. 99.**Error or Appeal Lies from Supreme Court of Oklahoma.** — *Comstock v. Eagleton*, 196 U. S. 99; *Oklahoma City v. McMaster*, 196 U. S. 529.**No Pecuniary Limit** is placed by the statute upon the appellate jurisdiction of the Supreme Court from the Circuit or District Courts. *Kirby v. American Soda Fountain Co.*, 194 U. S. 141.**250. 2. Question of Federal Jurisdiction Essential.** — *Bache v. Hunt*, 193 U. S. 523; *Schweer v. Brown*, 195 U. S. 171; *Courtney v. Pradt*, 196 U. S. 89.**3. Sufficiency of Service of Process a Jurisdictional Question.** — *Courtney v. Pradt*, 196 U. S. 89.**4. Amount in Controversy.** — *Kirby v. American Soda Fountain Co.*, 194 U. S. 141.**6. Where Jurisdiction the Sole Issue.** — *Halpin v. Amerman*, (C. C. A.) 138 Fed. Rep. 548. See also *American Fisheries Co. v. Lennen*, (C. C. A.) 130 Fed. Rep. 533.**251. 1. Summary of Rules Governing Jurisdiction and Appeals.** — *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397; *Defiance Water Co. v. Defiance*, 191 U. S. 184; *Schweer v. Brown*, 195 U. S. 171. See also *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618; *Viquesney v. Allen*, (C. C. A.) 131 Fed. Rep. 21.**4. Review Confined to Question of Jurisdiction.** — *Newburyport Water Co. v. Newburyport*, 193 U. S. 561; *Courtney v. Pradt*, 196 U. S. 89.**Rule Not Applicable to Habeas Corpus Cases.** — See *In re Lee Look*, 146 Cal. 567.**6. Certificate Necessary.** — *Arkansas v. Schlierholz*, 179 U. S. 598; *Filhiol v. Torney*, 194 U. S. 356; *Schweer v. Brown*, 195 U. S. 171; *Courtney v. Pradt*, 196 U. S. 89. See also *Huntington v. Laidley*, 176 U. S. 668.9. See *New v. Oklahoma*, 195 U. S. 252.**252. 1. Jurisdiction Exclusive.** — *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397; *Terry v. Bird*, (C. C. A.) 129 Fed. Rep. 592.**2. Complete Review Authorized.** — *Newburyport Water Co. v. Newburyport*, 193 U. S. 561; *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618.

- 252.** Construction or Application of Constitution. — See notes 6, 8, 9.
 Constitutionality or Validity of United States Law or Treaty. — See note 10.
- 253.** Federal Constitutionality of State Constitution or Law. — See notes 1, 2, 3.
 (c) Cases Coming from Circuit Court of Appeals — *aa.* BY APPEAL OR ERROR. — See notes 5, 6.
bb. BY CERTIFICATION. — See note 8.
- 254.** Certiorari to Circuit Court of Appeals. — See notes 6, 10.
- 255.** III. CIRCUIT COURT OF APPEALS — 1. Organization and Authority —
b. HOW CONSTITUTED. — See note 3.
- 256.** *c.* AUTHORITY — (2) *Issuance of Writs.* — See notes 4, 5.
 4. Jurisdiction — *a.* IN GENERAL. — See note 12.
- 257.** Purpose of Act. — See note 4.
- 258.** *c.* JURISDICTION EXCLUSIVELY APPELLATE. — See note 2.
d. NECESSITY THAT DECISION APPEALED FROM BE FINAL —
 (1) *In General.* — See notes 3, 4.
 (2) *Requisites of Final Decision* — (a) *In General.* — See note 7.
- 259.** (c) Effect of References and Conditions. — See note 3.
- 260.** (e) Specific Orders and Decrees Considered. — See notes 1, 2.
- 252.** 4. Issue Must Appear of Record. — *Filhiol v. Torney*, 194 U. S. 356.
- 6.** Constitution Construed and Applied by Direct Appeal. — *Cosmopolitan Min. Co. v. Walsh*, 193 U. S. 460; *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112; *Defiance Water Co. v. Defiance*, 191 U. S. 184; *Burton v. U. S.*, 196 U. S. 283; *Fayerweather v. Ritch*, 195 U. S. 276. See also *Filhiol v. Torney*, 194 U. S. 356.
- Interstate Commerce Question Within Clause.** — See *Interstate Commerce Commission v. Baird*, 194 U. S. 25.
- The Right to Vote for Members of Congress.** — See *Anthony v. Burrow*, 129 Fed. Rep. 783.
- Habeas Corpus Cases Included.** — *In re Marmo*, 138 Fed. Rep. 201.
- 8.** Constitution Must Have Been Construed or Applied. — See *Fayerweather v. Ritch*, 195 U. S. 276.
- 9.** *American Express Co. v. Iowa*, 196 U. S. 133; *Adams Express Co. v. Iowa*, 196 U. S. 147, 10. See *Sloan v. U. S.*, 193 U. S. 614.
- Habeas Corpus Cases.** — *Pettit v. Walshe*, 194 U. S. 205; *In re Marmo*, 138 Fed. Rep. 201.
- 253.** 1. Cases Involving Validity of State Constitution or Law. — *Defiance Water Co. v. Defiance*, 191 U. S. 184.
- 2.** Constitutionality of Municipal Ordinances. — See *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517; *Cleveland v. Cleveland Electric R. Co.*, 194 U. S. 538; *Defiance Water Co. v. Defiance*, 191 U. S. 184; *Savannah v. Holst*, (C. C. A.) 132 Fed. Rep. 901.
- 3.** Immaterial Whether Right Upheld or Denied, or that Question Arose by Way of Defense. — *Defiance Water Co. v. Defiance*, 191 U. S. 184.
- 5.** Appeal or Writ of Error from Circuit Court of Appeals. — *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397.
- The Bill Need Not State the Amount in Dispute.** — See *Robinson v. Suburban Brick Co.*, (C. C. A.) 127 Fed. Rep. 804.
- 6.** Only Final Judgments Reviewable. — See *Harriman v. Northern Securities Co.*, 197 U. S. 244.
- 8.** Certification to Supreme Court by Circuit Court of Appeals. — See *Middletown Nat. Bank v. Toledo, etc., R. Co.*, (C. C. A.) 127 Fed. Rep. 85; *Toledo Traction Co. v. Cameron*, (C. C. A.) 137 Fed. Rep. 49.
- 254.** 6. Power to Issue Writ Determined. — See *Harriman v. Northern Securities Co.*, 197 U. S. 244.
- 10.** Writ Ordinarily Issued Only After Final Decree. — See *Harriman v. Northern Securities Co.*, 197 U. S. 244.
- 255.** 3. See *Peters v. Hanger*, (C. C. A.) 136 Fed. Rep. 181.
- 256.** 4. See *Purnell v. Page*, 128 Fed. Rep. 496.
- 5.** *Mandamus.* — See *Barber Asphalt Paving Co. v. Morris*, (C. C. A.) 132 Fed. Rep. 945.
- 12.** The Appellate Jurisdiction in Bankruptcy Proceedings. — *Dodge v. Norlin*, (C. C. A.) 133 Fed. Rep. 363.
- 257.** 4. Purpose of Act. — *Dodge v. Norlin*, (C. C. A.) 133 Fed. Rep. 363.
- 258.** 2. Appellate Jurisdiction Does Not Depend on Amount in Controversy. — *Kirby v. American Soda Fountain Co.*, 194 U. S. 141.
- 3.** Jurisdiction Only of Final Judgments. — *Christensen Engineering Co. v. Westinghouse Air Brake Co.*, (C. C. A.) 129 Fed. Rep. 96; *Bullock Electric, etc., Co. v. Westinghouse Electric, etc., Co.*, (C. C. A.) 129 Fed. Rep. 105; *Clement v. Wilson*, (C. C. A.) 135 Fed. Rep. 749; *Columbia Ave. Trust Co. v. MacAfee Co.*, (C. C. A.) 136 Fed. Rep. 402. See also *Heinze v. Butte, etc., Consol. Min. Co.*, (C. C. A.) 129 Fed. Rep. 274; *Dodge v. Norlin*, (C. C. A.) 133 Fed. Rep. 363.
- 4.** Exception as to Injunction Orders. — *Star Brass Works v. General Electric Co.*, (C. C. A.) 129 Fed. Rep. 102. See also *Frye v. Carstens*, (C. C. A.) 130 Fed. Rep. 766; *Columbia Ave. Trust Co. v. MacAfee Co.*, (C. C. A.) 136 Fed. Rep. 402; *Crown Cork, etc., Co. v. Standard Stopper Co.*, (C. C. A.) 136 Fed. Rep. 184.
- 7.** Final Decree as to Collateral Matter Appealable. — *Dodge v. Norlin*, (C. C. A.) 133 Fed. Rep. 363.
- 259.** 3. Decree Interlocutory When Reference Directed. — See *U. S. Fidelity, etc., Co. v. Hampton*, (C. C. A.) 134 Fed. Rep. 734.
- 260.** 1. A Decree Dismissing in Part a Bill

261. *e.* RESERVATION OF JURISDICTION — Specific Instances. — See notes 2, 6.

262. *g.* IN INJUNCTION AND RECEIVERSHIP PROCEEDINGS — Final Decision upon the Merits on Appeal. — See note 2.

263. Meaning of Continuing an Injunction. — See note 6.

264. *h.* FINALITY OF JURISDICTION — (2) *Where Jurisdiction Depends on Diverse Citizenship.* — See notes 1, 2.

Cases Involving Constitutional Questions. — See note 4.

265. (5) *Criminal Cases.* — See note 3.

In Contempt. — See note 6.

(7) *Territorial Cases.* — See note 9.

267. IV. CIRCUIT COURTS — 4. Jurisdiction — *a.* ORIGINAL JURISDICTION — (1) *General Statute* — (a) In General. — See note 13.

268. (b) Suits of Civil Nature at Common Law or in Equity. — See notes 1, 2.

Suits in Equity. — See note 6.

As a "Suit of a Civil Nature, at Common Law or in Equity." — See note 10.

269. See notes 10, 15.

A Proceeding to Establish and Probate a Will. — See note 19.

270. A Proceeding for the Settlement and Distribution of an Estate. — See notes 1, 2.

for Infringement of a Patent. — See *Starr Brass Works v. General Electric Co.*, (C. C. A.) 129 Fed. Rep. 102.

For Other Decrees Held Not to Be Final. — *Heinze v. Butte*, etc., Consol. Min. Co., (C. C. A.) 129 Fed. Rep. 274; *Christensen Engineering Co. v. Westinghouse Air Brake Co.*, (C. C. A.) 129 Fed. Rep. 96; *Clarke v. Eureka County Bank*, 131 Fed. Rep. 145; *Jabine v. Sparks*, (C. C. A.) 131 Fed. Rep. 440; *Clement v. Wilson*, (C. C. A.) 135 Fed. Rep. 749; *Columbia Ave. Trust Co. v. McAfee Co.*, (C. C. A.) 136 Fed. Rep. 402; *Born v. Schneider*, 128 Fed. Rep. 179.

260. 2. Order Denying a New Trial. — See *Jefferson Hotel Co. v. Warren*, (C. C. A.) 128 Fed. Rep. 565; *United Engineering, etc., Co. v. Broadnax*, (C. C. A.) 136 Fed. Rep. 351.

Other Instances. — *Viquesney v. Allen*, (C. C. A.) 131 Fed. Rep. 21; *Chicago Wooden Ware Co. v. Miller Ladder Co.*, (C. C. A.) 133 Fed. Rep. 541; *Dodge v. Norlin*, (C. C. A.) 133 Fed. Rep. 363; *Scriven v. North*, (C. C. A.) 134 Fed. Rep. 366; *Bullock Electric, etc., Co. v. Westinghouse Electric, etc., Co.*, (C. C. A.) 129 Fed. Rep. 105.

261. 2. Under the Bankruptcy Act. — *Dodge v. Norlin*, (C. C. A.) 133 Fed. Rep. 363.

6. Under the Tucker Act. — See *Cornell Steamboat Co. v. U. S.*, 130 Fed. Rep. 480.

262. 2. An Injunction upon a Prima Facie Showing. — See *Railroad Commission v. J. Rosenbaum Grain Co.*, (C. C. A.) 130 Fed. Rep. 110.

263. 6 Order Denying, Dissolving, or Refusing to Dissolve Injunction. — See *Christensen Engineering Co. v. Westinghouse Air Brake Co.*, (C. C. A.) 129 Fed. Rep. 96.

264. 1. Jurisdiction as Originally Invoked the Test. — *Bankers Mut. Casualty Co. v. Minneapolis, etc., R. Co.*, 192 U. S. 371.

2. Diverse Citizenship Must Be Sole Ground of Jurisdiction. — See *Bankers Mut. Casualty Co. v. Minneapolis, etc., R. Co.*, 192 U. S. 371.

4. Cases Involving Constitutional Questions. — See *Terry v. Bird*, (C. C. A.) 129 Fed. Rep.

592; *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397.

265. 3. Criminal Jurisdiction. — *New v. Oklahoma*, 195 U. S. 252.

6. Final Jurisdiction in Contempt. — *In re Heinze*, (C. C. A.) 127 Fed. Rep. 96; *Matter of Christensen Engineering Co.*, 194 U. S. 458. See also *Heinze v. Butte*, etc., Consol. Min. Co., (C. C. A.) 129 Fed. Rep. 274; *Bullock Electric, etc., Co. v. Westinghouse Electric, etc., Co.*, 129 Fed. Rep. 105; *Christensen Engineering Co. v. Westinghouse Air Brake Co.*, (C. C. A.) 129 Fed. Rep. 96.

9. See *Shields v. Mongollon Exploration Co.*, (C. C. A.) 137 Fed. Rep. 539.

The District Court of Alaska. — See *Copper River Min. Co. v. McClellan*, (C. C. A.) 138 Fed. Rep. 333; *Shoup v. Marks*, (C. C. A.) 128 Fed. Rep. 32.

267. 13. *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397. See also *Rankin v. Herod*, 130 Fed. Rep. 390; *Stevenson v. Fain*, 195 U. S. 165.

268. 1. Suits of a Civil Nature at Common Law or in Equity. — *Israel v. Israel*, 130 Fed. Rep. 237.

2. Nature of the Action, Not Its Form. — *Peyton v. Desmond*, (C. C. A.) 129 Fed. Rep. 1; *Israel v. Israel*, 130 Fed. Rep. 237. See also *Stevenson v. Fain*, 195 U. S. 165.

The Form of Action Prescribed by State Statute. — *Courtney v. Pradt*, 196 U. S. 89.

6. See *Viquesney v. Allen*, (C. C. A.) 131 Fed. Rep. 21.

10. By Receiver of National Bank. — See *Rankin v. Herod*, 130 Fed. Rep. 390; *Hampton Roads R., etc., Co. v. Newport News, etc., R., etc., Co.*, 131 Fed. Rep. 534.

269. 10. Validity of Tax. — See *Michigan R. Tax Cases*, 138 Fed. Rep. 223.

15. Suits to Recover Penalty. — *Israel v. Israel*, 130 Fed. Rep. 237.

19. Proceedings as to Wills. — See *Security Trust, etc., Co. v. Alexander*, 134 Fed. Rep. 767.

270. 1. Proceedings for Settlement of Estates. — *Thiel Detective Service Co. v. McClure*, 130

270. A Writ of Mandamus. — See notes 4, 5.

(c) Amount in Controversy — The Sufficiency of the Amount in Dispute Is a Jurisdictional Requirement. — See note 6.

It Is the Amount or Value of That Which the Complainant Claims. — See note 7.

271. See note 2.

Damages Capable of Being Estimated in Money. — See notes 6, 7, 8.

(d) Suits Arising under Constitution, Laws, or Treaties — *aa.* IN GENERAL. — See notes 9, 10.

To Give a Circuit Court Jurisdiction. — See note 11.

272. See notes 1, 2.

Suits By and Against States. — See notes 3, 4, 5.

Fed. Rep. 55; *Moore v. Fidelity Trust Co.*, 134 Fed. Rep. 489.

270. 2. Proceeding by Creditor to Establish Debt Against Estate. — See *Thiel Detective Service Co. v. McClure*, 130 Fed. Rep. 55.

4. Writ of Mandamus. — *Kelly v. Grand Circle, etc.*, 129 Fed. Rep. 830; *Mystic Milling Co. v. Chicago, etc.*, R. Co., 132 Fed. Rep. 289; *In re Massachusetts*, 197 U. S. 482. See also *Columbia Ave. Sav. Fund, etc.*, Co. *v. Dawson*, 130 Fed. Rep. 152; *Large v. Consolidated Nat. Bank*, 137 Fed. Rep. 168; *Knapp v. Lake Shore, etc.*, R. Co., 197 U. S. 536.

5. See *Mystic Milling Co. v. Chicago, etc.*, R. Co., 132 Fed. Rep. 289; *Barber Asphalt Paving Co. v. Morris*, (C. C. A.) 132 Fed. Rep. 945.

6. Amount in Controversy a Jurisdictional Fact. — *Battle v. Atkinson*, 191 U. S. 559, *affirming* 115 Fed. Rep. 384; *Butters v. Carney*, 127 Fed. Rep. 622; *Coulter v. Fargo*, (C. C. A.) 127 Fed. Rep. 912; *Winchester Repeating Arms Co. v. Butler*, 128 Fed. Rep. 976; *Wines v. Cobb Real Estate Co.*, 128 Fed. Rep. 198; *Louisville, etc.*, R. Co. *v. Smith*, (C. C. A.) 128 Fed. Rep. 1; *Israel v. Israel*, 130 Fed. Rep. 237; *U. S. v. Churchyard*, 132 Fed. Rep. 82; *White Swan Mines Co. v. Balliet*, 134 Fed. Rep. 1004; *Pennsylvania R. Co. v. Bay*, 138 Fed. Rep. 203; *McDaniel v. Traylor*, 196 U. S. 415. See also *Robinson v. Suburban Brick Co.*, (C. C. A.) 127 Fed. Rep. 804; *Bloomington v. Watson*, (C. C. A.) 128 Fed. Rep. 268; *Rankin v. Herod*, 130 Fed. Rep. 390; *Columbia Ave. Sav. Fund, etc.*, Co. *v. Dawson*, 130 Fed. Rep. 152; *Gunby v. Armstrong*, (C. C. A.) 133 Fed. Rep. 417; *Stanwood v. Wishard*, 134 Fed. Rep. 959.

Amount Not Material in Suits for Infringement of Trademarks. — See *Winchester Repeating Arms Co. v. Butler*, 128 Fed. Rep. 976.

Burden of Proof. — Where by the averments in the plaintiff's bill *prima facie* jurisdiction is shown, the defendant can oust it only by proper averments and proof. *Wiemer v. Louisville Water Co.*, 130 Fed. Rep. 244; *Butters v. Carney*, 127 Fed. Rep. 622.

7. Value of the Matter in Dispute. — *Israel v. Israel*, 130 Fed. Rep. 237; *Battle v. Atkinson*, 191 U. S. 559, *affirming* 115 Fed. Rep. 384. See also *Kirby v. American Soda Fountain Co.*, 194 U. S. 141.

Actions in Ejectment. — *Butters v. Carney*, 127 Fed. Rep. 622.

Suits to Quiet Title. — *Greenfield v. U. S. Mortgage Co.*, 133 Fed. Rep. 784; *McDaniel v. Traylor*, 196 U. S. 415.

Suits for Injunction. — *Louisville, etc.*, R. Co.

v. Smith, (C. C. A.) 128 Fed. Rep. 1; *Southern R. Co. v. Greensboro Ice, etc., Co.*, 134 Fed. Rep. 82. See also *Coulter v. Fargo*, (C. C. A.) 127 Fed. Rep. 912; *Winchester Repeating Arms Co. v. Butler*, 128 Fed. Rep. 976; *Jacobs v. Mexican Sugar Co.*, 130 Fed. Rep. 589.

Suits to Enjoin Collection of Taxes. — *Douglas Co. v. Stone*, 191 U. S. 557, *affirming* 110 Fed. Rep. 812.

271. 2. Judgment Falls Short of Amount. — See *Israel v. Israel*, 130 Fed. Rep. 237.

A Subsequent Change in the Conditions does not oust the Circuit Court of jurisdiction. *Kirby v. American Soda Fountain Co.*, 194 U. S. 141.

6. Causes Having Money Value. — *Clifford v. Williams*, 131 Fed. Rep. 100.

7. Causes Having No Money Value. — *Clifford v. Williams*, 131 Fed. Rep. 100.

8. See *Israel v. Israel*, 130 Fed. Rep. 237.

9. Suits Arising under Constitution, Laws, or Treaties — Without Regard to Citizenship. — *Columbia Ave. Sav. Fund, etc.*, Co. *v. Dawson*, 130 Fed. Rep. 152; *People's Sav. Bank v. Layman*, 134 Fed. Rep. 635; *Knight v. Shelton*, 134 Fed. Rep. 423; *George v. Wallace*, (C. C. A.) 135 Fed. Rep. 286; *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397. See also *Defiance Water Co. v. Defiance*, 191 U. S. 184.

10. Without Regard to Amount in Controversy. — See *Rankin v. Herod*, 130 Fed. Rep. 390; *Schofield v. Palmer*, 134 Fed. Rep. 753; *Knight v. Shelton*, 134 Fed. Rep. 423.

11. Involve Construction of Constitution or Laws. — *Anthony v. Burrow*, 129 Fed. Rep. 783; *Savannah v. Holst*, (C. C. A.) 132 Fed. Rep. 901; *St. Louis, etc.*, R. Co. *v. Davis*, 132 Fed. Rep. 629; *U. S. v. Bell*, (C. C. A.) 135 Fed. Rep. 336; *Bankers Mut. Casualty Co. v. Minneapolis, etc.*, R. Co., 192 U. S. 371; *Barney v. New York*, 193 U. S. 430; *Underground R. Co. v. New York*, 193 U. S. 416; *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112; *Minnesota v. Northern Securities Co.*, 194 U. S. 48. See also *Weimer v. Louisville Water Co.*, 130 Fed. Rep. 244; *Michigan R. Tax Cases*, 138 Fed. Rep. 223; *Sloan v. U. S.*, 193 U. S. 614.

272. 1. Issue on Facts Only. — See *Willitt v. Baker*, 133 Fed. Rep. 937.

2. Other Questions Involved. — *People's Sav. Bank v. Layman*, 134 Fed. Rep. 635. See also *Knight v. Shelton*, 134 Fed. Rep. 423.

3. Suits By and Against States. — See *Minnesota v. Northern Securities Co.*, 194 U. S. 48.

4. *Chandler v. Dix*, 194 U. S. 590. See also *Camden Interstate R. Co. v. Catlettsburg*, 129 Fed. Rep. 421.

- 272.** *bb.* SUITS ARISING UNDER CONSTITUTION. — See notes 6, 7, 8, 9.
cc. SUITS ARISING UNDER LAWS OF UNITED STATES. — See note 12.
- 273.** See notes 1, 2, 7, 9, 10.
 The Fact that a Receiver Was Appointed by a Federal Court. — See note 11.
 Actions Based on the Express Provisions of the National Banking Act. — See notes 13, 14.
- 274.** (e) Suits by United States. — See note 7.
 (f) Between Citizens of Different States — *aa.* CITIZENSHIP IN GENERAL. — See notes 9, 10.
bb. STATE AS CITIZEN. — See note 11.
cc. CITIZENS OF TERRITORIES OR DISTRICT OF COLUMBIA. — See note 12.
- 275.** *dd.* CITIZENSHIP OF CORPORATIONS. — See notes 1, 2, 3.
- 272.** 5. See *Coulter v. Weir*, (C. C. A.) 127 Fed. Rep. 897; *Coulter v. Fargo*, (C. C. A.) 127 Fed. Rep. 912.
6. Impairing Obligation of Contract. — *Columbia Ave. Sav. Fund, etc., Co. v. Dawson*, 130 Fed. Rep. 152; *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517; *Cleveland v. Cleveland Electric R. Co.*, 194 U. S. 538; *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112. See also *York County Sav. Bank v. Abbot*, 131 Fed. Rep. 980; *Dawson v. Columbia Ave. Sav. Fund, etc., Co.*, 197 U. S. 178.
7. Due Process of Law. — *Holst v. Savannah Electric Co.*, 131 Fed. Rep. 931, reversed on other grounds (C. C. A.) 132 Fed. Rep. 901; *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112. See also *U. S. v. Moore*, 129 Fed. Rep. 630; *Savannah v. Holst*, (C. C. A.) 132 Fed. Rep. 901; *St. Louis, etc., R. Co. v. Davis*, 132 Fed. Rep. 629; *Michigan R. Tax Cases*, 138 Fed. Rep. 223; *Dawson v. Columbia Ave. Sav. Fund, etc., Co.*, 197 U. S. 178.
8. Under Interstate Commerce Clause. — *Southern R. Co. v. Greensboro Ice, etc., Co.*, 134 Fed. Rep. 82. See also *New Haven Pulp, etc., Co. v. Downington Mfg. Co.*, 130 Fed. Rep. 605; *St. Louis, etc., R. Co. v. Davis*, 132 Fed. Rep. 629.
9. Erroneous Administration of Constitutional State Statutes. — *Barney v. New York*, 193 U. S. 430. See also *U. S. v. Bell*, (C. C. A.) 135 Fed. Rep. 336.
12. Against Federal Corporations. — See *Wolff v. Choctaw, etc., R. Co.*, 133 Fed. Rep. 601.
- 273.** 1. Rights under National Bank Laws. — See *George v. Wallace*, (C. C. A.) 135 Fed. Rep. 286.
2. Receivers of National Banks. — *Rankin v. Herod*, 130 Fed. Rep. 390.
7. Infringement of Trademark. — See *A. Leschen, etc., Rope Co. v. Broderick, etc., Rope Co.*, (C. C. A.) 134 Fed. Rep. 571.
9. On a Contractor's Bond. — See *U. S. v. Churchyard*, 132 Fed. Rep. 82; *U. S. v. Barrett*, 135 Fed. Rep. 189.
10. Under Federal Election Laws. — *Knight v. Shelton*, 134 Fed. Rep. 423.
11. Suits By and Against Federal Receivers. — *Pepper v. Rogers*, 128 Fed. Rep. 987. See also *Gunby v. Armstrong*, (C. C. A.) 133 Fed. Rep. 417.
13. Actions Against Officers of National Banks. — See *George v. Wallace*, (C. C. A.) 135 Fed. Rep. 286.
14. See *Anglo-American Land Mortg., etc., Co. v. Cheshire Provident Inst.*, 134 Fed. Rep. 152.
- 274.** 7. Suits by United States. — See *U. S. v. Churchyard*, 132 Fed. Rep. 82.
9. Citizenship in General. — *Willett v. Baker*, 133 Fed. Rep. 937. See also *Eisele v. Oddie*, 128 Fed. Rep. 941; *Von Voight v. Michigan Cent. R. Co.*, 130 Fed. Rep. 398; *Baltimore, etc., R. Co. v. Doty*, (C. C. A.) 133 Fed. Rep. 866; *Stevenson v. Fain*, 195 U. S. 165.
10. *Eisele v. Oddie*, 128 Fed. Rep. 941; *Stockwell v. Boston, etc., R. Co.*, 131 Fed. Rep. 152. See also *Yocum v. Parker*, (C. C. A.) 130 Fed. Rep. 770; *Mohican Tp. v. Johnson*, (C. C. A.) 133 Fed. Rep. 524; *Sun Printing, etc., Assoc. v. Edwards*, 194 U. S. 377.
- Removal to Another State. — *Wiemer v. Louisville Water Co.*, 130 Fed. Rep. 244. See also *Eisele v. Oddie*, 128 Fed. Rep. 941.
11. The State as a Citizen. — *Minnesota v. Northern Securities Co.*, 194 U. S. 48.
12. Citizens of Territories or District of Columbia. — See *Guilford Granite Co. v. Harrison Granite Co.*, 23 App. Cas. (D. C.) 1.
- 275.** 1. Citizenship of Corporation. — See *White Swan Mines Co. v. Balliet*, 134 Fed. Rep. 1004.
2. *Alabama, etc., Mfg. Co. v. Riverdale Cotton Mills*, (C. C. A.) 127 Fed. Rep. 497; *U. S. v. Northern Pac. R. Co.*, (C. C. A.) 134 Fed. Rep. 715; *Knight v. Litcher, etc., Lumber Co.*, (C. C. A.) 136 Fed. Rep. 404; *Doctor v. Harrington*, 196 U. S. 579; *Thomas v. Ohio State University*, 195 U. S. 207. See also *Arkwright Mills v. Aultman, etc., Machinery Co.*, 128 Fed. Rep. 195; *Stockwell v. Boston, etc., R. Co.*, 131 Fed. Rep. 152; *McKane v. Burke*, 132 Fed. Rep. 688; *Utah-Nevada Co. v. De Lamar*, (C. C. A.) 133 Fed. Rep. 113; *George v. Wallace*, (C. C. A.) 135 Fed. Rep. 286; *Cable v. U. S. Life Ins. Co.*, 191 U. S. 288; *Sun Printing, etc., Assoc. v. Edwards*, 194 U. S. 377.
- A Municipal Corporation. — See *Mohican Tp. v. Johnson*, (C. C. A.) 133 Fed. Rep. 524.
- Corporation De Facto Not Entitled to Sue on Ground of Citizenship. — *Gastonia Cotton Mfg. Co. v. W. L. Wells Co.*, (C. C. A.) 128 Fed. Rep. 369, affirmed 198 U. S. 177.
3. Transacting Business in Another State. — *Wolff v. Choctaw, etc., R. Co.*, 133 Fed. Rep. 601; *U. S. v. Northern Pac. R. Co.*, (C. C. A.) 134 Fed. Rep. 715. See also *Guilford Granite Co. v. Harrison Granite Co.*, 23 App. Cas. (D. C.) 1; *Weed v. Centre, etc., St. R. Co.*, 132 Fed. Rep. 151; *Knight v. Litcher, etc., Lumber Co.*, (C. C. A.) 136 Fed. Rep. 404.

- 275.** A Corporation Actually Incorporated in Two States. — See note 4.
cc. CITIZENSHIP OF PARTNERSHIP OR JOINT STOCK COMPANY. — See note 6.
- 276.** *ff.* SEVERAL PLAINTIFFS OR DEFENDANTS. — See note 1.
 The Mere Joinder of Formal or Nominal Parties. — See note 2.
 A Rearrangement of the Parties to the Suit. — See note 3.
- 277.** *gg.* REPRESENTATIVE PARTIES. — See notes 1, 2, 3.
hh. WAIVER OF CITIZENSHIP. — See note 4.
 (g) Claims to Lands under Grants of Different States. — See note 5.
 (h) Controversies Between Citizens and Foreign Subjects — Without Reference to Which Is Plaintiff or Defendant. — See note 7.
 Aliens. — See note 11.
- 278.** (j) Suits by Assignees. — See note 9.
- 279.** See notes 2, 3, 4, 5, 6, 9.
- 280.** (2) *Miscellaneous Statutes* — (a) Provisions of Revised Statutes. — See note 5.

275. 4. Corporations Incorporated in Two States. — Alabama, etc., *Mfg. Co. v. Riverdale Cotton Mills*, (C. C. A.) 127 Fed. Rep. 497; *Goodwin v. Boston*, etc., R. Co., 127 Fed. Rep. 986.

Railroads Receiving Grants of Authority from Two or More States. — See *Goodwin v. Boston*, etc., R. Co., 127 Fed. Rep. 986.

6. Citizenship of Partnership or Joint Stock Company. — *Fred Macey Co. v. Macey*, (C. C. A.) 135 Fed. Rep. 725. See also *Bloomington v. Watson*, (C. C. A.) 128 Fed. Rep. 268.

In a Proceeding Against the Members of a Firm Jointly there is no diversity of citizenship where some of the members are citizens of the same state as the complainant. *Raphael v. Trask*, 194 U. S. 272.

276. 1. Several Plaintiffs or Defendants. — See *Dominion Nat. Bank v. Olympia Cotton Mills*, 128 Fed. Rep. 181; *Bloomington v. Watson*, (C. C. A.) 128 Fed. Rep. 268; *Keller v. Kansas City*, etc., R. Co., 135 Fed. Rep. 202; *George v. Wallace*, (C. C. A.) 135 Fed. Rep. 286; *King v. Davis*, 137 Fed. Rep. 198.

2. Joinder of Formal Parties. — *Groel v. United Electric Co.*, 132 Fed. Rep. 252; *White Swan Mines Co. v. Balliet*, 134 Fed. Rep. 1004. See also *Seymour v. Farmers L. & T. Co.*, (C. C. A.) 128 Fed. Rep. 907; *U. S. v. Churchyard*, 132 Fed. Rep. 82; *Boatmen's Bank v. Fritzlen*, (C. C. A.) 135 Fed. Rep. 650.

3. Rearrangement of Parties. — *Groel v. United Electric Co.*, 132 Fed. Rep. 252; *Boatmen's Bank v. Fritzlen*, (C. C. A.) 135 Fed. Rep. 650; *Dawson v. Columbia Ave. Sav. Fund*, etc., Co., 197 U. S. 178. See also *Mills v. Chicago*, 127 Fed. Rep. 731; *German Sav.*, etc., Soc. *v. Tull*, (C. C. A.) 136 Fed. Rep. 1.

277. 1. Representative Parties. — *McDuffie v. Montgomery*, 128 Fed. Rep. 105.

2. See *Seymour v. Farmers L. & T. Co.*, (C. C. A.) 128 Fed. Rep. 907; *Hampton Roads R.*, etc., Co. *v. Newport News*, etc., R., etc., Co., 131 Fed. Rep. 534.

3. See *Toledo Traction Co. v. Cameron*, (C. C. A.) 137 Fed. Rep. 49.

4. Waiver of Citizenship. — *Utah-Nevada Co. v. De Lamar*, (C. C. A.) 133 Fed. Rep. 113; *Fred Macey Co. v. Macey*, (C. C. A.) 135 Fed. Rep. 725; *Thomas v. Ohio State University*, 195 U. S. 207. See also *Wolff v. Choctaw*, etc., R.

Co., 133 Fed. Rep. 601; *Gorman-Wright Co. v. Wright*, (C. C. A.) 134 Fed. Rep. 363.

Right to Suit in One's Own District May Be Waived. — *Dominion Nat. Bank v. Olympia Cotton Mills*, 128 Fed. Rep. 181; *Bolles v. Lehigh Valley R. Co.*, 127 Fed. Rep. 884; *Pepper v. Rogers*, 128 Fed. Rep. 987.

5. Claims to Lands under Grants of Different States. — *Stevenson v. Fain*, 195 U. S. 165.

7. Controversies Between Citizens and Foreign Subjects. — See *United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co.*, 133 Fed. Rep. 930.

11. Aliens. — See *Von Voight v. Michigan Cent. R. Co.*, 130 Fed. Rep. 398.

278. 9. Choses in Action. — *Hoadley v. Day*, 128 Fed. Rep. 302; *Utah-Nevada Co. v. De Lamar*, (C. C. A.) 133 Fed. Rep. 113; *Gorman-Wright Co. v. Wright*, (C. C. A.) 134 Fed. Rep. 363. See also *Peacock*, etc., Co. *v. Thaggard*, 128 Fed. Rep. 1005, *affirmed* (C. C. A.) 129 Fed. Rep. 1005.

279. 2. General Application of Provision. — *Bolles v. Lehigh Valley R. Co.*, 127 Fed. Rep. 884. See also *Pepper v. Rogers*, 128 Fed. Rep. 987; *Peacock*, etc., Co. *v. Thaggard*, 128 Fed. Rep. 1005, *affirmed* (C. C. A.) 129 Fed. Rep. 1005; *Consumers' Gas Trust Co. v. Quinby*, (C. C. A.) 137 Fed. Rep. 882.

3. Time of Diverse Citizenship of Assignor. — *Noyes v. Crawford*, 133 Fed. Rep. 796. See also *Gorman-Wright Co. v. Wright*, (C. C. A.) 134 Fed. Rep. 363.

4. Citizenship of Intermediate Assignors. — See *Noyes v. Crawford*, 133 Fed. Rep. 796.

5. Merger in Judgment. — See *Stanwood v. Wishard*, 134 Fed. Rep. 959.

6. Cross-bill Based on Assigned Contract. — See *Peacock*, etc., Co. *v. Thaggard*, 128 Fed. Rep. 1005, *affirmed* (C. C. A.) 129 Fed. Rep. 1005.

9. To Recover Possession. — See *Hoadley v. Day*, 128 Fed. Rep. 302.

280. 5. Infringement Suits. — *United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co.*, 133 Fed. Rep. 930; *Rupp*, etc., Co. *v. Elliott*, (C. C. A.) 131 Fed. Rep. 730; *Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co.*, 132 Fed. Rep. 614; *Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co.*, 130 Fed. Rep. 558. See also *Miller v. Schwar-*

282. *b.* ON REMOVAL FROM STATE COURTS — (1) *In General.* — See notes 10, 11, 12.

(2) *Separable Controversies.* — See notes 13, 14.

283. (3) *Prejudice or Local Influence.* — See note 3.

284. *The Prejudice or Local Influence May Relate.* — See note 1.

If Prejudice or Local Influence in an Adjoining County. — See note 5.

286. *c.* CONCURRENT JURISDICTION OF CIRCUIT AND DISTRICT COURTS — (2) *Other Provisions of Revised Statutes.* — See notes 1, 4, 5.

(3) *Other Subsequent Statutes.* — See note 11.

287. (4) *Under Bankruptcy Act.* — See note 6.

291. VI. COURT OF CLAIMS — 5. *Jurisdiction* — *a.* IN GENERAL. — See notes 17, 20.

297. *c.* SUBSEQUENT STATUTES — (3) *Act of 1887* — (a) *In General.* — See note 2.

(b) *Claims Founded on Constitution, Statutes, Contracts, or Damages.* — See notes 4, 11.

298. (4) *Act of 1891.* — See note 8.

300. 7. *Limitations* — *There Are Other Statutory Provisions.* — See note 10.

ner, 130 Fed. Rep. 561; *International Wireless Tel. Co. v. Fessenden*, 131 Fed. Rep. 491; *Westinghouse Mach. Co. v. Press Pub. Co.*, 127 Fed. Rep. 822.

Invalidity of Patent as Defense. — See *Roberts v. Bennett*, (C. C. A.) 136 Fed. Rep. 193.

282. 10. *The Test of the Right of Removal.* — *Groel v. United Electric Co.*, 132 Fed. Rep. 252; *Minnesota v. Northern Securities Co.*, 194 U. S. 48. See also *Mystic Milling Co. v. Chicago, etc., R. Co.*, 132 Fed. Rep. 289; *Davenport v. Southern R. Co.*, (C. C. A.) 135 Fed. Rep. 960; *Saunders v. Adams Express Co.*, 136 Fed. Rep. 494.

11. *Removal by Consent.* — *Minnesota v. Northern Securities Co.*, 194 U. S. 48. See also *Pepper v. Rogers*, 128 Fed. Rep. 987; *Miller v. Clifford*, (C. C. A.) 133 Fed. Rep. 880; *Gebbie v. Review of Reviews Co.*, 134 Fed. Rep. 150.

12. See *Madisonville Traction Co. v. St. Bernard Min. Co.*, 130 Fed. Rep. 789.

13. *Separable Controversies.* — *McIntyre v. Southern R. Co.*, 131 Fed. Rep. 985; *Henry v. Illinois Cent. R. Co.*, 132 Fed. Rep. 715; *Boatmen's Bank v. Fritzlen*, (C. C. A.) 135 Fed. Rep. 650. See also *Munford Rubber Tire Co. v. Consolidated Rubber Tire Co.*, 130 Fed. Rep. 496; *Roberts v. Shelby Steel Tube Co.*, (C. C. A.) 131 Fed. Rep. 729; *American Bridge Co. v. Hunt*, (C. C. A.) 130 Fed. Rep. 302; *Miller v. Clifford*, (C. C. A.) 133 Fed. Rep. 880.

14. *Entire Suit Removed.* — See *St. Bernard Min. Co. v. Madisonville Traction Co.*, 130 Fed. Rep. 794, *affirmed* 196 U. S. 239; *Groel v. United Electric Co.*, 132 Fed. Rep. 252; *Hatcher v. Hendrie, etc., Mfg., etc., Co.*, (C. C. A.) 133 Fed. Rep. 267; *Boatmen's Bank v. Fritzlen*, (C. C. A.) 135 Fed. Rep. 650; *Indian Mountain Jellico Coal Co. v. Asheville Ice, etc., Co.*, 135 Fed. Rep. 837.

282. 3. *What Causes May Be Removed.* — *Boatmen's Bank v. Fritzlen*, (C. C. A.) 135 Fed. Rep. 650. See also *Parker v. Vanderbilt*, 136 Fed. Rep. 246; *Indian Mountain Jellico Coal Co. v. Asheville Ice, etc., Co.*, 135 Fed.

Rep. 837; *Ellison v. Louisville, etc., R. Co.*, (C. C. A.) 112 Fed. Rep. 805.

That There Must Be Present the Jurisdictional Amount in Controversy. — *Gilson v. Mutual Reserve Fund L. Assoc.*, 129 Fed. Rep. 1003; *Price v. Ellis*, 129 Fed. Rep. 482; *Davies v. Wells*, 134 Fed. Rep. 139.

284. 1. *Parker v. Vanderbilt*, 136 Fed. Rep. 246.

5. *Prejudice or Influence in Adjoining County.* — See *Parker v. Vanderbilt*, 136 Fed. Rep. 246.

286. 1. *Suits by United States.* — See U. S. v. *Churchyard*, 132 Fed. Rep. 82.

A Receiver of a National Bank. — *Schofield v. Palmer*, 134 Fed. Rep. 753.

4. *Suits for Injuries by Conspirators in Certain Cases.* — See U. S. v. *Moore*, 129 Fed. Rep. 630.

5. *Rights under State Laws Are Not Protected.* — See U. S. v. *Moore*, 129 Fed. Rep. 630.

11. *Claims under Tucker Act.* — *Cornell Steamboat Co. v. U. S.*, 130 Fed. Rep. 480. See also U. S. v. *Cornell Steamboat Co.*, (C. C. A.) 137 Fed. Rep. 455.

287. 6. See *Viquesney v. Allen*, (C. C. A.) 131 Fed. Rep. 21.

291. 17. *Money Demands Only.* — See *Summey v. U. S.*, 39 Ct. Cl. 199; *District of Columbia v. Barnes*, 197 U. S. 146.

20. *Equitable Claims or Relief.* — See *District of Columbia v. Barnes*, 197 U. S. 146.

297. 2. *Act of 1887.* — See *Vincent v. U. S.*, 39 Ct. Cl. 456.

Enlargement of Jurisdiction. — *District of Columbia v. Barnes*, 197 U. S. 146.

4. *Claims Founded on Constitution, Statutes, Contracts, or Damages.* — See *Bellah v. U. S.*, 39 Ct. Cl. 396; *Le More v. U. S.*, 39 Ct. Cl. 484.

11. *War Claims.* — See *Bellah v. U. S.*, 39 Ct. Cl. 396.

298. 8. *Indian Depredation Claims.* — *Gallegos v. U. S.*, 39 Ct. Cl. 86. See also *Vincent v. U. S.*, 39 Ct. Cl. 456.

300. 10. *Indian Depredation Claims.* — See *Gallegos v. U. S.*, 39 Ct. Cl. 86.

UNITED STATES MARSHALS.

BY J. HAVILAND SMITH.

305. III. POWERS, DUTIES, AND LIABILITIES — 2. In Regard to Execution of Process — *a.* IN GENERAL. — Liability for Negligence. — See note 2.

310. V. COMPENSATION — 1. In General. — See note 1.

2. For Serving Process — *a.* FEES AND COMMISSIONS — (1) *In General.* — See note 7.

314. 3. For Attendance on Court or Commissioner. — See note 3.

For What Days Per Diem Allowed. — See note 5.

316. 5. For Keeping and Transporting Prisoners. — See note 3.

317. 10. Reimbursement for Expenditures. — See note 1.

VI. DEPUTY MARSHALS — 1. In General — Appointment, Qualification, and Tenure. — See note 5.

305. 2. A Marshal Who Has Received Two Executions on the Same Judgment cannot be held liable for the amount of both. *Grubbs v. Needles*, 5 Indian Ter. 458.

310. 1. Extra Compensation Allowed for Transferring Prize of War Out of District. — *The Adula*, 127 Fed. Rep. 849.

7. For Service of Subpœnas by Bailiffs. — See *Swift v. U. S.*, 128 Fed. Rep. 763.

314. 3. Allowance When Circuit and District Courts Both Held by One Judge. — Where additional bailiffs in excess of three, but not exceeding six altogether, attended the Circuit and District Courts on days when only one judge was present, but he held both courts at the same time, the marshal was held to be entitled to a *per diem* compensation for their attend-

ance, but not to be entitled to recover for attendance of the same persons at the same time as both bailiffs and deputy marshals. *Swift v. U. S.*, 128 Fed. Rep. 763.

5. Entitled to Fee Though Judge Not Present. — See *Swift v. U. S.*, 128 Fed. Rep. 763.

316. 3. Compensation Allowed for Meals for Officers in Charge of Prisoners and Witnesses in Custody. — *Swift v. U. S.*, 128 Fed. Rep. 763.

317. 1. Stenographer's Fees and Expenses Paid by Parties and Wrongly Charged Against Marshal. — See *Swift v. U. S.*, 128 Fed. Rep. 763.

5. Marshal May Employ Private Citizen to Assist Him. — *Murray v. Pfeiffer*, 70 N. J. L. 768.

UNIVERSITIES AND COLLEGES.

BY JOHN SIMPSON.

321. II. FOUNDATION AND LEGISLATIVE CONTROL — 1. As Public Corporations. — See note 2.

322. Private Donations. — See note 1.

326. III. OFFICERS — 3. Professors Not Officers. — See note 3.

IV. POWERS OF INCORPORATED UNIVERSITIES AND COLLEGES — 1. In General. — See note 5.

332. 8. To Sue and Be Sued. — See note 2.

9. To Change Location. — See note 11.

333. 11. To Make Contracts. — See note 4.

321. 2. As Public Corporations. — *Carrick Academy v. Clark*, 112 Tenn. 483.

322. 1. Private Donations to State Universities. — *Carrick Academy v. Clark*, 112 Tenn. 483

326. 3. Professors Not Officers. — State Board of Agriculture *v.* Meyers, (Colo. App. 1904) 77 Pac. Rep. 372.

5. Medical College Held to Have Implied Power to Maintain Hospital. — *Hutchinson's Succession*, 112 La. 656.

332. 2. State Institution, Where Charter Provides Therefor. — See *Ward v. Kansas State Agricultural College*, (C. C. A.) 138 Fed. Rep. 372.

11. *Packard v. Thiel College*, 209 Pa. St. 349, holding further that persons who had contributed funds had a legal standing to enjoin removal.

333. 4. Power to Contract. — *Ward v. Kansas State Agricultural College*, (C. C. A.) 138

334. V. DONATIONS AND SUBSCRIPTIONS — 1. Government Aid — a. IN GENERAL — Agricultural Colleges. — See note 4.

336. VI. DISSOLUTION — 2. Private Corporations — a. BY FORFEITURE FROM MISUSER. — See note 2.

338. UNLAWFUL — UNLAWFULLY. — See note 3.

347. UNLESS. — See note 2.

348. UNMARRIED. — See note 1.

351. UNSOUND MIND. — See note 5.

352. UNTIL — TILL. — See note 3.

355. UNWROUGHT. — See note 1.

358. UPON — ON — On or About. — See note 1.

Fed. Rep. 372; State Board of Agriculture v. Meyers, (Colo. App. 1904) 77 Pac. Rep. 372.

Conveyance of Medical College to University — Reconveyance Decreed on Failure of Consideration. — See Medical College Laboratory v. State University, 178 N. Y. 153, affirming 76 N. Y. App. Div. 48.

334. 4. Amounts of Appropriations. — Agricultural, etc., College v. Hager, (Ky. 1905) 87 S. W. Rep. 1125.

336. 2. De Facto Dissolution by Transfer of Property. — A legislative enactment which transferred the property of an incorporated medical college to a university has been held to operate as a *de facto* dissolution of the former, since it destroyed the only function which it could perform. Hutchinson's Succession, 112 La. 656.

338. 3. Unlawful. — State v. Savant, 115 La. 226.

347. 2. "Unless" Imports Negative Condition Precedent. — Hickory v. Southern R. Co., 137 N. Car. 189.

348. 1. Having No Husband or Wife at Time in Question. — In re Smith, (1903) 1 Ch. 373.

351. 5. Unsound Mind Includes Every Species of Unsoundness of Mind. — In re Streiff, 119 Wis. 566.

352. 3. Until — Exclusive or Inclusive. — People v. Fitzgerald, 180 N. Y. 269, 275, 96 N. Y. App. Div. 242.

Exclusive Construction. — Johnson v. State, 141 Ala. 7.

355. 1. Unwrought — Revenue Act. — See U. S. v. Roessler, etc., Chemical Co., (C. C. A.) 137 Fed. Rep. 770.

358. 1. On or About. — People v. Miller, 137 Cal. 642.

USAGES AND CUSTOMS.

By O. D. ESTEE.

369. II. CUSTOMS HAVING FORCE AND EFFECT OF LAW — b. DEVELOPMENT OF USAGE INTO LAW — The Transition. — See note 4.

370. 2. Particular Customs in England. — See note 1.

371. III. REQUISITES OF VALID USAGE — 2. Reasonableness — a. IN GENERAL. — See note 4.

373. b. COMMON-LAW CUSTOMS — (1) England. — See note 2.

376. 3. Legality — a. GENERAL RULE — REASON FOR RULE. — See note 1.

386. IV. KNOWLEDGE OF USAGES — 1. In General — b. PARTICULAR USAGES OF TRADE. — See note 2.

369. 4. Custom with Force of Law Judicially Noticed. — See Holder v. Western German Bank, 132 Fed. Rep. 187.

Usages of Political Parties Judicially Noticed. — State v. Metcalf, (S. Dak. 1904) 100 N. W. Rep. 923.

370. 1. Immemorial Antiquity. — Mercer v. Denne, (1904) 2 Ch. 534, affirmed (1905) 2 Ch. 538, supporting the text paragraph generally as to the necessity for certainty, continuance without interruption, and reasonableness.

371. 4. Reasonableness as a Requisite. — See Matvieff v. Crosfield, 51 W. R. 365.

373. 2. Mercer v. Denne, (1904) 2 Ch. 534, affirmed (1905) 2 Ch. 538.

376. 1. Legality as a Requisite — General Rule. — Entwistle v. Henke, 211 Ill. 273.

386. 2. The Following Cases Are Illustrative of the Rule. — Matvieff v. Crosfield, 51 W. R. 365; John O'Brien Lumber Co. v. Wilkinson, 123 Wis. 272.

390. 2. Elements from Which Knowledge Presumed — *c.* CERTAINTY AND UNIFORMITY. — See note 3.

392. *d.* GENERALITY — The Requisite Degree of Generality. — See notes 1, 2, 3.

396. 4. Where Knowledge Is Prima Facie or Conclusively Presumed — *b.* CONCLUSIVE PRESUMPTION — (1) *Insurers.* — See note 1.

400. 5. Where Direct or Presumptive Evidence of Knowledge Necessary — Where Parties Are Not in Same Trade — *c.* USAGES IN CONTRACTS FOR LABOR AND SERVICES. — See note 1.

401. 6. Where Direct Evidence of Knowledge Necessary — *a.* USAGES OF PARTICULAR PLACES. — See note 1.

407. *b.* USAGES OF AN INDIVIDUAL — (5) *Usages of Particular Banks.* — See notes 1, 2.

412. V. PROOF OF USAGE — 2. How Provable — Form of Question — *c.* NOT PROVABLE BY PARTICULAR INSTANCES. — See note 3.

413. 3. Qualification of Witnesses. — See note 2.

421. VIII. FUNCTIONS OF USAGES — 2. Application to Contracts — *b.* TO INTERPRET CONTRACT — (2) *Implied Incorporation of Usages* — (a) *In General.* — See note 2.

427. (3) *To Explain Meaning of Express Terms* — (a) *In General.* — See note 3.

428. See note 5.

430. (6) *Terms Having Technical Meaning Only.* — See note 2.

(4) *To Supply Matters as to Which Contract Silent* — (a) *In General.* — See note 4.

432. See note 2.

(b) *Annexing Incidents.* — See note 3.

433. (5) *Usages of What Place Govern.* — See note 6.

c. TO VARY OR CONTRADICT CONTRACT — (1) *Express Terms of Contract.* — See note 8.

390. 3. Must Be Certain and Uniform. — *Kalamazoo Corset Co. v. Simon*, 129 Fed. Rep. 144, *affirmed* (C. C. A.) 129 Fed. Rep. 1005.

392. 1. Requisite Degree of Generality. — *Traders' Ins. Co. v. Dobbins*, 114 Tenn. 227, *citing* 29 AM. AND ENG. ENCYC. OF LAW (2d ed.) 392.

2. Need Not Be Followed in Every Transaction. — *Traders' Ins. Co. v. Dobbins*, 114 Tenn. 227, *citing* 29 AM. AND ENG. ENCYC. OF LAW (2d ed.) 392.

3. Need Not Be Coextensive with State. — *Traders' Ins. Co. v. Dobbins*, 114 Tenn. 227, *citing* 29 AM. AND ENG. ENCYC. OF LAW (2d ed.) 392.

396. 1. Insurance. — *Traders' Ins. Co. v. Dobbins*, 114 Tenn. 227, *citing* 29 AM. AND ENG. ENCYC. OF LAW (2d ed.) 393, 394 [396].

400. 1. Usages in Contracts for Labor and Services. — *American Ins. Co. v. France*, 111 Ill. App. 310.

401. 1. Usages of Particular Places. — *Bacon Fruit Co. v. Blessing*, 122 Ga. 369; *Rake v. Townsend*, (Iowa 1905) 102 N. W. Rep. 499.

407. 1. *Kuder v. Greene*, (Ark. 1904) 82 S. W. Rep. 836.

2. See *Kuder v. Greene*, (Ark. 1904) 82 S. W. Rep. 836.

412. 3. Not Provable by Particular Instances. — *Nagle v. Hake*, 123 Wis. 256.

413. 2. Knowledge of Individual Cases Only. — *Nagle v. Hake*, 123 Wis. 256.

421. 2. Implied Incorporation of Usages. — *Peterson v. Eight Hundred and Sixty-Nine*

Cedar Logs, 127 Fed. Rep. 868; *Lillard v. Kentucky Distilleries, etc., Co.*, (C. C. A.) 134 Fed. Rep. 168.

427. 3. To Explain Meaning of Express Terms. — *Kalamazoo Corset Co. v. Simon*, 129 Fed. Rep. 144, *affirmed* (C. C. A.) 129 Fed. Rep. 1005; *Lillard v. Kentucky Distilleries, etc., Co.*, (C. C. A.) 134 Fed. Rep. 168; *John O'Brien Lumber Co. v. Wilkinson*, 123 Wis. 272. See also *Boruszewski v. Middlesex Mut. Assur. Co.*, 186 Mass. 589.

428. 5. Usage Admissible to Show Mode of Payment. — *Morris v. Supplee*, 208 Pa. St. 253.

430. 2. Purely Technical Terms. — *Soper v. Tyler*, 77 Conn. 104.

4. May Supply Matters as to Which Contract Silent. — *Kalamazoo Corset Co. v. Simon*, 129 Fed. Rep. 144, *affirmed* (C. C. A.) 129 Fed. Rep. 1005.

432. 2. Admissible to Explain Manner of Compensation. — *Hughes v. Knott*, 138 N. Car. 105; *Blalock v. Clark*, 137 N. Car. 140.

3. Usage May Annex Incidents. — *Lillard v. Kentucky Distilleries, etc., Co.*, (C. C. A.) 134 Fed. Rep. 168; *Kosloski v. Kelly*, 122 Wis. 665. See also *Moore v. U. S.*, 196 U. S. 157.

433. 6. Usages Loci Contractus Govern. — *Soper v. Tyler*, 77 Conn. 104.

8. Not Admissible to Vary Express Contract. — *Portland Flouring Mills Co. v. British, etc., Marine Ins. Co.*, (C. C. A.) 130 Fed. Rep. 860; *Lillard v. Kentucky Distilleries, etc., Co.*, (C. C. A.) 134 Fed. Rep. 168; *Moore v. U. S.*, 196 U. S. 157; *Wiggin v. Federal Stock, etc., Co.*, 77

437. (2) *Legal Import of Contract.* — See note 4.

439. (4) *Adding Inconsistent Incidents.* — See note 1.

USE, USED, ETC. — See note 3.

446. [USELESS. — See note 2a.]

USUAL — USUALLY. — See note 5.

448. **USUFRUCT.** — See note 1.

Conn. 507; *Boruszewski v. Middlesex Mut. Assur. Co.*, 186 Mass. 589; *Cappel v. Weir*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 419; *Kosloski v. Kelly*, 122 Wis. 665.

437. 4. *Cannot Vary Legal Import.* — *Kalamazoo Corset Co. v. Simon*, 129 Fed. Rep. 144, *affirmed* (C. C. A.) 129 Fed. Rep. 1005.

439. 1. *Cannot Annex Inconsistent Incidents.* — See *Kalamazoo Corset Co. v. Simon*, 129 Fed. Rep. 144, *affirmed* (C. C. A.) 129 Fed. Rep. 1005

3. *Use.* — *Pacific Mut. L. Ins. Co. v. Terry*, (Tex. Civ. App. 1904) 84 S. W. Rep. 656.

See also *Tromans v. Hodkinson*, (1903) 1 K. B. 30.

Used in Sense of Making Practice of. — *Provident Sav. L. Assur. Soc. v. Exchange Bank*, (C. C. A.) 126 Fed. Rep. 360.

446. 2a. "Useless" in Statute Construed to mean "Practically Useless" and Not "Absolutely Useless." — *Matter of Trask*, (Supm. Ct. Spec. T.) 45 Misc. (N. Y.) 244.

5. *Usual.* — *State v. Snyder*, 182 Mo. 513.

448. 1. *Usufruct.* — *Schwartz v. Gerhardt*, 44 Oregon 425.

USURY.

BY B. B. CLARK.

457. III. GENERAL CONSTRUCTION AND VALIDITY OF USURY STATUTES —

5. *Exemptions from Operation of Statutes* — *Exemption of Loans Secured by Negotiable Instruments, Etc.* — See note 4.

6. *Retroactive Effect of Statutes.* — See note 7.

458. 7. *Effect of Repeal of Statutes.* — See note 9.

461. IV. WHAT CONSTITUTES USURY — 2. *Contrivances to Evade Usury Statutes.* — See note 3.

3. *Intent* — a. *IN GENERAL.* — See note 4.

462. See note 2.

463. b. *MISTAKE OF FACT.* — See notes 3, 4.

464. 4. *Loan or Forbearance* — a. *IN GENERAL.* — See note 5.

465. c. *AGREEMENT TO REPAY PRINCIPAL* — (1) *In General.* — See note 6.

469. f. *TRANSACTIONS BETWEEN CORPORATION AND STOCKHOLDER* — (2) *Transactions Between Building and Loan Associations and Their Members* — (a) *In General* — *In the Majority of the Jurisdictions in America.* — See note 7.

457. 4. *In re Wilde*, 133 Fed. Rep. 562, decided under the *New York* statute.

7. *Retroactive Effect of Usury Statutes.* — *Adams v. Shirk*, 117 Fed. Rep. 801, 55 C. C. A. 25; *Mastin v. Cochran*, (Ky. 1903) 76 S. W. Rep. 343.

458. 9. *Petterson v. Berry*, 125 Fed. Rep. 902, 60 C. C. A. 610.

461. 3. *Contrivances to Evade Usury Statutes.* — *Ford v. Washington Nat. Bldg., etc., Assoc.*, 10 Idaho 30; *Johnson v. Joyce*, 90 Minn. 377; *Hagan v. Barnes*, 92 Minn. 128; *Bell v. Mulholland*, 90 Mo. App. 612; *American Mut. Bldg., etc., Assoc. v. Cornibe*, 35 Tex. Civ. App. 385; *Lorentz v. Pinnell*, 55 W. Va. 114.

4. *Intent.* — *Green v. Grant*, 134 Mich. 462.

462. 2. *Corrupt Intent Implied.* — *Trainor v. German-American Sav., etc., Assoc.*, 102 Ill. App. 604; *Hagan v. Barnes*, 92 Minn. 128;

Simpson v. Hefter, (N. Y. City Ct. Tr. T.) 42 Misc. (N. Y.) 482.

463. 3. *Mistake of Fact.* — *Aldrich v. McCloy*, (Ark. 1905) 87 S. W. Rep. 813; *Weicker v. Stavely*, (N. Dak. 1905) 103 N. W. Rep. 753; *Rushton v. Woodham*, 68 S. Car. 110; *Goodale v. Wallace*, (S. Dak. 1905) 103 N. W. Rep. 651, quoting 29 AM. AND ENG. ENCYC. OF LAW (2d ed.) 463; *Norris v. W. C. Belcher Land Mortg. Co.*, 98 Tex. 176.

4. *Mistake in Computation.* — *Becker v. Headsten*, 137 Mich. 478.

464. 5. *Necessity for Loan or Forbearance.* — *Lusk v. Smith*, (Kan. 1905) 81 Pac. Rep. 173; *Flagg v. Fisk*, 93 N. Y. App. Div. 169, *affirmed* 179 N. Y. 590.

465. 6. *Option to Repay Loan in Chattel Does Not Relieve from Usury.* — *Johnson v. Joyce*, 90 Minn. 377.

469. 7. *Building and Loan Associations* —

- 471.** Minority Rule. — See note 1.
 (b) Statutory Sanction. — See notes 2, 3.
- 472.** See notes 2, 3.
 g. SALE OF CREDIT. — See note 4.
- 473.** See note 3.
 h. SALE AND PURCHASE OF CHOSSES IN ACTION — (1) *In General*. — See note 8.
- 476.** (3) *Paper Having No Inception Prior to Negotiation* — (a) *In General*. — Sale by Maker or Obligor. — See note 3.
 (b) Accommodation Paper — aa. IN GENERAL — Purchase with Notice of Nature of Paper. — See note 8.
- 477.** bb. PURCHASE WITHOUT NOTICE OF NATURE OF PAPER — General Rule. — See note 2.
- 478.** i. SALE AS COVER FOR LOAN OR FORBEARANCE — (1) *In General*. — See note 6.
- 479.** See note 1.
 (3) *Sales with Agreement to Repurchase*. — See note 5.
- 480.** See note 2.
- 482.** 5. Payment of or Agreement to Pay Usurious Interest — a. IN GENERAL. — See note 1.
- 483.** Option to Borrower to Pay Before Maturity by Paying Usurious Interest. — See note 1.
- Payment of Debt Before Maturity. — See note 3.

General Rule. — *Skinner v. Southern Home Bldg., etc., Assoc.*, (Fla. 1903) 35 So. Rep. 67; *Iowa Cent. Bldg., etc., Assoc. v. Klock*, (Iowa 1903) 94 N. W. Rep. 1120; *Royal Loan Assoc. v. Forter*, 68 Kan. 468; *Clarke v. Woodruff*, (Neb. 1904) 100 N. W. Rep. 314; *Epping v. Washington Nat. Bldg., etc., Assoc.*, 44 Oregon 116; *Prince v. Holston Nat. Bldg., etc., Assoc.*, 55 W. Va. 19.

471. 1. Minority Rule. — *Collins v. Citizens' Bank, etc., Co.*, 121 Ga. 513.

2. Statutory Sanction. — *Bacon v. Iowa Sav., etc., Assoc.*, 121 Iowa 449; *Moses v. National Loan, etc., Co.*, 92 Mo. App. 484; *Roberts v. Murray*, (County Ct.) 40 Misc. (N. Y.) 339.

3. Rooney v. Southern Bldg., etc., Assoc., 119 Ga. 941; *National Bldg. Assoc. v. Quinn*, 121 Ga. 307.

472. 2. Royal Loan Assoc. v. Forter, 68 Kan. 468.

3. Skinner v. Southern Home Bldg., etc., Assoc., (Fla. 1903) 35 So. Rep. 67; *Lewis v. Farmers' Loan, etc., Assoc.*, 183 Mo. 351; *Moses v. National Loan, etc., Co.*, 92 Mo. App. 484; *Kittredge v. Chillicothe Loan, etc., Assoc.*, 103 Mo. App. 361.

4. Sale of Credit. — *Ryttenberg v. Schefer*, 131 Fed. Rep. 313; *Forgotson v. Raubitschek*, (Supm. Ct. App. T.) 87 N. Y. Supp. 503.

A Mortgage Given as Security for an Accommodation Indorsement is not usurious because it exceeds the amount of the note which the mortgagee indorsed. *Bouker v. Galligan*, (N. J. 1904) 57 Atl. Rep. 1010.

473. 3. Evasion of Usury Statutes. — *Forgotson v. Raubitschek*, (Supm. Ct. App. T.) 87 N. Y. Supp. 503.

8. Sale of Choses in Action — Bills and Notes. — *Simpson v. Hefter*, (N. Y. City Ct. Tr. T.) 42 Misc. (N. Y.) 482.

476. 3. Sale by Maker or Obligor. — *Fletcher v. Alpena Circuit Judge*, 136 Mich. 511.

8. Purchase with Notice of Nature of Paper. — *Simpson v. Hefter*, (N. Y. City Ct. Tr. T.) 42 Misc. (N. Y.) 482.

477. 2. Purchase Without Notice — General Rule. — *Simpson v. Hefter*, (N. Y. City Ct. Tr. T.) 42 Misc. (N. Y.) 482.

478. 6. Sales. — *Edwards v. Capps*, 122 Ga. 827; *Flagg v. Fisk*, 93 N. Y. App. Div. 169, *affirmed* 179 N. Y. 590.

479. 1. Sales as Cover for Usury. — *Tomlin v. Morris*, (Ky. 1904) 82 S. W. Rep. 373; *Hagan v. Barnes*, 92 Minn. 128.

Sale of Unearned Salary Illegal When Mere Device to Cover Usury. — *Van Vechten v. McGuire*, 70 N. J. L. 152, *affirmed* 70 N. J. L. 657.

5. Connolly v. Keenan, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 589.

480. 2. Liskey v. Snyder, 56 W. Va. 610.

482. 1. Agreement for Interest. — *Hailey First Nat. Bank v. Glenn*, 10 Idaho 224; *Lusk v. Smith*, (Kan. 1905) 81 Pac. Rep. 173; *Bosworth v. Kinghorn*, 94 N. Y. App. Div. 187, *affirmed* 179 N. Y. 590, holding further that excessive payment as a mere gratuity by the debtor does not constitute usury; *Weicker v. Stavelly*, (N. Dak. 1905) 103 N. W. Rep. 753.

483. 1. Kilpatrick v. Germania L. Ins. Co., 95 N. Y. App. Div. 287.

3. Kilpatrick v. Germania L. Ins. Co., 95 N. Y. App. Div. 287. But where an agreement for instalment payments of the principal would, if carried out to the maturity of the loan, have resulted in the exaction of illegal interest, the facts that the borrower had an option to prepay the loan before the full maturity and that if such option had been exercised at an early stage of the indebtedness there would have been no payment of usury were held not to prevent the loan from being usurious where such

487. g. AGREEMENT FOR EXCESSIVE INTEREST ON CONTINGENCY —
(1) *In General.* — See note 1.

488. h. TIME FOR WHICH INTEREST MAY BE COMPUTED — (1) *In General* — Retention of Money by Lender After Contract of Loan. — See note 8.

489. Repayment of Principal in Instalments. — See note 5.

490. Calculating Month as Thirty Days — Use of Rowlett's Tables. — See note 3.

491. i. TAKING INTEREST IN ADVANCE. — See note 3.

492. In the Case of Loans Running Several Years. — See note 3.

j. TAKING INTEREST SEMIANNUALLY, QUARTERLY, ETC. — See note 6.

493. k. COMPOUND INTEREST — Agreement at Time of Loan or Forbearance. — See note 3.

The Statutes in Some Jurisdictions. — See note 7.

Agreement at Maturity of Interest. — See note 9.

494. l. AGREEMENT FOR BONUS TO LENDER IN ADDITION TO INTEREST. — See note 4.

495. See notes 1, 4.

496. m. INDEMNIFYING LENDER FOR CHARGES INCURRED WITH RESPECT TO LOAN. — See notes 6, 7.

499. o. AGREEMENT TO PAY TAXES. — See notes 4, 5, 8.

501. q. PAYING COMMISSIONS TO AGENTS — (1) *To Agent of Borrower or Debtor.* — See note 7.

502. (2) To Agent of Lender or Creditor — (a) *In General.* — See note 7.

option was not exercised. *Ford v. Washington Nat. Bldg., etc., Assoc.*, 10 Idaho 30.

487. 1. *Goodale v. Wallace*, (S. Dak. 1905) 103 N. W. Rep. 651, quoting 29 AM. AND ENG. ENCYC. OF LAW (2d ed.) 486.

488. 8. Retention of Money by Lender After Loan. — *Farm Land Co. v. St. Raynor*, (Neb. 1905) 97 N. W. Rep. 330.

489. 5. Adding Interest to Instalments. — Where a loan is made to be repaid in instalments, it seems to be proper for the lender to calculate on the amount of the principal involved in each instalment note interest to the date when such instalment is due and to add the amount of such interest to the principal of the instalment and take a note for such aggregate amount, payable, without interest, at the date of the maturity of such instalment. *Goodale v. Wallace*, (S. Dak. 1905) 103 N. W. Rep. 651.

490. 3. Statutory Provisions. — *Howell v. Pennington*, 118 Ga. 494.

491. 3. *Helena First Nat. Bank v. Waddell*, (Ark. 1905) 85 S. W. Rep. 417.

492. 3. *Allen v. Dunn*, (Neb. 1904) 99 N. W. Rep. 680. See, however, *Metz v. Winne*, (Okla. 1904) 79 Pac. Rep. 223.

6. Interest Payable Semiannually, Quarterly, Etc. — *Helena First Nat. Bank v. Waddell*, (Ark. 1905) 85 S. W. Rep. 417.

493. 3. Interest on Overdue Interest. — *Goodale v. Wallace*, (S. Dak. 1905) 103 N. W. Rep. 651, following *Hovey v. Edmison*, 3 Dak. 449.

7. Statutory Provisions. — *Lee v. Melby*, 93 Minn. 4.

9. Agreement at Maturity of Interest. — *Gay v. Berkey*, 137 Mich. 658; *Lee v. Melby*, 93 Minn. 4.

494. 4. *Missouri Real Estate Syndicate v. Sims*, 179 Mo. 679; *Osborn v. Payne*, 111 Mo.

App. 29; *Allen v. Dunn*, (Neb. 1904) 99 N. W. Rep. 680; *Leipziger v. Van Saun*, 64 N. J. Eq. 37; *Hare v. Winterer*, (Neb. 1901) 96 N. W. Rep. 179; *Brown v. Skotland*, 12 N. Dak. 445; *Peoples Bldg., etc., Assoc. v. Marston*, 30 Tex. Civ. App. 100; *Harper v. Middle States Loan, etc., Co.*, 55 W. Va. 149.

495. 1. *Reich v. Cochran*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 621, affirmed as to this point, but reversed on other grounds, 102 N. Y. App. Div. 615, 105 N. Y. App. Div. 542.

4. *Laidley v. Cram*, 96 Mo. App. 580.

496. 6. Searching Title and Drawing Papers. — *McCall v. Herrin*, 118 Ga. 522; *Liskey v. Snyder*, 56 W. Va. 610.

7. Examination of Security. — *Liskey v. Snyder*, 56 W. Va. 610.

499. 4. Agreement to Pay Taxes. — Where the statute imposing a tax on mortgages provided that an agreement by the borrower to pay the tax should be void, it was held that such an agreement could not taint the transaction with usury. *Hailey First Nat. Bank v. Glenn*, 10 Idaho 224.

5. *Norris v. W. C. Belcher Land Mortg. Co.*, 98 Tex. 176, holding, however, that the transaction is not usurious where it is not certain at the time of the loan that the taxes together with the interest will exceed the highest legal rate of interest. To similar effect see *Green v. Grant*, 134 Mich. 462.

8. *Norris v. W. C. Belcher Land Mortg. Co.*, 98 Tex. 176.

501. 7. Commission to Agent of Borrower. — *Whitlock v. Cohn*, 72 Ark. 83; *Gantzer v. Schmeltz*, 107 Ill. App. 641, reversed in part 206 Ill. 560; *Bovee v. Butters*, 92 Minn. 149, wherein the borrower's agent was the husband of the lender.

502. 7. Commission to Agent of Lender. — *McCall v. Herrin*, 118 Ga. 522; *Gantzer v.*

503. (b) Knowledge and Consent of Lender to Exaction of Commission by Agent. — See note 9.

506. r. PENALTY AS DISTINGUISHED FROM USURIOUS INTEREST — (1) *In General.* — See note 2.

507. (2) *Increased Interest After Maturity of Indebtedness.* — See note 3.

508. (3) *Provisions Accelerating Maturity of Loan.* — See note 3.

509. s. CONTEMPORANEOUS CONTRACTS AS CONDITION OF LOAN — (1) *In General.* — See notes 5, 6.

510. (3) *Agreement to Pay Debt to Lender* — Prior Debt of Borrower. — See note 4.

(4) *Requiring Borrower to Take Insurance from Lender.* — See note 6.

511. (6) *Collateral Agreements with Commission Merchants or Factors Making Advances.* — See note 6.

512. See note 1.

515. VI. SECURITIES FOR USURIOUS AGREEMENTS. — See note 9.

516. Statutory Avoidance of Securities. — See notes 1, 2, 4.

517. VII. SUBSTITUTED AND RENEWAL CONTRACTS. — See note 5.

518. See notes 2, 4, 5.

519. Change in Obligor or Obligees — Substitution of New Debtor or Obligees. — See note 3.

522. VIII. ASSIGNEES OF USURIOUS CHOSSES IN ACTION — 2. Holders of Usurious Negotiable Paper. — See note 1.

Schmeltz, 206 Ill. 560, *modifying* 107 Ill. App. 641, and *following* Hoyt v. Pawtucket Sav. Inst., 110 Ill. 390; Siegelman v. Jones, 103 Mo. App. 172; McWhirter v. Longstreet, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 831. See, however, Ridgway v. Davenport, 37 Wash. 134.

503. 9. Consent of Lender to Exaction of Commission. — Richards v. Bippus, 18 App. Cas. (D. C.) 293. See also Siegelman v. Jones, 103 Mo. App. 172.

506. 2. Goodale v. Wallace, (S. Dak. 1905) 103 N. W. Rep. 651.

507. 3. Increased Interest After Maturity. — See Sloane v. Lucas, 37 Wash. 348.

508. 3. McCrary v. Woodard, 122 Ga. 793; Goodale v. Wallace, (S. Dak. 1905) 103 N. W. Rep. 651.

509. 5. An Agreement that a Portion of the Loan Shall Be Expended on the Land Mortgaged as security for the loan does not render the transaction usurious. *Motes v. People's Bldg., etc., Assoc.*, 137 Ala. 369.

6. Requiring the Borrower to Take Stock in a Building and Loan Association has been held to be unobjectionable. *Gunby v. Armstrong*, 133 Fed. Rep. 417, 66 C. C. A. 627. So in the case of loans by a building and loan association to one of its members, premiums required by a contract to be paid on the stock of the borrowing member are not to be taken into consideration in determining whether the loan was usurious. *Motes v. People's Bldg., etc., Assoc.*, 137 Ala. 369. But if the subscription to and payment on the stock of the building and loan association merely constitute a device to cover usury the transaction will be deemed usurious. *Kleimeir v. Covington Perpetual Bldg., etc., Assoc.*, (Ky. 1902) 70 S. W. Rep. 41; *American Mut. Bldg., etc., Assoc. v. Cornibe*, 35 Tex. Civ. App. 385, *following* *Cot-*

ton States Bldg. Co. v. Reily, (Tex. Civ. App. 1899) 50 S. W. Rep. 961.

510. 4. Agreement to Discharge Prior Joint Indebtedness of Borrower and Lender Not Usurious. — *Southern Trading Co. v. State Nat. Bank*, 35 Tex. Civ. App. 5.

6. See *Mutual Ben. L. Ins. Co. v. Louisville First Nat. Bank*, 115 Ky. 757.

511. 6. Commission on Sales. — *In re Wilde*, 133 Fed. Rep. 562 (note broker advancing moneys and charging interest besides commission on sale of notes); *Allen-West Commission Co. v. People's Bank*, (Ark. 1905) 84 S. W. Rep. 1041.

512. 1. Damages for Failure to Make Consignments. — *Kitchen v. Robinson*, 138 Ala. 419; *Allen-West Commission Co. v. People's Bank*, (Ark. 1905) 84 S. W. Rep. 1041.

515. 9. Stipulation for Attorney's Fees. — *Skinner v. Southern Home Bldg., etc., Assoc.*, (Fla. 1903) 35 So. Rep. 67.

516. 1. Statutory Avoidance of Securities. — *Bell v. Mulholland*, 90 Mo. App. 612.

2. *Davis v. Tandy*, 107 Mo. App. 437.

Security Not Revived by Crediting Usury on Principal. — *Adams v. Moody*, 91 Mo. App. 41.

4. *Osborn v. Payne*, 111 Mo. App. 29. Under the Georgia Statute. — *Elder v. Elder*, 119 Ga. 174.

517. 5. Substituted and Renewal Contracts. — *Rapid City First Nat. Bank v. McCarthy*, (S. Dak. 1904) 100 N. W. Rep. 14.

518. 2. *Nicrosi v. Walker*, 139 Ala. 369.

4. *Compare Dannenmann v. Charleton*, 113 La. 276.

5. *Lanier v. Olliff*, 117 Ga. 307.

519. 3. Renewal of Obligation in Hands of Third Party. — *Nicrosi v. Walker*, 139 Ala. 369; *Coleman v. Cole*, 96 Mo. App. 22.

522. 1. *Harbaugh v. Tanner*, 163 Ind. 574.

522. To Entitle a Holder of Negotiable Paper Tainted with Usury to Protection. — See notes 3, 4.

524. IX. PENALTIES AND FORFEITURES — 1. Forfeiture of Principal. — See note 7.

525. 2. Forfeiture of Interest. — See note 6.

528. 3. Forfeiture of Double or Treble Interest Taken — *c.* AMOUNT OF FORFEITURE. — See note 12.

530. *d.* ENFORCEMENT OF FORFEITURE — By Whom Enforceable. — See note 1.

Limitation of Actions. — See note 10.

531. X. EXPURGATION OF USURY. — See notes 4, 5.

533. XI. DEFENSE OF USURY — 3. Who Entitled to Set Up Defense — *a.* DEBTOR — Waiver by Debtor of Defense. — See note 4.

c. ASSIGNEES IN BANKRUPTCY OR INSOLVENCY. — See note 8.

534. *d.* USURER. — See note 1.

e. STRANGERS — (1) *In General.* — See note 2.

(2) *Other Creditors of Debtor.* — See notes 4, 6.

535. (4) *Purchasers of Equity of Redemption* — Usurious Mortgage. — See note 6.

536. See note 2.

537. See note 7.

f. MORTGAGOR AFTER TRANSFER OF EQUITY OF REDEMPTION. — See notes 8, 9.

538. See note 1.

540. *i.* USURY IN ASSIGNMENT OF CHOSE IN ACTION. — See note 1.

522. 3. *Haynes v. Gay*, 37 Wash. 236.

4. *Simpson v. Hefter*, (N. Y. City Ct. Tr. T.) 42 Misc. (N. Y.) 482. See, however, *Haynes v. Gay*, 37 Wash. 230.

524. 7. *Loans by Bankers Exempted from Statutory Forfeiture of Principal.* — *In re Wilde*, 133 Fed. Rep. 562 (under the *New York* statute).

525. 6. *Lyle v. Winn*, 45 Fla. 419; *Wenham v. Mallin*, 103 Ill. App. 609, *affirmed* 209 Ill. 252; *Fletcher v. Alpena Circuit Judge*, 136 Mich. 511; *Clark v. Woodruff*, (Neb. 1904) 100 N. W. Rep. 314; *Waldner v. Bowden State Bank*, 13 N. Dak. 604; *Rapid City First Nat. Bank v. McCarthy*, (S. Dak. 1904) 100 N. W. Rep. 14.

Bank Officer Contracting with Bank for Usury Not Relieved from Payment of All Interest. — *Gund v. Ballard*, (Neb. 1905) 103 N. W. Rep. 309.

Reservation of Usury through Mistake Does Not Forfeit Entire Interest. — *Goodale v. Wallace*, (S. Dak. 1905) 103 N. W. Rep. 651.

528. 12. *Amount of Forfeiture.* — *Taylor v. Parker*, 137 N. Car. 418; *Waldner v. Bowden State Bank*, 13 N. Dak. 604.

530. 1. *Personal Representative of Debtor Not Entitled to Recover.* — *Garris v. Thomas*, 66 S. Car. 57.

10. *Taylor v. Parker*, 137 N. Car. 418.

531. 4. *Expurgation of Usury.* — *Nicrosi v. Walker*, 139 Ala. 369; *Coleman v. Cole*, 96 Mo. App. 22; *Cowgill v. Jones*, 99 Mo. App. 390.

5. *Nicrosi v. Walker*, 139 Ala. 369.

533. 4. *Waiver of Defense.* — *Ford v. Washington Nat. Bldg., etc., Assoc.*, 10 Idaho 30.

8. Receiver for Mortgagor May Set Up Defense. — *Lyons v. Smith*, 111 Mo. App. 272.

534. 1. *Usurer.* — *Missouri Real Estate Syndicate v. Sims*, 179 Mo. 679.

2. Strangers. — *In re Worth*, 130 Fed. Rep. 927; *Fletcher v. Alpena Circuit Judge*, 136 Mich. 511; *Union Credit, etc., Co. v. Union Stock Yard, etc., Co.*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 431; *Harper v. Middle States Loan, etc., Co.*, 55 W. Va. 149.

Trustee in Deed of Trust Cannot Set Up Defense. — *Snyder v. Middle States Loan, etc., Co.*, 52 W. Va. 655.

4. *In re Worth*, 130 Fed. Rep. 927.

6. See *Lyons v. Smith*, 111 Mo. App. 272.

535. 6. *Purchaser of Equity of Redemption.* — *In re Worth*, 130 Fed. Rep. 927; *Matthews v. Ormerd*, 140 Cal. 578; *Harper v. Middle States Loan, etc., Co.*, 55 W. Va. 149.

Purchase under Warranty Deed. — *Compare Ford v. Washington Nat. Bldg., etc., Assoc.*, 10 Idaho 30.

536. 2. *Bacon v. Iowa Sav., etc., Assoc.*, 121 Iowa 449; *Erwin v. Morris*, 137 N. Car. 48, holding, however, that a purchaser under an agreement to pay what was "actually due" on the mortgage could set up the defense.

537. 7. *Ford v. Washington Nat. Bldg., etc., Assoc.*, 10 Idaho 30; *Epping v. Washington Nat. Bldg., etc., Assoc.*, 44 Oregon 116. See also *Washington Nat. Bldg., etc., Assoc. v. Andrews*, 95 Md. 696; *Egan v. North American Sav., etc., Co.*, 45 Oregon 131.

8. Sale by Mortgagor with Covenant of Warranty. — See *Rorer v. Holston Nat. Bldg., etc., Assoc.*, 55 W. Va. 255.

9. By Mortgagor. — *Washington Nat. Bldg., etc., Assoc. v. Andrews*, 95 Md. 696.

538. 1. *Epping v. Washington Nat. Bldg., etc., Assoc.*, 44 Oregon 116.

540. 1. *Union Credit, etc., Co. v. Union*

- 541.** XII. PROOF OF USURY — 2. Burden of Proof. — See note 4.
542. 4. Questions of Law and Fact. — See note 14.
543. See note 1.
 5. Presumptions. — See note 3.
544. XIII. REMEDIES AGAINST USURY — 1. Recovery of Payments — *a.* IN GENERAL. — See notes 2, 5.
545. Statutory Provisions. — See note 6.
 Building and Loan Associations. — See note 9.
546. Effect of Statutes Imposing Forfeiture. — See note 3.
b. WHERE RIGHT OF RECOVERY IS COMPLETE. — See note 7.
 Payment of Principal. — See note 9.
547. *d.* RELEASE OF RIGHT OF RECOVERY. — See note 4.
548. *f.* AGAINST WHOM RECOVERABLE. — See notes 3, 4.
g. FORM OF REMEDY. — See note 6.
549. *h.* LIMITATION OF ACTIONS. — See notes 1, 2.
 2. Application of Payments. — See note 3.
550. See notes 2, 3.

Stock Yard, etc., Co., (Supm. Ct. App. T.) 46 Misc. (N. Y.) 431.

541. 4. Burden of Proof. — *In re Wilde*, 133 Fed. Rep. 562; *Lusk v. Smith*, (Kan. 1905) 81 Pac. Rep. 173.

542. 14. Questions of Law and Fact. — *Slocumb v. Stewart*, 123 Ga. 360; *Norris v. W. C. Belcher Land Mortg. Co.*, 98 Tex. 176.

543. 1. *Allen v. Dunn*, (Neb. 1904) 99 N. W. Rep. 680; *Raphael v. Margolies*, (Supm. Ct. App. T.) 42 Misc. (N. Y.) 204; *Milford v. Milford*, 67 S. Car. 553.

For Evidence Insufficient to Support the Plea of Usury, see *Equitable Mortg. Co. v. Watson*, 119 Ga. 280.

3. Where an Agreement to Pay Interest Is Subject to Two Constructions, one of which will make it usurious and the other not, the court will adopt the latter. *Lusk v. Smith*, (Kan. 1905) 81 Pac. Rep. 173.

544. 2. *Paducah Banking Co. v. Ragsdale*, (Ky. 1902) 69 S. W. Rep. 796; *Van Vechten v. McGuire*, 70 N. J. L. 152, affirmed 70 N. J. L. 657; *Clarke v. Day*, (N. J. 1905) 60 Atl. Rep. 39; *Harper v. Middle States Loan, etc., Co.*, 55 W. Va. 149. See, however, *Milford v. Milford*, 67 S. Car. 553.

5. *Matthews v. Ormerd*, 140 Cal. 578; *Albeitz v. d'Arcambol*, 109 Ill. App. 505; *Beach v. Guaranty Sav., etc., Assoc.*, 44 Oregon 530.

545. 6. *Matz v. Arick*, 76 Conn. 388.
 9. Building and Loan Associations. — *Beach v. Guaranty Sav., etc., Assoc.*, 44 Oregon 530.

546. 3. *Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451.

7. Necessity for Payment in Money. — *Pike v. Wathen*, (Ky. 1903) 76 S. W. Rep. 322.

9. *Crenshaw v. Duff*, 113 Ky. 912.

547. 4. *Milford v. Milford*, 67 S. Car. 553.
 Consideration for Second Agreement Must Be Valid. — *Clarke v. Day*, (N. J. 1905) 60 Atl. Rep. 39.

548. 3. Recovery Against Personal Representative Allowed. — *Crenshaw v. Crenshaw*, (Ky. 1902) 69 S. W. Rep. 711.

4. Assignee of Obligation. — *Harbaugh v. Tanner*, 163 Ind. 574.

6. Form of Remedy. — *Harbaugh v. Tanner*, 163 Ind. 574.

Suit in Equity Maintainable. — *Lorentz v. Pinnell*, 55 W. Va. 114.

549. 1. *Gunby v. Armstrong*, 133 Fed. Rep. 417, 66 C. C. A. 627; *Burnside v. Mealer*, (Ky. 1904) 80 S. W. Rep. 785.

Action Classified Among Actions on Implied Contracts. — *Buntyn v. National Mut. Bldg., etc., Assoc.*, 86 Miss. 454.

2. Where Several Notes, All Tainted with Usury, Are Given for the purchase of land, each constitutes a distinct debt, and, one of them having been paid off with usury, the fact that the other remains unpaid will not extend the time in which the debtor may sue to recover the usury paid upon the first. *Carter v. Farthing*, 115 Ky. 123.

Where Suit Is Brought in Equity to recover usurious interest paid, the cause of action is not deemed to have accrued until the payments made exceed the principal and legal interest. *Lorentz v. Pinnell*, 55 W. Va. 114.

3. Application of Payments. — *Nicrosi v. Walker*, 139 Ala. 369; *Albeitz v. d'Arcambol*, 109 Ill. App. 505; *Crenshaw v. Duff*, 113 Ky. 912; *Whinery v. Garrett*, (Ky. 1903) 71 S. W. Rep. 855; *Epping v. Washington Nat. Bldg., etc., Assoc.*, 44 Oregon 116; *Egan v. North American Sav., etc., Co.*, 45 Oregon 131; *Lorentz v. Pinnell*, 55 W. Va. 114. See, however, *Milford v. Milford*, 67 S. Car. 553.

Rule Applied to Building and Loan Associations. — *Ford v. Washington Nat. Bldg., etc., Assoc.*, 10 Idaho 30, holding that the right of a member of a building association was not affected by the fact that some members might have withdrawn from the association after receiving a *pro rata* share of the excessive payment, thus diminishing the proceeds to be received by the remaining members; *Kleimeir v. Covington Perpetual Bldg., etc., Assoc.*, (Ky. 1902) 70 S. W. Rep. 41; *Olliges v. Kentucky Citizens' Bldg., etc., Assoc.*, (Ky. 1903) 72 S. W. Rep. 747; *Peoples Bldg., etc., Assoc. v. Marston*, 30 Tex. Civ. App. 100.

550. 2. *Lewis v. Farmers' Loan, etc., Assoc.*, 183 Mo. 351.

3. Connecticut Statute Expressly Prohibiting Set-off of Usury Against Principal. — See *Matz v. Arick*, 76 Conn. 388.

551. Limitation of Actions. — See notes 5, 6.

A Surety. — See note 9.

552. 3. Equitable Relief — *a.* IN GENERAL. — See note 1.

Where the Remedy at Law Is Inadequate. — See notes 6, 8.

553. See note 3.

b. NECESSITY TO DO EQUITY — (1) *In General.* — See note 9.

554. See note 2.

557. 4. Relief from Judgments and Decrees for Usury — *a.* COLLATERAL ATTACK. — See note 5.

559. *b.* DIRECT ATTACK. — See note 2.

XIV. CRIMINAL PROSECUTIONS. — See note 8.

560. See note 3.

UTENSIL. — See note 6.

UTILITY. — See note 7.

UTMOST CARE. — See note 8.

562. VACANCY — VACANT — VACATE. — See notes 3, 5.

551. 5. Limitation of Actions. — *Rapid City First Nat. Bank v. McCarthy*, (S. Dak. 1904) 100 N. W. Rep. 14; *Washington Nat. Bldg., etc., Assoc. v. Wendling*, 102 Va. 279.

6. *Lorentz v. Pinnell*, '55 W. Va. 114. See also *Carter v. Farthing*, 115 Ky. 123.

9. Surety. — *Whinery v. Garrett*, (Ky. 1903) 71 S. W. Rep. 855.

552. 1. Equitable Relief — Adequate Remedy at Law. — *Bell v. Mulholland*, 90 Mo. App. 612.

6. Inadequate Remedy at Law. — *Bell v. Mulholland*, 90 Mo. App. 612.

8. Cancellation of Mortgages. — *Egan v. North American Sav., etc., Co.*, 45 Oregon 131; *Rorer v. Holston Nat. Bldg., etc., Assoc.*, 55 W. Va. 255.

553. 3. Injunction Against Foreclosure. — *Erwin v. Morris*, 137 N. Car. 48; *Rorer v. Holston Nat. Bldg., etc., Assoc.*, 55 W. Va. 255.

9. Necessity to Do Equity. — *Ryttenberg v. Schefer*, 131 Fed. Rep. 313; *Wenham v. Malin*, 103 Ill. App. 609, *affirmed* 209 Ill. 252; *Malone v. Danforth*, 137 Mich. 227; *Gund v. Ballard*, (Neb. 1905) 103 N. W. Rep. 309.

554. 2. Compare *Lyons v. Smith*, 111 Mo. App. 272.

557. 5. Collateral Attack on Judgments and

Decrees. — *Hoffman v. Milner*, 142 Ala. 678 (collateral attack on award of arbitrators).

559. 2. *Snyder v. Middle States Loan, etc., Co.*, 52 W. Va. 655.

8. *Ex p. Sohncke*, (Cal. 1905) 82 Pac. Rep. 956, holding the statute to be unconstitutional for lack of uniformity of operation; *State v. Wickenhoefer*, (Del. 1906) 64 Atl. Rep. 273, upholding the validity of the *Delaware* statute; *People v. City Prison*, (Supm. Ct. Spec. T.) 89 N. Y. Supp. 322, holding that the taking of security is not necessary to constitute the offense.

560. 3. *People v. City Prison*, (Supm. Ct. Spec. T.) 89 N. Y. Supp. 322.

6. Steam Thresher Held to Be "Farming Utensil." — *Laporte v. Libby*, 114 La. 570.

7. Utility. — See *Williams Calk Co. v. Never-slip Mfg. Co.*, 136 Fed. Rep. 210.

8. Utmost Care — Corners. — *Ilges v. St. Louis Transit Co.*, 102 Mo. App. 529; *Fillingham v. St. Louis Transit Co.*, 102 Mo. App. 573.

562. 3. Vacancy, Etc. — *State v. Burkhead*, 187 Mo. 34.

Vacated Construed to Mean Abandoned. — *Corr v. Philadelphia*, 14 Pa. Dist. 35.

5. Incumbent Rightfully in Possession — No Vacancy. — *State v. Trewhitt*, 113 Tenn. 567; *Chaddock v. Burke*, 103 Va. 694.

VAGRANCY.

By A. A. WADSWORTH.

569. I. WHAT CONSTITUTES — 2. Under Statute — *a.* IN GENERAL — The English Vagrant Acts. — See note 2.

Statutes of United States. — See note 3.

570. *c.* IDLENESS. — See note 1.

d. DESERTION OF WIFE OR FAMILY. — See note 2.

569. 2. English Vagrant Acts. — See *Popular Union v. Martin*, 91 L. T. N. S. 550.

3. The Gist of the Offense, under the *Georgia* statute, is the failure or refusal of the offender to work when work is necessary to the support

of himself or his family. *Hartman v. State*, 119 Ga. 427.

570. 1. Proof of Idleness. — *Hartman v. State*, 119 Ga. 427.

2. Desertion of Wife or Family. — The omis-

571. *g.* JUVENILE VAGRANCY. — See note 5.

572. IV. PUNISHMENT. — See note 6.

579. VALUE. — See note 2.

580. VEGETABLE. — See note 5.

sion of the defendant to remove his children from the workhouse at the expiration of his term of imprisonment for deserting them constitutes a fresh substantive offense under the *English* statute. *Bannister v. Sullivan*, 91 L. T. N. S. 380.

571. 5. Juvenile Vagrancy. — See *Stevens v. State*, 118 Ga. 806, discussing the sufficiency of evidence.

572. 6. Georgia Statute—Relief from Penalty by Giving Bond. — See *Morton v. Nelms*, 118 Ga. 786; *Coleman v. Nelms*, 119 Ga. 307.

579. 2. Effect, Import. — See *Moline v. State*, (Neb. 1904) 100 N. W. Rep. 812.

580. 5. Vegetables—Revenue Laws. — See *Kraut v. U. S.*, 139 Fed. Rep. 94.

VENDOR AND PURCHASER.

By E. C. ELLSBREE.

592. I. THE CONTRACT — 1. Requisites and Validity in General — *b.* CERTAINTY AND DEFINITENESS — Price. — See note 3.

593. Description of Premises. — See note 1.

2. Offer and Acceptance — *a.* GENERAL PRINCIPLES — Requisites of Offer. — See note 6.

594. Withdrawal of Offer. — See note 6.

595. *b.* NECESSITY OF ACCEPTANCE. — See note 7.

c. WHO MAY ACCEPT. — See note 9.

596. *d.* REQUISITES AND VALIDITY OF ACCEPTANCE — (1) *Manner and Form of Acceptance* — Acceptance by Conduct. — See note 7.

597. (2) *Acceptance Must Be Unconditional.* — See note 7.

598. See note 1.

601. *e.* EFFECT OF ACCEPTANCE. — See note 3.

f. OPTION DISTINGUISHED FROM CONTRACT OF SALE. — See note 4.

605. 5. Construction and Effect of Contract — *d.* SEPARABLE OR ENTIRE CONTRACTS — Several Contracts in One Instrument. — See note 4.

607. II. ESTATE AND TITLE — 2. The Title — *b.* EXECUTORY CONTRACTS — (1) *Necessity for Good Title* — (a) In General. — See note 2.

592. 3. Necessity of Fixing Price. — *North Vancouver v. Tracy*, 34 Can. Sup. Ct. 132.

Where the Terms of Payment Are Not Agreed Upon, and it is understood that the vendee is not to pay cash, it is not enough that the price has been fixed by the parties. *Queen's College v. Jayne*, 10 Ont. L. Rep. 319.

593. 1. Exact Description Not Necessary. — *Kent v. Williams*, 146 Cal. 3. See also *Hyden v. Perkins*, (Ky. 1904) 83 S. W. Rep. 128.

6. Offer Must Be Definite and Absolute. — See *Clergue v. Preston*, 8 Ont. L. Rep. 84.

594. 6. Withdrawal of Offer. — *Flynn v. Jordal*, 124 Iowa 457; *Frank v. Stratford-Handcock*, 13 Wyo. 37.

595. 7. Necessity of Acceptance. — *Frank v. Stratford-Handcock*, 13 Wyo. 37.

9. Right of Acceptance Not Assignable. — *Rease v. Kittle*, 56 W. Va. 269.

596. 7. Acceptance by Conduct. — *Church v. Lapham*, 94 N. Y. App. Div. 550.

597. 7. Acceptance Must Be Unconditional. — *Kreutzer v. Lynch*, 122 Wis. 474.

598. 1. Acceptance Imposing New Terms or Conditions. — See *Flynn v. Jordal*, 124 Iowa 457.

A Request for Modification of the Terms of the Offer does not necessarily render the acceptance conditional. *Turner v. McCormick*, 56 W. Va. 161, 107 Am. St. Rep. 801; *Kreutzer v. Lynch*, 122 Wis. 474.

601. 3. Acceptance Completes Contract. — *Rodman v. Robinson*, 134 N. Car. 503; *Ferguson v. Getzendaner*, 98 Tex. 310.

4. Option Distinguished from Contract of Sale. — *Standiford v. Thompson*, (C. C. A.) 135 Fed. Rep. 991; *Womack v. Coleman*, 92 Minn. 328; *Wallace v. Figone*, 107 Mo. App. 362.

605. 4. Separate Items — Consideration Apportioned. — Where the part of a contract to be performed by one party consists of separate and independent items and the consideration therefor is apportioned to each item, the contract is severable. *Stauff v. Bingenheimer*, 94 Minn. 309.

607. 2. Good Title Implied. — *Goodell v.*

- 609.** (c) Knowledge of Defects. — See note 10.
- 610.** (2) *By Whom Made.* — See notes 11, 12.
- 611.** (3) *What Is Good Title* — (a) In General. — See notes 1, 5.
(b) Free from Incumbrances — *aa.* IN GENERAL. — See note 6.
- 612.** *bb.* ENUMERATION OF INCUMBRANCES — **Mortgages.** — See note 2.
Dower. — See note 5.
Lease. — See note 6.
Building Restrictions. — See note 8.
- 613.** (c) Free from Reasonable Doubt. — See notes 7, 9.
(d) Free from Litigation — In General. — See note 10.
- 614.** Encroachments. — See note 1.
- 616.** (4) *Express Stipulations Concerning Title Construed* — (h) Right, Title, and Interest. — See note 7.
- 617.** (5) *Defective Title as Affecting Purchaser's Obligation and Rights* — (a) Duty to Accept. — See note 12.
- 621.** (6) *Remedies of Purchaser* — (b) In Equity — *bb.* ENJOINING COLLECTION FOR PURCHASE MONEY. — See note 7.
- 622.** (7) *Defenses of Purchaser* — (a) To Action for Purchase Price. — See note 3.
- 623.** Abandonment of Possession. — See note 2.
Burden of Proof. — See note 4.
- 625.** III. EXCESS OR DEFICIENCY IN QUANTITY OF LAND — 2. Right of Parties to Compensation — *a.* IN ABSENCE OF EXPRESS AGREEMENT — (i) *Deficiency in Quantity* — (a) Sale for Gross Sum — *aa.* IN ABSENCE OF FRAUD OR MISTAKE — (*aa.*) General Rule. — See note 7.
- 629.** (*dd.*) *As Affected by Specification of Quantity* — *aaa.* Qualified Statement. — See note 2.
bb. ABATEMENT FOR FRAUD OR GROSS MISTAKE — (*aa.*) In General. — See note 5.
- Sanford, 31 Mont. 163; Miller v. Bronson, 26 R. I. 62.
- 609.** 10. Knowledge of Defective Title. — Henderson v. Beatty, 124 Iowa 163; Ewart v. Bowman, 70 S. Car. 357.
- 610.** 11. Legal Representatives May Make Title. — Wollenberg v. Rose, 45 Oregon 615.
12. Wollenberg v. Rose, 45 Oregon 615.
- 611.** 1. Marketable Title Necessary at Law. — Muller v. Palmer, 144 Cal. 305; Hewitt v. Parsley, 101 Md. 206; Scudder v. Watt, 98 N. Y. App. Div. 228; Downey v. Seib, 102 N. Y. App. Div. 317; Wollenberg v. Rose, 45 Oregon 615. See also Carolan v. Yoran, 104 N. Y. App. Div. 488.
5. Free from Litigation, Etc. — Wollenberg v. Rose, 45 Oregon 615.
6. Incumbrances Created or Suffered by the Purchaser under a contract of sale do not constitute a breach of the warranty in the vendor's deed given in pursuance of the contract of sale. Stein v. Waddell, 37 Wash. 634.
- 612.** 2. Mortgages. — Miller v. Bronson, 26 R. I. 62.
5. Inchoate Dower Right. — Cowan v. Kane, 211 Ill. 572.
6. Unexpired Lease. — Martin v. Roberts, 127 Iowa 218.
8. Building Restrictions. — Coues v. Hallahan, 209 Pa. St. 224.
- 613.** 7. Free from Reasonable Doubt. — Muller v. Palmer, 144 Cal. 305; Brown v. Widen, (Iowa 1905) 103 N. W. Rep. 158; Downey v. Seib, 102 N. Y. App. Div. 317; Wollenberg v. Rose, 45 Oregon 615; Miller v. Bronson, 26 R. I. 62; Corbett v. McGregor, (Tex. Civ. App. 1904) 84 S. W. Rep. 278.
9. Title Such as Reasonable Purchaser Would Accept. — Wollenberg v. Rose, 45 Oregon 615.
10. Freedom from Litigation. — Muller v. Palmer, 144 Cal. 305; Brown v. Widen, (Iowa 1905) 103 N. W. Rep. 158; Wollenberg v. Rose, 45 Oregon 615; Miller v. Bronson, 26 R. I. 62; Corbett v. McGregor, (Tex. Civ. App. 1904) 84 S. W. Rep. 278.
- 614.** 1. Encroachments. — Bergman v. Klein, 97 N. Y. App. Div. 15; Klim v. Sachs, 102 N. Y. App. Div. 44.
- 616.** 7. No Objection Where Fraud or Concealment Absent. — Scott v. Slaughter, 35 Tex. Civ. App. 524.
- 617.** 12. Waiver of Defects. — Cowan v. Kane, 211 Ill. 572.
- 621.** 7. Judgment for Purchase Money Restrained. — See Williams v. Neely, (C. C. A.) 134 Fed. Rep. 1.
- 622.** 3. Defective Title as Defense. — Altgelt v. Mernitz, (Tex. Civ. App. 1904) 83 S. W. Rep. 891.
- 623.** 2. Abandonment of Possession. — Dunn v. Mills, 70 Kan. 656; Lanyon v. Chesney, 186 Mo. 540.
4. Onus on Purchaser to Show Want of Good Title. — Wilson v. Moore, (Tex. Civ. App. 1905) 85 S. W. Rep. 25.
- 625.** 7. No Abatement Where Sale in Gross. — Cork v. Cook, 56 W. Va. 51.
- 629.** 2. Qualified Statement of Quantity. — Cork v. Cook, 56 W. Va. 51.
5. Abatement for Fraudulent Misrepresentations

630. See note 1.

632. (b) Sale by Measurement — *bb.* FOR SMALL DEFICIENCY — (*bb.*) Of Valuable Land. — See note 3.

(c) Partial Failure of Title — *aa.* GENERAL RULE. — See note 4.

635. (2) *Excess in Quantity* — (a) Sale for Gross Sum — *aa.* GENERAL RULE. — See note 6.

642. *g.* MEASURE OF DAMAGES — (2) *Deficiency in Quantity* — (b) Arising from Partial Failure of Title. — See note 4.

643. IV. RESCISSION, ABANDONMENT, AND FORFEITURE — 1. Rescission — *c.* OPTION TO RESCIND. — See note 1.

644. Vendor's Option. — See note 1.

d. RESCISSION BY AGREEMENT OF PARTIES — (1) *In General.* — See note 3.

645. (3) *Rescission by Parol.* — See notes 2, 3.

(4) *By Provision in Contract.* — See note 5.

647. *e.* CONDITIONS TO RESCISSION — (2) *Rule of Status Quo* — (a) *In General.* — See note 1.

648. (b) Return of Consideration by Vendor. — See note 1.

649. A Substantial Compliance. — See note 1.

(c) Return or Tender of Deed or Possession by Vendee. — See note 7.

650. (d) Compensation for Improvements, Repairs, and Taxes — The Measure of Compensation for Improvements. — See note 8.

653. (3) *Demand and Offer of Performance.* — See note 5.

When Excused. — See note 7.

f. GROUNDS OF RESCISSION — (1) *In General.* — See note 9.

655. (2) *Fraud and Misrepresentation* — (b) Representations of Fact — *aa.* *IN GENERAL.* — See note 1.

bb. PROMISES AND DECLARATIONS OF INTENTION. — See note 2.

657. (c) *Materiality of Representation and Right to Rely Thereon* — *aa.* *IN GENERAL.* — See note 1.

as to Quantity. — *Lugwig v. Petrie*, 32 Ind. App. 550.

630. 1. Abatement for Gross Mutual Mistake *as to Quantity.* — *Butt v. Smith*, 121 Wis. 566, 105 Am. St. Rep. 1039.

632. 3. Abatement for Slight Deficiency in Valuable Land. — *Raben v. Risnikoff*, 95 N. Y. App. Div. 68; *Albro v. Gowland*, 98 N. Y. App. Div. 474.

4. Abatement for Partial Failure of Title. — *Williams v. Neely*, (C. C. A.) 134 Fed. Rep. 1.

635. 6. Vendor Not Entitled to Compensation for Excess. — *Newman v. Kay*, 57 W. Va. 98.

642. 4. Measure for Partial Failure of Title. — *Cypress Lumber, etc., Co. v. Tillar*, 73 Ark. 354; *Sweet v. Howell*, 96 N. Y. App. Div. 45.

643. 1. Option to Rescind. — *Pagnuelo v. Choquette*, 34 Can. Sup. Ct. 102.

644. 1. Vendor May Rescind When Vendee Fails to Perform According to Terms of Contract. — *Mason v. Strickland*, (Neb. 1905) 103 N. W. Rep. 458.

3. By New Contract. — *Marsh v. Despard*, 56 W. Va. 132.

645. 2. By Parol. — *Wadge v. Kittleson*, 12 N. Dak. 452; *Haugen v. Skjervheim*, 13 N. Dak. 616.

3. Yielding of Possession or Other Equally Unequivocal Act. — *Marsh v. Despard*, 56 W. Va. 132.

5. Occurrence of Contingency. — *Peirson v. Canada Permanent Corp.*, 11 British Columbia 130.

647. 1. It Is Not an Invariable Rule that the rescission of a contract obtained by fraud will be denied merely upon the ground that the parties cannot be placed in *statu quo*. If equity can still be done between the parties, courts will grant relief to the defrauded party. *Green v. Duvergey*, 146 Cal. 379.

648. 1. Return of Consideration. — *Lytle v. Scottish American Mortg. Co.*, 122 Ga. 458.

649. 1. Substantial Compliance Sufficient. — *Green v. Duvergey*, 146 Cal. 379.

7. Tender of Possession or Deed. — *Phelps v. Mineral Springs Heights Co.*, 123 Wis. 253; *Van Buskirk v. Van Wart*, 36 N. Bruns. 422.

650. 8. Improvements. — *Lawson v. Vernon*, 38 Wash. 422, 107 Am. St. Rep. 778, citing 29 AM. AND ENG. ENCYC. OF LAW (2d ed.) 650.

653. 5. Demand and Offer of Performance. — *Cranwell v. Clinton Realty Co.*, 67 N. J. Eq. 540.

7. When Excused. — *Primm v. Wise*, 126 Iowa 528.

9. Bad Bargain Not Ground for Rescission. — *Sohan v. Gibson*, (Ky. 1904) 80 S. W. Rep. 1173; *Rodman v. Robinson*, 134 N. Car. 503.

655. 1. Representations of Fact. — *Miller v. Fulmer*, 25 Pa. Super. Ct. 106.

2. Promises and Declarations of Intention. — *Miller v. Fulmer*, 25 Pa. Super. Ct. 106.

657. 1. Materiality of Representation. —

- 657.** *bb.* REPRESENTATIONS AS TO TITLE. — See note 2.
658. *dd.* REPRESENTATIONS AS TO QUANTITY. — See note 2.
659. (a) *Reliance on Representations* — *aa.* IN GENERAL. — See note 4.
660. See note 1.
bb. EQUAL MEANS OF KNOWLEDGE. — See note 4.
661. *cc.* ACTUAL EXAMINATION. — See note 1.
662. (e) *Concealment and Failure to Disclose Facts* — *cc.* FAILURE OF VENDEE TO DISCLOSE FACTS. — See note 6.
663. *dd.* DUTY OF VENDOR TO DISCLOSE DEFECTIVE TITLE. — See note 1.
(f) *Knowledge and Intent* — *Vendor's Knowledge of Falsity Immaterial.* — See note 3.
664. (g) *Damage or Prejudice.* — See note 1.
665. (3) *Mistake* — (a) *Mistake of Fact.* — See notes 7, 8.
666. (4) *Failure of Vendor to Perform* — (b) *Failure of Vendor's Title* — *aa.* IN GENERAL. — See note 2.
Where Time Is of the Essence of the Contract. — See note 3.
670. *hh.* EXECUTED CONTRACT UNDER GENERAL WARRANTY DEED. — See note 1.
671. (5) *Failure of Vendee to Perform* — (a) *In General.* — See note 6.
675. *g.* TOTAL OR PARTIAL RESCISSION. — See note 8.
676. *h.* LOSS OF RIGHT TO RESCIND — (i) *By Waiver or Ratification* — *In General.* — See note 1.
682. 3. *Forfeiture* — *a.* IN GENERAL. — See note 8.
What Constitutes Election. — See note 11.
683. *c.* OPTION TO DECLARE FORFEITURE. — See notes 10, 11.

Storthz v. Arnold, (Ark. 1905) 84 S. W. Rep. 1036.

657. 2. *Representations as to Title.* — Muller v. Palmer, 144 Cal. 305; Altgelt v. Mernitz, (Tex. Civ. App. 1904) 83 S. W. Rep. 891; Corbett v. McGregor, (Tex. Civ. App. 1904) 84 S. W. Rep. 278; Morris v. Brown, (Tex. Civ. App. 1905) 85 S. W. Rep. 1015.

658. 2. *Representations as to Quantity.* — Stearns v. Kennedy, 94 Minn. 439 (unless by ordinary prudence the falsity of the representations would have been ascertained); McIntyre v. Harrington, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 94.

659. 4. *Reliance on Representation* — *In General.* — Cork v. Cook, 56 W. Va. 51; McNaughton v. Hudson, 37 Nova Scotia 191.

660. 1. *Reliance on Own Judgment or Information Obtained Elsewhere.* — Sohan v. Gibson, (Ky. 1904) 80 S. W. Rep. 1173; Cork v. Cook, 56 W. Va. 51.

4. *Equal Means of Knowledge.* — See Lawson v. Vernon, 38 Wash. 422, 107 Am. St. Rep. 778.

661. 1. *Independent Examination.* — Sohan v. Gibson, (Ky. 1904) 80 S. W. Rep. 1173. See also Newton v. Levy, (Ky. 1892) 82 S. W. Rep. 259.

662. 6. *Vendor Intentionally Deceived.* — Garr v. Alden, (Mich. 1905) 102 N. W. Rep. 950.

663. 1. *Duty to Disclose Defective Title.* — Corbett v. McGregor, (Tex. Civ. App. 1904) 84 S. W. Rep. 278.

3. *Vendor's Knowledge of Falsity Immaterial.* — Annis v. Ferguson, (Ky. 1905) 84 S. W. Rep. 553; Altgelt v. Mernitz, (Tex. Civ. App. 1904) 83 S. W. Rep. 891.

664. 1. *Damage or Prejudice.* — Storthz v. Arnold, (Ark. 1905) 84 S. W. Rep. 1036.

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665. 7. *Location of Land.* — Hopkins v. Fuller, 15 Manitoba 282.

8. *Quantity of Land.* — Benesh v. Travelers' Ins. Co., (N. Dak. 1905) 103 N. W. Rep. 405. But see Newman v. Kay, 57 W. Va. 98, *disapproving* and *overruling* the West Virginia cases cited in the original note.

666. 2. *In General.* — Primm v. Wise, 126 Iowa 528; Webb v. Hancher, 127 Iowa 269.

3. *Time of Essence.* — Seibel v. Purchase, 134 Fed. Rep. 484.

No Right to Time Within Which to Procure Title. — Webb v. Hancher, 127 Iowa 269.

670. 1. *Executed Contract under General Warranty Deed — No Fraud or Mistake.* — Joiner v. Trail, (Ky. 1905) 86 S. W. Rep. 980.

671. 6. *In General.* — Cranwell v. Clinton Realty Co., 67 N. J. Eq. 540.

675. 8. *Entire Contract — Wholly Rescinded.* — Lytle v. Scottish American Mortg. Co., 122 Ga. 458.

676. 1. *General Rule.* — Bales v. Williamson, (Iowa 1905) 103 N. W. Rep. 150.

682. 8. *Strict Construction of Agreement.* — Reclamation Dist. No. 551 v. Van Loben Sels, 145 Cal. 181; Wolke v. Watts, 125 Iowa 321; Cughan v. Larson, 13 N. Dak. 373.

11. *Sale to Third Person.* — Moran v. Palmer, 36 Wash. 684.

683. 10. *Option to Declare Forfeiture.* — Thompson v. Colby, 127 Iowa 234; Vito v. Birkel, 209 Pa. St. 206; Weaver v. Griffith, 210 Pa. St. 13, 105 Am. St. Rep. 783; Zeimantz v. Blake, 39 Wash. 6.

11. *Provision for Benefit of Vendor.* — Maffet v. Oregon, etc., R. Co., (Oregon 1905) 80 Pac. Rep. 489; Weaver v. Griffith, 210 Pa. St. 13, 105 Am. St. Rep. 783.

- 684.** *d.* NOTICE OF FORFEITURE. — See notes 1, 6.
e. NONPAYMENT OF PURCHASE PRICE. — See note 7.
- 685.** *g.* WAIVER AND ABANDONMENT — By Laches. — See note 5.
 By Acceptance of Payments. — See note 6.
 By Extension of Time of Payment. — See note 11.
- 686.** **V. PERFORMANCE OF THE CONTRACT** — 1. Conditions Precedent — See note 7.
- 687.** 2. Tender — *b.* NECESSITY OF TENDER — (1) *When Covenants Are Dependent.* — See note 1.
- 689.** (3) *Construction of Agreements — Whether Dependent or Independent* — (a) In General — Dependent unless Contrary Intention Appears. — See note 1.
 Independent When Time Fixed for One Performance and Not for the Other. — See note 5.
- 691.** (4) *Waiver and Excuse of Tender* — (b) Refusal to Perform. — See note 7.
- 692.** (c) Inability to Perform. — See note 2.
- 694.** *c.* SUFFICIENCY OF TENDER — (1) *As to Time* — (a) Time of Performance Fixed by Contract — *bb.* WHEN TIME IS OF ESSENCE — (aa) In General — The Tendency of the Modern Cases. — See note 4.
 By the Terms of the Contract. — See note 5.
 (bb) Time of Essence by Subsequent Notice. — See note 8.
- 703.** **VII. RIGHTS AND LIABILITIES ARISING OUT OF CONTRACT OF SALE** —
1. As Between Vendor and Purchaser — *a.* NATURE OF THE RELATION — (2) *In Equity.* — See note 10.
- 706.** *b.* RIGHT TO POSSESSION — (4) *Effect of Failure to Give Possession.* — See note 2.
- 707.** *d.* INTEREST AND RENTS AND PROFITS — (2) *In General.* — See note 9.
- 711.** (4) *Delay in Completion of Contract* — (b) Delay Due to Fault of Vendor. — See note 1.

684. 1. Notice Must Accurately Describe Land. — *Wolke v. Watts*, 125 Iowa 321.

6. Waiver — Indulgence. — *Tingue v. Patch*, 93 Minn. 427.

7. Time of Essence. — *Vito v. Birkel*, 209 Pa. St. 206.

685. 5. By Laches — *Cughan v. Larson*, 13 N. Dak. 373.

6. Acceptance of Payments. — *Kuhn v. Skelley*, 25 Pa. Super. Ct. 185.

11. Extension of Time of Payment. — *Neppach v. Oregon, etc., R. Co.*, (Oregon 1905) 80 Pac. Rep. 482.

686. 7. Conditions Precedent Must Be Performed. — *Martin v. Roberts*, 127 Iowa 218; *Spooner v. Cross*, 127 Iowa 259; *Brown v. Widen*, (Iowa 1905) 103 N. W. Rep. 158.

687. 1. Tender Essential When Covenants Dependent. — *Stein v. Waddell*, 37 Wash. 634. Ability and Readiness to Pay and Demand of Debt Sufficient. — *Cole v. Killam*, 187 Mass. 213.

689. 1. Dependent in Absence of Contrary Intention. — *Stein v. Waddell*, 37 Wash. 634.

5. Independent When Time Fixed for Only One Performance. — *Walker v. Sawyer*, 34 Ind. App. 239.

691. 7. Waiver of Tender by Refusal to Perform. — *Harmon v. Thompson*, (Ky. 1905) 84 S. W. Rep. 569.

692. 2. Tender Excused by Inability of Other to Perform. — *Primm v. Wise*, 126 Iowa 528; *Martin v. Roberts*, 127 Iowa 218; *Webb v.*

Hancher, 127 Iowa 269; *Guthiel v. Gilmer*, 27 Utah 496.

694. 4. Time Not of Essence unless So Expressed. — *Hosmer v. Wyoming R., etc., Co.*, (C. C. A.) 129 Fed. Rep. 883; *Ellis v. Bryant*, 120 Ga. 890; *Cranwell v. Clinton Realty Co.*, 67 N. J. Eq. 540; *Wright-Blodgett Co. v. Astoria Co.*, 45 Oregon 224; *Cosby v. Honaker*, 57 W. Va. 512.

5. Time of Essence by Terms of Contract. — *Ellis v. Bryant*, 120 Ga. 890; *Wright-Blodgett Co. v. Astoria Co.*, 45 Oregon 224.

8. Time of Essence by Subsequent Notice. — *Ellis v. Bryant*, 120 Ga. 890. Compare *Cranwell v. Clinton Realty Co.*, 67 N. J. Eq. 540.

Time May Be Made of Essence by Conduct of Party. — *Boldt v. Early*, 33 Ind. App. 434, 104 Am. St. Rep. 255.

703. 10. Trust Relation. — *Stearns v. Kennedy*, 94 Minn. 439; *Hubbard v. Kansas City Stained Glass Works, etc., Co.*, 188 Mo. 18; *Marion v. Wolcott*, (N. J. 1904) 59 Atl. Rep. 242; *Flanagan v. Great Cent. Land Co.*, 45 Oregon 335.

706. 2. Rents and Profits Recoverable. — See *Plews v. Samuel*, (1904) 1 Ch. 464.

707. 9. Interest from Time Fixed for Completion. — *Ferguson v. Epperly*, 127 Iowa 214; *Holyoke Envelope Co. v. U. S. Envelope Co.*, 186 Mass. 498.

711. 1. Delay in Showing Good Title. — See *Wood v. Howland*, 127 Iowa 394.

713. *e.* WHO BEARS LOSSES — (1) *In General*. — See note 2.

714. (2) *Duty of Vendor in Possession* — (a) *In General*. — See note 3.

715. (4) *Who Entitled to Gains*. — See note 6.

f. RIGHT TO RECOVER FOR INJURIES TO LAND. — See note 8.

g. EXPENSES — (1) *Taxes and Assessments* — (a) *Before Making of Contract*. — See note 10.

716. (b) *Between Contract and Time for Performance*. — See note 1.

719. VIII. REMEDIES — 1. *Of Vendor* — *a.* ACTION FOR BREACH OF CONTRACT — (2) *Measure of Damages* — (b) *Difference Between Contract Price and Market Value*. — See note 3.

723. 2. *Of Purchaser* — *a.* ACTION FOR BREACH OF CONTRACT — (1) *Right to Action*. — See note 11.

724. See note 3.

725. (2) *Measure of Damages* — (b) *In United States*. — See note 1.
The Weight of Authority. — See note 2.

726. *b.* RECOVERY OF PAYMENTS BY PURCHASER — (1) *Tender of Consideration and Demand of Performance* — *In General*. — See note 4.

727. When Tender and Demand Unnecessary. — See note 1.

(2) *Grounds for Recovery* — (b) *Inability of Vendor to Convey*. — See note 4.

(c) *Refusal of Vendor to Convey*. — See note 5.

728. (d) *Rescission for Fraud or Mistake*. — See note 1.

729. (3) *Effect of Vendee's Default*. — See note 6.

713. 2. *Losses Fall on Purchaser*. — *Marion v. Wolcott*, (N. J. 1904) 59 Atl. Rep. 242.

714. 3. *Vendor Must Take Care of Estate*. — *Plews v. Samuel*, (1904) 1 Ch. 464.

715. 6. *Purchaser Entitled to Gains*. — *Marion v. Wolcott*, (N. J. 1904) 59 Atl. Rep. 242.

8. *Injuries Occurring Previously*. — See *Dawson v. Great Northern, etc., R. Co.*, (1905) 1 K. B. 260, *reversing* (1904) 1 K. B. 277.

10. *Taxes Levied Before Making of Contract*. — *In re Bailies*, 127 Iowa 124, holding that it was immaterial that the taxes had not become a lien. But see *In re Allen*, (1904) 2 Ch. 226.

An Agreement to Convey Free from Incumbrance does not include tax liens which were not in existence when the contract was made. *Everett v. Marston*, 186 Mo. 587.

716. 1. *Vendor in Possession Liable for Taxes*. — *Clinton v. Shugart*, 126 Iowa 179. But under the *Kentucky* statute the holder of the equitable title should list the property and pay the taxes thereon, whether the property be in possession or not at the time of payment. *Hughes v. McCreary*, (Ky. 1905) 86 S. W. Rep. 522.

719. 3. *Difference Between Contract Price and Market Value*. — *Harmon v. Thompson*, (Ky. 1905) 84 S. W. Rep. 569; *Kuntz v. Schnugg*, 99 N. Y. App. Div. 191.

723. 11. *Election of Remedies*. — *Rodman v. Robinson*, 134 N. Car. 503. See also *Maffet v. Oregon, etc., R. Co.*, (Oregon 1905) 80 Pac. Rep. 489.

Action of Case Will Not Lie. — *Morehouse v. Terrill*, 111 Ill. App. 460.

724. 3. *Performance Prevented by Act of Purchaser*. — *Findley v. Koch*, 126 Iowa 131.

725. 1. *Fraud or Wilful Refusal*. — *Goodman v. Wolf*, 95 N. Y. App. Div. 522; *Arent-*

sen v. Moreland, 122 Wis. 167, 106 Am. St. Rep. 951.

2. *Prevailing Rule*. — *Watkins v. American Nat. Bank*, (C. C. A.) 134 Fed. Rep. 36; *Nolde v. Gray*, (Neb. 1905) 102 N. W. Rep. 759; *Brown v. Horniss*, 70 N. J. L. 260; *Le Roy v. Jacobosky*, 136 N. Car. 443; *Neppach v. Oregon, etc., R. Co.*, (Oregon 1905) 80 Pac. Rep. 482, *citing* 29 AM. AND ENG. ENCYC. OF LAW (2d ed.) 724.

When the Purchase Price Has Been Paid the measure of damages for the total breach of the covenant to convey is the value of the property. *Watkins v. American Nat. Bank*, (C. C. A.) 134 Fed. Rep. 36.

726. 4. *Tender and Demand*. — *Compare Seibel v. Purchase*, 134 Fed. Rep. 484.

727. 1. *Tender and Demand Excused*. — *Durham v. Wick*, 210 Pa. St. 128, 105 Am. St. Rep. 789; *Kreutzer v. Lynch*, 122 Wis. 474.

4. *Vendor Unable to Convey*. — *Seibel v. Purchase*, 134 Fed. Rep. 484.

5. *Refusal of Vendor to Convey*. — *Durham v. Wick*, 210 Pa. St. 128, 105 Am. St. Rep. 789. See also *Maffet v. Oregon, etc., R. Co.*, (Oregon 1905) 80 Pac. Rep. 489.

728. 1. *Rescission for Fraud*. — *Muller v. Palmer*, 144 Cal. 305.

Damages Without Rescission. — Although the vendee retains possession of the land, and elects not to rescind the sale, still the facts and circumstances may be such that he will be entitled to recover the damages sustained by reason of false representations. *Guinn v. Ames*, 36 Tex. Civ. App. 613.

729. 6. *Vendee in Default*. — *Lytle v. Scottish American Mortg. Co.*, 122 Ga. 458; *Gallagher v. Dettelbach*, 25 Ohio Cir. Ct. 342; *Woodman v. Blue Grass Land Co.*, 125 Wis. 489.

VENDOR'S LIEN.

BY E. C. ELLSBREE.

733. I. IMPLIED VENDOR'S LIEN — 1. Definition and Distinctions. — See note 1.

736. 2. Origin and Nature of Lien — Vendor's Lien Not Property. — See note 2.

743. 4. Existence and Extent of Lien — *c.* NATURE OF DEBT SECURED. — See note 5.

749. 7. In Whose Favor Lien Exists — *a.* IN GENERAL — Money Paid by Third Person. — See note 6.

753. 8. Enforcement of Lien — *b.* AGAINST WHOM ENFORCEABLE — (1) *In General.* — See note 8.

754. (2) *Purchasers with Notice.* — See note 5.

759. *d.* DEFENSES. — See note 4.

e. STATUTE OF LIMITATIONS. — See notes 5, 6.

760. 9. Priorities. — See note 8.

762. 10. Waiver of Lien — *a.* IN GENERAL — In Common with All Other Rights of a Civil Character. — See note 2.

763. *b.* TAKING SECURITY — General Rule Is that Lien Waived. — See note 4.

765. As Payment of Original Debt. — See note 3.

768. *c.* JUDGMENT AT LAW FOR DEBT. — See note 8.

780. III. LIEN EXPRESSLY RESERVED IN CONVEYANCE — 2. Nature and Effect — *a.* IN GENERAL. — See note 4.

781. *b.* RESERVED LIEN COMPARED WITH MORTGAGE. — See note 2.

789. 6. Priority. — See note 4.

790. 7. Assignment — It Is Established by the Great Weight of Authority. — See note 5.

794. VENUE. — See note 4.

733. 1. Implied Vendor's Lien Defined. — Bryson *v.* Collmer, 33 Ind. App. 494.

Founded on Unpaid Purchase Money. — Borrer *v.* Carrier, 34 Ind. App. 353.

736. 2. Vendor's Lien Not Estate or Property. — Bryson *v.* Collmer, 33 Ind. App. 494.

743. 5. Bach *v.* Kidansky, 106 N. Y. App. Div. 502.

No Lien Where No Consideration Passes. — Ostenson *v.* Severson, 126 Iowa 197.

749. 6. Person Advancing Money to Vendee. — Hardin *v.* Hooks, 72 Ark. 433. Compare Schmidt *v.* Schmidt, 123 Wis. 295.

753. 8. Bryson *v.* Collmer, 33 Ind. App. 494, supporting generally notes 5 to 8 of the original text paragraph.

Homestead. — Compare Schmidt *v.* Schmidt, 123 Wis. 295, citing Berger *v.* Berger, 104 Wis. 282, which held that the statute abolishes the right to a vendor's lien in case the property is a homestead. See generally the title HOME-STEAD, 626. 6 *et seq.*

754. 5. Purchasers with Notice. — Bryson *v.* Collmer, 33 Ind. App. 494; Borrer *v.* Carrier, 34 Ind. App. 353.

759. 4. Young *v.* Figg, (Neb. 1904) 100 N. W. Rep. 311, holding that a vendee in undisturbed possession cannot set up want of title in the vendor.

5. Lien Held Not Barred by Limitation. —

See Bargo *v.* Bargo, (Ky. 1905) 86 S. W. Rep. 525.

6. Lien Held Barred by Limitation. — Wise *v.* Wolfe, (Ky. 1905) 85 S. W. Rep. 1191; Berger *v.* Waldbaum, (Supm. Ct. Tr. T.) 46 Misc. (N. Y.) 4.

760. 8. Mortgagee with Notice. — Harter *v.* Capital City Brewing Co., 64 N. J. Eq. 155, affirmed 66 N. J. Eq. 432.

762. 2. Waiver — General Rule. — See *In re Durrow Brick Co.*, (1904) 1 Ir. R. 530.

763. 4. Security of Third Person. — Acree *v.* Stone, 142 Ala. 156.

765. 3. In General Whenever the Vendor Accepts a Bond, Bill, or Other Obligation as a Satisfaction. — See Acree *v.* Stone, 142 Ala. 156.

768. 8. Borrer *v.* Carrier, 34 Ind. App. 353.

780. 4. Title Remaining in Vendor Descends to Heirs. — McCord *v.* Hames, (Tex. Civ. App. 1905) 85 S. W. Rep. 504.

781. 2. Analogous to Mortgage. — Smith *v.* Butler, 72 Ark. 350.

789. 4. Takes Priority over Statutory Allowance to Widow and Infants. — Zieschang *v.* Helmke, (Tex. Civ. App. 1904) 84 S. W. Rep. 436.

790. 5. Assignment of Note. — Smith *v.* Butler, 72 Ark. 350.

794. 4. Venue — County Where Cause Is to Be Tried. — Fields *v.* Daisy Gold Min. Co., 26 Utah 373.

VERBAL AGREEMENTS (STATUTE OF FRAUDS).

BY H. W. HOYE.

806. III. CONFLICT OF LAWS — Contract to Deliver Goods in Another State. — See note 1.

807. IV. CONSTRUCTION OF STATUTE — Federal Courts Follow State Construction. — See note 1.

V. TO WHOM PLEA OF STATUTE AVAILABLE — 1. In General. — See note 4.

808. See note 1.

809. 2. Creditors. — See note 1.

3. Successors in Interest — *a.* IN GENERAL. — See note 6.

811. VI. WAIVER OF PROTECTION OF STATUTE — 2. Waiver by Failure to Plead. — See note 5.

812. 3. Waiver by Acting upon Contract. — See note 1.

Waiver by Vendor or Purchaser. — See note 2.

820. VII. OPERATION OF STATUTE — 4. Validity of Oral Conveyances — *b.* OPERATION AS ESTATES AT WILL AND FROM YEAR TO YEAR. — See note 1.

823. 7. Damages for Breach of Oral Contract. — See note 6.

824. 8. Parol Modification of Written Instrument — *a.* GENERAL RULE. — See note 7.

826. b. WHEN GENERAL RULE NOT APPLICABLE — Contracts Performed as Altered. — See note 7.

827. d. RESCISSION OF CONTRACT. — See note 1.

9. Contracts in Part Within Statute. — See notes 3, 4.

828. 10. Contracts Completely Performed — *a.* IN GENERAL. — See note 8.

829. b. CONTRACTS IN CONSIDERATION OF MARRIAGE. — See note 2.

806. 1. Contract to Deliver Goods in Another State. — *F. W. Brockman Commission Co. v. Kilbourne*, 111 Mo. App. 542.

807. 1. Federal Courts Follow State Construction. — *York v. Washburn*, (C. C. A.) 129 Fed. Rep. 564.

4. Strangers Cannot Set Up Statute. — *Cannon v. Castleman*, 164 Ind. 343; *Scudder v. Morris*, 107 Mo. App. 634; *Bringham v. Texas*, (Tex. Civ. App. 1905) 87 S. W. Rep. 893.

808. 1. Strangers Cannot Avoid Sale of Land. — See *Atlanta, etc., R. Co. v. Southern R. Co.*, (C. C. A.) 131 Fed. Rep. 657.

809. 1. Creditors. — *Cannon v. Castleman*, 164 Ind. 343; *Mott v. Ferguson*, 92 Minn. 201.

6. Successor in Interest. — *Stowell v. Gram*, 184 Mass. 562.

811. 5. Waiver by Failure to Object to Evidence. — *Holt v. Howard*, 77 Vt. 49.

812. 1. Reliance on Breach of Contract Is Waiver of Statute. — *Christiansen v. Aldrich*, 30 Mont. 446.

2. Cannon v. Castleman, 164 Ind. 343.

820. 1. In Massachusetts. — *Sheehan v. Fall River*, 187 Mass. 356.

In Washington an oral lease, if good at all, must be construed as a lease from month to

month, and then only where the tenant has been put into possession. *Richards v. Redelsheimer*, 36 Wash. 325.

823. 6. Damages for Breach Not Recoverable. — *Chamberlain v. Abrams*, 36 Wash. 587.

824. 7. Written Instrument Cannot Be Altered by Parol. — *Vezev v. Rashleigh*, (1904) 1 Ch. 634, 90 L. T. N. S. 663; *Largey v. Leggat*, 30 Mont. 148.

826. 7. Contracts Performed as Altered. — See *Denison v. Sawyer*, (Minn. 1905) 104 N. W. Rep. 305.

827. 1. Rescission by Parol. — *Vezev v. Rashleigh*, (1904) 1 Ch. 634, 90 L. T. N. S. 663.

3. When Contract Partly Within Statute Enforceable. — See *Bastin Telephone Co. v. Richmond Telephone Co.*, 117 Ky. 122, in which case, however, the contract was held to be indivisible and unenforceable.

4. When Action Brought upon Whole Contract. — *Loper v. Sheldon*, 120 Wis. 26.

828. 8. Contracts Completely Performed. — *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127 Iowa 153.

829. 2. Contracts in Consideration of Marriage. — *Austin v. Kuehn*, 111 Ill. App. 506, 211 Ill. 113.

829. *c.* CONTRACTS RELATING TO LANDS. — See note 3.

830. *d.* PROMISES TO PAY DEBTS OF ANOTHER. — See note 14.

831. 11. Contracts Partly Performed — *a.* DOCTRINE OF PART PERFORMANCE. — See note 5.

832. *b.* FULL PERFORMANCE ON ONE SIDE — (1) *In General.* — See note 3.

833. (2) *Contracts for Sale of Lands.* — See note 1.

834. See notes 1, 2.

(5) *Leases.* — See note 13.

835. (7) *Contracts Not to Be Performed Within One Year.* — See note 2.

836. *c.* RIGHTS ARISING FROM PART PERFORMANCE — (1) *In General.* — See note 2.

838. (2) *Recovery of Money Paid.* — See note 1.

839. (3) *Recovery for Property Transferred* — *Money Loaned.* — See note 6.

(4) *Recovery for Services.* — See note 7.

840. (5) *Recovery for Improvements.* — See note 3.

842. (6) *Recovery for Use and Occupation* — (c) *Under Lease.* — See note 5.

843. (7) *Contract as Measure of Damages* — (d) *Action for Services.* — See note 4.

844. See note 1.

845. VIII. ENFORCEMENT OF ORAL CONTRACTS IN EQUITY — 1. *In General.* — See note 1.

829. 3. *Contracts Relating to Lands.* — *Lasley v. Delano*, (Mich. 1905) 102 N. W. Rep. 1063, 12 Detroit Leg. N. 1; See *v. Mallonee*, 107 Mo. App. 721.

Where, under a Parol Gift of Land, the Donee Actually Enters into Possession and expends money in making improvements, the transaction is taken out of the statute. *Rowe v. Henderson*, 4 Indian Ter. 597.

830. 14. *Promise to Pay Debt of Another.* — *Lasley v. Delano*, (Mich. 1905) 102 N. W. Rep. 1063, 12 Detroit Leg. N. 1.

831. 5. *Part Performance of No Avail at Law.* — *Koenig v. Dohm*, 209 Ill. 468; *Leis v. Potter*, 68 Kan. 117; *Doty v. Doty*, 80 S. W. Rep. 803, 26 Ky. L. Rep. 63; *Commings v. Perry*, (County Ct.) 44 Misc. (N. Y.) 458; *Hall v. Misenheimer*, 137 N. Car. 183, 107 Am. St. Rep. 451; *Baxter v. Doane*, 208 Pa. St. 585.

832. 3. *Full Performance on One Side.* — *Yule v. Fell*, 123 Iowa 662; *Foster Lumber Co. v. Harlan County Bank*, (Kan. 1905) 80 Pac. Rep. 49; *Donovan v. P. Shoenhofen Brewing Co.*, 102 Mo. App. 427; *Hasenbeck v. Hasenbeck*, 111 Mo. App. 38; *Hubbard v. Kansas City Stained Glass Works, etc., Co.*, 188 Mo. 18; *Conlon v. Mission of the Immaculate Virgin*, 87 N. Y. App. Div. 165; *Halsell v. Renfrow*, 14 Okla. 674; *Spencer v. Spencer*, 25 R. I. 239; *Hand v. Nix*, (Tex. Civ. App. 1905) 87 S. W. Rep. 204; *Lee v. Wrixon*, 37 Wash. 47; *Matter of Field*, 33 Wash. 63. See also *Meisner v. Meisner*, 36 Can. Sup. Ct. 34.

833. 1. *Full Performance as to Conveyance of Lands.* — *McCoy v. McCoy*, 32 Ind. App. 38, 102 Am. St. Rep. 223; *McCullough v. Finley*, 69 Kan. 705; *Noland v. Cincinnati Cooperage Co.*, (Ky. 1904) 82 S. W. Rep. 627; *Whitley v. Whitley*, 80 S. W. Rep. 825, 26 Ky. L. Rep. 134; *Tucker v. Dolan*, 109 Mo. App. 442. See also *McDougall v. Cairns*, 2 N. W. Ter. 219.

834. 1. *Recovery May Be Had on Implied*

Contract. — Compare *Commings v. Perry*, (County Ct.) 44 Misc. (N. Y.) 458.

2. *Vendee May Not Enforce Contract.* — *Harri-man v. Tyndale*, 184 Mass. 534; *Chamberlain v. Abrams*, 36 Wash. 587. And see *Elsbury v. Shull*, 32 Ind. App. 556.

13. *Leases.* — *Noland v. Cincinnati Cooperage Co.*, (Ky. 1904) 82 S. W. Rep. 627.

835. 2. *Contracts Not to Be Performed Within One Year.* — *Weber v. Weber*, 76 S. W. Rep. 507, 25 Ky. L. Rep. 908; *Noland v. Cincinnati Cooperage Co.*, (Ky. 1904) 82 S. W. Rep. 627; *Sorells v. Goldberg*, 34 Tex. Civ. App. 265.

836. 2. *Right of Recovery for Part Performance.* — *Doty v. Doty*, 80 S. W. Rep. 803, 26 Ky. L. Rep. 63; *De Montague v. Bacharach*, 187 Mass. 128.

838. 1. *Recovery of Purchase Price.* — *McKinley v. Lloyd*, 128 Fed. Rep. 519; *Brashear v. Rabenstein*, (Kan. 1905) 80 Pac. Rep. 950; *Interstate Hotel Co. v. Woodward, etc., Amusement Co.*, 103 Mo. App. 198; *Durham v. Wick*, 210 Pa. St. 128, 105 Am. St. Rep. 789.

839. 6. *Money Loaned.* — *Weber v. Weber*, 76 S. W. Rep. 507, 25 Ky. L. Rep. 908.

7. *Recovery for Services.* — *Booker v. Heffner*, 95 N. Y. App. Div. 84; *McKinley v. Lloyd*, 128 Fed. Rep. 519.

If the Suit Is Brought on the Contract. — *Banta v. Banta*, 31 N. Y. App. Div. 172.

840. 3. *Recovery for Improvements.* — See *Reynolds v. Clowdus*, 4 Indian Ter. 679.

842. 5. *Recovery under Lease.* — *Merchants' State Bank v. Ruettell*, 12 N. Dak. 519.

843. 4. *Action for Services.* — *Michels v. West*, 109 Ill. App. 418.

844. 1. *Contrary Decisions.* — See *Alderding v. Allison*, 31 Ind. App. 397.

845. 1. *Equity Will Relieve Against Fraud.* — *Sathre v. Rolfe*, 31 Mont. 85; *Halsell v. Renfrow*, 14 Okla. 674. See also *Hartman v. Powell*, (N. J. 1905) 59 Atl. Rep. 628.

- 846.** 2. Refusal of One Party to Perform. — See note 1.
847. 3. Failure of Instrument to Express Intention of Parties. — See note 1.
848. IX. THE MEMORANDUM — 2. Form — *a.* IN GENERAL. — See notes 5, 8, 9.
849. See note 1.
850. *b.* SEPARATE WRITINGS. — See notes 2, 4.
852. *c.* WHAT DOCUMENTS AMOUNT TO. — See notes 1, 2, 5, 11, 13.
853. See notes 6, 12.
854. See note 5.
 3. Time of Execution. — See note 8.
855. 4. Delivery — Undelivered Deed. — See notes 12, 14.
856. Letter to Third Person. — See note 1.
 5. Manner of Execution — *a.* SIGNATURE — (1) *Necessity.* — See note 4.
 (2) *Sufficiency* — (*a*) Place of Signature. — See notes 5, 7. See generally the title SIGN — SIGNATURE.

846. 1. Failure to Perform Not Fraud. — Koenig *v.* Dohm, 209 Ill. 468; Markham *v.* Katzenstein, 209 Ill. 607; Largey *v.* Leggat, 30 Mont. 148; Lozier *v.* Hill, (N. J. 1904) 59 Atl. Rep. 234; Dechenbach *v.* Rima, 45 Oregon 500; New York, etc., Land Co. *v.* Dooley, 33 Tex. Civ. App. 636.

847. 1. Power of Equity to Reform Instrument. — Sathre *v.* Rolfe, 31 Mont. 85.

848. 5. Formality Not Essential. — Devine *v.* Warner, 76 Conn. 229; Nebraska Bridge Supply, etc., Co. *v.* Conway, (Iowa 1905) 103 N. W. Rep. 122; Butterfield *v.* Commercial Cattle Co., (Neb. 1904) 101 N. W. Rep. 250; Bayles *v.* Strong, 104 N. Y. App. Div. 153; Blum *v.* Blum, (Supm. Ct. App. T.) 90 N. Y. Supp. 445.

8. Detail of Particulars Not Required. — Seymour *v.* Warren, 179 N. Y. 1.

9. Memorandum Must Contain All Elements of Contract. — Stewart *v.* Cook, 118 Ga. 541; Austin *v.* Kuehn, 211 Ill. 113; Darnell *v.* Laferty, 113 Mo. App. 282; Brauer *v.* Oceanic Steam Nav. Co., 178 N. Y. 339; Hall *v.* Misenheimer, 137 N. Car. 183, 107 Am. St. Rep. 451; Halsell *v.* Renfrow, 14 Okla. 674.

849. 1. Essential Terms Enumerated. — Matter of Robinson, 142 Cal. 152; Darnell *v.* Laferty, 113 Mo. App. 282; Mine La Motte Lead, etc., Co. *v.* White, 106 Mo. App. 222; Blum *v.* Blum, (Supm. Ct. App. T.) 90 N. Y. Supp. 445; Brauer *v.* Oceanic Steam Nav. Co., 178 N. Y. 339; Halsell *v.* Renfrow, 14 Okla. 674.

850. 2. Memorandum May Consist of Several Writings. — Devine *v.* Warner, 76 Conn. 229; Nebraska Bridge Supply, etc., Co. *v.* Conway, (Iowa 1905) 103 N. W. Rep. 122; Charlton *v.* Columbia Real Estate Co., (N. J. 1905) 60 Atl. Rep. 192; Bristol *v.* Mente, 79 N. Y. App. Div. 67, *affirmed* 178 N. Y. 599; Sutter *v.* Isabella Furnace Co., 210 Pa. St. 79; Cobb *v.* Glenn Boom, etc., Co., 57 W. Va. 49.

4. Separate Writings Must Refer to Each Other. — Sivell *v.* Hogan, 119 Ga. 167.

852. 1. Assignment of Lease. — Lamb *v.* Hall, 147 Cal. 44.

2. Auctioneer's Entry. — Garth *v.* Davis, (Ky. 1905) 85 S. W. Rep. 692; Atkinson *v.* Washington and Jefferson College, 54 W. Va. 32.

5. Bill of Goods. — Equitable Mfg. Co. *v.* Allen, 76 Vt. 22, 104 Am. St. Rep. 915.

11. Corporation Vote. — Compare Cumberland, etc., R. Co. *v.* Shelbyville, etc., R. Co., 117 Ky. 95.

13. Deed. — See Dorr Cattle Co. *v.* Des Moines Nat. Bank, 127 Iowa 153. See further *infra*, this title, **855.** 12, 13.

853. 6. Letters. — Cooper *v.* Bay State Gas Co., 127 Fed. Rep. 482; Woodruff *v.* Butler, 75 Conn. 679; Gough *v.* Loomis, 123 Iowa 642; Welsh *v.* Brainerd, (Minn. 1905) 103 N. W. Rep. 1031; Bristol *v.* Mente, 79 N. Y. App. Div. 67, *affirmed* 178 N. Y. 599; Halsell *v.* Renfrow, 14 Okla. 674; Huguenot Mills *v.* Jempson, 68 S. Car. 363, 102 Am. St. Rep. 673.

12. Receipt. — Bayles *v.* Strong, 104 N. Y. App. Div. 153; Hall *v.* Misenheimer, 137 N. Car. 183, 107 Am. St. Rep. 451. Compare Kurdy *v.* Rogers, 10 Idaho 416.

854. 5. Telegrams. — Collyer *v.* Davis, (Neb. 1904) 101 N. W. Rep. 1001; Cobb *v.* Glenn Boom, etc., Co., 57 W. Va. 49.

8. Memorandum May Be Executed Any Time Before Action Brought. — Helios-Upton Co. *v.* Thomas, 96 N. Y. App. Div. 401.

855. 12. Undelivered Deed Insufficient. — Morrow *v.* Moore, 98 Me. 373, 99 Am. St. Rep. 410; Schneider *v.* Vogler, (Neb. 1904) 97 N. W. Rep. 1018. See also Charlton *v.* Columbia Real Estate Co., 67 N. J. Eq. 629, *citing* 29 AM. AND ENG. ENCYC. OF LAW (2d ed.) 855, as to the conflict of authority, but not deciding the question; Halsell *v.* Renfrow, 14 Okla. 674.

14. Undelivered Deed May Supply Description of Property. — See Charlton *v.* Columbia Real Estate Co., 67 N. J. Eq. 629, applying the principle to an undelivered lease.

856. 1. Letter Addressed to Third Person. — Butterfield *v.* Commercial Cattle Co., (Neb. 1904) 101 N. W. Rep. 250; Charlton *v.* Columbia Real Estate Co., (N. J. 1905) 60 Atl. Rep. 192; Bristol *v.* Mente, 79 N. Y. App. Div. 67, *affirmed* 178 N. Y. 599. See also Nebraska Bridge Supply, etc., Co. *v.* Conway, (Iowa 1904) 98 N. W. Rep. 1024. Compare Mathes *v.* Bell, 121 Iowa 722.

4. When Unsigned Memorandum Binding. — Merchants' Coal Co. *v.* Billmeyer, 54 W. Va. 1.

5. "Signature" May Be in Any Part of Instrument. — Hall *v.* Misenheimer, 137 N. Car. 183, 107 Am. St. Rep. 451.

- 857.** See notes 1, 2, 7.
- 858.** (b) *Manner of Signature.* — See note 2.
Signature by Partnership. — See note 4.
 (c) *Signature by Single Party.* — See note 7.
- 859.** See note 1.
- 860.** *Offer and Acceptance.* — See notes 7, 9, 10.
- 861.** (a) *Signature by Agent* — *cc. NATURE OF AUTHORITY.* — See note 11.
- 862.** See notes 1, 4.
- 863.** *dd. RATIFICATION.* — See note 8.
- 864.** *ff. SIGNATURE IN NAME OF AGENT.* — See notes 1, 2, 3.
 6. *Contents* — *a. PARTIES.* — See note 8.
b. SUBJECT-MATTER — (1) *In General.* — See note 8.
865. (2) *Personal Property.* — See notes 1, 2, 3.
866. (3) *Real Property.* — See notes 5, 6.
- 856.** 7. *Name Must Be Written with Intent to Sign.* — *Jewett v. Greisheimer*, 100 N. Y. App. Div. 210.
- 857.** 1. *When Printed Name Sufficient.* — *Compare Ferguson v. Trovaten*, 94 Minn. 209.
2. *Entry in Book Sufficient.* — *Devine v. Warner*, 76 Conn. 229. But see *Nasmith Co. v. Alexander Brown Milling, etc., Co.*, 9 Ont. L. Rep. 21, holding that an entry in a book containing the owner's name stamped on the fly leaf was insufficient.
7. *Indorsement by Agent on Check for Part of Purchase Price Insufficient.* — *Koenig v. Dohm*, 209 Ill. 468.
- 858.** 2. *Stamp Insufficient Unless Used as Signature.* — See *Nasmith Co. v. Alexander Brown Milling, etc., Co.*, 9 Ont. L. Rep. 21.
4. *Signature by One Partner.* — *Garth v. Davis*, (Ky. 1905) 85 S. W. Rep. 692.
7. *Signature by Party to Be Charged Sufficient.* — *Nebraska Bridge Supply, etc., Co. v. Conway*, (Iowa 1905) 103 N. W. Rep. 122, citing 29 AM. AND ENG. ENCYC. OF LAW (2d ed.) 858; *Engler v. Garrett*, 100 Md. 387; *Charlton v. Columbia Real Estate Co.*, (N. J. 1905) 60 Atl. Rep. 192; *Seymour v. Warren*, 179 N. Y. 1, reversing 86 N. Y. App. Div. 403; *Dyer v. Winston*, 33 Tex. Civ. App. 412.
- 859.** 1. *Signature by Executors under Power in Will Sufficient.* — *Matter of Robinson*, 142 Cal. 152.
- 860.** 7. *Verbal Acceptance of Written Offer Sufficient.* — *Gough v. Loomis*, 123 Iowa 642.
9. *Oral Acceptance of Proposal to Purchase Land.* — *Ferguson v. Trovaten*, 94 Minn. 209; *Kileen v. Kennedy*, 90 Minn. 414; *Newlin v. Hoyt*, 91 Minn. 409.
10. *Acceptance Must Be in Terms of Offer.* — *Kreutzer v. Lynch*, 122 Wis. 474.
- 861.** 11. *Parol Authority to Contract for Sale of Personal Property Sufficient.* — *Fordyce Round Bale Cotton Press Co. v. Seaver*, (Ark. 1905) 85 S. W. Rep. 1126. See generally the title AGENCY, **955.** 2 *et seq.* See also the title REAL ESTATE BROKERS, **900.** 4.
- 862.** 1. *Written Authority to Contract for Sale of Lands Necessary.* — *Koenig v. Dohm*, 209 Ill. 468; *Power v. Immigration Land Co.*, 93 Minn. 247; *Newlin v. Hoyt*, 91 Minn. 409; *Marshall v. Trerise*, (Mont. 1905) 81 Pac. Rep. 400. See also *Lund v. Thackery*, (S. Dak. 1904) 99 N. W. Rep. 856.
4. *Seal Considered of No Value.* — See *Daniel v. Garner*, 71 Ark. 484.
- 863.** 8. *Written Ratification Required.* — *People's Min., etc., Co. v. Central Consol. Mines Corp.*, (Colo. App. 1905) 80 Pac. Rep. 479; *Butman v. Butman*, 213 Ill. 104; *Johnson v. Fecht*, 185 Mo. 335.
- 864.** 1. *Agent May Sign in Own Name.* — *Brooks v. Cook*, 141 Ala. 499; *Nebraska Bridge Supply, etc., Co. v. Conway*, (Iowa 1905) 103 N. W. Rep. 122, citing 29 AM. AND ENG. ENCYC. OF LAW (2d ed.) 864.
2. *Name of Principal Need Not Appear.* — *Darnell v. Lafferty*, 113 Mo. App. 282.
3. *Agency May Be Shown by Parol.* — *Darnell v. Lafferty*, 113 Mo. App. 282; *Usher v. Daniels*, (N. H. 1905) 60 Atl. Rep. 746; *Huguenot Mills v. Jempson*, 68 S. Car. 363, 102 Am. St. Rep. 673.
8. *Memorandum Must Show Parties.* — *Morrison v. Hazzard*, (Tex. Civ. App. 1905) 88 S. W. Rep. 385; *Maber v. Penskowski*, 15 Manitoba 236.
- 865.** 8. *Memorandum Must Show Subject-matter.* — *Kurdy v. Rogers*, 10 Idaho 416; *Chellis v. Grimes*, 72 N. H. 337; *Brauer v. Oceanic Steam Nav. Co.*, 178 N. Y. 339.
- 866.** 1. *Memorandum Must Be Explicit as to Personal Property.* — *Darnell v. Lafferty*, 113 Mo. App. 282 ("ten head of cows and heifers" sufficient).
2. *Quantity or Number of Property.* — *Stewart v. Cook*, 118 Ga. 541 (weight of bales of cotton sold required).
3. *Immaterial Particulars.* — *Mathes v. Bell*, 121 Iowa 722.
5. *Necessity for Describing Land.* — *Kurdy v. Rogers*, 10 Idaho 416; *Johnson v. Fecht*, 185 Mo. 335; *Chellis v. Grimes*, 72 N. H. 337; *Morrison v. Hazzard*, (Tex. Civ. App. 1905) 88 S. W. Rep. 385; *Penn v. Texas Yellow Pine Lumber Co.*, 35 Tex. Civ. App. 181.
- Memorandum Consisting of Several Letters — Loss of Letter Containing Description Not Fatal.* — *Welsh v. Brainerd*, (Minn. 1905) 103 N. W. Rep. 1031.
6. *Description Sufficient, if Land Can Be Identified.* — *Gage v. Cameron*, 212 Ill. 146; *Engler v. Garrett*, 100 Md. 387; *Ruzicka v. Hotovy*, (Neb. 1904) 101 N. W. Rep. 328; *Claphan v. Barber*, 65 N. J. Eq. 550; *Ward v. Gay*, 137 N. Car. 397; *Henry v. Black*, 210 Pa. St. 245, 105 Am. St. Rep. 802.

- 867.** See notes 1, 2, 3.
- 868.** *c.* CONSIDERATION. — See notes 4, 8.
- 869.** *Contra Decisions.* — See note 4.
Sealed Instrument. — See note 7.
"For Value Received." — See note 9.
- 870.** *Consideration for Guaranty.* — See notes 1, 2.
- 871.** See note 5.
- 872.** *d.* TERMS OF SALE. — See note 5.
- 873.** *e.* TIME. — See note 6.
- 874.** *f.* CONCLUDED AGREEMENT. — See note 2.
 7. *Variation* — *a.* VARYING BY PAROL. — See note 4.
- 875.** See note 2.
b. ALTERATION. — See note 5.
- 876.** *X.* ESTATES IN LANDS — 1. *In General.* — See note 1.
- 878.** 3. *Verbal Agreements Purporting to Pass Title* — *b.* AGREEMENT TO BUILD OR REPAIR. — See note 1.
c. AGREEMENT TO CONVEY FOR SERVICES. — See note 3.
f. AGREEMENT TO EXCHANGE LAND. — See note 7.
h. AGREEMENT TO LEASE. — See note 11.
- 879.** *i.* AGREEMENT TO PARTITION — (2) *Effect of Possession.* — See note 4.
- Description Held Sufficient.* — *Strubbe v. Lewis*, 76 S. W. Rep. 150, 25 Ky. L. Rep. 605; *Dyer v. Winston*, 33 Tex. Civ. App. 412.
- Description Held Insufficient.* — *Hefferlin v. Karlman*, 29 Mont. 139.
- 867.** 1. *Parol Evidence Admissible to Apply Description.* — *Strubbe v. Lewis*, 76 S. W. Rep. 150, 25 Ky. L. Rep. 605.
2. *Parol Evidence Inadmissible to Supply Description.* — *Halsell v. Renfrow*, 14 Okla. 674.
3. *Description Obtained from Other Writings.* — *Gough v. Loomis*, 123 Iowa 642. See also *Colliver v. Davis*, (Neb. 1904) 101 N. W. Rep. 1001.
- 868.** 4. *Price Must Be Stated.* — *Chellis v. Grimes*, 72 N. H. 337; *Hall v. Misenheimer*, 137 N. Car. 183, 107 Am. St. Rep. 451.
8. *Consideration May Be Inferred.* — *Seymour v. Warren*, 179 N. Y. 1; *Helios-Upton Co. v. Thomas*, 96 N. Y. App. Div. 401.
- 869.** 4. *Price Need Not Be Stated.* — *Tucker v. Dolan*, 109 Mo. App. 442; *Dyer v. Winston*, 33 Tex. Civ. App. 412.
- Statement of Consideration Unnecessary by Statute.* — *Strubbe v. Lewis*, 76 S. W. Rep. 150, 25 Ky. L. Rep. 605; *Brumback v. Chowning*, (Ky. 1904) 82 S. W. Rep. 974.
7. *Sealed Instrument.* — *Gein v. Little*, (Supm. Ct. Tr. T.) 43 Misc. (N. Y.) 421, *affirmed* 102 N. Y. App. Div. 614.
9. *"For Value Received."* — *White Sewing Mach. Co. v. Fowler*, (Nev. 1904) 78 Pac. Rep. 1034.
- 870.** 1. *Consideration Must Be Expressed.* — *Loper v. Sheldon*, 120 Wis. 26. *Compare Finkelstein v. Kessler*, (Supm. Ct. App. T.) 84 N. Y. Supp. 266.
2. *Consideration Need Not Be Expressed.* — *Ruzicka v. Hotovy*, (Neb. 1904) 101 N. W. Rep. 328.
- 871.** 5. *Where Guaranty Part of Principal Contract.* — *Helios-Upton Co. v. Thomas*, 96 N. Y. App. Div. 401.
- 872.** 5. *Memorandum Must Show Terms of Sale.* — *Trusts, etc., Co. v. Ross*, 9 Ont. L. Rep. 715.
- 873.** 6. *Reasonable Time Presumed.* — *Darnell v. Lafferty*, 113 Mo. App. 282.
- 874.** 2. *Offer May Be Read with Written Acceptance.* — *Sivell v. Hogan*, 119 Ga. 167; *Brophy v. Idaho Produce, etc., Co.*, 31 Mont. 279.
4. *Parol Additions to Memorandum Not Permissible.* — *Niles v. Hancock*, 140 Cal. 157; *Stewart v. Cook*, 118 Ga. 541; *McConathy v. Latham*, 116 Ky. 735; *Darnell v. Lafferty*, 113 Mo. App. 282; *Hall v. Small*, 178 Mo. 629; *Largey v. Leggat*, 30 Mont. 148; *Halsell v. Renfrow*, 14 Okla. 674; *Morrison v. Hazzard*, (Tex. Civ. App. 1905) 88 S. W. Rep. 385.
- 875.** 2. *Parol Evidence Admissible to Explain or Apply Writing.* — *Darnell v. Lafferty*, 113 Mo. App. 282; *Brauer v. Oceanic Steam Nav. Co.*, 178 N. Y. 339.
5. *Alteration by Stranger Immaterial.* — *Equitable Mfg. Co. v. Allen*, 76 Vt. 22, 104 Am. St. Rep. 915.
- 876.** 1. *In General.* — *McKinley v. Lloyd*, 128 Fed. Rep. 519.
- Agreement to Look After Land and Pay Taxes Not Within Statute.* — *New York, etc., Land Co. v. Dooley*, 33 Tex. Civ. App. 636.
- A Contract Made in Furtherance of a Railroad's Statutory Right to appropriate gravel, wood, etc., for construction work does not create an interest in land and need not be in writing.* *Cox v. St. Louis, etc., R. Co.*, 111 Mo. App. 394.
- 878.** 1. *Agreement to Build.* — A contract between joint tenants, by which one is to build a house and after the rents have equaled the cost of building to divide them with the other, is not within the statute. *Ayotte v. Nadeau*, 32 Mont. 498.
3. *Agreement to Convey for Services.* — *Rodgers v. Lamb*, 137 Mich. 241, 11 Detroit Leg. N. 296.
7. *Parol Exchange Void.* — *McCoy v. McCoy*, 32 Ind. App. 38, 102 Am. St. Rep. 223.
11. *Agreement to Lease.* — *Browder v. Phinney*, 37 Wash. 70.
- 879.** 4. *Effect of Possession.* — *McCullough*

- 880.** *l.* AGREEMENTS RELATING TO MORTGAGES. — See note 6.
- 881.** *p.* AGREEMENTS AS TO BOUNDARY LINES. — See note 2.
- 882.** 4. Creation of Easements. — See note 3.
- 883.** 5. Creation of Licenses. — See note 1.
Revocation of Licenses. — See notes 3, 5.
- 884.** 6. Creation of Leases — *a.* IN GENERAL. — See note 2.
- 886.** *f.* EXTENSIONS AND RENEWALS — (2) *Written Leases.* — See note 3.
7. Contracts for Sale — *a.* IN GENERAL. — See note 6.
- 888.** *d.* KIND OF INTEREST — (3) *Contracts Relating to Mines.* — See note 6.
- 889.** *e.* KIND OF PROPERTY — (1) *Sale of Crops* — (b) *Fructus Naturales.* — See note 5.
(c) *Fructus Industriales.* — See note 6.
- 891.** (3) *Sale of Growing Trees and Timber.* — See note 2.
- 892.** (4) *Sale of Improvements and Fixtures.* — See note 1.
f. KIND OF CONTRACT — (1) *Agreements with Agents.* — See note 13.
- 893.** See note 2.
(2) *Agreements to Devise.* — See note 7.
- 894.** See note 1.

v. Finley, 69 Kan. 705. See further the title PARTITION, 1137. 8 *et seq.*

880. 6. Agreement to Advance Money. — An oral agreement between the holders of notes secured by a mortgage, that one of the holders will advance money to the mortgagor to protect the property, is invalid. *Eikelman v. Perdw,* 140 Cal. 687.

Agreement to Lend Money to Be Secured by Mortgage. — An agreement whereby the plaintiff was to keep in readiness a sum of money for the purpose of lending it to the defendant, to be secured by a mortgage upon a mine, the defendant to pay interest during the dates provided in the agreement, was held not to be within the statute, since there was no specific promise to mortgage the property. *Ehlen v. Selden,* 99 Md. 699.

881. 2. Boundary-line Agreements. — *Steinhilber v. Holmes,* 68 Kan. 607; *Frazier v. Mineral Development Co.,* (Ky. 1905) 86 S. W. Rep. 983; *Mays v. Hinchman,* 57 W. Va. 602.

882. 3. Creation of Easements. — *Belser v. Moore,* 73 Ark. 296; *Howes v. Barmon,* (Idaho 1905) 81 Pac. Rep. 48; *Entwhistle v. Henke,* 211 Ill. 273; *Mine La Motte Lead, etc., Co. v. White,* 106 Mo. App. 222; *Peer v. Wadsworth,* 67 N. J. Eq. 191; *Parsons v. Hunt,* 98 Tex. 420. Compare *Hutchins v. Munn,* 22 App. Cas. (D. C.) 88.

Parol Grant of Easement Taken Out of Statute by Part Performance. — *Hardcastle v. Holmes,* (Kan. 1905) 80 Pac. Rep. 962.

Agreement to Permit Maintenance of Telephone Poles Not Within Statute. — *Anderson v. Mt. Sterling Telephone Co.,* (Ky. 1905) 86 S. W. Rep. 1119.

883. 1. Creation of Licenses. — *Howes v. Barmon,* (Idaho 1905) 81 Pac. Rep. 48.

3. Revocation of Licenses. — *Entwhistle v. Henke,* 211 Ill. 273.

5. Timber Cut. — *Antrin Iron Co. v. Anderson,* (Mich. 1905) 104 N. W. Rep. 319; *Mine*

La Motte Lead, etc., Co. v. White, 106 Mo. App. 222.

884. 2. In General. — *Browder v. Phinney,* 37 Wash. 70.

886. 3. Written Leases. — Compare *Landt v. Schneider,* 31 Mont. 15.

6. Contracts for Sale — In General. — *Leis v. Potter,* 68 Kan. 117; *Lozier v. Hill,* (N. J. 1904) 59 Atl. Rep. 234; *Chamberlain v. Abrams,* 36 Wash. 587.

888. 6. Contracts Relating to Mines. — *Entwhistle v. Henke,* 211 Ill. 273.

889. 5. *Fructus Naturales.* — *Ross v. Cook,* (Kan. 1905) 80 Pac. Rep. 38, holding further that severance of a small portion of the crop is not sufficient to take the transaction out of the statute.

6. *Fructus Industriales.* — *Wimp v. Early,* 104 Mo. App. 85.

891. 2. See *Antrin Iron Co. v. Anderson,* (Mich. 1905) 104 N. W. Rep. 319; *Bayles v. Strong,* 104 N. Y. App. Div. 153.

892. 1. Sale of Improvements and Fixtures. — See *Cumberland, etc., R. Co. v. Shelbyville, etc., R. Co.,* 117 Ky. 95, holding that an agreement to sell the rolling stock and roadbed of a railroad is within the statute.

13. Contracts to Buy or Sell for Another. — *Hancock v. Dodge,* 85 Miss. 228; *Johnson v. Hayward,* (Neb. 1905) 103 N. W. Rep. 1058. See also *Ober v. Stephens,* 54 W. Va. 354.

893. 2. Option to Purchase Not Within Statute. — *Hughes v. Antill,* 23 Pa. Super. Ct. 290.

7. Oral Promise to Devise Land. — *Waters v. Cline,* (Ky. 1905) 85 S. W. Rep. 209, 750; *Lozier v. Hill,* (N. J. 1904) 51 Atl. Rep. 234; *Dixon v. Sheridan,* 125 Wis. 60. See further the titles DEBTS OF DECEDENTS, 1018. 7 *et seq.*; SPECIFIC PERFORMANCE, 93. 2 *et seq.*

Agreement to Devise in Consideration of Support Valid. — *Caldwell v. Drummond,* 127 Iowa 134.

894. 1. Part Performance. — *Teske v. Dittberner,* (Neb. 1903) 98 N. W. Rep. 57.

895. (4) *Agreements to Pay Consideration.* — See note 1.

(5) *Agreements to Pay Incumbrances.* — See note 2.

(6) *Agreements Creating Parol Liens.* — See note 3.

896. See note 1.

897. (9) *Agreements for Redemption.* — See note 1.

898. (12) *Agreements for Partnerships and Joint Purchases of Land* —

(a) *Partnership Contracts* — *aa. PARTNERSHIPS FOR SPECULATION.* — See note 1.

899. (b) *Joint Purchases* — *aa. IN GENERAL.* — See note 5.

904. **XI. PROMISES BY EXECUTORS OR ADMINISTRATORS — 2. Application of Statute.** — See note 4.

906. **XII. PROMISES TO ANSWER FOR THE DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER — 1. In General** — *b. ORIGINAL AND COLLATERAL PROMISES.* — See note 2.

Character of Promise as Question of Law or of Fact. — See note 6.

907. See notes 4, 5.

910. *e. NECESSITY FOR CONSIDERATION.* — See note 10.

911. *f. ACCEPTANCE OF BILLS, ORDERS, ETC.* — *Bill of Exchange.* — See note 5.

912. *g. INDEMNITY CONTRACTS.* — See note 1.

2. Discharge of Original Debtor. — See note 2.

913. **4. Promise to Pay Promisor's Own Debt** — *a. IN GENERAL.* — See note 5.

914. *b. PROMISES AS PART OF PURCHASE PRICE OF PROPERTY.* — See note 9.

895. 1. Promise to Pay Consideration. — See *Boston v. Boston*, (1904) 1 K. B. 124, 73 L. J. K. B. 17, 89 L. T. N. S. 468, 52 W. R. 65.

2. Agreement to Pay Incumbrances. — *New York, etc., Land Co. v. Dooley*, 33 Tex. Civ. App. 636.

3. Parol Liens. — *Tucker v. S. Ottenheimer Estate*, (Oregon 1905) 81 Pac. Rep. 361. Compare *Baxter v. Pritchard*, 122 Iowa 590.

Equitable Right to Vendor's Lien Not Interest in Land. — *Halvorsen v. Halvorsen*, 120 Wis. 52. See also *Helfrech Lumber, etc., Co. v. Honaker*, (Ky. 1903) 76 S. W. Rep. 342.

Extension of Time for Payment of Lien Notes Not Within Statute. — *Booher v. Anderson*, (Tex. Civ. App. 1905) 86 S. W. Rep. 956.

896. 1. Verbal Agreement to Extend Written Option Invalid. — *McConathy v. Lanham*, 116 Ky. 735.

897. 1. Agreements for Redemption. — *Davis v. Greenwood*, 2 Neb. (unofficial) 317, 96 N. W. Rep. 526. But an agreement to allow another to redeem land forfeited to the state for the nonpayment of taxes is within the statute and must be in writing. *Henry v. Knod*, (Ark. 1905) 85 S. W. Rep. 1130.

898. 1. Partnership for Speculation. — *Garth v. Davis*, (Ky. 1905) 85 S. W. Rep. 692; *Larkin v. Martin*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 179. See also *Kreutzer v. Lynch*, 122 Wis. 474.

899. 5. Joint Purchases. — *Wilhite v. Skelton*, 5 Indian Ter. 621.

904. 4. Promise Must Be Collateral. — *Flannery v. Chidgey*, 33 Tex. Civ. App. 638.

906. 2. Original and Collateral Promises. — *Manary v. Runyon*, 43 Oregon 495.

6. A Question of Fact. — *East Baltimore Lumber Co. v. K'Nessett Israel Aushe S'Phard Congregation*, 100 Md. 125; *McCormick v.*

Johnson, 31 Mont. 266; *Halsted v. Pelletreau*, 101 N. Y. App. Div. 125; *Sargent v. Johns*, 206 Pa. St. 386; *Fosha v. O'Donnell*, 120 Wis. 336.

907. 4. "Will See You Paid" Collateral. — *Wray v. Cox*, 86 Miss. 638. See also *Halsted v. Pelletreau*, 101 N. Y. App. Div. 125. But see *Newton Grain Co. v. Pierce*, 106 Mo. App. 200.

5. "Will Pay if He Does Not" Collateral. — *Newton Grain Co. v. Pierce*, 106 Mo. App. 200.

910. 10. Necessity for Consideration. — *Runkle v. Kettering*, 127 Iowa 6; *Ruhl v. Heintze*, 97 N. Y. App. Div. 442, holding that an oral promise by a wife to pay her husband's debt for her board is within the statute; *Turner v. Lyles*, 68 S. Car. 392; *McCord v. Edward Hines Lumber Co.*, 124 Wis. 509.

The Oral Promise of an Indorser to Deposit the Amount Covered by the note indorsed is within the statute unless the holder of the note surrenders it to the indorser. *Crawford v. Steel*, 137 Mich. 610, 11 Detroit Leg. N. 420.

911. 5. Oral Acceptance of Bill of Exchange. — *Ragsdale v. Gresham*, 141 Ala. 308.

912. 1. Smith v. Schneider, (Supm. Ct. App. T.) 84 N. Y. Supp. 238; *Peterson v. Creason*, (Oregon 1905) 81 Pac. Rep. 574.

2. Discharge of Original Debtor. — *American Wire, etc., Bed Co. v. Schultz*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 637; *Berg v. Spitz*, 87 N. Y. App. Div. 602.

913. 5. Promise to Pay Promisor's Debt. — *Moore v. Florence First Nat. Bank*, 139 Ala. 595; *Scherzer v. Muirhead*, (Supm. Ct. App. T.) 84 N. Y. Supp. 159; *Peterson v. Creason*, (Oregon 1905) 81 Pac. Rep. 574. See also *McCord v. Edward Hines Lumber Co.*, 124 Wis. 509.

914. 9. Promise as Part of Purchase Price. —

- 916.** *c.* GUARANTY OF OBLIGATION OF THIRD PERSON. — See note 5.
- 917.** *d.* PROMISE TO PAY OUT OF DEBTOR'S FUNDS IN PROMISOR'S HANDS. — See note 5.
- 918.** *e.* NOVATION. — See note 10.
- 919.** The Essential Elements of a Valid Novation. — See note 7.
- 920.** 5. Benefit Conferred on Third Person at Promisor's Request — *a.* RULE OF LIABILITY STATED. — See note 2.
- 921.** See note 4.
- b.* RULE OF NONLIABILITY STATED. — See note 7.
- 922.** See note 2.
- An Oral Promise to Pay for Benefits Previously Rendered. — See note 6.
- 923.** *c.* TEST OF LIABILITY. — See note 3.
- 925.** *f.* ADMISSIBILITY AND WEIGHT OF EVIDENCE — (1) *Charge on Promisee's Books* — Where the Third Person Is Alone Charged. — See note 2.
- 927.** 6. New Consideration Beneficial or Otherwise to Promisor — *a.* NEW CONSIDERATION NOT BENEFICIAL TO PROMISOR. — See note 8.
- 928.** *b.* NEW CONSIDERATION BENEFICIAL TO PROMISOR — (1) *To Subserve Promisor's Interest* — New Beneficial Consideration in General. — See note 1.
- 929.** Self-interest of Promisor the Primary Object. — See note 4.
- 931.** (2) *Creating Liability of Promisor Independent of Promise.* — See note 4.
- 932.** *c.* FORBEARANCE BY CREDITOR FOR BENEFIT OF DEBTOR. — See note 8.
- 933.** See note 4.
- 934.** *d.* RELINQUISHMENT OF LIEN OR OTHER ADVANTAGE BY CREDITOR. — See note 3.

In re Dresser, (C. C. A.) 135 Fed. Rep. 495; *Pratt v. Fishwild*, 121 Iowa 642; *Runkle v. Kettering*, 127 Iowa 6; *Wear-Boogher Dry Goods Co. v. Kelly*, 84 Miss. 236; *McCormick v. Johnson*, 31 Mont. 266; *Lyon v. Clochessy*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 67; *Deaver v. Deaver*, 137 N. Car. 240; *Tyler v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. (1905) 87 S. W. Rep. 238; *Conley v. Hampton*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1171.

Agreement of New Partner to Pay Part of Firm's Debts Valid. — *Bartlett v. Smith*, (Neb. 1904) 98 N. W. Rep. 687.

916. 5. Guaranty of Third Person's Obligation. — *Smith v. Schneider*, (Supm. Ct. App. T.) 84 N. Y. Supp. 238.

917. 5. Promise to Pay Out of Debtor's Funds. — *Bates v. Birmingham Paint, etc., Co.*, (Ala. 1905) 38 So. Rep. 845; *Adlan v. McKnight*, 32 Mont. 349; *Fosha v. O'Donnell*, 120 Wis. 336. See also *Groesbeck v. T. H. Thompson Milling Co.*, (Tex. Civ. App. 1905) 86 S. W. Rep. 346.

918. 10. Novation. — *Lyon v. Clochessy*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 67; *Berg v. Spitz*, 87 N. Y. App. Div. 602; *Sargent v. Johns*, 206 Pa. St. 386. And see the title NOVATION, 675. 5.

919. 7. See *Netterstrom v. Gallistel*, 110 Ill. App. 352.

920. 2. Goods Furnished to Third Person. — *Runkle v. Kettering*, 127 Iowa 6; *Newton Grain Co. v. Pierce*, 106 Mo. App. 200.

921. 4. Board Supplied to Third Person. — *Marr v. Burlington, etc., R. Co.*, 121 Iowa 117; *Stevenson v. Sterling*, 138 Mich. 300.

7. Goods Furnished to Third Person. — *Andresen v. Upham Mfg. Co.*, 120 Wis. 561.

922. 2. Medical Services. — *Flannery v. Chidgey*, 33 Tex. Civ. App. 638.

6. Pre-existing Debt of Third Person. — *Wilson v. Dietrich*, (N. J. 1904) 59 Atl. Rep. 251; *Reelman v. Grosfend*, (Mich. 1905) 104 N. W. Rep. 331.

923. 3. If Any Credit to Third Person, Promise Invalid. — *Andresen v. Upham Mfg. Co.*, 120 Wis. 561.

925. 2. Charge to Third Person Not Conclusive. — *Runkle v. Kettering*, 127 Iowa 6.

927. 8. Detriment to Promisee or Benefit to Debtor. — *Daytona Bridge Co. v. Bond*, (Fla. 1904) 36 So. Rep. 445; *Ellis v. Carroll*, 68 S. Car. 376, 102 Am. St. Rep. 679.

928. 1. New Consideration Beneficial to Promisor. — *Moore v. Florence First Nat. Bank*, 139 Ala. 595.

929. 4. Leading Object to Subserve Promisor's Interest. — *Pizzi v. Nardello*, 23 Pa. Super. Ct. 535; *Sargent v. Johns*, 206 Pa. St. 386; *Rowell v. Smith*, 123 Wis. 510.

931. 4. New York Rule. — *Berg v. Spitz*, 87 N. Y. App. Div. 602.

932. 8. Giving Time to Debtor. — *Wattenbarger v. Hodges*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1013.

933. 4. Forbearance to Levy Attachment Against Debtor. — *Stromberg v. Loiacono*, (Supm. Ct. App. T.) 45 Misc. (N. Y.) 651.

934. 3. Relinquishment of Lien, Promisor Benefited. — *Simpson v. Carr*, (Ky. 1903) 76 S. W. Rep. 346; *Ellis v. Carroll*, 68 S. Car. 376, 102 Am. St. Rep. 679. See also *Bomgardner v. Swartz*, 26 Pa. Super. Ct. 263.

935. 7. Promises by Owners to Contractors, Subcontractors, Laborers, or Materialmen — a. FOR FUTURE LABOR OR SUPPLIES — Promisee a Subcontractor. — See note 6.

936. See note 2.

b. FOR PAST OR PAST AND FUTURE LABOR OR SUPPLIES — For the Past. — See note 4.

937. XIII. REPRESENTATION AS TO CREDIT OF ANOTHER — The Clause of the Fourth Section of the Statute of Frauds. — See note 10.

938. See note 1.

939. Character of Representations. — See note 3.

XIV. AGREEMENTS IN CONSIDERATION OF MARRIAGE — 1. Executory Contracts — a. IN GENERAL. — See note 9.

941. 2. Executed Contracts — Part Performance. — See note 2.

Marriage Not Part Performance. — See note 3.

XV. CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR — 1. Contracts Within the Statute — a. IN GENERAL. — See note 5.

943. *b. ONE-YEAR CONTRACTS TO COMMENCE IN FUTURO — (1) In General* — Where Performance to Begin Next Day. — See note 8.

(2) *Hiring Contracts.* — See note 10.

944. (3) Leases. — See notes 1, 2.

946. *d. PROMISES OF MARRIAGE.* — See note 2.

2. Contracts Not Within Statute — a. CONTRACTS EXPRESSLY TO BE PERFORMED WITHIN YEAR — (1) In General. — See note 3.

(2) *One-year Contracts to Commence at Once — Nor Is a Contract of Hiring.* — See note 6.

b. CONTRACTS POSSIBLE OF PERFORMANCE WITHIN YEAR — (1) In General. — See note 11.

935. 6. Promisee a Subcontractor. — Reislér v. Silbermintz, 99 N. Y. App. Div. 131; Potter v. Greenberg, 24 Pa. Super. Ct. 505.

936. 2. Boorstein v. Moffatt, 36 Nova Scotia 81; Nichols v. Dixon, (Tex. Civ. App. 1905) 85 S. W. Rep. 1051.

4. Where a Contractor Has Failed, and His Surety Is Compelled to Finish the Work, a promise by the surety to pay the contractor for work already performed if he will do the balance of the work is valid. Pizzi v. Nardello, 209 Pa. St. 1.

937. 10. Fourth Clause of Statute of Frauds Inapplicable. — McDonald v. Smith, (Mich. 1905) 102 N. W. Rep. 668.

938. 1. Representations by Bank President. — Compare Hunt v. Taylor, (Ky. 1905) 87 S. W. Rep. 290.

939. 3. Money Obtained by Corporation. — Compare Walker v. Russell, 186 Mass. 69, holding that representations as to the financial condition of a corporation, made to induce the plaintiff to purchase shares of the treasury stock, are not within the statute.

9. Contracts in Consideration of Marriage. — Austin v. Kuehn, 111 Ill. App. 506, affirmed 211 Ill. 113; Steen v. Kirkpatrick, 84 Miss. 63; Pennsylvania R. Co. v. Warren, (N. J. 1905) 60 Atl. Rep. 1122.

941. 2. Part Performance. — Weld v. Weld, (Kan. 1905) 81 Pac. Rep. 183.

3. Marriage Not Part Performance. — Pennsylvania R. Co. v. Warren, (N. J. 1905) 60 Atl. Rep. 1122.

5. Contracts Within Statute. — Eikelman v. Perdew, 140 Cal. 687; Weber v. Weber, 76 S.

W. Rep. 507, 25 Ky. L. Rep. 908; Brosius v. Evans, 90 Minn. 521; Akins v. Hicks, 109 Mo. App. 95; Fanger v. Caspary, 87 N. Y. App. Div. 417; Seamans v. Barentsen, 180 N. Y. 333, 105 Am. St. Rep. 759; Johnson v. Upper, 38 Wash. 693.

943. 8. See Smith v. Gold Coast, etc., Explorers, (1903) 1 K. B. 538, 72 L. J. K. B. 235, 88 L. T. N. S. 442, 51 W. R. 373.

10. Hiring Contracts for Year to Begin in Futuro. — Booker v. Heffner, 95 N. Y. App. Div. 84.

944. 1. One-year Lease to Commence in Futuro Within Statute. — Landt v. Schneider, 31 Mont. 15.

2. One-year Clause Held Not to Apply. — Paul-ton v. Kreiser, (S. Dak. 1904) 101 N. W. Rep. 46.

946. 2. Statute Held to Apply. — Haslam v. Barge, 69 Neb. 644.

3. Contracts Expressly to Be Performed Within Year. — Mail, etc., Co. v. Wood, 140 Mich. 505.

6. Hiring Contract to Begin on Day Contract Made. — Yule v. Fell, 123 Iowa 662; Bennett v. Mahler, 90 N. Y. App. Div. 22.

11. Contracts Possible of Performance Within Year. — American Quarries Co. v. Lay, (Ind. App. 1905) 73 N. E. Rep. 608; Degnan v. Nowlin, 5 Indian Ter. 312; Janney Mfg. Co. v. Banta, (Ky. 1904) 83 S. W. Rep. 130; Anderson v. Mt. Sterling Telephone Co., (Ky. 1905) 86 S. W. Rep. 1119; Neal v. Parker, 98 Md. 254; Thomas v. South Haven, etc., R. Co., 138 Mich. 50; Steen v. Kirkpatrick, 84 Miss. 63; Mathews v. Wallace, 104 Mo. App. 96; Ayotte

950. (3) *Contracts Depending on Contingency*—(a) *In General*—*Illustrations*.—See note 2.

951. (b) *Contracts Depending on Contingency of Death*.—See note 4.

954. XVI. *CONTRACTS FOR THE SALE OF GOODS, WARES, OR MERCHANDISES*—3. *What Contracts Within Statute*—a. *IN GENERAL*.—See note 1.

961. c. *AS RESPECTS PROPERTY SOLD*—(8) *Corporate Stock*—*Subscription for Corporate Stock*.—See note 4.

d. *CONTRACTS FOR MANUFACTURE AND SALE OF GOODS*—(1) *In General*.—See note 5.

965. (3) *Distinction Dependent upon Whether Goods Are Made in Course of Ordinary Business of Seller or Not*.—See note 2.

967. (5) *Questions of Law and Fact*.—See note 3.

969. 4. *Payment, Part Payment, or Earnest*—b. *REQUISITES OF*—(3) *Time of Payment*—Under Statutes Requiring Payment at the Time. —See note 3.

972. d. *EFFECT OF PAYMENT*—(1) *In General*.—See note 2.

5. *Delivery, Acceptance, and Receipt of Goods*—a. *NECESSITY FOR ACCEPTANCE AND RECEIPT*—*In General*.—See note 4.

975. c. *TIME OF RECEIPT AND ACCEPTANCE*—(1) *Subsequent to Execution of Contract*—*In General*.—See note 3.

981. e. *REQUISITES AND SUFFICIENCY OF ACCEPTANCE AND RECEIPT*—(3) *Insufficiency of Mere Words and Necessity for Acts*—*Necessity for Clear and Unequivocal Acts*.—See note 4.

982. (5) *Acts of Buyer*—(a) *In General*.—See note 6.

984. (b) *Examination of Goods by Buyer*.—See note 2.

(c) *Retention of Goods by Buyer for Unreasonable Time*—*In General*.—See note 3.

988. (9) *Delivery to Carrier, Warehouseman, or Wharfinger*—*Insufficiency of Delivery to Carrier*.—See note 2.

v. Nadeau, 32 Mont. 498; Matter of Field, 33 Wash. 63. See also De Land v. Hall, 134 Mich. 381, 10 Detroit Leg. N. 480.

950. 2. *Performance Depending on Termination of Litigation*.—Collyer v. Davis, (Neb. 1904) 101 N. W. Rep. 1001.

951. 4. *Contracts Depending on Death*.—Whitley v. Whitley, 80 S. W. Rep. 825, 26 Ky. L. Rep. 134.

954. 1. *Statute Applies Only to Such Contracts as Come Within Its Terms*.—See Mason v. Spiller, 186 Mass. 346.

Agreement Between Debtor and Creditor to Sell Debtor's Goods and Pay Creditor from Proceeds Not Within Statute.—Bogigian v. Hassanoff, 186 Mass. 380.

A Contract to Furnish Appliances to Be Affixed to Machinery Forming Part of the Freehold has been held not to be a contract for the sale of goods within the meaning of the statute.—Underferd Stoker Co. v. Detroit Salt Co., 135 Mich. 431, 10 Detroit Leg. N. 829.

Contract for Municipal Water Supply Is for Goods, Wares, and Merchandise.—Jersey City v. Harrison, 71 N. J. L. 69.

961. 4. *Subscription for Corporate Stock*.—Reed v. Gold, 102 Va. 37.

5. *Contract for Manufacture and Sale of Goods Not Generally Within Statute*.—Yoe v. Newcomb, 33 Ind. App. 615; Johnson v. Holland, 124 Iowa 157; Putnam Foundry, etc., Co. v. Canfield, 25 R. I. 548; Gross v. Heckert, 120 Wis. 314.

965. 2. *Distinction Dependent upon Whether Goods Are Made in Course of Ordinary Business of*

Seller or Not.—See Yoe v. Newcomb, 33 Ind. App. 615.

Sale of Goods Manufactured or to Be Manufactured in Course of Seller's Business Is Within Statute.—Helmert v. Nagel, 112 Mo. App. 202.

967. 3. *Mixed Question of Law and Fact as to Whether Contract Was for Work and Labor*.—See Johnson v. Holland, 124 Iowa 157.

969. 3. *Insufficiency of Subsequent Payment Unless Contract Is Reaffirmed or Restated*.—Koewing v. Wilder, (C. C. A.) 128 Fed. Rep. 558.

972. 2. *Effect of Part Payment*.—Cooper v. Bay State Gas Co., 127 Fed. Rep. 482; Slater Brick Co. v. Shackleton, 30 Mont. 390.

4. *Necessity for Receipt and Acceptance*.—Richardson v. Smith, 101 Md. 15; Slater Brick Co. v. Shackleton, 30 Mont. 390; Hatch v. Gluck, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 122.

975. 3. *Sufficiency of Subsequent Acceptance and Receipt*.—Slater Brick Co. v. Shackleton, 30 Mont. 390.

981. 4. *Necessity for Clear and Unequivocal Acts*.—Devine v. Warner, 76 Conn. 229.

982. 6. *Pressing Hay into Bales by Buyer Sufficient Acceptance*.—Edwards v. Brown, 98 Me. 165.

984. 2. *Examination of Goods by Buyer*.—Hatch v. Gluck, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 122.

3. *Effect of Retention of Goods by Buyer for Unreasonable Time*.—MacEvoy v. Aronson, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 622.

988. 2. *Insufficiency of Delivery to Carrier Designated by Seller*.—Richardson v. Smith,

991. (11) *Acceptance and Receipt of Part* — (a) *In General*. — See note 4.

993. (b) *Receipt and Acceptance of Samples*. — See note 3.

994. (12) *Questions of Law and Fact as to Acceptance and Receipt* — (b) *Questions of Fact for Jury*. — See note 5.

996. *f. EVIDENCE OF ACCEPTANCE AND RECEIPT* — (3) *Parol Evidence* — *Correspondence of Goods with Sample*. — See note 1.

g. EFFECT OF ACCEPTANCE AND RECEIPT — *In General*. — See note 3.

101 Md. 15; *Gatiss v. Ayr*, 134 Mich. 233; *Standard Wall Paper Co. v. Towns*, 72 N. H. 324.

991. 4. *Sufficiency of Acceptance and Receipt of Part*. — *Slater Brick Co. v. Shackleton*, 30 Mont. 390; *MacEvoy v. Aronson*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 622.

993. 3. *Receipt and Acceptance of Samples*. — *Richardson v. Smith*, 101 Md. 15, quoting 29 AM. AND ENG. ENCYC. OF LAW (2d ed.) 993.

994. 5. *Questions of Fact for Jury*. — *Richardson v. Smith*, 101 Md. 15; *Standard Wall Paper Co. v. Towns*, 72 N. H. 324.

996. 1. *Correspondence of Goods with Sample*. — *Hatch v. Gluck*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 122.

3. *Delivery and Acceptance of Property Satisfies Statute*. — *Bristol v. Mente*, 79 N. Y. App. Div. 67, affirmed 178 N. Y. 599.

VERDICT.

BY LEO GOODMAN.

1002. III. VARIOUS KINDS OF VERDICTS — 1. *General Verdict* — *a. IN GENERAL*. — See notes 2, 3.

b. AS DISTINGUISHED FROM SPECIAL VERDICT. — See note 7.

1003. *d. REQUISITES OF* — (1) *In General* — *The Amount of Evidence Necessary*. — See notes 2, 3.

A Verdict Must Be Reasonable. — See note 4.

Statutory Directions. — See note 7.

Consistency with Instructions of the Court. — See note 8.

1004. See note 1.

Indirect, Indefinite, or Argumentative. — See note 2.

(2) *Number of Jurors Necessary*. — See notes 4, 5.

1005. See note 1.

1002. 2. *General Verdict* — *Definition*. — *Foster v. Beemis Indianapolis Bag Co.*, 163 Ind. 351; *Union Traction Co. v. Vandercook*, 32 Ind. App. 621; *Jeffersonville v. Gray*, 165 Ind. 26; *Cincinnati, etc., Electric St. R. Co. v. Klump*, (Ind. App. 1906) 77 N. E. Rep. 869; *Southern R. Co. v. Roach*, (Ind. App. 1906) 77 N. E. Rep. 606; *Ft. Wayne Traction Co. v. Hardendorf*, 164 Ind. 403; *Busher v. New York L. Ins. Co.*, 72 N. H. 551.

3. *Affirms Law and Infers Facts*. — *Morrison v. Lee*, 13 N. Dak. 591.

7. *As Distinguished from Special Verdict*. — *Morrison v. Lee*, 13 N. Dak. 591.

1003. 2. *Weight of Evidence*. — *Strasser v. Goldberg*, 120 Wis. 621.

3. *Verdict Adjusted Between Claims of Plaintiff and Defendant*. — *Lee v. Huron Indemnity Union*, 135 Mich. 291.

4. *Verdict Must Be Reasonable*. — *Stevens v. Walker*, 99 Me. 43.

7. *Statutory Directions Control Jury*. — *Marshall v. Armstrong*, 105 Mo. App. 234.

8. *Consistency with Instructions of Court*. — *Morrison v. Dickey*, 119 Ga. 698; *Cotter v. Butte, etc., Smelting Co.*, 31 Mont. 129; *Mc-*

Allister v. Rocky Fork Coal Co., 31 Mont. 359; *Strong v. Eggert*, (Neb. 1904) 99 N. W. Rep. 647; *Wallerich v. Puget Sound Warehouse Co.*, 38 Wash. 501.

1004. 1. *Incorrect Instructions Control Verdict*. — *McAllister v. Rocky Fork Coal Co.*, 31 Mont. 359. *Contra*, *Johnston v. Kleinsmith*, 33 Tex. Civ. App. 236; *Collins v. George*, 102 Va. 509.

Verdict Not Controlled by Unnecessary Instructions. — *Babcock v. Maxwell*, 29 Mont. 31.

2. *Indirect, Indefinite, or Argumentative Verdicts*. — *Elwell v. Roper*, 72 N. H. 585.

4. *In Texas*. — *Gray v. Freeman*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1105.

5. *Unanimous Consent of Jurors*. — *People v. Croot*, 33 Colo. 426; *Star Loan Co. v. Duffy Van, etc., Co.*, 20 Colo. App. 250; *Lincoln Traction Co. v. Heller*, (Neb. 1904) 100 N. W. Rep. 197.

In Missouri, by Statute, a verdict supported by nine of twelve jurors is valid. *Shaw v. Goldman*, 183 Mo. 461; *McClure v. Feldmann*, 184 Mo. 710; *Schroeder v. St. Louis Transit Co.*, 111 Mo. App. 67.

1005. 1. *Concurrence in Same View*. —

- 1005.** Numerical Irregularity May Be Waived. — See note 2.
- 1006.** (3) *Mode of Deliberation* — (a) In General — The Lack of All Constraint. — See notes 2, 3, 4.
- 1007.** See note 1.
Where There Is No Previous Agreement to Abide by the Result. — See note 3.
The Existence of a Previous Agreement. — See note 4.
- 1008.** (b) How Improper Methods of Arriving at Verdict May Be Shown. — See note 4.
- 1009.** See note 1.
- 1012.** A Resort to Devices Productive of Chance and Quotient Verdicts. — See note 8.
(4) *Responsiveness*. — See note 10.
- 1013.** See note 2.
- 1014.** Where There Are Several Separate and Distinct Issues. — See note 3.
But When All of the Issues Are Essentially the Same. — See note 4.
- 1016.** (5) *Certainty*. — See note 1.
- 1017.** Courts Are Inclined to Favor the Validity of a Verdict. — See note 1.
- 1018.** The Court May Not Look to Matters Dehors the Record. — See note 2.
Determination by Arithmetical Calculation. — See notes 4, 5.
- 1021.** *e.* AMOUNT. — See note 2.
Reduction of Amount by Remittitur. — See note 8.

Compare Schroeder v. St. Louis Transit Co., 111 Mo. App. 67.

1005. 2. Waiver of Numerical Irregularity — Civil Actions. — Gray v. Freeman, (Tex. Civ. App. 1905) 84 S. W. Rep. 1105.

1006. 2. Litigants Entitled to Deliberation of All Jurors. — Pence v. California Min. Co., 27 Utah 378.

3. Verdict Determined by Chance. — Birmingham R., etc., Co. v. Clemons, 142 Ala. 160; Groves, etc., R. Co. v. Herman, 206 Ill. 34; Battle Creek v. Haak, 139 Mich. 514; Pence v. California Min. Co., 27 Utah 378.

4. Experiments to Ascertain Average of Opinion. — Birmingham R., etc., Co. v. Clemons, 142 Ala. 160; Battle Creek v. Haak, 139 Mich. 514; Groves, etc., R. Co. v. Herman, 206 Ill. 34.

1007. 1. Not Favorably Regarded. — Battle Creek v. Haak, 139 Mich. 514.

3. No Previous Agreement to Abide by Result. — Groves, etc., R. Co. v. Herman, 206 Ill. 34; Pence v. California Min. Co., 27 Utah 378.

4. Previous Agreement to Adopt Contingent Result. — Birmingham R., etc., Co. v. Clemons, 142 Ala. 160.

1008. 4. Exculpatory and Supporting Affidavits Admissible. — Birmingham R., etc., Co. v. Clemons, 142 Ala. 160; Reed v. Mexico, 101 Mo. App. 155.

1009. 1. Affidavits of Jurors Not Admissible. — Weil v. Stone, 33 Ind. App. 112; Battle Creek v. Haak, 139 Mich. 514; Meisch v. Sippy, 102 Mo. App. 559; Leahy v. Tesson, 108 Mo. App. 372; Flynt v. Taylor, (Tex. Civ. App. 1905) 91 S. W. Rep. 864; Galloway v. Floyd, 36 Tex. Civ. App. 379; Pickens v. Coal River Boom, etc., Co., 58 W. Va. 11. But see Douglas v. Agne, 125 Iowa 67.

1012. 8. Affidavits to Show Chance Verdict — Admissible. — Birmingham R., etc., Co. v. Clemons, 142 Ala. 160; Pence v. California Min. Co., 27 Utah 378.

10. Verdict Must Be Responsive to Issue. — Elwell v. Roper, 72 N. H. 585; Marshall v.

Armstrong, 105 Mo. App. 234; Tew v. Young, 134 N. Car. 493.

1013. 2. Failure to Determine One of Several Issues. — Marshall v. Armstrong, 105 Mo. App. 234; Elwell v. Roper, 72 N. H. 585; Tew v. Young, 134 N. Car. 493.

1014. 3. Verdict on One of Several Issues. — See Mitchell v. St. Louis, etc., Co., 116 Mo. App. 81.

4. Several Issues Essentially the Same. — Junction Min. Co. v. Ench, 111 Ill. App. 346.

1016. 1. Verdict Must Be Reasonably Certain. — Elwell v. Roper, 72 N. H. 585; Grays Harbor Boom Co. v. Lytle Logging, etc., Co., 38 Wash. 88.

Some Instances of Verdict Held Sufficiently Certain. — Gould v. Hartwig, 71 Kan. 438; Brown v. Gillett, 39 Wash. 495.

Some Instances of Verdict Held Not Sufficiently Certain. — Long v. Wayne Circuit Judge, 136 Mich. 12; Grays Harbor Boom Co. v. Lytle Logging, etc., Co., 38 Wash. 88.

1017. 1. Verdict Supported When Possible. — Lawson v. Robinson, 68 Kan. 737; Gould v. Hartwig, 71 Kan. 438; Brown v. Gillett, 39 Wash. 495, citing 29 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1017; Grays Harbor Boom Co. v. Lytle Logging, etc., Co., 38 Wash. 88.

1018. 2. Verdict Is Sufficient Which Can Be Rendered Certain. — Nelson Mfg. Co. v. Shreve, 104 Mo. App. 474; International, etc., R. Co. v. McGehee, (Tex. Civ. App. 1904) 81 S. W. Rep. 804.

4. Exclusive Province of Jury to Find Amount of Damages. — Nelson Mfg. v. Shreve, 104 Mo. App. 474.

5. Interest Calculated in Conformity with Terms of Verdict. — Gould v. Hartwig, 71 Kan. 438; Nelson Mfg. Co. v. Shreve, 104 Mo. App. 474; International, etc., R. Co. v. McGehee, (Tex. Civ. App. 1904) 81 S. W. Rep. 804.

1021. 2. Amount Determined from Pleadings. — Sullivan v. New York City R. Co., (Supm. Ct. App. T.) 94 N. Y. Supp. 370.

8. Sullivan v. New York City R. Co., (Supm. Ct. App. T.) 94 N. Y. Supp. 370.

- 1022.** Allowance of Interest by Verdict. — See note 1.
f. CONSTRUCTION. — See notes 2, 3.
- 1023.** See notes 1, 2.
 From the Standpoint of the Jury's Intention. — See notes 6, 7.
- 1024.** A Failure to Find as to One or More Defendants. — See note 4.
- 1025.** A Verdict in Favor of One Party. — See note 3.
 The Test of the Sufficiency. — See note 4.
- 1028.** 3. Special Verdict — *c.* RIGHT TO RETURN. — See note 5.
- 1029.** Statutes in Many States. — See note 2.
d. REQUISITES — (1) *In General*. — See note 3.
- 1030.** The Special Verdict Should Contain Facts. — See note 1.
 (2) *Responsiveness*. — See note 2.
- 1031.** (3) *Certainty*. — See note 1.
- 1032.** *e.* CONSTRUCTION — Whatever Facts Do Not Appear. — See note 2.
f. SURPLUSAGE. — See note 4.
- 1034.** 7. Special Findings — *a.* AT COMMON LAW — (2) *Origin*. — See notes 4, 5, 6.
 (3) *Silence on Material Fact Construed*. — See note 7.
- 1035.** (5) *Consistency with Each Other*. — See note 2.
 (6) *Inconsistency with General Verdict*. — See note 3.

1022. 1. Allowance of Interest by Verdict. — *Corcoran v. Halloran*, (S. Dak. 1906) 107 N. W. Rep. 210; *Hurst v. Webster Mfg. Co.*, 128 Wis. 342.

2. Verdict to Have Reasonable Construction. — *Strickland v. Hutchinson*, 123 Ga. 396; *Lawson v. Robinson*, 68 Kan. 737.

3. Not to Be Avoided unless from Necessity. — *Grays Harbor Boom Co. v. Lytle Logging, etc., Co.*, 38 Wash. 88.

1023. 1. Verdict Presumed to Be as Broad as Issues. — *Busher v. New York L. Ins. Co.*, 72 N. H. 551; *Ellis v. Littlefield*, (Tex. Civ. App. 1906) 93 S. W. Rep. 171.

2. Verdict Presumed to Be Consistent with Instructions. — *Ellis v. Littlefield*, (Tex. Civ. App. 1906) 93 S. W. Rep. 171.

6. Intent of Jurors to Govern Construction. — *Toal v. North Jersey St. R. Co.*, (N. J. 1904) 58 Atl. Rep. 172.

7. Verdict Not to Be Read as Abstraction. — *See Evans v. Gray*, (Tex. Civ. App. 1905) 86 S. W. Rep. 375.

1024. 4. Silence as to Part of Defendants. — *Taylor v. Houston, etc., R. Co.*, (Tex. Civ. App. 1904) 80 S. W. Rep. 260.

1025. 3. Verdict in Favor of One Party Construed. — *McMahon v. Hetch-Hetchy, etc., R. Co.*, 2 Cal. App. 400; *Lawson v. Robinson*, 68 Kan. 737; *Rapid Transit R. Co. v. Miller*, (Tex. Civ. App. 1905) 85 S. W. Rep. 439.

4. Test of Sufficiency. — *McMahon v. Hetch-Hetchy, etc., R. Co.*, 2 Cal. App. 400; *Grays Harbor Boom Co. v. Lytle Logging, etc., Co.*, 38 Wash. 88.

1028. 5. Right to Return — At Common Law. — *Gila Valley, etc., R. Co. v. Lyon*, (Ariz. 1905) 80 Pac. Rep. 337.

1029. 2. Statutory Regulations. — *Morrison v. Lee*, 13 N. Dak. 591; *San Antonio v. Marshall*, (Tex. Civ. App. 1905) 85 S. W. Rep. 315; *York v. Hilger*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1117; *Ross v. Muskowitz*, (Tex. Civ. App. 1906) 95 S. W. Rep. 86; *Schmitt v. Northern Pac. R. Co.*, 120 Wis. 397; *Pearson*

v. Kelly, 122 Wis. 660; *Wisconsin Farm Land Co. v. Bullard*, 119 Wis. 320.

3. Requisites — In General. — *Elwell v. Roper*, 72 N. H. 585; *San Antonio v. Marshall*, (Tex. Civ. App. 1905) 85 S. W. Rep. 315; *York v. Hilger*, (Tex. Civ. App. 1905) 84 S. W. Rep. 1117.

1030. 1. Special Verdict Must Contain Facts. — *Morrison v. Lee*, 13 N. Dak. 591. See also *Dunlap v. Raywood Rice Canal, etc., Co.*, (Tex. Civ. App. 1906) 95 S. W. Rep. 43.

2. Must Pass upon All Material Issues. — *Elwell v. Roper*, 72 N. H. 585; *Wisconsin Farm Land Co. v. Bullard*, 119 Wis. 320.

1031. 1. Must Be Certain. — *Elwell v. Roper*, 72 N. H. 585; *Lowe v. Ring*, 123 Wis. 370. See also *Mueller v. Northwestern Iron Co.*, 125 Wis. 326.

1032. 2. De Non Apparentibus et Non Existentibus Eadem Est Ratio et Judicium. — *Elwell v. Roper*, 72 N. H. 585; *Coke v. Ikard*, (Tex. Civ. App. 1905) 87 S. W. Rep. 869.

4. Surplusage. — *Winters v. Coons*, 162 Ind. 26.

1034. 4. Origin. — See *Gila Valley, etc., R. Co. v. Lyon*, (Ariz. 1905) 80 Pac. Rep. 337.

5. Interrogations as to Grounds of Verdict. — See *Ellis v. Block*, 187 Mass. 408; *Scaling v. Wichita Falls First Nat. Bank*, (Tex. Civ. App. 1905) 87 S. W. Rep. 715.

6. Instructions to Return Findings. — *Elwell v. Roper*, 72 N. H. 585.

7. Silence on Material Fact Construed. — *Kalina v. Union Pac. R. Co.*, 69 Kan. 172; *Croan v. Baden*, (Kan. 1906) 85 Pac. Rep. 532.

1035. 2. Consistency with Each Other. — *Meyer-Clarke-Rowe Mines Co. v. Steinfield*, (Ark. 1905) 80 Pac. Rep. 400; *Union Traction Co. v. Vandercook*, 32 Ind. App. 621; *Smith v. Michigan Cent. R. Co.*, 35 Ind. App. 188; *Capital Lumber Co. v. Barth*, (Mont. 1905) 81 Pac. Rep. 994; *Commerce Milling, etc., Co. v. Morris*, (Tex. Civ. App. 1905) 86 S. W. Rep. 73; *Taylor v. Flynt*, 33 Tex. Civ. App. 664. See also *Morgan v. Jackson*, 32 Ind. App. 169; *Armour Packing Co. v. Howe*, 68 Kan. 663.

3. Inconsistency Between Special Finding and

1035. Every Reasonable Presumption in Favor of the General Verdict. — See note 4.

1036. In Order to Control the General Verdict. — See notes 1, 2, 3.

1037. *b.* UNDER STATUTE. — See note 1.

General Verdict — *Colorado*. — Drake *v.* Justice Gold Min. Co., 32 Colo. 259.

Illinois. — Court of Honor *v.* Dinger, 221 Ill. 176.

Indiana. — Albany Land Co. *v.* Rickel, 162 Ind. 222; Mishawaka *v.* Kirby, 32 Ind. App. 233; Foster *v.* Beemis Indianapolis Bag Co., 163 Ind. 351; Smith *v.* Michigan Cent. R. Co., 35 Ind. App. 188; Cleveland, etc., R. Co. *v.* Miller, 165 Ind. 381; Jeffersonville *v.* Gray, 165 Ind. 26; Cincinnati, etc., Electric St. R. Co. *v.* Klump, (Ind. App. 1906) 77 N. E. Rep. 869; Southern R. Co. *v.* Roach, (Ind. App. 1906) 77 N. E. Rep. 606; Bedford Quarries Co. *v.* Turner, (Ind. App. 1905) 75 N. E. Rep. 25; Lake Erie, etc., R. Co. *v.* Fike, 35 Ind. App. 554; Flickner *v.* Lambert, 36 Ind. App. 524; Indianapolis St. R. Co. *v.* Johnson, 163 Ind. 518; Chicago, etc., R. Co. *v.* Cunningham, 33 Ind. App. 145; Republic Iron, etc., Co. *v.* Jones, 32 Ind. App. 189; Union Traction Co. *v.* Vandercook, 32 Ind. App. 621; Southern R. Co. *v.* Davis, 34 Ind. App. 377; Lake Shore, etc., R. Co. *v.* Graham, 162 Ind. 374; Ft. Wayne Traction Co. *v.* Hardendorf, 164 Ind. 403.

Kansas. — Armour Packing Co. *v.* Howe, 68 Kan. 663; American Smelting, etc., Co. *v.* Hoke, (Kan. 1906) 85 Pac. Rep. 804; Seeds *v.* American Bridge Co., 68 Kan. 522; Samson *v.* Zimmerman, (Kan. 1906) 85 Pac. Rep. 757.

Montana. — Capital Lumber Co. *v.* Barth, (Mont. 1905) 81 Pac. Rep. 994.

Oklahoma. — White *v.* Madison, 16 Okla. 212.

Texas. — Taylor *v.* Flynt, 33 Tex. Civ. App. 664.

Washington. — Stratton *v.* C. H. Nichols Lumber Co., 39 Wash. 323.

Wisconsin. — Anderson *v.* Chicago Brass Co., 127 Wis. 273.

1035. 4. Presumptions in Favor of General Verdict. — Drake *v.* Justice Gold Min. Co., 32 Colo. 259; Lake Shore, etc., R. Co. *v.* Graham, 162 Ind. 374; Albany Land Co. *v.* Rickel, 162 Ind. 222; Evansville, etc., R. Co. *v.* Clements, 32 Ind. App. 659; Union Traction Co. *v.* Vandercook, 32 Ind. App. 621; Chicago, etc., R. Co. *v.* Leachman, 161 Ind. 512; Mishawaka *v.* Kirby, 32 Ind. App. 233; Lake Erie, etc., R. Co. *v.* Fike, 35 Ind. App. 554; Jeffersonville *v.* Gray, 165 Ind. 26; Indianapolis St. R. Co. *v.* Johnson, 163 Ind. 518; Ft. Wayne Traction Co. *v.* Hardendorf, 164 Ind. 403; Samson *v.* Zimmerman, (Kan. 1906) 85 Pac. Rep. 757.

1036. 1. Finding Must Not Be Contradictory — *Colorado*. — Drake *v.* Justice Gold Min. Co., 32 Colo. 259.

Illinois. — Henrietta Coal Co. *v.* Campbell, 112 Ill. App. 452.

Indiana. — Union Traction Co. *v.* Vandercook, 32 Ind. App. 621; Evansville, etc., R. Co. *v.* Clements, 32 Ind. App. 659; Lake Shore, etc., R. Co. *v.* Graham, 162 Ind. 374; Chicago, etc., R. Co. *v.* Turner, 33 Ind. App. 264; Mishawaka *v.* Kirby, 32 Ind. App. 233; Chicago, etc., R. Co. *v.* Stephenson, 33 Ind. App. 95; Chicago, etc., R. Co. *v.* Leachman, 161 Ind. 512;

Albany Land Co. *v.* Rickel, 162 Ind. 222; Lake Shore, etc., R. Co. *v.* Teeters, (Ind. App. 1905) 74 N. E. Rep. 1014; Farmers Ins. Assoc. *v.* Reavis, 163 Ind. 327; Pittsburgh, etc., R. Co. *v.* Newsom, 35 Ind. App. 299; Ft. Wayne Traction Co. *v.* Hardendorf, 164 Ind. 403; Indianapolis St. R. Co. *v.* Johnson, 163 Ind. 518; Smith *v.* Michigan Cent. R. Co., 35 Ind. App. 188; Jeffersonville *v.* Gray, 165 Ind. 26; Flickner *v.* Lambert, 36 Ind. App. 524; Lake Erie, etc., R. Co. *v.* Fike, 35 Ind. App. 554; Indianapolis St. R. Co. *v.* Marschke, (Ind. 1906) 77 N. E. Rep. 945.

Iowa. — Kuehl *v.* Chicago, etc., R. Co., 126 Iowa 638; Wilson *v.* Onstott, 121 Iowa 263.

Kansas. — Moeser *v.* Lewis, 68 Kan. 485; Burnell *v.* Bradbury, 69 Kan. 444; Eureka *v.* Neville, 71 Kan. 842; Seeds *v.* American Bridge Co., 68 Kan. 522.

Michigan. — Martin *v.* Fisher, 143 Mich. 462.

New Hampshire. — Wheeler *v.* Metropolitan Stock Exch., 72 N. H. 315.

Oklahoma. — White *v.* Madison, 16 Okla. 212.

2. Verdict on Unsubstantial Grounds. — Chicago, etc., R. Co. *v.* Cunningham, 33 Ind. App. 145; Bedford Quarries Co. *v.* Turner, (Ind. App. 1905) 75 N. E. Rep. 25; Southern R. Co. *v.* Roach, (Ind. App. 1906) 77 N. E. Rep. 606; Lake Erie, etc., R. Co. *v.* Fike, 35 Ind. App. 554; P. H. & F. M. Roots Co. *v.* Meeker, 165 Ind. 132; National Brass Mfg. Co. *v.* Rawlings, 71 Kan. 246; Missouri, etc., R. Co. *v.* Dorr, (Kan. 1906) 85 Pac. Rep. 533; Aultman, etc., Machinery Co. *v.* Wier, 67 Kan. 674.

3. Discretionary with Court. — Compare Drake *v.* Justice Gold Min. Co., 32 Colo. 259.

1037. 1. Under Statute — *Arizona*. — Gila Valley, etc., R. Co. *v.* Lyon, (Ariz. 1905) 80 Pac. Rep. 337.

Colorado. — Drake *v.* Justice Gold Min. Co., 32 Colo. 259.

Illinois. — Court of Honor *v.* Dinger, 221 Ill. 176; Pittsburgh, etc., R. Co. *v.* Smith, 207 Ill. 486; Illinois Cent. R. Co. *v.* Scheffner, 209 Ill. 9; Toledo, etc., R. Co. *v.* Valodin, 109 Ill. App. 132; Pittsburgh, etc., R. Co. *v.* Smith, 110 Ill. App. 154; Lake St. El. R. Co. *v.* Fitzgerald, 112 Ill. App. 312; Junction Min. Co. *v.* Ench, 111 Ill. App. 346.

Indiana. — Winters *v.* Coons, 162 Ind. 26; Cleveland, etc., R. Co. *v.* Miller, 165 Ind. 381; Farmers Ins. Assoc. *v.* Reavis, 163 Ind. 321; O. M. Cockrum Co. *v.* Klein, 165 Ind. 627; Cleveland, etc., R. Co. *v.* Miller, 165 Ind. 381.

Kansas. — American Smelting, etc., Co. *v.* Hoke, (Kan. 1906) 85 Pac. Rep. 804.

Nebraska. — Johnson *v.* Heath, (Neb. 1904) 98 N. W. Rep. 832.

Ohio. — Davis *v.* Turner, 69 Ohio St. 101; West *v.* Koppenberger, 26 Ohio Cir. Ct. 168.

Texas. — Moore *v.* Pierson, (Tex. 1906) 94 S. W. Rep. 1132; Edelstein *v.* Brown, (Tex. Civ. App. 1906) 95 S. W. Rep. 1126; Featherstone *v.* Brown, (Tex. Civ. App. 1905) 88 S. W. Rep. 470; Home Circle Soc. No. 2 *v.* Shelton, (Tex. Civ. App. 1905) 85 S. W. Rep. 320.

- 1040.** IV. FORM OF VERDICT — 1. In General. — See note 1.
1041. See note 2.
1042. See note 1.
1043. 3. Written Verdict. — See note 1.
 Signing Verdict. — See note 5.
1044. 7. Verdict upon Issues Out of Chancery. — See note 5.
1045. See note 1.

1046. VESSEL. — See note 4.
1048. VEST—VESTED. — See note 2.
1056. VICINITY—VICINAGE. — See note 6.
1058. VIDELICET. — See note 3.
1064. VISITORIAL POWER. — See note 1.

Washington. — *Morrison v. Northern Pac. R. Co.*, 34 Wash. 70.

1040. 1. Form of Verdict—In General. — *Mallott v. Howell*, 111 Ill. App. 233; *Wages v. Quincy*, etc., R. Co., 110 Mo. App. 230; *Fontaine v. Nuse*, (Tex. Civ. App. 1905) 85 S. W. Rep. 852.

1041. 2. Omission of Words. — *Wages v. Quincy*, etc., R. Co., 110 Mo. App. 230.

1042. 1. Incorrect Orthography. — *Colorado Canal Co. v. Sims*, (Tex. Civ. App. 1906) 94 S. W. Rep. 365; *Braun*, etc., Co. v. *Paulson*, (Tex. Civ. App. 1906) 95 S. W. Rep. 617.

1043. 1. Interpretation of Statutes. — *Kentucky Distilleries*, etc., Co. v. *Leonard*, (Ky. 1905) 87 S. W. Rep. 809.

5. Signature Regulated by Statute. — *Kingfisher v. Altizer*, 13 Okla. 121. See also *Rapid Transit R. Co. v. Miller*, (Tex. Civ. App. 1905) 85 S. W. Rep. 439; *Dunlap v. Raywood Rice Canal*, etc., Co., (Tex. Civ. App. 1906) 95 S. W. Rep. 43.

1044. 5. Verdicts upon Issues Out of Chancery. — *Pratt v. United Alaska Min. Co.*, 1 Alaska 95; *McClelland v. Bullis*, 34 Colo. 69; *Curtis v. Kirkpatrick*, 9 Idaho 629. And see the title ISSUES TO THE JURY, 11 ENCYC. OF PL. AND PR. 702 *et seq.*

1045. 1. Statutory and Constitutional Regulations. — *Burke v. Coyne*, 188 Mass. 401; *Reider v. Walz*, 93 Minn. 399.

1046. 4. Mud-scow May Be a Vessel. — *In re Eastern Dredging Co.*, 138 Fed. Rep. 942.

1048. 2. Phillips's Estate, 205 Pa. St. 510.

1056. 6. Vicinity. — *Jones v. Rogers*, 85 Miss. 802, citing 29 AM. AND ENG. ENCYC. OF LAW (2d ed.) 1056. See also *Mann v. Pere Marquette R. Co.*, 135 Mich. 221.

1058. 3. Chicago Terminal Transfer R. Co. v. *Young*, 118 Ill. App. 226.

1064. 1. Visitorial Power. — See *Harkness v. Guthrie*, 27 Utah 248.

VOID AND VOIDABLE.

1065. I. DEFINITIONS AND GENERAL PRINCIPLES — Void. — See note 1.

1065. 1. Void Defined. — *Cumberland Telephone*, etc., Co. v. *Evansville*, 127 Fed. Rep. 197; *U. S. v. Dietrich*, 126 Fed. Rep. 674, holding that the term "void" in a statute making void all contracts with the United States in which members of Congress are interested (see

the title ILLEGAL CONTRACTS, 975. 6 *et seq.*) was used in the sense of null from the beginning and incapable of ratification. See also *Allen v. Davenport*, (C. C. A.) 132 Fed. Rep. 216.

VOTING TRUSTS.

1077. I. DEFINITION. — See note 1.

1078. II. LEGALITY OF TRUST — In General. — See note 4.

1079. Separation of Voting Power and Beneficial Interest — Irrevocable Proxy. — See note 1.

1077. 1. Construction of Voting Trust Agreement Making Mortgagee Voting Trustee. — See *Curtze v. Iron Dyke Copper Min. Co.*, (Oregon 1905) 81 Pac. Rep. 815.

1078. 4. Northern Securities Case — *Sherman*

Anti-trust Act. — See *Harriman v. Northern Securities Co.*, 197 U. S. 244.

1079. 1. Temporary Injunction Granted — Evidence of Bad Faith. — See *Knickerbocker Invest. Co. v. Voorhees*, 100 N. Y. App. Div. 414.

1082. WAGER.—See note 6.

1085. WAGES.—See note 2.

1087. WAGON.—See note 2.

1082. 6. Wager.—Wright v. Stewart, 130 Fed. Rep. 920; Thompson v. Williamson, 67 N. J. Eq. 212.

1085. 2. "Wages" Practically Synonymous

with "Hire."—*In re Yoder*, 127 Fed. Rep. 894.

1087. 2. "Wagon" Synonymous with "Carriage."—Luce v. Hassam, 76 Vt. 450.

WAIVER.

By E. C. ELLSBREE.

1091. II. DEFINITION AND DISTINCTIONS—1. Definition.—See note 2.

1092. 2. Distinctions—Estoppel in Pais.—See note 4.

1093. III. ESSENTIALS OF WAIVER—2. Capacity and Authority—*b. AUTHORITY.*—See note 11.

3. Knowledge of Right—*a. GENERAL RULE.*—See note 13.

1095. 4. Intent—*a. IN GENERAL.*—See note 7.

1097. 5. Consideration.—See notes 1, 2.

Consideration in Relation to Waiver of Forfeitures of Insurance Policies.—See note 5.

1098. IV. MANNER AND PROOF OF WAIVER—1. By Agreement—*a. IN GENERAL.*—See note 5.

1103. 2. By Conduct—*a. IN GENERAL.*—See note 2.

b. REQUISITES AND SUFFICIENCY OF CONDUCT—(1) *Positive Acts*—(b) *Instances*—Unrestricted Delivery of Goods as Waiver of Cash Payment.—See note 4.

Waiver of Right to Rescind Contract.—See note 5.

1104. Waiver of Time of Performance.—See note 1.

1091. 2. Waiver the Intentional Relinquishment of Known Right.—Griffith v. Newell, 69 S. Car. 300.

1092. 4. Waiver and Estoppel Used Indiscriminately in Insurance Law.—Phenix Ins. Co. v. Grove, 215 Ill. 299.

1093. 11. Necessity for Authority.—Knarston v. Manhattan L. Ins. Co., 140 Cal. 57.

13. Knowledge Essential.—Gallaher v. Garland, 126 Iowa 206; Modern Steel Structural Co. v. Van Buren County, 126 Iowa 606; Cochran v. Philadelphia Mortg., etc., Co., (Neb. 1903) 96 N. W. Rep. 1051; Plataner v. American Bonding Co., (Supm. Ct. App. T.) 92 N. Y. Supp. 238.

1095. 7. Necessity for Intent.—Paulson v. Lyon, 26 Utah 438.

1097. 1. Agreement Founded on Consideration.—F. W. Brockman Commission Co. v. Kilbourne, 111 Mo. App. 542.

2. Waiver Must Be upon Consideration or Act as Estoppel.—Lawrence County v. Stewart, 72 Ark. 525.

5. Waiver Independent of Agreement or Estoppel.—Knarston v. Manhattan L. Ins. Co., 140 Cal. 57; Mettner v. Northwestern Nat. L. Ins. Co., 127 Iowa 205.

1098. 5. Waiver by Express Agreement.—Knarston v. Manhattan L. Ins. Co., 140 Cal. 57; Maffet v. Oregon, etc., R. Co., (Oregon 1905) 80 Pac. Rep. 489.

Evidence Held to Show Waiver by Agreement.—See Clydebank Engineering, etc., Co. v. Yzquierdo y Castaneda, (1905) A. C. 6.

1103. 2. Waiver by Conduct—General Rule.—Hemmings v. Sceptre L. Assoc., (1905) 1 Ch. 365; Braithwaite v. Foreign Hardwood Co., (1905) 2 K. B. 543; Ottawa Northern, etc., R. Co. v. Dominion Bridge Co., 36 Can. Sup. Ct. 347; *In re McCrae*, 8 Ont. L. Rep. 156; Knarston v. Manhattan L. Ins. Co., 140 Cal. 57; Fidelity Mut. L. Ins. Co. v. Price, 117 Ky. 25; Brown v. Goldthwaite Furniture Co., 186 Mass. 51; American Cotton Co. v. Herring, 84 Miss. 693; Exchange Bank v. Thuringia Ins. Co., 109 Mo. App. 654; Maffet v. Oregon, etc., R. Co., (Oregon 1905) 80 Pac. Rep. 489.

Conduct Justifying Belief that Certain Action Would Be Futile may constitute a waiver of such action. Kreutzer v. Lynch, 122 Wis. 474.

The Provisions of a Written Contract may be waived by participation in acts done in disregard of it. Evans v. Howell, 211 Ill. 85.

4. Unrestricted Delivery of Goods Presumptive Evidence of a Waiver of Condition as to Cash Payment.—Albert v. R. Lewis Steiner Mfg. Co., (Supm. Ct. App. T.) 42 Misc. (N. Y.) 522.

Suit for Price of Waiver of Condition as to Retention of Ownership.—Alden v. Dyer, 92 Minn. 134.

5. Act Ratifying Contract a Waiver of Right to Rescind.—Baltimore, etc., R. Co. v. Jolly, 71 Ohio St. 92.

1104. 1. Waiver of Time of Performance.—Gough v. Loomis, 123 Iowa 642; General Electric Co. v. National Contracting Co., 178 N. Y. 369; Wheeling Creek Gas, etc., Co. v. Elder, 54 W. Va. 335.

1105. (c) Necessity for Clear and Decisive Act. — See notes 2, 5.

1106. (2) *Failure to Act*. — See note 1.

Application of Rule to Contracts. — See notes 5, 6.

1107. V. WHAT RIGHTS MAY BE WAIVED — 1. In General. — See notes 4, 5.

1108. VI. WAIVER A QUESTION OF LAW OR FACT. — See notes 4, 5.

Waiver of Forfeiture for Nonpayment by Extension of Time. — *Claudius v. West End Heights Amusement Co.*, 109 Mo. App. 346.

1105. 2. A Waiver of Nonessentials is more easily and safely inferred than is a waiver of essentials in a contract. *Campion v. Marston*, 99 Me. 410.

5. Express Reservation of Rights. — *Griffith v. Newell*, 69 S. Car. 300.

1106. 1. Waiver by Failure to Act. — *Phenix Ins. Co. v. Grove*, 215 Ill. 299; *Person v. McCargar*, 92 Minn. 294; *Toronto v. Toronto Electric Light Co.*, 10 Ont. L. Rep. 621; *Chambly Mfg. Co. v. Willet*, 34 Can. Sup. Ct. 502.

Objections Not Urged Seasonably Are Waived. — *W. W. Kimball Co. v. Tasca*, 26 R. I. 565.

A Buyer Waives the Right to Reject Goods. — *Yeiser v. Russell*, (Ky. 1904) 83 S. W. Rep. 574.

5. Acquiescence a Waiver of Right to Rescind Contract. — *Shappirio v. Goldberg*, 192 U. S.

232; *Pratt v. S. J. Langston Mercantile Co.*, 111 Mo. App. 96; *Timmins v. Russell*, 13 N. Dak. 487; *Hallwood Cash Register Co. v. Berry*, 35 Tex. Civ. App. 554.

6. Waiver of Right to Rescind by Acquiescing in Performance. — *National L., etc., Co. v. Omans*, 137 Mich. 365.

1107. 4. Waiver of Statutory Right. — *Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57; *Kehe v. Blackhawk County*, 125 Iowa 549.

5. Waiver of Constitutional Right. — *Knarston v. Manhattan L. Ins. Co.*, 140 Cal. 57.

1108. 4. Waiver a Question of Fact. — *Austin Mfg. Co. v. Snouffer*, (Iowa 1905) 102 N. W. Rep. 128; *Mettner v. Northwestern Nat. L. Ins. Co.*, 127 Iowa 205; *Campion v. Marston*, 99 Me. 410; *Exchange Bank v. Thuringia Ins. Co.*, 109 Mo. App. 654.

5. Waiver a Mixed Question of Law and Fact. — *Exchange Bank v. Thuringia Ins. Co.*, 109 Mo. App. 654.

2. WANTON — WANTONLY — WANTONNESS. — See note 3.

2. 3. Wanton. — *Montgomery St. R. Co. v. Rice*, 142 Ala. 674; *Cleveland, etc., R. Co. v. Ricker*, 116 Ill. App. 428; *Cleveland, etc., R. Co. v. Cline*, 111 Ill. App. 416; *Tinsley v. Western Union Tel. Co.*, 72 S. Car. 350; *Rainwater v. State*, 46 Tex. Crim. 496.

WAREHOUSES AND WAREHOUSEMEN.

By H. O'B. COOPER.

39. IV. PUBLIC NATURE OF WAREHOUSE. — See note 12.

41. VII. CONTRACT OF STORAGE — 1. In General — Implied Contract. — See note 6.

42. 3. Whether Bailment or Sale — a. IN GENERAL — Affected by Custom. — See note 4.

45. VIII. STORAGE IN MASS — 4. Whether Bailment or Sale — Modern Rule. — See note 4.

46. IX. DUTIES AND LIABILITIES — 2. As to Goods Stored — a. GENERAL RULE AS TO DUTY OF WAREHOUSEMAN — (1) *Statement of Rule — Ordinary Care.* — See note 11.

47. See note 1.

49. (3) *Specific Applications of Rule* — (a) *Destruction of Goods by Fire — As a General Rule.* — See note 1.

51. (e) *Goods in Cold Storage.* — See note 8.

52. (4) *How Ordinary Care Determined.* — See note 4.

(5) *Burden of Proof* — (a) *General Rule.* — See note 7.

53. (b) *When Negligence Presumed.* — See note 1.

c. DUTY TO STORE IN WAREHOUSE CONTRACTED FOR. — See note 6.

54. 4. Limitation of Liability — a. BY CONTRACT. — See notes 5, 9.

b. BY CONTRIBUTORY NEGLIGENCE OF BAILOR. — See note 11.

39. 12. Public Agencies. — *Orient Ins. Co. v. Northern Pac. R. Co.*, 31 Mont. 502.

41. 6. Implied Contract. — *American Cotton Co. v. Herring*, 84 Miss. 693.

42. 4. Affected by Custom. — *Thompson v. Jordan*, 164 Ind. 551.

45. 4. Modern View. — See *Mayer v. Gersbacher*, 207 Ill. 296, *affirming* 106 Ill. App. 511; *Thompson v. Jordan*, 164 Ind. 551.

46. 11. Ordinary Care. — *Louisville, etc., R. Co. v. U. S.*, 39 Ct. Cl. 405; *Denver Public Warehouse Co. v. Munger*, (Colo. App. 1904) 77 Pac. Rep. 5; *Mayer v. Gersbacher*, 207 Ill. 296, *affirming* 106 Ill. App. 511; *Prince v. St. Louis Cotton Compress Co.*, 112 Mo. App. 49.

47. 1. Liable for Negligence. — *Denver Public Warehouse Co. v. Munger*, (Colo. App. 1904) 77 Pac. Rep. 5.

Not Liable for Loss by Unknown Inherent Defects. — *S. A. Trufant Commission Co. v. Yazoo, etc., R. Co.*, 111 La. 633.

49. 1. Negligence Not Proximate Cause. — *McLane v. Botsford Elevator Co.*, 136 Mich. 664.

51. 8. Goods in Cold Storage. — *Rudell v. Grand Rapids Cold-Storage Co.*, 136 Mich. 528, holding further that in an action for damage to goods stored it is competent to show that other goods than plaintiff's were similarly damaged.

52. 4. Question for Jury. — *Dieterle v. Bekin*, 143 Cal. 683; *Toplitz v. Timmins*, (Supm. Ct. App. T.) 88 N. Y. Supp. 946. See also *McCurdy v. Wallblom Furniture, etc., Co.*, 94 Minn. 326.

7. Burden Shifted. — Evidence that the defendant did not exercise ordinary care casts upon him the burden of showing that the loss was not due to his negligence. *Dieterle v. Bekin*, 143 Cal. 683.

53. 1. Prima Facie Negligence. — *Dieterle v. Bekin*, 143 Cal. 683; *Toplitz v. Timmins*, (Supm. Ct. App. T.) 88 N. Y. Supp. 946.

6. Storage in Wrong Warehouse. — *Hudson v. Columbian Transfer Co.*, 137 Mich. 255; *McCurdy v. Wallblom Furniture, etc., Co.*, 94 Minn. 326. See also *Mial v. Oliver*, 8 Ont. L. Rep. 66.

54. 5. Liability Limited by Contract. — See *Dieterle v. Bekin*, 143 Cal. 683; *Denver Public Warehouse Co. v. Munger*, (Colo. App. 1904) 77 Pac. Rep. 5.

9. Denver Public Warehouse Co. v. Munger, (Colo. App. 1904) 77 Pac. Rep. 5.

11. Contributory Negligence of Bailor. — See *Denver Public Warehouse Co. v. Munger*, (Colo. App. 1904) 77 Pac. Rep. 5.

Affirmative Defense. — *Orient Ins. Co. v. Northern Pac. R. Co.*, 31 Mont. 502.

- 54.** *c.* GOODS TAKEN UNDER JUDICIAL PROCESS. — See note 15.
- 56.** 5. Liability for Conversion — *b.* FAILURE OR REFUSAL TO DELIVER — (1) *Generally* — Qualification of Rule. — See note 5.
(2) *Title in Third Person.* — See note 7.
- 57.** (3) *Conflicting Claims* — *Right to Interpleader.* — See note 1.
- 59.** 7. Measure of Damages — *c.* RETURN OF DAMAGED PROPERTY. — See note 12.
- 60.** *e.* CONVERSION OR NEGLIGENT DESTRUCTION OF PROPERTY — (1) *In General.* — See note 5.
- 61.** X. COMPENSATION OF WAREHOUSEMEN — 1. In General. — See note 4.
- 62.** 4. Goods Held to Enforce Lien. — See note 4.
- 63.** XI. LIEN OF WAREHOUSEMAN — 1. In General — *a.* AT COMMON LAW. — See note 5.
b. BY STATUTE. — See note 7.
- 64.** 3. Priority of Lien — Lien of Mortgagor. — See note 3.
4. Waiver and Loss of Lien — Presumption. — See note 6.
- 66.** 5. Extent of Lien — *d.* MORTGAGED PROPERTY. — See note 3.
6. Enforcement of Lien by Sale. — See note 7.
- 67.** Notice of Sale. — See note 1.
- 69.** XII. WAREHOUSEMAN'S RECEIPT — 4. Pledge of Receipt — *a.* BY DELIVERY. — See note 10.
- 70.** *d.* RIGHTS OF PLEDGEE — (1) *Title of Pledgee* — Bona Fide Holder. — See note 6.
- 71.** (3) *To Sue.* — See note 4.
5. Negotiability — *a.* IN GENERAL. — See note 6.
- 73.** *b.* STATUTORY PROVISIONS. — See note 2.
- 78.** 6. Effect of Receipt — *f.* EFFECT AS EVIDENCE — (2) *Admissibility of Parol Evidence to Vary or Contradict* — General Rule. — See note 9.
- 54.** 15. Goods Taken under Process. — Wheeler, etc., Mfg. Co. v. Brookfield, 70 N. J. L. 703.
- 56.** 5. Receipt or Indemnity. — Wheeler, etc., Mfg. Co. v. Brookfield, 70 N. J. L. 703.
7. Statute Preventing Warehouseman from Denying Receipt-holder's Title. — See Wheeler, etc., Mfg. Co. v. Brookfield, 70 N. J. L. 703.
- 57.** 1. Decision Contra. — Beebe v. Mead, 101 N. Y. App. Div. 500.
- 59.** 12. Return of Damaged Property. — Prince v. St. Louis Cotton Compress Co., 112 Mo. App. 49.
- 60.** 5. Market Value of Property. — Reebie v. Brackett, 109 Ill. App. 631; McCurdy v. Wallblom Furniture, etc., Co., 94 Minn. 326.
- 61.** 4. Services of Warehouseman — Value Question of Fact. — Clough v. A. J. Stillwell Meat Co., 112 Mo. App. 177.
- 62.** 4. Goods Held to Enforce Lien. — Reidenbach v. Tuch, (Supm. Ct. App. T.) 88 N. Y. Supp. 366.
- 63.** 5. At Common Law. — Reebie v. Brackett, 109 Ill. App. 631.
7. New York. — See Reidenbach v. Tuch, (Supm. Ct. App. T.) 88 N. Y. Supp. 366.
- General Lien by Statute in Michigan. — Kaufman v. Leonard, (Mich. 1905) 102 N. W. Rep. 632.
- 64.** 3. Mortgagor's Lien. — See Singer Mfg. Co. v. Becket, (Supm. Ct. App. T.) 85 N. Y. Supp. 391.
6. Restorage of Goods — Lien Attaches. — Kaufman v. Leonard, (Mich. 1905) 102 N. W. Rep. 632.
- 66.** 3. Mortgaged Property. — See Singer Mfg. Co. v. Becket, (Supm. Ct. App. T.) 85 N. Y. Supp. 391.
7. Without an Enabling Statute or an order of court a warehouseman cannot sell property stored with him. Reebie v. Brackett, 109 Ill. App. 631.
- 67.** 1. Owner Present at Sale. — See Webb v. Downes, 93 Minn. 457.
- 69.** 10. Farmers, etc., Bank v. Bennett, 120 Ga. 1012; Wheeler, etc., Mfg. Co. v. Brookfield, 70 N. J. L. 703.
- Louisiana Statute — U. S. Bonded Warehouse Receipt Need Not Be Paraphed "for Hypothecation." — Blanc v. Germania Nat. Bank, 114 La. 739.
- 70.** 6. Bona Fide Holder. — Bush v. Export Storage Co., 136 Fed. Rep. 918.
- 71.** 4. Right to Sue. — Bush v. Export Storage Co., 136 Fed. Rep. 918; Farmers', etc., Bank v. Bennett, 120 Ga. 1012.
6. Lewis v. Portland First Nat. Bank, (Oregon 1904) 78 Pac. Rep. 990.
- Assignment of Receipt Containing Stipulation "Transferable Only on the Books of Yard." — See Sanger v. Travis County Farmers' Alliance, (Tex. Civ. App. 1904) 84 S. W. Rep. 856.
- 73.** 2. Lewis v. Portland First Nat. Bank, (Oregon 1904) 78 Pac. Rep. 990.
- New Jersey Statute — Negotiable in Absence of Words "Not Negotiable" on Face. — Wheeler, etc., Mfg. Co. v. Brookfield, 70 N. J. L. 703.
- 78.** 9. Receipt Not Specifying Repository — Parol Evidence of Agreement for Particular Repository Competent. — See McCurdy v. Wallblom Furniture, etc., Co., 94 Minn. 326.

- 80. XIII. INSURANCE OF BAILOR'S PROPERTY — 3. Duty of Warehouseman to Insure — b. BY CONTRACT. — See note 6.**
5. Removal of Goods Insured. — See note 10.

80. 6. Failure to Insure in Name of Depositor. — See Clough v. A. J. Stillwell Meat Co., 112 Mo. App. 177.
10. Deposit in Wrong Warehouse. — Hudson v. Columbian Transfer Co., 137 Mich. 255.

WARRANTS.

By A. A. WADSWORTH.

- 84. II. WARRANT OF ARREST — 2. Issuance — a. WHO MAY ISSUE. — See note 2.**

b. THE COMPLAINT — (2) By Whom Made. — See note 4.

- 85. (3) Form and Requisites — (a) In General. — See note 4.**

- 86. (b) Necessity of Showing Probable Cause — bb. AFFIDAVIT ON INFORMATION AND BELIEF — aaa. In General. — See note 3.**

- 87. Affidavit in Positive Form. — See note 2.**

bbb. Examination of Witnesses. — See note 4.

- 90. III. SCHOOL WARRANTS OR ORDERS — 3. Issuance — a. POWER TO ISSUE — (1) In General — Notice of Powers of Officers. — See note 5.**

- 91. c. MANNER OF ISSUANCE — (1) In General — Compliance with the Statute Essential. — See note 8.**

- 92. (2) Formal Requisites — (c) Specifying Fund. — See note 5.**

(d) Stating Purpose for Which Drawn. — See note 6.

- 94. 4. Validity — a. PRESUMPTION OF VALIDITY. — See note 2.**

- 97. 5. Transfer — a. NEGOTIABILITY. — See note 2.**

- 100. 8. Action on Warrant — b. LIABILITY OF OFFICERS. — See note 8.**

- 103. IV. MISCELLANEOUS WARRANTS — 6. Warrant in Bankruptcy. — See note 11.**

84. 2. District Judge. — State v. Chappell, 26 R. I. 375.

Justice of the Peace. — Ormond v. Ball, 120 Ga. 916.

Clerk of Court. — Pruett v. State, 141 Ala. 69.

Mayor — Implied Power. — Williams v. Sewell, 121 Ga. 665.

Issuance Judicial Act, but Not Act of Court. — Ormond v. Ball, 120 Ga. 916.

4. Complaint Need Not Show that It Was Made by Credible Person. — Steinke v. State, (Tex. Crim. 1905) 86 S. W. Rep. 753.

85. 4. Description of Defendant. — See State v. King, (Kan. 1905) 80 Pac. Rep. 606.

Right to Demand Written Complaint on Appeal. — See Topeka v. Kersch, (Kan. 1905) 80 Pac. Rep. 29.

Affiant's Name Need Not Appear in Body of Affidavit. — Schnair v. State, (Tex. Crim. 1905) 84 S. W. Rep. 592.

86. 3. Information and Belief. — State v. McLain, 13 N. Dak. 368.

87. 2. Gilbert v. Satterlee, (Supm. Ct. Tr.

T.) 43 Misc. (N. Y.) 292, affirmed 101 N. Y. App. Div. 313.

4. Oral Examination. — Murphy v. State, 124 Wis. 635.

90. 5. Oppenheimer v. Greencastle School Tp., 164 Ind. 99.

91. 8. Statutory Provisions as to Manner of Issuance. — Oppenheimer v. Greencastle School Tp., 164 Ind. 99; Tunica County v. Rhodes, 85 Miss. 500.

92. 5. Fund. — Tunica County v. Rhodes, 85 Miss. 500.

6. Purpose. — Tunica County v. Rhodes, 85 Miss. 500.

94. 2. School Dist. No. 3 v. Western Tube Co., 13 Wyo. 304.

97. 2. Negotiability. — Oppenheimer v. Greencastle School Tp., 164 Ind. 99.

100. 8. Individual Liability. — Oppenheimer v. Greencastle School Tp., 164 Ind. 99.

103. 11. Warrants in Bankruptcy. — See In re Andre, (C. C. A.) 135 Fed. Rep. 736; In re Kolin, (C. C. A.) 134 Fed. Rep. 557.

Bond Required Before Warrant Issues. — In re Haff, (C. C. A.) 135 Fed. Rep. 742.

WARRANTS OF ATTORNEY.

By A. A. WADSWORTH.

110. III. FORMAL REQUISITES — 2. Explicit Grant of Authority. — See note 4.

111. 3. Designation of Person Authorized — Indefinite Grant. — See note 1.
4. Certainty of Sum. — See note 2.

113. IV. EXERCISE OF POWER — 1. Warrant Strictly Pursued — a. IN GENERAL. — See note 3.

As to Person in Whose Favor Confession May Be Made. — See note 6.

116. 6. Amount for Which Made — General Statements. — See note 10.

121. VII. THE JUDGMENT — 5. Amount — a. IN GENERAL. — See note 2.

110. 4. Explicit Grant of Power. — Weber v. Powers, 213 Ill. 370.

111. 1. Person Not Specified. — See Mulhearn v. Roach, 24 Pa. Super. Ct. 483, holding further that under a warrant to any attorney the grantor has no right to be first heard before entry of judgment.

2. Sum Certain. — Weber v. Powers, 213 Ill. 370.

113. 3. Strict Construction. — Weber v. Powers, 213 Ill. 370; Eddy v. Smiley, 26 Pa. Super. Ct. 318.

6. A Warrant of Attorney to Confess Judgment

in Favor of a Company with which the defendant has entered into covenants will not sustain a judgment by confession in favor of an individual who has succeeded to the rights of such company. Eddy v. Smiley, 26 Pa. Super. Ct. 318.

116. 10. Weber v. Powers, 213 Ill. 370.

121. 2. Where a Part of the Debt Has Been Collected, a judgment entered for the full amount authorized by the warrant is valid under the *New Jersey* statute, but execution will issue only for the balance of the debt and costs. Earl v. Jenkins, 71 N. J. L. 416.

WARRANTY.

By O. D. ESTEE.

134. V. WARRANTY OF FUTURE SOUNDNESS. — See note 3.

137. VIII. WHAT CONSTITUTES A WARRANTY — 1. General Rule. — See note 1.

140. 2. Intention to Warrant a Necessary Element — When Proof of Intention Unnecessary. — See note 7.

141. 3. Expressions of Opinion. — See note 2.

142. 4. Simplex Commendatio. — See note 8.

151. 16. Question for Jury. — See note 2.

155. X. WARRANTY IN PARTICULAR SALES — 4. Of Horses. — See note 4.

160. XI. RULE AS TO OBVIOUS OR KNOWN DEFECTS — 1. Are Not Ordinarily Included in a Warranty. — See note 1.

134. 3. Warranty of Future Quality Valid. — Miller v. F. R. Patch Mfg. Co., 101 N. Y. App. Div. 22.

137. 1. Sauerman v. Simmons, (Ark. 1905) 86 S. W. Rep. 429.

140. 7. Superior Knowledge of Seller. — Statements in regard to machinery, made by a seller who is familiar therewith to a buyer who is ignorant of machinery generally, may amount to a warranty irrespective of the seller's intention. Northwestern Lumber Co. v. Callendar, 36 Wash. 492.

141. 2. Mere Expressions of Opinion No Warranty. — Sauerman v. Simmons, (Ark. 1905) 86

S. W. Rep. 429; Holt v. Sims, 94 Minn. 157.

142. 8. Mere Commendation — "Dealers' Talk" — No Warranty. — Sauerman v. Simmons, (Ark. 1905) 86 S. W. Rep. 429; Lander v. Sheehan, 32 Mont. 25.

151. 2. A Question for the Jury. — Sauerman v. Simmons, (Ark. 1905) 86 S. W. Rep. 429; Lander v. Sheehan, 32 Mont. 25; Phillips v. Crosby, 70 N. J. L. 785.

155. 4. Sales of Horses. — See Faust v. Koers, 111 Mo. App. 560.

160. 1. Obvious Defects Not Embraced in Warranty. — Doyle v. Parish, 110 Mo. App. 470.

161. 3. Warranty May Embrace Obvious Defects. — See note 2.

162. 5. Limitations of General Rule — Where the Buyer Had No Opportunity to See or Inspect the Goods. — See note 6.

174. XIV. CONSTRUCTION AND INTERPRETATION OF WARRANTIES — 2. Warranty Relates to Time and Place of Sale. — See note 6.

175. See note 1.

180. XV. BREACH OF WARRANTY — WHAT CONSTITUTES — 1. Of Warranty of Quality — *c.* IN SALES OF HORSES. — See note 4.

183. XVI. WAIVER OF WARRANTY OR BREACH — 2. By Payment of Price. — See note 1.

184. 3. Buyer's Receipt and Retention of Article — *a.* WHERE CONTRACT IS EXECUTED. — See note 10.

185. The Fact that the Buyer Resold the Article. — See note 1.

186. *b.* WHERE CONTRACT IS EXECUTORY. — See note 1.

188. *c.* SPECIAL CONTRACTUAL STIPULATIONS AS TO EFFECT OF RETENTION AND USE — The Fact that, under the Contract of Sale, the Buyer Has the Privilege of Returning the Article. — See note 4.

190. XVII. REMEDIES FOR BREACH OF WARRANTY — 2. Breach of Warranty of Quality — *a.* GENERALLY. — See note 3.

b. RESCISSION — (1) *Right to Rescind.* — See note 8.

193. (2) *Buyer's Duty upon Rescinding* — The First Duty of the Buyer, or Rescinding, Is to Return the Article. — See notes 3, 4.

The Buyer Must Act Promptly. — See note 5.

195. Actual Redelivery to Seller Not Necessary. — See note 2.

(2) *Right to Rescind No Bar to Other Remedies.* — See note 6.

c. RIGHT TO SET OFF DAMAGES IN ACTION FOR PRICE. — See note 8.

197. *d.* ACTION ON WARRANTY FOR DAMAGES. — See note 5.

198. *f.* WHERE CONTRACT PROVIDES SPECIAL REMEDY. — See note 1.

161. 2. Seller Held Liable on Warranty of Title Known to Purchaser to Be Invalid. — *Neville v. Hughes*, 104 Mo. App. 455.

162. 6. See *Doyle v. Parish*, 110 Mo. App. 470.

174. 6. Warranty May Relate to Condition of Article at Place of Delivery. — *Union Carpet Lining Co. v. Miller*, (Tex. Civ. App. 1905) 86 S. W. Rep. 651.

175. 1. In Absence of Express Agreement Otherwise Warranty Relates to Time of Sale. — *McGill v. Harris*, 36 Nova Scotia 414.

180. 4. Horse Sold for Breeding Purposes. — *Wingate v. Johnson*, 126 Iowa 154.

183. 1. Payment of Price or Promise to Pay No Waiver. — *C. H. Dean Co. v. Standifer*, (Tex. Civ. App. 1904) 83 S. W. Rep. 230.

184. 10. Buyer's Retention of Article No Waiver. — *Daily v. Smith-Hippen Co.*, 111 Ill. App. 310. And see the title SALES, 1093. 3.

But Inspection, Acceptance, and Retention for Two Years without objection have been held to amount to a waiver of warranty of machinery. *Parker v. Fenwick*, 138 N. Car. 209.

185. 1. *C. H. Dean Co. v. Standifer*, (Tex. Civ. App. 1904) 83 S. W. Rep. 230.

186. 1. Acceptance No Waiver Even in Case of Executory Contracts. — *Yeiser v. Russell*, (Ky. 1904) 83 S. W. Rep. 574.

188. 4. Buyer Must Exercise Option to Return Goods Within Reasonable Time. — *Vogel v. Moore*, (Ky. 1905) 84 S. W. Rep. 557.

190. 3. Buyer Has Choice of Three Remedies — See *Allen v. D. A. Tompkins Co.*, 136 N. Car. 208.

8. Buyer Has No Right to Rescind After Contract Executed. — See generally the title SALES, 1109. 4 *et seq.*

193. 3. If the Contract Specifically Provides for the Return of Goods, even worthless goods must be returned. *Haynes v. Plano Mfg Co.*, 36 Tex. Civ. App. 567.

4. Buyer's Duty to Return Article Sold. — *Thomas China Co. v. C. W. Raymond Co.*, (C. C. A.) 135 Fed. Rep. 25.

5. Buyer Must Act Promptly. — See *Pound v. Williams*, 119 Ga. 904.

195. 2. Driving a Horse Merely to Exercise Him, after rescission of sale, tender, and refusal of the seller to receive him, does not amount to an assumption of ownership and control of the horse. *Faust v. Koers*, 111 Mo. App. 560.

6. Buyer May Waive Remedy of Rescission. — *Thomas China Co. v. C. W. Raymond Co.*, (C. C. A.) 135 Fed. Rep. 25.

8. Buyer May Recoup or Set Off. — *Pound v. Williams*, 119 Ga. 904; *Centaur Cycle Co. v. Hill*, 7 Ont. L. Rep. 110. And see the title SALES, 1158. 3.

197. 5. *Centaur Cycle Co. v. Hill*, 7 Ont. L. Rep. 110. See also *Parker v. Fenwick*, 138 N. Car. 209.

198. 1. Contract May Restrict Buyer's Remedies. — See the title SALES, 1158. 2.

- 199.** *h. CONDITIONS PRECEDENT TO BUYER'S RIGHT OF ACTION—*
(2) Payment of Purchase Money.—See note 6.
200. **(4) Buyer's Duty to Return Article Purchased.**—See note 4.
201. **(5) Special Conditions Fixed by Contract of Sale—**(a) **Notice of Defects.**—See notes 8, 9.
202. **Proof of Compliance with the Condition Is Unnecessary.**—See note 1.
205. **(b) Opportunity to Remedy Defects.**—See note 7.
209. **XIX. MEASURE OF DAMAGES—1. General Doctrine—***a.* **DIFFERENCE BETWEEN ACTUAL AND REPRESENTED VALUES.**—See note 6.
214. *b.* **CONSEQUENTIAL DAMAGES—**(1) *Generally.*—See note 3.
219. **(5) Breach of Warranty of Machinery—The Expense or Cost of Changing or Repairing.**—See note 2.
224. **6. Breach of Warranty of Title—If the Buyer Defends the Title.**—See note 5.
226. **XX. EVIDENCE—3. Evidence of Comparisons.**—See notes 5, 7.

199. 6. *C. H. Dean Co. v. Standifer*, (Tex. Civ. App. 1904) 83 S. W. Rep. 230.

200. 4. **Buyer Not Bound to Return Article Purchased.**—*Billson v. Hall*, etc., Constr. Co., (Supm. Ct. App. T.) 43 Misc. (N. Y.) 620; *C. H. Dean Co. v. Standifer*, (Tex. Civ. App. 1904) 83 S. W. Rep. 230. See also *Miller v. F. R. Patch Mfg. Co.*, 101 N. Y. App. Div. 22.

201. 8. **Notice of Defects Unnecessary When Not Expressly Stipulated For.**—*C. H. Dean Co. v. Standifer*, (Tex. Civ. App. 1904) 83 S. W. Rep. 230.

9. **Notice of Defects Necessary Where Contract Provides for It.**—*Pratt v. S. J. Lanston Mercantile Co.*, 111 Mo. App. 96.

Notice and Opportunity to Remedy Defects Conditions Precedent to Suit.—*Allen v. D. A. Tompkins Co.*, 136 N. Car. 208.

202. 1. **Sending or Promising to Send a Man to Repair the Defects.**—*Advance Thresher Co. v. Curd*, (Ky. 1905) 85 S. W. Rep. 690.

205. 7. **Buyer Must Allow Seller Opportunity to Remedy Defects.**—See *Osborne v. West*, (Iowa 1905) 103 N. W. Rep. 118.

209. 6. **Measure of Damages Ordinarily Dif-**

ference Between Actual and Warranted Values.—*Doyle v. Parish*, 110 Mo. App. 470; *McQuade v. Newman*, (Supm. Ct. App. T.) 88 N. Y. Supp. 363; *Parker v. Fenwick*, 138 N. Car. 209. See also *Long v. Chapman*, 97 N. Y. App. Div. 241; *Critcher v. Porter-McNeal Co.*, 135 N. Car. 542. And see the title **SALES**, **1158**. 7.

214. 3. **"Gains Prevented and Losses Sustained" Are Recoverable.**—*Cincinnati Butchers' Supply Co. v. Steinmetz*, 35 Ind. App. 228; *C. H. Dean Co. v. Standifer*, (Tex. Civ. App. 1904) 83 S. W. Rep. 230. See also *Critcher v. Porter-McNeal Co.*, 135 N. Car. 542. And see the title **SALES**, **1159**. 2 *et seq.*

219. 2. *Miller v. F. R. Patch Mfg. Co.*, 101 N. Y. App. Div. 22. See also *Rochevot v. Wolf*, 96 N. Y. App. Div. 506.

224. 5. **Cost and Expense of Defending Title.**—*Schnurmacher v. Kennedy*, (Supm. Ct. App. T.) 88 N. Y. Supp. 943.

226. 5. **Evidence of Comparisons.**—*Haynes v. Plano Mfg. Co.*, 36 Tex. Civ. App. 567.

7. **Evidence that Similar Article Had Proved Unsatisfactory to Others Inadmissible on Buyer's Behalf.**—*Lander v. Sheehan*, 32 Mont. 25.

WASTE.

BY BASIL JONES.

236. **IV. KINDS OF WASTE—2. Legal Waste—***b.* **VOLUNTARY WASTE.**—See note 4.

237. *c.* **PERMISSIVE WASTE.**—See note 2.

244. **V. PARTICULAR ACTS OR OMISSIONS CONSTITUTING WASTE—1. Legal Waste—***b.* **CUTTING OR DESTROYING TREES—**(1) *Timber Trees—*(e) **Clearing the Land for Cultivation or Pasture.**—See note 3.

259. **VI. WHO MAY COMMIT WASTE—3. Tenants for Life or Years—***a.* **VOLUNTARY OR COMMISSIVE WASTE.**—See note 6.

261. *b.* **PERMISSIVE WASTE.**—See note 5.

236. 4. **Definition of Voluntary Waste.**—See *Roby v. Newton*, 121 Ga. 679.

237. 2. **Definition of Permissive Waste.**—See *Roby v. Newton*, 121 Ga. 679.

244. 3. **Criterion of Waste—Cleared and Wooded Land.**—*Roby v. Newton*, 121 Ga. 679.

259. 6. **Liability of Tenants for Life or Years for Voluntary Waste.**—*Roby v. Newton*, 121 Ga. 679, stating also the rule at early common law.

261. 5. *Roby v. Newton*, 121 Ga. 679.

264. *d.* TENANTS IN DOWER AND BY CURTESY — (2) *Permissive Waste.*
See note 9.

281. VII. REMEDIES FOR WASTE — 2. Modern Remedies — *a.* ACTION ON THE CASE IN THE NATURE OF WASTE — (4) *By and Against Whom Maintainable* — (b) *By Whom Maintainable* — Immediate Reversion in Plaintiff Not Necessary. — See note 3.

294. *b.* INJUNCTION — (5) *By and Against Whom Available* — (d) *Against Whom Maintainable* — *gg* TENANTS IN COMMON. — See note 8.

301. VIII. DAMAGES AND PENALTIES — 1. Measure of Damages. — See note 7.

302. 2. Treble Damages. — See note 1.

303. 3. Forfeiture. — See note 3.

306. [WATERPROOF CLOTH. — See note 8a.]

264. 9. See *Roby v. Newton*, 121 Ga. 679.

281. 3. *Halstead v. Sigler*, 35 Ind. App. 419.

294. 8. Acts Destructive of the Estate. — *Leatherbury v. McInnis*, 85 Miss. 160, 107 Am. St. Rep. 226.

301. 7. See *Halstead v. Sigler*, 35 Ind. App. 419.

302. 1. Statute of Gloucester. — See *Roby v. Newton*, 121 Ga. 679.

303. 3. Retention of Forfeiture in the United States. — *Roby v. Newton*, 121 Ga. 679, holding, however, that under the Georgia statute a re-

mainderman is not entitled to claim immediate possession as a result of a forfeiture of the life tenant's interest, unless it appears that there have been both permissive and voluntary waste by the tenant, or one for whose conduct he is responsible, and also that the voluntary waste was committed wantonly and in a manner evidencing an utter disregard of the rights of the next taker.

306. 8a. "Waterproof Cloth," in Revenue Act, Held to Include "Cravenette Cloth." — *Brown v. U. S.*, 126 Fed. Rep. 446, affirmed (C. C. A.) 136 Fed. Rep. 550.

WATERS AND WATERCOURSES.

By B. B. CLARK.

311. I. UNDERGROUND WATERS — 1. Percolating Waters — *c.* INTERCEPTION AND DIVERSION — (1) *In General.* — See note 6.

313. See note 2.

314. (2) *Sinking Wells.* — See note 2.

Qualifications of Rule. — See notes 8, 9.

315. See note 1.

321. *c.* ARTIFICIAL PERCOLATION. — See note 9.

322. Div-rsion of Waters by Artificial Percolation. — See note 1.

311. 6. Interception and Diversion. — *Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 578; *Barclay v. Abraham*, 121 Iowa 619, 100 Am. St. Rep. 365; *Dolbeer v. Suncook Water-Works Co.*, 72 N. H. 562; *Houston, etc., R. Co. v. East*, 98 Tex. 146, reversing (Tex. Civ. App. 1903) 77 S. W. Rep. 646; *Uhl v. Ohio River R. Co.*, 56 W. Va. 494, 107 Am. St. Rep. 860.

313. 2. Injuries to Watercourses. — Compare *McClintock v. Hudson*, 141 Cal. 275.

No Right to Divert Percolating Waters So as to Injure Watercourse in Which Rights Acquired by Appropriation. — *Ogilvy Irrigating, etc., Co. v. Insinger*, 19 Colo. App. 380. See generally *infra*, this title, **399.** 2 *et seq.*

314. 2. Sinking Wells. — *Houston, etc., R. Co. v. East*, 98 Tex. 146, reversing (Tex. Civ. App. 1903) 77 S. W. Rep. 646.

8. *McClintock v. Hudson*, 141 Cal. 275; *Cohen v. La Canada Land, etc., Co.*, 142 Cal. 437.

9. *Barclay v. Abraham*, 121 Iowa 619, 100 Am. St. Rep. 365.

315. 1. *Reisert v. New York*, 174 N. Y. 196, 101 N. Y. App. Div. 93, reversing on other grounds (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 275; *Dinger v. New York*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 319, affirmed 101 N. Y. App. Div. 202; *George v. New York*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 270.

321. 9. Percolation from Artificial Reservoir. — *Turpen v. Turlock Irrigation Dist.*, 141 Cal. 1; *Carrington v. Brooks*, 121 Ga. 250; *Schwarzenbach v. Electric Water Power Co.*, 101 N. Y. App. Div. 345. See, however, *Neumeister v. Goddard*, 125 Wis. 82.

Owner Bound to Use Care Proportionate to Danger of Injury. — *Scott v. Longwell*, 139 Mich. 12, 5 A. & E. Ann. Cas. 679.

322. 1. Diversion Through Artificial Percolation. — *McClintock v. Hudson*, 141 Cal. 275; *Montecito Valley Water Co. v. Santa Barbara*,

322. 2. Underground Watercourses. — See note 2.

323. See note 1.

II. SURFACE WATERS — 1. Definition. — See note 2.

324. See note 6.

Flood Waters of Watercourses. — See notes 7, 8, 9.

325. See note 1.

326. Water Which Collects in Depressions. — See note 1.

3. Repulsion of Flow — a. CIVIL-LAW RULE — (1) *In General.* —

See note 7.

327. See note 1.

328. See note 1.

329. (2) *Urban Property.* — See note 6.

(4) *Remedies for Obstruction.* — See note 8.

330. b. COMMON-LAW RULE — (1) *In General.* — See note 3.

332. (3) *Railroad Companies.* — See note 3.

333. (4) *Natural Drainage Channels.* — See note 1.

144 Cal. 578; Ogilvy Irrigating, etc., Co. v. Insinger, 19 Colo. App. 380.

322. 2. Underground Watercourses. — Howard v. Perrin, (Ariz. 1904) 76 Pac. Rep. 460; McClintock v. Hudson, 141 Cal. 275; St. Amand v. Lehman, 120 Ga. 253, following Saddler v. Lee, 66 Ga. 45, 42 Am. St. Rep. 62; Barclay v. Abraham, 121 Iowa 619, 100 Am. St. Rep. 365; Whitmore v. Utah Fuel Co., 26 Utah 488.

323. 1. Barclay v. Abraham, 121 Iowa 619, 100 Am. St. Rep. 365, holding that the burden of proof is upon those asserting rights to sub-surface waters to show that they flow in a defined and known channel.

2. Surface Waters Defined. — Applegate v. Franklin, 109 Mo. App. 293.

324. 6. Davis v. Fry, 14 Okla. 340.

7. Flood Waters. — Erwin v. Erie R. Co., 98 N. Y. App. Div. 402; Welty v. Vulgamore, 24 Ohio Cir. Ct. 572.

8. Johnson v. Gray's Point Terminal R. Co., 111 Mo. App. 378; Fordham v. Northern Pac. R. Co., 30 Mont. 421, 104 Am. St. Rep. 729; Uhl v. Ohio River R. Co., 56 W. Va. 494, 107 Am. St. Rep. 860.

9. California Pastoral, etc., Co. v. Enterprise Canal, etc., Co., 127 Fed. Rep. 741; Ballentine v. Hammond, 68 S. Car. 153.

325. 1. Fordham v. Northern Pac. R. Co., 30 Mont. 421, 104 Am. St. Rep. 729; Uhl v. Ohio River R. Co., 56 W. Va. 494, 107 Am. St. Rep. 860.

326. 1. Collections in Depressions. — Applegate v. Franklin, 109 Mo. App. 293.

7. Repulsion of Surplus Waters — Civil-law Rule. — Wood v. Moulton, 146 Cal. 317; Sanitary Dist. v. Alderman, 113 Ill. App. 23; Robertson v. Daviess Gravel Road Co., 116 Ky. 913; Fahnestock v. Feldner, 98 Md. 335; Cranston v. Snyder, 137 Mich. 340; O'Connor v. Hogan, (Mich. 1905) 104 N. W. Rep. 29; Louisville, etc., R. Co. v. Binkley, 1 Tenn. Ch. 531.

327. 1. The Texas Statute. — Gulf, etc., R. Co. v. Huffman, (Tex. Civ. App. 1904) 81 S. W. Rep. 536; Albers v. San Antonio, etc., R. Co., 36 Tex. Civ. App. 186; Texas, etc., R. Co. v. Whitaker, 36 Tex. Civ. App. 571; Denison, etc., R. Co. v. Barry, 98 Tex. 248; Taylor v. San Antonio, etc., R. Co., 36 Tex. Civ. App. 658; San Antonio, etc., R. Co. v. Gurley, (Tex. Civ. App. 1904) 83 S. W. Rep. 842; Gulf, etc.,

R. Co. v. Provo, (Tex. Civ. App. 1904) 84 S. W. Rep. 275; St. Louis Southwestern R. Co. v. Baer, (Tex. Civ. App. 1905) 86 S. W. Rep. 653; Texas Cent. R. Co. v. Brown, (Tex. Civ. App. 1905) 86 S. W. Rep. 659; San Antonio, etc., R. Co. v. Kiersey, 98 Tex. 590; Gulf, etc., R. Co. v. Harbison, (Tex. Civ. App. 1905) 88 S. W. Rep. 452.

328. 1. Municipal Corporations. — Holbrook v. Norcross, 121 Ga. 319.

329. 6. Hall v. Rising, 141 Ala. 431.

8. Measure of Damages. — See Texas Cent. R. Co. v. Brown, (Tex. Civ. App. 1905) 86 S. W. Rep. 659.

330. 3. Common-law Rule — *Indiana.* — Hart v. Sigman, 32 Ind. App. 227; Clay v. Pittsburgh, etc., R. Co., 164 Ind. 439.

Iowa. — Brown v. Armstrong, 127 Iowa 175.

Kansas. — Bryant v. Merritt, (Kan. 1905) 80 Pac. Rep. 600.

Minnesota. — Werner v. Popp, 94 Minn. 118, following Brown v. Winona, etc., R. Co., 53 Minn. 259, 39 Am. St. Rep. 603.

Missouri. — Applegate v. Franklin, 109 Mo. App. 293; Johnson v. Gray's Point Terminal R. Co., 111 Mo. App. 378.

Nebraska. — Todd v. York County, (Neb. 1904) 100 N. W. Rep. 299; Aldritt v. Fleischauer, (Neb. 1905) 103 N. W. Rep. 1084.

New Jersey. — McCloskey v. Atlantic City R. Co., 70 N. J. L. 200; Sullivan v. Browning, 67 N. J. Eq. 391, following Jessup v. Bamford Bros. Silk Mfg. Co., 66 N. J. L. 641.

New York. — Howard v. Howard, 88 N. Y. App. Div. 175.

Texas. — Gramann v. Eicholtz, 36 Tex. Civ. App. 309; Barnett v. Matagorda Rice, etc., Co., 98 Tex. 355.

West Virginia. — Uhl v. Ohio River R. Co., 56 W. Va. 494, 107 Am. St. Rep. 860.

Wyoming. — Ladd v. Redle, 12 Wyo. 362.

Compare *Riverside Cotton Mills v. Lanier*, 102 Va. 148.

332. 3. Railroad Companies. — Clay v. Pittsburgh, etc., R. Co., 164 Ind. 439.

333. 1. Natural Drainage Channels. — Brown v. Armstrong, 127 Iowa 175; Aldritt v. Fleischauer, (Neb. 1905) 103 N. W. Rep. 1084; Barstow Irrigation Co. v. Black, (Tex. Civ. App. 1905) 86 N. W. Rep. 1036. See also Erwin v. Erie R. Co., 98 N. Y. App. Div. 402.

- 335.** 4. Drainage of Surface Waters — *a.* IN GENERAL. — See notes 3, 7.
- 337.** See note 2.
- 338.** See note 4.
- 339.** See note 2.
- b.* MUNICIPAL CORPORATIONS. — See note 4.
- 340.** *c.* RAILROAD COMPANIES. — See note 3.
- 341.** *d.* DRAINAGE OF DEPRESSIONS AND MARSH LANDS. — See note 2.
- 342.** See notes 1, 2.
- 343.** *f.* DRAINAGE INTO WATERCOURSES. — See notes 6, 7.
- 344.** See note 2.
- The Drainage of Highways. — See note 5.
- g.* CONTRACT RIGHTS. — See note 7.
- 345.** *h.* PRESCRIPTIVE RIGHTS. — See notes 3, 6, 8.
- 346.** *i.* REMEDIES — Action for Damages. — See note 3.
- 347.** Injunction. — See note 1.
- 335.** 3. No Liability for Permitting Natural Drainage. — *Campbell v. Flannery*, 29 Mont. 246.
7. Casting Away Surface Waters in Artificial Channels — *California*. — *Allen v. Stowell*, 145 Cal. 666, 104 Am. St. Rep. 80; *Wood v. Moulton*, 146 Cal. 317.
- Idaho*. — *Stuart v. Noble Ditch Co.*, 9 Idaho 765.
- Illinois*. — *Kennedy v. Murphy*, 112 Ill. App. 607; *Sanitary Dist. v. Alderman*, 113 Ill. App. 23.
- Indiana*. — *Baltimore, etc., Southwestern R. Co. v. Quillen*, 34 Ind. App. 330, 107 Am. St. Rep. 158; *Clay v. Pittsburgh, etc., R. Co.*, 164 Ind. 439.
- Iowa*. — *Geneser v. Healy*, 124 Iowa 310; *Everett v. Christopher*, 125 Iowa 668; *Brown v. Armstrong*, 127 Iowa 175; *Keck v. Venghause*, 127 Iowa 529.
- Kansas*. — *Baldwin v. Ohio Tp.*, 70 Kan. 102.
- Kentucky*. — *Robertson v. Daviess Gravel Road Co.*, 116 Ky. 913.
- Michigan*. — *Cranson v. Snyder*, 137 Mich. 340; *O'Connor v. Hogan*, (Mich. 1905) 104 N. W. Rep. 29.
- Nebraska*. — *Todd v. York County*, (Neb. 1904) 100 N. W. Rep. 299.
- Oklahoma*. — *Davis v. Fry*, 14 Okla. 340.
- Rhode Island*. — *Johnson v. White*, 26 R. I. 207.
- Tennessee*. — *Tyrus v. Kansas City, etc., R. Co.*, 114 Tenn. 579.
- Texas*. — *Chicago, etc., R. Co. v. Longbottom*, (Tex. Civ. App. 1904) 80 S. W. Rep. 542; *Gramann v. Eicholtz*, 36 Tex. Civ. App. 309; *Barstow Irrigation Co. v. Black*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1036.
- West Virginia*. — *Uhl v. Ohio River R. Co.*, 56 W. Va. 494, 107 Am. St. Rep. 860.
- Wyoming*. — *Ladd v. Redle*, 12 Wyo. 362.
- 337.** 2. Qualification of Rule — Reasonable Improvement. — *Dorr v. Simmerson*, 127 Iowa 551; *Werner v. Popp*, 94 Minn. 118, following *Brown v. Winona, etc., R. Co.*, 53 Minn. 259, 39 Am. St. Rep. 603; *Todd v. York County*, (Neb. 1904) 100 N. W. Rep. 209; *Albritt v. Fleischauer*, (Neb. 1905) 103 N. W. Rep. 1084; *Riverside Cotton Mills v. Lanier*, 102 Va. 148.
- 338.** 4. *Kennedy v. Murphy*, 112 Ill. App. 607, holding that nominal damages are recoverable.
- 339.** 2. *Rickels v. Log Owners' Booming Co.*, (Mich. 1905) 102 N. W. Rep. 652.
4. *Johnson v. White*, 26 R. I. 207.
- 340.** 3. Railroad Companies. — *Clay v. Pittsburgh, etc., R. Co.*, 164 Ind. 439.
- 341.** 2. Drainage of Depressions and Marsh Lands. — *Cranson v. Snyder*, 137 Mich. 340; *Davis v. Fry*, 14 Okla. 340. Compare *Todd v. York County*, (Neb. 1904) 100 N. W. Rep. 299; *Albritt v. Fleischauer*, (Neb. 1905) 103 N. W. Rep. 1084. And see *supra*, this title, **337.** 2.
- 342.** 1. *Cranson v. Snyder*, 137 Mich. 340; *O'Connor v. Hogan*, (Mich. 1905) 104 N. W. Rep. 29.
2. But the Owner of Land Covered by Mere Surface Water May Drain Off the Water though he thereby causes the drainage of adjoining land to the injury of a fishery maintained by the owner of such land. *Applegate v. Franklin*, 109 Mo. App. 293.
- 343.** 6. Drainage into Watercourses. — *Fahnestock v. Feldner*, 98 Md. 335.
7. *Baldwin v. Ohio Tp.*, 70 Kan. 102; *Riverside Cotton Mills v. Lanier*, 102 Va. 148.
- 344.** 2. Changing Watershed. — *Baldwin v. Ohio Tp.*, 70 Kan. 102.
- Surplus Water of Artesian Well May Be Discharged into Watercourse. — *Mead v. Mellette*, (S. Dak. 1904) 101 N. W. Rep. 355.
5. Drainage of Highways. — *Baldwin v. Ohio Tp.*, 70 Kan. 102.
7. *Dorman v. Droll*, 215 Ill. 262.
- 345.** 3. Prescription. — *Abbott v. Pond*, 142 Cal. 393; *Brown v. Armstrong*, 127 Iowa 175; *Cranson v. Snyder*, 137 Mich. 340.
6. *Clay v. Pittsburgh, etc., R. Co.*, 164 Ind. 439.
8. *Flynn v. Service*, (Mich. 1905) 103 N. W. Rep. 541.
- 346.** 3. Action for Damages. — *Baltimore, etc., Southwestern R. Co. v. Quillen*, 34 Ind. App. 330, 107 Am. St. Rep. 158; *Chicago, etc., R. Co. v. Longbottom*, (Tex. Civ. App. 1904) 80 S. W. Rep. 542; *Texas, etc., R. Co. v. Whitaker*, 36 Tex. Civ. App. 571; *San Antonio, etc., R. Co. v. Gurley*, (Tex. Civ. App. 1904) 83 S. W. Rep. 842; *St. Louis Southwestern R. Co. v. Baer*, (Tex. Civ. App. 1905) 86 S. W. Rep. 653.
- 347.** 1. Injunction. — *Allen v. Stowell*, 145 Cal. 666, 104 Am. St. Rep. 80.

- 347.** Removal of Cause of Diversion. — See note 3.
- 348.** III. WATERCOURSES — 1. Definition. — See note 1.
- 349.** Channel. — See notes 2, 3, 4.
- 350.** Flow. — See notes 4, 6.
- 351.** Swales, Sloughs, and Ravines. — See note 1.
Source. — See note 3.
- 352.** Question of Law and Fact. — See note 4.
- 353.** 3. Who Are Entitled to Riparian Rights. — See note 3.
- 354.** 4. Rights in Bed of Stream. — See note 1.
5. Right to Flow of Watercourse. — See note 8.
- 355.** See note 2.
- 356.** 6. Right to Use of Water — *a.* IN GENERAL. — See note 3.
- 357.** See notes 1, 5.
Ordinary and Extraordinary Wants. — See note 6.
- 358.** *b.* DOMESTIC PURPOSES. — See note 10.
- 359.** See note 5.
- 360.** *c.* MECHANICAL PURPOSES. — See note 5.
e. IRRIGATION. — See note 8.
7. Diversion — *a.* IN GENERAL. — See note 9.
- 347.** 3. O'Connor v. Hogan, (Mich. 1905) 104 N. W. Rep. 29.
- 348.** 1. Watercourse Defined. — Johnson v. Gray's Point Terminal R. Co., 111 Mo. App. 378; Erwin v. Erie R. Co., 98 N. Y. App. Div. 402; Gramann v. Eicholtz, 36 Tex. Civ. App. 309.
- 349.** 2. Channel. — Erwin v. Erie R. Co., 98 N. Y. App. Div. 402.
3. Blohowak v. Grochoski, 119 Wis. 189.
4. Harrington v. Demaris, (Oregon 1904) 77 Pac. Rep. 603; Blohowak v. Grochoski, 119 Wis. 189.
- 350.** 4. Flow. — Erwin v. Erie R. Co., 98 N. Y. App. Div. 402; Blohowak v. Grochoski, 119 Wis. 189.
- Stagnant or Back Water connected with and forming part of the watercourse is water of the watercourse. Uhl v. Ohio River R. Co., 56 W. Va. 494, 107 Am. St. Rep. 860.
6. Continuity of Flow. — Gramann v. Eicholtz, 36 Tex. Civ. App. 309.
- 351.** 1. Swales, Sloughs, and Ravines. — Erwin v. Erie R. Co., 98 N. Y. App. Div. 402.
3. Blohowak v. Grochoski, 119 Wis. 189.
- 352.** 4. Blohowak v. Grochoski, 119 Wis. 189.
- 353.** 3. See the title RIPARIAN RIGHTS, 982. 4, 5.
- 354.** 1. Great Torrington Commons Conservators v. Stevens, (1904) 1 Ch. 347.
8. Right to Flow of Watercourse. — California Pastoral, etc., Co. v. Enterprise Canal, etc., Co., 127 Fed. Rep. 741; Mohl v. Lamar Canal Co., 128 Fed. Rep. 776; Holcomb v. Blair, (Ky. 1903) 76 S. W. Rep. 843; Gray v. Ft. Plain, 105 N. Y. App. Div. 215; Brewster v. J. & J. Rogers Co., 169 N. Y. 79; Bachert v. Lehigh Coal, etc., Co., 208 Pa. St. 362; Webster v. Harris, 111 Tenn. 668; Clements v. Watkins Land, etc., Co., 36 Tex. Civ. App. 339. And see the title RIPARIAN RIGHTS, 979. 5 *et seq.*
- 355.** 2. Webster v. Harris, 111 Tenn. 668.
- 356.** 3. Right to Reasonable Use of Water. — Suisun v. De Freitas, 142 Cal. 350; Muncie Pulp Co. v. Koontz, 33 Ind. App. 532; State v. Longfellow, 169 Mo. 109; Pierson v. Speyer, 178 N. Y. 270, 102 Am. St. Rep. 499, reversing 82 N. Y. App. Div. 556; Samuels v. Armstrong, (Supm. Ct. Tr. T.) 46 Misc. (N. Y.) 481; Lawrie v. Silsby, 76 Vt. 240, 104 Am. St. Rep. 927; Taylor v. Com., 102 Va. 759, 102 Am. St. Rep. 865; Monroe Mill Co. v. Menzel, 35 Wash. 487, 102 Am. St. Rep. 905. And see the title RIPARIAN RIGHTS, 979. 5.
- Right Is Part and Parcel of Land, Not Mere Appurtenance. — Cline v. Stock, (Neb. 1904) 98 N. W. Rep. 454. And see the title RIPARIAN RIGHTS, 981. 7 *et seq.*
- 357.** 1. Unreasonable Use. — McCartney v. Londonderry, etc., R. Co., (1904) A. C. 301; Cline v. Stock, (Neb. 1904) 98 N. W. Rep. 454; Samuels v. Armstrong, (Supm. Ct. Tr. T.) 46 Misc. (N. Y.) 481.
- Cannot Reduce Stream Below Natural Level. — Webster v. Harris, 111 Tenn. 668.
5. Muncie Pulp Co. v. Koontz, 33 Ind. App. 532; Bowman v. Humphrey, 124 Iowa 744; Lawrie v. Silsby, 76 Vt. 240, 104 Am. St. Rep. 927. And see the title RIPARIAN RIGHTS, 980. 1, 2.
6. Ordinary and Extraordinary Wants. — Watkins Land Co. v. Clements, 98 Tex. 578.
- 358.** 10. Domestic Purposes. — Webster v. Harris, 111 Tenn. 668.
- 359.** 5. Municipal Water Supply. — Osborn v. Norwalk, 77 Conn. 663; Elberton v. Hobbs, 121 Ga. 749; Elberton v. Pearle Cotton Mills, 123 Ga. 1; Lonsdale Co. v. Woonsocket, 25 R. I. 428. See, however, American Assoc. v. Eastern Kentucky Land Co., 2 Tenn. Ch. App. 132.
- 360.** 5. Railroad May Use Water for Engines. — *Contra*, McCartney v. Londonderry, etc., R. Co., (1904) A. C. 301, overruling Sandwich v. Great Northern R. Co., 10 Ch. D. 707, cited in the original note.
8. Irrigation. — See Clark v. Allaman, (Kan. 1905) 80 Pac. Rep. 571; Cline v. Stock, (Neb. 1905) 102 N. W. Rep. 265; Watkins Land Co. v. Clements, 98 Tex. 578, reversing 36 Tex. Civ. App. 339.
9. Diversion. — McCartney v. Londonderry, etc., R. Co., (1904) A. C. 301; Hoge v. Eaton,

- 362.** The Detention of the Waters of a Stream by a Dam. — See note 5.
Change in Channel. — See notes 6, 7.
- 363.** See notes 1, 3.
Artificial Increase of Flow. — See note 5.
- 364.** *b.* DIVERSION BY NATURAL CAUSES. — See note 2.
c. EMINENT DOMAIN. — See notes 7, 9.
- 365.** *d.* CONTRACT RIGHTS. — See note 1.
e. PRESCRIPTIVE RIGHTS — A Lower Riparian Owner. — See note 2.
An Upper Riparian Owner. — See note 5.
- 366.** See notes 1, 3.
- 367.** Where the Federal Government Is a Riparian Owner. — See note 6.
The Extent of the Prescriptive Right. — See note 8.
- 368.** *f.* REMEDIES FOR DIVERSION — (1) *Action for Damages.* — See note 4.
- 369.** See note 1.
The Measure of Damages. — See note 2.
(2) *Equitable Relief.* — See note 3.

135 Fed. Rep. 411 (wherein the respective riparian proprietors were residents of different states); California Pastoral, etc., Co. v. Enterprise Canal, etc., Co., 127 Fed. Rep. 741; Elberton v. Hobbs, 121 Ga. 749; Clements v. Watkins Land, etc., Co., 36 Tex. Civ. App. 339.

Withdrawing Water for Manufacture of Ice for Sale Unreasonable. — Samuels v. Armstrong, (Supm. Ct. Tr. T.) 46 Misc. (N. Y.) 481.

362. 5. Detention by Dam Not Necessarily Unreasonable. — Pierson v. Speyer, 178 N. Y. 270, 102 Am. St. Rep. 499.

6. Daum v. Cooper, 208 Ill. 391; Lonsdale Co. v. Woonsocket, 25 R. I. 428; Neumeister v. Goddard, 125 Wis. 82.

7. Burden of Showing Return to Stream Is on Person Diverting. — Lonsdale Co. v. Woonsocket, 25 R. I. 428.

363. 1. Brewer v. Calif, 103 N. Y. App. Div. 138; Gramann v. Eicholtz, 36 Tex. Civ. App. 309; San Antonio, etc., R. Co. v. Gurley, (Tex. Civ. App. 1904) 83 S. W. Rep. 842.

3. Rickels v. Log Owners' Booming Co., (Mich. 1905) 102 N. W. Rep. 652.

5. Roe v. Redner, (Supm. Ct. Tr. T.) 46 Misc. (N. Y.) 25.

364. 2. In Case of a Gradual Change in the banks of a watercourse, the riparian owner on whose land the watercourse encroaches has no right to build an embankment where the original bank was located and thus obstruct the watercourse. Holcomb v. Blair, (Ky. 1903) 76 S. W. Rep. 843.

7. Eminent Domain — Municipal Water Supply. — Selectmen v. Com., 184 Mass. 502.

9. Sprague v. Dorr, 185 Mass. 10; McCook Irrigation, etc., Co. v. Crews, (Neb. 1905) 102 N. W. Rep. 249.

Compensation Must Be Made. — Elberton v. Hobbs, 121 Ga. 749. And see the title RIPARIAN RIGHTS, 981. 10.

365. 1. Contract Rights. — Roberts v. Krafts, 141 Cal. 20; Craig v. Crafton Water Co., 141 Cal. 178; McPhee v. Kelsey, 44 Oregon 203; Everett Water Co. v. Powers, 37 Wash. 143.

2. Prescriptive Rights — As Against Upper Riparian Owner. — Clark v. Allaman, (Kan. 1905) 80 Pac. Rep. 571; Harrington v. Demaris, (Oregon 1904) 77 Pac. Rep. 603; Beers v. Sharpe,

44 Oregon 386; Lawrie v. Silsby, 76 Vt. 240, 104 Am. St. Rep. 927.

5. As Against Lower Riparian Owners. — Southern California Invest. Co. v. Wilshire, 144 Cal. 68; Gutierrez v. Wege, 145 Cal. 730; Hall v. Carter, 33 Tex. Civ. App. 230; Lawrie v. Silsby, 76 Vt. 240, 104 Am. St. Rep. 927. See, however, Leonard v. St. John, 101 Va. 752.

Nonriparian Owner May by Prescription Acquire Right to Divert. — Lawrie v. Silsby, 76 Vt. 240, 104 Am. St. Rep. 927.

366. 1. What Necessary to Acquisition of Prescriptive Right. — Clark v. Allaman, (Kan. 1905) 80 Pac. Rep. 571.

3. Griseza v. Terwilliger, 144 Cal. 456; Bauers v. Bull, (Oregon 1904) 78 Pac. Rep. 757.

367. 6. Against Grantee of Federal Government. — Southern California Invest. Co. v. Wilshire, 144 Cal. 68.

8. Extent of Prescriptive Right. — Southern California Invest. Co. v. Wilshire, 144 Cal. 68; Gutierrez v. Wege, 145 Cal. 730; Osborn v. Norwalk, 77 Conn. 663; Penrhyn Slate Co. v. Granville Electric Light, etc., Co., 181 N. Y. 80; Hall v. Carter, 33 Tex. Civ. App. 230.

368. 4. Lower Riparian Owner. — Anderson Land, etc., Co. v. McConnell, 133 Fed. Rep. 581; California Pastoral, etc., Co. v. Enterprise Canal, etc., Co., 127 Fed. Rep. 741; Miller v. Rickey, 127 Fed. Rep. 573; Rose v. Mesner, 142 Cal. 322; Miller v. Enterprise Canal, etc., Co., 145 Cal. 652; Osborn v. Norwalk, 77 Conn. 663; Daum v. Cooper, 208 Ill. 391; Cline v. Stock, (Neb. 1905) 102 N. W. Rep. 265; Samuels v. Armstrong, (Supm. Ct. Tr. T.) 46 Misc. (N. Y.) 481. And see the title RIPARIAN RIGHTS, 980. 3.

369. 1. Necessity for Special Damages. — Roberts v. Claremont R., etc., Co., (N. H. 1904) 59 Atl. Rep. 619; Gray v. Ft. Plain, 105 N. Y. App. Div. 215.

2. Measure of Damages. — Gray v. Ft. Plain, 105 N. Y. App. Div. 215; Lonsdale Co. v. Woonsocket, 25 R. I. 428.

3. Equitable Relief. — California Pastoral, etc., Co. v. Enterprise Canal, etc., Co., 127 Fed. Rep. 741; Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578; St. Amand v. Lehman,

370. See note 1.

371. See note 5.

Effect of Laches. — See note 7.

(4) *Who May Sue for Diversion.* — See note 12.

372. 8. Detention and Obstruction of Flow — *a.* DETENTION OF FLOW. —

See note 4.

374. *b.* OBSTRUCTION OF FLOW — (1) *In General.* — See notes 2, 3, 4.

375. See notes 1, 3.

Where Bridges, Culverts, etc., Are Constructed. — See note 4.

376. Contract Rights. — See note 2.

(2) *Prescriptive Right.* — See notes 3, 5, 7.

120 Ga. 253; *Cline v. Stock*, (Neb. 1904) 98 N. W. Rep. 454; *Roberts v. Claremont R., etc., Co.*, (N. H. 1904) 59 Atl. Rep. 619; *Samuels v. Armstrong*, (Supm. Ct. Tr. T.) 46 Misc. (N. Y.) 481; *Leonard v. St. John*, 101 Va. 752.

370. 1. Material Damage Not Necessary. — Southern California Invest. Co. *v.* Wilshire, 144 Cal. 68; *Elberton v. Hobbs*, 121 Ga. 749. See, however, *Penrhyn Slate Co. v. Granville Electric Light, etc., Co.*, 181 N. Y. 80.

371. 5. Compare *Elberton v. Hobbs*, 121 Ga. 749; *Elberton v. Pearle Cotton Mills*, 121 Ga. 1.

7. Laches. — *Penrhyn Slate Co. v. Granville Electric Light, etc., Co.*, 181 N. Y. 80, reversing 84 N. Y. App. Div. 92.

Acquiescence Measured by Period of Limitation at Law. — California Pastoral, etc., Co. *v.* Enterprise Canal, etc., Co., 127 Fed. Rep. 741.

12. Lessee May Sue for Wrongful Diversion. — California Pastoral, etc., Co. *v.* Enterprise Canal, etc., Co., 127 Fed. Rep. 741.

372. 4. Impounding Water for Ornamental Purposes and for Fish Pond Held Not to Be Unreasonable. — *Pierson v. Speyer*, 178 N. Y. 270, 102 Am. St. Rep. 499, reversing 82 N. Y. App. Div. 556.

374. 2. Obstruction of Flow. — *Campbell v. Flannery*, 29 Mont. 246.

3. California. — *Yuba County v. Kate Hayes Min. Co.*, 141 Cal. 360.

Connecticut. — *Osborn v. Norwalk*, 77 Conn. 663.

Georgia. — *Southern R. Co. v. Morris*, 119 Ga. 234; *Nuckolls v. Anderson*, 120 Ga. 677.

Illinois. — *Baumgartner v. Bradt*, 207 Ill. 345.

Indiana. — *American Plate Glass Co. v. Nicolson*, 34 Ind. App. 643.

Maryland. — *Fahnestock v. Feldner*, 98 Md. 335.

Michigan. — *Pluchak v. Crawford*, 137 Mich. 509.

North Carolina. — *Candler v. Asheville Electric Co.*, 135 N. Car. 12.

Pennsylvania. — *Lynch v. Troxell*, 207 Pa. St. 162; *Matlack v. Callahan*, 25 Pa. Super. Ct. 454.

South Carolina. — *Ballentine v. Hammond*, 68 S. Car. 153.

Tennessee. — *Atlanta, etc., R. Co. v. Higdon*, 111 Tenn. 121.

Wisconsin. — *Blohowak v. Grochoski*, 119 Wis. 189.

And see the title DAMS, 715. 1.

4. *Atchison, etc., R. Co. v. Jones*, 110 Ill. App. 626; *Chaffin v. Fries Mfg., etc., Co.*, 135

N. Car. 95, 136 N. Car. 364; *Krause v. Oregon Iron, etc., Co.*, 45 Oregon 378.

375. 1. *Pickens v. Coal River Boom, etc., Co.*, (W. Va. 1905) 50 S. E. Rep. 872. And see the title DAMS, 715. 2.

3. No Liability in Absence of Injury. — *San Antonio, etc., R. Co. v. Turnham*, (Tex. Civ. App. 1904) 78 S. W. Rep. 1086.

4. Bridges and Culverts — Illinois. — *Atchison, etc., R. Co. v. Jones*, 110 Ill. App. 626.

Indiana. — *Baltimore, etc., Southwestern R. Co. v. Quillen*, 34 Ind. App. 330, 107 Am. St. Rep. 158; *Pittsburgh, etc., R. Co. v. Greb*, 34 Ind. App. 625.

Iowa. — *Vyse v. Chicago, etc., R. Co.*, 126 Iowa 90.

Massachusetts. — *Com. v. Newton*, 186 Mass. 286.

New York. — *Kipp v. New York Cent., etc., R. Co.*, 89 N. Y. App. Div. 392; *Dennison v. New York Cent., etc., R. Co.*, 98 N. Y. App. Div. 399.

Pennsylvania. — *Matlack v. Callahan*, 25 Pa. Super. Ct. 454.

Texas. — *San Antonio, etc., R. Co. v. Kiersey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1045; *Bell v. Missouri, etc., R. Co.*, 36 Tex. Civ. App. 569; *Gulf, etc., R. Co. v. Provo*, (Tex. Civ. App. 1904) 84 S. W. Rep. 275; *Gulf, etc., R. Co. v. Harbison*, (Tex. Civ. App. 1905) 88 S. W. Rep. 452.

West Virginia. — *Uhl v. Ohio River R. Co.*, 56 W. Va. 494, 107 Am. St. Rep. 860.

See further the titles BRIDGES, 933. 6; RAILROADS, 715. 9.

Liability Dependent on Negligence. — *Lampley v. Atlantic Coast Line R. Co.*, 71 S. Car. 156.

376. 2. Contract Rights. — *Stadler v. Missouri River Power Co.*, 133 Fed. Rep. 314; *Phillips v. Watuppa Reservoir Co.*, 184 Mass. 404; *Johnson v. Sherman County Irrigation, etc., Co.*, (Neb. 1904) 98 N. W. Rep. 1096; *Schwarzenbach v. Electric Water Power Co.*, 101 N. Y. App. Div. 345; *Roe v. Redner*, (Supm. Ct. Tr. T.) 46 Misc. (N. Y.) 25; *Harris v. Ft. Miller Pulp, etc., Co.*, 103 N. Y. App. Div. 597; *Reid v. Courtenay Mfg. Co.*, 68 S. Car. 466.

Dedication of Right of Flowage to Municipality. — See *Boye v. Albert Lea*, 93 Minn. 121.

3. Prescriptive Rights. — *Hall v. State*, 92 N. Y. App. Div. 96; *Erwin v. Erie R. Co.*, 98 N. Y. App. Div. 402.

5. *Foster v. Sebago Imp. Co.*, 100 Me. 196.

7. *Foster v. Sebago Imp. Co.*, 109 Me. 196;

376. The Extent of the Right. — See note 9.

377. *c.* REMEDIES FOR DETENTION AND OBSTRUCTION. — See notes 5, 6.

9. Increasing Flow. — See note 8.

378. See notes 1, 8.

10. Pollution of Watercourses — *a.* IN GENERAL. — See note 9.

379. See note 1.

380. See notes 5, 8.

381. See note 3.

382. *b.* CONTRIBUTING CAUSES OF POLLUTION. — See note 5.

c. POLLUTION FROM REASONABLE USE. — See note 6.

383. See notes 2, 3, 5.

d. PRESCRIPTIVE RIGHT. — See notes 7, 10.

The Extent of the Prescriptive Right. — See note 12.

384. Loss of Right. — See note 3.

376. **9.** Extent of Right. — *Carrington v. Brooks*, 121 Ga. 250.

377. **5.** Action for Damages. — *Carley v. Jennings*, 131 Mich. 385; *Gordon v. International Paper Co.*, 72 N. H. 346; *Bachert v. Lehigh Coal, etc., Co.*, 208 Pa. St. 362; *Ballentine v. Hammond*, 68 S. Car. 153. And see the titles DAMS, **720.** *1 et seq.*; RIPARIAN RIGHTS, **980.** **3.**

Measure of Damages. — *Southern R. Co. v. Morris*, 119 Ga. 234; *Sanitary Dist. v. Herbert*, 108 Ill. App. 532; *Sanitary Dist. v. Pearce*, 110 Ill. App. 592; *Atchison, etc., R. Co. v. Jones*, 110 Ill. App. 626; *Gartner v. Chicago, etc., R. Co.*, (Neb. 1904) 98 N. W. Rep. 1052; *Jones v. Kramer*, 133 N. Car. 446; *Chaffin v. Fries Mfg., etc., Co.*, 135 N. Car. 95; *Lynch v. Troxell*, 207 Pa. St. 162; *Atlanta, etc., R. Co. v. Higdon*, 111 Tenn. 121; *San Antonio, etc., R. Co. v. Kiersey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1045; *Gulf, etc., R. Co. v. Harbison*, (Tex. Civ. App. 1905) 88 S. W. Rep. 452; *Pickens v. Coal River Boom, etc., Co.*, (W. Va. 1905) 50 S. E. Rep. 872.

6. Equitable Relief. — *American Plate Glass Co. v. Nicoson*, 34 Ind. App. 643; *Fahnestock v. Feldner*, 98 Md. 335; *Scheurich v. Southwest Missouri Light Co.*, 109 Mo. App. 406; *Schwarzenbach v. Electric Water Power Co.*, 101 N. Y. App. Div. 345; *Krause v. Oregon Iron, etc., Co.*, 45 Oregon 378. Compare *Boynton v. Hall*, 100 Me. 131.

Several Riparian Owners May Join in Suit. — *Baumgartner v. Bradt*, 207 Ill. 345.

8. Increasing Flow. — *Craft v. Norfolk, etc., R. Co.*, 136 N. Car. 49; *Matlock v. Callahan*, 25 Pa. Super. Ct. 454. And see the title RIPARIAN RIGHTS, **980.** **7.**

378. **1.** *Osborn v. Norwalk*, 77 Conn. 663; *Bryant v. Frank H. Lamb Timber Co.*, 37 Wash. 168.

8. *Baldwin v. Ohio Tp.*, 70 Kan. 102.

9. Pollution of Watercourse. — *McCarthy v. Gaston Ridge Mill, etc., Co.*, 144 Cal. 542; *Dudley v. New Britain*, 77 Conn. 322; *Kewanee v. Otley*, 204 Ill. 402; *Muncie Pulp Co. v. Koontz*, 33 Ind. App. 532; *Bowman v. Humphrey*, 124 Iowa 744; *Fahnestock v. Feldner*, 98 Md. 335.

Immaterial that Discharge of Polluting Matter Is Not Directly into Watercourse. — *U. S. Board, etc., Co. v. Moore*, 35 Ind. App. 684.

379. **1.** Mills and Factories. — *Midlothian*

County Council v. Pumpherson Oil Co., Sc. Ct. of Sess. 6 F. 387; *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21; *Muncie Pulp Co. v. Martin*, 164 Ind. 30; *U. S. Board, etc., Co. v. Moore*, 35 Ind. App. 684.

Discharge from Creamery. — *Perry v. Howe Co-operative Creamery Co.*, 125 Iowa 415; *Bowman v. Humphrey*, 124 Iowa 744.

380. **5.** Mines. — *McCarthy v. Gaston Mill, etc., Co.*, 144 Cal. 542; *Yuba County v. Kate Hayes Min. Co.*, 141 Cal. 360; *Watson v. Colusa-Parrot Min., etc., Co.*, 31 Mont. 513; *Chessman v. Hale*, 31 Mont. 577.

8. *Kewanee v. Otley*, 204 Ill. 402.

381. **3.** *Yuba County v. Kate Hayes Min. Co.*, 141 Cal. 360; *Kewanee v. Otley*, 204 Ill. 402; *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21; *Bowman v. Humphrey*, 124 Iowa 744; *Neely v. Detroit Sugar Co.*, 138 Mich. 469; *Chessman v. Hale*, 31 Mont. 577.

382. **5.** *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21.

Damages. — Where several persons acting independently contribute towards the pollution of a watercourse, each is liable to lower riparian owners for whatever damage is caused by his own wrongful acts, and for none other. *Bowman v. Humphrey*, 124 Iowa 744; *Watson v. Colusa-Parrot Min., etc., Co.*, 31 Mont. 513.

6. Pollution from Reasonable Use. — *Muncie Pulp Co. v. Koontz*, 33 Ind. App. 532; *Fahnestock v. Feldner*, 98 Md. 335, the latter case holding that the discharge of house drainage, as distinguished from waterclosets, etc., was not unreasonable.

383. **2.** *Perry v. Howe Co-operative Creamery Co.*, 125 Iowa 415.

3. *Muncie Pulp Co. v. Koontz*, 33 Ind. App. 532.

5. Question for Jury. — *Muncie Pulp Co. v. Koontz*, 33 Ind. App. 532.

7. Prescriptive Right. — *Cleveland v. Standard Bag, etc., Co.*, 72 Ohio St. 324.

10. *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21.

12. Extent of Right. — *Chessman v. Hale*, 31 Mont. 577.

384. **3.** A Prescriptive Right to Pollute a Watercourse May Be Taken under the Power of Eminent Domain, when the waters of the watercourse are taken for a municipal water supply. *Sprague v. Dorr*, 185 Mass. 10.

384. *g. REMEDIES FOR POLLUTION.* — See note 6.

385. See note 1.

386. *Indictment.* — See note 1.

Who May Sue for Pollution. — See note 5.

11. Levees and Embankments. — See note 6.

387. See note 1.

388. **13. Appropriation of Waters** — *a. IN GENERAL.* — See note 6.

389. *Doctrine in Western States.* — See note 4.

390. See note 1.

b. PURPOSES OF APPROPRIATION. — See note 3.

391. See notes 1, 3, 4.

c. WHO MAY APPROPRIATE. — See notes 7, 8.

d. WHAT WATERS MAY BE APPROPRIATED. — See note 10.

392. See notes 1, 2, 4.

e. WHAT CONSTITUTES APPROPRIATION. — See notes 5, 6.

384. 6. Action for Damages. — *West Arlington Imp. Co. v. Mt. Hope Retreat*, 97 Md. 191; *Schumacher v. Shawhan*, 93 Mo. App. 573; *Todd v. York*, (Neb. 1902) 92 N. W. Rep. 1040; *Sammons v. Gloversville*, 81 N. Y. App. Div. 332. See also the title *RIPARIAN RIGHTS*, **980. 3.**

Measure of Damages. — *Dudley v. New Britain*, 77 Conn. 322; *Perry v. Howe Co-operative Creamery Co.*, 125 Iowa 415; *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21; *Muncie Pulp Co. v. Martin*, 164 Ind. 30; *Watson v. Colusa-Parrot Min., etc., Co.*, 31 Mont. 513.

Public Benefit from Defendant's Business Not to Be Considered in Estimating Damages. — *Bowman v. Humphrey*, 124 Iowa 744.

385. 1. Equitable Relief. — *Yuba County v. Kate Hayes Min. Co.*, 141 Cal. 360; *Kewanee v. Otley*, 204 Ill. 402; *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21; *Lawrie v. Silsby*, 76 Vt. 240, 104 Am. St. Rep. 927.

Laches. — *McKee v. Grand Rapids*, 137 Mich. 200.

Mandatory Injunction. — See *McCarthy v. Gaston Ridge Mill, etc., Co.*, 144 Cal. 542.

Extent of Pollution Requisite to Authorize Injunctive Relief. — See *Muncie Pulp Co. v. Koontz*, 33 Ind. App. 532.

386. 1. See *Sprague v. Dorr*, 185 Mass. 10 (municipal regulations for protection of water supply).

5. A Non-riparian Owner Who Had Acquired by Grant the Right to Take Water from a stream for domestic uses has been held to be entitled to sue to enjoin an upper riparian owner from polluting the waters of the stream. *Lawrie v. Silsby*, 76 Vt. 240, 104 Am. St. Rep. 927, *disapproving* *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300; *Ormerod v. Todmorden Joint Stock Mill Co.*, 11 Q. B. D. 155. See also *Yuba County v. Kate Hayes Min. Co.*, 141 Cal. 360.

6. Levees and Embankments. — *American Plate Glass Co. v. Nicoson*, 34 Ind. App. 643.

387. 1. *Keck v. Venghause*, 127 Iowa 529; *Illinois Cent. R. Co. v. Bom*, (Ky. 1903) 76 S. W. Rep. 352; *Welty v. Vulgamore*, 24 Ohio Cir. Ct. 572 (holding, however, that there is no liability for injuries from extraordinary floods not reasonably to be anticipated).

388. 6. Common-law Rule. — *Clark v. Allaman*, (Kan. 1905) 80 Pac. Rep. 571.

389. 4. Doctrine in Western States. — *Miller v. Rickey*, 127 Fed. Rep. 573; *Hoge v. Eaton*, 135 Fed. Rep. 411; *Mt. Carmel Fruit Co. v. Webster*, 140 Cal. 183; *Boise City Irrigation, etc., Co. v. Stewart*, 10 Idaho 38; *Miles v. Butte Electric, etc., Co.*, 32 Mont. 56; *Bullerdick v. Hermsever*, 32 Mont. 541; *Orient Min. Co. v. Freckleton*, 27 Utah 125; *Nash v. Clark*, 27 Utah 158.

390. 1. The Act of Congress Was Merely a Recognition of the Local Custom and Laws and did not operate as the establishment of a new right. *Mohn v. Lamar Canal Co.*, 128 Fed. Rep. 776.

3. Irrigation. — *Sayre v. Johnson*, (Mont. 1905) 81 Pac. Rep. 389.

391. 1. Mills. — *Telluride v. Blair*, 33 Colo. 353.

3. Necessity that Purpose Be Beneficial. — *Miller v. Rickey*, 127 Fed. Rep. 573; *Johnston v. Little Horse Creek Irrigating Co.*, 13 Wyo. 208.

4. Rodgers v. Pitt, 129 Fed. Rep. 932.

7. Hays v. Buzard, 31 Mont. 74.

Lessee May Appropriate for Use on Leased Lands. — *Sayre v. Johnson*, (Mont. 1905) 81 Pac. Rep. 389.

8. Gould v. Maricopa Canal Co., (Ariz. 1904) 76 Pac. Rep. 598.

10. Waters of Head Springs. — *Gould v. Maricopa Canal Co.*, (Ariz. 1904) 76 Pac. Rep. 598.

Waters of Underground Watercourse May Be Appropriated. — *Howard v. Perrin*, (Ariz. 1904) 76 Pac. Rep. 460.

Waters of Streams Arising in Another State May Be Appropriated. — *Hoge v. Eaton*, 135 Fed. Rep. 411.

392. 1. Compare *California Pastoral, etc., Co. v. Enterprise Canal, etc., Co.*, 127 Fed. Rep. 741; *Sander v. Wilson*, 34 Wash. 659.

2. Where the Appropriator Limits Himself to Certain Specified Dates, subsequent appropriators may acquire a vested right to the water to be used at times not embraced in the claim of the first appropriator. *Rodgers v. Pitt*, 129 Fed. Rep. 932.

4. Percolating Waters. — *Howard v. Perrin*, (Ariz. 1904) 76 Pac. Rep. 460.

Underground Watercourses. — *Whitmore v. Utah Fuel Co.*, 26 Utah 488.

5. Application to Beneficial Use. — *Rodgers v. Pitt*, 129 Fed. Rep. 932; *Gould v. Maricopa*

393. Means of Appropriation. — See notes 5, 6, 8, 9, 10, 11, 12, 13, 14.

394. See note 1.

f. EXTENT OF RIGHTS. — See notes 7, 8, 9.

395. See notes 1, 2, 3.

396. See note 2.

g. PRIORITIES. — See notes 3, 4, 5, 6.

397. See note 5.

h. LOSS AND ABANDONMENT OF RIGHTS. — See note 11.

398. See notes 1, 6.

i. TRANSFER OF RIGHTS. — See note 8.

399. See note 1.

Canal Co., (Ariz. 1904) 76 Pac. Rep. 598; Miles *v.* Butte Electric, etc., Co., 32 Mont. 56; Beers *v.* Sharpe, 44 Oregon 386.

392. 6. Necessity of Actual Diversion. — Rodgers *v.* Pitt, 129 Fed. Rep. 932; Beers *v.* Sharpe, 44 Oregon 386.

393. 5. Wasteful System Used — Court May Decree Excess to Subsequent Appropriators. — See Rodgers *v.* Pitt, 129 Fed. Rep. 932.

6. Miller *v.* Rickey, 127 Fed. Rep. 573; Rose *v.* Mesmer, 142 Cal. 322.

8. See Boglino *v.* Giorgetta, (Colo. App. 1904) 78 Pac. Rep. 612, holding that the appropriator does not acquire an easement over the public domain for the purpose of enabling him to turn water from his ditch when running too full; Whitmore *v.* Pleasant Valley Coal Co., 27 Utah 284.

9. Ennor *v.* Raine, 27 Nev. 178.

10. Campbell *v.* Flannery, 32 Mont. 119.

11. Constructing Ditch over Land of Third Person. — Boglino *v.* Giorgetta, (Colo. App. 1904) 78 Pac. Rep. 612; Boldridge *v.* Leon Lake Ditch, etc., Co., (Colo. App. 1905) 80 Pac. Rep. 477.

12. Nash *v.* Clark, 27 Utah 158.

13. Blankenship *v.* Whaley, 142 Cal. 566; Maple Orchard Grove, etc., Co. *v.* Marshall, 27 Utah 215.

14. Centerville, etc., Irrigation Ditch Co. *v.* Sanger Lumber Co., 140 Cal. 385; State Agricultural College *v.* Hutchinson, (Oregon 1905) 78 Pac. Rep. 1028.

394. 1. Gould *v.* Maricopa Canal Co., (Ariz. 1904) 76 Pac. Rep. 598.

7. Extent of Rights. — Rodgers *v.* Pitt, 129 Fed. Rep. 932; Craig *v.* Crafton Water Co., 141 Cal. 178; Gutierrez *v.* Wege, 145 Cal. 730; Telluride *v.* Blair, 33 Colo. 353; Sayre *v.* Johnson, (Mont. 1905) 81 Pac. Rep. 389; Glaze *v.* Frost, 44 Oregon 29.

Extent May Be Limited as to Both Time and Quantity. — Ft. Lyon Canal Co. *v.* Chew, 33 Colo. 392.

8. Changing Use. — Hays *v.* Buzard, 31 Mont. 74; Farmers', etc., Irrigation Co. *v.* Gothenburg Water Power, etc., Co., (Neb. 1905) 102 N. W. Rep. 487; Johnston *v.* Little Horse Creek Irrigating Co., 13 Wyo. 208.

9. Change in Means and Place of Diversion. — Miller *v.* Rickey, 127 Fed. Rep. 573; Bolter *v.* Garrett, 44 Oregon 304; Johnston *v.* Little Horse Creek Irrigating Co., 13 Wyo. 208.

395. 1. Change in Place of Use. — Platte Valley Irrigation Co. *v.* Central Trust Co., 32 Colo. 102; Hard *v.* Boise City Irrigation, etc., Co., 9 Idaho 589; Farmers', etc., Irrigation Co. *v.*

Gothenburg Water Power, etc., Co., (Neb. 1905) 102 N. W. Rep. 487.

2. Change Must Not Be Prejudicial to Others. — Southern Californian Invest. Co. *v.* Wilshire, 144 Cal. 68; Ft. Lyon Canal Co. *v.* Chew, 33 Colo. 392; Bolter *v.* Garrett, 44 Oregon 304.

3. Anderson Land, etc., Co. *v.* McConnell, 133 Fed. Rep. 581; Ogilvy Irrigating, etc., Co. *v.* Insinger, 19 Colo. App. 380; Cole *v.* Richards Irrigation Co., 27 Utah 205.

396. 2. Rose *v.* Mesmer, 142 Cal. 322; Ft. Lyon Canal Co. *v.* Chew, 33 Colo. 392; Norman *v.* Corbley, 32 Mont. 195; Bolter *v.* Garrett, 44 Oregon 304. See also Rodgers *v.* Pitt, 129 Fed. Rep. 932.

3. Priorities of Appropriation Rights. — Farmers' High Line Canal, etc., Co. *v.* White, 32 Colo. 114; Moe *v.* Harger, 10 Idaho 302.

4. Norman *v.* Corbley, 32 Mont. 195.

5. Rodgers *v.* Pitt, 129 Fed. Rep. 932.

6. Beers *v.* Sharpe, 44 Oregon 386.

397. 5. Sander *v.* Wilson, 34 Wash. 659.

11. Nonuser Without Intention to Abandon. — Gould *v.* Maricopa Canal Co., (Ariz. 1904) 76 Pac. Rep. 598; Norman *v.* Corbley, 32 Mont. 195; Farmers' Irrigation Dist. *v.* Frank, (Neb. 1904) 100 N. W. Rep. 286; Promontory Ranch Co. *v.* Argile, 28 Utah 398.

398. 1. Abandonment. — Brockman *v.* Grand Canal Co., (Ariz. 1904) 76 Pac. Rep. 602; Griseza *v.* Terwilliger, 144 Cal. 456; Rutherford *v.* Lucerne Canal, etc., Co., 12 Wyo. 299.

The Burden of Proving an Abandonment. — Platte Valley Irrigation Co. *v.* Central Trust Co., 32 Colo. 102.

No Estoppel by Failure to Object to Construction of Ditch. — Bolter *v.* Garrett, 44 Oregon 304.

6. Rose *v.* Mesmer, 142 Cal. 322; Griseza *v.* Terwilliger, 144 Cal. 456; Talbott *v.* Butte City Water Co., 29 Mont. 17; Bullerick *v.* Hermismeyer, 32 Mont. 541; Harrington *v.* Demaris, (Oregon 1904) 77 Pac. Rep. 603.

8. Transfer of Water Rights. — Mt. Carmel Fruit Co. *v.* Webster, 140 Cal. 183; Gutheil Park Invest. Co. *v.* Montclair, 32 Colo. 420; Bessemer Irrigating Ditch Co. *v.* Woolley, 32 Colo. 437, 105 Am. St. Rep. 91; Hard *v.* Boise City Irrigation, etc., Co., 9 Idaho 589; State *v.* Salt Lake City, 29 Utah 361; Johnston *v.* Little Horse Creek Irrigating Co., 13 Wyo. 208.

Specific Performance of Contract for Sale. — See Bullerick *v.* Hermismeyer, 32 Mont. 541.

399. 1. Magill *v.* Hyatt, (Colo. App. 1905) 80 Pac. Rep. 472.

A Loan of Use of Water is not valid as against a junior appropriator as to whom the resulting

399. j. PROTECTION OF RIGHTS. — See notes 2, 3, 4, 5, 6.

change in the place of use is injurious. *Ft. Lyon Canal Co. v. Chew*, 33 Colo. 392.

399. 2. Protection of Water Rights. — *Moe v. Harger*, 10 Idaho 194.

Withdrawal of Water Within Limits of Another State. — *Miller v. Rickey*, 127 Fed. Rep. 573; *Hoge v. Eaton*, 135 Fed. Rep. 411.

Statutory Proceedings for Determination of Water Rights. — *Baer Bros. Land, etc., Co. v. Wilson*, 32 Colo. 500; *Boise City Irrigation, etc., Co. v. Stewart*, 10 Idaho 38, 62.

3. Recovery of Damages. — *Whitmore v. Utah Fuel Co.*, 26 Utah 488.

4. Injunction. — *Miller v. Rickey*, 127 Fed. Rep. 573; *Rodgers v. Pitt*, 129 Fed. Rep. 932; *Anderson Land, etc., Co. v. McConnell*, 133

Fed. Rep. 581; *Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 578; *Moe v. Harger*, 10 Idaho 194; *Cole v. Richards Irrigation Co.*, 27 Utah 205.

5. Quieting Title. — *Griseza v. Terwilliger*, 144 Cal. 456; *Farmers' High Line Canal, etc., Co. v. White*, 32 Colo. 114; *Needle Rock Ditch Co. v. Crawford-Clipper Ditch Co.*, 32 Colo. 209; *Gutheil Park Invest. Co. v. Montclair*, 32 Colo. 420; *Bessemer Irrigating Ditch Co. v. Woolley*, 32 Colo. 437, 105 Am. St. Rep. 91; *Bear Lake County v. Budge*, 9 Idaho 703; *Elmer v. McCune*, 29 Utah 320.

6. For Evidence Held Not to Be Sufficient to Show that Diversion Was Not Injurious to the Plaintiff, see *Moe v. Harger*, 10 Idaho 194.

WATERWORKS AND WATER COMPANIES.

By E. C. ELLSBREE.

405. II. GRANT OF FRANCHISE — 3. Grant to Municipal Corporations — b. LEGISLATIVE AUTHORITY — (2) Implied Authority. — See note 6.

406. The Power to Contract for Water Supply. — See note 3.

4. Grant of Exclusive Franchise — b. BY INFERIOR LEGISLATIVE BODIES. — See note 6.

407. 5. Nature of Right — a. CONSTITUTIONAL GUARANTY — (1) Acceptance and Performance. — See note 4.

(2) *Limited Franchise Powers.* — See note 6.

409. 6. Eminent Domain — a. NATURE AND EXTENT OF POWER — Extent of Power. — See note 3.

412. III. CONSTRUCTION OF LEGISLATIVE GRANTS — 1. In General. — See note 4.

413. 2. Exclusive Franchise — Strict Construction. — See note 2.

Grant Protected by Federal Constitution — Impairing Obligation of Contracts. — See note 3.

414. 3. Power of Municipality After Grant of Franchise — a. IN GENERAL. — See note 1.

b. EXCLUSIVE FRANCHISE — CITY CANNOT COMPETE. — See note 2.

405. 6. Power to Contract Is Not Power to Operate. — *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201.

A Municipality Has No Power to Become a Part Stockholder in a waterworks or other corporation or to borrow money to pay for such stock, unless express authority to do so is given by statute. *Voss v. Waterloo Water Co.*, 163 Ind. 69, 106 Am. St. Rep. 201.

406. 3. Livermore v. Millville, 71 N. J. L. 503.

6. Power of Municipality. — *Farmers' L. & T. Co. v. Sioux Falls*, 131 Fed. Rep. 890.

407. 4. City Cannot Annul Ordinance Contract When Acted Upon. — *Armour Packing Co. v. Metropolitan Water Co.*, (C. C. A.) 130 Fed. Rep. 851.

6. Further Supply May Be Contracted For. — *Jersey City v. Kearny*, (N. J. 1905) 59 Atl. Rep. 1056.

409. 3. A Water Company May Condemn Property Already Held for a Public Use, when absolutely necessary to the exercise of its franchise. *Independent Natural Gas Co. v. Butler Water Co.*, 210 Pa. St. 177; *Marin County Water Co. v. Marin County*, 145 Cal. 586.

412. 4. Geographical Limits. — *Smith v. Stoughton*, 185 Mass. 329.

413. 2. Exclusive Privilege Never Implied. — *Farmers' L. & T. Co. v. Sioux Falls*, 131 Fed. Rep. 890.

3. Impairment of Obligation of Contract. — *Columbia Ave. Sav. Fund, etc., Co. v. Dawson*, 130 Fed. Rep. 152; *Mercantile Trust, etc., Co. v. Columbus Waterworks Co.*, 130 Fed. Rep. 180.

414. 1. Farmers' L. & T. Co. v. Sioux Falls, 131 Fed. Rep. 890.

2. Columbia Ave. Sav. Fund, etc., Co. v. Dawson, 130 Fed. Rep. 152; *Mercantile Trust, etc.,*

414. After Termination of Franchise.—See note 4.

c. RIGHT TO ACQUIRE PROPERTY OF WATER COMPANY NOT MANDATORY. — See note 5.

416. IV. REGULATION AND CONTROL — 1. By State — *c.* POLICE POWER. — See note 4.

419. V. RULES AND REGULATIONS — 1. Power to Make Reasonable Regulations. — See note 1.

2. Requiring Compliance with Regulations. — See note 4.

423. VI. WATER RATES — 2. State or Municipal Regulation. — See note 2.

424. 3. Judicial Functions — This Supervisory Power. — See note 5.

425. 4. Test of Reasonableness of Rates — *b.* VALUE OF PLANT. — See note 4.

c. EARNING CAPACITY. — See note 6.

426. VII. DUTIES AND LIABILITIES — 1. Duty to Furnish Water — *a.* IN GENERAL. — See note 3.

Mandamus. — See note 5.

b. DISCRIMINATION IN RATES AND SERVICE — (1) *Unjust Discrimination.* — See note 6.

427. (2) *Reasonable Discrimination.* — See note 4.

c. QUALITY OF WATER FURNISHED — (1) *General Rule — Of Reasonable Purity.* — See note 6.

(2) *Contract Specifying Quality.* — See note 8.

428. See note 2.

429. 2. Liability for Negligence — *b.* ESCAPE OF WATER. — See note 3.

Co. v. Columbus Waterworks Co., 130 Fed. Rep. 180.

414. 4. After Termination of Franchise Period. — Farmers' L. & T. Co. v. Sioux Falls, 131 Fed. Rep. 890.

5. Competition by City with Private Company. — Helena Water Works Co. v. Helena, 195 U. S. 383, affirming 122 Fed. Rep. 1, stated in the original note.

416. 4. Police Power. — An ordinance exacting a license fee from water companies for every fire plug in use has been held not to be a legitimate exercise of the police power. Cambridge v. Cambridge Water Co., 99 Md. 501.

419. 1. Reasonable Regulations. — Louisville Water Co. v. Wiemer, (C. C. A.) 130 Fed. Rep. 257, holding, however, that a water company has no power to control a customer's use of water after delivery.

4. May Cut Off Water Supply for Noncompliance with Rules. — South-West Suburban Water Co. v. Guardians of Poor, (1904) 2 K. B. 174.

423. 2. Regulation of Water Rates. — Wilson v. Tallahassee Waterworks Co., (Fla. 1904) 36 So. Rep. 63.

Duty of Municipality. — Power conferred upon a municipality to establish maximum water rates imposes the duty to ascertain what rates are, in the given case, just and reasonable, and to fix such rates as the maximum. Chicago v. Rogers Park Water Co., 214 Ill. 212.

424. 5. Boise City Irrigation, etc., Co. v. Clark, (C. C. A.) 131 Fed. Rep. 415.

425. 4. Circumstances to Be Considered in Fixing Rates. — See Brunswick, etc., Water Dist. v. Maine Water Co., 99 Me. 371, holding that the amount of money actually and wisely expended in producing the plant is a primary consideration and that franchise values are not to be disregarded, but the value as a going con-

cern is to be considered only as involved in structural value; Souther v. Gloucester, 187 Mass. 552.

6. Rights of Public. — Boise City Irrigation, etc., Co. v. Clark, (C. C. A.) 131 Fed. Rep. 415; Brunswick, etc., Water Dist. v. Maine Water Co., 99 Me. 371.

426. 3. Where Contract Absolute, Vis Major No Excuse for Nonperformance. — Whitehouse v. Staten Island Water Supply Co., 101 N. Y. App. Div. 112.

Elevated Location of Plaintiff's House No Excuse for Nonperformance. — Whitehouse v. Staten Island Water Supply Co., 101 N. Y. App. Div. 112.

5. Mandatory Injunction May Be Granted. — Wiemer v. Louisville Water Co., 130 Fed. Rep. 251.

6. Must Not Discriminate Unjustly. — Wiemer v. Louisville Water Co., 130 Fed. Rep. 251.

427. 4. Reasonable Discrimination. — Northampton v. Ellen, (1904) 1 K. B. 299.

The Question of Consumption. — Wilson v. Tallahassee Waterworks Co., (Fla. 1904) 36 So. Rep. 63.

6. The Term "Pure Water." — Meridian Waterworks Co. v. Meridian, 85 Miss. 515, holding that acceptance of samples did not preclude a city from complaining where the water subsequently furnished was impure.

8. Acceptance Cannot Be Inferred. — See Illinois Trust, etc., Bank v. Pontiac, 112 Ill. App. 545, affirmed 212 Ill. 326.

428. 2. Reasonable Notice Must Be Given to the Water Company. — Illinois Trust, etc., Bank v. Pontiac, 112 Ill. App. 545, affirmed 212 Ill. 326.

429. 3. Aschoff v. Evansville, 34 Ind. App. 25.

No Liability When Not Guilty of Negligence. --

430. 3. Liability for Fire Loss from Inadequate Supply — a. AS AGAINST MUNICIPALITY — In General. — See note 1.

No Privity of Interest in Property Owner. — See note 2.

b. AS AGAINST WATER COMPANY — (1) Rule Stated. — See note 3.

431. A Contrary View. — See note 4.

432. (4) Special Contract with Consumer. — See note 3.

434. VIII. LIABILITY OF CONSUMERS FOR WATER FURNISHED — 1. Where There Is Express Contract — b. LIABILITY OF MUNICIPALITY — (5) Charter Limitation upon Indebtedness. — See note 1.

435. 3. Exemption from Water Rates. — See notes 2, 3.

440. WAYBILL. — See note 1.

445. WEARING APPAREL. — See note 2.

448. WEEKLY — See note 1.

McCord Rubber Co. v. St. Joseph Water Co., 181 Mo. 678.

430. 1. Municipality Not Liable. — Metropolitan Trust Co. v. Topeka Water Co., 132 Fed. Rep. 702; Allen, etc., Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 104 Am. St. Rep. 525.

2. Allen, etc., Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 104 Am. St. Rep. 525, overruling Planters' Oil Mill v. Monroe Waterworks, etc., Co., 52 La. Ann. 1243, stated in the original note.

3. General Rule — No Liability. — Metropolitan Trust Co. v. Topeka Water Co., 132 Fed. Rep. 702; Blunk v. Dennison Water Supply Co., 71 Ohio St. 250.

No Recovery Where Contract Stipulates for Non-liability Even Though Company Negligent. — Buchanan, etc., Lumber Co. v. East Jersey Coast Water Co., 71 N. J. L. 350.

431. 4. Contrary View — Kentucky. — Lexington Hydraulic, etc., Co. v. Oots, (Ky. 1905) 84 S. W. Rep. 774.

Kentucky Rule Followed in North Carolina. — Jones v. Durham Water Co., 135 N. Car. 553.

No Liability When Failure Result of Inevitable Accident. — Springfield F. & M. Ins. Co. v. Graves County Water, etc., Co., (Ky. 1905) 85 S. W. Rep. 205.

432. 3. The Measure of Damages is the value of the property destroyed, and not merely the value of the water which should have been fur-

nished under the contract. Harris v. Columbia Water, etc., Co., 114 Tenn. 328.

434. 1. Contract Does Not Create "Indebtedness" for Full Amount Due — Columbia Ave. Sav. Fund, etc., Co. v. Dawson, 130 Fed. Rep. 152. See also Voss v. Waterloo Water Co., 163 Ind. 69, 106 Am. St. Rep. 201. And see the title MUNICIPAL CORPORATIONS, 1171. 7 et seq.

435. 2. No Duty to Furnish City Free of Charge. — See Water Com'rs v. Board of Education, 137 Mich. 245.

3. Constitutionality of Act Forbidding Charge for Water. — An ordinance requiring a water company to furnish water without charge to all charitable, religious, and educational institutions is a taking of the company's property for public and private use, and cannot be sustained as an exercise of the police power. Chicago v. Rogers Park Water Co., 214 Ill. 212.

440. 1. Sellers v. Savannah, etc., R Co., 123 Ga. 389, citing 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 440.

445. 2. Jewelry — A pearl chain has been held to be covered by a declaration of *wearing apparel* under a customs act. U. S. v. One Pearl Chain, (C. C. A.) 139 Fed. Rep. 513.

Wearing Apparel Made of Lace — Revenue Laws. — See Goldenberg v. U. S. (C. C. A.) 130 Fed. Rep. 108.

448. 1. A weekly paper is a paper published once in each week. Com. v. Brown, 210 Pa. St. 33.

WEIGHTS AND MEASURES.

455. III. POWER OF REGULATION — 3. Particular Commodities — c. SALE OF COAL BY WEIGHT. — See note 2.

461. VII. FALSE WEIGHTS AND MEASURES — 2. Keeping False Weights and Measures — What Is False Weighing Machine. — See note 6.

462. 3. Using False Weights and Measures. — See note 1.

455. 2. Sale of Coal by Weight. — See Beardsley v. Pike, 90 L. T. N. S. 652; Crick v. Nichols, (1905) 1 K. B. 501; Houghton v. Andrews, (1905) 1 K. B. 503, note.

461. 6. What Is False Weighing Machine. — Placing a paper bag under the scoop of a beam weighing machine, where it remains while

goods are being weighed, is "using" for trade a weighing machine which is "false and unjust," contrary to the English Weights and Measures Act of 1878. London County Council v. Payne, (1905) 1 K. B. 410. Compare Stone v. Tyler, (1905) 1 K. B. 290.

462. 1. Using False Weights and Measures

464. VIII. WEIGHTS AND MEASURES IN CONTRACTS — 3. Usages and Customs. — See note 5.

466. WEST, WESTERLY, ETC. — See note 2.

— Intent. — It has been held to be no defense in a prosecution for using incorrect scales that they got out of balance because the wrong pans were put on them after cleaning. *New York v. Biffle*, (Supm. Ct. App. T.) 91 N. Y. Supp. 737.

464. 5. General Usage. — See *King v. Spencer*, 91 L. T. N. S. 470.

As to usage to explain contract provisions in regard to weights and measures, see the title USAGES AND CUSTOMS, **428.** 6, 7; **431.** 1.

466. 2. Westerly Construed to Mean Due West. — *State v. Huff*, 105 Mo. App. 354.

WHARVES AND WHARFINGERS.

By LEO GOODMAN.

478. IV. ERECTION OF WHARVES — RIGHT TO ERECT — 2. Erection by Government — *c.* MUNICIPALITY — (1) *In General.* — See note 3.

490. (6) *Duties and Liabilities as Wharf Owner* — Duty to Repair. — See note 7.

491. V. GOVERNMENTAL CONTROL OVER ERECTION AND MAINTENANCE OF WHARVES — 1. State and Municipal Control. — See note 4.

507. VIII. LIABILITIES, OBLIGATIONS, AND DUTIES OF WHARFINGERS — 2. Liability for Safety of Wharf or Dock — *a.* IN GENERAL. — See note 1.

508. *c.* DEGREE OF CARE. — See note 3.

e. FAILURE TO EXERCISE REASONABLE CARE. — See note 6.

509. *g.* CONCEALED OBSTRUCTIONS. — See notes 3, 6, 9.

512. WHEN. — See note 3.

514. WHENEVER. — See note 1.

WHERE. — See note 2.

515. WHEREUPON. — See note 2.

WHILE. — See note 5.

518. WHOLESALE. — See note 5.

478. 3. Power of Municipalities to Erect. — See *Jeffersonville v. Gray*, 165 Ind. 26, citing 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 478.

490. 7. Damages Caused by Neglect to Repair Wharf. — *Jeffersonville v. Gray*, 165 Ind. 26, citing 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 490.

491. 4. State and Municipal Control. — See *Vallejo Ferry Co. v. Vallejo*, 146 Cal. 392; *New Orleans v. New Orleans, etc., R. Co.*, 112 La. 1011; *Morgan City v. Dalton*, 112 La. 9.

507. 1. General Liability. — *Barber v. Lockwood*, 134 Fed. Rep. 985.

508. 3. Reasonable Care Required. — *Butler v. M'Alpine*, (1904) 2 Ir. R. 445.

6. Failure to Exercise Reasonable Care. — *Barber v. Lockwood*, 134 Fed. Rep. 985.

509. 3. Projecting Pilings. — *Barber v. Lockwood*, 134 Fed. Rep. 985.

6. Rocks. — *Butler v. M'Alpine*, (1904) 2 Ir. R. 445; *Smith v. Gould*, 136 Fed. Rep. 719.

9. Inequalities in Bottom. — See *Parker v. Plomesgate Rural Council*, 9 Com. Cas. (Eng.) 107.

512. 3. When. — *Swink v. Anthony*, 107 Mo. App. 601.

514. 1. Whenever means "at whatever time," and is not the equivalent of "in any case." *Funkhouser v. Spahr*, 102 Va. 310.

2. Where. — *Swink v. Anthony*, 107 Mo. App. 601.

515. 2. Whereupon. — *New Iberia v. Moss Hotel Co.*, 112 La. 525.

Whereupon and Thereupon Distinguished. — *Orlando v. Orlando Water, etc., Co.*, 50 Fla. 215.

5. While. — *Stafford v. St. John*, 164 Ind. 277; *Gulf, etc., R. Co. v. Howard*, 97 Tex. 513.

518. 5. Wholesale. — *State v. Scampini*, 77 Vt. 108. See also *Com. v. Poulin*, 187 Mass. 568.

WILFUL, WILFULLY, ETC

- 525.** I. GENERAL DEFINITION. — See note 1.
- 526.** See note 2.
- 528.** II. KNOWINGLY — BONA FIDE BELIEF. — See note 3.
- 530.** III. EVIL INTENT, MALICE, ETC. — See note 2.
- 531.** See note 2.
- 533.** See note 1.
- 534.** IV. NEGLIGENCE — WILFUL NEGLIGENCE — WILFUL INJURY. — See note 3.
- 535.** Wilful Neglect. — See note 1.
- 525.** 1. Intentional. — Tillis v. Tillis, 55 W. Va. 198.
- 526.** 2. Wilfully Held to Mean Purposely. — State v. Nease, (Oregon 1905) 80 Pac. Rep. 897.
- "Wilful," When Applied to Intent, Implies Purpose or Willingness. — State v. McGahey, 12 N. Dak. 543.
- "Wilfully" Not Synonymous with "Rudely." — Fuller v. State, (Tex. Crim. 1905) 87 S. W. Rep. 832 (statute punishing those who should "rudely" display a deadly weapon).
- 528.** 3. Wilfully Includes Knowingly. — State v. Nease, (Oregon 1905) 80 Pac. Rep. 897.
- 530.** 2. Bad Purpose or Motive. — State v. Morgan, 136 N. Car. 628.
- 531.** 2. Evil Intent. — Roberts v. U. S., (C. C. A.) 126 Fed. Rep. 897.
- 533.** 1. New York Penal Code. — McMorris v. Howell, 89 N. Y. App. Div. 277.
- 534.** 3. Wilfulness and Negligence Distinguished. — See Resurrection Gold Min. Co. v. Fortune Gold Min. Co., (C. C. A.) 129 Fed. Rep. 668 (wilful trespass); Matter of Mallon, (Surrogate Ct.) 43 Misc. (N. Y.) 569 ("wilful default" implies more than negligence or carelessness).
- 535.** 1. Wilful Neglect. — Alger v. Duluth-Superior Traction Co., 93 Minn. 314.

WILLS.

By E. C. ELLSBREE.

- 550.** III. DEFINITION AND CLASSIFICATION — 1. Definition. — See note 3.
- 553.** 2. Classification — *b.* WRITTEN WILLS — (2) *Olographic Wills* — Date. — See note 4.
- 556.** (7) *Joint and Mutual Wills*. — See notes 3, 6.
- 557.** (8) *Louisiana Testaments* — (b) *Nuncupative Wills* — *bb.* PUBLIC NUNCUPATIVE WILLS — Dictation. — See note 4.
- 563.** *c.* ORAL OR NUNCUPATIVE WILLS — (3) *Statutory Restrictions* — (a) Degree of Proof Required. — See note 5.
- 565.** Verbal Instructions and Informal Writings. — See note 4.
- 566.** (c) Witnesses — Witnesses Must Be Disinterested. — See note 1.
- 567.** (d) *Rogatio Testium*. — See note 3.
- 550.** 3. Matter of Davis, (Surrogate Ct.) 45 Misc. (N. Y.) 554, *affirmed* 105 N. Y. App. Div. 221.
- 553.** 4. Error in Date Held Not to Invalidate Will. — Matter of Fay, 145 Cal. 82, 104 Am. St. Rep. 17. See also Matter of Clisby, 145 Cal. 407, 104 Am. St. Rep. 58.
- 556.** 3. Joint Wills Valid. — Gerbrich v. Freitag, 213 Ill. 552, 104 Am. St. Rep. 234.
- 6.** Mutual Wills Valid. — Gerbrich v. Freitag, 213 Ill. 552, 104 Am. St. Rep. 234.
- 557.** 4. Dictation Must Be by Words Pronounced Orally. — Theriot's Succession, 114 La. 611.
- 563.** 5. Strict Proof Required. — Godfrey v. Smith, (Neb. 1905) 103 N. W. Rep. 450.
- 565.** 4. Informal Writing by Soldier or Seaman. — In Goods of Scott, (1903) P. 243. See also In Goods of Gordon, 21 Times L. Rep. 653.
- 566.** 1. Legatee Not Competent Witness. — Godfrey v. Smith, (Neb. 1905) 103 N. W. Rep. 450.
- 567.** 3. Formal Rogatio Testium Unnecessary. — Baird v. Baird, 70 Kan. 564.

568. (a) *Time of Making.* — See note 1.

574. IV. FORM — 1. What Constitutes a Will — *b.* INFORMAL INSTRUMENTS — (2) *American Cases* — If the Local Statute Prescribes Certain Formalities of Execution. — See note 5.

576. *c.* DEEDS DISTINGUISHED FROM WILLS. — See note 1.

577. *e.* WILLS DISTINGUISHED FROM GIFTS MORTIS CAUSA. — See note 7.

578. *g.* EXTRANEOUS PAPERS — INCORPORATION BY REFERENCE. — See note 8.

580. Two or More Wills May Be Construed Together. — See note 2.

583. 2. Formal Requisites — *b.* SIGNATURE — (3) *Sufficiency of Signature* — (a) Place of Signature — Signature at End of Will. — See notes 4, 5, 10.

584. Where the Will Is Written on Several Sheets of Paper. — See note 4.

587. *c.* PUBLICATION — Manner of Publication. — See note 4.

592. *h.* ATTESTATION AND SUBSCRIPTION — (3) *Effect of Legislation.* — See note 3.

593. (4) *Effect of Unsigned Attestation Clause Where Subscription Unnecessary.* — See note 2.

594. (5) *Essentiality of Attestation Clause.* — See notes 1, 2.

(7) *Value of Attestation Clause as Evidence.* — See note 4.

596. (9) *Knowledge of Witnesses as to Contents or Nature of Paper.* — See note 1.

(11) *Request to Witnesses to Sign.* — See note 5.

598. (13) *Subscription in Presence of Testator — Mental Apprehension.* — See note 7.

599. *Vision.* — See notes 1, 3.

568. 1. *Contrary Rule.* — *Baird v. Baird*, 70 Kan. 564; *Godfrey v. Smith*, (Neb. 1905) 103 N. W. Rep. 450.

574. 5. Where Certain Formalities Are Prescribed. — *Demartini v. Allegretti*, 146 Cal. 214; *Moore v. Weston*, 13 N. Dak. 574.

576. 1. *Deed Distinguished from Will.* — *Cribbs v. Walker*, (Ark. 1905) 85 S. W. Rep. 244; *McLain v. Garrison*, (Tex. Civ. App. 1905) 88 S. W. Rep. 484.

Declaration of Trust Distinguished from Will. — *Robb v. Washington, etc.*, College, 103 N. Y. App. Div. 327.

577. 7. *Wills Distinguished from Gifts Mortis Causa.* — *Noble v. Garden*, 146 Cal. 225.

578. 8. *Extraneous Papers Incorporated by Reference.* — See *Bryan v. Bigelow*, 77 Conn. 604, 107 Am. St. Rep. 66.

580. 2. *Two or More Wills Construed Together.* — *Fry v. Fry*, 125 Iowa 424, holding that two wills may be construed together to prevent partial intestacy.

583. 4. *Signature Must Closely Follow Written Matter.* — *Matter of Seaman*, 146 Cal. 455.

5. *Signature Must Follow All Testamentary Provisions.* — *Ward v. Putnam*, (Ky. 1905) 85 S. W. Rep. 179. See also *Irwin v. Jacques*, 71 Ohio St. 395.

10. *Ward v. Putnam*, (Ky. 1905) 85 S. W. Rep. 179.

584. 4. *Where a Will Written on Three Pages of Paper Was Signed on the First Page Only*, it was held that the first page of the will ought to be admitted to probate. *Millward v. Buswell*, 20 Times L. Rep. 714. But in *In Goods of Madden*, (1905) 2 Ir. R. 612, it being the opinion of the court that the first page, which contained the signature and the attestation

clause, was originally written last, but was inadvertently misplaced, probate of the whole will was allowed.

587. 4. *What Constitutes Publication under the Statute.* — *In re Breining*, (N. J. 1904) 59 Atl. Rep. 561.

592. 3. *Attestation and Subscription Required Generally in United States.* — *Montague v. Schiefelin*, (Oregon 1905) 80 Pac. Rep. 654.

Will Void Where Attested by Less than Statutory Number of Witnesses. — *Fortner v. Wiggins*, 121 Ga. 26; *Standley v. Moss*, 114 Ill. App. 612; *Fleming v. Morrison*, 187 Mass. 120, 105 Am. St. Rep. 386.

593. 2. *Effect of Unsigned Attestation Clause.* — Where an attestation clause was written out, the fact that the witnesses subscribed their names elsewhere on the will was held to be a mere informality not affecting the validity of the will. *Barricklow v. Stewart*, 163 Ind. 438.

594. 1. *Attestation Clause Not Essential.* — *Barricklow v. Stewart*, 163 Ind. 438.

2. *Subscription Sufficient Without Attestation Clause.* — *Barricklow v. Stewart*, 163 Ind. 438.

4. *Not Evidence of Facts Not Stated.* — *In re Beggan*, (N. J. 1905) 59 Atl. Rep. 874.

596. 1. *Witnesses Need Not Know Contents of Paper.* — *Roche v. Nason*, 105 N. Y. App. Div. 256.

5. *Informality of Request to Sign.* — *Savage v. Bowen*, 103 Va. 540.

598. 7. See *McNeil v. Cullen*, 35 Can. Sup. Ct. 510.

599. 1. *True Test of Vision.* — *Healey v. Bartlett*, (N. H. 1904) 59 Atl. Rep. 617.

3. *Subscription in Same and Different Rooms as Prima Facie Evidence.* — *In re Beggan*, (N. J. 1905) 59 Atl. Rep. 874.

- 601.** (14) *Simultaneous Presence of Witnesses.* — See note 1.
- 603.** (16) *Place of Subscription* — (a) *In General.* — See note 2.
(c) *Where Will Consists of Several Sheets.* — See note 7.
- 604.** (20) *Qualifications of Attesting Witnesses* — (a) "Credible" Equivalent to "Competent." — See note 1.
(c) *Who Are Competent Attesting Witnesses* — *aa. IN GENERAL.* — See note 6.
- 609.** *V. WHO MAY MAKE A WILL* — 2. *Married Women* — *c. CAPACITY UNDER STATUTE* — (1) *In General.* — See note 8.
- 614.** *VII. WHAT MAY BE DEVISED OR BEQUEATHED* — 1. *In General.* — See note 6.
- 619.** 6. *After-acquired Property* — *b. REALTY.* — See note 3.
- 621.** *IX. REVOCATION* — 2. *By Act of Party* — *a. RIGHT OF REVOCATION* — (2) *Mutual Wills* — (a) *In General.* — See note 4.
- 623.** *d. REVOCATION BY WRITTEN INSTRUMENT* — (1) *In General.* — See note 5.
- 628.** (2) *Particular Writings* — (d) *By Letter.* — See note 4.
- 631.** *e. REVOCATION BY CANCELLATION OR DESTRUCTION OF WILL* — (3) *Partial Revocation* — (a) *Whether Permissible.* — See note 7.
- 634.** (4) *Intention to Revoke* — (a) *Necessity of Intent to Revoke* — *c. DEPENDENT RELATIVE REVOCATION.* — See note 2.
- 635.** (b) *Evidence of Intent to Revoke* — *cc. PRESUMPTIONS* — (dd) *Where Will Cannot Be Found.* — See note 7.
- 636.** See note 1.
- 637.** *ee. DECLARATIONS* — (aa) *Of Testator.* — See note 4.
- 642.** (6) *The Act of Cancellation or Destruction* — (b) *Particular Acts* — *dd. CANCELING OR OBLITERATING* — (dd) *Effect of Canceling Particular Clause.* — See note 5.
- 647.** 3. *By Act of Law* — *b. PARTICULAR CHANGES IN TESTATOR'S CONDITION OR CIRCUMSTANCES* — (1) *Marriage* — (b) *Under Statutes* — *bb. IN UNITED STATES* — (dd) *Statutes Relating to Wills of Unmarried Women Only* — *Who Is an Unmarried Woman.* — See note 7.
(cc) *Statutes Making Wife Heir of Husband.* — See note 9.
- 649.** (2) *Birth of Issue* — (b) *Under Statutes* — *aa. IN GENERAL.* — See note 7.
- 601.** 1. *Simultaneous Presence of Witnesses Unnecessary.* — *Fleming v. Morrison*, 187 Mass. 120, 105 Am. St. Rep. 386.
- 603.** 2. *Rule in Absence of Statute.* — See *Barricklow v. Stewart*, 163 Ind. 438.
7. *Presumption as to Sheets Bound Together at Testator's Death.* — *Roche v. Nason*, 105 N. Y. App. Div. 256, citing 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 603.
- 604.** 1. "Credible" Construed to Mean "Competent." — *O'Brien v. Bonfield*, 213 Ill. 428; *Standley v. Moss*, 114 Ill. App. 612.
6. *Competent Attesting Witnesses Generally.* — *O'Brien v. Bonfield*, 213 Ill. 428.
- 609.** 8. *Statutory Removal of Incapacity.* — *Matter of Folwell*, 67 N. J. Eq. 570.
- 614.** 6. *Leasehold Transferable as "Personal Estate"* under English Wills Act. — *In re Grassi*, (1905) 1 Ch. 584.
- 619.** 3. *Intention of Testator Governs under Present Statutes.* — *In re Smith*, 10 Ont. L. Rep. 449.
- Devise of Whole Estate to Same Beneficiary Passes After-acquired Property.* — *Mueller v. Buenger*, 184 Mo. 458, 105 Am. St. Rep. 541.
- After-acquired Property Passes under Residuary Clause.* — *Mueller v. Buenger*, 184 Mo. 458, 105 Am. St. Rep. 541. See also the title LEGACIES AND DEVISES, 725. 3.
- 621.** 4. *Revocation of Mutual Wills in General.* — *Stone v. Hoskins*, (1905) P. 194.
- 623.** 5. *Statutory Provisions.* — *Castens v. Murray*, 122 Ga. 396.
- 628.** 4. *Letter.* — See *In Goods of Eyre*, (1905) 2 Ir. R. 540.
- 631.** 7. *Under Statutes Similar to Statute of Frauds.* — *Fry v. Fry*, 125 Iowa 424.
- 634.** 2. *When Doctrine Does Not Apply.* — *Compare Dixon v. Solicitor to Treasury*, (1905) P. 42.
- 635.** 7. *Where Will Cannot Be Found.* — *In re Colbert*, 31 Mont. 461.
- 636.** 1. *Will Not Shown to Have Been in Testator's Possession.* — *In re Colbert*, 31 Mont. 461.
- 637.** 4. *Subsequent Declarations Inadmissible.* — *In re Colbert*, 31 Mont. 461.
- 642.** 5. *Effect of Canceling Particular Clause.* — *Richardson v. Baird*, 126 Iowa 408.
- 647.** 7. *Married Woman Subsequently Becoming a Widow.* — Under the *Georgia* statute the will of a woman, married at the time when it was made, is revoked by her subsequent second marriage after becoming a widow. *McWhorter v. Oneal*, 121 Ga. 539.
9. *Effect of Statutes Making Wife Heir of Husband.* — *In re Teopfer*, (N. Mex. 1904) 78 Pac. Rep. 53.
- 649.** 7. See *Fry v. Fry*, 125 Iowa 424.

652. (3) *Marriage and Birth of Issue* — (a) *At Common Law* — Adopted Children. — See note 1.

653. (5) *Alienation of Estate* — (a) *Rule Stated* — *aa. REAL PROPERTY* — (*aa*) *Voluntary Alienation*. — See note 1.

661. **XI. CONSTRUCTION** — 1. *General Rules of Interpretation* — *a. INTENTION OF TESTATOR* — *Statement of Rule*. — See note 3.

662. See note 2.

663. *When Interpretation Not Needed*. — See note 2.

b. ENTIRE WILL TO BE CONSIDERED. — See note 5.

664. *c. WILL TO BE GIVEN EFFECT AS A WHOLE*. — See note 4.

665. *d. WILL AND CODICIL TO BE CONSTRUED TOGETHER*. — See note 1.

e. EFFECT OF VOID CLAUSE. — See note 2.

666. *f. SURROUNDING FACTS AND CIRCUMSTANCES TO BE CONSIDERED*. — See note 1.

667. See note 1.

g. CONSTRUCTION IN FAVOR OF WILL. — See notes 9, 10.

668. *h. PRESUMPTION AGAINST PARTIAL INTESTACY*. — See notes 1, 2.

i. HEIRS FAVORED. — See note 3.

669. See note 1.

670. *j. LANGUAGE OF WILL* — (1) *Meaning of Words Generally*. — See note 1.

671. *Words Expressive of Desire Merely*. — See note 2.

652. 1. *Rule Applicable to Adopted Children*. — *Sandon v. Sandon*, 123 Wis. 603.

653. 1. *Effect of Voluntary Alienation of Property Devised*. — *Compare Woodward v. Woodward*, 33 Colo. 457.

661. 3. *Intention of Testator*. — *Nelson v. Nelson*, (Ind. App. 1904) 72 N. E. Rep. 482; *Matlock v. Lock*, (Ind. App. 1905) 73 N. E. Rep. 171; *Taylor v. Stephens*, (Ind. 1905) 74 N. E. Rep. 980; *McGuire v. Gallagher*, 99 Me. 334; *Gerding v. Wells*, 100 Md. 93; *Crapo v. Pierce*, 187 Mass. 141; *Mueller v. Buenger*, 184 Mo. 458, 105 Am. St. Rep. 541; *Brooks v. Brooks*, 187 Mo. 476; *Missouri Baptist Sanitarium v. McCune*, 112 Mo. App. 332; *Kent v. Kent*, 99 N. Y. App. Div. 112; *Bowen v. Hackney*, 136 N. Car. 187; *King's Estate*, 210 Pa. St. 435; *Travers v. Casey*, 36 N. Bruns. 229; *Walsh v. Fleming*, 10 Ont. L. Rep. 226.

662. 2. *Intention Expressed in Will Governs*. — *Re Kinnear*, 90 L. T. N. S. 537.

663. 2. *When Interpretation Not Needed*. — *Brooks v. Brooks*, 187 Mo. 476; *Lewisohn v. Henry*, 179 N. Y. 352; *Shedden's Estate*, 210 Pa. St. 82.

5. *Entire Will to Be Considered*. — *Gruenewald v. New*, 215 Ill. 132; *Olcott v. Tope*, 213 Ill. 124; *McGuire v. Gallagher*, 99 Me. 334; *Gordon v. McDougall*, 84 Miss. 715; *Brooks v. Brooks*, 187 Mo. 476.

664. 4. *Effect Given to Will as a Whole*. — *Dee v. Dee*, 212 Ill. 338; *Olcott v. Tope*, 213 Ill. 124; *McGuire v. Gallagher*, 99 Me. 334; *Gerding v. Wells*, 100 Md. 93.

665. 1. *Will and Codicil to Be Construed Together*. — *Re Dunn*, 7 Ont. L. Rep. 560.

A Recital in a Codicil may be referred to for the purpose of explaining an ambiguity in the will, provided the recital is not obviously erroneous. *In re Venn*, (1904) 2 Ch. 52.

2. *Effect of Void Clause*. — *Reid v. Voorhees*, 216 Ill. 236; *Lord v. Lord*, (Supm. Ct. Spec. T.)

44 Misc. (N. Y.) 530; *Matter of Trotter*, 104 N. Y. App. Div. 188, affirmed 182 N. Y. 465.

666. 1. *Surrounding Facts and Circumstances to Be Considered*. — *Nelson v. Nelson*, (Ind. App. 1904) 72 N. E. Rep. 482; *Shropshire v. Gault*, (Ky. 1904) 83 S. W. Rep. 590; *Crapo v. Pierce*, 187 Mass. 141; *Mueller v. Buenger*, 184 Mo. 458, 105 Am. St. Rep. 541.

667. 1. *Testator's Family and Estate Considered*. — *Olcott v. Tope*, 213 Ill. 124.

9. *Construction in Favor of Will*. — *Matter of Fay*, 145 Cal. 82, 104 Am. St. Rep. 17; *Mee v. Gordon*, 104 N. Y. App. Div. 520; *Walsh v. Fleming*, 10 Ont. L. Rep. 226.

Construction Avoiding Forfeiture of Property Rights Favored. — *Carlin v. Harris*, 100 Md. 49.

10. *Construction Consistent with Law*. — *Kent v. Kent*, 99 N. Y. App. Div. 112.

668. 1. *Presumption Against Partial Intestacy*. — *O'Connor v. Murphy*, 147 Cal. 148; *Wixon v. Watson*, 214 Ill. 158; *Ridgely v. Ridgely*, 100 Md. 230; *Vance's Estate*, 209 Pa. St. 561; *Fiske v. Fiske*, 26 R. I. 509.

But the presumption will not prevail when the language of the will, fairly construed, is insufficient to carry the whole estate. *Gallagher v. McKeague*, 125 Wis. 116.

2. *Wixon v. Watson*, 214 Ill. 158.

3. *Heirs Favored*. — *Watson v. Smith*, 210 Pa. St. 190; *Miller's Estate*, 26 Pa. Super. Ct. 443.

669. 1. *Disinheritance Only by Express Words or Necessary Implication*. — *Olcott v. Tope*, 213 Ill. 124; *Matter of Union Trust Co.*, 179 N. Y. 261.

670. 1. *Meaning of Words Generally*. — *Nelson v. Nelson*, (Ind. App. 1904) 72 N. E. Rep. 482; *Taylor v. Stephens*, (Ind. App. 1904) 72 N. E. Rep. 609; *McCurdy v. McCallum*, 186 Mass. 464; *Missouri Baptist Sanitarium v. McCune*, 112 Mo. App. 332.

671. 2. *"Request" Construed as Mandatory*

672. *k.* PUNCTUATION. — See note 4.

673. 2. Parol Evidence in Aid of Construction — *a.* IN GENERAL — But Parol Evidence Is Admissible. — See note 10.

674. Intention Different from That Expressed. — See note 1.

675. *b.* WHEN TERMS PLAIN AND UNAMBIGUOUS. — See note 5.

676. *c.* SURROUNDING FACTS AND CIRCUMSTANCES. — See note 1.

677. See note 1.

678. Circumstances Mere Aids to Construction. — See note 1.

d. DECLARATIONS AND INSTRUCTIONS OF TESTATOR. — See note 2.

679. Latent Ambiguity. — See note 5.

680. *f.* MISTAKE OR OMISSION — (1) *Mistake* — But the Execution of a Will Through Fraud or Mistake. — See note 4.

682. *j.* IDENTIFICATION OF LEGATEE OR DEVISEE. — See notes 1, 2.

683. Charitable Bequests. — See note 3.

k. IDENTIFICATION OF LEGACY OR DEVISE — General Rule. — See note 4.

685. 3. Inconsistency and Repugnancy. — See note 6.

687. General and Specific Provisions. — See note 2.

4. General and Particular Intent. — See note 3.

688. 5. Cutting Down Clear Gift by Doubtful Expressions. — See note 1.

in Furtherance of Intention. — See *McCurdy v. McCallum*, 186 Mass. 464. See generally the title PRECATORY TRUSTS.

672. 4. Punctuation a Last Resort in Construction of Will. — *Lewisohn v. Henry*, 179 N. Y. 352. See further the title INTERPRETATION AND CONSTRUCTION, 20. 6 *et seq.*; and compare the rules as to statutory construction stated in the title STATUTES, 631. 4 *et seq.*

673. 10. When Parol Evidence Admissible. — *In re Rayner*, (1904) 1 Ch. 176; *Miller's Estate*, 26 Pa. Super. Ct. 443.

Only Trusts Claimed on Mere Implication of Law Rebuttable by Parol. — *Bryan v. Bigelow*, 77 Conn. 604, 107 Am. St. Rep. 66.

674. 1. Intention Different from That Expressed. — *Bryan v. Bigelow*, 77 Conn. 604, 107 Am. St. Rep. 66; *Carpenter v. Carpenter*, (Ky. 1905) 84 S. W. Rep. 737.

675. 5. When Terms Plain and Unambiguous. — *Bryan v. Bigelow*, 77 Conn. 604, 107 Am. St. Rep. 66; *Oliver v. Henderson*, 121 Ga. 836, 104 Am. St. Rep. 185; *Carpenter v. Carpenter*, (Ky. 1905) 84 S. W. Rep. 737.

676. 1. Evidence of Surrounding Facts and Circumstances. — *Missouri Baptist Sanitarium v. McCune*, 112 Mo. App. 332; *Sandon v. Sandon*, 123 Wis. 603.

677. 1. When Words Plain and Unambiguous. — *Missouri Baptist Sanitarium v. McCune*, 112 Mo. App. 332; *Sandon v. Sandon*, 123 Wis. 603.

678. 1. Circumstances Mere Aids to Construction. — *Missouri Baptist Sanitarium v. McCune*, 112 Mo. App. 332.

2. Declarations and Instructions of Testator Inadmissible. — *Matter of Holt*, 146 Cal. 77; *Cochran v. Lee*, (Ky. 1905) 84 S. W. Rep. 337; *Lehnhoff v. Theine*, 184 Mo. 346; *Sandon v. Sandon*, 123 Wis. 603.

679. 5. Latent Ambiguity. — *Dawson v. Waggaman*, 23 App. Cas. (D. C.) 428.

680. 4. *Fleming v. Morrison*, 187 Mass. 120, 105 Am. St. Rep. 386, holding that parol

evidence is admissible to contradict recitals in an instrument that it is a will and that it is signed and attested as such.

682. 1. Identification of Legatee or Devisee — General Rule. — *Henderson v. Henderson*, (1905) 1 Ir. R. 353; *In re Blake*, (1904) 1 Ir. R. 98; *Cook v. Universalist Gen. Convention*, 138 Mich. 157; *Bowman v. Domestic, etc., Missionary Soc.*, 100 N. Y. App. Div. 29, modified 182 N. Y. 494; *Miller's Estate*, 26 Pa. Super. Ct. 443.

2. Latent Ambiguity. — *Rathjens v. Merrill*, 38 Wash. 442.

683. 3. Charitable Bequests. — *Bowman v. Domestic, etc., Missionary Soc.*, 100 N. Y. App. Div. 29, modified 182 N. Y. 494.

4. Identification of Legacy or Devise — General Rule. — *Ackerman v. Crouter*, (N. J. 1905) 59 Atl. Rep. 574; *Miller's Estate*, 26 Pa. Super. Ct. 443.

Evidence of Former Wills Admitted to Explain Mistakes in Description of Subject-matter of Bequest. — *In re Smith*, 20 Times L. Rep. 287.

685. 6. Inconsistency and Repugnancy. — *Dee v. Dee*, 212 Ill. 338; *Williams v. Boul*, 101 N. Y. App. Div. 593; *Robbins v. Smith*, 72 Ohio St. 1.

Where a Devise Absolute in Terms Is Followed by an Independent Provision as to the disposition of the property after the death of the devisee, the absolute devise will prevail, and the inconsistent subsequent provision will be disregarded. *Tarbell v. Smith*, 125 Iowa 388.

687. 2. General and Specific Provisions. — See *Murdoch v. Brass*, Sc. Ct. of Sess. 6 F. 841.

3. General and Particular Intent. — See *In re Smith*, 10 Ont. L. Rep. 449.

688. 1. Cutting Down Clear Gift by Doubtful Expressions. — *Snodgrass v. Brandenburg*, 164 Ind. 61; *Geiting v. Wells*, 100 Md. 93; *Brooks v. Brooks*, 187 Mo. 476; *Mee v. Gordon*, 104 N. Y. App. Div. 520; *Watson v. Smith*, 210 Pa. St. 190; *In re Smith*, 10 Ont. L. Rep. 449.

- 689.** 6. Rejecting Words. — See notes 1, 2.
690. 7. Supplying Words. — See note 2.
692. 8. Changing Words — "Or" Construed "And" and Vice Versa. — See note 1.
694. 10. Uncertainty — *a.* IN GENERAL. — See note 1.
695. *c.* UNCERTAINTY AS TO OBJECTS OF GIFT. — See note 3.
696. See note 7.
699. 11. Estates Arising from Implication — *c.* IMPLICATION OF LIFE ESTATES. — See note 4.
711. 12. Period Referred To — *c.* WORDS IMPORTING DEATH — (2) *Words Referring to Death Coupled with Contingency* — A Contrary Doctrine. — See note 1.
712. 13. Construction of Particular Words — *a.* WORDS DESCRIPTIVE OF PROPERTY — (1) *Generally.* — See note 1.
716. (4) "*Rents and Profits*" — "*Income.*" — See note 1.
717. (9) "*Goods and Chattels.*" — See note 6.
718. 14. Construction of Gifts to Classes — *a.* DEFINITION AND CHARACTERISTICS — Where Individuals Named. — See notes 3, 4.
719. Rights of Survivors. — See note 1.
b. TIME OF ASCERTAINING CLASS — (1) *In General.* — See note 2.
720. (2) *Gifts to Children* — (a) Immediate Gift. — See note 3.
721. (b) Gifts by Way of Remainder. — See note 3.
723. (d) Aggregate Fund Payable on Marriage or Attainment of Given Age. — See note 3.
727. *c.* TAKING PER CAPITA OR PER STIRPES — (2) *Application of Rule* — (a) *In General* — Per Capita Distribution. — See note 5.
731. (e) Gifts to Heirs, Etc. — Division Among Classes of Heirs. — See note 1.

689. 1. Rejecting Words. — *Reid v. Voorhees*, 216 Ill. 236.

2. Must Be Absolutely Irreconcilable with Context. — *Reid v. Voorhees*, 216 Ill. 236.

Testator's Intention Must Be Clearly Furthered by Rejection. — *Paul v. Philbrick*, (N. H. 1905) 60 Atl. Rep. 682.

Nothing to Be Rejected to Which Reasonable Effect Can Be Given. — *Taylor v. Stephens*, (Ind. App. 1904) 72 N. E. Rep. 609.

690. 2. Supplying Words. — *Olcott v. Tope*, 213 Ill. 124; *Paul v. Philbrick*, (N. H. 1905) 60 Atl. Rep. 682. See also *Todd v. Tarbell*, 187 Mass. 480.

692. 1. "Or" and "And." — *Olcott v. Tope*, 213 Ill. 124; *Shropshire v. Gault*, (Ky. 1904) 83 S. W. Rep. 590.

694. 1. Devise Upheld if Intention Ascertainable. — *Dee v. Dee*, 212 Ill. 338.

695. 3. Objects and Purposes of Testator to Be Certain. — It is enough if the testator uses language which is sufficiently clear to enable courts by extrinsic evidence to identify the beneficiary or trustee. *Cook v. Universalist Gen. Convention*, 138 Mich. 157. See also *Murdock v. Brass*, Sc. Ct. of Sess. 6 F. 841.

696. 7. Will Void for Uncertainty. — *Murdock v. Brass*, Sc. Ct. of Sess. 6 F. 841.

699. 4. Devise to One of Several Coheireesses. — See *contra*, *In re Willatts*, (1905) 1 Ch. 378, 92 L. T. N. S. 195, affirmed (1905) 2 Ch. 135.

711. 1. Contrary Doctrine. — *Tarbell v. Smith*, 125 Iowa 388; *Smith v. Hull*, 97 N. Y. App. Div. 228.

712. 1. "Investment." — Bank deposits will not ordinarily pass under a bequest of "pecuniary investments." *In re Price*, (1905) 2 Ch. 55.

"All My Household Furniture and Effects in

My Residence," has been held not to include wool stored in a store which formed part of the residence. *MacPhail v. Phillips*, (1904) 1 Ir. R. 155.

A Bequest of "All Moneys Owning to" the Testator at Death will pass bank deposits standing to his credit. *In re Derbyshire*, 54 W. R. 135.

716. 1. "Income." — *Matter of Hull*, 97 N. Y. App. Div. 258.

717. 6. "All of This World's Goods of which I may be possessed" has been held to include real estate. *Torrey v. Horrey*, 70 N. J. L. 672.

718. 3. Where Some Individuals Named. — *Davis v. Sanders*, 123 Ga. 177, citing 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 718.

4. Number and Share of Named Individuals Certain. — *Davis v. Sanders*, 123 Ga. 177, citing 30 AM. AND ENG. ENCYC. OF LAW (2d ed.) 718.

719. 1. Rights of Survivors. — *Davis v. Sanders*, 123 Ga. 177.

2. Time of Ascertaining Class. — *In re Clark*, 8 Ont. L. Rep. 599.

720. 3. Immediate Gift to Children. — *In re Clark*, 8 Ont. L. Rep. 599.

721. 3. Children in Esse Take Vested Interests. — *Crawley v. Kendrick*, 122 Ga. 183. See also *Harkness v. Harkness*, 9 Ont. L. Rep. 705.

723. 3. Aggregate Fund Payable on Marriage or Attainment of Given Age. — *In re Courtenay*, 74 L. J. Ch. 654; *In re Archer*, 7 Ont. L. Rep. 491. Compare *Hope Johnstone v. Sinclair*, Sc. Ct. of Sess. 7 F. 25.

727. 5. Gift to "Children and Grandchildren," or to A and the Children of B. — *Harkness v. Harkness*, 9 Ont. L. Rep. 705.

731. 1. Division Among Classes of Heirs. — *Knutson v. Vidders*, 126 Iowa 511.

- 731.** (3) *Effect of Words Importing Equal Division.* — See note 3.
732. See note 1.
733. (4) *Presumption Yields to Contrary Intent.* — See note 3.
736. 15. *Quantity of Interest Passing* — *a.* CONSIDERATIONS COMMON TO REALTY AND PERSONALTY — (2) *Effect of Particular Provisions* —
 (b) *Power of Disposition and Control* — *aa.* GENERAL DEVISES AND BEQUESTS. — See notes 1, 3.
 Implied Power of Sale. — See note 6.
737. *bb.* DEFINITE DEVISES AND BEQUESTS. — See note 2.
738. See notes 2, 4.
739. *Property Consumed in Using.* — See note 5.
741. (d) *Limitations Over* — *aa.* UNCERTAIN ESTATES. — See note 5.
742. *bb.* ABSOLUTE ESTATES. — See note 6.
743. *Absolute Gift Cut Down by Subsequent Limitation.* — See note 1.
 (e) *Gift of Rents and Profits or Income.* — See note 3.
744. (f) *Precatory Provisions.* — See note 5.
 b. ESTATES IN FEE AND FOR LIFE — (1) *Sufficiency of Language to Pass the Fee* — (a) *Independent of Statute.* — See note 6.
745. *Expressions Sufficient to Pass Fee.* — See note 2.
747. (b) *By Statute.* — See note 1.
 (2) *Language Necessary to Create Life Estate.* — See note 4.
748. *Gift During Widowhood.* — See note 1.
 (3) *Technical Language Controlling* — (b) *Reducing Fee Expressly Created.* — See note 5.
749. See note 1.

731. 3. *Effect of Words Importing Equal Division.* — *Hughes v. Hughes*, (Ky. 1904) 82 S. W. Rep. 408.

Under a *Bequest of Income to Be "Equally" Divided*, the legatees take as tenants in common, and not as a class or as joint tenants. *Loomis v. Gorham*, 186 Mass. 444.

732. 1. *Equal Division Among Heirs.* — *Parrott v. Barrett*, 70 S. Car. 195.

733. 3. *Presumption Yields to Contrary Intent.* — *Kidwell v. Ketler*, 146 Cal. 12.

736. 1. *General Gift with Unlimited Power of Disposition.* — *Tuerk v. Schueler*, (N. J. 1904) 60 Atl. Rep. 357; *Breeden v. Welker*, 2 Tenn. Ch. App. 109; *Re McDougall*, 8 Ont. L. Rep. 640. See also *Reid v. Carleton*, (1905) 1 Ir. R. 147.

3. *Subsequent Limitation Defeated by Power of Disposition.* — *Tuerk v. Schueler*, (N. J. 1904) 60 Atl. Rep. 357.

The *Power, to Defeat an Executory Devise*, must be a power given by the will itself, and not one attaching as a legal incident to the estate given by the will. *Carson v. Carson*, (Tenn. 1905) 88 S. W. Rep. 175.

6. *Implied Power of Sale.* — *McGuire v. Gallagher*, 99 Me. 334.

737. 2. *Definite Devise for Life Not Enlarged to Absolute Interest by Power of Disposal.* — *Melton v. Camp*, 121 Ga. 693; *Fiske v. Fiske*, 26 R. I. 509. See also *In re Tuck*, 10 Ont. L. Rep. 309. But see *Re Bethune*, 7 Ont. L. Rep. 417.

738. 2. *Power to Dispose of Fee Expressly Intended to Be Conferred.* — *Parks v. Robinson*, 138 N. Car. 269.

4. *Estate Passing to Remainderman.* — *In re Tuck*, 10 Ont. L. Rep. 309.

739. 5. *A Bequest of Money will not always vest an absolute estate in the beneficiary on the theory that the enjoyment means its destruc-*

tion. A trust may be created so that the beneficiary may have only a right to the interest or income of a fund, and the fund itself be kept intact for remaindermen. *Wixon v. Watson*, 214 Ill. 158.

741. 5. *Life Estate Resulting from Limitation Over.* — *O'Connor v. Rowland*, 73 Ark. 422; *Osterhout v. Osterhout*, 8 Ont. L. Rep. 685.

742. 6. *Limitation Over Repugnant and Void.* — *In re Hanbury*, (1904) 1 Cn. 415; *Tarbell v. Smith*, 125 Iowa 388.

743. 1. *Absolute Gift Cut Down by Subsequent Limitation.* — *King v. King*, 215 Ill. 100; *Robbins v. Smith*, 72 Ohio St. 1.

3. *Unrestricted Gift of Income a Gift of Property Absolutely.* — *Matter of Hull*, 97 N. Y. App. Div. 258.

744. 5. *Whether Words Precatory a Question of Intent.* — *Bloom v. Strauss*, 72 Ark. 56.

6. *Words Passing Fee Independent of Statute.* — *Snodgrass v. Brandenburg*, 164 Ind. 61; *McCullough v. Johnetta Coal Co.*, 210 Pa. St. 222.

745. 2. *Expressions Sufficient to Pass Fee.* — *Snodgrass v. Brandenburg*, 164 Ind. 61.

747. 1. *Effect of Statutes on Common Law.* — See *King v. King*, 215 Ill. 100; *Gruenewald v. Neu*, 215 Ill. 132; *Wool v. Fleetwood*, 136 N. Car. 460.

4. *Devises "for Life," etc., Effective Limitations of Life Estate.* — *Schneider v. Schneider*, 124 Wis. 111.

748. 1. *Gift During Widowhood.* — *Beatty v. Irwin*, 35 Ind. App. 238.

5. *Fee Not Reduced Except by Positive Provisions.* — *Snodgrass v. Brandenburg*, 164 Ind. 61; *Williams v. Boul*, 101 N. Y. App. Div. 593.

749. 1. *Limitations Over in Derogation of Fee Void.* — *Tarbell v. Smith*, 125 Iowa 388; *Luckey v. McCray*, 125 Iowa 691; *Merrill v. Webster*, 187 Mass. 562; *Gannon v. Pauk*, 183

757. *c.* ESTATES TAIL — (2) *Abolition of Estates Tail by Statute.* — See notes 4, 5.

764. 16. Vested and Contingent Interests — *b.* LEGACIES PAYABLE OUT OF PERSONALTY — (1) *Controlling Principles* — (b) *Intention of Testator Controlling.* — See notes 2, 3.

765. (c) *Construction of Legacies as Vested Favored.* — See note 5.

766. (d) *Time of Vesting.* — See note 2.

767. (2) *Ascertainment of Nature of Interest from Words of Gift* — (a) *Gift Distinct from Direction to Pay* — *aa.* IN GENERAL — See note 1.

771. (b) *Gift Contained in Direction to Pay or Divide.* — See note 1.

776. (3) *When Legacy to Take Effect upon Happening of Contingency* — (b) *Attainment of Specified Age.* — See note 3.

When Attainment of Given Age Condition Precedent. — See note 4.

777. See note 1.

781. (5) *When Payment of Legacy Postponed* — *Postponement to Let in Other Interest.* — See note 3.

797. 17. *Divesting Clauses* — *d.* VESTING OF SUBSTITUTED INTEREST. — See note 5.

800. 18. *Conditional Devises and Bequests* — *b.* CONDITIONS PRECEDENT AND SUBSEQUENT DISTINGUISHED. — See note 1.

802. *e.* CONDITIONS IN RESTRAINT OF MARRIAGE — (1) *As to Real Estate.* — See note 4.

805. (5) *Restraints upon Second Marriage.* — See note 3.

806. *f.* CONDITION NOT TO CONTEST WILL. — See note 5.

h. CONDITION AS TO RESIDENCE OF DEVISEE. — See note 8.

808. 19. *Survivorship* — *a.* WORDS OF SURVIVORSHIP — TO WHAT PERIOD REFERRED — (1) *Immediate Gift.* — See note 1.

809. (2) *Gift After Precedent Interest* — (b) *Words Referred to Period of Distribution.* — See note 3.

Mo. 265; *Carson v. Carson*, (Tenn. 1905) 88 S. W. Rep. 175.

757. 4. *Estates Tail Given Effect as Fee-simple Estates.* — *Young v. Amburgy*, (Ky. 1905) 87 S. W. Rep. 802; *Rhodes v. Bouldry*, 138 Mich. 144; *McCullough v. Johnetta Coal Co.*, 210 Pa. St. 222.

5. *Estates Tail Given Effect as Life Estates.* — *Wheelock v. Simons*, (Ark. 1905) 86 S. W. Rep. 830; *Gannon v. Pauk*, 183 Mo. 265.

764. 2. *Vesting Dependent on Intention.* — *Rhode Island Hospital Trust Co. v. Noyes*, 26 R. I. 323.

3. *A Direction that a Legacy Shall "Vest"* at a certain time may mean merely a vesting in possession and enjoyment and not affect the vesting in point of right. *Smith v. Jordan*, 77 Conn. 469.

765. 5. *Vesting of Legacies Favored.* — *Rhode Island Hospital Trust Co. v. Noyes*, 26 R. I. 323.

766. 2. *Time of Vesting.* — *Watkins v. Bigelow*, 93 Minn. 361; *Wicker v. Wicker*, 70 S. Car. 33.

767. 1. *Gift Distinct from Direction to Pay.* — *Rhode Island Hospital Trust Co. v. Noyes*, 26 R. I. 323; *Matter of Ranken*, 101 N. Y. App. Div. 189, *affirmed* 182 N. Y. 519.

771. 1. *Gift Contained in Direction to Pay.* — *Dee v. Dee*, 212 Ill. 338; *Lewisohn v. Henry*, 179 N. Y. 352.

776. 3. *Legacy Payable at Stated Age.* — *Matter of Ranken*, 101 N. Y. App. Div. 189, *affirmed* 182 N. Y. 519.

4. *Gift Conditioned on Attainment of Specified Age.* — *Jackson's Estate*, 209 Pa. St. 520.

777. 1. *Legacy at Twenty-one.* — *Heberton v. McClain*, 135 Fed. Rep. 226.

781. 3. *Postponement to Let in Other Interest.* — *Dee v. Dee*, 212 Ill. 338.

797. 5. *A Vested Interest Given to Children* is not to be divested by a gift over if the parent dies without leaving children. *Re Bradbury*, 90 L. T. N. S. 824.

800. 1. *Conditions Precedent and Subsequent Distinguished.* — *In re Ross*, 7 Ont. L. Rep. 493.

802. 4. *Condition Annexed to Estate for Life or in Fee.* — See *Watts v. Griffin*, 137 N. Car. 572, holding that the condition must be reasonable and certain in terms.

805. 3. *Validity of Restraints upon Second Marriage.* — *In re Mumby*, 8 Ont. L. Rep. 283; *Re Deller*, 6 Ont. L. Rep. 711.

In Indiana. — *Beatty v. Irwin*, 35 Ind. App. 238.

806. 5. *Where There Is Probabilis Causa Litigandi*, a contest of the will will not cause a forfeiture. *Friend's Estate*, 209 Pa. St. 442.

8. *Condition as to Residence on Premises.* — See *In re Ross*, 7 Ont. L. Rep. 493.

808. 1. *Death of Testator.* — *Taylor v. Stephens*, (Ind. 1905) 74 N. E. Rep. 980; *Morton v. Morton*, (Ky. 1905) 85 S. W. Rep. 1188.

809. 3. *Prevailing Rule in United States.* — *Ridgely v. Ridgely*, 100 Md. 230; *Renner v. Williams*, 71 Ohio St. 340.

810. Construction Modified by Language of Will. — See note 5.

812. 20. Substitution — *a.* DEFINITION AND OPERATION. — See note 1.

814. *c.* WHETHER ISSUE OF LEGATEE DEAD AT DATE OF WILL CAN TAKE — (2) *Gifts to Classes* — (*a*) *Substitutional Gifts* — *aa.* IN GENERAL. — See note 3.

810. 5. When Contrary Intention Manifest. — *Ridgely v. Ridgely*, 100 Md. 230; *Morton v. Morton*, (Ky. 1905) 85 S. W. Rep. 1188.

812. 1. Immediate Gift. — *Re Fleming*, 7 Ont. L. Rep. 651.

814. 3. Issue Cannot Take unless Parent Might Have Taken. — *Re Fleming*, 7 Ont. L. Rep. 651. See also *Re Kinnear*, 90 L. T. N. S. 537.

WINDING UP AND REORGANIZATION OF CORPORATIONS.

By E. C. ELLSBREE.

825. II. EFFECT OF REORGANIZATION ON OLD CORPORATION — 1. As to Identity of Old and Reorganized Corporation — *a.* IDENTITY QUESTION OF INTENT. — See note 1.

832. III. REORGANIZATION BY FORECLOSURE PURCHASERS — 3. Reorganization or Purchasing Committees — *b.* POWERS, DUTIES, AND LIABILITIES — (1) *Power to Modify or Depart from Reorganization Agreement* — (*b*) *When Invested with Wide Discretion* — *aa.* IN GENERAL. — See notes 2, 3.

834. (4) *Duty to Inform Bondholders of Terms of Proposed Reorganization*. — See note 1.

835. (7) *Liability of Committee* — (*a*) *To Parties to Reorganization Agreement* — *aa.* FOR BREACH OF TRUST. — See note 4.

869. 7. Rights, Powers, Duties, and Liabilities of New Corporation — *d.* LIABILITY FOR DEBTS AND OTHER CONTRACTS OF OLD CORPORATION — (1) *Liability for Debts* — (*a*) *Debts Not Assumed by Purchasers* — *aa.* IN GENERAL. — See note 5.

883. *h.* TAX UPON REINCORPORATION — (1) *Liability of New Corporation*. — See note 3.

889. WINDOW. — See note 8.

890. WISH. — See note 4.

893. WITHIN. — See note 2.

895. WITHOUT. — See note 1.

825. 1. Identity of Old and New Corporation Question of Intention. — *Allen v. North Des Moines M. E. Church*, 127 Iowa 96.

832. 2. Agreements Construed Liberally in Favor of Committee. — *Compare Industrial, etc., Trust v. Tod*, 180 N. Y. 215, reversing 93 N. Y. App. Div. 263.

3. Committee Liable for Malfeasance, Misfeasance, or Gross Negligence. — *Industrial, etc., Trust v. Tod*, 180 N. Y. 215.

834. 1. Failure to File Plan Before Sale. — *Compare Industrial, etc., Trust v. Tod*, 180 N. Y. 215, reversing 93 N. Y. App. Div. 263, cited in the original note.

835. 4. Measure of Damages. — In an action against a reorganization committee for failure to submit the reorganization plan to the bondholders before foreclosure, whereby the bonds tentatively deposited with the committee were lost, the measure of damages is the

value of the bonds as of the date when the agreement was violated by the committee. *Industrial, etc., Trust v. Tod*, 180 N. Y. 215.

869. 5. New Corporation Not Liable for Debts of Old Corporation. — *Allen v. North Des Moines M. E. Church*, 127 Iowa 96.

883. 3. New Corporation Taxable. — *Com. v. Licking Valley Bldg. Assoc. No. 3*, (Ky. 1904) 82 S. W. Rep. 435.

889. 8. A Window is not less a window because it is not capable of being opened, or because it is not fixed in a vertical plane. *Easton v. Isted*, (1903) 1 Ch. 405.

890. 4. Precatory Trust Not Created. — *Russell v. U. S. Trust Co.*, 127 Fed. Rep. 447.

893. 2. Computation of Time. — *Vose v. Kuhn*, (Supm. Ct. Tr. T.) 45 Misc. (N. Y.) 455.

895. 1. Without May Mean Independently Of. — *Evans v. McFarland*, 186 Mo. 725.

WITNESSES.

By E. G. CHILTON.

- 910.** III. SWEARING THE WITNESS — 1. In General. — See notes 4, 6.
- 911.** No Particular Form of Oath Is Essential at Common Law. — See note 7.
- 912.** IV. COMPETENCY — 1. Persons Interested — *b.* PARTIES OF RECORD — (1) *In General.* — See note 1.
- 915.** (3) *Effect of a Default.* — See note 1.
- 917.** (6) *Exceptions to General Rule* — (b) *In Equity.* — See note 4.
- 918.** *c.* PERSONS NOT PARTIES OF RECORD — (1) *In General.* — See note 1.
- 927.** (6) *Principal and Agent — Master and Servant.* — See note 1.
- 935.** 4. Defect of Understanding — *b.* IDIOTS, LUNATICS, ETC. — (2) *Condition at Time of Event Testified To.* — See note 11.
- 937.** 5. Want of Religious Belief — *a.* AT COMMON LAW — (1) *Test of Competency.* — See note 3.
- Necessity of Belief in Punishment in Next World. — See note 10.
- 939.** *b.* STATUTORY AND CONSTITUTIONAL CHANGES. — See note 4.
- 940.** Effect of Constitutional Provisions. — See note 1.
- 941.** 10. Negroes. — See note 1.
11. Attorneys. — See note 6.
- 942.** 13. Husband and Wife — *a.* AT COMMON LAW AND UNDER STATUTES DECLARATORY OF THE COMMON LAW — (1) *General Rule* — (a) *Testimony for Each Other* — *aa.* CIVIL CASES — (*aa*) *One Spouse Party of Record* — *General Rule.* — See note 5.
- 945.** *bb.* CRIMINAL CASES. — See note 1.
- (b) *Testimony Against Each Other* — *aa.* CIVIL CASES — (*aa*) *Against Spouse Party of Record.* — See note 7.
- 947.** Statutes Prohibiting Testimony in Actions Founded in Adultery. — See notes 1, 2.
- 910.** 4. The Witnesses May Be Sworn in a Body before any of them testify. *State v. Crea*, 10 Idaho 88.
- 6.** Time of Objection to Unsworn Witness. — See *Southern R. Co. v. Ellis*, 123 Ga. 614, holding that it was sufficient, in the absence of objection, to recall an unsworn witness and permit him to swear that what he had previously stated was true.
- 911.** 7. Too Late After Witness Sworn to Inquire as to What Oath Most Binding. — *State v. Davis*, 186 Mo. 533.
- 912.** 1. General Rule. — *Graves v. Rivers*, 123 Ga. 224; *In re Maher*, 210 Ill. 160.
- Interest Only Reason for Exclusion. — *Weston v. Elliott*, 72 N. H. 433.
- 915.** 1. Effect of Default in Action Ex Contractu. — See *Weston v. Elliott*, 72 N. H. 433.
- 917.** 4. Rule in Equity. — See *Weston v. Elliott*, 72 N. H. 433.
- 918.** 1. Interested Witness Incompetent. — *Feitl v. Chicago City R. Co.*, 211 Ill. 279.
- 927.** 1. Misconduct of Servant or Agent. — *Feitl v. Chicago City R. Co.*, 211 Ill. 279.
- 935.** 11. Witness Competent. — See *Hendricks v. Mechanics' Bank*, (Supm. Ct. App. T.) 88 N. Y. Supp. 176.
- 937.** 3. Atheists Incompetent. — See *Bright v. Com.*, (Ky. 1905) 86 S. W. Rep. 527.
10. Belief in Punishment Sufficient. — See *Bright v. Com.*, (Ky. 1905) 86 S. W. Rep. 527.
- 939.** 4. Statutory Abolition of Religious Test. — *Bright v. Com.*, (Ky. 1905) 86 S. W. Rep. 527. See also *Clark v. Finnegan*, 127 Iowa 644.
- 940.** 1. Testifying in One's Own Behalf a "Civil Right." — *Bright v. Com.*, (Ky. 1905) 86 S. W. Rep. 527.
- 941.** 1. *Rascoe v. Walker-Smith Co.*, 98 Tex. 565.
- 6.** Incompetency Removed by Statute. — *Wood v. Etiwanda Water Co.*, 147 Cal. 228.
- 942.** 5. Incompetent in Favor of Other Spouse. — *Morgenroth v. Spencer*, 124 Wis. 564. See also *Schultz v. Culbertson*, 125 Wis. 169.
- Wife Competent Where Husband's Interest in Event of Suit Not Direct. — *Phillips v. Poulter*, 111 Ill. App. 330.
- 945.** 1. Criminal Cases. — *Elmore v. State*, 140 Ala. 184; *State v. Sargood*, 77 Vt. 80. See also *Graff v. People*, 208 Ill. 312. Compare *State v. Lortz*, 186 Mo. 122.
- 7.** Incompetent Against Other Spouse. — *Hartley v. Hartley*, (R. I. 1905) 61 Atl. Rep. 144. See also *German-American Ins. Co. v. Paul*, 5 Indian Ter. 703; *Marshall v. Marshall*, (Kan. 1905) 80 Pac. Rep. 629.
- 947.** 1. Allegations of Adultery. — *Knicker-*

947. (bb) *Against Spouse Not Party of Record — Action for Criminal Conversation.* — See note 7.

bb. CRIMINAL CASES — (aa) *Spouse Defendant in Case in Which Witness Called.* — See note 9.

950. (2) *Effect of Divorce* — (b) *Against Former Spouse.* — See note 3. Criminal Cases. — See note 10.

951. (3) *Effect of Death of One Spouse* — (a) *In Favor of Decedent's Estate.* — See note 1.

(b) *Against Estate.* — See notes 4, 5.

952. (4) *Where Marriage Is Void* — (b) *Bigamous Marriages.* — See note 4.

953. (5) *Codefendants of Husband or Wife* — (a) *Criminal Cases* — aa. TESTIMONY IN FAVOR OF CODEFENDANT. — See notes 1, 2.

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954. (6) *Exceptions to General Rule, Based on Policy* — (a) *Crimes Against Each Other* — aa. IN GENERAL. — See note 9.

955. bb. WHAT CRIMES WITHIN EXCEPTION. — See note 7.

958. (d) *Other Exceptions — Facts Within Knowledge of Wife Alone.* — See note 2. b. EFFECT OF STATUTES REMOVING INTEREST DISQUALIFICATION — (I) *Testimony in Favor of Spouse.* — See note 5.

961. c. STATUTES EXPRESSLY REMOVING INCOMPETENCY — (I) *Introductory.* — See note 2.

(2) *Absolute Competency* — (a) *Civil Cases.* — See note 3.

(b) *Criminal Cases.* — See note 6.

962. (3) *Competent with Consent of Each Other* — (b) *Against Each Other.* — See note 10.

964. (4) *Agency* — (a) *In General — Statutory Competency.* — See note 1.

967. (6) *Adverse Interests in Separate Property.* — See note 1.

(7) *Actions in Which Wife Would Be Plaintiff or Defendant if Unmarried* — TESTIMONY OF ONE ALLOWED. — See notes 4, 8.

bocker v. Worthing, 138 Mich. 224. Compare Schaab v. Schaab, 66 N. J. Eq. 334.

947. 2. *Effect of Divorce.* — See Knickerbocker v. Worthing, 138 Mich. 224.

7. *Action for Alienation of Affections — Neither Spouse Competent to Prove or Disprove Adultery.* — Knickerbocker v. Worthing, 138 Mich. 224.

9. *Incompetent Against Spouse.* — Cole v. State, (Tex. Crim. 1905) 88 S. W. Rep. 341. See also Graff v. People, 208 Ill. 312. Compare Com. v. Barker, 185 Mass. 324.

950. 3. *Confidential Communications Excluded.* — German-American Ins. Co. v. Paul, 5 Indian Ter. 703. See also Knickerbocker v. Worthing, 138 Mich. 224; Cole v. State, (Tex. Crim. 1905) 88 S. W. Rep. 341.

10. *Anything Not Confidential.* — State v. Nelson, 39 Wash. 221.

951. 1. *Testimony Admissible.* — Schultz v. Culbertson, 125 Wis. 169.

4. *Confidential Communications Excluded.* — Hannaford v. Dowdle, (Ark. 1905) 86 S. W. Rep. 818.

Survivor Competent to Prove Parol Gift. — Contra, Buckel v. Smith, (Ky. 1904) 82 S. W. Rep. 235.

5. *Witness Competent in General.* — Hannaford v. Dowdle, (Ark. 1905) 86 S. W. Rep. 818.

952. 4. *Second Wife Competent.* — Murphy v. State, 122 Ga. 149.

953. 1. *Excluded on Joint Trial.* — State v. Sargood, 77 Vt. 80.

2. *Testimony Not Affecting Spouse's Guilt.* — See State v. Sargood, 77 Vt. 80.

5. *Separate Trials.* — See State v. Sargood, 77 Vt. 80.

954. 9. *Crimes Against Each Other.* — State v. Harris, (Del. 1904) 58 Atl. Rep. 1042; Murray v. State, (Tex. Crim. 1905) 86 S. W. Rep. 1024 (by statute). Compare Frazier v. State, (Tex. Crim. 1905) 86 S. W. Rep. 754.

955. 7. *Assault and Battery.* — State v. Harris, (Del. 1904) 58 Atl. Rep. 1042.

958. 2. *Action for Necessaries.* — Morgenroth v. Spencer, 124 Wis. 564.

5. *Georgia.* — See Macon R., etc., Co. v. Mason, 123 Ga. 773.

961. 2. *Com. v. Barker*, 185 Mass. 324. And see the title PRIVILEGED COMMUNICATIONS, **94.** 1.

3. *Competent for Each Other.* — Jefferson First Nat. Bank v. Harris, 56 W. Va. 345.

6. *Competent for Accused.* — See State v. Lortz, 186 Mo. 122.

962. 10. *Statutes Making Consent Necessary* — Knickerbocker v. Worthing, 138 Mich. 224.

964. 1. *Kansas Statute — "Transactions."* — See Marshall v. Marshall, (Kan. 1905) 80 Pac. Rep. 629.

967. 1. *Similar Statute in Louisiana.* — Schoppel v. Daly, 112 La. 201.

4. *Only One May Testify.* — Floore v. Green, (Ky. 1904) 83 S. W. Rep. 133.

8. *Exercise of Privilege.* — Floore v. Green, (Ky. 1904) 83 S. W. Rep. 133.

967. (10) *Refusal to Support Wife.* — See note 16.

970. **V. DETERMINING QUESTION OF COMPETENCY** — 1. **Time of Making Objection** — *a.* BEFORE EXAMINATION IN CHIEF. — See note 3.

b. DURING EXAMINATION. — See note 5.

971. See note 3.

c. EFFECT OF CROSS-EXAMINATION. — See notes 4, 6.

d. AFTER WITNESS LEAVES STAND. — See note 8.

972. *e.* AFTER CONCLUSION OF TRIAL. — See notes 1, 2.

f. DEPOSITIONS. — See note 3.

g. WAIVER BY MAKING WITNESS OWN WITNESS. — See note 6.

973. *h.* WAIVER BY STIPULATION. — See note 1.

2. Specifying Ground of Objection. — See note 2.

Objections to Testimony Are Not Objections to Competency of Witness. — See note 3.

3. Evidence on Question of Competency — *a.* EXAMINATION ON VOIR

DIRE. — See notes 4, 6.

976. *b.* PROOF FROM OTHER SOURCES. — See notes 1, 2.

4. Competency a Question for the Court. — See note 4.

967. 16. *Neglect to Support Wife.* — *Wester v. State*, 142 Ala. 56.

970. 3. *Time of Making Objection — Before Examination in Chief.* — *Standley v. Moss*, 114 Ill. App. 612; *Tabor v. Tabor*, 136 Mich. 255; *Edwards v. Latimer*, 183 Mo. 610; *Imboden v. St. Louis Union Trust Co.*, 111 Mo. App. 220. See also *Eatman v. State*, 139 Ala. 67; *Young v. State*, 122 Ga. 725.

5. *At First Opportunity.* — *Mann v. Balfour*, 187 Mo. 290; *Imboden v. St. Louis Union Trust Co.*, 111 Mo. App. 220.

971. 3. See *Mann v. Balfour*, 187 Mo. 290.

4. *Cross-examination by Which the Witness's Competency Is Established* estops the cross-examining party from objecting. *Speck v. Kenoyer*, 164 Ind. 431.

6. *Edwards v. Latimer*, 183 Mo. 610; *Imboden v. St. Louis Union Trust Co.*, 111 Mo. App. 220.

8. *After Witness Leaves Stand.* — See *Green v. Green*, (Ky. 1904) 82 S. W. Rep. 1011.

972. 1. *Trial de Novo.* — It has been held that where the incompetency of a witness was waived in one court, the question cannot be raised on a trial *de novo* in a different court. *Imboden v. St. Louis Union Trust Co.*, 111 Mo. App. 220.

2. *Muskeget Island Club v. Nantucket*, 185 Mass. 303.

3. *At Deposition of Witness of Opposite Party.* — See *Imboden v. St. Louis Union Trust Co.*, 111 Mo. App. 220.

6. *Waiver by Making Witness Own Witness.* — *Kwiecinski v. Newman*, 137 Mich. 287; *Dee v. King*, 77 Vt. 230.

973. 1. *Waiver by Stipulation.* — *Imboden v. St. Louis Union Trust Co.*, 111 Mo. App. 220.

2. *Objection Should Be Specific.* — *Murphey v. Bush*, 122 Ga. 715; *Mann v. Balfour*, 187 Mo. 290. See also *German American Sav. Bank v. Hanna*, 124 Iowa 374.

Objection Limited to Ground Specified. — *Gerhardt v. Tucker*, 187 Mo. 46.

3. *Objections to Testimony Not Objections to Competency.* — *Imboden v. St. Louis Union Trust Co.*, 111 Mo. App. 220.

4. See *Landthrift v. State*, 140 Ala. 114; *Yzaguirre v. State*, (Tex. Crim. 1904) 85 S. W. Rep. 14; *Hart v. Godkin*, 122 Wis. 646.

6. *Vickery v. State*, (Fla. 1905) 38 So. Rep. 907.

976. 1. See *Groff v. Groff*, 209 Pa. St. 603.

2. *Witness's Own Testimony Cannot Remove Competency Proved Aliunde.* — See *Groff v. Groff*, 209 Pa. St. 603.

4. *Competency — Court Is Judge of Law and Fact* — *Alabama.* — *Parrish v. State*, 139 Ala. 16. *Arizona.* — *Gila Valley, etc., R. Co. v. Lyon*, (Ariz. 1905) 80 Pac. Rep. 337.

Georgia. — See *Davis v. State*, 120 Ga. 433; *Young v. State*, 122 Ga. 725.

Illinois. — See *Sokel v. People*, 212 Ill. 238.

Indiana. — *La Porte Carriage Co. v. Sullender*, (Ind. App. 1904) 71 N. E. Rep. 922.

Massachusetts. — *Muskeget Island Club v. Nantucket*, 185 Mass. 303.

Minnesota. — *Clarke v. Philadelphia, etc., Coal, etc., Co.*, 92 Minn. 418; *Corse v. Minnesota Grain Co.*, 94 Minn. 331.

Missouri. — *Schrodt v. St. Joseph*, 109 Mo. App. 627.

Montana. — *Watson v. Colusa-Parrot Min., etc., Co.*, 31 Mont. 513.

New Jersey. — *Burns v. Delaware, etc., Tel., etc., Co.*, 70 N. J. L. 745.

Pennsylvania. — *Hope v. Philadelphia, etc., R. Co.*, 211 Pa. St. 401. See also *Com. v. Furman*, 211 Pa. St. 549, 107 Am. St. Rep. 574.

South Dakota. — *Borneman v. Chicago, etc., R. Co.*, (S. Dak. 1905) 104 N. W. Rep. 208.

Texas. — *North Texas Constr. Co. v. Bostick*, 98 Tex. 239.

Wisconsin. — *Hart v. Godkin*, 122 Wis. 646. See also *Vagts v. Utman*, 125 Wis. 265.

Competency of Young Children Peculiarly Within Discretion of Court. — *Com. v. Furman*, 211 Pa. St. 549, 107 Am. St. Rep. 574; *Freasier v. State*, (Tex. Crim. 1904) 84 S. W. Rep. 360. See also *Eatman v. State*, 139 Ala. 67; *Clark v. Finnegan*, 127 Iowa 644.

Inability to Define the Legal Obligation of an Oath does not constitute incompetency. *Bright v. Com.*, (Ky. 1905) 86 S. W. Rep. 527.

977. Error to Leave Question of Fact to Jury. — See note 1.
Court's Decision Conclusive. — See notes 2, 3, 5, 6.

978. Expert Witnesses. — See note 1.

VI. INCOMPETENCY REMOVED BY STATUTE — 1. Interest Disqualification

— *a.* CIVIL CASES — (1) *In England*. — See note 2.

988. 3. Death or Disability of Opposing Party — *b.* ACTIONS AND PROCEEDINGS AFFECTED BY STATUTE — (1) *In General*. — See note 4.

989. (3) *Actions on "Claim or Demand" Against Decedent's Estate*. — See note 6.

991. *c.* PERSONS EXCLUDED — (1) *Parties to Actions or Proceedings* — (a) *In General*. — See note 8.

992. (c) *Opposite Party*. — See note 9.

993. (d) *Parties Improperly Joined*. — See note 2.

(i) *Interested Parties of Record*. — See note 10.

994. (j) *Nominal and Disinterested Parties of Record* — General Rule. — See note 2.

996. (k) *Interested Parties Not of Record* — General Rule. — See note 1.

997. *Minority Rule*. — See note 1.

(2) *Parties to Thing or Contract in Action* — (a) *In General*. — See

note 6.

977. 1. Error to Leave Question of Fact to Jury. — See *Weston v. Teufel*, 213 Ill. 291.

2. Court's Decision Conclusive. — *Burns v. Delaware, etc., Tel., etc., Co.*, 70 N. J. L. 745.

3. *Borneman v. Chicago, etc., R. Co.*, (S. Dak. 1905) 104 N. W. Rep. 208; *Hart v. Godkin*, 122 Wis. 646. See also *Sokel v. People*, 212 Ill. 238.

5. Where Question Reserved. — *Muskeget Island Club v. Nantucket*, 185 Mass. 303.

6. Abuse of Discretion. — *Gila Valley R., etc., Co. v. Lyon*, (Ariz. 1905) 80 Pac. Rep. 337; *Young v. State*, 122 Ga. 725; *North Texas Constr. Co. v. Bostick*, 98 Tex. 239. See also *Com. v. Furman*, 211 Pa. St. 549, 107 Am. St. Rep. 574.

No Abuse of Discretion. — *Lakeside Mfg. Co. v. Worcester*, 186 Mass. 552; *Clarke v. Philadelphia, etc., Coal, etc., Co.*, 92 Minn. 418; *Corse v. Minnesota Grain Co.*, 94 Minn. 331; *Freasier v. State*, (Tex. Crim. 1904) 84 S. W. Rep. 360.

978. 1. Expert Witnesses. — *Parrish v. State*, 139 Ala. 16; *Gila Valley, etc., R. Co. v. Lyon*, (Ariz. 1905) 80 Pac. Rep. 337; *Lakeside Mfg. Co. v. Worcester*, 186 Mass. 552; *Klous v. Com.*, 188 Mass. 149; *Schrodt v. St. Joseph*, 109 Mo. App. 627; *Mann v. Balfour*, 187 Mo. 290; *Burns v. Delaware, etc., Tel., etc., Co.*, 70 N. J. L. 745; *Hope v. Philadelphia, etc., R. Co.*, 211 Pa. St. 401.

2. Fallacies of Common Law. — See *Creeping Bear v. State*, 113 Tenn. 322.

988. 4. *Cunningham v. Stoner*, 10 Idaho 549. See also *Roach v. Roach*, 69 Kan. 522.

989. 6. "Claim or Demand" Against Estate. — *Bollinger v. Wright*, 143 Cal. 292.

The Mississippi Statute. — *Liverman v. Lee*, 86 Miss. 370.

991. 8. Exclusion of "Parties" Only. — *German-American Sav. Bank v. Hanna*, 124 Iowa 374; *Hoffmann v. Union Dime Sav. Inst.*, 95 N. Y. App. Div. 329. See also *Moore v. Crump*, 84 Miss. 612; *Jones v. Jones*, (Miss. 1904) 37 So. Rep. 499; *Johnson v. Cameron*, 136 N. Car. 243.

992. 9. Compare *Peirson v. McNeal*, 137 Mich. 158.

993. 2. Parties Improperly Joined. — *Jones v. Jones*, 213 Ill. 228.

10. Interested Parties of Record — *United States*. — See *Russell v. Russell*, 129 Fed. Rep. 434. *District of Columbia*. — *Dawson v. Waggonman*, 23 App. Cas. (D. C.) 428.

Illinois. — *In re Maher*, 210 Ill. 160; *Symonds v. Caldwell*, 112 Ill. App. 341. See also *Godfrey v. Phillips*, 209 Ill. 584.

Iowa. — See *Ross v. Kirkwood*, 123 Iowa 668.

Kentucky. — *Proctor v. Proctor*, (Ky. 1904) 81 S. W. Rep. 272; *Black v. Cox*, (Ky. 1904) 82 S. W. Rep. 278; *Barnett v. Adams*, (Ky. 1904) 82 S. W. Rep. 406; *Green v. Green*, (Ky. 1904) 82 S. W. Rep. 1011.

Mississippi. — *Watson v. Duncan*, 84 Miss. 763; *Moore v. Crump*, 84 Miss. 612; *Jones v. Jones*, (Miss. 1904) 37 So. Rep. 499.

New York. — *Burdick v. Burdick*, 180 N. Y. 261; *Connolly v. Keenan*, (Supm. Ct. Spec. T.) 42 Misc. (N. Y.) 589; *Cody v. Hadcox*, 98 N. Y. App. Div. 467; *Matter of Blair*, 99 N. Y. App. Div. 81; *Pringle v. Burroughs*, 100 N. Y. App. Div. 366; *Wakefield v. Wakefield*, (N. Y. City Ct. Tr. T.) 92 N. Y. Supp. 399. See also *Komp v. Luria*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 339.

Texas. — *Abbott v. Stiff*, (Tex. Civ. App. 1904) 81 S. W. Rep. 562; *Tompkins v. McGinn*, (Tex. Civ. App. 1905) 85 S. W. Rep. 452.

994. 2. Nominal or Formal Parties Not Excluded. — See *Tompkins v. McGinn*, (Tex. Civ. App. 1905) 85 S. W. Rep. 452.

996. 1. "Party" Held to Mean Only Party of Record. — Compare *People's Nat. Bank v. Wilcox*, 136 Mich. 567.

997. 1. Direct Interest Essential. — See *German American Sav. Bank v. Hanna*, 124 Iowa 374.

6. Surviving Party to Thing or Contract in Action. — *Asbury v. Hicklin*, 181 Mo. 658; *Stam v. Smith*, 183 Mo. 464; *Montelius v. Montelius*, 209 Pa. St. 541; *Wright v. Hanna*, 210 Pa. St. 349. See also *Gerhardt v. Tucker*, 187 Mo. 46; *Mann v. Balfour*, 187 Mo. 290.

- 999.** (c) What Is the Contract or Cause of Action in Issue. — See note 9.
- 1001.** (d) Protection of Estate or Persons Holding under Deceased Party. — See note 1.
- (3) *Persons Interested in Event of Action* — (a) Disqualification of Interest in General. — See note 5.
- 1002.** See note 1.
- 1003.** (b) Nature of Disqualifying Interest — *aa.* INTEREST IN EVENT OF SUIT ESSENTIAL. — See note 2.
- 1004.** Interest Balanced — Liability in Any Event. — See note 1.
- bb.* PECUNIARY INTEREST. — See note 4.
- What Constitutes Pecuniary Interest. — See notes 5, 6.
- 1005.** Relationship to a Party. — See note 1.
- 1006.** *cc.* INTEREST MUST BE PRESENT, CERTAIN, AND FIXED. — See note 1.
- dd.* INTEREST ADVERSE TO OTHER PARTY. — See note 3.
- 1008.** (4) *Persons in Particular Relations* — (a) Creditors of Decedents. — See note 9.
- 1009.** (b) Persons from Whom Party Derives Title — *aa.* IN GENERAL. — See note 4.
- 1010.** *bb.* GRANTORS AND ASSIGNORS — Grantors. — See note 4.
- Assignors. — See note 6.
- 1011.** (c) Husband and Wife — Disqualification of One Disqualifies Other. — See note 5.
- 1013.** (d) Donor and Donee — Contest Between Donee and Donor's Representative — Donee Incompetent. — See note 3.

999. 9. What Is the Contract or Cause of Action in Issue. — See *Stam v. Smith*, 183 Mo. 464.

1001. 1. Contest Between Execution Creditor of Decedent and Claimant of Property Levied On. — *Deaver v. Deaver*, 137 N. Car. 240.

5. Persons Interested in Event Generally Incompetent — *Alabama*. — *Meyers v. Meyers*, 141 Ala. 343; *Henderson v. Brunson*, 141 Ala. 674.

Georgia. — *Skeen v. Moore*, 120 Ga. 1057.

Illinois. — *In re Maher*, 210 Ill. 160; *Off v. Trapp*, 109 Ill. App. 49. See also *Godfrey v. Phillips*, 209 Ill. 584.

Iowa. — *German American Sav. Bank v. Hanna*, 124 Iowa 374.

Kentucky. — *Barnett v. Adams*, (Ky. 1904) 82 S. W. Rep. 406.

New York. — *Rosseau v. Rouss*, 180 N. Y. 116; *Hoffmann v. Union Dime Sav. Inst.*, 95 N. Y. App. Div. 329; *Downey v. Owen*, 98 N. Y. App. Div. 411; *Roberts v. Mack*, 98 N. Y. App. Div. 485; *Smith v. Smith*, 100 N. Y. App. Div. 1; *Healy v. Malcolm*, 99 N. Y. App. Div. 370.

North Carolina. — *Hall v. Holloman*, 136 N. Car. 34; *Johnson v. Cameron*, 136 N. Car. 243; *Yow v. Hamilton*, 136 N. Car. 357.

Vermont. — *Miller v. Stebbins*, 77 Vt. 183.

1002. 1. Persons Not Parties Nor Interested in Event Competent to Testify. — *Henderson v. Brunson*, 141 Ala. 674; *O'Brien v. Bonfield*, 213 Ill. 428; *German-American Sav. Bank v. Hanna*, 124 Iowa 374; *Hoffmann v. Union Dime Sav. Inst.*, 95 N. Y. App. Div. 329; *Deaver v. Deaver*, 137 N. Car. 240.

1003. 2. Interest in Event Necessary to Disqualify. — *Henderson v. Brunson*, 141 Ala. 674; *German American Sav. Bank v. Hanna*, 124 Iowa 374; *Hoffman v. Union Dime Sav. Inst.*, 95 N. Y. App. Div. 329; *Tompkins v. McGinn*, (Tex. Civ. App. 1905) 85 S. W. Rep. 452. See also *Miller v. Stebbins*, 77 Vt. 183. Compare *Barnett v. Adams*, (Ky. 1904) 82 S. W. Rep. 406.

1004. 1. Interest Balanced. — See *Weston v. Elliott*, 72 N. H. 433.

4. Pecuniary Benefit. — *O'Brien v. Bonfield*, 213 Ill. 428; *Hoffmann v. Union Dime Sav. Inst.*, 95 N. Y. App. Div. 329.

5. Liability Resulting from Action. — *O'Brien v. Bonfield*, 213 Ill. 428; *Miller v. Stebbins*, 77 Vt. 183.

6. Interest as Heir or Beneficiary Affected. — Compare *Henderson v. Brunson*, 141 Ala. 674, holding that an heir expectant has no such pecuniary interest as renders him incompetent.

1005. 1. Relationship. — *Henderson v. Brunson*, 141 Ala. 674; *O'Brien v. Bonfield*, 213 Ill. 428.

1006. 1. Interest Must Be Present, Certain, and Fixed. — *O'Brien v. Bonfield*, 213 Ill. 428; *Hoffmann v. Union Dime Sav. Inst.*, 95 N. Y. App. Div. 329. See also *Miller v. Stebbins*, 77 Vt. 183.

3. When Interest Not Opposed to Decedent's Representatives. — *Jones v. Jones*, 213 Ill. 228; *Crosetti's Estate*, 211 Pa. St. 490.

1008. 9. Creditor of Decedent Incompetent as Witness in His Own Behalf. — *Union Bank v. Nickell*, 57 W. Va. 57.

1009. 4. Person Furnishing Sole Consideration for Decedent's Promise to Plaintiff Excluded. — *Rosseau v. Rouss*, 180 N. Y. 116.

1010. 4. Grantors Excluded. — *Roberts v. Mack*, 98 N. Y. App. Div. 485.

6. Assignors — Express Statutory Provision. — *Healy v. Malcolm*, 99 N. Y. App. Div. 370.

1011. 5. Husband and Wife — Disqualification of One Disqualifies Other. — *Finn v. Sowders*, (Mich. 1905) 103 N. W. Rep. 177; *Tompkins v. McGinn*, (Tex. Civ. App. 1905) 85 S. W. Rep. 452; *Miller v. Stebbins*, 77 Vt. 183. See also *German American Sav. Bank v. Hanna*, 124 Iowa 374; *Eastwood v. Crane*, 125 Iowa 707.

1013. 3. Donee Not Competent Witness Against Deceased Donor's Personal Representa-

1014. (c) Heirs, Devisees, Etc. — *aa.* IN GENERAL. — See note 11.

1015. *bb.* PROBATE PROCEEDINGS. — See note 6.

1018. (f) Personal Representatives of Decedent — Representative Personally Interested. — See note 1.

d. PERSONS PROTECTED — (1) *Opposing Party in General* —

(a) Who Is Opposite or Adverse Party — An Opposite Party. — See note 4.

1019. (b) Provision that Neither Party Shall Testify. — See note 1.

(2) *Enumeration of Classes* — (a) *In General* — *aa.* OPPOSING PARTY MUST COME WITHIN STATUTE. — See note 2.

1020. *bb.* PERSONS DERIVING TITLE FROM DECEASED PERSON. — See note 1.

(b) Personal Representatives — *aa.* REPRESENTING ESTATE. — See note 3.

1021. *cc.* WHO DEEMED A REPRESENTATIVE. — See note 1.

1022. (c) Parties in Representative Capacity — Where an Executor or Administrator Is a Party in His Own Right. — See note 8.

1024. (e) Devisees. — See note 1.

(f) Heirs. — See note 2.

1026. *e.* SUBJECTS AND CHARACTER OF TESTIMONY EXCLUDED —

(1) *Transactions and Communications with Decedents Generally* — (b) *Terms Defined and Explained* — A "Communication." — See note 1.

1027. Facts Specially Known to Decedent. — See note 2.

Participation by Third Persons. — See note 6.

1028. (c) What Matters Constitute Transactions and Communications — *aa.* IN GENERAL. — See note 1.

bb. PARTICULAR INSTANCES — (*aa.*) *Contracts*. — See notes 2, 3.

tives. — Dawson v. Waggaman, 23 App. Cas. (D. C.) 428.

1014. 11. Heir Interested Party. — Crosetti's Estate, 211 Pa. St. 490.

1015. 6. Probate Proceedings. — See Godfrey v. Phillips, 209 Ill. 584.

Wife of Heir Incompetent. — Roche v. Nason, 105 N. Y. App. Div. 256.

1018. 1. Representative Personally Interested. — Compare Field v. Field, (Tex. Civ. App. 1905) 87 S. W. Rep. 726.

4. Reed v. Whipple, (Mich. 1905) 103 N. W. Rep. 548.

1019. 1. Neither Party Allowed to Testify. — Barrett v. Eastham, (Tex. Civ. App. 1905) 86 S. W. Rep. 1057; Rogers v. Tompkins, (Tex. Civ. App. 1905) 87 S. W. Rep. 379; Rascoe v. Walker-Smith Co., 98 Tex. 565. See also Eastwood v. Crane, 125 Iowa 707; Parsons v. Wentworth, (N. H. 1904) 59 Atl. Rep. 623; Field v. Field, (Tex. Civ. App. 1905) 87 S. W. Rep. 726.

2. Enumeration of Classes — Opposing Party Must Come Within Statute. — Broadrick v. Broadrick, 25 Pa. Super. Ct. 225.

1020. 1. Persons Deriving Title from Deceased Person. — Downey v. Owen, 98 N. Y. App. Div. 411; Roberts v. Mack, 98 N. Y. App. Div. 485.

3. Personal Representatives — Estate Protected. — Dawson v. Waggaman, 23 App. Cas. (D. C.) 428; Johnston v. Coney, 120 Ga. 767; Skeen v. Moore, 120 Ga. 1057; Symonds v. Caldwell, 112 Ill. App. 341; Rousseau v. Rouss, 180 N. Y. 116; Roberts v. Mack, 98 N. Y. App. Div. 485; Cody v. Hadcox, 98 N. Y. App. Div. 467; Healy v. Malcolm, 99 N. Y. App. Div. 370; Hall v. Holloman, 136 N. Car. 34; Deaver v. Deaver, 137 N. Car. 240; Emerson v. Scott, (Tex. Civ. App. 1905) 87 S. W. Rep. 369. See also Small

v. Pryor, (N. J. 1905) 61 Atl. Rep. 564; McKinley v. Coe, 66 N. J. Eq. 70; Field v. Field, (Tex. Civ. App. 1905) 87 S. W. Rep. 726.

1021. 1. Who Deemed a Representative. — Peirson v. McNeal, 137 Mich. 158.

1022. 8. Where Executors Intervene as Agents for Those Interested, and not on behalf of the estate, the opposing party is not precluded from testifying. Russell v. Russell, 129 Fed. Rep. 434.

1024. 1. Devisees — Contra in New Jersey. — McKinley v. Coe, 66 N. J. Eq. 70; Small v. Pryor, (N. J. 1905) 61 Atl. Rep. 564.

Legatees. — In Texas the legatee of a deceased person is not protected. Emerson v. Scott, (Tex. Civ. App. 1905) 87 S. W. Rep. 369.

2. Heirs. — Tabor v. Tabor, 136 Mich. 255; Emerson v. Scott, (Tex. Civ. App. 1905) 87 S. W. Rep. 369.

When Heir Not Protected. — Under the Nebraska statute the heir does not represent the deceased when the right of the deceased at the time of his death is not in controversy, but the question is to whom that right descends. Sorensen v. Sorensen, 68 Neb. 510.

1026. 1. Conversations with or Statements Made by Decedent. — Hall v. Holloman, 136 N. Car. 34.

1027. 2. Facts Specially Known to Decedent. — See Finn v. Sowders, (Mich. 1905) 103 N. W. Rep. 177.

6. Participation by Third Person. — Burdick v. Burdick, 180 N. Y. 261.

1028. 1. Miscellaneous Instances of Personal Transactions. — Johnston v. Coney, 120 Ga. 767; Skeen v. Moore, 120 Ga. 1057; Burdick v. Burdick, 180 N. Y. 261; Cody v. Hadcox, 98 N. Y. App. Div. 467.

2. Contracts. — Eastwood v. Crane, 125 Iowa 707; Proctor v. Proctor, (Ky. 1904) 81 S. W.

1028. (bb) *Payment of Money.* — See note 6.

1029. See note 1.

(cc) *Marriage.* — See note 3.

(ee) *Execution of Instruments.* — See note 7.

1030. (ff) *Delivery of Instrument or Other Thing by Decedent.* — See note 4.

(gg) *Denial of Transaction.* — See note 7.

1031. cc. *INDEPENDENT FACTS* — (aa) *Rule Stated.* — See notes 5, 6.

1032. (bb) *What Are Independent Facts — In General.* — See note 3.

1034. *Physical and Mental Condition of Decedent.* — See note 4.

1035. dd. *FACTS FROM WHICH PERSONAL TRANSACTIONS MAY BE INFERRED* — (bb)

Indirect Testimony as to Personal Transactions. — See note 2.

1036. (d) *Written Communications and Transactions* — bb. *LOSS OF WRITTEN EVIDENCE.* — See note 6.

1038. (e) *Actions for Services — Fact of Rendition of Services.* — See note 3.

1039. *Proof of Value of Services.* — See note 1.

Proof of Nonpayment. — See note 2.

(2) *Matters Occurring in Lifetime of Decedent.* — See note 7.

1040. *Construction of Statute.* — See note 1.

1041. (3) *Facts Equally Known to Witness and Decedent.* — See notes

1, 2.

Transactions with Third Persons. — See note 7.

1042. (5) *Transactions with Partners and Other Joint Contractors* —

(a) *Partners.* — See note 5.

Rep. 272; *Black v. Cox*, (Ky. 1904) 82 S. W. Rep. 278; *People's Nat. Bank v. Wilcox*, 136 Mich. 567; *Jones v. Jones*, (Miss. 1904) 37 So. Rep. 499; *Rousseau v. Rouss*, 180 N. Y. 116. See also *Roach v. Roach*, 69 Kan. 522; *Finn v. Sowders*, (Mich. 1905) 103 N. W. Rep. 177.

Existence of Partnership. — *Rascoe v. Walker-Smith Co.*, 98 Tex. 565.

1028. 3. *Identity of Land Conveyed.* — *Bargo v. Bargo*, (Ky. 1905) 86 S. W. Rep. 525.

6. *Payment of Money Is a Personal Transaction.* — *Moore v. Crump*, 84 Miss. 612; *Abbott v. Stiff*, (Tex. Civ. App. 1904) 81 S. W. Rep. 562; *Barrett v. Eastham*, (Tex. Civ. App. 1905) 86 S. W. Rep. 1057.

1029. 1. *Denying Payment.* — *Abbott v. Stiff*, (Tex. Civ. App. 1904) 81 S. W. Rep. 562.

3. *Marriage.* — *In re Maher*, 210 Ill. 160; *Bowman v. Little*, 101 Md. 273; *Imboden v. St. Louis Union Trust Co.*, 111 Mo. App. 220.

7. *The Execution of a Mortgage* by a widow pursuant to a separation agreement with her husband, since deceased, is within the inhibition of the statute. *Holland v. Holland*, 98 N. Y. App. Div. 366.

1030. 4. *Delivery of Deed, Etc.* — See *Johnson v. Cameron*, 136 N. Car. 243, wherein, however, the testimony was held to be competent, it being given by a third person.

Testimony Showing Nondelivery of a Mortgage is within the inhibition of the statute. *Smith v. Smith*, 100 N. Y. App. Div. 1.

7. *Denial of Conversation.* — *Compare Healy v. Malcolm*, 99 N. Y. App. Div. 370.

Denial that Deceased Imparted Certain Information to Witness. — *Komp v. Luria*, (Supm. Ct. Spec. T.) 46 Misc. (N. Y.) 339.

1031. 5. *Independent Facts in General.* — *Smith v. Fry*, (Iowa 1905) 103 N. W. Rep. 1002; *Chenault v. Thomas*, (Ky. 1904) 83 S. W. Rep. 109; *Veum v. Sheeran*, (Minn. 1905) 104 N. W. Rep. 135.

6. *Tompkins v. McGinn*, (Tex. Civ. App. 1905) 85 S. W. Rep. 452.

1032. 3. *Information Not Obtained from Decedent or Insane Person.* — *Veum v. Sheeran*, (Minn. 1905) 104 N. W. Rep. 135. See also *Deaver v. Deaver*, 137 N. Car. 240.

1034. 4. *Testimony as to Mental Condition Held Inadmissible.* — *Holland v. Holland*, 98 N. Y. App. Div. 366.

1035. 2. *Indirect Testimony.* — *Matter of Blair*, 99 N. Y. App. Div. 81.

1036. 6. *Loss of Writings.* — See *Smith v. Fry*, (Iowa 1905) 103 N. W. Rep. 1002.

1038. 3. *Services Necessarily Rendered in Presence of Decedent.* — *Parker v. Ballard*, 123 Ga. 441. See also *Green v. Green*, (Ky. 1904) 82 S. W. Rep. 1011.

1039. 1. *Value of Services.* — *Kwiecinski v. Newman*, 137 Mich. 287.

2. *State v. Sharpe*, 183 Mo. 715.

7. *Matters Occurring in Lifetime of Decedent.* — *Steen v. Kirkpatrick*, 84 Miss. 63; *Cockrell v. Cockrell*, 83 Miss. 385; *Wright v. Davis*, 72 N. H. 448.

1040. 1. *Strict Construction of Statute.* — See *Steen v. Kirkpatrick*, 84 Miss. 63.

1041. 1. *Facts Equally Known to Witness and Decedent.* — *People's Nat. Bank v. Wilcox*, 136 Mich. 567; *Peirson v. McNeal*, 137 Mich. 158; *Wilcox v. Wilcox*, (Mich. 1905) 102 N. W. Rep. 954; *Finn v. Sowders*, (Mich. 1905) 103 N. W. Rep. 177; *Reed v. Whipple*, (Mich. 1905) 103 N. W. Rep. 548; *Wilbur v. Grover*, (Mich. 1905) 103 N. W. Rep. 583; *Taylor v. Taylor*, 138 Mich. 658. See also *Kwiecinski v. Newman*, 137 Mich. 287.

2. *Want of Consideration.* — See *Sheldon v. Carr*, (Mich. 1905) 103 N. W. Rep. 181.

7. *Compare Smith v. Fry*, (Iowa 1905) 103 N. W. Rep. 1002.

1042. 5. *Transactions with Partners.* — *People's Nat. Bank v. Wilcox*, 136 Mich. 567.

1043. Surviving Partner as Against Deceased Partner. — See note 7.

1046. (6) *Transactions with Agents* — (a) *Agents Generally* — *aa.* COMPETENCY OF PARTY — (bb) *Where Agent Is Dead or Not Competent to Testify*. — See note 5.

1048. *bb.* COMPETENCY OF AGENT. — See notes 1, 5.

1050. (b) *Officers and Agents of Corporations*. — See note 1.

1051. (7) *Transactions with Third Persons* — (b) *Between Decedent and Third Persons* — *aa.* GENERAL RULE. — See note 6.

1055. *f.* EXCEPTIONS TO RULES OF INCOMPETENCY — (1) *Admissibility of Testimony of Representative* — (a) *In General*. — See note 3.

1056. Both Parties Appearing in Representative Capacity. — See note 2.

(2) *Admissibility of Testimony of Opposite Party* — (a) *Where Representative Testifies* — *aa.* IN GENERAL. — See note 9.

1058. (b) *Where Representative Introduces Testimony of Third Person*. — See note 6.

1060. (e) *Where Opposite Party Is Examined by Representative* — *aa.* IN GENERAL. — See note 9.

1061. *bb.* EFFECT OF EXAMINATION AS WAIVING OPPOSITE PARTY'S INCOMPETENCY. — See note 3.

1062. *Where Representative Misuses Right of Cross-examination*. — See note 2.

1063. VII. CREDIBILITY AND IMPEACHMENT OF WITNESSES — 1. *In General* — *Modes of Impeaching Credit*. — See note 1.

2. *Definitions* — *b.* IMPEACHMENT. — See note 3.

1064. 3. *Province of Court and Jury* — *a.* GENERAL RULES — (1) *Province of Jury or Other Triers of Facts*. — See notes 1, 2.

1043. 7. *Survivor as Against Deceased Partner*. — See *Rascoe v. Walker-Smith Co.*, 98 Tex. 565.

1046. 5. *Death of Agent* — *Express Statutory Provision*. — *Central Bank v. Thayer*, 184 Mo. 61.

1048. 1. *Not Testimony in His Own Behalf*. — *Compare Skeen v. Moore*, 120 Ga. 1057.

5. *Express Exclusion of Agents*. — *Murphey v. Bush*, 122 Ga. 715.

1050. 1. *Competency of Party*. — *People's Nat. Bank v. Wilcox*, 136 Mich. 567.

1051. 6. *Transactions Between Decedent and Third Persons*. — *Lucas v. McDonald*, 126 Iowa 678; *Jacobs v. Jacobs*, (Iowa 1905) 104 N. W. Rep. 489; *Matter of Andrews*, 97 N. Y. App. Div. 429.

1055. 3. *Representatives Allowed to Testify*. — *Justis v. Justis*, 99 Md. 69; *Tabor v. Tabor*, 136 Mich. 255; *Weston v. Elliott*, 72 N. H. 433; *Wakefield v. Wakefield*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 87. See also *In re McLaughlin*, (N. J. 1904) 59 Atl. Rep. 469; *Matter of Cozine*, 104 N. Y. App. Div. 182; *Hall v. Holloman*, 136 N. Car. 34.

Representative Who Is Real Party in Interest Cannot Testify. — *Peirson v. McNeal*, 137 Mich. 158; *Downey v. Owen*, 98 N. Y. App. Div. 411.

1056. 2. *Neither Representative Competent*. — See *Crosetti's Estate*, 211 Pa. St. 490.

9. *Incompetency of Opposite Party Waived*. — See *Weston v. Elliott*, 72 N. H. 433.

1058. 6. *Introduction of Testimony of Third Person No Waiver*. — *Burdick v. Burdick*, 180 N. Y. 261. *Compare Symonds v. Caldwell*, 112 Ill. App. 341.

1060. 9. *Opposite Party May Be Examined by Representative*. — *Cline v. Dexter*, (Neb. 1904) 101 N. W. Rep. 246. See also *Rascoe v. Walker-Smith Co.*, 98 Tex. 565; *Currie v. Michie*, 123 Wis. 120.

1061. 3. *Effect as Waiving Opposite Party's Incompetency*. — *Currie v. Michie*, 123 Wis. 120. See also *Cline v. Dexter*, (Neb. 1904) 101 N. W. Rep. 246; *Rascoe v. Walker-Smith Co.*, 98 Tex. 565. *Compare Wilbur v. Grover*, (Mich. 1905) 103 N. W. Rep. 583.

1062. 2. See *Matter of Cozine*, 104 N. Y. App. Div. 182.

1063. 1. *Various Modes of Impeaching Credit of Witnesses*. — See *Hicklin v. Territory*, (Ariz. 1905) 80 Pac. Rep. 340; *People v. Howard*, 143 Cal. 316; *Shailer v. Bullock*, (Conn. 1905) 61 Atl. Rep. 65; *State v. Crea*, 10 Idaho 88; *Deck v. Baltimore, etc.*, R. Co., 100 Md. 168; *Savage v. Bowen*, 103 Va. 540.

3. *Contradictory Evidence*. — *Hagen v. New York Cent., etc.*, R. Co., (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 540, *reversed* on other grounds 100 N. Y. App. Div. 218.

1064. 1. *Credibility of Witnesses a Question of Fact*. — *United States*. — *Dimmick v. U. S.*, (C. C. A.) 135 Fed. Rep. 257; *Union Pac. R. Co. v. Lucas*, (C. C. A.) 136 Fed. Rep. 374. See also *Wong Din v. U. S.*, (C. C. A.) 135 Fed. Rep. 702; *Denison v. Shawmut Min. Co.*, 135 Fed. Rep. 864.

Alabama. — *Parrish v. State*, 139 Ala. 16 (expert witnesses); *Brown v. State*, 142 Ala. 287. *Arkansas*. — See *Lee v. State*, 72 Ark. 436.

California. — *People v. Kelly*, 146 Cal. 119. See also *People v. Miles*, 143 Cal. 636.

Connecticut. — *Lewis v. Lewis*, 76 Conn. 586.

Delaware. — *State v. Brinte*, 4 Penn. (Del.) 551.

Georgia. — *Georgia Southern, etc.*, R. Co. v. *Wisnacker*, 120 Ga. 656; *Davis v. State*, 122 Ga. 564. See also *Cowart v. State*, 120 Ga. 510.

Illinois. — *Piper v. Andricks*, 209 Ill. 564; *Kehl v. Abram*, 210 Ill. 218, 102 Am. St. Rep. 158; *Hauser v. People*, 210 Ill. 253.

1065. See note 1.

1066. See note 1.

(2) *Province of Court.* — See note 3.

1067. See notes 1, 2.

Indiana. — *Southern R. Co. v. State*, (Ind. App. 1904) 72 N. E. Rep. 174; *Strebin v. Lavengood*, 163 Ind. 478; *Indianapolis St. R. Co. v. Johnson*, 163 Ind. 518.

Indian Territory. — *Williams v. U. S.*, (Indian Ter. 1904) 88 S. W. Rep. 334.

Iowa. — *Christensen v. Thompson*, 123 Iowa 717. See also *Goulding v. Phillips*, 124 Iowa 496; *Hofacre v. Monticello*, (Iowa 1905) 103 N. W. Rep. 488.

Kentucky. — *Crutcher v. Stuart*, (Ky. 1904) 82 S. W. Rep. 421.

Maryland. — *Western Maryland R. Co. v. Shivers*, 101 Md. 391.

Michigan. — *King v. Ann Arbor R. Co.*, 137 Mich. 487; *Taylor v. Taylor*, 138 Mich. 658. See also *Lovely v. Grand Rapids*, etc., R. Co., 137 Mich. 653.

Missouri. — *State v. Lortz*, 186 Mo. 122; *Wright v. Kansas City*, 187 Mo. 678; *State v. Cummings*, 189 Mo. 626; *Bissell v. York*, 108 Mo. App. 272; *McKee v. St. Louis Transit Co.*, 108 Mo. App. 470; *Woodard v. Cooney*, 111 Mo. App. 152; *Reed v. Chicago*, etc., R. Co., 112 Mo. App. 575; *Watson v. Gross*, 112 Mo. App. 615; *Flynn v. St. Louis Transit Co.*, 113 Mo. App. 185. See also *Bray v. Riggs*, 110 Mo. App. 630; *Johnson v. Chilton*, 111 Mo. App. 244; *Fields v. Missouri Pac. R. Co.*, 113 Mo. App. 642.

Montana. — *State v. Jones*, 32 Mont. 442.

New York. — *Hagan v. New York Cent.*, etc., R. Co., (Supm. Ct. Spec. T.) 44 Misc. (N. Y.) 540, reversed on other grounds 100 N. Y. App. Div. 218; *Spring v. Millington*, (County Ct.) 44 Misc. (N. Y.) 624; *Doherty v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 91 N. Y. Supp. 19; *Rosenbloom v. Cohen*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 80.

North Carolina. — *Craft v. Norfolk*, etc., R. Co., 136 N. Car. 49; *Bond v. Wilson*, 137 N. Car. 145; *Coleman v. Southern R. Co.*, 138 N. Car. 351; *Lehew v. Hewett*, 138 N. Car. 6; *State v. Smith*, 138 N. Car. 700.

North Dakota. — *State v. Wisnewski*, 13 N. Dak. 649.

Oklahoma. — *Hill v. Territory*, (Okla. 1905) 79 Pac. Rep. 757. See also *Brenton v. Territory*, (Okla. 1904) 78 Pac. Rep. 83.

Oregon. — *State v. Leasia*, 45 Oregon 410; *Pacific Export Lumber Co. v. North Pac. Lumber Co.*, (Oregon 1905) 80 Pac. Rep. 105.

Pennsylvania. — *Dinan v. Supreme Council*, etc., 210 Pa. St. 456; *Com. v. Gibson*, 211 Pa. St. 546.

South Dakota. — *Weller v. Hilderbrandt*, (S. Dak. 1904) 101 N. W. Rep. 1108.

Texas. — *Stull v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 1059; *Simpson v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 15; *Mora v. Thomas*, (Tex. Civ. App. 1905) 86 S. W. Rep. 632; *Elkins v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 149.

Virginia. — *Farley v. Thalhimer*, 103 Va. 504.

Washington. — *State v. Johnson*, 36 Wash. 294; *State v. Mann*, 39 Wash. 144.

1064. 2. The Function of the Trial Court. — *Dimmick v. U. S.*, (C. C. A.) 135 Fed. Rep. 257; *Woodman v. Illinois Trust*, etc., Bank, 211 Ill. 578.

1065. 1. Whether Witness Has Been Impeached or Discredited a Question of Fact. — *Corothers v. State*, (Ark. 1905) 88 S. W. Rep. 585; *Ector v. State*, 120 Ga. 543; *Pike v. State*, 121 Ga. 604; *Powell v. State*, 122 Ga. 571; *Doyle v. Burns*, 123 Iowa 488; *State v. Bartlett*, 127 Iowa 689; *Illinois Cent. R. Co. v. McManus*, (Ky. 1904) 82 S. W. Rep. 399; *State v. Sharp*, 183 Mo. 715; *Restetsky v. Delmar Ave.*, etc., R. Co., (Mo. App. 1904) 85 S. W. Rep. 665; *Franks v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 148; *Texas*, etc., R. Co. v. *Skates*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1166. See also *Spearman v. Sanders*, 121 Ga. 468; *State v. Day*, 188 Mo. 359.

Whether Witness Mistaken Question for Jury. — *Braham v. State*, (Ala. 1905) 38 So. Rep. 919.

1066. 1. Hauser v. People, 210 Ill. 253; *Hunt v. Dexter Sulphite Pulp*, etc., Co., 100 N. Y. App. Div. 119. See also *Ford v. Fargason*, 120 Ga. 606.

3. Province of Court — In General — Arkansas. — See *Thomas v. State*, (Ark. 1905) 86 S. W. Rep. 404.

Georgia. — *Georgia Southern*, etc., R. Co. v. *Wisenbacker*, 120 Ga. 656.

Illinois. — *Weston v. Teufel*, 213 Ill. 291.

Indiana. — *Southern R. Co. v. State*, (Ind. App. 1904) 72 N. E. Rep. 174.

Michigan. — *King v. Ann Arbor R. Co.*, 137 Mich. 487.

Missouri. — *State v. Sharp*, 183 Mo. 715; *Imboden v. St. Louis Union Trust Co.*, 111 Mo. App. 220.

Nebraska. — *Kleutsch v. Security Mut. L. Ins. Co.*, (Neb. 1904) 100 N. W. Rep. 139.

North Carolina. — *State v. Smith*, 138 N. Car. 700.

North Dakota. — *State v. Wisnewski*, 13 N. Dak. 649.

Pennsylvania. — See *Dinan v. Supreme Council*, etc., 210 Pa. St. 456.

Texas. — *Washington v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 653; *Ft. Worth*, etc., R. Co. v. *Roberts*, (Tex. Civ. App. 1904) 83 S. W. Rep. 250; *Stull v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 1059; *Tally v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 339. See also *Ellington v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 153.

If the Law Fixes the Weight or Effect of Evidence, there is no impropriety in the court's declaring it to the jury. *State v. Knowles*, 185 Mo. 141.

1067. 1. Words and Conduct of Court. — *Columbus v. Anglin*, 120 Ga. 785; *Grant v. State*, 122 Ga. 740.

Conduct Held Not to Violate Rule. — *Johnson v. Leffler Co.*, 122 Ga. 670; *People v. Estell*, 106 N. Y. App. Div. 516.

1067. (3) *Scope of General Rules* — (a) *In General*. — See notes 3, 4.

1068. (b) *Unimpeached and Uncontradicted Witnesses*. — See notes 1, 3, 4.

1069. b. *RULES FOR GUIDANCE OF COURT AND JURY* — (1) *In General*. — See note 1.

1070. (2) *Personal Knowledge of Juror*. — See note 1.

(4) *Means of Knowledge*. — See notes 4, 5.

1071. (6) *Relative Value of Positive and Negative Testimony*. — See note 3.

1072. See note 1.

(7) *Falsus in Uno, Falsus in Omnibus*. — See notes 2, 3.

1073. See note 1.

1074. See notes 1, 2.

4. *Attacking Reputation of Witness* — a. *IN GENERAL*. — See notes

3, 4.

1067. 2. *Cautionary Instructions*. — See *State v. Wisniewski*, 13 N. Dak. 649.

Court Should Caution Jury Against Improper Use of Impeaching Testimony. — *Brittain v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 278.

3. *Jury Not to Arbitrarily or Capriciously Disbelieve Testimony*. — *Williams v. Van Norden Trust Co.*, 104 N. Y. App. Div. 251. See also *Hintz v. Michigan Cent. R. Co.*, (Mich. 1905) 104 N. W. Rep. 23.

4. *Verdict Based on Testimony Thoroughly Impeached and Discredited*. — See *Suckow v. State*, 122 Wis. 156. See generally the title *NEW TRIAL*, 14 ENCYC. OF PL. AND PR. 768 *et seq.*

1068. 1. *Unimpeached and Uncontradicted Witnesses* — *In General*. — *Lewis v. Lewis*, 76 Conn. 586; *Detwiler v. Cox*, 120 Ga. 638. See also *Rosenbloom v. Cohen*, (Supm. Ct. App. T.) 46 Misc. (N. Y.) 80.

3. *Directing Verdict on Unimpeached and Uncontradicted Testimony*. — See *Gudfelder v. Pittsburgh, etc., R. Co.*, 207 Pa. St. 629.

4. *Setting Aside Verdict Contrary to Unimpeached and Uncontradicted Evidence*. — *Spring v. Millington*, (County Ct.) 44 Misc. (N. Y.) 624; *State v. Merchant*, (Tex. Civ. App. 1905) 85 S. W. Rep. 483.

Decision of Judge as Trier of Fact Set Aside. — *Williams v. Van Norden Trust Co.*, 104 N. Y. App. Div. 251.

1069. 1. *Rules for the Guidance of the Jury* — *In General*. — *People v. Miles*, 143 Cal. 636; *Hauser v. People*, 210 Ill. 253; *Toledo, etc., R. Co. v. Fenstermaker*, 163 Ind. 534; *State v. Sharp*, 183 Mo. 715; *Woodard v. Cooney*, 111 Mo. App. 152; *State v. Day*, 188 Mo. 359; *Harrison v. Lakenan*, 189 Mo. 581. See also *Denison v. Shawmut Min. Co.*, 135 Fed. Rep. 864; *Strebin v. Lavengood*, 163 Ind. 478; *Lovely v. Grand Rapids, etc., R. Co.*, 137 Mich. 653; *Wright v. Kansas City*, 187 Mo. 678; *State v. Cummings*, 189 Mo. 626.

1070. 1. *Personal Knowledge of Juror*. — *Douglass v. Agne*, 125 Iowa 67.

4. *State v. Sharp*, 183 Mo. 715. See also *Toledo, etc., R. Co. v. Fenstermaker*, 163 Ind. 534; *Ferguson v. State*, (Neb. 1904) 100 N. W. Rep. 800.

5. See *Christy v. Elliott*, 2 Ill. 31.

1071. 3. *Relative Value of Positive and Negative Testimony*. — *Chicago, etc., R. Co. v. Andrews*, (C. C. A.) 130 Fed. Rep. 65. See also *Cowart v. State*, 120 Ga. 510; *McMakin v. McMakin*, (Ky. 1905) 87 S. W. Rep. 1140.

1072. 1. *Rule One Relating to Weight of Evidence*. — See *Chicago, etc., R. Co. v. Andrews*, (C. C. A.) 130 Fed. Rep. 65.

Instructing Jury as to Weight of Evidence. — It is error for the court to instruct the jury that positive testimony is more weighty than negative without further instruction that on weighing the testimony of the witnesses the jury shall determine their credibility. *Cowart v. State*, 120 Ga. 510.

2. *Falsus in Uno, Falsus in Omnibus*. — *Johnson v. Farrell*, 215 Ill. 542; *State v. Sharp*, 183 Mo. 715; *Fields v. Missouri Pac. R. Co.*, 113 Mo. App. 642; *Suckow v. State*, 122 Wis. 156; *Pumoro v. Merrill*, 125 Wis. 102. See also *McKee v. St. Louis Transit Co.*, 108 Mo. App. 470; *Wright v. Kansas City*, 187 Mo. 678.

3. *Corroboration by Other Evidence*. — *Powell v. State*, 122 Ga. 571; *State v. Waln*, (Idaho 1905) 80 Pac. Rep. 221; *Chicago, etc., R. Co. v. Kelly*, 210 Ill. 449; *Stevens v. People*, 215 Ill. 593; *State v. Johnson*, (N. Dak. 1905) 103 N. W. Rep. 565; *Hart v. Godkin*, 122 Wis. 646. See also *People v. Kelly*, 146 Cal. 119; *Weston v. Teufel*, 213 Ill. 291; *Doyle v. Burns*, 123 Iowa 488; *Flynn v. St. Louis Transit Co.*, 113 Mo. App. 185.

1073. 1. *Prerequisites to Application of Maxim*. — *Johnson v. Farrell*, 215 Ill. 542; *State v. Sharp*, 183 Mo. 715; *Fields v. Missouri Pac. R. Co.*, 113 Mo. App. 642; *State v. Johnson*, (N. Dak. 1905) 103 N. W. Rep. 565; *Pumoro v. Merrill*, 125 Wis. 102. See also *People v. Kelly*, 146 Cal. 119; *State v. Waln*, (Idaho 1905) 80 Pac. Rep. 221; *Chicago, etc., R. Co. v. Kelly*, 210 Ill. 449; *McKee v. St. Louis Transit Co.*, 108 Mo. App. 470; *Hart v. Godkin*, 122 Wis. 646.

1074. 1. *No Rule of Law or Presumption by Virtue of Maxim*. — See *Pumoro v. Merrill*, 125 Wis. 102.

2. *Trial Without Jury*. — *Flynn v. St. Louis Transit Co.*, 113 Mo. App. 185.

3. *Attacking Reputation of Witness* — *In General*. — *State v. Anderson*, 125 Iowa 501; *Deck v. Baltimore, etc., R. Co.*, 100 Md. 168. See also *Stevens v. People*, 215 Ill. 593; *Williams v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 1155.

4. *General Moral Character*. — *Gregory v. State*, 140 Ala. 16; *State v. Haupt*, 126 Iowa 152; *Mount v. Com.*, (Ky. 1905) 86 S. W. Rep. 707; *Wright v. Kansas City*, 187 Mo. 678. See also *Douglass v. Agne*, 125 Iowa 67.

1075. See notes 1, 2.

1076. *b. EXAMINATION OF IMPEACHING WITNESSES — (1) Direct Examination — Inquiry if Impeaching Witness Knows Reputation. — See note 2.*

Question as to What Reputation Is. — See note 4.

Question of Believable on Oath. — See note 5.

1077. *(2) Cross-examination. — See notes 2, 3.*

c. REQUISITE KNOWLEDGE OF IMPEACHING WITNESS — General Reputation. — See note 4.

1078. See notes 3, 4.

Opinion Based on Personal Knowledge Not Admissible. — See note 6.

1079. *d. TIME AND PLACE OF ACQUIRING REPUTATION. — See notes 5, 6.*

Former Residence, if Not Too Remote. — See note 8.

1080. *Time. — See notes 5, 7, 8.*

1081. *e. PARTICULAR ACTS OF MISCONDUCT. — See note 8.*

1082. *On Cross-examination. — See notes 1, 2, 3, 4, 5.*

f. PARTICULAR TRAITS OF CHARACTER — (1) When Not Material to the Issue. — See note 6.

1083. See notes 1, 2, 3.

1075. 1. Statute. — *State v. Haupt*, 126 Iowa 152.

2. Confined to Truth and Veracity. — *Deck v. Baltimore*, etc., R. Co., 100 Md. 168. See also *Chicago City R. Co. v. Uhter*, 212 Ill. 174. Compare *State v. Day*, 188 Mo. 359.

1076. 2. Question Should Be as to "General" Reputation. — See *Alford v. State*, (Fla. 1904) 36 So. Rep. 436.

4. See *Alford v. State*, (Fla. 1904) 36 So. Rep. 436.

5. If Believable on Oath. — *Alford v. State*, (Fla. 1904) 36 So. Rep. 436.

1077. 2. Cross-examination. — *South Bend v. Turner*, 163 Ind. 194; *State v. Day*, 188 Mo. 359.

3. Hofacre v. Monticello, (Iowa 1905) 103 N. W. Rep. 488.

4. Requisite Knowledge of Impeaching Witness — General Reputation. — *Taylor v. State*, 121 Ga. 348; *Hofacre v. Monticello*, (Iowa 1905) 103 N. W. Rep. 488; *State v. Shouse*, 188 Mo. 473. See also *Alford v. State*, (Fla. 1904) 36 So. Rep. 436; *South Bend v. Turner*, 163 Ind. 194.

1078. 3. Opinion of Two or Three Not Enough. — *South Bend v. Turner*, 163 Ind. 194; *State v. Day*, 188 Mo. 359.

4. Opinion of Class of Community Not Enough. — See *State v. Day*, 188 Mo. 359.

6. Knowledge of General Reputation. — *Taylor v. State*, 121 Ga. 348.

1079. 5. Confined to Place of Present or Recent Residence. — *Douglass v. Agne*, 125 Iowa 67; *State v. Shouse*, 188 Mo. 973. See also *Dimmick v. U. S.*, (C. C. A.) 135 Fed. Rep. 257; *Alford v. State*, (Fla. 1904) 36 So. Rep. 436.

6. Extent of "Neighborhood." — See *Alford v. State*, (Fla. 1904) 36 So. Rep. 436.

8. Former Residence. — *Alford v. State*, (Fla. 1904) 36 So. Rep. 436, holding further that the question of remoteness is for the court; *Douglass v. Agne*, 125 Iowa 67.

1080. 5. Time of Testifying. — *Douglass v. Agne*, 125 Iowa 67; *State v. Day*, 188 Mo. 359.

7. *Dimmick v. U. S.*, (C. C. A.) 135 Fed. Rep. 257; *Douglass v. Agne*, 125 Iowa 67.

8. Within Discretion of Court. — *Alford v. State*, (Fla. 1904) 36 So. Rep. 436.

1081. 8. Particular Acts of Misconduct. — *Burks v. State*, 72 Ark. 461; *Shailer v. Bullock*, (Conn. 1905) 61 Atl. Rep. 65; *Chicago City R. Co. v. Uhter*, 212 Ill. 174; *Mount v. Com.*, (Ky. 1905) 86 S. W. Rep. 707; *Wright v. Kansas City*, 187 Mo. 678; *Flohr v. Territory*, 14 Okla. 477; *State v. Nergaard*, 124 Wis. 414. See also *State v. Thompson*, 127 Iowa 440; *State v. Day*, 188 Mo. 359.

1082. 1. On Cross-examination. — *Little Rock Vehicle, etc., Co. v. Robinson*, (Ark. 1905) 87 S. W. Rep. 1029; *Shailer v. Bullock*, (Conn. 1905) 61 Atl. Rep. 65; *Grant v. State*, 122 Ga. 740; *Dunn v. State*, 162 Ind. 174; *People v. Farrell*, 137 Mich. 127; *People v. De Garmo*, 179 N. Y. 130; *Coleman v. Southern R. Co.*, 138 N. Car. 351. See also *State v. Buffington*, (Kan. 1905) 81 Pac. Rep. 465.

2. *Shailer v. Bullock*, (Conn. 1905) 61 Atl. Rep. 65; *People v. Farrell*, 137 Mich. 127; *Flohr v. Territory*, 14 Okla. 477. See also *Com. v. Williams*, 209 Pa. St. 529.

3. *People v. De Garmo*, 179 N. Y. 130. See also *Clarke v. Philadelphia, etc., Coal, etc., Co.*, 92 Minn. 418.

4. *Little Rock Vehicle, etc., Co. v. Robinson*, (Ark. 1905) 87 S. W. Rep. 1029; *Shailer v. Bullock*, (Conn. 1905) 61 Atl. Rep. 65; *Dunn v. State*, 162 Ind. 174; *Clarke v. Philadelphia, etc., Coal, etc., Co.*, 92 Minn. 418; *Kennington v. Catoe*, 68 S. Car. 470; *State v. Mann*, 39 Wash. 144. See also *State v. Buffington*, (Kan. 1905) 81 Pac. Rep. 465.

5. Witness's Answer Is Conclusive. — *Shailer v. Bullock*, (Conn. 1905) 61 Atl. Rep. 65; *Dunn v. State*, 162 Ind. 174; *People v. De Garmo*, 179 N. Y. 130.

6. Particular Traits Not Material to Issue. — *Chicago City R. Co. v. Uhter*, 212 Ill. 174. See also *People v. Albers*, 137 Mich. 678; *Williams v. U. S.*, (Indian Ter. 1904) 88 S. W. Rep. 334.

1083. 1. Reputation for Chastity. — *People v. Wilson*, 136 Mich. 298. See also *State v. Haupt*, 126 Iowa 152; *State v. Thompson*, 127

1084. See note 2.

Occupation. — See notes 3, 4, 6, 8.

(2) *When Material to the Issue.* — See note 10.

1085. *g.* CONVICTION OF INFAMOUS CRIME. — See notes 2, 4, 5, 6, 7.

1086. See notes 1, 2.

The Record Is the Best Evidence. — See note 3.

1087. See notes 1, 2.

Time of Conviction. — See note 3.

1088. 5. Bias of Witness — *a.* GENERAL RULE. — See note 2.

b. IN FAVOR OF PARTY CALLING HIM — (1) *In General.* — See

note 3.

1089. See note 3.

1090. (2) *Kinship Between Witness and Party.* — See note 1.

Iowa 440. Compare *Williams v. U. S.*, (Indian Ter. 1904) 88 S. W. Rep. 334.

Proper to Ask Witness if She Is Mistress of Defendant. — *Ivy v. State*, 84 Miss. 264.

1083. 2. Reputation as Common Prostitute. — *Brittain v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 278. See also *Hofacre v. Monticello*, (Iowa 1905) 103 N. W. Rep. 488. Compare *Williams v. U. S.*, (Ind. Ter. 1904) 88 S. W. Rep. 334.

3. *State v. Day*, 188 Mo. 359.

1084. 2. Keeper of House of Ill Fame — Contra on Cross-examination. — *Curtis v. State*, 46 Tex. Crim. 480.

3. General Question as to Occupation. — *Curtis v. State*, 46 Tex. Crim. 480. See also *Brittain v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 278; *Sexton v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 348.

4. Question Whether Witness Engaged in Gambling. — *Curtis v. State*, 46 Tex. Crim. 480.

Whether Witness Inmate of House of Ill Fame. — *Brittain v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 279.

Whether Witness a "Kept" Woman. — See *Little Rock Vehicle, etc., Co. v. Robinson*, (Ark. 1905) 87 S. W. Rep. 1029.

6. See *Williams v. U. S.*, (Indian Ter. 1904) 88 S. W. Rep. 334. Compare *Tally v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 339.

8. Cocaine Fiend. — *Williams v. U. S.*, (Indian Ter. 1904) 88 S. W. Rep. 334.

10. In Action for Seduction. — See *Jordan v. State*, 120 Ga. 864. Compare *State v. Haupt*, 126 Iowa 152.

1085. 2. Conviction of Infamous Crime. — *Powell v. State*, 122 Ga. 571; *Bise v. U. S.*, 5 Indian Ter. 602; *Illinois Cent. R. Co. v. McManus*, (Ky. 1904) 82 S. W. Rep. 399; *Wells v. Territory*, (Okla. 1905) 81 Pac. Rep. 425; *Gray v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 764.

4. Pardon Immaterial. — *Gallagher v. People*, 211 Ill. 158. See also *Curtis v. State*, 46 Tex. Crim. 480.

5. Only Infamous Crimes. — *Wilkerson v. State*, 140 Ala. 165; *State v. Forsha*, (Mo. 1905) 88 S. W. Rep. 746; *Gray v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 764. See also *Shailer v. Bullock*, (Conn. 1905) 61 Atl. Rep. 65; *Curtis v. State*, 46 Tex. Crim. 480.

6. Any Crime. — *Lewis v. State*, 85 Miss. 35; *Cook v. State*, 85 Miss. 738. See also *Roszczyńska v. State*, 125 Wis. 414.

7. Crime Must Imply Moral Turpitude. — See *Tally v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 339.

1086. 1. Indictment — Contra in Texas Court of Criminal Appeals. — *Franklin v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 357.

2. Evidence of Arrest Not Admissible. — See *Curtis v. State*, 46 Tex. Crim. 480, supporting the Texas rule stated in the original note.

3. Record of Conviction Best Evidence. — *McKevitt v. People*, 208 Ill. 460. See also *Gordon v. State*, 140 Ala. 29; *Coward v. Jackson County*, 137 N. Car. 299. Contra, by statute, *Shailer v. Bullock*, (Conn. 1905) 61 Atl. Rep. 65.

1087. 1. *Coleman v. Southern R. Co.*, 138 N. Car. 351.

2. *Martin v. Moore*, 99 Md. 41.

3. Conviction or Indictment Must Not Be Too Remote. — See *Wesley v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 802.

1088. 2. Bias of Witness — General Rule. — *Ringer v. State*, (Ark. 1905) 85 S. W. Rep. 410; *Eatman v. State*, (Fla. 1904) 37 So. Rep. 577; *Detwiler v. Cox*, 120 Ga. 638; *Taylor v. State*, 121 Ga. 348; *Harrell v. State*, 121 Ga. 607; *Goulding v. Phillips*, 124 Iowa 496; *Lovely v. Grand Rapids, etc., R. Co.*, 137 Mich. 653; *Seymour v. Bruske*, (Mich. 1905) 103 N. W. Rep. 613; *State v. Sharp*, 183 Mo. 715; *Creeping Bear v. State*, 113 Tenn. 322; *Lowe v. Ring*, 123 Wis. 107. See also *Strebin v. Lavengood*, 163 Ind. 478; *State v. Lee*, (Oregon 1905) 79 Pac. Rep. 577; *Houston, etc., R. Co. v. Wilson*, (Tex. Civ. App. 1904) 84 S. W. Rep. 274.

Quantum of Bias for Jury. — *Com. v. Gibson*, 211 Pa. St. 546.

3. In Favor of Party Calling Him — In General. — *Wilkerson v. State*, 140 Ala. 165; *Jones v. State*, 141 Ala. 55; *Taylor v. State*, 121 Ga. 348; *Harrell v. State*, 121 Ga. 607; *Kennedy v. Murphy*, 112 Ill. App. 607; *Lovely v. Grand Rapids, etc., R. Co.*, 137 Mich. 653; *Seymour v. Bruske*, (Mich. 1905) 103 N. W. Rep. 613; *State v. Howard*, 30 Mont. 518; *Finlen v. Heinze*, 32 Mont. 354; *Sexton v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 348.

1089. 3. Elements of Facts Showing Bias or Partiality. — *Illinois Cent. R. Co. v. Burke*, 112 Ill. App. 415.

1090. 1. Kinship Between Witness and Party. — *Illinois Cent. R. Co. v. Burke*, 112 Ill. App. 415. See also *Creeping Bear v. State*, 113 Tenn. 322.

- 1091.** (3) *Contractual Relationship with Party — Employees.* — See note 1.
c. AGAINST OPPOSITE PARTY. — See note 4.
- 1092.** In a Criminal Prosecution. — See note 1.
Hostility Proved by Any Competent Evidence. — See notes 4, 5.
- 1093.** See note 1.
The Extent to Which an Examination May Go. — See note 2.
Nature of Facts Sought to Be Proved. — See note 4.
- 1094.** *d. INTEREST IN EVENT OF SUIT — (1) Parties to Civil Actions.*
 — See note 3.
- 1095.** (2) *Other Persons.* — See note 4.
- 1096.** 6. Powers of Mind and Memory. — See notes 1, 3.
- 1097.** 8. Contradiction of Witness — *a. MATERIALITY OF EVIDENCE — (1) Cross-examination — (a) Direct Contradiction — Irrelevant Matters.* — See note 1.

1091. 1. Central of Georgia R. Co. *v.* Bagley, 121 Ga. 781; State *v.* Lortz, 186 Mo. 122. See also *Lovely v. Grand Rapids, etc.*, R. Co., 137 Mich. 653; *Hintz v. Michigan Cent. R. Co.*, (Mich. 1905) 104 N. W. Rep. 23.

4. Hostility. — *Gainey v. State*, 141 Ala. 72; *Couch v. Couch*, 141 Ala. 361; *Robertson v. Louisville, etc., R. Co.*, 142 Ala. 216; *Eatman v. State*, (Fla. 1904) 37 So. Rep. 577; *Seymour v. Bruske*, (Mich. 1905) 103 N. W. Rep. 613; *State v. Lee*, (Oregon 1905) 79 Pac. Rep. 577; *Creeping Bear v. State*, 113 Tenn. 322; *Houston, etc., R. Co. v. Wilson*, (Tex. Civ. App. 1904) 84 S. W. Rep. 274; *Brownlee v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 1153; *Lowe v. Ring*, 123 Wis. 107. See also *Williams v. State*, 140 Ala. 10; *Gregory v. State*, 140 Ala. 16; *People v. Rice*, 136 Mich. 619.

1092. 1. Hostility of State's Witnesses Towards Defendant. — *Ringer v. State*, (Ark. 1905) 85 S. W. Rep. 410; *McDuffie v. State*, 121 Ga. 580; *State v. Lee*, (Oregon 1905) 79 Pac. Rep. 577; *Creeping Bear v. State*, 113 Tenn. 322; *Brownlee v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 1153.

Not Necessary to Lay Predicate to Show Hostility or Bias. — *Alford v. State*, (Fla. 1904) 36 So. Rep. 436.

4. Hostility Proved by Any Competent Evidence. — *Ringer v. State*, (Ark. 1905) 85 S. W. Rep. 410; *Alford v. State*, (Fla. 1904) 36 So. Rep. 436; *People v. Rice*, 136 Mich. 619; *State v. Lee*, (Oregon 1905) 79 Pac. Rep. 577; *Creeping Bear v. State*, 113 Tenn. 322; *Houston, etc., R. Co. v. Wilson*, (Tex. Civ. App. 1904) 84 S. W. Rep. 274; *Brownlee v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 1153. See also *Robertson v. Louisville, etc., R. Co.*, 142 Ala. 216.

5. Opposite Party Not Bound by Cross-examination. — *McDuffie v. State*, 121 Ga. 580.

1093. 1. Cause of Hostility Not Admissible. — *Compare State v. Lee*, (Oregon 1905) 79 Pac. Rep. 577.

2. Extent of Examination — Discretion of Court. — *Seymour v. Bruske*, (Mich. 1905) 103 N. W. Rep. 613; *Lowe v. Ring*, 123 Wis. 107.

Improper Questions. — It has been held that for the purpose of showing hostility a witness for the state in a criminal prosecution may not be asked what it cost him to come to the place of trial or whether he paid his own expenses. *Parrish v. State*, 139 Ala. 16.

4. Nature of Facts Sought to Be Proved. — See *Harrell v. State*, 121 Ga. 607; *Houston, etc., R. Co. v. Wilson*, (Tex. Civ. App. 1904) 84 S. W. Rep. 274.

1094. 3. Interest to Be Considered by Jury. — *Illinois Cent. R. Co. v. Burke*, 112 Ill. App. 415; *State v. Howard*, 30 Mont. 518; *Grant v. Stamler*, (N. J. 1905) 59 Atl. Rep. 890; *Hirsh v. American Dist. Tel. Co.*, (Supm. Ct. App. T.) 92 N. Y. Supp. 794; *Creeping Bear v. State*, 113 Tenn. 322. See also *Couch v. Couch*, 141 Ala. 361.

1095. 4. Witness Shielded from Prosecution by Testimony. — See *Wood v. Metropolitan St. R. Co.*, 181 Mo. 433.

1096. 1. Drunkenness. — *State v. Sejours*, 113 La. 676.

3. Insanity or Mental Hallucinations. — It is proper to ask a witness as to his place of residence, and if it incidentally becomes known that the witness has been confined in a lunatic asylum, and his credibility thereby affected, there is no ground of complaint. *Hendricks v. Mechanics' Bank*, (Supm. Ct. App. T.) 88 N. Y. Supp. 176.

1097. 1. Contradiction of Irrelevant Facts Elicited on Cross-examination — United States. — *The Saranac*, 132 Fed. Rep. 936.

Arkansas. — *Hot Springs St. R. Co. v. Bode-man*, (Ark. 1905) 88 S. W. Rep. 960. See also *Hinson v. State*, (Ark. 1905) 88 S. W. Rep. 947.

California. — *Western Union Oil Co. v. Newlove*, 145 Cal. 772.

Georgia. — *Johnston v. Coney*, 120 Ga. 767.

Indiana. — *Dunn v. State*, 162 Ind. 174.

Iowa. — *State v. Wasson*, 126 Iowa 320; *State v. Matheson*, (Iowa 1905) 103 N. W. Rep. 137; *Hofacre v. Monticello*, (Iowa 1905) 103 N. W. Rep. 488.

Kentucky. — *Yelton v. Black*, (Ky. 1904) 82 S. W. Rep. 634; *Lancaster v. Lancaster*, (Ky. 1905) 87 S. W. Rep. 1137.

Mississippi. — *Dunk v. State*, 84 Miss. 452; *Davis v. State*, 85 Miss. 416; *Simms v. Forbes*, (Miss. 1905) 38 So. Rep. 546.

Missouri. — *Wojtylak v. Kansas, etc., Coal Co.*, 188 Mo. 260.

New York. — *People v. De Garmo*, 179 N. Y. 130; *Dorry v. Union R. Co.*, 104 N. Y. App. Div. 309; *McGurk v. New York City R. Co.*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 392.

North Carolina. — *Coleman v. Southern R. Co.*, 138 N. Car. 351.

1099. See notes 1, 3

1100 (b) Former Statements of Witness. — See note 2.

1102. (c) Interest and Bias. — See note 2.

(d) Test of Collateral Matter. — See note 6.

1103. b. DIRECT CONTRADICTION — (1) *In General*. — See note 3.

1104. (2) *Cross-examination and Contradiction* — See note 3.

1105. c. FORMER CONTRADICTORY STATEMENTS — (1) *General Rule — Oral Statements*. — See note 1.

Texas. — *Weaver v. State*, 46 Tex. Crim. 607; *Miller v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 393; *Fox v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 157.

Vermont. — See *Hathaway v. Goslant*, 77 Vt. 199.

1099. 1. Reasons for Rule — Limitations of Right to Cross-examine. — *Ferguson v. State*, (Neb. 1904) 100 N. W. Rep. 800; *Lambert v. Hamlin*, (N. H. 1905) 59 Atl. Rep. 941.

Extent of Cross-examination Rests in Discretion of Trial Court. — *Terre Haute Electric Co. v. Watson*, 33 Ind. App. 124; *Hill v. Territory*, (Okla. 1905) 79 Pac. Rep. 757.

3. Exclusion of Questions on Cross-examination. — *Burks v. State*, 72 Ark. 461; *Southern R. Co. v. State*, (Ind. App. 1904) 72 N. E. Rep. 174; *Hofacre v. Monticello*, (Iowa 1905) 103 N. W. Rep. 488; *Burnside v. Everett*, 186 Mass. 4. See also *Davis v. State*, 85 Miss. 416.

1100. 2. Materiality of Former Statements of Witness. — *The Saranac*, 132 Fed. Rep. 936; *Hinson v. State*, (Ark. 1905) 88 S. W. Rep. 947; *Watts v. State*, 120 Ga. 496; *State v. Crea*, 10 Idaho 88; *State v. Matheson*, (Iowa 1905) 103 N. W. Rep. 137; *Yelton v. Black*, (Ky. 1904) 82 S. W. Rep. 634; *Wojtylak v. Kansas, etc., Coal Co.*, 188 Mo. 260; *Dorry v. Union R. Co.*, 104 N. Y. App. Div. 309. See also *Western Union Oil Co. v. Newlove*, 145 Cal. 772; *State v. Dalcourt*, 112 La. 420; *Gallejos v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1150.

1102. 2. Interest and Bias. — *Alford v. State*, (Fla. 1904) 36 So. Rep. 436.

6. Test of Collateral Matter. — *Western Union Oil Co. v. Newlove*, 145 Cal. 772; *State v. Matheson*, (Iowa 1905) 103 N. W. Rep. 137.

Matter Is Not Collateral when its purpose is to contradict the witness regarding his veracity. *State v. Dalcourt*, 112 La. 420.

1103. 3. Direct Contradiction. — *Sampson v. Hughes*, 147 Cal. 62; *Deck v. Baltimore, etc., R. Co.*, 100 Md. 168. See also *Ferguson v. State*, (Neb. 1904) 100 N. W. Rep. 800.

Miscellaneous Illustrations — Evidence Held Admissible. — *Weaver v. State*, 46 Tex. Crim. 607; *Ball v. Com.*, (Ky. 1905) 85 S. W. Rep. 226; *Lampkin v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 803; *Thompson v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1059; *International, etc., R. Co. v. Boykin*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1163; *Long v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 203.

1104. 3. Cross-examination and Contradiction. — *Ferguson v. State*, (Neb. 1904) 100 N. W. Rep. 800.

1105. 1. When Witness Denies Having Made Statement — *Alabama*. — *De Yampert v. State*,

139 Ala. 53; *Jones v. State*, 141 Ala. 55; *Brown v. State*, 142 Ala. 287.

California. — *Western Union Oil Co. v. Newlove*, 145 Cal. 772; *People v. Jailles*, 146 Cal. 301; *People v. Heart*, (Cal. 1905) 81 Pac. Rep. 1018.

Florida. — *Vickery v. State*, (Fla. 1905) 38 So. Rep. 907. See also *Thomas v. State*, (Fla. 1904) 36 So. Rep. 161; *Alford v. State*, (Fla. 1904) 36 So. Rep. 436.

Georgia. — *Spearman v. Sanders*, 121 Ga. 468. See also *Ector v. State*, 120 Ga. 543.

Idaho. — *State v. Crea*, 10 Idaho 88.

Illinois. — *Belt R. Co. v. Confrey*, 209 Ill. 344; *Chicago, etc., R. Co. v. Crose*, 214 Ill. 602. See also *Stevens v. People*, 215 Ill. 593.

Indiana. — *Indianapolis, etc., R. Co. v. Hubbard*, (Ind. App. 1905) 74 N. E. Rep. 535; *Walker v. State*, (Ind. 1905) 74 N. E. Rep. 614. See also *Myers v. Manlove*, 164 Ind. 128.

Iowa. — *Severson v. Gremm*, 124 Iowa 729; *Gregory v. Wabash R. Co.*, 126 Iowa 230; *State v. Brown*, (Iowa 1905) 102 N. W. Rep. 799; *State v. Matheson*, (Iowa 1905) 103 N. W. Rep. 137.

Kentucky. — *Whitt v. Com.*, (Ky. 1905) 84 S. W. Rep. 340. See also *Straight Creek Coal Co. v. Haney*, (Ky. 1905) 87 S. W. Rep. 1114; *McMakin v. McMakin*, (Ky. 1905) 87 S. W. Rep. 1140.

Louisiana. — *State v. Dalcourt*, 112 La. 420.

Michigan. — *Culver v. South Haven, etc., R. Co.*, 138 Mich. 443.

Minnesota. — See also *McDonald v. Bayha*, 93 Minn. 139.

Missouri. — *State v. Lockhart*, 188 Mo. 427. See also *Wojtylak v. Kansas Coal Co.*, 188 Mo. 260.

New Hampshire. — *Villeneuve v. Manchester St. R. Co.*, (N. H. 1905) 60 Atl. Rep. 748.

New York. — *Hanlon v. Ehrich*, 178 N. Y. 474; *Burke v. Borden's Condensed Milk Co.*, 98 N. Y. App. Div. 219.

North Carolina. — *State v. Exum*, 138 N. Car. 599.

South Carolina. — *Sentell v. Southern R. Co.*, 70 S. Car. 183; *State v. Marks*, 70 S. Car. 448.

Texas. — *Simpson v. State*, 46 Tex. Crim. 551; *Wallace v. State*, 46 Tex. Crim. 341; *Dean v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 816; *Contreras v. San Antonio Traction Co.*, (Tex. Civ. App. 1904) 83 S. W. Rep. 870; *Spencer Shoe Co. v. Jaramillo*, (Tex. Civ. App. 1904) 84 S. W. Rep. 241; *Thompson v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1059; *Gallejos v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1150. See also *Elkins v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 149.

Wisconsin. — See *Suckow v. State*, 122 Wis. 156.

- 1106.** (2) *Written Statements* — (a) *In General*. — See note 4.
1107. See notes 1, 2, 3.
1108. (c) *Extent to Which Statements Admissible*. — See note 1.
 (d) *Authentication of Writing*. — See note 3.
 (3) *Former Testimony of Witness* — (a) *Rule Stated*. — See notes 5, 6.
1109. See notes 1, 3.
 (b) *Mode of Proof* — *aa. BY PERSONS WHO HEARD TESTIMONY*. — See notes 5, 7, 10.
1110. *bb. BY STENOGRAPHER*. — See note 2.
cc. BY STENOGRAPHER'S TRANSCRIPT OF NOTES. — See note 5.
1111. *ee. BY INTRODUCTION OF FORMER DEPOSITION*. — See note 2.
 (4) *Where Witness Admits Discrediting Fact*. — See note 3.
1112. (5) *Where Witness Neither Admits Nor Denies Discrediting Fact*. — See note 1.
 (6) *Former Statement of Opinion* — (a) *In General*. — See note 3.
1113. (7) *Statements of Persons Other than Witness*. — See note 5.
1114. (8) *Purpose and Effect of Contradictory Evidence* — *By Witness*. — See note 3.

1106. 4. *Impeachment by Former Written Statements*. — *Chicago City R. Co. v. Matthieson*, 212 Ill. 292; *Chicago, etc., R. Co. v. Crose*, 113 Ill. App. 547, *affirmed* 214 Ill. 602; *State v. Rogers*, (La. 1905) 38 So. Rep. 952; *Rand v. Sage*, 94 Minn. 344; *Lambeck v. Stiefel*, 71 N. J. L. 320; *Hanlon v. Ehrich*, 178 N. Y. 474. See also *Williams v. Brown*, 137 Mich. 569; *Norman v. Corbley*, 32 Mont. 195; *Villeneuve v. Manchester St. R. Co.*, (N. H. 1905) 60 Atl. Rep. 748.

Witness Should Be Permitted to Explain Written Statements Before Admission. — *McDonald v. Bayha*, 93 Minn. 139.

1107. 1. *Contradiction by Letters of Witness*. — *State v. Rogers*, (La. 1905) 38 So. Rep. 952. See also *McDonald v. Bayha*, 93 Minn. 139; *Lambeck v. Stiefel*, 71 N. J. L. 320.

Written Statement of Accident. — *Hanlon v. Ehrich*, 178 N. Y. 474.

2. *Contradiction by Affidavit*. — See *State v. Exum*, 138 N. Car. 599.

3. *Petition and Schedules in Bankruptcy*. — *Rand v. Sage*, 94 Minn. 344.

Statement of Details of Accident. — *Chicago City R. Co. v. Matthieson*, 212 Ill. 292.

1108. 1. *Extent to Which Former Statements Admissible*. — *Hanlon v. Ehrich*, 178 N. Y. 474.

3. *Necessity for Authentication*. — *Burton v. State*, 141 Ala. 32.

5. *Testimony at Former Trial*. — *Carney v. Hennessey*, 77 Conn. 577; *Davis v. State*, (Fla. 1904) 36 So. Rep. 170; *Spearman v. Sanders*, 121 Ga. 468; *Culver v. South Haven, etc.*, R. Co., 138 Mich. 443; *Field v. Schuster*, 26 Pa. Super. Ct. 82; *Coolidge v. Ayers*, 77 Vt. 448.

6. *Testimony in Another Action*. — *Harmon v. Territory*, (Okla. 1905) 79 Pac. Rep. 765.

1109. 1. *Testimony at Preliminary Hearing*. — *Chicago, etc., R. Co. v. Crose*, 214 Ill. 602; *Whitt v. Com.*, (Ky. 1905) 84 S. W. Rep. 340; *Dyer v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 193.

3. *Testimony Before Grand Jury*. — *Davis v. State*, 122 Ga. 564; *State v. Brown*, (Iowa 1905) 102 N. W. Rep. 799; *Simpson v. State*, 46 Tex. Crim. 551.

The Defendant's Testimony Before the Grand Jury is inadmissible to impeach his testimony on the trial in the absence of proof of warning that it could be used against him. *Bowen v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 520.

5. *Proof by Another Person Who Heard Testimony*. — *Whitt v. Com.*, (Ky. 1905) 84 S. W. Rep. 340; *Gallegos v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1150.

7. *Proof by Grand Jurors*. — *Simpson v. State*, 46 Tex. Crim. 551.

Proof by Witness Present in Grand Jury Room. — *Davis v. State*, 122 Ga. 564.

10. *Proof by Presiding Judge*. — *Chicago, etc., R. Co. v. Crose*, 214 Ill. 602; *Dyer v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 193.

1110. 2. *Stenographer May Read Notes*. — *Davis v. State*, (Fla. 1904) 36 So. Rep. 170.

May Use Abstract Taken from Notes to Refresh Memory. — *Culver v. South Haven, etc.*, R. Co., 138 Mich. 443.

May Use Carbon Transcript of Notes to Refresh Memory. — *Harmon v. Territory*, (Okla. 1905) 79 Pac. Rep. 765.

5. *Stenographer's Transcript Admissible under Statute*. — See *Harmon v. Territory*, (Okla. 1905) 79 Pac. Rep. 765.

1111. 2. *Contradiction by Former Deposition*. — *Gasquet v. Pechin*, 143 Cal. 515; *Knights-Templars, etc., L. Indemnity Co. v. Crayton*, 209 Ill. 550.

3. *Contradictory Statements*. — *Chicago, etc., R. Co. v. Crose*, 214 Ill. 602, 105 Am. St. Rep. 135; *Dean v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 816.

1112. 1. *Contradictory Proof Admissible*. — *Chicago City R. Co. v. Matthieson*, 212 Ill. 292.

3. *Former Statements of Opinion Held Inadmissible*. — *State v. Crea*, 10 Idaho 88; *State v. Matheson*, (Iowa 1905) 103 N. W. Rep. 137.

1113. 5. *Statements of Others Assented to by Witness*. — See *State v. Matheson*, (Iowa 1905) 103 N. W. Rep. 137.

1114. 3. *Competent Only for Purpose of Impeachment*. — *Chicago City R. Co. v. Matthieson*, 212 Ill. 292.

1115. By Party. — See note 4.

(9) *Statements Must Be Inconsistent or Contradictory* — (a) General Rule. — See note 7.

1116. (10) *Time to Introduce Impeaching Evidence*. — See note 4.

1117. See note 1.

1118. d. ACTS AND CONDUCT OF WITNESS INCONSISTENT WITH TESTIMONY. — See note 4.

e. FORMER STATEMENT OF WITNESS OMITTING MATERIAL FACTS — (1) *In General*. — See note 5.

1119. 9. Laying Foundation for Discrediting Evidence — a. CONTRADICTORY STATEMENTS — (1) *Rule that Foundation Must Be Laid* — (a) Oral Statements. — See note 2.

1120. See note 1.

1121. Former Testimony. — See note 2.

1122. (b) Written Statements. — See note 2.

1124. (2) *Rule that Foundation Need Not Be Laid*. — See note 1.

(3) *When Witness Is Party to Litigation*. — See notes 2, 3, 4.

1115. 4. Discrediting Party by Statements Out of Court. — *Contreras v. San Antonio Traction Co.*, (Tex. Civ. App. 1904) 83 S. W. Rep. 870.

7. Statement Must Be Inconsistent or Contradictory. — *Clemens v. Kaiser*, 211 Ill. 460; *State v. Matheson*, (Iowa 1905) 103 N. W. Rep. 137. See also *Western Union Oil Co. v. Newlove*, 145 Cal. 772; *State v. Crea*, 10 Idaho 88; *Wojtylak v. Kansas, etc., Coal Co.*, 188 Mo. 260; *Villeneuve v. Manchester St. R. Co.*, (N. H. 1905) 60 Atl. Rep. 748.

Must Be Inconsistent in Material Particular. — *Myers v. Manlove*, 164 Ind. 128.

1116. 4. Time to Introduce Impeaching Testimony. — *Chicago City R. Co. v. Matthieson*, 212 Ill. 292.

1117. 1. Introduction During Cross-examination. — *Chicago City R. Co. v. Matthieson*, 212 Ill. 292.

1118. 4. Acts and Conduct of Witness Inconsistent with Testimony. — *Cogswell v. Hall*, 185 Mass. 455; *State v. Howard*, 30 Mont. 518; *Charping v. Toxaway Mills*, 70 S. Car. 470; *Lampkin v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 803; *International, etc., R. Co. v. Boykin*, (Tex. Civ. App. 1905) 85 S. W. Rep. 1163; *Long v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 203; *Savage v. Bowen*, 103 Va. 540. See also *Thompson v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1059.

5. Former Statement Omitting Material Facts — In General. — *Dyer v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 193; *Coolidge v. Ayers*, 77 Vt. 448.

1119. 2. Foundation for Discrediting Evidence — *Alabama*. — *Jones v. State*, 141 Ala. 55. See also *Gregory v. State*, 140 Ala. 16; *Brown v. State*, 142 Ala. 287.

California. — *Western Union Oil Co. v. Newlove*, 145 Cal. 772; *People v. Heart*, (Cal. 1905) 81 Pac. Rep. 1018. See also *Gasquet v. Pechin*, 143 Cal. 515; *People v. Jailles*, 146 Cal. 301.

Florida. — *Thomas v. State*, (Fla. 1904) 36 So. Rep. 161; *Davis v. State*, (Fla. 1904) 36 So. Rep. 170; *Alford v. State*, (Fla. 1904) 36 So. Rep. 436; *Vickery v. State*, (Fla. 1905) 38 So. Rep. 907.

Georgia. — *Jordan v. State*, 120 Ga. 864.

Illinois. — *Chicago City R. Co. v. Matthieson*, 212 Ill. 292. See also *Chicago, etc., R. Co. v. Crose*, 214 Ill. 602.

Indian Territory. — *Wilson v. U. S.*, 5 Indian Ter. 610.

Indiana. — See *Walker v. State*, (Ind. 1905) 74 N. E. Rep. 614.

Iowa. — *Gregory v. Wabash R. Co.*, 126 Iowa 230; *State v. Matheson*, (Iowa 1905) 103 N. W. Rep. 137.

Louisiana. — *State v. Dalcourt*, 112 La. 420. See also *State v. Rogers*, (La. 1905) 38 So. Rep. 952.

Minnesota. — See *McDonald v. Bayha*, 93 Minn. 139.

New Jersey. — *State v. Brady*, 71 N. J. L. 360.

New York. — *Burke v. Borden's Condensed Milk Co.*, 98 N. Y. App. Div. 219.

South Carolina. — *State v. Marks*, 70 S. Car. 448. See also *Sentell v. Southern R. Co.*, 70 S. Car. 183.

Texas. — *Gallegos v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1150. See also *Contreras v. San Antonio Traction Co.*, (Tex. Civ. App. 1904) 83 S. W. Rep. 870.

Virginia. — *Savage v. Bowen*, 103 Va. 540.

Wisconsin. — See *Illinois Steel Co. v. Jeka*, 123 Wis. 419.

1120. 1. Time, Place, etc., to Be Specified. — *Gregory v. Wabash R. Co.*, 126 Iowa 230; *Burke v. Borden's Condensed Milk Co.*, 98 N. Y. App. Div. 219, 90 N. Y. Supp. 527; *State v. Marks*, 70 S. Car. 448. See also *State v. Lyons*, 113 La. 959.

1121. 2. Former Oral Testimony. — *Davis v. State*, (Fla. 1904) 36 So. Rep. 170; *Gallegos v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 1150; *Coolidge v. Ayers*, 77 Va. 448.

1122. 2. Written Statements. — *Chicago City R. Co. v. Matthieson*, 212 Ill. 292; *State v. Rogers*, (La. 1905) 38 So. Rep. 952.

1124. 1. Rule that Foundation Need Not Be Laid. — *Villeneuve v. Manchester St. R. Co.*, (N. H. 1905) 60 Atl. Rep. 748.

2. Proof of Admissions Against Interest. — *Contreras v. San Antonio Traction Co.*, (Tex. Civ. App. 1904) 83 S. W. Rep. 870; *Coolidge v. Ayers*, 77 Vt. 448.

- 1127.** (5) *Refreshing Memory of Witness.* — See note 4.
b. BIAS OF WITNESS. — See notes 5, 6.
- 1128.** 10. *Impeaching One's Own Witness* — *a. IN GENERAL.* — See note 3.
- 1129.** *b. CONTRADICTING ONE'S OWN WITNESS.* — See note 2.
- 1130.** *c. PARTY ENTRAPPED BY HOSTILE WITNESS* — (1) *Refreshing Recollection.* — See note 1.
 (2) *Proof of Prior Inconsistent Statements* — (a) *Rule at Common Law.* — See note 2.
- 1131.** See note 1.
(b) Statutory Rule. — See note 2.
- 1132.** See note 3.
(c) Limitations of Rule. — See note 4.
- 1133.** *e. WHERE PARTY CALLS OPPOSING WITNESS* — *New Matter Brought Out on Cross-examination.* — See note 6
- 1134.** *f. ONE PARTY CALLED BY THE OTHER.* — See note 5.
 11. *Impeachment of Defendant in Criminal Case* — *a. IN GENERAL.* — See note 6.
- 1135.** *b. ATTACKING REPUTATION OF WITNESS.* — See note 2.
- 1136.** *c. CONVICTION OF CRIME.* — See notes 1, 2, 3, 5, 6.

1124. 3. *Impeaching Party by Proof of Contradictory Statements.* — McDonald *v. Bayha*, 93 Minn. 139.

4. *Admissions Competent as Original Evidence.* — Contreras *v. San Antonio Traction Co.*, (Tex. Civ. App. 1904) 83 S. W. Rep. 870; Coolidge *v. Ayers*, 77 Vt. 448.

1127. 4. *Refreshing Memory of Witness.* — Ashby *v. Elsberry*, etc., Gravel Road Co., 111 Mo. App. 79; Hart *v. Maloney*, 101 N. Y. App. Div. 37; American Bonding Co. *v. Milstead*, 102 Va. 683.

5. *Foundation Not Required.* — Creeping Bear *v. State*, 113 Tenn. 322.

6. *Foundation Required.* — See Parrish *v. State*, 139 Ala. 16.

1128. 3. *Impeachment Not Allowed.* — Carney *v. Hennessey*, 77 Conn. 577; Moultrie Repair Co. *v. Hill*, 120 Ga. 730; Sauter *v. Anderson*, 112 Ill. App. 580; Donaldson *v. New York*, etc., R. Co., 188 Mass. 484; Dunk *v. State*, 84 Miss. 452; Price *v. State*, (Miss. 1905) 38 So. Rep. 41; Joyce *v. St. Louis Transit Co.*, 111 Mo. App. 565; Hetzel *v. Easterly*, 96 N. Y. App. Div. 517; Ruhl *v. Heintze*, 97 N. Y. App. Div. 442; Mead *v. Otto Huber Brewery*, 104 N. Y. App. 10; Steinke *v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 753; Stout *v. Sands*, 56 W. Va. 663; Rex *v. Hutchinson*, 11 British Columbia 24. See also Franklin *v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 357.

1129. 2. *Proof by Other Witnesses.* — Carney *v. Hennessey*, 77 Conn. 577; Sauter *v. Anderson*, 112 Ill. App. 580; Moultrie Repair Co. *v. Hill*, 120 Ga. 730; Donaldson *v. New York*, etc., R. Co., 188 Mass. 484; Joyce *v. St. Louis Transit Co.*, 111 Mo. App. 565; Hetzel *v. Easterly*, 96 N. Y. App. Div. 517; Ruhl *v. Heintze*, 97 N. Y. App. Div. 442; Mead *v. Otto Huber Brewery*, 104 N. Y. App. Div. 10; McCue *v. Com.*, 103 Va. 870; Stout *v. Sands*, 56 W. Va. 663; Rex *v. Hutchinson*, 11 British Columbia 24.

1130. 1. *Refreshing Recollection.* — State *v. Moon*, (Kan. 1905) 80 Pac. Rep. 597. See also McCue *v. Com.*, 103 Va. 870.

Leading Questions May Be Asked. — Zilver *v. Robert Graves Co.*, 106 N. Y. App. Div. 582.

2. *Proof Not Allowed.* — Joyce *v. St. Louis Transit Co.*, 111 Mo. App. 565. See also Brown *v. State*, (Fla. 1904) 36 So. Rep. 705; McCue *v. Com.*, 103 Va. 870; Stout *v. Sands*, 56 W. Va. 663.

1131. 1. *Proof of Prior Statements Allowed.* — Dunk *v. State*, 84 Miss. 452; Price *v. State*, (Miss. 1905) 38 So. Rep. 41.

2. *Statutes Allowing Proof of Previous Statements.* — Walker *v. State*, (Ind. 1905) 74 N. E. Rep. 614; Whitt *v. Com.*, (Ky. 1905) 84 S. W. Rep. 340; Donaldson *v. New York*, etc., R. Co., 188 Mass. 484; Franklin *v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 357.

1132. 3. *Laying Predicate.* — Reyes *v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 245.

4. *Limitations of Rule.* — Brown *v. State*, (Fla. 1904) 36 So. Rep. 705; Dunk *v. State*, 84 Miss. 452.

1133. 6. *Cross-examination on New Matter.* — See Weaver *v. State*, 46 Tex. Crim. 607.

1134. 5. *Proof of Admissions.* — Carney *v. Hennessey*, 77 Conn. 577.

6. *Defendant Subject to Impeachment Like Any Other Witness.* — Smith *v. State*, (Ark. 1905) 85 S. W. Rep. 1123; People *v. Buckley*, 143 Cal. 375; State *v. Buffington*, (Kan. 1905) 81 Pac. Rep. 465; Helm *v. Com.*, (Ky. 1904) 81 S. W. Rep. 270; Bess *v. Com.*, (Ky. 1904) 82 S. W. Rep. 576. See also People *v. Scalamiero*, 143 Cal. 343; State *v. Howard*, 30 Mont. 518; State *v. Rogers*, 31 Mont. 1; Brittain *v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 270; Ellington *v. State*, (Tex. Crim. 1905) 87 S. W. Rep. 153.

1135. 2. *General Moral Character.* — State *v. Thompson*, 127 Iowa 440. See generally the title CHARACTER (IN EVIDENCE).

Particular Acts of Misconduct Not Admissible. — Dunn *v. State*, 162 Ind. 174.

1136. 1. Smith *v. State*, (Ark. 1905) 85 S. W. Rep. 1124; Gallagher *v. People*, 211 Ill. 158; State *v. Knowles*, 98 Me. 429; State *v. Fox*, 70 N. J. L. 353.

1136. Record of Conviction. — See note 7.

Identity. — See notes 9, 10.

1137. *d.* CROSS-EXAMINATION. — See notes 5, 6, 7, 8.

Indictment — See note 10.

1138. *e.* CONTRADICTIONARY STATEMENTS OF WITNESS. — See note 5.

1139. *f.* INSTRUCTIONS ON CREDIBILITY. — See notes 2, 3, 4.

1140. 13. Impeaching and Supporting an Impeaching Witness. — See note 2.

1141. VIII. CORROBORATION OF WITNESSES — 2. Evidence in Support of Credit — *a.* NOT ALLOWED UNTIL CREDIBILITY OF WITNESS IS ATTACKED. — See note 5.

1143. *b.* ALLOWED WHEN CREDIBILITY OF WITNESS IS ATTACKED — (1) *In General.* — See note 1.

(2) *Evidence in Rebuttal of Testimony Showing Bias.* — See note 3.

(3) *Evidence in Rebuttal of Testimony Showing Contradictory Statements.* — See note 4.

1144. See note 1.

1136. 2. Cross-examination as to Imprisonment. — *Lang v. U. S.*, (C. C. A.) 133 Fed. Rep. 201.

3. Cross-examination as to Conviction of Felony. — *People v. Buckley*, 143 Cal. 375; *State v. Knowles*, 98 Me. 429; *Gray v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 764; *Sexton v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 348. See also *State v. Rogers*, 31 Mont. 1. Compare *People v. Majoine*, 144 Cal. 303.

5. Conviction of Misdemeanor. — *State v. Heusack*, 189 Mo. 295; *State v. Fox*, 70 N. J. L. 353; *State v. Mount*, (N. J. 1905) 61 Atl. Rep. 259. See also *Smith v. State*, (Ark. 1905) 85 S. W. Rep. 1124.

6. Crime Involving Moral Turpitude. — *Gray v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 764.

7. Record of Conviction. — *Smith v. State*, (Ark. 1905) 85 S. W. Rep. 1124; *McKevitt v. People*, 208 Ill. 460; *Gallagher v. People*, 211 Ill. 158; *State v. Knowles*, 98 Me. 429; *State v. Mount*, (N. J. 1905) 61 Atl. Rep. 259; *Colbert v. State*, 125 Wis. 423.

9. Identity. — *Colbert v. State*, 125 Wis. 423. See also *State v. Knowles*, 98 Me. 429.

10. Conviction Must Not Be Too Remote. — See *State v. Knowles*, 98 Me. 429.

1137. 5. Particular Offenses Relative to Credibility. — *Corothers v. State*, (Ark. 1905) 88 S. W. Rep. 585; *Dunn v. State*, 162 Ind. 174; *State v. Buffington*, (Kan. 1905) 81 Pac. Rep. 465; *People v. Farrell*, 137 Mich. 127; *People v. De Garmo*, 179 N. Y. 130. See also *Stull v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 1059.

6. *People v. Buckley*, 143 Cal. 375. See also *Ferguson v. State*, (Neb. 1904) 100 N. W. Rep. 800.

7. Particular Acts Having No Connection with Offense on Trial. — *People v. Buckley*, 143 Cal. 375; *Shepherd v. Com.*, (Ky. 1905) 85 S. W. Rep. 191; *People v. De Garmo*, 179 N. Y. 130; *State v. Shockley*, 29 Utah 25; *State v. Nergaard*, 124 Wis. 414.

8. Too Remote. — *People v. Dowell*, 136 Mich. 306; *Wesley v. State*, (Tex. Crim. 1905) 85 S. W. Rep. 802. See also *Stull v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 1059.

10. May Be Asked as to Indictment. — See *State v. Mount*, (N. J. 1905) 61 Atl. Rep. 259.

But Moral Turpitude Must Be Involved. — *Hays v. State*, (Tex. Crim. 1904) 82 S. W. Rep. 511.

1138. 5. Witness's Answer Conclusive When Not Material to Issue. — *Weaver v. State*, 46 Tex. Crim. 607.

1139. 2. Court May Instruct Jury as to Defendant's Interest. — *Waller v. People*, 209 Ill. 284.

3. Instructions that Jury Not Bound to Believe Defendant Proper. — See *McCracken v. People*, 209 Ill. 215.

4. Disregarding Defendant's Testimony. — See *State v. Sharp*, 183 Mo. 715.

1140. 2. Impeaching and Supporting an Impeaching Witness. — *Brown v. State*, 142 Ala. 287; *Jordan v. State*, 120 Ga. 864; *Dunn v. Com.*, (Ky. 1905) 84 S. W. Rep. 321. See also *Hellard v. Com.*, (Ky. 1905) 84 S. W. Rep. 329.

Credibility of Impeaching Witness Is for Jury. — *State v. Bartlett*, 127 Iowa 680.

1141. 5. Not Allowed until Credibility Attacked. — *Gordon v. Miller*, 111 Mo. App. 342; *Dean v. State*, (Tex. Crim. 1904) 83 S. W. Rep. 816; *Franklin v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 357. See also *Swain v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 335.

1143. 1. Evidence of Good Character in Rebuttal of Evidence of Bad Character. — *Dimmick v. U. S.*, (C. C. A.) 135 Fed. Rep. 257; *Brown v. State*, 142 Ala. 287.

Evidence in Rebuttal of Discrediting Testimony Other than That of Bad Character. — *Sweeney v. Sweeney*, 121 Ga. 293; *Contreras v. San Antonio Traction Co.*, (Tex. Civ. App. 1904) 83 S. W. Rep. 870; *Comer v. Thornton*, (Tex. Civ. App. 1905) 86 S. W. Rep. 19. See also *State v. Exum*, 138 N. Car. 599.

3. Rebutting Testimony Showing Bias. — *Comer v. Thornton*, (Tex. Civ. App. 1905) 86 S. W. Rep. 19.

4. Rebutting Testimony as to Contradictory Statements. — *Spearman v. Sanders*, 121 Ga. 468; *Villeneuve v. Manchester St. R. Co.*, (N. H. 1905) 60 Atl. Rep. 748; *Swain v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 335.

1144. 1. Evidence of Other Portions of Former Statement in Rebuttal. — *State v. Bean*, 77 Vt. 384.

1145. *c.* EVIDENCE OF PRIOR CONSISTENT STATEMENTS — (1) *Before Attack on Credibility of Witness* — (a) *In General.* — See note 3.

1146. (b) *Rape or Assault with Intent to Commit Rape.* — See note 1.

(2) *After Attack on Credibility of Witness* — (a) *Rule that Evidence Is Admissible.* — See note 3.

1147. See note 1.

(b) *Rule that Evidence Is Inadmissible.* — See note 5.

1148. (c) *Witness Testifying under Influence of Bias or Other Motive Prompting False Testimony.* — See note 1.

1149. (d) *Where Witness Is a Party to the Litigation.* — See note 1.

(e) *As Corroborative Evidence.* — See note 2.

1150. *d.* EVIDENCE OF GOOD CHARACTER — (2) *To Rebut Inference of Bad Character or Reputation* — (a) *Evidence Held Admissible.* — See notes 1, 3, 4.

1153. (6) *How Proof Made — Qualifications of Witnesses* — (b) *Direct Evidence of Good Character — aa. AFFIRMATIVE EVIDENCE.* — See note 2.

1154. IX. PRIVILEGE OF REFUSING TO ANSWER — 1. *Exposure to Criminal Charge.* — See note 1.

Direct Crimination Not Necessary. — See note 2.

1155. *Reasonable Danger of Prosecution.* — See note 1.

1156. 2. *Exposure to Penalty or Forfeiture.* — See note 3.

1157. 4. *Exposure to Disgrace.* — See note 4.

1158. *Matter Material to Issue.* — See notes 1, 2.

1145. 3. *Prior Consistent Statements.* — *State v. Sharp*, 183 Mo. 715; *State v. Exum*, 138 N. Car. 599; *Glover v. Coit*, 36 Tex. Civ. App. 104; *Simpson v. State*, 46 Tex. Crim. 551; *Wallace v. State*, 46 Tex. Crim. 341; *McKensie v. Watson*, 36 Tex. Civ. App. 235; *Franklin v. State*, (Tex. Crim. 1905) 88 S. W. Rep. 357; *State v. Bean*, 77 Vt. 384. See also *Southern Pac. Co. v. Schuyler*, (C. C. A.) 135 Fed. Rep. 1015; *Strebin v. Lavengood*, 163 Ind. 478.

1146. 1. *Rape or Assault with Intent to Commit Rape.* — *Posey v. State*, (Ala. 1905) 38 So. Rep. 1019; *State v. Smith*, 138 N. Car. 700.

Delay in Complaining May Be Considered. — *People v. Estell*, 106 N. Y. App. Div. 516. And see the title RAPE, 877. 7 *et seq.*

3. *Rule Liberally Applied.* — *State v. Exum*, 138 N. Car. 599. See also *Sweeney v. Sweeney*, 121 Ga. 293.

1147. 1. *Rebutting Evidence of Contradictory Statements.* — See *Ex p. McCoy*, (Tex. Crim. 1904) 82 S. W. Rep. 1044.

5. *Prior Consistent Statements Generally Inadmissible.* — *Sweeney v. Sweeney*, 121 Ga. 293; *Waller v. People*, 209 Ill. 284; *Chicago City R. Co. v. Matthieson*, 212 Ill. 292. Compare *State v. McDaniel*, 68 S. Car. 304, 102 Am. St. Rep. 661.

1148. 1. *Witness Testifying under Influence of Bias, Etc.* — *Sweeney v. Sweeney*, 121 Ga. 293; *Chicago City R. Co. v. Matthieson*, 212 Ill. 292; *Griffin v. Boston*, 188 Mass. 475; *State v. McDaniel*, 68 S. Car. 304, 102 Am. St. Rep. 661; *Glover v. Coit*, 36 Tex. Civ. App. 104.

1149. 1. *Maryland Statute — Evidence Inadmissible.* — See *Maryland Steel Co. v. Engleman*, 101 Md. 661.

2. *Prior Statements, etc., as Corroborative Evidence.* — *State v. Exum*, 138 N. Car. 599.

1150. 1. *Proof of Good Character in General.* — *State v. Exum*, 138 N. Car. 599. See also

Dimmick v. U. S., (C. C. A.) 135 Fed. Rep. 257.

3. *Attacking Character by Evidence of Contradictory Statements.* — *Contreras v. San Antonio Traction Co.*, (Tex. Civ. App. 1904) 83 S. W. Rep. 870; *Swain v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 335.

4. *Witness Assailed by Vigorous Cross-examination.* — See *Swain v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 335.

1153. 2. *Qualifications of Sustaining Witness.* — *Stull v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 1059. See also *Contreras v. San Antonio Traction Co.*, (Tex. Civ. App. 1904) 83 S. W. Rep. 870.

1154. 1. *Exposure to Criminal Charge.* — *In re Hooks Smelting Co.*, 138 Fed. Rep. 954; *Rogers v. Superior Ct.*, 145 Cal. 88; *Wilson v. Ohio Farmers' Ins. Co.*, 164 Ind. 462; *State v. Cobby*, (Iowa 1905) 103 N. W. Rep. 99; *State v. Inman*, 70 Kan. 894; *Bess v. Com.*, (Ky. 1904) 82 S. W. Rep. 576; *In re Moser*, 138 Mich. 302; *State v. Rogers*, 31 Mont. 1; *State v. Miller*, 71 N. J. L. 527; *State v. Shockley*, 29 Utah 25. See also *People v. Buckley*, 143 Cal. 375; *Ivy v. State*, 84 Miss. 264; *Starr v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 1023.

2. *Witness Not Compellable to Disclose any Link in Chain of Proof Against Him.* — *In re Hess*, 134 Fed. Rep. 109. See also *Rogers v. Superior Ct.*, 145 Cal. 88.

1155. 1. *In re Hess*, 134 Fed. Rep. 109. See also *State v. Jack*, 69 Kan. 387.

1156. 3. *Answers Disclosing Trade Secrets.* — See *In re Park*, 138 Fed. Rep. 421.

1157. 4. See *Rogers v. Superior Ct.*, 145 Cal. 88; *In re Moser*, 138 Mich. 302; *State v. Howard*, 30 Mont. 518.

1158. 1. *Witness Required to Answer as to Material Matters.* — *State v. Rogers*, 31 Mont. 1.

2. *Collateral and Irrelevant Matters.* — *State v. Rogers*, 31 Mont. 1.

- 1158.** 5. Constitutional Guaranty — *a.* IN GENERAL. — See note 5.
- 1159.** See notes 1, 2.
Not Limited to Criminal Prosecutions Against Witness Himself. — See note 3.
Production of Books and Papers. — See note 8.
- 1160.** See notes 1, 2.
Physical Examination and Experiments. — See note 3.
- 1161.** *b.* STATUTES ABRIDGING PRIVILEGE — Provision that Answers Shall Not Be Used Against Witness. — See note 1.
Absolute Indemnity. — See note 2.
Where Immunity Complete. — See note 3.
- 1162.** *c.* CROSS-EXAMINATION OF DEFENDANT. — See note 4.
- 1163.** See notes 1, 4.
- 1165.** 6. Where Witness Can No Longer Be Prosecuted. — See note 2.
7. Privilege of Witness, Not of Party. — See notes 3, 4.
- 1166.** See note 2.
8. Who Determines Tendency of Question. — See note 5.
- 1169.** 10. Question May Lawfully Be Asked. — See notes 5, 6, 10, 11.
- 1170.** See note 1.
- 1158.** 5. Constitutional Guaranty. — *In re* Hess, 134 Fed. Rep. 109.
What Is Not Compulsion. — *State v. Miller*, 71 N. J. L. 527.
- 1159.** 1. Fifth Amendment — Restriction Solely on Federal Power. — *State v. Miller*, 71 N. J. L. 527.
2. *State v. Jack*, 69 Kan. 387; *State v. Strait*, 94 Minn. 384; *People v. Schneider*, (Mich. 1905) 103 N. W. Rep. 173; *In re Moser*, 138 Mich. 302; *People v. Court of Gen. Sessions*, 96 N. Y. App. Div. 201, *affirmed* 179 N. Y. 594.
3. Not Limited to Criminal Prosecutions Against Witness. — See *Davis v. State*, 122 Ga. 564.
Right Same in Civil as in Criminal Case. — *Wilson v. Ohio Farmers' Ins. Co.*, 164 Ind. 462.
8. Under Fifth Amendment. — *Interstate Commerce Commission v. Baird*, 194 U. S. 25; *In re Hess*, 134 Fed. Rep. 109.
Under State Constitution Provisions. — See *State v. Strait*, 94 Minn. 384.
- A Bankrupt pleading his constitutional privilege must bring his books for the court or referee to determine whether his plea is well founded. *In re Hark*, 136 Fed. Rep. 986. And it is for the court to determine whether the production will incriminate the bankrupt. *In re Hess*, 136 Fed. Rep. 988.
- 1160.** 1. Papers Otherwise Obtained by the Prosecution May Be Used. — *State v. Royce*, 38 Wash. 111.
2. Public Records. — *State v. Strait*, 94 Minn. 384.
3. Compulsory Physical Examination of Accused. — *State v. Miller*, 71 N. J. L. 527.
- 1161.** 1. Statutes Providing that Answers Shall Not Be Used in Evidence Held Constitutional. — See *Murphy v. State*, 124 Wis. 635.
2. Absolute Indemnity. — *State v. Jack*, 69 Kan. 387; *People v. Court of Gen. Sessions*, 96 N. Y. App. Div. 201, *affirmed* 179 N. Y. 594.
The Bankruptcy Act. — *In re Hess*, 134 Fed. Rep. 109.
Tennessee Statute in Regard to Election Offenses — Witness Compellable in Criminal Proceedings Only. — *Lindsay v. Allen*, 113 Tenn. 517.
3. Where Immunity Complete. — *People v. Court of Gen. Sessions*, 96 N. Y. App. Div. 201, *affirmed* 179 N. Y. 594.
- 1162.** 4. Waiver of Privilege by Defendant. — *Smith v. State*, (Ind. 1905) 74 N. E. Rep. 983; *Razee v. State*, (Neb. 1905) 103 N. W. Rep. 438; *State v. Miller*, 71 N. J. L. 527; *Collins v. State*, (Tex. Crim. 1905) 84 S. W. Rep. 585. See also *State v. Shockley*, 29 Utah 25.
- 1163.** 1. Discretion of Trial Court. — *Smith v. State*, (Ind. 1905) 74 N. E. Rep. 983.
4. Cross-examination Confined to Matters Tested to in Chief. — *Razee v. State*, (Neb. 1905) 103 N. W. Rep. 438.
- 1165.** 2. Acquittal. — *Wilson v. Ohio Farmers' Ins. Co.*, 164 Ind. 462.
3. Exclusively Privilege of Witness. — *In re Knickerbocker Steamboat Co.*, 136 Fed. Rep. 956; *In re Moser*, 138 Mich. 302; *People v. Court of Gen. Sessions*, 96 N. Y. App. Div. 201, *affirmed* 179 N. Y. 594; *State v. Shockley*, 29 Utah 25.
4. Neither Party Can Claim Privilege. — *State v. Cobley*, (Iowa 1905) 103 N. W. Rep. 99. See also *People v. Court of Gen. Sessions*, 96 N. Y. App. Div. 201, *affirmed* 179 N. Y. 594.
- 1166.** 2. *In re Knickerbocker Steamboat Co.*, 136 Fed. Rep. 956; *State v. Shockley*, 29 Utah 25.
5. For Court to Determine Tendency. — *In re Hess*, 136 Fed. Rep. 988. See also *State v. Cobley*, (Iowa 1905) 103 N. W. Rep. 99; *In re Moser*, 138 Mich. 302. Compare *Wilson v. Ohio Farmers' Ins. Co.*, 164 Ind. 462.
- 1169.** 5. Judge May Inform Witness of Privilege. — *Davis v. State*, 122 Ga. 564.
6. Cases Holding that Court Must Instruct Witness. — *Starr v. State*, (Tex. Crim. 1905) 86 S. W. Rep. 1023.
10. Witness May Waive Privilege. — *Davis v. State*, 122 Ga. 564.
11. *Davis v. State*, 122 Ga. 564. See also *Bess v. Com.*, (Ky. 1904) 82 S. W. Rep. 576.
- 1170.** 1. *Davis v. State*, 122 Ga. 564; *Bess v. Com.*, (Ky. 1904) 82 S. W. Rep. 576.

1170. 11. Effect of Refusing to Answer — *b.* WHERE PRIVILEGE IS DENIED. — See note 7.

1171. XI. COMPENSATION AND EXPENSES — 1. In General. — See note 9.

1173. 5. Prerequisites to Compensation — *a.* SUBPOENA AND RECOGNIZANCE. — See note 1.

1174. 6. For What Compensation Is Allowable — *a.* MILEAGE — (1) *In General.* — See note 5.

1175. (2) *Nonresident Witness* — (a) Resident Without the State. — See note 3.

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(c) Limitation as to District and Distance — In the State Courts. — See note 6.

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1182. 8. Rate of Compensation — *a.* UNDER STATUTE. — See note 6.

1185. 10. Actions Relating to Compensation — *a.* BY WITNESSES — (1) *Against Party Securing Attendance* — (b) *Evidence* — (bb) *Certificates.* — See note 9.

1187. (4) *Against the County* — (a) *Witnesses in Criminal Proceedings.* — See note 3.

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1188. *c.* BY ASSIGNEE OF CERTIFICATE. — See note 7.

1190. [WOODEN STRUCTURE. — See note 4a.]

1170. 7. Where Privilege Denied — Contempt of Court. — See *Rogers v. Superior Ct.*, 145 Cal. 88; *Wilson v. Ohio Farmers' Ins. Co.*, 164 Ind. 462.

1171. 9. Compensation Allowed. — *Climie v. Appanoose County*, 125 Iowa 292; *Perry v. Howe Co-operative Creamery Co.*, 125 Iowa 415; *Merriam v. Johnson*, 93 Minn. 316; *Coward v. Jackson County*, 137 N. Car. 299.

1173. 1. Subpoena or Recognizance Essential. — See *Coward v. Jackson County*, 137 N. Car. 299.

1174. 5. Mileage. — *Coward v. Jackson County*, 137 N. Car. 299.

1175. 3. Resident Without the State — Entitled to Mileage. — *Climie v. Appanoose County*, 125 Iowa 292. See also *Perry v. Howe Co-operative Creamery Co.*, 125 Iowa 415.

8. Entitled to Mileage. — See *Coward v. Jackson County*, 137 N. Car. 299.

1176. 6. Statutory Regulations. — *Whitehead v. Breckenridge*, 5 Indian Ter. 133.

1177. 9. Attendance at Court — Actual Attendance. — See *Coward v. Jackson County*, 137 N. Car. 299.

1182. 6. Rate of Compensation — Generally. — *Climie v. Appanoose County*, 125 Iowa 292; *Coward v. Jackson County*, 137 N. Car. 299.

1185. 9. Witness Certificate. — See *Climie v. Appanoose County*, 125 Iowa 292.

1187. 3. Witness for Prosecution. — *Coward v. Jackson County*, 137 N. Car. 299.

Expert Witness Entitled to Recover Only Statutory Fee in Absence of Contract. — *Main v. Sherman County*, (Neb. 1905) 103 N. W. Rep. 1038.

6. Under Statute. — *Climie v. Appanoose County*, 125 Iowa 292.

1188. 7. Action by Assignee of Certificate. — *Climie v. Appanoose County*, 125 Iowa 292; *Coward v. Jackson County*, 137 N. Car. 299.

1190. 4a. Wooden Structure — London Building Act 1894. — See *Westminster v. London County Council*, (1902) 1 K. B. 326.

WOODS AND FORESTS.

1191. I. TERMS DEFINED AND EXPLAINED — 2. Forests — Forest Commission. — See note 6.

1191. 6. Forest Commission. — See *People v. Kelsey*, 180 N. Y. 24.

WORKING CONTRACTS.

By B. B. CLARK.

1196. II. CREATION OF CONTRACT — 2. Offer and Acceptance — Reality of Assent. — See note 11.

1197. 4. Consideration. — See note 9.

1198. Mutuality. — See note 2.

5. Necessity for Written Contracts. — See note 8.

1201. III. PLANS AND SPECIFICATIONS. — See notes 5, 9.

1204. V. GENERAL CONSTRUCTION OF WORKING CONTRACTS — 1. In General — Construction by Court. — See note 1.

Consideration of Contract as Whole. — See notes 2, 3.

Reasonable and Just Construction. — See note 4.

Construction by Parties. — See note 5.

1205. Construction Against Party Preparing Contract. — See note 1.

Parol Evidence to Vary Writing. — See note 2.

Construction by Architect or Engineer. — See note 7.

1206. 2. Particular Terms and Phrases. — See notes 25, 30.

1207. 4. Entire and Divisible Contracts. — See notes 2, 3.

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1209. VI. MODIFICATIONS AND ALTERATIONS. — See note 1.

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1196. 11. Excusable Mistake Entitles Contractor to Rescission of Contract. — *School Com'rs v. Bender*, (Ind. App. 1904) 72 N. E. Rep. 154.

1197. 9. Consideration. — *Taylor v. Leeson*, 35 Ind. App. 620.

1198. 2. Mutuality. — See *Flitcroft v. Allenhurst Club*, (N. J. 1905) 61 Atl. Rep. 82, holding, however, that where the contract price was specified, failure of the written agreement to contain an express promise to pay did not amount to a want of mutuality, such a promise being clearly implied.

8. *Holland v. Ryan*, (Supm. Ct. App. T.) 92 N. Y. Supp. 242.

1201. 5. Plans and Specifications. — *McGregor v. J. A. Ware Constr. Co.*, 188 Mo. 611.
9. *Hayes v. Wagner*, 113 Ill. App. 299, *affirmed* 220 Ill. 256.

1204. 1. Construction by Court. — *Dugan v. Kelly*, (Ark. 1905) 86 S. W. Rep. 831; *Moore v. Pritchett*, 121 Ga. 439. See generally the title QUESTIONS OF LAW AND FACT, 553. 2 *et seq.*

When the Language Employed in the Contract Is Not Free from Ambiguity, or when the interpretation depends upon the sense in which the words are used in view of the subject to which they relate, the relation of the parties, and the surrounding circumstances, the construction is a mixed question of law and fact to be determined by a jury. *Norton v. Shields*, 132 Fed. Rep. 873.

2. Consideration of Contract as Whole. — *Morrill, etc., Constr. Co. v. Boston*, 186 Mass. 217.
3. Sanitary Dist. v. McMahon, etc., Co., 110 Ill. App. 510.

4. Reasonable and Just Construction. — *Cress-*

well v. Robertson, (Mich. 1905) 102 N. W. Rep. 963.

5. Construction by Parties. — *Harris v. Louisiana Mach., etc., Co.*, 112 La. 196; *New York Metal Ceiling Co. v. City Homes Imp. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 233; *Carolina Plumbing, etc., Co. v. Hall*, 136 N. Car. 530.

1205. 1. Construction Against Party Preparing Contract. — *Camardella v. Holmes*, 97 N. Y. App. Div. 120.

Rule Inapplicable Where Contract Unambiguous. — *Novelty Mill Co. v. Heinzerling*, 39 Wash. 244.

2. Parol Evidence to Vary. — *Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co.*, (C. C. A.) 132 Fed. Rep. 957; *Dugan v. Kelly*, (Ark. 1905) 86 S. W. Rep. 831; *Sanitary Dist. v. McMahon, etc., Co.*, 110 Ill. App. 510.

7. *Woarms v. U. S.*, 39 Ct. Cl. 10; *Norcross v. Wyman*, 187 Mass. 25.

1206. 25. *Camardella v. Holmes*, 97 N. Y. App. Div. 120.

30. *McFerran v. U. S.*, 39 Ct. Cl. 441.

1207. 2. Entire and Divisible Contracts. — *Sanitary Dist. v. McMahon, etc., Co.*, 110 Ill. App. 510.

3. *Warwick First Nat. Bank v. Mitchell*, (Supm. Ct. Tr. T.) 46 Misc. (N. Y.) 30; *Caughy v. Parker*, 26 Pa. Super. Ct. 289.

1208. 3. *Sanitary Dist. v. McMahon, etc., Co.*, 110 Ill. App. 510.

1209. 1. Right of Builder to Demand Alterations. — *Fontano v. Robbins*, 22 App. Cas. (D. C.) 253.

1210. 3. *Guthrie v. Carpenter*, 162 Ind. 417; *Perry v. Levenson*, 178 N. Y. 559, *affirming* 82 N. Y. App. Div. 94.

1210. Allowances and Deductions from Compensation. — See note 5.

1211. Effect of Modifications and Deviations on Original Contract. — See notes 1, 2.

VII. RESCISSION AND TERMINATION OF CONTRACT — 1. In General.

— See notes 3, 7, 8.

1213. Failure of Builder to Perform. — See note 2.

1218. IX. PERFORMANCE AND BREACH — 1. In General. — See note 9.

1219. See notes 4, 6.

1220. Subletting. — See note 4.

1221. Proof of Performance or Breach. — See note 1.

2. Substantial Performance. — See note 4.

1222. See notes 1, 3.

1223. See notes 1, 2, 3.

1221. See note 1.

3. Partial Performance — *a.* FULL PERFORMANCE NOT EXCUSED.

— See note 3.

1225. See note 1.

1226. See notes 1, 5.

1227. See notes 6, 7.

b. FULL PERFORMANCE EXCUSED — (1) *In General.* — See note 10.

1228. See note 4.

1230. Measure of Recovery. — See notes 2, 3.

1210. 5. *Connors v. U. S.*, 130 Fed. Rep. 600.

1211. 1. *Gray v. Jones*, (Oregon 1905) 81 Pac. Rep. 813.

2. *Reber v. Brownback*, 27 Pa. Super. Ct. 471.

3. *Mutual Rescission.* — *Hughes v. Brennan Constr. Co.*, 24 App. Cas. (D. C.) 90.

7. *Termination by Builder.* — *Dugue v. Levy*, 114 La. 22.

8. *Damages for Breach.* — *Norton v. Shields*, 132 Fed. Rep. 873; *Dugue v. Levy*, 114 La. 22.

1213. 2. *Smith v. Curran*, 138 Fed. Rep. 150.

1218. 9. *Delaying Contractor.* — *Olson v. Viroqua*, 121 Wis. 571.

1219. 4. *Waiver.* — *W. H. Stubbings Co. v. World's Columbian Exposition Co.*, 110 Ill. App. 210.

6. *Breach by Contractor.* — *Schultze v. Goodstein*, 180 N. Y. 248.

1220. 4. *The Contractor Is Not Required Personally to Superintend the Work*, but may have it done under the direction of a superintendent. *Council v. Teal*, 122 Ga. 61.

1221. 1. *Judgment Between Contractor and Subcontractor Not Res Judicata Between Contractor and Builder.* — *Wagner v. St. Peter's Hospital*, 32 Mont. 206.

4. *Substantial Performance.* — *Evans v. Howell*, 211 Ill. 85, *affirming* 111 Ill. App. 167; *Dugue v. Levy*, 114 La. 22; *Burke v. Coyne*, 128 Mass. 401; *Isetts v. Bliwise*, (N. J. 1905) 60 Atl. Rep. 200; *Perry v. Levenson*, 178 N. Y. 559, *affirming* 82 N. Y. App. Div. 94; *Manning v. School Dist. No. 6*, 124 Wis. 84.

1222. 1. *Reductions Allowed to Builder.* — *Isetts v. Bliwise*, (N. J. 1905) 60 Atl. Rep. 200; *New York Metal Ceiling Co. v. City Homes Imp. Co.*, (Supm. Ct. App. T.) 88 N. Y. Supp. 233; *Shultz v. Seibel*, 209 Pa. St. 27; *Manning v. School Dist. No. 6*, 124 Wis. 84.

3. *Manning v. School Dist. No. 6*, 124 Wis. 84.

1223. 1. *Manning v. School Dist. No. 6*, 124 Wis. 84.

2. *What Constitutes Substantial Performance.* — *Windham v. Independent Telephone Co.*, 35 Wash. 166.

3. *Uldrickson v. Samdahl*, 92 Minn. 297; *Isetts v. Bliwise*, (N. J. 1905) 60 Atl. Rep. 200.

1224. 1. *Krombach v. Teilelbaum*, (Supm. Ct. App. T.) 90 N. Y. Supp. 367; *Caughey v. Parker*, 26 Pa. Super. Ct. 289; *Manning v. School Dist. No. 6*, 124 Wis. 84.

Where the Builder Contracted for a Four-inch Well, the boring of a three-inch well does not constitute a substantial compliance. *Connor v. Trapp*, 127 Iowa 742.

3. *No Recovery on Contract.* — *Freedley v. Wilson*, (C. C. A.) 136 Fed. Rep. 586; *Nulton v. Croskey*, 111 Mo. App. 18; *Krombach v. Teilelbaum*, (Supm. Ct. App. T.) 90 N. Y. Supp. 367; *White v. Von Waffenstein*, (Supm. Ct. App. T.) 47 Misc. (N. Y.) 670; *Cox v. Markham*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1163; *Manning v. School Dist. No. 6*, 124 Wis. 84.

1225. 1. *Quantum Meruit.* — *Matthews v. Farrell*, 140 Ala. 298.

1226. 1. *Wilful Failure to Perform Fully.* — *Manning v. School Dist. No. 6*, 124 Wis. 84.

5. *Caruthers v. Cook*, (Tex. Civ. App. 1905) 84 S. W. Rep. 690.

1227. 6. *Measure of Recovery.* — *Manning v. School Dist. No. 6*, 124 Wis. 84.

7. *Shultz v. Seibel*, 209 Pa. St. 27.

10. *Full Performance Excused.* — *Lehmann v. Webster*, 209 Ill. 264, *affirming* 110 Ill. App. 298; *Poland v. Thomaston Face, etc., Brick Co.*, 100 Me. 133; *Anderson v. Hilker*, 38 Wash. 632.

1228. 4. *Nonpayment of Instalments of Compensation.* — *Eagle Iron Works v. Farley*, 178 N. Y. 595, *affirming* 83 N. Y. App. Div. 82.

1230. 2. *Anderson v. Hilker*, 38 Wash. 632.

3. *Anderson v. Hilker*, 38 Wash. 632.

- 1231.** (2) *Waiver of Full Performance.* — See note 1.
1232. See note 2.
1233. 4. *Character and Quality of Work Required.* — See notes 4, 7.
1234. See note 2.
Defective Plans and Specifications. — See note 8.
1235. *Contracts to Sink Wells.* — See notes 1, 5.
1236. 5. *Performance to Satisfaction of Builder.* — See note 2.
1237. 6. *Approval of Architects, Engineers, Etc.* — *a.* NECESSITY. — See note 6.
1239. *Damages for Breach of Contract.* — See note 1.
1240. *b.* SUFFICIENCY OF APPROVAL OR CERTIFICATE. — See note 1.
Form. — See note 4.
1242. *c.* BY WHOM TO BE APPROVED. — See note 3.
d. CONCLUSIVENESS OF APPROVAL. — See note 8.
1245. *e.* EXCUSES FOR NONAPPROVAL OR NONPRODUCTION OF CERTIFICATE. — See notes 4, 7.
1246. See note 1.
Acceptance of Work. — See note 10.
1247. *Fraud.* — See note 5.
1248. See note 1.
1251. 7. *Destruction of Work* — *b.* CONTRACT FOR WORK ON EXISTING STRUCTURE. — See notes 7, 8.

1231. 1. *Acceptance of Work.* — *Burke v. Coyne*, 188 Mass. 401.

1232. 2. *Acquiescence as Work Progresses.* — *Dugue v. Levy*, 114 La. 22.

1233. 4. *Duty to Perform in Workmanlike Manner.* — *Electric Supply, etc., Co. v. Conway Electric Light, etc., Co.*, 186 Mass. 449.

Question for Jury. — *Shultz v. Seibel*, 209 Pa. St. 27.

7. *Ideal Heating Co. v. Kramer*, 127 Iowa 137.

1234. 2. *Ideal Heating Co. v. Kramer*, 127 Iowa 137.

8. *Defective Plans.* — *Novelty Mill Co. v. Heinzerling*, 39 Wash. 244.

1235. 1. *Contract to Sink Well.* — *Mansfield v. Morgan*, 140 Ala. 567; *Council v. Teal*, 122 Ga. 61; *Poland v. Thomaston Face, etc., Brick Co.*, 100 Me. 133.

5. *Contract Requirements as to Quantity or Quality.* — *Connor v. Trapp*, 127 Iowa 742; *Caruthers v. Cook*, (Tex. Civ. App. 1905) 84 S. W. Rep. 690; *Cox v. Markham*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1163.

1236. 2. *Performance to Satisfaction of Builder.* — *Manning v. School Dist. No. 6*, 124 Wis. 84. See further the title SATISFY, SATISFACTION, ETC., **1236.** 1 *et seq.*

1237. 6. *Provisions for Approval by Architect, etc., Upheld.* — *Heidlinger v. Onward Constr. Co.*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 555, holding further that the architect's determination need not be based on the evidence of witnesses; *Halsey v. Waukesha Springs Sanitarium*, 125 Wis. 311.

1239. 1. *Damages for Breach of Contract.* — *W. H. Stubbings Co. v. World's Columbian Exposition Co.*, 110 Ill. App. 210.

1240. 1. *Graves Elevator Co. v. John H. Parker Co.*, 92 N. Y. App. Div. 456.

4. *Form of Certificate.* — *Eastham v. Western Constr. Co.*, 36 Wash. 7.

1242. 3. *Where Two Architects Whose Certificate Was Required Dissolved Partnership*

during the work and the builder refused to allow one of the architects to have anything to do with the work and accepted progress certificates signed by the other, the final certificate signed by such architect was held to be sufficient. *Lavanway v. Cannon*, 37 Wash. 593.

8. *Conclusiveness of Approval.* — *Heidlinger v. Onward Constr. Co.*, (Supm. Ct. Tr. T.) 44 Misc. (N. Y.) 555; *McManus v. Annett*, 101 N. Y. App. Div. 6; *Eastham v. Western Constr. Co.*, 36 Wash. 7.

Rule Applied as Between Contractor and Subcontractor. — *Graves Elevator Co. v. John H. Parker Co.*, 92 N. Y. App. Div. 456.

1245. 4. *Procurement Rendered Impossible by Act of Builder.* — *Halsey v. Waukesha Springs Sanitarium*, 125 Wis. 311.

7. *Wrongful Discharge of Builder.* — *Ocorr, etc., Co. v. Little Falls*, 178 N. Y. 622, *affirming* 77 N. Y. App. Div. 592.

1246. 1. *Windham v. Independent Telephone Co.*, 35 Wash. 166.

10. *Acceptance.* — *Windham v. Independent Telephone Co.*, 35 Wash. 166.

1247. 5. *Co-operation by Builder in Fraud Unnecessary.* — *Halsey v. Waukesha Springs Sanitarium*, 125 Wis. 311.

1248. 1. *Arbitrary Withholding of Approval.* — *Dugue v. Levy*, 114 La. 22; *Perry v. Levenson*, 178 N. Y. 559, *affirming* 82 N. Y. App. Div. 94; *Halsey v. Waukesha Springs Sanitarium*, 125 Wis. 311.

1251. 7. *Krause v. School Town*, 162 Ind. 278, 102 Am. St. Rep. 203.

8. *Recovery for Work Done.* — *Young v. Chicopee*, 186 Mass. 518, *following* *Butterfield v. Byron*, 153 Mass. 517; *Halsey v. Waukesha Springs Sanitarium*, 125 Wis. 311, *following* *Cook v. McCabe*, 53 Wis. 250; *Vogt v. Hecker*, 118 Wis. 306. See, however, *Krause v. School Town*, 162 Ind. 278, 102 Am. St. Rep. 203; *Dame v. Woods*, (N. H. 1905) 60 Atl. Rep. 744.

1253. See note 4.

8. Time of Performance — *a. IN GENERAL.* — See note 8.

1254. See notes 5, 7, 8.

1255. *b. EXCUSES FOR NONPERFORMANCE WITHIN REQUIRED TIME*

— (1) *Acts and Defaults of Builder.* — See notes 2, 7.

1258. (7) *Extra Work and Alterations.* — See notes 1, 5.

1259. (8) *Waiver and Extension of Time.* — See notes 2, 5.

1260. See notes 5, 6, 8.

1261. *c. EFFECT OF NONCOMPLETION IN TIME ON RIGHT TO COMPENSATION.* — See note 1.

1263. *d. REMEDIES FOR NONCOMPLETION IN TIME* — (2) *Damages for Failure to Complete in Time* — (b) *Liquidated Damages.* — See note 1.

1264. 9. *Completion of Work by Builder at Expense of Contractor.* — See notes 2, 4.

1265. X. *COMPENSATION* — 1. *Amount of Compensation* — *a. IN GENERAL.* — See note 6.

1270. *c. ESTIMATES AND CLASSIFICATION BY ARCHITECTS, ENGINEERS, ETC.* — (4) *Conclusiveness of Estimate, Etc.* — See note 4.

1272. *Fraud.* — See note 8.

1273. 2. *When Payable* — *a. IN GENERAL.* — See note 11.

1274. See notes 2, 3.

1275. See notes 1, 2.

1276. *b. INSTALMENTS AS WORK PROGRESSES.* — See notes 1, 3.

1279. 5. *Who Liable for Compensation.* — See note 1.

No Recovery for Unused Material Destroyed. — *Young v. Chicopee*, 186 Mass. 518.

1253. 4. *Compare Krause v. School Town*, 162 Ind. 278, 102 Am. St. Rep. 203.

8. Performance Within Reasonable Time. — *Anderson v. Hilker*, 38 Wash. 632.

1254. 5. *Anderson v. Hilker*, 38 Wash. 632.

7. Provisions as to Time of Performance. — *Beebe v. Redward*, 35 Wash. 615.

8. Bolter v. Kozlowski, 211 Ill. 79, *affirming* 112 Ill. App. 13.

1255. 2. *Acts and Defaults of Builder.* — *Perry v. Levenson*, 178 N. Y. 559, *affirming* 82 N. Y. App. Div. 94.

Contract Requiring Prompt Claim for Extension of Time on Builder's Default. — See *Curry v. Olmstead*, 26 R. I. 462.

7. W. H. Stubbings Co. v. World's Columbian Exposition Co., 110 Ill. App. 210; *Sanitary Dist. v. McMahon, etc., Co.*, 110 Ill. App. 510.

1258. 1. *Small v. Burke*, 92 N. Y. App. Div. 338.

5. Small v. Burke, 92 N. Y. App. Div. 338.

1259. 2. *Waiver and Extension of Time.* — *Guthrie v. Carpenter*, 162 Ind. 417.

The Architect or Engineer. — *Davis v. La Crosse Hospital Assoc.*, 121 Wis. 579.

5. Crocker-Wheeler Co. v. Varick Realty Co., 104 N. Y. App. Div. 568, *affirming* (Supm. Ct. App. T.) 43 Misc. (N. Y.) 645.

1260. 5. *Crocker-Wheeler Co. v. Varick Realty Co.*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 645, *affirmed* 104 N. Y. App. Div. 568.

6. Lawrence County v. Stewart, 72 Ark. 525.

8. Lawrence County v. Stewart, 72 Ark. 525.

1261. 1. *Bes Line Constr. Co. v. Wood*, (Tex. Civ. App. 1904) 84 S. W. Rep. 378.

1263. 1. *Liquidated Damages.* — *Small v. Burke*, 92 N. Y. App. Div. 338; *Davis v. La*

Crosse Hospital Assoc., 121 Wis. 579. See, however, *Coen v. Birchard*, 124 Iowa 394.

1264. 2. *Completion of Work by Builder at Expense of Contractor.* — *White v. Abbott*, 188 Mass. 99.

4. Asbestos Mfg. Co. v. Burns, 24 Pa. Super. Ct. 84.

1265. 6. *Amount of Compensation.* — *Mansfield v. Morgan*, 140 Ala. 567; *Combs v. Burt, etc., Lumber Co.*, (Ky. 1905) 85 S. W. Rep. 227.

Percentage on Cost. — *Westendorf v. Dininny*, 103 N. Y. App. Div. 593.

1270. 4. *Conclusiveness.* — *Woarms v. U. S.*, 39 Ct. Cl. 10; *McGregor v. J. A. Ware Constr. Co.*, 188 Mo. 611.

1272. 8. *Fraud.* — *Woarms v. U. S.*, 39 Ct. Cl. 10.

1273. 11. *Provisions as to Time of Payment.* — *Ferguson Lumber Co. v. Little Rock Well, etc., Co.*, (Ark. 1905) 84 S. W. Rep. 794.

1274. 2. *Conditions Frustrated by Builder -- Payment Cannot Be Resisted.* — *Mogulewsky v. Rohrig*, 104 N. Y. App. Div. 147.

3. Lavanway v. Cannon, 37 Wash. 593.

1275. 1. *No Time Fixed for Payment.* — *Poland v. Thomaston Face, etc., Brick Co.*, 100 Me. 133; *Caughey v. Parker*, 26 Pa. Super. Ct. 289.

2. Potter v. Greenberg, 24 Pa. Super. Ct. 502.

1276. 1. *Estimates and Certificates of Architects, Etc.* — *Sheyer v. Pinkerton Constr. Co.*, (N. J. 1904) 59 Atl. Rep. 462.

O. K. Indorsement on Bill Sufficient Certificate. — *Getchell, etc., Lumber, etc., Co. v. Peterson*, 124 Iowa 599.

3. Sheyer v. Pinkerton Constr. Co., (N. J. 1904) 59 Atl. Rep. 462.

1279. 1. *Reisler v. Silbermintz*, 99 N. Y. App. Div. 131.

1279. XI. EXTRA WORK — 1. What Constitutes Extra Work — a. IN GENERAL. — See note 12.

1280. See note 1.

1281. 2. Liability of Builder for Extra Work. — See note 10.

1282. See notes 3, 7, 8.

1283. See note 6.

1284. See note 1.

3. Power of Architect, Engineer, etc., to Order Extra Work. — See notes 2, 5.

1285. See note 4.

1286. See note 2.

1287. 4. Compensation — b. ESTIMATES AND CERTIFICATES OF ARCHITECTS, ENGINEERS, ETC. — See notes 9, 10.

1290. WORKMAN. — See note 2.

WORKS. — See note 5.

1292. WORKS OF ART. — See note 2.

1293. WORK, WORKING, ETC. — See note 1.

1302. WRIT. — See note 6.

1303. WRITE, WRITING, ETC. — See note 3.

1306. WRONGFUL — WRONGFULLY. — See note 3.

1307. WROUGHT. — See note 1.

1310. ZINC. — See note 7.

1279. 12. What Constitutes Extra Work. — *W. H. Stubbings Co. v. World's Columbian Exposition Co.*, 110 Ill. App. 210; *Roberts v. Koss*, 32 Ind. App. 510; *Hely v. Hoertz*, (Ky. 1904) 82 S. W. Rep. 402; *Cresswell v. Robertson*, (Mich. 1905) 102 N. W. Rep. 963; *Graves Elevator Co. v. John H. Parker Co.*, 92 N. Y. App. Div. 456; *Richard v. Clark*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 622; *Langley v. Rouss*, 106 N. Y. App. Div. 225.

1280. 1. Connors v. U. S., 130 Fed. Rep. 609.

1281. 10. Extra Work Voluntarily Performed. — *McFerran v. U. S.*, 39 Ct. Cl. 441.

1282. 3. McFerran v. U. S., 39 Ct. Cl. 441.
7. Agreements for Extra Work. — *Shultz v. Seibel*, 209 Pa. St. 27.

8. Implied Promise to Pay for Extra Work. — *McFerran v. U. S.*, 39 Ct. Cl. 441; *W. H. Stubbings Co. v. World's Columbian Exposition Co.*, 110 Ill. App. 210.

1283. 6. Davis v. La Crosse Hospital Assoc., 121 Wis. 579.

1284. 1. W. H. Stubbings Co. v. World's Columbian Exposition Co., 110 Ill. App. 210.

2. Fontano v. Robbins, 22 App. Cas. (D. C.) 253; *Wagner v. St. Peter's Hospital*, 32 Mont. 203; *Richard v. Clark*, (Supm. Ct. App. T.) 43 Misc. (N. Y.) 622.

5. Baltimore, etc., R. Co. v. Jolly, 71 Ohio St. 92.

1285. 4. W. H. Stubbings Co. v. World's Columbian Exposition Co., 110 Ill. App. 210; *Sheyer v. Pinkerton Constr. Co.*, (N. J. 1904) 59 Atl. Rep. 462.

1286. 2. Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co., (C. C. A.) 132 Fed. Rep. 957; *Cronin v. Still*, 35 Tex. Civ. App. 293.

1287. 9. Valuation by Architect, Engineer, Etc. — *Langley v. Rouss*, 106 N. Y. App. Div. 225.

10. Conrad v. Humphrey, (Ky. 1905) 84 S. W. Rep. 313.

1290. 2. Independent Contractor. — *Vamplaw v. Parkgate Iron, etc., Co.*, (1903) 1 K. B. 851.

5. Works. — Under the *English Tramways Act* 1870, prescribing the time within which *works* are to be commenced, the term *works* means physical *works* actually executed. *Atty.-Gen. v. Bournemouth*, (1902) 2 Ch. 714.

1292. 2. Works of Art — Revenue Law. — See *U. S. v. Ecclesiastical Art Works*, 139 Fed. Rep. 798.

1293. 1. Mere Physical or Mental Exertion to accomplish an end is work; so is that upon which one labors, and also that produced thereby. *Chippewa Bridge Co. v. Durand*, 122 Wis. 93.

1302. 6. Writ. — *State v. District Ct.*, (Mont. 1906) 83 Pac. Rep. 641.

1303. 3. Copyright Law — Photograph. — See *American Mutoscope, etc., Co. v. Edison Mfg. Co.*, 137 Fed. Rep. 262.

1306. 3. Wrongful Synonymous with Felonious. — *State v. Fordham*, 13 N. Dak. 494.

1307. 1. Wrought — Revenue Law. — See *U. S. v. Roessler, etc., Chemical Co.*, (C. C. A.) 137 Fed. Rep. 770.

1310. 7. Zinc — Revenue Law. — See *Eckstein v. U. S.*, 140 Fed. Rep. 94.

